

Executive Summary

Introduction by Chair, Dr. Romesh Weeramantry (Centre for International Law)

This session surveys government views on the many processes of reform and norm development currently underway in international investment law. Panelists from Singapore, Viet Nam, South Korea and India were asked to comment on the following four areas of ongoing reform:

1. ICSID Rules Amendment: Among the issues being considered by ICSID are the time and cost of arbitration, third party funding, security for costs, new ICSID mediation rules, and a code of conduct for arbitrators. Each of these reforms essentially seeks to redress criticisms that have been leveled against investment arbitration.
2. UNCITRAL Working Group III: The UNCITRAL WGIII process looks at the reform of investor-state dispute settlement broadly, considering reforms ranging from improvements to the existing system of investor-state arbitration to systemic reform, replacing ad hoc arbitral proceedings with a multilateral investment court. As with the ICSID process, these reform efforts are driven by the desire to address criticisms that have been leveled against the existing system of investment arbitration.
3. Multilateral Framework for Investment Facilitation in the WTO: Negotiations on a multilateral framework for investment facilitation are ongoing at the WTO. As yet, there is no working text in the public domain, although it seems as though the final text will likely contain a set of hard obligations for states to take steps toward ensuring, or at least improving, the transparency, predictability, efficiency and consistency of domestic regulations.
4. The Development of Mediation and Conciliation as an Alternative: States are increasingly interested in alternatives to third-party adjudication of their disputes by investors. Concurrent with this development has been the signing of the Singapore Convention on Mediation in 2019.

In addition, panelists were invited to comment on whether they believe that there is a distinct (or emerging) Asian or ASEAN voice on international investment law.

Ms. Natalie Morris-Sharma (Singapore Attorney General's Chambers)¹

Singapore (SG) supports the ICSID reform initiative and has participated actively in the process since 2016. It supports the general direction of reforms, such as proposals to permit

¹ Speaking in her personal capacity.

consolidation of claims, security for costs and third-party funding. The new ICSID mediation rules, as complemented by the Singapore Convention on Mediation, are also welcome. It supports the close collaboration between ICSID and UNCITRAL WG III as seen from the elaboration of a code of conduct for adjudicators. It is beneficial to have a standardized code applicable to all ISDS cases irrespective of the arbitral rules chosen. SG supports various aspects of the code of conduct, including on competency, disclosure, confidentiality.

With respect to the three main areas of concern that have been identified in the WG III discussions: First, Singapore shares the concern in relation to costs and duration, and supports reforms (such as on security for costs) that deter frivolous and unmeritorious claims. Second, in relation to consistency and correctness of arbitral decisions, SG supports consideration by WG III of an appellate mechanism. Third, regarding the selection and appointment of arbitrators, in addition to supporting unified arbitrator standards, SG has provided its views on the selection of arbitrators in the context of both a permanent structure and ad hoc ISDS.

SG is relatively positive with respect to the WTO process. It has been participating actively in those ongoing discussions.

SG has explicitly included mediation provisions in SG's investment treaties, such as in the Indonesia-SG BIT, and EU-SG Investment Protection Agreement. In addition, mediation can be pursued during the cooling off period, as a complement to arbitration, or even as a standalone mechanism. In the context of WG III, SG has supported further work on investor-State mediation. Mediation is cost-effective, time-effective, flexible and respectful of party autonomy. It also preserves the right to regulate of States, as well as the relationship between the investor and the host State. Further, with the Singapore Convention on Mediation, there is a regime for the cross-border enforcement of mediated settlements, including in the investor-State context.

Historically there has not been a distinctive Asian voice on international investment law. But trade and capital flows are shifting towards Asia and the economic strength of the region will generate an Asian voice. Within ASEAN, there is an ASEAN voice in many respects. There is the ASEAN Comprehensive Investment Agreement (ACIA), which in many ways has formed the base text for ASEAN's agreements such as the Regional Comprehensive Economic Partnership Agreement (RCEP). Further, in negotiating these agreements, ASEAN delegations coordinate their position first before engaging their dialogue partners. At the UNCITRAL and ICSID meetings, while there is no coordinated ASEAN position, ASEAN delegations are increasingly active and often these delegations substantively concur.

