

Kluwer Arbitration Blog

2023 Year in Review: ISDS Reforms – Milestone Achieved, Uncertainties Persist

Ajoo Kim (Assistant Editor for Investment Arbitration) · Tuesday, February 20th, 2024

2023 marked a milestone in the reform of investor-State dispute settlement (“ISDS”). In July 2023, the United Nations Commission on International Trade Law (“UNCITRAL”) Commission notably adopted the Code of Conduct for Arbitrators in International Investment Dispute Resolution (“Code for Arbitrators”) and adopted in principle the Code of Conduct for Judges in International Investment Dispute Resolution (“Code for Judges”) (collectively, “the Codes”). The final texts of the Codes were recently issued in February 2024 (*see* the final texts of the Code for Arbitrators [here](#) and for the Code for Judges [here](#)). Meanwhile, the ISDS reform process, including the modernization of the Energy Charter Treaty (“ECT”), continues to encounter challenges and raise concerns. This year-in-review post, featuring the perspectives of our contributors from 2023, primarily focuses on the efforts of UNCITRAL Working Group III (“WG III”) in ISDS reform and the adoption of the Codes, and offers a brief status report on ECT modernization.

UNCITRAL Working Group III and Adoption of the Codes

Reviewing UNCITRAL WG III’s works for ISDS reform in 2023, the group held three formal working group sessions and one intersessional meeting (*see* [here](#)). Previously, WG III identified concerns regarding ISDS (Phase I) and considered whether reform was desirable in light of any identified concerns (Phase II). Concluding that reform was desirable, WG III began devising solutions to be recommended to the Commission (Phase III). Upon entering Phase III, the focus was on “narrowing reform options, developing legal text, and working to achieve political consensus,” as articulated by Professor [Kathleen Claussen](#), [Malcolm Langford](#), and [Julian Arato](#).

The 44th session on 23-27 January 2023 focused on the draft Codes and commentary and the appellate mechanism. The 45th session on 27-31 March 2023 centered on draft provisions and guidelines on mediation, draft legislative guide on investment dispute prevention and mitigation, early dismissal and preliminary determination, and codes of conduct and commentary, resulting in a feasible compromise on the Codes. Professor [Chiara Giorgetti](#) reminisced about the last intense 17 minutes of the session, marking a significant milestone in the ISDS reform process. The UNCITRAL Secretariat was tasked with revising the draft Codes for finalization and adoption during the Commission’s fifth-sixth session in 2023, where both Codes, along with their accompanying commentary, were ultimately adopted in July 2023. The 46th session on 9-13

October 2023 discussed draft provisions for establishing an advisory centre and for procedural and cross-cutting issues. [The Sixth Intersessional Meeting](#) in Singapore on 7-8 September 2023 focused on a proposed standing multilateral mechanism and an appellate mechanism for ISDS.

The Codes, [outlined by Professor Giorgetti](#), aim to enhance adjudicators' independence and impartiality, regulate double-hatting, impose comprehensive disclosure requirements, and address obligations concerning confidentiality of proceedings, fees and expenses, and tribunal assistants. Unlike the Code for Arbitrators, the Code for Judges was recommended for adoption "in principle" due to the ongoing discussions about the potential establishment of [a standing mechanism](#) for resolving investment disputes. Should such a mechanism be established, the Code would be subject to further consideration in light of the agreement reached on the mechanism, including regulations on the judges.

Beyond the Finish Line: Lingering Concerns

Echoing earlier submissions to UNCITRAL and ICSID ([see here](#) and [here](#)), persistent challenges surround the Codes. [Professor Giorgetti](#) emphasized the unresolved issue of implementation and enforcement of the Codes. She pointed out that challenges or disqualification of arbitrators would remain subject to applicable rules or the instrument of consent, given the absence of monitoring institutions. Professor Giorgetti also noted the lengthy negotiation process of the Codes and underscored the potential for divergence in ethical rules arising from their bifurcated nature.

Siding with the latter view, [Fahira Brodlija](#) commented that polarized views "pose a viable risk to the progress on attainable and targeted reforms that could, in fact, improve the practice of ISDS and mitigate some of the issues and concerns previously highlighted within the [WG III]." Ms. Brodlija's analysis delved into whether the Codes were a low-hanging fruit or an appetizer, addressing the challenges and trade-offs that surfaced during their negotiation and drafting.

[Khan Khalid Adnan](#) contended that the abolition of the practice of double-hatting is "practically unnecessary because double hatting should be held permissible to preserve party autonomy by eliminating the risk of conflict of interest through imposing substantial disclosure requirements." Invoking the existing disclosure obligations in arbitration practice, such as those outlined in [the new ICSID Arbitration Rules 2022](#), he suggested alternative solutions to the abolition of double-hatting. These proposals included expressly addressing the issue of double-hatting in treaties and requiring arbitrators to sign a declaration pursuant to ICSID Arbitration Rules 2022 before accepting appointments.

