Dispute Resolution Review

Volume 2 Issue 1

2023

The Role of Expert Advisory Mediation in Addressing Practical and Political Barriers to ISDS Mediation

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THE ROLE OF EXPERT ADVISORY MEDIATION IN ADDRESSING PRACTICAL AND POLITICAL BARRIERS TO ISDS MEDIATION

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Abstract

The recent drive to encourage the use of mediation in investor-state dispute settlement (ISDS) has brought to centre the practical and political barriers to its uptake on the part of States. While efforts have been made to provide States with guidance to address practical issues relating to State bureaucracy and the authority of its agents, comparatively less attention has been paid to the political barriers posed. On this issue, legal users (lawyers and legal advisers) who participated in the Singapore International Dispute Resolution Academy (SIDRA) Interviews on international dispute resolution mechanisms have highlighted the value of expert advisory mediation in ISDS.

This article draws on the findings from the SIDRA International Dispute Resolution Survey: 2020 Final Report and SIDRA Interviews, and underscores the wider importance of exploring several mediation models and process design in encouraging ISDS mediation. This article seeks to understand the practical and political barriers to ISDS mediation and the suitability of expert advisory mediation in ISDS as a means of allaying State concerns regarding practical and political barriers.

I INTRODUCTION

Growing discontent with the investor-state dispute settlement (ISDS) system by host States and investors has pushed stakeholders to reform the system. Investment treaty arbitration, the leading mode of dispute resolution for investor-state disputes,[1] is now criticized as a too costly and too lengthy

* Research Associate, Singapore International Dispute Resolution Academy (SIDRA). I would like to thank Nadja Alexander, Samantha Clare Goh, Clarissa Chern Xin Yi and Keith Detros for their constructive comments and support.

1 SIDRA, Singapore Management University School of Law, 'SIDRA International Dispute Resolution Survey: 2020 Final Report (2020)'

process which deteriorates business relationships, and often brings about difficulties in enforcing an arbitral award should any of the parties secure one. One of the suggested reforms to address these problems has been institutionalizing and promoting mediation as an alternative to arbitration. Mediation is seen as 'well-positioned to address dissatisfaction with investor-state arbitration'.[2] Mediation offers a faster and less expensive alternative and provides an environment that is more conducive to preserving business relationships.

Mediation has been gaining a foothold in the ISDS system in recent years. Many States have included mediation as a method of resolving disputes in their model bilateral investment treaties.[3] In 2012, the International Bar Association (IBA) adopted the Rules for Investor State Mediation. The UNCITRAL Working Group III on Investor-State Dispute Settlement Reform is crafting guidelines meant to encourage States to settle investment disputes via mediation. In 2020, the United Nations Convention on International Settlement Agreements Resulting from Mediation—also known as the Singapore Convention on Mediation—entered into force, which is broad enough to cover mediated settlements regarding investments.[4] Recently, the International Centre for Settlement of Investment Disputes (ICSID) developed the first-ever institutional rules for investor-state mediation.[5] The ICSID Mediation Rules took effect on 1 July 2022.

Notwithstanding these efforts, it appears that States and investors are still reluctant to make use of mediation. Despite being in place since 2012, the IBA Rules on Investor-State Mediation has been utilised in only one known investor-state dispute and one ICSID conciliation case that utilised the same rules.[6] In 2019, it was reported that there were 1,023 investor-state disputes. Out of that number, only 12 cases were publicly reported under the ICSID conciliation rules.[7] Ten cases went to mediation or conciliation.[8]

The Singapore International Dispute Resolution Academy International Dispute Resolution Survey: 2020 Final Report (SIDRA Survey), which targeted

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<https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/index.html> ('SIDRA Final Report 2020').

2 James M Claxton, 'Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?' (2020) 20 *Pepperdine Dispute Resolution Law Journal* 78, 83.

3 Examples of investment treaties which have adopted mediation mechanisms to deal with disputes between the contracting parties include the EU-Singapore Investment Protection Agreement, the Dominican Republic-Central American Free Trade Agreement and the Mainland and Hong Kong Closer Economic Partnership Agreement.

