Investor-State Dispute Mediation: The Benefits and Obstacles

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The title of today's program is "Investor-State Mediation: Is There a Future?" As we begin our discussion of this subject, the threshold question that must be addressed is why are we talking about it at all. Can investor-State disputes really benefit from mediation,[1] 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. Today one finds considerable interest in promoting mediation

[1] There is a lack of clarity in the literature on investor-State disputes as to the meaning of the words conciliation and mediation and whether they differ. There are many different styles and techniques that those working to facilitate settlement use to help resolve disputes. As used in this article, mediation is a process in which the mediator attempts to bring the parties to agreement as opposed to conciliation in which the neutral delivers his or her nonbinding opinion of the merits to the parties and makes a recommendation. The ICSID does not dictate which of these techniques should be employed, as it provides that the conciliators "may" make recommendations. ICSID Convention, Regulations and Rules; Rules of Procedure for Conciliation Proceedings ("Conciliation Rules"), Rule 22, *available at* http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf. It is, however, the author's understanding that to date the conciliations at ICSID have followed the latter model with what must be viewed essentially as nonbinding evaluations of the dispute delivered to the parties. In mediation too, the mediator in trying to bring the parties to agreement often makes recommendations and even evaluations, but the distinguishing feature is whether those recommendations/evaluations are made to the parties separately in caucus or whether they are made to all parties together, something done less frequently and only with clear consent from 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 as opposed to the goal being to have a conciliator evaluate the case, deliver a solution, and then attempt to get the parties to accept it.

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for investor-State disputes and facilitating its development from those speaking from all perspectives: host-government representatives, administering institution representatives, and investors.

Indeed, as we consider the developments of the past several years, it becomes clear that the use of mediation in the burgeoning field of investor-State arbitrations is a subject that should be explored. Investor-State claims have been increasing in number with over 300 cases now known to have been filed, most in recent years.[2] Of these, over 200 have been filed with the International Centre for Settlement of Investment Disputes (ICSID).[3] Over 75 countries have faced investor-State arbitration claims. [4] With this widespread growth of arbitration of investor-State disputes, scholarly literature analyzing the possibilities of mediation in this context has emerged.[5]

It must be recognized that mediation has not been widely used in investor-State disputes. ICSID has only had a handful of conciliations registered with it. For example, in 2008 there were 31 new arbitrations filed but only one conciliation, and that was a conciliation required by the parties' contract.[6] But mediation has become increasingly accepted as a useful dispute resolution mechanism and has had great success in the United States and the United Kingdom. In recognition of the value of mediation, the European Union adopted the Mediation Directive in 2008.[7] Mediation has long been a part of the societal culture in many nations of the world, all part of today's global economy. The recent economic downturn has caused all parties to

[2] United Nations Conference on Trade and Development [UNCTAD], *Latest Developments In Investor-State Dispute Settlement*, IIA *Monitor* No. 1, at 1 (2009) [hereinafter UNCTAD No. 1].

[3] *Id.*

[4] *Id.*

[5] *See, e.g.*, Jack J. Coe, Jr., "Settlement of Investor-State Disputes through Mediation Preliminary Remarks on Processes, Problems and Prospects," in *Enforcement of Arbitral Awards Against Sovereigns* ch. 4 (R. Doak Bishop, ed., 2009) [hereinafter Coe Preliminary Remarks]; Jack J. Coe, Jr., Toward a Complementary Use of Conciliation in Investor-State Disputes—A Preliminary Sketch, 12 *U.C. Davis J. Int'l L. & Pol'y* 7 (2005) [hereinafter Coe Complementary Use]; Susan D. Franck, "Integrating Investment Treaty Conflict and Dispute Systems Design," 92 *Minn. L. Rev.* 161 (2007) and sources cited therein.

[6] 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.

[7] 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, 2008 O.J. (L 136) 3, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008L0052:EN:HTML.

look for cost-saving measures. All of these drivers increasingly lead to the greater utilization of mediation. Moreover, the success of mediation as a dispute resolution tool is itself creating its own momentum and growth.

Concerns specific to investor-State arbitration also suggest that mediation may 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. 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 common.[8] Investor-State arbitrations can be inordinately costly[9] and subject the state to the possibility of enormous damage awards.

These issues have been recognized and were discussed during the UNCTAD multiyear 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 to address these problems was "to enhance the role of alternative methods of treaty-based investor–state dispute resolution in IIAs [international investment agreements]."[10] Mediation is one such alternative dispute resolution method.

