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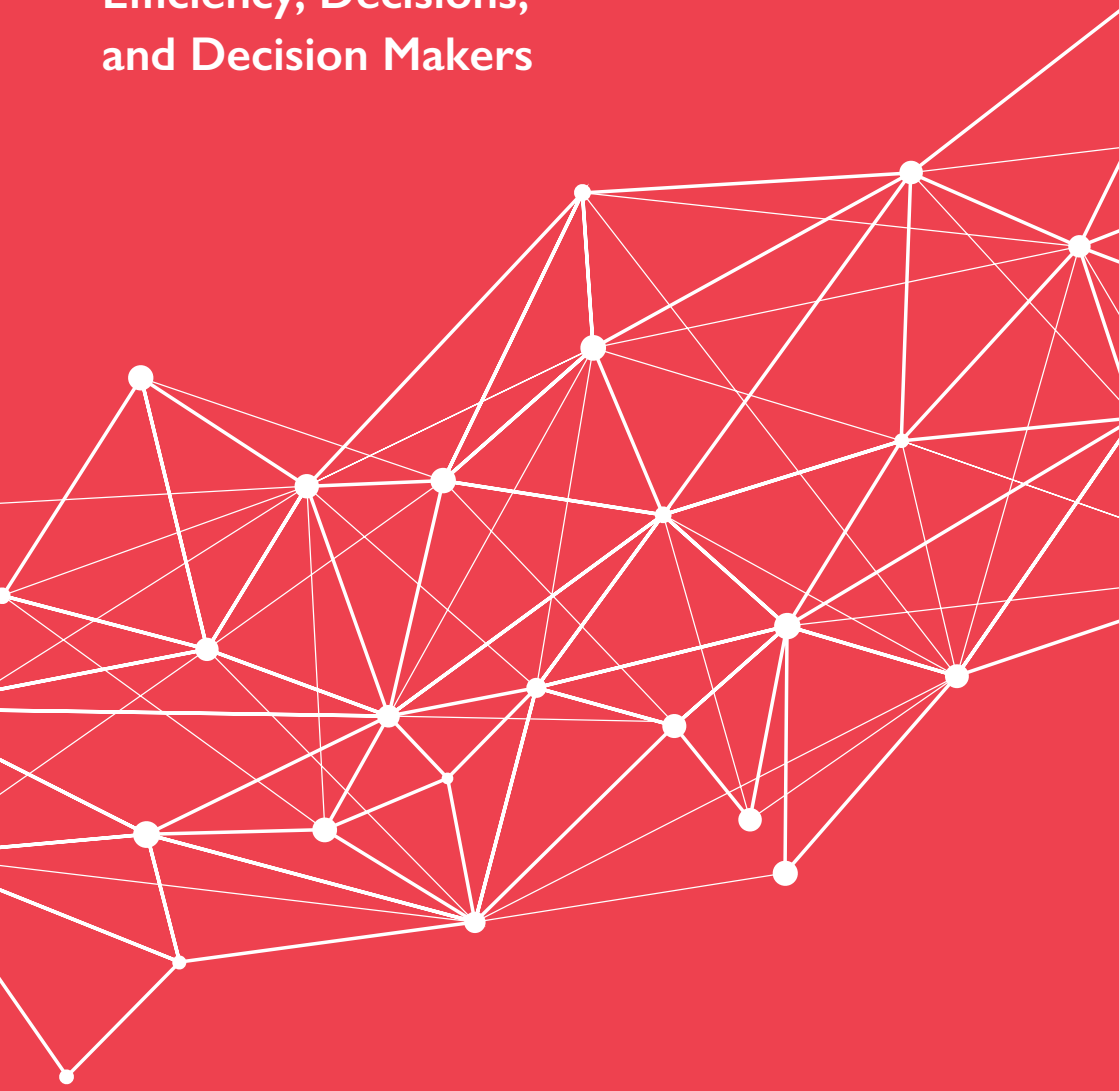
Discussion Papers

CIArb at UNCITRAL Working Group III on ISDS Reform: **Efficiency, Decisions, and Decision Makers**



Introduction

UNCITRAL Working Group III (WG III) is made up of 60 voting member states along with almost 120 non-voting observers. As of the 37th session, WG III is now the largest UNCITRAL working group ever with 55 observer states now sitting with the voting states. There are also 2 state entities, 6 inter-governmental organisations, and over 50 non-governmental organisations sitting as observers. It is notable that while the EU is classed as an observer entity and has no voting power or official role beyond advising, their firm position in the proceedings and unclear role in relation to the individual European voting members has been a topic for debate.

WG III's current mandate is to address Investor-State Dispute Settlement (ISDS) system reform. The Chartered Institute of Arbitrators (CIArb) participates in the discussions as one of the observer non-governmental organisations represented by Dr. Paul Tichauer, Chair of the Canada Branch of the CIArb, and Mercy McBrayer, CIArb's Research and Academic Affairs Manager. WG III has laid out a plan for addressing its mandate that is segmented into three phases. In Phase I, completed during the 34th and 35th Sessions, WG III identified the concerns regarding ISDS. The 36th Session was the first session in Phase II of the plan. The directive for the session was to consider whether reform was desirable, considering the identified concerns. The key agreement reached by the group in the 36th Session was that reform of the current ISDS system is indeed desirable.

The 37th Session was the initial meeting of Phase III where the mandate to develop relevant solutions to recommend to the Commission was to finally be enacted. However, most of the session centred on drawing up a work plan for addressing the identified areas for reform that was acceptable to all states. In doing so, some of the states began to use a neologism, "iterationist," to describe those who express a desire to take a moderated and iterative approach to the reform work. This approach was framed as "obstructive" and "delaying tactics" designed to ensure failure. A binary choice was introduced with this term, stating that if states did not choose to design a new system based around the use of a supra-national multilateral investment court that they were not serious about reform. In the context of the workplan discussions, this meant that any plan put forward for addressing the reform areas in a prioritised manner was met with strong resistance from the states and observers in support of repealing the system. This stance brought certain states into alignment while creating tension between many others making further substantive discussions difficult.

A proposal was put forward by some states to divide work into two tracks: one creating a proposal for a replacement mechanism for the ISDS system and one prioritising areas for

reform to the current system. It was suggested that the two tracks could then be either used in conjunction, or one could be set aside if the one was achieving more success and support that the other. In the end, the support for such a solution was not widespread. A compromise workplan that was heavily "iterationist" was developed by a broad coalition. This work plan was not fully adopted by the group but gave a much clearer starting point for moving forward in the 38th session. It remains to be seen whether the "repeal and replace" camp will moderate their stance and allow the compromise work plan to go forward.

It is notable that certain major economic superpowers did not take strong positions in the workplan debates, other than to resist the repeal and replace proposal. Resistance to the proposal that WG III develop a treaty to allow the states to replace the ISDS system with a formal, UNCITRAL developed, multilateral court-based system is becoming more visible. The conversation continues to shift and change in each session with apparent momentum building behind a strategy of targeted reforms at this time.

Throughout the discussions, CIArb has emphasised the importance of minimising risk when selecting the type and scale of any reform to the ISDS regime. The ISDS system forms a critical component to the global trade and investment system and, therefore, changes to the system have far-reaching effects that should be evaluated carefully. The delegation particularly stresses the value of implementing reform in a manner that is incremental, iterative, progressive, and prioritised. However, CIArb fully supports active reform measures in the areas identified by WG III and discussed in these papers. This is the basis for CIArb's position that evolution, not revolution, should be the reference point for any ISDS reforms undertaken by WG III.

