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CURRENT STATE AND FUTURE OF INVESTOR–STATE MEDIATION

Abstract: *To protect the investments of their investors abroad, countries began to conclude investment treaties among themselves in the middle of the 20th century. The main feature of such treaties has been the availability of an effective mechanism for resolving disputes between a state and an investor. Most of them provide for arbitration, the effectiveness of which is universally recognised. However, arbitration has come under criticism in recent years. Among the main reasons are the inconsistency of awards, the high cost and long duration of proceedings, the lack of transparency and other issues. Due to that, practitioners and scholars call for reform and suggest, inter alia, resorting to investor–state mediation. In this regard, many developments have been made to increase the use of mediation in future. For example, the Working Group III reform is currently taking place, the Singapore Convention has been signed, arbitration rules and guidelines have been issued, etc.*

Keywords: ADR, arbitration, mediation, investor–state dispute settlement, Working Group III

INTRODUCTION

Investment plays an extremely important role in the development of all countries. Any country that aims to develop is interested in attracting foreign investors to invest in it. However, investing in unstable economies may not always be a good idea for a foreign investor. In addition to business risks, this is due to the unpredictability of governments' actions. There have been many cases where a government expropriated the investor's property, imposed excessive taxes, applied other arbitrary measures, etc.[1]

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[1] *E.g.* arbitral awards in the following cases: Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014 (Russian courts, acting in bad faith, launched criminal cases against Yukos for tax evasion, which ultimately led to the company's bankruptcy);

In the past, when such cases happened, the only remedies available to the foreign investor were to rely on their home state for diplomatic protection or to apply to the domestic court of the host state. Nevertheless, neither measure is very effective nor guarantees fair compensation for the actions of the host state. To change this and provide reliable protection for investment, states began to conclude investment treaties between themselves, containing certain guarantees of protection for investments. The first bilateral investment treaty (BIT) was concluded between Germany and Pakistan in 1959, and other states followed this example. Many BITs were signed during the 1960s.[2]

Initially, such treaties were mostly signed between developed and developing countries. The priority for developing countries was to attract more foreign investment, while for the developed countries it was to ensure protection for their investors in foreign countries.[3] The paradigm then shifted, and now there are many BITs between two developing countries as well as between two developed ones.[4] Frequently, some investment guarantees are contained in other bilateral treaties between states (not related to investments only) or multilateral treaties between many states (e.g. trade agreements). As of March 2025, there have been more than 3,300 BITs or other treaties with investment provisions (TIPs).[5]

As a rule, investment agreements include provisions on the prohibition of expropriation without compensation, fair and equitable treatment, free transfer of capital, full protection and security, etc. More importantly, most investment treaties envisage a mechanism of dispute resolution between a foreign investor and a host state, usually providing an investor with recourse to international arbitration. For example, the UK Model BIT (2008) contains the following dispute settlement provision:

> Settlement of Disputes between an Investor and a Host State
>
> Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period

CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Final Award, 14 March 2003 (the Media Council, a body of Czechia, replaced the operator of a broadcasting station, which was partly owned by the Claimant, on questionable grounds and destroyed its investment); Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I), SCC Case No. 116/2010, Award, 19 December 2013 (Kazakhstan cancelled oil and gas exploration contracts held by the Claimant's local operating companies, after which its Kazakh assets were seized).

[2] A. Ghouri, *The Evolution of Investment Treaties*, in: A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Wolters Kluwer, Alphen aan den Rijn: 2015, p. 24.

[3] *Ibidem*, pp. 14, 24.

[4] *Ibidem*, pp. 24–25.

[5] *International Investment Agreements Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 30 June 2025).

> of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.[6]

International arbitration became a primary method of resolving disputes between investors and host states, as it confirmed its effectives for resolution of such politically sensitive disputes. The other most commonly used method for resolving investment disputes is negotiation, which the parties may engage in before, during, or even after arbitration. One commentator noted that "it seems that parties [in investment disputes] drive on a two-lane road" and "[w]hen changing lanes, they move directly from negotiation to investor–State arbitration and sometimes back again."[7]

Despite this, in recent years, scholars and practitioners have often criticised investor–state dispute settlement system (ISDS) and in particular investor–state arbitration, emphasising the need for reform.[8] The main issues they point to are the inconsistency of arbitral awards, the high cost and long duration of arbitral proceedings, the lack of transparency and other problems. As for possible solutions, some of them have called for resorting to other methods of dispute resolution in ISDS, the most obvious option of which is investor–state mediation. In this regard, many developments have occurred at the international level aiming to increase the use of investor–state mediation.

The article discusses investor–state mediation and the main developments that have taken place in recent years. It is divided into two main parts. Section 1 describes the main peculiarities of investor–state mediation, how it is conducted, its strength and concerns about it, as well as its current place in ISDS. Section 2 discusses the main developments on investor–state mediation in recent years and how they address existing concerns on mediation. Thus, the article provides an overview of the current state of investor–state mediation and assesses how all these developments may influence its future, i.e. increase its use in ISDS.

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[6] Draft Agreement Between the Government of United Kingdom of Great Britain and Northern Ireland and the Government X for the Promotion and Protection of Investment (adopted in 2008) (emphasis added).

[7] J. Jung, *Investor–State Mediation – A Third Lane on the ISDS Highway?*, 40(2) ASA Bulletin 273 (2022).

[8] *See generally* M. Waibel, A. Kaushal, K-H.L. Chung, C. Balchin, *The Backlash against Investment Arbitration: Perceptions and Reality*, Wolters Kluwer, Alphen aan den Rijn: 2010; A. Anderson, B. Beaumont (eds.), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*, Wolters Kluwer, Alphen aan den Rijn: 2020. *See also EESC Backs Criticism of Investor-State Dispute Settlement (ISDS), and Calls for a More Holistic Approach*, European Economic and Social Committe, 7 November 2022, available at: https://www.eesc.europa.eu/en/news-media/news/eesc-backs-criticism-investor-state-dispute-settlement-isds-and-calls-more-holistic-approach (accessed 30 June 2025).

1. INVESTOR–STATE MEDIATION AS AN ALTERNATIVE TO INVESTOR–STATE ARBITRATION

1.1. What is investor–state mediation?

Mediation is a form of alternative dispute resolution which envisages resolving disputes between the parties with the help of a neutral third party, a mediator, that assists the parties in establishing communication and coming to a joint solution. Mediation in its modern sense began to develop in the second half of the 20th century, primarily in common-law countries: the USA, Australia, Great Britain – and later in other countries. Nonetheless, certain procedures similar to mediation were practiced even in Ancient Rome, Greece, Medieval Europe, etc.[9]

In general, the idea of mediation is that in cases where the parties seek a de-escalation or, ideally, a quick end to ongoing controversies in order to continue their business or decently separate, they can choose to take responsibility for their own fate by cooperatively negotiating a mutually acceptable solution with the assistance of a neutral third party.[10] It is worth noting that mediation is not limited to consideration of disputes; its main purpose is to provide the parties with means to increase the effectiveness of negotiations through the involvement of a neutral party. It helps to find a mutually beneficial compromise when the parties are in conflict or faced with certain difficulties. Therefore, the key players in mediation are not neutral persons, legal advisors, witnesses or other participants in the process, but the parties themselves. Mediation only makes sense and can be successful if the parties want it and if it suits them to solve the difficulties they have faced.[11]

Mediation can be used to resolve any disputes, including those in civil, labour and even criminal cases. In recent years, it has also become a worthy alternative to arbitration in the resolution of international commercial disputes. Many arbitral institutions have issued arbitration rules and began to administer mediation cases, e.g. SCC Arbitration Institute, International Chamber of Commerce, London Court of Arbitration, Hong Kong International Arbitration Centre and others.

