Kluwer Arbitration Blog

Reforming Substantive Investment Law: How Should We Do It?

Simon Batifort, Belén Ibañez (Curtis, Mallet-Prevost, Colt & Mosle LLP) and Remy Gerbay (Hughes Hubbard LLP) · Friday, June 16th, 2023

On March 31, 2023, the Dispute Resolution Interest Group of the American Society of International Law (ASIL) hosted the session "Reforming Substantive Investment Law: How Should We Do It?" during the ASIL Annual Meeting in Washington, DC. The event featured Donald McRae, Ladan Mehranvar, Amaia Rivas Kortazar and Sylvie Tabet, and was moderated by DRIG co-chairs Simon Batifort and Rémy Gerbay. This post summarizes key takeaways from the speakers' interventions.

The reform of international investment law has been a contentious issue for some time. It dates back to the unsuccessful negotiations on a Multilateral Agreement on Investment in the 1990s and continues with the ongoing discussions at UNCITRAL Working Group III (WGIII) on the reform of investor-State dispute settlement (ISDS). The panelists focused on the methods that could be adopted for the substantive reform of international investment law, drawing inspiration from approaches to international lawmaking followed in various contexts.

Multilateral Negotiation at UNCITRAL WGIII: Pros and Cons of A Government-led Approach

The discussion started by examining the method followed in the ongoing negotiations at UNCITRAL Working Group III. Sylvie Tabet explained that although some States had been engaging in investment law reform on a bilateral or regional basis, there was a recognition by States that any comprehensive reform had to be multilateral. WGIII was given a mandate to discuss the procedural aspects of ISDS reform and to address various criticisms, such as perceived lack of legitimacy, consistency and transparency. There was a desire to address these concerns both from capital-importing and exporting States, which led to discussions on a broad, systemic reform. One emerging idea to address these concerns was that of a multilateral investment court, and the possibility of an appellate mechanism, which appears in several EU agreements, including the Canada-EU CETA. The discussions have been ongoing for a number of years. A broad representation of States and experts have been engaged in the discussions, allowing for high-level policy and technical discussions with the technical support of the UNCITRAL Secretariat. The process has been relatively slow, as expected in a multilateral context and given the scope of discussion. Progress has been made on elaborating proposals and texts on mediation and a code of

conduct for arbitrators (see coverage on the Blog here), and other procedural improvements gathered significant support and will be discussed in coming meetings. She concluded that the process is moving in the right direction, with a tremendous amount of relationship-building among States and fruitful exchanges of ideas.

Ladan Mehranvar observed that WGIII is intended to work as a government-led and consensus-based project, with input from all States to shape discussions on ISDS reform. While WGIII provides an opportunity for less powerful States to achieve meaningful reforms by participating in a multilateral forum, she noted that many voices from the Global South are missing in the process. Data collected by Mehranvar show that even when delegates from the Global South are present, they make fewer interventions than delegates from more powerful States, which are often the home State of investors bringing claims. She therefore argues that to level the playing field, low-income States require more technical and financial support in order to contribute to the negotiations more meaningfully, given that any reform to the system will have an enormous impact on these States, which are often at the receiving end of claims. As a result of this imbalance of powers, there is a real risk that WGIII is producing middle ground solutions that will only institutionalize and re-legitimize a broken system. More support is necessary to create spaces for low-income States to come together, exchange ideas, and develop mutually beneficial positions that reflect their interests and level of development. WGIII is missing this support and needs to get it right, or the process will fail to address the fundamental flaws of the ISDS system. For those reasons, Mehranvar did not think the WGIII process is an ideal model to follow for the substantive reform of ISDS.

The Attempt to Modernize the Energy Charter Treaty

Another recent example of international lawmaking is the process followed since 2017 to modernize the Energy Charter Treaty (ECT). Amaia Rivas Kortazar recalled that the European Commission proposed several changes to the ECT, including limiting the scope of obligations to exclude fossil fuel energy and products, increasing the regulatory power of States, imposing higher environmental standards on investors, limiting investment protection standards, and including climate commitment provisions. The modernization process incorporated most of these proposals, and the European Commission proposed the approval of the updated treaty. Nevertheless, seven EU member States, including Spain, announced their withdrawal from the ECT just before the conference to approve the modernized text of the ECT was scheduled to be held. The European Parliament has criticized the result of the process, stating that it is not in conformity with the Paris Agreement and European law, and has called on the European Commission to coordinate a withdrawal of all EU member States from the ECT. The situation remains complicated as the Commission is working to carry out the European Parliament's instruction to coordinate a withdrawal from the ECT.

