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The ISDS Reform Process: New Perspectives on the Issues under Debate

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As scholars and practitioners have reported in recent years, the investor-state reform process continues to make progress at the UN Commission on International Trade Law (UNCITRAL). The most recent session held in New York at the end of March yielded productive results. A new Special Issue of the Journal of International Dispute Settlement (JIDS) provides readers with detailed analysis on several of the topics now under debate within Working Group III (WG III). This post provides a short summary of the collection.

The reform efforts have now moved into a new stage. By now, states are working in the weeds on concrete reform proposals across a wide range of issues, from ethical rules for adjudicators, to the regulation of third-party funding, to the creation of a permanent appellate mechanism. This is a marked shift from previous phases of the negotiation, where states identified the core issues of concern with investor-state dispute settlement (ISDS) (2017-2018) and explored the nature of the problems and possible solutions (2019-2021). The focus is now on narrowing reform options, developing legal text, and working to achieve political consensus. For a more detailed update on the status of the reform, we encourage readers to consult our Introduction to the Special Issue available on the JIDS website.

The JIDS Special Issue takes the pulse of the UNCITRAL reform process at this midway point. It features contributions by members of the Academic Forum on ISDS, engaging with various topics on the negotiating table, as well as some that are off the table or hovering in-between. Together, these articles seek to address questions of design, dilemmas, and discontent – especially how states negotiate the values and trade-offs of reform and engage (or not) with critics of the process. They do so from the perspectives of law, social science, and public policy and they employ a range of methods, including computational approaches. They provide a novel and cross-cutting analysis of some of the most important topics in focus for the Working Group, covering ethical, procedural, substantive, and institutional issues that span the entirety of the arbitration process.

The Issue begins with a contribution by Olof Larsson, Theresa Squatrito, Øyvind Stiansen, and Taylor St John, who study the selection and appointment of adjudicators in two dozen international courts and tribunals. In *Selection and Appointment in International Adjudication: Insights from Political Science*, the authors scrutinize the political science and empirical legal literatures that focus on dilemmas such as balancing judicial independence and accountability, and weighing the promotion of diversity against the need for high qualifications on the bench. The authors study

options for reform that would address concerns about representation such as tailored voting rules, and geographic or gender quotas.

Malcolm Langford, Daniel Behn, and Maria Chiara Malaguti analyze how selection and appointment dilemmas might operate in different in ISDS reform models and which of them might address the central legitimacy concerns advanced by critics of the system. In *The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement*, they first set out seven reform models, which range from unreformed ISDS, to narrower reform options (such as rosters) to options entailing more systematic overhaul (such as a standing tribunal and appellate body) and exit (no ISDS). They construct and apply a 'quadrilemma' as a heuristic, to recognize and frame the key design trade-offs among the values of judicial independence, judicial accountability, judicial diversity, and procedural fairness.

Next, Chiara Giorgetti examines the draft code of conduct under consideration by the Working Group. In *The Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: A Low-Hanging Fruit in the ISDS Reform Process***,** she reviews the key features of the proposed code, which has since been bifurcated into separate codes for judges and arbitrators. After outlining the history and content of the code, Giorgetti analyzes three sensitive issues that have informed the debates around it: repeat appointments, issue conflict, and double hatting.

The Special Issue then moves on to several matters that have only lately (and tentatively) made their way onto the agenda and into a formal UNCITRAL Secretariat working paper for states.

The first is mediation as an alternative or complement to arbitration. This proposal gained increased traction in recent years, and could be included in WG III's focus on prevention of disputes. In *Mediation in Future Investor-State Dispute Settlement*, Catherine Kessedjian, Anne van Aaken, Runar Lie, Loukas Mistelis, and José Maria Reis consider how mediation and dispute prevention have been used in practice, using supervised machine learning.

The next article concerns damages, an issue championed by several developing states in the negotiations. In *Damages and ISDS Reform Between Procedure and Substance*, Jonathan Bonnitcha, Malcolm Langford, Jose M. Alvarez-Zarate and Daniel Behn begin by analyzing statistically the general trends in damages awards, noting the upwards trend in compensation (after adjusting for inflation). This analysis is followed by a review of the predominant ways that damages are calculated within those awards, with the controversial discounted cash flow method becoming increasingly predominant.

In *Reforming Shareholder Claims in ISDS*, Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra begin by noting that shareholder claims for reflective loss – or claims by shareholders based on injury to the corporation that purportedly diminish share value – are generally barred in domestic corporate law but accepted in investment law. The authors argue that the availability of such claims creates harms that outweigh any benefits.

The final article concerns investor accountability, an issue that has largely remained off the table within UNCITRAL, with the exception of some discussion of counter-claims. Martin Jarrett, Sergio Puig, and Steven Ratner pick up this theme in *Investor Accountability: Indirect Actions, Direct Actions by States, and Direct Actions by Individuals*. The authors unpack three key strategies for holding investors accountable: indirect methods, direct claims by states, and direct claims by individuals. They conclude that one advantage of all three options is that each draws on

existing features of ISDS, and that the biggest barrier to implementing them is political rather than legal.

While the immediate objects of their study will continue to evolve, these pieces mark an historical milestone in the UNCITRAL reform process—a moment in which conversations have turned to the granular detailed work. The Special Issue looks backward and forward at this critical milestone.

Finally, we wish to acknowledge our dear colleague, Associate Professor Daniel F. Behn, former Co-Chair of the Academic Forum, who co-designed this Special Issue and helped review many of the articles. In July 2022, he sadly and tragically passed away. His numerous and exceptional contributions to the scholarship and practice of international investment law are remembered and he will be deeply missed.

This post is drawn from an introduction essay in volume 14 of the Journal of International Dispute Settlement by Julian Arato, Kathleen Claussen, and Malcolm Langford, and is cross-posted at the International Economic Law and Policy Blog.

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