UNICTRAL WORKING GROUP III

First Deliberations on Reforms of the Investor-State Dispute Settlement System

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Executive Summary

The Investor-State Dispute Settlement system is a critical element of today's global environment and trans-national investments. The United Nations Commission on International Trade Law has given its Working Group III the mandate to consider possible reforms to that system. Consistent with its mandate, Working Group III began its deliberations in Vienna in late November 2017. The discussions were lively and as a first stage, focused on identifying possible concerns regarding the Investor-State Dispute Settlement process. The Working Group initially considered issues relating to costs and duration, transparency, and coherence and consistency within the procedures that implement the system. The discussions thus far suggest that concerns exist regarding various aspects of the Investor-State Dispute Settlement system and its current operation.

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I. Introduction – The Investor-State Dispute Settlement System

The Investor-State Dispute Settlement (ISDS) system developed to allow a foreign national – either an individual or an entity – to assert a claim directly against a sovereign State where the foreign national's investment was made in that State. ISDS represented a major change from the then-existing international judicial system, which generally foreclosed such direct actions and instead relied on diplomacy to resolve investment-related disputes. The "ISDS regime was intended to 'de-politicize' investment disputes and effectively remove the risk of such disputes escalating into inter-State conflicts."[1]

International investment treaties were conceived as a means to encourage foreign investment in those countries that entered into such treaties, often under-developed nations desiring foreign direct investment. Such agreements seek to provide foreign investors with a degree of confidence in the stability and safety of their investments, including substantive guarantees that impose enforceable obligations on States. These include undertakings by States to provide fair and equitable treatment (FET) for the foreign national and also protection against expropriation and discriminatory treatment.

Thousands of bilateral investment treaties (BITs) now exist. While their provisions vary, normally they provide for resolution of disputes between a foreign investor from one signatory against the other signatory State in which the investment occurred. The steps for resolving such disputes usually include:

(1) the investor may assert a claim directly against the host State;

(2) an arbitral tribunal then is constituted *ad hoc* for the purpose of deciding the dispute; and

(3) both the investor and responding State participate in selection of the arbitrators who comprise the tribunal.[2]

II. The Commission's Mandate to Working Group III

At its fiftieth session, held in July 2017 in New York City, the United Nations Commission on International Trade Law (UNCITRAL) considered possible future work

[1] A/CN.9/WG.III/WP.142, "Possible reform of investor-State dispute settlement (ISDS): Note by the Secretariat," (18 Sept. 2017), ¶ 5.

[2] Ibid., ¶s 6-7.

in the area of ISDS.[3] The Commission previously had discussed this potential topic at its session in 2016. At that session, it received and reviewed a study conducted under the auspices of the Geneva Center for International Dispute Settlement (CIDS), which was a preliminary analysis of possible issues for consideration if reform of the ISDS system occurred at the multilateral level.[4]

In addition, to facilitate further discussions on the topic, the UNCITRAL Secretariat disseminated a questionnaire after the 2016 session to States to obtain information on the existing ISDS regime; the dispute resolution provisions typically included in international investment agreements (IIAs); as well as the existing legislative and judicial frameworks for recognition, enforcement, and appeal of ISDS arbitral awards.[5] Forty countries responded to the questionnaire.[6]

Based on the information presented at its 2016 meeting and the results of the Secretariat's questionnaire, at its 2017 meeting the Commission debated three topics for possible future work, including concurrent proceedings, a code of ethics for arbitrators, and "possible reform of the investor-State dispute settlement regime."

There was considerable discussion on the need for possible reform of ISDS as well as whether UNICTRAL was the best forum for such discussions. Proponents of undertaking the review for possible reform asserted that the "main objective … should

[3] See generally A/72/17, "Report of the United Nations Commission on International Trade Law, Fiftieth Session", Supplement No. 17 (3-21 July 2017).

[4] See Gabrielle Kaufmann-Kohler and Michele Potestà, "Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism? Analysis and roadmap," Geneva Center for International Dispute Settlement (3 June 2016) (available at http://www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf).

[5] See generally A/CN.9.917, "Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)," (20 Apr. 2017).

