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INVESTOR-STATE MEDIATION AND THE RISE OF TRANSPARENCY IN INTERNATIONAL INVESTMENT LAW: OPPORTUNITY OR THREAT?

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I. INTRODUCTION

Today, more than ever, the role of investor-state mediation cannot be appraised without regard to the mounting concerns against investor-state arbitration. Investment treaties typically protect nationals of one Contracting Party (natural persons or corporations) when realizing investments in the other Contracting Party State.1 The most common form of such treaties is the bilateral investment treaty (BIT). As of today, more than 2,800 BITs have been concluded, 2,100 of which are in force.2 To these treaties one may add regional free trade agreements that include investment chapters or regional investment treaties. One of the many examples is Chapter 11 of the North American Free Trade Agreement (NAFTA) that covers investments.3 All of these treaties provide for substantive rights and protections such as the prohibition against uncompensated expropriation and various non-discriminatory standards.4 However, investment treaties have

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4. See ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (2009); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES (2nd ed. 2015); DOLZER & SCHREUER, supra note 1, at 119; DUGAN ET AL., supra note 1; RUDOLPH DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES (1995); JESWALD W. SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL (2013); THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter
attained their present recognition due to their dispute settlement provisions and particularly the investor-state arbitration clause almost mechanically inserted in the majority of such treaties. This arbitration clause enables investors to directly sue the host state for breaches of the investment treaty in an international arbitral tribunal typically comprised of three members. Investor-state arbitrations are either *ad hoc* or institutional, with the most well regarded institutional body being the International Centre for the Settlement of Investment Disputes (ICSID) established by the Washington 1965 Convention.

Over the past three decades, investor-state arbitration proliferated with ICSID registering fifty cases per year and administering more than two hundred at any given time. The most frequent respondent states are Argentina (more than fifty cases), Venezuela, Czech Republic, Egypt, Canada, Mexico, Ecuador, India, Ukraine, Poland, and the United States. The increasing use of investor-state arbitration has also been met with opposition and a widespread consensus for the need of reform.

Over the past few years, Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention and terminated a considerable number of BITs. More recently, South Africa and Indonesia have also filed notices to denounce the ICSID Convention.

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terminate BITs.\textsuperscript{12}

The opposition towards investor-state arbitration stems, in many regards, from the characteristics of such contemporary dispute settlement procedures. In a nutshell, a significant number of investment arbitration cases involve investment in public service sectors and public utilities;\textsuperscript{13} investment claims arising out of emergency economic measures or civil unrest;\textsuperscript{14} and cases that revolve around issues of public health, environmental regulation,\textsuperscript{15} and human rights, in general.\textsuperscript{16} Moreover, investor-state cases often involve allegations of state misconduct and corruption,\textsuperscript{17} are costly dispute settlement procedures, and the payment of compensation in connection with any arising arbitration awards is borne by the taxpayers of the host state.\textsuperscript{18} All these factors are to the interest of the local population as the objectives of foreign investors, governments, and local populations are oftentimes conflicting.\textsuperscript{19} Investor-state arbitration has also been criticized for enabling the so-called “regulatory chill”,\textsuperscript{20} which is a hesitancy to implement a higher degree of regulation in fear of investment arbitration claims.\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{13} See Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Procedural Order No. 3, ¶ 60 (Sept. 29, 2006); Vattenfall AB v. Federal Republic of Germany, ICSID Case No. ARB/12/12 (Oct. 2016); Tradex Hellas S.A. v. Republic of Albania, ICSID Case No. ARB/94/2, Award, ¶ G, Art. 4 (Apr. 29, 1999), 5 ICSID Rep. 70 (2002).
\item \textsuperscript{14} See, e.g., Poštová banka, a.s. v. Hellenic Republic, ICSID Case No. ARB/13/8, Award, ¶ 46 (Apr. 9, 2015); Abacal v. Argentine Republic, ICSID Case No. ARB/07/5 (formerly named Giovanna a Beccara v. the Argentine Republic).
\item \textsuperscript{15} See, e.g., Methanex Corp. v. United States of America, Final Award of the Tribunal on Jurisdiction & Merits, Part III, ¶ 56 (NAFTA Trib. Aug. 3, 2005), http://www.naftaclaims.com/disputes/usa/Methanex/Methanex_Final_Award.pdf; Vattenfall AB, ICSID Case No. ARB/12/12; Philip Morris Asia Ltd. v. Commonwealth of Australia, PCA Case No. 2012-12, Award on Jurisdiction & Admissibility, ¶ 102, 111, 390-92, https://www.pcacases.com/web/sendAttach/1711.
\item \textsuperscript{16} See, e.g., Piero Foresti v. Republic of South Africa, ICSID Case No. ARB(AF)/07/1, Award, § 2(B).
\item \textsuperscript{17} See, e.g., Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/7, Award, Chap. IV, ¶ 154; World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, § II, ¶ 74 (Oct. 4, 2006); see generally Aloyius P. Llamzon, \textit{Corruption in International Investment Arbitration} (2014).
\item \textsuperscript{18} See Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Final Award, ¶ 635, 1887 (July 18, 2014) (award of USD 60,000,000).
\item \textsuperscript{21} Kyla Tienhaara, \textit{Regulatory Chill and the Threat of Arbitration: A View from Political
As later discussed in this article, another source of concern for investor-state arbitration is the lack of transparency in such transnational proceedings. Finally, another concern that is frequently raised is the use of investor-state arbitration to circumvent national courts and the perceived bias of arbitrators, that act both as counsel and as arbitrator in related proceedings.

