

Unlocking Value Through Stakeholder Engagement: New Forms to Resolve Investor-State Disputes

2020 ISDS Mediation Working Group Report

June 16, 2020

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I. Background

The **2019 Investor-State Dispute Settlement (ISDS) Mediation Colloquium** brought together ISDS stakeholders to discuss the benefits and obstacles of using mediation to resolve Investor-State Disputes. The emphasis was on Central Asia and the Belt and Road Initiative (BRI). The goal was to identify guidelines and best practices for the role that mediation can play as part of ISDS. Participants included mediation experts from leading alternative dispute resolution (ADR) programs and organizations, regional state officials, corporate counsels from critical industries, as well as experienced NGO representatives.

The 2019 ISDS Mediation Colloquium was hosted in December 2019 by the Negotiation Task Force (NTF) of the Davis Center for Russian and Eurasian Studies at Harvard University. The Colloquium was convened by Arvid Bell, Malik Dahlan and Wolf von Kumberg in collaboration with NTF Innovation Fellow Bernadette Stadler.

A key and novel contribution of the Colloquium was its focus on negotiation analysis tools as a way to approach and structure the ISDS mediation debate. An ISDS mediation sector review, compiled by the NTF and discussed during the Colloquium, can be found in the Appendix of this Report.

Following the 2019 Mediation Colloquium, a group of meeting attendees established the independent **ISDS Mediation Working Group**. The Working Group seeks to build on the Colloquium by engaging the investor-state mediation community, including mediation practitioners, academics, ADR Institutions, law firms and State and NGO representatives. Its goal is to identify ways for stakeholders to expand the effective use of mediation in Investor-State disputes, obstacles to using mediation in this context, and options to assist in developing the use of mediation to resolve investor-state disputes.

This **2020 ISDS Mediation Working Group Report** is the working group's first output. In order to increase transparency around the goals and interests of ISDS stakeholders, this report makes the key findings and points of discussion of the 2019 Colloquium public. It includes a summary of the discussion as well as additional insights, though not all points are necessarily endorsed by all colloquium participants.

Because this report does not draw on representative samples or focus groups, but on the input provided by the Colloquium participants and Working Group members, it does not claim to represent all stakeholder interests in its full complexity. A large part of this report is in "notes" form (based on the 2019 Colloquium) because the Working Groups sees value in disseminating these insights to carry the discussion forward.

The report is guided by the premise that a transparent and comprehensive exchange of different perspectives is crucial to advance a productive discussion of the benefits and obstacles of mediation to resolve investor-states disputes. The 2020 coronavirus pandemic and its economic consequences make the search for new, creative ways to resolve complex disputes even more important. Mediation can play an important role in increasing stakeholder engagement, identifying options for mutual gain, and reducing time and resources spent on resolving disputes.

The ISDS Mediation Working Group

London, UK

June 2020

II. Summary

A. Take-Aways

1. **New forms of resolving investor-state disputes** should address the lack of transparency in current ISDS processes, enhance governance structures to allow officials to take responsibility, and they should be grounded in an assessment-based process design.
2. Stakeholders should promote a **broader range of interventions** at different stages of an investor-state dispute's development – up to and including formal mediation. Private, facilitated discussions should be available as an option prior to the initiation of formal mediation or arbitration proceedings.
3. Institutions should focus on **facilitation and mediation capacity building**. They should identify and train a broader pool of facilitators capable of navigating issues at different points of ISDS processes. States could work on developing a single point of contact that the parties can rely on.
4. Stakeholders should adopt a system that promotes two-way communication, open to both states and investors, that allows them to **better share information and initiate a discussion at any point** – from a mere question, to a problem, to a dispute – to enable them to better engage each other and avoid disputes, as well as maintain alignment.
5. States would likely promote these proposals within civil society if they saw them as an appropriate vehicle to manage relations with investors and to avoid and resolve disputes. When state and civil society stakeholders view investment as a means to **sustainable development**, they will be more likely to work to attract, retain, and protect investments.