4 Claxton (n 2) 88.

5 International Centre for Settlement of Investment Disputes (ICSID), 'Draft ICSID Mediation Rules, Introductory Note' <https://icsid.worldbank.org/resources/rules-and-regulations/mediation-rules/introductory-note>.

6 *Republic of Equatorial Guinea v CMS Energy Corporation and others* (ICSID Case No CONC(AF)/12/2).

7 David Ng, 'The Way Forward for Mediation as a Reform Option for ISDS: Background Paper', *UNCITRAL Working Group III Virtual Pre-Intersessional Meeting* (9 November 2020) <https://www.doj.gov.hk/en/publications/pdf/2020_pre_intersessional_meeting_proceedings_e.pdf>.

8 Ibid 339.

client users (defined as corporate executives and in-house counsel) and legal users (defined as lawyers and legal advisers) of cross-border dispute resolution mechanisms, indicated that arbitration is still the preferred mode of dispute resolution in the ISDS system. In fact, the majority of respondents to the SIDRA Survey shows that over 82% of client and legal users prefer institutional arbitration and ad hoc arbitration to resolve investment disputes over litigation and mediation.[9]

To better understand the issues relating to the slow uptake and to discuss ways to address the barriers to mediation in investor-state dispute settlement, SIDRA interviewed select legal users who participated in the survey to share their views on the matter.[10] The SIDRA Interviews were conducted from November to December 2020 with a total of 18 legal users participating. This article sets out the findings of the SIDRA Interviews relevant to the slow uptake of mediation in ISDS, which can be encapsulated in these two points:

1. **Practical and political barriers prevent States from fully participating in ISDS mediation.** Practical issues include (a) the involvement of several government officials to settle a dispute, (b) government budgetary concerns and (c) claimants submitting inflated claims that automatically discourage States from coming to the negotiating table. Political barriers refer to the unwillingness of government officials to agree on settlements without the participation of a deciding body like a court judge or arbitral tribunal.
2. **Expert advisory mediation can be a tool that addresses the practical and political barriers.** An expert advisory mediator can proactively assist parties in crafting a mutually acceptable settlement agreement. In this way, both parties may be more willing to mediate disputes and States may be able to better manage political issues.

In the following sections, this article will look at the challenges and criticisms of the current ISDS arbitration system (Part II). Part III explains why mediation can be a desirable alternative to investor-state arbitration. Part IV will then detail the findings of the SIDRA Interviews as to why ISDS mediation has not yet caught up to arbitration. Finally, Part V will discuss the potential viability of expert advisory mediation.

II CRITICISMS OF THE CURRENT ISDS SYSTEM

Arbitration has been the most dominant method of resolving investor-state disputes. Over 82% of respondents, consisting of client users who are corporate executives, in-house counsel, and legal users who are external

9 SIDRA Final Report 2020 (n 1) 16.

10 The SIDRA Interviews were conducted by Dr Nadja Alexander, Rachel Tan, Vakhtang Giorgadze, Allison Goh, and Samantha Clare Goh from SIDRA and Michael Peer from PwC. The interviews aimed to contextualise the findings of the SIDRA Survey published in July 2020.

counsel and legal advisers, to the SIDRA Survey prefer institutional arbitration to resolve investment disputes.[11] Around 52% of the respondents prefer ad hoc arbitration.[12]

Despite arbitration being the overwhelming choice, stakeholders have expressed their dissatisfaction with the system. Stakeholders have found arbitration to be an overly lengthy and costly process.[13] In addition, investors have had trouble enforcing arbitral awards. Different stakeholders have also questioned the legitimacy of the arbitration process in ISDS.[14]

On average, an investment arbitration case takes three years.[15] By the time an arbitral award is released, States and investors may have already 'moved on to other issues, losing the investment'.[16]

