ISDS Reform, Intra-EU BITs and CETA: New and Upcoming Developments

On 19 January 2019, the European Union submitted new proposals to the United Nations Commission on International Trade Law (***UNCITRAL***) Working Group III (***WGIII***) tasked with examining the reform of investor-State dispute settlement (***ISDS***).

As we have reported before (see here, here, here and here), discussions are currently being held within WGIII on a possible reform of ISDS mechanisms. Those rounds of discussions take place twice a year (in April and in November) and were initiated in November 2017. The discussions are divided into three distinct phases: identifying concerns about ISDS (***Phase I***); considering whether reform of the current system is desirable in the light of any identified concerns (***Phase II***); and designing options for reform responding to any such concerns (***Phase III***).

After its 36th Session (which took place in Vienna in October-November 2018), WGIII has now almost completed Phase II of its mandate.

In order to move into Phase III and start discussing concrete

reform options, the Chairman of WGIII has invited countries involved in the discussions to submit proposals regarding the content of such reform as well as the roadmap to achieve those reforms. Those proposals would then be discussed during the next meeting of WGIII in April 2019.

In light of this invitation, the EU has now submitted two papers to the WGIII Secretariat.

The first paper includes a description of the ISDS reform that the EU wishes to support. Interestingly, although the EU used to previously label its reform option a "*Multilateral Investment Court*", it now refers to a "*Multilateral Standing Mechanism*". The key features of the reform (discussed here) remain, however, largely unchanged. The paper submitted by the EU on 19 January 2019 provides more clarity regarding several key aspects.

Among those clarifications, I have highlighted the following elements:

– Regarding the appointment of "adjudicators" (again the EU no longer refers to "*judges*"):

> *"It is vital to ensure the neutrality of adjudicators. A robust and transparent appointment process would be necessary to ensure the independence and impartiality of the adjudicators. All ideas to ensure neutrality should be considered, but inspiration can be drawn, inter alia, from recently created international or regional courts which have screening mechanisms to ensure that the adjudicators appointed do in fact meet the necessary standards of judicial independence. The persons appointed to the screening mechanisms should be independent. These could, for example, be ex officio appointments (for example, the President of the International Court of Justice, other senior or recently retired judges from international or domestic*

> *supreme courts). Candidates for the standing mechanism could be both proposed by the contracting parties and apply directly for appointment. Consideration should be given to allowing non-nationals of contracting parties to be appointed. They would be subject to a vote requiring a significant majority of votes of the contracting parties*".

– Regarding the appellate mechanism, the paper provides that appeals against decisions by the tribunal of first instance to the appellate tribunal should be based on "*error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts*". The appellate tribunal would, however, not be entitled to undertake a *de novo* review of the facts.

– Regarding the enforcement mechanism the paper provides that:

> "*Effective enforcement of awards of a standing mechanism is vital. Given that it would feature an appeal mechanism, there is no need for review of awards at the domestic level or through ad hoc international mechanisms (i.e. the function of annulment or set-aside currently exercised by national courts and ICSID annulment committees would be exercised by the broader review provided by the appeal mechanism). Therefore, there should not be review of such awards at domestic level.*
>
> *It is suggested that the instrument creating a standing mechanism should create its own enforcement regime, which would not provide for review at domestic level.*
>
> *It would also be the case that awards under a future standing mechanism could additionally be capable of enforcement under the New York Convention on the*

> *Recognition and Enforcement of Foreign Arbitral Awards*".

The second paper submitted by the EU on 19 January 2019 describes the roadmap or work plan that the EU suggests that WGIII should follow in the course of Phase III of its mandate.

In light of this proposal, the EU suggests that Phase III should be divided into 4 different steps:

> "***Step 1*** *involves the identification and proposal by governments of their preferred reform options, in conceptual form, on which they would like to see the Working Group eventually develop solutions. These options should respond to the concerns expressed in the Working Group in respect of which it was considered that reform was desirable.*
>
> *In* ***Step 2*** *the Working Group would identify which of the reform options put forward under Step 1 should be the subject of further work. This would entail a discussion at conceptual level of the options which have been put forward and then a decision on which option or combination of options the Working Group should engage in further work on.*
>
> ***Step 3*** *would involve a discussion and decisions in respect of the priority to be given, the sequencing of the deliberations, the possibility of multiple tracks, coordination with other international organisations and inter-sessional work of the options identified in Step 2. This could take place in conjunction with Step 2, so that the questions of which options to progress, and how, will be informed by the logistical possibilities and constraints within UNCITRAL.*
>
> ***Step 4*** *would involve, in light of the approach adopted in Steps 2 and 3, developing concrete solutions and text proposals, which could be adopted or endorsed by the*

UNCITRAL Commission and, ultimately, the General Assembly of the United Nations".

The EU also made clear that if individual governments decide to work on options in WGIII that "*would not imply acceptance either of the outcomes of the work or of the options as being necessarily considered desirable by that government*".

Lastly, let me also highlight that Indonesia also recently submitted a position paper to WGIII. The options for reform suggested by Indonesia are the following:

> – Providing more safeguards in both substantive and ISDS provisions so that the investor's rights and obligations could be equitably addressed;
>
> – Allowing investors to make an international arbitration claim after exhaustion of local remedies;
>
> – Requiring separate written consent as a condition for an investor to make ISDS claims to international arbitration; and
>
> – Introducing mandatory mediation as an alternative dispute resolution before turning to ISDS.

*

* *

On a closely related topic, several EU Member States have, on 15 January 2019, declared their commitments to terminate all bilateral investment treaties within the EU (intra-EU BITs). This declaration follows the *Achmea* judgment of 6 March 2018 in which the Court of Justice of the European Union found that ISDS clauses in intra-EU BITs violated Articles 267 and 344 TFEU (see previous discussions on this case here, here and here).

In their declaration, those EU Members States agreed that they

will take the following actions:

> “[…]
>
> *2. In cooperation with a defending Member State, the Member State, in which an investor that has brought such an action is established, will take the necessary measures to inform the investment arbitration tribunals concerned of those consequences. Similarly, defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent.*
>
> *3. By the present declaration, Member States inform the investor community that no new intra-EU investment arbitration proceeding should be initiated.*
>
> *4. Member States which control undertakings that have brought investment arbitration cases against another Member State will take steps under their national laws governing such undertakings, in compliance with Union law, so that those undertakings withdraw pending investment arbitration cases.*
>
> *5. In light of the Achmea judgment, Member States will terminate all bilateral investment treaties concluded between them by means of a plurilateral treaty or, where that is mutually recognised as more expedient, bilaterally.*
>
> […]
>
> *8. Member States will make best efforts to deposit their instruments of ratification, approval or acceptance of that plurilateral treaty or of any bilateral treaty terminating bilateral investment treaties between Member States no later than 6 December 2019.*

[…]."

Importantly, this declaration was signed by 22 EU Member States with the exception of Luxembourg, Malta, Finland, Hungary, Slovenia and Sweden.

*

*   *

Finally, I wanted to bring to your attention the fact that Advocate General Bot is expected to hand down next week (Tuesday 29 January 2019) his long-awaited Opinion regarding the compatibility of the chapter on investor-State dispute settlement (Chapter 8, including fundamental rights in the CETA with respect to the EU Treaties (see our hearing report). This Opinion was originally scheduled to be handed down in October 2018 but it was delayed.

Copyright © 2016 International Litigation Blog.
All Rights Reserved.
Reproduction totale ou partielle interdite.