In general, the ISDS reform discussions fall under three main themes: Efficiency, decisions, and decision makers. The purpose of these discussion papers is to present a basic overview of the issues under discussion in each thematic area and to show the varying and often opposing views that delegates must consider. These papers are designed to inform rather than persuade and to provide a starting point for meaningful conversations on ISDS reform among CIArb stakeholders.

01.
Efficiency

One of the broadest concerns in the ISDS system is the ever-increasing length and cost of arbitral proceedings. States may argue that this is the fault of the investors who seek to manipulate the system in order to drag out the process to cost the state so much time and money that the state simply makes a settlement offer, regardless of the merits of the investor's claim. Investors would argue that the states are to blame as the government bureaucracies behind them create unnecessarily laborious timeframes for even the smallest procedural matters. Both may point the finger at the practitioners who advise them, coming up with the strategies that best benefits their side regardless of time and costs, all while billing their clients hourly. Both may also lay blame on the arbitrators themselves who take few steps to curtail the parties' activities that increase duration and costs, even when they are empowered to do so. Parties may even accuse the arbitrators as having a financial interest in as long a process as possible, despite the fact that many disputes are done through administrating institutions with capped rates for arbitrators. These criticisms may all have merit while none show an entirely accurate picture. Regardless of where blame may lie, one thing is certain: ISDS proceedings are long and expensive processes that become ever longer and more expensive.

Empirical research released this year by both the Academic Forum of WG III and by Professor Susan Franck of American University show that there is a quantifiable and direct correlation between time and costs in an investor-state arbitration. In other words, it is now proven that the shorter an arbitration is, the less it will cost. The reduction of time and cost is at a consistent rate as well, meaning that parties can predict the savings realized for each decrease in time. Thus, the simplest way for parties to reduce costs is to find ways to truncate proceedings. Conversely, the direct benefit between increasing efficiency of the proceedings and reducing the cost is now a known. This would indicate that addressing issues of efficiency would be a very effective and broad reaching area to focus reform.

Third-party funding

As time and cost of ISDS proceedings has increased, the rise of third-party funding has been inevitable. The concept of third-party funding is simple enough: a party with no prior interest in a dispute provides financing to one of the parties so that the party may continue pursuing the dispute. The funder does this on condition of receiving a percentage of any award rendered. However, the notion of turning legal disputes into a market commodity is unsettling to many in the legal arena. In addition, questions of the ethics of a third-party funder's interest in, and thus influence over, the dispute itself are raised.

The debate over the use of third-party funding is particularly heated in ISDS. Indeed, the 2018 ICCA-QMUL Report devotes an entire chapter to the topic of third-party funding issues in investment arbitration. One of the reasons for the vociferous debate over investment arbitration is the participation of state governments and the view that the costs of pursuing disputes in that forum are paid for out of public coffers. In ISDS, the practice of accepting third-party funding has benefited both investors and states.

For small, developing, or poor states, third-party funding from a charitable organization may mean the difference between being forced to bend the will on private corporate interests and pursuing policies that protect the public. The Phillip Morris v. Uruguay case is a prime example of this situation. However, the criticism of such an arrangement is that it allows third parties with a specific social or political interest in the outcome of the dispute, but who cannot directly avail themselves of protections under trade agreements or investment treaties, to influence the outcome of a dispute. It may also be argued that charitable funding the only type of funding available to states, since commercial third-party funders would not fund a state's dispute. This is because, up until this point, no state has ever been a claimant in an ISDS case that has gone to the award phase. By definition, this means that states cannot receive an award from which a funder could realize any return on investment. States argue that this creates an unfair advantage and a situation where undue influence is exerted on the process by a non-party to the dispute. Investors would argue that eliminating access to funding in the system creates serious questions of access to justice.

For the investor, some disputes could not be brought without the participation of a third-party funder. It is not uncommon for investors to bring claims in ISDS without having any assets or liquidity. This may indeed form the basis for the dispute if the investor has lost its profitability or assets due to state action. States often criticize this situation claiming that a frivolous or unmeritorious ISDS claim is merely a strategy for the investor to force a settlement offer from the state. However, it is important to note that a professional third-party funder will often vet disputes before agreeing to fund. The vetting is often done by experienced arbitration lawyers who can identify whether the claim has any basis or is simply a desperate attempt at a pay-out. Funding a dispute is an investment for which the professional third-party funder expects a return in the form of a percentage of any awarded damages and so would avoid disputes with too great a risk of dismissal or award for the state.

States have countered this argument by questioning whether the mere presence of a funder can influence the tribunal in favour of the investor and undermine the neutrality of the proceedings. However, experienced ISDS arbitrators understand that the mere presence of a funder is in no way dispositive.

Funders take a risk based on their analysis of the information available to them. This information is not shared with the tribunal and may or may not include all of the information from the opposing party which the tribunal will have access to in making their decision. The tribunal also understands that, as mentioned, the state rarely has the backing of a funder and that this is not tied in any way to the merits of their case.

In the recent cases against Ecuador, tribunals have begun to allow states to make counterclaims in ISDS disputes. This opens the door for states to receive monetary awards for damages on counterclaims as respondents in the dispute. It would seem that a logical possibility would be for the states and funders to explore the possibility of receiving private commercial third-party funding for counterclaims against investors.

There are arguments that the presence of third-party funders in ISDS disputes increases costs and time to resolution, but there are equally arguments to the contrary. However, the presence of third-party funders in ISDS disputes seems to have become a forgone conclusion at this stage. The question before WG III is one of the extent of the influence these non-parties to the dispute have over the outcome of issues that directly influence public policy simply by paying for the process. This has turned the conversation away from whether funding should be allowed and towards whether funders in ISDS disputes should be regulated in some way.

Security for costs

Under both the ICSID and UNCITRAL Rules, tribunals have the power to award security for costs. In a situation as described above where an investor has brought a claim without any assets or liquidity, such a measure would ostensibly provide a means for states to ensure that the claim is not frivolous. Investors might wish to request security for costs in disputes with states that are known to be corrupt in their judicial processes or where enforcing a damages award against the state may be difficult due to the lack of legitimate infrastructure.

However, ISDS tribunals are known to have awarded security for costs in only two ISDS disputes to date. While tribunals arguably could be encouraged to use their broad power to take steps to curtail baseless claims, guard the integrity of an award, or control parties that intentionally create delays, there are additional difficulties as a state might be unable to recover awarded costs as the investor, as mentioned, may be insolvent. It is notable that beyond security for costs measures, there are few mechanisms to address frivolous or unmeritorious claims.

In our practice guidance on security for costs applications, CIArb has noted that the legal principles for allocating and awarding security of costs is not standardized. Instead, the guidelines detail the competing interests that an arbitrator should consider when analysing a security for costs request: the likelihood of the success of the claim or defence, the ability of the party against whom security is sought to be able to satisfy an adverse costs award, and the interests of justice. The first interest addresses states' concern over frivolous disputes. The second addresses the situation that many investors find themselves in when bringing a dispute, namely insolvency. And the last shows that it is imperative that an arbitrator strike a balance between the varying party interests in making their decision on a security for costs application.

However, the rarity of security for costs awards in ISDS disputes shows the reticence of arbitrators to utilize the security for costs tool. In their proposed amendments to the Rules, ICSID has attempted to encourage arbitrators to use this power by specifying in Rule 51 that arbitrators may order security for costs and give consequences for non-compliance, including suspension of the proceedings. This provision has been a particular desire of states, but arbitrators are still encouraged to consider the ability of the party against whom the security is sought to comply. This could raise a risk of the deferment of the valid claims of impecunious claimants unless arbitrators also recognize that the claims and the insolvency can be due to the acts of the state. Used with such a balance in mind, security for costs could be a powerful tool in increasing the efficiency of the ISDS process.

