

The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes*

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RESUMO: A mediação tornou-se, nos últimos anos, um valioso mecanismo de resolução de litígios. O processo de mediação teve grande sucesso nos Estados Unidos e no Reino Unido e, em reconhecimento do seu valor, a União Europeia adotou a diretiva relativa à mediação em 2008 para incentivar a utilização de processos de mediação. Com a economia global de hoje e o enorme crescimento do comércio transfronteiras, a mediação está vindo à tona, uma vez que, em muitas nações, tem se tornado parte da cultura da sociedade. Além disso, a recente desaceleração econômica fez com que todas as partes recorressem a medidas de redução de custos, fato que gerou uma maior utilização da mediação. O sucesso da mediação como instrumento de resolução de litígios gerou a criação de uma dinâmica própria, com o crescimento significativo do uso da mediação na resolução de disputas comerciais privadas. Este artigo analisa as muitas vantagens oferecidas pela mediação sobre a negociação direta e o julgamento no tribunal de arbitragem, e como essas vantagens se aplicam a litígios de investimentos internacionais, bem como os desafios especiais enfrentados pelas disputas estaduais na mediação.

ABSTRACT: Mediation has become increasingly accepted as a useful dispute resolution mechanism. It has had great success in the United States and the United Kingdom and, in recognition of its value, the European Union adopted the Mediation Directive in 2008 to encourage the use of mediation procedures¹. With today's global economy and the tremendous growth of cross border commerce, mediation is coming to the fore as it has long been a part of the societal culture in many nations. Moreover, the recent economic downturn, which has caused all parties to look for cost saving measures, is increasingly leading to greater utilization of mediation. The very success of mediation as a dispute resolution tool is itself creating its own momentum and leading to significant growth in the use of mediation in the resolution of private commercial disputes. The success of mediation has led

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1 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *Official Journal L 136*, 24.05.2008, p. 0003-0008; available at also <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=celex:32008l0052:en:html>.

to consideration of whether the application of mediation techniques should be encouraged and developed in the context of investor state disputes. This article reviews the many advantages mediation offers over direct negotiation and adjudication in arbitration or court, how those advantages apply to investor state disputes and the special challenges that investor state disputes present to the success of a mediation.

SUMÁRIO: I – The mediation process; II – The benefits of mediation over direct negotiation; III – The benefits of improved communication through mediation; IV – The benefits of mediation over arbitration or litigation; V – Obstacles to successful mediation in investor state disputes; Conclusion.

I – THE MEDIATION PROCESS

Dispute resolution can be accomplished through four basic mechanisms, each with its own set of variations: direct negotiation, mediation/conciliation (sometimes referred to as facilitated negotiation), arbitration or court adjudication². As one moves across the continuum of these various modalities, the parties increasingly lose control over the resolution of their dispute. This loss of control has been perceived in some cases as leading to inappropriate and even undesirable results not only from the perspective of the losing party but even from the broader perspective of societal welfare. Dissatisfaction with such results and the dramatic increase in recent decades in litigation which overburdened the courts and caused disruption and expense for the parties, led to the search for alternatives. Alternative dispute resolution (ADR) in the form of mediation or conciliation, processes that had long been used to resolve local disputes in many communities around the world with resort to an “elder,” emerged and blossomed. Today mediation is mandated in many courts throughout the world before the matter may be heard by a judge or jury, and mediation as a condition precedent to arbitration or litigation is finding its way into many contracts in the so called “step clauses”.

Conciliation for investor state disputes has long been available. The International Centre for Settlement of Investment Disputes (“ICSID”) adopted the ICSID Conciliation Rules in 1967³ at the same time as its Arbitration Rules. There are over 140 contracting states to the ICSID Convention and the great majority of investor state claims are administered under its auspices. However, ICSID has only had a handful of conciliations registered with it under its conciliation

2 For a discussion of various dispute resolution modalities see, Exploring Alternatives to Investment Treaty Arbitration and the Prevention of Investor-State Disputes – *Advanced unedited draft* – UNCTAD Series on International Investment Policies for Development United Nations, 2010 (“UNCTAD Exploring Alternatives”), Glossary of Important Terms at p. xi-xx, available at <http://investmentadr.wlu.edu/deptimages/UNCTAD/UNCTADAlternativesArbitrationAdvancedDraft.PDF>.

