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Challenges of Mediating Investor-State Disputes

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Abstract—Mediation has gained a lot of traction in the context of ISDS in the past few years. There are many who truly believe that this could be an alternative to highly costly and lengthy investor-State arbitrations and litigations. States have started to include mediation in their investment treaties; institutions have designed separate mediation rules and procedures specifically for investor-State disputes. The 2022 International Dispute Resolution Survey from the Singapore International Dispute Resolution Academy (SIDRA) is a testament to this positive trend towards investor-State mediation. In the 2022 SIDRA Survey, the respondents signal increased acceptance of mediation in ISDS.

Despite these trends, the use of mediation in investor-State disputes appears to be very limited. During the 2022 SIDRA Survey qualitative interviews, the SIDRA tried to enquire about the users' perspective on the Survey results on mediation and the prospect of the use of mediation for investor-State matters.

This article examines the challenges of using mediation in ISDS to propose possible solutions to overcome these challenges. Section II presents the 2022 SIDRA Survey results. Section III outlines and examines user insights collected during qualitative interviews. Section IV proposes possible measures to eliminate the obstacles hindering the use of mediation by States. Section V draws final conclusions.

I. INTRODUCTION

In the past decade, the investor-State dispute settlement (ISDS) system has come under serious scrutiny which gave rise to a thorough debate in international circles and civil society. The dissatisfaction of users, mainly States, instigated a comprehensive discussion on possible reforms and alternatives. One of the most high-level and the most inclusive discussions on the reforms to ISDS is taking place within the Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). The list of possible reform options discussed by the UNCITRAL Working Group III is quite long—from incremental changes aimed at fixing the existing ISDS system from within, to more systemic reforms proposing the establishment

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of whole new dispute settlement institutions. One of the reform options considered by the Group is a 'means of alternative dispute resolution', including mediation.[2]

Mediation has gained a lot of traction in the context of ISDS in the past few years. There are many who truly believe that this could be an alternative to highly costly and lengthy investor-State arbitration and litigation. States have started to include mediation as a dispute settlement mechanism in their investment treaties;[3] institutions have designed separate mediation rules and procedures specifically for investor-State disputes.[4] The 2022 International Dispute Resolution Survey from the Singapore International Dispute Resolution Academy (SIDRA) (2022 SIDRA Survey) is a testament to this positive trend towards investor-State mediation. In the 2022 SIDRA Survey, the respondents signal increased acceptance of mediation in ISDS.[5]

Despite these trends, the use of mediation in investor-State disputes appears to be very limited.[6] There are only a handful of known ISDS cases in which parties have used mediation. Despite public endorsement and promotion of investor-State mediation, the use of mediation in ISDS matters may seem to be challenging for States.[7] Commentators in the field assert that efforts to promote the use of mediation in ISDS have failed to address important concerns that hinder the use of mediation by States.[8] During the 2022 SIDRA Survey qualitative interviews, among various pressing issues, the SIDRA tried to enquire about users' perspective on the Survey results on mediation and the prospect of the use of mediation for investor-State matters. The qualitative interviews with several respondents, which included government representatives responsible for overseeing investor-State disputes, have offered interesting points of view as to the particular challenges that States and State agencies face in attempting dispute settlement through mediation.

This article examines the challenges in using mediation in ISDS to propose possible solutions to overcome them. Section II presents the 2022 SIDRA Survey Results.

[2] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019)' UN Doc A/CN.9/1004, 7.

[3] See eg Comprehensive Economic and Trade Agreement between Canada and the European Union (signed 30 October 2016, provisionally entered into force 21 September 2017) (CETA) art 8.20; Investment Protection Agreement between the European Union and the Socialist Republic of Vietnam (signed 30 June 2019, will enter into force upon ratification by all EU Member States) (EU–Vietnam IPA) art 3.31; Agreement Between the United States of America, the United Mexican States, and Canada (signed 30 November 2018, entered into force 1 July 2020) (USMCA) art 14.D.2; Accord entre le Conseil fédéral suisse et le Gouvernement de la République d'Indonésie concernant la promotion et la protection réciproque des investissements (signed May 24, 2022, Treaty has not entered into force yet) art 18; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (signed 8 March 2018, entered into force 30 December 2018 for Australia, Canada, Japan, Mexico, New Zealand, Singapore; 14 January 2019 for Vietnam; 19 September 2021 for Peru; 29 November 2022 for Malaysia; 21 February 2023 for Chile; and 12 July 2023 for Brunei Darussalam) (CPTPP) art 9.18.

[4] See eg IBA Rules for Investor-State Mediation (2012); UNCITRAL Mediation Rules (2021); and ICSID Mediation Rules and Regulations (2022).

[5] Singapore International Dispute Resolution Academy (SIDRA), SIDRA International Dispute Resolution Survey: Final Report (2022) (2022 SIDRA Survey Rep) 29-42 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey-2022/22_0068%20SMU%20SIDRA%20Survey%20Report%202022_FA4(C).pdf> accessed 8 April 2023.

[6] See Catherine Kessedjian and others, 'Mediation in Future Investor-State Dispute Settlement' (2022) vol 14 (2) J Intl Disp Settlement 9, 10: The information on the use of mediation in investor-State disputes is scarce. Based on the empirical research conducted for the purposes of their study in investor-State mediation, C Kessedjian and others concluded that '[t]he lack of documented occurrences could either mean that such practice is rare, or that documentation of such practice is not publicly available'; Andrea Kupfer Schneider and Nancy A Welsh, 'Bargaining in the Shadow of Investor-State Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management' (2021) 17 U St Thomas L J 382, 383.

[7] See James M Claxton, 'Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?' (2020) 20 Pepperdine Disp Resol L J 80: '[R]esistance to investor-state mediation runs deep and is complicated by structural and political barriers'.

[8] Such concerns include 'political cost of settling cases, the lack of coordination between state agencies with different portfolios, and the existence of governmental actors with different jurisdictions and misaligned incentives'. Schneider and Welsh (n 6) 374.

Section III outlines and examines user insights collected during qualitative interviews, including respondents' perspectives on States' reluctance to use mediation in ISDS. Section IV proposes possible measures to eliminate the obstacles hindering the use of mediation by States. Section V draws final conclusions.

II. 2021 SIDRA SURVEY FINDINGS

In 2021, SIDRA conducted the second iteration of its Survey and in 2022 issued the SIDRA Survey Final Report (2022 SIDRA Survey Report). The SIDRA Survey studies user experiences with arbitration, litigation, mediation, mixed-mode (hybrid) dispute resolution and ISDS mechanisms.[9] The aim of the SIDRA Survey is to understand how and why businesses and their counsel make decisions in resolving cross-border disputes.[10]

The 2022 SIDRA Survey Report has revealed interesting and somewhat intriguing findings regarding the use of mediation in investor-State disputes. When compared with the previous SIDRA Survey conducted in 2020 and other existing empirical research in this area,[11] the 2022 SIDRA Survey results demonstrate a trend of evolving acceptance of mediation in ISDS.

