Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: New Developments and Implications for India and Australia

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Abstract  India’s 2016 Model Bilateral Investment Treaty (BIT) was partly prompted by the 2010 investor-state arbitration award for White Industries against India under the latter’s BIT with Australia, terminated by India in 2017 along with many other older BITs. India’s Model BIT is decidedly more pro-host-state in substantive commitments towards foreign investors, although still retains circumscribed investor-state arbitration provisions, and it may be complicating India’s negotiations for new Free Trade Agreements (FTAs). Australia is also reviewing its own older BITs, although its recent FTA investment chapters mostly retain a more conventional format. However, Australia’s FTA with Indonesia signed in 2019 includes an unusual provision allowing the host state to require the foreign investor to try mediation before proceeding with investor-state arbitration. So does the Hong Kong - UAE BIT, also signed in 2019. Recent empirical analysis of settlements in investment arbitrations suggests there is more scope for amicable dispute resolution than some expect. Accordingly, in its future treaty (re)negotiations, India might also consider proposing provisions for mandatory mediation before arbitration.


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India attracted global attention in 2015 when it released a new Model Bilateral Investment Treaty (BIT), revised and released a year later after further public consultation, as a more pro-host-State template to guide India’s investment treaty (re-)negotiations. The Indian government also terminated old BITs signed from the 1990s to liberalise and protect inbound foreign direct investment (FDI), which the government came to perceive as too pro-investor, where those BITs included provisions that allowed unilateral termination on written notice.\textsuperscript{840} One such instrument was the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, which entered into force on 4 March 2000 but was terminated by India on 23 March 2017.\textsuperscript{841}

Part of the backdrop for this shift in Indian policy regarding investment treaties is a belated but significant increase in inbound investor-State dispute settlement (ISDS) arbitration claims brought by foreign investors under older-style BITs. One of the first high-profile claims was brought successfully by Australian resources company White Industries under the Australia-India BIT then in force. The company’s International Chamber of Commerce (ICC) arbitration award, rendered on 24 March 1998 for AUD 4.08 million against an Indian State-owned Enterprise in a contractual dispute, suffered extensive delays in the enforcement proceedings through Indian courts, so eventually the Australian company claimed instead against the Indian government under the BIT. The ISDS arbitral tribunal agreed that the government had not provided “effective means” for commercial arbitration award enforcement, as promised under the BIT (through its most-favoured nation treatment provision, which allowed invocation of the “effective means” guarantee included in a subsequently concluded BIT between India and Kuwait). Accordingly, on 30 November 2011, the ISDS tribunal awarded White Industries (a) the A$4.08 million ICC award, (b) the company’s A$500,000 legal and other costs incurred in the ICC arbitration, (c) US$84,000 for ICC arbitrator fees and (d) US$66,000 for witness costs incurred in the ISDS arbitration, plus (e) 8% annual interest on all the foregoing from 14 March 1998 until payment of the ISDS award. The Indian government apparently paid this total to White Industries, around A$10 million, but the ISDS award also ordered the parties to bear equally the other costs in the ISDS arbitration. Those were considerable, including fees and disbursements of almost A$1 million for the investor claimant’s Australian and Indian law firms, and around 13 million Indian Rupees and 465,000 British Pounds for the respondent state’s Indian

\textsuperscript{840} Prabhash Ranjan, India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash, Oxford University Press, 2019.
\textsuperscript{841} However, this BIT’s commitments will continue to apply to investments made on or before 22 March 2017 for a period of 15 years from the Agreement’s termination date: see <https://www.dfat.gov.au/trade/investment/australias-bilateral-investment-treaties>. 
law firm and counsel. This BIT case generated widespread public debate in India and was followed by many other claims by foreign investors under BITs with other countries, alleging a range of treaty violations.

India’s Model BIT still retains an ISDS procedure. However, it has a narrow scope, including for timing: foreign investors can only commence arbitration after attempting to exhaust local remedies for five years, and there is also a tight limitation period. This new approach to ISDS, combined with narrower substantive commitments made under the Model BIT, might have complicated negotiations for the Regional Comprehensive Economic Partnership (RCEP) investment chapter. That is because some among the ten ASEAN member States (such as Singapore) and other five RCEP negotiating parties included States (such as Japan and Korea) are major outbound investors that tend nowadays to press quite strongly for more traditional ISDS-backed commitments in their investment treaties. Ultimately, RCEP was signed on 15 November 2020 without India, but also without ISDS, for the time being. However, almost all pairs of the remaining 15 RCEP signatories anyway have at least one ISDS-backed investment treaty already in force among them.

