Diplomatic and Judicial Means of Dispute Settlement addresses a question of growing practical and theoretical importance in international law: the synergies and potential conflicts among different means of settling international disputes. The contributing authors, who include some of the world’s leading academics and practitioners, analyze various areas where such interactions have become ever more frequent, such as the law of territorial disputes, international criminal law, international trade law, investment arbitration and human rights. The groundbreaking new volume aims to provide both a survey of prominent case-studies and an analytical framework to foster research on this increasingly important topic.

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Chapter Eight

Investment Disputes – Moving Beyond Arbitration

Michael E. Schneider

The network of International Investment Treaties (IIT) which has developed during recent decades has created an unprecedented degree of legal security in the relations between foreign investors and their host States. But the legal system on which it is based remains rudimentary and the available remedy is almost exclusively rights-based arbitration and claims for financial compensation. As practiced today the system lacks the flexibility that is necessary for supporting complex long-term relations and their evolution in a changing economic, political, technological environment. Such flexibility is needed as part of the substantive legal rules governing the relationship between the foreign investor and the host State and in the methods by which these rules are given effect in cases of conflict. The present chapter considers approaches for resolving investment disputes which are responsive to the need for flexibility and the constraints which these approaches face; the equally important subject of developing the substantive rules and principles by which rights and obligations of the investor are reconciled with the evolving interests and objectives of the host society must be left for another study.

While arbitration – producing as it does a rights-based binding solution – is a necessary basis for investment disputes, it appears desirable and indeed necessary to develop the system beyond arbitration. To this effect other mechanisms should be made available which provide greater flexibility in reconciling the conflicting objectives and interests. Alternative methods of dispute resolution (ADR), as they have been developed in commercial relations, may serve as a useful reference; but they must be adapted and developed to meet the specificity of the disputes as they arise in the relations between foreign investors and their host States.
1. The Context

It is an essential prerequisite for the success of modern economies that individuals, acting alone or in groups, commit their own resources or those over which they have control to economic ventures. They do so in the context of organised societies, mainly States, which regulate the relationship between the economic activities, including the resources committed to investments, and the host societies in which such investments are made. Economists, such as Hernando de Soto in his seminal work on the “Mystery of Capitalism”, have emphasised the extent to which the reliability of these regulations, starting with the guarantee of property rights and their derivatives, are an essential feature for investments and economic development in our economies. But this legal stability is only one of the factors of the development equation.

The success of an investment and the development of the society in which it is made are determined by many factors; these factors are subject to more or less frequent change. The relationship between investors and the host society, therefore, is fragile; at any time disruptions may occur. Societies and their legal systems have developed formal and informal mechanisms for managing the effect of such disruptions and for restoring productive relations after they have occurred; generally they succeed in one way or another.

When the investment is made by players coming from outside the host society an additional dimension is introduced. This additional dimension may aggravate the disruptions and may cause complications in the attempts to restore productive relations. Traditionally, such attempts were placed in what is described as diplomatic protection, even if historically the protection was not always limited to very diplomatic means.

In the second half of the last century a new feature was added by the progressive development of a world-wide network of treaties intended to provide some stability in the relationship between the foreign investor and the host States. They do so by providing some substantive rules concerning the treatment of foreign investors and by offering to the foreign investor recourse to international arbitration. The creation of this network of investor-State arbitration is a very important step in the development of international relations in a global economy.

However, with the success of this new feature in the system, criticism arose. The criticism has different origins and causes and it is directed against different aspects of the process. Some critics attack the very principle that a foreign investor may bring a dispute with the host State before a body other than the State’s own courts; others find fault with the decisions rendered by the arbitral tribunals to which the disputes are submitted; and a third category of criticism concerns the procedures by which the dispute is resolved, in particular the time and money required for conducting such investment arbitrations.

If one considers the system of investment arbitration in the more general context of the diversity of factors and interests which have a bearing on the relationship between a foreign investor and the host society, one can see the limitations of this system: it reduces this diversity to a small number of considerations which consist mainly in terms of the investor’s loss and compensation for it. Arbitration, as it is now practiced in investor-State disputes, “is focused entirely on the payment of compensation and not on maintaining a working relationship between the parties”.1 Moreover, investment arbitration deals with the complex issues that arise in investment disputes in the narrow framework of a legal system which is rudimentary and which develops in a haphazard manner.

From this perspective, alternatives to arbitration as a form of dispute settlement have an importance and a dimension which would seem to be much greater than the methods of alternative dispute resolution in commercial relations. The need for them arises not just from a desire to avoid or reduce the increasing expenditures in time, money and other resources absorbed in investment arbitration proceedings. They would seem to be a necessary enlargement from the present investor-State arbitration regime. Such enlargement of the system therefore appears as an important feature for creating, on an international level, the means for reconciling the diverging interest between those who commit resources to risky investments and those who, in one way or another, are affected by these investments.

The present chapter explores the mechanisms used in practice: the potential they may offer and the constraints they face. It first provides a brief overview of some ADR methods used in commercial disputes and of some of those which can be found in inter-State disputes. Investment disputes will be shown as a specific category, their specific features will be described and some examples and past experiences of ADR in these disputes will be presented. This will be followed by an assessment of the scope for change in this area and by considering possible approaches. Finally the initiative taken by the International Bar Association (IBA) in preparing Investor-State Mediation Rules will be examined.

II. ADR in Commercial Disputes

Alternative methods of dispute resolution are understood here as all those which lead to a solution adopted voluntarily by the parties to the dispute and not imposed by an arbitrator, a judge or some other authority.

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1 UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration (UNCTAD Series, 2010), at xxiii and 19; decisions such as those in Goetz v. Burundi, discussed below in Section VI.C, are rare exceptions.
The first and simplest alternative, self-evidently, is the attempt by the parties themselves at reaching a resolution of their dispute without the help of others. Much has been said about such attempts and the methods to be used for them to succeed. They remain probably the most frequent form in which disputes are resolved. However, they are normally not included in the discussion about ADR methods which are concerned essentially with the intervention of a third person, assisting the parties in one form or another in their search for the settlement of the dispute.

These third persons, depending on the method adopted or on other criteria, are described as a facilitator, mediator, conciliator, neutral or, in the case of some specialised methods, an adjudicator, dispute board, or expert, to name but a few. Sometimes the term “neutral” is used to describe several or all of these third persons that seek to assist the parties in their search for the settlement.2

The role which the neutral assumes in ADR methods may vary considerably. On the one end of the spectrum one finds forms of assisted negotiation, where the parties have the lead and the neutral seeks primarily to assist them in addressing the dispute in the most efficient manner and in calming the emotions. At the other end of the spectrum one finds such forms as adjudication, dispute boards or the preliminary decision of the engineer in construction projects, where the neutral presents a solution which the parties agreed to apply at least provisionally until the completion of the works. If by that time one of the parties remains dissatisfied with the preliminary decision, it may commence arbitration proceedings in which the provisional decision may be “opened up” and the dispute is considered afresh, possibly with a different outcome. Reports on this system indicate that it is quite rare that the decision of the adjudicator or the dispute board is questioned and arbitration or court proceedings are commenced.

The principal form that comes to mind in the discussion about ADR concerns methods in which the neutral plays an active role in the attempts of bringing the parties to a settlement without imposing it – not even provisionally. The process normally is described as conciliation or mediation. In this respect, too, different methods are applied.

One criterion for distinguishing different methods appears of some importance: it concerns the opinion of the neutral. Some neutrals limit their role to assisting the parties to understand their opponent’s position and to bringing the opposing positions closer together until settlement is reached. Others express their own opinion, during the process or at its end. The latter approach has the advantage that the view of a neutral person may bring some sense of reality into the discussion between the parties. However, it also transforms the nature of this discussion. When the parties understand that the sole target of their argument in the negotiations is the persuasion of the opponent, they are likely to conduct the discussion differently than they would do if the neutral is a reference person who at some stage of the process expresses an opinion. In this latter situation, each of the parties is likely to target also the neutral in its argument in the hope of enlisting the neutral’s support and using it in the argument against the opponent.