Pursuant to the 2022 SIDRA Survey results, arbitration remains the most acceptable form of dispute resolution with 86 per cent of respondents favouring institutional arbitration and 71 per cent ad hoc arbitration.[12] Even though mediation ranks far below arbitration for the time being, the level of acceptance of this mechanism in ISDS by the survey respondents is still quite significant; mediation comes as a second most favoured dispute resolution mechanism after arbitration with 24 per cent of respondents choosing mediation.[13] This is a significant improvement from the 2020 SIDRA Survey results when respondents ranked mediation only as a third possible choice after arbitration and international and local courts.[14] The top factors affecting the decision to use mediation in ISDS matters include cost (at 100 per cent), speed (at 100 per cent) and procedural flexibility (at 100 per cent).[15] It is even more interesting that user satisfaction with these factors is much higher in mediation than in arbitration.[16]

The 2022 SIDRA Survey Report imparts additional data on this subject that can contribute to a more nuanced analysis of this topic. Interestingly, there is a significant difference in the approaches between the respondent category identified as client users (in-house counsel, corporate executives, government lawyers) and those identified as external counsel. Client users use arbitration and mediation more evenly (at 50 per cent for each mechanism), while external counsels indicated a much higher preference for arbitration (at 89 per cent for institutional arbitration and 74 per cent

[9] 2022 SIDRA Survey Rep (n 5) 1.
[10] ibid.
[11] See eg Queen Mary University of London (QMUL), 2020 QMUL -CCIAG Survey: Investors' Perceptions of ISDS (May 2020) (QMUL 2020 ISDS Survey) <https://arbitration.qmul.ac.uk/media/arbitration/docs/QM-CCIAG-Survey-ISDS-2020.pdf> accessed 8 April 2023.
[12] 2022 SIDRA Survey Rep (n 5) 64.
[13] ibid.
[14] SIDRA, SIDRA International Dispute Resolution Survey: 2020 Final Report (2020) (2020 SIDRA Survey Rep) 16 <https://sidra.smu.edu.sg/sites/sidra.smu.edu.sg/files/survey/24/index.html> accessed 8 April 2023.
[15] ibid 70.
[16] Sixty per cent of respondents are satisfied with the costs and 80 per cent with the speed of mediation, whereas respondents' satisfaction with the two factors is only at 37 per cent in arbitration. SIDRA 2022 Survey Rep (n 5) 68, 70.

for ad hoc arbitration) over mediation (at 21 per cent). This difference is especially remarkable since external counsel advice plays an important role in parties' decisions regarding the dispute settlement mechanisms and procedure. In 2022 SIDRA Survey, counsel advice is the most significant factor (at 62 per cent) together with contractual obligations (at 62 per cent) determining respondents' choice of dispute settlement mechanism in ISDS.[17] The 2022 SIDRA Survey Report explains such a difference by the fact that client users might be more motivated to save time and costs as well as the fact that mediation allows more direct involvement of the parties in the dispute settlement process than arbitration.[18]

Another interesting piece of empirical data provided by the 2022 SIDRA Survey is the fact that the respondents voted for institutional mediation (at 24 per cent) while showing zero preference for ad hoc mediation (at 0 per cent).[19]

The 2022 SIDRA Survey results are in line with other contemporary reputable empirical research. For example, the Queen Mary University of London (QMUL) 2020 International Arbitration Survey in ISDS (QMUL 2020 ISDS Survey) likewise determined that mediation is increasingly considered in ISDS 'as a helpful mechanism to resolve, mitigate or prevent disputes'.[20] Significant number of respondents (64 per cent)[21] positively responded to the question whether they would welcome introducing a mandatory requirement to undertake mediation prior to arbitration proceedings.[22]

III. CHALLENGES OF MEDIATING INVESTOR-STATE DISPUTES: INSIGHTS COLLECTED THROUGH QUALITATIVE INTERVIEWS

After the biennial quantitative analysis of the Survey results, SIDRA routinely conducts qualitative interviews with selected respondents of the Survey. This qualitative aspect of SIDRA's empirical research adds nuance to the reading of the quantitative data and provides deeper insights on survey findings. In relation to the 2022 Survey findings, SIDRA conducted qualitative interviews with a number of respondents on various areas covered by the Survey, including use of mediation in ISDS. The views of the three interviewees discussed below are particularly interesting in identifying challenges of using mediation by States for investor-State matters. While all three respondents view mediation as a useful mechanism to resolve investor-State disputes, they identify as obstacles to mediation (i) lack of legal and institutional framework, (ii) difficulty of decision-making regarding the use of mediation as well as settlement of disputes amicably, (iii) political scrutiny, (iv) post-settlement audits and public prosecution, (v) State bureaucracy and difficulty of coordinating among various State agencies and stakeholders. Interviewees also opine on issues such as the effect of inflated claims on the negotiation of amicable settlement, and the optics of proposing mediation or any other form of amicable resolution of the dispute for that matter.

[17] 2022 SIDRA Survey Rep (n 5) 64, 65.
[18] ibid 65.
[19] ibid 64.
[20] See QMUL 2020 ISDS Survey (n 11) 24.
[21] ibid. There must be a mechanical error in the QMUL 2020 ISDS Survey Report (n 11) 24; the figure is the total of 34 per cent and 30 per cent of respondents favouring the proposal, therefore the final figure should be 64 per cent.
[22] ibid. Out of 64 per cent of respondents, 34 per cent 'somewhat favoured' and 30 per cent 'strongly favoured' the proposal.

A. *Interviewee I*

Interviewee I is a government official with years of experience of representing State and State entities in international commercial and investment dispute settlement procedures, including investor-State mediation.[23] Interviewee I spoke positively of mediation as an effective dispute resolution mechanism for investor-State matters. In this context, features of mediation such as 'more cost-effective', procedurally 'easier to undergo' and a platform where parties 'are equal' and can directly communicate were considered appealing. This is in line with the 2022 SIDRA Survey findings in terms of factors considered in choosing mediation in ISDS matters as well as the user satisfaction in relation to the same.[24]

Although Interviewee I welcomes the use of mediation in investor-State disputes, it was also pin-pointed that there are particular challenges which may make it difficult for States to settle disputes through mediation. The main concern in the experience of Interviewee I is a so-called post-audit or similar post-mediation procedure scrutinizing the process of mediation and the settlement reached between the disputing parties. As explained further, after the settlement, the officials involved in mediation, or in any form of amicable dispute resolution (ADR) for that matter, will have to justify the agreed settlement and deal with 'meddling' of government agencies who were not involved in the mediation process in the first place. Authorities responsible for such post-audit mechanisms refuse to be involved in the mediation process; officials involved in mediation have difficulty in negotiating and settling the matter on certain terms since they are not sure whether the settlement amount would be approved by the relevant governmental entities and thus, whether they would be able to comply with the settlement (ie pay any agreed settlement amount or take other agreed action).