The above concerns have influenced the drafting of contemporary investment treaties and have also led to initiatives seeking to reform some of the perceived deficiencies of international investment law. The most notable of such initiatives is the rise of transparency discussed in Part IV of this article. Suffice however to say, that it should not be hard to see that greater transparency in investor-state arbitration is aimed at alleviating some of the concerns referred to above. Investor-state mediation is nevertheless a pre-arbitration dispute resolution method that, if successful, eliminates the need to pursue investor-state arbitration. However, as we will see, mediation in general and investor-state mediation in particular, is highly confidential. Would this then mean that investor-state mediation may be used as a medium to circumvent the increasing standards of transparency and other public concerns that are sought to be addressed when it comes to investor-state arbitration? In other words, if the concerns raised with regard to investor-state arbitration have merit, why shouldn’t they be applicable with respect to any investor-state dispute settlement proceeding? In addition to these questions, one should also take into account that the United Nations Commission on International Trade Law (UNCITRAL) is considering a multilateral convention on the enforcement of mediated settlements. If this treaty were to be concluded, would it mean that investor-state mediation would not only be a convenient method to avoid
the high levels of transparency now paradigmatic to investor-state arbitration, but
would also enjoy high levels of international enforceability?

For now, these arguably legitimate concerns may be kept as a working hypothesis, or an issue to be determined after the apposition of three tenets. The first is the role of negotiation and pre-arbitration consultations in international investment law discussed in Part II of this article. With respect to this tenet, this article shows that investment treaties usually provide for negotiation and pre-arbitration consultation periods as a means to promote the amicable resolution of disputes between investors and host states. Given however that investor-state mediation is a distinct dispute resolution method, an examination of negotiation and pre-arbitration consultation periods is required in order to more fully detail the role and potential use of investor-state mediation. The second tenet is dealt with in Part II that focuses on the development and evolution of investor-state mediation as a distinct pre-arbitration dispute resolution procedure.\(^{26}\) Specific weight is given to two recent developments, the adoption by the International Bar Association (IBA) of a distinct set of rules for investor-state mediation that took place in 2012,\(^{27}\) and the appearance of distinct investor-state mediation provisions in recent investment treaties.\(^{28}\) Finally, the third tenet is the rise of transparency in investor-state arbitration that is discussed in Part III.\(^{29}\) In particular, this part lays out the main characteristics of the UNCITRAL Rules on Transparency and of the Mauritius Convention on Transparency in investor-state arbitration.\(^{30}\) With these three tenets in place, Part V analyzes the implications of transparency in international investment law to the future role and importance of investor-state mediation.

II. INVESTOR-STATE MEDIATION AND OTHER PRE-ARBITRATION OPTIONS

A. Amicable Consultations and Negotiation

Investment treaties typically include a series of pre-arbitration requirements that can be broken down into amicable consultation periods, waiver and consent provisions,\(^{31}\) and prior-litigation requirements.\(^{32}\) This section only focuses on the

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26. See infra Section II.
29. See infra Section III.
32. See, e.g., Agreement on the Reciprocal Promotion & Protection of Investments, Arg.-Spain, art. X, ¶ 3(a), Oct. 3, 1991, 1699 U.N.T.S. 29403 (a claim may be submitted to investment arbitration if
first pre-arbitration requirement, which is often referred to as “consultation and negotiation.” A typical investment treaty provision of this kind usually reads as follows:

The disputing parties should first attempt to settle a claim through consultation or negotiation. The verb “shall” is sometimes replaced by the verb “should.” However, investment treaties are generally not particularly specific as to the form and procedure that this effort to amicably settle investment disputes needs to take. Some investment treaties nevertheless require the filing of a “written request” for consultations or negotiations as well as set specific timeframes for the holding of such amicable procedures. Furthermore, the amicable settlement requirement “after a period of eighteen (18) months has elapsed from the moment when the dispute was submitted to the competent tribunal of the Contracting Party in whose territory the investment was made, the said tribunal has not given its final decision, or where the final decision has been made but the parties are still in dispute.”; see also Agreement for the Promotion & Protection of Investments, Arg.-U.K.-N. Ir. B.I.T., art. 8, ¶ 2(a), Dec. 11, 1990, 1765 U.N.T.S. 30682; Treaty on the Encouragement & Reciprocal Protection of Investments, Arg.-Ger., art. 10, ¶ 3(a), Apr. 9, 1991, 1091 U.N.T.S. 32583.


36. See, e.g., ASEAN CIA, supra note 33, at art. 31, ¶ 1 (“... consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Member State.”).

37. Compare Agreement Between Canada and [Country] for the Promotion and Protection of Investments, art. 25, ¶ 2 (2004), http://www.italaw.com/investment-treaties (“Consultations shall be held within 30 days of the submission of the notice of intent to submit a claim to arbitration, unless the
found in investment treaties is in principle supplemented by a specific cooling-off period that usually ranges between three, six, and twelve months.

