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The critique of reform proposals for ISDS: solutions to existing and future problems

Abstract: Addressing wide ranging dissatisfactions regarding the current Investor-State Dispute Settlement (ISDS) system, the UNCITRAL working group III (WGIII) members are working continuously to put forward necessary reforms to the system which may take couple of more years. Considering their works till to date, the proposals might bring great improvement to the current system and will also add significant qualities. However, still, they did not put forward elaborate proposals on some of the important matters for an effective and sustainable dispute settlement system. Moreover, they might follow little bit the similar track of the WTO which is in crisis itself.

Keywords: ISDS, UNCITRAL, WTO, WGIII, reform

1. Introduction

The initiative by the United Nations Commission on International Trade Law (hereinafter: UNCITRAL) Working Group III (hereinafter: WGIII) to reform the procedural aspects of the Investor-State Dispute Settlement (hereinafter: ISDS) is very significant, even though dealing with substantive reform is much needed. The proposals by the WGIII are focusing on creating a permanent procedural mechanism for investment law. The WGIII is working on many important procedural issues, for instance, multilateral mechanism, multilateral advisory center, selection and appointment of ISDS tribunal members, code of conduct, mediation, assessment of damages and compensation, control mechanisms on treaty interpretation, multilateral instrument on ISDS reform, and third-party

funding.[1] In this article, the author analyses some of the important matters related to the reform of ISDS by the WGIII.

2. The critique of reform proposals for ISDS

2.1. One- or two-tier system

There are two proposals regarding the reform of dispute settlement mechanism. Firstly, stand-alone review or appellate mechanism, and secondly, setting-up of a multilateral investment court with first instance and appellate mechanism.[2] Many members of the WGIII expressed their support for an appellate mechanism regardless of tribunal structure. Some of the members backed the first option and some others have supported the second option. For instance, the European Union and its member States have proposed a first instance tribunal and an appellate tribunal.[3] Morocco has proposed setting up of a standing appellate mechanism.[4] And last but not the least, China also backs a permanent appellate mechanism.[5]

The members who support setting up of an appellate mechanism seek to strengthen the correctness of the arbitral decisions and resolving errors in decisions by the first instance tribunal or court.[6] This view was also reemphasized in another proposal where it is expressed that appellate mechanism would enable

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[1] Lavranos (2021) 845.

[2] Bungenberg and Reinisch (2011) 3.

[3] UNCITRAL (24 January 2019) A/CN.9/WG.III/WP.159/Add.1, para. 13 and 14.

[4] UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161, para. 34.

[5] UNCITRAL (19 July 2019) A/CN.9/WG.III/WP.177, para. 4.

[6] UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161; UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.175; UNCITRAL (19 July 2019) A/CN.9/WG.III/WP.177.

the tribunal to recheck and correct the decisions, and the mechanism would empower the parties to seek coherent and fair decisions.[7] Some of the members of the WGIII strongly believe that this mechanism will enhance consistency and predictability in arbitral decisions. The aim of this mechanism is to bring more accountability to the system, and develop a body of legally authoritative interpretations in the international investment law regime.[8]

From the active participation of the members, it is observed that the second option is more supported and in-line with their expected reformation option. So many rules have to be laid down to take such step. Right now, the WGIII is in its initial stage laying the foundation for reform and getting proposals and feedbacks from the members. Considering the importance and demand of appellate mechanism in the ISDS, it shall be incorporated in the system. This would be a significant reform to the current system, and would enable more check and balance.

2.2. Arbitrators and adjudicators appointment methods

One of the central criticisms related to the current ISDS system is related to the arbitrators. The criticisms range from their appointment method to their interpretation of the treaties.[9] Acknowledging the critical nature of the situation, the WGIII members have initiated significant reformation to this matter. As of September 19, 2022, several members of the WGIII have submitted their proposals, and the WGIII has comprised many

[7] UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.175, para. 9.
[8] UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161; UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.175; UNCITRAL (19 July 2019) A/CN.9/WG.III/WP.177.
[9] Dimsey and Pramod (2021) 1154.

of those proposals into one file that has been reviewed and changed over time following continuous discussions.

