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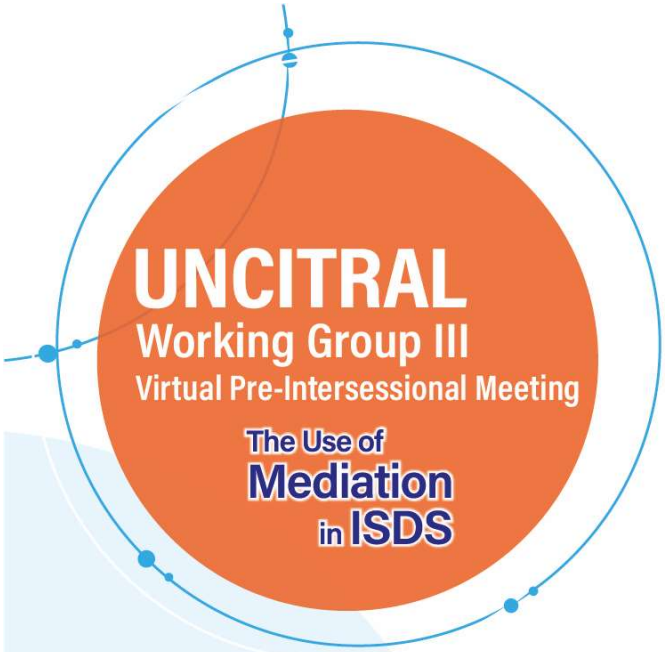
UNCITRAL
Working Group III
Virtual Pre-Intersessional Meeting

The Use of Mediation in ISDS

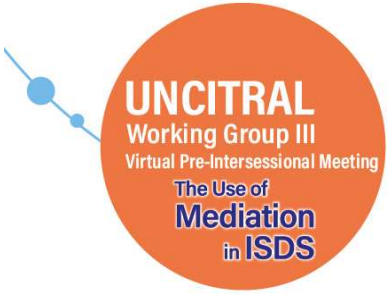


Capacity Building and Training in enhancing the role of Mediation in ISDS

- Mediation can be an alternative to arbitration.
- Mediation can be used alongside arbitration.
- Mediation, as compared to arbitration, is an area which has not gained international acceptance.

Charlampos Giannakopoulos: Centre for International Law "Investor-State Arbitration meets Mediation: The view from UNCITRAL" October 1 2020

"There exists a rising interest globally for alternative forms of dispute resolution (ADR) for investor-state disputes. Indicative examples from investment treaty-making confirm this, including the USMCA, CPTPP, the EU's investment agreements with Canada, Singapore, Vietnam, ACIA and the China-Hong Kong CEPA (which altogether eschews investor-state arbitration in favour of, among others, mediation). Further, in 2016, the Energy Charter Conference adopted a Guide on Investment Mediation to facilitate the ECT parties in deciding whether to opt for mediation and to inform them about how to prepare for it."



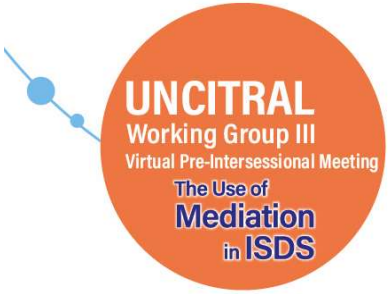
CHANGING LANDSCAPE ON MEDIATION RULES

The applicability of mediation as a tool in ISDS disputes has changed as rules on mediation have been developed by:

(a)the International Chamber of Commerce;
(b) the International Bar Association;
(c) the Energy Charter conference;
(d) ICSID
(e) UNCITRAL

Without formal training and capacity building of stakeholders by experts in the field, it is unlikely that parties and States will be willing to resort to mediation as a means of settling dispute.

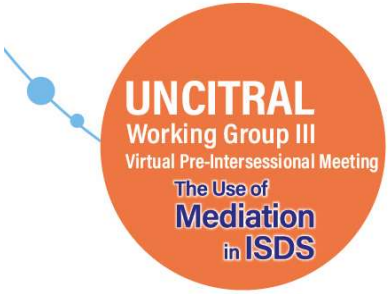
It is only with training of Government officials and those who negotiate treaties that mediation is likely to emerge as a real alternative to arbitration or as a method of dispute resolution which can seamlessly be used alongside arbitration to resolve investor/State disputes.



