Investor-State Mediation – A Third Lane on the ISDS Highway?

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Future Orientation – Interest-Based Negotiation – Tailormade and Sustainable Solution – Control over the Outcome – Flexibility – Creativity – Inclusion of Stakeholders – Fruitful Controversies – User Friendly – Capacity Building – Mediation Readiness – Success Stories – Cost-Efficient Fast Track – Preservation of Relationships and Investments

Summary

This article sets out in detail the proposition of investor-State mediation and examines recent developments in the field. The article also 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 article 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 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.

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1. The Idea of ISDS

Foreign direct investments connect domestic economies to international flows of capital and global value chains and are a channel for the transfer of know-how and technology. They are an important economic driver and create private-public, cross-border and, ideally, long-lasting business relationships. However, they can also be sources of fiercely fought, complex disputes.

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 856 ICSID arbitrations and 13 ICSID conciliation cases later, it is clear that arbitration is the predominant investor-State dispute settlement ("ISDS") mechanism.[3]

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 of a contracting State to an international investment agreement can directly sue the contracting State which hosts the investment. 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]

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1 ANTONIO R. PARRA, The History of ICSID, 2nd ed., 2017, p. 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, p. 23 et seq.

3 The ICSID Caseload-Statistics, Issue 2022-1, p. 9.

4 ALEXANDRA GOETZ-CHARLIER, Mediating Investor-State Disputes in Free Trade Agreements: An Evaluation of the EU's Proposal, 2019, 24, European Foreign Affairs Review, 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"), p. 255 and 259.

2. ISDS – the Need to Build a Three-Lane Highway[6]

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.[7]

Hence, currently, it seems that parties in ISDS drive on a two-lane road. When changing lanes, they move directly from negotiation to investor-State arbitration and sometimes back again.

This might make sense e.g. in the most factually and legally complex cases of unlawful expropriation with large amounts in controversy and diverse public and private interests at stake and in which the relationship between the investor and the host State is already seriously damaged.

However, there are other situations in which e.g. 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 the 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 at the mediation table. Thus, in these cases the parties might prefer an interest-based form of dispute resolution to the rights-based form of investment arbitration.[8]

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 that 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

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6 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, p. 2 et seq.

7 The ICSID Caseload-Statistics, Issue 2022-1, p. 8.

8 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. 483.

domestic courts, and direct and indirect costs in the amount of approximately USD 4 mio. accumulated on Metalclad's side.[9]

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.[10] 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.[11]

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*".[12] 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.[13]

Thus, with regard to disputes as complex and multifaceted as investor-State disputes the current two-lane road must be upgraded to at least a three-lane highway, the middle lane being investor-State mediation.

3. 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

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9 JACK J. COE, Toward a Complimentary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch, 12 University of California Davis Journal of International Law and Policy, 2005, ("COE 2005"), p. 8 et seqq.; DAHLAN/VON KUMBERG, p. 486.

10 The ICSID Caseload-Statistics, Issue 2022-1, p. 13.

11 Information available at https://investmentpolicy.unctad.org/investment-dispute-settlement (last visited on 16 April 2022).

12 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.

13 FRAUKE NITSCHKE, Amicable Investor-State Dispute Settlement at ICSID: Modernizing Conciliation and Introducing Mediation, BCDR International Arbitration Review 6, no. 2, 2019, ("NITSCHKE, BIAR"), p. 411.

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 decision-makers 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 finding *the* truth of actions from the past and, consequently, applying the law, 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 some point, to accept one another's perception of what happened in the past or to mutually agree on *the* truth. 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 levelling the impact of noise and bias, the errors in human thinking described by the Nobel laureate Daniel Kahneman et al.[14] Mediators are trained "decision observers" able to spot biases which are affecting the parties' decision making.[15] Also, they help reducing noise by structuring the negotiation and, thus, guaranteeing "decision hygiene".[16] Hence, mediators assist the parties with debiasing their decision making process.

Investor-State mediation is suitable to address different needs and interests of the parties than the ones addressed in investor-State arbitration:

Relationships between the parties can be preserved, improved or even restored throughout mediation proceedings and, thus, mediation can prevent disputes or de-escalate them. Investor-State arbitration, on the other hand, tends to exacerbate divisiveness between the parties.

