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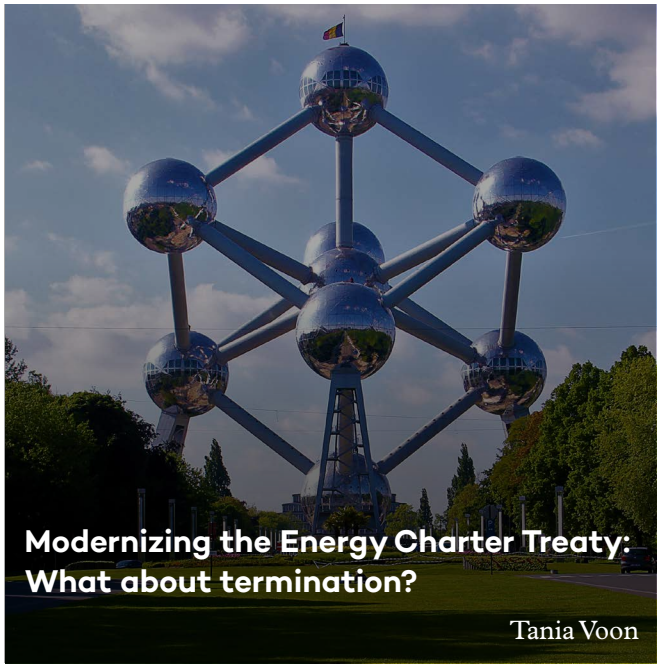

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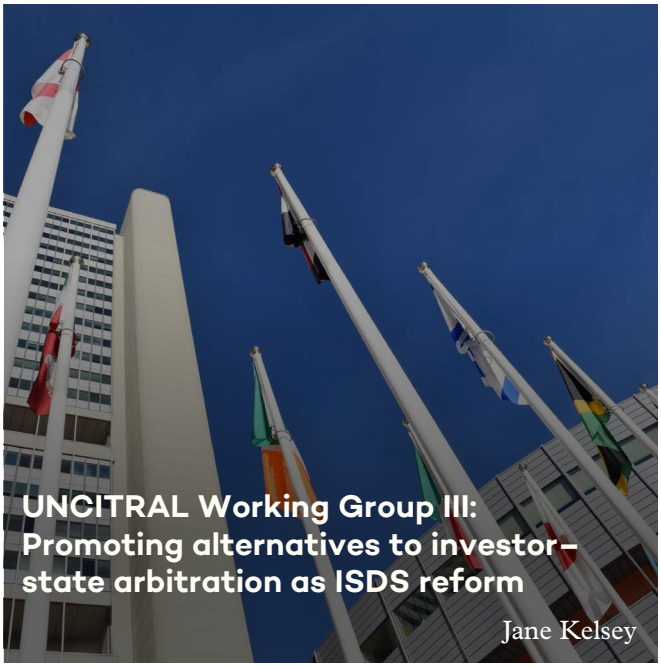
Tania Voon



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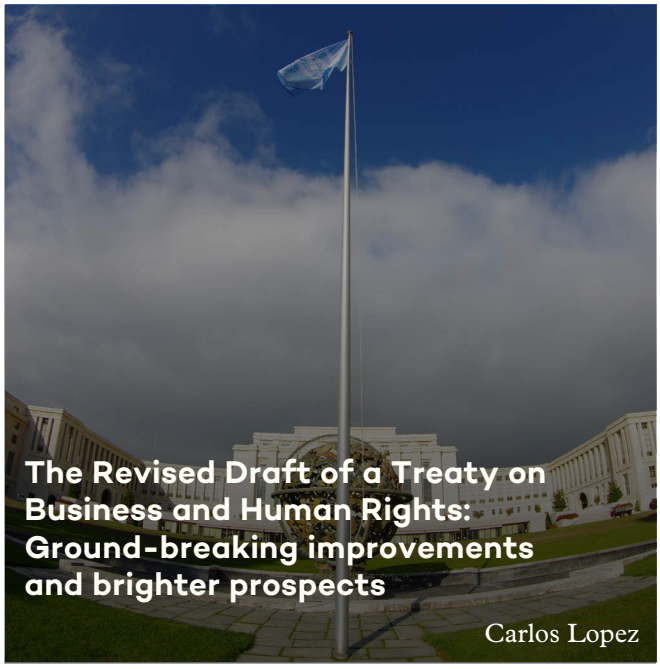

