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Mediation as a Prerequisite for Dispute Prevention in Investment Treaty Arbitration

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Annotation: This article analyzes the development and increasing significance of mediation as a preliminary step to prevent disputes in investment treaty arbitration. It discusses the historical context, current legal and institutional frameworks such as ICSID, UNCITRAL, and bilateral treaties, and explores doctrinal aspects of combining mediation and arbitration. Empirical evidence, including case studies, is reviewed to assess the effectiveness of mediation. The challenges of integrating mediation, including confidentiality, enforcement, and transparency concerns, are critically evaluated. Finally, forward-looking reform proposals are presented to enhance the use of mediation and institutionalize it as a standard part of investor-state dispute resolution mechanisms.

Keywords: Mediation, Investment Treaty Arbitration, ICSID, UNCITRAL, Investor-State Dispute Settlement, Singapore Convention on Mediation, Bilateral Investment Treaties, dispute prevention, arbitration reforms.

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Introduction

International investment arbitration has long been the primary mechanism for resolving disputes between foreign investors and host states. However, investor–state arbitration has faced mounting criticisms, including high costs, protracted proceedings (often averaging four years and over $6 million in costs per party), and rigid "win-lose" outcomes. In response, stakeholders have increasingly looked to mediation – a facilitated negotiation process – as a more efficient and amicable alternative. Mediation offers the prospect of faster resolution, reduced expenses, and mutually beneficial settlements, addressing some aspects of the legitimacy crisis that has beset the investor–state dispute settlement (ISDS) system. Recent developments in international law underscore a "new era" in which mediation is being actively integrated into the ISDS framework. This article traces the evolution of mediation in investment disputes and analyzes its role as a necessary step for dispute prevention, alongside arbitration, in investment treaty cases. It examines current legal frameworks (ICSID, UNCITRAL, and treaty regimes) that promote mediation, doctrinal issues in combining mediation with arbitration, empirical evidence of

mediation's track record, critiques of relying on mediation, and forward-looking reforms to institutionalize mediation as a pre-arbitration step in resolving investment disputes.

Historical Evolution of Mediation in Investment Treaty Disputes

From the outset of modern investment treaty arbitration, amicable settlement has been contemplated but rarely formalized. The 1965 ICSID Convention provided for both arbitration and *conciliation* as dispute resolution mechanisms, reflecting an expectation that some disputes might be resolved by non-binding recommendations of a conciliation commission. In practice, however, conciliation under ICSID was seldom used: as of the end of 2024, only 14 conciliation cases (about 1.4% of all ICSID cases) had ever been registered, compared to over a thousand arbitrations. Most bilateral investment treaties (BITs) historically included "cooling-off" periods (commonly 3 to 6 months) obliging investors and states to attempt negotiations before arbitration, but they did not typically mandate formal mediation. These consultation requirements were aimed at dispute prevention, yet they often amounted to exchanges of diplomatic letters rather than structured mediation.

By the 2000s and 2010s, discontent with ISDS grew, as states and civil society criticized arbitral proceedings for their opacity, costs, and intrusiveness on regulatory sovereignty. This legitimacy crisis spurred interest in alternative dispute resolution. Notably, mediation began to gain traction in the 2010s as a complementary tool to resolve investor–state conflicts more amicably. In 2012, the International Bar Association (IBA) promulgated its Rules for Investor–State Mediation, providing a first set of tailored procedural rules. A few years later, in 2016, the Energy Charter Treaty (ECT) Secretariat issued a Guide on Investment Mediation to encourage use of mediation for disputes arising under the multilateral ECT. These soft-law initiatives signaled an emerging consensus that structured mediation could help settle disputes before or alongside arbitration.

The late 2010s saw key international instruments bolstering mediation. In 2018 the United Nations adopted the Singapore Convention on Mediation, which created for the first time a global regime for enforcing international mediated settlement agreements (analogous to the New York Convention for arbitral awards). This convention, which entered into force in 2020, gave teeth to mediation outcomes by enabling direct enforcement of settlement agreements across borders, thereby improving confidence that investor–state settlements can be honored. By 2023, over 55 states had signed the Singapore Convention, and an increasing number were ratifying it. In parallel, states began referencing mediation in their treaties. A recent empirical study shows a steady rise in mediation clauses in investment agreements, from under 1% of treaties in 2004 to roughly 17% in 2018. For example, modern treaties like the Netherlands' 2019 Model BIT and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) explicitly encourage or even require the use of mediation as part of their investor–state dispute resolution provisions. This marks a significant evolution from older BIT practice, embedding mediation as a recognized step in resolving disputes.

