On a More Effective Use of Mediation in Investor-State Disputes: Current Issues and Possible Solutions

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Introduction: The Status of Investor-State Mediation

Mediation has slowly started to carve out its own niche when it comes to dispute resolution. As pointed out in quantitative analyses, mediation offers an efficient dispute resolution method that can be employed even before an adjudicative procedure is initiated, thereby preventing the need to refer disputes to a judge or an arbitral tribunal.[1] Interest in mediation has grown in the realm of international dispute resolution ("IDR"), especially with respect to foreign direct investment ("FDI") disputes. One of the main reasons for this growing popularity is the increase in Investor-state disputes in the last few decades[2] and the "legitimacy crisis" faced by adjudicative dispute resolution methods in this field.[3] In the context of Investor-state Dispute Settlement ("ISDS"), the United Nations Commission on International Trade Law ("UNCITRAL") has been working to reform a system that is now perceived to be outdated and incapable of addressing the needs of international actors.[4] According to many, [5] international arbitration in the context of FDI disputes has failed to provide a quick and cost-effective dispute resolution mechanism. [6] Several countries have called for reforms in the ISDS system or have started looking for other Alternative Dispute Resolution (ADR) methods to help settle

[1] International Mediation Institute, 'Global Data Trends and Regional Differences' (*Global Pound Conference Series*, 2018) < https://imimediation.org/research/gpc/> accessed 31 March 2024, 3.

[2] See the aggregate data in UNCTAD, 'Facts on Investor-state Arbitrations in 2021: with a Special Focus on Tax-Related ISDS Cases' (*IIA Issues Note*, July 2022) < https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf> accessed 30 March 2024. As it can be seen from Figure 1 at Page 1, there has been an exponential growth in ISDS cases starting 1997 and this trend is ongoing.

[3] Susan D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,' (2005) 73(4) Fordham Law Review 1521.

[4] 'Working Group III: Investor-state Dispute Settlement Reform' (*United Nations Commission On International Trade Law*) < https://uncitral.un.org/en/working_groups/3/investor-state> accessed 30 March 2024. The UNCITRAL is currently promoting the reform of the ISDS system, particularly through the action of its Working Group III (WGIII), currently in its 48th session. The current topics that are being discussed are multiple and diverse, ranging from "Investment Mediation and Dispute Prevention" to "Procedural Rules Reform and Cross-cutting Issues" and "Appellate Mechanism." The WGIII aims at addressing the discontent with the international arbitration shown by multiple States and to promote a better ISDS system.

[5] Thomas Dietz et al., 'The Legitimacy Crisis of Investor-state Arbitration and the New EU Investment Court System' (2019) 26(2) Review of International Political Economy 749; Daniel Behn et al., *The Legitimacy of Investment Arbitration*: *Empirical Perspectives* (Oxford University Press 2022).

[6] Aceris Law LLC, 'The Cost of Investment Arbitration: UNCITRAL, ICSID Proceedings and Third-Party Funding' (27 December 2017) <https://www.acerislaw.com/cost-investment-arbitration-uncitral-icsid-proceedings-third-party-funding/ > accessed 30 March 2024. The average party cost at the time when the article was written was of around USD 7.4 million for claimants and USD 5.1 million for respondents, while a case lasted – on average – 4.3 years.

their international disputes.[7] Mediation, therefore, has been increasingly utilised[8]. Yet, despite the renewed interest in other ADR methods, foreign investors still prefer arbitration, and there are still some hurdles that need to be addressed for a non-adjudicative "cultural shift" to take place, and for mediation to have a prominent role in the domain of international dispute resolution.[9]

A Difficult Balancing Act: The Transparency *versus* Confidentiality Debate in Investor-State Mediation

The first issue that mediation must deal with is striking the right balance between transparency and confidentiality. This is a highly debated topic in international arbitration as well with scholars and stakeholders widely discussing which principle should prevail. [10] The author aims to analyse the different relationships between these two principles and tries to address how the right balance could be achieved.

Confidentiality aims at precluding third parties from assisting proceedings and imposes on the parties a duty not to disclose what happened behind closed doors, including prohibiting the circulation of any documents generated or produced. In doing so, confidentiality restricts the number of individuals who can have a holistic understanding of what occurs during the ADR process. On the other hand, transparency requires that the facts relating to the case at hand should be made public so that people can easily access them. The debate on these two conflicting principles is of relevance to stakeholders in the investment disputes domain.

