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

\* SHAHLA F. ALI & ODYSSEAS G. REPOUSIS

## 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> All of these treaties provide for substantive rights and protections such as the prohibition against uncompensated expropriation and various non-discriminatory standards.<sup>4</sup> However, investment treaties have

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1. JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 158-60, 169-71 (2009); RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 235-37 (2008); KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* 2-4 (2010); CHRISTOPHER F. DUGAN, DON WALLACE, JR., NOAH D. RUBINS & BORZU SABAH, *INVESTOR-STATE ARBITRATION* 51-52 (2008).

2. U.N. Conf. on Trade & Dev. (UNCTAD), *Inv. Pol'y Hub: Int'l Inv. Agreements*, <http://investmentpolicyhub.unctad.org/IIA>.

3. See North American Free Trade Agreement, art. 1131, ¶ 2, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA]; MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F. G. HANNAFORD, *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11* (2006); Andrea K. Bjorklund, *NAFTA*, in *COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES* 506 (Chester Brown ed., 2013).

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.<sup>5</sup> Investor-state arbitrations are either *ad hoc* or institutional,<sup>6</sup> with the most well regarded institutional body being the International Centre for the Settlement of Investment Disputes (ICSID) established by the Washington 1965 Convention.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup> The increasing use of investor-state arbitration has also been met with opposition and a widespread consensus for the need of reform.<sup>10</sup> Over the past few years, Bolivia, Ecuador and Venezuela withdrew from the ICSID Convention and terminated a considerable number of BITs.<sup>11</sup> More recently, South Africa and Indonesia have also filed notices to

Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* (2007); NOAH RUBINS & N. STEPHAN KINSELLA, *INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION: A PRACTITIONER'S GUIDE* (2005); VANDELDELDE, *supra* note 1.

5. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, § 2, art. 37, ¶ 37(2)(b), Mar. 18, 1965, 575 UNTS 159 (entered into force on Oct. 14, 1966) [hereinafter ICSID Convention].

6. Compare *Corona Materials, LLC v. Dom. Rep.*, ICSID Case No. ARB(AF)/14/3, Award on the Respondent's Expedited Preliminary Objection, (May 31, 2016), with *Occidental Petroleum Corp. and Occidental Exploration & Prod. Co. v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, (Nov. 2, 2015).

7. ICSID Convention, *supra* note 5, § 1, art. 1; see ANTONIO R. PARRA, *THE HISTORY OF ICSID* (2012); CHITTHARANJAN F. AMERASINGHE, *JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS* 433–35 (2009).

8. INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES, *2015 Annual Report* 21 (Sept. 4, 2015).

9. U. N. Conf. on Trade & Developments, *Investor-State Dispute Settlement: Review of Developments in 2014*, 2 IIA Issues Note at 2–3, UNCTAD/WEB/DIAE/PCB/2015/2 (May 2015), [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d2_en.pdf).

10. See Christoph Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 353–68 (Michael Waibel et al. eds., 2010); see also DOLZER & SCHREUER, *supra* note 1, at 243; JEAN E. KALICKI & ANNA JOUBIN-BRET (EDS.), *RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY* (2015).

11. See briefly U. N. Conference on Trade & Development, *Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims*, 2 IIA Issues Note at 1, UNCTAD/WEB/DIAE/IA/2010/2 (Dec. 2010) [http://unctad.org/en/Docs/webdiaeia20106\\_en.pdf](http://unctad.org/en/Docs/webdiaeia20106_en.pdf); see Ricardo Dalmaso Marques, *Notes on the Persistent Latin American Countries' Attitude Towards Investment Arbitration and ICSID*, WOLTERS KLUWER: KLUWER ARBITRATION BLOG (July 24, 2014), <http://kluwerarbitrationblog.com/blog/2014/07/24/some-notes-on-the-latin-american-countries-attitude-towards-investment-arbitration-and-icsid>.

terminate BITs.<sup>12</sup>

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;<sup>13</sup> investment claims arising out of emergency economic measures or civil unrest;<sup>14</sup> and cases that revolve around issues of public health, environmental regulation,<sup>15</sup> and human rights, in general.<sup>16</sup> Moreover, investor-state cases often involve allegations of state misconduct and corruption,<sup>17</sup> 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.<sup>18</sup> All these factors are to the interest of the local population as the objectives of foreign investors, governments, and local populations are oftentimes conflicting.<sup>19</sup> Investor-state arbitration has also been criticized for enabling the so-called “regulatory chill”,<sup>20</sup> which is a hesitancy to implement a higher degree of regulation in fear of investment arbitration claims.<sup>21</sup>

12. Jonathan Lang, *Bilateral Investment Treaties: A shield or a sword?*, BOWAN GILFILLAN: CORPORATE NEWSFLASH, <http://www.bowman.co.za/FileBrowser/ArticleDocuments/South-African-Government-Canceling-Bilateral-Investment-Treaties.pdf>.

13. See *Biwater Gauff (Tanz.) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order N° 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).

14. See, e.g., *Poštová banka, a.s. v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, ¶ 46 (Apr. 9, 2015); *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly named *Giovanna a Beccara v. the Argentine Republic*).

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](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.pccases.com/web/sendAttach/1711>.

16. See, e.g., *Piero Foresti v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1, Award, § 2(B).

17. See, e.g., *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, 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 ALOYSIUS P. LLAMZON, *CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION* (2014).

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).