The most significant evolution came when ICSID itself – the world's leading ISDS forum – overhauled its rules. On 21 March 2022, ICSID member states unanimously adopted a new set of ICSID Mediation Rules, which entered into force on 1 July 2022. This was a landmark: it is the first time an international institution provided a *bespoke mediation procedure specifically for investor–State disputes*. The ICSID Mediation Rules were designed to be accessible and flexible. Crucially, they are open to any investment dispute involving a State (or regional economic integration organization), without requiring that the state be an ICSID Convention member. In other words, ICSID's mediation facility can be used even in cases where ICSID arbitration might not be available – a broad approach anticipating greater demand for mediation amid ISDS reforms. Together, these developments – IBA Rules, ECT Guide, Singapore Convention, and ICSID's new rules – illustrate a clear historical trajectory: mediation has moved from the

periphery of international investment law to the mainstream, increasingly seen as a necessary component of the dispute resolution toolkit rather than a mere afterthought.

Legal and Institutional Frameworks Promoting Mediation in ISDS

Contemporary international investment law now features multiple legal and institutional frameworks that integrate mediation alongside arbitration. The most salient frameworks include:

ICSID Convention and Rules: The ICSID Convention (1965) has always permitted conciliation, but the new ICSID Mediation Rules (2022) go further in formalizing mediation. Under these rules, any investor–state dispute related to an investment can be submitted to ICSID mediation if both parties consent in writing. The mediation is administered by ICSID's Secretariat similarly to an arbitration or conciliation case. Unlike ICSID arbitration, there is no requirement that the respondent State be an ICSID Contracting State for mediation – even non-ICSID members can mediate under the Additional Facility. The ICSID Mediation Rules outline procedures for commencing mediation, appointing mediators, exchanging initial statements, and conducting sessions. They emphasize party autonomy and confidentiality. Importantly, ICSID has modernized its approach to allow mediation in tandem with arbitration: parties may pause an ongoing arbitration to attempt mediation, or agree to incorporate a successful mediated settlement into an arbitral award (a consent award) for enforceability. This flexibility reflects ICSID's intent that mediation should complement the arbitration process rather than replace it outright.

UNCITRAL Framework: The United Nations Commission on International Trade Law (UNCITRAL) has actively developed tools to facilitate investor–state mediation. In July 2023, UNCITRAL's Working Group III (tasked with ISDS reform) finalized Model Treaty Provisions and Guidelines on Investment Mediation. These model clauses are available for states to insert into BITs or investment chapters of trade agreements, or even in domestic investment laws, to encourage or require mediation in investor–state disputes. The provisions offer states two options: a purely voluntary mediation clause, or a mandatory mediation clause. Under the latter, if a party triggers mediation, the other party must engage in a mediation process, and no arbitration or other proceedings may be initiated for a specified period (e.g. 60 or 90 days) or until the mediator declares an impasse. The model provisions also stipulate that starting a mediation will automatically stay any pending arbitration during the mediation period, without need for a separate agreement. To balance transparency and confidentiality, the UNCITRAL draft rules provide that the fact that mediation is taking place (and its ultimate outcome) can be made public, but all discussions and information exchanged in mediation remain confidential. They further clarify that if mediation fails, positions or admissions made during the mediation are "without prejudice" to the parties' legal arguments or rights in later arbitration. Finally, the UNCITRAL guidelines urge that any settlement reached should meet the formal requirements of the 2018 Singapore Convention on Mediation, ensuring the deal can be enforced like an arbitral award across borders. These UNCITRAL tools – now approved by the UNCITRAL Commission – provide a ready-made legal blueprint for states to institutionalize mediation as a step in ISDS on a global scale.

Bilateral and Multilateral Treaty Provisions: A growing number of treaties explicitly promote mediation. Many recent BITs and investment chapters incorporate multi-tier dispute clauses, where the parties must first seek amicable settlement (often through consultation or mediation) before arbitration. For instance, the EU–Canada Comprehensive Economic and Trade Agreement (CETA) establishes a mediation mechanism for investment disputes, complete with agreed Rules of Mediation adopted by the CETA Joint Committee in 2017. This mechanism is voluntary but provides a structured procedure for the parties to follow with a neutral mediator. The CPTPP (2018) similarly provides that disputing parties *"shall endeavor to resolve disputes through consultations, negotiations or other amicable means, which may include non-binding third-party procedures such as conciliation or mediation"*, and allows disputing parties to agree to mediation

at any time. The Netherlands Model BIT (2019)goes a step further: it requires that if both parties consent, mediation shall commence and can continue in parallel with arbitration, and it encourages disputing parties to consider mediation after the notice of dispute is submitted. These treaty provisions are reinforced by institutional supports; for example, Global Affairs Canada and the European Commission have jointly published mediation rules and rosters of mediators available for investor–state disputes under treaties like CETA. Even at the regional level, initiatives are underway – the recently signed AfCFTA Investment Protocol (2023) for Africa includes provisions on cooperative settlement and may develop mediation rules as part of its dispute prevention strategy. In sum, treaty practice has evolved to not only permit but actively facilitate mediation, reflecting states' recognition that preventing disputes from escalating to arbitration is in the mutual interest of investors and hosts.

