Enning Chang, Vienna (online), 8 to 12 February 2021

Update: Investor-state dispute settlement reform – UNCITRAL Working Group III met in Vienna (online) in February to continue discussions on reform options of the ISDS system.

A structural reform in the ISDS adjudication ought to achieve correctness, coherence and consistency, but at the same time to rein in cost and duration due to the complexity of ISDS system. An important theme of the Working Group's deliberations at the 40th session is how to achieve the balance between efficiency and coherence, with delegations placing different priorities on these twin aims.

Two reform options discussed at the 40th session

From February 8 to 9, the Working Group reviewed the reform proposal of setting a standing committee for selection and appointment of ISDS Tribunal members. While many states opined on how to establish a standing committee without prejudice to their final position on adoption of such a mechanism, some states still expect more evaluation on its general adequacy and necessity, including a cost-benefit analysis. In contrast, some states insisted on furthering specific texts to ensure efficient discussion.

From February 10 to 12, the Working Group focused on drafted provisions on appellate mechanism and enforcement. At the end of the session, it became clear that the following additions are likely to happen when the awarded damage triggers certain percentage of a Respondent State's GDP.: gate-keeping rules to address the concern about reopening of cases and increasing costs; a clearer standard for appeal based on error of facts; specifications on grounds for appeal under exceptional circumstances, e.g. The rules on appealable decision might end up regulating more general, to settle the disagreement on whether to include contract-based cases with state-owned enterprises. The rule on security for cost of appeal also sparked controversy, as some consider it a filter for impecunious parties, not frivolous claims.

With a general consensus on the goal of diversity(inclusiveness) through reform, views on means to achieve the end seem to fall on different ends of the spectrum. For example, a minority view on geographic diversity is that it can be self-regulated once investment arbitration is equally developed between regions. Some endorsed an almost bottom-up approach: as arbitral institutions are already taking measures to achieve diversity, instead of imposing hard diversity criteria on selection of adjudicators, the Working Group should only provide guiding principles. Most progressive view was that since parties are risk-averse and do not favor new entrances, softer measures would be void. Thus, inclusiveness would not be achieved without structural reform led by states. Diversity should ultimately increase legitimacy and coherence, that ISDS adjudicators should understand the political economic and cultural realities of respondent states as pointed out by a number of states.

Developing code of conduct for ISDS adjudicators was on the agenda but later left to be discussed in the resumed session.

A few highlights

The following are provided as food for thoughts for the readers of this short report[i]:

- Analogies seems to be working both ways in meetings like this: they could lighten up the air and catch audiences' attention, but could also drag on disagreements. A rhetoric analogy was made between hitting one's head by jumping into an unfitted swimming pool and discussing how to set up a standing committee, reflecting the view that deeper discussion on technicalities is unnecessary without a cost-benefit analysis. In another example, an analogy was made to domestic judges holding States accountable on administrative issues, in support of the argument that adjudicators in a standing committee *would not* feel indebted to States and biased in States' favor. Naturally it invited counter-arguments saying the ISDS system is inherently different from the domestic system, that the domestic check-and-balance is absent in the international system.

- Non-governmental organizations' presence in the Working Group not only brought in valuable stakeholders' points of view (including those for local communities and small and medium-sized enterprises (SMEs)), but also inserted useful empirical data into the debate. For example, on whether States would balance their defensive and offensive interests when choosing their standing committee nominees, the issue was more contextualized with the following data: approximately 83% ISDS cases are filed from OECD states, suggesting that few States have offensive interests.

- Below the surface of disagreements on the procedural reform options may be the fundamental differences between legal systems. For one, while lack of consistency in ISDS decisions is of concern on paper, it seems to be more of a concern for delegations from civil law jurisdictions, while many with common law systems see some differences in treaty interpretation as warranted by the variety of BITs in existence. Another example is the preferences between party-appointed experts and tribunal- appointed experts,[ii] though both are designed to resolve the issue of lack of specific expertise of an assigned member in a permanent body of ISDS adjudicators.

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[i] The views and opinions expressed herein are those of the author and do not necessarily reflect the official position of the Moot Alumni Association (MAA).

[ii] The former generally preferred in common law while it is the latter in civil law. See John M. Townsend, Bridging the Common Law Civil Law Divide in International Arbitration, Hughes Hubbard & Reed LLP.