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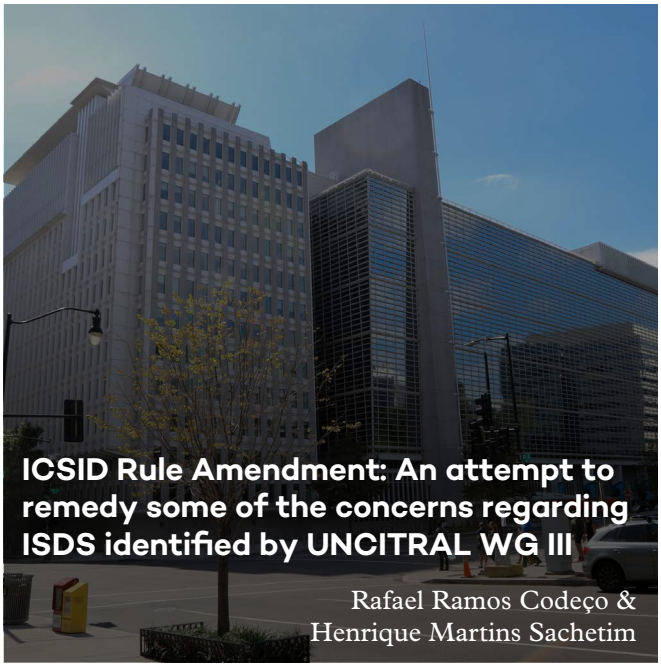

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Rafael Ramos Codeço &
Henrique Martins Sachetim

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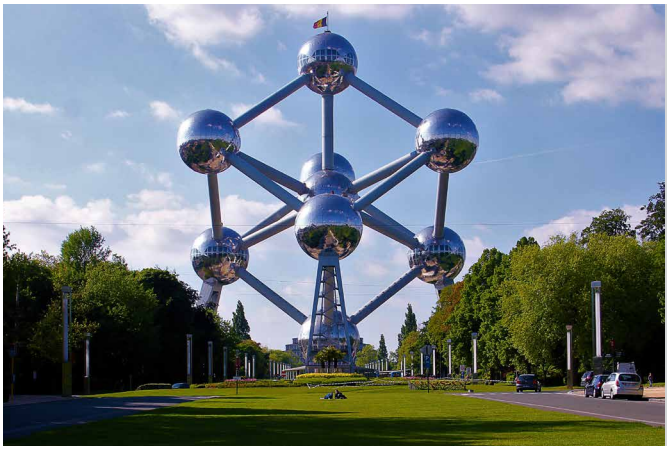
LIST OF ACRONYMS

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
COMESA	Common Market for Eastern and Southern Africa
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership
CSR	Corporate Social Responsibility
EAC	East African Community
EC	European Commission
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
IIA	International Investment Agreements
IISD	International Institute for Sustainable Development
ILO	International Labour Organization
ISDS	Investor–State Dispute Settlement
ITN	Investment Treaty News
MFN	Most-Favoured Nation
MIC	Multilateral Investment Court
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
PCA	Permanent Court of Arbitration
PPP	Public–Private Partnership
RCEP	Regional Comprehensive Economic Partnership
SADC	Southern African Development Community
SCC	Stockholm Chamber of Commerce
SDG	Sustainable Development Goal
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
USMCA	United States–Mexico–Canada Agreement
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

INSIGHT 1

Modernizing the Energy Charter Treaty: What about termination?

Tania Voon



In late 2018, the Energy Charter Conference agreed to a list of topics to be discussed in connection with the so-called "modernization" of the 51-party ECT,[1] such as the definitions of investment and investor, the right to regulate, the definition of indirect expropriation, the umbrella clause, frivolous claims and third-party funding. Commentators have pointed out that although this list includes many important issues, strangely, two of the most important general topics are omitted: ISDS and climate change.[2] These omissions are stark given that they occur at a time when in-depth discussions on ISDS reform are taking place in multiple forums (including under the auspices of the EU and UNCITRAL) and when the need for a major shift towards renewable energy is widely recognized as urgent and essential to the future of the planet.

