Kluwer Arbitration Blog

Making Mediation More Attractive For Investor-State Disputes

Daniel Weinstein (JAMS; Weinstein International Foundation) and Mushegh Manukyan (Office of the Ombudsman for United Nations Funds and Programmes) · Tuesday, March 26th, 2019 · Three Crowns LLP

For many years, arbitration has been the *de facto* vehicle of choice for the resolution of investor-state disputes. However, despite the wholesale and widespread adoption of mediation in every sort of dispute, mediation is used rarely in investor-state disputes (*Systra v. Philippines* is one example). As of this writing, only 11 (1.3% of total ICSID cases) known conciliations—a procedure similar to mediation—have been recorded by ICSID. Even rarer are instances of tribunals encouraging parties to try mediation (*see, e.g., Achmea v. Slovakia*).

In recent years, there have been extensive discussions about the use and potential superiority of mediation for these disputes. In this short piece, we address the main concerns against the use of mediation in investor-state disputes, offer some comparisons to the more popular path for investor-state arbitration, and then present several advantages of mediation to encourage its wider use in the international dispute resolution.

Concerns And Objections To Mediating Investor-State Disputes

Unsurprisingly, only 36% of ICSID cases settle or discontinue. Moreover, according to PITAD, of the total number of 1,056 investment cases, only 186 settled and 104 discontinued (including after the jurisdictional stage). This number renders sufficient proof that there is an ample potential for investor-state disputes to settle through mediation. Despite this, States and investors remain reluctant to use mediation due to various concerns, with the most frequently cited objections outlined below.

State actors may avoid mediation for at least ***five*** reasons (*see* more details in the Report: Survey on Obstacles to Settlement of Investor-State Disputes). *First*, they may wish to avoid taking responsibility for a settlement, and many disputants prefer a terrible outcome imposed upon them to a better, but imperfect outcome that they own. *Second*, they may find it easier to obtain buy-in or budgetary approval for a binding award relative to a voluntary settlement. *Third*, they may be unwilling to publicly accept guilt for previous state actions that ran afoul of agreements or treaties. *Fourth*, officials may fear being accused of corruption and may have concerns about personal liability. *Finally*, the relevant government officials may have conflicting perspectives, interests, and knowledge about the dispute and its settlement. These concerns are largely mitigated in arbitration through shifting the responsibility to external counsel and arbitrators with the power to make a binding decision. In case of a failure, counsel and arbitrators are to blame.

From the investors' perspective, arbitration has become a natural choice to resolve investor-state disputes. Investors even threaten States with arbitration in an attempt to incentivize a State to negotiate. But investors often avoid mediation because they fear that preferring settlement to adjudication may make them appear weak, because they are naïve or overconfident regarding the risks and costs of obtaining an arbitral award, or because they underestimate the challenges of enforcing an arbitral award.

Overcoming These Concerns And Objections

The following ideas are our suggestions for getting past the myriad concerns to mediating investor-state disputes.

Utilizing the Mediator's Proposal. Contrary to arbitration where there is no voluntary exit from the process without legal consequences, an exit from mediation may take many forms. One of the commonly used forms is the mediator's proposal. A mediator's proposal is a mediator's settlement proposal to all parties at the appropriate stage of the mediation—usually when there's an impasse or stuck point in the bargaining, and each party is given the option of accepting or rejecting it without modification. If both parties accept, settlement occurs. If either rejects, bargaining continues.

We suggest several additional features to a traditional mediator's proposal, namely that upon parties' acceptance of the proposal the mediator—if he or she feels appropriate to do so—issue a letter confirming that (i) the negotiated deal is fair; (ii) the terms agreed upon by the parties are commercially reasonable; and (iii) negotiations were conducted in good faith. It is critical that the mediator be highly credible and trusted so his or her opinion can have an ample weight for executive officials, State leadership, and the general public. The proposal would allow government officials to minimize if not eliminate most of their concerns regarding settlement.

Appreciating the Value of an "Unsettled" Mediation. The success in arbitration is frequently measured by the victory and the size of the awarded damages. In the same vein, mediation is often wrongly perceived to be successful only if the dispute is settled. Simply because a mediation concluded without a settlement does not mean that the mediation failed. An unsettled mediation can also yield benefits, such as: (i) a better understanding of the dispute and the interests involved; (ii) a chance to evaluate the opposing party's counsel; and (iii) an opportunity to assess the merits of each side's arguments. These qualities of a "failed" mediation may lead parties to productive direct negotiations or streamlined adjudication. This is particularly relevant for parties who find themselves in the cooling-off period of an investment treaty because they can evaluate their case prior to launching arbitration.

