Kluwer Arbitration Blog

Investor-State Arbitration Meets Mediation: The View from UNCITRAL

Charalampos Giannakopoulos (Centre for International Law) · Thursday, October 1st, 2020

As has been previously reported in this blog (e.g., here and here), there exists a rising interest globally for alternative forms of dispute resolution (ADR) for investor-state disputes. Indicative examples from investment treaty-making confirm this, including the USMCA, CPTPP, the EU's investment agreements with Canada, Singapore and Viet Nam, ACIA, and the China-Hong Kong CEPA (which altogether eschews investor-state arbitration in favour of, among others, mediation). Further, in 2016, the Energy Charter Conference adopted a Guide on Investment Mediation to facilitate the ECT parties in deciding whether to opt for mediation and to inform them about how to prepare for it.

It is thus not surprising to see that mediation has also entered into the UNCITRAL Working Group III (WG) discussions as part of the broader debate on investor-state dispute settlement ('ISDS') reform. This post addresses the current state of the UNCITRAL discussions on mediation (I) and outlines the proposed avenues to integrate mediation into the institutional arbitration apparatus as envisaged by delegations (II). The post concludes with some thoughts about areas that are ripe for further study which could benefit the current discussions (III).

I. Discussions on Mediation in the WG: A Bird's-Eye View

The close relationship between arbitration and dispute prevention was mentioned already in the WG's first report when it began its work on ISDS in late 2017. It was subsequently reiterated in the first inter-sessional meeting. ADR processes were formally included among the list of possible reform options in Working Paper 149.

One generally sees a convergence of opinions in support of ADR within the WG. Moreover, support largely cuts across the various camps that have emerged during the debates and includes such delegations as the United States, China, and the EU (para 16). According to Working Paper 190 (paras 30–31), the reasons put forward in support of ADR revolve around three elements: (i) time- and cost-efficiency; (ii) the ability to clarify the issues in dispute and to thus help narrow the gap between disputing parties; (iii) flexibility and adaptability which could help preserve the relationship between the host state and the investor.

Some delegations have also expressed views about how ADR could work in a reformed regime.

Indonesia's submission, for instance, favours compulsory mediation, whereas Thailand's submission highlights a "hybrid" or "mixed" approach, where adjudicative (arbitration or judicial settlement) and non-adjudicative (e.g., mediation) processes can operate side by side.

Recent developments on the side-lines of the WG discussions include a concept paper on investor-state mediation prepared by the ISDS Academic Forum and a webinar on mediation co-hosted by the UNCITRAL Secretariat and the ISDS Academic Forum.

The topic of dispute prevention is now up for a general discussion in the WG's upcoming October 2020 meeting. It is also slated as a topic for a more in-depth, technical examination in a proposed inter-sessional meeting currently scheduled to be held in November 2020.

II. Institutionalising mediation within reformed ISDS

a. Expected benefits of institutionalisation

According to the EU submission to the WG, value could be brought through the provision of institutional support to any ADR mechanisms to be adopted by the WG. Such support can take the form of maintaining lists of mediators or conciliators and facilitating efforts to bring about amicable settlements.

Institutionalising mediation in a reformed ISDS regime could have certain advantages in terms of facilitating settlements. A 2018 survey indicates that commonly reported obstacles to settlements from the state's standpoint principally include a general unwillingness to assume responsibility for voluntary settlements, the politicisation of disputes, negative publicity, and the fear by government officials of being subjected to allegations for corruption or prosecution.

Institutionalisation would introduce a degree of internal monitoring and transparency in a process that is often conducted under complete confidentiality. This could help facilitate settlements by reducing the chances of dilatory tactics by a bad faith party and by alleviating the fear for allegations of corruption and for negative publicity. Furthermore, integrating mediation throughout the adjudicative process may serve to project it as an integral part of reformed ISDS. This may make it easier for states to accept responsibility for a proposed settlement rather than regarding such a move as an unacceptable concession.

b. A modular format?

The exact form that the institutionalisation of any mediation rules will take is something to be further fleshed out by the WG, thus making reliable predictions on this front difficult. That said, the chosen format of holding concurrent discussions on a variety of topics could perhaps point towards the development of a menu of reform options to be included in a future multilateral instrument to which countries can subscribe (see here). Support for this modular, "open architecture", approach has been expressed in literature (e.g., here and here) and by some delegations within the WG (e.g., Colombia, Ecuador, and the joint submission by Chile, Israel, Japan, Mexico, and Peru). The EU has likewise expressed support for it as a practical matter, although it generally regards it as a less preferable option compared to its own global multilateral investment court (MIC) proposal.

At the moment there are two proposed, partially overlapping, avenues for institutionalising mediation, both of which can be brought under a modular format.

Avenue 1: Institutionalisation under the "dispute settlement" pillar

Rules on mediation could be included in a future multilateral instrument on ISDS and could be opted-in by each country that wishes to do so, or even attach to an eventual MIC provided that an MIC is among the reform options available. This instrument could incorporate by reference already existing procedural rules on mediation (such as those currently under amendment at ICSID, or those of the PCA, ICC, SCC, or IBA); alternatively, UNCITRAL could establish its own rules. Indeed, UNCITRAL is in the process of updating its 1980 Conciliation Rules as part of developing a broader framework on international mediation, which also includes the recent Singapore Convention on Mediation and the UNCITRAL Model Law on International Commercial Mediation.

