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Proposals at the UNCITRAL Working Group III for the Establishment of an Advisory Centre: A Possible Path to ISDS Reform?

Pablo Pérez-Salido · Friday, August 30th, 2019

Introduction

There are parallel initiatives currently considering a potential reform of the international Investor-State Dispute Settlement (“ISDS”) system. Particularly, the work presently taking place at the United Nations Commission on International Trade Law (“UNCITRAL”) by its Working Group III (WGIII) is one of the forums that continues to attract attention as we get closer to its 38th Session scheduled for October 14, 2019, in Vienna, Austria (a detailed list of the WGIII’s public documents is available [here](#)). The progress at the WGIII has been previously addressed in this blog [here](#) and [here](#).

To date, conversations at the WGIII continue to be government-led. In particular, amongst the different governments’ proposals submitted so far, several support the establishment of an advisory centre for investment disputes. Although the idea of an advisory centre is not entirely new,¹⁾ it is certainly innovative in the context of ISDS. These submissions argue that an advisory centre is a crucial mechanism to solve issues related to access to legal aid, or lack thereof, by developing countries within the context of international treaty disputes. In essence, this reasoning is mainly motivated by the growing concerns around the costs and duration of ISDS proceedings in the existing system. In fact, this ISDS reform option appears to be a natural response by some national governments to the growing number of recent ISDS cases they are facing and to increasing budgetary constraints resulting from the 2008 financial crisis.

For these reasons, the establishment of an advisory centre could represent a significant opportunity to facilitate access to legal services and expertise necessary to better articulate an efficient defense in investment treaty disputes. However, there are numerous challenges connected to the establishment of such an advisory mechanism. For instance, ISDS is currently a decentralized system, and logistically it could be very difficult to create and, most importantly, finance an international advisory entity with global reach. These concerns are further discussed below in more detail.

The Working Group III’s Mandate

Since the summer of 2017, when the WGIII received its mandate²⁾ to identify issues regarding the existing ISDS system and assess whether its reform would be desirable, a total of four sessions have taken place with remarkable results. First, during the 37th Session held in New York in April of this year, numerous issues were identified, and classified under three main groups: (i) the lack of certainty and predictability of ISDS decisions; (ii) the lack of impartiality and independence of the party-appointed arbitrators; and (iii) the costs and duration of the proceedings (A/CN.9/970, para. 16). Subsequently, and in light of these concerns, consensus was ultimately reached by member States that ISDS reform was desirable. Since then, the WGIII has focused its efforts to narrow down the different reform proposals received and to establish a workplan to accomplish such reform.

To date, only the following governments have filed submissions with the WGIII: Indonesia, the EU and its Member States, Morocco, Thailand, Costa Rica, Brazil, Colombia, Turkey, Ecuador, South Africa, China, South Korea, Chile, Israel, and Japan.³⁾ However, it is expected that other delegations will file their submissions before October 2019. While some of the received proposals call for a ‘gradual’ reform, focusing first on resolving the most urgent deficiencies of the ISDS system (namely, third-party funding, code of ethics, dispute prevention mechanisms, and issues related to multiple proceedings), other proposals advocate instead for a more comprehensive ‘structural’ reform. As such, while a final workplan for reform is still being designed, the proposal for the establishment of an advisory centre appears to be compatible with these two predominant approaches for reform.

Proposals for the Establishment of an Advisory Centre

In preparation of the upcoming 38th Session, the WGIII published its [Annotated Provisional Agenda](#) and preparatory papers on a number of topics, including on the establishment of an [advisory centre](#). Amongst the above-mentioned governments’ submissions, only six include a specific proposal for the establishment of such an advisory centre. Although each proposal offers a different approach to the scope of its services and potential beneficiaries, the rationale behind all of them is the same: the costs and duration of the ISDS proceedings in the current system create a burden on States that typically lack the financial muscle and/or the experience to efficiently handle this type of disputes (mainly, developing countries, but also SMEs and individual investors) (A/CN.9/WG.III/WP.168, para. 4). Consequently, an advisory centre could help developing States, at a low-cost, to better understand, manage, and defend themselves when facing investment disputes. Additionally, it could aid in the exchange of information and create better practices and protection standards for foreign investors.

For instance, Thailand advocates, *inter alia*, for the establishment of an Advisory Centre for International Investment Law (ACIIL), following the example of the Advisory Centre on WTO Law established in 2001 (A/CN.9/WG.III/WP.162, paras. 26 and 27). This ACIIL, it is argued, would serve a double purpose. First, it would provide States with legal advice before any investment dispute arises; and second, in the event of an existing dispute, it would then act as legal counsel. Further, Thailand suggests that this ACIIL could also help States to build their own institutional capacity and to develop a “Guideline on Dispute Prevention” (A/CN.9/WG.III/WP.162, para 25).

South Korea supports Thailand's proposal and recognizes its merits. In its submission, South Korea shares its experiences in defending a series of recent ISDS cases and emphasizes the value of accumulated expertise, knowledge, and institutional capacity in both dispute-prevention and post-dispute regulatory efforts (A/CN.9/WG.III/WP.179, page 5, section 2). These factors, South Korea asserts, usually play a crucial role in an effective defense, especially during the early stages of the proceedings. Therefore, South Korea suggests that an advisory centre could allow States to benefit from a system of shared information and experiences between countries. Furthermore, South Korea argues that an advisory centre could also be a platform in charge of the creation and dissemination of new policy guidelines and educational materials on investment law, ultimately contributing to the prevention of investment disputes.

