Chapter 5.3

Investor–State Mediation

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SUMMARY

This chapter sets out in detail the proposition of Investor-State Mediation and examines recent developments in the field. The chapter sheds light on practicalities such as the agreement to mediate, the necessity of an ongoing consent, timing issues, mediation rules, the process, criteria on how to choose the mediator and mediation counsel, etc.

Moreover, the chapter analyzes the two main reasons for the limited uptake of ICSID conciliation. Also, it sets out current political and structural obstacles to settlement of investment disputes. Ways to overcome these obstacles in the future are being suggested.

Furthermore, current discontent in Investor-State Dispute Settlement (ISDS) is compared with what Investor-State Mediation is offering in this regard.

Eventually, it is concluded that Investor-State mediation, although no *panacea* to every dispute, can be a valuable addition to the ISDS toolbox.

A. THE IDEA OF ISDS

In 1966, when the International Centre for Settlement of Investment Disputes (ICSID) was established by the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention)*, the drafters included conciliation *and* arbitration as dispute resolution mechanisms.

The conciliation rules were modeled on State-to-State conciliation processes known at that time, and a number of successful facilitation interventions by the World Bank in large-scale investment disputes in the 1950s and 1960s.[1] Thus, the drafters were convinced that the instrument of choice would be the conciliation rules: "*[I]t may be noted that the Bank's own experience, among others, has indicated the value of conciliation which is less formal and politically more palatable than arbitration.*"[2]

Ironically, some 897 ICSID arbitrations and 12 ICSID conciliation cases later, it is clear that arbitration is the predominant ISDS mechanism.[3]

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1 Antonio R. Parra, *The History of ICSID*, 2nd ed., 2017, pp. 22 et seq.

2 Aron Broches, *Note by A. Broches, General Counsel, transmitted to the Executive Directors: Settlement of Disputes Between Governments and Private Parties*, History of the ICSID Convention, Volume II-1, 1968 and reprinted 2006, p. 3; Antonio R. Parra, *The History of ICSID*, 2nd ed., 2017, pp. 23 et seq.

3 The ICSID Caseload-Statistics, Issue 2024-2, p. 2.

The rationale behind international investment protection was to avoid State-to-State disputes which caused political contestation and diplomatic crises at that time. Instead, foreign investors from a contracting State to an international investment agreement – the home state – can directly sue the contracting State which hosts the investment – the host state. Thus, the invention of ISDS helped depoliticizing the resolution of investment disputes.[4] A power-based approach was replaced by a rights-based approach.[5]

B. INVESTOR-STATE ARBITRATION NOWADAYS

Nowadays, investment disputes are regularly resolved by Investor-State arbitration. The first ICSID Convention arbitration case was registered in 1972. By now, approximately 1'000 Investor-State arbitration cases have occurred globally. According to recent statistics, some 40 – 60 new cases are expected to be initiated per year.[6]

After increasingly frequent resort to the arbitral method of dispute resolution in ISDS over the last half century, serious backlash started appearing in recent years.[7] The European Union even advocates a "revolutionary" approach by suggesting a comprehensive redesign of the current arbitral mechanism and the introduction of a multilateral investment court.

What led to the demand for changes in the current arrangement of the arbitral ISDS mechanism?

At the heart of the criticism lies the impression that the current system fails to balance the two fundamental interests that clash in the field of foreign investment. These are the interests of (i) the private property and legitimate expectations of investors, on the one hand, and (ii) the public interest expressed through the conduct of politics and the enactment of policies by governments, on the other hand.[8] According to critics, the balance has shifted too much in favor of investors.

In order to overcome this imbalance of interests, the aim of proposed ISDS reforms is the affirmation of the following values and their adequate implementation: the establishment of the rule of law, consistent and predictable interpretation and application of the law, an appellate mechanism, the independence and neutrality of arbitrators or judges, efficient and economical procedures, the

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4 Alexandra Goetz-Charlier, *Mediating Investor-State Disputes in Free Trade Agreements: An Evaluation of the EU's Proposal*, 24 European Foreign Affairs Review 2019, Issue 1 (Goetz-Charlier), p. 82.

5 Mariana H. Gonstead, *Beyond Investor-State Disputes: Intercultural Capacity Building to Optimize Negotiation, Mediation, and Conflict Management*, 17 U. ST. THOMAS L.J. 251, 2021, (Gonstead), pp. 255 and 259.

6 The ICSID Caseload-Statistics, Issue 2024-2, p. 4.

7 Jose M. A. Zarate, *Legitimacy Concerns of the Proposed Multilateral Investment Court: Is Democracy Possible?*, The South Centre Investment Policy Brief 18, June 2019, p. 3.

8 P. J. Kuijper, I. Pernice, S. Hindelang, M. Kinnear, M. Scchwarz, M. Reuling, *ISDS Provisions in the EU's International Investment Agreements*, Volume 2 – Studies: *Study on Investor State Dispute Settlement and Alternatives of Dispute Resolution in International Investment Law*, Directorate-General for External Policies of the EU, 2014, p. 57.

protection of the rights and freedom of the State to conduct policy and regulate areas of public interest, transparency and legitimacy of the process.[9]

The image of justice administered by a relatively small group of privately appointed arbitrators behind closed doors in matters of public interest and, thus, the failure to comply with the open court principle, is one of the major criticisms against the ISDS system. Transparency is seen as a condition of legitimacy.[10]

There is also a perceived lack of independence and impartiality of the decision-makers in the Investor-State arbitration system due to party-appointment and double-hatting (lawyers acting as counsel and arbitrator). Other issues are the lack of consistency, coherence, predictability and correctness of arbitral awards as well as limitations in existing challenge mechanisms. Hence, there is a problem with legal certainty in Investor-State arbitration.[11]

Obviously, cost and duration are big concerns in Investor-State arbitration as well. The search for facts and law in a process in which the parties receive a meaningful opportunity to present their cases takes time. Thus, the average duration of an investor-State arbitration is over four years.[12]

Cost is a direct reflection of the amount of time taken to prepare, present and judge a specific case. Hence, Investor-State arbitrations usually come at high costs. The average cost of an Investor-State arbitration is approximately USD 5 – 6 mio. per party in legal fees, and up to USD 1 mio. for arbitration costs (tribunal, hearings, institution, etc.).[13]

Arbitral awards usually entail monetary compensation, while specific performance or restitution may not be available options. The monetary compensation sought by the investor is often large, even by comparison to the host State's budget and assets.

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9 Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, European Yearbook of International Economic Law, Springer, 2018, p. 9.

10 Gabrielle Kaufmann-Kohler/Michele Potesta, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-state Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism?*, First CIDS Report, 2016 (Kaufmann-Kohler/Potesta), p. 14; Nadja Alexander, *Investor-State Mediation: How the Landscape Is Changing*, Kluwer Mediation Blog, 2021, available at: http://mediationblog.kluwerarbitration.com/2021/04/16/investor-state-mediation-how-the-landscape-is-changing/; Shahla F. Ali/Odysseas G. Repousis, *Investor State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?*, Denver Journal of Int'l Law and Policy, Vol. 45, No. 2, 2018 (Ali/Repousis), p. 228; M. R. Dahlan/Wolf von Kumberg, *Investor-State Dispute Settlement Reconceptionalized: Regulation of Disputes, Standards and Mediation*, 18 Pepp. Disp. Resol. L.J. 467, 2018 (Dahlan/von Kumberg), p. 476 et seq.