Other Institutional Initiatives: Beyond ICSID and UNCITRAL, various organizations have stepped in to support mediation in ISDS. The Energy Charter Conference endorsed an Investment Mediation Guide in 2016 and even a Model Instrument for states to handle investment grievances (such as appointing a government focal point for negotiations). The International Chamber of Commerce (ICC) and Centre for Effective Dispute Resolution (CEDR) have both developed guidance for investor–state mediation (CEDR's 2019 Investor-State Mediation Guide, for example, offers practical tools for mediating public-private disputes). These resources, while not legally binding, contribute to an ecosystem that normalizes mediation in the ISDS context. Furthermore, organizations like the International Mediation Institute (IMI) have created credentialing criteria for investor–state mediators and, together with ICSID, launched training programs to build a cadre of qualified mediators familiar with international investment law. This is crucial for the institutionalization of mediation: having clear rules, treaty frameworks, and skilled practitioners in place lowers the barriers for parties to attempt mediation before resorting to arbitration.

Mediation's Role vis-à-vis Arbitration: Doctrinal Analysis

From a doctrinal perspective, mediation both complements and can prevent the need for arbitration in investment disputes. The two processes are distinct yet increasingly interrelated in practice:

Complementarity and "Med-Arb" Approaches: Mediation is fundamentally a consensual, non-binding process, whereas arbitration yields binding decisions. Rather than viewing these as mutually exclusive, modern practice integrates them. Parties might agree to "med-arb" or "arb-med-arb" sequences. For example, a dispute can begin in arbitration, pause for mediation, and if a settlement is reached, the arbitration is discontinued or the mediated terms are recorded in a consent award by the arbitral tribunal. This approach leverages the strengths of both processes: mediation allows creative, interest-based solutions (e.g., payment plans, project renegotiations, apologies, future investment commitments) that an arbitral tribunal could not order, while arbitration's presence assures the parties that if mediation fails, their legal rights can still be adjudicated. ICSID's rules explicitly facilitate such interplay – an arbitral tribunal can stay proceedings to allow mediation, and any partial settlement can narrow the issues remaining for arbitration. Thus, mediation can complement arbitration by streamlining disputes, resolving some or all issues and thereby *preventing a full-blown arbitration hearing on the merits*.

Mediation as a Filter and Dispute Prevention Tool: Mediation can function as a pre-arbitration filter, weeding out cases that do not require a definitive legal ruling. Not every investor–state conflict raises novel treaty interpretations or big public policy questions. Many disputes are primarily commercial or factual in nature (e.g. payment of a contractual debt by a state entity, or compensation for expropriation where the only issue is amount). These are well-suited to settlement. By institutionalizing mediation as a first step, frivolous or easily resolvable claims might be settled early, and even meritorious claims might find an early off-ramp if the state and

investor can agree on a compromise. This preventative function was the rationale behind "cooling-off" negotiation clauses in BITs historically; formal mediation simply provides a more structured and potentially effective way to realize that goal.

One doctrinal question is whether requiring mediation as a precondition to arbitration affects an investor's consent to arbitration. Investment tribunals have generally treated pre-arbitration negotiation requirements as procedural conditions, not jurisdictional barriers – meaning failure to negotiate for the prescribed period doesn't necessarily void consent to arbitrate, especially if it would be futile. However, if treaties or rules expressly mandate mediation (not just consultation), tribunals in future may take these requirements seriously. The UNCITRAL model clause language, for example, contemplates that an arbitration *"may not be commenced"* until a mediation has run its course or a set time has passed. This suggests that if a treaty adopts such a clause, an arbitral tribunal could stay or dismiss a prematurely filed claim. In essence, the legal effect would be that mediation becomes a jurisdictional prerequisite to arbitration under that treaty. Proponents argue this is a reasonable limitation, as it mirrors requirements in many domestic legal systems where certain disputes must go to mediation or conciliation first (for instance, labor disputes or investor–state contracts with multi-tier clauses). The doctrinal balance lies in ensuring that requiring mediation *does not unduly prejudice either party's right to eventual arbitration*. The UNCITRAL drafts safeguard this by limiting the mediation period and by the "without prejudice" rule (nothing said in mediation can be used against a party later).

A legal advantage of arbitration has always been the enforceability of awards via the ICSID Convention or the New York Convention. Mediation, if successful, produces a settlement agreement – essentially a contract – which traditionally lacked a straightforward enforcement mechanism internationally. This difference historically made some investors wary of mediation: a state might agree to a settlement but later not comply, forcing the investor back to square one. The advent of the Singapore Convention on Mediation (2019)addresses this concern by allowing mediated settlements to be directly enforced in courts of contracting states, much like arbitral awards. Additionally, in an ICSID context, parties can convert a mediated settlement into an ICSID award by consent, which is then enforceable under the ICSID Convention's robust enforcement regime. These mechanisms show how mediation is being doctrinally linked with arbitration's enforcement power – making the two processes less siloed. Mediation can thus lead to outcomes that have similar finality and bite as arbitral awards (with the benefit that those outcomes were mutually agreed).