Costs are inextricably linked to the length of a case.[17] Legal counsel and experts take up 80% to 90% of the costs of an investment arbitration proceeding.[18] Parties incur around US$ 8 million just to participate in an investment arbitration.[19] This has potentially damaging financial implications for respondent States considering that they pay for the high costs using public funds and may be diverting financial resources away from important developmental programs.[20] High costs also effectively bar small and medium enterprises from accessing ISDS arbitration as a means of resolving their disputes with States.[21]

Even after an arbitral tribunal issues an award, parties still face difficulties enforcing the same. Relationships between States and investors may also be damaged after years of having to face each other in an adversarial type of

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11 SIDRA Final Report 2020 (n 1). The SIDRA Survey was answered by 304 respondents from 46 countries. Among all the respondents, 64% were legal users (lawyers and legal advisers) and 36% were client users (corporate executives and in-house counsel). Among the 46 countries the respondents operate or practice from, only seven are not ICSID Member States.

12 Ibid.

13 Susan D Franck, 'Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide' (2014) 29 *ICSID Review – Foreign Investment Law Journal*, 66, 71.

14 Ibid.

15 Andrea K Schneider and Nancy A Welsh, 'Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management' (2021) 17 *University of St Thomas Law Journal* 373, 377; Wolf von Kumberg, Jeremy Lack and Michael Leathes, 'Enabling Early Settlement in Investor–State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29 *ICSID Review – Foreign Investment Law Journal*, 133, 135.

16 Schneider and Welsh (n 16) 377.

17 Commission on International Trade Law (UNCITRAL), Working Group III on Investor-State Dispute Settlement Reform, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session – Part I* (A/CN.9/930/Rev.1) (19 December 2017) [38] ('UNCITRAL Working Group III Report').

18 Ibid [36].

19 Ibid; Schneider and Welsh (n 16) 377.

20 UNCITRAL Working Group III Report (n 18) [37], [40].

21 Ibid [41].

arbitration,[22] making it difficult for either party to enforce any arbitral award in the end. Apart from that, enforcement actions can also take a long time.[23]

Stakeholders have also raised doubt as to the legitimacy of investor-state arbitration. Specifically, they are questioning the implications of having arbitrators decide public interest issues of a host State,[24] especially when domestic courts are able to 'offer adequate access to justice to a foreign investor'.[25] Decisions of arbitral tribunals also tend to be unpredictable given the lack of consistency of the awards issued by *ad hoc* tribunals.[26]

Stakeholders have also raised the lack of diversity of arbitrators[27] and that the practice of double-hatting, where an individual acts as counsel, arbitrator, or expert in different ISDS arbitral proceedings,[28] as undermining the legitimacy of ISDS arbitration.

III MEDIATION AS A POSSIBLE ALTERNATIVE

Against this background, mediation has emerged as a possible alternative to ISDS arbitration to resolve investment disputes.[29]

The UNCITRAL Draft Guidelines for Participants in Investment Mediation describes mediation as 'a flexible process whereby a [mediator] assists the parties in reaching an amicable settlement of the issues in dispute'.[30] It is an 'efficient tool to resolve investment disputes' and can be resorted to 'throughout the investment life cycle and alongside arbitration'.[31] As mediation is meant to help the parties reach a mutually acceptable settlement in order 'to maximize their objectives',[32] it gives 'States … problem-solving opportunities that do not necessarily infringe on sovereignty'.[33]

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22 Kun Fan, 'Mediation of Investor–State Disputes: A Treaty Survey' (2020) *Journal of Dispute Resolution* 327, 328; Schneider and Welsh (n 16) 377.

23 UNCITRAL Working Group III Report (n 18) [48].

24 Munir Maniruzzaman, 'A Rethink of Investor-State Dispute Settlement', *Kluwer Arbitration Blog* (Web Page, 30 May 2013) <http://arbitrationblog.kluwerarbitration.com/2013/05/30/a-rethink-of-investor-state-dispute-settlement/>.

25 Gabrielle Kaufmann-Kohler and Michele Potestà, *European Yearbook of International Economic Law Special Issue: Investor-State Dispute Settlement and National Courts Current Framework and Reform Options* (Springer Open, 2020) 8.