[6] See generally A/CN.9.918, "Settlement of commercial disputes Investor-State Dispute Settlement Framework – Compilation of comments," (31 Jan. 2017); A/CN.9.918/Add. 1, "Investor-State Dispute Settlement Framework – Compilation of comments," (31 Jan. 2017); A/CN.9/918/Add. 2, "Investor-State Dispute Settlement Framework – Compilation of comments," (31 Jan. 2017); A/CN.9/918/Add. 3, "Investor-State Dispute Settlement Framework – Compilation of comments," (31 Jan. 2017); A/CN.9/918/Add. 4, "Investor-State Dispute Settlement Framework – Compilation of comments," (31 Jan. 2017); A/CN.9/918/Add. 5, "Investor-State Dispute Settlement Framework – Compilation of comments," (27 Mar. 2017); A/CN.9/918/Add. 6, "Investor-State Dispute Settlement Framework – Compilation of comments," (21 Apr. 2017); A/CN.9/918/Add. 7, "Investor-State Dispute Settlement Framework – Compilation of comments," (12 June 2017); A/CN.9/918/Add. 8, "Investor-State Dispute Settlement Framework – Compilation of comments," (27 June 2017); A/CN.9/918/Add. 9, "Investor-State Dispute Settlement Framework – Compilation of comments," (13 July 2017); A/CN.9/918/Add. 10, "Investor-State Dispute Settlement Framework – Compilation of comments," (26 Mar. 2018).

be to restore confidence in the overall [ISDS] system." Others pointed out the existence of diverse (more than 3,000) IIAs with a variety of approaches and methods for ISDS and questioned whether reforms were needed or what form any changes to the existing system might take.[7]

Consensus developed that UNCITRAL should undertake work on ISDS reform. The first step in the process would be identifying existing issues and concerns as well as the positive aspects of the existing system, to provide a framework for possible reforms. The widest range of possible solutions would be discussed and reforms, if any, should be undertaken gradually, while leaving open the possibility for individual states to adopt their own approach to ISDS reform.

This process of identifying existing issues and concerns, while necessarily led by governments, would include, involve, and "engage with diverse stakeholders", including intergovernmental organizations, non-governmental organizations (NGOs), and experts, investors, practitioners, and academics.[8]

Several possible solutions and topics for discussion were identified. These included:

(1) the establishment of a permanent multilateral investment court;
(2) methods for the appointment or selection of judges or arbitrators for investor-State disputes;
(3) an appeal or review mechanism for awards;
(4) the costs and fees involved in ISDS;
(5) applicable law to ISDS; and
(6) enforcement of awards or judgments.

The discussions made clear that the deliberations should not be limited to procedural issues, but rather should include substantive aspects, such as a State's right to determine the meaning and scope of "fair and equitable treatment" (FET), expropriation, and due process requirements. That said, the Commission recognized that substantive issues were far less amenable to deliberations than procedural topics.[9]

[7] A/72/17, ¶s 240-246.

[8] Ibid., ¶s 247-253.

[9] Ibid., ¶s 254-257.

The Commission ultimately tasked Working Group III (WG III) with "a broad mandate to work on the possible reform of investor-State dispute settlement."[10] In that regard, the Commission directed that WG III should

> ensure that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, would be Government-led, with high-level input from all Governments, consensus-based and fully transparent. The Working Group would proceed to: (a) first, identify and consider concerns regarding investor-State dispute settlement; (b) second, consider whether reform was desirable in the light of any identified concerns; and (c) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission.[11]

Further, the Commission directed that WG III should ensure that any possible suggested reforms would be cognizant of the work of other international organizations and should allow each State to decide whether and to what extent it desired to adopt any proposed reforms.[12] The initial session of WG III was set for late November and early December 2017.

III. Pre-Session Submissions

Prior to the commencement of WG III's first session in Vienna, two intergovernmental organizations, the International Centre for Settlement of Investor Disputes (ICSID) and the Permanent Court of Arbitration (PCA) submitted notes relating to ISDS. ICSID, which administers more than 70 percent of all ISDS cases, presented a summary of its on-going process to amend its rules. ICSID pointed out that the proposed amendments – which would update its rules for the first time since 2006 – were intended to modernize the ICSID procedure; reduce time and costs; simplify the rules; and increase the use of electronic submissions and fewer copies.

[10] Ibid., ¶ 264.

[11] Ibid.

[12] Ibid.

ICSID stated that it anticipated that the proposed amendments would be adopted in 2019 or 2020.[13]

The PCA's submission summarized its role in the ISDS process, its history regarding administering ISDS disputes and use of the UNCITRAL Arbitration Rules, and its standing as a unique quasi-permanent arbitral body. The PCA expressed no view on the need for any particular reform of ISDS, noting that any revisions to the existing system were "the prerogative of governments…." However, the PCA noted that to the extent any reforms were considered, it was prepared to assist at the technical level such as revised mechanisms for ISDS. Further, the PCA indicated its availability to work with UNCITRAL to implement a permanent investment court or appeal mechanism.[14]

IV. The December 2017 Session of WG III

WG III held its first session on ISDS in Vienna beginning in late November 2017. The session got off to a contentious start, as the delegates could not agree on the chair. An election by secret ballot ensued, and after a day-and-a-half, the chair and rapporteur were determined.[15] As a result of the time spent deciding the chair, the working group was unable to complete its full report on the session until its April 2018 session in New York City.[16] Further, the time available to spend on substantive discussions was reduced to little more than three days.

