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Research Report

Advancing alternatives: Promoting mediation and conciliation in investor-state dispute settlement

Columbia FDI Perspectives, No. 340

Provided in Cooperation with:

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Suggested Citation: Chang, Brian; Kang, Daniel (2022) : Advancing alternatives: Promoting mediation and conciliation in investor-state dispute settlement, Columbia FDI Perspectives, No. 340, Columbia University, Columbia Center on Sustainable Investment (CCSI), New York, NY

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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

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No. 340 September 19, 2022

Advancing alternatives: Promoting mediation and conciliation in investor-state dispute settlement

by

Brian Chang and Daniel Kang*

Although the International Centre for Settlement of Investment Disputes (ICSID) is best known for administering investor-state arbitrations, its establishment was in fact inspired by the World Bank's [experience](#) in conciliating and mediating foreign investment disputes during the 1950s. While ICSID has [administered](#) only 13 conciliation cases to date, there is strong interest in promoting the use of mediation and conciliation as alternatives to arbitration.¹ Reasons for this include potential time and cost savings and the freedom to reach solutions beyond monetary compensation.

References to mediation in investor-state dispute settlement (ISDS) provisions have steadily increased since their first appearance in the 2004 Central America-Dominican Republic FTA. Out of 3,815 international investment agreements (IIAs) examined in April 2021, references to mediation were found in the ISDS provisions of 53 IIAs, while references to conciliation were found in 1,125.

However, most of these references merely encourage mediation, without consenting to it. Instead, the majority of IIAs referring to conciliation provide for advance consent to “conciliation or arbitration,” adopting language similar to the 1968 Indonesia-Netherlands bilateral investment treaty (BIT), which was the first IIA to reference ICSID. No IIA adopts the formulation proposed in the 1969 ICSID [Model Clauses for Bilateral Investment Treaties](#), Paragraph 5: “conciliation followed, if the dispute remains unresolved within -a stated time limit- , by arbitration.” One reason for the low use of conciliation may be that IIAs providing advance consent to “conciliation or arbitration” (or a simple consent to resolve disputes at ICSID) may appear as imposing a “fork-in-the-road” scenario between conciliation or arbitration.² This interpretation would therefore incentivize investors to choose arbitration due to its binding outcome.

How can the use of conciliation and mediation be [increased](#)?

- Future ISDS provisions should be drafted unambiguously to ensure that the initiation of mediation or conciliation does not prejudice recourse to arbitration. Moreover, drafters should ensure that a “fork-in-the-road” imposed between domestic legal proceedings and ISDS does not apply to amicable settlement procedures like mediation and conciliation.
- ISDS provisions should address mediation or conciliation in greater detail, including by referencing to specific mediation or conciliation institutional rules; suspending time-limitation periods to initiate arbitration claims while conciliation or mediation is ongoing; and ensuring that communications made during the conciliation or mediation proceedings are not disclosed or used in contentious proceedings. Positive examples in this direction can be found in the [2017 China-Hong Kong CEPA](#) and the [2018 EU-Singapore IPA](#).
- Countries should adopt ISDS provisions that provide advance consent to conciliation or mediation and go beyond merely encouraging conciliation or mediation before or during arbitration. Countries have previously provided advance consent to conciliation in at least 806 IIAs: the same should be done for mediation. Countries may wish to consider the UNCITRAL Secretariat’s [draft provisions on mediation](#), currently being considered by the UNCITRAL Working Group III, which suggests, *inter alia*, that states undertake to commence mediation and attend a first mediation conference.
- Finally, while model clauses and model BITs address future disputes, institutions should develop guidance documents and model agreements providing for consent to investor-state conciliation or mediation during ongoing arbitrations. Arbitral tribunals already commonly use their power to suspend proceedings and allow settlement discussions to commence, but there are no guidance or model templates specifically assisting disputing parties to engage in mediation or conciliation while arbitration proceedings are suspended. The simplest template would be an agreement to mediation or conciliation under a specific set of rules and an agreement on the mediator(s)/conciliator(s). More detailed optional template language could help parties to consider such issues as an agreed duration for the initial suspension of arbitral proceedings and the enforceability of a mediation ruling or mediated settlement agreement (e.g., as a consent award, or under the [Singapore Convention on Mediation](#)).

Given the recent development of mediation rules by ICSID, UNCITRAL and the International Bar Association, countries should consider including standing offers to engage in mediation or conciliation based on specific rules in their ISDS provisions. This would incur minimal costs, since countries may withdraw from settlement discussions whenever they wish. However, it would send a strong signal to investors as well as other stakeholders (e.g., ministries and sub-national governments) that the country is genuinely willing to engage in structured and assisted amicable settlement discussions should investment disputes arise.

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¹ See, e.g., the UNCITRAL Working Group III consideration of [ADR mechanisms and dispute prevention](#), the UNCITRAL Secretariat's Working Papers on "[draft provisions on mediation](#)" and "[draft guidelines on mediation](#)", and the ICSID Secretariat's new [mediation rules](#) and [updated conciliation rules](#). Mediation and conciliation are generally regarded as interchangeable in the UNCITRAL context. For the differences between mediation and conciliation in the ICSID context, see Frauke Nitschke, "[ICSID mediation and ICSID conciliation—understanding the differences](#)," *Kluwer Mediation Blog*, Dec. 6, 2021.

² The correctness of this interpretation is disputed, as it appears inconsistent with the text and *travaux préparatoires* of the ICSID Convention and the purpose commonly ascribed to IIAs of encouraging amicable settlement and efficient dispute resolution. See, [Romesh Weeramantry, Brian Chang and Joel Sherard-Chow, "Conciliation and mediation in investor-state dispute settlement provisions: a quantitative and qualitative analysis,"](#) *ICSID Review*, Apr. 4, 2022, Part V.

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