26 UNCITRAL, Working Group III on Investor-State Dispute Settlement Reform, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session – Part II* (A/CN.9/930/Add.1/Rev.1) (26 February 2018) [13].

27 UNCITRAL, Working Group III on Investor-State Dispute Settlement Reform, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session* (A/CN.9/964) (6 November 2018) [92].

28 Ibid [70].

29 Fan (n 23) 328; Schneider and Welsh (n 16) 379.

30 UNCITRAL, Working Group III on Investor-State Dispute Settlement Reform, *Draft Clauses on Mediation* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/draft_clauses_on_mediation.pdf> ('Draft Guidelines').

31 Ibid [2].

32 Franck (n 14) 72.

33 Ibid.

Mediation is a more flexible process than arbitration. This means that it can be a faster and less expensive dispute resolution mechanism.[34] The time and financial resources that can be saved when mediating an investment dispute may be used by States for its developmental projects, and investors may use the same to further their business interests.[35] Certainly though, investor-state mediation has been subject to criticisms, for example, risks associated with lack of finality and a direct enforcement mechanism and concerns about the tensions between confidentiality and transparency. These are addressed below.

In terms of the opportunities that mediation can offer as it is a less adversarial process than arbitration and parties are expected to actively work with the mediator to create settlement options,[36] mediation allows parties to maintain or even repair business relationships.[37] Investors are better able to preserve their relationships with States if they still have ongoing business interests or if they are considering future ventures with the very same State.[38] In turn, States are also better able to preserve its political and economic reputation that would enable it to attract more foreign capital.[39]

Mediation can also alleviate some of the legitimacy issues plaguing ISDS arbitration. Parties involved in a mediation are able to control the outcome. They are free to accept a mediated settlement or walk away from the process altogether. As such, parties can avoid 'an outcome that is not necessarily determinate, or otherwise mitigating future risks generated by crystallized awards that articulate applications of law with which stakeholders may disagree'.[40] Mediation thus addresses the unpredictability of arbitral awards, as well as "concerns about private arbitrators sitting in judgment over states" [41] as the parties themselves actively work towards a mutually acceptable solution. As a result, parties are able to control their financial exposure. It is also possible that there will be no risk of a regulatory chill on the part of States as 'no resolution of a dispute is imposed on a State'.[42]

With the entry into force of the Singapore Convention on Mediation, it is expected that more parties will opt to mediate their investor-state disputes.[43] The Singapore Convention on Mediation addresses the practical problem of enforcement. The Convention is written broadly enough to include investment-related settlements under its purview.[44] It allows parties to

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34 Claxton (n 2) 84; Franck (n 14) 78.
35 Franck (n 14) 78.
36 Draft Guidelines (n 31) [16].
37 Franck (n 14) 78; UNCITRAL, Working Group III on Investor-State Dispute Settlement Reform, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session* (A/CN.9/1044) (10 November 2020) [27].
38 Franck (n 14) 78.
39 Ibid.
40 Ibid.
41 Claxton (n 2) 84.
42 Draft Guidelines (n 31) [28].
43 Claxton (n 2) 88.
44 Ibid.

directly enforce settlements across borders with ease.[45] The Singapore Convention on Mediation can also be particularly useful in investor-state disputes should the State later decide to renounce the settlement agreement because of a regime change.[46]

IV FINDINGS OF SIDRA INTERVIEWS

Despite all the apparent advantages of mediation, there is a relatively slow uptake of the process. When asked what their preferred mode of dispute resolution mechanism in investor-state disputes, only 14% of the respondents to the SIDRA Survey chose *ad hoc* mediation and 7% opted for institutional mediation.[47] Interestingly, over 52% of the total number of respondents found the ability to use mediation in the ISDS system 'extremely useful' or 'useful'. For 80% of client users (corporate executives and in-house counsel), the ability to use mediation was considered 'extremely useful' or 'useful', while 48% of legal users (lawyers and legal advisers) found mediation 'extremely useful' or 'useful'.[48]

To better understand the data from the SIDRA Survey, SIDRA spoke with legal users that participated in the Survey from November to December 2020. 18 users from 11 different countries, covering five continents, participated in the interviews. The majority of these users are lawyers based in Asia and, specifically, in Singapore. These legal users advise clients on cross-border commercial and investment disputes and shared their views on the matter during the SIDRA Interviews.

