

CEDR Investor- State Mediation Guide for Lawyers and their Clients



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Overview of Mediation

Investor-State Dispute Settlement (ISDS) legal practitioners are increasingly incorporating mediation into their advocacy toolkit. The investment climate, in particular after the pandemic and increasingly with focus on environmental issues, is changing and with it the dispute resolution mechanisms that are being employed to address investor-State issues. These Notes represent a collection of best practice tips taken from leading ISDS practitioners around the globe.

CEDR's Role

Consistent with its role as a global thought leader in conflict resolution, CEDP has been actively engaged in multiple Investor State Mediation education and training initiatives including, most prominently, a series of Investor-State Mediator Training programmes in Asia, Europe and the Americas, in close cooperation with ICSID and ECT.

ISDS is complex and raises issues that only an Institution with 30 years of commercial mediation experience can assist in resolving. CEDP uses its 'good offices' to assist parties to agree to mediation. Our process design experts and case advisors are dedicated to assisting the parties and the mediators in establishing the platform needed for each case to resolve cases through to settlement.

CEDP also recognised an opportunity to add something new to the growing body of practical Investor-State Mediation information and advice. What has been missing to date is a piece focused on strategic considerations for legal counsel. With that in mind CEDP created an advisory group of globally diverse leading ISDS practitioners. Over the course of several open meetings this group were asked to identify critical issues in ISDS Mediation and talk through a range of possible options and approaches. What follows is a summary of their expert advice.

Links

[Visit CEDR'S Investor-State Webpage >>](#)

Recent Developments in Investor-State Mediation

- During the last 10 years, leading international dispute organisations including the International Centre for the Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL) and the Energy Charter Conference (ECT) have focused on the investor-State dispute settlement needs of the global community.
- Another contribution to the development of Investor-State Mediation is the recent enactment of the United Nations Convention on the Enforcement of International Settlement Agreements Resulting from Mediation (“Singapore Convention”).

They have responded with a host of Investor-State Mediation initiatives including; [mediation rules published by ICSID](#), procedural rules published by the International Bar Association (IBA), UNCITRAL and ICSID, process guides ([ECT Mediation Guide](#) and [ICSID Background Paper on Investment Mediation](#)) and statutory/regulatory frameworks ([ECT Model Instrument](#)) and [an overview of Mediation Provisions in Investment Treaties](#).

[A list of signatory States](#), including ratification dates and exceptions, can be found here. NGOs, including the [International Bar Association](#) (IBA) and the [International Mediation Institute](#) (IMI) have also supported the effective use of investor-State Mediation with, among other things, investment dispute focused model rules and mediator selection criteria.

Links

[ECT Mediation Guide >>](#)

[ECT Model Instrument >>](#)

[ICSID Mediation Rules >>](#)

[ICSID Background Paper on Investment Mediation >>](#)

[Overview of Mediation Provisions in Investment Treaties >>](#)

[List of signatory States, including ratification dates and exceptions >>](#)

[International Mediation Institute \(IMI\) >>](#)



Podcast: Investor-State Disputes, Making Mediation Mainstream

In our third podcast on Investor-State Mediation, James South (Managing Director, CEDR) interviews Meg Kinnear (Secretary-General, ICSID) about the continuing progress mediation is making in the field of Investor-State Dispute Resolution.

James and Meg Discuss:

- The drafting of the ICSID Convention
- Why now is the right time to reconsider our approach to Investor-State Dispute Resolution
- The future direction of mediation in this field and how to bring it into the mainstream

Why Mediate Investor State Dispute Claims

The following reasons were identified by the advisory group as reasons why their clients should consider mediation for the resolution of Investor-State Disputes:

- Internal and External cost savings (External cost estimate for a mediation is a fraction of the \$5 million for an average Investor-State arbitration, in addition to the internal costs for the State and the investor including lost opportunity costs and potential loss in FDI).
- The opportunity to reach a relatively quick settlement (Estimate is 6 to 9 months - based on the experience of similar international commercial mediations).
- The opportunity to reach an amicable settlement preserving the parties' ongoing relationship.
- The value of independent, impartial third-party mediator feedback on party claims, road blocks to settlement and possible avenues for resolution.
- When utilised early, mediation provides a more flexible avenue for exploring critical relationship management issues (e.g. "we can't work with this subcontractor").
- Mediation as a confidential and private process provides a safe opportunity to discuss extra-contractual issues impacting the investment relationship (e.g. changes in economic, environmental or socio-political climate) and negotiate acceptable solutions.
- Good for Foreign Direct Investment (FOi) initiatives being established by States as it demonstrates a proactive conflict management environment to investors, thereby reducing dispute risks.
- Helps provide greater clarity on each parties view on the issues in dispute. This provides a better basis for seeing the pathway to a negotiated settlement.