11 Jack J. Coe, *Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution*, in: Catharine Titi/Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes*, 2019, (Coe 2019), p. 62; Kaufmann-Kohler/Potesta, pp. 11 et seqq.; Ali/Repousis, p. 228; Dahlan/von Kumberg, pp. 474 et seqq. and 477 et seq.

12 Allen & Overy and the British Institute of International and Comparative Law, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, 2021, p. 5.

13 Id., p. 4.

Last but not least, while the Investor-State arbitration system did away with the power-orientation of the former State-to-State system, it is now tainted by strong legalism.

C. DO WE NEED AN INTEREST-BASED APPROACH TO ISDS?

There are situations in which the investor's main interest is to just finish the project and start earning a return on the investment while the host State is interested in retaining or even expanding the investment and maintaining its overall attractiveness for foreign direct investments. These are situations in which the parties might want to remain in the drivers' seat, roll up their sleeves and probe whether they can find a creative and sustainable solution they can mutually benefit from in the foreseeable future. Mediation generally offers more flexibility in structuring such an outcome than arbitration. Thus, in these cases the parties might prefer an interest-based form of dispute resolution to the rights-based form of investment arbitration.[14]

Grant Kesler, Metalclad's former CEO, after having been awarded nearly USD 17 mio. against Mexico, revealed that the arbitral mechanism he experienced was – despite "winning" the case – so dissatisfying that he wished he had used more informal mechanisms to settle. He said this in light of the costs and length of the proceedings and the subsequent breakdown of relations. The proceedings had spanned approximately five years, involved a battle in domestic courts, and direct and indirect costs in the amount of approximately USD 4 mio. accumulated on Metalclad's side.[15]

Generally, statistics of ICSID show that only around 65% of ICSID arbitrations are eventually decided by the arbitral tribunal. In the remaining 35% of the cases the disputes are settled, or the proceedings are otherwise discontinued before a final award is issued.[16] The data at UNCTAD Investment Policy Hub shows the same: Among the total number of known treaty-based arbitrations approximately 20% are settled and 10% are otherwise discontinued.[17]

These figures indicate 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 [every] case*."[18] Clearly, as the settlement statistics show, there is room for amicable resolution of investment disputes and, thus, Investor-State mediation – before and even after arbitration proceedings are instituted.[19]

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14 Dahlan/von Kumberg, p. 483.

15 Jack J. Coe, *Toward a Complimentary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch*, 12 UC Davis Journal of Int'l Law and Policy, 2005 (Coe 2005), pp. 8 et seqq.; Dahlan/von Kumberg, p. 486.

16 The ICSID Caseload-Statistics, Issue 2024-2, p. 12.

17 Information available at: https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited on 13 August 2024).

18 *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, UNCITRAL PCA Case No. 2008-13, Final Award, 7 December 2012, §60. Despite the hint, the parties did not attempt mediation. The case eventually resulted in a judgment by the European Court of Justice (*Case C-284/16 Achmea*) largely undoing the system of intra-EU investment treaty arbitration.

19 Frauke Nitschke, *Amicable Investor-State Dispute Settlement at ICSID: Modernizing Conciliation and Introducing Mediation*, BCDR Int'l Arbitration Review 6, No. 2, 2019 (Nitschke BIAR), p. 411.

D. THE PROPOSITION OF INVESTOR-STATE MEDIATION

The idea of mediation in general is that in cases in which the parties seek a de-escalation or, ideally, a quick end to ongoing controversies in order to get on with their business or decently separate, they can, at any time, choose to take responsibility for their own fate by cooperatively negotiating a mutually acceptable solution with the assistance of a third-party neutral. Such situations are conceivable in Investor-State settings too.

Often in direct negotiations parties try to convince one another of their views of what went wrong in the past. At some point they might bring in legal counsel and counsel will try to convince the other side on how a certain action or measure taken in the past breached a contract and violated the law, just as they try to convince the arbitral tribunal in an arbitration. A negotiation performed according to this pattern is prone to end up in an impasse.

Mediation offers something else. While the arbitration process is tailored to help the parties find *the* truth about actions from the past and, subsequently, applying the law to those facts, mediators work under the precondition that there are different perceptions of what happened in the past and that parties look towards building the future. A successful mediation process does not require the parties, at any point in time, to accept one another's perception of what happened in the past or to mutually agree on *the* truth, or even how the law should be applied. Rather, the goal of a future oriented mediation process is to work towards a solution which is acceptable under both perceptions and, thus, everyone's "reality."

Taking it from there, mediators facilitate an interest-based negotiation by leveling the impact of noise and bias, and the errors in human thinking described by late Daniel Kahneman et al.[20] Mediators are trained "decision observers" able to spot biases which are affecting the parties' decision making.[21] Also, they help reducing noise by structuring the negotiation and, thus, guaranteeing "decision hygiene."[22] In other words, mediators assist the parties with debiasing their decision making process.

Contrary to Investor-State arbitration, Investor-State mediation is suitable to address needs and interests of the parties. Relationships between the parties can be preserved, improved or even restored throughout mediation proceedings. Mediation can prevent disputes or de-escalate them. Investor-State arbitration, on the other hand, tends to exacerbate divisiveness between the parties.

In an Investor-State mediation, parties can work towards retention and potential expansion of the investment or similar investments if this is what they are interested in.[23] If not, they can structure

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[20] Daniel Kahneman/Olivier Sibony/Cass R. Sunstein, *Noise*, 2021 (Kahneman/Sibony/Sunstein); Daniel Kahneman, Thinking Fast and Slow, 2011.

[21] Kahneman/Sibony/Sunstein, pp. 240 et seqq.

[22] Kahneman/Sibony/Sunstein, Noise, 2021, pp. 243 et seq., and 312 et seqq.

[23] Gonstead suggests: "To move forward, we need to move … to a proactive, relationship-centered approach that maximizes joint gains. Adopting a relationship-centered approach can shift the paradigm from the mindset of protection to cooperation, from a focus on individual positions to a focus on collective interests,

a self-determined winding-down of their relationship according to the needs of both sides. In both scenarios, monetary as well as non-monetary settlement options can be considered. In that sense, Investor-State mediation is much more flexible than Investor-State arbitration which usually entails the breakdown of a relationship followed by a final monetary compensation.

Contrary to Investor-State arbitration, Investor-State mediation is flexible enough to allow for the inclusion, by the parties, of stakeholders who are impacted either by the investment, the dispute, or any negotiated solution, such as local communities, and non-governmental or supranational organizations. In the investment arbitration context, these are typically referred to as "non-disputing parties."[24] Hence, an effort can be made to address non-disputing parties' concerns and give them a direct agency in the results. Eventually, a mediated settlement might be able to satisfy the needs not only of the parties but of various stakeholders. Or, at the very least, understanding can be fostered as to why this is not entirely possible.

Generally, Investor-State mediation offers the possibility to control the outcome and take the opportunity to tailor a solution that caters to the parties' long-term business, social, political, cultural and various other needs and interests. This stands in contrast to the uncertainty of an adjudicated outcome.

Last but not least, mediation is not only a cynical ploy to draw out the facts and maybe generate rotten compromises, but – skilfully done – has the potential to prevent or end fiercely fought disputes and, instead, turn them into fruitful controversies which lead to sustainable relationships and, thus, investments. This is, indeed, the value mediation can add.

