Kluwer Arbitration Blog

2020 in Review: Institutional Reform Efforts and Developments in Investment Arbitration

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Introduction

In spite of delays and shifting priorities owing to the pandemic, institutional efforts to reform the investor-state dispute settlement (ISDS) regime have continued throughout 2020.

In this post, we look back at our coverage of the work of UNCITRAL Working Group III ("WGIII") on investor-State arbitration reform, especially in light of the 2021 reform agenda. Recognizing a paradigm shift, we also reflect on the rise of investor-State mediation as a precursor or alternative to arbitration.

The 39th session of the UNCITRAL Working Group III

The 39th session of the UNCITRAL Working Group III ("WGIII") was scheduled to take place in New York from 30 March to 3 April 2020 but was postponed due to the unfolding COVID-19 situation. The session later convened from 5 to 9 October 2020 in Vienna (WG report here), focusing on the following areas of reform:

- dispute prevention and mitigation as well as other means of ADR;
- treaty interpretation by States parties;
- security for costs;
- means to address frivolous claims;
- multiple proceedings including counterclaims; and
- reflective loss and shareholder claims (together with the OECD).

Throughout 2020, our Blog contributors reflected on reform proposals to address these issues – with the most popular lens being to examine whether, in practice, the proposals are fit to achieve the overarching goals driving the reform process.

Discussions on the Multilateral Investment Court and Appellate Mechanism

In a post dated March 2020, Marike R. P. Paulsson observed that in addressing the criticism of the current system of ISDS, WGIII has established two pathways: one is the (total or partial) replacement of the system; and the second is incremental reforms within the system. The first pathway proposes two alternatives. One is the Multilateral Investment Court ("MIC") that replaces the system in total and the other is the Appellate Mechanism ("AM") that replaces crucial parts of the system such as annulment mechanisms, enforcement, and finality of awards. Both are premised on the idea of abandonment of party autonomy; and with that the right of disputing parties to appoint an arbitrator.

Assessing the AM proposal's ability to achieve overarching reform goals, Paulsson noted that while an AM could improve consistency in substantive norms application (and therefore contribute to confidence in ISDS), much of the motivation for reform has been driven at the backdrop of duration and costs. Conversely, the introduction of an AM would incidentally increase both, requiring further consideration about its fitness for purpose.

Similarly, assessing the MIC proposal, Fernando Dias Simões queried whether the creation of a MIC without the traditional party-appointed arbitrator regime, could by and of itself, really succeed in its goal of de-politicizing ISDS "by break[ing] the link between disputing parties and adjudicators". Simões argued that a political element will inevitably be associated with any dispute that involves public policy, with no irrefutable evidence that international judges are more independent and impartial than arbitrators. To that end, Simões advocated for certain procedural tools to mitigate the risk of politicization.

Even though the negotiation process on the MIC has been slow and "one cannot predict when an implementable conclusion will be reached," Andreea Nica observed that there had been a strategic shift in the WG's engagement on the MIC proposal, with "what initially looked like delegations anchored in rigid positions now resembles a common engineering exercise in search for solutions."

It remains to be seen whether Nica's optimism is borne out at the 40th session, scheduled to take place in February 2021, where the Working Group is expected to continue its consideration of the following reform options: (i) selection and appointment of ISDS tribunal members (ii) appellate mechanism and enforcement issues; and (iii) the draft Code of Conduct (discussed below).

Discussions on incremental reform

Turning to efforts for incremental reform within the existing ISDS system, our Blog contributors, similar to above, have applied a fitness-for-purpose lens to discussions with respect to security for costs and counterclaims.

Leading up to the 39th session, the General Assembly Secretariat had issued a note on issues to be considered on the topic of **security for costs** and frivolous claims. Examining the proposed reforms to the security for costs regime against its intended purpose of reducing frivolous claims, Johan Sidklev and Bruno Gustafsson argued that while a loosening of the strict standards for granting security for costs may be warranted, it is ultimately of limited utility for averting frivolous claims in ISDS.

In separate posts here and here, Anna De Luca, and Nicholas Diamond and Kabir Duggal,

discussed the role of **counterclaims** in ISDS, particularly as a possible avenue for holding investors accountable for alleged human rights violations.

Luca observed WGIII's silence on the issue of counterclaims due to its standing as "inextricably intertwined with substantive aspects", thereby falling outside the scope of procedural ISDS reform. However, noting that the WGIII has not foreclosed such consideration, Diamond and Duggal find that counterclaims could play a role in advancing certain civil and political rights, such as the right to a fair trial.

Discussions relating to ISDS and both security for costs and counterclaims have previously been covered in the Blog – see here and here.

Code of conduct for arbitrators

An important development in 2020 was WGIII's publication of a draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. This document was prepared jointly by the ICSID and UNCITRAL Secretariats, partly in response to concern over arbitrators' independence and impartiality. Its text provides policymakers with a range of options on issues including disclosure obligations, repeat appointments, issue conflicts, and more.

Our contributors reported on this development here and here. The WGIII will further consider the draft Code of Conduct in its 40th session.

