

Kluwer Arbitration Blog

Investor-State Arbitration Meets Mediation: Developments, Intersections and Future Trajectories

Esmé Shirlow (Associate Editor) (Australian National University) · Monday, September 28th, 2020

Arbitration has undoubtedly become the dominant international procedure for settling investor-State disputes. Over the years, we have published various [posts](#) on the Blog that have considered intersections and tensions between arbitration and other, alternative, forms of investor-State dispute settlement ('ISDS'). To mark this month's [entry into force](#) of the Singapore Convention on Mediation, our series this week develops on this theme. We will be exploring whether investor-State mediation can become an alternative (or supplement) to investor-State arbitration and, if so, what the potential benefits, risks and features of such a development might be. We will also be highlighting the close linkages between investor-State mediation and arbitration, including their connection in institutional reform efforts and regional innovations.

Mediation as an Alternative (or Supplement?) to Investor-State Arbitration

Investor-State disputes could conceivably be settled through a range of procedures, including through negotiation, recourse to contractually-selected fora, claims in domestic courts, diplomatic protection, mediation, conciliation, arbitration, or even international judicial settlement. In recent years, stakeholders in the investment treaty regime have shown increased interest in exploring non-arbitral options for the settlement of investment disputes. While the European Union's 'multilateral investment court' proposal [has garnered](#) much interest, other modes of dispute settlement are increasingly being proffered as additional alternatives to remedy some of investor-State arbitration's perceived deficiencies. Investor-State mediation, in particular, is gaining increased prominence in reform agendas.

'Mediation' refers to a dispute settlement process in which a third party assists the disputing parties to resolve their dispute. Mediations can alter the dynamics between the parties to assist them to communicate and even reach agreement about the outcome of their dispute. It is also typically more flexible and potentially cheaper than investor-State arbitration. These features mean that it holds particular advantages over arbitration for parties to investor-State disputes. In the first post of our series, Rachel Tan Xi'en will explore these potential strengths of mediation in more detail. Her post will also introduce the recent developments that have precipitated an increased interest in (and the viability of) mediation for investor-State disputes. To do so, Rachel's post will explore the enforcement possibilities provided by the Singapore Convention on Mediation, and further examine some of mediation's potential benefits to parties to investor-State disputes vis-à-vis

arbitration.

Despite the potential advantages of mediation compared to arbitration, there are reasons to be cautious about this form of investor-State dispute settlement. In the next post in our series, I will highlight some of the drawbacks of mediation as compared to arbitration for investor-State disputes. This post unpacks the possible challenges – to both institutions and parties – that might be associated with a shift from investor-State arbitration to mediation. I will examine, in particular, how mediation may cut against some of the important reforms that have taken place with regard to investor-State arbitration. This highlights the importance of pursuing ISDS reforms holistically and cohesively.

Both of these posts set the scene for the rest of the series, which examines specific institutional, legal and policy developments that indicate the likelihood of an increased interaction between arbitration and mediation as ISDS options for future disputes. While investment treaties have long noted non-arbitral options for the settlement of investment disputes, the institutional and regional developments highlighted in the remaining posts of the series indicate that investor-State mediation is likely to become an increasingly frequent (and popular) choice, necessitating deeper consideration by arbitration practitioners as to its merits, challenges, and intersections with the arbitration regime.

Institutional Reforms to Arbitration and Investor-State Mediation

States and arbitral institutions have undertaken efforts in recent years to increase the use of mediation as a method for settling investor-State disputes. Both the UNCITRAL and ICSID reform processes, in particular, have emphasised the possible utility of developing mediation as an alternative investor-State dispute settlement method. UNCITRAL’s Working Group III has [noted](#), in particular, “a generally-shared view that alternative dispute resolution methods, including mediation ... could operate to prevent the escalation of disputes to arbitration and could alleviate concerns about the costs and duration of arbitration”. Procedural reform of investor-State mediation falls within the mandate of [Working Group III](#), which has been tasked with considering possible reform options for investor-State dispute settlement generally, not just investor-State arbitration.

