



Universität Hamburg
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Mediation in Future Investor-State Dispute Settlement

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Overview

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Motivation: Dispute Prevention

2

Where do we stand de lege lata?

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Ways forward

1

Motivation: Dispute Prevention

	National	International
State / State	n.a.	Long history
Private /Private	Strong	Gaining ground, Singapore Convention on Mediation (entry into force on 12 September 2020)
State / Private	Gaining ground (CoE)	ISDS: the gap to fill, but slow beginnings

2

Where do we stand de lege lata?

1. Cooling-off periods in IIAs

- Encourage negotiation before parties can initiate formal arbitration procedures
- Conciliation, state agency or an ombudsman are common in cooling-off periods but can also be a vessel for mediation

2. Mediation provisions in newer IIAs

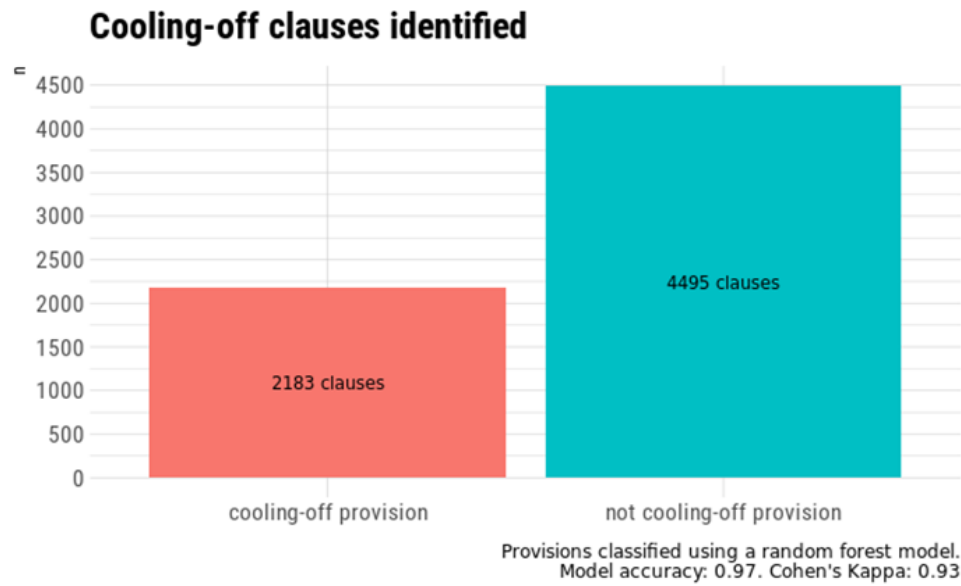
2 Where do we stand de lege lata?

- Mapping the field of cooling-off periods in IIAs
 - UNCTAD mapping project contains no information on cooling-off periods
 - WTI EDIT project did not code cooling-off yet
 - Our Data Set done by supervised machine learning (Algorithms) on 3,127 treaties (of the WTI EDIT Project)
 - At **treaty** level, the model identified cooling-off provisions **in 2,052 treaties**. If we take the 2,885 treaties with ISDS-related articles identified, this would represent **71%** of the treaties
 - Cooling-off periods are predominantly 6 months

2

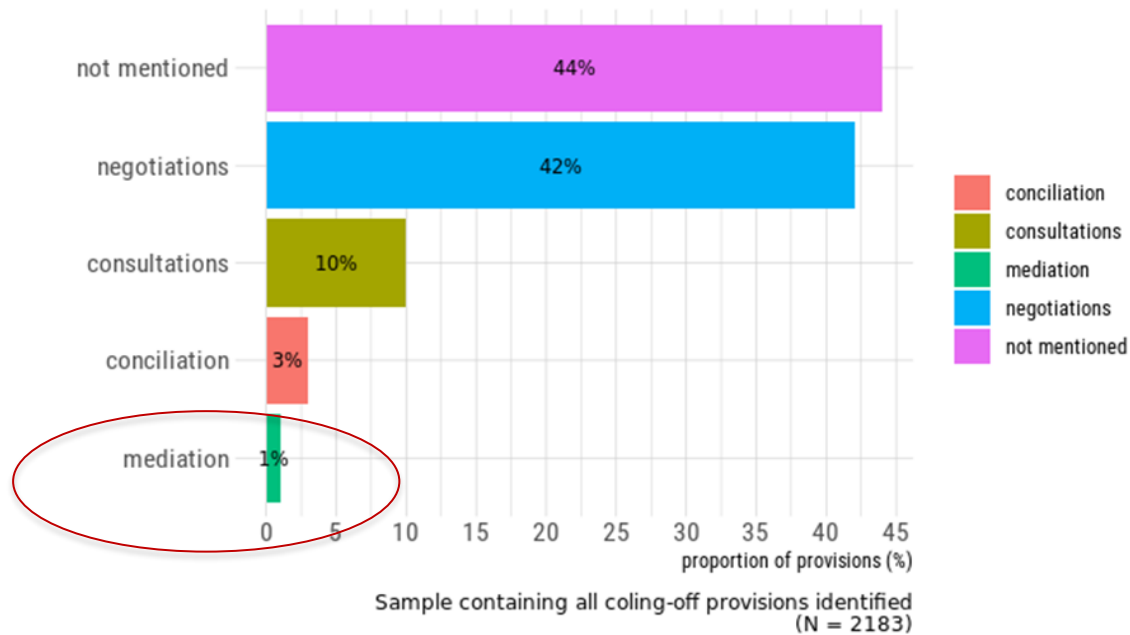
Where do we stand de lege lata?