B. Suggestions

6. Organize a **regional workshop** focused on senior governmental officials with authority and responsibility for investment promotion and protection, potentially supported by Singapore and other multilateral/academic institutions knowledgeable about ISDS/dispute resolution.
7. Focus on state actors (structure, authority, responsibility) with **regional focus on Central Asia**.
8. Work with **arbitration lawyers** to bring them on board with the shift in approach towards other forms of dispute resolution, i.e. mediation.
9. Develop **teaching materials**, case studies of past investment disputes, and scenarios that allow people to learn about new dispute prevention and resolution techniques.
10. Create a **working group** whose agenda would include the creation of online teaching materials that provide diplomats with information on dispute resolution as it connects to classical diplomacy and to sustainable development. It would also include the creation of a general menu of dispute resolution alternatives for treaty negotiators.

III. Report

A. Framing the Issues

Investor-state dispute settlement (ISDS) is a dispute resolution process that allows foreign investors in any given State to see their investment protected via access to justice, mostly provided by arbitration since the 1970s. ISDS is mostly a creature of public international law and its provisions are contained inter alia in a bilateral investment treaties (BITs). ISDS is also found in multilateral investment agreements (MIAs), such as the Energy Charter Treaty (ECT). Most ISDS provisions in these instruments refer to ISDS under the auspices of the International Centre for Settlement of Investment Disputes (ICSID), which was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which established.

BITs and MIAs both grant investors certain rights and specify the mechanisms that can be used to resolve disputes with States. Investor-State arbitration is one such mechanism within the ISDS system, which allows the investors to bring a case before an arbitration tribunal against the host state if their rights, as granted by the treaty, are violated. Currently, the legal protection of Foreign Direct Investment (FDI) under public international law is guaranteed by a network of more than 3500 BITs and MIAs. The majority of these legal instruments provides foreign investors with a substantive legal protection (including, e.g., the right to “fair and equitable treatment”, “full protection and security”, “free transfer of means” and the right not to be directly or indirectly expropriated without full compensation), and access to ISDS for redress against Host States for breaches of such protection.

Dispute resolution services may be carried out by tribunals deciding under the auspices of an Arbitration Center or Institution such as ICSID, ICC or the Stockholm Chamber or administered by an Institution such as the PCA. Other tribunals may be deciding in an ad hoc manner using, for example UNCITRAL arbitration rules. However, investor-State arbitration may also be carried out under the auspices of international arbitral tribunals governed by different rules or institutions, such as the Permanent Court of Arbitration (PCA) in The Hague, the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC) and the Hong Kong International Arbitration Centre (HKIAC).

B. Challenges to ISDS

In recent years various actors, including the United States and the EU, have criticized ISDS, and primarily its investment arbitration process, for an alleged lack of transparency, excessive secrecy, and for allegedly infringing on sovereign rights without any accountability or appeal. ISDS is also accused of being one-sided since it protects the investor but not the Host State; and because the investor is often the only one to benefit from access to justice, given that a number of tribunals have decided that states are not allowed to file counterclaims against investors.

Today, the largest infrastructure investment strategy on the planet is China’s Belt and Road Initiative (BRI) with a legal ecology that relies exclusively on BITs. BRI projects will inevitably create challenges and necessitate a fresh look at the dispute resolution mechanisms included within these BITs, many of which rely on ISDS to safeguard FDI within the Eurasian and BRI Participating States.