In the view of Interviewee I, it is especially hard to mediate when there is no specific law authorizing the use of mediation in investor-State cases and allowing the State to 'enter into mediation agreements'. Thus, Interviewee I suggests that in order to have investor-State disputes mediated, 'laws have to be made'. Such laws should authorize the use of mediation as well as regulate procedures of post-settlement audit or scrutiny in a way that could eliminate the 'unknowingness' and uncertainty of compliance with such settlements.

Another solution proposed by Interviewee I is to have a separate body on the domestic level—an 'advisory board' of some sort that could advise on a possible financial exposure of the State in the ongoing dispute (in terms of both cost of proceedings and the amount of compensation on the merits) and thus, a reasonable settlement amount.

In response to the question whether the adoption of United Nations Convention on International Settlement Agreements resulting from Mediation (Singapore Convention) may have any positive effect on the use of mediation in ISDS, Interviewee I responded affirmatively observing that 'it has to start somewhere' and that the Convention can facilitate the use of mediation by the States and commercial entities. The effects of joining Singapore Convention and the role of other policy and legislative

[23] Interview with a government official working for the public agency representing the State and its instrumentalities in international commercial and investment dispute settlement proceedings. This person has been involved in one of the few investor-State mediations on behalf of the State.

[24] 2022 SIDRA Survey Rep (n 5) 70 results discussed in Section II.

acts in legitimizing mediation including for the purposes of ISDS will be discussed further in Part III.

B. *Interviewee II*

Interviewee II is an arbitrator, counsel and mediator based in Singapore with years of experience in ISDS.[25] In addition to the advantages named by the Interviewee I, Interviewee II mentioned other benefits of mediation such as an opportunity to obtain valuable information about the opposing party and their counsel, their perspective on the case and in collecting other insights on the matter. In addition, parties can get a fresh view or a more nuanced sense of the strengths and weaknesses of their case from a reputable neutral evaluator such as a mediator.[26] These are generally considered important upsides of mediation that are beneficial even when mediation is unsuccessful.[27]

Interviewee II voiced several concerns about investor-State mediation. First, when it comes to a potential payment of a sum of money from the State's budget, many States might find it more 'palatable' were, say, a tribunal to make the decision for them. Then the government would avoid accepting political responsibility for settling. Second, in the eyes of Interviewee II, 'ridiculous[ly] inflated' claims brought by investors make it difficult for States to negotiate a reasonable settlement. Third, investor-State disputes typically involve numerous different State departments and agencies, with each having its own different interests and considerations, which makes it particularly challenging to mediate and settle investor-State matters.[28] The State agency taking the lead in the mediation/settlement process is usually not the line agency, who has an interest in the substantive matter. It is difficult for State bodies representing the State in mediation to deal with these layers of bureaucracy and take responsibility to sign off on the deal unless the decision goes up to the highest authority like the cabinet or 'the president of the State'.

C. *Interviewee III*

Interviewee III is a partner in an international law firm representing clients in litigation, arbitration and mediation, including in ISDS.[29] Interviewee III focused on the problem of decision-making from the angle of political sensitivity. In some countries

[25] Interview with an independent arbitrator, counsel and mediator based in Singapore.

[26] Mediators should not make any judgement of parties' conduct or provide any kind of legal or expert advice. This said, '[w]hen appropriate, the mediator assists the parties to assess the strengths and weaknesses of their views through techniques such as reality testing and risk assessment.' ICSID, 'Background Paper on Investment Mediation' (July 2021) (ICSID Background Paper on Investment Mediation) 7 <https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Investment_Mediation_Oct.2021.pdf> accessed 15 April 2023.

[27] Daniel Weinstein and Mushegh Manukyan believe that unsuccessful mediation can yield such benefits as (i) a better understanding of the dispute and the interests involved; (ii) a chance to evaluate the opposing party's counsel; and (iii) an opportunity to assess the merits of each side's arguments. In their view, such values of a 'failed' mediation can lead to 'productive direct negotiations or streamlined adjudication'. Daniel Weinstein and Mushengh Manukyan, 'Making Mediation More Attractive for Investor-State Disputes' (*Kluwer Arbitration Blog*, 26 March 2019) <https://arbitrationblog.kluwerarbitration.com/2019/03/26/making-mediation-more-attractive-for-investor-state-disputes/> accessed 15 May 2023. Even if parties fail to settle, mediation attempt can help narrow the disputed issues and encourage continued communication between the parties. See Schneider and Welsh (n 6) 384; Kun Fan, 'Mediation of Investor-State Disputes: A Treaty Survey' (2020) J Disp Resolution 331.

[28] Commentators have voiced same concern as a barrier to investor-State mediation. See eg Schneider and Welsh (n 6) 387.

[29] Interview with partner of an international law firm practicing ISDS.

with unstable political situations, government officials can end up in jail or be prosecuted for settling matters and for signing settlement agreements. In the experience of Intervewee III, such developments have taken place in certain countries after the change of political forces and the government.

The other challenge identified by Interviewee III concerned the fact that proposing mediation or any other form of amicable settlement might be seen as a sign of weakness from the State party; States fear that if they establish a precedent for settling disputes they might be 'flooded with cases'.

Interviewee III is of the view that mediation should be mandatory;[30] one consequence of this would be to help develop mediation practice in ISDS.

D. *Summary of the Findings of Qualitative Interviews*

The challenges and concerns discussed by the SIDRA Survey respondents concur with the findings of other similar empirical research. By way of example, in 2016–17, the Centre for International Law of National University of Singapore conducted a Survey on the Obstacles to Settlement of Investor-State Disputes (2018 NUS Survey) and issued its Report in 2018 (2018 NUS Survey Report).[31] The Survey asked respondents a series of closed as well as open-ended questions to determine key challenges of settling disputes.

According to the 2018 NUS Survey Report, the most significant obstacle to settling disputes is 'the desire to defer responsibility for decision-making to a third party' such as a tribunal.[32] Other important factors include fear of public criticism, fear of prosecution for corruption and personal responsibility and fear of setting precedent for future disputes.[33] The final category of obstacles relates to structure and bureaucracy of the State, in particular: difficulty of agreement among multiple stakeholders with conflicting and competing perspectives and interests;[34] difficulty of obtaining budgetary approval for payment under settlement; and risk of losing settlement opportunity due to the delays in consulting and coordinating with all stakeholders.[35]

To summarize, based on stakeholder interviews with SIDRA Survey respondents and other empirical research, the challenges encountered by States in settling investor-State disputes, and thus the use of mediation in ISDS can be grouped into the following categories:

(i) legitimacy of mediation as an appropriate dispute settlement mechanism in ISDS;
(ii) legal and regulatory framework on mediation of investor-State matters and coordination on the settlement of disputes through mediation within the particular State's bureaucracy;

[30] On the merits and demerits of compulsion of mediation in ISDS, see Claxton (n 7).

