Kluwer Arbitration Blog

Investor-State Mediation: Insight and Inspiration from the First Virtual Pre-Intersessional Meeting of UNCITRAL WGIII

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There may have been a lot of government restrictions limiting physical gatherings this year, but these restrictions surely did not limit our enthusiasm in gathering (virtually and intellectually) for the first-ever United Nations Commission on International Trade Law ('UNCITRAL') Working Group III ('WGIII') Pre-Intersessional Meeting. The virtual event, with the theme "The Use of Mediation in ISDS", was successfully held in Hong Kong on 9 November 2020, attracting more than 500 registrations from over 74 countries.

The panel discussion among the promising line-up of ISDS experts engaged with UNCITRAL's ongoing work on ISDS reform and the speakers indicated a hope that the event could contribute to the Secretary's preparatory work on the topic and pave the way for further discussions to be held by WGIII. This post provides an overview of the Pre-International Meeting, highlighting some of the key themes, including challenges to ISDS mediation, multi-tiered dispute resolution, hybrid models for ISDS, and possible reform options.

Videos of the event and related materials are available here. Interested readers may also visit this page for more Kluwer blog posts on investor-state mediation.

Overcoming challenges to ISDS mediation

The first panel (Shane Spelliscy as moderator, and Justin D'Agostino, Meg Kinnear, Professor Jaemin Lee, and Mairée Uran Bidegain as speakers) discussed the challenges associated with the use of mediation in ISDS and how to overcome these challenges. The panel observed that the overall settlement rate for ISDS is quite low relative to settlement rates in commercial litigation and arbitration. Various reasons for this were discussed, including the lack of incentives for early settlement, the lack of coordination and consensus between different ministries and officials, and inadequate awareness and confidence in mediation generally.

The panellists then moved on to consider the ICSID mediation mechanism and the Korean experience in ISDS mediation. The panel concluded with a number of proposals to overcome the challenges that had been identified. These include, among other things, developing internal awareness about mediation as well as capacity to mediate and having more detailed treaty provisions to provide a stronger foundation for mediation in future.

Multi-tiered dispute resolution

The second panel (Dr Anthony Neoh QC SC JP as moderator, and Wolf von Kumberg, Professor Jack J. Coe Jr., and Ronald Sum as speakers) considered the use of mediation as part of a multi-tiered dispute resolution process. The panellists first examined the multi-tiered provisions in a few bilateral agreements, such as the Comprehensive and Economic Trade Agreement (CETA). They pointed out that while these provisions appear to be intended to encourage the use of mediation in conjunction with arbitration, obstacles may arise. One example is the fact that these systems are often geared towards preparing for arbitration during cooling off periods.

In light of the obstacles, the panel proposed a number of solutions to make the multi-tiered dispute resolution process more effective. The proposals include considering the use of Med/Arb/Med models; continuing the evolution of institutional frameworks; and designing more effective mediation protocols.

Finally, the panel explored the innovative aspects of the investment mediation rules under the CEPA (Closer Economic Partnership Arrangement) between Mainland China and Hong Kong SAR, highlighting the requirements in relation to the qualifications and skills of CEPA mediators, the provisions on enforcement of mediated settlements, confidentiality, and the compulsory Mediation Management Conference procedure. The panellists suggested that the CEPA mediation mechanism, which is a clear set of rules with an open and transparent mechanism affording protection to foreign investors, may be a potential model for reference for UNCITRAL's work in future.

Hybrid Models for ISDS

The third panel (Natalie Morris-Sharma as moderator, and Barton Legum, Francis Xavier SC, Cao Lijun, Blanca Salas-Ferrer, and Professor Hi-Taek Shin as speakers) considered the use of hybrid models, which are dispute resolution mechanisms involving both arbitration and mediation, in resolving ISDS disputes. The panel discussed a number of legal issues arising from the use of hybrid models. For instance, some hybrid ISDS provisions fail because the language is unclear. Another potential issue is that mediation and arbitration are not kept separate from one another. This can be problematic where confidential information or admissions from mediation get intertwined with the arbitration proceedings, with the result that the arbitral award may be challenged on due process grounds.

A number of recommendations emerged from the panel session. The panel recommended mandatory mediation because, among other benefits, it provides a valid basis for state respondents to have recourse to alternative approaches outside arbitration without the need to worry about criticisms or allegations of corruption. It also helps to preserve the relationship between the investor and the State. Another recommendation is the development of a permanent investment court structure, which is capable of bringing much needed predictability and structure to mediation.

The panel also considered the potential for arbitrators to also act as mediators in ISDS cases. The panel acknowledged the potential benefits of such practice, such as time and cost savings. However, in light of some of the issues raised earlier, such as concerns over confidentiality as well

as impartiality of arbitrators when mediation fails and arbitration resumes, the panel suggested a cautious approach for ISDS cases whereby only the presiding arbitrator will act as mediator, with the understanding that if mediation fails, he or she will resign and a new president will be appointed.

Reform options for ISDS mediation

The fourth panel (Anna Joubin-Bret as moderator, and Alejandro Carballo-Leyda, Charlie Garnjana-Goonchorn, and Dinay Reetoo as speakers) discussed the possible reform options for ISDS mediation. The panel highlighted three broad categories of recommendations – (1) improving the legal framework; (2) capacity building; and (3) leveraging mediation's synergy with other ISDS reform options.

It was suggested that there is a need to improve the legal framework for investor-State mediation at both the international and domestic levels. At the international level, the panel called for the development of model treaty clauses and ISDS mediation protocols. As for the domestic level, there needs to be better domestic institutional frameworks to facilitate the use of mediation by States.

Capacity building is important for a variety of reasons. For instance, it helps to demystify the use of mediation as a means of resolving ISDS disputes (in particular, it helps address concerns relating to corruption and concerns that the government is not acting in the best interest of the people if it agrees to settle). Capacity building can be achieved through education and promotion initiatives, such as conducting training courses and promoting the literature cited and developed in the Working Group III process.

Lastly, the panel considered the synergy of mediation with other possible ISDS reform options. In particular, the panel highlighted the potential of an Advisory Centre on International Investment Law ('ACIIL'). The panellists considered that an ACIIL can (1) help state officials understand mediation; (2) take on the role of both neutral institution and legal advisor to provide an evaluation as to whether and when mediation is appropriate; and (3) facilitate the mediation process (by proposing mediators and ensuring that State representatives have the appropriate authority to negotiate and reach an agreement).

The way forward

Following a Q&A session in which the audience eagerly participated, the event finally came to an end. Just like the novel format of this first-ever virtual Pre-Intersessional Meeting, the ideas emerging from the panel discussion proved equally forward-looking and there was a lot of food for thought for everyone. It is hoped that all these discussions could give us some inspiration on how we can shape the future of ISDS mediation going forward and contribute to the work of WGIII as well as the ongoing dialogue among the wider ISDS community.

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