A Watershed Moment for ISDS Reform

Last week marked a watershed moment for the movement to reform investor-state dispute settlement (***ISDS***). Meeting in Vienna, Delegates to the United Nations Commission on International Trade Law (***UNCITRAL***) Working Group III (***WGIII***) agreed to work multilaterally to reform the resolution of investment disputes. Delegates agreed to focus on responding to key systemic concerns with ISDS, as identified in WGIII's two previous sessions.[1]

WGIII began its work on ISDS in Vienna last year, at its 34th Session. From the start, Delegates divided the process into three broad phases: identifying concerns about ISDS (***Phase I***); deciding which concerns, if any, were ripe for multilateral reform in UNCITRAL (***Phase II***); and designing options for reforms responding to any such concerns (***Phase III***). Phases I and II would be of prime importance in setting the frame. Though additional concerns can always be raised, any agenda for reform would be largely grounded in the problems identified in these early meetings. WGIII began its work identifying concerns with ISDS in 2017 and essentially concluded Phase I at its 35th Session in New York last Spring. By the end of that meeting, WGIII had identified a range of

procedural and structural concerns with ISDS, relating to: (i) fragmented *arbitral outcomes*; (ii) the *arbitrators* charged with adjudicating disputes; (iii) matters of *duration and cost*; and (iv) *third-party funding*.

The Working Group concluded Phase II last week, in its 36th session in Vienna, finding that these concerns about ISDS were serious enough to merit reform and agreeing to pursue reforms multilaterally. The turn to Phase III opens the door to the most dramatic opportunity for thinking through multilateral and systemic reforms to ISDS in a generation – arguably since its inception. WGIII will begin debating questions of form and design at its 37th Session in New York next Spring. Before then, Delegations will surely circulate diverse reform proposals. Options discussed thus far have ranged from soft law, to incremental treaty-based reform, to more transformative institutional reforms – including establishing an Appellate Mechanism, a standing Appellate Body, or the Multilateral Investment Court championed by the European Union.[2]

The reform process is thus at an inflection point. All options are formally on the table. Yet it should be understood that the future of the process will be shaped by its beginning. The agenda for reform within UNCITRAL will be largely framed by the concerns that WGIII has identified in its first three sessions. Though subject to future additions, the package of concerns identified thus far will largely channel the reform debate to come and delimit its scope. It is thus crucial to be clear about what exactly was decided in Phases I and II.

With respect to *arbitral outcomes*, the Working Group decided to address concerns about consistency, coherence and correctness of arbitral interpretations, all of which affect predictability for States and investors in their interactions *ex ante*. For WGIII, this means considering reforms to those features of ISDS that enable and exacerbate such problems.

These include both the limits of current mechanisms to correct inconsistency and incorrectness in arbitral case law (*e.g.* no systematic mechanism for appeal), as well as the lack of a framework to address multiple claims arising out of the same injury (including the possibility of shareholder claims for reflective loss and parallel treaty and contract claims).[3]

With respect to the *arbitrators*, Delegates expressed concerns relating to independence, impartiality, conflicts of interest and diversity. In this vein, WGIII decided to consider reforms to institutional features of ISDS relating to arbitrator selection (especially party appointment of arbitrators); party remuneration of arbitrators; and possibilities of issue-conflict and double-hatting (where the same individuals serve as arbitrators in some disputes and as counsel in other potentially related disputes).

Finally, with respect to *costs*, WGIII determined that reforms were desirable to redress the excessive length of ISDS disputes, the difficulty in recovering costs awards against investors (including the need for rules on security for costs) and the lack of a mechanism to address frivolous or unmeritorious claims. Previously WGIII had also identified concerns related to *third party funding*, but deferred deciding whether to place these matters on the reform agenda until its 37th Session in New York (2019).

Together these concerns make up the agenda for Phase III. At present there is no roadmap for how to reform ISDS – only a decision to pursue reforms multilaterally through UNCITRAL. From the discussions in WGIII thus far, it is at least clear that there will be dramatic differences among member Delegations about how far to go. Some are pushing for incrementalism (like Chile, Japan and the U.S.). Others are openly advocating for a full-blown multilateral investment court (including E.U. Member States, Canada and Mauritius). And many remain in between or undeclared.[4] Nothing is yet

decided and formally, at least, all options are on the table.

Still, the agenda itself will frame the process going forward. It thus behooves anyone following WGIII's progress to ask where the concerns identified thus far point us. Though there is no single unifying theme tying together the concerns on the agenda, there are clear *leitmotifs*. ISDS' lack of systematicity, uniformity and unpredictability all loom large – implicated by interpretive inconsistency as well as the lack of arbitral ethical standards and the limits to mechanisms for resolving arbitrator conflicts of interest or streamlining matters of cost.

As we turn to Phase III, the question will be how to calibrate reforms to these specific kinds of concerns. Will soft law standards be deemed sufficient? Or will larger-scale institutional mechanisms ultimately appear necessary? In the event, we can be sure that there will be schisms among Delegations in the room. But from where I sit, the agenda decided in Vienna points toward systemic reform.

[**Editorial note:** This post first appeared on the *International Economic Law and Policy Blog.*]

[1] I have had the privilege of participating in WGIII's discussions as an Observer Delegate with the American Society of International Law (ASIL).

[2] The UNCITRAL Secretariat has compiled a non-exclusive range of options. *See Possible Reform of Investor-State Dispute Settlement, Note by the Secretariat*, U.N. Doc. A/CN.9/WG.III/WP.149, *available at http://www.uncitral.org/pdf/english/workinggroups/wg_3/WGIII-36th-session/149_main_paper_7_September_DRAFT.pdf*; *see also* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of International Investment Law*, 112 Am. J. Int'l L. 361 (2018).

[3] For a more fulsome discussion of the problems of

shareholder reflective loss and the treaty/contract problem, see Julian Arato, *The Private Law Critique of International Investment Law*, 113 Am. J. Int'l L. (forthcoming 2019); David Gaukrodger, "Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law", OECD Working Papers on International Investment, 2014/02, OECD Publishing (2014), available at http://dx.doi.org/10.1787/5jz0xvgngmr3-en.

[4] On incremental vs. systemic reform strategies, see Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 Am. J. Int'l L. 410 (2018).
