

RECENT TRENDS IN INVESTOR- STATE DISPUTES: AN UPDATE ON MEDIATION AND CONCILIATION

Energy Charter Treaty
Bruxelles, 6 et 7 Novembre 2014

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Outline

- The framework for Investor-State Mediation: the treaties allow but are not conducive
- A recent trend in investment treaties: Investor-State Mediation (ISM) provisions
- Comparing CETA Annex on Mediation and IBA ISM Rules
- The way forward

The framework for I-S Mediation

Beyond eye-rolling and awareness-building: 4 basic requirements

- An offer to mediate in investment treaties
- Rules to guide investor-State mediation
- A pool of credible mediators
- Enforcement of the mediated settlement?

Mediation offer in IIAs

- 1st requirement: the treaty must allow/offer mediation
- A growing number of IIAs: Specific wording referring to mediation/conciliation as a method to reach amicable settlement during the “cooling-off” period.
- Ex: the US model treaty.
- Ex.: the ECT

Recent trend: stand-alone mediation provisions in IIAs

- A recent trend: Stand-alone mediation provisions in IIAs
 - Mediation annex in draft EU-Canada CETA
 - Mediation/conciliation in the ASEAN ACIA
- In regional IIAs:
 - The revised Investment Treaty of the Arab League of January 2013
 - The COMESA CCIA
 - In model BITs and recent treaties: the Thai model BIT of 2012

ISM-specific rules: treaty-based or Stand-alone ?

- The Canada-EU CETA (draft) annex on mediation: detailed rules in the treaty
- The IBA investor-State mediation rules
- The UNCITRAL Rules on conciliation (in fact mediation rules)
- The ICSID Rules on conciliation
- New ICC Mediation Rules

- Drafting treaty-specific mediation rules
- Reference to general or specific rules

- Recommendation: guide the parties. Allow for changes.

Treaty-specific mediation rules

- The Canada-EU CETA (draft) annex on mediation

General provision in the treaty:

- 1. The disputing parties may at any time agree to have recourse to mediation.
- 2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.
- 3. Recourse to mediation shall be governed by the rules set out in Annex I. Any time limit mentioned in Annex I may be modified by mutual agreement between the disputing parties.
- Proposed time-frame for mediation: 60 days from the appointment of the mediator.

The IBA ISM Rules of October 2012

The Rules Propose guidelines for:

- the commencement and the termination of a mediation process,
- the conduct of a mediation including a mediation management conference,
- the appointment and the role of a mediator (or co-mediators),
- privacy and confidentiality of the mediation,
- issues such as costs and fees
- An appendix A with a Model Statement of Independence and Availability
- An appendix B with Qualifications for Mediator
- An appendix C with Choice of Mediator through designating authority.

CETA Annex on Mediation: Initiation

Objective of the Annex: provide rules to facilitate the finding of a mutually agreed solution through a comprehensive and expeditious procedure with the assistance of a mediator.

- Article 2 - Initiation of the Procedure
- 1. After a request for consultations has been lodged pursuant to Article 2 of [ISDS Section] either disputing party may request, at any time, the commencement of a mediation procedure. Such request shall be addressed to the other party in writing.
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- Where the request concerns an alleged breach of the agreement by the authorities of the European Union or by the authorities of the Member States of the European Union, it shall be addressed to the European Union.
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- 2. The party to which such request is addressed shall give sympathetic consideration to the request and accept or reject it in writing **within 10 working days of its receipt.**
- **IMPORTANCE OF TIMEFRAME**

The IBA ISM Rules: commencement

1. Commencement of the Mediation (Article 2)

- General outline for the commencement of a mediation process, provides for a flexible procedure and the possibility to initiate mediation prior to or concurrently with domestic court or arbitration proceedings
- Leaves the door open - to be used for any kind of differences and disputes and at different stages of a dispute, whether already materialized or whether it is still in the early stages.
- Independence and impartiality of Mediator: Statement of Independence (Appendix A) or requirement of designating authority (institutional support to the mediation)
- Designation of the mediator and the co-mediator (Articles 4 and 6)

