ISDS Reform: Designing Permanent Institutions at Working Group III

Last week, the United Nations Commission on International Trade Law (***UNCITRAL***) Working Group III (***WGIII***) turned squarely to designing permanent adjudicative institutions for the resolution of investment disputes. As readers of this blog may be aware, WGIII is charged with developing multilateral reforms to the current ad hoc system of investor-state dispute resolution (***ISDS***). This government-led process involves delegations from around a hundred States, with active participation by dozens of observer delegations from international organizations, arbitral institutions, NGOs, business associations, and learned societies. Beginning in WGIII's 34th Session in 2017, this work has continued through biannual sessions in Vienna and New York. From 2017 to 2018, delegations registered substantial concerns with ISDS, relating to fragmented arbitral outcomes; arbitrator independence, impartiality, and diversity; duration and cost; multiple proceedings; and third-party funding (Phase 1). In the fall of 2018, WGIII decided to work multilaterally to reform such concerns within UNCITRAL (Phase 2). As of its 37th Session in 2019, WGIII has moved firmly into working on

concrete reform options (Phase 3) (discussed here).

WGIII's 38th Session in Vienna marked a key transition into detailed discussion of reform options. Meeting initially in October 2019, the WGIII held discussions on a series of reform options according to a pre-determined project schedule. This work was grounded in proposals by over forty-five governments, across twenty-three submissions (here); complemented by several Secretariat papers; submissions by observer delegations (here); and concept papers by the Academic Forum on ISDS Reform (here). In this initial meeting, WGIII focused on (i) developing a multilateral advisory center; (ii) a code of conduct; and (iii) reforms to third-party funding (discussed here). Discussions centered on high level values, trade-offs and prioritization, with the goal of guiding the Secretariat as it turns to developing more concrete reform options.

Resuming its 38th Session in Vienna last week (January 2020), WGIII turned squarely to designing permanent institutions: (iv) a standing appellate mechanism; and (v) a multilateral investment court (***MIC***); as well as the cross-cutting question of (vi) selecting and appointing adjudicators. As with the discussions last fall, the goal was to discuss each reform option at a high level, to provide guidance to the Secretariat. The Working Group is not yet taking firm decisions on the desirability or ultimate form of any reforms, although some States are already revealing their preferences. Later this year, WGIII will develop a new project schedule and begin circling back to each topic, *seriatim*, with the benefit of new responsive work by the Secretariat, the Academic Forum, and other organizations (such as the OECD, ICSID, the PCA, and several NGOs).

Appellate Mechanism and MIC

A large number of delegations expressed support for developing

a standalone appellate mechanism. The basic idea would be to create a treaty-based standing tribunal to hear appeals from arbitral awards decided under its member states' network of *inter se* bilateral and multilateral investment treaties. This approach would leave the fragmented ecology of ISDS in place for first instance decisions, but systematize adjudication through a centralized appellate body. A smaller group of States (led by the European Union) were committed to developing a more fully integrated MIC, combining centralized appellate review with a centralized court of first instance. The two-instance MIC approach would replace ISDS altogether among members. For now, WGIII focused on matters common to both types of permanent institution, and mostly considered them together.

(a) *Values*. Among States supporting appellate review, there was broad agreement that the objective is to secure better correctness, consistency, and coherence in investment adjudication, and hopefully thereby enhance the legitimacy of the system. At the same time, several delegations recognized that these values were in tension with other concerns like reducing cost and duration.

(b) *Nature and Scope of Appeal*. Recognizing the tension between the values of appeal and reducing costs, most delegations did not favor complete *de novo* appellate review. Many coalesced instead around *de novo* review for errors of law, and limited review for manifest errors of fact. Several delegations stressed that the grounds for appeal should also include the grounds for annulment (ICSID) or set-aside (New York Convention), to avoid the proliferation of proceedings. Most agreed that only final decisions should be subject to appeal, though views varied on whether this should include only awards, or also interim decisions (*e.g.*, jurisdiction or provisional measures) and when any interim appeals might be filed (noting trade-offs for cost and duration).

(c) *Effect of Appeals*. Key questions arose about what powers

an appellate instance would have, *vis-à-vis* the first instance arbitral tribunal, the parties to the dispute, the States parties to the underlying treaty, and non-parties.