[31] Seraphina Chew, Lucy Reed, J Christopher Thomas, 'Report: Survey on Obstacles to Settlement of Investor-State Disputes' (2018) NUS - Centre for International Law Working Paper 18/01 (2018 NUS Survey Rep) <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf> accessed 10 April 2023.

[32] ibid; Kessedjian and others (n 6) 15.

[33] 2018 NUS Survey Rep (n 31).

[34] See also, Shu Shang, 'Implementing Investor-State Mediation in China's Next Generation Investment Treaties' in Julien Chaisse (ed), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy* (OUP 2019) 514–516.

[35] 2018 NUS Survey Rep (n 31) 2.

(iii) decision-making and approval in relation to mediation as a process choice as well as regarding the final settlement of the actual dispute;
(iv) funding the mediation process and payment under settlement agreement.

IV. POSSIBLE WAYS TO ELIMINATE OBSTACLES TO INVESTOR-STATE MEDIATION

States could take measures to eliminate perceived obstacles to the settlement of disputes through mediation, and thus defy the existing challenges of using mediation in ISDS. In order to do so States need to implement a series of complex and coordinated policy decisions and reforms. This section discusses and proposes possible approaches and State measures that could tackle the four categories of challenges identified in Section III. Besides the research conducted for the purposes of this article, the ideas and possible solutions proposed in this section are based on the personal experience of the author deriving from many years of practice in public service in the area of ISDS,[36] as well as on insight from the discussions in international fora and institutions considering the challenges and corresponding solutions/reforms to the current system of ISDS.

A. *Legitimacy of Mediation as a Dispute Resolution Mechanism in ISDS*

Mediation, although not a novelty, is a relatively unconventional way of resolving investor-State disputes. As practice and empirical evidence (including the 2022 SIDRA Survey findings discussed above) show, arbitration is by far the most favoured and commonly used mechanism in the context of disputes between investors and States. Although the vast majority of investment protection treaties invite parties to resolve disputes amicably before formal arbitral or court proceedings, they rarely suggest any particular mechanism or form of such ADR.[37] Those treaties that do refer to ADR mechanisms largely do not refer to mediation.[38] In terms of dispute settlement practices, the ICSID statistics show that a significant portion of investor-State arbitration cases settle;[39] the number of settled cases might be even higher on the expanse of cases that are non-ICSID arbitrations, that are confidential or those that settle even before the commencement of formal proceedings. When it comes to the use of mediation as a dispute resolution mechanism, however, there are only a handful of known investor-State mediation cases.[40]

[36] The author of this article served as the Head of Department of State Representation in Arbitration and Foreign Courts at Georgia's Ministry of Justice from June 2011 to May 2022. Among other tasks, she was responsible for State representation in the negotiations on amicable settlement of investor-State disputes and the conclusion of settlement agreements. Throughout her tenure, she has been involved in settlement negotiations on 12 investor-State disputes out of which nine were successful resulting in final settlements at different stages of dispute settlement proceedings.

[37] Based on the Kessedjian and colleagues' research, only 627 treaties out of 2577 treaties mapped on UNCTAD's website contain provisions for voluntary ADR (conciliation/mediation). Kessedjian and others (n 6) 5.

[38] ibid 8: Mediation is mentioned only in one per cent of treaties that refer to ADR mechanisms.

[39] Fifty one per cent of cases in 2022 were settled or otherwise discontinued. See ICSID, 'ICSID Releases 2022 Caseload Statistics', News Release (30 January 2023) (ICSID Press Release) <https://icsid.worldbank.org/news-and-events/communiques/icsid-releases-2022-caseload-statistics#:~:text=The%20outcome%20of%20cases%20at,were%20settled%20or%20otherwise%20discontinued> accessed 20 April 2023.

[40] One example is *Systra v Philippines*, where parties unsuccessfully attempted mediation under IBA Rules. Kessedjian and others (n 6) 10. On other attempts of investor-State mediation, see Schneider and Welsh (n 6) 384.

There are two other investor-State matters that have been successfully settled in ICC mediation:

(i) case between Odebrecht Consortium and Dominican Republic. See Cosmo Sanderson, 'Billion-Dollar Odebrecht Dispute Settled through Mediation' *Global Arbitration Review* (18 March 2020) <https://

Mediation as a means of ADR is new or relatively unknown in many jurisdictions. Some jurisdictions might not be readily receptive to the concept of mediating investor-State disputes. There might be questions as to why a State prefers mediation—an informal, confidential process driven by the parties and their interests—over formal adjudication where a neutral judge or arbitrator decides the case on the basis of the applicable law. The value of mediation in terms of dispute management or mitigating the costs and risks in resolving investor-State disputes is not sufficiently understood and recognized.[41] Mediation might even be perceived as a behind-the-door process to reach unlawful agreements. State authorities in charge of investor-State dispute resolution might be reluctant to choose mediation procedures for fear of criticism from the constituency and difficulty in justifying their decision to opt for it. Because of the lack of legal regulation and practice even responsible government officials might not be familiar with mediation and therefore not be in a position to pursue it. The fact that external counsel would not favour mediation in ISDS matters[42] and therefore are presumably loath to advise[43] the use of mediation to resolve such matters is certainly not helpful.

For the reasons outlined above, States need to take measures to increase the legitimacy of mediation in their respective jurisdictions. States can do so by taking concrete actions both on domestic and international levels.

There are a number of measures States could implement in their respective jurisdictions to raise the legitimacy and trust towards mediation:

(i) Adopt laws on mediation: in order to increase legitimacy and trust in mediation as a process, States should implement mediation on a broader scale. States can adopt legislation on mediation for private commercial disputes as well as voluntary and/or court-mandated mediation for disputes in other legal relationships (eg family law disputes, labour law disputes). Putting in place a robust legal framework would give mediation the highest possible legitimacy and facilitate the use of mediation in resolving various disputes involving parties, natural and legal professionals from a given jurisdiction. Furthermore, as Alexander suggests, while parties are free to use mediation, it is legislative incentives that trigger mediation and thus, facilitate increased use of it.[44] Use of mediation in domestic and international cross-border cases would raise awareness of and increase trust in mediation among both the community and professional circles. With trust established, the government and community

globalarbitrationreview.com/article/billion-dollar-odebrecht-dispute-settled-through-mediation> accessed 18 April 2023;

(ii) case between Global Steel Holding Limited and Nigeria. See Jack Ballantyne, 'Nigeria Settles Multibillion Steel Dispute after ICC Mediation' *Global Arbitration Review* (5 September 2022) <https://globalarbitrationreview.com/article/nigeria-settles-multibillion-steel-dispute-after-icc-mediation> accessed 17 April 2023.