To sum up, mediation offers a collaborative, future-oriented, user-friendly approach which subtly facilitates the parties' negotiations and decision-making in the interest of and by the disputing parties themselves, rather than having a judgment imposed on them potentially impacting a State's right to regulate. Mediation allows for a broad range of solutions, limited only by mandatory provisions of the law as well as the parties' imagination and their willingness to cooperate.

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from mainly enforcing a 'Bill of Economic Rights' to maximizing joint gains, and from securing investment to strengthening the investor-State business relationships to reach higher levels of investment retention and expansion", at p. 262.

[24] UNCITRAL Guidelines on Mediation for International Investment Disputes, 2024, para. 30 (UNCITRAL Guidelines) available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2401497e_mediation_guidelines_-ebook_eng.pdf; Jack J. Coe, *Concurrent Co-Mediation: Toward a More Collaborative Centre of Gravity in Investor-State Dispute Resolution*, in: Catharine Titi/Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes*, 2019 (Coe 2019), p. 63.

E. THE TECHNICALITIES OF INVESTOR-STATE MEDIATION

I. Agreement to Mediate

Mediation is voluntary. The parties' consent to mediate can either be set out in a mediation clause in the contract between the host State and the investor, or in a separate mediation agreement after the dispute has arisen. Also, international investment agreements (or an investment law) can and sometimes do propose or encourage mediation. In some cases, they contain advance consent of the State to mediate at the investor's election, and a small handful even mandates mediation.[25]

The *UNCITRAL Model Provisions on Mediation for International Investment Disputes* seek to encourage the use of mediation in ISDS by recommending a formula for inclusion in investment treaties.[26]

Generally, the European Commission has been a vocal proponent of the resolution of investment disputes through mediation.[27] The investment chapter contained in the EU's most recent Free Trade Agreements with third countries routinely includes a mediation provision allowing parties to mediate at any time – before and during the Investor-State arbitration.[28]

The latest increase of mediation provisions in international investment agreements[29] is promising with regard to the further development of Investor-State mediation, as it is believed that one reason for the limited uptake of ICSID conciliation is related to the lack of conciliation clauses in investment contracts and treaties.[30] Generally, contract and treaty clauses which provide for – or arbitrators who suggest to try – mediation can help to remove the *onus* of suggesting mediation from one of the parties, and this is very important. They also anchor mediation as a process tool in the public policy of a State, which encourages the use of mediation.[31] The mediation process is frequently

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25 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, pp. 3 et seqq.; Nitschke BIAR, p. 415.

26 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model_provisions_e_1.pdf.

27 Goetz-Charlier, p. 84.

28 E.g. the EU-Canada Comprehensive Economic and Trade Agreement (CETA), available at: https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/; the EU-Singapore Free Trade Agreement, available https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreements_en; or the EU-Vietnam Free Trade Agreement, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437.

29 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, p. 2; Catharine Titi, *Mediation and the Settlement of International Investment Disputes – Between Utopia and Realism*, in: Catharine Titi/Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes*, 2019, (Titi), pp. 26 et seqq.

30 Titi, p. 26.

31 Energy Charter Secretariat, *Model Instrument on Management of Investment Disputes, With Explanatory Note*, 2018 (ECT Model Instrument), p. 17, available at: https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf.

underutilized if it depends on one party to propose the process as the proposal is often interpreted as showing weakness.[32]

II. Ongoing Consent to Mediate

Investor-State mediation is always voluntary throughout the procedure. Hence, unlike arbitration, the process cannot put an end to the dispute without both disputants agreeing to the settlement terms. Either party can withdraw from the mediation at any time. Thus, consent of the parties is not only required at the outset of a mediation, but throughout the entire procedure (so called "ongoing consent").[33]

III. Timing of the Mediation[34]

Mediation is an option before, during or after an arbitral proceeding and can be started at any time during the life-cycle of an investment.[35]

Ideally, a mediator accompanies a complex investment project from the beginning, in order to improve communication and, thus, prevent disputes in the first place or manage them early on. Some investment treaties, indeed, provide for dispute prevention mechanisms that resemble mediation.[36]

However, also at a more formal dispute stage, a treaty can stipulate, or the parties can agree on a specific mediation-window within which the Investor-State mediation is conducted as a stand-alone process. This can be done at different points in time. Amicable settlement (or cooling-off) periods are often mentioned as possible timeframes to include a mediation-window. However, at this early stage, negotiations often either do not take place or prove futile. The host State usually lacks sufficient information at that early juncture to meaningfully participate.[37] A mediation window can also be included into the arbitration process following the request for arbitration, hence, prior to the constitution of the arbitral tribunal, or after any major procedural step, e.g. case management conference, submission of written briefs, hearing, decision on jurisdiction or on liability, etc.

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32 Coe 2005, p. 38.

33 ICSID, *Background Paper on Investment Mediation*, 2021, p. 5; Nitschke BIAR, p. 415 footnote 212; Frauke Nitschke, *Part 3 – ICSID Mediation and ICSID Conciliation – Understanding the Differences*, Kluwer Mediation Blog, 2021, available at: https://mediationblog.kluwerarbitration.com/2021/12/06/part-3-icsid-mediation-and-icsid-conciliation-understanding-the-differences/.

34 For more details, see Frauke Nitschke, *Part 1 – How to Assess the Suitability of Mediation for Investment Disputes*, Kluwer Mediation Blog, 2021, available at: http://mediationblog.kluwer-arbitration.com/2021/10/06/part-1-how-to-assess-the-suitability-of-mediation-for-investment-disputes/.

35 UNCITRAL Guidelines, para. 46.

36 Titi, pp. 29 et seqq.

37 Jack J. Coe, *Settlement of Investor-State Disputes Through Mediation – Preliminary Remarks on Processes, Problems and Prospects*, in: Raymond Doak Bishop (ed), *Enforcement of Arbitral Awards Against Sovereigns*, 2009 (Coe 2009), p. 95.

As there does not seem to be just one right time to include a mediation window, one might even consider conducting a mediation in parallel to the arbitration.[38] Even as circumstances evolve, mediation remains accessible at all times as well as at all stages.[39] As a consequence, the parties can make use of the advantages of mediation at various times during the life of a dispute, as the parties' understanding of their case and the likelihood of success evolves. Other advantages of parallel mediation are the fact that the arbitration is not getting delayed due to the conduct of the mediation, the arbitration gets streamlined while being conducted, and even a partial settlement may occur.

In conclusion, a mediation can be made available along the whole investment conflict *continuum* – the earlier and the more often the better.

IV. Mediation Rules

Mediation is a form of dispute resolution that is less formal than arbitration or even ICSID conciliation. The flexibility of Investor-State mediation is one of its greatest advantages, as it can cater to the specific needs of the parties.

Interestingly enough, so far most international investment agreements that provide for amicable dispute resolution, do not regulate the procedure.[40] The recent availability of the *UNCITRAL Model Provisions on Mediation for International Investment Disputes* might change that. The model provisions even suggest that the parties should agree to conduct the mediation in accordance with a specific set of mediation rules.[41]

The goal of such rules is to ensure an efficient and cost-effective process by setting out basic procedures for starting, conducting, and terminating the mediation. They also provide provisions on costs and confidentiality, etc.