There have been attempts to express this distinction in the terminology, calling one method conciliation and the other mediation. However, these attempts have produced different and contradictory results.3 For the purpose of the present contribution the two terms will be used interchangeably.

Finally, mention should be made of the combination of conciliation or mediation with arbitration. In some dispute resolution systems, attempts at conciliation are prescribed before a party may commence judicial proceedings; however, the two phases of the proceedings are conducted in stages and before different persons. In a more advanced form the two forms of dispute settlement are combined before the same person. Such combination is used in the court proceedings of some countries and is considered anathema in others. The combination is for instance well-known in the judicial system of Germany where the code of civil procedure expressly requires the judge to seek, at all stages of the court proceedings, to reconcile the parties.4 Judges there regularly interact with the parties in attempts to settle the case; often they succeed. Similar provisions and practices can be found in Switzerland.5 A similar approach is practiced in China and some other countries of the Far East.

This practice of introducing conciliation as part of a contentious procedure has found application in domestic and international arbitration. Some arbitration acts expressly provide for it; so do some arbitration rules and

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2 The International Chamber of Commerce (ICC) ADR Rules, Preamble, provides: “Amicable settlement is a desirable solution for business disputes and differences. It can occur before or during the litigation or arbitration of a dispute and can often be facilitated through the aid of a third party (the “Neutral”) acting in accordance with simple rules. The parties can agree to submit to such rules in their underlying contract or at any other time.” See also, for example, Article 3 of the Rules dealing with selection of the Neutral. (Emphasis added.)


4 The German Code of Civil Procedure (ZPO), Article 278 (1), provides: “Das Gericht soll in jeder Lage des Verfahrens auf eine gütliche Beilegung des Rechtsstreits oder einzelner Streitpunkte bedacht sein.”

5 They were reflected in the provisions of many of the 26 cantonal codes of civil procedure and can now be found in Article 124(3) of the new Federal Code of Civil Procedure.
special guidelines. The practice, sometimes also referred to as Arb/Med is applied successfully by some arbitrators but remains controversial. It must be pointed out, however, that the type of conciliation or mediation which an arbitrator practices in the case of an Arb/Med procedure is not identical and often more limited in scope than a full-fledged mediation; it is normally limited to an anticipation of the outcome of the arbitration; opening the dispute to considerations and interests outside the scope of the arbitration is not normally considered as part of the role of an arbitrator who acts as mediator.

III. ADR in International Relations between States

In public international law the term ADR is not generally used. When a specialist in public international law considers alternatives, what comes to mind is most likely that between war and peaceful settlement of disputes.

International practice has developed a variety of approaches to promote such peaceful settlement. Legal doctrine grouped them into diplomatic methods on the one hand and legal or judicial methods on the other. The latter include, in particular, proceedings before what is now the International Court of Justice, arbitration and a growing number of specialised international tribunals.

Diplomatic methods of dispute settlement can be seen as corresponding to ADR in commercial disputes. They include negotiations, good offices and mediation, conciliation, fact-finding and inquiries.

These traditional methods have been complemented by a variety of multilateral mechanisms. The United Nations, in particular through the Security Council, the General Assembly and the Secretary General play an important role in the prevention and settlement of international disputes; similar functions have been developed in the context of various regional or specialised organisations which provide for various forms of diplomatic dispute settlement as well as judicial or arbitral institutions.

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6 For example, the Hong Kong Arbitration Ordinance (Cap. 609), Section 32, provides for it; International Arbitration Act of Singapore, Article 17(1); and CEDR Rules for the Facilitation of Settlement in International Arbitration.


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The study of these various institutions and methods of diplomatic dispute settlement might provide useful inspiration and assistance when it comes to resolving investment disputes, in particular insofar as international implications of domestic conflicts are concerned.

However, the reference must be considered with caution. The traditional method for dealing with investment disputes through diplomatic protection has given rise to resentment by host States. The avoidance of the causes for this resentment was precisely one of the principal objectives for the development of modern methods for the settlement of investment disputes through ICSID and bilateral investment protection treaties; but, as mentioned above, this development has created new resentment against the power of international arbitral tribunals in matters concerning the host state.

As will be seen later in this chapter, the intervention of a third party may be useful or even necessary to increase the willingness of the host State and the various groups involved in the dispute and also that of the investor to seek a settlement which may save the investment project and avoid spending much time and money on arbitration or judicial proceedings. When looking to the practice between States for creative new solutions in the field of investment disputes, multilateral approaches might offer a promising reference, in particular where they make allowance for a diversity of players and interests.

At this stage, three examples of diplomatic means of dispute settlement may be mentioned.

The first concerns an international mediation which produced a mechanism for the resolution of a large number of claims of foreign investors against their host State. Following the Tehran hostage crisis, Algeria mediated the dispute between Iran and the United States, leading to the 1981 Algiers Declaration. As part of this settlement the Iran-US Claims Tribunal was created with the power for the adjudication of claims by both States and their nationals and the financial means for implementing the Tribunal’s decisions were provided.

Another type of settlement mechanism provides for compensation of the victims of international conflicts. Such mechanisms have been created in favour of workers deported during World War II, to distribute funds held on dormant accounts, or for restoring property rights of people expelled from their homes. A particularly remarkable institution in this respect was the United Nations Compensation Commission (UNCC) which adjudicated several million claims against Iraq following its invasion and occupation of Kuwait and Security Council Resolutions declaring Iraq’s liability in

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8 Algiers Accords, ILM 20 (1981), at 224 et seq.
principle.9 While the disregard of Iraq's rights as the defendant State in these proceedings disqualifies the system as such for future dispute resolution, it nevertheless contained features which deserve further attention and may be promising for future development, especially in the context of the treatment of claims for environmental damages and the manner in which technical, commercial and legal issues were examined in a combined procedure.

A very different example concerns international and domestic efforts to settle the civil conflicts in Tajikistan. In a recent article,10 Michael Forbes Smith describes the many years of efforts to reconcile conflicting factions in and around that country, bringing an end to the civil war after the State had become independent with the end of the Soviet Union. Forbes Smith seeks to compare the UN-moderated peace process with classic mediation theory, as applied to the resolution of civil and commercial disputes and to international political and military disputes.

These examples show the diversity of methods and institutions used for resolving international disputes. This diversity includes the possibility of resolving different aspects of a complex dispute by different methods and institutions, grouping claims of many different parties if they are related to the same or similar legal bases and by adopting simplified procedures for certain aspects of a dispute. The last example illustrates the complexity of a mediation taking into account a variety of different players and developments as impacting on the evolution of political disputes. Even though investment disputes are not of a dimension as the civil war in Tajikistan, the diversity in the players and their interests, underlying antagonisms and disrupting developments can create obstacles of equal difficulty in the search for the resolution of investment disputes. They may require similar measures of creativity, patience and determination.

IV. Investment Disputes as a Distinct Category

In order to understand the role of ADR in investment disputes, the potential and the scope of improvements in the process, it is important to understand the specificity of investment disputes. While such disputes share many characteristics with commercial and other disputes, there are some characteristics that are specific to investment disputes or that are more prominent there. When discussing these specificities one should consider separately those on the side of the host State and those on the side of the investor. Moreover, there are differences between disputes that arise out of an investment agreement between the host State and a foreign investor and those that are specific to disputes subject to an investment protection treaty or similar international instrument.