As for investor–state mediation specifically, it entails the resolution of investment disputes through the process of mediation between one private party (or more), and a sovereign state.[12] Investor–state mediation is suitable for resolving all the same

[9] R. Karpenko, *Historical Background of Implementation of Mediation in Ukraine and Other Countries*, 4 Entrepreneurship, Economy and Law 28 (2020), p. 29.

[10] Jung, *supra* note 7.

[11] J.-F. Guillemin, *Reasons for Choosing Alternative Dispute Resolution*, in: J.-C. Goldsmith, A. Ingen-Housz, G. Pointon (eds.), *ADR in Business: Practice and Issues across Countries and Cultures I*, Wolters Kluwer, Alphen aan den Rijn: 2006, pp. 21–23.

[12] T.-K. IU, *Is Investor–State Mediation an Emerging Practice? A Practitioner's Perspective*, Kluwer Mediation Blog, 16 October 2019, available at: https://mediationblog.kluwerarbitration.com/2019/10/16/is-investor-state-mediation-an-emerging-practice-a-practitioners-perspective/ (accessed 30 June 2025).

issues as investor–state arbitration. In particular, it can be used to resolve disputes concerning changes in investment incentive measures, termination or interference with a contract by the state, revocation of licences or permits, unexpected tariffs or taxation, etc.[13]

Also, it is necessary to distinguish between mediation and conciliation (which is also sometimes used for resolving investor–state disputes) because these concepts are rather similar and sometimes used interchangeably. At the International Centre for Settlement of Investment Disputes (ICSID), the two processes have the following differences:

- Once consent has been granted, a party cannot withdraw unilaterally from conciliation. In turn, consent for mediation is necessary not only at the beginning, but also throughout the entire mediation process. Either party has the right to withdraw from the mediation at any point.[14]
- In ICSID mediation, the mediator's role is limited to assisting the parties in reaching a mutually acceptable solution for all or some of the disputed issues. On the other hand, in ICSID conciliation, the conciliation commission has a broader mandate, which is to facilitate resolution as well as clarify the issues in the dispute.[15] It is important to note that neither the mediator nor the conciliator have the authority to take decisions on the merits.
- In contrast to conciliation, a party cannot file an objection that the mediator does not have jurisdiction to consider the dispute, as the process is entirely voluntary. This enables both parties and the mediator to concentrate on resolving the disputed issues.[16]
- Mediation is a more informal process compared to conciliation, as a mediator has no authority to issue procedural orders or decisions.[17]

1.2. How is investor–state mediation conducted?

To understand how the mediation of investment disputes is conducted, it is worth considering the ICSID Mediation Rules. The ICSID adopted these Rules in 2022, marking the first institutional mediation rules designed specifically for investment disputes.[18]

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[13] *Ibidem.*

[14] *Key Differences between Mediation and Conciliation at ICSID*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation/key-differences-between-mediation-and-conciliation (accessed 30 June 2025).

[15] *Ibidem.*

[16] *Ibidem.*

[17] *Ibidem.*

[18] *Rules and Regulations – Mediation*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

1.2.1. Consent to mediation

The main condition of mediation, as in the case of arbitration, is the consent of the parties to recourse to this procedure. Such consent may be included in investment agreements between a state and an investor, or in BITs or TIPs between states. As with investor–state arbitration, the consent of a state in bilateral or multilateral investment agreements is asymmetrical in nature, as a BIT or TIP is a treaty concluded between states, and not between a state and an investor. It is generally accepted that such a provision is only an offer by the state to the investor to refer to arbitration/mediation if a dispute arises.[19]

An example of such consent to mediation can be found in the Costa Rica–United Arab Emirates BIT (2017). Art. 14(3) of the Treaty provides that "[i]n the event that an investment dispute cannot be settled by consultations and negotiations [...] within three months after the respondent received the notice of dispute, it shall be submitted to a third-party procedure such as conciliation and mediation."[20]

According to the ICSID Mediation Rules, a party to the dispute may submit a request for mediation even without the consent of the other party.[21] However, if the other party rejects the offer to mediate or fails to accept the offer to mediate during the specified period, the Secretary-General will inform the parties that no further action will be taken on the request.[22]

1.2.2. Confidentiality of proceedings

As a general rule, all information related to mediation proceedings shall be confidential unless the parties agree otherwise, the information or document is independently available or disclosure is required by law.[23] Additionally, a party shall not rely in other proceedings on any positions taken, admissions or offers of settlement made or views expressed by the other party or the mediator during mediation, unless the parties agree otherwise.[24]

1.2.3. Mediator

Besides the parties, the figure of utmost importance in mediation is the mediator. When the parties choose to use mediation, they basically entrust the mediator to

[19] L. Boisson De Chazournes, *Consent in Investment Arbitration: A Few Remarks*, Kluwer Arbitration Blog, 13 January 2023, available at: https://arbitrationblog.kluwerarbitration.com/2023/01/13/consent-in-investment-arbitration-a-few-remarks/ (accessed 30 June 2025).

[20] Agreement Between the Government of the United Arab Emirates and the Government of the Republic of Costa Rica for the Reciprocal Promotion and Protection of Investments (adopted on 3 October 2017, entered into force 21 October 2020).

[21] Rule 6(1) of the ICSID Mediation Rules (2022).

[22] *Ibidem*, Rule 6(5).

[23] *Ibidem*, Rule 10(1).

[24] *Ibidem*, Rule 11.

design and manage a balanced process of communication and negotiation, based on rules proposed and agreed by the parties. In most cases, mediators are also law practitioners, managers, economists, engineers, psychologists, professors or professionals in another field.[25]

According to the ICSID Mediation Rules, the mediator shall be impartial and independent of the parties, and the parties may agree that the mediator shall have specific qualifications or expertise.[26] Unlike in investor–state arbitration, where there can only be an odd number of arbitrators (predominantly one or three), the ICSID Mediation Rules determine that there shall be one mediator or two co-mediators, where each mediator shall be appointed by agreement of the parties.[27] The Rules also prescribe an order of appointment, resignation, and replacement of a mediator, which is very similar to investor–state arbitration.[28]

1.2.4. Mediation proceedings

Chapter V of the Rules addresses how mediator(s) and parties should conduct the mediation process. The key provisions are as follows:

- The mediator shall assist the parties in reaching a mutually acceptable resolution of all or part of the disputed issues. The mediator has no authority to impose a resolution of the dispute on the parties (Rule 17(1)).
- Each party shall file a brief written statement with the Secretary-General describing the initial issues in dispute and their views on these issues and the procedure to be followed during the mediation (Rule 19(1)).
- The mediator shall hold the first session with the parties within 30 days after the date of the transmittal of a request for mediation. At the first session, after consulting with the parties, the mediator shall determine the protocol for conducting the mediation, including procedural language, the place of meeting, whether meetings will be held in person or remotely, the participation of other persons in the mediation, the process that would be followed to conclude and implement a settlement agreement, etc. (Rule 20).
- The mediator, or the Secretary-General if no mediator has been appointed, shall issue a notice of termination of the mediation if 1) the parties have concluded a settlement agreement; 2) the parties have agreed to terminate the mediation; 3) one of the parties has decided to withdraw from mediation, unless the remaining parties agree to continue; 4) the mediator has determined

[25] C.-A. Gavrila, *The Roles of the Mediator*, adigavrila, available at: https://www.adigavrila.com/en/blog/the-roles-of-the-mediator/ (accessed 30 June 2025).