Thus, 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.[17] If not, they can structure a self-determined termination

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14 DANIEL KAHNEMAN/OLIVIER SIBONY/CASS R. SUNSTEIN, Noise, 2021, ("KAHNEMAN/SIBONY/SUSNTEIN"); DANIEL KAHNEMAN, Thinking fast and slow, 2011.

15 KAHNEMAN/SIBONY/SUSNTEIN, p. 240 et seqq.

16 KAHNEMAN/SIBONY/SUSNTEIN, Noise, 2021, p. 243 et seq. and 312 et seqq.

17 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, 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*" (p. 262).

of their relationship according to their needs. 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 for the parties to allow for the inclusion of stakeholders who are impacted either by the investment, the dispute or any negotiated solution, such as local communities, non-governmental or supranational organizations (in the investment arbitration context typically referred to as "non-disputing parties").[18] Hence, an effort can be made to meet 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 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 – skillfully 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 a mediation can add.

To sum up, mediation offers a collaborative, forward-looking, 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.[19] Mediation allows for a broad range of solutions, limited only by the parties' imagination and mandatory provisions of the law.

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[18] UNCITRAL Secretariat, Initial Draft Guidelines on Possible reform of investor-State dispute settlement (ISDS): Mediation and other forms of alternative dispute settlement, 2021, ("UNCITRAL Draft Guidelines"), p. 6 and 8, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_guidelines_on_mediation.pdf (last visited on 16 April 2022); 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.

[19] UNCITRAL Draft Guidelines, p. 8.

4. Investor-State Mediation: How?

a. 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.[20]

Generally, the European Commission has been a vocal proponent of the resolution of investment disputes through mediation.[21] 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.[22]

The latest increase of mediation provisions in international investment agreements[23] 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.[24] 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

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20 ICSID, Overview of Investment Treaty Clauses on Mediation, 2021, p. 3 et seqq.; NITSCHKE, BIAR, p. 415; UNCITRAL Secretariat, Initial Draft Note on Possible reform of investor-State dispute settlement (ISDS) – Mediation and other forms of alternative dispute resolution (ADR), 2021, ("UNCITRAL Draft Note"), p. 4, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf (last visited on 16 April 2022).

21 ALEXANDRA GOETZ-CHARLIER, p. 84.

22 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://trade.ec.europa.eu/doclib/press/index.cfm?id=961; or the EU-Vietnam Free Trade Agreement which has, however, not yet entered into force, available at https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437 (last visited on 16 April 2022).

23 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"), p. 26 et seqq.

24 TITI, p. 26.

encourages the use of mediation.[25] The mediation process is frequently underutilized if it depends on one party to propose the process as the proposal is often interpreted as showing weakness.[26]

b. Ongoing Consent to Mediate

Investor-State mediation is voluntary at all times 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").[27]

c. Timing of the Mediation[28]

Ideally, a mediator accompanies a complex investment project from the beginning, in order to prevent disputes in the first place or to manage them early on. Some investment treaties, indeed, provide for dispute prevention mechanisms that resemble mediation.[29]

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.[30] 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

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25 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 (last visited on 16 April 2022).

26 COE 2005, p. 38.

27 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 http://mediationblog.kluwerarbitration.com/2021/12/06/part-3-icsid-mediation-and-icsid-conciliation-understanding-the-differences/ (last visited on 16 April 2022).

28 For more details: 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/ (last visited on 16 April 2022).

29 TITI, p. 29 et seqq.

30 UNCITRAL Draft Note, p. 9.

juncture to meaningfully participate.[31] 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.

As there does not seem to be *the* right time to include a mediation window, one might also consider conducting a mediation in parallel to the arbitration.[32] Like this, the parties can take advantage of the various times during the life of the dispute when the parties' understanding of their case and the likelihood of success change. Other advantages of a parallel mediation are the effect that the arbitration is not getting delayed due to the conduct of the mediation and that the arbitration gets streamlined while being conducted and maybe even partial settlements occur.

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

d. 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, most international investment agreements that provide for amicable dispute resolution, do not regulate the procedure.[33]

Nevertheless, in any given case, it can be helpful to agree on a specific set of mediation rules. 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 and provisions on costs and confidentiality, etc.

Once a dispute has arisen, the parties are often unable to jointly appoint a mediator without assistance. Therefore, the main advantage of a mediation that is 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 exist: The International Bar Association's IBA Rules for Investor-State Mediation 2012

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31 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.