Confidentiality, or the lack of transparency, could negatively impact the citizens of the states that are involved in investment disputes. As has occurred in multiple arbitral cases, states may be held liable to pay huge amounts in damages, which can have a profound impact on their GDPs and, therefore, affect their citizens.[11] In some cases, the high amount of damages has led to countries becoming more averse to international investment arbitration. For instance, India's "commercial reservation" restricts the applicability of the New York Convention to international commercial arbitration only.

[7] Lauge N. Skovgaard Poulsen and Geoffrey Gertz, 'Reforming the Investment Treaty Regime A 'Backward-looking' approach' (*Chatham House*, 2021); 'Reform of the ISDS Mechanism' (*European Commission*, 2015) < https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/investment-disputes/reform-isds-mechanism_en> accessed 30 March 2024; and Wei Shen and Shuping Li, 'China's Engagement in ISDS Reform: Text, Practice, and Political Economy' (2021) 7 China WTO Review 269.

[8] For a few examples of successful cases of investor-state mediation, see *Systra SA and Systra Philippines Inc. v Philippines* and *Société d'Energie et d'Eau du Gabon (SEEG) and Veolia Africa v Gabon*.

[9] Lorraine M. Brennan, 'Preparing the Client in an International Mediation: What to Expect from the Process.' in Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation* (Fordham Papers 2014) 141, 151.

[10].

[11] E.g., see the arbitral cases related to the Argentinian "Pesification Decree" or the *Yukos* saga.

Based on the commercial reservation, the Delhi High Court held that investment arbitration is not commercial in nature.[12] The commercial reservation clearly shows how the local government is effectively engaging in protectionist behaviour by trying to avoid the enforceability of international investment-related arbitral awards. Despite this, arbitration has moved towards a more transparent framework thanks to multiple international instruments. Yet, the situation remains more complicated for mediation. [13]

In general, mediation in the context of ISDS provides for a greater level of confidentiality as compared to arbitration. For example, in Annex 29-C - *Rules of Procedure for Mediation* of the Comprehensive Economic Trade Agreement (CETA), Art. 6.1 specifically provides that "all stages of the proceeding, including any advice or proposed solution, are confidential," the only exception to this being Art. 4.6, which states that when parties reach a "mutually agreed solution," the agreement will have to be made public. However, the parties can still avoid the publication of certain parts of the agreement, provided that they designate those areas as confidential. It is clear that the level of confidentiality that CETA allows for mediation is far greater than the one for arbitration, especially when we compare the provisions on transparency for arbitral proceedings under the same regime. In fact, Annex 29-A – *Rules of procedure for arbitration* provides that submissions should be publicly available and that hearings should be open to the public.[14] While the parties to the arbitration are still free to decide on the confidentiality of proceedings, confidentiality is seen as the norm for mediation and as an exception for arbitration under the CETA.

The rationale for this is that mediation strongly relies on the confidentiality of the proceeding to help ensure that the parties are completely open with each other. As it was correctly pointed out, "requiring increased transparency would undermine the environment in which mediation operates." [15] In other words, mediation simply cannot be used as successfully when the participants are not free to engage in a meaningful and candid discussion among themselves. [16] Hence, striking a balance to protect stakeholders through transparency, while also preserving the effectiveness of mediation itself is difficult. While some may call for a diminished level of confidentiality, it is commendable that

[12] *Union of India v Vodafone Group Plc United Kingdom & Anor* (2018) AIROnline Del 1656; Union *of India v Khaitan Holdings (Mauritius) Ltd & Ors* CS (OS) 46/2019, I.As. 1235/2019 & 1238/2019.
[13] See UNCITRAL, Rules on Transparency in Treaty-based Investor-state Arbitration and the UN Convention on Transparency in Treaty-Based Investor-state Arbitration. Similarly, multiple states now provide for increased transparency in their Model BITs (e.g., Canada 2021 Model BIT). Transparency has also been increased by permitting third parties to take part in the proceedings as *amici curiae*.
[14] EU-Canada 2016 CETA, Annex 29-A, Art. 38.
[15] Chester Brown and Phoebe Winch, 'The Confidentiality and Transparency Debate in Commercial and Investment Mediation.' in Catharine Titi and Katia Fach Gòmez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 334, 329.
[16] Ignacio de la Rasilla, 'The Greatest Victory'? Challenges and Opportunities for Mediation in Investor-state Dispute Settlement' (2023) 38(1) ICSID Review – Foreign Investment Law Journal 169, 181.

privacy has been preserved to an appreciable degree. A completely transparent mediation is nothing but a blunt instrument in the hands of the parties and potentially a speedbump in the dispute resolution process when non-adjudicative dispute resolution methods are prescribed as mandatory steps before referring the dispute to arbitration. If mediation were to be rendered ineffective by a public proceeding, the discussion about finding an alternative to international arbitration would be moot.

