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Mediation of Investor-State Disputes: Revisiting the Prospects

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Getting over the skepticism. Since the International Bar Association adopted its Rules for Investor-State Mediation last October, there has been an uptick in discussions regarding the topic, including a mock mediation panel presented this spring during the American Society of International Law's Annual Meeting. Nonetheless, investor-State mediation still faces skepticism from many arbitration professionals, both because of the limited track record of mediation and conciliation in this arena (*e.g.*, only 6 concluded and 3 pending ICSID conciliation proceedings) and because of the political realities inherent in "settling" by any means a claim against a State, which requires individual officials to take ownership and responsibility for a decision that may involve concessions or payments.

It is worth remembering, however, that investor-State arbitration faced similar skepticism just a few decades ago. According to the ICSID website, while only 18 arbitration cases were registered at ICSID in its first 20 years (1965-1984), the next 20 years saw 150 new cases (1985-2004), and a further 242 cases were registered in the following 8 years alone (2005-2012). Meanwhile, in the business world, use of mediation has grown *alongside* arbitration, to the extent that many commercial agreements even require efforts to mediate as a precursor to commencing arbitration. The track record for mediation in the commercial arena has been stellar: according to the ICC's 2012 Statistical Report, 16 out of 21 new cases (76%) that were filed in 2012 under the ICC ADR Rules were settled by mediation, with two more settled by conciliation, one by a combination of neutral evaluation and mediation, and the remaining two withdrawn before the settlement technique had been fixed.

While investor-State disputes present special challenges, there is no reason to assume that over time mediation or conciliation might not emerge, similarly, at least as a palatable option to attempt before commencing what may turn out to be lengthy arbitration proceedings. The first step may be from States (like Canada) that already have proven amenable to early negotiations to try to settle certain claims, while vigorously defending against others. If a State is willing in principle to contemplate the amicable resolution of claims, it is not too much of a leap to imagine that it might be willing to attempt non-binding procedures to assist in that resolution.

The issue then becomes which aspects of investor-State mediation may be most attractive to potential users, and whether any improvements in infrastructure are necessary to strengthen them. Several aspects deserve consideration.

1. Cost and time-saver, or further delay? The old assumption that arbitration is more time and

cost efficient than traditional litigation has given way to the recognition, particularly in investor-State cases, that arbitration itself can be drawn out and immensely expensive. Even in the purely commercial arbitration context, a 2011 Chartered Institute of Arbitrators survey of 254 arbitrations conducted between 1991 and 2010 reported an average length of 17 to 20 months, and average costs of around 2 million dollars. Investor-State arbitrations generally are longer and more costly; Anthony Sinclair's 2009 survey of 115 ICSID cases revealed an average 3.6 years from request to arbitration to final award, a figure that would expand significantly if initial mandatory cooling-off periods and possible annulment challenges were factored in.

The length of investor-State proceedings is due to many factors, of which a limited pool of very experienced and thus very busy arbitrators is only one. Much of the delay is inherent in the fact that the issues tend to be complicated and the parties for understandable reasons wish to litigate them in depth. Arbitrators likewise feel compelled to address the issues in depth in the award, not only because of the importance of their mandate, but also because of the need to "show their work" to protect against annulment challenges for "failure to state reasons," and the likelihood that awards will become public and the tribunal's reasoning thus be scrutinized by a broader audience.

In principle, investor-State mediation has the potential to save time and costs, because selection of only one mediator is required, less time is required to educate the mediator on the parties' basic positions for purposes of exploring amicable resolution than for fully arbitrating a dispute, and settlements obviate the need for a (lengthy) written decision. The few ICSID conciliation proceedings that have been held suggest that where they are successful in brokering a settlement, this happens more quickly than an arbitration proceeding produces a final award, although still not as quickly as one might hope.

Of course, not all mediated cases result in settlement, and it is axiomatic that a failed mediation that does not obviate the need to proceed to arbitration adds to the length of the overall process. Parties who consider settlement to be extremely unlikely may see little advantage, therefore, in trying mediation first, except insofar as it may enable them to learn (and become more realistic) about the strengths and weaknesses of their respective positions, for purposes of a later arbitration. On the other hand, there are many investor-State cases in which settlement realistically *cannot* be ruled out from the beginning: the latest ICSID statistics reveal that some 24% of all concluded ICSID arbitrations between 1972 and 2012 settled during the proceedings. For such cases, the calculus of risks and benefits of attempting an initial mediation may shift if investor-State mediation procedures can be made reliably expeditious.

2. Privacy and confidentiality. Most investor-State arbitrations attract significant media and public attention, which can complicate any path towards amicable resolution. Mediation offers greater alternatives to maintain confidentiality. Article 10 of the new IBA Rules provides the general rule of thumb for investor-State mediation — that it can be as private as the parties wish it to be. To a significant extent, the parties can agree in writing how much they would like to disclose, or not to disclose, regarding the content of the settlement or the documents relevant to the case.

