Kluwer Mediation Blog

Is Investor-State Mediation An Emerging Practice? A Practitioner's Perspective

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I have recently been approached to enrol myself in an investor-state mediation training programme and also to speak at one of the sessions. That triggers off my deeper thoughts on the topic of investor-state mediation and related issues. This blog is an attempt to share my thoughts so that fellow mediation practitioners may consider whether or not investor-state mediation is an area on which they should embark. It is also my hope that my sharing below will also make readers become more aware of the practice of investor-state mediation.

While there may not be a universally acceptable definition, investor-state mediation entails the resolution of investment disputes through the process of mediation between one party (or more than one party) being private, and the other party being a sovereign state.

Investor-state mediation often includes but is not limited to the following public law dimensions:

- Changes in investment incentive measures;
- Termination or interference of a contract by the state;
- Revocation of licences or permits; and
- Unexpected tariffs or taxation.

Investor-state mediation also involves international investment law issues such as,

- Expropriation;
- Alleged breach of the "fair and equitable" provision in the contract between the investor and the state; and
- Interpretation of investment treaties.

(*See* Recent Developments in Investor-State Dispute Settlement (ISDS) [IIA ISSUE Note, No. 1, 2014] Page 5; Also 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018 [IIA Issues Note, No. 2, 2019]', Page 4).

There has also been an increasing involvement of human rights in international investment law. Recently, human rights instruments such as UN Guiding Principles on Business and Human Rights and the "Zero Draft" treaty and an arbitral case *Urbaser v. Argentina* appear to impose an obligation on both states and companies to prevent human rights abuse in business operations.

As illustrated above, an investor-state mediator, in addition to the possession of usual mediation

and process skills, is expected to be knowledgeable about certain specialised legal dimensions as aforesaid which are not normally needed in the practice of private international commercial disputes.

Apart from the requirements of additional legal knowledge, a practitioner may consider whether there are too few disputes for investor-state mediators. While there has been tremendous growth in numbers of investor-state dispute settlement ("ISDS") since 1992, most of the disputes have been resolved by arbitration rather than mediation. That said, one should note that although mediation did not seem to be following the rising trend of investor-state arbitration, there has been a consistent use of mediation over the period. By way of figures, since 2003, on average for every two years, one mediation is being recorded. Besides, there is a possibility that investor-state disputes which had taken place under the veil of confidentiality are not reported and thus not known by outsiders resulting in the impression that investor-state mediation is the less preferred means of resolving disputes between states and investors.

In any event, there have been recent calls for reform on investor-state dispute resolution and one of which is the increase of the use of mediation. Investment mediation has been mentioned by delegations such as China, the United States and Albania (A/CN.9/930/Rev.1) during the course of the working sessions of UNCITRAL Working Group III. Besides, International Centre for Settlement of Investment Dispute ("ICSID") presented its third working paper on new stand-alone rules for mediation on 16 August 2019. With the signing of the Singapore Convention on 7 August 2019 by 46 states, enforcement of mediated settlement agreements will become a lot easier and more efficient. As such, it is likely that parties to investor-state disputes will be more willing to go for mediation.

States tend to deal with disputes not in the same way as their commercial counterparts because states generally have more non-commercial considerations (for example, the people's sentiment, criticism from the opposition party/parties, chance of the government being re-elected, and pressures from powerful neighbouring countries, etc.) If the first role of mediators is to identify the rights and interests of the parties, then it must be said that this role is even more difficult with the coming in of political issues. (*see* 'Report: Survey on Obstacles to Settlement of Investor-State Disputes').

Given that investor-state mediation is a very specialised practice, mediators intending to embark on this area of practice will need to receive specialised training. However, those who have received the specialised training may not be assigned to conduct disputes of this nature because the mediator, if appointed must have the trust of the private investor as well as the state. Mediators should also take note that while their skills and knowledge are important considerations for the parties, a mediator's nationality could also be a factor in the appointment process due to express or implicit nationality requirements. Busy international commercial mediators may find the practice of investor-state mediation less attractive if their consideration is purely from a commercial perspective.

While mediators must bear these challenges in mind, they will certainly see that there are always two sides of the same coin. The economic benefits brought by investor-state mediations could be significant. Investor-state disputes often involve claimants and respondents where one party originated from a developed country, and the other from a developing country. These disputes often relate to claims concerning investments on infrastructures, chiefly, information and communication, and the supply of energy resources and such activities are of utmost importance to

the two parties, namely the company from the developed country and the government of the developing country. Mediation, being a process with the aim of preserving ongoing relationships and creating win-win solutions has a higher chance of fuelling the pace of developing countries advancing toward a more prosperous future. (*See* Recent Developments in Investor-State Dispute Settlement (ISDS) [IIA Issue Note, No. 1, 2014], Figure 7; Fact Sheet on Investor-State Dispute Settlement Cases in 2018 [IIA Issues Note, No. 2, 2019], Page 3).

From another perspective, different jurisdictions and economic systems belonging to the same country need to resolve disputes in a prudent manner in order to avoid political tension. A prime example is the incorporation of a mediation mechanism for investment disputes between Hong Kong and the Mainland Government into the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) on 28 June 2017. Under the mechanism, disputes between Mainland Chinese investors and Hong Kong authorities can be brought to mediation on application to relevant institutions. Having such a mechanism will not only preserve and enhance the relationship between Hong Kong and Mainland China but also attract more trades and growth to the region. As such, the dispute resolution mechanism provided for Hong Kong investors in Mainland China and likewise, the dispute resolution mechanism provided for Mainland Chinese investors in Hong Kong only contain mediation mechanism without the installation of the arbitration mechanism.

From a personal development point of view, being included in an investor-state mediation panel would be an honour. Under the ICSID Convention, signatory-state can only provide 4 members to both the panel of arbitration and conciliation. It must be a person of “high moral character”, “with recognised competence in the field of law, commerce[…]” and who may be “relied upon to exercise independent judgment”. An appointment would thus be a recognition by the state, and proof to one’s qualities of character and professionalism.

While mediations may be conducted between personnel of the state and the private party, the bigger picture is that the dispute, if not resolved will affect the livelihood of many workers who make a living from foreign investments. Investors tend to invest in primary industries, and primary industries tend to rely on low-paid workers. As such, the mediation work to be involved is more than getting a settlement but a peace-making mission economically and politically.

Although no one could tell with certainty that investor-state mediation shall be the preferred way of resolving disputes between an investor and a sovereign state, a mediator, with the heart to serve, should not refuse an opportunity to receive training in investment law and investor-state mediation training as such training will certainly broaden one’s horizon. Therefore, I venture to appeal to mediators to participate in the practice of investor-state mediation and as a start consider going through the relevant training.

**Credits to Mr Bryan Lai, third year law student at the University of Sussex for his assistance in research on investor-state mediation.*

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