BILATERAL INVESTMENT TREATIES AND MEDIATION CLAUSES

Capacity building in mediation may contribute to highlight the following advantages of mediation as a means of addressing Investor/State disputes:

- Cost effectiveness and time-effective means of dispute resolution;
- Tool for preventing disputes from emerging or escalating to formal investment disputes;
- In the event a formal investment dispute is triggered, mediation may assist the parties to narrow down the key issues in disputes; and
- Flexibility and autonomy to disputing parties.

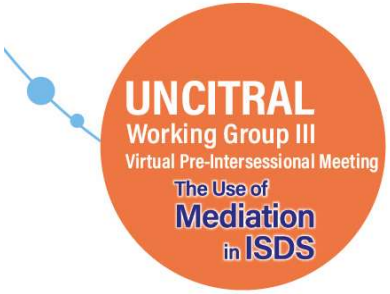


<u>Mediation creeping into arbitration disputes? Training in mediation may assist parties in seeing beyond arbitration as a means of dispute resolution in the ISDS context</u>

In an arbitration between **Achema and the Slovak Republic [Achema B.V. (formerly Eureko B.V) v The Slovak Republic, PCA Repository No 2008-13, Final Award 60 (Dec 7 2012)**, the tribunal made an uncustomary remark to the parties at the close of the hearing on the merits:

"[A] settlement on this case would be a good thing, in that the aims approximately aligned, and that the black and white solution of a legal decision in which one side wins and the other side loses is not the optimum outcome in this case… should the Parties desire to seek out somebody who might act as a mediator or reconciliator, the Secretary-General of the PCA might be in a position to assist."

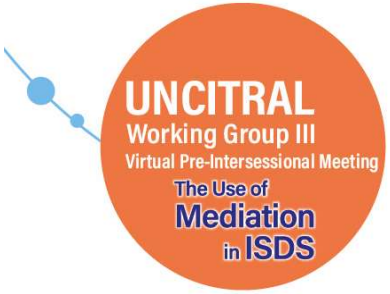
Source: Pepperdine Dispute Resolution Law Journal, Volume 20 issue 1, Article 4, at page 6



The nature of ISDS disputes to which mediation may apply and the need for capacity building and training to highlight the potential areas where mediation may be useful:

Investor-state mediation often includes but is not limited to the following public law dimensions:

- Changes in investment incentive measures;
- Termination or interference of a contract by the State;
- Revocation of licences or permits; and
- Unexpected tariffs or taxation.
- Investor-State mediation also involves international investment law issues such as:
- Expropriation;
- Alleged breach of the "fair and equitable" provision in the contract between the investor and the state; and
- Interpretation of investment treaties.



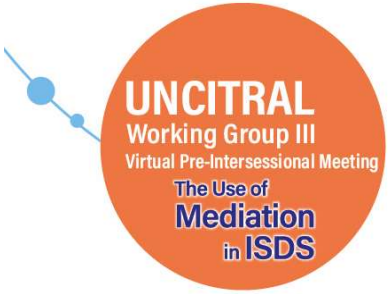
SINGAPORE CONVENTION

- The Singapore Convention may potentially be a watershed moment in mainstreaming of mediation. It is crucial for the success of the Singapore Convention that as many States as possible sign up to it without reservations. Only training and capacity building in relation to the potential benefits of the Singapore Convention will make it more popular among States.

- Enforceability of agreements which are subject to mediation.

- UNCITRAL amended Model Law on Mediation will also greatly assist in making mediation more popular.

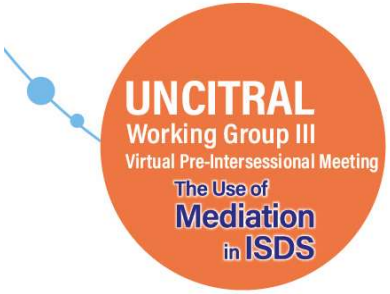
- These developments in the field of mediation require capacity building and training for them to gain general acceptance amongst States and investors.



SINGAPORE CONVENTION AND STATE PRACTICE AND TRAINING

- The 2018 Singapore Convention on International Settlement Agreements (already alluded to above) applies to settlements in an ISDS context.

- However, the negotiators granted States the right to make a reservation to the effect that a State "shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration."