19. See Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 719-20 (2014); Laurence Boisson de Chazourmes, *Making the Proceedings Public and Allowing Third Party Interventions: Are the New Generation Bilateral Investment Treaties (U.S., Canada) Bifurcating Investment Arbitration from International Commercial Arbitration?*, 6 J. WORLD INV. & TRADE 105, 105-08 (2005); Nigel Blackaby & Caroline Richard, *Amicus Curiae: A Panacea for Legitimacy in Investment Arbitration?*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* 253, 253-55 (Michael Waibel et al. eds., 2010).

20. Scott Miller, *Investor-State Dispute Settlement*, CENTER FOR STRATEGIC & INT'L STUDIES (Mar. 24, 2015), <https://www.csis.org/analysis/investor-state-dispute-settlement>.

21. Kyla Tienhaara, *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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> If this treaty were to be concluded, would it mean that investor-state mediation would not only be a convenient method to avoid

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*Science*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 606, 607 (Chester Brown & Kate Miles eds., 2011).

22. See N. Jansen Calamita, *Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach*, 15 J. WORLD INVEST. & TRADE 645, 650-53 (2014).

23. See Michael Waibel et al., *The Backlash against Investment Arbitration: Perceptions and Reality*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY* xxxvii, xxxvii-li (Michael Waibel et al. eds., 2010).

24. See *infra* Part IV.

25. See generally Laila El Shentenawi, *A New York Convention for Mediation May be Coming Soon*, LEXOLOGY (Aug. 28, 2015), <http://www.lexology.com/library/detail.aspx?g=416b9435-39bb-4fa7-a3b0-1039f0007e7f>; UNCITRAL Rep., Forty-Seventh Session, UN Doc A/69/17, ¶ 124 (July 7-18, 2014) stating that:

Support was expressed for possible work in that area on many of the bases expressed above. Doubts were also expressed as to the feasibility of the project and questions were raised in relation to that possible topic of work, including: (a) whether the new regime of enforcement envisaged would be optional in nature; (b) whether the New York Convention was the appropriate model for work in relation to mediated settlement agreements; (c) whether formalizing enforcement of settlement agreements would in fact diminish the value of mediation as resulting in contractual agreements; (d) whether complex contracts arising out of mediation were suitable for enforcement under such a proposed treaty; (e) whether other means of converting mediated settlement agreements into binding awards obviated the need for such a treaty; and (f) what the legal implications for a regime akin to the New York Convention in the field of mediation might be.

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.<sup>26</sup> 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,<sup>27</sup> and the appearance of distinct investor-state mediation provisions in recent investment treaties.<sup>28</sup> Finally, the third tenet is the rise of transparency in investor-state arbitration that is discussed in Part III.<sup>29</sup> 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.<sup>30</sup> 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,<sup>31</sup> and prior-litigation requirements.<sup>32</sup> This section only focuses on the

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26. See *infra* Section II.

27. See International Bar Association, *Rules for Investor-State Mediation*, art. 1, ¶ 1 (Oct. 4, 2012), [http://www.ibanet.org/LPD/Dispute\\_Resolution\\_Section/Mediation/State\\_Mediation/Default.aspx](http://www.ibanet.org/LPD/Dispute_Resolution_Section/Mediation/State_Mediation/Default.aspx).

28. Comprehensive Economic & Trade Agreement, Can.-E.U., art. 8.2, Sept. 14, 2016, 10973 Council of European Union 16; Agreement on the Reciprocal Promotion & Protection of Investments, Belg.-U.A.E., art. 12, ¶ 1, Mar. 8, 2004, UNCTAD Inv. Pol'y Hub.

29. See *infra* Section III.

30. Rep. of the Comm'n on Int'l Trade Law, at Annex 1, U.N. Doc. A/68/17 (Jan. 2014); G.A. Res. 69/116, at 2/7 (Feb. 2015).

31. See J.C. Thomas, *Investor-State Arbitration under NAFTA Chapter 11*, 37 CAN. Y.B. INT'L L. 99, 115-19 (1999); Jacob S. Lee, *No "Double-Dipping" Allowed: An Analysis of Waste Management, Inc. v. United Mexican States and the Article 1121 Waiver Requirement for Arbitration under Chapter 11 of NAFTA*, 69 FORDHAM L. REV. 2655, 2669 (2001).

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.”<sup>33</sup> 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.<sup>34</sup>

The verb “shall” is sometimes replaced by the verb “should.”<sup>35</sup> 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<sup>36</sup> as well as set specific timeframes for the holding of such amicable procedures.<sup>37</sup> 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.

33. *See, e.g.*, U.S. DEP'T OF STATE, 2012 U.S. MODEL BILATERAL INV. TREATY, art. 23 (2012), [http://www.state.gov/e/eb/ifa/bit](http://www.state.gov/e/eb/ifa/bit;); Italian 2003 Model B.I.T., art. X, ¶ 1 (2003), <http://www.italaw.com/investment-treaties> [hereinafter Italian Model BIT]. Such consultation and negotiation may also include the use of non-binding third-party procedures. *See e.g.*, Ass'n of Southeast Asia Nations Comprehensive Inv. Agreement, art. 31, ¶ 1 (2007), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3095> [hereinafter ASEAN CIA].