Failing to amicably settle a dispute within the given cooling-off period allows for an investor to bring an investor-state arbitration claim. However, investor-state tribunals have not been uniform in approaching pre-arbitration consultation periods. For example, an issue of great divide has been the ability of an investor to resort to arbitration if amicable consultations/negotiations failed or are futile but the cooling-off period has not yet lapsed. In this respect, a possible way to determine the nature of pre-arbitration consultation periods would be to examine the language used by the contracting parties to an investment treaty. However, this is not an easy task since treaty stipulations differ as well as rarely provide for any

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38. DOLZER & SCHREUER, supra note 1, at 249–50.
42. See, e.g., German Model BIT, supra note 35, at art. 10, ¶ 2 ("If the dispute cannot be settled within six months of the date on which it was raised by one of the parties to the dispute, it shall, at the request of the investor of the other Contracting State, be submitted to arbitration."); France Model BIT, supra note 34, art. 7 ("If this dispute has not been settled within a period of six months from the date on which it occurred by one or other of the parties to the dispute, it shall be submitted at the request of either party to [arbitration] . . ."); India Model BIT, supra note 34, art. 9, ¶ 2 ("Any such dispute which has not been amicably settled within a period of six months may, if both Parties agree, be submitted to [arbitration]"); Italian Model BIT, art. X, ¶ 3 ("In the event that such dispute cannot be settled as provided for in paragraph 1 [amicable settlement] of this Article within six months from the date of the written application for settlement, the investor in question may submit at his choice the dispute for settlement to . . ."); NAFTA, Article 1120(1): " . . . provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration . . .".
43. See infra p. 8–9.
clarifications whatsoever. For example, the NAFTA provides that the “disputing parties should first attempt to settle a claim through consultation or negotiation.”\textsuperscript{44} Contrarily, the ECT employs the verb “shall” but also adds the proviso “if possible.”\textsuperscript{45} The indeterminacy associated with the obligatory nature of pre-arbitration consultation periods is best reflected in the rulings of the tribunals in \textit{Abaclat v. Argentina}\textsuperscript{46} and \textit{Ambiente v. Argentina,}\textsuperscript{47} both of which were established under the Argentina-Italy BIT.\textsuperscript{48} In these cases, the tribunals were divided in interpreting the amicable consultations clause.\textsuperscript{49} The first tribunal found that “the consultation requirement” of the above BIT “is not to be considered of a mandatory nature but as the expression of the good will of the Parties to try firstly to settle any dispute in an amicable way”\textsuperscript{50} and it “only refers to the possibility of such amicable settlement talks, whereby such term is to be reasonably understood as referring not only to the technical possibility of settlement talks, but also to the possibility, i.e. the [likelihood], of a positive result.”\textsuperscript{51} Contrarily, the second tribunal found that the Argentina-Italy BIT created a “multi-layered, sequential dispute resolution system constituting mandatory jurisdictional requirements”\textsuperscript{52} and the amicable consultations clause “clearly suggests that it creates a duty for the Parties to enter into consultations.”\textsuperscript{53}

The above findings clearly indicate the indeterminacy of pre-arbitration consultation periods and question the obligatory nature of such consultations.\textsuperscript{54} At the same time, the disputing parties to an investor-state arbitration can always engage in negotiations for the settlement of their dispute. In fact, the latest ICSID caseload statistics indicate that with regard to concluded cases, thirty six percent were settled or otherwise discontinued.\textsuperscript{55} Indeed, a prominent commentator has noted that “[i]t is unclear whether settlement negotiations are mandatory”\textsuperscript{56} since “nothing prevents [the parties] from engaging in settlement negotiations after the

\begin{itemize}
\item \textsuperscript{44} NAFTA, \textit{supra} note 3, art. 1118 (emphasis added).
\item \textsuperscript{45} See ECT, \textit{supra} note 35, art. 26 ¶ 1 (“Disputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former, which concern an alleged breach of an obligation of the former under Part III shall, if possible, be settled amicably.”).
\item \textsuperscript{46} \textit{Abaclat v. Argentine Republic}, ICSID Case No. ARB/07/5 (formerly named Giovanna a Beccara \textit{v. the Argentine Republic}), Decision on Jurisdiction and Admissibility (Aug. 4, 2011).
\item \textsuperscript{47} \textit{Ambiente Ufficio S.P.A. v. Argentine Republic}, ICSID Case No. ARB/08/9 (formerly named Giordano Alpi \textit{v. Argentine Republic}), Decision on Jurisdiction and Admissibility (Feb. 8, 2013).
\item \textsuperscript{49} \textit{Id.} at art. 8, ¶ 1.
\item \textsuperscript{50} \textit{Abaclat}, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 564.
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Ambiente}, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 570.
\item \textsuperscript{53} \textit{Id.} ¶ 577.
\item \textsuperscript{54} See \textit{Abaclat}, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility; \textit{Ambiente}, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility.
\item \textsuperscript{55} INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2016-1) 13 (2016).
\item \textsuperscript{56} Bjorklund, \textit{supra} note 3, at 504.
\end{itemize}
arbitration has commenced. All these statements lead to the conclusion that while investment treaties usually provide for amicable consultations or negotiation, the mandatory nature of such pre-arbitration procedures is not always clear. At the same time, settlement negotiations are always available to the disputing parties even after the initiation of the arbitration claim. With these remarks in place, one may wonder how investor-state mediation can provide an alternative avenue for the pre-arbitration settlement of investment disputes.

B. Why then mediate? An Introduction

In order to understand the current need for investor-state mediation, two main issues should be taken into consideration. First, due regard should be had to the downsides of investor-state arbitration and contemporary international arbitration proceedings. Second, investor-state mediation should be appraised in light of pre-arbitration consultations and negotiation.