[26] Rule 12 of the ICSID Mediation Rules (2022).

[27] *Ibidem*, Rule 13(1).

[28] *Ibidem*, Rules 13–15.

that there is no likelihood of resolution through the mediation; or 5) the parties have not taken any steps to appoint a mediator within 120 days after the date of registration (Rule 22).

If the mediation is successful, the process results in a settlement being agreed by the parties, which is then subject to the applicable approval processes the parties identified at the first session.[29] An investor might need to obtain internal approval within the company, while for a host state, approval is typically required from relevant government authorities or agencies.

1.3. Strengths of investor–state mediation compared to arbitration

Mediation has some obvious strengths compared to arbitration. Although investor–state arbitration is and likely always will be the primary method of resolving investment disputes, its main shortcomings are cost and the duration of proceedings.

According to a survey by the British Institute of International and Comparative Law (BIICL), the average costs of investor–state arbitration are around USD 6.4 million for the investor and USD 4.7 million for the respondent state. The average tribunal costs in ICSID and ad hoc arbitrations amount to USD 958,000 and USD 1.05 million, respectively. If one of the parties initiates annulment proceedings, both parties will have to spend an additional USD 1.3 to 1.4 million.[30]

As for the duration of proceedings, according to data from the BIICL survey, the average length of investor–state arbitration proceedings is 4.4 years, though it directly depends on the value of the claim. For example, disputes with a value of up to USD 50 million lasted a maximum of 3.6 years, while disputes with a value exceeding USD 1 billion lasted up to 8 years.[31]

Despite the uniformly accepted effectiveness of arbitration, the parties may often want to avoid the years of dispute resolution in arbitration and the significant costs of arbitration proceedings. In this case, mediating investment disputes is an excellent alternative, because its duration and cost are much lower.

Other strengths of investor–state mediation compared to investor–state arbitration are as follows:

– *The ability of the parties to formulate an outcome.* Critics of investor–state arbitration often emphasise the unpredictability of decisions by international

[29] *Conduct of the Mediation – Facilitated Dialogue – ICSID Mediation (2022)*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/procedures/mediation/conduct-of-mediation/2022 (accessed 30 June 2025).

[30] M. Hodgson, Y. Kryvoi, D. Hrčka, *2021 Empirical Study: Costs, Damages and Duration in Investor–State Arbitration*, British Institute of International and Comparative Law, London: 2021, p. 4, available at: https://www.biicl.org/documents/136_isds-costs-damages-duration_june_2021.pdf (accessed 30 June 2025).

[31] *Ibidem*, p. 32.

tribunals.[32] And although this issue is debatable, given the number of investment treaties and the specifics of each case, during mediation the parties can avoid any unpredictability as they are the ones who formulate the outcome of the mediation.

– *Preserving the parties' relationships.* Mediation is suitable for those parties who, despite the controversy, want to maintain good relations between each other. This is possible due to the fact that the parties make decisions by mutual consent, which can be beneficial for both.[33] For example, given that the respondent in investment disputes is in most cases a developing country, mediation could help that country retain investments that are necessary for its development.

At the same time, mediation also has advantages due to which the parties choose arbitration, namely:

– *Confidentiality.* As already mentioned in section 1.2.2, it is generally accepted that mediation proceedings are confidential. It is possible, however, that the general rule of confidentiality in investor–state mediation will be revised in future. This is discussed in more detail in section 1.4 – "Concerns about investor–state mediation".
– *Selection of a mediator/co-mediators.* Just as in arbitration, in mediation the parties can choose a neutral party to help them resolve the dispute.
– *Flexibility.* Flexibility is manifested in the fact that the parties can fully control the dispute resolution process: choose mediators/arbitrators, determine the hearing date, agree on confidentiality issues, etc. This feature is inherent in both arbitration and mediation, and is a major advantage of alternative dispute resolution methods (ADR) compared to domestic litigation.

1.4. Concerns about investor–state mediation

Despite such strengths, some scholars and practitioners have certain concerns about investor–state mediation. The first of them is the aforementioned confidentiality, which is an integral feature of mediation and one of its main strengths. The main concern is that there has been considerable debate about increasing transparency in investment disputes in recent years. Transparency means that the public may be notified of, obtain information about and possibly take part in arbitral proceedings

[32] *See* B. Arp, *Comparing Criticism to International Adjudication across Investment, Trade, and Human Rights Dispute Settlement Mechanisms*, in: B. Arp, R. Arturo Polanco Zamora (eds.), *International Arbitration in Times of Economic Nationalism*, Wolters Kluwer, Alphen aan den Rijn: 2022, pp. 103–105.

[33] M. Dumanova, P. Neuburger, *Beyond Investment Arbitration: Investment Mediation as a "New Light"*, International Bar Association, 21 October 2022, available at: https://www.ibanet.org/beyond-investment-arbitration-investment-mediation-new-light#_edn23 (accessed 30 June 2025).

established to decide a claim made by a foreign investor.[34] In this regard, the most remarkable are the recent efforts by the United Nations Commission on International Trade Law (UNCITRAL), which introduced their Rules on Transparency in Treaty-based Investor–State Arbitration (Transparency Rules) in 2013, established the Transparency Registry and developed the Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention).[35]

Due to that, the widespread acceptance of confidentiality in mediation may be seen as conflicting with the trend towards transparency and accountability in investment dispute resolution, as these disputes can encompass substantial public policy issues with consequences for a nation's regulatory decisions and fiscal duties.[36] Some commentators also assume that investor–state mediation can be a convenient method to avoid the high levels of transparency currently typical of investor–state arbitration.[37]

The second major concern is about politics, namely that some politicians may interpret the admission of responsibility as a defeat and, thus, be cautious to take such unpopular decisions.[38] This is also closely connected with the third concern: the lack of national-law frameworks on mediation. The lack of internal policies or regulations concerning mediation generates ambiguity for government officials when it comes to dealing with mediation. For instance, state officials face challenges in determining whether to engage in mediation; if they do so, issues arise regarding the delegation of authority, such as identifying responsible parties for negotiation or settlement or securing a budget for mediation.[39]

Last but not least is the lack of awareness. Not everyone involved in the resolution of investment disputes, e.g. politicians, is acquainted with mediation and its main advantages.

1.5. Current place of investor–state mediation in ISDS

Considering the provisions of international investment treaties and case statistics, it is clear that mediation is not a predominant method of dispute resolution in

[34] E.U. Moneke, *The Quest for Transparency in Investor–State Arbitration: Are the Transparency Rules and the Mauritius Convention Effective Instruments of Reform?*, 86(2) International Journal of Arbitration, Mediation and Dispute Management 157 (2020), p. 163.

[35] *Ibidem*, p. 158.