C. The Search for ISDS Alternatives

States have been increasingly looking for ways to improve the current ISDS system or for alternative mechanisms that can be adopted. Many recent BITs feature a mediation provision in addition to investment arbitration for free trade and investment agreements, such as the EU–Canada Comprehensive Economic and Trade Agreement (CETA), the attempted Trans-Pacific Partnership (TPP) and now the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The “IBA Rules on Investor-State Mediation” provide a legal framework specifically designed for mediation in the ISDS context. The Energy Charter Treaty (ECT) has been encouraging the use of mediation in ISDS. In July 2016, the Energy Charter Conference approved a “Guide on Investment Mediation” to set out ways in which mediation might be used in relation to disputes arising in an investment context. An additional step was taken by the Energy Charter Conference on December 3, 2018 when it recommended the Model Instrument on Management of Investment Disputes as a framework for States to prevent, manage, and resolve investment disputes, thereby permitting States to create an internal process that enables officials to negotiate, mediate, and settle disputes.

Reform of the ISDS system has become the focus of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The mandate of the working group was set at the 50th session of the UNCITRAL in July 2017, and the working group began its work in November 2017. It comprises member and observer states as well as observer intergovernmental and non-governmental organizations. As such, the working group, while benefiting from the widest possible breadth of available expertise from all stakeholders, remains government-led.

The working group has agreed that there are sufficient concerns with the ISDS system to warrant reform and is considering possible solutions to address them. The working group’s mandate is: (1) to identify and consider concerns regarding investor-state dispute settlement; (2) to consider whether reform was desirable in the light of any identified concerns; and (3) if it concluded that reform was desirable, to develop any relevant solutions to be recommended to the commission. The group has made progress in its meetings to date, identifying concerns and considering whether procedural (not substantive) reform in those areas was desirable. The identified concerns fell into three categories: (1) concerns pertaining to consistency, coherence, predictability and correctness of arbitral awards; (2) concerns pertaining to arbitrators and decision-makers; and (3) concerns pertaining to cost and duration of ISDS cases (with focus on arbitration proceedings). Mediation was included as a possible tool to consider in the submissions of several States.

On the mediation front, the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (the "Singapore Convention on Mediation") was adopted on 20 December 2018 and was open for signature on 7 August 2019 in Singapore and, thereafter, at the United Nations headquarters in New York. The Singapore Convention on Mediation applies to international settlement agreements of commercial disputes resulting from mediation (“settlement agreements”). It establishes a harmonized legal framework for the right to invoke settlement agreements as well as for their enforcement.

The Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving commercial disputes. As a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation, thereby contributing to the Sustainable Development Goals (SDG), mainly the SDG 16.

In August 2018, ICSID proposed to its 151 Member States the first set of institutional mediation rules specifically designed for investor-State disputes. Since then, the ICSID Secretariat has engaged in stakeholder consultations with States and the general public. States have welcomed the proposed mediation framework, which is expected to be adopted later this year.

There has also been a cooperative effort by ICSID, the Energy Charter Secretariat and CEDR to run training programs for IS mediators. Programs have been held in Washington, Paris and Hong Kong. It is anticipated that with a growing cadre of trained mediators capable of understanding the complexities and process of ISDS, states and investors will become more confident in using mediation in a number of these disputes.

It is clear from the ongoing activities to review and improve ISDS that states and investors are looking for new ways to approach these disputes. It remains to be seen whether some of the improvements, if adopted, will undermine investor confidence in the regime and negatively affect investment flows. While some are advocating changes such as the replacement of the arbitral process with an International Commercial Court, there are tools already in existence, such as mediation, to bring about more amicable resolution of these disputes.

D. Colloquium Insights

The 2019 ISDS Mediation Colloquium featured several key topics of discussion. Below, we list some of the key insights from diverse experts and stakeholders in attendance. These insights do not necessarily represent points of consensus among all those convened.