First of all it must be pointed out that international investment disputes have an ambiguous status which distinguishes them both from inter-State disputes and from purely commercial disputes, domestic or international: they concern a legal and factual situation centred in the host country and which in many respects is linked with its legal system. The term "investment",11 despite the differences in its definition that need not be considered here, implies some form of engagement of resources in a foreign entity (a natural person or, in most cases, a corporation or other legal entity) in the host country.

At the same time, investment disputes as they are considered here, contain elements of "internationalisation", in particular by providing for the jurisdiction of a non-national authority, invariably international arbitration, normally at a seat abroad, and often also the application of a law other than that of the host State.

Traditionally, the legal arrangements that provided for the internationalisation of this type of investment were of a contractual nature and often were described as "State Contracts". The legal nature of these contracts and of the disputes arising under them has been the subject of intense academic debate,12 but has also occupied international fora including the United Nations and its specialised agencies.13

While agreements between States and foreign investors continue to be concluded and to give rise to investment disputes, the vast network of

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11 The emphasis here is on "international" investment disputes so as to distinguish them from those disputes which are purely domestic because, irrespective of the nationality of the parties, they are subject only to the jurisdiction of the courts in the host country.

12 The term "investment" is critical to the jurisdiction of some institutions, in particular ICSID, and its definition has given rise to extensive legal writing. Here the term is taken as self-understood and the refinements in this discussion will be left aside.

13 See in particular the early seminal study by Karl-Heinz Böckstieg, Der Staat als Vertragspartner ausländischer Privatunternehmen (Athénäum Verlag, 1971); this has been followed by a host of other books and studies.

14 E.g. General Assembly Resolution 1803 (XVII), U.N. Doc. A/5217 (14 December 1962) and a number of other texts, including those relating to Permanent Sovereignty over Natural Resources.
investment protection treaties and similar instruments has created a new dimension for the relations between investors and host States. Despite their diversity, these international instruments form a legal framework for a large part of international investments; a framework for investments not only in developing countries but, as some recent cases have shown, also in the most advanced industrialised countries; and this framework provides both substantive legal rules concerning the treatment of foreign investors and the basis for enforcing them in arbitration.

As part of this development, investment disputes have emerged as a new category in international arbitration. This new category increasingly can be distinguished from commercial arbitration not only by reference to the parties involved but also by the institutions involved, the professionals acting as counsel and arbitrator and by procedural practices. This distinction, as shall be shown presently, is justified by the specific features and challenges of investment disputes. More attention must be given to the question whether arbitration as it is now practiced is the most suitable method of dispute resolution to respond to these challenges and the improvements that can be made by alternative methods.

V. Some Specific Features and Challenges of Investment Disputes

Investment disputes, and in particular those arising in the context of a treaty, differ from commercial disputes in a number of ways. The challenges which they raise are reflected in arbitration proceedings; they create particular hurdles for other forms of dispute resolution and require that special attention be given to the adaptation and development of such other forms.

The differences considered here concern first of all the nature of the dispute, in particular its subject matter. The differences also concern the nature and role of the parties to the dispute. The State and the investor differ in the role they play at the origin of the dispute and in its evolution; and they differ in what they have to offer in attempts to settle and with respect to the constraints under which they find themselves when considering an ADR procedure and the possibility of a settlement.

A. The Subject Matter of the Dispute

Traditional investment disputes arise primarily from a contract regulating the investment and an alleged breach of this contract. Such breaches may relate to contributions that the host government committed to make to the investment project. In many cases, however, they concern commitments relating to governmental action itself. Such action may concern a concession for mining rights or for providing certain goods or services to the public, such as operating public transportation, utility supplies, telecommunications, news services or, as in the case of the monopolies granted to Ivar Kreuger, even matchsticks. In this context, the commitments of the government often extended to areas of its legislative action, in particular in the field of taxation or other regulations affecting the investment.

Treaty based investor-State disputes also concern primarily governmental action. But since the breach invoked by the investor need not be based on the violation of an investment agreement with the claiming investor, the scope of such governmental action is much wider in treaty-based disputes. The case of the investor may relate to legislative or regulatory acts and their implementation, to acts of the administration or to action, including inaction, of the judicial system.

The acts to which the dispute relates are not infrequently the consequence of a political process that may involve a diversity of political actors. This is obvious when legislative acts are concerned; but the action of the administration, and even of the judicial system, form part of the political system of the host State and are subject to political influence.

In such circumstances, the dispute with the investor may involve interests and considerations quite unrelated to the investment itself and not infrequently a diversity of players, often with differing agendas. With respect to the investor and the investment itself, diverging interests and agendas also may play an important role in the generation of the dispute and its aggravation.

Depending on the size and relative importance of the investment, the subject matter of the dispute, the measures affecting the investor or the lack of its protection, may be the subject of great public attention and any action taken by the government may cause heated debate in the public arena.

It is readily apparent that these characteristics of the dispute also have an impact when a settlement of the dispute is sought. Dispute settlement procedures must take them into account if the settlement efforts are expected to have any success.

B. The State as a Party in Investment Disputes

Probably more than most commercial transactions, investment operations often involve a large number of interrelationships and, on the side of the State, often a number of different entities. Depending on the organisation of the host State, the entities exercising public responsibility may well be subject to differing political control. Thus, an investment in an industrial plant may involve regulations at the level of the local community in which it is located as well as those of larger units and the central government. It also
may depend on the supplies of utilities and services by public or regulated entities and it may rely on access to the local market.

From a legal point of view at the international level, in matters of responsibility under an investment treaty, the State appears as a single entity. In reality, however, a variety of different entities may be involved. Whether they are independent of each other and have different legal personality in the domestic legal system or are merely departments of the government, they may have different objectives and priorities and may act in different manners; and they may differ about what an acceptable result would be. Clarifying the positions of all possible stakeholders and aligning all players to taking a coherent position can be a difficult task. Reaching such a joint position is all the more difficult if it requires the modification of previously defended positions, making concessions to the opponent in the dispute.

Moreover, the individuals who have to develop positions in these different entities and who have to implement them are normally civil servants or politicians. They are responsible in varying degrees to the government, to their party or to the public at large. The forms that this responsibility takes may differ widely, depending on such aspects as the function of the person, the organisation of the State and the manner in which accountability is developed in the organisation. This type of responsibility is not easy to face; and it often leads to protective reactions. Courage to take unpopular decisions is not necessarily the dominant characteristic of civil servants or politicians. Avoiding risks or transferring them to other players often is a necessity for success in their careers or even their survival.

The difficulty is aggravated by various checks and controls exercised over public servants. Auditing the decisions of public services and their justification is a necessary feature of public administration. So are anti-corruption measures. They imply that civil servants must justify their decisions before persons and institutions that view the circumstances in which a concession has been made from a rather different perspective. In particular, when the administration has publicly built up an apparently strong position towards the investor, it may not always be easy to explain to auditors and inspectors that abandoning this position and agreeing to a settlement was in the public interest and not the result of negligence or even made at the price of some personal benefit to the decision makers involved.16

Concessions that normally are required for a settlement are generally even more difficult when stakeholders or otherwise interested groups outside the government are involved in the debate; they may be political parties in the opposition, groupings from the civil society in the country or even foreign players, public or private. Some of the players in the public debate may have an interest in keeping the dispute alive or may find it to their advantage to exploit the fact that concessions were made for achieving a settlement.

