THE TIME FOR INVESTOR STATE MEDIATION HAS COME JUNE 16, 2020

BY WOLF VON KUMBERG IDR BRIEF

COVID-19 has compounded doubts about the post-war international order brought about by the 2008 financial crisis. This marks a change in how global trade investment will be governed in the future. The Singapore Convention on Mediation in 2019 recognised mediation as an official international process by which to resolve disputes, and mediation will be even more useful in an investor-state context in the political and economic aftermath of COVID-19. As states compete to distinguish themselves to attract inward investment in a post COVID-19 environment, mediation can and should play an important role.

Wolf von Kumberg *- Wolf von Kumberg is a member of the iPlatform Board and Global Advisor. He has over 30 years of international legal, compliance, conflict management and business experience. He served as Legal Director and Assistant General Counsel to Northrop Grumman Corporation out of its London office, as legal and commercial director for Sperry Marine Limited, out of its London office, as EMEA Legal Director for Litton Industries Inc., in Zurich, Switzerland and as Canadian VP Legal for Litton Canada Limited out of its Toronto office. Wolf has unique knowledge related to global business and the legal, compliance, regulatory and cultural issues associated therewith. He is a Fellow of the Chartered Institute of Arbitrators (CIArb, a CEDR qualified mediator and serves on the Boards of both the American Arbitration Association and CEDR. Wolf now spends his time as a full time conflict resolver, as mediator, arbitrator and dispute board member. Wolf and Malik are also the founders of the International Dispute Registry (IDR), which works on ADR capacity building projects worldwide.*

Introduction

In 2017, Malik Dahlan and I wrote an article[1] on the need for investor-state mediation, in light of the criticism that the investor state dispute system (ISDS) faced from many quarters. We postulated the following:

> … current criticisms of Investor-State Dispute Settlement ("ISDS") are ill-informed and attempts at reforming the system are misguided. The definition of ISDS itself has been, for a long time, limited to investment quasi-judicial bodies or at best arbitration. Analysis of the roots of the ever-growing backlash reveals that the main causes for concern are politically negotiated investment treaties, an inherently biased system, lack of transparency, and inconsistent decision-making. Examination of the core reasons behind these complaints leads to the conclusion that the EU Commission's solution to reform ISDS through a permanent court raises more issues and will throw ISDS into disarray. A better approach is to accept the premise that the current system needs improvement. However, accepting this premise requires regulating disputes themselves, rather than simply regulating the resolution of cases, and establishing standards when unable to regulate these. The regulation of disputes would allow the work already begun by UNCITRAL through its notes on transparency to continue… introducing mediation to regulate the process of Investor State Disputes ("ISD") can improve and indeed complement the procedural gap evident in the current ISDS system.

The world today is different to the world of 2017. Global supply chains are being broken. The energy market has collapsed. Options for international travel and even public transportation are highly limited. Legal obligations are murky. International trade has come a standstill. Swathes of industries have faced closure, and mass unemployment following in its wake. COVID-19 has also, as is increasingly evident, significantly set back global cooperation. Yet in doing so, COVID-19 has accelerated a process that had already started as far back as the 2008 financial crisis, which initiated the scramble by states to begin looking at international finance and the institutions behind it with great suspicion.

The frantic search for foreign direct investment (FDI) and all its attendant benefits began to be undermined by a growing sense of exposure, as glaring flaws were exposed in the financial system supporting global trade. This sentiment was exacerbated by the election of Donald Trump on a nationalist platform that put the post-war international order and its institutions into question—Bretton Woods among them. The Trump Administration's trade war with China further contributed to the reversal of trends in international trade. Suddenly, multi-national companies faced criticism for investing abroad at the expense of employees in their home country or region. Even more disconcerting, the challenge of international supply chain disruption and reshoring will dramatically change how global trade investment is governed.

