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UNCITRAL Working Group III: One Step Closer to a Multilateral Investment Court?

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During its last resumed 38th session which took place in Vienna from 20–24 January 2020 the UNCITRAL Working Group III discussed in parallel three reform alternatives, based on the notes prepared by the Secretariat. These alternatives suggested the creation of: (i) a stand-alone review or appellate mechanism; (ii) a standing multilateral investment court (MIC); and/or (iii) changes to the procedures relevant to the selection and appointment of arbitrators and adjudicators. UNCITRAL Working Group III undertook a preliminary consideration of several issues with the goal of clarifying, defining and elaborating these three options (Report, §15). Its demarche continued the desired little more action commenced at its previous session of October 2019. However, instead of asking the delegations to side with a particular reform option, as one might have expected, a more pragmatic approach was undertaken. The agenda was essentially split in three core issues which were holistically addressed: (i) enforcement of the decisions, (ii) financing, and (iii) selection and appointment of adjudicators. No decision on whether to adopt a particular solution was embraced at this stage.

The Idea of a Multilateral Investment Court

For the European Union (EU), an important and active player in the reform process, a MIC is the only course of action that can effectively address all the concerns identified in the second stage of work conducted by UNCITRAL Working Group III. In an attempt to materialise its view, in January 2019 the EU formally advanced the idea of a "standing mechanism". It would have two levels of adjudication, with appeal open only for errors of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. Appeal was thus envisaged to exclude the possibility for a *de novo* review of the facts. The EU proposal also suggested that the standing mechanism have full-time adjudicators who would not conduct any outside activities. These adjudicators would also be subject to qualification requirements comparable to those of other international courts, and would be selected through a non-renewable term of office combined with a transparent appointment process which would ensure independence, impartiality and observances of strict ethical requirements. Transparency of procedures, including access by interested third parties, were also flagged as reform goals. According to the proposal, enforcement of the awards of the standing mechanism would be carried out under a self-contained enforcement regime excluding domestic court review, or, alternatively, under Article 1(2) ("permanent arbitral bodies") of the New York Convention. Financing would be made through contributions of the

contracting States and would be managed through a trust fund. The EU proposal envisaged that the mechanism would be structured as an "opt-in" system, *i.e.* each State would be free to decide whether to accept the jurisdiction of the MIC, and if so, to which investment treaties it would be applicable. The mechanism would also be used for State-to-State dispute settlement.

As a side note, the EU's submission is part of its broader agenda to reform the ISDS system, which began in 2015 and gained momentum in March 2018 when the Council published the negotiating directives for the MIC. On the basis of this mandate, the European Commission (EC) is playing on two fronts: (1) it is advocating for the creation of a MIC as part of the discussions initiated in UNCITRAL Working Group III, and (2) it is advancing its Investment Court System (ICS) in the investment agreements it is concluding. This second front exceeds the scope of this post. Nevertheless, it is worth noting the EU's courageous start in implementing provisions relating to the fundaments of ICSs in several investment and free trade agreements concluded or pending conclusion by the EU with Canada (CETA), Singapore (EUSFTA), Vietnam (EVFTA) and Mexico, which is also on the table in all on-going investment negotiations. As shown in a previous post, the Court of Justice of the European Union (CJEU) confirmed in its Opinion 1/17 of 30 April 2019 the compatibility of an ICS like the one included in CETA with EU's primary law.[1)] Apart from greenlighting the implementation of ICSs, the establishment "*in the longer term [of a] multilateral investment Tribunal*" (§108) was also touched upon by the CJEU, arguably as the ultimate goal.

Multilateral Investment Court in 3D: Enforcement of Decisions, Financing and Composition

The MIC was formally on the agenda of UNCITRAL Working Group III for the first time since its inception. It was proposed both as a standalone option and as part of the matters common to an appellate mechanism, with both envisaged as permanent institutions. Mirroring the structure of the agenda of the session, the creation of a MIC was subject to a three-pronged analysis.

First, the topic of **enforcement of the decisions rendered by a MIC** was addressed from two perspectives. For enforcement in participating States, the Working Group discussed the possibility of creating an internal mechanism in the founding convention (potentially modelled on Article 54 of the ICSID Convention), with further consideration to be given to potential conflicts with existing enforcement regimes and issues of State immunity (Report, §§64-66). Some States also advocated for an enforcement based on the New York convention model (Report, §§67-68).

Issues associated with enforcement in non-participating States appeared more vexing. Article 1(2) of the New York Convention (which refers to awards "made by permanent arbitral bodies") was advanced as a possibility (Report, §70). Several ideas were put forth in order to mitigate the risk of inconsistent application of this provision by domestic courts, such as relevant wording in the founding convention or the issuance of a specific recommendation on the interpretation of Article 1(2) (Report, §§71-73). Certain States also noted that the risk of non-enforceability could be mitigated by allowing non-participating States to opt into the enforcement mechanism later down the line (Report, §§74-77).