Wolf von Kumberg, International Arbitrator & CEDR Mediator gives an overview of InvestorState Mediation, including:

- What are Investor-State Disputes?
- What is Investor-State Mediation?
- Benefits of Investor-State Mediation
- Unique Challenges of Investor-State Disputes



Suitability of Cases for Investor-State Dispute Mediation

Maintaining relationships

Mediation is particularly well-suited to cases where both the Investor and the State have an interest in maintaining an on-going relationship and where there is a general willingness to engage in negotiations (mediation is essentially facilitated negotiation).

Monetary and non-monetary issues

Where the key issue in dispute is quantum, mediation serves parties by expanding the perspective beyond sums and allowing the identification of a quantum range and similarly valued non-monetary remedies.

Early resolution

Mediation should be considered as an early part of the parties' investment grievance resolution process, before disagreements harden into disputes.

Parties control

Mediation is helpful where there is a desire to keep control of the process and the outcome, in particular if possible solutions extend beyond purely monetary relief.

State settlement framework

Access to mediation is facilitated where a State has implemented a framework within which negotiations can take place and State officials feel empowered and are authorised to settle matters without fear of repercussions and in accordance with existing laws.

The IS Mediation Road Map

While the mediation process is flexible, and the mediators will work to tailor to process to the needs of the parties, the road map shown, sets out the broad stages of an IS Mediation process.



Initial Phase - Initial Written Statements, Initial Contacts, First Session

The parties provide the mediator with initial written statements and develop the protocol for the conduct of the mediation, covering issues such as language, venue(s), confidentiality and disclosure of information.



Facilitated Dialogue - Opening, Exploration & Negotiation Phase

During the opening, the parties will provide opening statements. Subsequently, the mediator explores with each party its needs and interests. With the mediator's assistance, the parties develop a framework for settlement and negotiate possible options for settlement of disputed issues. Tools used may include: joint and separate meetings, seeking expert advice (e.g. legal, financial, etc), field trips.



Concluding Phase - Settlement Agreement/Termination of the Mediation

If the parties reach a mutually agreeable solution of all or parts of the dispute, they will develop the detailed terms of settlement; if no settlement is reached, the parties may agree to terminate the mediation. Subsequently, the mediator explores with each party its needs and interests. With the mediator's assistance, the parties develop a framework for settlement and negotiate possible options for settlement of disputed issues. Tools used may include: joint and separate meetings, seeking expert advice (e.g. legal, financial, etc), field trips.



Practical Considerations

The practical considerations in Investor-State mediations revolve around striking a balanced approach in relation to each of the issues set out below:

Authority to negotiate and recommend settlement:

Authority issues are particularly important in InvestorState mediation. Multiple agencies may be involved and having persons with authority to negotiate is critical to eventual ratification. There should also be a representative present who has the authority to recommend any settlement to the ratification body.

Multiple disputes with similar issues:

The potential impact of any negotiated settlement on other existing or potential claims should be considered.

Stakeholder mapping and inclusion:

Mediation presents an opportunity to engage parties critical to reaching a sustainable settlement; these might include community, environmental, labour or other non contractual interests.

Selection of Co-Mediators

Given the complexity of IS Disputes, it will be usual for co-mediators to be appointed. Both parties will need to agree on the two mediators who will work together as a team to mediate the dispute.

Information disclosure vs confidentiality:

Needs and statutory requirements for public access/information should be addressed, even while maintaining the confidentiality essential to mediation and effective negotiation.

Recognition of settlement agreements:

Early consideration should be given to the availability of various enforcement mechanisms, including applicability and requirements of the local jurisdiction and the Singapore Convention. It should be noted that as settlement agreement as agreed by the parties, enforcement process are invariably not used in practice.

Timing

Investor-State Mediation can be accessed to effectively resolve disputes at any point in the dispute resolution continuum, including:

Pre-arbitration

Mediation can be an effective early, pre-arbitration settlement tool when provided for as part of the Investor-State dispute resolution process. Ideally, mediation should be incorporated as a key part of State investment legislation and rule-making (See **ECT Model Instrument on Management of Investor Disputes**).

In anticipation of arbitration

Mediation can also be used in anticipation of the Investor-State arbitration process. Investors have had some success in sending their draft Demand for Arbitration to the State before filing and inviting settlement discussion.

Cooling off period

This period, often contained in many Treaties can be a useful trigger point for the parties to consider mediating. However consideration should be given to mediating sooner, as even at this point, positions can already have become entrenched.

In parallel

After the commencement of arbitration, mediation should be considered in parallel with Investor-State Arbitration proceedings. An arbitral tribunal's determination on liability, quantum or jurisdiction can create the opportunity for mediated negotiation.

Post award

Mediation could also be considered post-Award, where review, enforcement and payment risks still exist.

Counsel familiar with commercial mediation should be prepared for a lengthier mediation process. The organisation of the proceedings (see provision for first joint session in ICSID Mediation Rule 20), as well as the resolution of transparency/confidentiality, authority and ratification issues, can and will take time. (See benefits above).

Settlement Options

In mediation, parties can safely address non-contractual economic, social and political needs in addition to contractual issues.