The decision made by the drafters of the CETA must be plauded. While certainly, investor-state disputes have a relevant impact on multiple stakeholders who are not necessarily taking part in the proceeding, it would be impossible to have an effective mediation if the parties cannot rely on the possibility of acting without external scrutiny. It has been said that "in order for the parties to disclose pertinent information to the mediator […] those parties must feel confident that the mediator is bound to maintain confidentiality in respect of such disclosures"[17]. In conclusion, a higher level of confidentiality in investor-state mediation is to be approved to maintain the effectiveness of this ADR method, but due to the peculiarity of this sector, the parties must also be free to disclose relevant information to stakeholders. The only reasonable limitation to such a regime must be – as provided for in the CETA – the duty to disclose the settlement agreement, so as to allow the public to better understand the eventual effects of the mediation proceeding and, eventually, to hold the host State accountable for its actions.

A Recurring Theme: Promoting the Culture of Mediation

Many are calling for a "cultural shift" to promote mediation.[18] This is especially because, in relation to investor-state disputes, non-adjudicative dispute resolution mechanisms are still far from being widely adopted, as data indicates. [19] Given that the entire process of mediation is dominated and dictated by the parties themselves, it is from them that the conversation of change must begin. There must be a shift in the mentality that the participants and those assisting them have when entering a mediation proceeding.[20]

[17] Andrew Agapiou and Bryan Clark, 'The Practical Significance of Confidentiality in Mediation' (2021) 37(1) Civil Justice Quarterly 74, 78. While the article focuses on civil mediation used in the United Kingdom, most of their reasoning about the importance of maintaining confidentiality can apply *mutatis mutandis* to investor-state mediation.
[18] Brennan (n 10); Chris Bisogni, 'Shifting Cultures and Mindsets in International Mediation' (Conventus Law, 23 March 2022) < https://conventuslaw.com/special-report/shifting-cultures-and-mindsets-in-international-mediation/> accessed 30 March 2024. This highlights a change in the previous litigation-oriented mentality.
[19] 'International Dispute Resolution Survey: 2022 Final Report' (*Singapore International Dispute Resolution Academy (SIDRA)*, 2022) <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/index.html> accessed 30 March 2024, 65.
[20] Carrie J. Menkel-Meadow, 'Mediation, Arbitration and Alternative Dispute Resolution (ADR).' in James D. Wright (ed), *International Encyclopaedia of the Social & Behavioural Sciences* (2015) 70. The "mentality shift" is necessary because of the difference between mediation and arbitration. While the latter is based on litigation and, thus, is

During mediation, parties can be assisted by their counsels, who serve more as supporting figures rather than active participants. In fact, it is well known that lawyers must make it clear to their clients that a cooperative mindset must be adopted.[21] Even more so, their mentality must be problem-solving oriented, rather than being focused solely on legal rights (the latter more closely resembling positional bargaining). [22] Some parties may abstain from finding a mediated solution to prevent giving the impression that they have "a weak case." [23] Yet, clients must understand that submitting their case to a mediation proceeding does not affect the strength of their rights but rather allows them to find non-adversarial and quicker solutions to their grievances. Once all participants become more familiar with this mechanism and its operation, such thinking will become a thing of the past.

Other than clients, the cultural shift must happen in the minds of their counsels. There is a need for lawyers to improve their knowledge of this mechanism while disposing of a "litigation mentality." Many believe that the propensity towards adjudicative dispute resolution methods is one of the main reasons why mediation is still underdeveloped and that lawyers are hindering the growth in the use of mediation.[24]If lawyers were to take advantage of one of the many courses done by mediation institutions[25], the rate of adoption of this ADR method would increase.