Meanwhile, on 19 September 2020 Australia ratified the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), aiming to retrofit greater transparency around ISDS procedures onto pre-2014 investment treaties. It has also initiated a public

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consultation to review Australia’s remaining BITs in other respects, attracting 27 submissions from the public.\textsuperscript{848} One common theme in submissions, and in the debate over ISDS generally world-wide, is whether treaties can be better drafted to reduce costs and delays associated with its arbitration procedure.\textsuperscript{849} The costs involved in bringing and defending the \textit{White Industries v India} BIT claim indicate that these can be considerable.\textsuperscript{850}

To address such concerns, calls have emerged over the past decade for more alternative dispute resolution mechanisms to be used in the ISDS regime, apart from arbitration, with a special focus on mediation.\textsuperscript{851} Mediation is believed to be a time- and cost-efficient dispute resolution mechanism that can prevent disputes from escalating to arbitration. Various stakeholders have taken up the call to facilitate and promote investor-State mediation. UNCITRAL Working Group III is discussing mediation in the context of ISDS reform, mediator trainings are being offered for investor-State disputes, and ICSID is promulgating mediation rules for the first time that will be available even if neither the home State of the investor nor the respondent host State is an ICSID Member State.\textsuperscript{852} Meanwhile, the \textit{UN Convention on International Settlement Agreements Resulting from Mediation} (Singapore Convention), widely considered the mediation equivalent of the New York Convention for enforcing results from cross-border arbitration, came into force from 12 September 2020.\textsuperscript{853} As of 6 October 2021, over 50 States have signed the Singapore Convention, including India (on 7 July 2019) and Australia (from 10 September 2021), and seven States have ratified it.\textsuperscript{854}


While the convention does not extend expressly to investment disputes, there is broad agreement that at least some settlement agreements resulting from investor-State mediations will fall within its scope.\(^\text{855}\)

Provisions for third-party procedures other than arbitration have been relatively rare in older-generation (BITs). A recent empirical study of Asian investment treaties concluded over the past decade reveals that approximately 24% specifically provide for mediation or conciliation of investor claims by various means.\(^\text{856}\) Of these instruments, about 15% provide investors with the right to compel States to conciliate investor claims, mostly under ICSID rules (Convention or Additional Facility), with the effect that conciliation is mandatory at the option of investors.

Yet even where investors have the option of conciliation, they rarely exercise this right. Only 13 ICSID conciliation cases have been filed since 1982 with four filed since 2016. The latest was filed by Barrick Niugini Ltd against Papua New Guinea on 22 July 2020 under a mining lease contract.\(^\text{857}\) Barrick Niugini is a joint venture between Chinese Zijin Mining and Canadian Barrick Gold, whose Australian subsidiary instituted\(^\text{858}\) an ICSID Convention arbitration in parallel with the conciliation on 11 August 2020 under the 1990 Australia-PNG BIT.\(^\text{859}\)

As a nudge towards more time- and cost- efficient dispute resolution, some newer treaties include additional express references to mediation or conciliation in ISDS clauses, but disputing parties must agree separately and later to those procedures.\(^\text{860}\) While the use of such voluntary mediation may

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be growing, until recently there has been little to no interest in mandatory mediation as a pre-condition to arbitration. See generally James Claxton, “Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?”, 20 Pepperdine Dispute Resolution Law Journal 78 <https://digitalcommons.pepperdine.edu/drlj/vol20/iss1/4> accessed 10 September 2020.

Some still see mediation as unlikely or even incompatible with the aims of ISDS. Perceived obstacles include: (a) some States may have difficulty determining an authority to conclude settlements on their behalf; (b) settling an investment dispute could be associated with risks of personal liability and criminal prosecution (especially in developing economies or totalitarian States with weak rule of law); (c) settling a dispute could be considered an admission of guilt by the respondent State; (d) a claimant may not recover as much from a settlement as a successful award; (e) some investment disputes have non-monetary claims that require legislative or policy measures from the respondent State which would go beyond the capacities of mediation; and (f) settlements promote secrecy of outcomes.

Several such arguments have been challenged through a recent empirical study analysing 541 concluded, treaty-based investor-State arbitration cases with the focus on settlement outcomes. The findings suggest that none of the key factors — such as the economic industry of the investment, size of the initial claim (or whether it was monetary or non-monetary), or the economic development status of the respondent State (and claimant home State) — have a negative impact on settlements. The study also found that in settlements the average compensation rate is 32%, very similar to that of the awarded-to-claimed compensation rate (31%). In addition, settlement agreements have been reached on non-pecuniary terms even when the claim was monetary, suggesting that non-pecuniary claimed relief is not an unsurmountable impediment to reaching a settlement agreement.