32 UNCITRAL Draft Note, p. 11; COE 2009, p. 97; COE 2019, p. 61 et seqq.

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

("IBA MR")[34], the Vienna International Arbitral Centre's Vienna Investment Mediation Rules 2021 ("Vienna MR")[35] and the brand new ICSID Mediation Rules ("ICSID MR")[36].

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 the 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).

e. Mediation Process[37]

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).

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). All the necessary procedural and organizational details, such as the means of communication and communication strategy in general, initiation or suspension of any other

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34 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 (last visited on 16 April 2022).

35 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 (last visited on 16 April 2022).

36 ICSID Mediation Rules 2022, available at https://icsid.worldbank.org/resources/rules-and-regulations/mediation-rules/chapterI-generalprovisions (last visited on 16 April 2022).

37 For a detailed description of the process under the ICSID MR see: NITSCHKE, BIAR, p. 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.

proceedings concerning the same dispute, application of prescription or limitation periods, the meeting structure, the venues, the mediator's fees, authority, confidentiality, the participation of other stakeholders apart from the parties, implementation of a potential settlement, etc. are agreed upon.

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). 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, or if requested by the parties, the mediator may make recommendations for the resolution (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.

f. 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).

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") 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 to develop 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 their 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, even 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 the litigated or arbitrated case on a legal basis and make a settlement recommendation before the negotiation then starts from there. Thus, early neutral evaluation, like arbitration, is a rights-based format.[38] 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 (so called "mediator's proposal") as a last resort, e.g. once there is an impasse.[39]

This distinction matters when looking at the recommended competency criteria for investor-State mediators. ICSID in its Background Paper[40], the UNCITRAL Secretariat in its Draft Guidelines[41], 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[42] and the ECT Secretariat in its 2016 Investment Mediation Guide[43] all suggest mediation training, accreditation and experience is a crucial competency criteria for investor-State mediators. This makes sense, as the value added by the mediator mostly consists of his/her mediation process

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38 DAHLAN/VON KUMBERG, p. 485.

39 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/ (last visited on 16 April 2022).

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

41 UNCITRAL Draft Guidelines, p. 4.

42 IMI Competency Criteria for Investor-State Mediators, 2016, available at file:///C:/Users/julia/Downloads/IMI-Investor-State-Mediation-Competency-Criteria.pdf (last visited on 16 April 2022).

43 Energy Charter Secretariat, Guide on Investment Mediation, 2016, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf (last visited on 16 April 2022).

management, conflict psychology, communication and negotiation skills, less so in his/her subject matter expertise.[44] Mediators need to be able to skillfully master the specificities of a mediation proceeding. Consequently, investor-State arbitrators cannot just be turned into investor-State mediators due to the lack of the specific skillset.[45] Nevertheless, an understanding of the context and framework of investor-State disputes and arbitration are also very helpful 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 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*".[46] 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,[47] 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 such 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.

g. Counsel in Mediation

In mediation the Parties' lawyers do not focus on legal arguments and evidence regarding breach of legal obligations. Still, some tasks are similar to the ones of an arbitration counsel. They may include educating the client about the mediation process, drafting a request for mediation and later a mediation brief, which is much shorter, however, and has a different focus than submissions in an arbitration proceeding, assisting with the selection of a

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44 WEINSTEIN/MANUKYAN.

45 UNCITRAL Draft Guidelines, p. 4 et seq.

46 LESTER NURICK/STEPHEN J. SCHNABLY, The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago, 1(2) ICSID Rev – FILJ, 1986, p. 348.

47 NITSCHKE, Conciliation, p. 130; NITSCHKE, BIAR, p. 384 et seq.

mediator, holding an opening statement, evaluating settlement options and drafting settlement terms.[48]

The preparation for a mediation session which needs to be done in close cooperation with the client differs greatly from the preparation e.g. 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. Thereby, a realistic assessment of the client's case needs to be provided.[48] 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 which party has what kind of leverage in the negotiation can be helpful.

Also, the conduct of 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. 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 proceeding. Mediation is credited with impressive rates of settlement, provided the parties and their counsel can be persuaded to attempt the technique.[49]

h. Enforcement

A mediated settlement is an ordinary contract and *pacta sunt servanda* or can otherwise 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.[50]

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48 UNCITRAL Draft Guidelines, p. 5 et seq.