All reforms don't lead to arbitration: the rise of investor-State mediation

This year we have seen a stronger push towards expanding the ISDS reform agenda to explore alternative mechanisms for settling investor-State disputes – in particular, investor-State mediation.

In a series of posts, contributors to the Blog marked the entry into force of the Singapore Convention on Mediation ("Singapore Convention"), by reflecting on mediation as an alternative to arbitration.

Contributor Rachel Tan welcomed the revamped mediation regime established by the Singapore Convention, highlighting the fact that the Convention introduces to mediation a characteristic that has long contributed to arbitration's popularity: enforceability. The Singapore Convention –"in substance the mediation equivalent to the New York Convention" – now enables settlement agreements between parties to be directly enforced across national borders. Teamed with what she considers to be the inherent benefits of mediation (i.e., the possibility of a more holistic outcome and of a settlement by consensus), Tan purported that the process established by the Singapore Convention "compels a deeper look at dispute resolution design for investor-State disputes", encouraging a tipping of balance in favour of mediation.

While the Singapore Convention's entry into force has amplified the focus on investor-State mediation, an increasing appetite for this mechanism has been demonstrable in recent years, making its way to even WGIII discussions.

Reflecting on WGIII discussions on mediation, Charalampos Giannakopoulos argued for the importance of institutionalising mediation to "introduce a degree of internal monitoring and transparency in a process that is often conducted under complete confidentiality".

In support of this hypothesis, Mr Giannakopoulos cited a 2018 survey indicating that States were generally reluctant to mediate due to, among other reasons, an unwillingness to assume responsibility for voluntary settlements, and the fear by government officials of being subjected to allegations for corruption or prosecution.

Further examining the broad acceptance of confidentiality in investor-State mediation, Esmé Shirlow situated this practice against increasing calls to reform the perceived lack of transparency in investor-State arbitration. Cautioning against reforming one mechanism without considering the unintended consequences for others, Dr Shirlow highlighted the need for a holistic and integrated approach to ISDS reforms.

Conclusion

Dr Shirlow's word of caution fits well within what has emerged as a strong theme among our contributors covering ISDS reform in 2020: a call to carefully balance interests, and to ensure that the different reform proposals, in attempting to fix specific problems, do not end up undermining the overarching goals at the very heart of the reform process.

Going into 2021, we will continue to monitor the development of these highly-debated issues – both in institutional reform processes – and through their manifestation at the regional and bilateral level, as was evident from our coverage of the new dispute settlement paradigms established by the USMCA and ECT modernization process.

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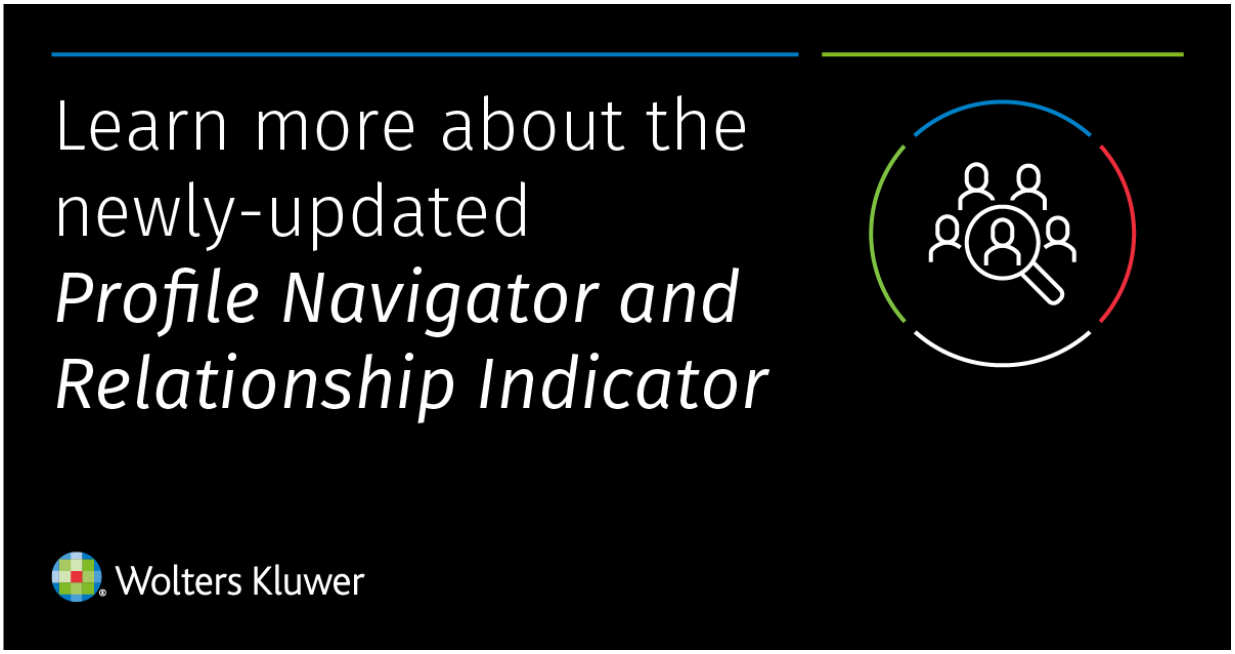

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