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2020 in Review: Institutional Trends in Investor-State Dispute Settlement

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In 2019, we were wondering whether winter had come to Investor-State Dispute Settlement (ISDS), bringing with it a decline in the negotiation and conclusion of bilateral investment treaties. Looking back on 2020, we are left asking ourselves a similar question. This post will examine the year's major institutional developments and their effects on ISDS both in 2020 and beyond.

COVID-19: ISDS' Cosy Winter?

Despite the growing news fatigue, it would be remiss to write a 2020 review without briefly mentioning COVID-19. Its "unprecedented impact on individuals, entities, businesses, and states" has, naturally, greatly impacted the world of ISDS. In July, UNCTAD's Investment Dispute Settlement Navigator reported that only 31 known ISDS arbitrations were initiated in the first half of 2020 (a 47% decrease from 2019). At the time, ICSID's 2020 Financial Year Annual Report stating that only 23 cases had been registered under the ICSID Convention (a 41% decrease from those registered in the 2019 financial year). However, ICSID's recently released 'Year in Review' newsletter reports a record 58 new cases were registered in 2020 under the ICSID Convention and Additional Facility, providing some optimism for those concerned about the effect COVID may have had on the demand for ICSID's services.

In addition to these quantitative changes, the year has also seen several qualitative changes to ISDS as a result of COVID-19. The recently released 'International Arbitration and the COVID-19 Revolution' explores the innovative effect that COVID-19 has had on ISDS; particularly, the ways the ISDS community has adapted to the new, harsher, conditions. Leading the way, arbitral institutions jointly declared their intention of ensuring that "pending cases may continue and that parties may have their cases heard without undue delay." Primarily, this response saw arbitral institutions embrace remote technologies and strive to implement secure online communication.

Yet, as Secretary-General of the ICC Mr Alexander Fessas has noted, "this really is not that new". Many of these 'adaptations' existed well before the pandemic: ICSID announced that 60% of ICSID hearings were occurring remotely in 2019; several institutions were in the process of updating their electronic filing rules; and all institutions provide a wide discretion for the parties and the arbitrators to frame the procedure for a given case. This pre-existing framework for remote hearings should not be surprising: ISDS tribunals have always needed to facilitate arbitrators,

counsel, and witnesses appearing from across the world; COVID-19 has simply increased the demand. Moreover, flexibility goes to the core of arbitration's *raison d'être* – it is meant to adjust swiftly to uncertainty. Accordingly, while the rest of the world was adapting to the chilling effect of COVID-19, ISDS institutions were already relatively well-prepared for the weather.

Diversity in Investment Arbitration

In 2018, Gary Benton summed up the problem of diversity in international arbitration by stating: "we widely recognize there is something wrong but we haven't effected a solution." In 2020, a solution appeared further away than ever. The ICSID Fiscal Year 2020 Caseload Statistics reported that only 14% of appointed arbitrators, conciliators and *ad hoc* committee members were women – a steep drop from the 24% of appointed arbitrators reported in 2019 and 2018. While this "step back" is a blow for gender diversity in ISDS, the general trend remains positive. Over the 2020 financial year, individuals of 44 nationalities were represented amongst arbitrator, conciliator and *ad hoc* committee member appointments—"the highest number in a single year at ICSID". Equally, in their 2020 report, the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings – 17 leading international arbitration institutions, law firms and gender diversity initiatives – reported that the proportion of female arbitrators has almost doubled over the past four years. However, the report also recognised that the most frequent source of information about arbitrator candidates is through word of mouth – something which entrenches existing standards and presents a barrier to new and diverse arbitrators.

Forging Ahead with ISDS?

The year saw a number of important bilateral and multilateral developments as States and institutions attempt to address the issues associated with ISDS.

In 2020, India and Brazil attracted attention from the ISDS community by signing the investment cooperation and facilitation treaty ('India-Brazil BIT'). Although seeking to encourage the 'cooperation and facilitation' of foreign investors, the India-Brazil BIT provides little in the way of investment protection: it does not contain ISDS or rules on indirect expropriation. Instead, the India-Brazil BIT rather adopts the Brazilian approach to BITs which "brings dispute prevention to the center stage with the adversarial form of dispute resolution being a secondary consideration." Such model-BITs tend to favour the host State's right to regulate but also undermine the value of any substantive rights as foreign investors find themselves without a means of enforcing them. In this sense, they may be seen as a return to a pre-ISDS era, thereby representing a significant shift away from the "decades-old practice of investor-state arbitration".

The India-Brazil BIT is by no means an isolated development: the trend internationally has been one of review and reform, with UNCITRAL's Working Group III ('WG III') and ICSID's working papers being prominent examples. During these reviews, States and arbitration institutions have been "exploring the potential for investor-State mediation to work alongside arbitration, or even to replace it altogether for some disputes." Utilising mediation as part of a reform to ISDS has become a common theme throughout the UNCITRAL Working Group III discussions. Similar to the India-Brazil BIT, institutionalising mediation in a reformed ISDS regime is said to facilitate settlements before arbitration is necessary.

However, while the advantages of these institutional reform efforts can be debated, a fundamental issue remains how to implement them. At the 39th session, WG III outlined a few approaches to incorporating substantive changes into a multilateral instrument. For example, a "suite" approach was suggested, according to which States could choose to incorporate one or more of the proposed reform options based on their political and policy concerns and interest. Alternatively, a minimum standard approach was offered, whereby certain core elements would be included in a multilateral instrument that would need to be adopted by all participating States.

In a lecture on the topic, Professor Zachary Douglas QC highlighted the complications that multilateral institutions can bring to this process; namely, a highly political and convoluted negotiation process. As an alternative, Professor Douglas recommended a bilateral approach designed to address the issues that have arisen from a State's own BITs and ISDS experience. This, it was reasoned, would speed up the negotiation process and allow for targeted solutions to the particular concerns of the State conducting the review of their BITs.

As we move into 2021 and States continue to review their BITs, we are likely to see new alterations and alternatives to the traditional ISDS model. However, there is no panacea to the issues surrounding foreign investment. As Dr Esmé Shirlow notes, reforms "to one procedure may produce unintended consequences for others." Accordingly, while arbitral institutions continue to discuss their role in facilitating international investment agreements, there will still be a need for a comprehensive approach that leverages "the strengths of different dispute settlement techniques whilst minimising their weaknesses".

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