[41] Kessedjian and others (n 6) 15.

[42] 2022 SIDRA Survey Rep (n 5) results discussed in Section II.

[43] CEDR Investor-State Mediation Guide for Lawyers and their Clients states that it is the professional responsibility of counsel acting in investor-State matters 'to explore settlement options, including mediation, with their clients'. See CEDR, 'CEDR Investor-State Mediation Guide for Lawyers and their Clients' (November 2021) 10 <https://www.cedr.com/wp-content/uploads/2022/03/Investor-State-Mediation-Guide-Interactive.pdf?utm_source=foleon&utm_medium=lead-magnet&utm_campaign=investor-state> accessed 15 May 2023.

[44] For example, in Singapore, main triggers to international cross-border mediation include court-related mediation provided in the statutes of the Singapore International Commercial Court (SICC), the Supreme Court, the State Court and the Family Justice Court, as well as contractual clauses on mediation that are recognized by Singapore Courts. Nadja Alexander, 'The Singapore Convention:What Happens after the Ink Has Dried?' (2020) 30 American Rev Intl Arbitration 243. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3583379>.

would be more receptive to using mediation in investor-State contexts. There are clearly many good reasons for and benefits in using mediation in domestic legal practices; there is an abundance of publications that are devoted to the nature and values of mediation, which we will not discuss here.

(ii) Introduce mediation in resolving administrative law disputes or issues related to governmental services: this is yet another way of putting mediation on the table, this time involving various government agencies and officials and raising legitimacy and confidence towards mediation among State officials and the constituency. Many States use mediation to effectively resolve administrative law disputes. For example, Georgia has introduced mediation by notary on public law disputes,[45] as well as mediation of disputes related to land registration,[46] juvenile justice[47] and collective labour disputes.[48]

(iii) Provide support to local dispute settlement structures in terms of training, foreign expertise, institutional development, etc. It has been empirically established that users are reluctant to embrace new mechanisms due to the lack of familiarity and fear of the unknown.[49] States could support their respective dispute settlement institutions and structures in training and capacity building; the State's role might be especially crucial in attracting foreign expertise, procuring foreign assistance, connections and cooperation for the benefit of local institutions and professional circles and for the development of local practices.

(iv) Provide training and capacity building for government entities responsible for investor-State matters. Besides other challenges, including issues of authority and decision-making that will be discussed in detail below, the reluctance of State officials to explore mediation in ISDS might be due to a lack of knowledge and experience in this area. Therefore, it is crucial to train responsible government agencies and public officials, give them access to foreign expertise and provide opportunities to share the experiences of other countries. States could consider designating a lead agency responsible for State representation in ISDS procedures, including mediation. States could thus direct training and capacity-building measures to this agency, and, going forward, ensure that the relevant expertise and experience is accumulated within one institution.

(v) Support awareness-raising campaigns and activities on mediation. For the reasons stated in Section III(C)., States could engage in awareness-raising campaigns and other measures to promote use of mediation generally as well as in investor-State contexts in their respective jurisdictions.

States could further raise legitimacy and trust of mediation by declaring their support and approval on an international level:

[45] According to the Law of Georgia on Notaries, a notary may serve as mediator on public law disputes, disputes related to inheritance or disputes between neighbours or any other disputes other than those subject to special dispute settlement arrangement by the law. Such mediation is subject to the agreement of the parties or may be requested by an administrative organ as prescribed by the law. Law of Georgia on Notaries (4 December 2009) N2283-IIს.

[46] Law of Georgia on the Improvement of Cadastral Data and the Procedure for Systematic and Sporadic Registration of Rights to Plots of Land within the Framework of the State Project (3 June 2016) N5153-რს.

[47] For example, mediation between the juvenile delinquent and the victim. Juvenile Justice Code of Georgia (12 June 2015) N3708-IIს.

[48] Labour Code of Georgia (17 December 2010) N4113-რს.

[49] Alexander (n 44) 236, 237.

(a) Include mediation in investment treaties. Inclusion of mediation in international investment agreements would give ISDS greater legitimacy. This would also provide solid legal bases for the actual use of this mechanism by States.[50] Although the existing treaty wording does not prevent States from using mediation during the cooling-off period,[51] they seem to be reluctant to do so. Lack of direct reference to mediation is considered to be one of the hurdles to engaging such a mechanism.[52] States have recently started to include direct reference to mediation in their investment agreements.[53] Mediation treaty clauses can propose voluntary (ie with the consent of the disputing parties) or mandatory (ie at the request of one of the disputing parties) mediation[54] and may include some default procedural provisions unless and until the parties agree on a particular set of mediation rules.[55,56]

(b) Sign and ratify the Singapore Convention.[57] The Singapore Convention has been signed by 57 countries.[58] Although primarily designed to provide an international enforcement regime for commercial cross-border disputes it also covers settlement agreements resulting from investor-State mediation.[59] By signing, and ratifying, or acceding to the Convention, as the case may be, the States declare strong commitment to guarantee the enforcement of mediated settlement agreements in their jurisdictions, including those resulting from investor-State mediations.[60] Even though the Convention regulates issues of enforcement, adhering to the Convention can have a much broader effect on the use of mediation in a particular jurisdiction including in ISDS. By joining the Singapore Convention, States concomitantly endorse mediation as a dispute settlement mechanism and further incentivize its use in cross-border commercial and investment disputes by providing prudent enforcement guarantees.

B. *Legal and Regulatory Framework*

As discussed in Section III, challenges related to the use of mediation include such factors as the lack of clear authority to engage in mediation in the investor-State context; furthermore, the difficulty of coordinating among different stakeholders within

[50] EU-Vietnam IPA (n 3) art 3.29: 'Any dispute should as far as possible be settled amicably through negotiations or mediation and, where possible, before the submission of a request for consultations…'.

A different model of ADR clause referring to mediation can be found in CPTPP (n 3):

> Article 9.18: Consultation and Negotiation
>
> 1. In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures, such as good offices, conciliation, or mediation.

[51] Kessedjian and others (n 6) 8.

[52] UNCITRAL, 'Possible Reform of Investor-State Dispute Settlement (ISDS): Draft Provisions on Mediation' (16 January 2023) UN Doc A/CN.9/WG.III/WP.226 (UNCITRAL Draft Provisions on Mediation) 2.

[53] See n 3.

[54] UNCITRAL Draft Provisions on Mediation (n 52).

[55] ibid.

[56] For various models of existing treaty provisions on mediation, see Fan (n 27) 332–37.