The appointment methods might be very challenging and tricky. This needs to be handled carefully. The dispute settlement system in international investment law might take over some solutions from the World Trade Organization (hereinafter WTO) system, however, we may not forget that there are some issues with that system as well. From the WGIII reform initiative, we've learned that they're proposing to incorporate more stricter regulations. For instance, they support creating an appointing authority which will be regulated by more transparent processes, they also support creating pre-established list of arbitrators or adjudicators.[10] However, which framework or method will be used to create such a list, still need to be addressed carefully.[11] Important thing to note that such mechanism might directly impact the current system where parties have power to deal with the appointment of arbitrators. Moreover, some members of the WGIII think that there should be an impact assessment on domestic legislations.[12]

As many State actors and scholars have expressed their dissatisfaction towards the double-hatting characteristic of the adjudicators under the current system, it is essential to standardize the current method.[13] The EU and its Member States

[10] UNCITRAL (31 July 2019) A/CN.9/WG.III/WP.169, UNCITRAL (24 January 2019) A/CN.9/WG.III/WP.159/Add.1, UNCITRAL (8 March 2019) A/CN.9/WG.III/WP.162. UNCITRAL (29 August 2019) A/CN.9/WG.III/WP.180.
[11] UNCITRAL (15 March 2019) A/CN.9/WG.III/WP.163, para. 5.
[12] UNCITRAL (22 March 2019) A/CN.9/WG.III/WP.164 and UNCITRAL (31 July 2019) A/CN.9/WG.III/WP.178. UNCITRAL (11 July 2019) A/CN.9/WG.III/WP.174, UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.175. UNCITRAL (19 July 2019) A/CN.9/WG.III/WP.177.
[13] Bao (2021) 925.

proposed some of the features of the adjudicators who would be appointed to the standing arbitration mechanism, for instance, they must commit full time, long term and non-renewable positions. This means that they would be barred from outside activities specially that lead to conflict of interest. The diversity and representativeness in terms of geography, know-how and gender have to be insured.[14]

This issue may remain critical in the dispute settlement system, as it is evident in the WTO dispute settlement system. One of the lessons of the WTO is to appoint the judges not by consensus or unanimity, but by majority of votes. Two-thirds majority when deciding might be the best solution. The WTO's consensus-based election process does not work.

2.3. The appointing authority

Appointing authority is another necessity in the system that needs to be sort out. The WTO has its own appointing authority for the selection of judges to the Appellate Body. The task of choosing Appellate Body members is considered very tough. It is evident from its maiden selection process which takes several months. Out of this experience, the members prepared a selection mechanism that was used couple of times. However, that has also proven to be unhelpful as powerful members of the WTO try to push their hegemony into the system.

However, the WGIII still did not lay down specific details about the appointing authority, although there is proposal to create an independent appointing authority. Until now, more emphasize were given to characteristics of the arbitrators and nature of their involvement as adjudicators. The WGIII members shall learn from the mistakes of the WTO dispute settlement

[14] Fach Gomez (2021) 1208.

mechanism and adopt such rules so that the system can be sustainable and reliable for the parties.

2.4. Treaty interpretation

Under the current Investor-State Dispute Settlement system, there is alleged arbitrariness in the awards which goes beyond the mandate of the arbitrators and there is also inconsistency in different awards. This issue not only engender alleged 'chilling effect' on the States' right to regulate, but also generates a lot of public outrage. Regulatory chill has been a deeply concerned issue around the legitimacy of ISDS.