With respect to the first issue, arbitration has theoretically been regarded as a swift and cost-effective mechanism to resolve disputes among parties. However, in the context of investor-state arbitration, empirical evidence appears to suggest the contrary. The “sheer expense” of investor-state arbitrations are noted in recent decisions. The average costs of an investor-state arbitration “skyrocketed” from around $1 or 2 million USD before 2007 to around $8 million USD in 2012. In some arbitrations, parties incurred costs of over $30 million USD. The OECD’s finding in 2012 corresponds to the research result by UNCTAD, quoting several examples of high legal costs within the range of $5 million USD to $10 million USD incurred for ISDS cases. The average length of an investor-state arbitration was found to be around 3.6 years from the filing of the

57. Id.
58. Abacat, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 564; Ambiente, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 570; Bjorklund, supra note 3, at 504.
59. Abacat, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 564; Ambiente, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 570; Bjorklund, supra note 3, at 504.
61. Id. at 16–17.
63. UNCTAD, Investor-State Disputes, supra, note 60, at 16.
65. Id. at 19.
66. Id.
67. UNCTAD, Investor-State Disputes, supra note 60, at 17–18.
request for arbitration to the date of the final award. The UNCTAD shared a similar view, noting that it would take around 3 to 4 years for a case to be heard and finally settled.

Regarding the reasons for the high costs of investor-state arbitration, scholars have noted a number of contributing factors including: 1) limited arbitrator availability; 2) nature and role of the parties’ counsel and their approaches to litigation (i.e. attributed to the use of expensive litigation techniques borrowed from corporate litigation practices); 3) high billing rates of arbitration lawyers; 4) substantial time spent on the selection of arbitrators; 5) proliferation of procedural, jurisdictional and discovery issues; 6) expanded use of high-cost party-appointed experts on a range of issues; 7) complexity of the legal and factual issues in international investment law; 8) high damages claims; 9) number and length of written pleadings; and, 10) uncertain cost shifting rules.

Investor state mediation, on the other hand, has the potential of offering a relatively efficient alternative. In some cases, it may assist parties to explore creative and innovative solutions that may lie outside strict legal remedies. Such remedies may be of particular relevance in polycentric, policy issues involving complex issues of force majeur arising from unforeseen natural disasters. As noted by Fuller, mediation can be of particular benefit in cases where adjudication has reached its “limits” such as in “polycentric disputes” where there are no clear issues subject to proofs and contentions.

The case of Vattenfall v. Germany arising following the Fukushima nuclear disaster and subsequent decision of the German government to phase out nuclear power production by 2022, arguably

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69. UNCTAD, Investor-State Disputes, supra note 60, at 18.

70. *Id.* at 16–17.

71. *Id.* at 20.

72. *Id.* at 17.

73. *Id.* at 14.

74. UNCTAD, Investor-State Disputes, supra note 60, at 18.

75. *Id.* at 17.


77. UNCTAD, Investor-State Disputes, supra note 60, at 17.

78. Amirfar, supra note 76.

79. UNCTAD, Investor-State Disputes, supra note 60, at 17.


81. *Id.*

82. *Id.*


84. Vattenfall AB, ICSID Case No. ARB/12/12.
raises multi-dimensional issues of public policy and force majeure. From both a process as well as efficiency perspective, investor state mediation may prove a viable alternative.

With respect to the second issue, the previous Section indicated that amicable consultations are rather indeterminate in international investment law and many investment treaties are unclear or silent with respect to their mandatory nature. In this regard, investor-state mediation presents an alternative solution that can provide the platform to effectively and expeditiously resolve a dispute prior to filing an investor-state arbitration claim. In this sense, investor-state mediation can also be more effective when compared to pre-arbitration consultations as well as negotiation. To a certain extent, negotiation is an umbrella notion that covers both the pre-arbitration phase, whereupon an investor-state mediation might take place, and the arbitration phase, that could be initiated after an unfruitful investor-state mediation. These initial remarks aim to set the limitations of investor-state mediation and also set its relation to other forms of alternative dispute resolution in the international investment law arena. Regardless, the purpose of this article is to show how the rise of transparency in investor-state arbitration could affect the dynamics of investor-state mediation. In order to appraise this working hypothesis, the next Part delineates the IBA Rules on Investor-State Mediation and emerging models of investor-state mediation clauses in investment treaties. Before however examining the emerging models of investor-state mediation, it is worth looking at “quasi-mediation proceedings” that already exist under the auspices of the World Bank, particularly under the ICSID Conciliation Proceedings.

C. ICSID Conciliation Proceedings

Under the ICSID Convention, the “purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.” Pursuant to this mandate the Centre in 1967 promulgated the ICSID Conciliation Rules and subsequently in 1978 the ICSID

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86. See supra Section II.A.


89. See ICSID Convention, supra note 7, art. 1(2).

90. The original Conciliation Rules were adopted on Sept. 25, 1967 and were effective as of Jan. 1, 1968. The Conciliation Rules have subsequently been amended three times. The first amendment was approved and took immediate effect on Sept. 26, 1984. The second amendment was approved on Sept. 29, 2002 and was effective on Jan. 1, 2003. The current Conciliation Rules were approved by
Additional Facility Conciliation Rules. Nevertheless, as of December 31, 2016, ICSID had registered 597 cases of which merely eight under the Conciliation Rules and two under the Additional Facility Conciliation Rules.

While ICSID Conciliation proceedings encompass many of the core characteristics paradigmatic to mediation, they also create a rigid arbitration-like procedural framework. In fact, it has been observed that the Conciliation Rules provide for a lengthy process, particularly in the beginning. It can take over four months to constitute a conciliation commission under the ICSID Rules, and then another sixty days to have a first session, facts that exacerbate the perception of ICSID Conciliation as a protracted process that does little to create momentum. It is natural, therefore, that parties seeking resolution of their disputes would not opt for a process that is perceived to simply prolong (or prevent) the production of a binding legal document.