Turkey advocates for reducing costs and the duration of ISDS proceedings through, *inter alia*, the creation of a non-profit mechanism that would provide low-cost advocacy services to developing countries, SMEs, and individual investors alike. Costa Rica also includes the establishment of such an advisory centre on its list of priorities for ISDS reform. Similarly, Morocco supports the establishment of an aid mechanism for developing countries facing ISDS cases, and emphasizes that a low-cost advisory centre is the only way to enable such countries to better navigate proceedings and efficiently prepare their defenses in this type of disputes (A/CN.9/WG.III/WP.161, paras. 18 to 20). The EU and its Member States agree with this last proposition of a low-cost advisory centre, but further clarify that such mechanism may also work as part of the process of establishing a standing investment court with an appeal mechanism (A/CN.9/WG.III/WP.159/Add.1, para. 38).

Challenges to the establishment of an advisory mechanism

Despite the existing support by the aforementioned States, it is uncertain as to whether the establishment of an advisory centre is likely to gain the necessary support from other States in order to be considered a viable reform option. In this regard, some preliminary questions need to be clarified before this proposal can possibly move forward. For instance, who would be the beneficiaries of this hypothetical advisory centre? Would it be limited to developing countries and countries with little experience in defending ISDS cases? Or would it be more expansive and include all respondent States, regardless of their economic status or prior experience defending investment treaty disputes? Finally, as some submissions suggest (*i.e.* Turkey), could SMEs and individual investors also become beneficiaries of this advisory centre? Determining the list of beneficiaries is crucial because it will have a significant impact on the financial needs, geographical reach, and organizational structure of the advisory centre.

Once determined, it is also imperative to identify the true needs of such potential beneficiaries. Thus, what would be the scope of services provided by this advisory mechanism? For instance, would it only provide services in connection with investment disputes prevention? Or would it also offer active legal services and advocacy support once an investment dispute has arisen? Additionally, would the centre provide support to its beneficiaries in their institutional capacity-building efforts as well as for the development of best practices in investment law?

The response to these and other questions is crucial to evaluate the viability of the proposal. A broader set of services for a larger group of beneficiaries would proportionally impact the magnitude of the organizational structure of the advisory centre and, more importantly, the

resources necessary for its financing.

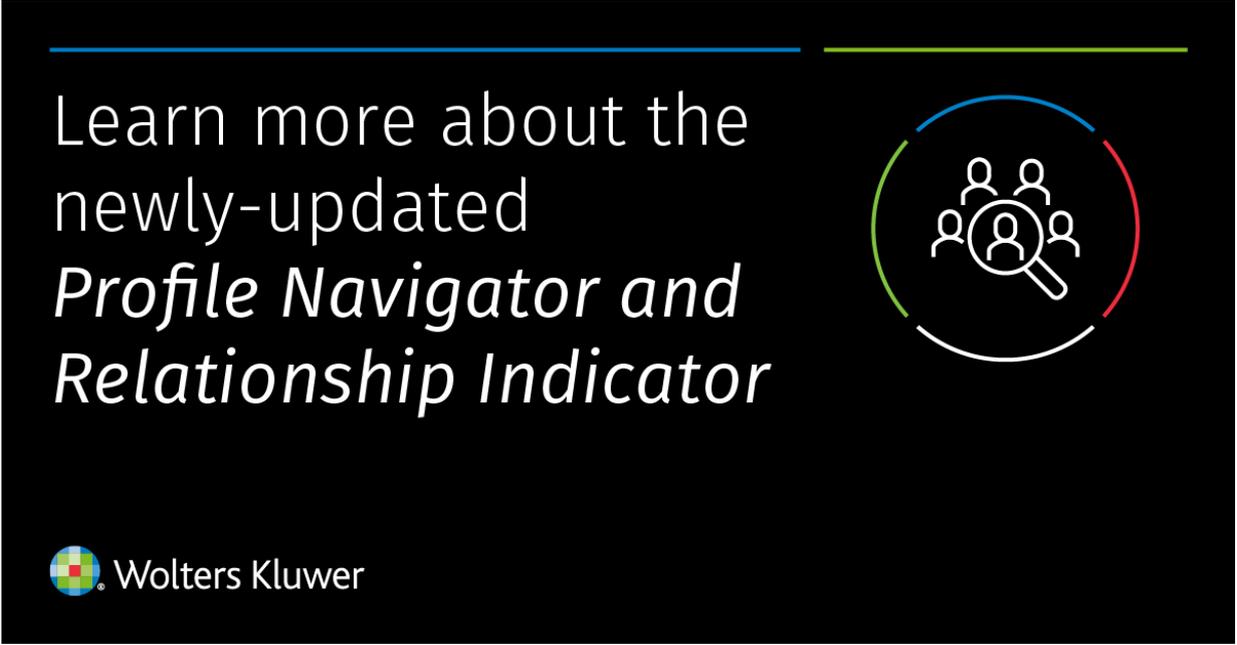
Session 38th at UNCITRAL WGIII appears to be the best platform to discuss these proposals and facilitate consensus around the viability of establishing an advisory centre.

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References

- ?1 *See e.g. the Advisory Centre on WTO Law; the UNASUR advisory centre project; and the ASEAN Forum initiative.*
- ?2 *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263 and 264.*
- ?3 *The Governments of Chile, Israel, and Japan submitted a join proposal (A/CN.9/WG.III/WP.163).*

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