

The Greatest Victory? Challenges and Opportunities for Mediation in Investor-State Dispute Settlement

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Asia's Contribution to Five Principles of

**PEACEFUL
COEXISTENCE**

:Past and Future

‘The **Greatest Victory** is the One that Requires no Battle’

Sun Tzu, The Art of War

5th Century BC



Sharp Ears to Hear a Thunderclap?

Downsides of Arbitration

- High **costs** of arbitration (averaging US\$4.2 to US\$6 million for claimants and US\$3.4 to US\$4.9 million for respondents)
- Protracted **time** frames (circa four years excluding annulment proceedings, which have a median average of two further years).
- '**Consistency**, coherence, predictability and correctness of arbitral decisions', matters related to the 'arbitrators' independence and expertise' and 'third-party funding' in investor-State arbitral proceedings.

Public Legitimacy Crisis

- Multiple legitimacy-related systemic anxieties and social costs relating to ISDS had led to a 'public legitimacy crisis'
- including because the so-called **regulatory chill**, whereby States arguably hesitate to implement public policy regulation in the health, environment or human rights areas for fear of investors making claims with the potential to escalate into astronomical arbitral awards.

Effects of arbitration on 'public decision-making', in particular across the developing world, underlies critical views of it such as that of M. Koskenniemi, for whom 'the juristic debate is but the surface of struggle over the role of public power and democratic governance of domestic and global economy'.

Nine Challenges / Obstacles to Mediation

1. Traditional obstacle

- The lack of mediation rules specific to investor-state disputes



1. Recent Trends

Proliferation of new mediation rules specific to ISDS in the last decade

International Bar Association's (IBA) rules on investor-State mediation (2012) New mediation rules which are also applicable to investment disputes released by the International Chamber of Commerce (ICC) and the Institute of the Stockholm Chamber of Commerce (SCC) in 2014. Crowning these developments is the first institutional 'standalone' set of mediation rules specifically designed to be fit for purpose in investment disputes proposed by the ICSID.

Nine Challenges / Obstacles to Mediation

2. Traditional obstacle

The lack of specific reference to mediation in most investment treaties and even less so to compulsory mediation.



2. Recent Trends

- The last decade has seen an increase in the provision for mediation as a means of amicable dispute resolution' A rising mediation trend can be observed across new treaties signed between 2010 and 2019 with more than one in four of them (28 per cent) providing for mediation.
- Mediation as a consensual mechanism may 'be agreed ad hoc between the disputing parties' at any time.

Nine Challenges / Obstacles to Mediation

3. Traditional obstacle

The absence in many host states of a national legal framework providing clear authorisation for officials to attempt to resolve disputes through investor-state mediation’.

Tendency among both government and corporate bureaucracies to ‘shift rather than assume responsibility’ to a third party such as the ‘tribunal, which determines the outcome by its award’, whereas ‘in mediation, the parties ultimately assume responsibility for the terms of the settlement

3. Recent Trends

- Greater awareness of the obstacle posed by a lack of appropriate domestic legal frameworks in this area has in turn led to suggestions for proposals to remedy them. In 2018, the Energy Charter Secretariat released its ‘Model Instrument on Management of Investment Disputes’ as a specific response to related challenges that may hinder the effectiveness of investment mediation

Nine Challenges / Obstacles to Mediation

4. Traditional obstacle

The disjunctive tensions between the goals of transparency in ISDS and the benefits of confidentiality in mediation

Concerns regarding public accountability in decisions to mediate under confidential conditions are further heightened by risks that such mediated settlements may impinge on a broader set of human rights and environmental obligations

4. Recent Trends

- In contrast with arbitral proceedings, no specific submissions by States in the current reform process under the aegis of UNCITRAL, and only a very limited number during consultations on the ICISD's mediation rules have emphasized the need to enhance transparency in conciliation- or mediation-related proceedings.

Nine Challenges / Obstacles to Mediation

5. Traditional obstacle

The absence of a pool of qualified mediators



5. Recent Trends

- The International Mediation Institute (IMI) released 'The IMI's Competency Criteria for Investor-State Mediators' in 2016. These competency criteria, which are designed to 'assist parties, institutions, designating authorities, and other appointing bodies in selecting competent and suitable mediators or co-mediators'.
- Several institutions have joined efforts to collaboratively offer training programmes for IS mediators to fulfil these criteria, and a number of professional service providers in the form of mediation centres for commercial and investment disputes have also recently been created in different regions

Nine Challenges / Obstacles to Mediation

6. Traditional obstacle

The general lack of awareness of the potential usefulness of mediation in the international investment community



6. Recent Trends

- Recent developments have fostered much larger analytical attention to mediation in the specialized academic literature as has the release of new explanatory resources ‘designed to encourage States and investors to actively consider mediation for investor-state disputes’ from different institutions.

Nine Challenges / Obstacles to Mediation

7. Traditional obstacle

Uncertainties regarding enforcement of mediated settlements in the investor-State context



7. Recent Trends

The entry into force (2020) of the Singapore Convention (57 Signatories; Parties: 14) (UN Convention on International Settlement Agreements Resulting from Mediation) which aims to provide a legal framework for mediated settlements comparable to what the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention') did for international commercial arbitration.

Nine Challenges / Obstacles to Mediation

8. Traditional obstacle

An excessive focus on mediation and other ADR mechanisms may turn out to become a regressive move fostering de-legalization and de-judicialization in the settlement of investment disputes.

It risks bringing back the problems to which arbitration in ISDS was deemed a solution, namely the need to create a stable international legal framework to facilitate and protect foreign investments which, in turn, bolsters the rule of law and promotes economic development

8. Recent Trends

- If mediation was to altogether take the currently hegemonic position of arbitration in ISDS it may risk reverting the successfully accomplished 'politics-to-rules transition of the resolution of disputes between states and foreign investors'. However, the percentage of recourses to mediation remains negligible when compared to arbitration and greater recourse to it may, indeed, effectively alleviate some of the current tensions in the arbitration centred system.

Nine Challenges / Obstacles to Mediation

9. Traditional obstacle

Entrenched interests favouring arbitration and related resistance from the legal industry sector.

Law firms have short-term financial incentive to encourage disputing parties to abandon arbitration for mediation' and 'driven by 'professional inclination' or 'self-interest' they may suggest that mediation is 'not effective' or is merely a 'delaying tactic'.

9. Recent Trends

In recent years several international firms have developed models to make a profit from mediated settlements