SINGAPORE CONVENTION

- Enables mediated settlement agreements to be enforced and invoked internationally, so long as the requirements of the Convention are met.

- It is the equivalent of the New York Convention on arbitral awards.

- It responds to one of the key obstacles which may have been raised against the use of mediation as a means of dispute resolution in the context of ISDS.

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SINGAPORE CONVENTION

- That perceived obstacle is that the outcome of mediation cannot be enforced internationally in the same way as an arbitral award can.

- Only training and capacity building in the field of mediation will contribute to shed light on the potential advantages of mediation and demystify it as an effective means of dispute resolution.

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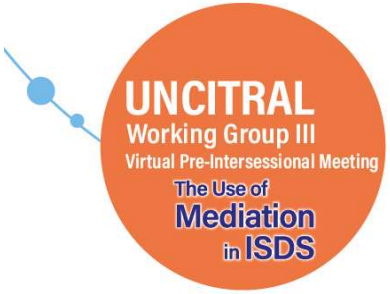
SINGAPORE CONVENTION AND TRAINING

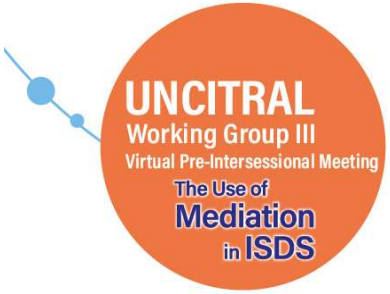
- The ISDS reform process undertaken within UNCITRAL has the capacity of fostering a culture through the creation of rules or through the capacity building of the Advisory Centre to change perceptions of States and significantly increase compliance with settlement agreements and by avoiding expressing any reservations to the Singapore Convention.



TRAINING OF STATE OFFICIALS IN MEDIATION

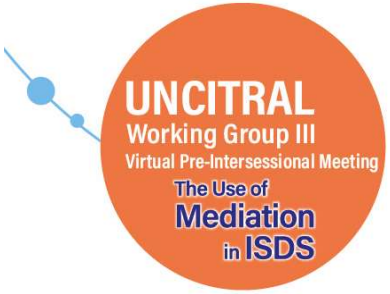
Mediation, as a means of dispute resolution, must be mainstreamed among Government officials in order to make it internationally acceptable as a means of dispute resolution in the ISDS context.

If mediation is to be used as an effective means of dispute resolution it is crucial to ensure that those who use mediation on behalf of the State are properly trained, use mediation effectively and, above all, are accountable.



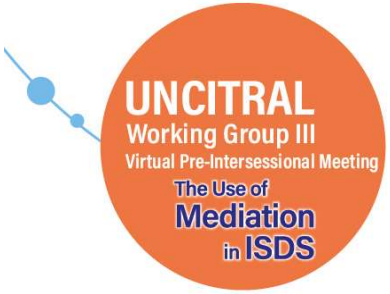
TRAINING IN MEDIATION: THE IBA RULES FOR INVESTOR-STATE MEDIATION (APPENDIX B) (QUALIFICATIONS AS MEDIATOR)

- Experience in dealing with Governments
- Experience as mediator
- Mediation training, including any accreditation as a mediator by an internationally recognized organization
- Experience in any form of dispute resolution proceedings involving States or State agencies or instrumentalities, in particular including investor-State disputes, peace negotiations, border disputes and trade disputes;



TRAINING IN MEDIATION: THE IBA RULES FOR INVESTOR-STATE MEDIATION (APPENDIX B) (QUALIFICATIONS AS MEDIATOR)

- Experience in any form of dispute resolution proceedings involving commercial entities, including particularly disputes relating to the substantive field of the investment at issue;
- Experience in dealing with governments;
- Experience as mediator in cross-cultural disputes;
- Experience in dealing with parties of the nationalities at issue; and
- Ability to communicate with the parties in the languages in which they and/or the key participants in the mediation are most comfortable communicating.



