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The Singapore Convention in the framework of the investor-state dispute settlement system

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Abstract: This contribution is aimed at analysing the extension of the scope of the Singapore Convention on Mediation to include settlement agreements arising out of investor-State mediation. To this end, the paper firstly approaches the ISDS crisis jointly with the UNCITRAL Working Group III reform proposals. Secondly, analyses the use of mediation in the scope of investor-State disputes and the rise of the Singapore Convention on mediation. Finally, argues for the applicability of the Convention to the context of ISDS. In addition, this work comprises the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Keywords: Investor-State Mediation. Singapore Convention. Investor-State Dispute Settlement.

> *"Mientras ciertos países latino-americanos están adoptando instrumentos que contemplan el arbitraje internacional como un medio para resolver litigios inversor-Estado, otros se han embarcado en una tendencia opuesta de terminar o disminuir el ámbito de aplicación de los compromisos existentes..."*
>
> Emmanuel Gaillard[1]

Introduction

One amidst the characteristics of a globalised society is the constant flow of foreign investment, channelled through the strong presence of transnational enterprises and their contractual network in different state economies. The regulatory webs that creates the international investment law are characterised by their complexity and mutability, traditionally considering two main assumptions: (i) the existence of International Investment Agreement (IIAs) systematising general practises between investors and host States; and (ii) the regulatory complementarity built through the practice of investment arbitration.

The tension between the two poles – host State and foreign investor – has a pendulum effect on the regulation of foreign investments. In the current century, recent developments, particularly related to the high political and financial cost of investment arbitration, have brought as a result the questioning of the legitimacy of the traditional model of conflict resolution between investors and States and of the international investment law itself.

The intense arbitration activity, particularly arising from the institutional system established by the World Bank in 1965 – through the Washington Convention – has been a source of significant criticism. The extensive interpretation of the standards of treatment of foreign investors by arbitration tribunals, questioning the regulatory capacity of national States – as exemplified by the cases "Magyar Farming and others v. Hungary",[2] "ESPF and others v. Italy",[3] "9REN Holding v. Spain"[4] and "CEF Energia v. Italy"[5] – has led to the perception that this system is highly protective of foreign investors to the detriment of the sovereign rights of the host State.

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1 GAILLARD, Emmanuel. *Tendencias anti-arbitraje en América Latina. Contratos Internacionales*. Coord. Diego P. Fernández Arroyo/Adriana Dreyzing de Klor, Asunción: CEDEP, 2008., pp. 311-315.

2 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

3 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

4 UNITED NATIONS. *United Nations Conference on Trade and Development*. Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

5 UNITED NATIONS. *United Nations Conference on Trade and Development*.Investment Policy Hub. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

This perspective, together with the investment arbitration crisis, led the United Nations Commission on International Trade Law (UNCITRAL) to deepen their studies in the reform of the Investor-State Dispute Settlement which, since 2017, has offered significant advances in the area. Nonetheless, nothing definitive has been signed yet – which leaves relative autonomy to States, through Bilateral Investment Treaties, Free Trade Agreements, Cooperation and Facilitation of Investment Agreements or similar instruments to regulate the matter of foreign investments and dispute resolution.

Moreover, initiatives on the use of mediation have been increasingly perceived, albeit they are not yet widespread. This is justified by the lack of guarantees that the parties have in relation to the enforcement of international agreements arising from mediation, even though these are characterised by a high degree of enforceability motivated by the voluntariness. As mentioned by Schneider[6] "to talk about mediation and its various modalities is to talk about a multidisciplinary structure of approach to conflict, which requires a comprehensive and systemic look at the conflict, the parties and their interactions".

However, when it comes to public interest the guarantees are even narrower. This is where the performance of the Singapore Convention would play an important role, in case its scope also allows the execution of agreements arising from investment relations. This paper applies the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments.

Firstly, it addresses the crisis of the system of Investor-State dispute settlement, followed by the reform of the UNCITRAL system. Secondly, it proposes the mediation as a suitable proposal for Investor-State dispute settlement. Finally, it traces notes on the Singapore Convention and the application of the Singapore Convention to the Investor-State Dispute Settlement.

1 The crisis of the investor-state dispute settlement system

International Investment Law, although highly controversial, is amongst the oldest fields of public international law. Considering the investor-State dispute settlement, the first known investment claims dispute mechanism was the one established by the Jay Treaty (1794) between the United States and Great Britain – which had the aim at maintaining peace among those two States through economic and commercial cooperation. Regarding international investment law, this treaty is particularly relevant because of its dispute resolution system characterised by

[6] SCHNEIDER, Patricia Dornelles. Uma visão sistêmica do procedimento de mediação – As lições do pensamento de Maturana. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 03, n. 06, p. 193-200, jul./dez. 2021. DOI: 10.52028/rbadr.v3i6.11.

mixed-claims tribunals or commissions with sitting arbitrators. That was the United States' primary method of settling international claims.[7]