[36] D. Morris, *ICSID Publishes New Materials on Mediation in Investment Disputes*, WilmerHale, 5 August 2021, available at: https://www.wilmerhale.com/en/insights/client-alerts/20210805-icsid-publishes-new-materials-on-mediation-in-investment-disputes (accessed 30 June 2025).

[37] S.F. Ali, O.G. Repousis, *Investor–State Mediation and the Rise of Transparency in International Investment Law: Opportunity or Threat*, 45 Denver Journal of International Law and Policy 225 (2017), pp. 228–229.

[38] Morris, *supra* note 36.

[39] Dumanova, Neuburger, *supra* note 33.

ISDS and that the two most common methods are negotiation and, of course, arbitration. Nonetheless, it is also clear that mediation has the potential to become a third power in ISDS.

1.5.1. Provisions on mediation in investment treaties

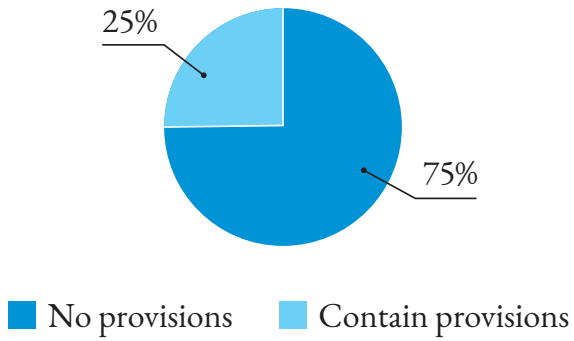
Although arbitration is a primary method of dispute resolution in investment treaties, some of them contain so-called multi-tiered resolution clauses, which outline the steps that must be followed before an investor can resort to arbitration. In recent years, there has been a trend to expressly provide for amicable dispute resolution within such clauses, some of which include mediation.

According to one ICSID study,[40] such clauses can be divided into five categories:

- clauses with an amicable settlement period prior to the institution of arbitration
- clauses that expressly permit mediation or another specified amicable dispute resolution mechanism prior to arbitration
- clauses encouraging the use of mediation or other amicable dispute resolution mechanisms in the amicable settlement period
- clauses mandating mediation or other amicable dispute resolution mechanisms prior to arbitration
- clauses permitting mediation at any point in time.

However, as statistics show, provisions on either conciliation (in most cases) or mediation are found in only 631 treaties, which is less than 25% of the treaties.[41]

Figure 1. Provisions on Conciliation/Mediation in Investment Treaties



[40] *Overview of Investment Treaty Clauses on Mediation*, International Centre for Settlement of Investment Disputes, 12 July 2021, available at: https://icsid.worldbank.org/resources/publications/overview-investment-treaty-clauses-mediation (accessed 30 June 2025).

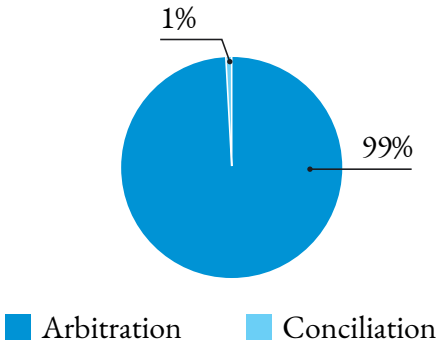
[41] *International Investment Agreements Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/international-investment-agreements (accessed 30 June 2025).

1.5.2. Use in practice

The statistics regarding the consideration of disputes in the ICSID are not in favour of mediation either. Since the adoption of the ICSID Mediation Rules in 2022, no mediation proceeding has been registered. However, considering the limited time that has passed, it is difficult to draw any relevant conclusions yet.

At the same time, we can consider the use of conciliation in the ICSID, given its similarity to mediation. Conciliation, together with arbitration, has been available for investors since the establishment of the Centre in 1966; yet, as of March 2025, only 15 conciliation cases have been considered or are pending in the ICSID. This figure is significantly lower than the 1,051 arbitration cases that have been resolved or are pending in the ICSID.[42]

Figure 2. ICSID Arbitration v. Conciliation Cases



1.5.3. Hidden potential?

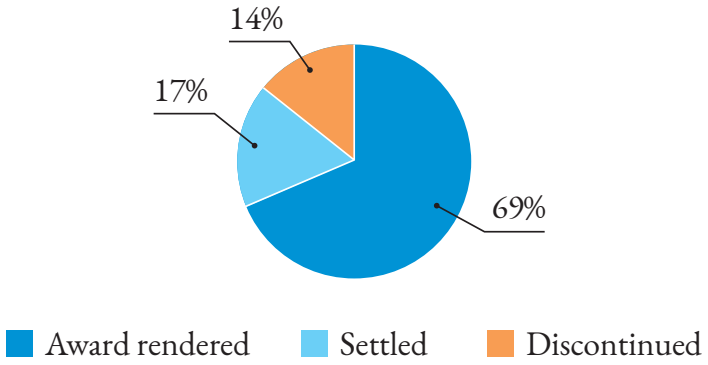
Nonetheless, there are a few indicators that confirm the potential of investor–state mediation and show positive changes in the attitude of investors and states towards it. According to the 2020 Queen Mary University of London and Corporate Counsel International Arbitration Group (QMUL-CCIAG) Survey: Investors' Perceptions of ISDS, 55% of respondents have a positive attitude towards investor–state mediation. For comparison, 53% of respondents have a positive attitude towards negotiations versus 73% and 81% towards treaty- and contract-based arbitration, respectively. In turn, only 23% of respondents have a positive attitude towards litigation of investment disputes in host-state courts and 46% towards governmental intervention on behalf of an investor.[43]

[42] *Search Cases*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/cases/case-database (accessed 30 June 2025).

[43] *2020 QMUL-CCIAG Survey: Investors' Perceptions of ISDS*, Queen Mary University of London, London: 2020, p. 7, available at: https://www.qmul.ac.uk/arbitration/research/2020-isds/ (accessed 30 June 2025).

Additionally, according to statistics from the United Nations Conference on Trade and Development (UNCTAD), there is a significant demand in ISDS for peaceful resolution of disputes: one third of all disagreements end with the dispute being settled or discontinued. According to UNCTAD statistics (as of July 2024), out of 1,025 cases considered, 179 were settled and 140 were otherwise discontinued.[44]

Figure 3. Total Arbitration Cases Concluded



The increase in provisions providing for mediation in investment treaties over the last decade is also promising.[45] For example, Italy, Canada and the Belgium-Luxembourg Economic Union included mediation in their newest model BITs.[46] Thus, although mediation is significantly inferior to negotiation and arbitration in ISDS at the moment, the survey and the statistics indicate that it has great prospects and that it can become the third main method for resolving investment disputes.

2. REACHING POTENTIAL: THE WORKING GROUP III REFORM AND OTHER DEVELOPMENTS TO INCREASE THE USE OF INVESTOR–STATE MEDIATION

Given the criticism of investor–state arbitration and the potential for mediation to become a decent alternative to it, many developments have taken place in the last

[44] *Investment Dispute Settlement Navigator*, UN trade & development, available at: https://investmentpolicy.unctad.org/investment-dispute-settlement (accessed 30 June 2025).