– *Powers vis-à-vis first instance tribunals*. It was broadly accepted that an appellate instance should have the power to reverse, vacate, or modify an arbitral award. Views varied on the question of remand. Some argued against remand power, *inter alia* out of concern for extending cost and duration. Others advocated strongly in favor of remand, emphasizing the challenges confronting other international jurisdictions lacking remand power (particularly the WTO, where the absence of a sufficient factual record requires the Appellate Body to either do its best to "*complete the analysis*", or dispose of appeals on the potentially arbitrary basis of burden of proof). Of these delegations, several favored broad, discretionary powers of remand, while others suggested limiting remand through soft or hortatory guidance (*g.*, "*only when necessary*"). States also expressed varied views on whether appeals of interim decisions should suspend the underlying arbitral process.

– *Effects on future tribunals*. States disagreed on the desirable precedential effect of appellate decisions (among parties), with some advocating strong *stare decisis*, and others preferring weaker persuasiveness norms. Others expressed concern about informal precedential effects for third States.

– *Participation of parties and non-parties*. Finally, States agreed on the importance of mechanisms for participation by treaty parties, including non-disputing party submissions and binding interpretations of underlying treaties. Some also suggested allowing *amicus* submissions by States party to investment treaties with terms similar to those under dispute.

(d) *Enforceability*. Delegations further discussed how to ensure and maximize enforceability for appellate or MIC decisions, both among States parties and in non-party jurisdictions. Most delegations favored imbuing any permanent institution with its own "*inherent*" mechanism for enforcement among parties (potentially modeled on Article 54 of the ICSID Convention). More vexing was how to ensure enforceability in third States. Several delegations proposed ways of piggybacking on the ICSID Convention (through a proposed *inter se* modification of that treaty), or the New York Convention (interpreting the concept of a "*permanent arbitral body*" in Article 1(2) to include an appellate mechanism or MIC, and using "*deeming language*" to make clear that parties to a MIC or appellate mechanism viewed these institutions' decisions as "*arbitral awards*"). Some States expressed uncertainty about these strategies, and questioned whether domestic courts would ultimately enforce appellate or MIC decisions as readily as typical arbitral awards. It was also voiced, however, that it was not clear whether (or why) non-parties would object to member states of an appellate mechanism or MIC interpreting the New York Convention in this fashion, given that their own outbound investors may wish to make use of those institutions down the line.

(e) *Financing*. Most delegations agreed that financing should be scalable, equitable, and should ensure the independence of adjudicators. States invoked numerous models from how other international courts are financed, including member contributions, trust funds, user fees, and hybrid models. Some delegations preferred funding by member States, but others questioned whether this might undermine adjudicator independence. Others stressed the advantage of user fees in disincentivizing frivolous claims and long shot appeals. It was also suggested that user fees might help avoid paralysis if member States cut off contributions (particularly in view of the WTO Appellate Body standoff). Many considered that a

hybrid model could strike the right balance, by combining member contributions and user fees. States also considered the viability of graduating member rates by level of development, with a trade-off between reducing costs for less developed states and (potentially) inflating the voice and influence of larger contributors.

Looking Forward: the Chair closed the discussion on permanent institutions by proposing eleven sets of issues to guide further work by the Secretariat in preparing reform options and draft language: (1) elaboration of key terms (*e.g.*, "*de novo*" review, or "*manifest*" error); (2) developing options for managing an appellate case load; (3) options on which kinds of decisions can be appealed, and when; (4) elaboration of how appeals might work beyond of treaty-based arbitration (including contract-based and investment-law-based arbitration); (5) how appeals would work in the context of *ad hoc* arbitration; (6) how to limit any impact of permanent bodies on third parties; (7) options for remand authority, with sensitivity to costs and duration; (8) options for ensuring participation by non-treaty parties; (9) further analysis for how the arbitral seat might affect appeals; (10) further work on enforceability; and (11) further work on hybrid financing models and ways to avoid undue influence by those who pay (or those who pay more).

Selection and Appointment of Adjudicators

Several delegations recognized that selection and appointment ranked among the most central questions on WGIII's agenda. It was acknowledged, however, that the trade-offs might not be the same in different institutional contexts, and thus different options might be desirable in relation to ISDS and permanent mechanisms. Here too, the goal of these initial discussions was to provide the Secretariat with information and guidance toward developing draft options.