In the 19th century, the method of gunboat diplomacy arose as a vent of imperialism. Albeit the use of the expression "diplomacy", this dispute settlement mechanism was not in essence peaceful or amicable. In other words, the outcome was based on the nations' power and influence. This way of dispute resolution is based on the demonstration, threat, or use of limited naval force for political objectives.[8]

In the late 19th century, with the advent of the Permanent Court of Arbitration, investors used to request the diplomatic protection of their own countries in order to litigate in the State-to-State Arbitration. Diplomatic protection is considered to be the main procedural mechanism against the lack of compliance in international public law – since it allows the individual to request that his State represent him in judicial or arbitral proceedings in such a way that the two parties are sovereign States. This has proven not to be the best resource because of the likely political and economic disturbances between the host-State and the State giving its diplomatic protection to the domestic investor.

As for Latin America, the Calvo Doctrine is cited – a doctrine manifested by a resistance to the internationalisation of disputes, giving rise to the investor's renunciation of diplomatic protection and its subjection to the domestic regime through the Calvo Clause.[9] According to Moreno Rodríguez,[10] in his private international law course in the Hague Academy, the Calvo Doctrine can be referenced in three main aspects: (i) since sovereign States are free and independent, they cannot suffer interference of any sort by other States, either by force or diplomatically; (ii) foreign investors should receive no better treatment than that accorded to the host States' own nationals. Each State could establish its own standard of treatment, which had to be accepted by foreigners conducting business there; and (iii) settlement should be achieved by the domestic courts of the host State alone.

And furthermore, investors could choose to submit disputes to the domestic courts of the countries receiving investment. But, precisely because of their State nature, those courts offered resistance to condemning the State itself for the benefit of the foreign investor. In this meanwhile, in 1965, within the framework of

[7] LILLICH, Richard B. The Jay Treaty Commissions. 37 *St. John's L. Rev*. 260 (1962-1963).

[8] MANDEL, Robert. The Effectiveness of Gunboat Diplomacy. *International Studies Quarterly*, Volume 30, Edição 1, Março 1986, pp. 59–76.

[9] CAETANO, F. A. K. Direito Internacional dos Investimentos na atualidade: uma análise da posição brasileira, in *Revista Científica do Departamento de Ciências Jurídicas, Políticas e Gerenciais do Uni-BH*, Belo Horizonte, vol. III, n. 1, jul-2010. Disponível em: www.unibh.br/revistas/ecivitas/ Acesso em: 07 Fev. 2021.

[10] RODRIGUEZ, Jose Antonio Moreno. *The Hague Academy of International Law*. Summer Courses on Private International Law. Private International Law and Investment Arbitration. 2021.

the World Bank's activities, the Washington Convention took place, establishing the International Centre for Settlement of Investment Disputes (ICSID). The Convention, ratified by 156 countries, waives the requirement of diplomatic protection and therefore allows investors direct access (mixed arbitration).

However, recent complaints about the lack of neutrality, impartiality and transparency of the decisions, as well as the simple repetition of judgements, have caused several countries to withdraw from the Washington Convention and to question the legitimacy of investment arbitration – for example Venezuela and Bolivia. According to Sornarajah it is a consequence of the "allegations that investment arbitration is dominated by a select group of arbitrators who usually decide in favour of foreign investors and create expansive law".[11]

Specifically with regard to transparency in investment arbitration, which seems to be one of the main current challenges, it is important to note that some argue that the lack of transparency gives rise to a violation of constitutional principles, such as the right of access to information and documents of public interest, the publicity of decisions and hearings and, outside the constitutional sphere, the requirements for admission of amicus curiae, their respective access to documents and the effectiveness of their participation.[12]

Whereas one of the biggest drivers of the investment arbitration crisis is the transparency factor, UNCITRAL developed in 2014 the "United Nations Convention on Transparency in Treaty-based Investor-State Arbitration" or "Mauritius Convention on Transparency". To date, only 9 countries are party to the Convention, although it has 23 signatures. The main criticism of the Convention, and what helps to justify its very low adherence, is that the provisions are very open and vague so that it is left to the State Party to apply it as it sees fit.

Thus, it is not farfetched to argue that the advocacy and civil society movement has played a much greater and more relevant role in publicising procedures and decisions. This is because it is a matter of public interest, regulatory autonomy and public budget. Foreign direct investment, in its most classic model, has been subject to great criticism by these groups, since it is not uncommon for companies established in the host States to infringe labour or environmental laws in favour of economic improvement.

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[11] SORNARAJAH, M. *The international law on foreign investment*. Fourth edition. Cambridge, United Kingdom; New York, USA: Cambridge University Press, 2017.

[12] SCHLEE, Paula. Transparência em arbitragens internacionais investidor-Estado. *Rev. secr. Trib. perm. revis*. Ano 3, Nº 5; Março 2015; pp. 95-113. Disponível em: http://www.revistastpr.com/index.php/rstpr/article/download/130/122 Acesso em: 12 Mai. 2021.