Mediation can be conducted with or without the administrative support of an institution.[42] Once a dispute has arisen, the parties are often unable to jointly appoint a mediator without assistance. Therefore, the main advantage of a mediation administered by an institution is the institution's expertise and assistance in appointing the mediator according to its mediation rules.

The following sets of Investor-State mediation rules are currently available: The International Bar Association's IBA Rules for Investor-State Mediation 2012 (IBA MR),[43] the Vienna International

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38 Coe 2009, p. 97; Coe 2019, pp. 61 et seqq.

39 UNCITRAL Guidelines, para. 8.

40 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, p. 6.

41 Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/model_provisions_e_1.pdf.

42 UNCITRAL Guidelines, para. 12.

43 The International Bar Association's *IBA Rules for Investor-State Mediation 2012*, available at: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C.

Arbitral Centre's Vienna Investment Mediation Rules 2021 (Vienna MR),[44] and the 2022 ICSID Mediation Rules (ICSID MR).[45]

The ICSID MR define a broader scope of application for ICSID mediation proceedings than the one which exists for ICSID conciliation and arbitration proceedings. The latter are subject to the jurisdictional conditions set out in Articles 25 – 27 of the ICSID Convention. The ICSID MR, on the other hand, are open to all States, no matter whether they are ICSID members or not, and the nationality of the investors is irrelevant. In fact, the ICSID Secretariat administers mediations relating to investments involving any State, State entity, or Regional Economic Integration Organization or agency thereof (Rule 2(1) ICSID MR).

V. The Mediation Process[46]

The parties can separately or jointly file a request for mediation (Rules 5 – 7 ICSID MR, Article 3 Vienna MR, Article 2 IBA MR). Assuming an agreement to mediate exists, they can then jointly, or with the assistance of an institution, appoint a mediator or two co-mediators (Rule 13 ICSID MR, Article 7 Vienna MR, Article 4 and 6 IBA MR).

The mediation process involves various phases different in nature, which all depend on the nature of the issues of the dispute at hand.[47]

Generally, in the initial mediation phase, the parties will file brief initial written statements (Rule 19 ICSID MR). They usually provide an overview of the facts that led to the dispute, the parties' requests, the state of negotiations, and how the mediation procedure should be conducted.

Thereafter, in a mediation management conference, the parties, together with the mediator, determine a mediation protocol (Rule 20 ICSID MR, Article 9(2) Vienna MR, Article 9 IBA MR). In this protocol, all the necessary procedural and organizational details are set out and agreed upon, such as the means of communication and communication strategy in general, initiation or suspension of any other proceedings concerning the same dispute, application of prescription or limitation periods, the meeting structure, the venues, the mediator's fees and authority, confidentiality, the participation of other stakeholders apart from the parties, implementation of a potential settlement, etc.

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44 Vienna International Arbitral Centre's Vienna Investment Mediation Rules 2021, available at: https://www.viac.eu/en/investment-arbitration/content/vienna-rules-investment-2021-online#Mediation_Part_II.

45 ICSID Mediation Rules 2022, available at: https://icsid.worldbank.org/resources/rules-and-regulations/mediation-rules/chapterI-generalprovisions.

46 For a detailed description of the process under the ICSID MR see: Nitschke BIAR, pp. 414 et seqq.; Frauke Nitschke, *A Preview of ICSID's New Investor-State Mediation Rules*, Kluwer Mediation Blog, 2020; Frauke Nitschke, *Part 2 – Understanding Mediation in the Investor-State Context*, Kluwer Mediation Blog, 2021.

47 UNCITRAL Guidelines, para. 31 (with an illustrative example of the different phases).

During the opening, exploration, and negotiation phase of the mediation, the parties work with the mediator in order to outline the issues in dispute and to explore their underlying interests, as well as potential settlement options.

Mediation sessions can be held in person or online (Rule 20(3)(c) ICSID MR, Article 9(3) Vienna MR, Article 9(1) IBA MR). As pointed out in the *UNCITRAL Guidelines on Mediation for International Investment Disputes (UNCITRAL Guidelines)*, the remote conduct of a mediation proceeding has developed in more recent years, due to obvious improvement of technology. It certainly has its upside as the interaction between the parties and the mediator is no longer bound to a specific location, which makes scheduling easier and helps to achieve an overall more cost-efficient process. Of course, as with any other remote means of work, online mediation brings with it certain dangers and issues which arise, especially with regard to data protection and cyber security, but this should be addressed on a case-by-case basis.[48]

Separate and joint meetings between the parties and the mediator are possible (Rule 17(4) ICSID MR, Article 9(7) Vienna MR, Article 8(3) IBA MR). If necessary, expert advice can be obtained[49] or, if requested by the parties, the mediator may make recommendations for the resolution of the dispute (Rules 21 ICSID MR, Article 8(7) and (8) IBA MR).

Ideally, the mediation will end in a concluding phase, in which it is terminated with a signed settlement agreement.

The settlement agreement is concluded on a voluntary basis, meaning it will be usually complied with by the parties. However, for the sake of legal certainty and the enforcement of the settlement later on, the parties should take care of some basic form requirements. This is also supported in the UNCITRAL Guidelines, namely as to the form, content, signing, delivery, and other requirements in connection with the parties' agreement.[50]

VI. The Mediator

An impartial and independent mediator assists the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute by structuring the parties' negotiation. He or she is responsible for the mediation process, however, has no authority to impose a resolution (Rules 12 and 17 ICSID MR, Article 7 Vienna MR, Articles 3 and 7 IBA MR). The mediator does not offer legal advice to the parties but assists the parties in assessing the strengths and weaknesses of their arguments.[51]

Mediators can apply different mediation styles. A *facilitative mediator* structures the process and assists the parties with communicating with one another, thereby, potentially acting as a negotiation coach. Understanding is fostered in joint sessions, while separate sessions (so called "caucuses")

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48 UNCITRAL Guidelines, paras. 32 et seq.

49 UNCITRAL Guidelines, para. 29.

50 UNCITRAL Guidelines, para. 40.

51 UNCITRAL Guidelines, paras. 14 et seq.

are used to learn aspects of the case not likely to be exposed by one party to the other in a joint session setting. The facilitative mediator focuses on exploring the parties' interests and, on the basis of the common interests, assists the parties in developing settlement options that respond to interests instead of positions. By facilitating the parties' decision-making process, the mediator ensures that the parties make unbiased and well-informed choices. The facilitative mediator tends to keep his/her own views on substance to himself/herself. However, he/she may take the lead on procedural points.

Apart from structuring the process and assisting with communication, an *evaluative mediator* tends to also influence the resolution of the conflict substantively by providing his/her own ideas and opinions or giving concrete advice. An evaluative mediator often works in caucus with the parties in order to probe their assessments and positions, to challenge proposals that might seem unrealistic, etc. While reality-testing and asking the parties to assess their arbitration/litigation risk, an evaluative mediator will regularly express his/her own view of the strengths and weaknesses of each side's case. If asked to do so by both parties, an evaluative mediator might eventually agree to make a settlement recommendation.

To avoid a misunderstanding: Mediation is not a binary system in which a mediator needs to choose either style. A good mediator is able to remain flexible and use the tools from either style as he/she deems fit or the parties request in a specific situation.