Interim relief

A request for interim relief is made in order to preserve the rights of a party in the dispute. As has been mentioned, it is not uncommon for investor claimants to be insolvent. Indeed, the acts of the state that led to the insolvency will form the basis for such an investor's claim in ISDS. Investors may request various types of relief, including non-monetary relief, before an arbitral tribunal can reasonably be constituted. Many such requests are made on an emergency basis at the outset of a dispute and are considered by a panel appointed solely to examine the application for such measures.

However, in order to grant interim relief, an arbitrator must establish that the eventually empanelled tribunal will prima facie have jurisdiction over the claim and that the claim is likely to succeed on the merits. Such an analysis raises concerns for both parties of a pre-evaluation of the merits of the case which could prejudice the outcome of the dispute. This is confirmed in CIArb's professional practice guideline on interim relief applications which advises arbitrators not to allow an analysis of an application for interim measures to lead to predetermination of the claim.

During the comment period to the proposed amendment to their Rules, ICSID was asked to clarify language in their Rule 50 which says tribunals may "recommend" provisional and interim measures. Parties seeking interim relief often argue that the power to recommend and the power to order are the same, as was determined by the tribunal in Mafezzini v. Spain. Such clarification was not given but rather a test was added to the ICSID Rules. The proposed test requires arbitrators to balance the urgency, necessity, and all relevant circumstances when considering an application for interim relief.

As with security for costs, many arbitrators may be reticent to award interim relief due to the risks of the appearance of prejudgment. Under most national legislation, parties can make applications for interim relief to national courts as well. If arbitrators are not encouraged to utilize their powers in arbitration, this could be seen as encouraging parties to apply to national courts for a pre-evaluation of their case. Such a situation could provide further strength for arguments of bodies such as the CJEU that tribunals should consult national courts on ISDS disputes, especially on questions of the merits under substantive laws. Interim relief requests which are intended to empower arbitrators to preserve rights in order to handle ISDS claims more efficiently may instead encourage a shift to the state involved multi-lateral investment courts supported by the EU if arbitrators are too reticent to use them.

Expedited procedures

Based on the time and cost analysis presented above, is the direct correlation between time and costs in ISDS arbitrations. Thus, one of the most apparent ways to increase the efficiency of ISDS proceedings is to provide mechanisms that shorten the proceedings, yielding both a time and cost savings. One proposed means of doing this is using rule sets that allow for expediting claims. Many commercial arbitration institutional rules include expedited and low-cost procedure regimes, but ISDS users largely have yet to utilize this strategy. Part of the reason why it is not as straightforward in ISDS disputes as it is in commercial disputes can be seen in the attempt of ICSID to introduce just such a mechanism into their Rules during the recent amendment process.

The newly proposed Rules 69 and 70 of the ICSID Rules is an optional set of procedures for expedited proceedings. These rules provide for a special procedure for arbitral appointments, strict time limits and page number limits on submissions, and a requirement that all matters of jurisdiction and merits be handled in a single proceeding and not be bifurcated. The time limit for the post-award remedies available to parties under the ICSID Rules is also truncated. Ultimately, the expected duration of a dispute under these expedited procedures is still up to 18 months (530 days).

In order to be effective, both parties would have to consent to apply the expedited process to their dispute. As claimants in ISDS, investors may wish to use the procedure to reduce the cost of bringing a claim against a state. However, states are likely to be resistant to agreeing to use the procedures as proposed since it is questionable whether bureaucratic governmental mechanisms that require approval and sign off at many levels and from many offices and individuals could adhere to such a timeframe. Additionally, the flexibility to make challenges and to amend procedures would be lost. There is an irony to this as states are quite vocal in the WG III discussions about wanting to increase efficiency. Yet, when the expedited procedure mechanism for the ICSID Rules was offered, the feedback from states was in favour of avoiding quick resolutions and not obligating government agencies to restrictive timeframes.

It will be helpful to see how frequently requested and agreed to the ICSID expedited procedure becomes, if and when it comes into force. The approach of the specific counsel representing the parties in the dispute would be critical to adhering to an expedited procedure and whether they would counsel parties to utilize the system. Counsel would surely view adhering to an expedited procedure as preferable to the even shorter expert determination proceedings that clients, especially investor claimants, may wish to use. Even so, expedited procedures in ISDS may simply not be practical. The proposed 18-month timeframe requires investors, states, counsel, and a tribunal that are 100% available to give the dispute their full attention for a year and a half. Even if a claimant had such capacity, it is highly unlikely that states would be able to meet such a schedule.

Pre-dispute settlement mechanisms

More promising than expedited procedures in applicable rules sets may be the movement to encourage the use of other alternative dispute resolution procedures prior to the initiation of ISDS arbitration claims. This is a strategy that is external from the arbitration mechanism but is starting to be incorporated into the overall ISDS mechanisms set out in investment treaties and trade agreements. Such pre-dispute mechanisms can take the form of required cooling-off periods or requirements to attempt settlement negotiations. For investors whose financial situation may be precarious in the light of state action, such requirements may be viewed as onerous.

Another mechanism is to require parties to attempt mediation first before filing a claim in ISDS. Since mediation can be done relatively quickly and the mediation mechanism generally has a high success rate in avoiding contentious disputes, this may be an acceptable pre-dispute mechanism to both states and investors. Requirements to mediate prior to filing a claim in ISDS can be drafted into treaties and agreements

by states at little risk to themselves. This would seem at first to be a practical solution for not only expediting ISDS disputes but in avoiding them all together.

However, as with many issues in ISDS, things are not generally straightforward. It remains to be seen how such mediated settlement agreements could be enforced across borders as stand-alone proceedings. A mediated settlement does not currently have the same power of enforcement that an arbitral award has. Further, domestic courts would have to be willing to recognize and enforce agreements made in foreign jurisdictions involving sovereign nations. A mediated settlement may not then provide the parties the relief sought to the degree an arbitral award would guarantee.

A recent development coming out of the work of UNCITRAL WG II may have significant impact in this area. The Singapore Mediation Convention was developed by WG II and presented to the states for signature in August of this year. 46 states, including the US, China, and India have signed. It is not yet known how many of these signatories will ratify the Singapore Convention into their domestic legislation. However, the positive reception has shown an interest by the states in moving towards a greater acceptance and facilitation of early stage conciliatory dispute resolution. Some have touted the Singapore Convention as having the potential to affect the use of mediation in commercial disputes to the same degree as the New York Convention affected the use of commercial arbitration.

However, it must be noted that the Singapore Convention pertains specifically to mediated settlements in disputes between two commercial parties. Signatory states have agreed to recognize and enforce mediated settlements between commercial parties as binding across national jurisdictions. The question remains as to whether this has the same effect in disputes where a state is involved, as is the case in ISDS disputes. While the New York Convention does not expressly apply to the recognition and enforcement of arbitral awards in ISDS disputes, it is accepted by many jurisdictions that it does. It is therefore possible that the Singapore Convention could have a significant impact on ISDS disputes by providing a basis for binding and enforceable mediated settlements between investors and states in the same way that the New York Convention currently under pins enforcement of awards in ISDS arbitration in many jurisdictions.

Bifurcation/concurrent proceedings on merits and jurisdiction

Arbitrators generally have broad discretion in determining the order in which the claims brought forward in an arbitration are addressed. Arbitrators may choose to consider jurisdictional challenges separately from the merits in bifurcated proceedings

or they may choose to consider the two concurrently. The potential efficiency benefit to bifurcating is that an early determination of lack of jurisdiction obviates the need to proceed any further with the dispute. This is the reason respondents tend to respond to a request for arbitration by a claimant with an immediate jurisdictional challenge.

