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Investor-State Arbitration Meets Mediation: Fostering Investor-State Mediation – Happiness Comes From Outside And Within

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Of the six States that have ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation ("Convention") only Singapore seems to have made any requisite preparation for its implementation, by passing the Singapore Convention Mediation Act in February 2020. Yet, following the Convention's entry into force on 12 September 2020, forthcoming developments in the area of international mediation are inevitable. As investor-state mediation is gaining traction, this post proposes mechanisms to foster mediation not only through outside interventions but also through internal settlement mechanisms, including by strengthening national mediation systems through the offering of mediation and ombuds services to investors.

Fostering investor-state mediation from outside

Alternative dispute resolution ("ADR") mechanisms are often viewed as one of the means to improve investor-state dispute settlement ("ISDS"). In this context, the Convention has served as a catalyst for these initiatives. For example, UNCITRAL Working Group III ("UWG") noted that in addition to the Convention and ICSID's work on developing mediation rules, "*reform options may include […] the establishment of relevant facilities for mediation as part of existing or new mechanisms*" (A/CN.9/WG.III/WP.166, ¶¶40-41). In addition, UWG has considered ways to incentivize investors and States to actively engage in ADR (A/CN.9/WG.III/WP.190, ¶45). For example, UWG discussed the establishment of an advisory facility, which could be tasked "*to offer ADR services and support early settlement of disputes,*" including to maintain a roster of mediators and to address public officials concerns when engaging in negotiations (A/CN.9/WG.III/WP.168, ¶22). In addition, some States such as Indonesia have viewed mandatory mediation as a way to improve ISDS (A/CN.9/WG.III/WP.156, ¶¶15, 19-20).

An important aspect of the Convention that may require clarification in national legislation is whether it covers investor-state disputes. As previously discussed,

although the *travaux préparatoires* of the Convention is controversial on this point (*see* A/CN.9/896, ¶¶61, 146; A/CN.9/WG.II/WP.200, ¶2), it appears that both UNCITRAL and ICSID Secretariats' stance on the matter is that the Convention covers investor-state disputes (*see* presentations by Judith Knieper and Frauke Nitschke at the IMI-SIMI Investor-State Mediation roundtable). Further, as Judith Knieper of UNCITRAL noted "*many states report back to* [UNICTRAL] *that one argument for them to sign up to the Singapore Convention is because they want to promote*" the Convention for investor-state disputes. Further, UNCITRAL is currently updating its 1980 Conciliation Rules consistent with the new framework on international mediation represented by the Convention (A/CN.9/WG.III/WP.190, ¶39). It is hoped that the ICSID mediation rules and the new UNCITRAL Conciliation Rules coupled with the Convention will encourage States and investors to extensively consider investor-state mediation before, during, or after arbitration.

Fostering investor-state mediation from within

Within the UWG discussions, States have also suggested strengthening national mediation capabilities. Mali, for example, has proposed to strengthen "*national mediation and dispute prevention bodies*," which "*should be involved throughout the [entire] process (from the conclusion of the investment agreement to the systematic monitoring of investment activities, rapid responses to problems and efforts to reach consensual solutions) and should be composed of public and private actors*" (A/CN.9/WG.III/WP.181, ¶3.F). Strong national and internal mediation systems are fundamental to the development of international mediation, especially in the context of investor-state disputes. Without such a foundation and experience within national systems, the proliferation of mediation will be less effective. To that end, the offering of mediation and ombuds services will build the requisite basis for the development of international mediation.

One reason for the success of Aron Broches' ISDS system was that States that signed up to the ICSID Convention and ultimately included it in investment treaties were no stranger to arbitration. In many national legal systems, arbitration had been in place for decades. Further, in 1961, when the drafting of the ICSID Convention was initiated, several international instruments had already been in place. This included the New York Convention (that was in force at the time for 16 signatories), the Geneva Convention of 1923 with its Protocol of 1927, and the European Convention on International Commercial Arbitration of 1961 (which came into force in 1964).

Unfortunately, mediation lacks such a legal foundation. Although the benefits of mediation are widely acknowledged, the actual embrace of mediation in national legal systems, let alone in practice—with limited exceptions, e.g. the United States—still progresses with baby steps. In many States, workable mediation laws are still to be promulgated as opposed to arbitration laws on the basis of the UNCITRAL model law. In this context, it is unfair to expect that only outside interventions by international organizations to boost mediation will yield the desired outcome. Efficient mediation systems should be established also from within. Namely, States and investors should also actively develop mechanisms to deal with disputes, both external and internal.