CAPACITY BUIDLING: REMOVING BARRIERS TO ADOPTION OF MEDIATION AS A MEANS OF RESOLVING ISDS DISPUTES

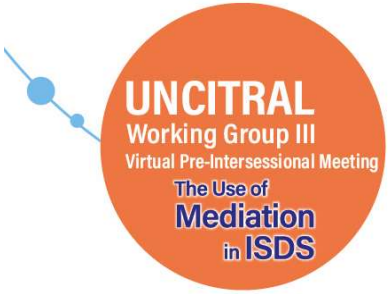
Countries may not have any legislative impediments, but still will be reluctant to go to mediation for at least the following reasons:

(a) the need to prove to the citizens that they are acting in the best interests of the country;

(b) the fact that it is easier for them to pay money out because there is a binding decision against the State instead of them giving money out willingly after an obscure process; and

(c) heightened confidentiality of the mediation process.

Way forward: If mediation is to be used by States as a means of settling ISDS disputes, there needs to be accountability at Parliamentary/State level in relation to disputes which have been settled. Training and capacity building in mediation are crucial for lawmakers to accept the use of mediation as a means of resolving ISDS disputes.

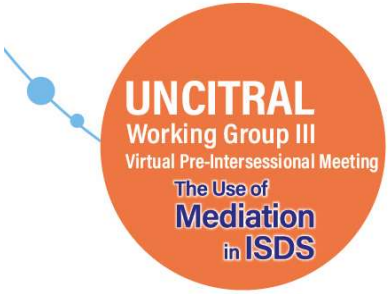


Training and capacity building as a condition precedent to institutionalisation of mediation as a means of dispute resolution

Institutionalising mediation in a reformed ISDS regime could have certain advantages in terms of facilitating settlements. A 2018 survey indicates that commonly reported obstacles to settlements from the state's standpoint principally include a general unwillingness to assume responsibility for voluntary settlements, the politicisation of disputes, negative publicity, and the fear by government officials of being subjected to allegations for corruption or prosecution.

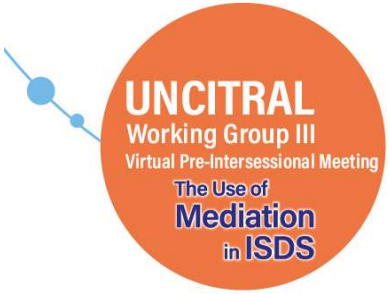
Training and capacity building as a condition precedent to institutionalisation of mediation as a means of dispute resolution

Institutionalisation would introduce a degree of internal monitoring and transparency in a process that is often conducted under complete confidentiality. This could help facilitate settlements by reducing the chances of dilatory tactics by a bad faith party and by alleviating the fear for allegations of corruption and for negative publicity. Furthermore, integrating mediation throughout the adjudicative process may serve to project it as an integral part of reformed ISDS. This may make it easier for States to accept responsibility for a proposed settlement rather than regarding such a move as an unacceptable concession. For this to happen in practice, the importance of capacity building among stakeholders cannot be overstated.



TRAINING AND USE OF MEDIATION AS A "COOLING OFF MECHANISM"

The UNCTAD Paper titled "Investor-State Disputes: Prevention and Alternatives to Arbitration" explains that IIAs usually specify a "cooling-off period" to encourage negotiation before parties can initiate formal arbitration procedures. Conciliation is also regularly mentioned as an option, often next to arbitration. Brief reference to non-binding third party procedures is hence common in IIAs. It contains no more specific data. Cooling off periods can thus be a vessel which may contain mediation or conciliation or cooling off periods can stand next those mechanisms. With such papers, capacity building and training though will be enhanced and may contribute to make mediation popular as a means of settling ISDS disputes.

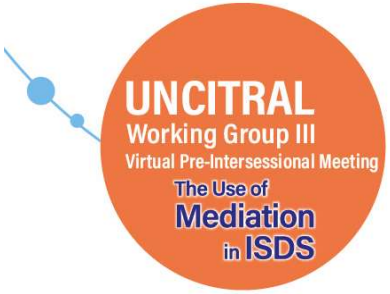


UNCTAD MAPPING OF INTERNATIONAL AGREEMENTS AND MEDIATION

An UNCTAD database of 2577 mapped International Investment Agreements search shows:

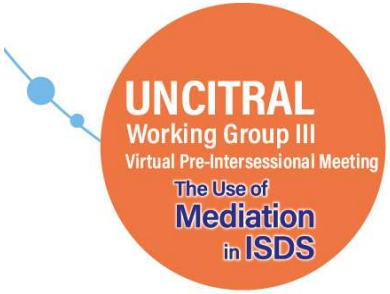
- 627 treaties containing a provision for Voluntary ADR (conciliation / mediation)
- No treaty containing a provision for Compulsory ADR (conciliation / mediation)
- 1813 treaties containing no provision
- 2 treaties inconclusive

Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, 'Mediation in Future Investor-State Dispute Settlement', Academic Forum on ISDS Concept Paper 2020/16, 5 March 2020.