[57] See Claxton (n 7) 87, 88: 'Singapore Convention should lend greater legitimacy to international mediation and advance understanding of its features'.

[58] United Nations Convention on International Settlement Agreements Resulting from Mediation (opened for signature 7 August 2019, entered into force 12 September 2020) (Singapore Convention), <https://www.singaporeconvention.org/> accessed 14 April 2023.

[59] Nadja Alexander and Shou Yu Chong, 'The Singapore Convention on Mediation: Origins and Application to Investor-State Disputes' in Mahdev Mohan & Chester Brown, *Asian Turn in Foreign Investment* (CUP 2021) 5.

[60] For the sake of completeness, it should be noted that under the Singapore Convention States can opt out of the treaty by applying reservation with respect to settlement agreements to which its governments or other public entities are a party. Singapore Convention (n 58), art 8(1)(a).

the government and lack of organization and structure in this process may lead to losing the momentum to settle. These problems are largely caused by the absence of clear domestic legal and institutional bases to use mediation and to organize the process of State representation in mediation. A general lack of a legal framework to support investor-State mediation and mediated settlements has been confirmed by stakeholders and commentators and has been identified as an obstacle to investor-State mediation.[61] In the absence of legal authority—either in the domestic legal framework or in international treaties—and procedures to engage in mediation, government officials, especially in those jurisdictions where mediation is an exotic animal, might eschew the decision to mediate and/or to lead the process thereto.

In order to eliminate such challenges, States need to authorize mediation for investor-State matters in their respective legal acts. The authority of responsible State bodies and officials should be clearly defined. The States can further elaborate and adopt policy documents and regulations guiding State officials through the process of mediation including with respect to such issues as:

(i) when mediation should be used;

(ii) what the mandate of public officials leading the process of mediation is;

(iii) how they should coordinate among different government entities and stakeholders;

(iv) who should be involved in the process of mediation;

(v) who should make final decisions on settlements and what is the procedure involved.

Such laws could serve as a triggering mechanism for investor-State mediation in the same way as legislative incentives trigger mediation for domestic or cross-border commercial disputes.[62]

Some States provide explicit authority in their domestic laws and by-laws to resolve investor-State disputes amicably. Such countries include, for example, Peru, Georgia, the Dominican Republic and Vietnam.

As part of its State Coordination and response System for International Investment Disputes, the Republic of Peru authorizes the Special Commission to evaluate the possibility of negotiations, adopt negotiation strategy and represent the State in such negotiations.[63] The law, however, refers to 'direct negotiations', thus, seemingly excluding any ADR mechanism involving third-party neutral mediators.[64]

Georgia has a designated public authority—a department within the Ministry of Justice of Georgia (Arbitration Department) that is responsible for State representation in international commercial and investment disputes. Among various functions in this capacity, the Arbitration Department is authorized to 'conduct negotiations with the opposing party or their representatives at any stage of the proceedings on the case with the aim of settling amicably the dispute' and to 'conclude the settlement agreement or participate in the conclusion of such agreement'.[65] The statute

[61] ISDS Mediation Working Group in its Report of 16 June 2020 identified two barriers to implementation of investor-State mediation: (i) lack of awareness; and (ii) absence of legal framework. 'Unlocking Value through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes' (London, 16 June 2020) ISDS Mediation Working Group Report 10; Schneider and Welsh (n 6) 387.

[62] Alexander (n 44) 242–44.

[63] Ley que establece el sistema de coordinación y respuesta del Estado en controversias internacionales de inversion N28933 (16 December 2006) (Law N28933 Peru) <https://mef.gob.pe/NORLEGAL/leyes/Ley_28933.pdf> accessed 14 April 2023.

[64] ibid.

[65] Statute of the Ministry of Justice of Georgia (30 December 2013) art 15.

provides clear authority to engage in settlement discussions and conclude settlement agreements, however, it does not make reference to mediation explicitly.[66]

In the case of the Dominican Republic, the use of mediation among other ADR mechanisms is directly provided and encouraged. Presidential Decree N303-15 directs State officials to include mediation in international trade and investment agreements; the decree further authorizes the use of mediation 'to resolve disputes arising in relation to international investment agreements' and designates a special authority within the Ministry of Industry and Trade of the Dominican Republic to handle such procedures.[67]

In case of Vietnam, a named 'Presiding Authority' that consists of ministry, ministerial or governmental agency or local authority (or a number of such agencies) whose measure is challenged by the investor in dispute, is authorized to 'preside over mediation and negotiation with the foreign investor'.[68] The Prime Minister's Decision No 14/2020/QD-TTg further defines functions of the Presiding Authority in relation to the coordination with other agencies and obtaining a negotiation mandate in the form of a mediation plan approved by the prime minister.[69]

On a more general level, the Energy Charter Treaty Secretariat has undertaken a project of devising a model legal instrument to provide States with useful tools to prevent or effectively manage their investment disputes. The Model Instrument on the Management of Investment Disputes adopted by the Energy Charter Conference (ECT Model Instrument) recognizes the importance of ADR mechanisms including mediation.[70] It encourages the inclusion of mediation and other ADR clauses in international agreements as well as investment contracts.[71] The Model Instrument also provides for the explicit authority of a responsible body to negotiate, draft and conclude settlement agreements.[72]

C. *Decision-Making*

As we learned from the stakeholder interviews as well as other empirical evidence, the key challenge of engaging in mediation and possibly concluding a settlement in ISDS lies with the relevant decision-making.[73] Authorized government officials are reluctant to make decisions and take responsibility for the settlement of investor-State disputes out of fear of public or political criticism, personal accountability or even criminal prosecution.[74] They would, thus, rather defer the responsibility of resolving

[66] It is the author's view that the wording of the Statute of the Ministry of Justice of Georgia does not exclude and can accommodate use of mediation or other ADR procedures involving neutral intermediary. As far as the author is concerned, Georgia never mediated an investor-State case; Georgia has settled significant numbers of its investor-State matters through direct negotiations. Therefore, the operation of the statutory provisions and extent of the authority of Georgian State officials in mediation has yet to be tested in practice.

[67] Presidential Decree 2015 No 303-15 of the Dominican Republic on the System for Prevention of Disputes art 5.

[68] Decision No 14/2020/QD-TTg on the Promulgation of Regulation on Cooperation in Resolution of International Investment Disputes (Vietnam 2020) art 6.

[69] ibid art 27.

[70] Energy Charter Secretariat, Model Instrument on Management of Investment Disputes (with Explanatory Note) (2018) CCDEC2018 26 (ECT Model Instrument) art 22.1.

[71] ibid art 22.2.

[72] ibid arts 11, 22.4.

[73] For example, 'accountability and authority to settle' are named as one of the main concerns over mediation in the guide on mediation prepared by the Department of Justice of Canada. Department of Justice Canada, 'Dispute Resolution Reference Guide: Mediation' (Dispute Resolution Reference Guide: Mediation) <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/04.html> accessed 15 May 2023.

