ACADEMIC FORUM ON ISDS

Concept Paper Project: Matching Concerns and Solutions

Introduction

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At the inaugural meeting of the Academic Forum on ISDS (the "AF") held on 26 April 2018 in New York, the idea was discussed to engage in a collective exercise exploring which solutions could meet the various criticisms voiced against the current investor-State dispute settlement ("ISDS") regime. That exploration was meant to provide State delegations with academic support for their deliberation on the reform of ISDS. The present papers are the result of the implementation of that idea.

This introduction sets out the objective (I) and scope of the concept papers (II), as well as the working process followed in preparing them (III).

Each concept paper is available on the AF website, together with this introduction and the conclusion setting out the main findings of the project.

This project was led by the authors of this introduction and Prof. George Bermann.

I. Objective: Providing a research-based contribution to phase 3 of WGIII

At its fiftieth session in July 2017, UNCITRAL decided to entrust Working Group III ("WGIII") with a three-phase mandate on "investor-State dispute settlement reform", whereby WGIII would first identify and consider concerns regarding ISDS; second, consider whether reform was desirable in the light of any identified concerns; and third, if WGIII were to conclude that reform was desirable, develop solutions to be recommended to UNCITRAL.[1]

As WGIII is nearing completion of the first two phases of its work, this project seeks to make a constructive and research-based contribution to the WGIII discussions. It is in particular hoped that it will provide additional elements for the benefit of policy-makers if and when they decide to embark on designing reform solutions. Especially now that WGIII has decided that "development of reforms by UNCITRAL is desirable" to address a number of concerns with the present ISDS system,[2] and is expected to move soon to discussing concrete reform options in phase 3 of its work, policy-makers and other stakeholders may

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[1] *See* Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17), paras. 263-264.

[2] *See* Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018) (A/CN.9/964), esp. paras. 40, 53, 63, 83, 90, 98, 108, 123, and 133.

hopefully be assisted by the concept papers when considering the benefits and drawbacks of one or the other reform scenario in light of the concerns that they consider most important.

II. Scope of project: Exploring four reform options to meet six concerns

During phase 1 of WGIII's work, delegates identified a number of concerns with the current ISDS system.[3] Taking these concerns as a starting point,[4] this project seeks to examine how each of them would be addressed under specific reform scenarios.[5] Specifically, each paper addresses one of the following six **concerns**:

1. Excessive **costs** of proceedings (including insufficient recoverability of cost awards);

2. Excessive **duration** of proceedings;

3. Lack of **consistency** and **coherence** in the interpretation of legal issues;

4. **Incorrectness** of decisions;

5. Lack of **diversity** among adjudicators; and

6. Lack of **independence, impartiality**, and **neutrality** of adjudicators.

In light of the preoccupation which is often voiced that discussions on a possible reform should be based on verifiable data, this project has put particular emphasis on the collection and analysis of empirical data relating to ISDS, through the creation of a specific working group tasked with the empirical analysis. The empirical working group has supported the other working groups with empirical evidence related to each concern and has summarized its main findings in a separate paper.

With the exception of the empirical paper, each paper examines whether and, if so, how and to what extent one of the six concerns just listed would be met under four **reform options**, namely:

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[3] *See* Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017) (A/CN.9/930/Rev.1 and A/CN.9/930/Add.1/Rev.1); Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018) (A/CN.9/935); Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018) (A/CN.9/964); UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat (A/CN.9/WG.III/WP.149).

[4] During the debates in WGIII, lack of transparency was also mentioned as one of the concerns with ISDS. Because instruments already exist to overcome this criticism (in particular, the UNCITRAL Transparency Rules and the Mauritius Convention), this concern has not been taken up in the AF concept paper project.

[5] *See also* for a similar exercise UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat (A/CN.9/WG.III/WP.149), esp. Annex (Tabular presentation of framework for discussion).

A. Improvement of the current investor-State arbitration system ("**IA improved**", IA standing for investment arbitration);[6]

B. Addition of an appellate mechanism to the current investment arbitration regime ("**IA + appeal**");

C. Introduction of a multilateral investment court (with or without an built-in appeal) ("**MIC**");

D. No ISDS at all, with two sub-scenarios, namely (i) recourse to domestic courts only, and (ii) State-to-State arbitration ("**No ISDS**").