The legal users were asked about their experience with ISDS mediation, why they think there has been a slow uptake to the process despite corporate users being supportive of it, and how to get over those challenges. The legal users said that States are more reluctant to mediate disputes with foreign investors. The issues identified by the legal users can be categorized into (1) practical and (2) political barriers that prevent States from fully participating in ISDS mediation.

A *Practical Barriers*

The main practical barrier identified during the SIDRA Interviews refers to how a State is structured. There are typically multiple government agencies and officials involved in an investor-state dispute. As such, there are many decision makers that would have to give their input regarding any step taken by the State. Because of government bureaucracy, States take some time to get the appropriate government ministries or agencies involved and give the matter the proper attention. The legal users interviewed indicated that having to

45 Fan (n 23) 341.
46 Claxton (n 2) 88.
47 SIDRA Final Report 2020 (n 1) 16.
48 Ibid 25.

need a lot of sign offs from different government officials makes the process of negotiating and coming to mediation more laborious.

Budgetary concerns are also a practical barrier for States. Many government officials are not comfortable with deciding on how much money it should spend on settlements. Government authorities would rather have a judge or a tribunal dictate the amount of money that it needs to pay out. This also ties into the issue regarding government bureaucracy — that several officials must approve the amount of money in a settlement agreement.

Another practical barrier identified during the SIDRA Interviews is the tendency of claimants to submit inflated claims that immediately discourage States from mediating and settling the dispute. States would rather opt for a more adjudicative process to work out the real amount involved in the dispute. Because parties would then already have spent money on an arbitration or litigation, the tendency is to see it through and forego other methods of dispute resolution.

B *Political Barriers*

The main political barrier identified during the SIDRA Interviews is an accountability issue. The legal users interviewed said that government authorities seem to be more reluctant to decide on a settlement agreement and do not want to be responsible for making the decision to spend money on an out-of-court settlement. Government officials would rather be directed or mandated by a judge or tribunal to pay a sum of money because it takes away responsibility from an individual or group decision maker. No government official wants to be accused of corruption or face even just the mere threat of being accused of corruption after the settlement is agreed upon or should there be a regime change in their respective countries later on.

The data gathered from the SIDRA Interviews is consistent with the findings of several commentators that these practical and political barriers deter many States from agreeing to mediate an investor-state dispute.[49] Mainly, States are reluctant to engage in an investor-state mediation because they fear political blowback in their own countries. Should States decide to mediate a dispute, they might be seen as weak and bowing to foreign private interests.[50] At worst, State officials may be accused of corruption because they entered into a settlement agreement that may be perceived to be disadvantageous to the government and the public interest.[51] States would rather shift responsibility and blame regarding liabilities, should there be any,

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49 Fan (n 23) 329; Schneider and Welsh (n 16) 387; Munir Maniruzzaman (n 25); Claxton (n 2) 80, 99; Seraphina Chew, Lucy Reed and J Christopher Thomas QC, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (September 2018) *NUS Centre for International Law Working Paper 18/01* <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf>.

50 Maniruzzaman (n 25); Claxton (n 2) 80.

51 Claxton (n 2) 80, 99; Schneider and Welsh (n 16) 387; Chew, Reed, and Thomas (n 50) 12–13.

to an arbitral tribunal even if this would mean having to go through a lengthier process and spending more public funds.[52]

V THE SUITABILITY OF EXPERT ADVISORY MEDIATION AS A MEANS TO ADDRESS BARRIERS

To address these barriers, participants to the SIDRA Interviews suggested a more 'directive' type of mediation where the mediator would assess the dispute, including all the parties' positions, and provide an opinion on a possible outcome should the parties decide to go through a more adversarial process like arbitration or litigation. This is an evaluative type of mediation.