[74] See Schneider and Welsh (n 6) 387: 'If citizens are unhappy with these agreements, they are likely to accuse the officials of weakness at best and corruption at worst'.

the dispute to a third party such as a tribunal or court. This, however, is a very costly, risky and ineffective alternative for the government. Government officials' reluctance in this regard might cost their States millions of dollars in legal and administrative fees in defending the case in international arbitration or litigation, expose them to the risk of a much worse financial outcome than settlement or to the reputational risks as a host country for foreign direct investment,[75] and last but not least, may result in the destruction of business relationships with an investor in dispute and therefore, result in the loss of future business and investment opportunities, including loss of jobs and economic development.[76] For these reasons, States should be motivated to provide a legal and institutional framework and security in order to empower government officials to take decisions to settle the disputes.

States could put in place measures to regulate the following:

(i) Clearly define the authority of the competent government officials leading the process of mediation (lead authority).
(ii) Provide for the duty of other stakeholders who have interest in the disputed matter to cooperate with the lead authority and establish the form and extent of their participation in the mediation process, if necessary.
(iii) Establish the procedure of obtaining negotiation mandate in the process of mediation by the lead authority.
(iv) Provide for and define the extent of independent decision-making by the lead authority in the process of mediation that would enable the lead authority to promptly operate in order to effectively conduct mediation as well as avoid losing momentum for a potential settlement in the process. Such decisions could relate to various procedural and substantive aspects of the settlement negotiations but not necessarily the ultimate settlement; these decisions could be subject to final approval of the higher authority.[77]
(v) Provide directions in determining and devising an acceptable settlement on the matter. What is acceptable settlement will depend on the circumstances of each case, however, States could provide certain guidelines to be followed in the process of mediating settlements. Such guidelines could elaborate on possible forms of settlement: depending on the matter at hand settlement should not be limited to monetary payments only but could include other creative solutions such as agreement restructuring, concluding a renegotiated

[75] In response to government agents' reluctance to mediate and the corresponding risk of exposing States to costly arbitration and large awards on damages, Claxton suggests introducing accountability of government agents for refusing to mediate. In his view, this might be a useful tool to ensure that mediation is given serious consideration in investor-State matters. Claxton (n 7) 91.

[76] Conversely, mediation could 'better protect relationships and keep investment in host countries'. Schneider and Welsh (n 6) 377. Pursuant to the ECT Model Instrument, in evaluating usefulness of amicable dispute settlement, States should consider such factors as high monetary costs of pursuing litigation and arbitration, effect of international decisions becoming public/impact on State reputation, maintenance of relationships with investors and likelihood of continuing business relationships in case of settlement. ECT Model Instrument (n 70) art 23. On the suitability of mediation to resolve investment disputes, see UNCITRAL, 'Possible reform of investor-State dispute settlement (ISDS), Draft guidelines on investment mediation, Note by the Secretariat' (17 January 2023) UN Doc A/CN.9/WG.III/WP.227 (UNCITRAL Draft Guidelines on Investment Mediation) 3.

[77] See ICSID Background Paper on Investment Mediation (n 26) 9: 'While it is helpful to have a team member vested with settlement authority present throughout the mediation, it may not always be possible given structural or organizational aspects (e.g. need for approval/sign-off from a ministry or ministries or cabinet on the side of the State party[…]). It is desirable to have at least one member within a team who has a clear line of communication to the relevant entity with settlement authority.'

concession, substitution of investor, buy-out of property or property right by the State. The directions could also envisage that government officials obtain third-party advice of external counsel[78] or an expert[79] on the possible exposure of defending the State in arbitration or litigation, including possible damages incurred by the opposing party, potential costs of arbitration or litigation. Such advice could be a useful basis to determine what could be an adequate settlement; it could also serve as a safeguard in the process of post-settlement audit or any form of scrutiny of the settlement that might follow. The Federal Government of Nigeria relied on international firm Price Water Cooper's (PwC) expert evaluation to settle multibillion-dollar dispute against Isle of Man-registered Global Steel Holdings Limited (GSHL) in a reported ICC mediation.[80] The Nigerian government stated that it agreed to pay a settlement sum after obtaining PwC's 'comprehensive review to ensure taxpayers are protected'.[81]

(vi) Refer decision on whether or not to conclude the final settlement of the dispute to a higher authority, preferably to a collective body such as government or an inter-agency commission. Given the political aspect of investor-State matters, which in most cases involve high stakes and important public interest, it would not be appropriate to put the political responsibility on a single public official or a single government agency. A collective body would include and represent those governmental stakeholders that have interest and responsibility in the matter to carefully consider the potential settlement, weigh the risks and collectively take an informed decision. In practice, those States who were able to successfully explore settlement routes, make decisions to mediate or negotiate and/or settle disputes at the highest governmental levels.[82]

Resolving investment disputes through mediation versus direct negotiation with the opposing party could be in and of itself a strong safeguard in the process of post-settlement audit or other procedure or public scrutiny of the settlement that might follow. Unlike direct negotiations, in mediation involvement of a neutral intermediary with an established reputation and integrity is a strong guarantee of due process.[83] In case of institutional mediation, the above is further amplified by the involvement

[78] Among other assistance, in the process of mediation, counsel can provide a realistic assessment of strengths and weaknesses of legal case. ICSID Background Paper on Investment Mediation (n 26) 10; UNCITRAL Draft Guidelines on Investment Mediation (n 76) 8. On the role of counsel in mediation, see also Dispute Resolution Reference Guide: Mediation (n 73).

[79] Parties can engage financial or industry experts to seek advice on non-legal issues to elaborate offers or devise final terms of the settlement. ICSID Background Paper on Investment Mediation (n 26) 10; UNCITRAL Draft Guidelines on Investment Mediation (n 76) 8.

[80] In September 2022, the Nigerian government announced the settlement of a dispute against Global Steel Holding limited owned by the Indian steel magnate Pramod Mittal. Case arose from the termination of various concessions and share-purchase contracts entered into between the parties in relation to Nigeria's steel industry, iron ore reserves and central railway network. Claimant was requesting US$5.28 billion in settlement and was threatening to resume ICC arbitration for a claim of US$14 billion. Nigeria settled the case in ICC mediation agreeing to pay US$496 million. See Ballantyne (n 40).

[81] Mary Izuaka, 'Nigeria to Pay $496 Million to settle Indian firm's claim over Ajaokuta steel' *Premium Times* (4 September 2022) <https://www.premiumtimesng.com/business/business-news/552308-nigeria-to-pay-496-million-to-settle-indian-firms-claim-over-ajaokuta-steel.html?tztc=1> accessed 17 April 2023.

[82] Kessedjian and others (n 6) 11, 12.