Ms Quynh VU (Viet Nam Ministry of Planning and Industry)²

One of the reasons that Viet Nam (VN) is not a member of the ICSID convention is its requirement that parties amend their domestic laws to enable enforcement of ICSID awards. But its posture may change now that it has ratified with the EU the Investment Protection

² Speaking in her personal capacity.

Agreement. VN follows the discussions on ICSID rule amendment as an observer and has also participated in webinars addressing the adoption of a code of conduct for adjudicators. The issues discussed in these meetings, such as third-party funding, security for costs, and an opt-in mechanism for expedited procedure, are of great importance to VN.

VN participates actively in the discussions in WG III. It is particularly interested in security for costs, third-party funding, as well as the question of damages, including reflected loss. It also follows closely discussions on the code of conduct, frivolous claims, multiple proceedings and counterclaims. VN contributes to the WGIII discussions regarding structural reforms, like the selection of adjudicators, an appellate mechanism, and the establishment of a multilateral investment court (MIC).

Some believe that reforms need to go beyond procedural matters. While substantive issues need not be added to the agenda of WG III, meaningful reform should include substantive law aspects.

Mediation is currently less used because arbitration has become a powerful tool. But some disputes can be solved through direct negotiation even prior to resort to either mediation or arbitration.

As to whether there is an Asian voice, VN is a party to more than 60 BITs, two-thirds of which were signed in the 1990s. It is also a party to more than 10 investment chapters in FTAs. Over the past 15 years, its approach to treaty drafting has evolved. For example, VN has introduced clear definitions limiting the scope of application of investment treaties and included more exceptions on public policy grounds. While the positions taken by ASEAN member states can vary across different international forums, like ICSID and UNCITRAL, ASEAN has developed a quite comprehensive and consistent practice with regards to the negotiation of investment treaties under the ASEAN umbrella.

Professor Jaemin Lee (Seoul National University)³

The ICSID rules amendment process is a critical process for reform and South Korea (SK) has been participating in the discussions actively since 2016. Attention to investment treaty arbitration has been rising in SK over the past 10 years, along with criticism of ISDS. The ICSID rules amendment process addresses some of those criticisms. SK believes that the discussions in ICSID thus far have been efficient, targeted and confined to specific topics, like third-party funding and the code of conduct for arbitrators. This is likely to lead to tangible outcomes in the near future.

At UNCITRAL WG III SK is interested in discussions that seek to enhance the consistency and coherence of decision making in investment arbitration cases, address the cost and duration of proceedings, and the possible introduction of an appellate mechanism. These three aspects are critical for maintaining the legitimacy of the system and preserving policy

³ Speaking in his personal capacity.

space for governments in a long run. With respect to the WGIII process, it would like to see the process of developing concrete reforms proceed steadily and efficiently. It hopes these discussions will end in a relatively short time so that countries can begin to adjust their national laws as well as international investment agreements.

The development of a Multilateral Framework for Investment Facilitation at the WTO is also an important development. This proposal has gathered wide support. But the interaction between the proposed new WTO agreement and existing IIAs is important. Investment facilitation refers to due process, transparency, consistency, etc. – matters that are also of concern in the application of investment protection provisions like FET. How does one insulate a prospective WTO investment facilitation agreement from the already controversial scope of IIAs? While it is acceptable that the WTO pursues its own investment facilitation agreement, it will be difficult and quite another thing to align or insulate it from the scope and application of IIAs.

One of the challenges for effective mediation has been a lack of systematization in the treatment of mediation in investment treaties. Even IIAs that mention mediation most often simply indicate it as a possibility as one option for dispute resolution. In that situation, it is very difficult for any government official to negotiate and to mediate and to accept an outcome involving payment to a foreign investor without having been seen to contest the investor's claim to its fullest through ISDS. That explains the low utilization of mediation and probably explains the increasing tendency to include more elaborate procedures for mediation in IIAs, a development which is also reflected in ICSID's development of mediation rules. This move towards systematizing and elaborating the structure of mediation will probably help states think about mediation more seriously in the future.

