



The Potential Impact of the Singapore Convention on the Development of the Investor-State Mediation

Mr. Wolf von Kumberg

Date: 13 May 2020 **Time:** 2:00pm CEST

Presentation Summary:

Mr. Wolf von Kumberg (Independent Arbitrator and IMI Certified Mediator) gave a remarkable presentation on the topic ‘The Potential Impact of the Singapore Convention on the Development of the Investor-State Mediation’.

Mr. von Kumberg began his presentation by opining that that the signing of the Singapore Convention on Mediation (SCM) on 7 August 2019 was a decisive moment for cross-border disputes as it gave a new credibility to mediation as an international dispute resolution process.¹ Prior to the signing of the SCM, many sovereign states and state entities were reluctant to settle disputes through mediation. This was due to uncertainties attributed to the mediation process. Private companies, on the other hand, were more willing to use mediation but it depended on companies’ size, sophistication, and location. He added that mediation was hardly featured in investor-State dispute settlement (ISDS) systems. The reason for that is that the ISDS had formulated its own unique dispute resolution system through the inclusion of arbitration provisions in bilateral investment treaties (BITS) or on a multilateral basis such as the [North American Free Trade Agreement](#) (NAFTA). Mr. von Kumberg stated that the [International Centre for Settlement of Investment Disputes](#) (ICSID), a body which handles most of investor-State disputes had only Arbitration and Conciliation rules. Additionally, the Conciliation rules

¹ Officially named United Nations Convention on International Settlement Agreements Resulting from Mediation

were not a form of mediation as it involved a tribunal that renders non-binding opinions. As such, parties almost never used conciliation and used the cooling-off period provided for in BITS to prepare for arbitration.

Mr. von Kumberg then went on to talk about the Energy Charter Treaty (ECT); an international investment agreement, consisting of 54 States, that establishes a multilateral framework for cross-border cooperation in the energy industry. The ECT Secretariat was interested in plugging the gaps in its Rules and consequently, a Guide on Investment Mediation was published to outline the mediation process and how it could be used in investor-State disputes.² However, the ECT Secretariat soon realized that the Guide alone was insufficient to promote mediation as states lacked internal framework to carry out mediation. As such, issues such as ‘Authority to settle’, ‘Transparency vs Confidentiality’, ‘Responsibility’, and ‘State budget’ had to be dealt with before states could adopt investment mediations. Subsequently, the Model Instrument on Management of Investment Disputes was published to assist States in dealing with these issues.³

Mr. von Kumberg recognized the importance of mediation awareness programs and trainings for mediators and states. These trainings would equip mediators and states with the knowledge and skillsets to effectively mediate investor-State disputes. Furthermore, by training more mediators to specialize in investor-State disputes, it would give the mediation process more credibility. The ICSID recognized and supported such a move and has began work on a new set of rules for investor-State mediation as part of a broader update to its procedural rules.⁴ He opined that this was a strong step forward in making mediation a part of the ISDS process and would give more credibility to investors, their counsels, and states.

Mr. von Kumberg stated that the Preamble of the SCM is a key significance to the development of investor-State mediation. He believes that states would recognize mediation as a legitimate dispute resolution mechanism once they ratify the SCM. He also stated that once this has been acknowledged, it would be difficult for states to hold the position that the SCM would not apply to states or their agencies when dealing with investors.

² Guide on Investment Mediation, 19 July 2016 a copy is available [here](#).

³ Model Instrument on Management of Investment Disputes, 23 December 2018, a copy is available [here](#).

⁴ The latest draft of the rules was published in August 2019 in [Working Paper #3: Proposals for Amendment of the ICSID Rules](#).

Mr. von Kumberg stated that the financial crisis arising from the COVID-19 situation will assist the growth of mediation. This has something to do with limitations to applying arbitration in investor-State disputes due to the following developments:

- A moratorium on all arbitration claims by investors under investment treaties called by the [Columbia Centre on Sustainable Investment](#); and
- Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union signed on 5 May 2020.⁵

Mr. von Kumberg concluded his presentation by noting that the limitations on arbitration coupled with the SCM would be a major boost for mediation in investor-State mediations.

Q&A Discussion

Some questions addressed by Mr. von Kumberg during the Q&A session:

- Would the SCM promote more respect for cooling-off periods or negotiation clauses in Investment Arbitration Agreements?
- How would the moratorium on investor-State disputes during COVID-19 affect mediation?
- Would the SCM be more attractive to capital-importing States than capital-exporting States?
- How realistic is enforcement of specific performance of obligations in a settlement agreement against a State? Would it be advisable to include pecuniary damages or dispute resolution clause in case of non-performance?
- How would the reservation to exclude settlement agreement involving state or state-owned enterprise from the SCM affect mediation in ISDS?
- Would the lack of third-party funding affect a State's decision to adopt mediation for investor-State disputes?

⁵ A copy is available [here](#).

We invite you to listen to Mr. von Kumberg's answers from the video record of the session available here, as well as his response to other questions not listed above. A copy of the paper prepared by Mr. von Kumberg for this presentation is available here.

Links to other requested resources that came up during the session are provided below:

- [United Nations Convention on International Settlement Agreements Resulting from Mediation](#) also known as the 'Singapore Convention on Mediation'
- Energy Charter Treaty [Guide on Investment Mediation](#), 2016
- [Energy Charter Treaty Model Instrument on Management of Investment Disputes](#), 2018
- ICSID Procedural Rules on Mediation – latest draft of the rules was published in August 2019 in [Working Paper #3: Proposals for Amendment of the ICSID Rules](#)
- [Agreement for Termination of Bilateral Investment Treaties between the Member States of the European Union](#), 2020

The team at SIMI and IMI would like to express our gratitude to Mr. von Kumberg for sharing his time to be a speaker at the Singapore Convention Seminar Series and to participants for joining us live for the session. Do join us for our next seminar by Ms. Sarah Blake on '*Culture, Process and Value Proposition in the Era of Singapore Convention on Mediation*'!