



# RECENT TRENDS IN INVESTOR- STATE DISPUTES: AN UPDATE ON MEDIATION AND CONCILIATION

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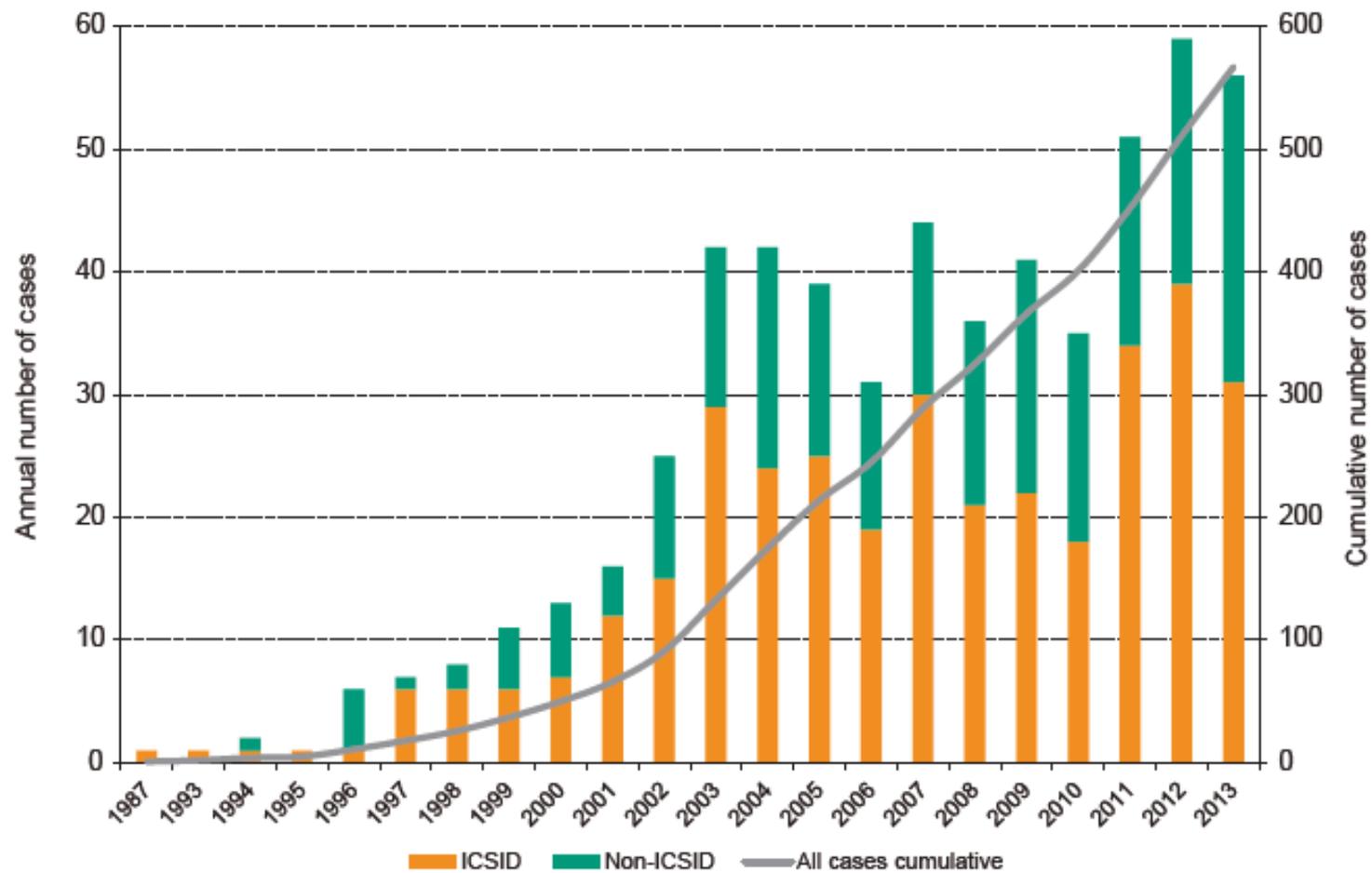
Anna Joubin-Bret  
Avocat à la Cour  
Cabinet Joubin-Bret  
Paris

# Outline

- The reasons for promoting mediation as an alternative to ISDS
- The framework for Investor-State Mediation: the treaties allow but are not conducive
- A recent trend in investment treaties: Investor-State Mediation (ISM) provisions
- Comparing CETA Annex on Mediation and IBA ISM Rules
- ISM in practice
- The way forward

## IN 2013, 56 NEW ISDS CASES WERE FILED - THE SECOND LARGEST ANNUAL NUMBER IN HISTORY

### Trends in known ISDS cases, 1987–2013



# The specific nature of investor-State dispute settlement

- They involve measures taken by a sovereign State at the central, regional or municipal levels). The State is **ALWAYS** the defendant in these cases;
- The dispute is subjected to international law;
- Recourse to international arbitration is among the options an investor can choose from;
- The relationship between investors and host States are meant to be long term investments.
- A final award granting compensation defeats the purpose of investment promotion;
- The amounts to defend the cases and final awards are very high and involve public money..

# Advantages/disadvantages of ISMediation

## Disadvantages of mediation

- Dilatory/waste of time and money
- Limited capacity and expertise
- Finality of an arbitral award
- Enforceability?
  