2 The reform of the uncitral system

In 2017, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III brought up the possible reform of investor-State dispute settlement (ISDS) mainly based on the aforementioned crisis of ISDS. Among the main concerns at this early stage were: (i) the arbitral process and outcomes; (ii) arbitrators and decision-makers; and (iii) perceptions of States, investors and the public. According to the report[13] for the 34th session, concerns expressed regarding procedural aspects of ISDS include: (i) lengthy duration and extensive cost of ISDS; (ii) lack of transparency in the proceedings; (iii) lack of an early dismissal mechanism to address unfounded claims; and (iv) lack of a mechanism to address counterclaims by respondent States.

In addition, concerns about the outcomes were also perceived, such as relating to the coherence and consistency in topics with respect to investment protection standards, lack of harmonisation in awards – for instance cases relate to a single measure by a State or a similar fact pattern or are based on identical or similar treaty provisions, divergent outcomes have been observed[14] – and finality of the award and review mechanisms. Furthermore, the arbitrators and decision-makers were not left out. The appointment and ethical requirements of those were also pointed out.[15]

The 41st session, which happened in November 2021, aimed to discuss the draft[16] of the Code of Conduct and its means of implementation and enforcement. In this sense, the status of work of UNCITRAL Working Group III comprises the initial drafts for comments and preparation and workplan for 2021 and 2022. The initial drafts for comments[17] are made of three main topics, which are the "assessment of damages and compensation", "mediation and other forms of alternative dispute resolution (ADR)" and, finally, the "standing multilateral mechanism: selection and appointment of ISDS tribunal members and related matters".

[13] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

[14] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

[15] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Thirty-fourth session. Disponível em: https://undocs.org/en/A/CN.9/WG.III/WP.142. Acesso em: 04 Set. 2021.

[16] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Forty-one session. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/a_cn_9_1086_advance.pdf. Acesso em: 31 Jan. 2021.

[17] UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 Set. 2021.

Moreover, the list of initial drafts in preparation[18] comprises the "appellate mechanism", the "cost of establishing a permanent body", the "dispute prevention and mitigation", the "enforcement of decisions by a court or appellate body", the "procedural rules reform and cross-cutting issues", the "selection and appointment of arbitrators" and "treaty interpretation". Although these are early stage initiatives and the final project will take years to come out, this demonstrates a concern and an awareness of the status quo regarding ISDS.

3 Mediation as a suitable solution for investor-state dispute settlement

Mediation, despite the specific characteristics applied to each different concept and kind of mediation procedure, is generally described as a process of dispute resolution involving a third, neutral and impartial party. This amicable method has been used since ancient times – even before the creation of the law and of the States. For instance, "mediation existed in the Middle East hundreds of years ago. In fact, the notion of deferring to a neutral and objective third-party for a decision towards the resolution of a dispute is well steeped in Arabic/Islamic traditions".[19]

Likewise, peace mediation or facilitation is well known as a means of conflict resolution in the context of wars. Richmond[20] highlights that "during the Cold War, and since, international mediation has become a well-recognised tool of conflict management and diplomacy, used by the US [...], the UN, a range of international non-governmental organisations (INGOs) and private actors". As noted by Mansur[21] "as peacemakers, mediators have abundant opportunities to face and embrace the suffering of other people", especially relevant for peace mediation. Although mediation had undergone transmutations, especially when referring to the rediscovery and exploration of alternative dispute resolution in the USA in the early 1970s, today, more than ever, mediation is seen as an effective method to solve international conflicts.

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18 UNITED NATIONS. *United Nations Commission on International Trade Law*. Working Group III (Investor-State Dispute Settlement Reform). Working Group III (Investor-State Dispute Settlement Reform). Disponível em: https://uncitral.un.org/en/working_groups/3/investor-state. Acesso em: 04 Set. 2021.

19 FATAHI, Negin. The History of Mediation In The Middle East And Its Prospects For The Future. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2018/01/23/history-mediation-middle-east-prospects-future/. Acesso em: 01 Jan. 2022.

20 BERCOVITCH, 1992 apud RICHMOND, Oliver P. A genealogy of mediation in international relations: From 'analogue' to 'digital' forms of global justice or managed war?. *Cooperation and Conflict Journal*. Volume 53, Número 3. Setembro 2018, pp. 301-319. Disponível em: https://www.jstor.org/stable/48512978?read-now=1&refreqid=excelsior%3A5daff20f7dd5083afac126b49fb6ddce&seq=1#page_scan_tab_contents. Acesso em: 04 Fev. 2022.

21 MANSUR, Maria Luisa. Viktor Frankl and the Art of Mediation. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 133-143, jul./dez. 2020.

