The Investor-State Dispute Settlement System: The Road To Overcoming Criticism

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Recent events such as the NAFTA re-negotiations have drawn leading newspapers around the world to turn their attention to ISDS tribunals. Often in an effort to make their stories sensational, they speak of "obscure tribunals," "secret trade court," and "justice behind closed doors," most of the time giving it an unfair and biased image.

In this context, the UN Commission on International Trade Law entrusted the Working Group III (the ***Working Group***) with a broad mandate to work on the possible reform of the ISDS framework. The Working Group is one of the six working groups to perform the substantive preparatory work on topics within the Commission's program of work. Within its mandate, the Working Group is working on identifying and considering expressed concerns about ISDS (I) and desirable reforms and solutions to be recommended to the Commission (II).

1. THE ISDS SYSTEM: THE NEED FOR REFORM

Procedural criticisms

The Working Group first identified that the length and costs of arbitral proceedings are rising. Delays are mainly due to the growing complexity of cases, the fragmented nature of investor protection provisions and the multiplication of interlocutory proceedings. Both sides to a proceeding also incur higher costs as monetary awards, legal fees and related costs can often be relatively high. While some States struggle to find resources to properly defend themselves, small-claim or impecunious investors might never be able to get their "day in court."

Other major concerns relate to the independence and impartiality of arbitrators, which focus on arbitrators' fees, qualifications and the lack of diversity in their appointments as reports show numerous repeated appointments and an important concentration of arbitrators from a certain region, age, gender and ethnicity. The means of appointing arbitrators are also under review, including the increased use of appointing authorities or the use of rosters established by States.

Closely related are criticisms about the lack of transparency and possibilities for third parties to participate in proceedings. Disclosure of third party funders is also highly controversial as it raises risks of conflict of interests, which may result in the removal of the arbitrator or an effective challenge of the award.

Substantive issues

Arbitral awards in the investor-state dispute context are criticized for their lack of consistency and for being contradictory. A good example is the widely different interpretations of the fair and equitable treatment standard. Some States have even modified their treaties to either include a "minimum standard of treatment" or an exhaustive definition. Another example is the lack of uniform standards for awarding damages. As a result, tribunals are free to choose their valuation methods, which often leads to the use of various methodologies and contradictory decisions.

According to the UN Secretariat, this may be the result of "*the fragmented nature of existing underlying investment treaties*" which, themselves, have varying standards of applicability. *See* A/CN.9/WG.III/WP.142, p. 7. Moreover, some treaties restrict ISDS to claims arising from breach of certain provisions or claims relating to expropriations. *See Vigotop Limited v. Hungary*, ICSID Case No. ARB/11/22.

Lastly, a particularly scrutinized public question turns upon State sovereignty and arbitral infringement. For example, taxation measures are generally prohibited from international arbitration claims, but significant exceptions have severely undercut this protection. Also, recent arbitral interim measures can be seen as infringing on a State's sovereignty when, for example, judicial domestic proceedings are not only stayed but are also ordered not to be enforced. The most recent example is *Puma Energy Holdings v. Benin*, where Christer Söderlund, the emergency arbitrator, ordered Benin, i.e. the executive power, to immediately take all available measures to prevent its court, i.e. the judiciary, from enforcing the Court of Appeal's judgment until the arbitral dispute before the CCJA was resolved.

2. MAIN OPTIONS TO OVERCOME CRITICISMS OF THE ISDS SYSTEM

Between 23 – 27 April 2018, the Working Group met in New York to study the reform suggestions, including: the amendment of investment treaties containing vague wording, the provision of joint interpretative statements or guidelines on interpretation of standards, the introduction of *stare decisis* and the adoption of a systemic approach through institutional solutions (e.g., appeal mechanisms or permanent adjudicatory bodies).