The study did find that settlements are associated with increased confidential outcomes compared to those ending in arbitration awards, but recently the rate of confidentiality for all outcomes has remained stable while the rate of settlements keeps falling. This suggest that leaving investor-State disputes


to arbitration does not guarantee increased transparency either. Such findings, highlighting more potential for amicable settlements generally than many may have assumed, dovetail with emerging interest by investors and States in mandatory mediation. A 2020 report by Queen Mary University of London finds that 64% of respondents (mostly in-house counsel plus some management representatives of firms investing internationally) favour integrating mediation as a mandatory pre-condition to arbitration in ISDS. Already, the new Hong-Kong-United Arab Emirates BIT (HK-UAE BIT) and the Indonesia-Australia Comprehensive Economic Partnership (IA-CEPA) free trade agreement adds unusual provisions for mandatory conciliation. The terms mark a break with the existing trend of IIAs that do not mention mediation or conciliation – much less make such provisions mandatory. Under these instruments, both signed in 2019, respondent States can require claimant investors to attempt conciliation before they can raise their claims in arbitration. Investors do not have the same right to mandatory conciliation. Both of the treaties carve dispute resolution out of their most-favoured nation provisions (Art. 14.5(3) of IA-CEPA and Art. 4(8) of the HK-UAE BIT), which means that there is no risk that this conciliation requirement can be circumvented by investors on the basis of MFN treatment.

These provisions mark an innovative approach to conciliation and a significant rethinking of its place in the ISDS system. They coincide with ongoing attempts to put States on better footing to manage and defend investor claims that include control mechanisms on treaty interpretation, procedures to address frivolous claims, and the potential creation of a multilateral advisory centre. The State option to require mediation as a precondition to arbitration could serve as a model for other treaties, although the Queen Mary report suggests that there may also be appetite for mandatory mediation among investors. Quite similarly, some commentators have argued that greater transparency around investor-State disputes can appeal to investors, not just host States, by highlighting State practices (such as discrimination in favour of well-organised local interests) that diminish overall welfare

866 Agreement Between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and The Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (signed on 16 June 2019 at Dubai) (“Hong Kong-United Arab Emirates BIT”).
867 Indonesia-Australia Comprehensive Economic Partnership Agreement (signed on 4 March 2019, entered into force on 5 July 2020) (“Indonesia-Australia CEPA”).
among more disparate citizens.\textsuperscript{868} Accordingly, in advocating compulsory investor-State mediation, reformers may find more widespread support than expected.

Nonetheless, to minimise the risks of just adding extra time and expense to ISDS proceedings, such provisions need to be well drafted. A separate analysis already identifies some uncertainties in interpretation, including for different timeframes established by IA-CEPA compared to the HK-UAE BIT.\textsuperscript{869} In theory, different timelines might be expected if the treaty involves a developing country likely to have more inbound than outbound ISDS claims. Indeed, Indonesia seems more likely to have proposed the compulsory mediation step than Australia, as it has been subject to seven inbound treaty-based claims\textsuperscript{870} according to UNCTAD (including a high-profile case brought ultimately unsuccessfully by Australian/British mining companies under the now-terminated 1992 Australia-Indonesia BIT).\textsuperscript{871} Indonesia has also mentioned mediation in UNCITRAL reform deliberations,\textsuperscript{872} whereas no compulsory mediation step was included in the Australia-Hong Kong BIT – even thought that, too, was signed in 2019.

Even so, the HK-UAE BIT shows that even developed economies can be willing to add a compulsory investor-State mediation step to dispute-resolution clauses. The mediation provision may have been proposed from the UAE side, which has been a respondent in five arbitrations (although its outbound investors have also initiated 13),\textsuperscript{873} whereas Hong Kong has not been subject to any – although Hong Kong has also been trying to position itself as a hub for investor-State mediations generally. Just as Lauge Poulsen’s earlier


empirical research showed a significant (though temporary) slowdown in investment treaty signings after a host State’s first inbound ISDS claim.\textsuperscript{874} It may be that States subject to several claims become more likely to negotiate for compulsory investor-State mediation provisions. Australia instead has only been subject to one serious inbound claim, albeit the very high-profile Philip Morris Asia claim brought unsuccessfully under the now-terminated 1993 BIT with Hong Kong, and its government may be mindful that Australian investors (especially resources companies) are now initiating quite a few outbound claims.\textsuperscript{875} Accordingly, even if a counterparty proposes a compulsory mediation step (like Hong Kong may have done for the new BIT), Australia may be less likely to agree unless pressed strongly (as Indonesia may have done with IA-CEPA).

If such hypotheses are plausible, it may take more sustained effort to “nudge” more States towards adding such compulsory investor-State mediation provisions. This could be done through international bodies, such as UNCITRAL, ICSID, UNCITRAL and the OECD. There should be also widespread consultation among stakeholders domestically, including firms or industry groups interested in outbound investment as well as the civil society groups that are typically more concerned about inbound ISDS claims. Broader discussion is needed anyway as Poulsen’s study reveals how “status quo bias” extends to treaty negotiators, and jurists may be particularly risk averse and wedded to precedent. A rethink may be particularly timely as concerns are emerging,\textsuperscript{876} including in Australia, about potential ISDS claims in the wake of the COVID-19 pandemic. Perhaps it is time also for India to consider pressing in future investment treaty negotiations for a mandatory mediation step before commencement of ISDS arbitration.

