# Mediation in Investor-State Dispute Settlement: still parallel Worlds?

***Abstract***

*This paper aims to give an overview of investor-state dispute settlement (ISDS), with descriptions of mediation and international investment, two broad and undefined (better to say undefinable, actually) concepts; and the peculiarities of the investor-state (IS) disputes, together with the present challenges and critics from the professionals and the public. Finally, it presents new trends currently being promoted by the Energy Charter Secretariat and the International Mediation Institute (IMI) in the energy sector which open undiscovered scenarios in the field of ISDS for both multinationals and States.*

## 1. Brief overview of mediation and international investments

Mediation, as an alternative dispute resolution method, can be used both at domestic and the international level to settle commercial and civil conflicts.

Regardless of the difficulty of providing an accurate definition of "mediation" – due to its intrinsic flexibility, which embraces every aspect of the process, including the laws and regulations around it – a description can be provided.

Mediation is a way to settle a (legal) conflict through the participation of a neutral third party, a mediator, who meets with the disputing parties and actively assists them in reaching an agreement based on their (business) interests, risk assessments, and policy considerations, not only their positions and claims.

In commercial mediation, as it is currently known, both parties of the dispute are private business actors that either operate at the domestic level or are involved in cross-border operations.

In the context of international economic relations, however, the biggest disputes – in terms of weight of the actors involved, amount at stake, and length of engagement – arise between a private company, usually a multinational, and a sovereign State.

In this field, it is possible to distinguish between two major domains, one concerning international investments and the other one concerning international trade.[1]

[1] For further information, see https://www.wto.org/english/tratop_e/invest_e/invest_e.htm



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This distinction also applies to the instruments of international law governing the aforementioned domains: the treaties or agreements for investment protection, and the Conventions of the World Trade Organization (WTO) for the trade of goods, services and intellectual property rights.[2]

There are numerous international working groups and experts that have questioned the notion of investment and there are countless papers and endless doctrines attempting to define it.

According to the WTO, an *investment* can be defined broadly to include physical assets, debts, intellectual property and trade secrets, and contractual benefits that have economic value.[3] The large number of bilateral treaties (BITs[4]) and Free Trade Agreements (FTAs[5]) for the promotion and protection of investments has created a large definition modeled on the concept of an asset, including both direct and portfolio investments. Although, the precise legal meaning of "investment" may be different based on the specific international treaty or agreement that applies in a particular case.

States promote and protect foreign direct investment (FDI) through the BITs or FTAs. These international provisions also establish legal rights for investors to protect the value of foreign assets against the acts or omissions of the host state.

**2. The ISDS structure**

Investor-State Dispute Settlement is a structure through which individual companies can sue countries for alleged discriminatory practices. ISDS provisions in BITs usually waive the local remedies rule meaning that investors are not required to exhaust local remedies before filing a claim with the arbitral tribunal.

A famous example is Chapter 11 of North American Free Trade Agreement (NAFTA)[6], which establishes a framework of rules providing investors from NAFTA countries with a predictable,

[2] Palmiero C., *La disciplina degli investimenti esteri nel diritto internazionale*, 19/02/20912 https://www.diritto.it/la-disciplina-degli-investimenti-esteri-nel-diritto-internazionale/

[3] WORLD TRADE ORG., TRADE AND FOREIGN DIRECT INVESTMENT (1996), available at http://www.wto.org/english/news_e/pres96_e/pr057_e.htm.

[4] Bilateral investment treaties (or, BITs) are international agreements establishing the terms and conditions for private investment by nationals and companies of one state in another state. From https://www.law.cornell.edu/wex/bilateral_investment_treaty

[5] Buying and selling, importing and exporting of goods and services, not capital or labor, between two or more countries that have no limits or quotas or barriers or unbalanced tariffs. From http://thelawdictionary.org/free-trade-agreement/

[6] For the text of NAFTA Chapter 11, see http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/fta-ale/11.aspx?lang=eng





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rules-based investment climate, as well as dispute settlement procedures, which are designed to offer timely recourse to a neutral (arbitral) tribunal.

