Investor-State Mediation: A "new" way to resolve old problems?

By Joe Tirado[1]

Introduction [arriba]

The last few years has seen growing pushback against Investor-State dispute settlement ("**ISDS**") in the form of Investor-State ("**IS**") international arbitration. This discontent is based primarily on transparency issues, the perception of systematic bias in favour of the investor, and the enormous cost and excessive time associated with the process.

The overall cost of an investor-state arbitration can be considerably more expensive than an equivalent commercial arbitration, with average party costs of approximately US$4.7 million for respondent states and US$6.4 million for investors, as well as tribunal costs of about US$1 million. These costs rise if annulment proceedings are pursued: US$1.3 million for an applicant and US$1.4 million for a respondent state[2].

It also may take longer to conclude an investor-state dispute. On average, ICSID proceedings last approximately four years and eight months. Generally, the higher the amount in dispute, the longer the proceedings will take. Indeed, claims in excess of US$1 billion last an average of almost eight years[3].

Even when an investor is successful in obtaining an award in its favour, states are increasingly refusing to pay investment treaty awards. In the recent second edition of the Report on Compliance with Investment Treaty Arbitration Awards 2023, published on 25 October 2023 by Dutch consultancy NL-Investment consulting has found that at least US$70.5 billion in award debt remains unpaid. The report focused on the top 20 countries that have refused to comply with ISDS awards rendered against them. The number of unpaid awards among those countries has risen from 36 in 2022 to 60 in 2023.

Considering the cost and time to resolve investor-state disputes, the fact that most tribunals continue to significantly reduce the amount of damages claimed by investors and the difficulty in enforcing awards against states, it is no wonder that investors are becoming increasing open to exploring other ways such as mediation as an effective and timely alternative dispute resolution mechanism for their conflicts.

Recent developments in IS mediation [arriba]

During the last 10 years leading ISDS institutions including the International Center for the Settlement of Investment Disputes (**ICSID**)/World Bank, the United Nations Commission on International Trade Law (**UNCITRAL**) and the Energy Charter Conference (**ECC**) have led the way in promoting and encouraging the use of early and effective conflict management techniques, including IS mediation, to better manage the inevitable disputes that arise in the course of IS relations. Together they have produced a host of useful initiatives including procedural rules (UNCITRAL and ICSID mediation rules), guides (ECT Guide on Investment Mediation Guideline) and statutory/regulatory frameworks (ECT Model Instrument on Management of Investment Disputes Model).

With all that, arguably the single biggest contribution to the development of IS mediation in recent years may be the enactment in 2019 of the United Nations Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (“**Singapore Convention**”).

Non-Governmental Organizations, including the International Bar Association (“**IBA**”) and the International Mediation Institute (“**IMI**”) have also supported the effective use of IS mediation with, among other things, IS focused model rules and mediator selection criteria.

Why mediate IS claims? [arriba]

Clients should consider mediation for the resolution of IS disputes for the following reasons:

- **Internal and external cost savings** - External cost estimate for a mediation is a fraction of the US$13-15 million for an average IS arbitration, in addition to the internal costs for the State and the investor including lost opportunity costs and potential loss in Foreign Direct Investment (“**FDI**”).

- **The opportunity to reach a relatively quick, and early settlement** – Estimated duration of mediation is 6 to 9 months, based on the experience of similar international commercial mediations. Mediation could be an early part of the parties’ investment grievance resolution process, before disagreements harden into disputes.

- **The chance to reach an amicable settlement preserving the parties’ ongoing relationship** - Mediation is particularly well-suited to cases where both the Investor and the State have an interest in maintaining an ongoing relationship and a general willingness to engage in negotiations.

- **The value of independent, impartial third-party mediator feedback on party claims, roadblocks to settlement and possible avenues for resolution.**

- **When utilized early, mediation provides a more flexible avenue for exploring critical relationship management issues such as, working with a particular sub-contractor**.

- **Confidentiality** - Mediation as a confidential and private process provides a safe opportunity to discuss extra-contractual issues impacting the investment relationship (for example, changes in economic, environmental or socio-political climate) and negotiate acceptable solutions.

- Mediation can be good for FDI initiatives being established by States as it demonstrates a proactive conflict management environment to investors, thereby reducing dispute risks.

- Helping to provide greater clarity on each party´s view on the issues in dispute. This provides a better basis for seeing the pathway to a negotiated settlement.

- **Maintaining parties´ control** - Mediation is helpful where there is a desire to keep control of the process and the outcome, in particular if possible solutions extend beyond purely monetary relief.

What cases are suitable for IS Mediation? [arriba]

Mediation is particularly well-suited to cases where both the Investor and the State have an interest in maintaining an on-going relationship.

Where the only issue in dispute is quantum, mediation serves parties by expanding the perspective solution beyond sums and allowing the identification of a quantum range and similarly valued non-monetary remedies.

Mediation will work best where a State has implemented a framework within which negotiations can take place and State officials feel empowered and are authorised to settle matters without fear of repercussions and in accordance with existing laws.