The International Monetary Fund (IMF) estimates that almost three-quarters of the increase in trade between 1993 and 2013 was due to the growth of supply chains. Trade rose fivefold over the course of

[1] Dahlan, M.R., & von Kumberg, W. (October 9, 2017). *Investor-State Dispute Settlement Reconceptualised: Regulation of Disputes, Standards and Mediation*. 17 Pepp. Disp. Resol. L.J. 233.

those twenty years, with supply chains helping to power global economic expansion. Just as important, supply chains were an important source of disinflation. Before COVID-19 hit, the Bank for International Settlements (BIS) estimated that global inflation would have been about a percentage point higher if it were not for the supply-chain enabled efficiencies of global production. Yet despite these economic benefits, and due to growing political backlash against globalization, more and more nations are threatening to bring their offshore investments back home.

What does this new trend mean for globalization and international trade in the post-pandemic world? What will the impact be on ISDS? And will the current pushback on globalization and its institutions provide a catalyst for the development of investor-state mediation? These are all questions that this paper will hopefully contribute to answering.

The Singapore Convention

With the signing of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation') in August 2019, mediation has been given new credibility as an international process for dispute resolution. To understand that in the context of investor-state disputes, one must first look at trends in how mediation is increasingly encouraged as a tool of international relations and diplomacy. In the past, mediation was not often considered in the context of investor-state disputes settlement (ISDS). It had its own unique dispute resolution system that had grown out of investment treaties negotiated between individual States (bilateral investment treaties, BITS) or on a multilateral basis between larger groups of states, such as NAFTA. International mediation was not even thought of as having a role in these disputes. ICSID, the body of the World Bank responsible for trade disputes, had arbitration rules and a set of conciliation rules. Yet the conciliation rules were not a form of mediation, but rather a tribunal that heard the dispute and then rendered a non-binding opinion. Most parties never used conciliation and moved directly to arbitration. The three-to-six month cooling-off period provided for in BITs was not used to try to find a resolution to the dispute, but rather to prepare for the arbitration.

Five years ago, we started our efforts in the critical energy space by assisting the Energy Charter Treaty (ECT) Secretariat, a grouping of 54 States which creates a multilateral framework for cross-border cooperation in the energy sector, to consider how mediation could be introduced to its rules. The rules provided for arbitration to resolve disputes with investors and had a reference to conciliation, but without any specific process. The Secretariat was interested in filling in the gaps by providing for the possibility of mediation. We worked on a mediation guide, which would provide member states with an outline of the mediation process and how it might be used in investor state disputes. The Guide on Investment Mediation was published on the July 19, 2016, and it was soon recognized that the guide alone was not enough. States have largely not engaged in mediation for lack of an internal framework, with such issues as authority to settle, transparency versus confidentiality, liability for taking decisions and state budgets being factors. As a result, the Secretariat then went on to review with the member states a model framework that could be adopted within state structures, through which these issues could be dealt with. The Model Instrument on

Management of Investment Disputes was published on the December 23, 2018 and has been adopted in the interim by several member states.

In addition to the ECT, we have also worked with International Mediation Institute of The Hague (IMI), International Centre for Settlement of Investment Disputes (ICSID) and the Centre for Effective Dispute Resolution (CEDR) to develop inter-state (IS) mediation awareness programs and training for mediators and States. In addition, to give the process credibility a cadre of mediators, who not only understood mediation, but also ISDS had to be trained. Since 2017, several annual IS mediator training courses have been held, creating mediators capable of handling a range of cases.

Even more important for the acceptance of mediation in these disputes is the fact that ICSID, the organization through which most of these disputes are arbitrated, has lent its full support to the development effort, even publishing its own IS mediation rules. This has given the initiative credibility with investors, their counsel and states and represents a leap forward to making mediation part of the ISDS process. Several important investor state disputes have already even used mediation. Keeping in mind that many cases are not disclosed, the most recent reported case was that of the Dominican Republic and Oldebrecht that was mediated this January by well-known international mediator Mercedes Tarrazón. The matter was mediated and a settlement agreement reached under International Chamber of Commerce (ICC) mediation rules.