CETA Annex on Mediation: selection

- Article 3 - Selection of the Mediator
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 - 1. If both disputing parties agree to a mediation procedure, the disputing parties shall endeavour to agree on a mediator within **15 working days** from the receipt of the reply to the request.
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 - 2. If the disputing parties cannot agree on the mediator within the established time frame, either disputing party may request the Secretary General of ICSID to draw the mediator by lot from the list established under Article 8 of the [ISDS Section].
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 - 3. The Secretary General of ICSID, shall select the mediator within **five working days** of the request referred to in paragraph 2 by either disputing party.
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 - 4. A mediator shall not be a national of either Party to the Agreement, unless the disputing parties agree otherwise.
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 - 5. The mediator shall assist, in an impartial and transparent manner, the disputing parties in reaching a mutually agreed solution.
- **NO CO-MEDIATION. APPOINTING AUTHORITY. REFERENCE TO THE TREATY ROSTER**
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The IBA ISM Rules: selection

3. Designation, resignation and replacement of the mediator (Articles 3 to 6)

- Bottom-line principle : parties have full responsibility and freedom to engage in a mediation and designate a mediator
- The setting up of two fallback possibilities to support the party wanting to launch the mediation process:
 - (i) a designating authority can be chosen by the parties in cases where the parties fail to agree on a mediator
 - (ii) the Secretary-General of the Permanent Court of Arbitration shall select a designating authority in cases where the parties fail to agree on it
- Simple and clear-cut rules are proposed for the resignation and replacement of a mediator

CETA Annex on Mediation: conduct

- Article 4 - Rules of the Mediation Procedure
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- 1. Within **10 working days** after the appointment of the mediator, the disputing party having invoked the mediation procedure shall present, in writing, a detailed description of the problem to the mediator and to the other disputing party. **Within 20 working days** after the date of delivery of this submission, the other disputing party may provide, in writing, its comments to the description of the problem. Either disputing party may include in its description or comments any information that it deems relevant.
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- 2. The mediator may decide on the most appropriate way of bringing clarity to the measure concerned. In particular, the mediator may organise meetings between the disputing parties, consult the disputing parties jointly or individually, seek the assistance of or consult with relevant experts and stakeholders and provide any additional support requested by the disputing parties. However, before seeking the assistance of or consulting with relevant experts and stakeholders, the mediator shall consult with the disputing parties.
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- 3. The mediator may offer advice and propose a solution for the consideration of the disputing parties which may accept or reject the proposed solution or may agree on a different solution. However, the mediator shall not advise or give comments on the consistency of the measure at issue with this Agreement.
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- 4. The procedure shall take place in the territory of the Party concerned, or by mutual agreement in any other location or by any other means.
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- 5. The disputing parties shall endeavour to reach **a mutually agreed solution within 60 days** from the appointment of the mediator. Pending a final agreement, the disputing parties may consider possible interim solutions.
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- 6. Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential.

PLACE OF PROCEDURE. ROLE OF THE MEDIATOR. STATEMENT OF INTEREST. CONFIDENTIALITY OF PROCEDURE AND OUTCOME

The IBA ISM Rules: the conduct

1. The conduct of a mediation (Article 8)

- The mediation shall be conducted in accordance with the parties' wishes and with the assistance of the mediator
- The mediator shall assist the parties to reach an agreement on a settlement of their dispute on a voluntary basis in which the parties make free choices as to the process and the outcome
- If requested by the parties, the mediator may make recommendations concerning an appropriate resolution of the differences or disputes

The IBA ISM Rules: the conduct cont'd

- 2. Conduct of the mediation (Article 9): Mediation Management Conference to define
 - Conduct of the mediation, outstanding procedural issues, languages, location
 - Provisional timetable
 - Confidentiality and privacy arrangements
 - Prescription or limitation periods
 - Decision not to proceed with arbitration or judicial proceeding
 - Special requirements for the approval of a settlement agreement
 - Financial arrangements.

Designation of the representatives of the parties empowered to conduct and reach an agreement.

Commitment to participate in the Mediation Management Conference and possibility to withdraw after the mediation management conference.

Give the mediation process a chance but not dilatory.

The IBA ISM Rules: conduct

3. Institutional Support (Article 4)

Parties and the mediator(s) may seek the support and the intervention of an institution where appropriate and authorized by the parties.

Adoption by arbitration and mediation institutions as part of their rules?

CETA Annex on Mediation: termination

- 7. The procedure shall be terminated:
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 - (a) by the adoption of a mutually agreed solution by the disputing parties, on the date of adoption;
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 - (b) by a written declaration of the mediator, after consultation with the disputing parties, that further efforts at mediation would be to no avail;
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 - (c) by written notice of a disputing party.

