

Out of scope

MULTILATERAL INVESTMENT COURT

8 NOVEMBER 2018

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Background

Working Group III of UNCITRAL is currently discussing the issue of multilateral reform of ISDS with a specific mandate to (1) examine the concerns of ISDS; (2) discuss whether reform is desirable; and (3) in the affirmative, design and propose any relevant solutions.

The Working Group covered the first step of the mandate at its first and second meetings (November 2017 in Vienna and April 2018 in New York). Issues that were discussed and identified as concerns of ISDS include duration and costs of proceedings, lack of transparency, lack of consistency and coherence in the interpretation of substantive principles, limited mechanisms to review awards, problems related to the appointment of arbitrators and their ethical requirements, lack of guarantees of independence and impartiality of arbitrators and third party funding. Completion of step 1 was without prejudice to any additional concerns that may continue to be flagged and discussed by the Working Group (one known concern is that of China to ensure that alternative dispute resolution (consultations, conciliation, mediation) is taken into account).

Analysis

The third meeting (29 October to 2 November 2018 - Vienna) of the Working Group confirmed that there is agreement in the Working Group that there are significant concerns that warrant reform of ISDS with only a few countries minimising these concerns or calling for additional evidence and reflection (). The vast majority of other countries () are at least open to considering "systemic reform" which is code-word for the creation of a permanent body such as the multilateral investment court. More countries are sending more capital-based and more senior delegates to the meetings which we read as a sign of increasing interest. This meeting has also seen an important increase in the number of delegations (around 400 persons) especially from Africa and other developing regions. This is largely due to the EU contribution to the UNCITRAL travel fund (€75,000 over 3 years). There are in addition many civil society actors present in the room so there is a high degree of transparency.

At its third meeting Working Group III discussed the majority of issues under phase 2 of the mandate (desirability of reform) and concluded that reform of ISDS is desirable with respect to consistency, predictability and correctness of ISDS arbitral decisions; independence and impartiality of arbitrators and constitution of arbitral tribunals; and costs and duration of proceedings. This closes the quasi-totality of the issues under phase 2 although it cannot yet be said that phase 2 is complete.

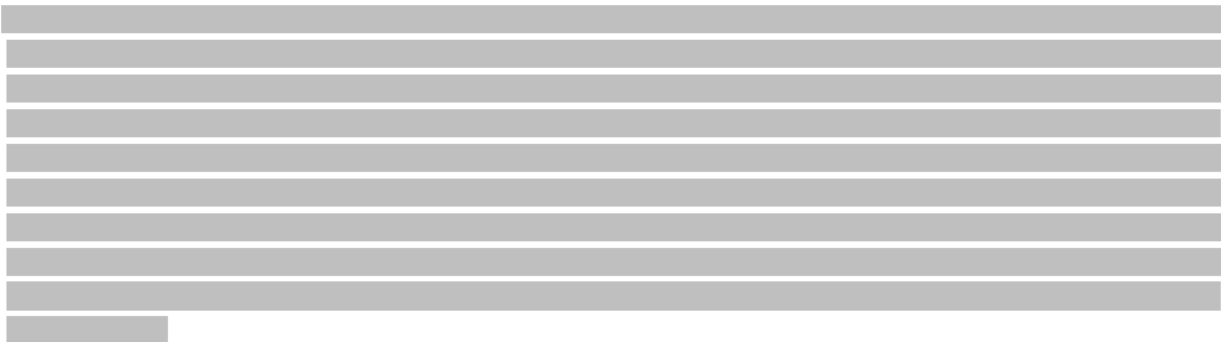
NGOs and some countries object to the scope of the discussion, arguing that it is also necessary to address the substantive rules. Some NGOs also argue that it is necessary to address investor obligations.

At its next meeting in April 2019, the Working Group will briefly finalise deliberations of the few outstanding issues under phase 2 and move to phase 3 to discuss and agree on the organisation of its

future work on substantive reform options. States are expected to submit proposals to inform discussions in April 2019.

These can have two elements. First, sketching out reform proposals. Second, making suggestions on organisation of work (e.g. on issues such as whether some of the work can be co-ordinated with other platforms working on similar issues (e.g. ICSID modernising its arbitration rules – this is less ambitious than the EU ideas being proposed in Working Group III), more frequent meetings of the Working Group, the creation of sub-groups working in parallel, etc. This reflection and discussion in April 2019 will lead to important questions of prioritisation, sequencing, parallel work, etc. that will have to be dealt with and will have an impact on the reform options that will be discussed in phase 3.

It would appear, although it has to be carefully nurtured, that there will be sufficient support to start more detailed work on the multilateral investment court in Autumn 2019 after the Working Group has reported to the UNCITRAL Commission in June-July 2019.



Proposals

The expectation is that the Working Group will start discussing as of April 2019 the substantive options for ISDS reform including the multilateral investment court. This requires the EU to set out comprehensively its views on the multilateral investment court. It may be necessary to allow for certain flexibility in discussions at the early stages of phase 3. This is more likely to yield positive results in the long run and ensure a more inclusive process (including with Japan and the US) given that not all countries are likely to immediately accept the desirability of a court.

The EU will table proposals setting out its vision of the multilateral court and on the organisation of future work under phase 3. This will be discussed with Member States. DG TRADE will continue the intensive contacts with like-minded countries to ensure ample support in April and with less like-minded countries to seek to ensure as harmonious a discussion as possible. These written submissions will need to be ready before the Xmas/New Year break to give time for translation in the UN so that they are properly before the Working Group in April.

In the short term, the Foreign Affairs Council (Trade) will be briefed on 9 November 2018 on the latest developments at UNCITRAL. It will be useful to remind Ministers that they address the issue of the Multilateral Investment Court project with their counterparts in their relations with third countries and to encourage them to factor this project into their planning of technical assistance. Clearly, the Commission's work on this, however intense, cannot substitute the longstanding contacts that Member States have with specific third countries.

On 22 November 2018 the Belgian Ministry of Foreign Affairs is hosting a high level event on the Multilateral Investment Court where the Commissioner will give a keynote speech (also featuring the Secretary-General of ICSID and Secretary of UNCITRAL). There will also be a round table with a number of African countries after the event. It is suggested to use this speech to articulate the EU's thinking for phase 3 of the process, in particular its vision of the multilateral investment court. It would be desirable to accompany this with a certain level of press activity.

In the period between now and April 2019 it would be desirable to continue contacts with ministers to encourage support for the EU's ideas. It may also be opportune to dedicate a further speech to this issue if the opportunity arises.