The limited publicly available information supports the accuracy of the above statement. In fact, in two recent conciliation cases, the proceedings lasted for about three years and appear to have taken the form of hard-fought trials. Based on the


91. The original Additional Facility Conciliation Rules were adopted in 1978. The Additional Facility Conciliation Rules have subsequently been amended twice. The first amendment was approved on Sept. 29, 2002 and was effective on Jan. 1, 2003. The current rules were approved by written vote of the Administrative Council in early 2006 and was effective from Apr. 10, 2006: ICSID Additional Facility Rules (2006). See https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Conciliation-(Additional-Facility)-Rules.aspx.


93. See Xenofon Karagiannis v. Republic of Albania, ICSID Case No. CONC/16/1; Republic of Equatorial Guinea v. CMS Energy Corporation and others, ICSID Case No. CONC(AF)/12/2; Hess Equatorial Guinea, Inc. and Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea, ICSID Case No. CONC(AF)/12/1; RSM Production Corporation v. Republic of Cameroon, ICSID Case No. CONC/11/1; Shareholders of SESAM v. Central African Republic, ICSID Case No. CONC/07/1; Togo Electricité v. Republic of Togo, ICSID Case No. CONC/05/1; TG World Petroleum Limited v. Republic of Niger, ICSID Case No. CONC/03/1; SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Madagascar, ICSID Case No. CONC/94/1; Tesoro Petroleum Corporation v. Trinidad and Tobago, ICSID Case No. CONC/83/1; SEDITEX Engineering Beratungsgesellschaft für die Textilindustrie m.b.H. v. Democratic Republic of Madagascar, ICSID Case No. CONC/82/1.

94. See ICSID CONVENTION, supra note 7, arts. 28–35.


96. See Republic of Equatorial Guinea v. CMS Energy Corporation and others, ICSID Case No. CONC(AF)/12/2 (Procedural Details: June 29, 2012, The Secretary-General registers a request for the institution of conciliation proceedings; July 4, 2012, Following the appointment by the parties, Claus von Wobeser (Mexican) accepts his appointment as Sole Conciliator; Mar. 15, 2013, The Sole Conciliator holds a first session in New York; Sept. 16, 2013, Each party files a written statement of its position pursuant to Article 33 of the ICSID Conciliation (Additional Facility) Rules; Oct. 18, 2013 –
above, it would appear that ICSID conciliation proceedings cannot readily be equated to investor-state mediation, as this has recently emerged, and is further discussed in Part III of this article.

III. THE EVOLUTION OF INVESTOR-STATE MEDIATION

A. The IBA 2012 Rules on Investor-State Mediation

1. Background

The IBA rules for Investor-State mediation ("The Rules") have as their primary purpose the establishment of a set of concrete measures to be followed in an investor-state mediation context to increase resort to mediation for investor-state disputes. The State Mediation subcommittee of the Mediation committee, housed under the IBA, promulgates The Rules. Formally adopted on October 4, 2012, The Rules are divided into 12 articles, and facilitate the resolution of disputes between States and States entities. The Rules establish clear guidelines for the commencement of mediation and for the appointment of a mediator in absence of party agreement.


98. Id.

99. Id.
2. Scope and Application

The Rules are designed for mediation of investment-related disputes involving States and States entities. The Rules apply when the mediating parties have agreed on the rules or authorized a mediator to apply the rules. The Rules may be varied or excluded partially or wholly at any time. Local provisions of law take precedence over The Rules.

3. News and Commentary

Wolters Kluwer N.V. commented that The Rules contain mostly standard clauses seen in other mediation rules, but also contain innovative regulations such as the clause on “Mediation Management Conference” (Article 9). It was also relatively optimistic on the future application of The Rules and the entrance of Mediation into the arena of Investor-State mediation. Herbert Smith Freehills commented on the relatively new development of including provisions for co-mediators, as well as the requirement of disclosure of any personal interest or personal conflict in a “statement of independence and availability.”

B. The emerging EU Model and Investor-State Mediation

A growing number of bilateral and multilateral trade agreements have recently integrated provisions for investor-state mediation into their respective frameworks as will be discussed below.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA), includes distinct investor-state mediation provisions. In particular, the investor-state mediation clause reads as follows:

The disputing parties may at any time agree to have recourse to mediation.

100. See id. art. 1.
101. See id. art. 1(a).
103. See id. art. 3.
104. Id. art. 9; Kalicki, supra note 87.
108. See CETA, supra note 107.
Recourse to mediation is without prejudice to the legal position or rights of either disputing party under this Chapter and is governed by the rules agreed to by the disputing parties including, if available, the rules for mediation adopted by the Committee on Services and Investment pursuant to Article 8.44.3(c).

The mediator is appointed by agreement of the disputing parties. The disputing parties may also request that the Secretary-General of ICSID appoint the mediator.

The disputing parties shall endeavour to reach a resolution of the dispute within 60 days from the appointment of the mediator.