49 COE 2009, p. 107.

50 COE 2009, p. 86; DAHLAN/VON KUMBERG, p. 488.

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.

Also, the Singapore Convention on Mediation, in principle, applies to settlements in an ISDS context. Except if the host State had declared the reservation contained in Article 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.[51]

5. Recent Promising Developments

In fact, 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 provision for mediation in disputes clauses in international investment agreements has been recorded throughout the last decade.[52] The EU held public consultations on investor-State mediation.[53] Moreover, 55 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.[54] The instrument was published together with a revised model law for mediation.[55] The Abu Dhabi Global Market Arbitration Centre together with the Centre for Effective Dispute Resolution ("CEDR"), in 2022, has established an investor-State mediators panel.[56] The Energy Charter Conference's 2016 Guide on Investment Mediation[57] as well as the Energy

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51 NITSCHKE, BIAR, p. 413.

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

53 European Commission, Consultation Document, Prevention and amicable resolution of disputes between investors and public authorities within the single market, available at: https://ec.europa.eu/info/sites/info/files/2017-investment-protection-mediation-consultationdocument_en_1.pdf (last visited on 16 April 2022).

54 Current numbers available at https://www.singaporeconvention.org/ (last visited on 16 April 2022).

55 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.

56 Information regarding the panel available at https://www.adgmac.com/panel-of-investor-state-mediators/ (last visited on 16 April 2022).

57 Energy Charter Conference, Guide on Investment Mediation, 2016. It provides practical guidance on investment mediation, including aspects related to preparation and conduct of

Charter Treaty's ("ECT") Model Instrument on Management of Investment Disputes[58] and ICSID's Background Paper[59] as well as ICSID's Overview of Investment Treaty Clauses on Mediation[60] were published. ICSID held an "Investment Mediation Insights" webinar series.[61] The UNCITRAL Working Group III on ISDS Reform held an intersessional meeting on the use of mediation in ISDS in October 2021 and is currently working on "*Guidelines for participants in investor-State mediation*".[62] Last but not least, 2022 started with the world's first international investor-State mediation competition, organized by the Moot Court Bench in Sri Lanka[63], and was followed by the second one, the Foreign Direct Investment Mediation Moot organized out of Japan[64].

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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 (last visited on 16 April 2022).

58 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 (last visited on 16 April 2022).

59 ICSID, Background Paper on Investment Mediation, 2021.

60 ICSID, Overview of Investment Treaty Clauses on Mediation, 2021.

61 The following webinars
- "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"

are available at https://icsid.worldbank.org/services/mediation-conciliation/mediation/investment-mediation-insights-webinar-series (last visited on 16 April 2022).

62 The draft text is available at https://trade.ec.europa.eu/doclib/docs/2021/december/tradoc_160000.pdf (last visited on 16 April 2022).

63 Information available at https://iimc.themootcourtbench.com/what/ (last visited on 16 April 2022).

64 Information available at https://mediation.fdimoot.org/about/ (last visited on 16 April 2022).

6. 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[65], identified many obstacles to settlement – or mediation in the first place – in investor-State cases, *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 also cause the dispute to become even more politically inflamed certainly does not help either.[66]

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.[67]

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 – 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 assessed, is the applicable law less settled than either side appreciates, or do delicate but pivotal questions of attribution or jurisdiction remain unresolved?[68]

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65 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, p. 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 (last visited on 16 April 2022).

66 See also UNCITRAL Draft Note, p. 6; DAHLAN/VON KUMBERG, p. 487.

67 See also UNCITRAL Draft Note, p. 6.

68 COE 2009, p. 91.

7. Overcoming the Investor-State Mediation Specific Obstacles

a. Mediation Readiness

It seems that structural obstacles to investor-State mediation and/or settlement can be overcome. A lot of capacity building initiatives by *inter alia* ICSID, ECT and CEDR are going on within government and private sector.[69] These will help to make companies and States ready and able to mediate.

In order for a government to be ready to mediate, the domestic legislative framework often needs to be adapted. It is for example 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.[70] Also, a specific inter-agency committee and/or a lead agency can be set up.[71]

An inter-agency committee can be staffed with senior politicians of all the ministries which ensure 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 is suitable. It will then explain this mechanism, e.g. the mediation process, to 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 problems. 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 the bearer of the authority to conclude an amicable settlement and to implement it in the end.[72]

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

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69 ICSID, Background Paper on Investment Mediation, 2021, p. 14.

