Kluwer Arbitration Blog

UNCITRAL and Investment Arbitration Reform: A Little More Action

Malcolm Langford (University of Oslo) · Monday, October 21st, 2019

UNCITRAL's Working Group III on investor-state dispute settlement (ISDS) assembled in Vienna last week to consider a raft of reforms concerning investment arbitration. The fifth session in this process, governments surprised many by finalising quickly a medium-term work plan and commencing deliberations with a pragmatism that has proved often elusive. To be sure, not all states are enamoured with the agenda. Some prefer the current system, others wish its abandonment. However, the working group can boast now that it is able to advance sensitive negotiations with a certain degree of concreteness and consensus. This blog post sums up the legal and policy developments of the week and ends with a reflection on the politics.

1. A medium-term plan

The session kicked off on Monday with a discussion of how to sequence the consideration of the five initial reform topics identified in the New York session in April 2019. These themes ranged from a code of conduct and third-party funding to adjudicator appointment, shareholder claims and an advisory centre. By early Tuesday morning, the Chair had secured consensus on a medium-term work plan. Although, it was achieved despite creative attempts to slow the process down, including a proposal for a verbatim reading of all 23 written state submissions.

The medium-term plan foresaw a staggered discussion. Firstly, three topics were slated for immediate discussion: the establishment of an Advisory Centre on International Investment Law; a code of conduct for arbitrators and judges, and third-party funding. The choice of the advisory centre appeared unusual given its late entry into the reform agenda. Nonetheless, it proved a suitable curtain opener given the support for the proposal in the room. Secondly, a set of mostly structural topics were scheduled for the January 2020 session in Vienna. These are the appellate mechanism, a standing multilateral investment court, and the selection and appointment of arbitrators and judges. Thirdly, a grab bag of other issues was pencilled in for the New York session (30 March to 3 April 2020). This includes reflective loss for shareholder claims but also counter-claims, dispute prevention and the overall reform instrument/s.

2. Advisory Centre on International Law

After achieving consensus on the work plan, discussion on an advisory centre commenced immediately. State after state took to the floor to announce support, highlighting the paradox that ISDS cases are often more factually complex and lengthier than WTO cases, but only the latter has an advisory centre. Moreover, developing countries consistently lose ISDS cases more often than developed countries and empirical research suggests that one cause is the lack of quality legal assistance.

However, states were divided on the design of a new centre, especially questions such as: *Who* would benefit? *What* services would be provided? And *how* would it be set up? There was a clear consensus that the prime beneficiaries should be low-income countries. However, some states and observers proposed that the centre help also small and medium enterprises (SMEs) and middle income states under certain conditions (e.g., through limited or partly remunerated support). The likely extent of resources for the centre hung heavily over the discussion of what services would be provided. States agreed on the importance of pre-dispute technical assistance and capacity building, while some were adamant that the centre should also provide representation. The advisory centre was envisaged as an intergovernmental body but with sufficient independence to ensure legitimacy, and could be funded through contributions by members states and user fees where appropriate. The UNCITRAL Secretariat was asked to begin preparatory work on a full proposal.

3. Code of Conduct

The discussions on the code of conduct attracted an equally strong degree of consensus with an emphasis on establishing a 'binding code'. This implied a focus on developing rules rather than guidelines, and precipitated a certain degree of concreteness in some proposals. However, states were partly divided in *how* they envisaged the code's architecture. Some championed a single rulebook for all arbitrators and eventual judges in ISDS. Others contended that structural reforms such as a court or appellate review would solve some or many of the current problems with arbitrator conduct, necessitating a less demanding or different code. For example, a standing judiciary and rigorous pre-appointment procedures could solve independence-based concerns with double hatting and impartiality concerns with issue conflicts. States were also unclear on *who* would be covered, with proposals for a separate code of conduct for counsel. To complicate matters further, ICSID is further ahead in developing a declaration of ethics, and the eventual product is likely to be influenced significantly by their deliberations and vice-versa.

States were largely in agreement on *what* themes should appear in a code of conduct. This included a relatively high degree on consensus on the need for detailed disclosure requirements by arbitrators as well as concrete rules to ensure efficiency. Some states mooted a limitation on the number of cases. However, there was a clear divide on other aspects. The most notable concerned 'double hatting', whereby arbitrators act as counsel in other ISDS cases. Some delegates expressed support for a complete ban on arbitrators acting as counsel, such as can be found in the code for the Court of Arbitration for Sport (S19). Others thought it should extend to all other ISDS roles, such as expert witness and advisors (with Chile pointing to its 2017 FTA with Argentina). Yet, others called for transitional rules such as a transition period or a ceiling on the number of cases. This could allow more young, female and non-Western nationals to transition more easily from counsel work into arbitral work.

Significant time was also devoted to enforcement mechanisms. Some states emphasised the importance of *reputational* sanctions, such as transparent and public listings of non-compliance. Others pointed to the need for *material* incentives, such as loss of fees. The UNCITRAL Secretariat will now proceed to develop a proposal in collaboration with ICSID.