CETA Annex on Mediation: enforcement

- Article 5 - Implementation of a Mutually Agreed Solution
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- 1. Where a solution has been agreed, each disputing party shall take the measures necessary to implement the mutually agreed **solution within the agreed timeframe.**
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- 2. The implementing disputing party shall inform the other disputing party in writing of any steps or measures taken to implement the mutually agreed solution.
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- 3. On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of (1) the measure at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties **15 working days to comment** on the draft report. After considering the comments of the disputing parties submitted within the period, the mediator shall submit, in writing, a final factual report to the disputing parties within **15 working days**. The factual report shall not include any interpretation of this Agreement.

CETA Annex on Mediation: link to ISDS

- Article 6 - Relationship to Dispute Settlement
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- 1. The procedure under this mediation mechanism is not intended to serve as a basis for dispute settlement procedures under this Agreement or another agreement. A disputing party shall not rely on or introduce as evidence in such dispute settlement procedures, nor shall any adjudicate body take into consideration:
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 - (a) positions taken by a disputing party in the course of the mediation procedure;
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 - (b) the fact that a disputing party has indicated its willingness to accept a solution to the measure subject to mediation; or
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 - (c) advice given or proposals made by the mediator.
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- 2. The mediation mechanism is without prejudice to the rights and obligations of the Parties and the disputing parties under the provisions on Investor-State Dispute Settlement and Dispute Settlement.
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- 3. Unless the disputing parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place.
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CETA Annex on Mediation: confidentiality

- “Mutually agreed solutions shall be made publicly available. However, the version disclosed to the public may not contain any information that a disputing party has designated as confidential. “
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- At the same time, Article 6.3 on the Relationship to Dispute Settlement provides that: “3. Unless the disputing parties agree otherwise, and without prejudice to Article 4(6), all steps of the procedure, including any advice or proposed solution, shall be confidential. However, any disputing party may disclose to the public that mediation is taking place. “

CANADA-EU (draft) Annex on Mediation

- Summary of timeframe: Overall 60 days from the appointment of the mediator
- Response by the other Party: within 10 days from receipt of the request
- Appointment of mediator: within 15 days from the receipt of the reply to the request
- Appointment by ICSID SG: within 5 days from the receipt of the request to appoint
- Statement by one party: within 10 days from the appointment of the mediator
- Statement by the other party: within 20 days from the receipt of the statement by the other party
- Overall timeframe: 60 days.
- On request: final report (15 days to comment).

CETA Annex on Mediation: time + costs

- Article 7 - Time Limits
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- Any time limit referred to in this Annex may be modified by mutual agreement between the disputing parties.
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- Article 8 - Costs
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- 1. Each disputing party shall bear its own expenses derived from the participation in the mediation procedure.
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- 2. The disputing parties shall share jointly and equally the expenses derived from organisational matters, including the remuneration and expenses of the mediator. Remuneration of the mediator shall be in accordance with that foreseen for arbitrators under Article 15 of the [ISDS Section].

The IBA ISM Rules: costs/fees

6. Dealing with the Costs of the arbitration (Article 12)

- Default rule: mediator's fees and expenses shall be borne by parties in equal share
- The parties are required to pay the Costs irrespective of whether a settlement agreement is concluded
- The fees of the mediator shall be calculated on a basis of hours spent by the mediator on the mediation, unless a flat fee or other basis is agreed among the parties and the mediator

The IBA ISM Rules: confidentiality

5. Confidentiality and privacy of the process (Article 10)

Two features:

- Confidentiality of documents and informations
- Confidentiality and privacy of the process

General and ISM-specific rules on mediation in IIAs

- ISM-specific: the IBA ISM Rules of 2012

Recourse to general mediation/conciliation rules:

- The UNCITRAL Rules on conciliation (mediation)
- The ICSID Rules on conciliation
- The ICC Mediation Rules of 1st January 2014

A pool of ISM mediators: work in progress

- Certification/accreditation: the role of the IMI
- Capacity-building
- A set pool (EU-Can roster) or an open set of criteria (IBA ISM).
- The experience of the ICC: building professionalism and capacity.
- Link with arbitration and judiciary.

ISM in practice

- One ICSID conciliation case currently using IBA ISM Rules
- Mediated settlement: examples in Malaysia, Indonesia. The ombudsman in Korea
- The role of diplomats/former diplomats
- ICSID cases settled before reaching final award: 39%
- Need for accountability and transparency

- Difficult to access statistics
- + and – of confidentiality

The way forward

- Administration of mediation proceedings is essential to build trust in mediation. Disseminate success cases.
- Develop a roster to strengthen the offer: arbitrators/judges/diplomats/mediators
- Capacity-building for parties, specially for the government officials
- The UNCITRAL working group mandate for 2014: enforcement of a mediated settlement.

THANK - YOU

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