[45] *See Overview of Investment Treaty Clauses on Mediation*, International Centre for Settlement of Investment Disputes, Washington: 2021, p. 2, available at: https://icsid.worldbank.org/sites/default/files/publications/Overview_Mediation_in_Treaties.pdf (accessed 30 June 2025). *See also* Jung, *supra* note 5.

[46] *See* Agreement Between the Government of the Italian Republic and the Government of X for the Promotion and Protection of Investments (adopted in August 2022); Agreement Between Canada and X for the Promotion and Protection of Investments (adopted on 12 May 2021); Agreement Between the Belgium-Luxembourg Economic Union, on the One Hand and X, on the Other Hand, on the Reciprocal Promotion and Protection of Investments (adopted on 28 March 2019).

decade to promote mediation in ISDS. Many respected international organisations and arbitral institutions took part in this. The most important developments are the Working Group III (WG III or Working Group) reform, the adoption of the Singapore Convention and the issuance of mediation rules and guidelines by arbitral institutions and non-governmental organisations.

2.1. Recent developments to increase the use of investor–state mediation

2.1.1. The WG III reform

2.1.1.1. What does the WG III reform entail?

The WG III was established by UNCITRAL in 2017 to pursue the reform of ISDS and address the current concerns about the regime. The work of the WG III was divided into three phases: (a) identify and consider concerns regarding ISDS; (b) consider whether reform was desirable in the light of any identified concerns; and (c) if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[47] The first and second stages were completed, with the Working Group having determined that reform is desirable. Such reform is considered necessary to respond to a range of issues that were identified and discussed during the meetings.[48]

During the first stage, the WG III identified the following main concerns about the ISDS regime: (a) inconsistency in arbitral decisions; (b) limited mechanisms to ensure the correctness of arbitral decisions; (c) a lack of predictability; (d) the parties' appointment of arbitrators; (e) the impact of party appointment on the impartiality and independence of arbitrators; (f) a lack of transparency; and (g) the increasing duration and costs of the procedure. Many states[49] and organisations[50]

[47] UN, *Report of the United Nations Commission on International Trade Law*, 3–21 July 2017, A/72/17, para. 264.

[48] E. Shirlow, *UNCITRAL Working Group III: An Introduction and Update*, Kluwer Arbitration Blog, 23 March 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/03/23/uncitral-working-group-iii-an-introduction-and-update/ (accessed 30 June 2025).

[49] *See* UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-fifth Session, Fifty-sixth Session (3–21 July 2023)*, A/CN.9/1131, 14 April 2023, para. 4. This session was attended by the following states, among others: Algeria, Argentina, Armenia, Belgium, Brazil, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Hungary, India, Indonesia, Iraq, Israel, Italy, Japan, Malawi, Mauritius, Mexico, Morocco, Nigeria, Panama, Peru, Poland, South Korea, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, and Uganda.

[50] *Ibidem*, para. 7. This session was attended by the following organisations, among others (including non-governmental ones): Economic Commission for Latin America and the Caribbean, International Centre for Settlement of Investment Disputes, United Nations Conference on Trade and Development, African Development Bank, Commonwealth Secretariat, American Arbitration Association/International

attended the meetings and submitted their suggestions regarding possible ways to improve the current system.

To address them, the WG III is currently considering the following possible reforms, among others: (a) establishing a Multilateral Investment Court or Appellate Mechanism; (b) establishing an Advisory Centre; (c) increasing the use of investor–state mediation; and (d) creating a Code of Conduct for adjudicators.

2.1.1.2. Considerations for increasing the use of investor–state mediation

In submissions to the WG III, states emphasised the need to explore mediation and other alternative dispute resolution methods. Most submissions referring to alternative dispute resolution methods highlighted the fact that they are more effective than arbitration in terms of time and costs, and their increased use would therefore address concerns regarding the cost and duration of ISDS. In addition, the countries indicated that alternative dispute resolution methods can preserve long-term relationships and that mediation usually helps clarify the positions of the disputing parties, thereby reducing the gap between them and allowing them to focus on the issues at stake.[51]

However, according to the WG III, very few treaties offer mediation and even fewer regulate the mediation procedure. If the investment treaty does not refer to mediation, the parties need to conclude a separate agreement for mediation, which requires additional effort, time and the necessary authority for government officials to engage in mediation. As an example of the obstacles to using mediation, the WG III also mentioned the difficulties in coordinating among the state agencies during mediation proceedings, the legal certainty required for officials to be involved in such proceedings and the need to ensure that the necessary approval process was established, including that those negotiating the settlements had the necessary authority to agree to a settlement agreement.[52]

Therefore, it was decided to develop the legal framework for encouraging mediation and to adopt (a) draft provisions on investment mediation and (b) draft guidelines in mediation. These, according to the WG III, should help increase the

Centre for Dispute Resolution, Cairo Regional Centre for International Commercial Arbitration, Center for International Investment and Commercial Arbitration, Stockholm Chamber of Commerce Arbitration Institute, Third World Network, United States Council for International Business, and Vienna International Arbitration Centre.

[51] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Dispute Prevention and Mitigation – Means of Alternative Dispute Resolution, Note by the Secretariat, Thirty-ninth session* (*30 March–3 April 2020)*, A/CN.9/WG.III/WP.190, 15 January 2020, paras. 29–31.

[52] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-third session (5–16 September)*, A/CN.9/WG.III/WP.217, 13 July 2022, paras. 11–12.

usage of mediation in ISDS.[53] It is important to note that the draft provisions and guidelines have not yet been officially adopted, so the final version may still be subject to change. The work of WG III is due in 2026.

A) Draft provisions on mediation

The draft provisions on mediation were prepared for possible inclusion in investment treaties or a multilateral instrument on ISDS reform, and as such would need to be adjusted if they were to become part of mediation rules or national legislation.[54] The WG III suggests including provisions regarding the following aspects:

- *Availability of mediation and level of conduciveness.* The WG III proposes option A and option B of such a provision. Option A envisages a consent-based, voluntary provision: "The parties shall consider mediation as a means of settling an international investment dispute amicably."[55] In turn, option B provides that after receiving a written request from one of the parties, mediation would automatically commence: "A party shall send a request in writing to the other party to commence mediation to settle an international investment dispute. The mediation is deemed to commence upon receipt of the request by the other party."[56] Both options include a definition of mediation and a list of available mediation rules that the parties could refer to. Unlike option A, option B provides a number of default rules in case the parties have not yet agreed or are unable to agree on a set of mediation rules.[57]
- *Information required in an invitation or request.* The draft version of provision 2 prescribes information to be contained in an invitation to mediate (according to draft provision 1, option A) and a request to commence mediation (according to draft provision 1, option B): (a) the name and contact details of the party and its legal representative(s); (b) a description of the factual basis of the dispute; (c) the government agencies and entities that have been involved in the matters giving rise to the dispute; and (d) a description of any prior steps taken to resolve the dispute, including any pending claims.[58]

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[53] *Ibidem*, paras. 11–12; UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation, Note by the Secretariat, Forty-third Session (5–16 September 2022)*, A/CN.9/WG.III/WP.218, 20 July 2022, paras. 1–2.

[54] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation, Note by the Secretariat, Forty-third Session (5–16 September)*, A/CN.9/WG.III/WP.217, 13 July 2022, para. 15.

[55] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 3.

[56] *Ibidem*.

[57] *Ibidem*, para. 5.

[58] *Ibidem*.