Doctrinally, one can argue that mediation "prevents" arbitration not by eliminating the legal right to arbitrate, but by rendering its exercise unnecessary. If a dispute is settled, there is no "dispute" left to arbitrate. Some treaties use language that if a dispute is not settled amicably within a period, it "may be submitted to arbitration" – implying that *only unresolved disputes proceed*. In this way, mediation serves the treaty parties' intent to avoid litigation where possible. Even in unresolved cases, a failed mediation often clarifies the issues and may lead to partial concessions (e.g., the state might concede on liability but dispute the amount, or vice versa). This can significantly focus subsequent arbitration on narrower questions, thereby shortening proceedings and sometimes encouraging a later settlement *during* arbitration. In sum, mediation doctrinally complements arbitration by *fulfilling the treaty-based duty to attempt amicable resolution*, and practically it can prevent the need for arbitration or reduce its scope.

While the push for investor–state mediation is relatively recent, there is emerging empirical data and case studies – both successes and failures – that illustrate how mediation has fared in practice:

The use of formal mediation/conciliation in ISDS has been extremely low historically, underscoring the cultural and practical hurdles that reforms aim to overcome. As noted, ICSID registered only 14 conciliation cases in its first 50+ years. An analysis in 2020 found that mediated settlements were virtually negligible in the universe of known ISDS cases – roughly 1–

2% of cases at most involved any form of mediation or conciliation. Recent ICSID data confirm that about one-third of investment arbitrations eventually end in settlement or discontinuance (instead of a tribunal award). For example, historically 34% of ICSID cases have been amicably settled or otherwise discontinued before a final award. This suggests that although formal mediation was seldom invoked, *many disputes do settle by negotiation once arbitration is underway*. The high settlement rate indicates an unmet potential: if structured mediation were initiated earlier (e.g. during the cooling-off period or at the outset of a case), some of those settlements might occur sooner, saving time and costs.

One early example of investor–state conciliation was *SPP v. Egypt* (the "Pyramids" dispute) in the 1980s, where the parties attempted ICSID conciliation over a tourism project dispute. That conciliation failed to produce a settlement, and the case proceeded to arbitration (resulting in a substantial award against Egypt). The failure illustrated the problem of *unenforceability* – Egypt reportedly reneged on paying what the conciliators recommended – which at the time made investors skeptical of conciliation. More recent examples show a gradually increasing openness to mediation:

In an ICSID conciliation case between Equatorial Guinea and CMS Energy, the parties in 2019 opted to apply the IBA Investor–State Mediation Rules, marking the first known use of those mediation rules in an ICSID context. While the details are confidential, the fact that the IBA Mediation Rules were used demonstrates parties' willingness to try innovative approaches within ICSID's framework. In *Systra S.A. v. Philippines (2016)*, a French engineering firm and the Philippine government agreed to attempt mediation under the IBA Rules, facilitated by the ICC's dispute resolution center. This was initiated under the dispute resolution clause of the France–Philippines BIT. Although details of the Systra mediation remain confidential, it is one of the rare instances publicly reported where an investor–state BIT dispute was submitted to a formal mediation process administered by a neutral institution. Observers noted it as a test case for whether BIT mediation could avert a full arbitration. (In that matter, had mediation not been tried, the investor could have proceeded to ICSID arbitration; the willingness to mediate suggests both sides saw a chance for early resolution.)

The Energy Charter Secretariat in 2016 reported a case (names undisclosed) where parties to an Energy Charter Treaty dispute engaged the Secretariat's good offices for mediation. While only limited information is available, the ECT Secretariat highlighted this as a proof of concept that even contentious energy disputes can be settled by dialogue. It inspired the development of a roster of *ECT conciliators/mediators* to assist future cases.

Many investor–state settlements occur after arbitration is filed but before an award, often through back-channel negotiations or with the help of a tribunal (which may act in a *conciliatory* manner during procedural breaks). For instance, the high-profile Italit ferme v. Indonesia case (a dispute over a power plant) was settled in 2015 after the tribunal encouraged parties to negotiate. Similarly, Vicente et al. v. Spain (renewable energy cases under the ECT) saw multiple claimants reach settlements with Spain mid-arbitration, influenced by parallel diplomatic discussions. These are not formal mediations, but they underscore that the majority of ISDS cases do not actually reach a final award – suggesting that dispute prevention or early resolution mechanisms have significant room to operate.