It is therefore not surprising that observers have highlighted the difficulties "for government officials to engage in a process that may result in a recommended settlement that falls obviously short of the rhetorical positions that they have expounded in parliament and in public".17 Or, as explained by Michael Reisman:

...in States in which there are active political oppositions waiting for an opportunity to pounce on the incumbents for having 'betrayed' the national patrimony by settling with an investor, modalities other than transparent third-party decisions can undermine or even bring down governments and destroy personal careers...[I]t is often easier for governments to have the right decision imposed by an outside tribunal rather than 'conceded' by the government.18

C. The Position of the Investor

For commercial parties, a dispute is generally a disturbance to their ordinary activities. Not only is it a wasteful exercise in terms of legal costs but also, and often more importantly, a dispute absorbs valuable resources and management time that could otherwise be spent on more productive activities. In addition, the dispute with a business partner may render useful cooperation and transactions more difficult if not impossible. These are some of the considerations which explain the favour that ADR methods generally enjoy with commercial enterprises.

However, there are differences between investors; some are more inclined to finding a settlement than others. Differences may lie in the nature of the investor's business and in the role that the specific investment has in its overall strategy. For some investors the individual project is part of a larger

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15 See, for example, Edna Sussman, "The Advantages of Mediation and the Special Challenges to its Utilization in Investor State Disputes", 27 (2000) Revista Brasileira de Arbitragem 64.
16 For comments on this aspect see Barton Legum, "The Difficulties of Conciliation in Investment Treaty Cases, Comments on Jack C. Coo" 21 (April 2006) Mealey's 1, who cites as an example the number of agencies which in the United States are involved in decision-making in investment disputes; see also Margarete Stevens and Ben Love, Investor-State
strategy; in the interest of that strategy or in the interest of good relations with the government in question, a settlement may be more attractive than the payment of damages at the end of several years of court or arbitration proceedings. In this context it is, of course, of some relevance whether the disputed project or the relations with the government in general still have a promising future for the investor.

There are, however, considerations that, on the side of the investor, too, play against settlement: bureaucracy is not limited to governments; some of the large enterprises exhibit similarities with public administration. In some cases, the investor may have no other remaining interest in the investment but to recover as much compensation as possible. There are also cases where one must have serious doubts about the validity and soundness of the investment itself and where, through the compensation sought, the investor would reap an unmerited profit.

When considering the possibilities of settlement, one must bear in mind that formal dispute resolution proceedings in arbitration or in the courts may have objectives beyond the specific dispute that they concern. Such proceedings may be pursued by the investor for other reasons, for instance with the objective of obtaining concessions in other areas.

Finally, mention must also be made of the involvement of third parties on the investor’s side. Such third parties may be insurance companies that have provided coverage of the investment and which, as part of the policy, require that the claim for compensation be pursued. Where the insurer is a public service in the investor’s home country, the dispute may, at some stage, move to the intergovernmental level. In the case of private insurances, the dispute may have to be fought out by the investor. Similar situations may arise in the case of third party funding or when claims are assigned to what are occasionally described as “vulture funds”.

These and other factors play a role on the side of the investor when it comes to determining the disposition towards a settlement and designing procedures intended to bring it about. Some may favour such disposition while others may create obstacles. In other words, the obstacles to settlement and ADR procedures are situated not only on the side of the host State; depending on the circumstances, investors, too, may create such obstacles.

VI. Past Experiences with ADR in Investment Disputes

The more general considerations in the preceding section of this chapter can usefully be illustrated by a number of concrete examples from international investment disputes.

A. The ICSID Experience

The difficulties of introducing ADR procedures in investment disputes find a striking confirmation by the experience of ICSID. Since its creation, ICSID offers not only arbitration services but also what it calls conciliation; a special set of rules has been prepared for this service. However, while ICSID arbitration—after having a slow start—is now widely used, conciliation under the ICSID Rules continues to have a shadow existence in comparison.

Until 2011 there had been six conciliation procedures, compared to some 300 arbitration cases. And the record of these six conciliation cases is meagre: only one produced a report that recorded a settlement. Two cases settled even before a conciliation commission had been created. In the remaining three cases the conciliation commissions issued reports recording the failure of the parties to reach agreement. Very recently, three more conciliation cases were brought in 2011 and 2012; in the first and the third of these cases the Conciliation Committees have been constituted; apart from the names of the parties, the members of the Committee and some steps in the procedure, no details about the dispute and the procedure adopted have been published by ICSID.

This quasi failure of the ICSID conciliation procedure contrasts with another observation: many ICSID cases, like many other disputes brought to arbitration, settle before an award is rendered. In the experience of ICSID, the rate of settlement after commencement of the arbitration is in the order of 40%. ICSID statistics for all cases up to the end of 2011 indicate that 39% of the disputes brought under the Convention and the Additional Facility Rules were “settled or proceedings otherwise discontinued”, i.e. including cases where the claimant simply gave up hope. Presumably this does not include those cases where the parties reached a settlement and submitted it.


[20] RSM Production Corporation v. Republic of Cameroon, registered as CONC11/1 on 19 September 2011, Commission constituted on 17 February 2012; see also “Africa claims stop and start at ICSID”, Global Arbitration Review 6 March 2012. Since then the conciliation commission in this case has been constituted and commenced its work; two other conciliation cases were filed in 2012: Hess Equatorial Guinea, Inc. v Tullow Equatorial Guinea Limited v. Republic of Equatorial Guinea, CONCA(AF)/12/1 and Republic of Equatorial Guinea v. CMS Energy Corporation and others, CONCA(AF)/12/2; von Wobesser appointed as conciliator.

to the arbitral tribunal which embodied it in an award on agreed terms. An example for such an award will be discussed below; three other cases have been mentioned by Susan F. Franck.22

What explains this apparent contradiction – the reluctance of the parties to resort to conciliation and their willingness to settle once the arbitration has commenced? Why the need for commencing the expensive and time consuming process of arbitration if in the end it is not the arbitration award that resolves the dispute but a voluntary settlement? And if arbitration is necessary to commence the process, what can be done to improve the approach, leading to earlier settlement and with less waste of time and cost?

B. Difficulties to Settle or Even Negotiate Fairly

The first factor, as explained above, relates to the difficulties faced by a public administration when it must take a decision which implies concessions to the investor. An example for these difficulties and their consequences has been provided in a recent ICSID award concerning the cases between the Republic of Georgia and Kardassopoulos and Fuchs. In its award, the arbitral tribunal described the manner in which the investment of Kardassopoulos and Fuchs, and in particular the compensation process following the expropriation of their investment, was handled. It concluded:

…the spirit of settlement appears to have diminished over time as lengthy delays, refusals by various government officials to address the matter, and internal disputes over who carried responsibility for the matter combined to result in an overall obstruction of the compensation process and disregard for the duty to provide compensation. (…)

Over the course of a seven year period following the formal establishment of a compensation process, responsibility for Tramex's claim was shuffled from one government ministry to another, without any progress. An overview of this process prepared…for President Shevardnadze in 2003 exposes the process for the farce that it had become.23

The claimants in this case then sought the assistance of Henri Kissinger, the former US Secretary of State, to intervene in their favour with President Shevardnadze. The arbitral tribunal noted that with that intervention "some relief appeared" on the horizon. But it then observed that

…the tide turned again as a new government was elected and yet another State commission established to consider the matter of Tramex's claims. This commission accomplished in one month what each previous commission had found itself incapable of accomplishing – the final disposition of the Tramex matter. This disposition was, however, wholly unacceptable.

In the end, the claimants were denied any compensation and had to resort to arbitration. The arbitral tribunal awarded to each investor US$15.1 million for their losses, plus US$30 million each in interest. In addition the Republic of Georgia was ordered to pay not less than US$7.9 million for the Claimants' legal costs in the arbitration.

Another recent case may serve to highlight the risks that may have to be faced by those who, on the side of the State, seek to find a solution. The case concerns a dispute that arose under the bilateral investment treaty between The Netherlands and Bolivia. On the basis of this treaty, Euro Telecom International (ETI) brought arbitration proceedings before ICSID. At the time of filing, Bolivia had notified its withdrawal from the Washington Convention; but this withdrawal became effective only shortly after the filing of the case by ETI. Bolivia objected to ICSID jurisdiction. An arbitral tribunal was nevertheless formed and proceeded with the case.