Shifting the Angle: Other Perspectives on ISDS Reform

Other contributions focused on substantive reform of ISDS or additional/alternative considerations for the reform. For instance, commentators, inspired by ongoing procedural reform discussions, explored potential approaches to substantive reform of ISDS. [As reported by Simon Batifort, Belén Ibañez, and Remy Gerbay](#), this included considering models akin to the method employed by the United Nations International Law Commission. However, caution was advised against adopting the WG III model for the substantive reform of ISDS due to insufficient representation from the Global South and limited opportunities for collaboration among low-income States in the overall

ISDS reform process.

As a point for consideration in the ongoing ISDS reform, Professor [Weijia Rao](#) recommended integrating empirical findings from an article on the characteristics of claimants in ISDS, emphasizing the significance of considering users and beneficiaries in the reform process. The analysis underscored that eliminating ISDS “could potentially deprive small or medium-sized firms—who, as the data indicates, are the primary users of ISDS and use it primarily to obtain financial compensation—of an important avenue for redress” and might not effectively address the regulatory chill issue.

As an alternative to ISDS, the Brazilian Model of Investment Arbitration (“BRAMIA”) was proposed. [Cesar A. Guimarães Pereira](#) and [Leonardo F. Souza-McMurtrie](#) presented BRAMIA as “a time-tested and conservative alternative to ISDS, that shifts perceptions of power back to the people while still protecting investors.”

The ECT Modernization: Withdrawals and Uncertainties

Regarding the modernization of the ECT, as [extensively covered by the Kluwer Arbitration Blog](#), [an agreement in principle](#) was reached as of 2022. Yet, unlike the Codes, the fate of the modernized ECT remains uncertain. As reported in [2022-in-review](#) on ISDS reform, the voting on the “agreement in principle” of the modernized ECT was initially set for April 2023 after a delay. The voting was once again postponed, this time, indefinitely. Preceding this, several European Union (“EU”) member States, including Spain, expressed their intent to withdraw from the ECT. [Fabian Eichberger](#) commented that the modernization process might conclude without any winners. Echoing this sentiment, [James McGlaughlin](#), in his post on how foreign investments might be governed “in a potential ECT lacuna”, envisioned a potential demise of the ECT amid attempts to modernize it.

On July 7, 2023, the European Commission, following its [non-paper](#) in February 2023, [recommended the EU’s withdrawal](#). This, among many, introduced uncertainties for EU energy sector investors regarding the viability of international arbitration under the ECT. For others, there is a growing risk of disputes as States balance investor obligations with environmental commitments. [Nicholas Lawn](#) and [Isabel San Martín](#), considering the possibility that “the end is not yet near for the ECT,” offered an analysis of the ECT withdrawal, outlining the implications of the EU’s withdrawal from the ECT, its consequences for the EU, and the next steps.

Despite the uncertainties, the modernization process is perceived as an effort to reform broadly and strike a balance between safeguarding foreign investment and maintaining host state sovereignty. In this context, [Maria José Alarcon](#) conducted a comparative analysis of the modernized ECT with other ISDS reform processes, illustrating how State Parties address criticisms of ISDS and respond to the need for investment protection.

Meanwhile, [Johannes Tropper](#) emphasized the necessity of an *inter se* modification to eliminate intra-EU arbitration and explored its potential adoption in alignment with international law, as endorsed by arbitral tribunals.

Closing Remarks

Despite the identified or arguable shortcomings and inherent challenges, the Codes represent a significant and noteworthy advancement in ISDS reform. They serve as “a much-welcomed development”, “an important element of the ISDS reform process” and “a good roadmap for other areas of ISDS reform.” While the work on the Codes is currently finalized, numerous reform options under consideration at UNCITRAL WG III will necessitate further deliberation, expected to continue until 2026. Recent discussions at the 47th session on 22-26 January 2024 encompassed draft provisions on procedural and cross-cutting issues and annotations, draft guidelines on prevention and mitigation of international investment disputes, and a draft statute for an advisory centre. The upcoming sessions would entail continued discussions of other reform options, including the selection and appointment of members to a standing multilateral investment tribunal, building upon the related [note](#) by the UNCITRAL Secretariat and previous discussions as elucidated by [Claudia Annacker and Hayk Kupelyants](#).

Regarding the ECT, [France, Germany, and Poland officially withdrew](#) as of December 2023. Additional withdrawals, including [Luxembourg’s set for mid-2024](#), are anticipated. These contribute to the uncertain future trajectory of ECT developments, necessitating vigilant monitoring for updated information.

In the unpredictable journey and ever-evolving landscape of ISDS reform in 2024, whether marked by successes or hurdles, the steadfast dedication should be to prioritize the paramount interests of stakeholders, adeptly navigating the inherent challenges posed by divergent interests. Yet, it is never an easy job.

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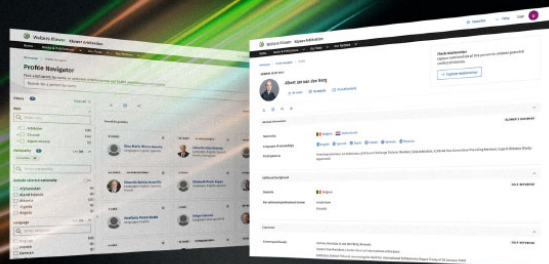
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