Expert advisory mediation, which is an evaluative type of mediation, has been described as 'legal mediation' as mediators are expected to look at the underlying substantive law of a dispute.[53] As such, expert advisory mediators are often senior lawyers or experts in their respective fields who are knowledgeable in the subject matter of the dispute.[54] Expert advisory mediation has been found to be particularly useful whenever parties attend mediation because it is mandatory, when parties might have an 'unrealistic view' of their case, when the parties want to hear the objective views of an expert and when parties want a speedy disposition of their dispute.[55] It can be distinguished from other evaluative forms of mediation such as wise counsel mediation where the mediator focuses more on the interests of the parties.[56]

Parties to an expert advisory mediation and their lawyers are expected to actively participate by providing opening mediation statements, case summaries and speaking during mediation to their submissions.[57] Like all mediators, expert advisory mediators facilitate a negotiation between the parties. However, they can offer expert advice in different ways. Throughout the mediation, mediators can provide 'information', express an opinion directly or indirectly, may offer advice, may be critical or judgmental, and may act as the agent of reality for example by working with risk assessment tools.[58] Additionally, at the end of the process, expert advisory mediators provide parties their opinion regarding the strengths and weaknesses of their respective positions, predict outcomes should the dispute proceed to arbitration or litigation and make recommendations to the parties individually

52 Schneider and Welsh (n 16) 387; Chew, Reed, and Thomas (n 50) 12–13.

53 Kenneth M Roberts, 'Mediating the Evaluative-Facilitative Debate: Why Both Parties Are Wrong and a Proposal for Settlement' (2007) 39 *Loyola University Chicago International Law Review* 187, 195.

54 Ibid; Nadja Alexander, 'The Mediation Metamodel: Understanding Practice' (2008) 26(1) *Conflict Resolution Quarterly* 97–123.

55 Alexander (n 55).

56 Ibid.

57 Franck (n 14) 72; Maniruzzaman (n 25).

58 Laurence Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012) 244.

or with all parties present.[59] Unlike arbitrators or judges, expert advisory mediators do not provide binding decisions. Thus, expert advisory mediation is in a position to encourage parties to work towards a settlement and even find other viable economic opportunities.[60]

In addition, the legal users who participated in the SIDRA Interviews suggest that expert advisory mediation is helpful in convincing more States to choose to mediate their investor-state disputes. Expert advisory mediators can assume a lot of responsibility from the parties involved in an investment dispute, especially States.[61] One commentator has described expert advisory mediation as having 'a psychological effect on … concerned state representatives in terms of confidence-building that they stand upon some credible platform in respect of their negotiation with the foreign investor … It may provide them with some legitimacy for their negotiation, hence a shield for deflecting any political criticism later on'.[62] States can refer to the findings or recommendations of the expert advisory mediator to justify both the decision to settle and the contents of the settlement agreement itself.

One of the legal users interviewed pointed out that expert advisory mediation can even address the issue of claimants inflating their claims at the onset of a dispute. Thus, this would help diminish the practical and political barriers to investor-state mediation.

Expert advisory mediation in the ISDS context could take different forms. For one, there is room for expert advisory mediation in the existing legal framework for investor-state dispute settlement. Out of 2,576 investment treaties mapped by the United Nations Conference on Trade and Development, 626 treaties include conciliation or mediation.[63] A study of recent international investment agreements (IIA) and model bilateral investment treaties (BIT) shows the varying degrees of how mediation is incorporated in these agreements, ranging from a mere mention of mediation to specific mediation procedural rules.[64] Thus, parties to these treaties can choose a more evaluative and in-depth process when they are designing their strategy and approach to mediation. Second, in crafting new investment agreements, parties can look into incorporating mediation, including expert advisory mediation, in their dispute resolution clauses.

Even so, as indicated at the beginning of this paper, there are several issues such as confidentiality, transparency and enforcement that needs to be addressed regardless of the precise mechanics adopted for expert advisory mediation in ISDS.