From the Parties to Mediators

The last stakeholder on whom this analysis will focus is the mediator. In relation to investor-state mediation, there is an ongoing issue relating to an extremely low number of specialised mediators. While the number of mediators, in general, is low, this issue is particularly relevant in the context of FDI, as the International Mediation Institute (IMI) currently identifies only seven certified professionals with specialisation in these kinds of disputes.[26] Due to the lack of specialised mediators, it is often the case that well-known arbitrators will be asked to serve as mediators, as was observed

inflammatory because the participants are put one against the other; the former is conciliatory, as both parties are cooperating with each other and trying to find a shared solution.

[21] Brennan (n 10) 144, 145.

[22] 'What is Positional Bargaining?' (The Program on Negotiation at *Harvard Law School*) <https://www.pon.harvard.edu/tag/positional-bargaining/> accessed 30 March 2024. The Harvard Law School's Program on Negotiation defines *positional bargaining* as "an approach that frames negotiation as an adversarial, zero-sum exercise focused on claiming rather than creating value." It appears clear that positional bargaining is a way of negotiating that hinders the strengths of mediation.

[23] James M. Rhodes, 'The Current Status and Future of International Mediation.' in Arthur W. Rovine (ed), *Contemporary Issues in International Arbitration and Mediation* (Fordham Papers 2014) 178, 181.

[24] David Hossack, 'Why Lawyers Don't Use Mediation' (*Morton Fraser Macroberts*, 10 January 2022) <https://www.mfmac.com/insights/litigation-dispute-resolution/why-lawyers-don-t-use-mediation/> accessed 31 March 2024.

[25] E.g., see CEDR Mediator Skills Training.

[26] Find IMI Certified Professionals — International Mediation Institute (imimediation.org), last checked on March 30, 2024. It is positive to note that three of them are women.

in *Systra SA and Systra Philippines Inc. v Philippines*.[27] On one hand, this is positive, given that an individual with expertise in international investment arbitration has a better understanding of the complexities and intricacies of an FDI dispute. On the other hand, these similarities between arbitration and mediation raise concerns about the future of mediation. Indeed, this 'double hatting' problem makes it unlikely that mediation will be able to present itself as a stand-alone and effective IDR method. While certain links between these two domains may be positive and promote a better reciprocal understanding, they may hinder the creation of an independent mediation system. If mediation is to carve out its own niche in the context of international investment disputes, a need for more specialised and independent mediators must be made mandatory. The reason for this need is because of the difference in the way disputes are addressed in mediation and arbitration, as the former is non-adjudicative, and the latter is adjudicative. While certainly professionals may be well versed in both, these two ADR methods are different from each other, and a specialised form of training is needed for each of them.

The Issues Relating to Host States

We move on to the other participant in an ISDS mediation – the host State. Some of the issues preventing the development of ISDS mediation are due to the actions (or inactions) of host States. The first problematic aspect is the lack of clarity in IIAs regarding which public body has the authority to participate in proceedings on behalf of the State. This causes a dichotomy, where, on one hand, States promote the use of international mediation, while failing to provide the necessary information for an efficient use of the same instrument that they are promoting. By maintaining this grey area, the number of mediations that can be carried out will be significantly low, especially when the IIA does not expressly provide for mandatory mediation. To resolve this, States should identify or create *ex novo* a state agency with the mandate of acting as the counterparty for the investor and on behalf of the host State.[28] As with most matters relating to the host State, the creation of a new entity tasked with dealing with foreign investors is also affected by political decision-making and budget constraints.

To add to this point, under certain national laws, public officials are prohibited from settling disputes by making substantial concessions to other parties, except in cases where they have received a special

[27] This is seen as the first case of successful investor-state mediation. In the case, Dr. Christopher J. Thomas KC acted as a mediator, even though he is better known for acting in investor-state arbitration.
[28] Peru established the SICRECI (SICRECI (mef.gob.pe)), allowing for the creation of a positive early communication system between investors and the State in relation to the use of investor-state mediation.

authorisation from the government. [29] These regulations significantly impede the possibility of reaching a settlement agreement between the parties, as they require multiple stages of approvals and authorisations by the host State before the mediation proceedings can even begin.

The two problems presented above are strictly linked with one of more practical relevance. Even when an investor can rely on a proper counterparty, there may still be difficulties at the time of discussing the precise terms of the settlement agreement. In the absence of the allocation of a specific budget for paying ADR services and for complying with the settlement agreement, an entity acting on behalf of the State will eventually reach a settlement that – for example – the government may find too expensive, and, thus, it will not comply with its terms.[30] Of course, due to the sheer economic dimension of international investment projects, it is impossible to allocate *ex-ante* a precise budget. Nonetheless, providing for monetary limits that the State representative must respect or precisely allocating a pre-determined amount when the dispute has arisen, will have the potential to make the mediation proceeding more efficient and increase the chances of compliance by the host State.

