United Nations Commission on International Trade Law

Working Group III – Investor-State Dispute Settlement Reform

37th Session, New York, 1-5 April 2019

Report to LAWASIA and UNCCA

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Summary

We attended the 37th Session of UNCITRAL Working Group III on Investor-State Dispute Settlement (ISDS) Reform at the UN Headquarters building in New York on 1-5 April 2019.

Over 100 states, international legal organisations, and other NGOs participated. This is a far higher level of interest than any other working groups.

In its thirty-seventh session, Working Group III has developed a workplan to progress ISDS reform and made key decisions concerning the resources to be employed in achieving such reform. Of note, the agreed workplan provides as follows:

1. By 15 July 2019, States are to indicate possible reform solutions (without limitations on creativity), and when and how they should be addressed in the project schedule.
2. At the next meeting in Vienna between 14 to 18 October 2019, there will be a discussion of the proposals and the creation of a project schedule. This will include a discussion as to which options to pursue and when to pursue them, using all tools available to the Working group.
3. Finally, the Working Group will begin to elaborate on potential reform options for recommendation to the Commission.

The Secretariat has also been charged with working alongside the practitioners' group, academic forum, and international organisations to:

1. update working paper 149 (entitled 'Possible reform of investor-State dispute settlement (ISDS)') and Annex to include all potential options;
2. prepare a paper concerning a potential code of conduct work, to be developed alongside the work of ICSID;

3. prepare a paper concerning indirect claims;
4. update the third-party funding working paper to include possible solutions and reform;
5. prepare a paper concerning the appointment of arbitrators; and
6. prepare a paper concerning the creation of an advisory centre.

Although focused on work planning, the participating states and NGOs had identified a number of possible steps for reform. The work planning was essential to directing efforts towards addressing calls for reform. A key fault line lay between the EU, which favoured the creation of a multi-lateral investment dispute court, and other states including the US, Japan and Israel, who favour a more bottom-up approach targeted at prioritising and addressing the various identified problems in ISDS requiring reform.

Of particular interest to LawAsia:

- The reform process is in significant part directed at serving the interests of developing states and parties by addressing, *inter alia*, the high cost of ISDS disputes (around USD$5m per party, on average).
- Despite the great interest in Working Group III, Pacific Island states were not represented at the Working Group. A place was set aside for PNG, but the delegation did not attend, likely for budgetary reasons.
- Regional developing states that did appear sought to be involved actively, including through discussion papers, but complained of lack of resources properly to participate in the work of the Working Group at its formal sessions, and expressed grave concerns about the ability also to participate in regional conferences.
- We identified a need for LawAsia to seek to engage in capacity-building among Pacific Island and regional developing states in the field of ISDS.
- We developed international contacts who may be able to assist in such activities, alongside local and regional contacts.

Working Group III

1. Working Group III to the United Nations Commission on International Trade Law (UNCITRAL) is charged with investigating the case for reform of the current investor-state dispute

settlement regime to better handle the shifting landscape of international investment transactions. The thirty-seventh session of the Working Group was held in New York from 1 to 5 April 2019.

2. Mr Shane Spelliscy was once again Chair of the Working Group and the Rapporteur was Ms Natalie Yu-Lin Morris-Sharma. They were accompanied by the Secretariat represented by Ms Anna Joubin-Bret (Secretary of UNCITRAL and Director of International Trade Law Division), Ms Corinne Montineri (Secretary of Working Group III and Senior Legal Officer of International Trade Law Division), Mr Jae Sung Lee (Legal Officer of International Trade Law Division), and Ms Judith Knieper (Legal Officer of International Trade Law Division).
3. During the course of the session, it was noted by the Chair that there were over 100 Member and Observer States represented at the session in conjunction with representatives from various other inter-governmental organisations and non-governmental organisations. This level of participation was said to be indicative of the importance placed upon the activities of Working Group III.

Agenda for the 37th Session

4. In anticipation of the thirty-seventh session, the Working Group was expected to give further consideration to the issue of third-party funding in investor-treaty arbitration, and to develop a workplan to address the concerns for which it had decided at earlier sessions that reform by UNCITRAL was desirable.
5. The development of a workplan was particularly important where any requests for funding or additional resources would have to be submitted prior to the Commission's next meeting between 8 to 26 July in Vienna. In circumstances where Working Group III was next to meet between 14 to 18 October 2019 in Vienna, an agreeable workplan had to be arrived at within the thirty-seventh session.

Report on the 37th Session

6. An advance draft copy of the official report on the work of the thirty-seventh session has been released at https://uncitral.un.org/sites/uncitral.un.org/files/acn9_970_as_sub_1.pdf.