In this piece I discuss a third, related omission from the list of topics for discussion in modernizing the ECT: the termination of the treaty itself or withdrawal from the treaty by one or more parties, including the treaty's survival clause. A key means of reforming international investment law today is by reaching better agreements and drafting better provisions. A corollary of such progress is the need to end older agreements[3] that lack more nuanced clarifications (for example, to the meaning of FET[4] or expropriation)[5] or appropriate exceptions (for example, for health objectives).[6] Similarly, newer investment agreements often include procedural improvements in ISDS, for example, addressing concerns with the potential for conflict of interest,[7] non-transparency[8] or attacks on legitimate public welfare measures.[9] The continuation of old-generation agreements that lack substantive or procedural improvements risks undermining reforms in modern agreements, because of the potential for the use of corporate restructuring[10] or the invocation of MFN clauses[11] to take advantage of the most investor-friendly treaties.

[1] International Energy Charter. (2018). *Approved topics for the modernisation of the Energy Charter Treaty.* Retrieved from https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty

[2] Bernasconi-Osterwalder, N. & Brauch, M. D. (2019, February). Redesigning the Energy Charter Treaty to advance the low-carbon transition. *Transnational Dispute Management, 1* (2019), p. 5. Retrieved from https://www.transnational-dispute-management.com/article.asp?key=2632 ; also available at https://www.iisd.org/library/redesigning-energy-charter-treaty-advance-low-carbon-transition

[3] See Voon, T. & Mitchell, A. (2019, May 18). Old agreements must be terminated to bring life to investment. *East Asia Forum*. Retrieved from https://www.eastasiaforum.org/2019/05/18/old-agreements-must-be-terminated-to-bring-life-to-investment

[4] See, for example, Free Trade Agreement between Canada and the Republic of Korea, September 23, 2014 (entered into force January 1, 2015), Art. 8.5.2. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3486/canada---korea-republic-of-fta-2014-

[5] See, for example, Government of India. (2015). *Model text for the Indian bilateral investment treaty*, Art. 5.5. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download

[6] See, for example, Singapore–Australia Free Trade Agreement, February 17, 2003 (entered into force July 28, 2003, as amended from December 1, 2017), Ch. 8, Art. 19. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3317/australia-singapore-fta

[7] See, for example, Kingdom of the Netherlands. (2018, October 18). *Netherlands model investment agreement*, Art. 20.6–20.7. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

[8] See, for example, Comprehensive Economic and Trade Agreement between Canada and the European Union, October 30, 2016 (entered into force provisionally September 21, 2017), Art. 8.36. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01). See also United Nations Convention on Transparency in Treaty-Based Investor–State Arbitration, December 10, 2014 (entered into force October 18, 2017). Retrieved from https://www.uncitral.org/pdf/english/texts/arbitration/transparency-convention/Transparency-Convention-e.pdf

[9] See, for example, Free Trade Agreement between Australia and the People's Republic of China, June 17, 2015 (entered into force December 20, 2015), Art. 9.11.4. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3572/australia---china-fta-2015-

[10] See Voon, T., Mitchell, A. & Munro, J. (2014). Legal responses to corporate manoeuvring in international investment arbitration. *Journal of International Dispute Settlement*, *5*, 41–68.

[11] See, for example, Batifort, S. & Heath, J. B. (2017). The new debate on the interpretation of MFN clauses in investment treaties: putting the brakes on multilateralization. *American Journal of International Law*, *111*(4), 873–913.

1. Termination or withdrawal if climate-friendly modernization fails

The topic of termination or withdrawal from the ECT is related to the topic of climate change because if a climate-friendly ECT cannot be achieved then termination or withdrawal may be the next best option for supporting a major transition from fossil fuels to clean energy.[12] The ECT is of primary significance to such a transition because of its focus on the energy sector.

Concluded in 1994, the ECT "establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the [European Energy] Charter."[13] The ECT specifically addresses "Environmental Aspects" in Article 19, which calls on parties to "strive to minimise in an economically efficient manner harmful Environmental Impacts'" and to "strive to take precautionary measures to prevent or minimise environmental degradation." Parties are to "take account of environmental considerations throughout the formulation and implementation of their energy policies."[14]

The objectives of the non-binding International Energy Charter adopted more recently in 2015 as a "declaration of political intention"[15] include "sustainable energy development, improving energy security and maximising . . . efficiency" in an "environmentally sound" manner.[16] These same provisions support action "encouraging the clean and efficient use of fossil fuels," "use of renewable energy sources and clean technologies, including clean fossil fuel technologies," "sharing of best practices on clean energy development and investment," and "promotion and use of low emission technologies."[17]

