

Enabling Early Settlement in Investor–State Arbitration

The Time to Introduce Mediation Has Come

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Abstract—There is a growing recognition, among both companies and States, that conflict resolution through traditional adversarial rights-based methods is not only expensive and drawn out, but destructive for long-term relationships as well as cross-border social and economic progress. While the parties devote their attention to the court or tribunal, seeking to convince adjudicators to rule in their favour, they stop communicating cooperatively, and the adversarial nature of these rights-based proceedings merely serves to escalate the conflict itself. This realization has prompted a resurgence of interests-based (as opposed to rights-based) dispute resolution methods—notably mediation—in both demand and supply.

On the user side, global companies, many of which are members of the Corporate Counsel International Arbitration Group (CCIAG), are looking for ways to engage in conflict avoidance and better dispute prevention and management processes. At the United Nations level, most sovereign States subscribe, directly or through political alliances, to the mission of the Group of Friends of Mediation⁴ to

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⁴ United Nations Peacemaker, 'Group of Friends Mediation' <<http://peacemaker.un.org/friendsofmediation>> accessed 13 September 2013. In September 2010, Finland and Turkey convened a Group of Friends of Mediation, the aim of which is:

- (a) to raise awareness within the international community of the importance of mediation as a means of conflict prevention and resolution;
- (b) to help build mediation capacity and expertise both within the UN and also in regional organizations, which are often most well-placed to assume such a mediating role in their own area of responsibility; and
- (c) to enhance the level of coordination among different actors of mediation to minimize unnecessary duplication and complications.

promote use of mediation to prevent and resolve conflicts. Reflecting the increased demand, private arbitration organisations like AAA/ICDR, Chartered Institute of Arbitrators (CIArb), CPR, ICC and JAMS are promoting amicable settlement negotiations by embracing mediation in their rules and practices.

The International Centre for Settlement of Investment Disputes (ICSID) and United Nations Commission on International Trade Law (UNCITRAL) Rules already provide for conciliation, but conciliation is a very different creature from mediation. Conciliators focus on rights-based settlement options for parties to choose from (eg what a tribunal is likely to decide or be influenced by). Mediators, on the other hand, focus on the subjective interests of the parties as the basis for negotiated outcomes and help the parties switch focus from their rights and positions (which are normally an analysis of the past) to their needs and interests (which are future-orientated) and to explore options for mutual gain.

Although ICSID has been exploring mediation for several years, some governments hesitate to use mediation in investor–State dispute settlement (ISDS) cases, apparently due to transparency and personal liability concerns. For the benefit of investors and States, it would be valuable if an interests-based process were introduced to operate in tandem with the established rights-based arbitral and conciliation processes that currently exist. This interests-based process could be dovetailed into the arbitral and conciliation processes, making negotiated settlements more accessible at an early stage, in a way that is practical, structured, economical and geared to preserving relationships and reputations. Highly respected ISDS experts, including ICSID arbitrators, are starting to express this view.⁵

In October 2012, Rules for Investor–State Mediation (IBA Rules)⁶ were published by the International Bar Association’s (IBA) Mediation Committee. It is suggested that the investor–State arbitral forums find ways to adopt, encourage and enable the IBA Rules, with some important support mechanisms mentioned below, to make mediation a far more practical and attractive option—whether

The Group of Friends comprises 32 UN Member States, plus seven regional organizations that collectively represent virtually every country in the world. A General Assembly Resolution was passed in July 2011 on strengthening the role of mediation. It therefore seems realistic to expect that the Member States of ICSID would support Administrative Council proposals to inculcate mediation into ICSID’s Rules if that can be done effectively.

