Investor-State Mediation: Observations on the Role of Institutions

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The remarkable growth of investor-State arbitration has brought added complexity to the process from both a procedural and substantive point of view. This development has prompted a series of calls to consider the wider use of alternative dispute resolution (ADR) mechanisms for investment disputes. The movement in favor of considering new dispute settlement options includes States, representatives of arbitral institutions and other international organizations, as well as counsel and arbitrators. One scholar who also serves as an arbitrator, Professor Jeswald Salacuse, has observed that the “boom” in investor-State arbitrations “has provoked a search for alternative dispute resolution mechanisms.” As concrete evidence of this search, the International

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Bar Association (IBA) Subcommittee on Mediation of Investor-State Disputes was launched in October 2007. Its mandate is as follows:

To examine the current use of mediation in relation to investor-State disputes, to determine whether wider use would benefit the investor-State dispute system in general (or discrete types of participants who use it in particular), to identify and assess obstacles to wider use of investor-State mediation, and to propose concrete measures that might be pursued to increase resort to mediation for investor-State disputes should our initial findings make such proposals appropriate.2

The IBA Subcommittee’s mandate captures the essence of the inquiry in four parts: the examination of the status quo, the determination of whether mediation would benefit investor-State disputes, the identification and assessment of obstacles to beneficial mediation, and the proposal of solutions and positive measures to increase mediation if appropriate. Notably, the mandate contains no inherently normative propositions about the nature of measures needed to increase the use of investor-State mediation or whether an increase in investor-State mediation is even desirable; it is best characterized as a call to action.

In the spirit of the IBA Subcommittee’s mandate, this article resists the urge to express a strong conviction about investor-State mediation or how it should be organized. Rather, it aims to explore an area of dispute settlement that deserves a closer look and, in particular, to explore what steps institutions might take to promote and enable the use of mediation in investor-State disputes. The first section of the article discusses developments in the investor-State dispute field that have prompted a focused consideration of investor-State mediation. The second section examines some of the challenges to alternative dispute resolution in the investor-State context and the role fulfilled by arbitral institutions and other relevant international organizations in administering and promoting investor-State mediation. The last section discusses some potential adaptation measures that the relevant institutions could implement to fulfill a more meaningful role in the development and administration of investor-State mediation.