Kluwer Arbitration Blog

Vienna and Geneva: Defining Arbitration in the Reform of Economic Institutions

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Delegates to the recently held 40th session of UNCITRAL Working Group III set out to debate the character of investor-State dispute settlement (**ISDS**) from three angles: the selection of tribunal members, the adoption of a code of conduct, and the establishment of an appellate mechanism (discussed in a series of posts on this reform process). While the week did not resolve the prospective institutional form of ISDS, this agenda raised questions concerning the enforcement of decisions made by any new institutional body. Yet as discussed in Kluwer's just-published volume on ISDS reform, such questions do not arise in a vacuum. The present post references the history and current revival of WTO arbitration to illustrate how parallel developments across international economic law clarify the scope of treaty references to 'arbitration' in this field.

Common Elements of WTO Arbitration

Although the possibility of recourse to arbitration surfaced in the 1948 Havana Charter, the GATT 1947 did not explicitly provide for arbitration. In 1987, several delegations to the Uruguay Round proposed arbitration as an alternative to panel proceedings. Their proposals partly served to address a problem that had plagued dispute settlement under the GATT regime: the requirement that panel reports be adopted by consensus in the GATT Council, where a losing party could block the adoption of the report to avoid compliance.

In its Dispute Settlement Understanding (**DSU**), the newly established WTO provided for two distinct types of arbitration mechanisms, which we respectively characterize as *implementation* and *alternative* arbitration. Implementation arbitration is found in Art. 21.3(c)—which consists solely in clarifying the "reasonable period of time" for compliance with a WTO panel or Appellate Body decision—and Art. 22.6, which determines the appropriate level of suspension of concessions. Alternative arbitration arises under Art. 25, whereby parties can agree to efficiently bypass 'mainstream' WTO proceedings.

Delegations during the Uruguay Round characterized these diverse types of arbitration principally in terms of their expeditious objective. During negotiations, the US had initially proposed arbitration "as an alternative means of dispute settlement for defined classes of cases, or by prior agreement of the disputing parties on an ad hoc basis", and where "[the] arbitrators' decision

would not require approval by the GATT Council". The discussions among delegations demonstrated uncertainty as to how arbitration was structurally distinguishable from the panel procedure, and thus as to its place within the GATT system. Beyond sharing an interest in rapidly resolving discretely defined issues, delegations thus deliberately avoided providing further detail regarding the character of arbitration. This explains the skeletal drafting of DSU Art. 25, as well as States' consensus on the "need for rapid completion of the dispute settlement process, including implementation" under Arts. 21.3(c) and 22.6.

The other element of arbitration that can be inferred from its consideration and subsequent ratification by 164 WTO members is a requirement of consent to a binding settlement. Both implementation and alternative arbitration under the DSU result in binding decisions, and compliance with these decisions remains subject to WTO institutional oversight. While implementation arbitration is often described as sui generis, unilaterally instituted arbitration under DSU Arts. 21.3(c) or 22.6 is nonetheless consensual in light of members' treaty-based consent to the prospect of 'incidental' proceedings arising during cases.

Distinguishing Features and Resurgence

By contrast, aspects of party autonomy often taken for granted in arbitration did not survive the Uruguay Round. While the choice of arbitrators under DSU Art. 25 was left to the parties, Art. 21(3)(c) arbitrations leave this choice to the WTO Director-General in practice, and Art. 22.6 arbitrations are conducted by the originally constituted panel when available. This diverged from the view of the GATT Secretariat, which suggested defining arbitration as "the process of resolving disputes on the basis of respect for law through decisions binding upon the disputant parties by arbitrators *appointed by the parties* to hear a particular case submitted by the parties".

WTO arbitration also provides no quarter to other common conceptions of party autonomy in arbitration. While DSU Art. 25 envisaged that members would be free to block the intervention of third parties in their arbitration, Art. 21(3)(c) and 22.6 arbitrators have found an implied power to admit third-party participation in these proceedings (see e.g., para 7). Each model also differs in terms of the requirement of party consent to the determination of arbitral procedures, and the possibility for parties to mutually adjust the scope of issues addressed in the award.