An evaluative mediation, however, should be distinguished from an early neutral evaluation. In an early neutral evaluation, the neutral body tends to predict the likely outcome of a litigated or arbitrated case on the basis of the applicable legal rules, and makes a settlement recommendation before negotiations take matters from there. Thus, early neutral evaluation, like arbitration, is a rights-based format.[52] Even an evaluative mediator, on the other hand, prefers to look for interest-based, self-determined and agreed outcomes by the parties, before he/she agrees to use the option of recommending specific settlement terms (a so called "mediator's proposal") as a last resort, e.g. once there is an impasse.[53]

This distinction matters when looking at the recommended competency criteria for Investor-State mediators. The UNCITRAL Guidelines,[54] ICSID in its Background Paper,[55] the IBA in its Appendix B of the IBA Rules for Investor-State Mediation 2012, as well as the International Mediation Institute (IMI) in its so called IMI 2016 Competency Criteria for Investor-State Mediators,[56] and the ECT

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52 Dahlan/von Kumberg, p. 485.

53 Daniel Weinstein/Mushegh Manukyan, *Making Mediation More Attractive for Investor-State Disputes*, Kluwer Arbitration Blog, 2019, (Weinstein/Manukyan), available at: http://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/.

54 UNCITRAL Guidelines, para. 17.

55 ICSID, *Background Paper on Investment Mediation*, 2021, p. 7 et seq.

56 IMI Competency Criteria for Investor-State Mediators, 2016, available at https://imimediation.org/wp-content/uploads/2022/03/IMI-Investor-State-Mediation-Competency-Criteria.pdf.

Secretariat in its 2016 Investment Mediation Guide,[57] all suggest that *inter alia* mediation training, accreditation and mediation experience are crucial competency criteria for Investor-State mediators. This makes sense, as the value added by the mediator mostly consists of his/her mediation process management, conflict psychology, communication and negotiation skills, and less so in his/her subject matter expertise.[58] Mediators need to be able to skillfully master the specificities of a mediation proceeding. Consequently, not just any Investor-State arbitrator can turn into an Investor-State mediator by choice or by demand, due to a lack of the specific skillset.[59] Nevertheless, an understanding of the context and framework of Investor-State disputes and arbitration are also necessary in order to probe the strengths and weaknesses of the parties' positions. Last but not least, intercultural competency is essential.

In fact, a second reason for the failure of ICSID conciliation – apart from the lack of conciliation clauses in international investment agreements – might be that the few conciliation processes that were conducted took the form of a rights-based early neutral evaluation instead of an interest-based mediation. The very first sole conciliator, Lord Wilberforce, in the 1980ies, understood that his task was to *"examine the contentions raised by the parties, to clarify the issues, and to endeavor to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement."*[60] While this statement has often been repeated as describing the role of a conciliator, this understanding is neither rooted in the text of the ICSID Convention, nor in the text of ICSID's Conciliation Rules,[61] and it does not entail much of the proposition of Investor-State mediation set out above. Mediation, even conducted in an evaluative style, is interest-based and, thus, different from a rights-based early neutral evaluation. One may hope that past misunderstandings about ICSID conciliation offer learning opportunities for the implementation of mediation as an amicable dispute settlement method for investment disputes. Recently, the Chair of the ICSID Administrative Council and President of the World Bank Group has made new designations to the ICSID panels of conciliators. Interestingly enough, a couple of world-renowned mediators were included in this appointment.

VI. Counsel in Mediation[62]

In mediation, the parties' lawyers do not focus on legal arguments and evidence regarding breach of legal obligations. Still, some tasks are similar to those of an arbitration counsel. They may include

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57 Energy Charter Secretariat, *Guide on Investment Mediation*, 2016, available at: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf.

58 Weinstein/Manukyan.

59 UNCITRAL Guidelines, para. 18.

60 Lester Nurick/Stephen J. Schnably, *The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago*, 1(2) ICSID Rev – FILJ, 1986, p. 348.

61 Nitschke, *Conciliation*, p. 130; Nitschke BIAR, pp. 384 et seq.

62 UNCITRAL Guidelines, para. 27; for detailed information on mediation advocacy please consult Harold I. Abramson, *Mediation Representation – Advocating as Problem-Solver*, 3rd ed. 2013.

educating the client about the mediation process, drafting a request for mediation and, later, a mediation brief. The brief is much shorter, however, and has a different focus than submissions in an arbitration proceeding. In addition, counsel will be assisting with the selection of the mediator, holding an opening statement, evaluating settlement options, and drafting settlement terms.

The preparations for a mediation session, which need to be done in close cooperation with the client, differ greatly from the preparation of an arbitral hearing. The interests of either party – not only of the client – need to be actively explored. Scenarios such as the best, worst, and most realistic alternatives to a negotiated agreement need to be worked out. Therefore, a realistic assessment of the client's case needs to be provided. A goal and maybe a bottom line need to be set, and a negotiation strategy on how to achieve the goal needs to be elaborated. Also, it is very valuable to plan the pattern of concessions one might be willing to make. Most importantly, low-cost trades for the client which, however, are of high value to the other side need to be identified. Also, a discussion on the question of which party has what kind of leverage in the negotiation can be helpful.

Similarly, the conduct of the mediation counsel during the mediation does not resemble the conduct of an arbitration counsel. An effective counsel in mediation needs to be willing to empower the client himself or herself. The business leads the negotiations. Counsel merely supports the client by being a sounding board and certainly also a legal resource. There is no need to fear a loss of control or detriments with regard to a potential arbitration as, on the one hand, the focus of the conversation conducted in mediation is different than the focus in arbitration and, on the other hand, sensitive information can be exchanged confidentially in caucus.

Hence, counsel can and even should accompany the client into the mediation. They need to be flexible, however, to adapt to the proceedings. Mediation is credited with impressive rates of settlement, provided the parties and their counsel can be persuaded to attempt the technique.[63]

VII. Enforcement

A mediated settlement is an ordinary contract and subject to *pacta sunt servanda.* It can be enforced according to the dispute resolution clause contained in the contract. Voluntary compliance usually is a realistic scenario, as the parties mutually agreed to the conclusion of the settlement agreement.[64]

To make a mediated settlement that has been reached during an ongoing arbitration directly enforceable, the parties can request the arbitral tribunal to embody the settlement in a consent award. Such an award would then be enforceable – if necessary – pursuant to the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.*

Also, the *Singapore Convention on Mediation*, in principle, applies to settlements in an ISDS context. An exception applies if the host State had declared the reservation contained in Article

63 Coe 2009, p. 107.

64 Coe 2009, p. 86; Dahlan/von Kumberg, p. 488.

8(1)(a) of the Singapore Convention on Mediation, according to which the Convention shall not apply to settlement agreements to which the host State itself or any of its agencies is a party.[65]

F. RECENT PROMISING DEVELOPMENTS

The proposition of Investor-State mediation has recently gained more popularity. This can be seen *inter alia* in the adoption of the ICSID MR in March 2022 by the 156 ICSID Member States, effective as of 1 July 2022. Also, a general increase in the number of mediation clauses in international investment agreements has been recorded throughout the last decade.[66] The EU held public consultations on Investor-State mediation.[67] Moreover, 57 States have signed the *United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation)* since its opening for signature in August 2019.[68] The instrument was published together with a revised UNCITRAL Model Law for Mediation.[69] The Abu Dhabi Global Market Arbitration Centre, together with the Centre for Effective Dispute Resolution (CEDR), in 2022, has established an Investor-State mediator panel.[70] The Energy Charter Conference's 2016 Guide on Investment Mediation,[71] as well as the Energy Charter Treaty's (ECT) Model Instrument on Management of Investment Disputes,[72] and ICSID's Background Paper,[73] as well as ICSID's Overview of Investment Treaty Clauses on Mediation,[74] were published in recent years. ICSID held

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65 Nitschke BIAR, p. 413.