- It is important to view mediation as *assisted negotiation*. Losing sight of this can cause misunderstandings about what mediation is trying to accomplish, and what its place should be in the ISDS system. The need for ‘assistance’ in negotiations creates a desire on both sides to obtain help, voluntarily, from a *neutral* party. Identifying this neutral party in various scenarios is one of the major challenges facing mediation processes within ISDS.
- Careful mapping of stakeholders and their interests in each type of dispute can enable us to identify areas of common ground and deep differences, as well as help to find linkages to parties outside of the central dispute that could act as a bridge between the main conflicting parties.
- Transparency as a goal in ISDS creates certain problems. While desirable from a normative perspective, it can hinder efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that can lead to posturing and unproductive dialogue.
- There is also a clear benefit to political actors in relying on processes that are legally binding (as in arbitration). Political actors may prefer to engage in a formalized dispute with a designated arbitrator because even where the outcome is not in their favor, they can shift the blame for said outcome onto the ‘higher powers’ that made the ruling. By contrast, they are more directly responsible for the outcome of any agreement reached via mediation between the two parties. So, there is potentially a lack of incentive for governments to adopt and political actors to enter into mediation processes.
- For companies that are multifaceted and conduct a variety of types of business in different countries, bringing a formal arbitration claim can be counter-productive. For these types of businesses, it may be more prudent to accept even egregious violations by host states because a public confrontation with the government is likely to lead to negative repercussions in their future transactions with this state. In some ways, then,

companies can face pressure to accept a state's infringements upon formal arrangements in the current ISDS system.

- There are two major obstacles to the more effective implementation of mediation in ISDS: (1) a lack of awareness of mediation as an alternative to arbitration, and (2) the lack of a formal, legal framework to support mediation and mediated settlements.
- A potential challenge to wider implementation of mediation in ISDS is the divergence in *rule by law* vs. *rule of law* from state to state. Mechanisms that are put in place to institutionalize mediation as a viable alternative must be sensitive to differences in the way that power is distributed (and decisions are made) in various cultures.
- There are three primary approaches to dispute resolution: (1) Power-based (e.g. labor strikes), (2) Rights-based (e.g. courts, arbitration), and (3) Interest-based (this is where mediation can be most effective: by appealing to the sides' interest in finding a mutually beneficial resolution).
- The idea of "mediation" perhaps needs to be framed in a different manner. The term "mediation" can evoke a sense of a formalized system of dispute resolution that may bring in the confrontational aspects of arbitration and legal proceedings. The challenge lies in creating informal systems that can take effect *prior* to the crystallization of a more formal dispute. The ideal *timing* of mediation along the timeline of a conflict's development is thus a central question.
- A significant challenge of our time is the growing rhetoric, particularly in politics, that the "system" writ large (ISDS included) is corrupt. This is likely to taint any alternative systems that are proposed, including mediation. We must therefore consider how to reverse this rhetorical trend and regain the trust that is necessary to legitimize any dispute settlement or mediation system.
- While the conventional wisdom is that law firms are opposed to mediation, in recent years several international firms have developed models to make a profit from mediated settlements. Lawyers may not be the obstacle they were once perceived to be.

E. Colloquium Output

At the conclusion of the Colloquium the following key points were identified:

1. Issues, stakeholders, and obstacles around Investor-State Disputes

- a. There are three primary approaches to dispute resolution: (1) Power-based (e.g. labor strikes), (2) Rights-based (e.g. courts, arbitration), and (3) Interest-based (this is where mediation can be most effective: by assisting all parties in integrating their varied interests into a mutually beneficial resolution).
- b. Obstacles: (i) avoiding responsibility, (ii) fear of criticism, (iii) political risk, (iv) governance structure, and (v) fear of setting a precedent.
- c. Challenges: (i) judicial sovereignty, (ii) fragmentation of ISDS mechanisms, and (iii) ISDS originally created for investment contracts but also incorporated in treaty provisions.

Output

- ISDS reform needs to be responded to but reform must also address the needs of host countries and investors today. (Ideas: 1. BRI disputes do not arise under a single agreement but spread over a variety of agreements. Could be resolved through a Treaty

Based Comprehensive Belt and Road Initiative; 2. Europe-led initiative: creation of a Multilateral Court and Appellate Mechanism that will import certain features from arbitration and WTO panels in place of the current investment arbitration system; 3. Reform-led initiative, e.g. UNCITRAL WGIII)

- Greater transparency is demanded by critics, but transparency as a goal in ISDS creates certain problems. While desirable from a normative perspective, it can hinder efforts at mediation by exposing early stages of discussions to public scrutiny, thereby creating pressure that can lead to posturing and unproductive dialogue. More research and discussion is required in this area.
- New forms of resolving investor-state disputes should enhance governance structures to allow State officials to take responsibility for effective dispute resolution and should be grounded in an assessment-based process design.

