

# Kluwer Mediation Blog

## Investor-state disputes: how arbitration and mediation can intertwine to provide more resonant solutions

Rafal Morek (CMS) · Monday, February 19th, 2024

Singapore is widely known as a leading centre on the map of international mediation.

On 7 August 2019, a signing ceremony for the [United Nations Convention on International Settlement Agreements Resulting from Mediation](#), nowadays commonly known as the Singapore Convention, was held there. On 23 February 2024, Singapore will host the [25th International Bar Association \(IBA\) Arbitration Day](#). It is no coincidence that the conference programme will begin with a discussion on how arbitration and mediation can intertwine to provide more resonant solutions in investor state disputes.



### Investment Treaty Clauses on Mediation

A growing number of investment treaties include mediation clauses. The [UNCTAD database](#) of over 2,500 mapped International Investment Agreements shows that only 627 treaties contain a provision for Voluntary ADR (conciliation/mediation). Many recent investment treaties contain a state's standing offer to mediate, which is subsequently accepted by an investor (see [ICSID's Overview of Investment Treaty Clauses on Mediation](#)). Parties are free to agree on the scope of the mediation and may agree to submit all, or just some of the matters in dispute to mediation. Some countries have made it mandatory for investors to go through mediation before moving on to arbitration. In addition to numerous bilateral and multilateral investment treaties, the [International](#)

Centre for Settlement of Investment Disputes (ICSID) Convention also authorises conciliation and mediation.

However, most investment treaties still do not include mediation clauses. None of the investment treaties includes any mediation provisions mandatory for both parties. Attitudes toward mediation vary from country to country and depend amongst other factors on local legal culture and political choices (see e.g. Joel Evans' blog post on "[Is China Leading the Way for Investor-State Mediation?](#)").

### Statistics

Statistics on investment disputes do not provide clear conclusions on the scale of the use of mediation, which is often a confidential process. As [Frauke Nitschke](#) (ICSID) correctly observed on this blog, [statistics](#) reveal that about 30-40% of ICSID arbitrations are settled or otherwise discontinued before a final award, indicating that amicable resolution of investment disputes is not infrequent. Similar conclusions may be drawn from the [data published by UNCTAD](#). At the same time, the [ICSID statistics published in 2024](#) demonstrate that the official number of registered conciliation/mediation cases remains limited. In particular, the conciliation cases amount up to approx. 1.5% of all ICSID cases.

At the same time, it is emphasised that conciliation/mediation may be much more efficient and hence attractive than arbitration. On average, ICSID arbitration cases take around 3.6 years. As regards costs, the average amount spent is approximately USD 5.6 million for claimants and USD 4.9 million for respondents. These factors often represent a big burden for investors and states alike.

Against this background, the potential of mediation is still not fully exploited. For this to happen, it is necessary to integrate mediation into institutional arrangements and integrate it within early stages arbitration services.

### Investment Mediation Rules

While investor-state disputes may also be mediated under regular mediation rules (such as the [UNCITRAL Mediation Rules](#) (2021)), there are some mediation rules specifically designed for investor-state dispute settlements.

The [International Bar Association \(IBA\) Rules for Investor-State Mediation](#) (2012) are "*designed for the mediation of investment-related differences or disputes involving States and State entities*". The ICSID rules on [ICSID Convention Conciliation](#) and [Additional Facility Conciliation](#) have been in place for decades (see: editions 2006 and 2022). More recently, ICSID has also established the [Mediation Rules](#) (editions 2018 and 2022) that complement ICSID's rules for arbitration, conciliation and factfinding, and which may be used either independently of, or in conjunction with them.

The mediator's role in ICSID mediation is limited to assisting the parties in reaching a mutually acceptable resolution of all or part of the issues in dispute (Mediation Rule 17), whereas in ICSID conciliation, the mandate of the conciliation commission is broader and includes an obligation to "*clarify the issues in dispute*" (Article 34 of the Convention, Conciliation Rule 24, Additional Facility Conciliation Rule 32) (see [ICSID's Background Paper on Investment Mediation](#)).

The [Permanent Court of Arbitration \(PCA\) Optional Rules for Conciliation on Disputes Relating to Natural Resources and/or the Environment](#) "*reflect the public international law element*" pertaining to disputes with States, and "*provide freedom for the parties to choose to have a conciliation commission of one, three, or five persons.*"

### Mediation guidelines

There are also some non-binding documents prepared by different institutions to assist parties in

relation to investor-state mediation.

For example, in 2016 the Energy Charter Conference endorsed the [ECT Guide on Investment Mediation](#) as a helpful tool to facilitate the amicable resolution of investment disputes. The guide was prepared by the Energy Charter Secretariat with the support of several intergovernmental organizations and international dispute-resolution bodies. These included ICSID, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce (ICC), the International Court of Arbitration, the Permanent Court of Arbitration (PCA), the UN Commission on International Trade Law (UNCITRAL), the Centre for Effective Dispute Resolution (CEDR), and the International Mediation Institute (IMI).

In 2017, the Energy Charter Treaty Secretariat (ECT) published the [ECT Model Instrument on Managing Investment Disputes](#) recommended to its Member States, in order to permit them to engage in, amongst others things, mediation leading to a settlement agreement.

The aim of the [International Mediation Institution \(IMI\) Competency Criteria for Investor-State Mediators](#) (2016) is to help with the selection of competent and suitable mediators for investor-state disputes.

[CEDR Investor-State Mediation Guide for Lawyers and their Clients](#) (2021) provides practical considerations for legal counsel.

### **UNCITRAL Working Group III (Investor-State Dispute Settlement Reform)**

The United Nations Commission on International Trade Law (UNCITRAL) Working Group III (Investor-State Dispute Settlement Reform) is also exploring mediation as a method of resolving investor-State disputes. The [Draft statute of an advisory centre on international investment dispute resolution](#) (dated 7 February 2024) provides that “*the advisory centre shall provide legal support and advice with regard to an international investment dispute proceeding prior to and after its initiation, including by:*

(a) *Providing a preliminary assessment of the case, including the appropriate means to resolve the dispute;*

(b) *Assisting in the selection of mediators, arbitrators or other types of adjudicators (including any challenge) as well as experts, taking into account geographical diversity and gender balance”.*

### **Investment mediation as a “new light” in ISDS?**

Mediation has always been an attractive alternative to investment arbitration due to its efficiency in terms of cost and time, the absence of the risk of unpredictable outcomes, and its potential to preserve the relationship between the investor and the state.

Historically, while investment arbitration enjoyed widespread acceptance by states in BITs and other economic agreements, investment mediation remained in its shadow entirely underutilised. As such, mediation has been referred to as a “*sleeping beauty*” in the field of dispute resolution. More recently, in light of the legitimacy crisis of investment arbitration, there is a growing interest in mediation as an option to resolve investor-state disputes. Mediation was hence included on the agenda of the multilateral ISDS (Investor-State Dispute System) reform.

There are strong reasons to believe that mediation has a promising future in the ISDS, and that it will gain more importance and popularity in the coming years. The [programme of the upcoming 25th IBA Arbitration Day](#) appears to confirm this trend.

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