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Mind the Label: Loyalists and Reformists and ISDS

Anne-Karin Grill · Friday, December 29th, 2017

In late November, the UN Headquarters in Vienna saw the first meeting of Working Group III of the United Nations Commission on International Trade (UNCITRAL). The meeting marked the initiation of a process of analysis and reform – whatever shape it may ultimately take – of the existing Investor State Dispute Settlement (ISDS) regime. At the meeting, the Working Group agreed to proceed first by identifying concerns regarding ISDS, then considering whether reform is desirable in light of any identified concerns, and, if it concludes that it is, developing relevant solutions to be recommended to the UNCITRAL.

As per the UNCITRAL mandate, the Working Group is more government-led than is typical of UNCITRAL Working Groups (more than 300 participants representing 80 states and 35 observers, including the European Union, UNCTAD ICSID, OECD and the PCA, while a number of other intergovernmental and non-governmental organisations also participated). This is a direct reflection of the express request of UNCITRAL that the deliberations of the Working Group, while benefiting from the widest possible breadth of available expertise from all stakeholders, should be government-led with high-level input from all governments, consensus-based and fully transparent.

Unsurprisingly, participants described the Vienna debates as "highly political".[1)] Internationally, there is a schism over whether to embrace ISDS and, if so, whether international claims by investors would be better heard by ad hoc arbitral bodies or a permanent investment court. Domestically, ISDS has stirred controversy at best and outright rejection at worst. While the need for fact-based analysis of the current ISDS regime was emphasised at the Vienna meeting, it was also noted that various perceptions of the relevant issues needed to be considered. The concerns of developing states, as well as access of small- and medium-sized enterprises to ISDS, were mentioned as well.

The initial discussions of Working Group III took place against the background of a note prepared by the UNCITRAL Secretariat, *"Possible reform of investor-State dispute settlement (ISDS),"* issued on 18 September 2017. This document lists well-known concerns regarding ISDS. Essentially, they fall within two broad categories: (i) concerns relating to the arbitral process and its outcomes (inconsistency in arbitral decisions, limited mechanisms to ensure the correctness of arbitral decisions, lack of

predictability, lack of transparency, increasing duration and costs of the procedure), and (ii) concerns relating to arbitrators/decision-makers (appointment of arbitrators by the parties, the impact of party appointment on the impartiality and independence of arbitrators). Potential reform measures to be considered by the Working Group cover a broad spectrum, from relatively minor adjustments to the existing ISDS regime (eg the introduction of alternative methods for appointing arbitrators, such as designing a system with a pool of members and the strengthening – or establishing – of ethical requirements) to further institutionalising the existing ISDS regime through the creation of a permanent adjudicatory body (such as a permanent investment court or dispute settlement body).

Non-state stakeholders in the reform process that is unfolding may appreciate the following:

1. Not everyone immediately appreciated putting the UNCITRAL in charge of ISDS reform. In fact, the Working Group usually dealing with questions of arbitration is Working Group II. Since the issues discussed are usually technical in nature (eg the development of model rules), many states have delegated their representation to arbitration practitioners. There was a concern that having states represented by arbitration practitioners in the reform discussions was inappropriate. Giving the reform mandate to Working Group III created a welcome loophole to allow states to reassess who should represent them without affront. What could possibly be expected from those practitioners anyway, if not attempts to delay or even frustrate any reform? Would not that be the case given that they have a vested financial interest in maintaining the status quo?

2. The arguments of advocates for the introduction of a permanent investment court or dispute settlement body – most notably the European Commission – are remarkably divorced from reality. Where arbitrator appointments are made by disputing parties, it is argued, attention is distracted from what is assumed to be their true long term interest: recourse to adjudicative bodies that faithfully interpret and apply the substantive provisions underlying their dispute. According to the self-proclaimed reformists of the current arbitration-focused ISDS regime, this leads to a continued high concentration of persons who have gained their experience as arbitrators primarily in the field of commercial disputes and who are therefore believed to be less familiar with public international law. Throw in the regional and gender diversity cards and you have the perfect storm: incompetence, non-diversity, political colouring. Are standing adjudicative bodies as we know them indeed above suspicion?

3. While ISDS served to depoliticize conflicts between investors and states and prevent them from escalating into interstate conflicts, its reputation does not mirror its benefits – in fact, quite the contrary. While States themselves have established and consented to the current ISDS regime and confirmed its legitimacy under international law, this legitimacy is increasingly challenged by their constituencies. Public opinion is weighing heavily and the statistics have added fuel to the fire. As of 1 January 2017, there were 767 publicly known treaty-based ISDS cases, in which 109 states were respondents in one or more of them. The apparent tensions are being channelled into comparisons of the relative merits of investor-state arbitration and a multilateral investment court system, with states staking out positions as "loyalists" or

"reformists". But let's mind the labels here: how "reformatory" is it to press ISDS into the mould of a standing investment court system? Is "same but different" really the universal cure? In terms of political marketing, the answer may be a clear yes. In terms of treating the apparent diseases of arbitration-based ISDS, which undeniably exist, would it not be more essential to focus on improving the existing ISDS regime?

Arbitration practitioners, experts, loyalists – let your voices be heard!

References

↑1 Anthea Roberts, UNCITRAL and ISDS Reform: Not Business as Usual, 11 December 2017

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