However, arbitrators often view the facts of the case that form the basis for the merits claims as equally integral to determining jurisdictional issues. In such a case, there is no efficiency benefit to bifurcation and there may in fact be a detriment should the tribunal affirm their jurisdiction over the claims. Accordingly, the proposed ICSID Rule amendments contain a presumption against bifurcation. Such a presumption is supported by CIArb's practice guidelines on jurisdictional challenges. This guideline directs arbitrators to consider jurisdictional challenges and merits concurrently and to issue an immediate final award should they find they have no jurisdiction. The prevailing view among practitioners is that bifurcation is more likely to decrease efficiency than to improve it.

Additionally, the proposed ICSID Rule 36 contains a requirement that jurisdictional challenges not raised in response to the claimants first memorial are waived. While this may encourage the efficiency of the overall proceeding, the states have noted that this requires them as respondents to continue developing their counter-memorials, possibly concurrently with concluding hearings on jurisdictional challenges, regardless of the outcome of their challenges, potentially leading to a significant increase of costs that may be unnecessary. Investors may respond that this encourages the states to avoid making tenuous jurisdictional challenges.

The ICSID Rules give arbitrators the power to suspend proceedings on the merits entirely while considering jurisdictional challenges, but this would be tantamount to a bifurcation. It is interesting to note that both the new CETA and CPTPP trade agreements include language affirmatively requiring tribunals to suspend merits proceedings once a state respondent lodges a jurisdictional challenge. This is yet another example of states' propensity to draft their investment instruments against efficiency. It also shows states' propensity to presume that their jurisdictions challenges should always be sustained, regardless of the facts of the case.

02.
Decisions

States have long expressed concerns over the divergent interpretations of substantive legal standards in awards rendered in ISDS arbitrations. Arbitrators are not bound to any previous legal interpretations in their awards and may determine their own jurisdiction under the principle of competence-competence. Divergent interpretations relating to jurisdiction and admissibility are inevitable across disputes.

States have also raised concerns regarding procedural inconsistency. The procedure of a dispute can vary based on the rules, institution, and arbitrators involved in the dispute. States have also noted the lack of a consistent framework in ISDS for addressing multiple concurrent proceedings involving similar claims or multiple claimants while the public has noted the lack of a framework for third parties affected by the claim to participate in disputes.

In addition, states often express concern over the notion of the "correctness" of decisions. This is a view that arbitrators are often unable to interpret the applicable law of a dispute and incorrectly apply the law. Yet the states that have raised this concern have not provided a clear idea of who is the proper authority to determine whether substantive law has been correctly interpreted in an investment dispute. Unlike commercial arbitration, ISDS awards are not subject to the consistent standards of review seen in the New York Convention and this is seen by many as a weakness of the system.

However, the claims possible in ISDS claims are breaches of treaty, as opposed to claims of contract breach seen in commercial arbitration. The trade treaties and instruments that provide the basis for claims, be they bilateral or multilateral, are all drafted with these tenets in mind, for example the rule of law, due process, access to justice, and most favoured nation treatment. These are underpinned by a compendium of instruments that form the international customary law on treaties, developed over the last century, and expressed in the Vienna Convention. ISDS disputes are thus matters of breaches of treaty and subject to the law of treaties. While these disputes certainly have a greater impact than disputes between commercial parties, the law of interpretation of breaches of treaty is quite uniform. Tribunals tend to apply this law in a consistent way and with great accuracy when compared to other disputes of treaty breach, such as occur in state to state disputes. The notion that only very certain people can be trusted to understand and apply the law in these disputes is largely disproven by current data, including that put out by the Academic Forum, shows a tendency to consistent interpretations by tribunals. Further, such an assumption has a significant negative impact on the later discussion of diversity.

Correctness – Instrument Interpretation, Predictability, and Consistency

Given that there is no binding precedent in arbitration, it is possible for tribunals analysing the same legal issues under the same trade instrument to reach differing conclusions. States have long criticised of this lack of consistency in investment awards. They complain that the lack of consistency in interpreting trade instruments creates an atmosphere of unpredictability regarding ISDS outcomes that inhibits states from developing their trade policy positions. This is largely disputed by new data on consistency in ISDS tribunals' analysis of treaties, as mentioned above. But further, as arbitrators may be from a variety of legal backgrounds and may have no experience with the applicable national laws at issue in a dispute or the laws of the signatory states to the trade agreements and treaties in question, there is a risk that the arbitrator may yield an award that is substantively incorrect.

States continually say that concerns over the consistent and predictable outcomes of disputes in ISDS are a top priority. This is despite many national courts' continual protection and affirmation of the autonomy principle which underpins the arbitral process which allows parties to choose their arbitrator, regardless of qualification, and to receive final and binding awards that are not subject to a review of the substantive legal interpretation of the chosen arbitrator. It is well known that in domestic legal systems, including those where there is binding precedent, it is not uncommon for judges to review the same issue of law and come to widely differing conclusions. Indeed, this possibility for differing interpretations forms the basis for the appeal process that exists in most domestic court systems. Further, judges in many domestic systems need have no legal education at all in order to sit in judgment over disputes and to interpret national legislation. Such practices are not widely seen as inhibiting the legal and political development of a state. In this light, the purported risk that use of the ISDS system of party appointed arbitrators leads to miscarriages of justice would seem low and rather overblown.

States also express concern over the differing treatment of the uniform language in trade treaties and agreements. Most trade instruments use standard mechanisms that are unique to international trade agreements, such as fair and equitable treatment, most favoured nation treatment, protection and security, and expropriation. As such language is used consistently across treaties, states argue that a consistent and overarching method of interpretation ought to be used by arbitrators. One proposal is that UNCITRAL take steps to develop a standard interpretation to be adopted by all states and require arbitrators in ISDS to apply it. But finding an international consensus for interpretation could be a difficult and lengthy process. Further, it can be argued that such an instrument already exists in the form of the Vienna Convention, supplemented by the Draft Articles on State Responsibility.

Review mechanisms

One of the basic features of dispute resolution through arbitration is the final and binding nature of the awards rendered. In commercial arbitration, the New York Convention establishes a bright line for the recognition and enforcement of arbitral awards internationally. One of the key principles contained in the New York Convention is that merit review of an arbitral award is inappropriate and that only a limited number of grounds exist for a national court to deny enforcement of an award. These grounds are narrowly limited to procedural issues. National legislative bodies and courts have largely enacted and applied these principles with great success. The purpose for such a limitation on merit review is to make the enforcement process consistent and predictable across jurisdictions. The New York Convention drafters also recognized that to allow a merit review by national courts would undermine the principle of party autonomy and as well as weaken arbitration as a process generally.

Whether or not the New York Convention applies to the recognition and enforcement of awards in investment arbitration is a subject for debate among scholars and academics worldwide. Thus far states have not drafted such an instrument for the recognition and enforcement of awards in ISDS. Given the desire of some states to eliminate the principle of party autonomy in disputes to which they are a party, drafting such an instrument could prove unpopular in the light of the unquestionable success of the New York Convention mechanism in private commercial arbitration. Further, such a formalized requirement for a merit review of awards in an arbitral proceeding would directly contradict the interpretation of laws by many national courts which strongly uphold the principles of party autonomy and the final and binding nature of arbitral awards.