As Charalampos Giannakopoulos will highlight in his post, the developments occurring within UNCITRAL’s ISDS reform discussions that may pave a way for an increasing intersection – or even replacement – of arbitration with mediation in future investor-State disputes. Charalampos’ post further highlights the institutional nexus between investor-State arbitration and mediation, noting a distinct likelihood that the institutions that to date have held an important role vis-à-vis investor-State arbitration will in the future also hold an important role in any institutionalised mediation efforts.

UNCITRAL is not alone in considering the possible use of mediation to offset some of investor-State arbitration’s perceived disadvantages. The ICSID Secretariat, for example, has also proposed a new set of investor-State Mediation Rules as part of its reform process. The Secretariat has [indicated](#) that the intention behind these Rules is to “respond to the requests of stakeholders to provide greater mediation capacity”. ICSID’s proposed mediation mechanism would sit within its Additional Facility, such that parties opting for mediation under the Rules would not be bound by

the Convention's jurisdictional constraints. The proposed Mediation Rules as drafted envisage "a very flexible process" in which the mediator would endeavour to "find a mutually agreeable resolution of all or part of the dispute". The Secretariat has noted its hope that these reforms, as well as other proposed amendments to the ICSID Fact-Finding and Conciliation Rules, will provide parties to investor-State disputes with "a range of modern dispute settlement options", which can be used "individually, or at times in parallel".

Will the Balance between Investor-State Mediation and Arbitration be Navigated Differently in Different Regions?

In addition to the above institutional developments, States in their treaties and domestic practice have also signalled interest in exploring mediation as a potential alternative, or supplement, to investor-State arbitration. Certain regions and States, in particular, have proven to be early-adopters of such reform options. The final three posts in our series will explore these developments from regional and national perspectives.

We will have two posts highlighting regional innovations concerning investor-State mediation and arbitration reform.

John Sabet will explore increasing regional norm-setting in Africa favouring alternative dispute resolution for investor-State disputes. John's post engages, in particular, with the innovations vis-à-vis the arbitration/mediation nexus that have been effected by several recent instruments adopted by States in that region, including the Pan-African Investment Code (which in Article 42 encourages parties to investor-State disputes to have recourse to non-arbitral means of settlement).

Romesh Weeramantry, Brian Chang, and Joel Sherard-Chow will explore the regional efforts of Asian States that have emphasised the role of mediation (and conciliation) as an alternative, or precursor, to investor-State arbitration. They note both historical and contemporary examples of these design choices in investment treaties, including to highlight an increasing incidence of *mandatory* pre-arbitration mediation in investment treaties involving Asian States (including the recent [Hong Kong-United Arab Emirates BIT](#) and [Indonesia-Australia CEPA](#)).

We will conclude the series with a post by Mushegh Manukyan that examines national efforts to redesign the mediation/arbitration nexus. Mushegh's post distinguishes between options to foster investor-State mediation from the 'outside' (including through the international institutional and regional reforms noted above) to those designed to foster investor-State mediation 'from within'. Mushegh's post examines various national mediation reform efforts, including efforts designed to strengthen national mediation capacities to reduce the elevation of investment disputes to international arbitration proceedings. Mushegh analyses, in particular, the prospects for developing national ombudsman mechanisms as a means of resolving disputes prior to the filing of arbitration claims.

We hope that these posts will collectively highlight some of the intersections between mediation and arbitration in the investor-State context, to illuminate key recent developments and possible future trajectories. We look forward to unpacking the connections and tensions between these modes of dispute settlement and hope you enjoy the series this week!


This post is part of a series on the relationship between investor-State arbitration and mediation. To see our full series of posts on this topic, click [here](#)

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).


Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

 Wolters Kluwer

This entry was posted on Monday, September 28th, 2020 at 8:00 am and is filed under [International Investment Arbitration](#), [International Mediation](#), [Investment Arbitration](#), [Investment Disputes](#), [Investment Treaties](#), [investor-State arbitration and mediation](#), [Mediation](#), [Mediation and Dispute Management](#)

You can follow any responses to this entry through the [Comments \(RSS\) feed](#). You can leave a response, or [trackback](#) from your own site.