ROLE OF TRAINING IN PROMOTION OF INVESTOR/STATE MEDIATION PRACTICE

- Overcoming barrier on the part of Government officials and investors in using mediation as a means of settlement of ISDS disputes;
- Use of training to educate Government officials on the use of mediation alongside arbitration in the context of ISDS disputes.
- Development of model treaty clauses on mediation and mediation protocols.
- Ensuring re-negotiation of bilateral investment treaties to ensure that these treaties allow for mediation.

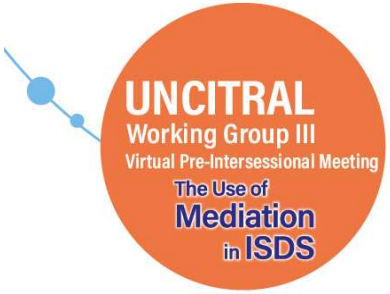


Pushing for mediation in ISDS context requires training and capacity building

Below is an excerpt from a speech by Sir Anthony Clarke. He pushed for civil justice reform, but I think his words are also appropriate in the context of promoting mediation for Investor/State disputes:

> It is of course a cliché that you can take a horse to water but whether it drinks is another thing entirely. That it is a cliché does not render it the less true. But what can perhaps be said is that a horse (even a very obstinate horse) is more likely to drink if taken to water. We should be doing more to encourage (and perhaps direct) the horse to go to the trough. The more horses approach the trough the more will drink from it.
>
> Litigants being like horses we should give them every assistance to settle their disputes in this way. We do them, and the justice system, a disservice if we do not
>
> Perhaps it is now time to take the horse to the trough. We should be doing more to encourage litigants to use mediation to settle their ISD. The more *we* do, the more likely *they* are to settle their disputes that way.

Source: Mediation of Investor–State Disputes: A Treaty Survey, Journal of Dispute Resolution. Volume 2020, Issue 2, Article 8. (Kun Fan)



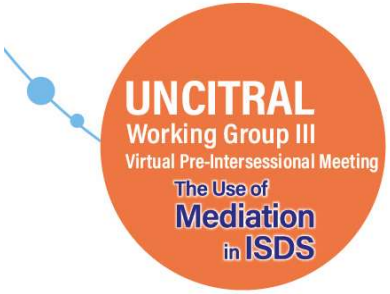
Capacity building as a condition precedent to demystify the use of mediation as a means of resolving ISDS disputes

- In commenting on the role of mediators, American practitioner Arthur Meyer noted that:

- The task of the mediator is not an easy one. The sea that he sails is only roughly charted, and its changing contours are not clearly discernible. He has no science of navigation, no fund inherited from the experience of others. He is a solitary artist recognizing at most of few guiding stars, and depending on his personal powers of divination.
- Mediation is a part of a more complicated process that involves numerous variables, and indeed becomes a variable itself in determining the final outcome of the more extensive process of conflict resolution. Consequently, it is very difficult to evaluate mediation in terms of success and failure. There is little consensus in the theory of mediation on what constitutes successful mediation. However, certain criteria to facilitate evaluation are suggested by scholars and practitioners who have attempted to subject mediation to systematic analysis.

CONCLUSION

- Use of mediation in ISDS disputes requires a paradigm shift. It is up to States and investors to decide how useful and cost-effective mediation is to them.
- There is a need to develop and publish guidelines on the use of mediation in the ISDS context.
- Academic articles on the use of mediation in the ISDS context would also contribute to raise awareness about the potential availability of mediation amongst States and investors.
- Beyond the usefulness and cost effectiveness of mediation is is important to ensure that there are transparent rules for mediation and that as many countries as possible are party to the Singapore Convention. The key to getting mediation internationally acceptable is the fact that agreements must be enforceable.
- Without training and capacity building the use of mediation in the context of ISDS disputes is likely to remain limited.



Thank you!

- The views expressed in this presentation are mine only and do not bind the Attorney-General's Office of Mauritius or the Republic of Mauritius.