ICSID has implemented one method of addressing this issue and allows for a limited review of investment awards by the ICSID Court in an annulment proceeding provided under the ICSID Rules. The ICSID Court has the power to review awards and to either annul an award or stay enforcement in the interests of justice. Investment disputes through different administrating bodies or ad hoc procedures do not have such an opportunity for a review of awards. This, states claim, is part of the reason for the inconsistent outcomes of investment disputes involving the same legal issues, instruments, and parties. Accordingly, many states have expressed a desire to expand the ICSID method and to allow, or even require, a review of investment dispute awards. However, unlike the ICSID review process, many states want to expand the award review to a full merit review rather than a limited procedural review. This raises the question of what such a review body would look like, who would sit on it, and how the reviewers would be chosen. The existence of such a

review body could have serious implications for arbitration as a dispute resolution mechanism generally as it would undermine the essence of the private process and provide for what is essentially an appellate process.

Multi-lateral investment courts

Some states, and notable the EU as an observer state entity, have suggested that the solution to the problems of consistency, predictability, and correctness in ISDS is to eliminate the current system of dispute resolution and to require all investment disputes to be submitted to a supra-national judicial body established specifically for that purpose. Support of such a system is seen as consistent with the CJEU's recent refusals to enforce investment dispute awards against EU member states and to require consultation with European courts in investment disputes between EU member states. However, recent interpretations out of European courts on the so-called "next generation trade treaties" model being implemented by the EU have narrowed the scope of such assertions to claims which would require the tribunal to interpret EU law. As ISDS disputes are based on international treaty claims, this would rarely, if ever, be a foreseeable situation in an investor-state dispute. This has now been found by over 30 tribunals sitting in ISDS disputes in the past year.

There are many challenges to the use of such a court system in investor-state disputes. First, it would require all states to develop a multi-lateral instrument which all states would consent to in order to establish a legitimate and authoritative tribunal. This is far from a realistic expectation. Many developing countries that are the intended beneficiaries of the investor-state system fear that the resulting court would be populated with decision makers from economically powerful states. Next, even if a more diverse panel of decision makers were seated, how the applicable law to disputes would be chosen is unclear and likely to be the subject of contention. Such a system would take many years, even decades, to develop to the point that it was widely accepted and used. Additionally, the concerns that exist over the diversity of decision makers in the dispute settlement system would be exacerbated, rather than solved, with a greatly reduced pool of decision makers. Presumably, the pool would also be established exclusively by the states, eliminating party autonomy in the choice of arbitrator for investors.

It is difficult to imagine that such a multi-lateral investment court system could be developed with broad consensus. As an example, NAFTA includes language in its dispute resolution mechanism that requires a standing multilateral tribunal to hear disputes. In the 26 years since the signing of that agreement, the US, Mexico, and Canada have failed agree on a method for appointing tribunal members or a

procedure for the tribunal to hear disputes. This is with only three states involved. The ISDS mechanism is used by more than one hundred states.

Even if it were possible to reach a broad consensus among a significant number of states, it would likely be viewed with suspicion by developing nations as another version of supra-national courts reputed for trying to impose Western versions of justice on non-Western cultures, such as the International Criminal Court in the Hague which has exclusively prosecuted defendants from Africa. It would be difficult, if not impossible, for such a court to render internationally recognized and enforceable decisions while lacking broad agreement and acceptance. Such a court could end up relying on controversial legal theories like extra-territorial jurisdiction to operate. In addition, multi-lateral investment courts that already exist to settle investment disputes between European Economic Area member states, such as the European Free Trade Agreement Court, are rarely used by the member states.

Transparency

One of the most frequent criticisms of the ISDS process by the wider public is the lack of transparency in dispute proceedings and the awards rendered. The growing level of public concern is difficult to balance with the investors' and states' concerns about confidentiality in the disputes. However, all one need do is run a Google search for "investor- state dispute settlement" to see the level of public suspicion and distrust for the ISDS process. Lack of transparency may be the greatest source of the public pressure on state governments to reform the process while, ironically, being one of the greatest enticements for the users of the system to participate in it.

Since all ISDS disputes involve states or state entities that are publicly funded, it is reasonable to expect that the public would demand access to the decision-making process for which they are paying. This is especially true in situations where citizens have been directly impacted by the activities of investors and where the state may have made the legislative reform that gave rise to the claim in order to protect those citizens. This is often seen in disputes that involve environmental damage or violations of human rights.

A shift has already taken place in encouraging parties to investment disputes to increase the transparency of proceedings. The UNCITRAL Rules which are used in ad hoc disputes now include optional Rules on Transparency which users can agree to apply. ICSID too has included new language on transparency in their proposed rule changes. Publication of awards is presumed in each ICSID dispute unless a party objects within a certain time. Procedural orders will be published after the parties

have an opportunity to redact them. Parties can also publish dispute documents unilaterally but must agree on redactions with the opposing party. The exact time frame and process for document publication is not spelled out though and may be handled on an individual dispute basis with the involvement of the tribunal. Further, tribunals must allow public observation of hearings unless both parties object. In the same vein, the UNCITRAL Rules on Transparency presume publication of transcripts or recordings of hearings and do not allow redaction.

The shift towards allowing increased transparency in ISDS leaves the level of confidentiality retained to be decided on a dispute by dispute basis. Transparency would ideally be discussed in the first procedural order but could be preceded by extensive party disputes over what is and what is not confidential. Transparency may be a necessity to foster public confidence in the system, but ultimately increased transparency could be complicated, costly, time consuming, and yield arbitrations within arbitrations. In other words, transparency in ISDS decisions may increase the legitimacy of ISDS while undermining any progress made on efficiency. The adage that you can have speed, low cost, or high-quality decisions in disputes, but only two of the three at a time, is proven again and again in the ISDS arena.

Of course, the elephant in the room in any discussions of transparency in arbitration is the Mauritius Transparency Convention which was hastily drafted by WG III before it was re-tasked to tackle ISDS reform. Only four small African states and Canada have so far signed on to this attempt at standardizing and enforcing transparency in arbitration. When placed next to the broad acceptance and success of WG II's Singapore Mediation Convention, which has been affirmed by several very economically powerful states, the sincerity and true importance of the ISDS transparency discussion among states is reframed entirely.

Third parties

Another public flash point in ISDS is the role of third parties that are affected by disputes between investors and states. The trade instruments which create the dispute settlement mechanisms delineate the rights of investors to bring claims but do not provide rights for third parties directly affected by the activities of investors to do the same.

There are differing interpretations of the way that trade instruments are constructed and the implied rights they contain in relation to the broader public. An investor's activities may damage the environment or violate international norms of human rights causing the state to respond by changing legislation to prevent harm to the public. This gives rise to an investor's claim against the state in ISDS. But there is no

avenue provided in the trade instruments for the directly affected citizens to seek compensation for the damages they have suffered since they are not parties to the instrument. The traditional view is that the arbitrator is not required to make considerations beyond the four corners of the instrument. This lack of consideration of affected third parties has given rise to the wider public perception that the ISDS system is set up to favour corporate interests, making states sovereign rights subservient to them. Another view is that individuals are parties through the states of which they are citizens. In defending its right to legislate in the interests of the health and safety of the public, the states assert the rights of the affected citizens on their behalf. This idea underpins the practice of respondent states asserting counterclaims for damages.

It has been noted that states have the power to draft trade instruments to expressly preserve or bolster the police powers of the state to legislate in the interests of health and safety. With more succinct treaty drafting, states could ensure their right to protect public interests without giving rise to an investor claim. However, the public criticism of the inability of damaged citizens to personally assert rights in ISDS remains.

Few avenues of addressing this problem have been put forward in the ISDS reform discussions. Some disputes have seen the participation of third parties in the form of amicus curiae. This is a common method in some legal traditions of allowing third parties to present evidence or submissions to bolster the case of one of the parties to the dispute. In arbitration, such participation is left to the discretion of the arbitrator. Whether or not a tribunal allows participation may depend on the legal background of the individual tribunal.