There is also lack of coherence in investment arbitration. Because of this, there is perception of biasness.[15] To tackle this issue, some interesting proposals were suggested by some of the members of the WGIII, however, no detailed plans proposed yet. For instance, the suggestion is made to set-up mechanism for treaty interpretation. This can be dealt with by introducing *ad hoc* authoritative interpretation mechanism. Authoritative interpretation by treaty institutions can be also a crucial mechanism to deal with this issue. Moreover, release of *travaux préparatoires*, and renvoi of interpretative questions can be useful way to address this issue.[16] These can be dealt with in three stages of engagement by a party or parties, *i.e.* unilateral interpretations, joint interpretations, and multilateral interpretations. In addition, it is important to note that confirming compliance by arbitrators might be very significant.[17] The proposals also were made to strengthen the

[15] Kahale III (2012) 1.

[16] UNCITRAL (24 January 2019) A/CN.9/WG.III/WP.159/Add.1, UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161. UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.176.

[17] UNCITRAL (8 March 2019) A/CN.9/WG.III/WP.162, UNCITRAL (15 March 2019) A/CN.9/WG.III/WP.163.

framework between State to State. The framework for technical consultations and setting up a joint review committee by the treaty Parties are significant in this regard.[18]

These proposals need to be discussed further, especially the matter related to unilateral and joint interpretations. The WGIII need to provide specifics, so that this can set guidelines and restrict arbitrariness of the arbitrators.

2.5. Cost reduction and access to justice

High cost of arbitration is a headache for everybody in the ISDS. One study shows that the average costs in investor-State arbitration is around 10–11 million USD (for both parties together).[19] By reducing and expediting some processes the cost can be curtailed. Under the WGIII, the proposals were made to expedite certain aspects of the procedure, for instance, appointment of arbitrators and preliminary objections.[20] Moreover, proposals were made to implement stricter timeline,[21] and to give parties improved, real-time information

[18] UNCITRAL (24 January 2019) A/CN.9/WG.III/WP.159/Add.1, UNCITRAL (29 August 2019) A/CN.9/WG.III/WP.180.
[19] Zamir (2021) 1456.
[20] UNCITRAL (8 March 2019) A/CN.9/WG.III/WP.162, UNCITRAL (15 March 2019) A/CN.9/WG.III/WP.163, UNCITRAL (22 March 2019) A/CN.9/WG.III/WP.164 and UNCITRAL (31 July 2019) A/CN.9/WG.III/WP.178, UNCITRAL (11 July 2019) A/CN.9/WG.III/WP.174.
[21] UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161, UNCITRAL (8 March 2019) A/CN.9/WG.III/WP.162, UNCITRAL (22 March 2019) A/CN.9/WG.III/WP.164 and UNCITRAL (31 July 2019) A/CN.9/WG.III/WP.178, UNCITRAL (17 July 2019) A/CN.9/WG.III/WP.176.

on the status of the case.[22] In addition, to reduce the burden of the cost, proposals were made to include the loser-pays rule.[23]

2.5.1. Access to justice

Access to justice is one of the most important elements for ensuring justice. Developing countries lack resources and expertise to represent their cases in front of international tribunals. To tackle this issue, proposal was made at the WGIII to set up an advisory center for international investment law. The proposal of this center is inspired by the success of similar initiative run by the WTO. The European Union and its member States included this in their negotiating directives, and this proposal is supported by a number of developing countries. The main objective of this initiative would be to develop capacity to the disadvantaged countries, and in doing so ensure access to justice. Although this might not solve all the problems related to discussing issue as it is the case under the WTO, however, it may improve the level of access to justice for developing countries.

2.5.2. Cost reduction

Another aspect of access to justice is to reduce the cost. A set of proposals were recommended by several States. Strengthening mediation for early settlement of disputes can be very crucial to avoid costly dispute settlement, so is execution of waiting (cooling-off) period before the launch of disputes. In another proposal, a mechanism for an early dismissal of claims is suggested, that may prevent excessive dispute procedures (frivolous claims). In such case, the claimant will be required to

[22] UNCITRAL (15 March 2019) A/CN.9/WG.III/WP.163.
[23] UNCITRAL (4 March 2019) A/CN.9/WG.III/WP.161, UNCITRAL (8 March 2019) A/CN.9/WG.III/WP.162, UNCITRAL (15 March 2019) A/CN.9/WG.III/WP.163.

pay all costs for the procedure. In some treaties, including some of the European Union Member States, such clauses have already been incorporated.