66 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, p. 2.

67 European Commission, Consultation Document, Prevention and amicable resolution of disputes between investors and public authorities within the single market, available at: https://finance.ec.europa.eu/system/files/2017-07/2017-investment-protection-mediation-privacy-statement_en.pdf.

68 Number of signatories to the Convention as of 13 August 2024 – current numbers available at https://www.singaporeconvention.org/.

69 Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation of the United Nations Commission on International Trade Law, Annex II, United Nations, General Assembly Resolution 73/199, United Nations Convention on International Settlement Agreements Resulting from Mediation, U.N. Doc. A/RES/73/199.

70 Information regarding the panel is available at https://www.adgmac.com/panel-of-investor-state-mediators/.

71 Energy Charter Conference, *Guide on Investment Mediation*, 2016. It provides practical guidance on investment mediation, including aspects related to preparation and conduct of the mediation, selection of the mediator and the role of party representatives and was adopted by approx. 1/3 of ICSID's 156 Member States. It is available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf.

72 The ECT Model Instrument is an instrument to be voluntarily utilized by States, either by way of implementing it as a domestic ISDS framework or serving as guidance concerning the practical and legal issues that should be considered in implementing a comprehensive conflict management plan for investment disputes, available at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf.

73 ICSID, *Background Paper on Investment Mediation*, 2021.

74 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021.

an "Investment Mediation Insights" webinar series.[75] The UNCITRAL Model Provisions on Mediation for International Investment Disputes, and the UNCITRAL Guidelines, were adopted by the United Nations' General Assembly on 7 December 2023. Last but not least, the Moot Court Bench in Sri Lanka organizes a yearly international Investor-State mediation competition.[76]

G. BACK TO REALITY – OBSTACLES TO SETTLEMENT

In 2018, a survey asking why parties are not settling disputes more frequently, conducted by the Centre for International Law at the National University of Singapore,[77] identified many obstacles to settlement – or mediation in the first place – in Investor-State cases. These include, *inter alia* the following:

Political obstacles: It can often be observed that the individuals involved in an investment dispute desire to defer responsibility for decision-making to a third-party. Also, the involved State officials fear public criticism and/or allegations of corruption. These are probably the most inhibiting factors with regard to the success of Investor-State mediation. Potentially negative media coverage, which might then cause the dispute to become even more politically inflamed, certainly does not help either.[78]

Obstacles due to the structure of the State: On the States' side, obstacles to settlement also arise from coordination problems among different agencies and ministries across all levels of government, as well as very practical challenges such as who has the authority to settle, or how can budgetary approval be obtained.[79]

Other obstacles: Last but not least, and these obstacles are not investment dispute specific, the individuals involved often have unrealistic expectations and inaccurate evaluations of the likely outcome of their dispute. Everyone thinks they have a reasonable chance of winning. The tool to cope with them in mediation is called "reality testing." The mediator is in a position to probe assumptions: are damages being optimistically calculated, are transactional costs being realistically

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75 The following webinars are available at https://icsid.worldbank.org/services/mediation-conciliation/mediation/investment-mediation-insights-webinar-series
– The International and Domestic Legal Framework on Investment Mediation—Quo Vadis?;
– Investment Mediation and Arbitration—Combination or Separation?;
– Myth Busting—Clarifying Common Misunderstandings about Investment Mediation;
– Investment Mediation—From the Investor's Perspective;
– Investment Mediation—From the State's Perspective;
– A Conversation with Investment Mediators.

76 Information available at https://iimc.themootcourtbench.com/what/.

77 Seraphina Chew/Lucy Reed/Christopher Thomas, *Report: Survey on Obstacles to Settlement of Investor-State Disputes*, NUS Centre for International Law Working Paper 18/01, 2018, pp. 1 et seqq.; available at https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf.

78 Dahlan/von Kumberg, p. 487.

79 UNCITRAL Guidelines, paras. 26 and 43.

assessed, is the applicable law less settled than either side appreciates, or do delicate but pivotal questions of attribution or jurisdiction remain unresolved?[80]

H. OVERCOMING THE INVESTOR-STATE MEDIATION SPECIFIC OBSTACLES

There are significant benefits to mediation, such as allowing parties to exercise control over the process to reach a self-tailored outcome and thereby preserving their relationship.[81] Nevertheless, establishing the interest-based approach of Investor-State mediation proves to be a difficult task. Here are some ideas on how to overcome structural obstacles to Investor-State mediation and/or settlement:

I. Mediation Readiness

A lot of capacity building initiatives by ICSID, ECT, CEDR, and others are going on within the government and private sector.[82] These will help to make companies and States ready and able to mediate. Also, UNCITRAL recently adopted, in principle, the statute that will form the basis for the establishment of an advisory center on international investment dispute resolution, which will provide crucial legal services in the field of ISDS, including training and representation support, with the aim of enhancing the capacity of States to prevent and handle international investment disputes.[83]

In order for a government to be ready to mediate, the domestic legislative framework often needs to be adapted. It is helpful if a State specifically encourages the use of mediation, e.g. by providing mediation clauses in international investment agreements, or by setting up a clear domestic policy anchoring the State's approval of mediation as an investment settlement tool.[84] A specific inter-agency committee and/or a lead agency can be set up and vested with "mediation authority."[85] All of this provides a "roadmap" for civil servants when confronted with an Investor-State mediation case. Once these public representatives no longer find themselves in a legal vacuum, the tendency to leave the solution to the problem to an independent third party can be overcome, and more States will be able to act proactively and benefit from mediation's full potential.

An inter-agency committee can be staffed with senior politicians and administrators of all relevant ministries which ensures efficient intragovernmental communication and a transparent flow of information. A lead agency can generally be tasked with the handling of investment disputes. The lead agency can conduct early assessments of the cases and determine which ISDS mechanism

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80 Coe 2009, p. 91.

81 UNCITRAL Guidelines, p. v.

82 ICSID, *Background Paper on Investment Mediation*, 2021, p. 14.

83 https://unis.unvienna.org/unis/en/pressrels/2024/unisl361.html.

84 UNCITRAL Guidelines, paras. 42 et seqq.; Frauke Nitschke, *Amicable Investor-State Dispute Settlement at ICSID: Modernizing Conciliation and Introducing Mediation*, BCDR Int'l Arbitration Review 6, No. 2, 2019 (Nitschke BIAR), pp. 430 et seq.

85 Nitschke BIAR, p. 430.

is suitable. It will then explain this mechanism, e.g. the mediation process, and coordinate it with other agencies within the State. Moreover, it can accumulate information on various investment disputes within the State in a centralized database, so as to be able to learn from past mistakes. These inter-agency committees and/or lead agencies can also bridge the difficulties of a specific ministry to obtain budgetary approval for a settlement, and they can help with setting up an adequate communication strategy and providing a spokesperson. Last but not least, the lead agency can be given the authority to conclude an amicable settlement and to implement it in the end.[86]

In order for the mediator to be able to efficiently explore potential settlement options with the parties, it is certainly helpful if at least one person on either party's side is vested with settlement authority. Due to corporate governance reasons on the investor's side, or various layers of agencies, ministries and cabinets on the State's side, however, this might not always be possible. In these cases, it is necessary to have people present in the mediation who have direct reporting duties, or at least direct communication lines to the entity with the relevant settlement authority,[87] as they need to conduct something like a parallel mediation within their own company or government.