4. Third-party funding

The final topic for reform was third-party funding. The mere definition of the phenomenon bedevilled the earlier discussion in New York, and this partly continued in Vienna. Did third-party funding include contingency fee arrangements for law firms? Did it cover non-profit forms of support, including to states? There were three camps. Firstly, states concerned mostly with the potential for conflict of interest with arbitrators defined third-party funding narrowly and advocated light-touch regulation. Secondly, states worried about perverse incentives – such as unwillingness to settle – defined it more broadly and advocated stronger regulation. Finally, those that viewed third-party funding as a generator of frivolous claims and inconsistent with the *raison d'etre* of investment treaties (promotion of investment) were more inclined to adopt a wide definition and call for prohibition.

The result was a series of reform proposals scattered along a spectrum. Some called for 'prohibition' with exceptions for impecunious claimants that lacked access to justice. Access to third-party funding would be conditional though on claims not being frivolous and speculative and funders not possessing a portfolio targeted at particular states. The majority of states favoured 'regulation', citing contractual liberty and access to justice, especially for SMEs. The key for these states was disclosure. However, there was disagreement over the necessary breadth of disclosure, especially the terms of the funding agreement.

Appropriate and proportionate sanctions were advocated. Some states pushed for strong material penalties such as payment of legal costs and annulment of cases, while some observers and states noted the unintended consequences of draconian rules, such as pushing the practice further underground. Indeed, the lack of transparency around contemporary third-party funding also led the Chair to call for all actors to share more data with the Secretariat or the ISDS Academic Forum on the frequency of use, the amount of funding, the reasons for funding, and how often it benefits SMEs. The Secretariat was asked to work with a broad and flexible definition of third-funding funding, develop a suite of options for regulation and control, and consider a separate code of conduct for funders.

5. Damages and Multilateral Convention Procedural Reform

The substantive discussions closed on Thursday with a brief consideration of two additional issues. The first was damages. States such as Nigeria and Pakistan noted their experience in facing multi-billion dollar ISDS awards and questioned the consistency and justification for different valuations methods. The issue will be returned to in April 2020 and there is high likelihood that the working group consider procedural reforms to ensure, at least, greater consistency in damages calculation. Likewise, there was a brief discussion of an eventual single instrument, a so-called Multilateral Convention on Procedural Reform, which will be discussed in forthcoming EJIL:Talk! blogs by Anthea Roberts and Taylor St. John. The idea is that states could opt into certain reforms

but not be required to swallow the whole package. Significant time will be devoted to this eventual reform structure in April 2020.

6. Plenary politics

Turning to the politics, previous WGIII sessions have been dominated by a mix of confrontation with cooperation. Last week proved more conciliatory. Only a handful of states sought to put spokes in the wheels of progress and the discourse of both states and observers was more moderate, with fewer charged, direct and open attacks. The reason is most likely the focus on concrete topics, as dissent was channelled into substance rather than form. It may have also been the assemblage of personalities that were present this time. Yet, whether this bonhomie survives the more contentious topic of a multilateral investment court in January remains to be seen. Moreover, some of the nit-picking on the adoption of the medium-term plan and sessional report spells some danger for a speedy review of draft treaty text.

There were two other political developments of note. First, continuing a trend, states from the Global South became significantly more active. They made longer and considered interventions on virtually every topic under consideration. Sometimes they mobilised in coalitions – e.g. when eight African states joined a common procedural statement with the European Union – but mostly articulated their own independent positions on a range of topics. The result is the emergence of subtle majority coalitions on distinct issues that partly complicates attempts at broad categorisations. Moreover, states such as Brazil and South Africa, which seek a more paradigmatic move away from ISDS, engaged more fully in various incrementalist and systemic reform discussions this session as they bide their time to speak to their own proposals such as dispute prevention in April 2020.

Second, the voice of investors and practitioners was more strongly heard in the room compared to the last few sessions. A range of associations representing companies and counsel made submissions. Although these groups varied considerably in their emphasis. The Practitioner's Forum and ITA offered support to the advisory centre; others offered rigorous defences of third-party funding on the basis it provided access to justice; and others cautioned on moving too quickly to ban double hatting given the potential side effects on diversity. One group EFILA organised a side event primarily devoted to highlighting the dangers of a multilateral investment court and the virtues of the current system.

However, other long-standing observers moved to place more focus on provision of research and written submissions. The ISDS Academic Forum launched seven papers on the WGIII topics, the university centre CCSI and civil society organisations IIED and IISD made four joint written submissions, and the Permanent Court of Arbitration secretariat sought to provide statistics on the murky topic of third-party financing. Pluricourts provided statistics on the topics at hand and was asked to follow up with statistical analysis on new topics.

7. Conclusion

Channelling Elvis Presley, the UNCITRAL WGIII rapporteur at the close of the previous New York session noted the importance of 'a little less conversation, a little more action'. The WGIII

session last week represented a clear maturing of the ISDS reform process. States were able to identify both areas of agreement and disagreement such that the Secretariat could begin to draft reform options and even treaty text. While states have only been hastening slowly until now, they displayed for a few days at least a potential to engage in a little more action.

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