3 ICSID Convention, Regulations and Rules; Rules of Procedure for Conciliation Proceedings (Conciliation Rules) (“ICSID Conciliation Rules”) available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf at p. 75-98.

rules. For example, in 2008 there were thirty one new arbitrations filed but only one conciliation, and that was a conciliation required by the parties' contract⁴. The fault may lie in part in the manner in which the ICSID conciliation rules are understood to work.

There is a lack of clarity in the literature as to whether mediation and conciliation are distinct processes. This article distinguishes between the two. Mediation is a process in which the mediator attempts to bring the parties to agreement using many different styles and techniques to facilitate settlement. This is on contrast to a conciliation, generally a more formal and structured process, in which the neutral delivers a nonbinding opinion of the merits to the parties and makes a recommendation. While in mediation too, the mediator in trying to bring the parties to agreement may make recommendations and even evaluations, in mediation those recommendations/evaluations are usually made to the parties separately in caucus rather than to all parties together and only delivered to all parties in joint session in rare instances following express request and consent by all parties. The fundamental difference is one of the underlying philosophy and approach. The goal in mediation is to assist the parties in arriving at their own solutions with due regard to any underlying interests that can be served as opposed to having a conciliator receive presentations, evaluate the case on the merits, deliver a recommendation and attempt to get the parties to accept it.

The ICSID conciliation rules do not dictate which of these techniques should be employed as it provides that the conciliators "may" make recommendations⁵. However, to date the conciliations at ICSID have followed the latter model with a formal process in the presentation of the facts to the neutral and the delivery of a non-binding evaluation of the dispute to the parties⁶. The costs and time delay in such a process, which can largely mimic the process in arbitration but result in a non-binding recommendation, has likely discouraged the parties from employing these rules.

The opportunities and advantages afforded to the parties in a mediation have been proven time and again in the resolution of commercial private disputes. The attractiveness of mediation compels its further consideration for investor state disputes. We review these many benefits applicable to all disputes.

II – THE BENEFITS OF MEDIATION OVER DIRECT NEGOTIATION

Designing an effective process – Constructing a mediation process is an art form. Each mediation presents its own set of challenges with its unique is-

4 International Centre for Settlement of Investment Disputes 2008 Annual Report, at 5 available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2008_Eng.

5 ICSID Conciliation Rules, *supra* note 3, Rule 22.

6 Ucheora Onwuamaegbu, "The Role of ADR in Investor – State Dispute Settlement: The ICSID Experience", *News from ICSID*, v. 22 (Winter), n. 2, p. 12-15 (2005).

sues, personalities, sensitivities and impediments to settlement. Who is at the table, what is on the table, when the discussions should take place, the sequence and manner in which parties and issues are addressed, all have tremendous impact on the likelihood of a successful resolution. A mediator can assess the distinctive characteristics of each mediation to design and shepherd the process. With direct negotiation there is no one who can embark on and implement such a fine tuned analysis. Direct negotiation simply does not create a vehicle for adjusting the negotiating process to the needs of the specific case.

Persistence in pursuing settlement – The mediator is not a champion of any party but is a champion for settlement. Often in direct negotiation the lawyers meet, talk, fail to resolve and go back to arbitration. Lawyers often feel that being the one to raise settlement again, and perhaps even again as the case unfolds, can be seen as a sign of weakness that will be a disadvantage in achieving the best result for the client. The mediator can persist in pursuing the settlement options as the case progresses and raise the issue again as more optimal times for resolution present themselves.

Providing an opportunity for a “day in court” – Strong emotions are frequently found in the context of any dispute. In such cases settlement is best achieved after those emotions and frustrations have found an outlet. Many litigants need to be listened to by an empathetic and wise counselor before they can settle and they need to feel like they have had their “day in court”. The mediator fills that role and enables the litigant to get the cathartic release before a learned professional similar to the arbitrator who would otherwise resolve the dispute. The mediator may also provide a government official the “cover” he or she needs to resolve the case without a formal adjudication process by enabling the official to use the mediator’s evaluation to justify the settlement.

Identifying impediments to settlement – A mediator is in a better position than trial counsel to identify what is going on outside the narrow confines of the dispute that can be an impediment to settlement. Are there political or social ramifications that must be managed? Are there third parties that must be consulted? Is the timing of the payment an issue? The mediator can help craft solutions or bring outside parties into the conversation to obviate impediments to settlement. If there are community groups or indigenous populations that must be involved in order to enable a government to settle a matter, the mediator can bring them in and address their needs and perspectives as part of the process and work skillfully with them to forge a consensus.

