Kluwer Arbitration Blog

Workshop on the Investor State Dispute Settlement Reform

Philipp Reinhold (Saarland University) · Saturday, December 28th, 2019

On the 1 October 2019, the Europa-Institut of Saarland University and the International Investment Centre Cologne (IILCC) co-organized a workshop on the Investor State Dispute Settlement (ISDS) Reform and the creation of a Multilateral Investment Court (MIC). At the event, the IILCC Study Group presented its preliminary conclusions regarding a comparative report on the Multilateral Investment Court, which comprises a study by *Prof. Dr. Marc Bungenberg,* together with *Prof. Dr. August Reinisch,*[1] as well as studies prepared by *Prof. Dr. Gabrielle Kaufmann-Kohler* together with *Dr. Michele Potestà*.[2]

Introduction

In his introductory remarks, *Jun.-Prof. Dr. Julian Scheu* set the stage by recalling various developments which led to the current reform discussions on ISDS. The trade and investment negotiations conducted by the European Commission around 2013 with the United States and Canada were an important starting point. At the same time, high stakes investment claims such as *Philip Morris v. Australia* and *Vattenfall v. Germany* caught the attention of the general public and triggered a heated debate on the overall legitimacy of ISDS.[3] These discussions culminated in the remarkable adoption of (a) the UN Convention on Transparency in Treaty-based Investor-State Arbitration in 2014, and (b) the inclusion of a permanent Investment Court System in the first generation of EU trade and investment agreements. Along with the ongoing reform discussions at UNCITRAL, these developments clearly illustrate that international investment law is going through a period of fundamental change. In conclusion, he argued that there could be no better moment in time for critical analysis and innovative thinking in this field of law.

Taking-up these remarks, *Prof. Bungenberg* provided insights on the circumstances leading to the preparation of the study together with *Prof. Reinisch*. Following from the public and heavy criticism towards investment arbitration, that came up in Germany and other countries during the negotiations of the Comprehensive Economic Free Trade Agreement (CETA) and especially as a result of *Vattenfall vs. Germany*, reforming ISDS became an issue of political debate. Whereas some voices demanded the abolishment of the whole system and others called for procedural reforms, it was the German Ministry of Economic Affairs that came up with the idea of a permanent institution replacing the current ad hoc procedure. This was opposed by a great number of practitioners and academicians whom argued instead for a moderate reform of the existing

arbitration system. In the following, several proposals where presented that focused exclusively on reforming aspects of the current ISDS system. The German Ministry of Economic Affairs, however, was looking for concrete and comprehensive reform ideas with regard to the implementation of a permanent court system. Therefore, *Prof. Reinisch* and *Prof. Bungenberg* were asked to prepare a study that deals with the institutionalization of ISDS, whereby they were given full academic freedom to elaborate on a concrete solution.

Overall, *Prof. Bungenberg* sees varying and sometimes much different reform proposals by various studies that have been published to this today. Therefore, he underscores the importance of comparisons, such as the one carried out by the IILCC Study Group for the ongoing reform discussions.

Institutional Structure

Philipp Reinhold started the series of presentations by focusing on the institutional elements included in the different reform proposals. At the beginning he emphasized that although both studies deal with options for a more permanent dispute settlement system, their methodical approach differs to a great extent leading to a very different level of detail. Whereas the study by *Bungenberg/Reinisch* offers specific institutional elements and explains their functions, the proposal by *Kaufmann-Kohler/Potestà* does not provide for a definitive structure but rather introduces two possible options for a more permanent investment dispute settlement. *Reinhold* described the institutional framework proposed by *Bungenberg/Reinisch* comprising a Plenary Body, a Secretariat, an Advisory Centre and Judges of a first and/or second instance. Against this background, he explained the institutional idea connected to the so called “Roster“ (discussed below), as well the “Permanent-Model” offered by *Kaufmann-Kohler/Potestà*. In concluding his presentation, *Reinhold* argued that every reform approach needs to balance the objective of a greater legitimacy with an overall efficiency of the system. Ignoring one of the two aspects entirely will prevent a reform and ultimately put the system itself at risk. In this regard, he expressed his support for the creation of an Advisory Centre as a component of higher legitimacy and inclusiveness.

The subsequent discussions focused on problems arising from a fundamental shift to a permanent court system, such as the enforcement of awards. Prof. *Bungenberg* argued that a real shift from an ad hoc arbitration to a permanent court system requires a clear and comprehensive institutional design. At this occasion he underlined the fact, that an Advisory Centre is not only proposed to support developing countries but also for small and medium enterprises. This means that, overall, the proposal seeks for a greater participation of different stakeholders in the system.

Implementation

Following on from the institutional considerations of the first section, *Leonard Funk* pointed out that questions regarding the implementation concern the instrument establishing the permanent body itself as well as its relationship to already existing IIAs. On this basis, he sees some essential differences between the two proposals. For example, *Bungenberg/Reinisch* propose that a minimum number of members should accede to the MIC Treaty before entering into force, whereas *Kaufmann-Kohler/Potesta* envisage to start the initiative as a purely plurilateral one with the

possibility for States to join at any later stage. Another difference concerns the possibility of acceding to the permanent body on the basis of an ad hoc consent, which is not seen critically by *Kaufmann-Kohler/Potestà*, but by *Bungenberg/Reinisch*. Overall, *Funk* concludes, that both proposals envisage to implement a permanent body into the current ISDS system without the need to amend existing IIAs. However, the *Kaufmann-Kohler/Potestà* proposal may be characterized by slightly less interference with the network of existing IIAs and a rather gradual transition from the existing to the new dispute resolution network.