Deliberations at the 37th Session

Third Party Funding

7. During earlier sessions of the Working Group, discussion had turned to the various issues and concerns associated with third-party funding in ISDS proceedings. In short, these concerns included:
    a. the risk of third-party funders gaining control and influence over ISDS regime;
    b. ethical issues surrounding third-party funding of ISDS claims;
    c. the risk of frivolous claims and abuse of the ISDS regime;
    d. a general discouragement of settlement;
    e. conflict of interest;
    f. issues of confidentiality, included whether and when disclosure of third-party funders or their agreements ought to occur to promote transparency; and
    g. negative impacts on the already high costs of ISDS, and to what extent security for costs could be employed to balance justice.
8. As a result, it was agreed that the Working Group would consider whether reform should be extended to third-party funding to give rise to a better balance between ensuring funding was available to promote access to justice and the need to protect the integrity of the ISDS regime.
9. This discussion was echoed at the intersessional regional meeting hosted by the Dominican Republic, where the concerns with the current use of third-party funding were further explored (See WP.160).
10. During the thirty-seventh session, the Working Group set out to determine whether reform to third-party funding ought to be undertaken. The deliberations may be summarised as follows:
    a. There was a material lack of uniformity across jurisdictions and contexts as to what constitutes third-party funding and the form it may take. A clear definition would be imperative to the effectiveness of any reform.
    b. It did not appear prudent to do away with third-party funding altogether. There appeared to be a consensus that third-party funding may be required to ensure adequate access to justice, particularly for smaller enterprises.
    c. Nevertheless, the practice did call for a degree of regulation to ensure a proper balance of justice was obtained.

d. Possible options for reform should be considered in parallel to reform options designed to address other concerns with ISDS and should build on the work being undertaken by organisations such as ICSID.

11. Albeit in a different context, we considered whether the Australian Law Reform Commission's report on class action proceedings and third-party funders (ALRC report 134) could assist the Working Group in its search for reform. While the supervisory role of the courts of Australia was undoubtedly squarely in mind, the research and discourse reported by the ALRC concerning the management of conflicts of interests and issues of transparency surrounding third-party funding may nevertheless be helpful in developing reform options. If nothing else, the Working Group may be assisted by the work of the ALRC in having carefully defined the issues and provided considered discussion to possible solutions.

Other Concerns

12. The Working Group also sought to embark on a discussion concerning what other issues or tools for reform might be employed. For the most part, however, this turned into a discussion of issues already identified by the Working Group or what tools might be employed to achieve reform. Thus, it was not necessary for any decision to be taken in this respect as the issues would be best canvassed at a later juncture.
13. Nevertheless, some recurrent themes included:
    a. better use of alternate dispute resolution techniques and local forums. Attention had been brought to the relatively new United Nations Convention on International Settlement Agreements Resulting from Mediation, the signing ceremony for which is scheduled to take place in Singapore on 7 August 2019;
    b. the necessity to address the 'regulatory chill' impact of the current ISDS regime, largely the product of a perceived (if not actual) asymmetric system bringing about high costs and high damages; and
    c. issues flowing from the inconsistent and uncertain awards coming through the ISDS regime, whether as to matters of law, the calculation of damages, or otherwise.

Available 'Tools'

14. From the outset, it is worth noting that throughout the course of discussions concerning the workplan, it was evident that technology was viewed by many as holding the key to greater participation of State Members and should feature prominently as a core tool available to the Working Group in the execution of any workplan. It was submitted that even more commonplace technologies, such as teleconference and video conference facilities, could greatly alleviate the financial and human resourcing issues faced by developing nations.
15. To start with, the floor was opened to discuss what tools could be exploited for the workplan to appraise the Working Group of a fulsome suite of options available to it. Emphasis was placed on the need to ensure that all tools respected the need for decisions to be made only by the Working Group to ensure the process remained State led. Nevertheless, discussion at this point was directed only to the identification of possible tools, rather than to whether they ought to be implemented.
16. Given the practical need to ensure there was agreement on any request for additional resources to be requested of the Commission prior to the July session, attention was directed to the fact that an unallocated week of session time (from the 15 weeks already allocated to all Working Groups) had become available and could be allocated by the Commission to the Working Group as one of the tools available to it. Given the time and resources had already been allocated for this 'spare week', the importance of not letting it go to waste was noted. And so, the Working Group would have to decide whether to ask the Commission to allocate this 'spare week' to it, such week to be taken up in addition to the week already tentatively scheduled for October in Vienna. Naturally, the decision remained with the Commission as to whether the 'spare week' would be allocated to the Working Group, or a different working group which may also have need for the additional time.
17. The merits of whether to request the Commission to allocate this 'spare week' to the Working Group were debated for several hours. It was observed that despite the concerns as to costs and human resources having been raised on numerous occasions, it was largely developing nations calling for the Working Group to take up any additional session time which could be procured. This was largely a product of consensus that the Working Group had a significant amount of work ahead of it. Discussion also turned to whether additional time was needed based on particular reform options, with those thought to be seeking a soft law reform approach (including because there was not enough time to overhaul the ISDS

regime) generally against the proposal to call for the 'spare week' to be allocated to the Working Group.