Appointing the Right Mediator. Appointing a professional arbitrator as a mediator who would likely lack extensive mediation experience is a rookie mistake. While an experienced arbitrator would have a better insight into the substantive issues of the investment dispute, mediation is firstly about the fair process and techniques to encourage effective discussion between the parties. Empaneling two mediators—an expert in the process and an expert in substantive issues—may be an optimal solution.

Mandatory Investor-State Mediation. The rise of investment arbitration was largely caused by investment treaties that envisaged arbitration for the resolution of investor-state disputes. Parties often need a little push to try new things. Lawyers who fell prey to litigation inertia found that the

judicial push to attend mandatory mediation (not to be confused with mandatory settlement) served them and their clients well. They say, "you can lead a horse to water but you can't make it drink." But when the leader is a judge or legislature the "horse," (parties or their lawyers) who may be subject to the proclamations of the bar, judiciary or business community, drinks and typically feels better after a long, cool sip. Mandating mediation for certain types of investment disputes, such as disputes below or above a certain financial threshold, may encourage litigants to embrace mediation and use it for a wider range of investment disputes.

The Arguments In Favor Of Investor-State Mediation

It is not enough to shoot down the arguments against mediation in investor-state disputes—there must be stand-alone, positive reasons to break inertia and change the system. Here, we present ***five*** distinct benefits, as compared to arbitration, that mediation may provide for investor-state disputes—and we are sure we have neglected some.

Parties can save significant money and time. A recent study shows, on average parties spend four years in an investment arbitration; investors and States spend at least US$ 6 million and US$ 4.8 million, respectively, on representation fees. In addition, the average cost for a three-member tribunal amounts to at least US$ 920,000. The time and money spent in investment arbitration are extraordinary compared to the time and money the parties could be spending in mediation.

Certainty of settlement versus uncertainty of arbitration. While a settlement is tangible and certain, the arbitration proceedings are only the tip of the iceberg of the final resolution of the dispute. Not only is the award unpredictable, but even after benefitting from an award in its favor, the prevailing party needs to take substantial steps to recover. And the successful party would likely face fierce hostility from the opposing party in trying to enforce the award.

Preserving relationships. Mediation is very useful when there is an ongoing or potential relationship between the parties. This may explain the widespread success of mediation (including mandatory mediation) in family disputes. Similarly, when an investor resorts to investment arbitration it should realize the likelihood of burning bridges and alienating the host country. In only a limited number of cases (*e.g.*, *CME v. Czech Republic*), have funds recovered through investment arbitration been reinvested in the host state.

Business and policy considerations. Investors or States may have business or sovereign reputational concerns in filing or sustaining an arbitration claim. Further, the investor's or its shareholders' priorities may change in relation to the dispute throughout arbitration proceedings. Similarly, a new government may want to send positive messages to foreign investors by attempting to settle existing disputes with investors.

***Confidentiality*.** Mediation is confidential. This means that, by and large, anything said in mediation cannot be used in courts. Indeed, parties often expand the scope of the confidentiality through a separate agreement or applicable rules. Although investment arbitrations in many cases have been conducted confidentially (while only awards and a few procedural decisions become public), recent trends toward transparency tend to undermine confidentiality in investor-state arbitrations.

Conclusion – A Dam Ready To Break?

We do not suggest that parties should mediate all investor-state disputes. The most politically

contentious disputes would likely be resolved through a binding arbitration. We rather propose that disputing parties employ mediation as one of the tools in their dispute resolution arsenal, which could be used prior to filing an arbitration claim (e.g. during the cooling-off period), during the arbitration proceedings, or even after the award is rendered.

To that end, some States have steadily encouraged mediation for investor-state disputes largely due to their disappointment from investment arbitration (*see, e.g.,* the European Commission's 2017 consultation document or the 2016 Guide on Investment Mediation of the Energy Charter Conference). On their part, the IBA, ICSID, and others have also encouraged the use of mediation. We hope that this trend continues and that investor-state mediation takes its rightful place alongside the successful use of mediation in so many other realms.

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