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UNCITRAL Working Group III: Reforms in the Realm of Investor-State Disputes – UNCITRAL's Proposals for an Appellate Mechanism and its Impact on Duration and Cost

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One of the topics on the agenda of UNCITRAL Working Group III is the establishment of an Appellate Court system. The system of investor-State dispute resolution therefore now faces the fact that WG III is considering, among other matters, the following:

- the repeal of local law governing the setting aside of an UNCITRAL award giving full jurisdiction to the Appellate Court;
- permanent appointment by States of adjudicators for this Appellate Court, abolishing the equality of disputing parties;
- the automatic adjournment of enforcement of awards pending an appeal;
- authority of the Appellate Court to review the merits of decisions on appeal, including reconsideration of findings of fact and law;
- the text of a set of rules of an undefined status applicable to the procedure on appeal, possibly detached from national laws; and
- provision for losing parties in investor-State dispute settlement across the globe to appeal those decisions, without regard to the bottleneck effect when the Appellate Court's docket reaches capacity.

This post considers the proposed appellate mechanism, and highlights the key issues it creates for duration, costs, and certainty in investment arbitration.

The Proposal for the Creation of an Appellate Mechanism

The system of investor-State dispute settlement ("ISDS") has been under sustained scrutiny and has received considerable criticism. In the wake of the *Achmea* decision, some governments have terminated intra-EU BITs; some tribunals have confirmed the holding of *Achmea* in subsequent awards (the chilling effect); and commentators continued to criticize the methods of international arbitration. The UNCITRAL Working Group III was established in fall 2017:

> At its forty-eighth session, in 2015, the Commission noted that the current circumstances in relation to investor-State arbitration posed challenges and proposals

> for reform had been formulated by a number of organizations. In that context, the Commission was informed that the Secretariat was conducting a study on whether the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency" or "Mauritius Convention") could provide a useful model for possible reforms in the field of investor-State arbitration, in conjunction with interested organizations.

In addressing the criticism of the current system of ISDS, the Working Group has established two pathways: one is the (total or partial) replacement of the system; and the second is incremental reforms within the system. The first pathway proposes two alternatives. One is the Multilateral Investment Court that replaces the system *in toto* and the other is the Appellate Mechanism that replaces crucial parts of the system such as annulment mechanisms, enforcement and finality of awards. Both are premised on the idea of abandonment of party autonomy; and with that the right of disputing parties to appoint an arbitrator. Instead, permanent judges will be appointed by the Contracting States. One must bear in mind that the one argument in favor of these efforts was to address the concerns about duration and cost in international arbitration and one wonders if this is the way to do it. Replacing ISDS with a system that eliminates party autonomy, will not give investors confidence. Perhaps it is useful to remind the reader of the reason for States to come together some decades ago to create the Washington Convention to conclude bilateral investment agreements:

> As such, early in the first Development Decade, which spanned the 1960's, it became increasingly clear that if the plans established for the growth in the economies of the developing countries were to be realized, it would be necessary to supplement the resources flowing to these countries from bilateral and multilateral governmental sources by additional investments originating in the private sector. To encourage such investments, the competent international organizations considered several schemes designed to remove some of the uncertainties and obstacles that faced investors in any foreign country.

The Appellate Mechanism and its negative impact on duration and costs creates uncertainty

The Appellate Mechanism would be a body of permanent adjudicators with jurisdiction to review arbitral awards on their merits. Arguably this would create consistency in the application of certain substantive norms in bilateral investment treaties. UNCITRAL's Secretariat submitted a note addressing the possible implementation of the Appellate Mechanism or Court ("the AC"). That note aims to outline the key elements of the AC which must give rise to concerns about both the feasibility of the implementation of the AC and the negative effect it would have on duration and the costs of dispute settlement. Consistency in the application of substantive norms in BITs would contribute to confidence in ISDS. However, the reason for the reforms was to address some of the main criticisms on ISDS – duration and costs. An AC, in fact, will increase duration and costs. Both lead to uncertainty, which tends to have a chilling effect on investment and trade. There are three key issues likely to arise in the implementation of the AC.

The Secretariat suggests that a Contracting Party to the investment treaty could use the AC

procedure as **the opportunity to be heard on treaty interpretation**, or could join with other States Party to the treaty to **seek rejection of decisions of the AC** through joint statements. This is not an official source of treaty interpretation as prescribed by the Vienna Convention on the Law of Treaties ("the VCLT"). It will not be qualified as a source of interpretation under Article 31(1) of the VCLT and it does not seem to be an interpretive declaration either (the latter have not been well developed in international law). The Secretariat has not yet provided the delegations with other examples or case law demonstrating the value of such statements by Contracting Parties as relevant to treaty interpretation at the time of a dispute. It has not reacted to the case of *Pope & Talbot Inc. v. Canada* in which the tribunal expressed misgivings about such a statement of interpretation, rendered in the middle of the dispute, made by Canada, US and Mexico about a question of law. If due process and fairness are to continue to be pillars of dispute resolution between investors and States, suggestions of such provenance would seem counterproductive. A unilateral interpretation by a Contracting State during a pending procedure would violate the due process rights of the investor and would create an inherent imbalance between the disputing parties.