18. Ultimately, after consuming a material amount of session time debating whether to ask for more session time, it became apparent that taking a decision on this point was premature until such time as further consideration had been given to the development of an agreed workplan, and thus the issue was deferred to later in the session. In the meantime, various other 'tools' available to the Working Group were identified and discussed, including:
    a. Joint sessions with other working groups, including Working Group II. This was largely seen as being less desirable and inefficient at this stage of the Working Group's work.
    b. Requesting additional funds from the Commission for a permanent increase to session time allocated to working groups. While this matter was debated at some length, any decision was deferred until later in the session.
    c. Issuing a standing request for Working Group III to take any 'spare week' of session time which may come about in any future years.
    d. Inter-sessional conferences and regional meetings, subject to rules about what can be discussed and there being no decisions made. Such conferences would also require reporting to the Working Group and oversight by the UNCITRAL Secretariat as the gatekeeper of fairness. While such conferences were left on the table as tools, developing nations appeared to prefer formal meetings as they were easier to procure funding and resources for.
    e. Informal meetings, drafting groups, and colloquiums.
    f. Greater use of the practitioners' group and academic forum, so long as they report back to the Working Group and don't presuppose outcomes.
    g. Greater involvement by relevant international organisations in the reform process to draw on an existing wealth of expertise and parallel reform efforts, while holding true to the process being State led.
19. The Secretariat was called upon to manage and oversee the use and implementation of these tools, as well as to facilitate greater transparency and access. The Government of Guinea also proposed to host an intersessional regional meeting to raise awareness in Africa on the current work of the Working Group and facilitating local discussion.

Workplan

20. As the main order of business for the Working Group during the thirty-seventh session, much focus and attention was directed to the development of an agreed workplan.
21. Various submissions had been made by State Members offering alternatives and options. Presentations on such submissions were delivered to the Working Group by the respective State Members, which facilitated a discussion as to which of these workplans would be most suitable. This allowed additional proposals to be submitted, along with variations to those already raised.
22. Through this discussion, observable 'camps' began to form, taking differing (and sometimes passionate) views as to whether the Working Group should pursue:
    a. a reform-based approach; or
    b. an issues-based approach.
23. The 'reform-based' approach developed out of the increasing tension between the pursuit of 'systemic' reform or 'incremental' reform. Despite issue being taken on numerous occasions to the imprecise meaning of these concepts and what was being proposed for each, they can be generally categorised as follows:
    a. The systemic reform would involve a complete overhaul of the ISDS regime, including through the implementation of an opt-in multilateral investment court with an in-built appeals mechanism.
    b. The incremental reform was best described as 'ISDS improved' and would involve amendments to the existing regime which did not fundamentally change its current operation.
24. The 'issues-based' approach arose from a recognition that it was perhaps premature to be presupposing which reform option should be pursued, and thus the Working Group should instead focus on the issues which had been identified as requiring reform and build up from there. It was argued this would be the best way to ensure any reform option implemented would solve the concerns agreed to be addressed.
25. This then spurred additional discussion concerning the necessity to achieve effective reform quickly, noting the concerns agreed by the Working Group as issued in need of reform would subsist until reform was implemented.
26. The 'camps' gave rise to three categories of potential workplan:

a. The 'workstream' workplan would separate out tracks of work based on reform options. One stream would develop a reform proposal focused on a multilateral investment court type solution, while the other (or others) would focus on more incremental reform options. Both tracks would then be assessed by the Working Group for a decision as to which (if not both) to implement and when.
b. The 'building block' workplan would focus on developing reform options surrounding the issues for reform and building a solution incrementally.
c. The 'hybrid' workplan essentially had each of the issues for reform explored as a parallel workstream.

27. The discussion began to turn more into an exploration as to which reform option would work best, rather than focussing on the most desirable workplan methodology to pursue to achieve reform. It became evident that several States needed or wanted more time to make detailed submissions as to which workplan options and reform options they saw as being best fitted for the Working Group.
28. Ultimately a draft workplan was developed predominately through informal consultations, highlighting the difficulty between achieving quick and efficient outcomes with ensuring absolute transparency and accessibility. Nevertheless, the workplan was agreed to be:
    a. By 15 July, States to indicate possible reform solutions (without limitations on creativity), and when and how they should be addressed in the project schedule.
    b. At the next meeting in Vienna, there will be a discussion of the proposals and the creation of a project schedule. This will include a discussion as to which options to pursue and when to pursue them, using all tools available to the Working group.
    c. Finally, the Working Group will begin to elaborate on potential reform options for recommendation to the Commission.

