Inaugural Washington Arbitration Week: Discussions on ISDS Reform, A Light at The End of the Tunnel

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The 1st edition of Washington Arbitration Week (WAW) included focus on systemic issues pertaining to ISDS. Today, ISDS reform is at a crucial point. Theories and approaches to reform are now crystallized into working papers from States and other organizations, and academic papers submitted before UNCITRAL's Working Group III ("WG III"). Panelists critically reviewed the milestones of ISDS reform from inter-institutional, State and legal counsel perspectives.

1. **Institutional Synergies Advancing ISDS Reform**

Although the work at ICSID and UNCITRAL represent two distinct initiatives, they have recently intersected in critical areas of reform and will likely continue to do so in the future. Lee Caplan (Arent Fox) moderated a panel featuring Meg Kinnear (ICSID), Anna Joubin-Bret (UNCITRAL), Mairee Urán Bidegain (Chile's Investment Arbitration Defense Program), Mallory Silberman (Arnold & Porter), and Chiara

Giorgetti (University of Richmond School of Law). In particular, they highlighted three key reform proposals currently under consideration by the international investment community.

The Draft Code of Conduct for Adjudicators

The First Draft Code of Conduct for Adjudicators ("Code") was published in May as a combined effort by the Secretariats of ICSID and UNCITRAL (which has been previously discussed on the Blog several times). Professor Giorgetti introduced the Code as a binding instrument applicable to all adjudicators in all ISDS. The Code addresses the core concern of ISDS reform: independence and impartiality (Article 4) and avoiding conflict of interests is tackled by an extensive disclosure requirement (Article 5).

The Code does not define issue conflict, which is left to States to flexibly regulate with several "bracketed" options suggested in the current draft. Ms. Kinnear shared feedback received thus far on the Code, with some States expressing a preference for an IBA-type model. On conflict and disclosure (Article 5), in view of the impossibility of an exhaustive definition, she clarified that clause 5.1. provides a general clause, while clause 5.2 provides specific examples. She suggested that there might be a need to clarify that failure to disclosure is not automatically conclusive of a conflict of interest.

However, as explained by Professor Giorgetti, there are several moving pieces in the broader picture of ISDS reform. Whilst the Code enjoys significant consensus, other aspects of the reform, such as the possible Multilateral Investment Court ("MIC"), continue to draw divided views.

The "Multilateral Investment Reform Agreement" ISDS Reform "A la Carte"

Ms. Urán shared the proposal submitted by Chile, Israel and Japan, for a Multilateral Investment Reform Agreement ("MIRA") as part of the proposals for the development of a workplan for stage three of WG III. The MIRA is structured as a menu of reform solutions that States could opt into on an "a la carte" basis. As

highlighted by Chile, Japan, Israel, Mexico and Peru in their submission before UNCITRAL's WG III, the mechanism could achieve uniformity by being applied across multiple investment treaties, as well as consistency and coherence of the ISDS system, tackling two of its most widely criticized issues.

A Shift Towards a Critical Stage in the ISDS Reform Process

Ms. Joubin Bret indicated that consensus has emerged on a binding multilateral agreement, with the crux of the question remaining on the content of such an agreement. The next session of WG III will examine the selection and appointment of adjudicators, including looking into elements of the Code. The cost of establishing a full-blown MIC or an appellate body was underscored by Ms. Kinnear, indicating that ICSID could usefully aid in providing those mechanisms.

For Ms. Silberman the ISDS reform process has reached a critical stage, where "nebulous theories and concepts" will soon be "turn[ed] into black and white text." As practical matter, counsel will turn to UNCITRAL's WG III working papers, aiming to rely on the contents of those drafts. To counter and prevent a possible misuse of the commentary, she suggested that further guidance could be added in the drafts for parties to take note.

2. Best Practices for States Regarding the Defense and Prevention of Investment Disputes

Albeit critiques, the ISDS system has acquired a level of maturity and sophistication, as evidenced by the panel on States tactical defenses. With the steady rise of investor-State arbitration, there is a great need for guidelines or best practices to assist States with the prevention of investment disputes and defense in investment arbitrations. This panel was moderated by Jose Antonio Rivas (Xtrategy, WAW Co-Founder), featuring former and current government officials Chester Brown (former UK ISDS Negotiator and currently at The University of Sydney), Adam Douglas (Trade Law Bureau, Canada), Cindy Rayo (Trade Secretary, Mexico), Nicole C. Thornton (Office of International Claims and Investment, Disputes U.S. Department of State) and Ricardo Ampuero (former President of the Special Commission Representing Peru in Investment Arbitration

Disputes). The discussions expanded on the Draft Guidelines for States' Defenses and Prevention of Investment Arbitration (to be published), proposed at the 2018 ABA Conference in Singapore.

Inter-Agency Communication Regarding ISDS

As investment claims tend to involve the actions or omissions of one or more State agencies, efficient inter-agency communication is key for defense, prevention and deterrence of investment disputes. Mr. Douglas mentioned that creating awareness among agencies is the most important preventive tool. However, it requires a great level of coordination and organization at an inter-agency level, particularly in federal and large States.

Inter-agency communication is critical for the settlement of potential investment disputes against the State. Mr. Ampuero presented the State's perspective, in which the case of Peru depicts a clear illustration. In Peru, State agencies alert the Special Commission whenever there are indications that an investment dispute may arise, allowing prevention mechanisms to kick in before the dispute has been formally notified to the State.