2. Realigning actors and relationships towards more effective dispute resolution

- a. Room to maneuver by providing training and building awareness of mediation.
- b. Realigning interaction with system
- c. Mediation = assisted negotiation
- d. BITs often have mediation clause
- e. Need to control mediation from beginning
- f. Define mediation
- g. Parties/stakeholders
- h. Voluntary interaction
- i. Assisted by neutral party (n+ 1th) Voluntarily accepted
- j. Identify parties and dynamics

Output

- Stakeholders should promote a broader range of interventions at different stages of an IS dispute's development – up to and including formal mediation.
- Private, facilitated discussions should be available as an option prior to the initiation of formal mediation or arbitration proceedings.
- Interest mapping / Sector Review
- Corporations share certain interests with NGOs, NGOs share certain interests with government, etc. It's not just black and white.
- Anticipate & engage stakeholders with indirect ties
- Negotiation networks mapping = effective way to analyze these ties; can be used to craft negotiation and mediation strategies
- Put into treaty: rules before fight
- Who is mediator? Define/assess med.
- Sides declines to participate in formal process cannot be neutral
- OECD mediation – NCP process Mediation ex. In India/Philippines

3. Assessing current models of Investor-State Mediation

- a. Investor-State Mediation is new and its effectiveness has not yet been systematically tested. Several factors are mentioned which are key to whether Investor-State Mediation is successful or not: drivers, stakeholders, institutional and systematic changes.
- b. There are terminological debates among ISDS community, however, things are moving. Two barriers were identified for the implementation of Investor-State Mediation: a) lack of awareness; (b) absence of a legal framework. In order to overcome these barriers, a few solutions were proposed. First, an investment mediation guide along with frameworks need to be developed. This guide will include: clear rules surrounding mediation in ISDS, how it works, and where it works. Such frameworks need to be institutionalized. Second, awareness needs to be raised through confidence-building.
- c. Recently developed ICSID rules for dispute settlement. Things are improving in the field of investor-state mediation compared to three years ago. New ICSID mediation rules cover who can be actors and how parties get secure consent.
- d. Contextual or cultural difference; b) Understanding the local rules (both rule of law and rule by law).
- e. Singapore Convention. There are to date 52 signatories to the convention. Foreseeable benefits of Singapore convention in international trade. The convention does not dictate under what mediation rules dispute resolution can take place.

4. Defining criteria and goals of new ISM arrangements

- a. Not a new problem; we've had a natural tension between states and investors for a long time, state/government may change the bargain they are offering
- b. What are the origins of instability? It's about trying to find the right balance; how do you balance the needs of the investor and the state (need for protecting assets, need to get reelected, etc.)
- c. It is the fact that we have an ISDS system in place that allows disputes to be headed off prior to big conflicts
- d. When a state is considering certain detrimental changes: you can have a discussion with them directly, thinking about commercial solutions before dispute becomes formalized
- e. So, what is the timing where mediation is most effective?
- f. World is polarized by rhetoric that the system is corrupt: politicians demonizing the system encourages the ongoing rhetoric
- g. How do we reverse this trend? How do we get the government and investors to agree that a given system is good for all sides?
- h. What we do next: promotion of mediation – talking about commercial/domestic mediation in China, this is relatively new to us
- i. We've largely ignored mediation within arbitration; and this is unfortunate
- j. In Japan there are not that many arbitration cases
- k. Chinese enterprises in the international context are not used to making claims because of the cost and risk of ruining the long-term relationship