- Responsibility for government officials
- Accountability: binding decision
- Not suitable for all types of disputes

## Advantages

- Limited costs
- Limited time frame
- Control for the State over the process
- Response to concerns about ISDS?
- Safeguards the investment relationship: win/win
- Alternative outcomes/not only monetary compensation
- Flexibility
- Process supported by treaty and rules

# The framework for I-S Mediation

Beyond eye-rolling and awareness-building: 4 basic requirements

- An offer to mediate in investment treaties
- Rules to guide investor-State mediation
- A pool of credible mediators
- Enforcement of the mediated settlement?

# Mediation offer in IIAs

- **1<sup>st</sup> requirement: the treaty must allow/offer mediation**
- A growing number of IIAs: Specific wording referring to mediation/conciliation as a method to reach amicable settlement during the “cooling-off” period.
- Ex: the US model treaty.
- Ex.: the ECT

# Recent trend: stand-alone mediation provisions in IIAs

- A recent trend: Stand-alone mediation provisions in IIAs
  - Mediation annex in draft EU-Canada CETA
  - Mediation/conciliation in the ASEAN ACIA
  - The revised Investment Treaty of the Arab League of January 2013
  - The COMESA CCIA
  - In model BITs and recent treaties: the Thai model BIT of 2012

# ISM-specific rules: treaty-based or Stand-alone ?

- The Canada-EU CETA (draft) annex on mediation: detailed rules in the treaty
- The IBA investor-State mediation rules
- The UNCITRAL Rules on conciliation (in fact mediation rules)
- The ICSID Rules on conciliation
- New ICC Mediation Rules
  
- Drafting treaty-specific mediation rules
- Reference to general or specific rules
  
- Recommendation: guide the parties. Allow for changes.

# Treaty-specific mediation rules

- The Canada-EU CETA (draft) annex on mediation

General provision in the treaty:

- 1. The disputing parties may at any time agree to have recourse to mediation.
- 2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.
- 3. Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by mutual agreement between the disputing parties.
- Proposed time-frame for mediation: 60 days from the appointment of the mediator.

# The IBA ISM Rules of October 2012

The Rules Propose guidelines for:

- the commencement and the termination of a mediation process,
- the conduct of a mediation including a mediation management conference,
- the appointment and the role of a mediator (or co-mediators),
- privacy and confidentiality of the mediation,
- issues such as costs and fees
- An appendix A with a Model Statement of Independence and Availability
- An appendix B with Qualifications for Mediator
- An appendix C with Choice of Mediator through designating authority.

# CETA Mediation Annex v. IBA ISM Rules

## CETA Mediation Annex

- Mediation rules are part of the treaty
- Link to other dispute settlement mechanisms
- Emphasis on limited time frame: 60 days
- Anytime: in parallel
- Limited flexibility
- Confidentiality provisions
- Appointment from a roster

## IBA ISM Rules

- Stand-alone ISMediation Rules
- Parallel and at any time
- Flexibility on time frame
- Mediation management conference
- Co-mediation
- Link to institution
- Confidentiality provisions
- Appointing authority

# CANADA-EU (draft) Annex on Mediation

- Summary of timeframe: Overall 60 days from the appointment of the mediator
- Response by the other Party: within 10 days from receipt of the request
- Appointment of mediator: within 15 days from the receipt of the reply to the request
- Appointment by ICSID SG: within 5 days from the receipt of the request to appoint
- Statement by one party: within 10 days from the appointment of the mediator
- Statement by the other party: within 20 days from the receipt of the statement by the other party
- Overall timeframe: 60 days.
- On request: final report (15 days to comment).

# General and ISM-specific rules on mediation

- ISM-specific: the IBA ISM Rules of 2012

Recourse to general mediation/conciliation rules:

- The UNCITRAL Rules on conciliation (mediation)
- The ICSID Rules on conciliation
- The ICC Mediation Rules of 1<sup>st</sup> January 2014

# ISM in practice

- One ICSID conciliation case currently using IBA ISM Rules: Equatorial Guinea
- Direct settlement: examples in Malaysia, Indonesia.
- The ombudsman in Korea
- ICSID cases settled before reaching final award: up to 39% (WB IFC data)
- Need for accountability and transparency
  
- Difficult to access statistics
- + and – of confidentiality

# The way forward

- Administration of mediation proceedings is essential to build trust in mediation. Disseminate success cases.
- Develop a roster to strengthen the offer: arbitrators/judges/diplomats/mediators. A role for diplomats and former diplomats?
- Capacity-building for parties, specially for the government officials
- The UNCITRAL working group mandate for 2014: enforcement of a mediated settlement.

# A pool of ISM mediators: work in progress

- Certification/accreditation: the role of the IMI
- Capacity-building
- A set pool (EU-Can roster of arbitrators) or an open set of criteria (IBA ISM).
- The experience of the ICC: building professionalism and capacity.
- Link with arbitration and judiciary.

# THANK - YOU

- Contact:
- Anna Joubin-Bret
- Cabinet Joubin-Bret
- 4 bis rue du Colonel Moll
- 75017 Paris
- [ajb@joubin-bret.com](mailto:ajb@joubin-bret.com)
- [www.joubin-bret.com](http://www.joubin-bret.com)