The founding instrument of the United Nations, namely, the UN Charter, an instrument of soft law globally binding, provides, and encourages, in its article 33, the peaceful mechanisms, as well as self-composition, as appropriate means in the resolution of international conflicts. Therefore, mediation, as an extrajudicial mechanism, self-compositive and based on the interests of the parties emerges as a consensual method of dispute resolution very effective.

Marieke Koekkoek, explains the consensual nature of mediation and enlightens that parties are free to withdraw from the process at any time. She also suggests that, as a consequence, it is more likely that a mediated settlement agreement will be followed by the parties because it may comprise their interests – whether on a personal or business level.[22]

In other words, this is an expression of voluntariness, a core principle of mediation, and signifies that the parties are free to withdraw from the procedure whenever they feel the need and the agreement, which is designed by them, tends to be considered fair as it is made on the basis of their interests. Thus, the sealed agreement largely embraces creative and durable solutions. Furthermore, mediation tends to be faster and less costly than arbitration, which is why it has been a widely used option for sealing international commercial disputes. In this sense, based on data from the Global Pound Conference,[23] J. Stipanowich reports that efficiency, given by the ratio of time and cost, is the most influential factor in the choice between dispute resolution processes.

In the scope of international commerce, mediation has been a strong tool towards the preservation of the commercial partnership alongside the personal relationship between the parties, besides being cost and time efficient. It is surely a practice that has great space in the bigger international ADR chambers, such as the International Chamber of Commerce (ICC) and the Vienna International Arbitration Centre (VIAC). Moreover, the United Nations Commission on International Trade Law (UNCITRAL) developed its Model Law on International Commercial Mediation – that amended the past model law on conciliation in 2002.

According to Nadja Alexander, the model laws adopted by the UN General Assembly functions as a model for states to establish the premises as part of their domestic legislation and can even be amended.[24]

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[22] KOEKKOEK, Marieke. *Mediation of investor – State disputes in China: Mediation as complementary method of dispute settlement to arbitration in investor – State disputes*. Thesis (L.L.M. em Direito Internacional do Comércio e Direito Internacional dos Investimentos) – University of Amsterdam. Amsterdã, 2012.

[23] STIPANOWICH, T. J. What Have We Learned from the Global Pound Conferences?. *Kluwer Arbitration Blog*, Wolters Kluver. 2017. Disponível em: http://arbitrationblog.kluwerarbitration.com/2017/11/27/learned-global-pound-conferences/. Acesso em: 19 Jun. 2021.

[24] ALEXANDER, Nadja. *UNCITRAL and International Mediation*. International and Comparative Mediation, Global Trends in Dispute Resolution. Volume 4. Holanda: Kluwer Law International, 2009. pp. 337 – 384.

This law "has been amended in 2018 with the addition of a new section on international settlement agreements and their enforcement".[25] The Commission also structured its mediation rules (updated in 2021)[26] and released the UNCITRAL Notes on Mediation (2021).[27] Finally, in order to establish the maestro of the orchestra, responsible for guiding its practical effectiveness, UNCITRAL developed the Singapore Convention on Mediation (2019) – which is responsible for guiding the enforcement of settlement agreements arising out of international mediation.

The ICC statistics have shown that, in 2020, its International Centre for ADR "received a total of 77 new cases registered under the Mediation Rules, Expert Rules, Dispute Board Rules and DOCDEX Rules – the largest number of cases registered in a year".[28] As of mediation itself, there were a record number of 45 new requests[29] involving 112 parties from 39 countries.

Specifically regarding investment relations, it is well known that investment treaties often provide for trying amicable solutions, whether in the cooling-off period or not, before going to adjudication. For instance, the US model of bilateral investment agreements[30] has shown a tendency of adopting third party consultations before entering into an arbitration procedure – this can also be seen as a type of combined dispute board, which is also considered a peaceful method of conflict prevention.

It is also a common practice, mainly when it comes to commercial contracts, the establishment of an escalation ADR clause that includes a series of steps the parties should follow when a conflict arises – usually negotiation and mediation are the first steps, while arbitration or judicial litigation are the last ones. In investment agreements, especially those that are newer, one can foresee a strong tendency

[25] UNITED NATIONS. *United Nations Commission on International Trade Law*. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018. Disponível em: https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. Acesso em: 04 Fev. 2022.

[26] UNITED NATIONS. *United Nations Commission on International Trade Law*. UNCITRAL Mediation Rules. Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral_mediation_rules_advance_copy.pdf. Acesso em: 04 Fev. 2022.

[27] UNITED NATIONS. *United Nations Commission on International Trade Law.* UNCITRAL Notes on Mediation (2021). Disponível em: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf. Acesso em: 04 Fev. 2022.

[28] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 Fev. 2022.

[29] INTERNATIONAL CHAMBER OF COMMERCE. *ICC Dispute Resolution 2020 Statistics*. Disponível em: https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf. Acesso em: 04 Fev. 2022.