The proposed amended ICSID Rules contain express provisions on the participation of amici. Tribunals should consider the affiliations of an amicus to the disputing party and require disclosures from them to determine their interests in the dispute. This is particularly directed at the participation of government organized non-governmental organizations, or GONGOs, who may receive their funding directly from the respondent state. Another consideration a tribunal should make is the increased time and cost of allowing amicus curiae to participate in disputes. Governmental entities that are not parties to the dispute often assert their rights to act as amici at great expense to the parties. The EU is known to do this regularly in investment disputes involving member states. Non-participating treaty parties too often seek to intervene. The proposed amended ICSID Rules require tribunals to allow submissions on treaty interpretation from other parties to the trade instrument but may limit submissions on other matters.

The participation of affected third parties in ISDS may be one of the most difficult areas to address in terms of the available legal mechanisms. Yet this may also be one of the most critical areas optically for ISDS reform.

03. Decision Makers

Arbitrators

Many states have taken the position that the existing ISDS regime does not offers a sufficient guarantee of independent and impartial arbitral tribunals. The standards of independence and impartiality required of individual arbitrators are subject to interpretation, unclear in scope, and homogeneous in practical application, creating the real possibility of biased tribunals hearing disputes. States also note the frequent practice among arbitrators of "double hatting" as both arbitrators and party counsel in disputes where similar legal claims are at issue. This practice, they say, could lead to conflicts of interest and a propensity for arbitrators to have pre-judged issues they should consider without bias. The challenge mechanisms in place to address such concerns have limitations and are also equally subject to interpretation.

States also express concerns regarding the existing approaches to constituting tribunals. In the view of the states, the goal of the process is to ensure that the tribunal members have the appropriate qualifications and characteristics to decide the case before them. The party-appointment system has inherent limitations as regards ensuring the competence and qualifications of all of the arbitrators on a panel since the parties have no control over the opposing party's appointments. Further, arbitrators are not subject to objective ethical standards or code of ethics. Such issues surrounding the selection of tribunals can impact awards of damages, create dissenting opinions, and foster the habit of repeatedly appointing of certain arbitrators on the perception that they are biased towards certain legal positions or certain types of parties. They also create the possibility of significant increase in time and costs addressing such challenges brought by parties. The proposed ICSID rules for expedited arbitration allow parties to suspend the schedule for challenges to arbitrators creating a possibility of losing the advantages that using truncated proceedings are designed to provide.

Strikingly, the states also have taken serious consideration of the situation that a limited number of individuals are repeatedly appointed as arbitrators in ISDS disputes. This has led to a lack of diversity in terms of gender, age, ethnicity, background, and geographical distribution of appointed arbitrators such that the professional background of arbitrators and the perspectives of differing legal systems and levels of economic development among states are not all proportionately represented in tribunals.

Impartiality and independence

One of the most discussed topics of UNCITRAL WG III is how to assure the impartiality and independence of arbitrators who decide ISDS disputes. The two terms tend to be used together in almost every instance in discussions, yet they are differing concepts. Independence refers to a lack of interest in the case in terms of professional connection to the parties or a financial interest in the outcome of the dispute. Impartiality refers to a lack of bias towards either party via personal connections or the party's legal arguments. While they are different concepts, the lack of either impartiality or independence in a dispute can mean an arbitrator is not appointed to the tribunal deciding that dispute.

The International Bar Association has published guidelines on dealing with such conflicts of interest which might lead to a lack of independence and impartiality. While a soft law instrument and not controlling authority, these guidelines are the most often used measure and are considered a peer reviewed measure of best practices. A key concept in the IBA guidelines is the notion of whether measures of independence and impartiality need to be objective or subjective. The question becomes whether, if the arbitrator is certain of their own impartiality and independence, that is sufficient or must that impartiality and independence be self-evident to all. In answering, it should be recognized that independence from an interest in the dispute may be more easily shown to an objective degree while showing impartiality may be more difficult.

It is important to note that, as with many other issues in ISDS, states have the power to make clear the appointment process to be used before disputes arise via express statement in the trade instruments they draft. States fears regarding the correctness of awards also ties into the discussion of impartiality and independence in that it has been asserted that the inconsistency of awards is due to many substantive findings made in error and that the errors are a result of bias on the part of arbitrators. Reforming the process to ensure disqualification of arbitrators where there is any possibility of lack of impartiality and independence would thus yield a reduction in the inconsistency and incorrectness of awards and thereby the legitimacy of the system. Yet no strong empirical evidence supporting the assertion that errors by arbitrators are a result of bias has been presented. The incidence of awards in ISDS disputes being declared unenforceable due to bias on the part of the arbitrator is the exception rather than the rule.

Appointment methods

There is great criticism among users of ISDS of the methods used to appoint arbitrators. The issue of impartiality and independence of a tribunal is impacted by the make-up of a tribunal. If a sole arbitrator is hearing the dispute, both impartiality and independence become more vital since the parties must agree before appointing that person. Impartiality and independence on an objective level become primary considerations for both parties. If, however, the tribunal is made up of three arbitrators, as is the case in ISDS arbitrations, one arbitrator is chosen by each party and the chairman is agreed to by the party appointed arbitrators. In this context the considerations of impartiality change. When a party appoints their own arbitrator, it is difficult to imagine that a party would not consider the likelihood that an arbitrator would be predisposed to taking their position on the legal issues. In that sense, partiality in terms of the legal issues becomes a positive consideration, even if personal bias and independence considerations remain.

This difference in methods of appointing a tribunal has led to the argument from some that party appointed arbitrators should be disposed of as a mechanism in ISDS and be replaced by another method of appointment, such as institutional lists or permanent multi-lateral investment courts. The new Dutch Model BIT utilises a mechanism of blind appointments from a list of nominees agreed to by the parties. However, steps could contravene the principle of party autonomy in arbitrations. Further, while it is true that a party appointed arbitrator is more likely to find for their appointing party, it has not been shown that such a predilection compromises the legitimacy of final awards since the neutrally appointed chairperson of the tribunal has the deciding vote. In some legal traditions this is a widely accepted method in domestic and commercial arbitration. The role of the party appointed arbitrator is seen as providing the expertise to inform the chairperson while it is the chairperson who must remain fully independent and impartial.

In either case, parties have the right to request disclosures from the nominees to the tribunal on topics that go to the potential for bias or a lack of independence in the dispute. Arbitrators voluntarily make an initial set of disclosures upon nomination. If parties feel this is insufficient or have reason to believe further disclosures are needed that might disqualify the arbitrator, they can make such a request. There is much debate over what are and are not proper subjects for disclosure and how distant a connection can be to potentially impact an arbitrators' ability to maintain neutrality in making an award. The answer to this seems to largely depend on the party making the disclosure request. If a party is asking disclosures of the other party's nominated arbitrator, there is a strategical interest in finding a disqualifying connection to the

dispute. If, however, a party is asking disclosures of their own appointed arbitrator, the disclosures may not be as probing. In the case of an appointment system where a rostering system or appointing authority is used in commercial disputes, the arbitrator appointed is frequently objectionable to both parties. In that case, both parties may have an interest in requesting probing disclosures until a disqualifying connection to the dispute is found. If this method were attempted in ISDS disputes, such strategies might increase the objective neutrality of appointees while undermining the overall efficiency of the system.