Some of the WGIII members are of the view that establishing a standing mechanism may bring stability and coherence to the system, and it will allow better handling of multiple claims. The standing mechanism will be more efficient in handling *CME/Lauder* type cases[24] brought under different treaties. The system can deal with such cases through joinder of cases, consolidation, stay of proceedings or even dismissal of cases.[25] Thus, it may engender greater predictability regarding interpretation. Some of the members of the WGIII think that the reformation will bring greater predictability of legal interpretation by allowing stable understanding of provisions, make the system more effective in terms of time, and hence will make the system more cost-effective. Under such circumstances where there are the predictable and stable legal interpretations, an investor most likely will not make 'adventurous' claims based on a legal reasoning that has been already rejected.[26]

Under the current reformation initiative, it is expected that, firstly, significant amount of time will be saved by opting for the proposed selection processes of the arbitrators. Unlike the current system, the parties will save cost on counsel fees by not spending time on the appointment of arbitrators. Under the current system, the appointment of arbitrators is very time-intensive and involves substantial counsel charges.[27] Secondly, unlike the current system, there would be no scope for 'double-hatting' characteristic of arbitrators, hence there might not be

[24] UNCITRAL, *Lauder v. Czech Republic* (3 September 2001), UNCITRAL, *CME v. Czech Republic* (14 March 2003).
[25] UNCITRAL (6 November 2018) A/CN.9/964, para. 56.
[26] UNCITRAL (6 November 2018) A/CN.9/964, para. 42.
[27] UNCITRAL (19 December 2017) A/CN.9/930/Rev.1.

any challenge for conflict of interests. This definitely will speed up the process and will help to be more cost-effective.[28] Thirdly, there will be no incentives associated with the adjudicators for prolonging a case unnecessarily. This most likely would speed up the process.[29] Fourthly, the system most likely would engender predictability by consistent rulings of the tribunal as it is evident also in the WTO dispute settlement system. This would negate the relitigation, hence would save time and money. However, under the current system, different *ad hoc* tribunals in different cases might have different positions.[30]

However, these reform proposals might improve the cost management, but may not reduce the cost greatly as expected, which is present in the WTO having similar dispute settlement system. So, this will continue to be an issue of concern for developing countries.[31]

2.6. Localizing international investment arbitration

Localizing the ISDS can play a vital role to boost strong participation and to empower the developing countries. As the functions of the States require coordinating among a number of departments, experts and legal counsel; they usually need considerable time to prepare their defense to ISDS claims. That means, if the location of the arbitration is near, they can communicate and prepare their defense more effectively and speedily. Moreover, localizing the ISDS might deal with some of the concerns by developing countries, for instance, cost and time issue, and understanding sensitivity of governmental works by arbitrators with regional background.

[28] UNCITRAL (6 November 2018) A/CN.9/964, para. 53.
[29] Sands (2018).
[30] UNCITRAL (6 November 2018) A/CN.9/964, para. 55.
[31] UNCITRAL (12 December 2017) A/CN.9/WG.III/WP.145.

There are many arbitration institutions in different locations outside of Europe and the United States of America. However, there is very little probability to utilize such hearing facilities. The study of Kidane confirms such concern under the current system. It shows that out of 64 cases involving an African State, no case was heard in Africa, but Europe was the hearing location overwhelmingly.[32]

Using Europe and the United States of America as arbitration location can be attached to the location of small groups of arbitrators and law firms. They have preferential choice to go to the location where their firms or occupation locate, and also ISDS institutions preferably choose arbitrators who are available nearby.[33] Given this behavior pattern, it is in the interest of the States to have ISDS hearing nearby their geographical presence.