- *Relationship with arbitration and other dispute resolution proceedings.* The WGIII showed strong support for a provision which envisages the automatic stay of arbitration, litigation or other proceedings if mediation is commenced, without the need for a separate agreement by the parties. The rationale behind this proposal was that such an automatic stay would minimise the likelihood of conflicts arising between the ongoing legal proceedings and would enable the disputing parties, especially states with limited resources, to focus more on mediation. Paragraph 1 of the provision prescribes that commencement of mediation shall halt any other dispute resolution proceedings. Paragraph 2 states that the parties need to notify the arbitral tribunal or the court in writing to trigger the suspension of a set of proceedings, and this notification is subject to the applicable rules of those proceedings.[59]
- *Confidentiality of mediation proceedings.* The Working Group emphasised the need to find a balance between transparency and confidentiality in mediation. The default rule under draft provision 4 is that all information related to mediation proceedings is confidential. Nonetheless, there are a few exceptions: (a) the information or document is independently available; (b) disclosure is required by law; (c) a party may disclose the fact that mediation is taking place or has taken place; and (d) a party may disclose the outcome of the mediation, including any settlement agreement.[60]
- *Without prejudice provision.* If mediation does not result in a settlement and a party initiates arbitration or other proceedings, the views, suggestions, admissions or willingness to reach a settlement expressed during the proceedings shall not be used to the detriment of the party who expressed them. For that, the WG III included the provision that engaging in mediation is without prejudice to the legal position or rights of a party in any other dispute resolution proceedings.[61]
- *Settlement agreement.* According to draft provision 6, the parties shall ensure that a settlement agreement resulting from mediation meets the requirements set forth in the Singapore Convention on Mediation. By this provision, the WG III aims to facilitate the enforcement of settlement agreements in any state party to the Singapore Convention that has not made a reservation provided for in Art. 8(1)(a) (that a party shall not apply this Convention to settlement agreements to which it is a party).[62]

[59] *Ibidem*, para. 6.
[60] *Ibidem*, paras. 6–7.
[61] *Ibidem*, para. 7.
[62] *Ibidem*, para. 8.

B) Draft guidelines on investment mediation

The guidelines are considered a useful educational and awareness-raising tool to promote the use of mediation. It was stated that the draft guidelines on investment mediation would be prepared as a stand-alone document independent from the draft provisions on mediation.[63] According to one of the reports of the WG III, the purpose of the draft guidelines is to explain how mediation can be utilised to resolve investment disputes and that the draft guidelines are not intended to promote any best practice, but rather to list and briefly describe issues that should be considered when undertaking investor–state mediation.

The draft guidelines explain the suitability of mediation to resolving an investment dispute, the timing and duration of mediation, the role of institutions, the role, qualification and appointment of a mediator, the role of the parties and other participants, the treatment of information and other topics.[64]

2.1.2. The Singapore Convention on Mediation

One of the greatest advantages of arbitration over other dispute resolution methods is the availability of an effective mechanism for recognising and enforcing arbitral awards in most countries of the world. This is made possible by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which provides for the enforcement of arbitral awards, subject to limited exceptions. ICSID awards, on the other hand, can be enforced through the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention), which stipulates that an award rendered under this Convention should have the same status as a final judgment of a court in any of its member states.

In 2020, mediation received its "own" alternative: the UN Convention on International Settlement Agreements Resulting from Mediation, also known as the Singapore Convention. This is a multilateral treaty, which provides a uniform, efficient way to enforce and invoke international settlement agreements resulting from mediation. The Convention was developed by the UNCITRAL Working Group II (WG II), which focussed on the issue of enforcing international settlement agreements resulting from mediation proceedings. The Group worked from 2015 to 2018, and in December 2018 the United Nations General Assembly unanimously

[63] UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Forty-third Session, Fifty-sixth Session (5–16 September 2022)*, A/CN.9/1124, 7 October 2022, para. 173.

[64] *See* UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.227, 17 January 2023.

passed a resolution to adopt the Singapore Convention.[65] As of March 2025, 57 states have signed it and 15 have ratified it.[66]

2.1.2.1. Main features of the Convention

The Singapore Convention has two particular features. The first is that it focusses on the peaceful resolution of international *commercial* disputes, namely, in accordance with Article 1, it applies to agreements resulting from mediation and concluded in writing by the parties to resolve a commercial dispute (settlement agreement) which is international when it is signed.[67] At the same time, the Convention does not apply to settlement agreements (a) concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes; (b) relating to family, inheritance or employment law; (c) that have been approved by a court or concluded in the course of proceedings before a court and are enforceable as a judgment in the state of that court; or (d) settlement agreements that have been recorded and are enforceable as an arbitral award.[68]

The second, main feature of the Convention is its enforcement mechanism. According to Article 4, each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Like the New York Convention, the Singapore Convention contains an exclusive list of grounds on which the competent authority of the state may refuse to recognise a settlement agreement: (a) a party to the settlement agreement was under some incapacity; (b) the settlement agreement is null and void, inoperative or incapable of being performed, is not binding or is not final, according to its terms or has been subsequently modified; (c) the obligations in the settlement agreement have been performed or are not clear or comprehensible; (d) granting relief would be contrary to the terms of the settlement agreement; (e) there was a serious breach by the mediator of standards applicable to the mediator or the mediation, without which that party would not have entered into the settlement agreement; (f) there was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence, and such failure to disclose had a material impact or undue influence on a party, without which that party would not have entered into the settlement agreement. The burden of proof rests with the person against whom the application

[65] *See Background to the Convention*, Singapore Convention on Mediation, 25 February 2025, available at: https://www.singaporeconvention.org/convention/about (accessed 30 June 2025).

[66] *See Jurisdictions*, Singapore Convention on Mediation, available at: https://www.singaporeconvention.org/jurisdictions (accessed 30 June 2025).

[67] United Nations Convention on International Settlement Agreements Resulting from Mediation (adopted December 2018), Art. 1(1).

[68] *Ibidem*, Art. 1(2–3).

is filed. The competent authority of the Party to the Convention where relief is sought under Art. 4 may also refuse to grant relief if it finds that (a) granting relief would be contrary to the public policy of that party or (b) the subject matter of the dispute is not capable of being settled by mediation under the law of that party.[69] These grounds are similar to those provided by the New York Convention for the enforcement of arbitration awards.

The Singapore Convention is called a milestone in international mediation, but at the same time commentators note that its success depends on two factors:

- international support for the Convention
- its domestic implementation through legislation and enforcement authorities.[70]

2.1.2.2. Application of the Singapore Convention to investor–state mediation

Considering that the Convention applies to international commercial disputes only, the question logically arises whether it can be applied to investor–state mediation. The answer is yes, but only to disputes which are commercial in nature.

The WG II consistently stated that the Singapore Convention is limited to "settlement agreements which are commercial in nature"[71] and "confirmed its understanding that the Convention would not have any impact or interfere with the public international law aspects of state liability or state immunity".[72] At the same time, the Convention is not limited to settlement agreements between only commercial parties, and does not automatically exclude being applied to state entities.[73] Art. 8(1) of the Convention states that a party to the Convention may declare that it shall not apply this Convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration. By this,

[69] *Ibidem*, Art. 4.

