Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT

Kluwer Arbitration Blog
September 5, 2020

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Please refer to this post as: James Claxton, Luke Nottage, and Ana Ubilava, 'Pioneering Mandatory Investor-State Conciliation Before Arbitration in Asia-Pacific Treaties: IA-CEPA and HK-UAE BIT', Kluwer Arbitration Blog, September 5 2020, http://arbitrationblog.kluwerarbitration.com/2020/09/05/pioneering-mandatory-investor-state-conciliation-before-arbitration-in-asia-pacific-treaties-ia-cepa-and-hk-uae-bit/

Arbitration has been the default dispute resolution mechanism in the investor-state dispute settlement (ISDS) regime for a long time. Provisions for third-party procedures other than arbitration have been relatively rare in older generation bilateral investment treaties (BITs). Even where those have provided in advance for the option of ICSID (Convention or Additional Facility) Conciliation Rules, investors have rarely invoked them. Only 13 cases have been filed since 1982 with four filed since 2016. The latest Conciliation Rules case was filed by Barrick Niugini Ltd against Papua New Guinea on 22 July 2020 under a mining lease contract. Barrick Niugini is a joint venture between Chinese Zijin Mining and Canadian Barrick Gold. In parallel, Barrick Gold's Australian subsidiary instituted ICSID Convention arbitration on 11 August 2020 under the 1990 Australia-PNG BIT.

Over the past decade, calls have grown for other alternative dispute resolution mechanisms with a special focus on mediation. 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 and so is the Academic Forum on ISDS (see, for example, a March 2020 paper circulated for discussion). 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 nor host state has ICSID membership status. The UN Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention) is also set to come into force from 12 September 2020. While this Singapore 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.

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.[fn]Article 8.20 of Comprehensive Economic and Trade Agreement (CETA) (2016). Article 9.18 (1) Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018). Article 20 of Argentina-UAE BIT (2018), Article 8.19 of Australia-Peru FTA (2020), Article 9.16 of Central America-Korea FTA (2018), Article 9.18 of CPTPP, Article 3.4 of EU-Singapore IPA (2018), Article 10 of Kazakhstan-UAE BIT (2018), Article 14.D.2 of USMCA (2018).[/fn] While the use of such voluntary mediation may be growing, until recently there has been little to no interest in mandatory mediation – as a pre-condition to arbitration. Some still see mediation as unlikely to be 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) settlements do not pay as much as what a Claimant could be awarded through a successful award; (e) some investment disputes have non-monetary claims that require certain 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 the 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 suggests 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 forthcoming 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, add unusual provisions for mandatory conciliation as a pre-condition to arbitration. These provisions mark a break with existing IIAs that do not even mention mediation or conciliation – much less make such provisions mandatory. Under the HK-UAE BIT and IA-CEPA, 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 forthcoming 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 among more disparate citizens. 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. 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 7 inbound treaty-based claims according to UNCTAD (including a high-profile one brought ultimately unsuccessfully by Australian/British mining companies under the now-terminated 1992 Australia-Indonesia BIT). Indonesia has also mentioned mediation in UNCITRAL reform deliberations, whereas no compulsory mediation step was included in the Australia-Hong Kong BIT – even thought that too was signed in 2019.

Nonetheless, the HK-UAE BIT shows that even developed economies can be willing to add a compulsory investor-state mediation step. It seems more likely to have been proposed from the UAE side, as the latter has experienced 4 inbound claims (although its outbound investors have also initiated 12), 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, 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. 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 in addition to the default arbitration clause. This could be done through international bodies (UNCITRAL, ICSID, UNCITRAL and the OECD) but 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, including in Australia, about potential ISDS claims in the wake of the COVID-19 pandemic. The Australian government has also just announced public consultation to review remaining older bilateral investment treaties. One question for stakeholder submissions is whether those should incorporate modern provisions from Australia's FTA practice. Compulsory mediation before arbitration is not specifically mentioned but is worth considering.