Ms. Thornton explained that prevention mechanisms such as incorporation of treaty language deterring frivolous claims and fostering judicial economy, benefit the State defense during the arbitration proceedings. She also mentioned the possibility of a summary disposition motion, by which States may seek to request the tribunal to narrow or dispose of the issues in the case. It is worth noting that most arbitration rules do not forbit it such motions, nor authorize them (aside of JAMS rule 18 for domestic arbitrations or if the parties agree to).

Time is of the Essence

Besides coordination, as quoted by Ms. Rayo from the Draft Guidelines "time is the most valuable asset that the State has" in the pre-arbitral and arbitral phases. States must articulate their defense strategies as soon as they receive a notice of dispute or notice of intent, or even before the notice, as illustrated by Peru's experience.

3. The Exception to the Rule in Investment Arbitration: States Counterclaims

With the growing trend among respondent States to file counterclaims against investors, States have asserted that they may also uphold investors' obligations in ISDS proceedings.

Marinn Carlson (Sidley Austin) served as moderator of a program on this topic, and was joined by Ana María Ordoñez (State´s Legal Defense Agency, Colombia), Ricardo Ampuero (former President of Peru's Inter-Agency Commission), and José Antonio Rivas (Xtrategy).

The Importance of Treaty Language for Counterclaims in Investment Arbitration

One of the most common challenges that States face when evaluating the possibility of filing a counterclaim is the issue of consent. Mr. Rivas provided some examples that have been used by tribunals to identify the disputing parties' consent to the counterclaim, establishing the tribunal's jurisdiction to hear counterclaims, which emphasizes the need to include clear language in investment treaties, including with respect to express obligations for investors.

Non-Treaty Contract ISDS Clauses, a Different Story for Counterclaims

The filing of counterclaims under ISDS contract provisions is a completely different story. As Mr. Ampuero emphasized, Peru's experience with counterclaims has been rather positive. More than 50% of the State's ISDS cases have arisen out of contractual ICSID provisions. Hence, review of statistics on counterclaims in investment arbitration reveals that many successful counterclaims arose out of contractual provisions allowing States to file such counterclaims.

4. A Conciliation Between Human Rights Claims and Investment

Arbitration?

With the exponential growth of investment disputes, the tension between human rights and investment arbitration has become a hot issue in ISDS. Clovis Trevino moderated a panel titled “Human Rights and Investment Arbitration” that featured Douglas Cassel (King & Spalding), Christian Leathley (Herbert Smith Freehills), María Angélica Burgos (Baker McKenzie), and Mariana Reyes (Xtrategy) as panelists.

Mr. Leathley explained that investment treaties have a very narrow focus as they address a particular audience and specific investor rights. However, some arbitration tribunals, such as the one in *Philip Morris v. Uruguay*, have attempted to broaden the scope. Recent investment treaties, such as the Morocco-Nigeria BIT and the Brazil-India BIT, demonstrate that States are increasingly including human rights protections in investment treaties. Mr. Cassel mentioned that States are best placed to include human rights in international investment law, as the balance that used to be in favor of investors, is now turning towards the State’s side, with the emergence of sophisticated model treaties and significant carve-outs.

Long Road to Go from Urbaser

Although the decision made progress by stating that enterprises are subject to a negative obligation “not to engage in activity aimed at destroying”, however it left the question unanswered as to positive obligations of the investor (in that sense see also *David Aren v. Costa Rica*, previously discussed on the Blog here).

Ms. Burgos mentioned that there is a general understanding that investors have Corporate Social Responsibility (“CSR”) obligations. However, the debate concentrates on whether tribunals have jurisdiction to decide these matters given the limited scope of their competence.

Mr. Leathley raised the question of what would be the consequences of holding an investor responsible for human rights violations? Subsequently, will that be limited to counterclaims, or would that undermine the legality of the investment and therefore should be raised as a question on jurisdiction?

While some of these questions were left unanswered, the panelist did assess that

the harmonization of investment arbitration and human rights may prove difficult for investment tribunals, considering that investment arbitration tribunals are seldom asked to address human right issues and both areas of international law may still be perceived – albeit questionably – as two worlds apart.

As for the future of human rights claims in ISDS, Ms. Burgos stated that, while there has been progress in the drafting of new generation BITs (see the Morocco-Nigeria BIT providing for "investors and investments shall uphold human rights in the host state"), that route is set to take long. The most expeditious way would be to regulate human rights obligations for investors at the national level. Nonetheless, how and when tribunals decide to address human rights claims in investment arbitration, will depend on the treaty and on the parties' submissions of each case.

Conclusion

The questions raised at the end of the human rights panel reflect many of the interrogations that remain in ISDS. As concrete answers to those questions are still in the making, the discussions amongst the fioriture of stakeholders' evidence that there is still a long road to ISDS reform. An earlier post entitled "Can't See the Tree Or the Forest" used an earthy metaphor, concluding synergies between experts and law makers must continue so that "every potentially viable variety of tree will be given due consideration before a decision is made whether to replant the forest entirely, or whether to seek better results through forest management". WAW's contribution to the discussion fostered those synergies, allowing us to at least "see" the issues.

Kluwer Arbitration Blog's full coverage of Washington Arbitration Week (WAW) is available here.