Posturing left at the door – In direct negotiations lawyers generally continue to speak to the strength of their client’s case and posture in the effort to maximize their negotiating position. No sensible discussion of the strengths and weaknesses takes place. With a mediator, the posturing can be eliminated in the course of the conversations and areas of agreement can be developed. The mediator provides a safe environment in which more meaningful progress to settlement can be made.

Ability to explore underlying interests – The mediator can meet privately with each of the parties and find out what they really care about. Often interests emerge that are not obvious and that a lawyer cannot bring up in a negotiation either because it undercuts some position in the case, could be seen as a sign of weakness or must be kept confidential. A mediator can identify those interests and assist in developing mechanisms to satisfy those interests in the settlement. This can be particularly important in the context of investor state disputes where the host state might be seeking additional investment from that investor or others and be reluctant to be publicly charged with a breach of an investment treaty with the consequent danger of appearing to be a state that is a poor risk for investment; the investor may be interested in protecting other existing interests in the host country or be interested in additional investment opportunities in that state or others and may be reluctant to appear to be litigious and damage its ability to succeed in pursuing investment opportunities.

Providing a realistic risk assessment – It is often useful to have an independent fresh set of eyes look at the dispute and assist the parties by helping them analyze the strengths and weaknesses of their case. Lawyers and parties often become convinced as to the strength of the case beyond any realistic appraisal. The mediator provides that independent unbiased review and can assist in the development of a more realistic analysis of the likelihood of success. Especially in the world of bilateral investment treaty (“BIT”) arbitrations where the outcome may be even more unpredictable than in the commonplace commercial case, a neutral evaluation for each party of the different paths a tribunal might follow can be invaluable.

Getting the client’s attention – A mediation requires the participation of decision makers with authority to settle. The mediation provides the opportunity to get the undivided attention of those who must make the decision on settling the dispute.

Ability to test solutions – Using a mediator as an intermediary enables the parties to test settlement positions before they are disclosed to the other side. The mediator can assess whether the settlement proposal is likely to be productive and hold it back if it is not a feasible solution. Thus parties can explore options without looking like they are giving in or negotiating against themselves. The mediator can utilize various negotiating tools and shuttle diplomacy techniques to drive the settlement process forward that are difficult to utilize in direct negotiation.

Knowledge of diverse cultures and legal systems – In international disputes a mediator accustomed to working with parties from different countries can serve an especially useful role by assisting the parties in bridging cultural differences and divides in legal principles. Without such a facilitator negotiations may break down over conflicts that can be easily avoided or deflected if handled properly.

III – THE BENEFITS OF IMPROVED COMMUNICATION THROUGH MEDIATION

Enables the parties to meet – The mediation provides a venue for the parties to meet and talk safely, often in a confidential setting, with the other

party. The parties can directly educate the other party about their view of the case thus providing a more realistic view of the case without a lawyer's screening. The appeal of important witnesses can often be assessed at an early stage. These frank exchanges often lead to changes of heart and new perspectives on the matter.

Taking the litigator off the hook – Often the litigator is retained because he or she is viewed as a fighter who will advocate for the client vigorously. It is sometimes difficult for the lawyer to draw back from being a champion for the client's cause as arbitration counsel and become settlement counsel championing the cause of resolving the dispute. The lawyer may feel that the client will view him or her with disfavor if he or she is not able to project continued confidence in the case. The mediator can help the lawyer bring about a reassessment of the case without undermining the client's confidence in the lawyer by facilitating the development of a more realistic view.

Enabling the party to have a voice – There are situations in which the party wants to settle but the lawyer is determined to fight on. The party may not feel so strongly as to change counsel as so much has already been invested in the lawyer's familiarity with the case but cannot persuade the lawyer that it is time to settle and move on. The mediator can ensure that the party has a voice and is in fact the last word on whether a settlement should be negotiated and on what terms.

Improving communication between lawyer and client – Sometimes the lawyer and the client are just not hearing each other. They may have very different perceptions of the case and where they want it to go; they may have had a change of heart since the matter started. Sometimes a lawyer or a client is so locked into a position that they simply are not communicating. The mediator can facilitate that conversation and make sure that each perspective is fully communicated and, most importantly, understood.