- l. So there's actually big room for mediation; we just don't know how to do investor/state mediation
- m. When we talk about the criteria/process: should it be driven by institutions or individuals in a more ad hoc manner
- n. Merchant guilds in the medieval times? Has characteristics of transcending borders of nation states
- o. Oil spill case: appointed Feinberg to design process handling oil spill cases?
- p. They try to solve it by themselves using administrative means
- q. Mediator needs to be particularly qualified, from law, technical, regional expertise, etc.
- r. How can we bring greater transparency/accountability
- s. Has to be a voluntary process
- t. Mandatory mediation? If we don't fixate on settlement, then we see mediation as a process and not event
- u. Contracts containing mediation provisions are good because half the magic of mediation is just in convening the parties
- v. Analytics and benchmarks - see where mediation is working and working well - need empirical data
- w. Simply by reframing disputes as a problem needing a solution has permitted ODR to pick up a following

Output

1. Institutions should focus on facilitation and mediation capacity building. They should identify and train a broader pool of facilitators capable of navigating issues at different points of ISDS processes. States could work on developing a single point of contact that the parties can rely on and put processes in place to permit mediation to be used effectively.
2. Dispute prevention v. dispute resolution – additional questions:
 - a. If the dispute is likely to come as a result of a regulatory change, you can go upstream to address the quality of rulemaking and regulatory practice
 - b. To what degree has the dispute resolution community connected with the investment attraction community?
 - c. Those groups working on attracting investments have a clear interest in effective dispute settlement.
 - d. How do you combat lawyers' incentives to encourage direct dispute mechanisms because they see more money there
 - e. Qualifications of mediators in this area? This is an extraordinarily complex area with a lot of pressure on the mediator given the caliber of people advising each side
 - f. To move the ball forward you are going to have to build a trust relationship
3. Tools and techniques
 - a. Early dispute management
 - b. Compulsory mediation

- c. Transparency
- d. Prevention and amicable resolution: 1. Clarification of the regulations, 2. Creation of agency addressing issues in this regulatory area
- e. Need to provide technical assistance for training, capacity building, guidance, participation of developing countries
- f. Database of treaty practice, institutional support, domestic laws and cases
- g. Organization: at some point the goal may be to establish a fully-fledged mediation center

5. Capturing observations, principles, and potential stakeholder moves

- a. There is both room and need for mediation and/or assisted negotiation in this space
- b. When we talk about mediation, we talk about the various forms it could take from informal to mandatory mediation
- c. Value in engagement at different points along the timeline
- d. One of the objectives is we need to get a credible process run by the right mediators
- e. Use of word “mediation:” early part of the process, parties will claim they do not need it
- f. Continuum from informality to formality
- g. Define mediation broadly
- h. There needs to be a means of engagement beyond invoking a formal mediation process
- i. Earlier, less formal process could involve a ‘neutral,’ a ‘facilitator’
- j. Transparency issue: energy policy should be transparent to avoid [what?]
- k. Those involved in the dispute need to make a call about who should be involved in the discussion
- l. Informal: not public; how transparent, etc. will be governed in different ways from country to country

Output

- Stakeholders should adopt a system that promotes a two-way street communication, open to both states and investors, that allows them to better share information and initiate a discussion at any point – whether it relates to a mere question, to a problem, or a dispute – to enable them to better engage each other and avoid disputes, as well as maintain alignment.
- States should be encouraged to promote these proposals within civil society as an appropriate vehicle for managing relations with investors and to avoid and resolve disputes. An understanding of why stakeholders want to make investments is needed in order to convince other stakeholders that it must be protected.
- Specifically, it is important to understand investment as a means to the ends of sustainable development and how dispute resolution mechanisms, such as mediation, lead to more stable and long-term investment environments.

