# Kluwer Mediation Blog

## Investor-State Mediation: New IBA Rules

Rafal Morek (DWF LLP) · Friday, November 9th, 2012

(Foreign) investor – (host) State disputes are for many reasons an intriguing and fast developing part of legal and dispute resolution practice. Since the late 1990s, the number of such disputes has increased sharply: In 1997, 19 known cases were brought against states. By 2007, there were over 250 known cases, and more than 450 by the end of 2011.

Some of them are enormous in terms of the amounts at stake and potential impact on the parties to the dispute. Others are just large. In the history of ICSID (*International Centre for Settlement of Investment Disputes*), the lowest awarded amount ever was US$ 460,000 (*Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award of June 27, 1990) and the highest – US$ 1,769,625,000 (*Occidental v. Ecuador*, ICSID Case No. ARB/06/11, Award of October 5, 2012). As of 30 June 2012, ICSID's registered cases were distributed across the economic sectors as follows: oil, gas, and mining (25%), electricity and other energy (13%), other industries (12%), transportation (11%), construction (7%), financial (7%), information and communication (6%), water, sanitation, and food protection (6%), agriculture, fishing, and forestry (5%), services and trade (4%), and tourism (4%).

Investor-State dispute settlement mechanisms allow foreign investors to challenge a wide range of governmental measures, and to sue host states before an arbitral tribunal, appointed on a case-by-case basis. Investment arbitration remains the most important form of dispute settlement in the relationship between states and foreign investors. Of the ICSID's caseload, 88% are convention arbitration cases (based on the 1965 ICSID Convention), 2% are convention conciliation cases, 9% are additional facility arbitration cases, and 1% is additional facility conciliation cases. For other (non-ICSID) investment cases, the use of conciliation would be probably even more limited.

However, increasing criticism against investment arbitration and its multiple shortcomings have emerged over the recent years. To put it mildly, in the words of Professor Ch. Schreuer: "the initial enthusiasm has given way to a more sober assessment." Increasingly, states and investors express concerns regarding the costs associated with the arbitration process. Some states are refusing to comply with arbitral awards. Other states hesitate to sign new bilateral investment treaties, or even rescind from old ones. Related issues attract the attention of the public.

As a positive side-effect of the criticism against investment arbitration, both investors and states as well as some international organizations such as UNCTAD, ICSID or IBA, are advocating for the increased use of mediation to supplement investor-State arbitration. For example, in 2011, ICSID, for the first time, designated to its roster ten individuals whom it considered to be particularly

suited to conciliation in investor-State cases. Previously, ICSID had always designated the same ten individuals to its arbitrator and conciliator roster (see the ICSID announcement). This change is significant. The list clearly confirms that the nature of mediation (conciliation) is fundamentally different from arbitration, and indirectly indicates the qualities ICSID finds important for mediating investment disputes.

The most recent development came in October 2012 when the International Bar Association (IBA) adopted new Rules for Investor State Mediation (the Rules). The Rules have been drafted by the IBA Subcommittee on State Mediation. They comprise twelve articles in total. While containing 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). The Rules also require the disclosure of any personal interest or potential conflict in a "statement of independence and availability", a template which is attached thereto.

Time will tell if the IBA Rules contribute to the increase in use of mediation in the investment cases. In general, mediation may be well suited for at least some disputes for two basic reasons: First, recourse to mediation may allow preservation or rebuilding of the sound relationship between the investor and the host State. Second, mediation makes it possible to seek an interest-based solution and go beyond monetary compensation as a primary remedy available in arbitration. In reality, in many cases, the fundamental interests of both parties (the investor and the State) may be surprisingly similar. The problem is that thus far it is just theory. Time for Change?

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