One such tool is an ombudsman office. The UWG discussions have to this effect also encompassed proposals by member states to strengthen, *inter alia*, the institution of the ombudsman (A/CN.9/WG.III/WP.166, ¶38).

Ombudsman to resolve internal disputes

The word "ombudsman" is Swedish in origin. Black's Law Dictionary defines it as an "*official appointed to receive, investigate, and report on private citizen' complaints about the government*." In the United Nations ("UN"), the term designates an informal mechanism that aims at listening to the concerns raised by stakeholders (e.g., members of the UN workforce) to help them to develop strategies to address those concerns, including through clarifying dispute resolution options and obtaining information on policies and procedures. In the UN, several such ombudsman offices exist, which also provide mediation services. For example, the Office of the Ombudsman for United National Funds and Programs currently offers enhanced mediation services with thanks to UNICEF, which has resorted to mediation to improve its organizational culture. This program allowed to engage over 60 experienced mediators around the world who are available to mediate disputes involving five United Nations organizations.

The corporate world is also no stranger to internal mediation. In the United States, many corporations and universities have developed ombuds and mediation programs often coupled with arbitration mechanisms (e.g. Coca-Cola Enterprises' ADR program), but those have not been widely utilized internationally. Of corporate programs outside the United States, Air France's mediation program, developed to reduce the volume of labor-related court cases, is worth mentioning. As Air France's Director of Legal Affairs reports, it has been "a great success," allowing to "*dramatically reduce litigation*" and "*improve [its] corporate image*."

As Mohandas Gandhi said "[i]f you want to change the world, start with you." Successful ombuds and mediation programs within corporations and sovereigns provide opportunities to gain experience in settlement processes, give confidence to respective officials in mediation advocacy, and improve organizational culture. Importantly, such internal systems may prompt the building of the requisite national foundation that investor-state mediation requires.

Ombudsman to resolve external disputes

Ombuds services are used in the investment context as well. South Korea's Foreign Investment Ombudsman ("FIO") is one illustrative example. FIO generally resolves issues with foreign investors through business counseling on domestic laws, but if the grievance results from inadequate laws or administrative hindrances FIO may address authorities to improve investment policy, administrative procedures or laws and regulations. From 1999 through 2018 FIO had received over 4,100 cases from foreign investors, which were resolved through a "home doctor" mechanism (expert-consultants who have deep knowledge and expertise in specific fields), administrative

intervention, or legislative improvement (FIO's 2018 annual report, p. 43).

So, too, Brazil's Direct Investments Ombudsman ("DIO") serves as a "single window" for investors to communicate with the Brazilian government. It offers support to foreign investors, answers requests, and seeks solutions to inquiries related to matters that affect their investments in Brazil. In response to inquiries, the DIO may establish a Grievance Settlement Body composed of Secretariat employees and public administration representatives. Based on the analysis of this Body, the Ombudsman may recommend the government to address the problem.

Peru's International Investment Disputes State Coordination and Response System is also worth mentioning. Peru's mechanism is a hybrid system because not only does it operate to ensure an optimal State response to investors' issues (including before escalation) but also to secure an appropriate institutional organization in the handling of investment arbitrations.

Concluding remarks

For host States, an ombuds office may serve a one-stop-shop to deal with a problem encountered by a foreign investor. It may also facilitate prevention or early diagnosis of the problem, allowing the authorities to correct it before it escalates to a formal dispute (*see* UNCTAD, pp. 87-88). In addition to prevention mechanisms, the system "*also provide[s] certainty for investors in creating a single contact in the government for investment disputes*" (*see* UNCTAD, pp. 20, 29-30, 35). To that end, it seems prudent for host States to develop such tools to address foreign investors' concerns in addition to existing arbitration mechanisms.

If the internal mechanism operates with independence and neutrality it may consider providing mediation services as well. The features of the existing system, however, may create limits for offering mediation services. For example, in Peru, the Response System also represents the State in investment arbitrations and thus lacks neutrality and independence. If requisite systems are lacking in the country or corporation, it may present a perfect opportunity to set such mechanisms up, with fresh efficient tools and processes. As Amcham Finland CEO rightfully put it, *"[a]ppointing an ombudsman would say to the world that [the State] is serious about attracting and retaining investments*."

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, click here

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