In the circumstances one may well be of the opinion that the risk of Bolivia to lose its jurisdictional objection were high. The competent Bolivian Minister found a face-saving solution by agreeing to transform the ICSID arbitration into proceedings under the UNCITRAL Arbitral Rules before the same arbitrators. Shortly thereafter the Minister was removed from her function and subsequently became subject to criminal investigations.24

From the present author's personal information, an example may be added: during the course of an arbitration the investor offered a settlement which would have avoided any payment by the Government. The offer was rejected even though the responsible persons in the Government were aware that it was more favourable than what could have been achieved in the arbitration. The arbitration continued and led to an award that ordered the Government to pay substantial amounts.

Practitioners familiar with investment arbitration would be able to add similar cases where concessions made by government representatives have exposed them to sanctions or where the actual or perceived risk of such sanctions prevented settlements.

C. Providing Justification for a Change in Position

Settlement of a dispute normally requires from all parties a change in the positions that they defended previously. In the circumstances described, parties must present an explanation by which they justify the change to those to whom they are responsible. The most frequently invoked change for


justifying a new approach and willingness to settle relates to a change in the circumstances of the dispute.

New circumstances may arise from a variety of events. For instance, the commencement of arbitration proceedings by the investor may serve for the public administration concerned as a new event that can justify a reconsideration of the position. Often the triggering event occurs during the course of the proceedings. Sometimes it may be a partial award that is taken as justification for such a change; in other cases the advancement of the case and the argument and evidence produced in the course of the proceedings brings a degree of clarification which produces the necessary reassessment.

Two arbitration practitioners describe their experience as follows:

...filing an ICSID arbitration against a host state could have a significant impact. Usually the host state will require 'blood to be spilt' – for instance, the ICSID tribunal issues an interim award in favour of the U.S. investor on jurisdiction – before the government will agree to settle.21

Judge Schwebel reported on his experience in a case in which he acted as a mediator: both parties "came to the mediation with inflexible demands upon the other. Neither party evidenced a willingness to modify those demands". The mediation failed shortly after having started. The dispute moved on to arbitration and, when the proceedings had advanced and the award became imminent, the parties settled. Judge Schwebel had no information why the sensible solution had not been reached earlier, but he offered as a possible explanation that "the exchange of written pleadings was salutary in demonstrating to the parties that the position of each side had their infirmities".26

A similar experience is relayed by Obadia. In one of the cases described by her, the parties showed a willingness to reach a settlement and the ICSID tribunal offered its assistance. The President of the Tribunal acted as mediator. At first the mediation failed and the parties had to resume the arbitration. However, as the proceedings continued, the parties reached agreement on some issues and left the others to be decided by the Tribunal.27

In a case concerning a large infrastructure project in southern Europe, the agreement with the Government provided for dispute settlement before the local courts; these refused to enter the claims filed by the foreign contractor who then brought some issues before an international technical expert


"Schwebel, “Is Mediation of Foreign Investment Disputes Plausible?”, at 238.


27 For details see Michael E. Schneider, "The Art of Blending Arbitration and Other ADR Methods", in Ingen-Hausz, ADR in Business 2 (2011) 313, at 324.


According to information from a source that the present author considers very reliable, but which is contested by another source, the parties agreed towards the end of the proceedings on an amount of the compensation for the nationalization of Aminol. Kuwait accepted to pay this amount immediately, if it was ordered by the arbitral tribunal to make the payment. The settlement was communicated confidentially to the arbitral tribunal which rendered a carefully reasoned award and a concurring opinion, ordering the payment of the agreed amount. Kuwait paid the award immediately.29

In the case of Antoine Goetz v. Burundi, an ICSID tribunal rendered a partial award by which it left to the Government the option between revoking an act that formed the subject of the investor’s complaint or to pay compensation. The Tribunal declared that, if the Government chose one of these two solutions it would not be in violation of its international obligations; if it failed to do so, the parties could resume the proceedings. On that basis the case was settled.30

This award followed the example of the award in the case of Texaco and Calasiasi v. Libya, where the arbitrator, relying on the terms of the arbitration clause, found that if the Government restored the concession, it would not be in breach of its obligations. The award brought about a rapid settlement, contrary to the two parallel cases which ordered payment of

28 Personal experience of the author.
29 For details see Michael E. Schneider, "The Art of Blending Arbitration and Other ADR Methods", in Ingen-Hausz, ADR in Business 2 (2011) 313, at 324.
31 Account by Dr Jean-Flavien Lalive, counsel for Aminol, reporting a discussion with a member of the arbitral tribunal after the completion of the case.
32 Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award (Embodying the Parties’ Settlement Agreement), 10 February 1999.
compensation and which required many years of efforts until the claimants were able to make some recovery of the amounts awarded.

Finally an example may be given for the intervention of a development finance institution (DFI). In a dispute concerning the construction of a dam financed by the X-DFI, the arbitral tribunal had rendered a partial award dealing with some of the claims; but a large number of other claims remained outstanding. In that situation, X-DFI addressed a letter to both parties containing the following passage:

In the light of the above, X-DFI is of the opinion, that the time has come to openly discuss those issues [which remain unresolved] during a High Level Meeting (HLM) in order to identify possible solutions and to assess the possibility of an amicable settlement of the issues, by this avoiding lengthy and expensive further arbitration procedures.

X-DFI, although not being party to the process, would like to support a possible amicable settlement and therefore offers to provide the framework and the required facilities for the HLM at its premises in…

The parties did indeed meet as invited, reached a settlement and withdrew the remainder of the arbitration.

D. Examples of Successful Mediations

Despite the difficulties that have been highlighted in this chapter, there are investment disputes in which the parties are able to settle without reference to arbitration. Little is known about these disputes and the manner in which the settlement is reached.

However, there are at least a few cases for which third party assistance in formalised procedures is reported. The following are two examples.

One of these cases concerns the first and only ICSID conciliation that produced a settlement. In the dispute between Tesoro Petroleum Corp. and Trinidad and Tobago, Lord Wilberforce was appointed as conciliator. The success of his conciliation probably was due to the manner in which he conceived his task. In his recommendation he described this task in the following terms:

…to examine the contentions raised by the parties, to clarify the issues, and to endeavour to evaluate their respective merits and the likelihood of their being accepted, or rejected, in Arbitration or Court proceedings, in the hope that such evaluation may assist the parties in reaching an agreed settlement.\(^{34}\)

VII. What To Do?

In the circumstances described, one may well reach the conclusion that there is not much that can or should be done: those disputes that can be settled amicably are settled. Since, despite all obstacles, the numbers of the disputes that are settled, before or during arbitration, seem to be high, one may wonder whether additional efforts are justified.

\(^{34}\) Thomas Wälde, "Efficient Management of Transnational Disputes: Mutual Gain by Mediation or Joint Loss in Litigation", 22(2) (2006) Arbitration International 205; see also Schwebel, "Is Mediation of Foreign Investment Disputes Plausible?", at 238.

\(^{35}\) For some aspects of the dispute see Nathalie Bernasconi, "Background paper on Vattenfall v. Germany arbitration", IISD, July 2009.

\(^{36}\) ICSID Case No ARB/09/6.
Moreover, from the little that is known about those cases where the disputes are settled, it appears that such settlements are brought about in direct negotiations between the parties without the intervention of mediators and other ADR neutrals. Once the dispute has become ripe for settlement, the parties seem to be able to resolve it on their own and without outside help.