Proponents of establishing a multi-lateral investment court to replace the ISDS system argue her that use of such a system would eliminate this problem. Rather than allowing the current ad hoc appointment system, disputes would be heard by a standing tribunal. Tribunal members would be vetted and trained to disclose potential conflicts of interest similarly to recusal in domestic court systems. This feature of increased assurance of impartiality and independence of decision makers may be the greatest strength of the multi-lateral investment court system. But as has been pointed out previously, this system would undermine the notion of party autonomy in many ways. Further, it is unclear what the method of appointing the standing tribunal would be and who would have a say in those appointments.

Finally, proponents of the system have yet to show conclusive empirical evidence that that the problem this method would solve is systemic enough to warrant such extensive changes. ICSID statistics show that states prevail in disputes using current appointment mechanisms more than 50% of the time. This would indicate that parties to a dispute have a fair chance at either prevailing or losing in the current system. Additionally, one of the most fundamental reasons for refusing enforcement of a final arbitral award in state courts is evident bias shown by an arbitrator. It is rare that this has been brought as successful grounds for challenging enforcement of an ISDS award. Further, ICSID and the PCA have experience and expertise requirements that arbitrators must meet before being allowed to accept appointments in ISDS disputes through those institutions. If parties choose to resolve their dispute through ad hoc arbitration instead, it can be argued that they accept the risks of the appointment mechanism they agree to compromising the evident impartiality and independence of a tribunal.

Challenge procedures

Another area of discussion is the procedures currently used in ISDS disputes for making challenges to an appointed arbitrator. The issues surrounding the reasons a party may challenge have been discussed. Yet the method of making challenges is also

a subject of debate since parties tend to utilize challenge procedures strategically, often increasing the duration and cost of a dispute in the process. If limitations are not made, parties may wait to challenge an arbitrator until late in the proceedings when it appears an arbitrator may be about to make findings against them or may have made procedural orders to their disadvantage. Proceedings may have to be suspended until the challenge is resolved. If the challenge is successful, the some of the completed procedures of the dispute may have to be redone by a newly appointed arbitrator. The practice in this area of ISDS disputes is very similar to that in commercial arbitration disputes.

ICSID, in its proposed rule amendments, has sought to address this problem in disputes it administrates. There is now a stated time frame for making challenges from the time a party "knew or should have known" of the grounds used to make a challenge. If it is clear a party did not do its due diligence in requesting disclosures or researching an arbitrator during the appointment process, the party may waive its right to challenge under the new procedure. Also, proceedings are no longer to be suspended while the challenge is dealt with unless both parties agree to it, except in the proposed expedited procedure. This diminishes the enticement for a party to use the arbitrator challenge procedure to intentionally create delay. ICSID also seeks to address the propensity of parties to spend time challenging the opposing party's appointed arbitrator in disputes that use a three-member panel. If both party-appointed arbitrators are challenged the same time, the entire panel is considered challenged and the chairperson has the authority to decide both challenges. WG III could similarly consider changes to the UNCITRAL ad hoc rules to similarly minimize abuse of arbitrator challenge procedures to address this issue in a more systemic way.

Conflicts of interest

Some connections to a dispute clearly call the qualification of a potential arbitrator into question. For example, if the arbitrator is a shareholder in one of the parties or is a close relative of one of the party's counsel, the probability that the arbitrator could not obtain either subjective or objective neutrality is quite high. Such conflicts of interest are widely accepted as compromising the arbitrator's impartiality and independence. But some connections have raised more discussion because it is unclear the level to which they can or do compromise the impartiality and independence of an arbitrator.

One example is the presence of a third-party funder in a dispute. Third-party funders provide financing to a party to the dispute but exercise no legal control over the dispute. But in order to determine whether to provide financing, third-party funders

must be familiar with the dispute in detail. Interactions between the funder and party's counsel are extensive and might rise to a degree that some would call involvement in the dispute. If third-party funders are involved in a dispute, then connections between the arbitrator and the third-party funder become relevant. Some argue that any connection between an arbitrator and a third-party funder, including financial interest in related, subsidiary, or parent entities, not only should be disclosed, but calls an arbitrator's neutrality into question. On the other side of the argument is the fact that no known challenge to enforcement of and ISDS award based on an arbitrator's connection to a third-party funder has succeeded.

Another of possible conflict of interest, as has been mentioned, is the practice of "double hatting" by arbitrators. This is where an arbitrator may also act as arbitration counsel in other disputes. If an arbitrator acts as counsel in a dispute where they assert a legal position on behalf of a client, this could undermine their independence if the same issue should arise in another dispute where they sit as the decision maker. It is not unknown for an arbitrator to act as decision maker and counsel concurrently in two separate disputes. While the disputes may not create a personal or professional connection for the arbitrator, they may be connected in the substance of the dispute at issue creating at least an appearance of the possibility that the arbitrator has pre-judged the issues in the dispute.

One of the reasons for the existence of double hatting is the propensity for the same few arbitrators to be appointed repeatedly by the users of ISDS. Parties tend to desire arbitrators who have extensive experience or who have issued awards in favour of their legal position. This means that an arbitrator's chances of being appointed again increase with each appointment. Some users have specific arbitrators that they appoint based on their previous awards in favour of their party or their position. There may be no other connection between the party and the arbitrator, but the repeat appointment calls the arbitrator's ability to remain neutral into question. While repeat appointment is spoken of broadly in negative terms in WG III discussions, both investors and states regularly appoint from a very small group of arbitrators. It remains to be seen if this is an area where actual reform can be feasibly undertaken.

Code of conduct

There is no universal ethical standard to which arbitrators are bound. Ethical obligations on legal practitioners differ from jurisdiction to jurisdiction. Under the principle of party autonomy, there is no requirement that an arbitrator have any legal training or qualification at all. In most jurisdictions, arbitrators are immune from action being taken against them personally for exercising bias in a dispute. This means that

if an arbitrator makes their decision in a non-neutral way, parties have no recourse except to fight enforcement of the award.

It has been suggested that a code of conduct for arbitrators in ISDS disputes be established. Such a code would provide an external obligation for arbitrators to act independently and impartially. It would provide a means for parties to take some sort of action against an arbitrator that acts in a biased manner. The criticism of such an obligation is that it could be abused by parties who lose a dispute. Undermining the arbitrator through a formal accusation of unethical behaviour provides another option to destabilize the award and call its enforcement into question. Arbitrators rely on reputation for appointments. Accusations of unethical behaviour, even if untrue, can damage an arbitrator's ability to get appointments.

CIArb has significant experience in this area as it utilizes a code of conduct for its members. The code is supra-jurisdictional and operates like a contract that members agree to adhere to when they are given membership. If a member fails to follow this code when they are acting as a neutral decision maker in a dispute, the consequences range from removal from appointment lists to revocation of membership. The purpose of such a code is to provide a uniform ethical expectation to both arbitrators and parties. This can save time and cost in an arbitration. But importantly for ISDS disputes, the code improves public confidence in a process that can be largely opaque. As was discussed under the subject of transparency, increasing public confidence in the ISDS process is key to making effective reforms. This interest may outweigh the risk that some parties may abuse an ethical code. An ethical code also provides a means for users of ISDS to hold arbitrators who act in a biased way to account. Consequences for unfounded accusations against arbitrators should be considered in drafting such a code.

Training, certification, or rostering requirements

It has been suggested that training standards or a certification requirement for decision makers be put in place in ISDS in order to address both the issue of neutrality and the quality of decisions. Establishing uniform training standards could be difficult as states would have to find a balance between vastly differing legal traditions internationally. However, the experience of the Chartered Institute of Arbitrators shows that this is a challenge that can be overcome. Uniform training can be developed that is takes such differences into account and maintains a high standard of quality. For example, in ISDS disputes, ensuring that arbitrators understand treaty interpretation is critical while understanding of certain areas of law that are domestic in nature is not. Rather than developing its own ISDS training regime, UNCITRAL could look to existing institutions

that have reputable and established training and certification programmes for ISDS. Arbitrators could choose from a limited list of UNCITRAL recognized training providers and choose one that fits their background.