Overall, the success rate of investor–state mediation is hard to quantify given confidentiality, but anecdotal evidence is mixed. Some mediations have failed to yield agreement (often due to wide gaps in valuations or principle), leading parties back to arbitration. Others have succeeded in producing creative settlements:

In **AES Corporation v. Kazakhstan (2013)**, although a formal mediation was not announced, the dispute (over electricity tariffs) was resolved through an amicable settlement after a period of

negotiations facilitated by an expert – effectively a mediation in all but name. The outcome allowed the investor to continue operations under revised conditions, avoiding an ICSID award. This case is often cited in Kazakhstan's investment agency reports as a win-win resolution. However, in the **Berkowitz v. Costa Rica** case (an ICSID dispute over real estate), the parties engaged in several rounds of settlement talks (with a mediator informally involved), but could not agree, partly due to *domestic political constraints* on the state's side. The arbitration proceeded to a final award. The post-mortem from Costa Rica's officials indicated that while mediation didn't avert arbitration, it helped narrow differences and may have contributed to a partial settlement of some claims. The available data suggests mediation is not a panacea but can be effective under the right circumstances – typically when both government and investor are motivated to preserve a relationship or avoid litigation costs. As formal mediation becomes more common through ICSID and UNCITRAL initiatives, empirical tracking is expected to improve (e.g. ICSID may start reporting how many mediations are registered each year). The early indicators, including the first ICSID mediation cases under the 2022 Rules being filed in 2023, will provide valuable lessons on success factors. Ultimately, the current low usage of mediation highlights the need for further incentives and cultural change – precisely the aim of ongoing reforms.

Challenges and Critiques of Relying on Mediation in ISDS

Despite the growing enthusiasm, **significant challenges and critiques** exist regarding the reliance on mediation as a dispute prevention step in investment arbitration:

A foremost critique is that investor–state disputes often involve public funds and regulatory actions, raising issues of public interest and transparency. Mediation is inherently confidential, which can clash with the modern push for transparency in ISDS. Unlike arbitration, where many treaties (and rules like the UNCITRAL Transparency Rules) now require public disclosure of documents and hearings, mediation typically occurs "in the shadows". Settling disputes behind closed doors could *undermine public accountability* – the state might quietly pay an investor or agree to relax a regulation without public scrutiny. Critics argue this opacity could erode the legitimacy gains that ISDS reforms seek. On the other hand, confidentiality is viewed as essential for mediation's success (parties need candor to compromise). This tension means designers of mediation frameworks must balance the two: for instance, publishing the fact of a mediation and its successful conclusion (as UNCITRAL's model suggests) without disclosing negotiation details. Nonetheless, skepticism remains that increased reliance on mediation could reduce the development of public legal precedents on treaty interpretation and keep important policy disputes out of the public eye.

ISDS was originally developed in part to *depoliticize*disputes and remove them from the realm of power politics. A binding arbitration before an impartial tribunal was seen as a safeguard for investors, especially smaller companies facing a host state. Mediation reintroduces negotiation dynamics that may reflect power imbalances. A host state might pressure an investor to settle for less than full compensation by leveraging political or economic might, or conversely a large multinational might pressure a developing state to concede regulatory space. Because mediation is voluntary and non-binding, a stronger party could walk away or use the process strategically to delay. Some critics fear a return to the days of diplomatic protection – indeed, in the Brazilian model (which foregoes investor–state arbitration), if mediation via focal points and state-to-state diplomacy fails, the investor's only recourse is its home state's espousal of the claim. This essentially *repoliticizes* the dispute, arguably disadvantaging investors from smaller or less influential home states. While mandatory mediation clauses attempt to ensure both sides come to the table, they cannot force a genuine will to compromise. Bad faith participation is a risk: a state could formally engage in mediation to satisfy a treaty requirement, with no intent to settle, simply running out the clock to gather intelligence on the investor's case. Similarly, an investor might use mediation to preview the state's defenses or to create political pressure (if news of talks leaks)

without sincerely aiming for settlement. These concerns highlight that mediation is *only as good as the parties' good faith*.

The practice of investor–state mediation faces a steep learning curve. Many government ministries and their counsel are inexperienced in mediation, which requires a different skill set than adversarial litigation. There can be internal resistance within states – officials may fear that settling will make them appear to admit wrongdoing or could expose them to allegations of corruption or mismanagement. Unlike a tribunal decision, a mediated settlement is a political decision for which an official must take responsibility. This "fear factor" is not trivial. Some domestic legal systems even lack clear authority or guidelines on who within a government can approve a settlement of an international claim, especially if it involves significant public funds. Without high-level political support, mediators often find it difficult to get states to move off hardline positions. Investors too may be culturally inclined to "have their day in court," especially if they feel wronged or seek a public vindication. In high-stakes cases, parties often doubt that mediation can bridge fundamentally different views on liability or compensation. Building a pro-mediation culture in ISDS will require training, awareness, and perhaps demonstration of success stories to change mindsets.