IV – THE BENEFITS OF MEDIATION OVER ARBITRATION OR LITIGATION

Speedier resolution – Investor state arbitration is generally a lengthy process; the average length of an arbitration proceeding at ICSID is three years and jurisdictional and arbitrator challenges are common⁷. The case may go on even longer if there is an annulment proceeding under the ICSID rules. The claimant must wait for the recovery and the respondent has the matter hanging over it, with all of the consequent public relations concerns. A settlement in mediation can often be concluded in a much shorter time frame. Even very complex, big

7 Jack J. Coe, Jr., Settlement of Investor-State Disputes through Mediation: Preliminary Remarks on Processes, Problems and Prospects ("Coe Preliminary Remarks") published in Enforcement of Arbitral Awards Against Sovereigns, R. Doak Bishop, ed. (Juris Publishing) 2009 at Chapter 4.

dollar cases often resolve in one or just a few sessions which can be scheduled on an expeditious basis⁸.

Reduced cost – Investor state arbitrations can be inordinately costly with the cost of the arbitration itself running in the many millions of dollars. For example in *Plama Consortium v. Bulgaria*, the parties legal costs were over \$17 million and in *Pey Casado v. Chile* over \$15 million⁹. The expedited resolution of a dispute in mediation avoids many of those costs. The earlier in the process the mediation is commenced the more likely the most significant cost savings will be achieved. While the dispute may not be ripe for resolution at an early stage, the mediator can assess when to press for settlement and reduce the costs incurred until that stage is achieved. The cost of the mediation itself is generally a small fraction of the costs incurred during the development of a case.

Streamlining the issues and exchange of information – If the mediation process is commenced at the beginning of the arbitration, the parties can work with the mediator to determine if any exchange of information is necessary before a meaningful conversation can be conducted. Generally such exchanges, if any are deemed necessary, can be streamlined dramatically and involve a small fraction of what might otherwise be exchanged. In many cases no exchange is needed. Especially in these days of e-mails, streamlining or eliminating document review can lead to huge cost savings.

Ability to explore creative solutions – An arbitrator must sit in a circumscribed universe guided by the law and the facts in meting out remedies that are supported by the law. Mediation provides an avenue for the exploration of remedies unavailable in arbitration that can achieve a successful result for all. An award of money damages or an injunction is not the optimal resolution for many cases and workable solutions in multiple settings can be achieved in mediation. For example, a mediation may achieve acceptable compromises on how a construction project should be adjusted to suit all, what new commercial arrangement can be made to replace the one in dispute, what substitute investment may be available, how a project can be developed without harm to the environment and in a way that benefits the local community. Tools unavailable in court can be used to achieve resolution.

Party control – Mediation affords the parties an opportunity to control the result. The mediator does not sit as an arbitrator but only as a facilitator to a settlement agreed to by the parties. Parties walk away with a result they feel they can live with as they have been the ones to decide it. The parties are not left to the mercy of whatever the arbitrators might rule.

8 It must be noted that the investor state disputes that have settled to date have generally settled only after the passage of some years without a significant time advantage. However, as attention is devoted to developing the optimal processes for a mediated resolution of such disputes, the time frame to resolution should be considerably shorter.

9 United Nations Conference on Trade And Development, Latest Developments in Investor – State Dispute Settlement, IIA Issues Note n. 1 (2009) (“UNCTAD Latest Developments 2009”) at 11.

Confidentiality – Mediation generally enables the parties to keep the settlement discussions private and not available to the public. While the result may be subject to public scrutiny, in many cases, even with a governmental entity, it may be possible to maintain the confidentiality of all or at least some of the negotiations and possibly avoid creating grounds for subsequent political or community based challenges to the agreement reached. Moreover, the confidential nature of the mediation itself enables the parties to explore with the mediator their real interests and concerns and discuss the case without informing the other party. The mediator will not disclose information he or she is not authorized to disclose. Speaking in a confidential setting encourages an openness not otherwise achieved and often enables the parties to find innovative solutions.

Maintains relationships – Arbitration's adversarial nature can drive a rift between parties who would be better served by maintaining the relationship. Many investor state disputes are between parties with long term contractual arrangement or other important ongoing relationships or with a future hoped for investment relationship. Mediation provides a venue for resolution of the dispute in a manner that preserves the relationship as common ground is reached consensually in a less contentious setting. Indeed, the relationship is sometimes improved as a result of the collaborative process.