Another suggestion is to maintain a roster of ISDS arbitrators. Such a list would be the expected outcome of training and certification requirements. But rosters could be used based on other characteristics as well, such as value of the case, region of the world involved, or area of technical expertise in dispute. Some would argue that rostering goes against the principle of party autonomy to limit parties' choice of arbitrator. However, such requirements may provide a compromise to undoing the system entirely and replacing it with a multi-lateral investment court. In addition, utilizing a list of competent arbitrators who meet a training standard could have the public confidence effect, similar to an ethical code, without wholesale undoing of the system.

Diversity

One of the areas of most vigorous debate in ISDS reform discussions is the lack of diversity among arbitrators. It is somewhat ironic that parties have the power to change this situation through their own appointments, yet repeatedly appoint the same non-diverse arbitrators as was mentioned above. This is a logical step taken by any party in arbitration, whether commercial or in ISDS, since experience remains the first consideration for parties appointing an arbitrator. However, this has become one of the main public criticisms of the ISDS system and an accepted criticism in the view of all users. The debate has moved past whether diversity needs to be increased and is now on to how to increase diversity while maintaining the integrity of the system.

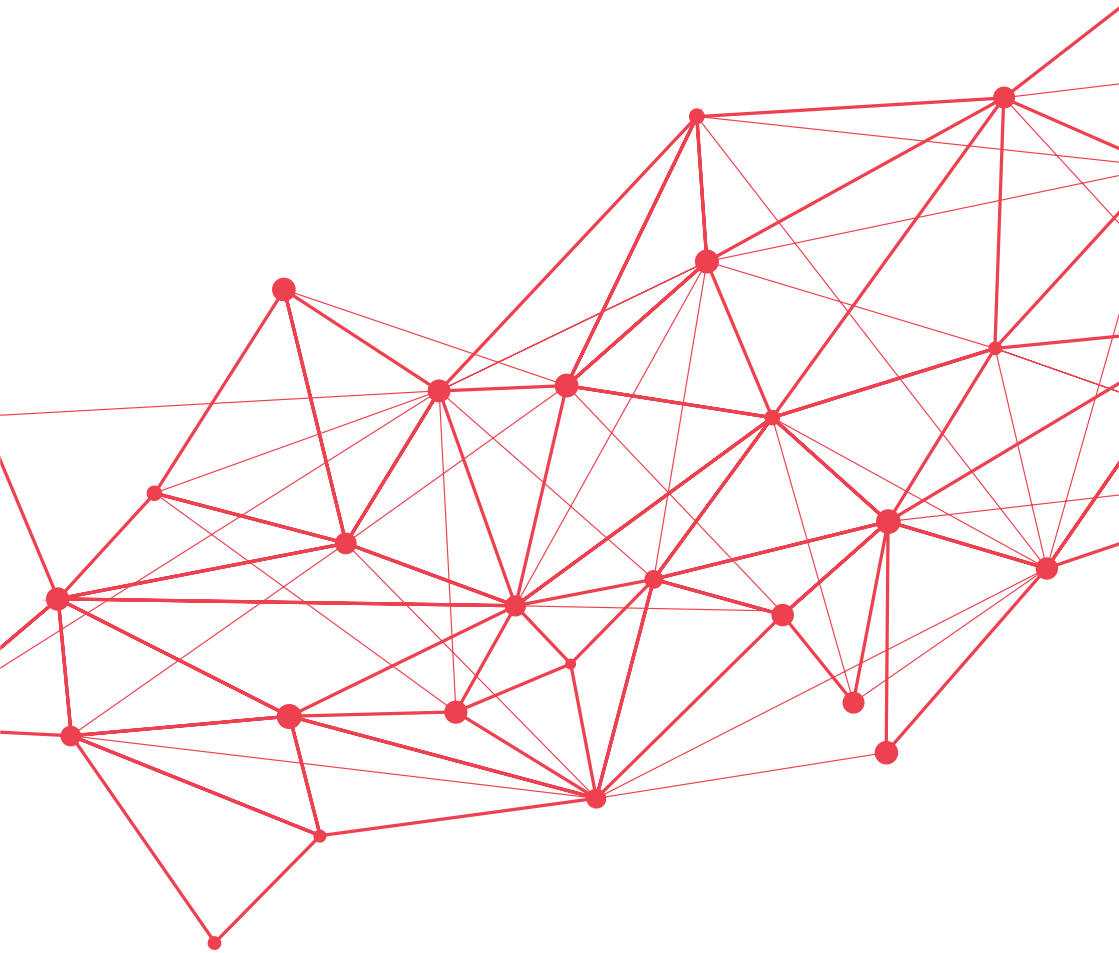
One need only examine popular news pieces to see that ISDS arbitrators are framed as an elite club of older, white, male lawyers employed to make rulings in secret court proceedings, framing ISDS arbitrators a sort of Illuminati-style association. However, it is true that ISDS arbitrators are largely older males of European or North American origin. This is true even when the case involves parties, facts, and law that have no connection to Europe or North America. Parties from developing nations tend towards appointing these arbitrators due to their experience rather than looking to decision makers from their own legal backgrounds and cultural traditions.

When parties choose an arbitrator, they tend to value experience over any other characteristic. This legitimate consideration inadvertently feeds into the repeat appointment effect. The more disputes an arbitrator hears, the more appointments they are likely to get. This creates a significant imbalance as aspiring arbitrators from

diverse backgrounds are unable to break into the field. The continual complaint is that they cannot get appointments without having already had appointments. This means that the same pool of arbitrators who have been in the field since its early days continue to be the core pool of appointed arbitrators and addition of new candidates happens very slowly. Currently, less than 10% of arbitrators appointed in ICSID disputes are female.

Potential lack of diversity is also key criticism of the use of multi-lateral investment courts. Such a system could be populated with a non-diverse group of decision makers appointed based on experience. In essence, the decisions makers in a new system would be the identical individuals making decisions in the current system, but with even further reduced chances for new individuals to enter the system. This could lead to even greater public distrust of the system publicly, particularly in developing nations who are the intended beneficiaries of ISDS. Counter to this argument is the idea that a multi-lateral panel could be representative across regions and gender balanced by design. But this would require states to develop such a court to make tribunal diversity a priority on par with experience, yielding further criticisms.

In many cases, an aspiring minority arbitrator may be highly trained and qualified to sit as a neutral yet struggle to be appointed. This is because parties attempt to minimize uncertainty in the outcome of disputes by appointing the same repeat arbitrators. One suggestion to deal with this tendency is to place limits on the number of ISDS appointments that an arbitrator can accept. Another is to place diversity requirements on the system where parties would be obligated to appoint women or minorities at a certain rate, as is already the case in administrating institutions that appoint in commercial disputes. Under such a system, the LCIA has reached gender parity in institutional appointments. Another idea is to use rosters that would have to include regional, gender, ethnic, legal background, and age diverse individuals. These lists could then be regularly rotated. Since all of these ideas would increase diversity while also inevitably work against the principle of party autonomy, it is clear why diversity in ISDS arbitrators is such a difficult issue to address.



Discusssion Papers authored by Mercy McBrayer,
Research and Academic Affairs Co-ordinator, ClArb

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CIArb
evolving to resolve

The Chartered Institute of Arbitrators
12 Bloomsbury Square, London, WC1A 2LP, UK

T: +44 (0)20 7421 7446
E: mmcbrayer@ciarb.org

Registered charity number: 803725

www.ciarb.org