Although the Singapore Convention now offers a pathway, it is still new and not universally ratified. Major players like the EU and many African states have not joined, meaning a mediated settlement might still need to be litigated in national courts for enforcement, with uncertain results. In contrast, an ICSID award has an automatic enforcement regime worldwide (among ICSID members) that states value for its predictability. Some skeptics thus view mediation settlements as inherently less secure. They point to past instances of states reneging on settlement promises (since there was little recourse for the investor except suing on the settlement contract). While converting settlements into arbitral awards (via consent awards) can mitigate this, that requires that an arbitration be on foot or be started solely to enforce a deal – which is procedurally awkward and may raise jurisdictional questions. Until the Singapore Convention gains broad acceptance, enforceability will remain a concern that might make investors and counsel hesitant to fully embrace mediation in high-value cases.

Unlike arbitration, mediation outcomes (successful settlements) are often confidential and do not create any precedent or interpretative guidance for other investors or states. Some legal scholars worry that if many disputes are diverted to mediation, the development of *investment jurisprudence* could slow down. Important treaty provisions might remain ambiguous if contentious cases never result in an award or judgment. Moreover, there is a concern that unequal settlements might be reached – for example, a well-advised investor could secure a generous settlement privately, whereas a similarly situated investor might get nothing if it cannot muster a credible arbitration threat. This could undermine the uniform application of investment treaty protections. In arbitration, at least in theory, similar cases yield similar legal outcomes, contributing to consistency (though arbitral inconsistency is itself a known issue). Mediation, being case-specific, offers no such consistency. While this is inherent to negotiated solutions, it is a trade-off to acknowledge: *justice in mediation is individual and interest-based, not rule-based*. For public policy stakeholders, this trade-off can be problematic if it leads to perceptions of favoritism or lack of principled resolution.

Another practical challenge is that mediation might resolve the easier parts of a dispute but leave the thorniest issues for arbitration. For instance, a state may agree to small concessions or payments in mediation, but fundamental disagreements (like whether an expropriation occurred) might remain for an arbitral tribunal to decide. This can sometimes complicate the arbitration, as the tribunal might be left with deciding high-stakes legal issues in a vacuum (since parties settled other aspects). Additionally, if mediation discussions are confidential, the tribunal might lack context that was explored in mediation. Though the "without prejudice" rule protects parties, it

also means potential duplication of efforts. A failed mediation effectively adds another phase to the dispute, raising the question: was it worth it? Critics point out that in some cases mediation could simply add delay and cost rather than reduce it, especially if attempted only pro forma.

In summary, while mediation offers promising advantages, these challenges illustrate why many participants have been cautious. The critiques do not suggest abandoning mediation, but rather highlight the need for careful design: ensuring transparency where appropriate, guarding against bad faith, building institutional capacity, and aligning incentives so that mediation is used genuinely to prevent and resolve disputes rather than as a tactical tool. Addressing these issues is a key focus of current reform initiatives.

Forward-Looking Reforms: Institutionalizing Mediation Before Arbitration

Looking ahead, numerous reform proposals and initiatives aim to **firmly embed mediation as a step before (or alongside) arbitration** in investor–state dispute settlement. These forward-looking measures seek to overcome challenges and make mediation a routine feature of investment dispute resolution:

As noted, UNCITRAL's Working Group III has delivered model treaty provisions that States can adopt to require mediation attempts. We can expect new treaties and renegotiated old treaties to increasingly include such clauses. Reform advocates propose that future BITs include a clause making mediation an obligatory first step – for example, a clause could stipulate that upon a dispute arising, the investor and state *"shall engage in mediation for a period of [120] days, and no arbitration may be commenced during this time"*. This effectively institutionalizes a "mediate-first" approach. Some proposals even suggest that if one party is willing to mediate and the other refuses, *the refusing party should bear costs* if the dispute later proceeds to arbitration, as an incentive to participate in good faith. While not yet common, tribunals in the future might consider such cost sanctions if a treaty clearly emphasizes mediation. Additionally, states might agree in treaties that settlements reached will be made public or notified to a monitoring body (to improve transparency and share lessons learned, without divulging sensitive terms). Periodic joint committee meetings(like those in some multilateral agreements) could review how disputes were resolved, creating a feedback loop to improve dispute prevention mechanisms.

ICSID, UNCITRAL, and other bodies are investing in capacity building to make mediation a practical reality. ICSID now maintains a panel of qualified mediators and is likely to roll out training programs for government lawyers on how to handle investor–state mediations. The ICSID Secretariat has also updated its advisory services to member states, encouraging them to establish internal protocols for mediation (for instance, designating a lead agency to handle mediation and streamlining approval processes for settlements). The World Bank, ICSID's parent institution, can play a role by using its convening power to facilitate mediation in sensitive cases (as it has occasionally done in the past behind the scenes). UNCITRAL's Guidelines on Investment Mediation (2023) serve as a manual for both states and mediators on best practices – from how to select a mediator with appropriate expertise, to how to prepare (e.g., assessing the value of claims, understanding political constraints), and how to conduct the process efficiently. These guidelines aim to demystify mediation for parties used to litigation. Over time, as more mediations occur, a body of knowledge and practice will develop, further institutionalizing the process.