To understand the significance of ISDS mediation, on the development of investor-state mediation, one need only look at the preamble of the Singapore Convention, which states:

> Recognizing the value for international trade of mediation as a method for settling commercial disputes in which the parties in dispute request a third person or persons to assist them in their attempt to settle the dispute amicably,
>
> Noting that mediation is increasingly used in international and domestic commercial practice as an alternative to litigation,
>
> Considering that the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States,
>
> Convinced that the establishment of a framework for international settlement agreements resulting from mediation that is acceptable to States with different legal, social and economic systems would contribute to the development of harmonious international economic relations,

By signing and ratifying the Convention, states have recognized the use of mediation as a legitimate public policy instrument for resolving cross border disputes. This gives mediation legal credibility and certainty as

a dispute resolution mechanism that can be used as part of the dispute resolution toolkit. Once states have acknowledged this for commercial disputes, it becomes difficult for them to argue that it does not apply to the state itself or its agencies when dealing with investors.

If we take as an example the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, few states have excluded the application of the Convention to arbitrations involving States or their agencies. In fact, one of the reasons international arbitration has become popular and an acceptable dispute resolution tool is that arbitral awards can also be enforced against states under the New York Convention. This example is a blueprint for the enforcement of mediated settlements against states. It is not so much enforcement that is important, as most states will abide after having agreed to a settlement; but it is key that states recognize, through the Singapore Convention, that mediation is an acceptable means of resolving disputes.

A Way Forward for Mediation

Given the unprecedented crisis the world is currently facing, the imperative to employ mediation in an investor-state context has grown. Arbitration, as a mechanism for resolving these disputes, has limitations. The Columbia Center on Sustainable Investment has called for a moratorium on all arbitration claims by private corporations against governments using international investment treaties. On May 5, 2020, a large number of EU member states signed an agreement for the termination of intra-EU bilateral investment treaties. This implements the March 2018 European Court of Justice (ECJ) judgement (or Achmea Case), in which the Court found that investor-state arbitration clauses in intra-EU bilateral investment treaties are incompatible with EU Treaties.

In December of last year, a colloquium at Harvard University brought together key stakeholders in the IS mediation international community with negotiation scholars to Harvard to consider the obstacles to mediating investor-State disputes and options to overcome them. The colloquium resulted in the establishment of a working group as well as a report on how to move the process forward. Key insights set out in the Report are the importance of:

- Viewing mediation as assisted negotiation. Losing sight of this can cause misunderstandings about what mediation is trying to accomplish, and what its place should be in the ISDS system. The need for 'assistance' in negotiations creates a desire on both sides to obtain help, voluntarily, from a neutral party. Identifying a neutral party is one of the major challenges facing mediation processes within ISDS.
- Carefully mapping stakeholders and their interests. This can enable mediators identify areas of common ground and linkages to parties outside of the central dispute that might bridge between the main conflicting parties.
- Understanding the possible downsides of transparency. While normatively desirable, transparency can hinder efforts at mediation by exposing early stages of discussions to public scrutiny, creating pressure that can lead to posturing and unproductive dialogue.

- Relying on processes that are legally binding, as is the case in arbitration. Political actors may prefer to engage in formalized disputes with a designated arbitrator because even when the outcome is not in their favor, they can shift the blame for said outcome onto the 'higher powers' that made the ruling. By contrast, any agreement reached via mediation between the two parties demands more responsibility. Hence, there is potentially a lack of incentive for governments to adopt and political actors to enter into mediation processes.