A domestic mediation framework and an inter-agency committee or lead agency with the respective authority also help mitigate the individual government official's fear of personal liability when compromising on the State's interests.[88]

Ideally, the lead agency or agencies, to which requests for amicable dispute resolution are to be directed, are set out in the treaty in a so called "designated agency provision." According to the overview of investment treaty clauses on mediation conducted by ICSID in 2021, the number of treaties doing so is growing.[89]

In some States, these kinds of agencies even act as ombuds offices or national dispute prevention agencies, and assume a *quasi*-mediating role themselves.[90]

In any event, the identified structural obstacles to settlement need to be discussed early in the mediation management conference, in order to be able to assess whether a settlement is realistically achievable, and will be enforceable or not. The parties are asked to identify the person or entity authorized to negotiate and settle the issues in dispute, as well as to describe the process

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86 These or similar and other considerations and many more details are set out in the ECT Model Instrument.

87 UNCITRAL Guidelines, para. 26.

88 Catherine Kessedjian/Anne van Aaken/Runar Lie/Loukas Mistelis, *Mediation in Future Investor-State Dispute Settlement*, Academic Forum on ISDS Concept Paper 2020/16, 2020, (Kessedjian/Van Aaken/Lie/Mistelis), p. 13.

89 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, p. 8.

90 Titi, pp. 29 et seqq.; Kessedjian/Van Aaken/Lie/Mistelis, p. 4; Mushegh Manukyan, *Investor-State Arbitration Meets Mediation: Fostering Investor-State Mediation – Happiness Comes from Outside and Within*, Kluwer Arbitration Blog, 2020, available at http://arbitrationblog.kluwerarbitration.com/2020/10/03/investor-state-arbitration-meets-mediation-fostering-investor-state-mediation-happiness-comes-from-outside-and-within/.

that needs to be followed to conclude and implement the settlement agreement very early on in the mediation management conference (Rule 20(4)(a) ICSID MR and Article 9(3)(a) IBA MR). Ideally, at the outset of every mediation, the parties are mutually willing to try to settle the dispute and, thereafter, to implement the settlement.

II. The Success Stories Must Be Told

While capacity building within governments helps to overcome the structural obstacles to Investor-State mediation, it might not be able to remove the political obstacles.

As long as civil society and non-governmental organizations generally perceive settlement to equal admitting mistakes and, thus, capitulation, it will be riskier for the government officials involved to attempt to work towards settlement than to just kick the can down the road and to wait for the arbitral tribunal to decide.

All too often, it seems that participating in settlement discussions – no matter whether the result is advantageous for the State party or not – entails the risk of personal liability and plays into the hands of political opponents. Or as put by Reisman: *"[I]n States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having 'betrayed' the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal careers."*[91] This may hamper attempts to amicably settle disputes.

In order to overcome this obstacle, one author suggests thinking about how to best compel parties to mediate Investor-State disputes in order to anchor mediation in the public policy of a given State.[92] Another approach could be to ask how this very common perception that settlement shows weakness, liability or capitulation can be changed?

Just as it is done in mediation, negative perceptions and their sources generally need to be uncovered, acknowledged and intentionally dealt with. In the current context this can be done, for example, by actively telling the unexpected success stories of Investor-State mediation.[93] These are stories of preventing or settling an Investor-State arbitration and, instead, turning the dispute

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91 Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, in: UNCTAD, *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, USA, 2011, p. 26.

92 James M. Claxton, *Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?*, Kobe University Social Science Research Paper Series, 2019, (Claxton), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3320087.

93 A couple of examples of non-confidential and, thus, transparent public-sector mediations, which proved effective in resolving complex multi-stakeholder disputes at the domestic level, are set out in Shahla F. Ali/Odysseas G. Repousis, *Investor State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?*, Denver Journal of Int'l Law and Policy, Vol. 45, No. 2, 2018, (Ali/Repousis), pp. 246 et seqq.

into a fruitful controversy which leads to better understanding among all the stakeholders and will, eventually, sustainably prevent divestment.

Investor-State mediation does not exist only in theory. However, the respective stories, unfortunately, remain largely untold – at least for the time being.

Only overcoming the negative perception attached to settling in an Investor-State mediation will enable government officials to freely choose the adequate dispute resolution mechanism in every specific Investor-State dispute.

III. It Can Be Done

In fact, a lot of incentives exist for Governments to try to reach a mutually beneficial settlement. First and foremost, there is the promotion of the State as an attractive investment destination. The prudent use of taxpayers' money is another. Saving the State's civil servants from years of extra work in the context of an arbitration proceeding is not to be underestimated either.

The statistics on settlement in Investor-State arbitration show that regardless of the obstacles identified above, settlements are in fact a reality and Investor-State mediations are starting to be conducted. The more Investor-State mediation success stories will actively be told, the more mediations will be generated, the more mainstream will Investor-State mediation be perceived by civil society, and the less will political opponents be able to exploit the conclusion of a settlement. Moreover, the more States have frameworks in place which support Investor-State mediation, the more comfort this will give to government officials to try it out.

Thus, Investor-State mediation-specific obstacles can be overcome over time.

I. INVESTOR-STATE MEDIATION: THE *PANACEA* FOR DISCONTENT IN ISDS?

I. Cost and Duration

Mediation is not cheap *per se*. Also, a complex Investor-State mediation will last at least a couple of months and, in the form of a parallel mediation, may last a couple of years. The meetings need to be diligently prepared by the parties and their lawyers. The mediator's fees and, potentially, fees of the administrative institution, the cost of physical meetings, and potentially expenses for expert advice will accumulate. Based on the information available on Investor-State mediations, the cost of investment mediation appears to range between USD 25'000 and USD 200'000.[94]

Mediation, however, is not pleadings-intensive or dependent on adducing full proof of all relevant facts and, thus, can produce results with greater speed and less expense than arbitration.[95] Also, there might be cases in which two co-mediators are chosen, but there will not be three third-party neutrals involved, as in Investor-State arbitration or conciliation.

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94 Frauke Nitschke, *Part 1 – How to Assess the Suitability of Mediation for Investment Disputes*, Kluwer Mediation Blog, 2021, available at http://mediationblog.kluwerarbitration.com/2021/10/06/part-1-how-to-assess-the-suitability-of-mediation-for-investment-disputes/.

95 Coe 2009, p. 86.

Usually, the mediator's fees and expenses, as well as the administrative fees, are borne by the parties in equal shares. Otherwise, the parties bear their own costs (Rule 9 ICSID MR, Article 8 Vienna MR, Article 12 IBA MR).

If the mediation does not end with a full settlement, the costs spent on the mediation are still not in vain. The information gathered will help with the preparation for and streamlining of the arbitration.

Overall, a mediation will always be cheaper and faster than an investment arbitration. Thus, cost and duration are less of a concern with regard to Investor-State mediation.

