



UNCITRAL
Working Group III
on ISDS Reform



Forum for Further Preparatory Work
on Investment Mediation

Mediation and Investment Treaties: Designing Effective Options

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INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION II

Proceedings of the Washington and Lee University and UNCTAD
Joint Symposium on International Investment and Alternative Dispute Resolution,
held on 29 March 2010 in Lexington, Virginia, United States of America

<https://bit.ly/3LJgOqz>



Joint Conference organised by A. Joubin-Bret and S.D. Franck

- Recorded Panels remain available on YouTube (see, e.g., <https://www.youtube.com/watch?v=QSMt5KMAvK4>)
- Initial Online Discussions synthesised in Pre-Conference Rapporteur Reports
- Written Remarks by Presenters and Participants
- Post-Conference Rapporteur Reports



UNCTAD's Existing Work on ADR and Investment Treaties

Investor-State Disputes: Prevention and Alternatives to Arbitration:
Original Volume (2010); Conference Proceedings, Volume II (2011).

The Challenge of the Status Quo

- Terms like ‘good offices’ and ‘amicable settlement’ are amorphous and uncertain
- Some arbitration tribunals have used the lack of clarity to permit investors to avoid complying with pre-arbitration dispute resolution



The Value of Integrating Mediation

- Conduct an internal diagnostic of types of investment treaty conflict
- Consider current obligations in treaties (waiting periods, exhaustion of remedies, etc.)
- Explore potential impact of MFN clauses on new procedural rights and obligations to decrease risk of unexpected results and to increase mediation utility

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‘Mandatory Mediation’ is a Misnomer

- ‘Mandatory Mediation’ typically involves a court intervention that orders parties, with no interest in mediating, to mediate (i.e. usually family law disputes)
- In investment treaty conflict, there is no free-standing, pre-existing entity that can order non-consenting parties to mediation

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Instead: Procedural Pre-requisites

- Set out clear *ex ante* procedures:
- Indicate what investors must do prior to accessing the right to adjudication, including:
 - Initial ‘Notice of Conflict’ / Submit ‘Request for Mediation’
 - Attend one joint session with mediator
 - Consider new ICSID Rules
 - Rule 19: Initial Written Statements (by parties, sent to mediator)
 - Rule 20: First Session

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Core Considerations for Rules

- Work from an existing template, but adapt as needed
 - *See e.g.* ICSID Mediation Rules including Rule 10 (confidentiality) and Rule 11 (without prejudice obligations)
- Having two mediators is valuable (for minimal cost)
- Provide general checklists for expectation management
 - Pre-mediation
 - During mediation

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