For instance, the paper on diversity explores whether the lack of diversity among adjudicators would be cured and, if so, how and to what extent, in the "IA improved", "IA + appeal", "MIC", and "No ISDS" reform options.

When the AF embarked on this project, WGIII was still in phase 1 of its work and reform options had not been systematically addressed. Nevertheless, it appeared then (and it continues to appear at the time of writing) that the four scenarios (and sub-scenarios) just mentioned are the main ones advanced in the discussions around ISDS reform and reflect the principal alternatives available for the design of dispute settlement systems. At the same time, they represent the broad spectrum of positions and views expressed in recent State practice and in the debate surrounding investment arbitration. These scenarios range from keeping the existing arbitral system with targeted adjustments (IA improved), to establishing standing bodies to complement (IA + appeal) or replace (MIC) investor-State arbitration, to the elimination of an international mechanism for direct claims by individuals against States (No ISDS), with two ensuing sub-scenarios (domestic remedies only and State-to-State dispute settlement).

This being said, the choice of the four reform scenarios calls for two comments. First, while each of these reform options may exist in a "pure" form, some of them could well be combined. For instance, States could design dispute settlement mechanisms in which access to ISDS or the MIC is conditioned upon recourse to domestic courts. In order not to overly complicate the exercise, the papers have mainly addressed the relevant concern under the four reform constellations without systematically considering combinations.

Second, the choice of the four reform scenarios is limited to dispute settlement mechanisms leading to a *binding* decision. This means that the concept papers do not examine methods such as mediation, conciliation, ombudsman, etc. This limitation in no way implies any judgment on the usefulness of these alternative mechanisms, which may well deserve being the subject of a further AF study. It was adopted because these methods are usually in any event combined with one of the binding options envisaged by the papers, and for reasons of efficiency to allow completing this project in a time fame aligned with the progress of WGIII.

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[6] This option could in particular include changes in respect of the appointment of and rules of conduct for arbitrators, e.g. providing for appointment predominantly by arbitral institutions or effected jointly by disputing parties; roster-system; adoption of ethical rules, or other procedural changes.

Finally, it is important to note that the purpose of the papers is not to provide an in-depth discussion of the concerns as such, which have all been examined in academic literature and in the UNCITRAL Secretariat's notes. The papers rather start from the *assumption* that these concerns exist (or are perceived to exist). *Assuming* that the concerns exist, the papers review how they would be dealt with under the various reform options.

Each concept paper draws its own conclusions regarding the suitability of the reform options to address the relevant concern and provides a standardized chart showing whether the relevant concern analyzed is resolved or not (or resolved only subject to certain conditions) in the different reform scenarios. Conclusive remarks complete the project and set out a table which aggregates all individual charts and visually captures how many concerns each scenario would be able to resolve.

III. Working process

The analysis of each of the six concerns listed above was assigned to a different working group, consisting of five to nine AF members. As already mentioned, a seventh working group was constituted to produce empirical evidence to assist the work of the others.

All AF members were invited to express their interest in participating in one or more of the seven working groups. The working groups were then composed on the basis of the preferences expressed by individual AF members and with an eye on a diverse and balanced composition of the groups. Each working group was coordinated by one chair or two co-chairs. The composition of the seven working groups is set out in each of the concept papers.

The concept papers benefitted from discussions with and comments from the entire AF, who currently counts over 120 members. A number of preliminary drafts were first circulated to all AF members in the fall of 2018 for their comments. The drafts received by then were discussed at the AF meeting held on 31 October 2018 at the University of Vienna. AF members who could not attend the meeting were invited to provide their comments in writing.

Revised and more advanced versions of the papers were subsequently re-circulated to the entire AF membership in early 2019 and discussed at the AF workshop held on 1-2 February 2019 at the University of Oslo, co-organized by PluriCourts and the Geneva Center for International Dispute Settlement (CIDS) and hosted by PluriCourts Centre for Excellence (LEGINVEST) and the Forum for Law & Social Science Faculty of Law, University of Oslo. At the workshop, each draft paper was presented and discussed, together with other papers on the reform of ISDS received through a call for papers. Revised drafts incorporating the comments received at the workshop were circulated once again to all AF members for their final comments.

While the concept papers benefitted from these broad consultations, each paper remains the sole responsibility of the members of the respective working group and is not to be attributed to other members of the AF.