However, the numbers of cases that do proceed through arbitration to the bitter end seem to be higher than those that are settled during the course of the arbitration; much time, money and other valuable resources are spent on them.

Moreover, little is known about the circumstances of the settlements: it may well be that in many cases the settlement is limited to some aspects and takes account of some of the interests at stake; other important aspects of the dispute may have been excluded, causing the germination of new disputes in the future; or it may simply consist of one party giving up hope and abandoning its position. Valuable investments may thus have been lost or, if they continued to exist, may have done so under less favourable conditions.

Thus, it may still be of interest to examine what can be done to increase the number of investment disputes that are settled, expand the scope of the settlement and improve the methods and conditions for reaching settlement. Leaving aside the important field of dispute prevention, possible lines of action to promote non-contentious dispute resolution may be found in three directions: (i) creating or strengthening the willingness to settle, (ii) improving the methods for reaching settlement, in particular by enlarging the participants (iii) considering the choice of the persons and institutions assisting in the search for settlement.

A. Creating or Strengthening the Willingness to Settle

Probably the greatest obstacle to reaching settlement, by negotiation or by any other ADR method, consists of a complete lack of, or an insufficiently developed, willingness to settle. Some of the causes that may explain this difficulty in investment disputes have been described above. Action for improvement must render more visible the costs of the persisting disputes; it must make the risks of court and arbitration proceedings more apparent and must provide assistance for justifying changes in previously proclaimed positions.

The first measure that might be considered in this respect concerns the costs of a drawn out dispute: these costs consist of a delay in the implementation of valuable investments or even their loss. In the situation of confrontation that prevails in disputes, these costs sometimes are used to build up the claims by one side; the other side then perceives them as posturing in the litigation. Neutral evaluations of the costs — suffered by both sides — from such delays or losses may be helpful incentives to promote the interest in settlements.

More directly, when the dispute is brought to arbitration, the direct costs, as they are documented in published awards, run into millions of US Dollars and sometimes even more.38

There has been some reluctance to award costs to the winning party as this is done frequently in commercial arbitration. However, this seems to be changing and in recent cases one finds awards that order the losing party to pay all legal costs expended by the winner. Such cost decisions may serve as a discouraging factor against bringing spurious claims or making untenable defences. However, the costs that have to be expected by a party often seem to be underestimated and the risk of having to bear the opponent’s costs rarely seems to be considered when deciding whether to seek settlement.

An additional cost incentive could be created by arrangements which, at an early stage of the arbitration, seek to secure the costs of the winning party. In commercial arbitration, arising out of a contract between the parties, such arrangements are contrary to the underlying principle of commercial arbitration: the parties agree to settle their dispute in arbitration and to fund the procedure jointly by equal contributions to the advances that have to be paid to the arbitral tribunal and to the institution; it is only at the end that the costs are allocated according to the outcome of the arbitration and other relevant criteria. In such a context, there is room for security for costs only in very exceptional circumstances.

The situation in treaty based investor-State arbitration is different: the action is not brought on the basis of a contract between the parties but by reference to a general commitment under the treaty. As a result of the application of arbitration rules created for contract-based arbitration, the parties to such treaty based proceedings are required to pay in equal shares the advances requested by the tribunal or the institution. It may be worth considering whether this principle of commercial arbitration should be applied in a more flexible manner in treaty-based arbitration.

Depending on the financial basis of the investor, the State may be justified in claiming security for costs, especially if the investor is a special purpose vehicle in a tax-haven country. One might even consider going a step further and provide for securities for the respective claims, depending on preliminary assessments of the case. In such a situation as that described in the Fuchs v. Georgia award quoted above, the investor may find it quite difficult,


38 For some information on these costs see Franck, loc. cit., 66 et seq.
after many years of frustrating negotiations, to provide funding for costly arbitration proceedings. If it prevails in the arbitration, it may have ahead of it an equally arduous task in trying to obtain effective payment of the sums awarded by the arbitral tribunal.

Decisions by which arbitral tribunals, at an early stage of the arbitration, address issues of arbitration costs and possibly also security for such costs and for the claims are rare; arbitral tribunals find it difficult at that stage to make decisions which may indicate a view on the possible outcome of the dispute, even if the view is declared to be provisional. Nevertheless, it may be worth considering further by what methods the parties to an arbitration can be alerted early to the costs which they may have to face not only for their own defence but also for that of the other party. Making the financial risks clearly apparent at an early stage of the arbitration may be a powerful incentive for settlement or favouring an ADR procedure.

Another approach to increase the willingness for settling or engaging in an ADR procedure consists of providing some indications of the possible outcome of the dispute. In the previous section of this chapter examples have been given of cases where such indications have assisted the parties to review their positions and approach in a more conciliatory spirit the possibility of a settlement. From early evaluation to partial awards and alternative decisions, there are a variety of methods by which arbitrators or other third persons may provide such indications, leaving it to the parties whether they wish to follow these indications in their settlement and to complete those points that have remained open. Indeed, the very fact that the parties have received a clear signal that the proclaimed position is not as solid as assumed may provoke a true ADR process leading to solutions beyond the dispute itself.

The initiative of such indications about the respective strengths and weaknesses of the parties’ positions may come from one of them or from outsiders, a financing institution or an insurance company; it may form part of an ADR procedure or may come only in the arbitration. Since such indications are provided on a preliminary basis without the full examination of the case, it is important that they remain provisional. Indeed, it is often their provisional nature which renders the approach acceptable to the parties to the dispute. The parties preserve the possibility of influencing the outcome of the dispute by adapting their argument and evidence to the neutral evaluation; but they are likely to have a better view on the risks that they must face if they continue in the arbitration.

B. Methods: Diversity of Procedures, Strengthening the Position of the Negotiators and Enlarging the Group of Participants

In commercial ADR proceedings a variety of methods are offered. The parties choose one and occasionally several and normally apply them in sequence or alternatively. In investor-State disputes, in particular when the dispute has reached political dimensions, the lines between different ADR methods are not always clearly drawn. No specific method alone may be sufficient; combinations may often be useful or even necessary.

The principal objective must be to adapt the chosen method or methods to the specific circumstances; this may require adjusting the process as it evolves. It may also require variations to established practices, such as the addition of a team of experts used in the example of Professor Wälde referred to above, assisting the mediator in devising solutions responsive to the interests and objectives of the parties.

An aspect that requires particular attention is the choice of the participants. It is a basic principle of ADR proceedings that the ultimate decision makers must be involved in order to secure the success of the process. As explained above, the implementation of an investment project and the disputes that may result from it often involve a large and diverse number of governmental institutions and other stakeholders and interested groups.

Therefore, one of the critical issues in the design of an ADR process for an investment dispute concerns the question as to how these interested groups are identified and integrated in it. The integration of these groups is necessary not only for reaching the settlement; when the settlement requires further action, its implementation often also requires the integration and support from these groups.

In some cases the central government or the competent ministry alone may be in charge of this integration and may well be in a position to do so without the direct participation of any other players in the process. This may require mechanisms and procedures through which the negotiator on the side of the host State receives from other departments involved the necessary information and authority to conduct the negotiations and reach settlement, normally within defined limits. In this context budgetary authority is of particular importance.\footnote{UNCTAD, "Investor-State Disputes", at 83 et seq.}

In other cases, the process may require that the group of participants be enlarged. A number of circumstances may render such an enlargement of the process difficult or even impossible: the interests may be too diverse or even opposing, the political system may be adverse to such cooperative solutions of the dispute; and some groups simply may not wish to have the dispute resolved because its continuation serves their political agenda. However, in the absence of such integration, the road to a settlement may remain closed or, if a settlement is found, it may remain without effect.

Depending on the existing control and audit mechanism in the governmental organisation, it may be of critical importance for the success of the
settlement efforts to find a method in which the competent institution is associated in the process and, before the conclusion of the settlement, is given the opportunity of vetting the result.