Other Decisions of the Working Group

29. The Working Group also agreed to task the secretariat with:
    a. making sure that the process is transparent and inclusive, including by ensuring all documents and information is available to all;
    b. updating working paper 149 and Annex to include all potential options;
    c. preparing a paper concerning a potential code of conduct work, to be developed alongside the work of ICSID;

d. preparing a paper concerning indirect claims;
e. updating the third-party funding working paper to include possible solutions and reform;
f. preparing a paper concerning the appointment of arbitrators; and
g. preparing a paper concerning the creation of an advisory centre.

30. It was noted that the Secretariat would seek to work closely with the practitioners' group, academic forum, and various international organisations in developing the various papers to be provided in advance of the next session.
31. It was also noted that NGOs could make submissions by 15 July, though they will have to be submitted in all the UN languages as the Commission does not have resources to translate non-State submissions. Such NGO submissions would also be treated differently to State submissions in keeping with the State led approach of the Working Group.
32. Finally, and with markedly little further deliberation, the Working Group decided to:
    a. request the 'spare week' of session time, indicating a preference to split the weeks;
    b. make a standing request for any free weeks which become available in later years; and
    c. refrain from requesting any additional funding for more than 15 weeks at this stage.

Conferences

Academic Forum

33. During a Session lunchbreak, we attended a presentation by the academic forum on their work so far. It was noted that significant progress had been made in developing a glossary of key terms in ISDS, relevant concept papers, and undertaking relevant empirical analysis.
34. The academic forum had been exploring which possible reform option could best address the key concerns identified by the Working Group, being:
    a. cost;
    b. duration;
    c. consistency;
    d. incorrectness;
    e. diversity; and
    f. independence / impartiality / neutrality.
35. Each of the following reform options were considered against each of the issues:
    a. Investment arbitration improved;

b. Investment arbitration with an appeal mechanism;
c. Multilateral investment court; and
d. No ISDS altogether.

36. Six working groups were formed to each deal with one of the issues, with an additional seventh working group looking at relevant empirical analysis.
37. Each of the concept papers can be found at www.cids.ch/academic-forum-concept-papers.

NYIAC Conferences

1. We also attended several conferences held by the New York International Arbitration Centre (NYIAC), including:
    a. Transparency & Reform in Investment Treaty Arbitration and a Discussion of UNCITRAL's Working Group III; and
    b. The Future of ISDS: Looking Beyond the Treaties.
2. Some of the core concepts raised at these conferences include:
    a. There is a need to reform ISDS to ensure that protectionist policies did not erode international law and its development to date.
    b. Systemic reform of the ISDS regime could be thorough and achievable without a complete replacement of the system or the implementation of a multilateral investment court.
    c. Attorney's fees are always going to be the bulk of the cost, and that is causing the issues.
    d. Arbitration was originally championed as the protector of state sovereignty, but now it is being used to suggest an attack on sovereignty.
    e. Arbitral bodies need the power to enforce "just, quick, and cheap" principles. There's been talk of a code of conduct for arbitrators, but should that also extend to practitioners?
    f. Replacement of the ISDS regime will bring about long periods of uncertainty. Investment arbitration has been crafted over 40 years and thousands of BITs, which will need to be amended and overhauled for any systemic revolution to be implemented.
    g. Investment will simply shift away from States which are hostile, and then come back indirectly through other States that have better BITs.

h. Investment protection is critical, especially for developing countries where the investor has little confidence in the local regime. Companies have structured current investments based on current treaties and to remove or tamper with those treaties would put those existing investments at risk.

Opportunities for LAWASIA

38. The Working Group has asked permanent State and NGO delegations to provide contact details by completing an appropriate form, attached for LAWASIA to action.
39. During the session, there was a marked absence of Fiji and other pacific island nations. It appears that greater effort is needed to integrate these regional nations into Working Group III. There may be an appropriate opportunity to host or organise an intersessional regional conference to help promote Working Group III, not dissimilar to the proposal put forward by the Government of Guinea for the African region.
40. There were also several calls for education and a greater availability of cheaper local specialists with ISDS experience to help developing nations. Thailand and Indonesia, for example, made submissions prior to the Session concerning the need for cheaper ISDS specialists with local experience and understanding of the needs of developing nations. This was said to be imperative in helping developing nations navigate the ISDS regime, including in the management of disputes and the negotiation of investment treaties. It was argued that with greater education and assistance, developing nations could begin to develop 'in-house' skills over time to afford better access to justice in the long term.
41. This is a real area of opportunity for LawAsia to bring together skilled persons in the region to provide a valuable service to countries in the region. A regional conference may be an appropriate vehicle for this, with suitable low-cost technology to facilitate participation by representatives from regional developing countries.
42. We developed contacts with persons with experience in capacity building of this kind, who would be willing to assist in such endeavours.