Qualifications. Delegations broadly agreed that adjudicators

must be competent, but expressed widely varied views on what competence entailed. Many stressed expertise, though emphases ranged across public international law, international investment law, sectoral expertise, dispute resolution in general, and the domestic law of the particular Respondent State. Not all delegations agreed how to (or whether to) prioritize expertise in these various fields. Delegations also broadly agreed that adjudicators must be neutral, independent and impartial, with high moral character. There was also a widely shared view that the body of adjudicators should be diverse according to a range of metrics, including gender, region, language, culture, socio-economics, and legal system. Proponents emphasized that diverse decisionmakers can result in higher quality decision-making. Some delegations cautioned against prioritizing diversity over excellence, and that overemphasis on diversity might restrict the pool of available adjudicators. However, others contended that these concerns were overblown, arguing that diversity and excellence must be pursued in tandem.

Reforming appointment in ISDS. Given the above values, much of the discussion focused on how to structure appointments. Some stressed party autonomy, and suggested that party appointment was the best way for States to ensure representation of qualifications they deemed most important in their own disputes. These delegations also emphasized the need for independence, and cautioned that State-appointed judges might not feel comfortable voting against the government. These delegations sought to pursue the above values while preserving party appointment, through clauses requiring diversity, flexible adjudicator rosters, or with a greater role for institutions. Other delegations considered that such reforms would be insufficient to mitigate existing biases – preferring to utilize more rigid arbitrator lists. It was generally agreed that the process should be more transparent. And delegations considered whether various other tools may be helpful, such as screening mechanisms, renewable or non-

renewable roster terms, and cooling off periods.

Selection and appointment in permanent institutions. In the context of permanent bodies, delegations argued for member-driven adjudicator selection on a standing basis. The European Union stressed that adjudicators should be selected by election, rather than consensus, stressing the singular role of vetoes in the ongoing crippling of the WTO Appellate Body. It was suggested that permanent adjudicators should serve on a full-time basis, with non-renewable terms to enhance their independence. However, a potential trade-off might be reduced accountability, and care would have to be taken to control perverse incentives relating to future employment prospects. Several delegations contended that member-driven appointments would result in a pro-State bias. Proponents argued, however, that these concerns were misplaced. In their view, States would appoint standing adjudicators with long term mixed interests in view, including protecting their outbound investors. Some States, finally, considered whether other appointment mechanisms were available for standing bodies, including appointment by a neutral United Nations entity, independent and representative nominating committees, or existing arbitral institutions.

Looking forward: the Chair closed the discussion on selection and appointment by proposing that the Secretariat further analyze three issues relating to adjudicator qualifications: (1) which specific qualifications to prioritize, with attention to unintended consequences and possible biases in the selection of qualifications; (2) options for how qualification requirements can be incorporated in a treaty reforming ad hoc ISDS (*e.g.*, in hortatory or binding form); and (3) options relating to nomination and selection in a permanent institutional context.

Conclusion and Preview

WGIII is now fully engaged in the design phase. More work

remains to be done on all aspects, and discussions continue. Yet the process has already taken remarkable strides, with particularly notable progress toward thinking through the contours of a future appellate mechanism. It remains surreal to watch these collegial and fruitful multilateral discussions about designing permanent institutions for the adjudication of investment disputes in parallel to the dispute settlement crisis in the WTO. Yet one encouraging aspect is that WGIII delegates are clearly learning from the challenges that have beset the WTO Appellate Body.[1]

WGIII will next meet in its 39th Session in New York in April 2020. By way of preview, delegations will turn to a wide range of cross-cutting reform options relating to: (vii) dispute prevention; (viii) treaty interpretation; (ix) security for costs; (x) frivolous claims; (xi) multiple proceedings and shareholder claims for reflective loss; and (xii) counter claims. These matters may seem technical, but several are critically important and bear close watching. For example, reforming the availability of reflective loss claims would have wide-ranging, positive systemic effects addressing many of the major concerns on WGIII's agenda (as I have argued in an Academic Forum paper on Reforming Shareholder Claims in ISDS, with Kathleen Claussen, Jaemin Lee, and Giovanni Zarra).[2]

At the end of the session, WGIII will begin considering questions of form, with particular focus on the possibility of developing (xiii) an omnibus treaty on procedural reform, with flexibility for states to opt-in to particular reforms on an *à la carte* basis. Secretariat papers on all of these matters are available on the UNCITRAL website, here.

The conversation continues. Onward to New York!

[**Editorial note:** This post first appeared on the *International Economic Law and Policy Blog.*]

[1] For more on the dynamics of the resumed 38th Session, stay tuned for a coming post on EJILTalk! And on IEL Blog by Anthea Roberts and Taylor St. John.

[2] See further Julian Arato, The Private Law Critique of International Investment Law, 113 Am. J. Int'l L. 1 (2019).