Moreover, it was noted that:

- For companies that conduct a variety of types of business in different countries, bringing a formal arbitration claim can be counterproductive. For these types of businesses, it may be more prudent to accept even egregious violations by host states because a public confrontation with the government would likely have negative repercussions on future transactions with this state. Hence, in some ways, companies can face pressure to accept a state's infringements upon formal arrangements in the current ISDS system.
- There are two major obstacles to the more effective implementation of mediation in ISDS. Firstly, a lack of awareness of mediation as an alternative to arbitration and secondly, a lack of any formal, legal framework to support mediation and mediated settlements.

- A potential challenge to wider implementation of mediation in ISDS is the divergence in rule by law versus rule of law from state to state. Mechanisms put in place to institutionalize mediation as a viable alternative must be sensitive to differences in the distribution of power and decision making in different states.
- There are three primary approaches to dispute resolution: (1) Power-based (e.g. labor strikes), (2) Rights-based (e.g. courts, arbitration), and (3) Interest-based. Mediation is primarily interest-based, as it appeals to both sides' interest by finding a mutually beneficial resolution.
- "Mediation" perhaps needs to be framed in a different manner. The term evokes a formalized system of dispute resolution that could pronounce the confrontational aspects of arbitration and legal proceedings. The challenge lies in creating informal systems that can take effect before the dispute becomes more formal. The timeline of a conflict's development is thus a central question.
- A significant challenge is charged rhetoric, particularly claims that the "system" is corrupt. This could taint proposed alternatives, including mediation. We must therefore consider how to reverse this rhetorical trend and regain the trust needed to legitimize any dispute settlement mechanism.
- While the conventional wisdom is that law firms are opposed to mediation, recent years have seen several international firms develop profitable models from mediation.

A follow-up Forum on IS Mediation will be held at the British Institute for International and Comparative Law (BIICL) this autumn. The forum will focus on working with States to ensure appropriate frameworks exist to permit mediation to take place.

This activity is especially timely as foreign direct investment (FDI) is already taking a hit due to COVID-19 and trade retrenchment. This is a trend that will almost certainly get worse, meaning that states must now do all that is possible to create a friendly investment climate. A key element is having a system that is perceived as being transparent and fair for resolving investor disputes. Early dispute resolution, rather than arbitration, can play a role in this. Some states have already implemented ombudsperson programs, with others maintaining a policy of mediating disputes as a prerequisite to arbitration. This is much in line with the premise that disputes have to be regulated, and there must be a process in place that outlines the various steps of dispute resolution.

COVID-19 has created a situation in which many investment agreements will not be executable in accordance with the terms stipulated therein. The Colombia Initiative's call for a moratorium on ISDS addresses this particular issue head-on. This will not be the only call for the suspension of ISDS, as states struggle to realign commitments due to budgetary constraints. It is here that mediation can play a vital role in helping both investors and states to restructure their legal commitments and, in many cases, to maintain the investment in a different form or conclude it on agreed terms. Arbitration cannot provide such remedies—and in any event, enforcing an arbitral award against a state that cannot pay, or seeks to avoid payment in this moment, hardly makes good business sense.

States now have to do all that is possible to facilitate both investment and compromise, and to resolve investor-state disputes. To do so, a system that is fair and compromise-oriented is essential, and mediation offers just that. The time for mediation to become an integral part of investor-state dispute resolution is now.

Wolf von Kumberg and Malik R. Dahlan,
London. June 15, 2020.

Appendix: A Concept for Mediation Guidelines

1. That states seeking to attract FDI implement an internal framework for permitting mediation along the lines of the ECT Model Instrument;

2. That officials are familiarised with the mediation process as per their own internal frameworks;

3. That States adopt a regulated approach to dispute resolution with investors, permitting for structured negotiation through a neutral, such as an ombudsperson;

4. That mediation, based on the ICSID's own mediation rules, should become a prerequisite to the commencement of arbitration in ISDS matters, or at the very least implemented alongside arbitration proceedings;
5. That, even where a dispute is arbitrated through to award, that mediation be available where needed to frame the award's implementation.