[30] Rwanda – United States of America BIT (2008), United States of America – Uruguay BIT (2005), Bahrain – United States of America BIT (1999), Mozambique – United States of America BIT (1998), Lithuania – United States of America BIT (1998), Azerbaijan – United States of America BIT (1997), Jordan – United States of America BIT (1997), Croatia – United States of America BIT (1996), Honduras – United States of America BIT (1995) and Latvia – United States of America BIT (1995).

towards the use of mediation. The European Union – setting aside its initiative on the Multilateral Investment Court and its reluctance to the Singapore Convention – has been including investor-State mediation in all agreements comprising the new generation of free trade agreements.

The United States-Mexico-Canada Agreement (USMCA), that replaced NAFTA, also has provisions on the use of mediation in the article 31.5: "1. Parties may decide at any time to voluntarily undertake an alternative method of dispute resolution, such as good offices, conciliation, or mediation".[31]

The Energy Charter Secretariat has evolved, in 2016, its guide on investment mediation[32] and in there highlighted the feasibility of mediation to be applied as a part of the Energy Charter Treaty (ECT) dispute settlement mechanism. In relation to procedural rules, the International Bar Association (IBA) designed in 2012 the first initiative: The IBA 2012 Rules on Investor-State Mediation.[33] These rules "establish clear guidelines for the commencement of mediation and for the appointment of a mediator in absence of party agreement".[34] Rafael Morek, being positive about it, argued that the Rules contain "many standard clauses seen also in other institutional mediation rules, the Rules provide also for some innovative regulations, including the rule on 'Mediation Management Conference' (Article 9)".[35]

In 2018, the International Centre for Settlement of Investment Disputes (ICSID), being aware of the ISDS crisis and the success of international commercial mediation, developed its own investor-State mediation institutional rules.[36] These rules, however, are the object of the working papers on amendment of ICSID rules – for example with regard to the registration of requests and the resignation and replacement of mediators.

It is noteworthy to mention that the Centre has taken many initiatives to promote the practice through training and partnerships. Recently, in March 2021,

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31 USMCA. *Chapter 31: Dispute Settlement. Section A: Dispute Settlement*. Disponível em: https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/31%20Dispute%20Settlement.pdf. Acesso em: 04 Fev. 2022.

32 ENERGY CHARTER SECRETARIAT. *Guide on Investment Mediation*. 2016. Disponível em: https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf. Acesso em: 04 Fev. 2022.

33 INTERNATIONAL BAR ASSOCIATION. *IBA Rules for Investor-State Mediation*. 2012. Disponível em: https://www.ibanet.org/MediaHandler?id=C74CE2C9-7E9E-4BCA-8988-2A4DF573192C. Acesso em: 04 Fev. 2022.

34 ALI, Shahla F.; REPOUSIS, Odysseas G. Investor-State mediation and the rise of transparency in international investment law: opportunity or threat?. *Denver Journal of International Law and Policy*. Volume 45. Número. 2, 2018. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3216254. Acesso em: 04 Fev. 2022.

35 MOREK, Rafael. Investor-State Mediation: New IBA Rules. *Kluwer Mediation Blog*. 2012. Disponível em: http://mediationblog.kluwerarbitration.com/2012/11/09/investor-state-mediation-new-iba-rules/. Acesso em: 04 Fev. 2022.

36 INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *Investor-State Mediation*. Disponível em: https://icsid.worldbank.org/services-arbitration-investor-state-mediation. Acesso em: 24 Abr. 2021.

ICSID and the Singapore International Mediation Centre entered into a cooperation agreement, the first for ICSID with a centre that is exclusively focused on mediation.[37] Purposely, ICSID in its 2021 Annual Report also recognizes that there is a "growing number of international investment agreements that specifically refer to mediation in their dispute settlement provisions to resolve investor-State disputes".[38]

Nonetheless, as far as known, there is a lack of investment mediation cases. This situation can be motivated by (i) the utilisation of ad hoc procedures based on strict confidentiality between the State and the investor; (ii) the use of institutional commercial mediation to settle investment disputes; and (iii) the difficulty to enforce international negotiated agreements that came out of a mediation process.

The most famous case of investor-State mediation is a result of the aforementioned second reason. In 2016, the ICC administered between a French investor and the State of Philippines – where the investor called the application of the ICC Mediation Rules and the IBA Investor-State Mediation Rules.[39] Unfortunately, the mediation did not terminated in an agreement and, despite the difficulty faced by the case managers to contact a State and its right representative in a mediation, scholars have defended that this process helped the parties to further their communication and relationship.[40] In addition to this first known case, there were a few more like Olyana Holdings v. Rwanda, Pan African Burkina v. Burkina Faso, Odebrecht-Tecnimont-Estrella Consortium and the Dominican Republic and its state-owned electricity company, Corporación de Empresas Eléctricas Estatales (CDEEE)[41] – but as Andrea Kupfer Schneider and Nancy Welsh stated it is still not clear if the parties involved reached an agreement and if the mediation was a formal investor-State mediation.[42]

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[37] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. Disponível em: https://icsid.worldbank.org/sites/default/files/publications/ICSID_AR21_CRA_bl1_web.pdf. Acesso em: 26 Out. 2021.