Commenting on the presentation, *Prof. Bungenberg* explained that, in his opinion, the ECJ had ruled out any form of ad hoc consent in his CETA opinion. Furthermore, a high degree of legal certainty could only be achieved through strict jurisdictional requirements. In view of the different reform proposals, *Dr. Scheu* stressed that constitutional hurdles of the EU will have to be taken into account in future reform negotiations.

Status and Selection of the Judges

In his presentation, *Samuel Meyer-Oldenburg* stressed the absolute necessity to create a legitimate dispute resolution mechanism by ensuring the competence and the independence of the adjudicators. In principle, this applies regardless of whether they form part of the permanent system or part of a roster. Starting with an appointment system, which should be dual levelled, the proposition of an independent screening committee, he concluded, that both proposals do in general agree about the necessity to set up an appointment procedure which prevents any doubts about the adjudicators. Once appointed, the terms of appointment become highly relevant. Both proposals prefer a system of full-time judges, to prevent “double hatting” and ensure an effective case management by limiting the admissibility of parallel engagements as far as possible. A code of conduct should ensure certain rules of behavior. On the other hand, the basic guarantees for judges must be met, as for example immunity and rules to exclude any kind of influence by the parties or the appointing entity.

The following discussion touched upon the compatibility of national diversity and expertise. In addition, the concern was raised that the system might become too costly. *Prof. Bungenberg* made clear that he sees no tensions between the requirements of diversity and expertise. With regard to costs, he argued that it should be kept in mind that the money would be spend to enforce the rule of law. *Dr. Scheu*, emphasized that the perceived legitimacy of the permanent court and the level of acceptance of its decisions are directly linked to the status of the judges. From his point of view, this makes the question one of the most important ones within the discussion.

Appeal Mechanism

Finally, *Alexander Dünkelsbühler* focused on different models of a potential appeal mechanism included in both proposals. First of all, he emphasized the authors principally agree that a uniform appeal mechanism will be beneficial to the uniformity of decisions in the sense of a “soft” precedent system as well as a higher legal certainty for both investors and states. Both proposals consider two options: the first possibility would be a uniform court with two instances, whereas the second option would consist of a single court of appeal separated from the first ad hoc instance. As an alternative, a system of preliminary decisions or plenary decisions is discussed, which would be

suitable to preserve the simplicity and speed for the parties characterizing the current form of arbitration proceedings. According to *Dünkelsbühler*, the essential questions raised by the models are to what extent the "softening" of the finality of an arbitral award is desirable and whether an appeal or a mere cassation will bring greater advantages. Furthermore, the grounds for appeal or setting aside still have to be determined. Finally, *Dünkelsbühler* concluded that it will be decisive whether the appeal mechanism is structurally linked to the first instance or whether it will function independently.

In the following discussions, *Prof. Bungenberg* pointed to the Chinese proposal submitted within the UNCITRAL Working Group III, which supports the idea of an appeal stage. The subsequent discussion focused on whether a preliminary ruling would be a good way to achieve a uniformity of decisions. In this context, *Prof. Bungenberg* argued that a system that involves some sort of preliminary ruling would be very unique and maybe difficult to accept for representatives outside the EU region. In addition, annulment questions would stay as a problem. Furthermore, a possible refusal to submit a question to preliminary rule was identified as a major problem.

Conclusion

In their final remarks, *Prof. Bungenberg* and *Dr. Scheu* emphasized that the discussions show the variety of reform options on the table for creating and implementing an MIC. Thereby it becomes clear that the subjects-matters are interrelated and choices in one field may directly or indirectly impact another one, making debates particularly complex. It is highly important for the stakeholders to get involved in a lively discussion which offers the whole spectrum of perspective to the community of States because, overall, it seems likely that the ongoing reform discussions at UNCITRAL will shape the future of ISDS. Very likely, future discussions will also involve a reform of substantive laws.

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Follow-up event

On 21 January 2020, zeiler.partners and the IILCC organize a follow-up debate on the reform of ISDS and the creation of a Multilateral Investment Court ("Do We Need a Multilateral Investment Court? Debating ISDS Reform between Enthusiasm and Scepticism") taking place in Vienna.

References

?1 *Marc Bungenberg* and *August Reinisch*, From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court – Options Regarding the Institutionalization of Investor-State Dispute Settlement, 2nd Edition (Open Access) Springer 2019 https://www.springer.com/gp/book/9783662597316).

?2 *Gabriele Kaufmann-Kohler* and *Michele Potestà*, CIDS research paper on whether the Mauritius Convention can serve as a model for further reforms, CIDS 2016 as well as CIDS Supplemental Report on the Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards, CIDS 2017.

?3 Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12; Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12.

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