It is generally accepted that about 80 percent of the mediated disputes settle in mediation. Only 30-40 percent of ICSID cases settle before the arbitration is concluded.[11] 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. Accordingly, we review some of the salient benefits of mediation to see if they apply in the context of investor-State arbitration and identify the special obstacles that can stand in the way of settlement of such disputes.

[8] Coe Preliminary Remarks, *supra* note 5.

[9] For example, in *Plama Consortium v. Bulgaria*, the parties' legal costs were over $17 million and in *Pey Casado v. Chile* over $15 million. *See* UNCTAD No. 1, *supra* note 2 at 11.

[10] *Id.* at 12.

[11] Coe Preliminary Remarks, *supra* note 5; Susan D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration," 86 *N.C. L. Rev.* 71 (2007), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=518280.

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 issues, 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.

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.

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 or 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 and the investor interested in protecting other existing interests in the host country or be interested in additional 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.

THE BENEFITS OF IMPROVED COMMUNICATION

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.

THE BENEFITS OF MEDIATION OVER ARBITRATION

Speedier Resolution

As noted above investor-State arbitration proceedings generally take several years to resolve a dispute, and 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 dollar cases often resolve in one or just a few sessions which can be scheduled on an expeditious basis.[12]

Reduced Cost

Preparing a case for arbitration is expensive. The expedited resolution of a dispute in mediation avoids many of the costs of that preparation. 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 asses 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 be exchanged in the arbitration if some discovery is to be part of the arbitration process. 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

[12] 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.

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 of 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. 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.

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 will be possible to maintain the confidentiality of the negotiations and possibly avoid creating grounds for subsequent 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 is authorized to disclose. It also may serve to provide the opportunity for the parties to speak to one another in a confidential setting, which encourages an openness not otherwise achieved and which often enables the parties to find innovative solutions.

Maintains Relationships

Many investor-State disputes are between parties with other important ongoing relationships or with future hoped for investment relationships. Arbitration's adversarial nature can drive a rift between parties who would be better served by maintaining the 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.

OBSTACLES TO SUCCESSFUL MEDIATION IN INVESTOR-STATE DISPUTES

While one is likely to conclude that virtually all of the benefits of mediation described above are applicable to many investor-State disputes, it must be recognized that there are obstacles unique to the settlement of disputes in this setting that must be considered.[13]

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.

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 of a 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.

[13] For a general discussion of many of the obstacles, see Coe Preliminary Remarks, *supra* note 5.

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 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 the settlement amount: is it the agency that committed the acts, the agency responsible for the BIT program, the defending agency, or some other governmental account?[14] Perhaps even more problematically, most countries have provisions that permit them to pay court judgments but have no parallel provisions for paying pre-adjudication settlement amounts.[15] 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 that 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.

[14] 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,'" 21(4) *Mealey's Int'l Arb. Rep.* 72 (2006).

[15] *Id.*

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 agreed.[16] 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 fee 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.

[16] *See* Coe Complementary Use, *supra* note 5, at 29-30.

Transparency and Confidentiality

The increasing call for transparency in BIT disputes and the growing inclusion of transparency provisions in BITs brings to 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 award.[17] 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 court.[18]

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.

[17] *See* Coe Preliminary Remarks, *supra* note 5; *see also* Edna Sussman, "The New York Convention Through a Mediation Prism," 15(4) *Disp. Resol. Mag.* (Summer 2009) (a publication of the American Bar Association) for a discussion of whether an arbitrator appointed after the dispute is settled can issue a valid and enforceable award.

[18] *See* Coe Preliminary Remarks, *supra* note 5.

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.

CONCLUSION

Others on this panel will review the various suggestions for building capacity for successful investor-State dispute resolution.

The first step must be a review of process issues. Many questions present themselves in this context.[19] These would include the following: 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 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 arises. 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 assistance.

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

Some countries are already developing capacity for participating in such mediation efforts for investor-State disputes by creating institutions under domestic law. Peru has established a special commission to evaluate claims. Colombia is developing legislation to create a lead agency to deal with such claims. Korea has an ombudsman to address claims against the state. Others will undoubtedly follow.

[19] *Id.*; Coe Complementary Use, *supra* note 5.

As we look to predict the future of investor-State dispute mediation, we are reminded of the well-known reply of Zhou Enlai, the Chinese premier, when asked by Henry Kissinger in 1976 about the impact of the French Revolution: "on reflection, it is too soon to tell."[20]

[20] *See* http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/zhou_enlai.stm.