Investor — state mediation: how the landscape is changing

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Nadja Alexander (Editor)
Singapore International Dispute Resolution Academy

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More than half the respondents to the International Dispute Resolution Academy’s (SIDRA) previous Survey identified mediation as a desirable reform measure for investor-state dispute resolution. Amongst other things, SIDRA’s recent publication has identified in users’ responses to the previous Survey published by the SIDRA that mediation as a desirable alternative to investor-state arbitration is now a serious and growing interest. This finding seems to reflect the fact that mediation can offer numerous advantages over traditional arbitration. For example, mediation can be faster, cheaper, and more flexible. It can also be more confidential and less adversarial. Mediation can also offer more opportunities for creative solutions. Finally, mediation can preserve the relationship between the parties, which is important in many cases.

Albeit the investor-state dispute resolution landscape is undergoing a variety of reforms. Investors and states are now forced to use a variety of dispute-resolution mechanisms in their investment agreement, with non-adversarial means gaining prominence. By way of example, the Singapore International Dispute Resolution Act 2019 provides a structured framework for the use of mediation. Annex 6 provides a set of procedural rules applicable to mediation, such as the initiation of mediation proceedings, agreement of the mediator, timeframe of mediation, and the implementation of a mutually agreed solution. One of the interesting points under this agreement is the role of the mediator. Article 4.3 of Annex 6 provides that the mediator may offer advice and propose a solution for consideration of the disputing parties who may accept or reject the proposed solution. This is in line with the practice of mediation as a facilitative means for the resolution of disputes.

In another illustration, the EU-Singapore Investment Protection Agreement, which was signed on 30 June 2019 and at the time of writing has not come into force, provides for mediation as a voluntary means for the settlement of investment disputes. Annex 7 of the Agreement also provides a code of conduct applicable to the tribunal, mediator, and mediators appointed under this agreement, which is a novel feature of investment mediation agreements. The role of the mediator goes beyond facilitating negotiations between disputing parties and embraces a more evaluative approach. The mediator may offer advice and propose a solution for consideration of the disputing parties who may accept or reject the proposed solution. As it is clear from this provision, the role of the mediator in the EU-Singapore Investment Protection Agreement is the role of the mediator. Article 4.3 of Annex 6 provides that the mediator may offer advice and propose a solution for consideration of the disputing parties who may accept or reject the proposed solution. This is in line with the practice of mediation as a facilitative means for the resolution of disputes.

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