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

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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

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<th>Disadvantages of mediation</th>
<th>Advantages</th>
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<td>• Dilatory/waste of time and money                                                         • Limited costs</td>
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<td>• Limited capacity and expertise                                                            • Limited time frame</td>
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<td>• Finality of an arbitral award                                                            • Control for the State over the process</td>
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<td>• Enforceability?                                                                          • Response to concerns about ISDS?</td>
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<td>• Responsibility for government officials                                                   • Safeguards the investment relationship: win/win</td>
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<td>• Accountability: binding decision                                                         • Alternative outcomes/not only monetary compensation</td>
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<td>• Not suitable for all types of disputes                                                    • Flexibility</td>
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<td>• Process supported by treaty and rules</td>
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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\textsuperscript{st} 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 appointing authority
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 1st 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

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