After the election, the chair first reminded the group of the three parts of its mandate as set by the full UNCITRAL Commission. Therefore, the entire first session was spent identifying concerns regarding ISDS. Factual concerns, as opposed to anecdotal perceptions, were identified as key to the discussions. The various representatives in attendance agreed that their focus should first be on treaty-based ISDS, and only later would consideration possibly be given to contract and investment

[13] A/CN.9/WGIII/WP.143, "Possible reform of investor-State dispute settlement (ISDS): Submissions from International Intergovernmental Organizations," (13 Oct. 2017), pp. 2-4.

[14] Ibid., pp. 4-7.

[15] A/CN.9/930/Rev.1, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)," Part I (19 Dec. 2017), ¶s 11-15.

[16] See A/CN.9/930/Add. 1/Rev.1, "Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017)," Part II (26 Feb. 2018).

law-based ISDS. Similarly, WG III decided to focus on arbitration-based ISDS, as opposed to other ISDS resolution means, such as mediation.[17]

The initial focus of the group was on procedural aspects. The group initially considered the duration and costs associated with ISDS. Much discussion occurred on the high cost of ISDS and the possible causes of those costs. The general consensus was that ISDS had become very expensive and time-consuming. Related to costs, there was general agreement that specific and clear rules on their allocation, including awards based on the relative outcome and conduct of the parties, security for costs, and the impact of third-party funding should be considered. Discussion also occurred on identifying some possible procedural solutions to the duration and costs issues. Overall, "the systematic nature of the concerns identified indicated a need for systemic solutions, which would bring with them the reduction of the overall costs through enhanced predictability and a greater ability to control proceedings themselves."[18]

WG III also considered issues of transparency associated with ISDS during its thirty-fourth session. While the group noted that transparency had already been addressed in the UNCITRAL Rules on Transparency in Treaty-based Investor-State arbitration in 2013 and the 2014 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention), the group took a broader view of transparency.

It was generally agreed that WG III should work to encourage and enhance transparency standards applicable to ISDS arbitral proceedings, because "enhancing public understanding of ISDS was key in addressing the perceived lack of legitimacy of the system." In addition, there was consensus that the group should address transparency issues relating to third-party funding and the appointment and compensation of arbitrators.[19] Discussion also occurred on the desirability of an early-dismissal procedure to dismiss meritless claims and also the need for respondent-

[17] A/CN.9/930/Rev. 1, ¶s 31-33. Mediation is a non-binding process, typically involving the participation of one or more third-party mediators, who assist the parties in working toward, and hopefully achieving, a resolution of the dispute.

[18] Ibid., ¶ 76. See generally ibid., ¶s 34-78.

[19] Ibid., ¶s 79-88.

States to assert counterclaims, where appropriate and assuming a proper legal basis existed for such action.[20]

Finally, WG III discussed issues of coherence – whether parts of the ISDS were logically related with no contradictions – and consistency – whether identical or similar cases were treated in the same manner. While the group recognized that different cases would have different facts and nuances, and that similar cases decided under different investment treaties could have different outcomes, the lack of predictability was raised as a critical issue. A systemic solution, which might involve a system of precedents, an appellate mechanism or a multilateral court were identified as possibilities for future deliberations. Some States supported these possible solutions. Other States, however, questioned whether a formal structure was needed and whether it would provide the desired solution to questions of coherence and consistency.[21] Further identification of possible concerns relating to the ISDS system will continue at the next session of WG III.

V. Conclusion

Working Group III commenced its work under the UNCITRAL Commission's mandate in late November 2017. Its mandate is to first, identify and consider concerns regarding investor-State dispute settlement; and second, consider whether reform was desirable in the light of any identified concerns. After considering those two topics, WG III then, assuming it decides that reform is desirable, is to develop any pertinent solutions for recommendation to the full UNCITRAL Commission.

Perhaps reflecting the interest and importance of the general subject of reform of the ISDS system, considerable discussion occurred on the general topics of costs and duration, transparency, and coherence and consistency in the system. Preliminary discussions occurred regarding possible solutions, including a trans-national tribunal or court of appeal, and various means to reduce costs or ensure they are fairly borne by the parties. Identification and discussion of additional concerns regarding the present ISDS system will occur at the next session of WG III.

[20] A/CN.9/930/Add. 1/Rev.1, ¶s 1-7.

[21] Ibid., ¶s 9-34.

The first session of WG III on possible ISDS reform thus indicates that future sessions should be lively and reflective of the importance of ISDS to not only States, but also to all stakeholders in the regime.