⁵ See eg Jean E Kalicki, ‘Mediation of Investor-State Disputes: Revisiting the Prospects’ (*Kluwer Arbitration Blog*, 14 June 2013) <<http://kluwerarbitrationblog.com/blog/2013/06/14/mediation-of-investor-state-disputes-revisiting-the-prospects/>> accessed 13 September 2013; Jack J Coe Jr, ‘Toward a Complementary Use of Conciliation in Investor–State Disputes—A Preliminary Sketch’ (2005) 12 UC Davis J Intl L & Poly 7; Jack J Coe Jr, ‘Concurrent Med-Arb (CMA)—Some Further Reflections on a Work in Progress’ in Anna Joubin-Bret and Susan Franck (eds), *Investor–State Disputes: Prevention and Alternatives to Arbitration II* (United Nations 2011); Jeswald W Salacuse, ‘Mediation in international business’ in J Bercovitch (ed), *Studies in International Mediation: Essays in Honor of Jeffrey Z Rubin* (Palgrave Macmillan 2002); Jeswald W Salacuse, ‘Is there a better way? Alternative Methods of Treaty-Based, Investor–State Dispute Resolution’ (2007) 31(1) Fordham Intl L J 138; Margrete Stevens and Ben Love, ‘Investor–State Mediation—Observations on the Role of Institutions’ in Anna Joubin-Bret and Susan Franck (eds), *Alternatives to Investor–State Dispute Settlement II* (United Nations 2011); Anna Joubin-Bret and Jan Knoerich, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (United Nations 2010); Anna Joubin-Bret, ‘Les nouvelles règles IBA de médiation entre investisseurs et États : un outil au service du règlement des différends investisseur–État (2013) 1 *Les Cahiers de l’Arbitrage* 225; Anna Joubin-Bret, Barton Legum and Inna Manassyan, ‘First Tailored Rules for Investor–State Mediation—Draft for Comment Prepared by the International Bar Association State Mediation Subcommittee’ (2012) 5(1) NY Disp Res Lawyer 68.

⁶ Rafal Morek, ‘Investor–State Mediation: New IBA Rules’ (*Kluwer Arbitration Blog*, 9 November 2012) <<http://kluwermediationblog.com/2012/11/09/investor-state-mediation-new-iba-rules/>> accessed 5 January 2014.

making them part of the Regulations and Rules or operating in parallel alongside them.

How can mediation be accommodated into investment treaty dispute resolution, having regard to the particular features of this class of dispute? Are there ways that the special challenges presented by typical investor–State disputes can be addressed through mediation? What further steps would aid parties to achieve just and quick outcomes?

The objective of this article is to demonstrate how investor–State disputes can benefit from mediation.

I. THE CURRENT STATUS OF MEDIATION IN INVESTOR–STATE DISPUTES

It has been estimated⁷ that, on average, investor–State cases take 3.6 years to result in an award, and are notoriously costly when assessed in the context of the final average award. In a forthcoming book, *Investment Treaty Arbitration: Myths, Realities and Costs* (OUP 2014), Professor Susan Franck will provide data in regards to time and costs related to investment treaty arbitration to better address the issue of whether arbitration is the most appropriate and efficient method for resolving all forms of investment treaty-related conflict given the economic risks involved. In its Annual Report for July 2011 to June 2012, ICSID emphasized that it continues to ‘develop and implement best practices to increase cost effectiveness and efficiency’, a mission no doubt shared by the other investor–State arbitral forums. Mediation (including converting settlements into arbitral consent awards) would be an essential step in that direction.

Around 40 percent of all ICSID cases settle or are discontinued before an award is rendered,⁸ and the same is probably true for other investor–State arbitral forums. However, collateral damage arises much earlier in most disputes. No doubt there are many reasons for delays in resolving disputes, including: poor relations between the parties or their counsel; adversarial frustrations; lack of familiarity with (and therefore distrust of) mediation; uncertainty about how to find the right competent and suitable mediators for the case in hand; lack of time to mediate within the arbitration process steps; not being convened by the arbitral organizations to consider mediation; not being proactively encouraged to seriously focus on settlement using skilled neutrals; and lack of adequate enforcement procedures. Whatever the reasons, no one can deny the benefit of avoiding disputes before they arise, or, if they have crystallized, preventing their escalation and seeking faster, cheaper and better outcomes that address the parties’ future needs and not only the past. Mediation provides those opportunities.

Experts in investment arbitration point out that:

- A cooling off period is built into bilateral investment treaties to enable the parties to negotiate at the outset. This is true, but there are no guidelines or international norms suggesting how parties can use this period productively.

⁷ ‘ICSID Arbitration: How Long Does It Take?’ <www.goldreserveinc.com/documents/ICSID%20arbitration%20How%20long%20does%20it%20take.pdf> accessed 5 January 2014.