II. Transparency

For mediation to be successful, the parties need to be able to participate in the negotiations without the fear that information shared will be used in future adjudicative proceedings. To address this, parties usually agree that information shall be exchanged "without prejudice" and, thus, cannot be used to the detriment of the revealing party in later proceedings. Confidentiality provisions create the safe environment that parties need in order to freely negotiate (Rules 10 and 11 ICSID MR[96], Article 12 Vienna MR, Article 8(4) and 10 IBA MR). These provisions are crucial for Investor-State mediation to work and many recent international investment agreements providing for mediation contain such provisions.[97]

Admittedly, there is potential tension between promoting the confidential process of Investor-State mediation and the general desire to increase transparency in ISDS.[98] Thus, a balance should be struck between confidentiality and transparency.[99]

Contrary to arbitration, no justice is administered behind closed doors in mediation, as it is not an adjudicative dispute resolution mechanism. Instead, in mediation, the parties negotiate behind closed doors which is not *per se* a problem. The State's participation in mediation constitutes administrative governmental action which, for sure, needs to comply with the rule of law. It is similar to government conduct during negotiations of a concession or license at the beginning of the investment lifecycle.

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96 Rules 10 and 11 ICSID MR are the result of extensive consultations with ICSID Member States. More information can be found in Nitschke BIAR, p. 419.

97 ICSID, *Overview of Investment Treaty Clauses on Mediation*, 2021, pp. 8 et seq.; ICSID, *Background Paper on Investment Mediation*, 2021, p. 14; UNCITRAL Guidelines, paras. 35 et seq.

98 Esmé Shirlow, *Investor-State Arbitration Meets Mediation: Potential Problems?*, Kluwer Arbitration Blog, 2020, available at http://arbitrationblog.kluwerarbitration.com/2020/09/30/investor-state-arbitration-meets-mediation-potential-problems/.

99 UNCITRAL Guidelines, para. 37.

Nevertheless, once a host State's ability to adopt regulatory measures as part of its sovereign functions is at issue in an Investor-State mediation, this sparks public interest.[100] The following tools are available to take account of the public interest regarding Investor-State mediations:

A joint communication plan can be initiated already at the mediation management conference, and refined throughout the mediation, setting out the timing and process to make information available to the broader public. The parties should discuss whether, when, and how the existence of the mediation and/or any resulting settlement, and its terms shall be publicized (Rules 10(2), 20(3)(e) and (g)(iv) ICSID MR, Article 10(3)(a) and (b) IBA MR). Moreover, the parties can use the tool of joint communiqués to give even more information about the ongoing or completed Investor-State mediation.[101]

Also, the parties can agree on involving non-disputing parties in the Investor-State mediation process (Rule 20(f) ICSID MR, Article 9(3)(b) IBA MR). Mediation is flexible enough to ensure that all relevant stakeholder interests, needs, concerns and desired outcomes are identified early in the process, and that those whose rights or interests may be impacted by a mediated outcome can be heard.

The World Bank publishes a framework for disclosure in public-private partnerships which is not specific to disputes but still illustrative of the objectives and scope of possible disclosure regimes.[102]

By actively applying these tools, transparency can and should be achieved in Investor-State mediation – at least after the case settles, at the very latest. Transparency is the condition of legitimacy and, ultimately, the key to overcoming the Investor-State mediation specific obstacles described above.

III. Investor-State Mediation is No *Panacea*, But Still Worth a Try

Investor-State mediation offers the chance to settle investment disputes in less time and at lower cost than Investor-State arbitration. That in itself should constitute a great offer.

Currently, settling an investment dispute is often seen as admitting mistakes and trying to hide them behind confidentiality. That can be changed. An Investor-State mediation led with a focus on transparency and inclusion of all relevant stakeholders has the potential to facilitate the long-term sustainability of investment projects, the common goal of investors and host States.[103]

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100 Chester Brown/Phoebe Winch, *The Confidentiality and Transparency Debate in Commercial and Investment Mediation*, in: Catharine Titi/Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes*, 2019, p. 321.

101 UNCITRAL Guidelines, para. 38.

102 World Bank Group, *A Framework for Disclosure in Public-Private Partnerships*, 2015, available at https://thedocs.worldbank.org/en/doc/773541448296707678-0100022015/original/Disclosure-inPPPsFramework.pdf.

103 Skartvedt Guven, *Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes*, Columbia Center on Sustainable Investment Blog, 3 January 2020, available at https://ccsi.columbia.edu/news/investor-state-mediation-opportunity-advance-sustainable-outcomes.

Due to its interest-based approach, mediation remedies the strict legalism inherent in Investor-State arbitration. Also, mediation can, by definition, not be investor-friendly, as both parties need to agree to a settlement. All in all, mediation is well-positioned to address dissatisfaction with Investor-State arbitration.[104]

CONCLUSION

As parties move along the *continuum* from negotiation to adjudication, they increasingly lose flexibility and control over their dispute.[105] So far, it seems that parties in ISDS drive on a two-lane road.[106] When changing lanes, they move directly from negotiation to investor-State arbitration. Adding Investor-State mediation as an additional lane to the ISDS highway means providing the disputants with more options to shift from lane to lane as circumstances require in the course of reaching their destination. Time will tell whether this new lane will be an often-used fast track, bypassing arbitration's victory-lane, or something that gets forgotten as quickly as the initially promising conciliation-lane.

As long as settling an investment dispute – and most of all settling it early on – is perceived as losing and, thus, entails a high risk for the people directly involved, mediation will probably not be able to thrive. However, there is no law that says that being courageous, and taking responsibility by negotiating one's own fate, has to be far riskier than remaining passive and, instead, spending the business' or the tax payers' money on legal advice in order to be able to outsource decision making to an arbitral tribunal. Capacity building and working towards mediation readiness is well underway. Changing civil society's perception of an (early) settlement remains crucial. How can this be done? Maybe by telling the success stories achieved in mediation. At least, this would solve the transparency issue.

Is Investor-State mediation the *panacea* for discontent in ISDS? The instruments that enable a fast and cost-effective Investor-State mediation process such as mediation clauses in international investment agreements, Investor-State mediation rules, institutional support, a pool of competent mediation counsel and mediators, as well as the means for online dispute resolution – and even broad acceptance of it – are ready to be used.

In the end, whether the shift from the win-lose arbitration system to a more cooperative, future-oriented and problem-solving Investor-State mediation system will succeed, depends on un-opportunistic first movers who are looking for sustainable progress – and not the truth or undivided victory. They need to be risk-savvy enough to place their dispute into the hands of a well trained and experienced mediator, instead of asking the usual small group of arbitrators for an early neutral

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104 Claxton, p. 6.

105 Titi, p. 22; Jeswald W. Salacuse, *Is there a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 Fordham Int'l Law Journal, 2007, pp. 154 et seq.

106 Following the image of the multi-lane highway drawn by Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, Legal Studies Research Paper Series, Paper Number 2020/25, pp. 2 et seq.

evaluation, and to communicate rather openly about the mediation, instead of shying away from the glare of the public eye.

To the extent that Investor-State mediation becomes more fully established and embedded in disputant expectations, greater familiarity and sophistication with the process will be gained. Once mediated cases will become public through party consent, the obstacles to Investor-State mediation and the transparency issue will be gradually tackled, and the users will more fully realize mediation's value-adding potential.[107]

[107] Ali/Repousis, p. 249; Coe 2019, p. 64.