Avenue 2: Institutionalisation under a "capacity building" pillar

Another suggestion that has surfaced is to include ADR in the mandate of the proposed advisory centre for ISDS. Working Papers 168 and 190 both raise this possibility. The centre's functions may range from handling ADR, to ensuring that ADR methods are properly conducted, to simply keeping a roster of expert mediators. A key element under this option is that the focus would not be placed only on supporting the early settlement of disputes, since the proposed advisory centre would also act as a hub for the transfer of knowledge and best practices among participating states vis-à-vis defending themselves in mediation or ISDS. This would likely cause conflicts of interest for the centre which could be addressed, for instance, by ensuring that the centre cannot act as mediator/conciliator itself.

Both avenues present UNCITRAL with an opportunity to become an international hub and a clearing house for investor-state mediation. The final choice may ultimately depend on the balance struck between pragmatism and the politics of symbolism. For example, although the advisory centre proposal is widely supported, especially by developing countries, the issue of its financing is still a thorny one among delegations.

III. Challenges going forward

A general word of caution may be offered by way of conclusion. For any rules or apparatus on investor-state mediation to be effective, it is paramount that there exists a firm footing on empirical data about what actually happens in practice. Although we have working theories on settlements (e.g., Echandi and Kher) and some evidence of common obstacles to settlements (including the 2018 survey referred to above), there is a general lack of systematic hard evidence and an in-depth understanding of the political economy of settlements, i.e., of the range and interplay of the various factors that facilitate settlements in practice. Attempts in literature to identify such factors, although insightful (e.g., Schwebel), tend to be anecdotal and not systematised (but cf Hafner-Burton, Puig, and Victor).

There is thus scope for a true synergy between academic research and the issues that the WG must address going forward (see Working Paper 190, paras 45ff). To this end, a recent bibliographical compendium on investor-state conciliation and mediation prepared by Romesh Weeramantry and

Brian Chang is a welcome development as a starting place to take stock of our current level of knowledge, the gaps in it, and the need for new studies and research agendas going forward.

Future studies could look into the anatomy of ISDS disputes and into individual settlement agreements, as for example Salacuse and Reed (p. 30ff) have argued, in an attempt to identify potential patterns. Simultaneously, studies could also look towards organisational theory and cognitive sciences for insights. Designing an UNCITRAL mediation facility would for example benefit from: (i) an understanding of the decision-making processes of investors vis-à-vis pursuing investor-state arbitration and/or seeking a settlement; and (ii) a deep-dive examination of exactly how the *modus operandi* of state bureaucracies facilitates or hinders the settlement of ISDS disputes.

Moreover, developing such knowledge has value going beyond the confines of ADR. It cuts across several aspects of the UNCITRAL process, including in particular the growing emphasis put by delegations on capacity building, technical assistance and knowledge transfer, all of which are linked to the advisory centre proposal.

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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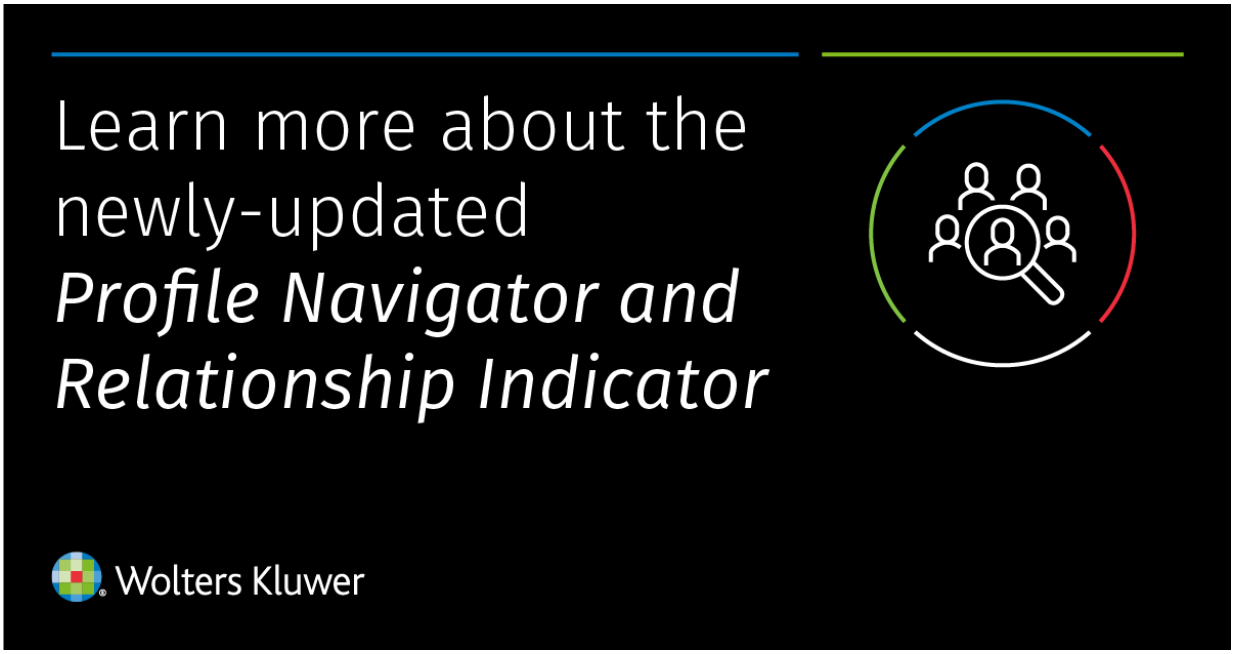

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