Less Burdensome – Arbitration is a lengthy process and often requires enormous expenditures of time by the parties to work with counsel, review documents, and prepare for the arbitration. All of these steps interfere with daily work and personal schedules. Mediation's prompt resolution relieves the parties of these burdens and minimizes disruption to their schedules.

Elimination of issues – Even an unsuccessful mediation is often useful to eliminate areas of dispute, narrow the issues in the case and uncover and organize issues for future discussion and negotiation.

Higher rates of compliance – It is said that settlements reached in mediation have a higher rate of compliance than those imposed by an adjudication. As the parties have themselves developed a resolution they feel is fair to them and that they are capable of performing, the likelihood of not fulfilling obligations of the settlement are reduced. Given the frequent difficulties encountered in collecting on awards against sovereign states, this can be a significant advantage.

Flexibility – Mediation is a flexible process. Different alternative dispute resolution techniques can be used as the particular matter dictates. For example, it can be preceded or succeeded by a mini-trial, med-arb can be considered, a neutral "expert" can be appointed to render an opinion on a legal or fact based point of difference. The process can be fine tuned to meet the needs of the case. If all else fails, the parties can continue in arbitration with a better understanding of the case.

INVESTOR STATE DISPUTES

Thus threshold question that must be addressed given the lack of utilization to date of mediation to resolve investor-state disputes is whether there is

a reason to pursue such techniques in this context. Can investor state disputes really benefit from mediation or are such disputes creatures unto themselves as to which normal litigation considerations on how to achieve settlement do not pertain.

When discussing this question a few years ago with colleagues, they uniformly responded that mediation would be futile in this context as the investor had already exhausted all negotiation channels before filing the arbitration. Thus earlier suggestions advocating mediation of investor state disputes were not vigorously pursued¹⁰. Today one finds tremendous interest in promoting mediation for investor state disputes and facilitating its development from those speaking from all perspectives: host government representatives, administering institution representatives and investors.

As we consider the developments of the past several years, the reasons for the current interest in mediating investor state disputes is apparent. International arbitration has been established as the principal method for the resolution of claims by investors against host states. The right to seek relief in arbitration rather than in court is established in virtually all of the approximately 3,000 international investment treaties now in force. It is considered a central investor protection device. Arbitration is seen as depoliticizing the process, providing neutrality and independence, and was intended to be a faster and cheaper process which affords greater party control.

Investor state claims have been increasing in number with approximately 350 arbitration cases now known to have been filed, most in recent years¹¹. Of these over 225 have been filed with ICSID¹² and have involved numerous nations. Over eighty one countries have faced investor state arbitration claims¹³. The greatest number of the claims administered by ICSID in 2009, forty seven percent, involved claims against states in Latin America or the Caribbean¹⁴. With this widespread growth of arbitration of investor state disputes, scholarly literature analyzing the possibilities of mediation in this context has emerged¹⁵.

10 See e.g., Onwuamaegbu, *supra* note 6; Karl Sauvant, "Mediation is the Key for Future Investment," *FDI Magazine*, April 2, 2002), available at http://www.fdimagazine.com/news/fullstory.php/aid/108/mediation_is_the_key_for_future_investment.html.

11 United Nations Conference on Trade and Development, Latest Developments in Investor– State Dispute Settlement, IIA Issues Note n. 1 (2010) ("UNCTAD Latest Developments 2010") at 1.

12 *Id.*

13 *Id.*

14 International Centre for Settlement of Investment Disputes 2009 Annual Report, at 5 available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnualReports&year=2009_Eng.

15 See e.g. Coe Preliminary Remarks, *supra* note 7; Jack J. Coe, Jr., Toward a Complementary Use of Conciliation in Investor-State Disputes – A Preliminary Sketch ("Coe Complementary Use"), 12 U.C. Davis J. Int'l L. & Pol'y 7 (2005); Susan D. Franck, Integrating Investment Treaty Conflict and Dispute Systems Design, 92:161 Minnesota Law Review (2007) ("Franck System Design") and sources cited therein; Jeswald W. Salacuse, Is There A Better Way? Alternative Methods of Treaty-Based, Investor State Dispute Resolution, 31 Fordham Int'l L.J. 138 (2007) ("Salacuse Alternative Methods").