Reforming the current system

Transparency – Some adjustments have already been implemented to overcome the criticisms on transparency. The new transparency standards have been adopted by ICSID in 2006 and UNCITRAL in 2013. Additionally, the Mauritius Convention on Transparency, which entered into force in October 2017, aims at applying the 2014 UNCITRAL Rules on Transparency in treaty-based investor-state arbitration. The Rules now apply by default to all investor-State arbitrations conducted under the UNCITRAL Arbitration Rules pursuant to treaties concluded on or after 1 April, 2014.

Appointment of arbitrators – The Working Group is considering new arbitrator-appointment procedures such as referring to a pre-established group of arbitrators under Article 37 of the ICSID Convention and its Additional Facility Rules and Article 6 of the UNCITRAL Arbitration Rules.

Aiming for consistency in arbitral awards: setting up of an appellate body – When the ICSID arbitral system was designed, despite the desirability of a consistent interpretation, proposals for the possibility to appeal on grounds such as an error of law/substantial error were rejected.

Consistency, which encompasses the coherent interpretation of applicable principles and standards of law, is fundamental to improve predictability, enhance trust in the ISDS system and to develop a homogenous international investment law. The inconsistency of the interpretation of the fair and equitable treatment standard has led not only to the modification of treaties by states to either

include a “minimum standard of treatment” obligation instead or an exhaustive definition of fair and equitable treatment but it has also led to contradictory decisions about the same facts, such as in *CME v Czech Republic* and *Lauder v Czech Republic*.

A permanent or semi-permanent appellate body might be seen as a solution, but the very idea of its creation in the existing system raises several questions.

First, filing appeals might become the norm for losing parties and, as such, there are concerns regarding the length, costs and complexity of proceedings which could prove detrimental for parties with limited resources. Another concern is the appellate body’s coexistence within the ICSID self-contained system, which excludes any appeal or other remedies, except for those provided for in the Convention itself (Article 53) and existing annulment mechanisms.

Then, the creation of such an appellate body raises questions regarding framing the grounds for appeal (broad/narrow) and the applicable standards of review to identify alleged errors of law as well as *stare decisis* and the scope of the decision’s binding effect. Should decisions be limited to the parties or whether a principle of law stated in its decisions could be constitutive of a precedent. The absence of a doctrine of precedent is often explained based on Article 53, according to which awards shall be binding *on the parties.*

Creation of a permanent dispute settlement body

Replacing the current ad-hoc arbitration system administered, for instance, by ICSID or other centers, and where arbitral tribunals are only set up on a case by case basis, with a permanent dispute settlement body is a more radical approach strongly advocated by the European Union, in order to build public confidence. On 20 March 2018 the European Council adopted the negotiating directives authorizing the European Commission to negotiate a convention establishing a multilateral court. The Council also decided to make the negotiating directives public.

The EU’s emphasis on the systemic nature of the concerns surrounding the ISDS system and on the need for a complete reform. Creating a multilateral court would indeed be a major departure from the ISDS system and would aim at addressing the fragmentation of the current regime.

The idea was put forward in the public consultation conducted in 2014, in the context of the development of the EU’s policy on investment protection and investment dispute settlement in the Transatlantic Trade and Investment Partnership (TTIP) agreement and has recently been in the spotlight after the *Achmea* case. Pioneer steps have already been taken in several BITs towards the creation of permanent investment bodies with notably, Chapter 8, Section F of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) or Chapter 8.II, Section 3 of the European Union-Vietnam Free Trade Agreement.

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In conclusion, if reforming the current ISDS system is certainly needed, it seems unlikely that either the creation of an appeal mechanism or a permanent body could address all public concerns. However, in its last report regarding the work of the thirty-fifth session, dated 18 May 2018, the Working Group concluded that “*while perceptions should be taken into account, they should not be the driving force for the current work.*” If reforms will “*deal with the public perception of ISDS,*” “*perceptions alone would not justify the need for reform and as a subjective concept, would need to be grounded on empirical evidence and facts*.” So even if there are no “magic solutions,” reforms are underway.