If the disputing parties agree to have recourse to mediation, Articles 8.19.6 and 8.19.8 shall not apply from the date on which the disputing parties agreed to have recourse to mediation to the date on which either disputing party decides to terminate the mediation. A decision by a disputing party to terminate the mediation shall be transmitted by way of a letter to the mediator and the other disputing party. 109

Annex 29-C of CETA sets out Mediation Procedures for disputes between the Contracting Parties, which could potentially also influence investor-state mediation proceedings. 110 These Articles describe the process of initiating the mediation process, selecting the mediator, the mediation rules, implementation, confidentiality, time limits, cost allocation, and puts in place a mechanism for ongoing review of the Procedures. 111

Similarly, the EU-Singapore FTA under its Annex 9-E and 9-F sets out a Mediation Mechanism for Investor-State Disputes and a Code of Conduct For Arbitrators and Mediators. 112 These provisions are quite similar to those found in CETA derive from a common objective of assisting parties to “facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure.” 113 The same model is expected to be followed in all future investment chapters included in EU’s FTAs, as is evidenced by the recent conclusion of the EU-Vietnam FTA, that also includes an investor-state mediation clause. 114

Further reflecting the trend toward the integration of mediation mechanisms into investor-state dispute resolution, the Trans-Pacific Partnership Trade Agreement (TPP) 115 sets out a provision for mediation under its article 9.18 as follows:

1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and

109. Id. art. 8.20.
110. Id. at Annex 29-C, art. 1–9.
111. Id. at Annex 29-C, art. 1–9.
112. EU-Sing. Free Trade Agreement, EU-Sing., June 29, 2015 [hereinafter EU-Sing. FTA], Annex 9-E and 9-F.
113. Id.
114. EU-Viet. FTA, supra note 107, art. 5.
115. TPP, supra note 107, art. 9.18.
negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation or mediation.

2. The claimant shall deliver to the respondent a written request for consultations setting out a brief description of facts regarding the measure or measures at issue.

3. For greater certainty, the initiation of consultations and negotiations shall not be construed as recognition of the jurisdiction of the tribunal.\textsuperscript{116}

However, unlike the EU mediation model, the TPP provides little if at all details on the procedure to be followed in investor-state mediation cases.

\textbf{D. The Convention on the Enforcement of Mediated Settlements}

The Convention on the Enforcement of Mediated Settlements (CEMS)\textsuperscript{117}, proposed in July 2014 during a session of UNCITRAL, aims to establish provisions on the enforceability of international commercial settlement agreements reached through mediation/conciliation.\textsuperscript{118} Working Group II ("WGII"), one of six working groups established by UNCITRAL to perform the substantive preparatory work, received a mandate in July 2015 to explore the development of either (i) a guidance text, (ii) model legislative provisions, or (iii) a convention on the enforcement of mediated settlements.\textsuperscript{119} The aim of such a convention is to build on the success of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("NY Convention") in the development, promotion and use of international mediation worldwide.\textsuperscript{120} Observers have noted that if the Convention is adopted with the same enthusiasm as the NY Convention:

[I]t will (i) create a strong international legal framework for mediation, that will (ii) encourage more parties to use this mechanism and (iii) result in many more disputes being settled without the time and expenses of litigation and arbitration, leading to (iv) greater and more effective access to justice.\textsuperscript{121}

These developments and especially the possibility of the conclusion of the CEMS, will on the one hand enhance the international enforceability of mediated settlements but on the other hand may raise serious concerns with respect transparency. For if CEMS were to be concluded, could it mean that investor-state mediation would now be convenient method to avoid the high levels of transparency now paradigmatic to investor-state arbitration? To respond to this issue, it is first necessary to turn to the current state of transparency in investor-

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.}, art. 9.18.
  \item \textsuperscript{117} \textit{See generally} Shentenawi, \textit{supra} note 25.
  \item \textsuperscript{118} \textit{Id.}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.
  \item \textsuperscript{121} Shentenawi, \textit{supra} note 25.
\end{itemize}
IV. THE RISE OF TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Transparency in investor-state arbitration has recently entered a completely new phase, with the adoption of the 2014 UNCITRAL Rules on Transparency and the conclusion of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (known as Mauritius Convention). The basic characteristics of these instruments are further discussed below. Suffice it to say, however, the surge in transparency requirements in investor-state arbitration was caused by generally the same reasons driving the so-called backlash against this method of international dispute settlement. These reasons were briefly discussed in the introduction to this article, and among others revolve around public interest concerns and the nature and sectors where investor-state arbitration cases arise. The purpose of this Section is to delineate the main tenets of the UNCITRAL Rules on Transparency and the Mauritius Convention and thus pave the way for the next Section that will appraise these developments in light of investor-state mediation and the proposed Convention on the Enforcement of Mediated Settlements.


125. Transparency Rules, supra note 123.

126. Mauritius Convention, supra note 124.
A. The UNCITRAL Rules on Transparency

1. Background

The UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (the "Rules on Transparency"), which came into effect on April 1, 2014, "comprise a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-State arbitration." The aim is to facilitate public disclosure of arbitration awards. This follows transparency trends within other areas of international arbitration (such as ICSID) and can give rise to greater consistency in awards.

2. Scope

The Rules on Transparency in general apply to investor-state arbitration under the UNCITRAL Arbitration Rules, but only for investment treaties concluded on or after April 1, 2014. For investment treaties prior to that date, as well as for treaties that fall within the above temporal scope, the Rules can apply by agreement of the disputing parties.

3. Content

In terms of substance and content, the Rules on Transparency deal with four main aspects of transparency considerations in investor-state arbitration. In brief, these are the publication of documents arising from such proceedings, the openness of investor-state arbitration hearings, the participation of the Contracting Parties to an investment treaty and the participation of amicus curiae.