The final issue relating to the state side of international investment mediation is accountability. In submitting a dispute to arbitration, the State can avoid accountability as at that point, the duty of the State ceases, leaving the matter in the hands of the arbitrators. In the case of an arbitral award against the State, the government is less likely to be blamed for the loss because the award has been made by a panel of independent arbitrators.[31] By agreeing to submit a dispute to arbitration, a State will effectively remove the political risk of being held accountable if an adverse decision is made by the tribunal. On the contrary, when a settlement agreement is reached through mediation, in giving taxpayers' money to a foreign investor, the government may be perceived as weak and willing to compromise. Of course, there is a high chance that settling a dispute will be more convenient than an arbitral award in the long run. This is because the benefits of keeping the parties' relationship intact in the context of foreign direct investment are significant for the host State and its prosperity. Still, it may be difficult to justify a settlement agreement to the wider public.

Moreover, an arbitral award will be issued possibly years after the dispute has arisen, while mediation provides for a quicker solution. In choosing the former, a State may effectively delay the adverse reputational effects of a decision. Of course, there is no easy way to solve the issue, and it is difficult

[29] E.g., Art 2045.3 of the French *Code Civil* expressly forbids state agencies from reaching a settlement agreement with third parties without an express authorisation granted by the Prime Minister.
[30] Jeswald W. Salause, 'Is There a Better Way? Alternative Methods of Treaty-Based, Investor-state Dispute Resolution' (2007) 31 Fordham International Law Journal 138, 178.
[31] Catherine Kessedjian et al., 'Mediation in Future Investor-state Dispute Settlement,' (2022) 00 Journal of International Dispute Settlement 1, 15.

to say whether it will ever be solved.[32] On one hand, the confidentiality of mediation proceedings and, eventually, of the following agreements may be helpful in partly hiding the results of mediation and its existence from the public. On the other hand, States may decide to willingly submit themselves to being held accountable by their citizens, recognising that sometimes mediation is the most effective solution in the long term, even when it may be more (politically) consequential in the short term.

The Role of Mediation Institutions in Promoting Mediation

As stated earlier, there is a need to promote a culture of mediation. A way to make the parties to the proceedings more aware of the strengths of mediation is to promote it through the multiple mediation institutions that are developing all over the world. Alongside these institutions, many academics are also foreseeing and favouring a greater role of mediation in international dispute resolution.[33] This link between scholars and practitioners will surely be able to foster positive dialogue on IDR methods globally. Mediation is currently being promoted by IMI through the work of its investor-state mediation task force. Notably, this task force was responsible for the creation of the IMI Competency Criteria for Investor-state Mediation. The document, besides giving an overview of FDI disputes, provides practitioners with general guidelines that can be of help in identifying the best-suited individuals for specific disputes. Similarly, the Centre for Effective Dispute Resolution ("CEDR") is promoting a more prominent role of mediation in the context of investor-state disputes through a podcast called "Making Mediation Mainstream." It has also issued its own CEDR Investor-state Mediation Guide for Lawyers and their Clients, directly addressing the parties to the proceeding and providing them with useful tools that can help them achieve a positive outcome.

Conclusion

Investor-state mediation is still a developing field. Even though it is positive to see calls for reform, multiple issues still need to be resolved by stakeholders if non-adjudicative ADR methods are to become more prominent in this sector. While the use of mediation is becoming increasingly widespread, addressing some of the present *vulnera* will surely help in making it more effective. This

[32] Catharine Titi, 'Between Utopia and Realism: Mediation and the Settlement of Investment Disputes.' in Catharine Titi and Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019) 17, 21, 35 – 38.

[33] E.g., the Singapore International Dispute Resolution Academy is currently managing the website on the Singapore Convention on Mediation, effectively promoting a greater role of non-adjudicative dispute resolution methods in the context of international disputes.

article attempts to cast light on some of the most relevant problems that are hindering the growth of non-adjudicative dispute resolution methods in the context of investor-state disputes. While mediation may never fully replace arbitration, it has the potential to become a significant component in the FDI sector. It can be a valuable tool for aggrieved investors if certain changes are implemented.

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