Kluwer Arbitration Blog

2024 PAW: Affaires d'Etats Vol. 3 – Amplifying the Voices of Developing States in ISDS Reform

Simon Batifort, Marie-Claire Argac, Cyprien Mathié (Curtis, Mallet-Prevost, Colt & Mosle LLP) · Tuesday, April 2nd, 2024

As part of the 2024 Paris Arbitration Week ("PAW"), Curtis, Mallet-Prevost, Colt & Mosle LLP hosted a webinar on "Amplifying the Voices of Developing States in ISDS Reform." This was the third installment in the "Affaires d'Etats" series on Investor-State Dispute Settlement ("ISDS") initiated by Curtis during 2022 PAW.

As the criticisms of ISDS intensify, this year's panel focused on the importance and means of amplifying the voices of developing States in ongoing reform efforts at the multilateral level, such as in the context of UNCITRAL Working Group III ("WGIII"), and at the unilateral, bilateral and regional levels. The event featured David Bigge (Chief of Investment Arbitration, U.S. Department of State), Margie-Lys Jaime (Legal Adviser, Office of Investment Arbitration, Ministry of Economy and Finance, Republic of Panama), Ladan Mehranvar (Senior Legal Researcher, Columbia Center on Sustainable Investment ("CCSI")) and Marie-Claire Argac (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP). Mr. Bigge and Ms. Jaime appeared in their personal capacities. The panel was moderated by Simon Batifort (Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP). This post encapsulates key takeaways from the webinar.

The Voices of Developing States in Multilateral Fora

Ladan Mehranvar kicked off the discussion by presenting the findings of her upcoming empirical paper on the attendance and participation of government delegations in the WGIII negotiations. Her research highlights that developing States most affected by ISDS as respondents fall into three groups: those that have not attended the working sessions, thus being unable to contribute to the negotiations; those that have made minimal interventions when in attendance; and those that have engaged more actively with multiple interventions. On the other hand, she noted that the home countries of investors initiating most claims, such as the U.S., Canada and E.U. countries, are by far the most vocal participants in the discussions. Ms. Mehranvar noted that these observations underscore a concerning trend where countries with greater influence in the creation of the ISDS regime are once again re-writing the (asymmetric) rules, paving the way for the re-legitimization of an inherently flawed system.

Margie-Lys Jaime, who represents Panama at UNCITRAL and has been actively involved in the

discussions, delved into the multifaceted challenges impacting developing States' engagement in the reform process. She pointed out that these States often face constraints, such as the lack of financial and human resources, resulting in smaller numbers of officials stretched across various responsibilities. Consequently, these delegations may not attend all the working sessions and, if they do attend, may not always have the necessary expertise to fully engage in the discussions. She also highlighted a recent divergence within WGIII, particularly between developed and developing States, regarding the scope of WGIII's mandate. While many developing States, including Colombia, advocate for addressing damages and other "cross-cutting" issues, several developed countries, like the U.S., the UK, and Switzerland, insist that such matters lie beyond WGIII's purview.

David Bigge, representing the U.S. in these reform discussions, provided insights into the WGIII reform process, emphasizing its goal of fostering government-led and consensus-based solutions. While this approach aims to ensure equality among Member States, Mr. Bigge acknowledged the inherent challenges in achieving consensus on a broad scale. He noted that States engage in coordination with like-minded States at WGIII, which may assist governments that are unable to send delegations. He also endorsed the use of hybrid work sessions to facilitate the participation of resource-strapped developing States in the discussions. However, he cautioned that this approach could potentially exacerbate asymmetries in some ways. Finally, Mr. Bigge addressed other reform initiatives at the multilateral and plurilateral levels, including the African Continental Free Trade Area ("AfCFTA") and discussions at the OECD.

Marie-Claire Argac, as a private practitioner specialized in representing States, provided her views as to whether the work product of WGIII adequately addresses the challenges faced by developing States. She opined that the reform items on which most progress has been made so far, namely the Code of Conduct for Arbitrators adopted by the Commission in July 2023 and the Multilateral Advisory Centre, take steps towards tackling significant issues regarding double hatting or assisting developing States in ISDS proceedings. However, those reform items are limited in scope and do not directly address the substantive issues with ISDS, such as expansive interpretations of treaty provisions and high damage awards. Apart from the discussion of "cross-cutting" issues over which there is a debate as to whether they are part of WGIII's mandate, other ongoing reform efforts, such as the multilateral investment court and the appellate mechanism, focus on procedural rather than substantive reform.

The Voices of Developing States in Unilateral, Bilateral and Regional Fora

In the second part of the panel discussion, Margie-Lys Jaime drew attention to the approach taken by several Latin American States concerning their bilateral investment treaties ("BITs"). Some countries have chosen to terminate their BITs or withdraw from the ICSID Convention, such as Honduras most recently. Some are negotiating their investment treaties, particularly free trade agreements ("FTAs"), collectively as a bloc to level the playing field. Ms. Jaime emphasized the significance of regional coordination as an effective strategy for developing countries when negotiating with developed counterparts. She suggested that this approach could be similarly beneficial at the multilateral level, enhancing the bargaining power of developing States. She also highlighted Panama's decision in 2010 to stop the negotiation of BITs in favor of prioritizing FTAs. She mentioned Colombia's Model BIT, developed in 2017, as an example of a tailored approach to investment treaty negotiations.

Marie-Claire Argac noted several other examples of actions taken by developing States seeking to avoid or redress the identified pitfalls of ISDS. India, for instance, terminated a large number of its BITs whose initial term had lapsed, generally accompanied by offers to renegotiate on the basis of India's 2015 Model BIT. As for its remaining BITs, India sought to enter into joint interpretative statements with its counterparts, with limited success. Brazil has no BITs in force and instead has developed a Cooperation and Facilitation Investment Agreement Model which does not include ISDS and favors state-to-state negotiations. Within the African continent, the African Union adopted the AfCFTA, whose investment protocol addresses many of the substantive criticisms against ISDS by including more carefully drafted standards of protection and seeking to enhance compliance with sustainability objectives.

David Bigge explained that Non-Disputing Treaty Parties ("NDTPs") submissions are also an interesting option for enabling treaty parties, including developing States, to clarify the interpretation of treaties and prevent potential abuses. Depending on the circumstance, NDTP submissions may be considered subsequent practice or subsequent agreement under Article 31(3) of the Vienna Convention on the Law of Treaties, and may likewise contribute to State practice relevant to customary international law.

In her closing remarks, Ladan Mehranvar pointed out that ISDS cases between 1987 and 2023 reveal that claimants won in only 15% of cases brought against high-income countries, whereas claimants won in 40% of cases against low-income countries. Additionally, high-income countries prevailed in 38% of cases on the merits, whereas low-income countries prevailed in only 12% of such cases. These statistics underscore a significant imbalance in outcomes between developed and developing States within the ISDS framework. Against this backdrop, Ms. Mehranvar emphasized the dilemma facing developing States: either comply with the rules and potentially face exorbitant compensation demands (see, for example, the recent USD 11 billion claim against Honduras, which prompted the country's denunciation of the ICSID Convention), or withdraw from the system by terminating their treaties, and risk being labeled a "rogue State." Her remarks underscore the need for reforms that actually address the real disparities and ensure a more balanced and equitable resolution of investment disputes.

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