[70] N.Y. Morris-Sharma, *The Singapore Convention: A Milestone for Mediation*, 6(2) BCDR International Arbitration Review 261 (2019), p. 264.

[71] UNCITRAL, *Settlement of Commercial Disputes – International Commercial Conciliation: Enforceability of Settlement Agreements*, *Note by the Secretariat, Sixty-fourth Session (1–5 February 2016)*, A/CN.9/WG.II/WP.195, 2 December 2015, para. 14; M. Manukyan, *Singapore Convention Series: A Call for a Broad Interpretation of the Singapore Mediation Convention in the Context of Investor–State Disputes*, Kluwer Mediation Blog, 10 June 2019, available at: https://mediationblog.kluwerarbitration.com/2019/06/10/singapore-convention-series-a-call-for-a-broad-interpretation-of-the-singapore-mediation-convention-in-the-context-of-investor-state-disputes/ (accessed 30 June 2025).

[72] UNCITRAL, *Report of Working Group II (Dispute Settlement) on the Work of its Sixty-fifth Session (Vienna, 12–23 September 2016), Fiftieth Session (3–21 July 2017)*, A/CN.9/896, 30 September 2016, para. 61.

[73] *Ibidem*.

the Convention is meant to be inclusionary and to facilitate enforcement even in investor–state disputes involving government entities.[74]

Interestingly, in one of its reports, the WG III – which works on reforming ISDS – stated that the Convention "contained reservations which would allow States to tailor its application in a flexible manner, including in the context of investor–state dispute settlement."[75] The WG III also included in the draft provisions on mediation a provision that the parties shall ensure that a settlement agreement resulting from mediation meets the requirements set forth in the Singapore Convention on Mediation. Accordingly, the WG III's view is that the Singapore Convention may apply to investment disputes.

It should be also noted that investor–state disputes typically arise on the basis of an investment treaty, free trade agreement, investment contract, investment legislation or by virtue of an umbrella clause in a treaty. In the absence of a reservation by the states in accordance with Art. 8 of the Singapore Convention, the commercial aspects of such disputes would certainly be covered under the Singapore Convention.[76]

2.1.3. Rules and guidelines on investor–state mediation

In recent years, several reputable arbitral institutions and non-governmental organisations have also promoted mediation, presenting their mediation rules and guidelines: the ICSID, the Vienna International Arbitration Centre (VIAC), the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce Arbitration Institute (SCC), the International Bar Association (IBA), the Energy Charter Treaty Congress (ECT Congress) and the International Mediation Institute (IMI).

2.1.3.1. ICSID Mediation Rules 2022

In response to the criticism of ISDS, the ICSID launched the Rules Amendment Project in 2016, the goal of which was to modernise, simplify and streamline the rules. Responding to requests from member states and users of the ICSID arbitration and conciliation services, the ICSID proposed, among other things, the adoption of the first set of institutional mediation rules to resolve investment disputes. After consultation, the ICSID published six working papers, updating its administrative and financial regulations, institution rules, arbitration and con-

[74] R. Tan, *Investor-State Arbitration Meets Mediation: The Singapore Convention on Mediation as Game-Changer*, Kluwer Arbitration Blog, 29 September 2020, available at: https://arbitrationblog.kluwerarbitration.com/2020/09/29/investor-state-arbitration-meets-mediation-the-singapore-convention-on-mediation-as-game-changer/ (accessed 30 June 2025).

[75] UNCITRAL, *Summary of the Intersessional Regional Meeting on Investor–State Dispute Settlement (ISDS) Reform Submitted by the Government of the Dominican Republic, Thirty-seventh Session (1–5 April 2019)*, A/CN.9/WG.III/WP.160, 27 February 2019, para. 54.

[76] UNCITRAL, *supra* note 69.

ciliation rules and additional facility rules, in addition to establishing new rules for mediation and fact-finding.[77] ICSID member states approved the amended rules on 21 March 2022, and the updated rules went into effect on 1 July 2022. The ICSID Mediation Rules became the first institutional mediation rules designed *specifically* for investment disputes.[78] Their main provisions were described in section 1.2 – "How is investor–state mediation conducted?"

2.1.3.2. Other institutional rules for investor–state mediation

In 2021, the VIAC introduced the Rules of Investment Mediation, which complement the Vienna Investment Arbitration Rules and may be used either independently of, or in conjunction with, arbitration proceedings. It is largely based on the proven concept of the VIAC Arbitration and Mediation Rules for commercial disputes, supplemented by special features that are essential to investment proceedings.[79]

Some other arbitration institutions have introduced their own mediation rules as well. These are the ICC Mediation Rules 2014 and the SCC Mediation Rules 2023. Although they are not specifically designed for investor–state disputes, they could apply to them as well. However, the ICC has so far administered only one treaty-based mediation. The SCC has so far not administered any investor–state mediation.[80]

2.1.3.3. IBA Rules for investor–state mediation

The IBA Rules for Investor–State Mediation were adopted in 2012, being the first rules "designed for the mediation of investment-related differences or disputes involving States and State entities."[81] To cite one commentator, it was an "extremely important first step toward legitimizing investor–state mediation."[82] At the same time, it was noted that "the rules [were] unlikely to go far enough to motivate significant integration of mediation into the fabric of the investment treaty context."[83] This was true, and as we can see 13 years after their adoption, these rules alone have

[77] *See ICSID Rules and Regulations Amendment*, International Centre for Settlement of Investment Disputes, 1 July 2022, available at: https://icsid.worldbank.org/resources/rules-amendments (accessed 30 June 2025). *See also* M. Harutyunyan, *The Revised ICSID Rules: A Further Step Towards Transparency and Efficiency*, 40(3) ASA Bulletin 529 (2022).

[78] *Rules and Regulations – Mediation*, International Centre for Settlement of Investment Disputes, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

[79] *Rules of Investment Arbitration and Mediation 2021*, Vienna International Arbitral Centre, available at: https://icsid.worldbank.org/rules-regulations/mediation (accessed 30 June 2025).

[80] H. Verbist, *Mediation as a Method to Settle International Trade and Investment Disputes*, in: A.M. Anderson, B. Beaumont (eds.), *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?*, Wolters Kluwer, Alphen aan den Rijn: 2020, pp. 362–363.

[81] Art. 1(1) of the IBA Rules for Investor–State Mediation (2012).

[82] N.A. Welsh, A.K. Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 Harvard Negotiation Law Review 71 (2013), p. 83.

[83] *Ibidem*.

not been able to change the stance of investor–state mediation. However, they are still in place and offer clear mechanisms and provisions for parties to initiate mediation.