⁸ ICSID, ‘Background Information on the International Centre for Settlement of Investment Disputes (ICSID)’ <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&icsidOverview=true&language=English>> accessed 5 January 2014.

In addition, investor–State arbitration rules do not help the parties to re-evaluate and actively explore other resolution options than arbitration or conciliation. Parties need help to overcome concerns about conveying a perception of weakness if they propose negotiations. Left to their own devices, parties tend to waste cooling-off periods by turning the temperature up, not down, and concentrating on arbitration, not settlement.

- Conciliation is always an option for the parties. This is true, but as explained above, conciliation is not mediation. Conciliation is a non-binding form of arbitration, where the conciliator (not the parties, as in mediation) set norms (eg possible interpretations of the applicable laws) and propose outcomes. A conciliator does not normally seek to address subjective interests, such as future needs or preferences, but makes a proposal based on the facts presented and the applicable laws. Most users therefore ignore the conciliation option. Of the 426 ICSID cases so far filed, only nine cases (approximately 2 percent) have gone to conciliation. Conciliation is just not seen as a credible cost-, time- or risk-effective dispute-resolution mechanism. By contrast, mediation in other commercial dispute areas has significantly greater satisfaction ratings than arbitration,⁹ being considerably faster and less costly. But neither investors nor States seem to be fully aware of how to make the best use of the mediation option.

Investment treaties and current ISDS rules do allow and encourage the parties to engage in settlement discussions, but are passive on mediation and do not actively facilitate its consideration or use. This contrasts with the many courts and private alternative dispute resolution (ADR) bodies that are actively promoting mediation. Consequently, businesses are increasingly considering whether, as a condition of entering into a State investment project, they should insist on a dispute resolution clause that refers disputes to a private dispute resolution institution more inclined to actively help them manage any conflicts proactively, efficiently and effectively (most privately run international arbitration providers now offer mediation services).

II. WHAT PARTIES NEED AND HOW MEDIATION CAN DELIVER

The last thing investors and States need is their vital relationships and reputations—not to mention potentially important social and economic benefits—being damaged by their attorneys locking horns in an escalating arbitration that is likely to take 3.6 years to resolve, while incurring increasing exposure in risk, time, reputation, costs and fees. Long before an award is rendered, the world has usually moved on, opportunities have been missed, knock-on effects have occurred, and the final award has lost much of its relevance, leaving individual company and government employees to pick up the pieces and shoulder the blame.

Parties not only need early opportunities to negotiate solutions, but if those chances fail to work, then they need convening at regular later moments when the

⁹ See eg AAA/FIDAL, 'Improving Economic and Non-Economic Outcomes in Managing Business Conflicts', International Mediation Institute (28 July 2013) <<http://www.imimmediation.org/dispute-wise-business-management-survey>> accessed 5 January 2014.

time may be more appropriate. Exactly when and how parties are brought to the table should be designed to foster fresh perspective-taking and not degenerate into a side-show for influencing an evaluative neutral to adopt their respective positions.

It would help if more treaties made explicit reference to mediation as a prior step, in a way that is distinct from conciliation, and as a compelling alternative to arbitration. Investor–State arbitration rules should actively encourage mediated dialogue so that interests-based settlement prospects can be fully explored in addition to (but not instead of) rights-based outcomes. The very high user satisfaction levels for mediation among international commercial disputants,¹⁰ now needs to be replicated in the investor–State area.

Actively promoting and administering mediation could be an additional role of the staff of the ICSID Secretariat, who are already highly trained in arbitration case management. Their roles, while always remaining neutral and never intervening in actual proceedings, could be extended to include: the skills to convene parties in the right frame of mind to consider settlement outcomes; explaining how mediation works and its benefits compared to other ADR options like conciliation and continuing with arbitration; providing case evaluation tools; offering guidance on the Mediation Rules; assisting in mediator selection; providing model documents or checklists to ensure equal and optimal preparation; coaching individuals on each side to work collaboratively to resolve disputes; and suggesting how issues could be separated and ADR processes efficiently combined.