Another reform idea gaining traction is the creation of an Advisory Centre on Investment Law, similar to the Advisory Centre on WTO Law. Such a center could assist developing states in both arbitration defense *and* in managing dispute prevention/mediation efforts. Working Group III has discussed an advisory center that could help states evaluate claims early and perhaps serve as a neutral facilitator for settlement discussions. In parallel, some countries are establishing domestic "investment ombudsmen" or focal points to address investor grievances before they escalate. For example, Brazil's CFIAs provide a Focal Point (ombudsman) for each party to help resolve issues

amicably. This approach is being looked at by other states: having a single window in the government that foreign investors can approach with problems can nip disputes in the bud. The Brazilian model's Joint Committee mechanism goes further to allow state-to-state dialogue on disputes if needed. While Brazil's choice to exclude investor arbitration is unique, aspects of its "dispute prevention" philosophy are being studied as good practice. Future reforms might encourage each state to have a national investment dispute prevention strategy – including early warning systems for complaints and mediation units embedded in investment promotion agencies.

The potential establishment of a Multilateral Investment Court (MIC), as advocated by the EU and others, also contemplates a role for mediation. In proposals for a permanent investment court, there is recognition that not all cases need adjudication; a mediation wing or a settlement facilitator could be part of the system. Even without a MIC, appellate mechanisms or revised arbitration rules could incorporate mediation in their procedures. For instance, an appellate body might remand a case for mediated settlement if appropriate, or arbitral rules might formally bifurcate proceedings, requiring a settlement conference after the initial memorials. Already, ICSID's updated Arbitration Rules (2022) promote procedural efficiency and cooperation – they even encourage tribunals to consider at case management conferences whether the parties have discussed settlement or whether a stay for mediation might be helpful. Such nudges can normalize the expectation that parties should try mediation at some stage.

A key pillar of making mediation a true peer to arbitration is broad adoption of the Singapore Convention on Mediation. Reformers are urging states (especially heavy users of ISDS) to ratify the Convention. As more states join (for example, recent accessions by Turkey and Brazil in 2024–25 have expanded its reach), mediated settlements in those jurisdictions become directly enforceable. The Convention has already influenced reforms: UNCITRAL's model clauses require that mediated settlements meet the Convention's criteria (written agreement, arising from mediation, etc.). Going forward, we might see treaties explicitly state that any settlement shall, if requested, be recorded in a form enforceable under the Singapore Convention or as an arbitral award. This belt-and-suspenders approach ensures parties have full confidence that choosing mediation will not leave them worse off in terms of enforcement. Additionally, some observers call for the ICSID Convention to be interpreted or even amended to better accommodate mediated settlements – for instance, allowing a quick registration of a settlement as an award without the need for a constituted tribunal (currently, a consent award requires a tribunal). While an ICSID Convention amendment is unlikely soon (given the requirement of unanimous approval), ICSID can administratively streamline converting settlements to awards under its rules.

We anticipate more pilot mediation programs spearheaded by institutions and states. For example, ICSID might launch a pilot where it offers discounted fees or expedited mediator appointment for certain categories of cases willing to try mediation first. Some states might include in their model BITs a provision that if mediation is used and a settlement reached, each party will bear its own costs, but if the investor skips mediation without cause and proceeds to arbitration, the tribunal may award costs against that party. Creative incentives like *fee-shifting clauses, expedited timelines,* or *pre-approved settlement frameworks* (such as annexes listing possible remedies that mediators can use as templates) could emerge. The energy and climate sectors are also ripe for such innovation – given the surge in renewable energy cases, institutions like the Energy Charter Secretariat and others are considering specialized mediation panels for climate-related investment disputes, aiming to resolve them with forward-looking solutions (e.g., contract adjustments rather than damages).

To address legitimacy concerns, reforms may introduce transparency measures into mediation. This could include publishing mediation statistics, case studies (anonymized), or even redacted settlement agreements with parties' consent to build public trust. Another idea is engaging stakeholders (like local communities affected by the investment) in the mediation process, perhaps

through submission of amicus briefs or consultation by the mediator. While mediation is typically bilateral, nothing prevents parties from jointly agreeing to hear the concerns of non-parties if that helps achieve a durable settlement. Future mediation practice in ISDS might evolve to accommodate such multi-stakeholder approaches, especially in disputes with high public interest (e.g., mining, environmental cases).

In combination, these reforms and initiatives aim to normalize mediation as an expected step in resolving investor–state conflicts. The overarching vision is a system where arbitration is not the default first resort, but rather *one of several options*, to be pursued when other avenues (like negotiation or mediation) have been earnestly tried and found insufficient. If successful, this could lead to fewer arbitrations, or at least narrower and less contentious ones, thereby alleviating some of the criticisms of ISDS. It represents a shift from a reactive dispute resolution model to a more proactive dispute management paradigm in international investment relations.