70 UNCITRAL Draft Note, p. 6 et seq.; UNCITRAL Draft Guidelines, p. 8 et seqq.; NITSCHKE, BIAR, p. 430 et seq.

71 NITSCHKE, BIAR, p. 430.

72 UNCITRAL Draft Guidelines, p. 9 et seq.; Also, these or similar and other considerations and many more details are set out in the ECT Model Instrument.

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[73] 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 help to mitigate the individual government official's fear of personal liability when compromising on the State's interests.[74]

Ideally, the lead agency to which requests for amicable dispute resolution are to be directed are set out in the treaty in a so called "designated agency provision".[75] According to the overview of investment treaty clauses on mediation, conducted by ICSID in 2021, the numbers of treaties doing so is growing.[76]

In some States these kinds of agencies even act as ombuds offices or national dispute prevention agencies and assume a *quasi*-mediating role themselves.[77]

In any event, the identified structural obstacles to settlement need to be discussed early on 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 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.

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73 UNCITRAL Draft Guidelines, p. 5.

74 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.

75 UNCITRAL Draft Note, p. 11.

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

77 TITI, p. 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/ (last visited on 16 April 2022).

b. The Success Stories Must be Told

While capacity building within government 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.

Hence, 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.*"[78] 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.[79] 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 e.g. be done by actively telling the unexpected success stories of investor-State mediation.[80] These are stories of preventing or

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78 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.

79 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 (last visited on 16 April 2022); see also UNCITRAL Draft Guidelines, p. 8 et seq.

80 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 here: SHAHLA F. ALI/ODYSSEAS G. REPOUSIS, Investor-State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat?, Denver

settling an investor-State arbitration and, instead, turning the dispute into a fruitful controversy which leads to better understanding among all the stakeholders and will, eventually, sustainably prevent divestment.

The latest, soon to be published research by ICSID shows that investor-State mediation does not only exist in theory. Many investor-State mediations have already been conducted. The respective stories, unfortunately, remain untold – for the time being.

Only overcoming the negative perception of settling in an investor-State mediation will enable government officials to freely choose the adequate dispute resolution mechanism – or lane on the ISDS highway to drive on – in every specific investor-State dispute.

c. It Can be Done

In fact, a lot of incentives exist for Governments to try to reach a mutually beneficial settlement, one of which being the promotion of the State as an attractive investment destination, others being a prudent use of taxpayers' money and saving the State's staff from extra work with regard to the arbitration proceeding. These incentives now need to be levelled to the government official's personal level.

The statistics on settlement in investor-State arbitration show that regardless of the obstacles identified above, settlements are in fact a reality. Also, the mentioned, forthcoming research on investment mediation indicates that investor-State mediations are already being conducted. The more investor-State mediation success stories will actively be told, the more mediations will be generated and 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 are going to have frameworks in place which support investor-State mediation, the more comfort this will give to government officials to try it out.

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

Journal of International Law and Policy, Vol. 45, No. 2, 2018, ("ALI/REPOUSIS"), p. 246 et seqq.

8. Investor-State Mediation: The *Panacea* for Discontent in ISDS?

a. Current Discontent in ISDS

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.[81]

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 mean costs of an investor-State arbitration are approximately USD 5 – 6 mio. per party in legal fees and up to USD 1 mio. for arbitration costs (tribunal, hearings, institution, etc.).[82]

Arbitral awards usually entail monetary compensations, 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.

Obviously, cost and duration are big concerns with regard to investor-State arbitration.

Yet, there are also others: The image of justice administered by a relatively small group of privately appointed arbitrators behind closed door 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.[83]

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

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[81] 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.

[82] Allen & Overy and the British Institute of International and Comparative Law, 2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration, 2021, p. 4.

[83] 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/ (last visited on 16 April 2022); ALI/REPOUSIS, p. 228; DAHLAN/VON KUMBERG, p. 476 et seq.

correctness of arbitral awards as well as limitations in existing challenge mechanisms. Hence, there is a problem with legal certainty in investor-State arbitration.[84]

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 a strong legalism.

b. Cost and Duration of Investor-State Mediation

Mediation is not *per se* cheap. Also, a complex investor-State mediation will last from at least a couple of months until, in the form of a parallel mediation, 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, costs for physical meetings and maybe even 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.[85]

Mediation, however, is not pleadings-intensive or dependent on adducing full proofs and, thus, can produce results with greater speed and less expense than arbitration.[86] 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.