[83] UNCITRAL Draft Guidelines on Investment Mediation (n 76) 3.

of an institution and its ethical requirements. These features of mediation constitute an insurance against any perception of impropriety or unlawful or shady deal-making behind closed doors.

D. *Funding*

Funding for mediation as well as for the purposes of the mediated settlement is an important factor in creating an enabling environment for mediating investor-State disputes. The issue of funding can create challenges in terms of execution and compliance with the final settlement as well as raise concerns of possible impropriety or corruption by public officials. Therefore, proper regulation of the financial side of the mediation process and later compliance with the final settlement is crucial.

The funds for financing State representation in mediation (eg services of lawyers, experts, mediator fees, administrative expenses of mediation institutions) as well as potential payments for the settlement agreements can be allocated in the State budget in advance in the beginning of the budget year. This way, States could avoid difficulty in obtaining funding and procuring agreement of relevant agencies in the process of the dispute settlement procedure, and thus avoid losing momentum for settlement or jeopardizing agreed settlement deals.

States could also provide rules and regulations for extraordinary allocation of the funds, in cases when the settlement opportunity could not have been foreseen and when the delay of payment might jeopardize the chance of settlement. States can always try to agree a schedule of instalment payments to allow them time to allocate funds in the budget, however, in practice investors would expect payment of at least a first instalment at the time of settlement as a sign of commitment and guarantee to future payments.

In the case of Georgia, funds for State representation in international arbitration, foreign litigation or settlement negotiations are allocated in the beginning of the budget year;[84] likewise, funds for any upcoming payments under the adverse arbitral award or foreign court judgment or under the settlement agreement entered by Georgia are allocated in advance in the State budget.[85]

It is submitted that the authority responsible for the financial side of any settlement (eg allocating the funds, making payments under settlement agreement) should be different from the authority negotiating and concluding any settlement. Imposing responsibility of settlement negotiation and decision-making thereto and also the funding of the settlement would be a heavy burden for a single agency or a single government official. Such division of responsibilities would also minimize the risks of possible abuse of authority or other impropriety or corruption on the part of the authority negotiating the settlement or any speculation thereto.

In the case of Georgia, while the Arbitration Department is the lead authority responsible for settlement negotiations and conclusion of settlement deals, it is the

[84] Funds allocated to the Ministry of Justice of Georgia for State representation in arbitrations, settlement negotiations and foreign court litigations under the annual law on the State budget include the following: funds for the procurement of services of external counsel, payment of administrative fees of arbitral institutions and foreign courts, expenses incurred with respect to the participation of witnesses and experts in the proceedings. See eg Law of Georgia on State Budget of 2023 (15 December 2022) N2383-IXმს-მპ.

[85] Payments under settlement agreements are made from the Fund for the Repayment of Financial Obligations Generated in the Previous Years or for the Enforcement of Judicial Decisions in the State Budget of each budget year. Law of Georgia on State Budget of 2023 (n 84).

Ministry of Finance who is in charge of allocating State funds for the said procedures and making payments under the settlement agreements.[86]

The Republic of Peru has a similar approach with respect to the funding of 'costs of the State's defence in International Investment Disputes'; such funds are allocated in the institutional budget of the Ministry of Economy and once approved in the annual budget law, are not subject to modification.[87] When it comes to the payment of money, including the payments under settlement agreements, however, Peru has a slightly different approach—a '[p]ublic Entity involved in the dispute' is responsible for such payments.[88] Similar to our approach proposed above, the ECT Model Instrument suggests that expenses for the resolution of international investment disputes should be funded from the central budget or local budget depending on whether responsible line agency is a central State body or a local public body.[89] The ECT Model Instrument further advises the allocation of such funds at the beginning of the year but at the same time suggests vesting 'Ministry of [Finance]' with the authority of allocating additional funding for any new dispute.[90]

Regardless of which model is chosen, the allocation of funds should be fully transparent and strictly follow the established procedure. This way States avoid any concerns or perceptions of possible impropriety or corruption in the process of settlement of disputes.

V. CONCLUSION

As the 2022 SIDRA Survey and other sources of empirical research have demonstrated, mediation as a process and amicable settlement as a possible solution have come under the spotlight in the context of investment disputes. A lot has been and continues to be done by international organizations, various professional fora, and dispute resolution institutions as well as by States collectively on an international level to promote the use of mediation in ISDS. However, absent an enabling environment and a prudent legal and institutional framework in individual States and, most importantly, a will on the part of their respective governments to settle investment disputes amicably, all these precious efforts will be to little avail in practice.

It is a fact that a significant number of ICSID[91] and presumably, non-ICISD matters settle amicably. Therefore, the potential for ADR, and primarily mediation, might be far greater than currently presumed. It is hoped that the heightened traction of mediation will raise States' awareness and understanding of the potential benefits and values of mediation in resolving investor-State matters[92] and thus, motivate them to further explore the possibility of settling ISDS cases. As discussed in this article,

[86] See eg Decree N1922 of the Government of Georgia dated 16 September 2016 approving the settlement between IFI SpA and Georgia and granting authority to the relevant government officials to conclude settlement agreement. The decree orders the Ministry of Finance of Georgia to allocate funds for the payment of settlement amount from the Fund for the Repayment of Financial Obligations Generated in the Previous Years or for the Enforcement of Judicial Decisions under the Law of Georgia on State Budget of 2016. Decree of the Government of Georgia on the Measures Related to the Settlement of Dispute between IFI SpA and Georgia <https://matsne.gov.ge/document/view/3408343?publication=0> accessed 21 April 2023.

[87] Law N28933 (Peru) (n 63) art 14.

[88] ibid.

[89] ECT Model Instrument (n 70) art 19.

[90] ibid.

[91] ICSID Press Release (n 39).

[92] On the advantages of mediation in matters involving State and State bodies, see Dispute Resolution Reference Guide: Mediation (n 73).

States will need to adopt policy, legislative and institutional measures to create an enabling environment to provide the necessary authority and security for relevant governmental decision-making.

After the settlement of a billion-dollar dispute between a Dominican State-owned power holdings company and Odebrecht Consortium in an ICC mediation, Foley Hoag's Kenneth Juan Figueroa suggested that attorneys should consider mediation seriously when advising their clients since 'the result demonstrates the important role mediation can play in resolving disputes'.[93] Sixty-two per cent of all respondents and 100 per cent of respondents identified as client users of the 2022 SIDRA Survey named 'the ability to use mediation' as one of the key developments in improving current ISDS.[94] This piece of empirical evidence clearly demonstrates the necessity and desire of including mediation in ISDS. The article concludes on this positive note in the hope of a bright future for investor-State mediation.

[93] Sanderson (n 40).
[94] 2022 SIDRA Survey Rep (n 5) 79 results discussed in Section II.