Paradoxically, monetary damages may be the least likely “currency” for settlement purposes in Investor-State disputes. State budgets are set, highly constrained by law and will likely require multiple levels of approval for change.

What works is where a settlement can be devised that is a positive outcome for the Investor and the State that is executable within the boundaries of the applicable legislative framework.

One alternative to damages is to arrange for a new investor to buy out the investment.

If a range of damages can be agreed in mediation the parties can create similar value through a host of non monetary settlement remedies, including regulatory change, extra-contractual commitments (e.g. labour contract commitments, community or environmental improvements) and new contracts.

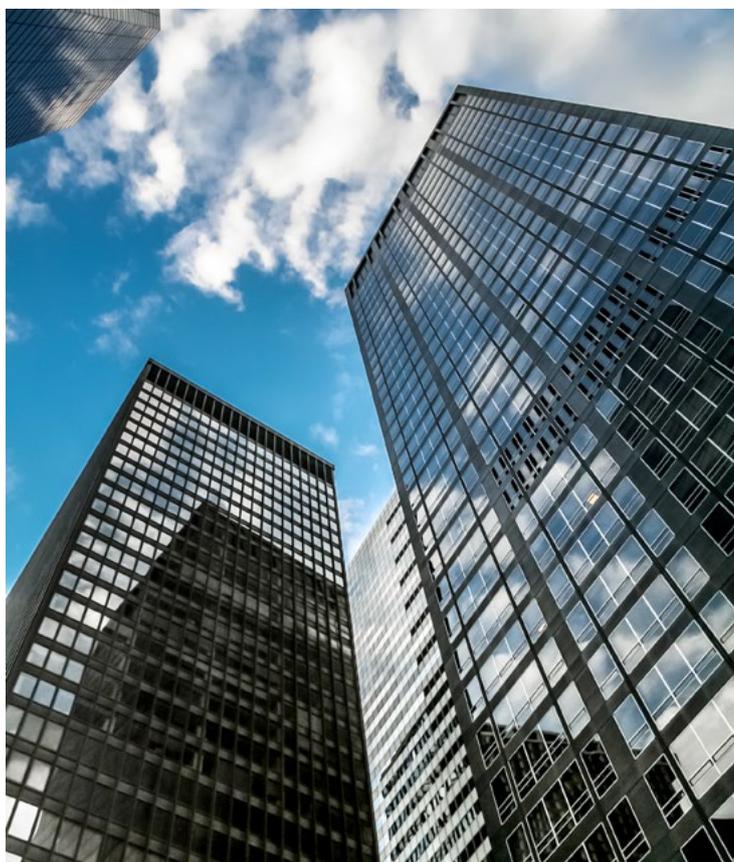
While contract renegotiation (e.g. delivery schedules, unit pricing etc.) is an attractive option, procurement laws and regulations will need to be respected.

The design process for mediation will permit stakeholders, in addition to the direct parties to the dispute, to be included in the process so that a more comprehensive settlement can be achieved and broader remedies agreed.



Developing Trust in Investor-State Mediation

- Investor-State Counsel do well to acknowledge the level of mistrust that typically exists when disputes occur between Investors and States. Strategic “gives” of information or concessions may go some way towards re-establishing trust.
- State Regulatory frameworks should provide for the use of mediation (See ECT Model Instrument) as both an early conflict resolution mechanism and a process to be used in parallel with investment arbitration.
- Investment Treaties should create the expectation that Parties will use mediation as a tool to avoid, manage and resolve Investor-State disputes.
- Investor-State Counsel should recognise their professional responsibility to explore settlement options, including mediation, with their clients.
- Mediation and, in particular, the role of the mediator is understood differently in various parts of the world. Mediators should explore Party expectations of mediation and address those expectations in designing an effective mediation procedure and mapping out appropriate mediator interventions.
- Investor-State Counsel can benefit from specific mediation advocacy training on representing their clients in this type of dispute.
- The mediator being a neutral provides an opportunity to build trust not only in the mediator, but also in the process and in the development of options for settlement.
- Trust in using mediation for investor-State disputes can be facilitated by reference to the support, rules and services provided by key ISDS institutions such as ICSID and ECT.



Podcast

In this podcast, James South (Managing Director, CEDR) and Frauke Nitschke (Senior Legal Counsel, ICSID) look at the framework for the development of Investor-State Mediation as well as four key factors integral to it becoming widely adopted:

- Buy-in of stakeholders, users, lawyers, government officials and institutions
- Key structural and process reforms
- Development of a credible cadre of mediators
- Awareness-raising

Appendices

CEDR Investor-State Mediation Practitioner Advisory Group who assisted with the development of the guide:

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- ICSID Draft Mediation Rules
- ICSID Background Paper on Investment Mediation
- ICSID's Overview of Mediation Provisions in Investment Treaties
- IMI Mediator Selection Criteria
- ECT Mediation Guide
- UNCITRAL
- UNCITRAL List of Singapore Convention Signatories
- UNCITRAL Notes on Mediation
- Model Instrument
- IBA Mediation Rules



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