Of course, the extent of confidentiality depends on whether the mechanism chosen for mediation itself results in public acknowledgement that a mediation process is underway, as for example is the case with the use of ICSID's conciliation procedures. Other institutions offering mediation services do not, however, maintain public registries of disputes submitted to them for this purpose. Mediation may also be more amenable to use of *ad hoc* (non-administered) procedures, particularly

as (unlike arbitration) it does not hinge on the eventuality of a detailed written decision that may be challenged or require enforcement against a recalcitrant party. By definition, mediation results either in a jointly agreed outcome (for which the negotiated terms may be kept quiet or released publicly as the parties prefer), or a simple failure to agree, which does not require public release that the process even has been attempted in the first instance.

3. Compliance. One of the perceived limits to mediation may be that unlike arbitration, it results, even when successful, simply in a contractual document (a settlement agreement) rather than a judgment or award carrying the independent imprimatur of a respected institution. Under Article 54 of the ICSID Convention, for example, ICSID awards are to be treated as binding by all other signatory States, and enforced as if such awards represented final judgments of the highest national courts of each such State. Outside of the ICSID process, arbitration awards carry significant weight through the provisions of the New York Convention, which limit the bases upon which they can be challenged or on which enforcement may be denied by national courts. By contrast, settlement agreements — whether achieved through mediation or direct negotiations — do not carry the same legal force.

However, the solution to this is fairly straightforward. As the parties in at least 15 ICSID cases have realized, an arbitral tribunal may be asked to incorporate the settlement in the form of a consent award, which then attracts all the enforceability of a final award under the ICSID Convention. In principle, there is no reason that parties proceeding through mediation could not invoke similar procedures, by jointly agreeing on an "arbitrator" to "so order" their settlement in the form of a consent award, either within the ICSID process or in the form of another type of institutional or *ad hoc* award protected by the New York Convention.

4. Restoration of business relationship. Mediation is also advocated for its ability to result in flexible solutions that may preserve an underlying business relationship, perhaps by restructuring obligations or encouraging additional commercial opportunities by way of creative compensation. By contrast, arbitration generally results in an award of monetary damages, which may leave unchanged (or even further damage) the underlying relationship between the parties. For investors whose ventures in a host State are irretrievably terminated, this distinction may not be a relevant factor. But history has shown that investment arbitration is not just an exit strategy; many investors who commence investor-State arbitration in fact intend (or at least would prefer) to remain active participants in the host State market. By avoiding a framework of "all out war," and instead facilitating an early dialogue, mediation may function as a form of early risk management, to help preserve underlying business relationships before they are too late to mend.

5. Decision-making power. Article 9(3)(a) of the IBA Rules states that "[a]t the mediation management conference, … each party shall either identify a representative who is authorized to settle the difference or disputes on its behalf or describe the process necessary for a settlement to be authorized." In some States, this may be the greatest obstacle to potential settlement through mediation or otherwise, either because investment disputes involve complex issues that range across multiple State agencies, or because political will is lacking. It can be difficult for State officials to take personal ownership (and therefore political "heat" back home) of a decision to recommend settlement or to accept such a recommendation made at a lower level of authority.

A lesson in this regard may be learned from Canada, which uses a standing professional body within its Department of Foreign Affairs and International Trade to evaluate and defend (or settle) NAFTA and other investor-State claims, rather than relying *ad hoc* for evaluation on officials more

closely affiliated with the ministries or agencies whose underlying conduct is at issue in individual disputes. A recommendation of settlement by apolitical authorities charged with making professional evaluations in the broader interest of a State may be easier to achieve — and easier for politicians ultimately to accept — than expecting the very officials whose conduct has been questioned to admit that their actions have created potential vulnerabilities for the State that may be in its interest to resolve voluntarily, without long drawn-out arbitration proceedings.

Conclusion. Investor-State arbitration has developed and matured significantly in the past few decades, and has established itself as an independent mechanism for resolution of complex public-private disputes. At the same time, the system necessarily has challenges and limitations, particularly as it evolves more and more to resemble all-out litigation. While not begrudging in any way the advantages of arbitration for disputes that simply cannot be resolved by other means, the time may be right to revisit the possibilities of investor-State mediation in appropriate cases, as either an alternative or a precursor to eventual arbitration. One way to move forward in this area would be for neutral observers to begin to collect examples of "best practices" that have facilitated settlement even after commencement of arbitration, from which providers of mediation services can learn. It would be interesting, too, to open more dialogues with States that have faced multiple investor-State arbitration claims, to explore whether there are innovations that might make the idea of using mediation more palatable to them in future.

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