For the investor the situation in this context is particularly delicate: on the one hand the need of associating diverging stakeholders in the settlement attempts can be of critical importance; on the other hand, the investor, as a foreigner, is not an accepted actor in the political life of the host country; as a matter of principle, the investor must abstain from interference in it.

The methods for enlarged ADR procedures do not seem to have received much attention among the lawyers dealing with dispute settlement procedures. They are more a subject of interest to political scientists or sociologists. Examples can be found in the instance in collective bargaining, as it is practiced in many industrialised countries. Such collective bargaining occasionally is described by terms such as "arbitration", even if the procedure is different from that generally used in commercial or investment arbitration. However, the example shows that outside the narrow world of arbitration lawyers there may be useful methods for resolving investment disputes in a manner that is more satisfactory to the present situation.

A recently reported example from Switzerland may serve as an illustration for such truly alternative methods: for some 20 years quarry owners, neighbours and environmentalists fought against each other in the Canton of Zug in court proceedings, public initiatives, popular votes and other measures. Eventually the local government created a committee in which local authorities, quarry contractors, landowners, political parties and NGOs were assembled with the assignment of regulating the conditions of quarrying for the twenty or thirty years to come. Eventually they reached a compromise that put the dispute to an end by preparing regulations for quarry operations that were acceptable to all concerned.\textsuperscript{40}

A similar alternative – and probably quite innovative approach – received much attention in Germany where public debates, demonstrations and a widely followed occupation movement against the construction of a new underground railway station in Stuttgart was at the centre of national attention for a considerable period of time; eventually it led to the replacement of the local government by the opposition engaged against the project.

A key feature in the process and a major factor in the final resolution of the dispute was a mediation by Heiner Geissler, a retired politician with much experience in procedures of collective bargaining in labour disputes.\textsuperscript{41} The process assembled the Government, local authorities, the Federal Railway Company and interested contractors, political parties and the principal

\textsuperscript{40} Iten, "Der Boden unter den Füssen", Neue Zürcher Zeitung, 14 January 2012, at 25.

\textsuperscript{41} Available at http://www.schlichtung-s21.de (last accessed 25 March 2012).

initiative having organised the protests. While some jurists as commentators had problems with the legality of the process,\textsuperscript{42} it contributed to the restoration of peace in the region and the implementation of the project in an adapted form.

Admittedly, an element of considerable additional complication would be introduced by including a foreign investor into such a mix of groups involved in the dispute. Nevertheless, these examples may serve as a challenge to the specialists in the settlement of international disputes, inviting them to search for creative solutions beyond the traditional forms of international arbitration.

C. The Persons and Institutions Assisting in the Dispute Settlement: The Relative Importance of Independence and Authority

It will have become evident from the discussion above that mediators and other persons assisting the parties in their search for a settlement may have to have qualifications that at least in part go beyond those that make a good mediator in commercial disputes. In addition to the classic mediator skills and an understanding of the substance of the dispute, the mediator may have to have a sense for the political and social fabric of the host country, responding to the specific context in which the dispute evolves.

In this respect it must appear as surprising to note the qualifications which, according to the Washington Convention, persons designated to serve as conciliators or arbitrators must have: "high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment".\textsuperscript{43} These are, of course, important qualifications; but one would have expected that experience as a conciliator (or arbitrator) and some other qualifications necessary for understanding the political context of the dispute, and assisting the parties in resolving it, would also have to be included among the list.

Apart from the personal qualifications of the mediator, there is another factor that may be of particular importance in the choice of the mediator in investment disputes: the respect that this person commands in the groups involved in the dispute and the weight that is attributed to his recommendations. Impartiality and independence have become the almost exclusive criteria for the selection of arbitrators and other "neutrals" in rules and guidelines relating to the selection. However, other possibly conflicting qualifications


\textsuperscript{43} Convention on the Settlement of Investment Disputes Between States and Nationals of Other States – International Centre for Settlement Of Investment Disputes, Washington 1965, Article 14 (1).
are of relevance for the choice of a mediator in investment disputes and, in other times and other social contexts, have played a more important role. Traditionally, the reputation and authority of the person to whom the parties look for the settlement of their dispute was of particular importance. The settlement of a dispute depends not only on the wisdom and justice of the solution proposed or imposed but also on the credibility and the clout of its author.

In the history of international relations there are numerous cases where the parties to a dispute turned to a person for the settlement of their dispute not because he was free of any actual or possible links with any of the parties, or because he did not give "rise to reasonable doubts in his independence and impartiality", but because the parties believed that he had the capacity of finding a solution acceptable to both parties and, perhaps even more important, because the authority that any solution brokered by him would command.

Among the examples that spring to mind, one may think of the Pope who settled the dispute between Spain and Portugal over the newly discovered lands in the West and whose decision still divides millions of people in Latin America by the language they speak. There is a long list of settlements between States that were brokered by other States, e.g. the mediation of France between Spain and the United States in 1898, that of the United States between Russia and Japan (1905), and between France and Tunisia (1958), that of the Soviet Union between India and Pakistan (1965) and the Camp David settlement between Egypt and Israel brought about by the President of the United States. It is unlikely that any of these successful mediators would have passed the IBA Guidelines on Conflicts of Interest or similar texts.

The model that attributes weight to respected peers rather than totally independent outsiders has applications in other contexts, too. In commercial arbitration one may find traces of this approach in dispute settlement mechanisms operated by closed groups, as for instance at commodity exchanges. Traditionally, disputes in such exchanges were decided by other traders. The authority and respect commanded by these "commercial men" are the decisive criteria for their choice, rather than criteria of strict "independence" as they are now frequently prescribed.

It is submitted that these considerations concerning the authority, respect and clout of the mediator may be of decisive importance in the success of a mediation or similar ADR process. In the example of the political mediation about the railway station in Stuttgart mentioned above, the person chosen as mediator was a high ranking politician. Although he had not previously taken a public position on the dispute, his party was the leader of the coalition of the local government, which was one of the principal protagonists of the dispute. Nevertheless, the authority and respect that Dr Geissler commanded in the German political scene made him acceptable as a mediator and indeed an ideal person for this function.

Can this experience be put to productive use in the mediation of investment disputes? I suggest that the answer should clearly be, yes! The reputation and authority of the mediator, additional to and independently of her mediation skills, can be expected to make decisive contributions at least at two levels: first of all at the engagement of the procedure, it may be more easily acceptable for the participants to leave their respective confrontational positions and enter into a mediation if they are invited to do so by a respected third person. When it comes to accepting the settlement and defending it, the solution adopted may pass more easily if it is associated with such a person. The clout of this person also might provide some protection to civil servants and politicians when they are accused that the settlement has compromised national interests.

In addition to the personal reputation of the mediator, the institution recommending or appointing her may be of importance. International organisations, financing institutions involved in the project or some other institutions distinct from the parties but respected by them may make such a contribution, enhancing the effectiveness of the mediator. In some cases insurance schemes in the home State of the investor play a role in promoting settlements. Often such interventions remain discrete as in the example quoted above. In any event a balance must be struck between the additional weight that may be given to the mediator by such an intervention and the risk that the outsider gets drawn into the dispute, creating resentment or even liability.

These considerations show that there are no simple solutions. What is required is first of all awareness of the diversity of the conflict situations, responsiveness to the factors determining this diversity and creativity in finding approaches that assist in finding solutions that take these factors into account as far as possible.

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44 In the historical context it is probably not politically incorrect to speak only of "he"; the cases where a woman was chosen as arbitrator are rare. As an exception the Queen of England comes to mind, who had been chosen as the arbitrator in the dispute between Argentina and Chile in the dispute over the Beagle Channel; sadly, the panel that eventually was appointed to resolve the dispute was composed only of men.