The IBA Rules are a step forward, but their implementation could be aided in at least ten important ways:

- (1) *Offering practical guidelines* about what could be done during the cooling-off period to give mediation a real chance. It would be extremely useful, for example, to have a Mediation Manual, similar to that sponsored by Norway, the Netherlands and the UK in cases under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises,¹¹ that provides parties with functional suggestions on how and why mediation can be used to resolve claims in specific instances. Such a manual, in all appropriate languages, would cover such areas as:

- Perspective-taking—for example, an objective analysis of the case by each party from the standpoint of all parties, ensuring that all parties' positions

¹⁰ In a survey in 2011 among 368 corporate counsel in Fortune 1,000 companies co-sponsored by the Straus Institute for Dispute Resolution at Pepperdine University School of Law, Cornell University's Scheinman Institute on Conflict Resolution and the International Institute for Conflict Prevention and Resolution, 85.6% of respondents indicated that they were "Very Likely" or "Likely" to use mediation to resolve corporate/commercial disputes in the future. By contrast, only 50.2% of respondents were "Very Likely" or "Likely" to use arbitration compared to litigation. For details see especially pages 30-34 of the article by Thomas J Stipanowich and J Ryan Lamare, 'Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 companies', Pepperdine University Legal Studies Research Paper No 2013/16 (19 February 2013), which was published widely, including by the Social Science Research Network on February 21, 2013 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2221471>. See also the Corporate Users ADR Survey among corporate counsel in 73 international companies conducted by the International Mediation Institute in 2013 <<http://imimediation.org/imi-international-corporate-users-adr-survey-full-results>> accessed 5 January 2014

¹¹ Consensus Building Institute (CBI), 'NCP Mediation Manual' (May 2012, revised July 2012) <http://cbuilding.org/sites/cbi.drupalconnect.com/files/CBI_NCP_Mediation_Manual_July2012.pdf>.

and interests are included and considered separately. In this regard, an advanced detailed case analysis tool called Olé is freely available;¹²

- Detailed preparation for meetings, including venue/location, languages (formal and informal), translation facilities, agenda-setting and procedural issues, prior submission (eg interest-statements in addition to position statements), and the representation and authority of the parties;
 - Dealing with confidentiality issues and understanding transparency and liability issues, as well as considering collaborative solutions to meet the parties' procedural needs on these points; and
 - Guidance on party representation and advocacy skills in mediation sessions, and ensuring that individual authority to resolve is clearly identified on all sides.
- (2) *Encouraging mediation to be used systematically during the cooling-off period* to focus the parties on procedural issues, with an emphasis on using this period to consider ways of enabling faster and less costly outcomes before the substantive issues are even addressed, and allowing interests and other possible constraints (eg time, budget or political) to surface and be taken into consideration at an early stage.
 - (3) *Providing flexible standards for process design, language issues and representation* in investor-State mediations. Certain formalities often take on additional significance, and require greater consideration, when one of the parties in a dispute is a sovereign State or when the process involves individuals who may be held personally accountable for any outcomes reached bilaterally. Issues of language and representation by persons having appropriate authority can be of great importance, especially where different ministries or administrative competencies are involved, and where there may be concerns of individuals acting *ultra vires*. Mediation provides many flexible solutions to such cases, for example enabling these often unexpressed worries to be discussed and practically addressed, which means allowing the parties to communicate unilaterally in their preferred languages with the mediators, or designating a single language for unofficial 'off the record' discussions (as opposed to formal 'on the record' discussions or written documents, which may need to be translated into several languages). This should not negatively impact issues of transparency, as the outcomes still need to be validated before they can be finalised and improved. They simply facilitate the inter-personal communication process and remove many of the social pressures and formalities that the protagonists may otherwise face, enabling a better mutual understanding of the concerns and interests of the parties.
 - (4) *Assisting the parties in finding competent and suitable mediators or co-mediators* and explaining the special value of co-mediators in ISDS to help overcome cultural, distance, language and other challenges, and how to work in parallel or in collaboration with the arbitral proceedings, without compromising them. A co-mediation could even involve a mediator working together with a conciliator or an arbitrator, if properly handled.
 - (5) *Creating a role for an independent and respected Designating Authority* with the appropriate knowledge of the international mediation market to recommend the right mediators where the parties are unable to make a choice. The

¹² International Mediation Institute, 'Olé! Online Dispute Analysis', <<http://www.imimmediation.org/ole>> accessed 5 January 2014.