Investors can file a complaint and seek compensation for damages, if their expectation of a profit has been negatively affected by some action that the host government took, such as the nationalization of a factory, land expropriation, or domestic policy changes. The dispute is normally handled, not in a public court but through a private arbitration panel, usually under the umbrella of various public or private institutions.

Given the factual background, it is easier to highlight that ISDS presents its own peculiarities:

i) the defendant is always a sovereign State, and the plaintiff takes actions to challenge measures taken by such sovereign State;
ii) the applicable law is international law and international treaties, rather than traditional national law;
iii) the nature of the relationship between the investor and the State involves a long-term engagement;
iv) financial amounts at stake are often very high;
v) the decision-making process, mainly within the State, can be very complex.

The most common venues where these proceedings take place are the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank, the International Chamber of Commerce (ICC), or the Stockholm Chamber of Commerce, all of which have adopted their own set of rule[7].

The current system of IS dispute resolution lacks a "structured, interest-based process".[8]

When a dispute arises from a foreign investment, the investor acting according to a BIT "has four clear options: arbitration, conciliation, factfinding, or direct negotiation with the host state. Arbitration is binding and rights-based. Conciliation as it exists under ICSID or UNCITRAL is nonbinding but still rights-based. Factfinding is ostensibly neutral on the rights/interests divide but inevitably emphasizes the facts relevant to a connected rights-based process". [9]

The challenge in ISDS would be to find the balance between protecting the simpler interests of the private company – return of the investment and the profit – and the more complex interests of the host State - financial stability, stimulation of the economic development, and non-economic interests (like transparency, health, environment, security etc.).[10]

[7] In case of ad hoc proceedings and when the parties agree, disputes can be also governed according to the rules of the United Nations Commission on International Trade Law (UNCITRAL) or, in case of mediation proceedings, pursuing to the International Bar Association (IBA) rules that will be discussed in a further paragraph.
[8] Harvard Law Review, *Mediation of Investor-State Conflicts. Bottom-up systems for dispute resolution*. June 20, 2014 - 127 Harv. L. Rev. 2543, pag. 2552
[9] See *id.*
[10] Sacerdoti G. and others, *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014, http://www.sidi-isil.org/wp-content/uploads/2014/04/Indice3.pdf


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It should be noted that recently, the current ISDS system was condemned by the public opinion worldwide in the context of the EU-US TTIP negotiations, the Transpacific Partnership, and the CETA deal between Canada and the EU.

The main criticisms are the lack of transparency in the process (usually arbitration), the unavailability of the option to appeal an arbitral award, and no accountability for the arbitrators that are considered private judges. In fact, these are the only situations in international law where a private party can sue a sovereign State without proving before that the State's domestic courts are not independent or reliable.

Despite the critics, and the fact that States are now more inclined to opt out of the ISDS system (Brazil, Australia, India, Indonesia, South Africa)[11], a speedy dispute resolution is essential for the ISDS system to work in modern economic environments.

For this purpose, Mediation may present a reliable and persuasive option for both investors and States seeking to settle disagreements and disputes arising from investment activities for a few different reasons. First of all, it can be used in conjunction with, or parallel to, investment arbitration, notably as a means to reach early settlement during the "cooling off" period[12] provided for in treaties. Secondly, it allows the parties to focus on the business needs that are possibly still underneath the investment, at the same moment that the dispute arises.

As an interest-based method, mediation in ISDS can offer several advantages in terms of procedural flexibility, timing flexibility (with regard the moment of the dispute when the proceeding starts, and the length of the proceeding itself once it is initiated), costs, and confidentiality. Moreover and above all, since it is a non-adversarial process, mediation offers a range of outcomes that are wider than those that arbitration or court proceedings can give space to: parties can either resolve the dispute or not, but can also reduce the number of issues currently in contention, narrowing the matter to take before a tribunal.