Concerns specific to investor state arbitration suggest that mediation may well lead to better results. The lack of consistency in the interpretation of treaty obligations has become a subject of discussion. The different arbitration rules available, while giving investors a choice, add to the lack of predictability. As discussed above, investor state arbitration is generally a lengthy process that can be extremely expensive and can subject the state to the possibility of enormous damage awards. Awards of tens and even hundreds of millions of dollars have been issued against host states and claims in the billions have been lodged¹⁶. Claims are brought that challenge public policy decisions made by states and can force a retreat from governmental decisions beneficial to the population they serve. The often long term relationships and contractual arrangements between the investor and the state can be severely damaged. The reputational risk from arbitration claims charging violations of investment treaties can negatively impact the flow of investment into a country and at the same time damage the investor's attractiveness not only to that state but also other states which fear embarking on a relationship with a litigious investor. The focus on monetary damages in arbitration precludes the development of more reasonable and appropriate remedies that might otherwise be available. Dissatisfaction with investor state arbitration has caused Bolivia and Ecuador in the last few years to denounce the ICSID Convention¹⁷.

With all of these drivers for an examination of better systems for resolution of disputes, the United Nations Conference on Trade and Development ("UNCTAD") recently expanded its research to explore the application of alternative dispute resolution in international investment law and to develop dispute prevention policies¹⁸. The issues raised by investor state arbitration were recognized and discussed during the UNCTAD multi-year expert meeting on investment for development held in Geneva in February of 2008. Apart from preventive means such as clarifying treaty language and treaty interpretation, one possibility considered at that session was "to enhance the role of alternative methods of treaty-based investor-state dispute resolution in IIAs [international investment agreements]"¹⁹. A Joint Symposium on Investment and Alternative Dispute Resolution sponsored by UNCTAD and Washington and Lee University School of Law was held in March of 2010²⁰. Following the symposium a comprehensive analysis of ways in which ADR can serve to improve the resolution of investor state disputes was released by UNCTAD²¹.

16 See examples cited in Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration* ("Franck Evaluating Claims"), v. 86, *North Carolina Law Review* at 71 (2007) available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=518280.

17 For a discussion of the consequences of a denunciation of the ICSID Convention, see Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, published in *The Backlash Against Investment Arbitration* (Kluwer pub.) 2010, Ch. 15, available at http://www.univie.ac.at/intlaw/wordpress/pdf/denunciation_icsid.pdf.

18 UNCTAD Latest Developments 2010, *supra* note 11 at 12.

19 UNCTAD Latest Developments 2009, *supra* note 9 at 12.

20 For Symposium videos and presentations see <http://investmentadr.wlu.edu/symposium>.

21 UNCTAD Exploring Alternatives, *supra* note 2.

It is generally accepted that about 80% of the mediated disputes settle in mediation. Only 30-40% of ICSID cases settle before the arbitration is concluded²². These figures suggest that if there is merit in the concept of mediation for investor state disputes, there is much room for increasing the number of settlements. The many benefits of mediation discussed above all lend themselves equally and in some cases even more forcefully in the context of investor state disputes.

V – OBSTACLES TO SUCCESSFUL MEDIATION IN INVESTOR STATE DISPUTES

Thus while one is likely to conclude that virtually all of the benefits of mediation are applicable to many investor state disputes and it is a mechanism that should be pursued with enthusiasm, the special challenges and obstacles unique to the settlement of disputes in this setting must also be considered²³.

Infringement on sovereignty – The host state may feel that it simply cannot concede and settle on any basis as the claims asserted are viewed as a direct attack on the rights and privileges of a sovereign state to regulate its own affairs. Some challenges may be directed at purposeful policy decision made by the state from which it cannot or will not retreat.

Uncertain merits – The unpredictability of the result in BIT arbitrations that has been observed by many scholars can be a disincentive to settlement. All parties may feel that they will be the winner, perhaps with more justification than is ordinarily the case. Thus while this can be a motivator for resolution as the outcome cannot be known, it can also lead to resistance to resolution.

Multiple Agencies – Once an arbitration is commenced there are likely to be multiple agencies that have some involvement in the dispute. There may be internal conflicts over such issues as who should participate in the mediation, who should dictate the strategy, and what an acceptable result would be. Thus unlike a corporation, there may not be a clear decision maker with whom the mediator can work to arrive at a resolution. A seminal principle in designing a successful mediation is ensuring that the real decision makers are involved. This may not be possible and constant second guessing and backtracking by agency representatives not in the room can be a problem.