[38] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES. *2021 Annual Report*. *Idem*.

[39] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[40] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[41] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

[42] SCHNEIDER, Andrea Knupfer; WELSH, Nancy A. Bargaining in the Shadow of Investor-state Mediation: How the Threat of Mediation Will Improve Parties' Conflict Management. 17 U. *St. Thomas L.J.* 373. 2021. Disponível em: https://scholarship.law.tamu.edu/facscholar/1481/?utm_source=scholarship.law.tamu.

Furthermore, Frauke Nitschke referred to seven considerations that the parties should consider when thinking of investment mediation:[43] (i) willingness to engage in negotiations; (ii) comprehensive assessment of the dispute; (iii) analysis of the stakeholders in relation to the dispute and stakeholders for a possible solution; (iv) desired structure/design/form of the dispute resolution process; (v) desire to maintain control of the outcome; (vi) financial resources to cover the costs of the dispute resolution process; and finally (vii) desired time frame to resolve the dispute.

And, although arbitration is currently the main method of dispute resolution in the investment field, it tends to be closer and closer to the ordinary judicial procedure. This is so true that, as Julien Cazala teaches, the desire of States to regain control of arbitral tribunals was reflected by the development of investment arbitration, which directly impacted the provisions present in treaties, especially BITs.[44]

Certainly the objective of this contribution is not to defend the inadequacy of arbitration to disputes between investors and the State, on the contrary, by the classical theory of Frank Sander, the so-called "multidoor courthouse", it is possible that, by the characteristics and distinctions of each dispute, the most appropriate method is arbitration. Likewise, it is plausible that it is mediation or even hybrid methods – those that integrate mediation and arbitration. Therefore, it is well known that mediation has a low esteem in international society since agreements, although with high compliance rates, were not enforceable when one party refused to comply with it. With the advent of the Singapore Convention, this panorama tends to change as the Convention offers mechanisms that aim to facilitate such enforcement.

4 First lines on the Singapore convention

The Singapore Convention, which, after 46 signatures, entered into force on 12 September 2020, aims to intensify the progressive harmonisation and

edu%2Ffacscholar%2F1481&utm_medium=PDF&utm_campaign=PDFCoverPages. Acesso em: 04 Fev. 2022.

43 NITSCHKE, Frauke. Part I – How to Assess the Suitability of Mediation for Investment Disputes. 2021. *Kluwer Mediation Blog*. Disponível em: http://mediationblog.kluwerarbitration.com/2021/10/06/part-i-how-to-assess-the-suitability-of-mediation-for-investment-disputes/. Acesso em: 04 Fev. 2022.

44 "*Le développement de l'arbitrage en matière d'investissement a incontestablement rendu nécessaire un raffinement progressif des énoncés conventionnels, traduisant une volonté de reprise en main par les États face à des tribunaux arbitraux dont certaines audaces ont parfois réussi à inquiéter tant les gouvernements que les investisseurs et plus largement la société civile".* CAZALA, Julien. La réforme de l'arbitrage d'investissement dans l'Accord Canada – États-Unis – Mexique devant se substituer à l'Accord de libre-échange nord-américain. *Cahiers de l'arbitrage – Paris Journal of International Arbitration*. 2019. número 4, pp. 782-790.

unification of international trade law, observing the interests of all international players, especially developing countries. The adoption of this tool is aimed at complementing the existing legal panorama regarding international mediation and seeks to harmonically develop international economic relations.

According to Manson, the Convention "will reduce/remove trade disputes as obstacles to trade flows by encouraging companies engaged in international trade to use mediation to resolve them – mediation whose outcomes will be enforceable across borders".[45]

To this end, its main characteristics are: i) in principle, it applies only to international commercial agreements resulting from mediation (art. 1, 1); ii) it does not apply to agreements that are enforceable as judgements or arbitral awards (art. 1, 3); and iii) it also does not apply to settlement agreements concluded for personal, family or domestic purposes, as well as agreements arising from family, inheritance or labour law (art. 1, 2).

According to Butlien, the Convention "is best viewed as a solution to the main barrier that hampered the use of mediation in settling international disputes",[46] that is, the possible failure to comply with the mediated settlement agreement. And failing such compliance or a mechanism that enforces this compliance, the parties would rely on arbitration or court proceedings anyway. It is also noteworthy to mention that, despite the mediation is characterised by voluntariness and, therefore, the agreements are more likely to be complied upon, in the international context the situation changes – especially when it comes to the presence of a State.

