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# Meaningful Consensus or Delaying Disagreements? UNCITRAL Working Group III and the Advisory Centre on International Investment Dispute Resolution

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UNCITRAL Working Group III ("WGIII") on Investor-State Dispute Settlement ("ISDS") Reform convened for its 48th session in April 2024 in New York to continue its work, among others, on the establishment of an advisory centre ("AC") on international investment dispute resolution ("IIDR"). In light of the discussions during the past three sessions from October 2023 to April 2024, WGIII has concluded its work on the draft statute ("DS"). It is expected to be approved during the 57th Commission session of UNCITRAL, which will take place between 24 June and 12 July 2024.

This post examines some outstanding aspects of the DS, namely the objective and scope of its activities, its governance structure, financing, and legal identity.

**Objectives and Scope**

WGIII started discussing Article 2 on the AC's objectives in October 2023. The provision notes that the AC aims to "provide training, support and assistance" with regard to IIDR and "enhance the capacity of States and regional economic integration organizations in preventing and handling [IIDR], in particular, least developed countries and developed countries." One discussion on Article 2 was whether the objectives of the AC should be broadly designated to allow their evolution over time. Another suggestion was to specifically tie them to Articles 6 and 7 (on technical assistance and capacity-building, and legal advice and support respectively) (A/CN.9/1160, p. 6). As of April 2024, the provision briefly refers to the AC's tasks, and the proposed reference to Articles 6 and 7 was removed (A/CN.9/WG.III/WP.238, p. 2).

A divisive issue was on whether the AC's work should also include State-State Dispute Settlement ("SSDS") (A/CN.9/1160, p. 6). Some delegates, such as those from Switzerland, Japan, Türkiye, and Russia, argued that SSDS was beyond the mandate granted to WGIII and thus, the AC should not provide services on SSDS. Others (those from the EU in particular) believed that SSDS should not be excluded from the scope, arguably with a view to *future-proofing* it – that is, defining the scope of the AC as comprehensively as possible to allow it sufficient flexibility to adapt to future trends and shifts in policy.

Those who argued against SSDS noted that it may put a heavy burden on the AC and create potential conflicts of interest. Assuming this 'heavy burden' refers to added workload, judging by the current number of SSDS proceedings, this is unlikely. However, the concern that the AC may end up providing services to both parties to an SSDS dispute is justified, and without necessary internal regulations ensuring complete compartmentalization of these services, it could indeed bring about legitimacy problems.

However, as I argued elsewhere, SSDS is not necessarily outside the scope of WGIII's mandate. It is true that, in many IIAs, ISDS procedure is markedly different from the SSDS procedure for disputes arising out of interpretative differences of the treaty in question. However, there are other situations where SSDS might be relevant, such as those where the home state espouses the claim of the foreign investor against the host state. The dispute that is being settled, despite having an inter-state character, is still one that arose between the foreign investor and the host state. Its settlement can plausibly be included in this definition. This is a matter of policy choice by the negotiating parties – not a restriction imposed upon them by the mandate. In any case, the current DS notes that the services are to be provided "with regard to [IIDR]" (Article 2), a term broader than ISDS.

During its April 2024 session, WGIII continued to encounter difficulties in agreeing on a common language. However, by the end of the week, WGIII agreed not to include an explicit reference to SSDS and delegated that decision to the Governing Committee pursuant to Article 5. It was also reiterated that definitions under other instruments, such as the Code of Conduct, are not binding and would not limit the Governing Committee's discretion on this matter.

**Structure**

In October 2023, the DS foresaw a two-tier structure composed of a Governing Committee and a Secretariat, headed by an Executive Director. During the January 2024 session, WGIII began considering the establishment of an Executive Committee. Following the corroborating intervention of the Executive Director of the Advisory Centre of WTO Law ("ACWL"), who noted that the three-tier system allowed for the ACWL to act more efficiently and independently, the sentiment favoring a three-tier system strengthened. In its current form, the AC's institutional structure strongly resembles the ACWL (see Niall Meagher and Leah Buencamino).

The DS comprehensively lays out the tasks for the Governing Committee, Executive Committee, and Executive Director respectively. According to Article 5, the Governing Committee shall oversee the AC and undertake tasks such as adopting regulations on the operation of the AC, appointing the Executive Committee and the Executive Director, evaluating and monitoring the performance of the AC, and adopting its annual budget. The Executive Committee, on the other hand, would ensure the efficient and effective operation of the AC, supervise the administration of the Secretariat, and prepare the annual budget with the approval of the Executive Director of the Governing Committee. Finally, the Executive Director is tasked with managing the day-to-day operations of the AC, employing and managing the staff, and preparing the annual report and budget.

The three-tier structure has important benefits. Leaving the management of the AC entirely to the Governing Committee, an organ which will include all members of the AC, may overburden it and slow down the decision-making and operations. Efficiently layering the structure of the AC can

indeed allow it to operate more efficiently and independently, in line with its general principles pursuant to Article 3. The Executive Committee would, among other things, serve to "insulate the direct influence of the Governing Committee on the Secretariat" (A/CN.9/1161, p. 7). Pursuant to Article 5(7), the members of the Executive Committee shall act in their personal capacity, and not as representatives of their countries. A three-tier structure can thus help the AC to function in accordance with its key objectives, instead of being mired by conflicting policy priorities of its members or donors. This being said, the three-tier structure should be geared towards optimizing the AC's operations, instead of creating redundancies in governance.