The Secretariat makes some suggestions as to **the law that could be applicable to the AC procedure**. It suggests the following possibilities: (i) the law applied before the first-tier tribunal, (ii) a different law if the seat of the appeal is not the same as in the first instance, or (iii) a completely de-nationalized procedure subject only to international law. The idea of de-nationalizing dispute resolution and creating laws entirely detached from their sovereign base has been tried before, unsuccessfully. Any attempt to do this would be unrealistic: would the sixty Member-States to the UNCITRAL Working Group III have to draft an international procedural law to be applied by the permanent adjudicators of the AC? As I note in my book on the New York Convention, the idea was raised at the occasion of the drafting of the 1958 New York Convention:

> Nothing has proven to be as divergent as the rules of procedure. Imposing uniform rules would deter many States from signing the Convention. The inclusion of such detailed provisions … would tend to overburden the text, and might provoke objections based on considerations of national law and lead to lengthy discussion.

As to the scope and standard of review, the Secretariat also looks into the subject of appeal on issues of law and fact and proposes that such review would be more consuming as it would require the disputing parties to present their case again. The Secretariat also considers the idea that the AC could provide for a review of issues *de novo* or whether it should accord some degree of deference to the findings of the first adjudicator. If the main objective of the reforms is to address issues of cost and duration, the idea of a review on issues of law and fact would constitute a second bite of the apple and inevitably increase cost and duration. In addition, this would lead to more uncertainty, which tends to have a chilling effect on cross-border investment. Even if the Working Group agrees to build in limitations on the scope of appellate review, how might this be done without the treaty language leaving the possibility of AC discretion and interpretation for a *de facto* review of those issues? The Secretariat appears to envisage that the AC will enable a review on the merits, instead of the review limited to matters of due process as currently provided under both the ICSID and UNCITRAL mechanisms. If the permanent adjudicators of the AC are to allow some deference to the members of the first instance tribunal, the drafters of the instrument creating the AC must consider the role of both (i) the 'first instance' arbitrators, with the mandate to consider all issues of law and fact and to decide the entire dispute on its merits; and (ii) the permanent

members of the AC, and their appropriate (limited) mandate in appeal. This is complex and will most likely be a source of disagreement and ultimately some ambiguity leading to unpredictability. Additional complexities are introduced by the fact that any rules drafted by the Working Group will ultimately be subject to interpretation. Will the Working Group create an interpretative mechanism or will the delegations defer to the VCLT?

Final Remarks

In addition to the above, there are many other elements to consider: in relation to the timing, statutes of limitation, and jurisdiction in relation to national courts. If the UNCITRAL Rules are applicable, who will have jurisdiction to decide on a request for the setting aside of the award? The same applies for ICSID annulment committees. The Secretariat raised the idea for the AC to 'have the ability to annul awards rendered in first instance'. This would mean that all Contracting Parties to the instrument that creates jurisdiction for the AC to set aside awards will have to amend their national provisions on annulment. Tilting at those windmills of sovereignty will be an ambitious undertaking.

Another matter that has been extensively addressed in the 1958 New York Convention and national laws is the possible adjournment of enforcement. This becomes an issue for consideration for the AC as well. It seems the Secretariat is considering such temporary stay. This would open the floodgates to dilatory tactics. Something that has been a basis for criticism of the current system. What would be the point of these 'reforms' if it leads to excessive delays?

Finally, the Secretariat has addressed the applicability of the 1958 New York Convention. However, while addressing this quintessential matter, it does not rely on Article I of the New York Convention, which determines the scope of the treaty. The Secretariat finds that the arbitration law of the place of arbitration determines whether a decision constitutes an award. This is not correct: it is the *lex fori* since the New York Convention is directed to the court of enforcement (of an arbitration agreement under Article II and arbitral award under Article V). Overall, the proposals for an appeal function lead to many issues that have been left unanswered.

Uncertainty has a chilling effect on investment. Therefore, for those countries with an interest in attracting foreign investment, it is important to reconsider these radical proposals, including how they would work in reality and whether it is in effect yet again one of those unrealistic dreams of the Man from La Mancha.

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