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130. See Transparency Rules, supra note 123, art. 1(2), art. 1(9).
131. Id. art. 3(1).
132. Id.
With respect to the publication of documents arising from investor-state arbitration, the Rules on Transparency list a series of documents that are subject to public disclosure, including expert reports and witness statements. The exhibits themselves are generally excluded from public disclosure but a table listing all exhibits should nevertheless be disclosed. Specific provisions also provide for the protection of confidential information, that are subject to redaction prior to the disclosure of documents arising from investor-state arbitration. The wide scope of transparency is also linked to oral hearings that are generally open to the public and through any means, including live transmission on the web. Certainly, parts of the hearings can be conducted in camera when “there is a need to protect confidential information or the integrity of the arbitral process.” The participation of Contracting Parties and amicus curiae deals with the participation of non-disputing parties lato sensu. Contracting Parties to an investment treaty - usually the investor’s home state- can make submissions with regard to “issues of treaty interpretation” and following the consultation of the disputing parties, an arbitral tribunal can also allow submissions “on further matters within the scope of

133. Id. art. 3(2).
135. Transparency Rules, supra note 115, art. 7(2)-(7), 7(3)-(4) state:
   3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate: (a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents; (b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and (c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties. 4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

136. Transparency Rules, supra note 123, art. 6(3) (“tribunal shall make logistical arrangements to facilitate the public access to hearings (“including where appropriate by organizing attendance through video links or such other means as it deems appropriate.”)"
137. Transparency Rules, supra note 123, art. 6(2).
139. Transparency Rules, supra note 123, art. 5(1).
the dispute." On the other hand, *amicus curiae* submissions or briefs refer to submissions of non-state actors, such as NGOs. Such third parties are allowed to file submissions under a certain procedure ensuring that the subject matter of such submission is within the scope of the dispute, that such submission "would assist the arbitral tribunal in the determination of a factual or legal issue", does not "disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party", and that the disputants "are given a reasonable opportunity to present their observations on any submission by the third person." Amici are nevertheless not allowed to participate in the arbitration hearing and present oral evidence.

140. Transparency Rules, supra note 123, art. 5(2).

142. Transparency Rules, supra note 115, art. 4(1)-(2) states: After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty (‘third person(s)’), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal: (a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person); (b) Disclose any connection, direct or indirect, which the third person has with any disputing party; (c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually); (d) Describe the nature of the interest that the third person has in the arbitration; and (e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

143. *Id.* art. 4(3)(b).
144. *Id.* art. 4(5).
145. *Id.* art. 4(6).
The above delineation of the Rules on Transparency elucidates the drastic change that these rules endeavor to make in the field of international investment law. The limitation of their temporal scope to investment treaties concluded on or after April 1, 2014, has recently been addressed by the Mauritius Convention discussed below.146

B. The Mauritius Convention

1. Background

The United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration was approved by the UN General Assembly in the Fall of 2014,147 and was opened for signature in Port Louis on March 17, 2015 (hence the name “Mauritius Convention”).148

2. Scope

Unlike the Rules on Transparency, the Mauritius Convention applies to investment treaties concluded before April 1, 2014149 and to investor-state arbitrations initiated under such treaties after the Mauritius Convention enters into force.150 For the Convention to enter into force, three ratifications are required, but as of today, Mauritius is the only country that has ratified the Convention.151 Furthermore, subject to a reservation stating otherwise, when the host state (respondent state) but not the investor’s home state has ratified the Convention, the Transparency Rules will apply to an investment treaty concluded before April 1, 2014, at the election of the disputing investor (unilateral offer of application).152

3. Content

The Mauritius Convention does not include substantive provisions in its body but merely incorporates by reference the Rules on Transparency discussed above. The Convention nevertheless adopts a slightly different approach with respect to its application. Unlike the Rules on Transparency that generally apply to investor-state arbitration under the UNCITRAL Arbitration Rules, unless the disputing parties otherwise agree, the Convention applies to any investor-state arbitration.153 Certainly, this broader application is to a certain degree limited by a set of reservations that are available to the contracting parties that eventually choose to

146. Mauritius Convention, supra note 124.
149. Mauritius Convention, supra note 124, art. 1(1).
150. Id. art. 5.
151. Id. art. 9.
152. Id. art. 2(2).
153. Id. art. 2(1).
ratify the Convention. Whether they will also make reservations and thus limit the application of the Mauritius Convention to certain investment treaties or investor-state arbitration under certain arbitration rules, remains to be seen in the near future.\footnote{154. The available reservations are of three kinds: (a) the Rules on Transparency will not apply with respect to a specific investment treaty. Mauritius Convention, supra note 116, art. 3(1)(a); the Rules on Transparency will only apply with respect to arbitrations under the UNCITRAL Rules. Mauritius Convention, supra note 116, art. 3(1)(b); the unilateral offer will not apply in cases in which a state is the respondent. Mauritius Convention, supra note 124, art. 3(1)(c).}

V. ARE TRANSPARENCY AND MEDIATION ANTITHETIC IN NATURE?

A. Investor-State Mediation as a threat to Transparency?

For cases that continue to raise sensitive issues of a confidential nature, parties may consider the confidentiality requirements associated with investor state mediation. Confidentiality has been considered as an essential element in mediation. It has been conceived that confidentiality encourages parties to speak freely and openly in the mediation while ensuring the integrity of the process.\footnote{155. ALEXANDER NADJA, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 245 (2009).} However, there is always a tension between confidentiality of mediation process and the administration of justice. When parties wish to litigate on issues related to topics addressed during mediation, in most cases the courts are not permitted to rely on mediated discussions unless special circumstances exist.\footnote{156. Id. at 247.} Only in circumstances where pre-existing information which is admissible in trial is also disclosed in mediation, or information is shared that is generally available to the public, or the parties allege breach of duty or professional misconduct of the mediator, can the limits of confidentiality in mediation be said to be reached.\footnote{157. Id. at 282–285.}