Designating Authority needs to be fully equipped to identify experienced, knowledgeable and skilled mediators, to know when to recommend co-mediators, and to know who among them are the most suitable in terms of dispute resolution style, subject matter expertise, and cultural and language skills. The Designating Authority can also play a purely procedural role in ensuring the momentum and the pace of the discussions is appropriately maintained, by periodically checking in with the parties and the neutrals to see whether they feel progress is being made, without becoming involved in substantive issues.

- (6) Providing model checklists, documents and tools (all of which, in highly usable formats, are readily available without copyright or cost restrictions) to assist the parties and their counsel to gain fresh insights into the case, and better understand each party's interests, needs and concerns. They encourage a balanced approach, mutual perspective-taking, and assessments of the future as well as the past. Having templates of model submissions or preparatory exercises that not only summarize positions but also subjective interests and concerns, as well as the parties' best, worst and probable or reasonable alternatives to a negotiated agreement (broken down by time, costs, outcomes and consequences) can help ensure more level and equal preparation on both sides. The International Mediation Institute (IMI),¹³ a charitable foundation that does not provide mediation services, makes available on its web portal various documents along these lines including a decision tree to help disputants consider the key pre-mediation issues, like mediator selection, on not just competency but, equally important, suitability. There is also a sophisticated IMI case assessment tool in both online and offline formats (Olé, mentioned above) to help parties and their counsel review their positions and interests, and those of the other side, and work out an optimal case strategy. It includes publicly available tools such as Professor Friedrich Glasl's nine-step Conflict Escalation Diagnosis,¹⁴ which helps parties incorporate critical de-escalation and anti-escalation steps into dispute settlement processes.
- (7) *Keeping the mediation rules clear, flexible and conceptually distinct from conciliation and arbitration rules* and helping parties understand how the roles of arbitrators and conciliators are quite distinct from those of mediators. It may also be useful for the parties to consider ways in which they may wish to vary the terms of the IBA Rules, as allowed for by Article 1.2 of the IBA Rules. For example, the IBA Rules permit the parties to have unilateral communications with the mediators, but distinguish oral communications from written communications in such cases. Article 8.4 of the IBA Rules states:

No information provided *orally* by a party to the mediator during a separate meeting may be disclosed to any other party by the mediator, unless the party explicitly so authorizes the mediator. Any *written* material that one party provides to the mediator

¹³ The IMI Independent Standards Commission consists of over 70 experts in professional mediation, from over 40 countries, which is a unique source of international expertise in the field. It has recently convened a Task Force on Mediation in Investor–State Dispute Settlement to focus on some of the suggestions made above. The organization could be used as a suitable international resource to assist parties in bringing mediation into the ISDS framework in the most effective ways possible. Awareness of what mediation is, and how effective it can be, is what States and investors now require to better understand the process. See International Mediation Institute <www.IMImediation.org> accessed 5 January 2014.

¹⁴ The Glasl Escalation Ladder is explained in Professor Glasl's book *Confronting Conflict: A First Aid Kit for Handling Conflict. A summary of the Ladder* (Hawthorn Press 1999). See Thomas Jordan, 'Glasl's Nine-Stage Model Of Conflict Escalation' (October 2000) <<http://www.mediate.com/articles/jordan.cfm>> accessed 13 September 2013.

with the intention that it not be shared with the other party or parties shall be clearly labelled as “Confidential—For Mediator’s Use Only” or words to similar effect. (emphases added)

In other words, although oral unilateral communications may not be shared by the mediators with any other parties, there is a presumption that written unilateral communications may be shared in the absence of specific labelling to the contrary. In some cases (especially where mediation is being used for the first time), the parties may wish to qualify that Rule. For example, they may prefer the mediators to treat all unilateral communications as confidential, regardless of whether they are made orally or in writing. This heightened confidentiality can facilitate the sharing of sensitive information in all formats, as parties try to grapple with the process itself as well as how to reach faster, better and cheaper outcomes by working collaboratively with the other party. When trust has not yet been established, the parties may benefit from amending Article 8.4 accordingly.