Moreover, the scope of the Singapore Convention is to become an essential instrument in the facilitation of international trade and the promotion of mediation as an appropriate and effective method of resolving commercial disputes. The Convention meets the main concern of the parties with regard to international mediation, which is the difficulty of enforceability when the parties disagree on this issue. Thus, in order to make the agreement binding and enforceable, in a simplified manner, it intends to be for mediation what the 1958 New York Convention is for arbitration: a catalyst effect for change and promotion of acceptance.

A research conducted by the professor S. I. Strong, in 2014, with many practitioners, suggested that

> international commercial mediation and conciliation may be developing along the same path as international commercial arbitration. At one time, international commercial arbitration was extremely rare, with a

[45] MASON, Paul Eric. A Convenção de Cingapura e seus benefícios para o Brasil. Revista Brasileira de Alternative Dispute Resolution – RBADR, Belo Horizonte, ano 02, n. 04, p. 181-193, jul./dez. 2020.

[46] BUTLIEN, Robert. The Singapore Convention on Mediation: A Brave New World for International Commercial Mediation. *Brooklyn Journal of International Law.* 46. Número. 1. 2020. pp. 183-214.

> significant expansion in the number of proceedings only occurring after the adoption of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1958.[47]

Hioureas goes in the same direction and argues that "international arbitration has been preferred over international mediation. This is in part because the widely adopted New York Convention provides a predictable framework for the recognition and enforcement of arbitral agreements and awards".[48] Furthermore, senior contracting parties consider using mediation since, on the verge of a dispute, parties tend to terminate the business relationship. However, mediation, for all its attributes, provides a forward-looking view aimed at maintaining these relationships.

5 The Singapore convention and the investor-state dispute settlement

The Singapore Convention, despite expressly providing that it only applies to disputes arising from international trade, may mean a paradigm shift in the resolution of disputes between investors and states. This is because these disciplines tend to come closer together, given the fine line between international investment law and international trade law. This scenario is, in fact, what happens in practice.

Although, due to the World Trade Organisation crisis and the need for structural reforms, Free Trade Agreements are losing some space in international society, they still make up a significant portion of the world economy. And, due to the challenges brought about by digitalisation, the new face of geopolitical conflicts and the pressing need for a more sustainable trade, the largest trade agreements also bring in their scope the matter of direct foreign investments.

The main examples are the Mercosur-European Union Agreement – which, despite not being in force, has been negotiated for over 20 years, which is the reason why the interconnection between the matters in time is proven, the European Union and China Agreement, the European Union and Canada Agreement and the European Union and the Association of Southeast Asian Nations (ASEAN) Agreement. All examples deal with commercial treaties that bring among their main objectives the increase of the flow of investments.

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[47] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper*. Número 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 Fev. 2022.

[48] HIOUREAS, Christina. The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward. *Berkeley Journal of International Law*. 37. Número 2. 2019. pp. 215-224.

Thus, at least half of the aforementioned agreements expressly provide for investment mediation as an appropriate means for resolving such disputes. And those that do not bring it directly, defend the use of consensual means even before the instauration of the arbitration or judicial procedure. In light of the urgency for a concise international investment law and the rise and greater acceptability of international mediation, the International Bar Association and the ICSID, the international centre for investment dispute resolution, have coined their own investor-state mediation rules – as mentioned before in the text.

That is, States have increasingly sought to develop this practice so as to require the ICSID, the main investment dispute resolution centre in the world, to create new rules on investor-State mediation. In response, ICSID has announced that it is developing a completely new set of mediation rules, which take investor and state proposals into account and are designed to expand mediation capacity. Moreover, the already existing rules define a complementary relationship to the existing rules of institutional arbitration in this Centre. It is extremely valid to point out that the IBA rules differ from the ICSID rules since the former, soft law, may be applied to institutional or ad hoc procedures.

Meanwhile, in her doctoral defence at the University of Paris Ouest, Olivia Danic points out that "*le droit international général a montré son inefficacité à protéger les investissements étrangers. Même si certains standards et normes existaient, ils n'ont pu empêcher la vague de nationalisation qui a suivi la décolonisation"*. In other words, it appears that even with the existence of standards and principles that guide this branch, international law is inefficient in protecting foreign direct investments.

Thus, with the help of the Singapore Convention and considering the crisis in the system of investment dispute resolution and, above all, arbitration, the protection of the rights of investors and receiving States can be carried out in a less costly, timely manner, without putting an end to the existing long-term commercial relationship, as the Convention facilitates and simplifies the enforcement procedure of agreements arising from mediation.

The cited research conducted by professor Strong also points out that disputes involving an ongoing relationship are definitely amenable to mediation,[49] especially considering the opinion of the great majority (74%) of the participants in his survey. Also, one can also argue that disputes involving parties from two different countries or cultures can be better settled through mediation or conciliation. That is because

[49] STRONG, S. I. Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation. *Legal Studies Research Paper Series Research Paper*. Número 2014-28. Disponível em: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526302. Acesso em: 04 Fev. 2022.

the process of communication – which could have been prejudiced by the cultural differences – is facilitated by the acting of an expert mediator.

