

Kluwer Arbitration Blog

Investment Arbitration: A Case for Incremental, Iterative, Progressive, and Prioritized ISDS Reform

Mercy McBrayer (Chartered Institute of Arbitrators) · Thursday, February 21st, 2019 · Chartered Institute of Arbitrators (CIArb)

At the heart of the debate surrounding Investor-State Dispute Settlement (ISDS) Reform is [UNCITRAL Working Group \(WG\) III](#). Until two years ago, WG III was dedicated to discussing issues surrounding online dispute resolution. But in 2017, in response to several significant awards against states in investment arbitration and corresponding public outcry, the WG III was re-tasked to examine the ISDS system and determine if it was desirable for the states to embark on a regime of reform to the system.

In order to provide a centralized compendium on information on the areas of potential reforms being discussed by WG III, the [Chartered Institute of Arbitrators](#) (CIArb) has launched a collection of discussion papers providing detailed information of the issues put forward in the discussions in WG III. As an official observer organization of WG III, CIArb is perfectly placed to provide perspective on the discussions to our 17,000-strong membership and to the wider arbitration practice. The purpose of [CIArb's ISDS Discussion Papers](#) is to inform readers of the various arguments put forward by the WG III-member states and observers regarding the topics that have arisen. The intent is not to persuade, but rather to inform stakeholders in ISDS. The views offered in the papers are not necessarily reflective of any position taken by the CIArb. Rather, they are a report of the views that the CIArb delegation observes are present in the discussions.

The key criticisms of ISDS have crystalized in recent years into three distinct categories: Efficiency, Decisions, and Decision-Makers. The [CIArb ISDS Discussion Papers](#) are broken into these three areas, which the WG III has accepted as overarching themes in the debate. In the discussion of **efficiency**, the papers offer views of the member states' criticisms of the increasing time and cost of ISDS disputes while also noting the necessity that the parties themselves create for lengthy, expensive proceedings. Solutions to these issues such as third-party funding of disputes, proposed expedited rules, strengthened security for costs and interim measures procedures, requiring pre-dispute settlement, and creating rules for bifurcation of proceedings have all been put forward. In the area of **decisions**, states have expressed a high level of concern over the consistency, predictability, and valid legal interpretation of instruments. With these issues have come suggestions of review mechanisms for awards and the establishment of multi-lateral investment courts, along with concerns over transparency and the role of third parties in proceedings. Finally, the discussion of **decision-makers** centres around ways to ensure the impartiality and independence of arbitrators in investment arbitration. This includes standards of disqualification, methods of appointment, challenge procedures, and conflicts of interest. WG III

has also discussed whether a code of conduct, training requirements, certifications, or rostering should be put in place for arbitrators. The lack of diversity of arbitrators in ISDS on many levels is also an area of serious concern to many states.

A common thread running throughout the discussions in all areas is the idea that each proposal or possible solution put forward raises its own set of problems and counter arguments as a result. Many reforms that have been put forward have the potential to affect other aspects of the system significantly, even if unintentionally. Most often, the concept of party autonomy, historically a defining element of arbitration, is the first to be forfeited. This is followed closely by the concept of confidentiality. Many states see these sacrifices as acceptable. In light of this, the sole position that CIArb has taken to this point is that a comprehensive analysis of the broad implications that any change will have on the system must be undertaken before any proposed reform is implemented. The ISDS system forms a critical component of the global trade and investment system and, therefore, changes to the system have far-reaching effects that should be **evaluated systematically and any reform must be incremental, iterative, progressive, and prioritized**. Hence, it is evolution, not revolution, that should be the reference point for any ISDS reforms undertaken by WG III. It is hoped that the Discussion Papers are a first step in just such an analysis.

CIArb's event officially launching the Discussion Papers, "[Evolution, Not Revolution: CIArb's Work on Investor State Dispute Settlement \(ISDS\) Reform at UNCITRAL Working Group III](#)", hosted by Pinsent Masons LLP and structured as an engaging discussion, with the participation of Dr Paul Tichauer, Jean-François Le Gal, Dr Crina Baltag, V.V. Veeder, QC, Philp Bliss Alikier, Wolf von Kumberg, Mercy McBrayer, and Lewis Johnston, was an excellent opportunity to present the CIArb ISDS Discussion Papers and hear the opinion of the public. On **efficiency**, the panellists highlighted the fact that the new generation of international investment agreements, as well as the amended arbitration rules provide for effective solutions for addressing issues of costs and duration of ISDS proceedings. It was stated that a prudent and proper approach to the ISDS reform should not focus on speedy and cost-effective resolution as a goal in itself. Further, the panellists emphasized the increasing role of prevention policies, including the efficient implementation of ADR proceedings, along with educating the public on the advantages of such alternative mechanisms, especially in the context of the [draft Singapore Convention on the International Settlement Agreements resulting from Mediation](#). With respect to **decision-makers**, the panellists confirmed the necessity of a code of ethics for arbitrators with meaningful sanctions, while emphasising certain consequences of the exclusion of party-appointed decision-makers. As to **decisions**, the panellists indicated that while there is a real concern, ultimately affecting the confidence in the system, certain mechanisms, such as interpretative statements of non-disputing treaty parties, can be employed in tackling this issue. It was also highlighted that while the current UNCITRAL WG III discussion is focused only on procedural aspects of the ISDS reform, a good number of issues are rooted in the lack of uniformity of the standards of treaty protection.



A similar event presenting developments in WG III work and updates to the Discussion Papers is planned for late summer 2019 and is expected to take place in Singapore. CIArb invites feedback on the Discussion Papers from the broader arbitration community. The intention is for the Discussion Papers to continue to evolve as the WG III discussions progress. Practitioners are invited to give feedback or to suggest inclusions to the [CIArb directly](#). The Discussion Papers can be found [here](#) and [here](#).

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This entry was posted on Thursday, February 21st, 2019 at 9:12 am and is filed under [Investment](#), [Investment Arbitration](#), [Investment protection](#), [Investor-State arbitration](#), [ISDS](#), [ISDS Reform](#)

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