Notwithstanding the general approach to confidentiality within the mediation process, there have been several examples of non-confidential public sector resource mediation, which demonstrate the possibilities for transparency in select investor-state mediation cases. For example, take the mediation involving the Snake River Basin in the United States involving $200 million USD in damages and raising over 150,000 water rights claims employed a public mediation process.\footnote{158. Francis McGovern, Mediation of the Snake River Basin, 42 IDAHO L. REV. 547, 548–53 (2006).} The case involved legal issues pertaining to treaty and statutory interpretation of federal and constitutional statutes.\footnote{159. Id. at 553.} Parties included an Idaho Power Company and a plethora of interested federal entities including the Department of the Interior, the Department of Agriculture, the Department of Energy, the Bureau of Indian Affairs, the Council of Environmental Quality, and the Fish and Wildlife Services to name a few.\footnote{160. Id. at 553–54.} The issues varied from “fishing in
general" of particular species like Salmon, to fishing passage, fish rearing and water flow along with channel maintenance, industrial and municipal pollution, and recreational uses of the river. The conflict was also riddled with legal issues pertaining the interpretation of Treaties of 1855, 1863 and 1893, and U.S. federal statutes such as The Endangered Species Act (ESA) and the Clean Water Act. The main issues largely involved how statutes for the maintenance of the quality of the river could be enforced if the resources were shared and clarifying the fragile relationship between the federal government and the Indian tribes in terms of resource management responsibilities.

In terms of the mediation process employed in this public sector dispute, a problem-solving and forward looking approach was taken. The ultimate success of the mediation was attributed to the focus on "future" and a realistic and "doable" settlement possibilities. The process lasted for six years reaching settlements on "water flows, endangered species, resource allocation and management, and governmental cooperation." The parties arrived at a settlement of federal funding in the amount of $200 million USD and an agreement of cooperative management for maintenance of water quality and flows of creeks and streams. This creative, multi-pronged settlement was made possible through the help of a small team of lawyers, stakeholders, and the use of a problem-solving model, all of which was feasible in the context of mediation, but very likely a result that could not have been achieved through an adjudication process.

Similarly, the mediation involving the management of the endangered Allagash river resources employed a public mediation process. The parties - a group of 23 stakeholders and advisors, including environmentalists, native sportsmen, Maine residents, and state canoeists - had been embroiled in a long term conflict with "no prospect of 'victory.'" These parties agreed to meet over a 30 hour mediated deliberation in the backdrop of a retreat at the River Divers Restaurant in Millinocket, Maine. The mediator spent considerable time with the stakeholders individually so as to understand their concerns and ascertain

161. Id. at 555.
162. Id. at 548.
164. Id.
167. McGovern, supra note 150, at 555.
168. Id. at 557.
169. Id. at 561.
170. Id. at 562.
171. Id.
173. Id.
174. Id.
At issue was the "original intent" of the documents entailing the creation of the waterway as well as a set of related or "tiered" issues. Mediation proved effective in arriving at a "one-text" agreement addressing a diverse set of interests formulated and signed by all concerned parties.

The above examples demonstrate that in some cases, transparent public-sector mediation can prove effective in resolving complex multi-party disputes at the domestic level. This experience is useful in considering the potential applicability of transparent multi-party investor state mediation in a select category of cases.

B. Investor-State Mediation as a supplementary, gap-filling mechanism

Many scholars have begun to consider the potential of investor-state mediation as a supplementary gap-filling mechanism in the world of investor-state disputes. This is due not only to the rigidity and financial cost associated with investor-state arbitration as described above, but also due to the often symbiotic relationship between host and investor, potential "policy costs", relational damage and possibility for non-compliance.

In terms of relational considerations, the host state in many cases is often "dependent upon the continued provision by the investor of the needed public service" while the investor "having submitted substantial capital to the privatized enterprise, is dependent on the host country for continued revenues." Cases involving long-term relational commitments are often seen as most conducive to mediated settlements.

Such relational considerations come into play when considering the question of enforcement. When agreements are imposed and not arrived at through mutual consent, investors often run the risk of a nation choosing not to comply with an adverse award or repeal a given underlying treaty if the award amount is considered burdensome.

In addition to relational considerations and the financial costs of the arbitration process, the "policy cost" of investor state arbitration requiring a "host country to repeal or modify measures that were implemented for the public good" are leading potential parties to look beyond arbitration for resolution.

The case of Metalclad v. Mexico is illustrative. The Chief Executive

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175. Id.
176. Id.
178. Id.
179. Id.
181. Id.
182. Id.
183. Id.
184. Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1 (May 19, 1997).
Officer of Metalclad, Grant Kesler, noted that after winning a $17 million USD arbitral award against Mexico, in hindsight and despite "winning" the case, felt that "the arbitration had been so dissatisfying that [he] wished the company had relied on other options to resolve the dispute." Such cases illustrate the increasing openness on the part of parties to look beyond arbitration for resolution processes that build upon consensual solutions that respect legitimate policy considerations and preserve on-going relationships.

VI. CONCLUSION

Reconciling the freedom of expression facilitated through confidential mediation communications and the public interest in transparency is a delicate balance to strike. Cases do exist of effective transparent public sector mediated outcomes at the domestic level with high rates of compliance as described in this paper. Yet, cases also exist requiring a high degree of discretion because they involve trade secrets, sensitive government protocols, and policy concerns that may not be effectively mediated in the glare of the public eye. In light of the above factors, it is suggested that in the early stages of the development of investor-state mediation, confidentiality be preserved. As the process becomes more fully established, familiarity is gained, expertise is developed, and selected mediated cases become public through party consent, the question of transparency in investor-state mediation can also be re-examined with an eye toward gradual openness in the long term.

185. Gracious, supra note 180.