34. NAFTA, *supra* note 3, art. 1118. *See also* Draft Agreement Between the Government of the Republic of France and the Government of the Republic of [Country] on the Reciprocal Promotion and Protection of Investments, art. 7 (2006), <http://www.italaw.com/investment-treaties> (“Any dispute concerning the investments occurring between one Contracting Party and a national or company of the other Contracting Party shall be settled amicably between the two parties concerned.”) [hereinafter France Model BIT]; *see also* Agreement Between the Government of the Republic of India and the Government of the Republic of [Country] for the Promotion and Protection of Investments, art. 9, ¶ 1 (2003), <http://www.italaw.com/investment-treaties> [hereinafter India Model BIT]; Free Trade Agreement, China-Peru, art. 139, ¶ 1 (Apr. 28, 2009) Agreement for the Strengthening of Economic Partnership, [http://fta.mofcom.gov.cn/bilu/annex/bilu\\_xdwb\\_en.pdf](http://fta.mofcom.gov.cn/bilu/annex/bilu_xdwb_en.pdf) [hereinafter China-Peru FTA]; Agreement for the Strengthening of the Economic Partnership, Japan-Mex., art. 77 (Sept. 17, 2004) Ministry of Foreign Affairs of Japan, <http://www.mofa.go.jp/region/latin/mexico/agreement/agreement.pdf>.

35. Treaty between the Federal Republic of Germany and [Country] Concerning the Encouragement and Reciprocal Protection of Investments, art. 10, ¶ 1 (2008), <http://www.italaw.com/investment-treaties> [hereinafter German Model BIT]; Agreement Between the Kingdom of Norway and [Country] for the Promotion and Protection of Investments, art. 15, ¶ 2 (2007), <http://www.italaw.com/investment-treaties>. *See* Energy Charter Treaty, art. 26, ¶ 1, Dec. 17, 1994, 280 U.N.T.S. 36116 (entered into force Apr. 16, 1998) (The ECT employs the verb “shall” along with the “if possible” proviso. “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.”) [hereinafter ECT].

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<sup>38</sup> that usually ranges between three,<sup>39</sup> six,<sup>40</sup> and twelve months.<sup>41</sup>

Failing to amicably settle a dispute within the given cooling-off period allows for an investor to bring an investor-state arbitration claim.<sup>42</sup> 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.<sup>43</sup> 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

disputing parties otherwise agree.”), with ASEAN CIA, *supra* note 33, at art. 31, ¶ 2 (which however refers to “30 days of receipt by the disputing Member State of the request for consultations . . .”).

38. DOLZER & SCHREUER, *supra* note 1, at 249–50.

39. *See, e.g.*, ECT, *supra* note 35, art. 26, ¶ 2; Agreement on Mutual Encouragement and Protection of Investments, Bulg.-Cyprus, art. 4.1, June, 18, 1988, UNCTAD Inv. Pol’y Hub; Agreement for the Promotion & Protection of Investments, Kyrg.-N. Ir. - U.K., art. 8, ¶ 1, Dec. 8, 1994, UNCTAD Inv. Pol’y Hub; Agreement for the Promotion & Reciprocal Protection of Investments, Russ.-N. Ir.-U.K., art. 8, ¶ 2, Apr. 6, 1989, UNCTAD Inv. Pol’y Hub; U.K.-Hung., art. 8, ¶ 1, Mar. 9, 1987; Agreement on the Promotion & Protection of Investments, Aust.-FYROM, art. 12, ¶ 1, Mar. 28, 2001, 2195 U.N.T.S. 191; Agreement on Encouragement & Reciprocal Protection of Investments, Neth.-Rom., art. 8, ¶ 2, Oct. 27, 1983, UNCTAD Inv. Pol’y Hub.

40. NAFTA, *supra* note 3, art. 1120, ¶ 1; Agreement on the Promotion & Reciprocal Protection of Investments, Lat.-Swed., art. 8, ¶ 2, Mar. 10, 1992, 1823 U.N.T.S. 31209; Agreement Regarding the Promotion & Mutual Protection of Investments, Cyprus-Russ., art. 7, ¶ 2, Apr. 11, 1997, UNCTAD Inv. Pol’y Hub; Agreement on the Promotion & Reciprocal Protection of Investments, Geor.-Greece, art. 8, ¶ 2, Nov. 9, 1994, UNCTAD Inv. Pol’y Hub; Agreement on the Promotion & Reciprocal Protection of Investments, Croat.-Sloven., art. 8, ¶ 2, Dec. 12, 1997, 2366 U.N.T.S. 42665; Agreement Concerning the Reciprocal Protection & Promotion of Investments, Belg.-Hung., art. 9, ¶ 2, May, 14, 1986, UNCTAD Inv. Pol’y Hub; Convention for the Protection & Promotion of Investments, Spain-Russ., art. 10, ¶ 1, Oct. 26, 1990, UNCTAD Inv. Pol’y Hub; Treaty on the Promotion & Mutual Protection of Investments, Germ.-Ukr., art. 11, ¶ 1, Feb. 15, 1993; Free Trade Agreement, China-Pak., art. 54, ¶ 2, Nov. 24, 2006, China FTA Network, <http://fta.mofcom.gov.cn/topic/enpakistan.shtml>; China-Peru FTA, *supra* note 34, art. 139, ¶ 2.

41. *See, e.g.*, Agreement on the Reciprocal Promotion & Protection of Investments, Pol.-Turk., art. 8, ¶ 1, Aug. 21, 1991, UNCTAD Inv. Pol’y Hub; Agreement on the Reciprocal Encouragement & Protection of Investments, China-Pak., art. 10, Feb. 12, 1989, UNCTAD Inv. Pol’y Hub.