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59 Laurence Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012) 244.

61 Roberts (n 54) 195; Alexander (n 55).

61 Alexander (n 55).

62 Maniruzzaman (n 25).

63 International Investor Agreements Navigator, Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping#>.

64 Fan (n 23) 331.

Confidentiality is an important feature of mediation as it encourages parties to freely express their positions. Transparency is equally important in the context of ISDS as public interest is involved in such disputes. In an investor-state mediation setting, expert advisory mediation can be flexible enough to make room for the interests of the parties to keep the proceedings confidential and balance this with necessary public disclosure.[65] By way of example, confidentiality and transparency obligations in expert advisory mediation can be modelled after the mechanisms found in the IBA Rules on Investor-State Mediation or the new ICSID Mediation Rules. Under the IBA Rules on Investor-State Mediation, the mediation shall be private.[66] Documents and communications prepared in connection with the mediation shall be confidential.[67] The confidentiality obligation does not extend to (1) the fact that the parties agreed to mediate or a settlement resulted from the mediation, unless the parties otherwise agree in writing, and (2) the terms of a settlement or partial settlement, unless and to extent that the parties otherwise agree in writing.[68] Under the ICSID Mediation Rules, all information relating to the mediation, and all documents generated in or obtained during the mediation, shall be confidential, unless (1) the parties agree otherwise, (2) the information or document is independently available, or (3) the disclosure is required by law.[69] The fact that the parties are mediating or have mediated shall be confidential, unless the parties agree otherwise.[70]

In terms of enforcement, no ISDS mechanism can guarantee the same. Anecdotal evidence suggests high compliance with mediated outcomes generally. Where compliance is a concern, it is possible to have mediated outcomes recorded as arbitral awards, making it enforceable under the ICSID Convention or the New York Convention. This, however, presupposes that an arbitration proceeding has been commenced or if parties chose mixed mode (hybrid) mechanisms such as Arbitration-Mediation and Arbitration-Mediation-Arbitration to resolve their dispute.[71] Further, the new direct enforcement regime brought about by the Singapore Convention on

65 David Ng, 'ISDS Reform Conference: Mapping the Way Forward Discussion Paper for the Session on Investment Mediation' (2019) [116] <http://isdsreform2019.aail.org/wp-content/uploads/2019/02/ISDS_Discussion_Paper_Investment_Mediation_by_David_Ng-1.pdf>.

66 International Bar Association (IBA), 'IBA Rules for Investor-State Mediation' (4 October 2012) art 10(1) <https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C>.

67 Ibid art 10(2).

68 Ibid arts 10(3)(a) and (b).

69 International Centre for Settlement of Investment Disputes (ICSID), 'ICSID Mediation Rules and Regulations' (July 2022) r 10(1) <https://icsid.worldbank.org/sites/default/files/documents/ICSID_Mediation.pdf>.

70 Ibid r 10(2).

71 Ng (n 66) [128].

Mediation is likely to enable parties to directly enforce such mediated outcomes once it gains traction.[72]

VI Conclusion

The recent drive to encourage the use of mediation in ISDS has spotlighted the practical and political barriers to its uptake on the part of States. While efforts have been made to provide states with guidance to address practical barriers relating to state bureaucracy and the authority of its agents, as well as the political barriers posed, more needs to be done to persuade parties to engage in mediation in ISDS. The legal users who participated in the SIDRA Interviews highlighted the value of expert advisory mediation in ISDS. Expert advisory mediation can be a suitable option to allay State concerns regarding practical and political responsibility. It may encourage more States to choose and actively participate in mediation, enabling parties to save time and costs, maintain business relationships and to focus on other business and political concerns. Issues regarding confidentiality and transparency can be carefully considered in the overall design of expert advisory mediation in the ISDS context.

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[72] Nadja Alexander and Shou Yu Chong, 'The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes' in Mahdev Mohan and Chester Brown (eds), *The Asian Turn in Foreign Investment* (Cambridge University Press, 2021) 340, 358.