Conclusion

Mediation in investor–state dispute settlement has evolved from a rarely used concept to a central feature of contemporary ISDS reform efforts. Historically overshadowed by arbitration, mediation is now recognized for its potential to prevent disputes from hardening into costly legal battles. Legal frameworks at the international and treaty level have begun to entrench mediation as a preliminary step – evident in ICSID's pioneering Mediation Rules (2022) and UNCITRAL's model treaty provisions (2023) that encourage or even mandate amicable resolution attempts. Doctrinally, mediation complements arbitration by offering a flexible, party-driven process that can resolve underlying interests, with arbitration as a backstop for points that cannot be agreed. Empirical experience, though limited, indicates that when used, mediation can achieve settlements and avoid the need for a tribunal decision – fulfilling the investment treaty system's original promise of providing investors and states with efficient justice. At the same time, challenges such as confidentiality, power imbalances, and enforceability concerns temper the enthusiasm. These critiques underscore that mediation is not a one-size-fits-all solution and must be carefully implemented to maintain fairness and transparency in a public-law context.

The direction of reform is clear: the international community is moving toward institutionalizing mediation as a standard phase of investor–state dispute resolution, transforming it from an ad hoc option into a necessary step for dispute prevention. The success of this transformation will depend on continued political will, capacity building, and fine-tuning of rules to address legitimate concerns. If upcoming initiatives – from new treaty language to advisory centers and training programs – are realized, we may soon see a paradigm where arbitration is used more sparingly, for only the most intractable disputes, while a larger share of investor–state conflicts are resolved through dialogue and mutually agreed outcomes. In a field often criticized for adversarialism and zero-sum outcomes, the rise of mediation represents a hopeful shift towards collaborative dispute resolution, aiming to save time, preserve relationships, and uphold the spirit of international investment cooperation. As one commentator noted, the "greatest victory" in investor–state disputes may be when parties find a solution *before* a fight becomes inevitable – and mediation is the tool to achieve that.

Reference list:

1. Johnson, L., Sachs, L., Güven, B., & Coleman, J. (2019). *Investor-state dispute prevention: A critical reflection*. Columbia Center on Sustainable Investment. Retrieved from https://ccsi.columbia.edu/sites/default/files/content/docs/Dispute%20Resolution%20Journal%20-%20Johnson%20et%20al.%20-%20Investor-State%20Dispute%20Prevention%5B16689%5D.pdf
2. Strong, S. I. (2014). Mediation of investor–state disputes: A treaty survey. *Journal of Dispute Resolution*, 2014(1), 71-137. Retrievedfrom

https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1866&context=jdr

3. JAMS ADR Insights. (2022). *Investor-state mediation: A new way to deal with old problems*. Retrieved from https://www.jamsadr.com/blog/2022/investorstate-mediation-a-new-way-to-deal-with-old-problems
4. Manciaux, S. (2024). Mediation of investment disputes under the ICSID Mediation Rules. In S. Manciaux (Ed.), *ICSID Mediation: Theory and Practice* (pp. 225-248).Springer. https://doi.org/10.1007/978-3-031-76345-8_10
5. International Bar Association (IBA). (2023). *Beyond investment arbitration: Investment mediation as new light*. Retrieved from https://www.ibanet.org/beyond-investment-arbitration-investment-mediation-new-light
6. Welsh, N. A., & Schneider, A. K. (2013). The thoughtful integration of mediation into bilateral investment treaties. *Harvard Negotiation Law Review*, 18, 71-142. Retrieved from https://scholarship.law.tamu.edu/facscholar/939
7. Franck, S. D. (2021). Investor-state mediation and the rise of transparency in ISDS. *Denver Journal of International Law & Policy*, 50(2), 249-283. Retrieved from https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1012&context=djilp
8. Schacherer, S. (2020). Amicable settlements in investor-state disputes: Empirical analysis of patterns and perceived problems. *Journal of International Dispute Settlement*, 11(1), 87-107. https://doi.org/10.1093/jnlids/idz025
9. Franck, S. D. (2019). Using investor-state mediation rules to promote conflict management. *Washington College of Law Research Paper No. 2019-09*. Retrieved from https://digitalcommons.wcl.american.edu/facsch_lawrev/965
10. ICSID, *Caseload – Statistics 2025-1*, at 12 (Mar. 2025).
11. Stephenson Harwood, *ICSID's New Mediation Rules approved by member states* (28 Mar. 2022).
12. Foley Hoag, *UNCITRAL Working Group III Reaches Notable Milestones…* (18 Apr. 2023).
13. Freshfields, *Investor-State Mediation: a bridge over troubled waters?* (2023).
14. Lexology, *Investor-State Mediation* (Jul. 2022).
15. Kluwer Arbitration Blog, *The Brazilian Cooperation and Facilitation Investment Agreement* (29 Dec. 2021).
16. Kluwer Arbitration Blog, *Investor-State Arbitration Meets Mediation: Potential Problems?* (30 Sep. 2020).
17. Columbia Center on Sustainable Investment, *UNCITRAL WGIII Finalized Drafts…* (2023).