On the development of an Asian approach to international investment law, Asia has become a global hub of investment and trade. Many Asian countries are realizing the importance of continuing flows of investment and seeking to strike an appropriate balance between protecting investors and maintaining sovereign policy space. Despite distinct levels of economic development among Asian states, the unique experience of many Asian countries could probably provide an important contribution to the discussion of reform in the future. Asians are very good at finding a balance between competing interests, as is evident in the successful conclusion of the Singapore Convention on Mediation. Asian countries could well contribute to the success of the general reform effort as well.

Mr. Promod Nair (Arista Chambers, India)⁴

Although India participated actively in the ICSID convention negotiations, it ended up not signing the convention. While it never gave formal reasons for this, a key concern seems to be the enforcement of ICSID awards. But India may rethink its position concerning the

⁴ Speaking in his personal capacity.

ICSID convention.

With respect to ISDS, there have been widespread concerns within India about the impact of third-party funding arrangements. India is likely to welcome reforms directed at greater and mandatory disclosure of information about third-party funding and greater levels of disclosure concerning corporate structures. For India the ICSID reform process is a positive development even though it has not been particularly active in engaging with the reform discussions currently underway.

Within UNCITRAL WG III, India's concerns are not very different from those articulated by previous panelists: consistency, and coherency in decision making, selection of arbitrators. In light of its adverse experiences with ISDS, India was an early and enthusiastic proponent of ISDS reform, including structural reforms. India has also expressed its preference for reform proposals to be adopted on a rolling basis, such as early adoption of the code of conduct for adjudicators, perhaps as a soft law instrument. Success on such early harvest reforms would increase confidence for the success of reform initiatives.

India is moderately skeptical of proposals for WTO investment facilitation. All countries could be expected to have a self-interest in ensuring transparency and credibility regarding their respective FDI regulatory frameworks. The question is not whether investment facilitation is good or bad but whether it requires an international legal framework. The push for a multilateral framework on investment facilitation at the WTO is likely to prove to be contentious. India's model BIT and most of its previous BITs have clearly emphasized the need to exclude pre-establishment coverage of investments. India has also been active in supporting enhanced investment screening procedures for foreign investors. Lastly, the extent to which the WTO agreement could impose substantive obligations is highly relevant for India. India has expressed strong reservations against an unconditional MFN clause in investment treaties, and it will likely oppose such a clause in the context of any future investment facilitation agreement. For all these reasons, India will probably not be overly enthusiastic in embracing a multilateral framework on investment facilitation.

On new approaches and specifically on mediation two points are important. First, even though few IIAs contain explicit mediation provision, many have a provision which enables a trigger notice to be sent, followed by a long cooling-off period. The underlying intention behind all of these provisions is that there is a window of time when investors and states will engage with each other and resolve their disputes through direct negotiation or mediation before going to binding dispute settlement. As far as the investor is concerned, commencing a BIT arbitration is akin to pressing the nuclear button. Second, even if the investor succeeds in the arbitration, there is a considerable enforcement risk. Most investors want to continue to do business in the host state; suing it does not help in that regard. Investors usually have an incentive to resolve disputes by mediation or direct negotiations.

On whether there is an Asian voice, two points are important. First, international investment law thus far has been shaped by capital-exporting countries like Europe and North America.

The Western model is still the dominant template of BITs prevalent across the world. At the substantive level, norm creation by arbitrations has also been primarily driven by arbitrators from North America and Europe. Second, Asia is not a monolith. It comprises states with very high GDP growth and increased investment per capita income; it also has several low-income countries. There are capital-exporting states, capital importing states, and many that are both. These geopolitical differences prevent close alignment when it comes to norm creation in international investment law. In addition, the three biggest economies in the region, China, Japan and India, have traditionally not been assertive in reshaping the investment law system. Other less significant economies such as Korea, SG have taken the lead. However, the landscape seems to be gradually changing given the increased economic importance of Asia, and more importantly, the greater involvement of Asian parties in investment arbitrations.