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.”<sup>44</sup> Contrarily, the ECT employs the verb “shall” but also adds the proviso “if possible.”<sup>45</sup> The indeterminacy associated with the obligatory nature of pre-arbitration consultation periods is best reflected in the rulings of the tribunals in *Abaclat v. Argentina*<sup>46</sup> and *Ambiente v. Argentina*,<sup>47</sup> both of which were established under the Argentina-Italy BIT.<sup>48</sup> In these cases, the tribunals were divided in interpreting the amicable consultations clause.<sup>49</sup> 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”<sup>50</sup> 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.”<sup>51</sup> Contrarily, the second tribunal found that the Argentina-Italy BIT created a “multi-layered, sequential dispute resolution system constituting mandatory jurisdictional requirements”<sup>52</sup> and the amicable consultations clause “clearly suggests that it creates a duty for the Parties to enter into consultations.”<sup>53</sup>

The above findings clearly indicate the indeterminacy of pre-arbitration consultation periods and question the obligatory nature of such consultations.<sup>54</sup> 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.<sup>55</sup> Indeed, a prominent commentator has noted that “[i]t is unclear whether settlement negotiations are mandatory”<sup>56</sup> since “nothing prevents [the parties] from engaging in settlement negotiations after the

44. NAFTA, *supra* note 3, art. 1118 (emphasis added).

45. See ECT, *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.”).

46. *Abaclat v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly named *Giovanna a Beccara v. the Argentine Republic*), Decision on Jurisdiction and Admissibility (Aug. 4, 2011).

47. *Ambiente Ufficio S.P.A. v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly named *Giordano Alpi v. Argentine Republic*), Decision on Jurisdiction and Admissibility (Feb. 8, 2013).

48. Agreement for the Promotion & Protection of Investments, Arg.-It., 1990, Investor-State LawGuide, <http://www.investorstatelawguide.com>.

49. *Id.* at art. 8, ¶ 1.

50. *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 564.

51. *Id.*

52. *Ambiente*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, ¶ 570.

53. *Id.* ¶ 577.

54. See *Abaclat*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility; *Ambiente*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility.

55. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASELOAD – STATISTICS (ISSUE 2016-1) 13 (2016).

56. Bjorklund, *supra* note 3, at 504.

arbitration has commenced.”<sup>57</sup> 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.<sup>58</sup> At the same time, settlement negotiations are always available to the disputing parties even after the initiation of the arbitration claim.<sup>59</sup> 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.<sup>60</sup> However, in the context of investor-state arbitration, empirical evidence appears to suggest the contrary.<sup>61</sup> The “sheer expense” of investor-state arbitrations are noted in recent decisions.<sup>62</sup> The average costs of an investor-state arbitration “skyrocketed”<sup>63</sup> from around \$1 or 2 million USD before 2007<sup>64</sup> to around \$8 million USD in 2012.<sup>65</sup> In some arbitrations, parties incurred costs of over \$30 million USD.<sup>66</sup> 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.<sup>67</sup> The average length of an investor-state arbitration was found to be around 3.6 years from the filing of the

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57. *Id.*

58. *Abaclat*, 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. *Abaclat*, 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.

60. U.N. CONF. ON TRADE & DEV., INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION, at 14, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D11 (2010) [hereinafter UNCTAD, Investor-State Disputes].

61. *Id.* at 16–17.

62. David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 DUKE L. J. 977, 990 (2011).

63. UNCTAD, Investor-State Disputes, *supra*, note 60, at 16.

64. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, ORG. FOR ECONOMIC CO-OPERATION & DEV. [OECD] WORKING PAPERS ON INTERNATIONAL INVESTMENT 2012/03, at 22 (2012), [http://www.oecd.org/daf/inv/investment-policy/WP-2012\\_3.pdf](http://www.oecd.org/daf/inv/investment-policy/WP-2012_3.pdf).

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.<sup>68</sup> 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.<sup>69</sup>

Regarding the reasons for the high costs of investor-state arbitration, scholars have noted a number of contributing factors including: 1) limited arbitrator availability;<sup>70</sup> 2) nature and role of the parties' counsel and their approaches to litigation<sup>71</sup> (i.e. attributed to the use of expensive litigation techniques borrowed from corporate litigation practices); 3) high billing rates of arbitration lawyers;<sup>72</sup> 4) substantial time spent on the selection of arbitrators;<sup>73</sup> 5) proliferation of procedural, jurisdictional and discovery issues;<sup>74</sup> 6) expanded use of high-cost party-appointed experts on a range of issues;<sup>75</sup> 7) complexity of the legal and factual issues in international investment law;<sup>76</sup> 8) high damages claims;<sup>77</sup> 9) number and length of written pleadings;<sup>78</sup> and, 10) uncertain cost shifting rules.<sup>79</sup>

Investor state mediation, on the other hand, has the potential of offering a relatively efficient alternative.<sup>80</sup> In some cases, it may assist parties to explore creative and innovative solutions that may lie outside strict legal remedies.<sup>81</sup> Such remedies may be of particular relevance in polycentric, policy issues involving complex issues of *force majeure* arising from unforeseen natural disasters.<sup>82</sup> 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.<sup>83</sup> The case of *Vattenfall v. Germany*,<sup>84</sup> arising following the Fukushima nuclear disaster and subsequent decision of the German government to phase out nuclear power production by 2022, arguably

68. Anthony Sinclair, *ICSID Arbitration: How Long Does it Take?* INT'L J. OF COM. & TREATY ARB. (Oct. 29, 2009), <http://www.goldreserveinc.com/wp-content/uploads/2016/01/ICSID-arbitration-How-long-does-it-take.pdf>.

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.

76. Catherine M. Amirfar, *Dispute Settlement Clauses in Investor-State Arbitration: An Informed Approach to Empirical Studies About Law a Response to Professor Yackee* 12 SANTA CLARA J. INT'L L. 303, 310 n. 17 (2014).