### 3. The new trend

Fresh and thought-provoking input in ISDS comes from the IMI[13] and Energy Charter Treaty (ECT) member States.[14]

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[11] For further reference https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration.

[12] "Cooling-off period" in BITs or FTAs can be defined as the timeframe between the notification of the claim to the opposing party and the initiation of the dispute resolution proceedings, either before an arbitral tribunal or a domestic court. Negotiations usually take place during this period to try and reach an amicable settlement.

[13] The IMI is non-profit public interest initiative to drive transparency and high competency standards into mediation practice across all fields, worldwide. https://imimediation.org/

[14] http://www.encharter.org/





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On July 19, 2016, the Energy Charter Conference unanimously approved the decision containing the "Guide on Investment Mediation".[15] This Guide is an "explanatory document" designed "to encourage Contracting Parties to consider to use mediation on voluntary basis as one of the options at any stage of the dispute to facilitate its amicable solution".[16]

The Guide covers a range of matters, including the rules which may apply to mediation proceedings, the likely structure of a mediation, and the enforceability of any resulting settlement agreement. The Guide also underlines the key differences between existing mediation and conciliation rules, giving a reference to the mediation rules adopted nowadays.[17] With the exception of the IBA Rules, the ECT Guide differs to existing sets of rules insofar as it focusses specifically upon investor‑State treaty-based mediation.[18]

On one side, the Energy Charter creates a framework for the countries to benefit from a balanced cooperation in the energy sector, and now the institutions related to the Energy Charter Process are boosting the use of mediation at any time in the dispute, if conflicts rise under the scope of its domain. Along with the Treaty, the mentioned Guide does not constraint, but suggests the parties to carefully evaluate during or after the cooling-off period[19] which mechanisms could be used under such 'amicable settlement' process. Therefore, parties are free to agree to use good offices, structured negotiation, mediation or conciliation using existing mechanisms or even agreeing on a tailor-made mechanism.

On another side, the IMI promotes the role of mediation in ISDS and on September 19, 2016 issued an inclusive set of Competency Criteria for Investor-State Mediators[20], with the aim "to assist users and providers of dispute resolution services in selecting suitable mediators for disputes between private sector entities and states.

Since mediation is as much an art as a science, Investor-State mediators should be not only competent but also suitable for each dispute[21] and, considering the interests at stake, the parties should take into account a wide range of criteria when choosing the neutral.

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[15] For further information and the text of the "Guide on Investment Mediation", see http://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf

[16] See *id.*

[17] IBA Investor-State Mediation Rules (2012), the ICC Mediation Rules (2014), the ICSID Rules of Procedure for Conciliation Proceedings (2006), the PCA Optional Conciliation Rules (1996), the Stockholm Chamber of Commerce Mediation Rules (2014), and the UNCITRAL Conciliation Rules (1980).

[18] Shirlow E., *The Rising Interest in the Mediation of Investment Treaty Disputes, and Scope for Increasing Interaction between Mediation and Arbitration*, September 29, 2016. http://kluwerarbitrationblog.com/2016/09/29/the-rising-interest-in-the-mediation-of-investment-treaty-disputes-and-scope-for-increasing-interaction-between-mediation-and-arbitration/

[19] See art. 26 of the ECT.

[20] http://globalpoundconference.org/Documents/IMI%20IS%20Med%20Competency%20Criteria[625483]FINAL%20-%2019%20September%202016.pdf

[21] See *id.*





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In conclusion, as a new and under-developed topic in the domain of international law and international investments, mediation in ISDS will stimulate further studies and discussions due to the nature of the process itself and its implementation in a field that is still controversial for many reasons. That may be seen in line with the spirit of the mediation process itself, which always opens a dialogue between the disputing parties regardless the outcome.



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