There are some benefits for allowing localization of ISDS. Firstly, it might boost confidence of the States to participate in such proceedings. Secondly, it might reduce grievances of States towards the ISDS awards. Thirdly, it will present more opportunities of informal dialogue between parties that may increase the chance of mediation. Fourthly, it will speed up the process as the parties will be able to present the evidence and expert testimony quickly. Fifthly, it might increase trust of the public and civil society by making the process more transparent and allowing local media. And finally, it will reduce institutional fee as arbitration institutions outside of Europe and the United States generally charge less fee. For instance, upon the registration of a request for arbitration, ICSID charges US$

[32] Kidane (2014) 597.
[33] Gaukrodger (2018).

42,000;[34] on the other hand, the charges at the Cairo Regional Centre for International Commercial Arbitration start at $750.[35]

3. The key solutions to existing and future problems

On the issue of expected and acceptable framework for the ISDS, the WGIII should opt for two-tier system. This is the classical approach in traditional judicial system and also gained support under the WTO. One-tier system with other reform options might be better than the current system, however, wouldn't satisfy the demands of the stakeholders.

Regarding the issue of arbitrators' appointment method, the WGIII members should deal with this as a most significant factor for ensuring fair awards. The process should be democratic as it involves multilateral parties, and it should enfranchise all members to the new agreement, specially the least developed. The new system should learn from both the positive and negative experiences of the WTO, *e.g.* to incorporate from the positive experiences of the WTO, and to improve regarding the negative experiences of the WTO. The arbitrators should be elected by the members, and two-third majority should be the decider, instead of consensus method of the WTO that tend to be slow and stagnant at times. If the WGIII members somehow opt for consensus method that would create problems in the future, and the system might become unsustainable.

On the issue of appointing authority, the WGIII members till now did not put forward concrete proposal. It might adopt dispute settlement body (DSB) like feature of the WTO into the system. The principal responsibility of this body would be to manage and appoint arbitrators and adjudicators. It also can

[34] ICSID (2022).
[35] CRCICA (2011).

look after other matters, for instance, to impose code of conduct of the arbitrators, etc. A treaty will be required to form such authority, and all the signatories, like the WTO system, can be the members of such body.

On the issue of treaty interpretation, the WGIII members may adopt some measures to deal with their frustration regarding the aggressive interpretative approach of the arbitrators. This might include sending the matter to the parties involved to decide their intention behind the text. They can also include guidelines in the code of conduct of the arbitrators, and violations may depose the arbitrators from their positions.

On the issue of cost reduction and access to justice, the WGIII members should take pertinent measures to empower the disadvantaged countries and enable them equal access to justice. If they can take necessary reforms, the system might be more predictable and may consume less time. Although, still, the process might be very expensive as it is in the case of WTO disputes.

On the issue of localization of international investment arbitration, the WGIII members should take this seriously. This will not only diversify the arbitration, but will also contribute to empower every regional member. This might further reduce the cost and give more access to justice to the disadvantaged members.

4. Conclusion

The current reform initiative under the WGIII is addressing merely half of the problems by only addressing procedural reform. This will not be able to address some critical issues associated with the substantive aspects. The proposed dispute settlement system, a multilateral investment court, under the

WGIII in principle is quite similar to the EU's multilateral investment court project, and to the World Trade Organization's dispute settlement system. As the WTO dispute settlement system itself faces trouble and fierce criticisms, the multilateral investment court certainly will face similar issues. During the reform process, it is essential to tackle such issues. However, it seems that the reform proposals under the WGIII is yet to address such issues effectively.

The author is of the view that a multilateral investment court is a very good proposal to start with, however, there is more to add to make it successful. Firstly, to strengthen the selection process of arbitrators. Instead of the WTO method, it can adopt some key features from the International Criminal Court's selection process related to judges, *e.g.,* two-third majority shall be the decider instead of consensus voting system. Secondly, to enfranchise developing countries, localization of dispute settlement can be a key step. The seat of the dispute settlement body can be region-based, *i.e.,* Africa, Asia, Latin America, Europe, North America, etc. The arbitrators can be selected from the respective region only. This might help to understand regional issues better and the arbitrators can be sensitive to the issues related to the public welfare. This will also reduce the cost of arbitration proceedings.

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