2.1.3.4. Guidelines on investor–state mediation

In 2016, the ECT Congress adopted its Guide on Investment Mediation. According to the preamble, it is designed to (a) explain the mediation process in general; (b) facilitate tips; and (c) explain the role of the Energy Charter Secretariat and other institutions. The aim is to have an explanatory document that could be voluntarily used by governments and companies to take the decision on whether to go for mediation and how to prepare for it. Some commentators have said that the adoption of this Guide is a clear recognition by states that mediation can play an important role in ISDS.[84]

One more guideline on investor–state mediation was issued in 2016. The IMI issued the Competency Criteria for Investor–State Mediators. The aim of the Criteria is to assist parties, institutions, designating authorities and other appointing bodies in selecting competent and suitable mediators or co-mediators for disagreements involving private-sector entities and states, by listing criteria that can help inform and guide their choices.[85] According to it, ideally, selected investor–state mediators should have satisfactory levels of knowledge and experience in each of the following areas: (a) investor–state issues; (b) mediation and other dispute resolution processes; (c) different forms of negotiation, mediation and conciliation; (d) arbitration and adjudication; (e) intercultural competency; and (f) other competencies such as knowledge of various tools and technologies that can assist the participants in communicating more effectively, reducing costs and saving time, such as online webinar or video-conferencing systems, data-analysis tools (e.g. decision trees or mind maps) and process management skills.[86]

2.2. Are these developments sufficient?

All these developments are of great importance for increasing the use of investor–state mediation in future. They are aimed at creating a clear international-law framework for conducting investor–state mediation, which simply did not exist a few years ago. These developments contributed to it in the following ways:

– The Singapore Convention has created an effective mechanism for enforcing international settlement agreements, which will definitely be taken into account by parties when choosing the most suitable dispute resolution mech-

[84] *Conference Endorses Guide on Investment Mediation*, International Energy Charter, 1 August 2016, available at: https://tinyurl.com/yptjyxn6 (accessed 30 June 2025).

[85] *IMI Competency Criteria for Investor–State Mediators*, International Mediation Institute, Hague: 2016, p. 1, available at: https://imimediation.org/wp-content/uploads/2022/03/IMI-Investor-State-Mediation-Competency-Criteria.pdf (accessed 30 June 2025).

[86] *Ibidem*, p. 4.

anism. Additionally, becoming a party to the Convention will demonstrate a state's recognition of mediation as a suitable dispute resolution mechanism and its willingness to comply with any outcome reached.[87]

- States may include the WG III's draft provisions on mediation in their investment agreements with other states or contracts with investors to make mediation an available option in the event of an investment dispute. The relevant provision will encourage the parties to consider mediation.[88]
- The existence of several sets of rules suitable for investor–state mediation gives the parties the opportunity to choose how they want to organise their procedure (for example, with the involvement of the institution or not). In addition, they provide the parties with a clear idea of how the procedure will take place. All the above-mentioned guidelines are also important as they are a useful source for the parties when choosing the most suitable dispute resolution mechanism and conducting the mediation proceedings.

However, it is also important to address existing concerns about investor–state mediation. Section 1.4 – "Concerns about investor–state mediation" identifies four main areas: (a) the confidentiality of mediation; (b) politics; (c) the lack of national-law frameworks; and (d) the lack of awareness. The current developments address only one of them: confidentiality.

The WG III addressed the issue of confidentiality by providing the default rule under draft provision 4 that all information related to mediation proceedings is confidential, with a few exceptions: (a) when the information or document is independently available; (b) when disclosure is required by law; (c) a party may disclose the fact that mediation is taking place or has taken place; and (d) a party may disclose the outcome of the mediation, including any settlement agreement.[89] The rules for investor–state mediation by the ICSID, the IBA and the VIAC also address the issue of confidentiality by providing a default rule with exceptions.

While the discussion on confidentiality is not over, all these developments contribute greatly to it. Considering that this has been proposed, in particular, by the WG III – whose decisions have been worked on by many exceptional experts and which has considered the submissions made by many states – such a proposal is very authoritative and will most likely be taken into account in future. Nonetheless, confidentiality is not the main issue which restrains investment from widespread

[87] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 46.

[88] *Ibidem*, para. 47.

[89] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Guidelines on Investment Mediation, Note by the Secretariat, Forty-third Session (5–16 September 2022)*, A/CN.9/WG.III/WP.218, 20 July 2022, pp. 6–7.

use. In the author's opinion, the next three concerns are much more important to be addressed in order to increase the use of investor–state mediation.

The first of them, the lack of awareness, is a complex issue which cannot be resolved in a few days. In the meantime, every conference, training workshop or even article on investor–state mediation may contribute to its popularisation to some extent. Given that this topic is widely discussed today, all of these developments contribute to a greater awareness of investor–state mediation between lawyers, investors and politicians. So, it is likely that the awareness of mediation among people who are involved in resolution of disputes between states and investors will increase in the coming years. The second issue is politics. It is difficult to predict or influence the behaviour of politicians, but it is more likely that after clear international- and national-law frameworks are developed, they will be more inclined to mediate disputes with investors. The third and most problematic issue, in the author's opinion, is the lack of national law frameworks for investor–state mediation. The challenge is that the international community has difficulties addressing it, as this is an internal matter for each state.

The development and adoption of a relevant legal framework in national law is a rather time-consuming process. Even such a significant international treaty as the Singapore Convention, after five years, had only been signed by 57 states and ratified by 15 states, which shows how slowly states may react to new developments in mediation. With national regulations it can be even more difficult and longer, because states have to develop them by themselves. Unfortunately, it may take years for states to create appropriate domestic legislation, if they even decide to do so. In addition, politicians may consider other issues to be more important (although some of them truly are), and therefore this will not be on their agenda.

CONCLUSION

As we can see from section 1, mediation is a promising method of dispute resolution that can take into account the interests of both parties, preserve their relationship and offer other strengths – such as flexibility, the ability to choose mediators (co-mediators), confidentiality, etc. However, it has not been widely used in ISDS, in spite of its great potential.

In the last decade, many steps have been taken to change this, the most important of which are the WG III reform, the Singapore Convention and the adoption of mediation rules and guidelines. All these developments are of great importance, because they are aimed at creating an international-law framework for investor–state mediation, which simply did not exist a few years ago. Nevertheless, they do not address one significant concern: the lack of national-law frameworks for inves-

tor–state mediation, including a clear framework for politicians on how to act in case of mediation. Therefore, it is necessary to continue the work on developing investor–state mediation, although now its main volume should be carried out not within the framework of international organisations, but in the legislative bodies of various states.

In order to ensure widespread use of investor–state mediation in future, states should not only implement those tools that the international community has developed in recent years, but should also develop their own domestic regulation on mediation. In particular, states should take the following steps:

- Modify their investment treaties to include mediation as a voluntary or mandatory dispute resolution mechanism. For this, they can use the draft provisions on investment mediation prepared by the WG III.
- Sign and ratify the Singapore Convention. Although the Convention can be used only for commercial issues in investor–state mediation, to cite one commentator, it will "give mediation enormous credibility as a dispute resolution mechanism that can be used as part of the dispute resolution toolkit".[90]
- Create a domestic legal framework for mediation, including for its officials, on how to act during investor–state mediation. As a first step, during one of the sessions of WG III, states were invited to adopt the UNCITRAL Law on Mediation.[91]

In summary, it should be noted that current developments have laid a solid foundation for the future of investor–state mediation. However, states and the international community still need to do a lot of work in order for mediation to stand beside negotiations and arbitration as a main method of resolving investment disputes.

[90] W. von Kumberg, *Investor State Mediation and the Singapore Convention*, ADR Institute of Canada, available at: https://adric.ca/investor-state-mediation-and-the-singapore-convention/ (accessed 30 June 2025).

[91] UNCITRAL, *Possible Reform of Investor-State Dispute Settlement (ISDS) – Draft Provisions on Mediation*, *Note by the Secretariat, Forty-fifth Session (27–31 March 2023)*, A/CN.9/WG.III/WP.226, 16 January 2023, para. 45.