Mediation in Future Investor-State Dispute Settlement

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Overview

1. Motivation: Dispute Prevention
2. Where do we stand de lege lata?
3. Case Law
4. Potential concerns about mediation
5. Ways forward
Motivation: Dispute Prevention

<table>
<thead>
<tr>
<th></th>
<th>National</th>
<th>International</th>
</tr>
</thead>
<tbody>
<tr>
<td>State / State</td>
<td>n.a.</td>
<td>Long history</td>
</tr>
<tr>
<td>Private / Private</td>
<td>Strong</td>
<td>Gaining ground, Singapore Convention on Mediation (entry into force on 12 September 2020)</td>
</tr>
<tr>
<td>State / Private</td>
<td>Gaining ground (CoE)</td>
<td>ISDS: the gap to fill, but slow beginnings</td>
</tr>
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</table>
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
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
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)
Where do we stand de lege lata?

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

➢ Investors’ view (2019/2020 QMUL investors’ survey)

Chart 1 - Q4: Investor Views on Dispute Resolution Mechanisms

<table>
<thead>
<tr>
<th>Dispute Resolution Mechanism</th>
<th>Positive</th>
<th>Neutral</th>
<th>Negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litigation in the host state’s courts</td>
<td>21%</td>
<td>18%</td>
<td>61%</td>
</tr>
<tr>
<td>Government intervention on behalf of Investors</td>
<td>45%</td>
<td>19%</td>
<td>35%</td>
</tr>
<tr>
<td>Direct negotiations between investors and state</td>
<td>52%</td>
<td>17%</td>
<td>30%</td>
</tr>
<tr>
<td>Mediation</td>
<td>54%</td>
<td>14%</td>
<td>31%</td>
</tr>
<tr>
<td>Treaty-based (e.g. BIT) arbitration</td>
<td>72%</td>
<td>8%</td>
<td>19%</td>
</tr>
<tr>
<td>Contract-based arbitration</td>
<td>81%</td>
<td>11%</td>
<td>8%</td>
</tr>
</tbody>
</table>
Potential concerns about mediation

➢ Investors’ view (2019/2020 QMUL investors’ survey)

Chart 19 - Question 29: Investors Views on Mandatory Requirements to mediate before commencing arbitration proceedings

- Strongly Favour: 30%
- Somewhat Favour: 34%
- No View: 11%
- Somewhat Oppose: 22%
- Strongly Oppose: 9%
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
5 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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