Investor-State Arbitration Meets Mediation: Putting Mediation and Conciliation Back into ISDS—The Asian Experience

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Aron Broches, the chief architect of the ICSID Convention, said in 1964 that the role of conciliation in the Convention's framework may prove to be more important than arbitration. There is little doubt that more than 50 years later, this forecast by one of international investment law's giants has not yet become a reality. The 'scorecard' for the years 1966 to 2020 was 756 ICSID arbitrations to 13 ICSID conciliations. More needs to be done if the deep-seated preference for arbitration is to change. But there are promising developments in the drafting of investment treaty conciliation and mediation provisions in investment treaties concluded by Asian States that are likely to take us closer to Mr. Broches' vision.

Early treaty practice in Asia

As part of the NUS Centre for International Law (CIL)'s project on ISDS mediation

and conciliation initiated by Lucy Reed and Christopher Thomas QC, we have observed that investment treaties entered into by Asian States are beginning to shift from unqualified provisions that provide advance consent to “conciliation or arbitration”, to more elaborate and nuanced provisions that encourage the utilization of mediation and conciliation during the initial phases of an investment arbitration, as well as throughout the lifecycle of the dispute.

In the late 1960s and 1970s, several Asian States signed bilateral investment treaties (BITs) with The Netherlands, Belgium / the Belgo-Luxembourg Economic Union (BLEU), and the United Kingdom (UK). These treaties typically consented in advance to conciliation or arbitration (e.g. Art. 11, Netherlands-Indonesia BIT (1968), since terminated; Art. 10, Belgium-Indonesia BIT (1970), since terminated; Art. 8, BLEU-Republic of Korea BIT (1974), since terminated; and Art. 7, UK-Indonesia BIT (1976)). Like most treaties of this era, a reference to conciliation was absent in their pre-arbitration negotiation or consultation provisions. A few treaties added an exhaustion of local remedies requirement as a precondition to conciliation or arbitration (e.g. Art. 12, Netherlands-Malaysia BIT (1971); Art. 11, Netherlands-Singapore BIT (1972)). Significantly, the term “mediation” was not included in these early BITs, potentially reflecting the expectation at the time that investors desiring to mediate their disputes would avail themselves of the ICSID conciliation procedure.

The Sri Lanka-Republic of Korea BIT of 1980 was the first intra-Asian investment treaty to provide advance consent to investor-State “conciliation or arbitration”. Sri Lanka subsequently included similar treaty provisions in treaties with Singapore (1980), Japan (1982) and Malaysia (1982); and South Korea subsequently included similar treaty provisions in treaties with Malaysia (1988), Thailand (1989) and Mongolia (1991). It might therefore be concluded that Sri Lanka and South Korea were the first Asian States to systematically include advance consent to investor-State conciliation in their treaties with other Asian States. Vietnam, India and Singapore followed suit in the 1990s, and many Asian States continue to provide advance consent to conciliation today.

Recent treaty practice in Asia

More recent treaties tend to expand the range of amicable dispute settlement

offered and refer not only to conciliation but also to mediation. A ground-breaking study by James Claxton of 143 Asian treaties that entered into force after 2010 found that 24 percent of them had ISDS provisions specifically providing for mediation or conciliation through various means.

Newer Asian treaties are now providing for conciliation or mediation at early stages of the investor-State dispute lifecycle. For example, during the pre-arbitration negotiation and consultation process (e.g. Art. 23.1, Australia-Hong Kong Investment Agreement (2019), Art. 9.16, Central America-Republic of Korea FTA (2018), and Art. 20.1, Chile-Hong Kong BIT (2016)). While these provisions refer to mediation or conciliation as an option, they typically do not provide advance consent to these procedures, meaning that a separate agreement is required.

The ASEAN Comprehensive Investment Agreement (ACIA) of 2012 requires note here for several reasons. First, the ACIA – unlike the original ASEAN Investment Agreement of 1987 (Art. 10) – provides a standalone Article on conciliation (Art. 30) (arbitration is provided for in Arts. 32 onward). Second, Art. 30 of the ACIA provides for hybrid or mixed-mode dispute resolution (e.g. "arb-con-arb" or "con-arb"), allowing conciliation to run in parallel to arbitration proceedings, although it requires a separate agreement to engage in conciliation. Art. 30(3) reiterates that conciliation proceedings and positions taken therein are without prejudice to other ISDS proceedings under the ACIA. Third, the absence of a "conciliation *or* arbitration" provision in ACIA avoids the problem of a choice of conciliation potentially giving rise to the argument that subsequent recourse to arbitration is precluded. A similar provision to Art. 30 ACIA can be found in Art. 10.4, Thailand Model BIT 2012, although the Thai Model BIT innovates further by referring to both conciliation and mediation.