45 The UNCTAD Study on Investor-State Disputes (2010), at 95, mentions the case of the German Hermes insurance and the US Overseas Private Investment Corporation (OPIC); similar programmes exist in other countries, in particular in the field of export risk insurance. In some instances intergovernmental committees examine cases where the insurance of one State had to cover losses caused by the other State.
D. Improving the Rules – the IBA Investor State Mediation Rules

Many of the factors described in this chapter that complicate the resolution of investment disputes concern the practices of the parties to investment disputes, constraints they face, their concerns, attitudes and approaches as well as those of institutions. Improvements will have to respond to these circumstances as they are specific to each dispute. It is not very likely that rules and regulations can bring much change, apart from providing the ad hoc or institutional framework in which initiatives can develop and address some of the practicalities that must be considered in the course of settlement attempts.

At present there are a number of rules and regulations available dealing with ADR methods and concerning primarily conciliation of mediation procedures. UNCITRAL has offered Conciliation Rules since 1980 and a Model Law on International Conciliation since 2002. The principal arbitration institutions offer such services under different names: ADR Rules are offered by the International Chamber of Commerce (ICC) “applicable to whatever settlement techniques [the parties] believe to be appropriate to help them settle their dispute”. The Permanent Court of Arbitration (PCA) in The Hague provides Mediation Rules, so does the Word Intellectual Property Organisation (WIPO), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR) and its parent organisation, the American Arbitration Association (AAA), the Swiss Chambers, the Stockholm Institute, the Vienna and many other chambers of commerce and other institutions.

The only rules offered specifically for investment disputes are the Conciliation Rules of ICSID and its Additional Facility that have been mentioned already. The reasons for their lack of success most likely include the heavy procedure that they prescribe. The commencement of ICSID conciliation is cumbersome and takes several months, in the latest case it took from 19 September 2011, when the request was registered, until 17 February 2012 when a conciliation commission had been constituted. The procedure then provides for written statements, supporting documentation, witnesses, experts and hearings in a way that closely resembles arbitration proceedings. No wonder that these rules are “perceived as overly rigid”. 46

While many of the existing mediation rules might well be used for some forms of ADR proceedings in investment disputes, it was nevertheless useful that consideration was given to specific ADR rules for such disputes. The

46 Stevens and Love, Investor-State Mediation: Observations on the Role of Institutions, Contemporary Issues in International Arbitration and Mediation – The Fordham Papers, at 23, with a more detailed criticism of these rules.

Mediation Committee of the IBA has taken up the task. 47 In 2008 it created a “State Mediation Subcommittee” under the leadership of Professor Jack Coe and Margarete Stevens.

This subcommittee commenced its work by seeking to identify reasons why investor-State mediation is not more prevalent. It identified as the principal reasons (a) excessive rigidity of those rules specifically applicable to investor-State mediation; (b) inadequate knowledge of the availability and potential benefits of mediation among representatives of States and investors; and (c) lack of a readily identifiable pool of mediators with both mediation skills and a background in investment disputes. 48

Based on this work, the subcommittee then addressed the first of these factors and, under the new leadership of Anna Joubin-Bret and Bart Legum set up a Working Group on Rules for Investor-State Mediation. The Working Group prepared draft rules that were discussed at the IBA Conference in Dubai on 2 November 2011 and subsequently revised. The latest version, dated 2 March 2012 is circulated for further comments. 49 It is planned that in 2012 the rules will be submitted to the IBA Council for adoption.

The draft IBA Investor-State Mediation Rules in their present version differ from the ICSID Conciliation Rules primarily by a much greater degree of flexibility; they leave the organisation of the procedure to the parties with the assistance of the mediator. Their main function is to provide a framework and some guidance in this respect. The draft IBA Rules resemble other mediation rules, except that in the IBA Rules some aspects are regulated in greater detail. These common features of the rules do not call for special comments in the context of the present article. The comments below, therefore, are limited to highlighting some aspects of the draft rules that may be seen as responding to particular concerns arising in relation to investor-State disputes.

The IBA draft rules regulate in detail the designation, resignation and removal of the mediator. As a matter of principle, the mediation is conducted by one mediator; co-mediation by two mediators is foreseen as an
option. The mediator or the co-mediators are designated by the parties to the dispute and, if they cannot agree, with the assistance of a Designating Authority. In a mechanism similar to that in the UNCITRAL Arbitration Rules, the Secretary-General of the Permanent Court of Arbitration may be called upon to select a Designating Authority if the parties have failed to do so.

The drafters of the rules have paid particular attention to qualifications for the mediator. The qualifications are set out in an appendix. They are not mandatory and merely serve as guidance for the parties and a Designating Authority which may have to intervene; but listing qualifications that are useful or even necessary for mediators in investor-State mediation is a useful exercise as an examination of the list of these qualifications shows.

This list is set out in Appendix B to the draft rules. It contains some qualifications that one would expect to find in such a document for any mediation, such as experience in mediation in general and specifically with respect to the languages and nationalities concerned. The list also mentions experience in dealing with governments and in dispute resolution proceedings with commercial entities in the substantive field of the investment at issue and in proceedings involving States or State agencies and instrumentalities; but in this context the list refers not only to investor-State disputes but also mentions peace negotiations, border disputes and trade disputes. The list specifically mentions experience as a mediator in cross-cultural disputes and points out that the "regional or international stature" of the person considered is a qualification to be considered when selecting the mediator.

As mentioned already, the draft rules prescribe that the mediation is conducted "in accordance with the parties' wishes and with the assistance of the mediator"; procedural decisions may be taken by the mediator, after consultation with the parties. Meetings of the mediator with one party only ("caucusing") is expressly permitted; the rules address the question whether and how information from one party may be shared with the others.

The mediation commences by a "mediation management conference". Parties having agreed to mediate under the Rules undertake to participate at least in this conference. Thereafter, any party may withdraw from the mediation at any time, after having notified the other party or parties and the mediator. Prior to the withdrawal, the mediator shall hold a meeting, in person or by means of telecommunication, with the parties, including the withdrawing party.

As a matter of principle, the mediation "shall be private" and only the mediator, parties and their representatives may attend. However, a party may communicate to the mediator and other party "the names of any non-party whose participation in the mediation it deems necessary or useful to the settlement of the differences and disputes". The communication is made

"for discussion" and the participation of such "non-party" in the mediation must be agreed by the parties and the mediator. The mediator may consult experts and may request that a party provide additional information and material.

The detailed rules deal with confidentiality issues; documents and communications concerning the mediation must remain confidential. But there is a list of exceptions that also includes both the fact that the parties have agreed to mediate or have settled in mediation; the terms of any settlement reached must remain confidential, unless otherwise agreed. In the light of the on-going work on transparency in investor-State disputes, especially in UNCITRAL, the confidentiality provisions may have to be reviewed.

If requested by all parties, the mediator may make "oral or written recommendations to the parties jointly concerning an appropriate resolution of the differences and disputes". However, the Rules also clarify that "the mediator shall not have authority to impose any partial or complete settlement on the parties". Such a settlement must be agreed by the parties in writing; the parties undertake to "exercise their best efforts to ensure that any settlement agreement is fully performed by the parties".

Once adopted, these rules can be expected to make a useful contribution to the wider use of ADR procedures in investment disputes; but much remains to be done for the development and promotion of means by which international investment disputes can be resolved in a manner that is responsive to the challenges caused by the great diversity of the interests, issues and conflict situations that arise in them.
Diplomatic and Judicial Means of Dispute Settlement

Edited by
Laurence Boisson de Chazournes, Marcelo G. Kohen and Jorge E. Viñuales

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