- (8) *Enabling the creative use of hybrids*, such as Arb-Med and Med-Arb and explaining their respective advantages and limitations, as well as the relative pros and cons of having the same neutrals ‘swap hats’.¹⁵ Although it is often possible for arbitrators to also act as conciliators, it is sensible to appoint separate neutrals to act as mediators—especially if unilateral communications or ‘caucuses’ will be used. These neutrals can work together, however, as a team (eg a mediator with a conciliator)—as a form of co-mediation, as discussed above. How these neutrals may then work together, share information or occasionally even swap hats is potentially valuable, but requires protective measures, such as disclosure obligations for any material information heard unilaterally that may have an influence on a final award, and obtaining signed waivers at various stages of the proceedings. That being said, some neutrals have successfully acted as mediators, conciliators and even as arbitrators in the same proceedings, with the parties’ ongoing written consent, in the interests of saving on time and expenses. Swapping hats can be fraught with ethical and other problems, however, and happens only rarely, but may be worth considering in specific cases.
- (9) *Using ‘consent awards’ or ‘awards on agreed terms’*, when appropriate or when proposed by the parties or the neutrals or suggested by the ICSID Secretariat. The use of these Awards enables mediated settlements to be recorded as an arbitral award (as in Rule 43 of the ICSID Arbitration Rules 2006 and Article 36.1 of the UNCITRAL Arbitration Rules 2010) thereby giving them full force and effect under the New York Convention or the ICSID Convention, as applicable. Using such awards can also convert a negotiated agreement into an externally posited obligation, which can help State representatives concerned about political reactions or personal liability for settling cases with investors. An early decision, even on partial matters, or similar binding and neutrally imposed interim outcome, can help overcome these concerns and also lay the foundation for an interests-based outcome, once certain fundamental issues of liability have been determined. The consequences of a finding of liability can be improved, for

¹⁵ For a more detailed discussion of hybrids and possible ways of combining mediation with other ADR processes, see Jeremy Lack, ‘Appropriate Dispute Resolution’ in Arnold Ingen-Housz (ed), *ADR in Business: Practice and Issues across Countries and Cultures* (Wolters Kluwer 2011) <<http://www.immediation.org/index.php?cID=278&cType=document>> accessed 13 September 2013.

example, by mediating quantum issues, reflecting a broader range of future interests than a tribunal could take into account.

- (10) *Assisting State institutions in coming to trust the mediation process* through effective standards and educational programs. It is perfectly possible to design transparent procedures to encourage State officials or senior executives to engage in mediation without fear of reprisal or censure. Having a private caucus with a mediator to express fears or concerns, or to explore how to safely explore sensitive or prickly topics with the other side, without feeling vulnerable, are all benefits that working with a mediator can provide, which have no adverse impact on the transparency or integrity of the outcome.

Most parties in any complex international dispute would benefit from the assistance of a non-evaluative neutral (or perhaps more than one) who knows how to proactively assist them in reaching a negotiated conclusion of their own creation that takes subjective and future-oriented interests into account in addition to findings of fact and law. Successful mediation preserves relations and assets, and leads to higher compliance ratings. It is in nobody's interests to let a long and costly arbitration system—or a little-used and questionable conciliation process—be the parties' only dispute resolution options. Without the intervention of an interests-based approach alongside the existing rights-based mechanisms already in place, parties are unlikely to consider many real options for mutual gain that could provide the basis of a pragmatic or 'win-win' outcome. New and widely practised forms of ADR should be embraced and integrated into both processes, to address the practical and cultural needs of all parties.

Mediation is typically far less costly and time consuming than a traditional rights-based judicial process like arbitration as it is not hidebound by the same fixed process parameters. A complex international dispute can be resolved within days, weeks or months, with proper professional assistance. It is rare for a mediation to last more than six months, let alone a year. Mediation introduced at the earliest stage, such as during the cooling-off period, would add little to the overall cost of ISDS but it provides a high chance of reducing the issues in contention or resolving the entire dispute. But it needs to be set up correctly, transparently encouraged and aided by the arbitral forum and facilitated by competent and certified mediators, who have adequate experience and suitable skills and expertise for each specific case.

We believe the time has come for the systematic adoption of mediation in ISDS, alongside, and dovetailed into, the arbitral process.