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.

80. Shahla Ali, *Prospects of Utilizing Investor-state Mediation and UNCITRAL Rules on Transparency for Polycentric Environmental Disaster-Related Disputes: The Case of Vattenfall v. Germany*, in *TRADE DEVELOPMENT THROUGH HARMONIZATION OF COMMERCIAL LAW* 137 (Muruga Perumal Ramaswamy & João Ribeiro eds., 2015).

81. *Id.*

82. *Id.*

83. Lon L. Fuller, *Mediation: Its Forms and Functions*, 44 S. CAL. L. REV. 305, 329–30 (1971).

84. *Vattenfall AB*, ICSID Case No. ARB/12/12.

raises multi-dimensional issues of public policy and force majeure.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.”<sup>89</sup> Pursuant to this mandate the Centre in 1967 promulgated the ICSID Conciliation Rules<sup>90</sup> and subsequently in 1978 the ICSID

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85. See Vattenfall AB, ICSID Case No. ARB/12/12; NATHALIE BERNASCONI-OSTERWALDER & MARTIN DIETRICH BRAUCH, INT’L INST. FOR SUSTAINABLE DEV., THE STATE OF PLAY IN VATTENFALL V. GERMANY II: LEAVING THE GERMAN PUBLIC IN THE DARK 2 (Dec. 2014), <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-german-public-dark-en.pdf>.

86. See *supra* Section IIA.

87. Jean E. Kalicki, *Mediation of Investor-State Disputes: Revisiting the Prospects*, KLUWER ARB. BLOG (June 13, 2013), <http://kluwerarbitrationblog.com/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>.

88. Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution* 31(1) FORDHAM INT’L L. J. 138, 155 (2007).

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.<sup>91</sup> Nevertheless, as of December 31, 2016, ICSID had registered 597 cases,<sup>92</sup> of which merely eight under the Conciliation Rules and two under the Additional Facility Conciliation Rules.<sup>93</sup>

While ICSID Conciliation proceedings encompass many of the core characteristics paradigmatic to mediation,<sup>94</sup> 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.<sup>95</sup>

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.<sup>96</sup> Based on the

written vote of the Administrative Council in 2006 and were effective from Apr. 10, 2006: (ICSID Rules (2006). See <https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention-Conciliation-Rules.aspx>.

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](https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Conciliation-(Additional-Facility)-Rules.aspx).

92. See THE ICSID CASELOAD – STATISTICS (ISSUE 2017-1), ICSID, [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20\(English\)%20Final.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202017-1%20(English)%20Final.pdf).

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.

95. See Margrete Stevens & Ben Love, *Investor-State Mediation: Observations on the Role of Institutions* 23, [www.cedr.com/about\\_us/arbitration\\_commission/](http://www.cedr.com/about_us/arbitration_commission/).

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.<sup>97</sup> The State Mediation subcommittee of the Mediation committee, housed under the IBA, promulgates The Rules.<sup>98</sup> Formally adopted on October 4, 2012, The Rules are divided into 12 articles, and facilitate the resolution of disputes between States and States entities.<sup>99</sup> The Rules establish clear guidelines for the commencement of mediation and for the appointment of a mediator in absence of party agreement.

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Oct. 19, 2013, The Sole Conciliator visits the place connected with the dispute pursuant to Article 30 (4)(c) of the ICSID Conciliation (Additional Facility) Rules; Nov. 1, 2013, Each party files a second written statement of its position pursuant to Article 33 of the ICSID Conciliation (Additional Facility) Rules; Mar. 25, 2014 - Mar.27, 2014, The Sole Conciliator holds a hearing on conciliation in New York; Jan. 12, 2015, The Sole Conciliator declares the proceeding closed in accordance with Article 37(2) of the Conciliation (Additional Facility) Rules; May 12, 2015, The Sole Conciliator renders its Report); *RSM Production Corporation v. Republic of Cameroon*, ICSID Case No. CONC/11/1 (Procedural Details: Sept. 19, 2011, The Secretary-General registers a request for the institution of conciliation proceedings; Dec. 6, 2011, Following appointment by the Claimant, J. Caleb Boggs III (U.S.) accepts his appointment as conciliator; Dec. 23, 2011, Following appointment by the Respondent, Jean-Pierre Ancel (French) accepts his appointment as conciliator; Feb. 17, 2012, Following appointment by the Chairman, Marino Baldi (Swiss) accepts his appointment as Commission President; Apr. 4, 2012, The Commission holds a first session in Paris; Apr. 30, 2012, The Respondent files a request for the Commission to order the joinder of a third-party to the conciliation proceedings; May 14, 2012, The Claimant files observations on the Respondent’s request of April 30, 2012; June 15, 2012, The Commission decides on the Respondent’s request of April 30, 2012; Aug. 9, 2012, The Commission issues Procedural Order No. 1 regarding the participation of a third-party to the proceedings; Aug. 17, 2012, The Commission issues Procedural Order No. 2 concerning the procedural calendar; Sept. 7, 2012, The Claimant files a statement of facts; Sept. 28, 2012, The Respondent files a statement of facts; Oct. 24, 2012 - Oct. 25, 2012, The Commission holds a hearing on the merits in Paris; Dec. 19, 2012 - Dec. 20, 2012, The Commission holds a hearing on the merits in Paris; April 15, 2013, The Commission declares the proceeding closed in accordance with Article (34)(2) of the ICSID Convention and ICSID Conciliation Rule 30(2); June 11, 2013, The Commission renders its Report).