Who is at the table – In an investor state dispute, not only is it likely that the resolution of the dispute will have to be disclosed beyond the participants in the mediation, but the dispute may raise significant issues as to which many stakeholders who are outside government may have an interest, e.g. a project with significant local environmental impacts. It may be difficult to identify all of the necessary participants, engage them successfully in the mediation process, achieve consensus among so many interests and avoid subsequent legal attacks on any solution reached.

Budgetary constraints – As more than one agency may be involved, there may be friction and lack of accord as to which agency's budget should pay

22 Coe Preliminary Remarks, *supra* note 7; Franck Evaluating Claims, *supra* note 16.

23 For a general discussion of many of the obstacles, see Coe Preliminary Remarks, *supra* note 7.

the settlement amount: is it the agency that committed the acts challenged, the agency responsible for the BIT program, the defending agency or some other governmental account²⁴. Perhaps even more problematically, most countries have provisions which permit them to pay court judgments but have no parallel provisions for paying pre-adjudication settlement amounts²⁵. An act of the legislature or specific budgetary authorization may be required raising questions as to the practicality of such a solution and as to the preservation of the confidentiality which is of importance in some cases.

Legislative act required – Apart from budgetary issues, the resolution of the dispute that can serve to settle the matter may require an act of the legislature, an obstacle that can vary in magnitude from a mere time delay to an absolute obstruction.

Blaming the Tribunal is easier – Host governments may find themselves in a difficult position in the dispute and may find it easier to blame a tribunal than to voluntarily accede to any demand even on a modified and negotiated basis. Negative public reaction may be easier for the government to deflect if the resolution is imposed rather than voluntarily agreed²⁶. However, some governmental representatives have voiced the view that settling with the assistance of a mediator is helpful in deflecting public criticism and can be more readily accepted than a directly negotiated settlement.

Mediation may not be shorter and cheaper – Mediation of a complex matter can be long and expensive; complicated issues may have to be confronted that require detailed attention by the parties, counsel and the mediator. Various constituencies may have to be consulted and brought to agreement. If the arbitration is placed in abeyance while the mediation progresses, years of delay may result. Of course, proceeding down both the arbitration and mediation track simultaneously can alleviate the delay factor but the additional expense of mediating a complicated matter can remain a disincentive.

Already negotiated – The parties may feel that mediation is a waste of time. Investors generally do not lightly launch an arbitration proceeding against a host government, especially if the investor has continuing interest in investment in that country. Negotiations to resolve the dispute have often already been attempted. The investor and the host state may feel that a mediation is a waste of time and money as an amicable resolution has already been attempted.

Transparency and confidentiality – The increasing call for transparency in BIT disputes and the growing inclusion of transparency provisions in BITs brings to

24 Bart Legum, *The Difficulties Of Conciliation In Investment Treaty Cases: A Comment On Professor Jack C. Coe's "Toward A Complementary Use Of Conciliation In Investor-State Disputes – A Preliminary Sketch"*, MEALEY'S International Arbitration Report v. 21, 4 April 2006.

25 *Id.*

26 See Coe *Complementary Use*, *supra* note 15 at 29-30. For an interesting example see the "Pyramids Case" in which the Egyptian Priome mineter when presented with a negotiated resolution of 10 million rejected it in favor of an arbitration because he feared settelement would subject him to attacks from his opponents and the media. Years later an arbitration award for 32.6 million was issued against Egypt. See, Salacuse *Alternative Methods*, *supra* note 15 at 150.

the fore the question of whether confidentiality can be maintained in the mediation. Confidentiality can be one of the most important attractions of a mediation in a commercial setting that may not always be available in an investor state dispute.

Enforcement issues – An arbitral award can be enforced. A mediated settlement agreement may be just a contract subject to contract defenses and provide only a cause of action for breach of contract. There are ways to attempt to deal with this concern. If the mediation takes place after the arbitration is commenced it should be possible to have the agreement entered as an agreed award²⁷, although such a course, may defeat the desire of the parties not to have their dispute publicly known. The parties may include a choice of law designation and an arbitration clause that would empower an arbitrator to assess whether the settlement agreement was breached and award damages. The parties might also establish a standby letter of credit or similar arrangement designed to make enforcement of the settlement comparatively routine, and freeing it from sovereign immunity and related obstacles that might arise in a domestic court²⁸.