IV. Appendix

A. ISDS Mediation Sector Review: Case Types and Stakeholder Interests

compiled by the Negotiation Task Force

1. State seizure/nationalization [NAT]

E.g. Anaconda Copper

The state takes over, seizes or nationalizes the investor's property and/or investments. This might be done directly through expropriation or indirectly through a series of measures that diminish the investor's economic interests to an unacceptable low level. The investor generally brings a claim against the state for compensation in the form of damages or to regain control of their property.

State's Interests: Seize corporate assets with minimum damage to the assets or the state's reputation; offer little to no compensation to company.

Corporation's Interests: Regain or retain control of expropriated assets; alternatively, obtain compensation for loss of economic interests in the form of damages.

NGO Interests: Protect the rule of law.

2. State introduces regulations that affect an investor's economic return [REG]

E.g. unilateral changes imposed on oil and gas concessions in Ecuador, Bolivia and Venezuela from 2004-2010

The state enacts a regulation or policy that increases the government 'take,' adversely impacting investor profits. The investor brings a claim against the state under its contractual and treaty protections to maintain their economic position, either by revoking the law or to through compensation in damages.

State's Interests: Institute regulations that effectively protect the public; retain sovereign control of creating or altering national regulation; offer little to no compensation to the company.

Corporation's Interests: Maintain agreed economic balance and contract/treaty protections; secure revocation of new regulations that have changed the existing bargain; obtain fair compensation for damages caused by the new regulations.

NGO Interests: Protect ability of government to enact regulatory measures that protect citizens even when unfavorable to corporate investors.

3. Changes in domestic legislation affecting operational costs [LEG]

E.g., Veolia vs. Egypt

A legislative change at the state or sub-state level changes the conditions on the ground for the investor, increasing its cost of operations and diminishing its economic return. The investor may initiate a claim for compensation for the impact the changes have on its profits.

State's Interests: Institute regulations that effectively protect the public; retain sovereign control of creating or altering national regulation; offer little to no compensation to the company.

Corporation's Interests: Ensure revision of new legislation to maintain the existing economic stability for its investment as agreed with the State; obtain fair compensation for any damages caused by new legislation.

NGO Interests: Protect ability of government to enact laws that improve the economic wellbeing of their citizens.

4. Domestic court judgement [CRT]

E.g. Ecuador vs. Chevron

If a decision is made in a domestic court that contravenes the terms of the investor's agreement with the State, the investor may initiate a claim in the appropriate forum (international or in another country) to prevent that decision from being enforced.

State's Interests: Keep case in national court system to control the outcome of the dispute and receive positive publicity or, possibly, a share of the settlement; prevent meddling of foreign actors in domestic problems.

Corporation's Interests: Overturn an adverse judicial outcome in a domestic court; ensure an impartial and independent review is undertaken of the claim; undo reputational damage caused by domestic judgement; avoid domestic court fines.

NGO Interests: Ensure that affected citizens are fairly compensated, especially in cases when neither national governments nor international corporations are motivated to provide said compensation to do so.

5. Relationship management [REL]

State's Interests: Demonstrate ability to implement, change and enforce national legislation; reduce domestic criticism about being captured by foreign interests; maintain reputation for positive investment climate.

Corporation's Interests: Preserve relationship with governments to secure future contracts; minimize publicity; protect investor reputation; maintain predictable relationship with government regardless of administration.

NGO Interests: Promote relationships that are based on transparent legal frameworks and that don't prioritize corporate interests over environmental and other concerns; increase transparency; promote anti-corruption measures; resolve disputes publicly to prevent nefarious behavior.

Note: There are secondary corporate considerations that apply to cases across the board. Namely, if corporations enter into a formal dispute, there is likely a desire for the outcome (if it is a win) to serve as a precedent for other countries to observe. Equally important, however, is a firm's consideration of the future relationship with a country: if they can, companies will try to preserve relationships with states that could still prove to be valuable partners down the line.

B. Contributions

The following 2019 ISDS Mediation Colloquium participants and ISDS Mediation Working Group members¹ have contributed to this report:

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