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 not in vain. The information gathered help with regard to the preparation for and streamlining of the arbitration.

Hence, overall a mediation will, for sure, always be cheaper and faster than an investment arbitration. Thus, cost and duration are less of a concern with regard to investor-State mediation.[87]

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84 KAUFMANN-KOHLER/POTESTA, p. 11 et seqq.; COE 2019, p. 62; ALI/REPOUSIS, p. 228; DAHLAN/VON KUMBERG, p. 474 et seqq. and 477 et seq.

85 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/ (last visited on 16 April 2022).

86 COE 2009, p. 86.

87 UNCITRAL Draft Note, p. 3.

c. Transparency

There is no doubt, confidentiality and without prejudice provisions, in the first place, create the save environment that parties need in order to freely negotiate without having to fear that the exchange of information could prove detrimental in a following adjudicative proceeding (Rules 10 and 11 ICSID MR[88], Article 12 Vienna MR, Article 8(4) and 10 IBA MR). These provisions are crucial for investor-State mediation to work and, hence, a number of recent international investment agreements providing for mediation contain such provisions.[89]

Admittedly, there is potential tension between promoting the confidential process of investor-State mediation and the general desire to increase transparency in ISDS.[90]

Contrary to arbitration, however, 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.[91]

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 a public interest.[92] The following tools are available to take account of the public interest involved in investor-State mediations:

A joint communication plan can be initiated already at the mediation management conference and refined throughout the mediation, setting out the

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88 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.

89 ICSID, Overview of Investment Treaty Clauses on Mediation, 2021, p. 8 et seq.; ICSID, Background Paper on Investment Mediation, 2021, p. 14; UNCITRAL Draft Note, p. 14; UNCITRAL Draft Guidelines, p. 7.

90 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/ (last visited on 16 April 2022).

91 UNCITRAL Draft Guidelines, p. 7.

92 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.

timing and process to make information available to the broader public.[93] The parties, at least, should discuss whether the fact of 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.

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). Potentially, 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 be included.

The World Bank publishes a framework for disclosure in public-private partnerships which is not specific for disputes but still illustrative of the objectives and scope of possible disclosure regimes.[94]

By actively applying these tools, transparency can and should be achieved in investor-State mediation – at least after the case settles, the very latest. Transparency is the condition of legitimacy and, ultimately, the key to overcome the investor-State mediation specific obstacles described above. So, parties that wish for investor-State mediation to be a third lane on the ISDS highway, will need to be courageous enough to choose transparency.

d. 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 less costs 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 the focus on transparency and inclusion of all relevant stakeholders has the potential to facilitate the long-term

93 UNCITRAL Draft Guidelines, p. 8.

94 World Bank Group, A Framework for Disclosure in Public-Private Partnerships, 2015, available at https://thedocs.worldbank.org/en/doc/773541448296707678-0100022015/original/DisclosureinPPPsFramework.pdf (last visited on 16 April 2022).

sustainability of investment projects – the common goal of investors and States.[95]

Due to the interest-based approach, mediation certainly remedies the strict legalism of investor-State arbitration. All in all, mediation is well-positioned to address dissatisfaction with investor-State arbitration.[96]

9. Conclusion

As parties move along the *continuum* from negotiation to adjudication, they increasingly lose flexibility and control over their dispute.[97] So far, it seems, that parties in ISDS drive on a two-lane road. 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. But, how can it be that being courageous in taking responsibility by negotiating one's own fate is, by 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 the 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

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95 SKARTVEDT GÜVEN, Investor-State Mediation: An Opportunity to Advance Sustainable Outcomes, Columbia Center on Sustainable Investment Blog, 3 January 2020

96 CLAXTON, p. 6.

97 TITI, p. 22; JESWALD W. SALACUSE, Is there a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution, 31 Fordham International Law Journal, 2007, p. 154 et seq.

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 lay 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 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, thus, 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.[98]

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[98] ALI/REPOUSIS, p. 249; COE 2019, p. 64.