97. International Bar Association Mediation Committee, State Mediation Subcommittee, *IBA Rules for Investor-State Mediation*, art. 1 (Oct 2012), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F>.

98. *Id.*

99. *Id.*

## 2. Scope and Application

The Rules are designed for mediation of investment-related disputes involving States and States entities.<sup>100</sup> The Rules apply when the mediating parties have agreed on the rules or authorized a mediator to apply the rules.<sup>101</sup> The Rules may be varied or excluded partially or wholly at any time.<sup>102</sup> Local provisions of law take precedence over The Rules.<sup>103</sup>

## 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).<sup>104</sup> It was also relatively optimistic on the future application of The Rules and the entrance of Mediation into the arena of Investor-State mediation.<sup>105</sup> 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.”<sup>106</sup>

### *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.<sup>107</sup>

The EU-Canada Comprehensive Economic and Trade Agreement (CETA), includes distinct investor-state mediation provisions.<sup>108</sup> 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).

102. International Bar Association Mediation Committee, State Mediation Subcommittee, *IBA Rules for Investor-State Mediation*, art. 2 (Oct 2012), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F>.

103. *See id.* art. 3.

104. *Id.* art. 9; Kalicki, *supra* note 87.

105. *See* Munir Maniruzzaman, *A Rethink of Investor-State Dispute Settlement*, KLUWER ARB. BLOG (May 30, 2013), <http://kluwerarbitrationblog.com/blog/2013/05/30/a-rethink-of-investor-state-dispute-settlement/>.

106. *See* Herbert Smith Freehills, *International Bar Association launches investor-state mediation rules* (Oct. 23, 2012), <http://hsfnotes.com/adr/2012/10/23/international-bar-association-launches-investor-state-mediation-rules/>.

107. *See, e.g.*, Comprehensive Economic and Trade Agreement, EU-Can., Annex 8-D, Oct. 30, 2016 [hereinafter CETA], available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf); EU-Vietnam Free Trade Agreement, EU-Viet, art 20, Feb. 1, 2016 [hereinafter EU-Viet. FTA]; Trans-Pacific Partnership Trade Agreement, art 9.5, Feb. 4, 2016 [hereinafter TPP].

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.<sup>109</sup>

Annex 29-C of CETA sets out Mediation Procedures for disputes between the Contracting Parties, which could potentially also influence investor-state mediation proceedings.<sup>110</sup> 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.<sup>111</sup>

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.<sup>112</sup> 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.”<sup>113</sup> 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.<sup>114</sup>

Further reflecting the trend toward the integration of mediation mechanisms into investor-state dispute resolution, the Trans-Pacific Partnership Trade Agreement (TPP)<sup>115</sup> 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

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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.<sup>116</sup>

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.

#### *D. The Convention on the Enforcement of Mediated Settlements*

The Convention on the Enforcement of Mediated Settlements (CEMS)<sup>117</sup>, 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.<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

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-

116. *Id.*, art. 9.18.

117. *See generally* Shentenawi, *supra* note 25.

118. *Id.*

119. *Id.*

120. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958.

121. Shentenawi, *supra* note 25.

state arbitration.

#### IV. THE RISE OF TRANSPARENCY IN INVESTOR-STATE ARBITRATION

Transparency in investor-state arbitration has recently entered a completely new phase,<sup>122</sup> with the adoption of the 2014 UNCITRAL Rules on Transparency<sup>123</sup> and the conclusion of the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (known as Mauritius Convention).<sup>124</sup> 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<sup>125</sup> and the Mauritius Convention<sup>126</sup> 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.

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122. See generally Stephan W. Schill, *Editorial: The Mauritius Convention on Transparency*, 16 J. WORLD INV. & TRADE 201, 201-04 (2015) [hereinafter Schill, *Editorial*]; Stephan W. Schill, *Editorial: Five Times Transparency in International Investment Law*, 15 J. WORLD INV. & TRADE 363, 369-72 (2014); Lise Johnson, *The Transparency Rules and Transparency Convention: A good start and model for broader reform in investor-state arbitration*, COLUM. FDI PERSPECTIVES, July 21, 2014, available at [ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf](http://ccsi.columbia.edu/files/2013/10/No-126-Johnson-FINAL1.pdf) (last visited Aug. 27, 2015); Samuel Levander, *Resolving "Dynamic Interpretation": An Empirical Analysis of the UNCITRAL Rules on Transparency*, 52 COLUM. J. TRANSNAT'L L. 506, 540-41 (2014); Luke Eric Peterson, *As Transparency Rules Take Effect, And UN Launches Case Registry, How Much Of ISDS Universe Will Be Laid Open Through This New Portal?*, INVEST. ARB. REP., Apr. 1, 2014, available at [www.iareporter.com/articles/as-transparency-rules-take-effect-and-un-launches-case-registry-how-much-of-isds-universe-will-be-laid-open-through-this-new-portal/](http://www.iareporter.com/articles/as-transparency-rules-take-effect-and-un-launches-case-registry-how-much-of-isds-universe-will-be-laid-open-through-this-new-portal/) (last visited Aug. 27, 2015).

123. See UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* (2014), as adopted by Resolution of the General Assembly 68/109, U.N. Doc. A/68/462 (Dec. 16, 2013), available at [www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf) [hereinafter *Transparency Rules*].