A number of additional questions were left open for the time being. This included the impact of the law applicable at the seat of the permanent body to issues of enforcement; the possibility for participating States to waive the right of review under Article V of the New York Convention; and

the role of domestic courts in relation to awards contrary to mandatory rules of law and essential public policies (Report, §80). In light of the numerous outstanding questions, the Secretariat was requested to conduct additional preparatory work and to provide an in-depth analysis of the questions raised during the deliberations, as well as information on provisions in existing international instruments and the potential adaption of such provisions in the context of a permanent body (Report, §81).

Second, in relation to **the financing of a MIC**, preliminary discussions revolved around matters such as remuneration of the adjudicators, costs related to the administration of the case and administrative support staff, and the overhead costs associated with maintaining the permanent body (Report, §82). The source and allocation of funding was of particular interest, given the need to safeguard the independence of the permanent body and to ensure that there would be no discrimination based on contributions provided by States (Report, §§86-88). The brainstormed solutions included financing by the participating States based on different criteria (*e.g.*, level of economic development, number of claims, voluntary contributions), the implementation of a user-pays system, or a hybrid financing mechanism combining the former two. A number of important questions were also flagged for further consideration, such as: long-term sustainability, transitional financing measures, contingency plans in case of lack of funds, and flexibility in the budget structure to reflect the caseload (Report, §93). Consequently, the Secretariat was requested to continue to analyse this topic, with a focus on hybrid models for financing, assessed contribution schemes for participating States, and potential budgets for a permanent body based on comparable international judicial bodies (Report, §94).

Third, with respect to **the selection and appointment of the adjudicators in a MIC**, key characteristics were considered to be qualified knowledge (although subject to the risk of reducing the pool of eligible individuals), independence and impartiality, accountability and integrity (Report, §§96-100 and §123). Geographical, gender and linguistic diversity as well as equitable representation of different legal systems and cultures were flagged as essential but only as long as such requirements would not jeopardize the ultimate goal of a fair and efficient resolution of the dispute (Report, §101). The representation of the participating States and the nomination of candidates (by participating States, by an independent entity or by interested individuals) were debated as fundamental points in relation to this topic. Some delegations also argued that the election process (through vote by/consensus of the participating States or selection by a committee) could potentially involve preliminary states, such as (i) a screening stage by neutral independent bodies or (ii) a consultation stage whereby certain stakeholders (*e.g.*, representatives of investors, professional associations in the field of international law and civil society) could take part in (Report, §§114-122). Other tackled aspects were the duration of the terms and possibility of renewal, the allocation of the cases (*e.g.*, by the president or on a random basis) and the criteria to be considered for such allocation (*e.g.*, specificities of the case, diversity, balance of work) (Report, §§123-129). These issues will be considered in more detail in a subsequent post in this series. The Secretariat was requested to prepare options covering the different aspects identified during the deliberations and to suggest ways in which pertinent qualifications and requirements could be incorporated into investment treaties or any other relevant instrument. Thus, it was expressly acknowledged that the "specific features would largely depend on the broader design of how ISDS would be conducted, including whether the ad hoc nature would be preserved or whether a permanent structure would be sought" (Report, §§132-133).

Finally, further exploratory work was deemed necessary for matters such as the location of the MIC, hosting within an existing organisation (possibly within the United Nations) or as a separate

body, and its prerogative to handle State-to-State disputes (Report, §130).

Conclusion

The latest work of UNCITRAL Working Group III illustrates a change in strategy towards better understanding the benefits and downsides of implementing a MIC, alongside other reform options. What initially looked like delegations anchored in rigid positions now resembles a common engineering exercise in search for a solution that could fly. Albeit a large number of topics remain partially or completely unaddressed at this stage,[2)] these will be subject to further analysis by the Secretariat and the delegations, and the discussions seem to be more structured and solution-oriented than they were previously. The process is slow and one cannot predict when an implementable conclusion will be reached. Nevertheless, it is moving, and the directions of the ultimate reform – be it in favour of a MIC or not – will arguably organically emerge throughout the process embarked on by the UNCITRAL Working Group III.

To see our full series of posts on the UNCITRAL WG III reform process, click here.

References

?1 Consequently, in October 2019, the EC submitted to the Council a proposal for the ICS in CETA which is pending adoption.

?2 The next session initially planned to take place between 30 March – 3 April 2020 in New York was rescheduled due to the coronavirus outbreak. Its agenda does not include the topic of a MIC *per se* but that of a potential multilateral instrument on ISDS reform.

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