Mehranvar pointed out that the ECT modernization process was not transparent, with leaked documents and speculation being the main sources of information for the public. The lack of civil society participation at the deliberations is a problem, considering that investment treaties and investor-State disputes often deal with public interest matters. By contrast, the UNCITRAL WGIII process is more transparent, with reports, submissions, working papers, and audio recordings of sessions available to the public. However, materials may not be accessible to all delegates, as they are sometimes published quite close to the sessions and are not translated in all the relevant languages. It is also challenging for States without adequate resources to keep up with the immense

amount of materials in preparation for WGIII negotiations. Civil society organizations can participate, but they must show interest, be accredited, and have the capacity and resources to participate meaningfully. Many organizations have dropped out due to the difficulty of keeping up, whereas representatives of corporate interests are still actively participating in the negotiations. To solve this problem, a formal mechanism could be created to coordinate civil society participation, similar to the one followed at the UN Committee on World Food Security. While the WGIII process is better than the ECT process, Mehranvar concluded there is still a lot of room for improvement.

The ILC, ICSID, and the WTO

Looking beyond current efforts to reform ISDS, Donald McRae examined whether the method followed by the United Nations' International Law Commission (ILC) could serve as an inspiration. The ILC's traditional role was to follow a structured process to turn customary international law into draft treaties for States to negotiate. However, it now focuses more on producing reports on topics with draft conclusions, principles, and guidelines. The ILC's composition is traditionally one third academics, one third government legal advisers, and one third diplomats/international organization members, thus ensuring that it is in touch with the realities of international practice. The ILC reports annually to the Sixth Committee of the United Nations General Assembly on the status of its drafts, which allows for constant governmental reaction to its work. This process is not purely intergovernmental, nor is it just the work of independent academics and practitioners; rather, it is a hybrid process that combines independence with close interaction with governments. He concluded that the process of distilling case law, scholarly opinions, and government comments into a series of guidelines, conclusions, or articles would be a useful structure for the reform of substantive investment law. Although there is not a lot of investment law that is customary international law, there is a substantial body of case law and scholarly opinion, which are both kinds of materials that the ILC looks at in its work.

McRae also reflected on the setting up of international institutions like ICSID and the WTO, noting that their creation was a product of successful international cooperation at specific points in time, which may not be easily replicated. That is one of the reasons why there have not been many substantive changes to these international institutions. Taking the WTO as an example, it has faced criticism for its inability to conclude treaties after the successful Uruguay Round. However, the WTO is institutionally set up for negotiating future treaties among member States, and has recently concluded agreements like the Trade Facilitation Agreement and the Fisheries Subsidies Agreement. He concluded that the process of negotiating international agreements in an intergovernmental scenario is often slow and requires consensus among the parties involved.

Multilateral vs. Bilateral Reform: One-size Fits All?

Pending the results of multilateral reform processes in the ISDS context, the *status quo* remains, which is not satisfactory for many States. Some have started renegotiating their investment treaties, while others have opted to terminate them.

Rivas Kortazar noted the difficulties that EU member States like Spain face in reforming their approach to international investment law due to two main challenges. First, EU member States do

not have the authority to negotiate investment treaties independently, as this responsibility lies with the European Commission. Any bilateral investment treaty must first obtain the consent of the Commission. Second, even if Spain were allowed to sign such treaties, it would have to make sure that they are consistent with European regulations, which requires coordination mechanisms that make it nearly impossible for EU member States to pursue a bilateral avenue for negotiations.

Tabet concluded by pointing to new discussions recently initiated at the OECD, which are divided in two tracks. The first track consists of identifying commonalities in substantive standards in new generation treaties as a basis for discussions on reform, while the second one focuses on how to align investment agreements with the Paris Agreement and net zero objectives. As this process is gaining momentum, this could be an opportunity for meaningful multilateral reform of both old and new agreements or could contribute to regional, and/or bilateral reform.

The Dispute Resolution Interest Group of the American Society of International Law (ASIL) is currently accepting entries for the second edition of the DRIG Prize for Best Article in International Dispute Resolution. To read more about the Prize, including details of how to nominate your work, please click here.

This entry was posted on Friday, June 16th, 2023 at 8:06 am and is filed under Conference, ISDS Reform, UNCITRAL
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.