124. See UNCITRAL, U.N. Convention on Transparency in Treaty-based Investor-State Arbitration, G.A. Res. 69/116, U.N. Doc. A/69/496 (Dec. 10, 2014), available at [www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf) [hereinafter *Mauritius Convention*]; see also UNCITRAL, U.N. Commission on International Trade Law Approves Draft UNCITRAL Convention on Transparency in Treaty-Based Investor-State Arbitration, U.N. Press Release UNIS/L/202 (July 10, 2014), available at [www.unis.unvienna.org/unis/en/pressrels/2014/unisl202.html](http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl202.html).

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.”<sup>127</sup> 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.<sup>128</sup>

#### 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.<sup>129</sup> 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.<sup>130</sup>

#### 3. Content

In terms of substance and content, the Rules on Transparency deal with four main aspects of transparency considerations in investor-state arbitration.<sup>131</sup> 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*.<sup>132</sup>

127. See *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, UNCITRAL, [http://www.uncitral.org/uncitral/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency.html) (last visited Nov. 19, 2016).

128. See Christina Knahr, *The New Rules on Participation of Non-Disputing Parties in ICSID Arbitration – Blessing or Curse?*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* 319 (Chester Brown & Kate Miles eds., 2011); Christina Knahr & August Reinisch, *Transparency versus Confidentiality in International Investment Arbitration – The Bewater Gauff Compromise*, 6 *LAW & PRAC. INT'L CTS. & TRIBUNALS* 97, 97-118 (2007); LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 141 (2d ed. 2011); Margie-Lys Jaime, *Relying Upon Parties' Interpretation In Treaty-Based Investor-State Dispute Settlement: Filling The Gaps In International Investment Agreements*, 46 *GEO. J. INT'L L.* 261, 287 (2014). See also ICSID Convention, *supra* note 7, art. 48(5); ICSID Convention Arbitration Rules, rules 37(2) and 48(4) (2006); see also ICSID Arbitration (Additional Facility) Rules, art. 53(3) (2006).

129. See Transparency Rules, *supra* note 115, art. 1(1); see also *id.* art. 1(2); Luke E. Peterson, *UN Working Group Finalizes UNCITRAL Transparency Rules, But They Won't Apply Automatically To Stockpiles Of Existing Investment Treaties*, *INVEST. ARB. REP.*, Feb. 14, 2013, available at [www.iareporter.com/articles/un-working-group-finalizes-uncitral-transparency-rules-but-they-wont-apply-automatically-to-stockpiles-of-existing-investment-treaties/](http://www.iareporter.com/articles/un-working-group-finalizes-uncitral-transparency-rules-but-they-wont-apply-automatically-to-stockpiles-of-existing-investment-treaties/) (last visited Aug. 27, 2015); Julia Salasky & Corinne Montineri, *UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, 31 *ASA BULLETIN* 774, 774-76 (2013).

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.<sup>133</sup> The exhibits themselves are generally excluded from public disclosure but a table listing all exhibits should nevertheless be disclosed.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup> 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.”<sup>137</sup> The participation of Contracting Parties and amicus curiae deals with the participation of non-disputing parties *lato sensu*.<sup>138</sup> Contracting Parties to an investment treaty - usually the investor’s home state- can make submissions with regard to “issues of treaty interpretation”<sup>139</sup> and following the consultation of the disputing parties, an arbitral tribunal can also allow submissions “on further matters within the scope of

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133. *Id.* art. 3(2).

134. *Id.* art. 3(1). Compare U.S. Model Bilateral Investment Treaty, art. 29(1) (2004) [hereinafter U.S. Model BIT 2004], with U.S. Model Bilateral Investment Treaty, art. 29(1) (2012) [hereinafter U.S. Model BIT 2012].

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.

See also Federico Ortino, *Transparency of Investment Awards: External and Internal Dimensions*, in *TRANSPARENCY IN INTERNATIONAL TRADE AND INVESTMENT DISPUTE SETTLEMENT* 119, 132–34 (Junji Nakagawa ed., 2013); JOACHIM DELANEY & DANIEL B. MAGRAW, *PROCEDURAL TRANSPARENCY* 751–76 (2008); Calamita, *supra* note 22, at 649–50; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 *VAND. J. TRANSNAT’L L.* 775, 786–87 (2008).

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).

138. See Jaime, *supra* note 128, at 287. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 *AM. J. INT’L L.* 45 (2013).

139. Transparency Rules, *supra* note 123, art. 5(1).

the dispute.”<sup>140</sup> On the other hand, *amicus curiae* submissions or briefs refer to submissions of non-state actors, such as NGOs.<sup>141</sup> Such third parties are allowed to file submissions under a certain procedure<sup>142</sup> 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”,<sup>143</sup> does not “disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party”,<sup>144</sup> and that the disputants “are given a reasonable opportunity to present their observations on any submission by the third person.”<sup>145</sup> Amici are nevertheless not allowed to participate in the arbitration hearing and present oral evidence.

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

141. See Lucas Bastin, *Amici Curiae in Investor-State Arbitration: Eight Recent Trends*, 30 ARB. INT'L 125, 127–40 (2014); Lucas Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 CAMBRIDGE J. INT'L & COMP. L. 208, 214–21 (2012); Laurence Boisson de Chazournes, *Transparency and Amicus Curiae Briefs*, 1 J. WORLD INT'L & TRADE 333 (2004); Alexis Mourre, *Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?*, 5 LAW & PRAC. INT'L CTS. & TRIBUNALS 257, 257–71 (2006); Andrea Bjorklund, *The Participation of Sub-National Government Units as Amici Curiae in International Investment Disputes*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 298, 298–316 (Chester Brown & Kate Miles eds., 2011); Jorge Viñuales, *Amicus Intervention in Investor-State Arbitration*, 61(4) DISP. RES. J. 72 (2007); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L. J. 681, 697–705 (2007); Julie Lee, *UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations*, 33 NW. J. INT'L L. & BUS. 439, 493–56 (2013); Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1286–90 (2009); Epaminontas E. Triantafilou, *Amicus Submissions in Investor-State Arbitration After Suez v. Argentina: The Gillis Wetter Prize*, 24 ARB. INT'L 571 (2008); Tomoko Ishikawa, *Third Party Participation In Investment Treaty Arbitration*, 59 INT'L & COMP. L.Q. 373, 373–412 (2010); Eugenia Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 29 BERK. J. INT'L L. 200, 200–24 (2011).