Bad publicity and bad precedent – The host state may fear negative local public reaction if it “gives in” to the demands of an investor without being required to do so by a tribunal. It may also fear that “giving in” may encourage other investors to pursue remedies against it or provide ammunition for other investors to demand they be similarly compensated or treated on an expeditious basis without having to prove their case to a tribunal.

No personal stake – Those negotiating on behalf of the state may not have the same incentive to settle as a litigant in a garden variety commercial dispute. Any ultimate award would not come out of the negotiator’s pocket and is unlikely to affect his or her compensation. Thus, while assuredly the governmental representative will have the interests of the state in mind, the personal interest in achieving resolution may not be as strong. Indeed in some countries where personal liability for official acts is embodied in local law there may a real disincentive to settlement.

CONCLUSION

As progress is made on developing alternative dispute resolution mechanisms for investor state disputes there are many questions that must be considered and many steps must be taken. The first step must be a review of process issues. Many questions present themselves in this context²⁹. These would include: Should the mediation be simultaneous with the arbitration? Is there a pool of mediators available who can serve effectively in this arena? Can those who have traditionally served as arbitrators change hats successfully? What should the neutral’s

27 See Coe Preliminary Remarks *supra* note 7; See also Edna Sussman, The New York Convention Through A Mediation Prism, *Dispute Resolution Magazine* (a publication of the American Bar Association) v. 15, n. 4 (Summer 2009) for a discussion of whether an arbitrator appointed after the dispute is settled can issue a valid and enforceable award.

28 See Coe Preliminary Remarks, *supra* note 7.

29 Coe Preliminary Remarks, *supra* note 7; Coe Complementary Use, *Supra* note 15; Jack J. Coe, Jr., Should Mediation of Investment Disputes be Encouraged and, if so by Whom and How?, published in *Contemporary*

role be? Do we need new rules for investor state mediation? Should ICSID amend its conciliation rules? Should there be presumptions on transparency?

The integration of a mediation step into new BITs as they are negotiated has been suggested as an important avenue for advancing the use of mediation. It is much easier for a host state to consent to mediation before the dispute arises³⁰. Facilitation of resolution in mediation through greater involvement of the home state of the investor in resolution of the dispute can also be of tremendous assistance³¹.

Cooperation among the international institutions including ICSID, the, Multilateral Investment Guarantee Agency (which has an in-house mediation group), UNCTAD and the World Bank in sharing perspectives on mediation and developing processes and encouraging utilization is a crucial next step³².

Some countries are already developing capacity for dispute prevention and mediation for investor state disputes by creating institutions under domestic law. Peru passed a law that creates a mechanism for informing authorities and agencies about international commitments and creates a process to evaluate claims³³. Colombia is developing legislation to create a lead agency to deal with such claims³⁴. Korea has an ombudsman to address claims against the state which has resulted in the successful resolution without any formal adjudication process of 298 of the 370 claims asserted³⁵. Morocco offers official mediation services to investors³⁶. Guatemala has established a lead agency to deal with current arbitrations and to prevent disputes as well as facilitate their early resolution³⁷. Panama and the Dominican Republic are working with UNCTAD to develop internal mechanisms to better handle investor state disputes³⁸. Others will undoubtedly follow.

As we look to the future to predict the likelihood of successful implementation of mediation tools to resolve investor state disputes, we are reminded of the famous words of Zhou Enlai, the Chinese premier, who said when asked in 1976 about the impact of the French Revolution “on reflection, it is too soon to tell”.

Issues in International Arbitration and Mediation, The Fordham Papers 2009, Arthur W. Rovine, ed. (Martinus Nijhoff Publisher) (“The Fordham Papers”) at pp. 339-357.

30 UNCTAD Exploring Alternatives, *supra* note 2 at 40-53, see also, Gabriel Bottini and Veronica Lavista, Conciliation and BITs, published in The Fordham Papers, *supra* note 29 at pp. 358-373.

31 See, Tillman Rudolf Braun, Investor State Mediation: Is there a Future? published in The Fordham Papers *Supra* note 29 at pp. 374-388.

32 See, Margrete Stevens and Ben Love, Investor-State Mediation: Observations on the Role of Institutions, published in The Fordham Papers, *Supra* note 29 at pp. 389-417.

33 UNCTAD Exploring Alternatives, *Supra* note 2 at 68-71.

34 *Id.* at 81.

35 *Id.* At 88.

36 *Id.* at 92.

37 *Id.* at 82.

38 *Id.* At 86.