Today, implementation arbitration is a standard feature of WTO proceedings. While alternative arbitration has been instituted in only one case thus far, the de facto demise of the Appellate Body in December 2019 has infused Art. 25 with new blood. To avoid an 'appeal into the void', several WTO members concluded the Multi-Party Interim Arbitration Arrangement (**MPIA**), which became available to 24 members upon constituting a pool of arbitrators in July 2020. This arrangement is based on DSU Art. 25, yet its first proponents aimed to replicate "as closely as possible all substantive and procedural aspects as well as the practice of Appellate Review".

Four disputes are currently notified under the MPIA. Additionally, some WTO members have reached bilateral agreements outside of the MPIA. Through these agreements, either member can unilaterally appeal a given panel report—or an implementation decision reached under Art. 21—to Art. 25 arbitration.

Harmonization in ISDS Context

If the UNCITRAL ISDS reform process concludes by establishing an institutional body lacking a self-contained compliance regime, this would be expected to raise questions before asset-State courts as to whether such decisions are subject to enforcement under the 1958 New York Convention (**NYC**). Some of these arguments may concern whether such decisions are 'foreign' awards within the meaning of that treaty. On this point, State courts have found that 'a-national' decisions (i.e., those rendered in institutional forums lacking a domestic *lex arbitri*) satisfy this requirement under NYC Art. I(1) (see paras 58–64). As the UNCITRAL Secretariat suggested in November 2020, a new institutional body can also satisfy the 'arbitral' requirement of NYC Art. I(2), which expressly covers awards rendered by 'permanent arbitral bodies'.

Some may question whether parties submit to an investment court through an 'agreement in writing'—a requirement for enforcement under NYC Art. II(1). An institutional body to which the parties do not directly consent, or which they may be legally required to use, differs from traditional depictions of arbitration as arising from an agreement made directly between disputing parties. Yet many international investment agreements confirm that arbitration without privity (i.e., the investor's acceptance, by initiating proceedings, of the host State's treaty-based offer to arbitrate) satisfies this requirement under the NYC. Some State courts have recognized this as well in NYC enforcement proceedings regarding non-ICSID investment awards (see e.g., para. 32 and pp. 72–73).

These conclusions are borne out in the practice of institutions with structural similarities to a prospective global investment court. On the question of 'foreign'-ness, Egyptian courts have characterized the Arab Investment Court (seated in Cairo) as "not related to the national procedural systems including any national arbitration system". In the specific context of NYC enforcement, US courts have found that decisions of the Iran-US Claims Tribunal (**IUSCT**) satisfy the requirement of an 'agreement in writing'. While English courts have questioned whether the IUSCT's constitutive treaty meets this threshold, they consider that the act of filing a claim in that forum cures any such shortcomings.

This broader institutional context mirrors the same conclusions that emerge from WTO arbitration. A shift to a more institutionalized ISDS model retains the universal requirement of parties' consent to a binding decision. Each of the above forums serve the objective of providing more expeditious dispute resolution than available alternatives: ISDS proceedings would be expected to remain more efficient than domestic trials and appeals, and the various types of WTO arbitration are faster than default DSU mechanisms, or the endless negotiation of implementation. Though parties challenging the enforcement of IUSCT decisions have not directly questioned investors' lack of control in selecting Tribunal members, WTO arbitration illustrates that States do not consider party autonomy in appointment and procedural matters to be *sine qua non* conditions for ascribing 'arbitral' character to a mechanism or legal decision.

Conclusion

Viewed as a relevant context for treaty interpretation, the most widely ratified economic conventions reflect a continuum of understanding as to the core terms of international arbitration. Through this history, we see that the arbitral character of an award does not arise from parties'

choice of procedure or arbitrators. Rather, as the UNCITRAL Secretariat noted on the prospect of combining annulment and appellate structures, such complexity 'might run contrary to the objectives of finality and efficiency' inherent in arbitration. Crossing the Alps between Vienna and Geneva, these two elements bind the 21st century reform of 20th century economic dispute settlement.

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