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.<sup>146</sup>

### 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,<sup>147</sup> and was opened for signature in Port Louis on March 17, 2015 (hence the name “Mauritius Convention”).<sup>148</sup>

#### 2. Scope

Unlike the Rules on Transparency, the Mauritius Convention applies to investment treaties concluded before April 1, 2014<sup>149</sup> and to investor-state arbitrations initiated under such treaties after the Mauritius Convention enters into force.<sup>150</sup> 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.<sup>151</sup> 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).<sup>152</sup>

#### 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.<sup>153</sup> 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

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146. Mauritius Convention, *supra* note 124.

147. See U.N. Convention on Transparency, *supra* note 124.

148. Mauritius Convention, *supra* note 124; *States Sign Convention on Transparency*, 10(2) GLOBAL ARB. REV. 7, 7 (2015); Lise Johnson, *The Mauritius Convention on Transparency: Comments on the treaty and its role in increasing transparency of investor-State arbitration*, CCSI Policy Paper, Sept. 2014, available at <http://ccsi.columbia.edu/files/2013/12/10.-Johnson-Mauritius-Convention-on-Transparency-Convention.pdf> (last visited Jan. 12, 2016).

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.<sup>154</sup>

## 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.<sup>155</sup> 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.<sup>156</sup> 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.<sup>157</sup>

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.<sup>158</sup> The case involved legal issues pertaining to treaty and statutory interpretation of federal and constitutional statutes.<sup>159</sup> 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.<sup>160</sup> The issues varied from “fishing in

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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).

155. ALEXANDER NADJA, INTERNATIONAL AND COMPARATIVE MEDIATION: LEGAL PERSPECTIVES 245 (2009).

156. *Id.* at 247.

157. *Id.* at 282–285.

158. Francis McGovern, *Mediation of the Snake River Basin*, 42 IDAHO L. REV. 547, 548–53 (2006).

159. *Id.* at 553.

160. *Id.* at 553–54.

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.<sup>161</sup> The conflict was also riddled with legal issues pertaining the interpretation of Treaties of 1855<sup>162</sup>, 1863<sup>163</sup> and 1893,<sup>164</sup> and U.S. federal statutes such as The Endangered Species Act (ESA)<sup>165</sup> and the Clean Water Act<sup>166</sup>. 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.<sup>167</sup>

In terms of the mediation process employed in this public sector dispute, a problem-solving and forward looking approach was taken.<sup>168</sup> The ultimate success of the mediation was attributed to the focus on “future” and a realistic and “doable” settlement possibilities.<sup>169</sup> The process lasted for six years reaching settlements on “water flows, endangered species, resource allocation and management, and governmental cooperation.”<sup>170</sup> 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.<sup>171</sup>

Similarly, the mediation involving the management of the endangered Allagash river resources employed a public mediation process.<sup>172</sup> 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.’”<sup>173</sup> 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.<sup>174</sup> The mediator spent considerable time with the stakeholders individually so as to understand their concerns and ascertain

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161. *Id.* at 555.

162. *Id.* at 548.

163. Francis McGovern, *Mediation of the Snake River Basin*, 42 IDAHO L. REV. 547, 548 (2006).

164. *Id.*

165. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1982), available at <https://www.fws.gov/laws/lawsdigest/esact.html>.

166. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977).

167. McGovern, *supra* note 150, at 555.

168. *Id.* at 557.

169. *Id.* at 561.

170. *Id.* at 562.

171. *Id.*

172. Jonathan W. Reitman, *The Allagash: A Case Study of a Successful Environmental Mediation*, MEDIATE.COM (2003), <http://www.mediate.com/articles/reitmanJ.cfm>.

173. *Id.*

174. *Id.*



priorities.<sup>175</sup> At issue was the “original intent”<sup>176</sup> of the documents entailing the creation of the waterway as well as a set of related or “tiered” issues.<sup>177</sup> Mediation proved effective in arriving at a “one-text”<sup>178</sup> agreement addressing a diverse set of interests formulated and signed by all concerned parties.<sup>179</sup>

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.<sup>180</sup> 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.<sup>181</sup>

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.”<sup>182</sup> Cases involving long-term relational commitments are often seen as most conducive to mediated settlements.

Such relational considerations come in to 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”<sup>183</sup> are leading potential parties to look beyond arbitration for resolution.

The case of *Metalclad v. Mexico*<sup>184</sup> is illustrative. The Chief Executive

175. *Id.*

176. *Id.*

177. Jonathan W. Reitman, *The Allagash: A Case Study of a Successful Environmental Mediation*, MEDIATE.COM (2003), <http://www.mediate.com/articles/reitmanJ.cfm>.

178. *Id.*

179. *Id.*

180. See Timothy Gracious, *Investor-State Mediation/Conciliation in India*, MEDIATE.COM (2015), <http://www.mediate.com/articles/TimothyG3.cfm#>.

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.”<sup>185</sup> 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.

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185. Gracious, *supra* note 180.