**Services**

The DS regulates the functions and services to be provided by the AC under its Articles 6 (technical assistance and capacity building) and 7 (legal advice and support with regard to IIDR). Whereas Article 6 concerns generic services open to all members, such as advice and training on dispute prevention and organization of seminars and conferences, Article 7 includes services that are specifically designed to assist member states in the context of a dispute and would be provided upon request.

Delegations disagreed on the issue of participation of non-members as beneficiaries of Article 6 services, with an emphasis on the difference between non-member states and non-member, non-state entities. The latter was particularly problematic, specifically the status of the Micro, Small and Medium Enterprises ("MSMEs"). On the one hand, it was argued that allowing MSMEs, who are potential claimants against the very states the AC seeks to support, might create deep conflicts of interest. On the other hand, allowing MSMEs to benefit from these services could reduce frivolous claims and prevent future disputes, help the AC maintain a balanced approach, and provide financial support to the AC by attracting donors (A/CN.9/1160, p. 10).

Article 6(3)(b) makes a reference to "other persons and entities" – a term which includes, but is not limited to, MSMEs. The provision also stipulates that the decision whether these entities should be allowed to benefit from some of these services is to be decided by the Governing Committee.

The fact that MSMEs, or other non-member, non-state entities are not explicitly and entirely excluded from the services provided under Article 6 is a welcome development. In its efforts to function as a forum for the exchange of information, the AC can establish communication between different stakeholders. This includes respondent states as well as claimants, but also non-governmental organizations, academic institutions, arbitration institutions, as well as practitioners. Providing capacity building for all stakeholders could foster dialogue, allow potential disputing parties to benefit from existing knowledge and experience in the field, and prevent disputes that may arise in the absence of such dialogue.

**Financing**

The AC will be funded by members' contributions, service fees, and voluntary contributions by non-members. While the October 2023 DS (A/CN.9/WG.III/WP.230, p. 9) refers to different sources of funding, subsequent versions of the DS seek to bring further clarity to the financial obligations of members. For example, Annex IV, currently entitled "Scale of minimum

contributions," will set forth the minimum amount of contributions expected from members on an annual, multi-year, and one-time basis. The annex also requires factoring in the level of economic development while setting these amounts, on the basis of the classifications under Annexes I, II, and III (least developed, developing, and other countries respectively). While WGIII initially considered another annex to regulate service fees, it ultimately decided to delegate the task of regulating their receipt to the Governing Committee.

The DS also includes the possibility of voluntary contributions. This allows for developed economies to contribute to the AC and is likely to be an important source of funding, similar to the ACWL (A/CN.9/1161, p. 15). WGIII has been cautious on this subject from the outset, given its potential to create conflicts of interest. The current DS thus requires that these contributions are consistent with the objectives of the AC, that they are reported in the annual report, and that they do not create any conflict of interest or impede independent operations of the AC. These voluntary contributions shall be made in accordance with the Governing Committee's regulations.

**Legal Status**

The dominant view within WGIII has been that the AC should be established as an intergovernmental organization and have international legal personality, akin to Article 18 of the ICSID Convention. As a corollary to its intergovernmental nature, the DS includes paragraphs on the functional immunity to be enjoyed by the AC (Article 9(4), (5), and (6)). In accordance with the provision, the AC, its property and assets shall enjoy, "at a minimum, such immunity as may be necessary for the fulfilment of its objectives and for the exercise of its functions", and shall be exempt from 'direct' taxes as opposed to all taxation (A/CN.9WG.III/XLVIII/CRP.1/Add.1, p. 4). The Executive Director and the Secretariat staff shall enjoy immunity with respect to acts performed by them in the exercise of their functions, without prejudice to their accountability to the AC and its members. These issues, and the exact shape such immunities will take, will ultimately depend on the headquarters of the AC – which will seemingly be decided by the AC itself. A number of countries, including Armenia (a delegation with significant contributions to WGIII's work thus far), have already expressed interest in hosting the AC headquarters.

In April 2024, the WGIII also started discussing the merits of (and potential challenges related to) establishing the AC under the auspices of the United Nations ("UN"). While such an incorporation would not affect the legal identity of the new AC as an intergovernmental organization *per se*, it would have a number of effects on its nature and functioning. Establishing the AC as part of the UN system would streamline its operations with other UN bodies, such as UNCITRAL, UNCTAD, OHRLLS, paving the way to create a coordinated network of UN institutions acting synchronously (A/CN.9/WG.III/WP.238, p. 8-9). This could be beneficial for the AC's activities, in particular those under Article 6 on technical assistance and capacity building. It could also give further visibility and legitimacy to the AC and its work as a UN body. However, being an integral part of the UN system might also mean possible limitations on institutional independence, require structural adjustments to its operations, and setting up procedures for operational mandates.

**Conclusions**

Despite persistent disagreements on some key issues, WGIII continues to deliver tangible results

since the finalization of its work on the Code of Conduct last year. While the DS broadly encapsulates a successful consensus, WGIII delegated some important decisions to the AC itself, such as the potential inclusion of SSDS within its scope and the status of non-member entities, including potential claimants such as MSMEs, as prospective participants in some of its activities. Delegating these issues to the AC can be seen as avoiding or delaying solutions and pushing forward existing disagreements to another entity. However, there is benefit in leaving a certain degree of flexibility for the AC itself to address these questions within its operational rules, depending on whether they become pressing, or even relevant, issues.

Ultimately, a prevalent sentiment among many delegations of WGIII is that the AC should, first and foremost, be able to fulfill its intended purpose in assisting least developed and developing countries in their efforts to access justice and adequately defend themselves against foreign investor claims, which can be crippling to their economies. It is yet to be seen whether the AC will live up to these expectations.

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