- Mapping the field of cooling-off periods in IIAs at the **article** level (more than one in some treaties)



2 Where do we stand de lege lata?

- Type of ADR mentioned in within cooling-off periods (absolute numbers and percent)



2 Where do we stand de lege lata?

- ADR provisions in IIAs (UNCTAD Data Base, 2577 IIAs)
 - **627 treaties** containing a provision for **voluntary** ADR (conciliation / mediation)
 - **No treaty** containing a provision for **compulsory** ADR (conciliation / mediation)
 - **1813 treaties containing no provision**

- Newer IIAs containing explicit provisions of mediation (not exhaustive)
 - USMCA, CETA, CPTPP, Argentina-Japan BIT, Argentina-UAE BIT, Armenia-Japan BIT, Australia-Peru FTA, Belarus-India BIT, Canada-Moldova BIT, Central America-Korea FTA, Kazakhstan-UAE BIT, Singapore-Sri Lanka FTA, UEA-Uruguay BIT, EU-Singapore IPA, EU-Vietnam (even with Annex on mediation)

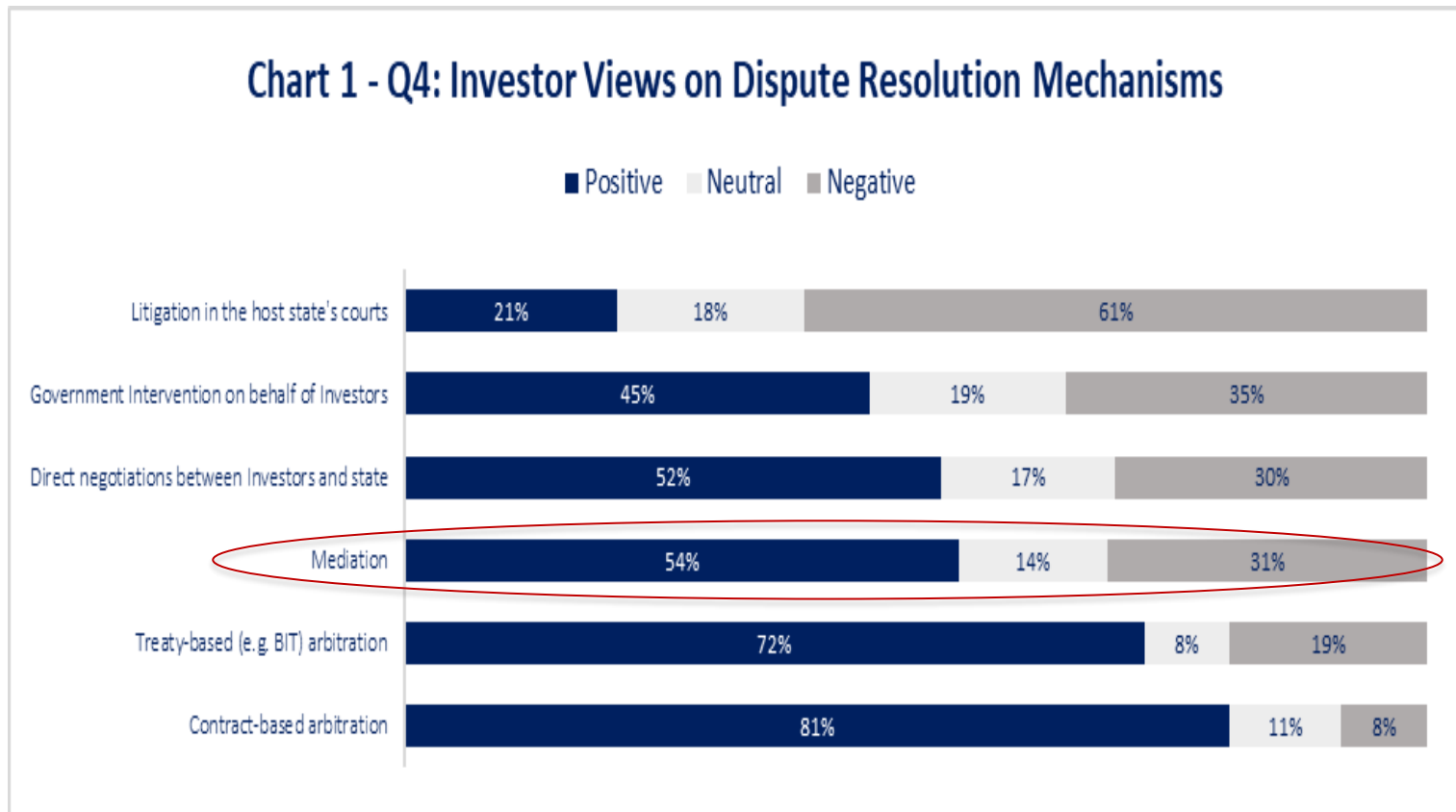
3 Case law

- In the ICSID system, 12 cases have been reported under the ICSID conciliation rules, harder to count for mediation
- 10 cases identified
 - Most common scenario: mediation has taken place **prior to the notice of arbitration**
 - Pre-ISDS mediation/conciliation effort is started **after notice of arbitration** is served
 - **Mediation only:** IBA rules for investor-state mediation (avoiding arbitration)
 - **Mediation in parallel** to pursuing arbitration

4

Potential concerns about mediation

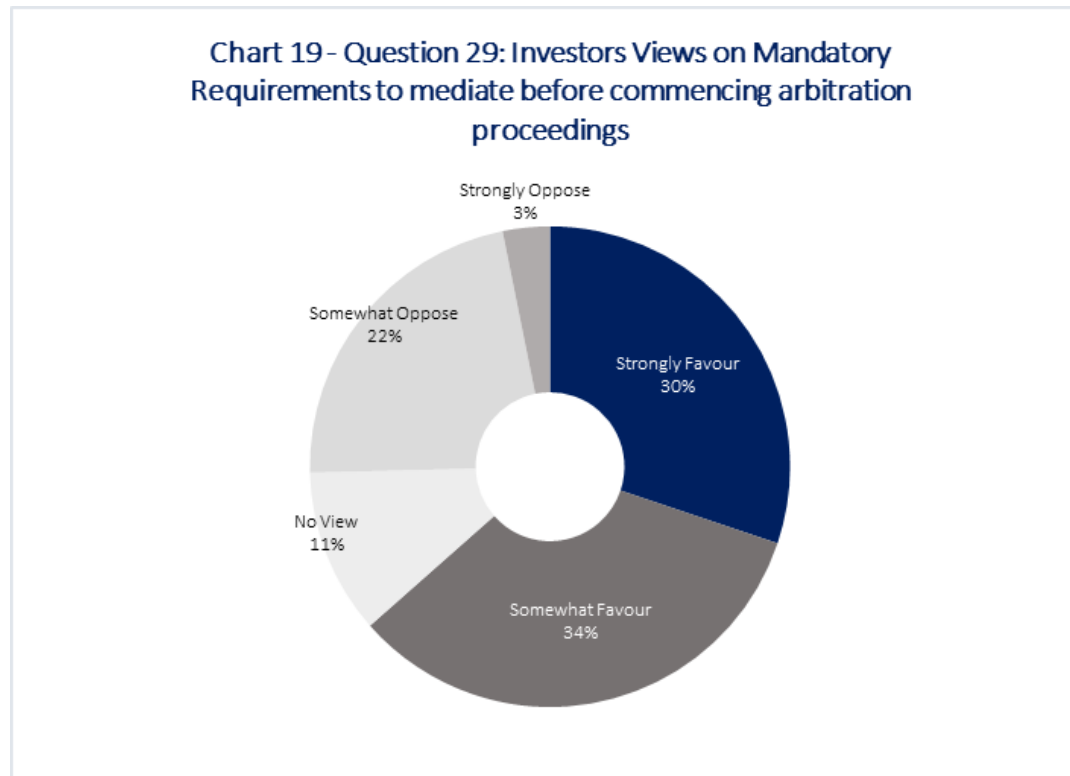
➤ Investors' view (2019/2020 QMUL investors' survey)



4

Potential concerns about mediation

➤ **Investors' view** (2019/2020 QMUL investors' survey)



4 Potential concerns about mediation

- Potential **civil society concerns**: human rights compatibility, confidentiality and opacity
- **Legislative impediments and State governance**: mediation may be prohibited for state authorities or need express authority to mediate; governmental approval process maybe cumbersome
- **Policy impediments** (accountability)
 - Problem of confidentiality of mediation
 - No binding decision on possibly high sums of money
 - Need to show that state authorities act in best interest of country
 - Possible solution: special, independent body (accountable to the highest political body and certainly to Parliament)

5

Ways forward

- **Guidelines** as to how to frame the mediation to make sure it
- ... fits the specific needs of **States**:
 - Timing
 - Line of authority
 - Monitoring the work of the person(s) participating in the mediation
 - Transparency and adaptation of the confidential parts of the process
- ... meets **civil society's** concerns: special techniques for reduced confidentiality

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Ways forward

- Enforcement of mediation settlement (Singapore Convention applicable if no reservation under Art. 8. 1. (a).)
- Code of conduct for mediators
- Cost and duration allocation
- Advisory Center on ISDS with capacity building function for mediation



Thank you for your attention!

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