Joséphine Hage et al. have spoken about how "the missing third piece in the international dispute resolution enforcement framework", here the Singapore Convention, can promote the international economic relations[50] – stating also that "three specific regions could benefit from the entry into force of the Singapore Convention: the Asia-Pacific are, the region covered by the BRI [Belt and Road Initiative] and Europe facing Brexit".[51]

The World Investment Report 2021, provided by the United Nations Conference on Trade and Development (UNCTAD) states that the top 10 host economies of FDI inflows are the United States, China, Hong Kong (China), Singapore, India, Luxembourg, Germany, Ireland, Mexico and Sweden. This data shows that all the specific regions cited by the aforesaid research comprise, precisely, those 10 countries (and also the others pointed by the UNCTAD report).

In conclusion, likewise as argued by Hage *et al.*, the Singapore Convention was the missing piece of the puzzle. Investment disputes usually involve long relationships, with culturally different parties, a number of stakeholders and tends to be time and cost consuming, mainly with regards to international investment arbitration. Therefore, if the application of the Convention to negotiated investment agreements arising out of an investment mediation is feasible, then it is reasonable to expect an improvement in the ISDS crisis and also in the investment and economic relations worldwide.

Conclusion

A highly controversial shaping factor of the international economy has been the foreign investment. Yet, data from the United Nations Conference on Trade and Development elucidates that there are more than 2200 Bilateral Investment Treaties in force and more than 300 treaties with investment provisions also in force.[52] Those comprises likewise the new generation of free trade agreements, including the new treaties signed by the European Union with the world's leading economic powers. It is not reasonable to expect that the conflicts arising out of

[50] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*. 32. Número 4. 2021. pp. 769-800.

[51] CHAHINE, Joséphine Hage; LOMBARDI, Ettore M.; LUTRAN, David; PEULVÉL, Catherine. The Acceleration of the Development of International Business Mediation after the Singapore Convention. *European Business Law Review*. 32. Número 4. 2021. pp. 769-800.

[52] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Investment Policy Hub*. International Investment Agreements. Investment Dispute Settlement Navigator. Disponível em: https://investmentpolicy.unctad.org/investment-dispute-settlement?status=2. Acesso em: 05 Set. 2021.

these treaties would be perfectly settled by the means of investment arbitration considering its so-called lack of legitimacy and that many countries have withdrawn from the ICSID Convention.

It is not by chance that the UNCITRAL and the ICSID are working together in promoting the reform of the ISDS system and in bringing out alternatives to those who are not willing to settle their disputes using investment arbitration. The international society is aware of the fact that mediation is increasingly gaining relevance through trade relations but not limited to. ICSID is working hard to foster investor-State mediation and is taking into account the recent developments in international mediation favoured by the Singapore Convention on mediation.

Nonetheless, the scope of application of this Convention is adamant that it will only apply to commercial disputes. This is the focus of this paper. That is, this paper addresses the fact that currently the practical distinctions between trade and investment international relations are faint. It is not rare to find trade agreements with chapters on foreign investment. And it is virtually not rare to find trade relations within investment relations (or related to). The web of legal relations that comprise these two subjects forms what is called international economic law, one of the most relevant areas in the international context.

Thus, the spread of mediation among investment disputes would be easier and faster if the enforcement of these agreements could rely on the Singapore Convention. In this sense, it is worth noting that mediation proposes to be a less time-consuming and less costly dispute resolution technique than arbitration – which increases its practical efficiency. All this, in line with recent ICSID initiatives, helps to prove the necessary relationship between the factors.

Finally, this article uses the hypothetical-deductive methodology, through the analysis of normative texts, cases and international instruments, and firstly has approached the ISDS crisis and the subsequent reform of the UNCITRAL investment system. This contribution has also addressed the use of mediation in investment disputes and has traced out the Singapore Convention on mediation and its applicability to investor-State dispute settlement.

Resumo: O intuito da presente contribuição é analisar a plausibilidade da extensão do escopo da Convenção de Cingapura sobre Mediação para incluir acordos decorrentes da mediação investidor-Estado. Para este fim, o documento aborda primeiramente a crise do sistema de resolução de controvérsias entre investidores e Estados, em conjunto com as propostas de reforma do Grupo de Trabalho III da UNCITRAL. Em segundo lugar, analisa o uso da mediação no âmbito das disputas investidor-Estado e o surgimento da Convenção de Cingapura sobre Mediação. Finalmente, argumenta a aplicabilidade da Convenção ao contexto das disputas de investimento, considerando sua complexidade. Ademais, este trabalho compreende a metodologia hipotético-dedutiva, através da análise de textos normativos, casos e instrumentos internacionais.

Palavras-chave: Mediação investidor-Estado. Convenção de Singapura. Sistema de Resolução de Controvérsias entre Investidores e Estado.

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