Another significant recent development is that a small but growing set of Asian treaties also contain detailed mechanisms for ISDS mediation, such as the EU-Singapore Investment Protection Agreement (IPA), the EU-Vietnam IPA (both not yet in force), as well as the China-Macau CEPA Investment Agreement, and the China-Hong Kong CEPA Investment Agreement (2017). It appears that the mediation provisions of the IPAs with the EU have been introduced at the insistence of the EU, as they contain very similar language to the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU (2017). They also innovate by adapting CETA's Rules of Procedure for Mediation between Contracting Parties into a Mediation Mechanism for Disputes between Investors

and Parties). China's Investment Agreements with its two Special Administrative Regions are noteworthy here because they include a detailed Mediation Mechanism for Investment Disputes running to eight pages, and because they do not provide for arbitration.

Perhaps most importantly, States have begun deploying provisions empowering States to require investors to engage in *mandatory* mediation before they can obtain recourse to arbitration (e.g. Art. 8(3), Hong Kong-United Arab Emirates BIT (2019) and Art. 14.23, Indonesia-Australia CEPA (2019)). These treaties have already been discussed in two excellent blog posts by James Claxton, Luke Nottage and Ana Ubilava together and by Ana as sole author.

Reasons for the low rate of recourse to ISDS conciliation

Many reasons have been offered for the low rate of recourse to conciliation in investment treaty disputes. Among these is the relatively formal procedural framework underlying the ICSID conciliation provisions, which was developed alongside the ICSID arbitration procedure. Both procedures have comparable provisions on, *inter alia*, registration and appointment, and jurisdiction challenges. Many critics of conciliation argue that it is too formalistic, legalistic and evaluative, but a close examination of the text of the ICSID conciliation rules and the drafting history of the ICSID Convention reveals that they actually offer flexibility during the proceedings to adopt approaches associated with interest-based, facilitative mediation.

A more compelling reason for parties to choose arbitration over conciliation is that many older investment treaties expressly require parties to choose between "arbitration *or* conciliation". Arguably, a choice of conciliation may preclude subsequent recourse to arbitration if conciliation proceedings fail to reach an agreed settlement. We envision that this issue will one day become another flashpoint area in investor-State disputes. It is an area which the ISDS conciliation and mediation project at CIL intends to examine in the near future.

A growing space for conciliation and mediation in ISDS

The past decade has also seen the development of new rules and procedural frameworks to support mediation and conciliation, such as the IBA Rules on Investor-State Mediation or the voluntary mediation rules that ICSID is in the process of adopting as part of its ongoing Rule Amendments project, which would allow disputing parties to engage in ICSID-administered mediation, regardless of whether they are parties to the ICSID Convention. (See: Proposed ICSID Mediation Rule 2, as explained by Frauke Nitschke; neither the investor's State nor the respondent State have to be parties to the ICSID Convention.) Another relevant development is the ongoing update of the UNCITRAL 1980 Conciliation Rules into the UNCITRAL Mediation Rules, both of which may be used for ISDS mediation. Support will also increase with the growth in State parties to the Singapore Convention on Mediation (SCM), which will enable the expedited enforcement of settlements arising out of ISDS mediations (unless a reservation is made under Article 8(1) of the SCM). There is also support for increased use of mediation and conciliation in the UNCITRAL Working Group III discussions on ISDS reforms, notably from China, Indonesia, Thailand, the EU and US.

In conclusion, we have shown that a growing number of Asian States are supporting the increased use of ISDS conciliation and mediation through the adoption of more sophisticated treaty provisions, from the inclusion of mediation and conciliation in amicable settlement clauses, to the reformulation of treaty text to ensure attempts at conciliation or mediation do not preclude subsequent arbitration, to the adoption of detailed and even mandatory mediation mechanisms.

CIL has previously examined the obstacles to amicable settlement in ISDS, which include government representatives' preference to defer responsibility for decision-making to a third-party, fear of criticism, coordination problems among different State organs and departments, and practical challenges such as who has the authority to settle, and whether they should be present at the mediation. CIL is currently researching the ways in which Asian States may overcome these obstacles. We look forward to using the outcomes of this study to assist ISDS to move further toward the vision held by Mr. Broches in 1964.

This post is part of a series on the relationship between investor-State arbitration and mediation. To see our full series of posts on this topic,

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