Timing [arriba]

Mediation is most effective early, pre-arbitration, as part of the IS claims resolution process. Ideally mediation should be incorporated as a key part of the States investment legislation and rule-making (see, Energy Charter Organisation's *Model Instrument on Management of Investor Disputes*).

Investors have had some success in sending their anticipated Arbitration filing to the State and inviting settlement discussion.

Though seemingly made for mediation, the "cooling off" period contained in many bilateral and multilateral investment treaties has proved to be a less successful time for negotiation, as positions are entrenched by that time.

Mediation should be considered in parallel with IS arbitration proceedings. An arbitral tribunal's determination on liability or quantum can create the opportunity for mediated negotiation.

Regardless of timing, counsel familiar with commercial mediation should be prepared for a lengthier mediation process. The organisation of the proceedings (see provision for first joint session in ICSID Mediation Rules), as well as the resolution of transparency/confidentiality, authority and ratification issues, can and will take time.

Remedies [arriba]

In mediation, parties can safely address non-contractual economic, social and political needs in addition to contractual issues.

Paradoxically, monetary damages may be the least likely "currency" for settlement purposes in Investor-State disputes. State budgets are set, highly constrained by law and will likely require multiple levels of approval for change.

What works is where a settlement can be devised that is a positive outcome for the Investor and the State that is executable within the boundaries of the applicable legislative framework.

One alternative to damages is to arrange for a new investor to buy out the investment.

If a range of damages can be agreed in mediation the parties can create similar value through a host of non-monetary settlement remedies, including regulatory change, extra-contractual commitments (for example, labour contract commitments, community or environmental improvements) and new contracts.

While contract renegotiation (e.g. delivery schedules, unit pricing etc.) is an attractive option, procurement laws and regulations will need to be respected.

The design process for mediation will permit stakeholders, in addition to the direct parties to the dispute, to be built in so that a more comprehensive settlement can be achieved and broader remedies agreed.

Developing trust in IS Mediation [arriba]

IS counsel do well to acknowledge the level of mistrust that typically exists when disputes occur between Investors and States. Strategic "gives" of information or concessions may go some way towards re-establishing trust.

State regulatory frameworks should provide for the use of mediation (see ECT Model Instrument) as both an early conflict resolution mechanism and a process to be used in parallel with investment arbitration.

Investment treaties should create the expectation that parties will use mediation as a tool to avoid, manage and resolve IS disputes.

Counsel to Investors and States should recognise their professional responsibility to explore settlement options, including mediation, with their clients.

Mediation and, in particular, the role of the mediator is understood differently in various parts of the world. Mediators should explore party expectations of mediation and address those expectations in designing an effective mediation procedure and mapping out appropriate mediator interventions.

IS counsel can benefit from specific mediation advocacy training on representing their clients in this type of dispute.

Trust in using mediation for IS disputes can be facilitated by reference to the support, rules and services provided by key ISDS institutions such as ICSID, UNCITRAL and the ECT.

Practical considerations [arriba]

The practical considerations in IS mediations require a balanced approach to the following issues:

- **Authority to negotiate and recommend settlement** - Authority issues are particularly important in IS mediation. Multiple agencies may be involved and having persons with authority to negotiate is critical to eventual ratification. There also should be a representative present with authority to recommend any settlement to the ratification body.

- **Multiple disputes with similar issues** - The potential impact of any negotiated settlement on other existing or potential claims should be considered.

- **Stakeholder mapping and inclusion** - Mediation presents an opportunity to engage parties critical to reaching a sustainable settlement; these might include community, environmental, labour or other non-contractual interests.

- **Selection of Co-mediators** - Given the complexity of IS disputes, it is usual for co-mediators to be appointed, by agreement of the parties, to work together as a team to mediate the dispute.

- **Information disclosure vs confidentiality** - Needs and statutory requirements for public access/information should be addressed, even while maintaining the confidentiality essential to mediation and effective negotiation.

- **Recognition of settlement agreements** - Early consideration should be given to the availability of various enforcement mechanisms, including applicability and requirements of the local jurisdiction and the Singapore Convention. It should be noted that as a settlement agreement is the product of an agreement between the parties, enforcement proceedings are invariably not required in practice.

Concluding thoughts [arriba]

There appears to be a growing momentum led by both investors and States alike to find a better way to resolve Investor-State disputes. The desire to adopt a different approach to dispute resolution is being driven by a change in the global investment climate, particularly after the pandemic. The tools are increasingly available to facilitate the use of IS mediation. As knowledge, awareness and use of these tools increases, it is to be hoped that the advantages and benefits that IS mediation can give to the parties will lead to its further uptake in the near future.

Notes [arriba]

[1] Joe Tirado is a partner with Garrigues UK LLP based in London.
[2] British Institute of International and Comparative Law and Allen & Overy 2021 Empirical Study: Cost, Damages and Duration in Investor-State Arbitration.
[3] Ibid.