In order to concretize the modernizing of the ECT, the treaty itself needs to be reframed[18] to align with the United Nations Framework Convention on Climate Change (which entered into force on March 21, 1994 and today has 197 parties), the Paris Agreement (which entered into force on November 4, 2016 and now has 185 parties) and the SDGs adopted at the United Nations Sustainable Development Summit in 2015.[19] Put simply, for climate goals to be achieved, the ECT must introduce a distinction between investments based on fossil fuels and those based on renewable energy.[20]

The goal of climate-friendly modernization of the ECT is vitally important but also highly ambitious, and apparently presently overlooked. In these circumstances the need to examine termination and withdrawal as alternatives is heightened. The potential for failure on the climate front provides a reason beyond the *Achmea* judgment by the CJEU[21] for EU parties to the ECT to start discussing the existing provisions on termination and withdrawal. That judgment has raised a question whether intra-EU ISDS claims[22] are possible under the ECT. The European Commission[23] and most EU member states say no;[24] some treaty-based investment arbitration tribunals have nevertheless continued to find jurisdiction over such claims.[25] Just as some EU member states have begun to terminate their intra-EU BITs, so too may they need to consider withdrawing from the ECT, whether on the basis of *Achmea* or their targets under the Paris Agreement.

[12] Bernasconi-Osterwalder, N. (2018, June 19). How the Energy Charter Treaty could have costly consequences for governments and climate action. *IISD Blog*. Retrieved from https://www.iisd.org/blog/how-energy-charter-treaty-could-have-costly-consequences-governments-and-climate-action

[13] Energy Charter Treaty, December 17, 1994, Art. 2. Retrieved from https://energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf

[14] Ibid., Art. 19.

[15] International Energy Charter. (2016, June 23). *The International Energy Charter*. Retrieved from https://energycharter.org/process/international-energy-charter-2015/overview

[16] International Energy Charter. (2015). *International Energy Charter*. Title I: Objectives. Retrieved from https://energycharter.org/fileadmin/DocumentsMedia/Legal/IEC_EN.pdf

[17] Ibid.

[18] Bernasconi & Brauch (2019), *supra* note 2, pp. 2–3.

[19] United Nations General Assembly, Resolution Adopted by the General Assembly on 25 September 2015 – Transforming our World: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (October 21, 2015). Retrieved from https://undocs.org/A/RES/70/1

[20] Bernasconi & Brauch (2019), *supra* note 2, p. 4.

[21] CJEU, Case C-284/16, *Slovak Republic v Achmea* (Judgment of the Court (Grand Chamber, March 6, 2018)). Retrieved from http://curia.europa.eu/juris/document/document.jsf?docid=199968&doclang=EN

[22] See UNCTAD. (2018, December). *Fact sheet on intra-European Union investor–state arbitration cases.* IIA Issues Note 3. Retrieved from https://investmentpolicy.unctad.org/publications/1193/fact-sheet-on-intra-european-union-investor-state-arbitration-cases

[23] Eiser Infrastructure Limited and Energia Solar Luxembourg SARL v. The Kingdom of Spain, Proposed brief of the European Commission on behalf of the European Union as *amicus curiae* in support of the Kingdom of Spain (United States District Court for the District of Columbia, filed March 13, 2019). Retrieved from https://www.italaw.com/cases/documents/7286

[24] European Commission. (2019, January 17). *Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection.* Retrieved from https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en

[25] See, for example, *9Ren Holdings SARL v. The Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, May 31, 2019. Retrieved from https://www.italaw.com/cases/7374

2. Dealing with the survival clause

Withdrawal of a party from the ECT is more complicated than might be expected yet emblematic of problems that often arise in terminating IIAs. The main reason for such problems is the inclusion of so-called survival clauses in many such agreements, including the ECT. ECT Article 47 (Withdrawal) allows a party to notify that it is withdrawing from the treaty, taking effect one year after receipt or later as specified in the notice. However, Article 47(3) contains a survival clause:[26]

> The provisions of this Treaty shall continue to apply to Investments made in the Area of a Contracting Party by Investors of other Contracting Parties or in the Area of other Contracting Parties by Investors of that Contracting Party as of the date when that Contracting Party's withdrawal from the Treaty takes effect for a period of 20 years from such date.

This clause means that a party that withdraws may still be subject to ISDS claims for two decades after they have officially withdrawn from the ECT, with respect to investments made before the date of withdrawal. For a party withdrawing from the ECT as a means of climate change reform or investment reform more generally, this lengthy additional period will likely be unpalatable. Italy, for example, withdrew from the ECT as of January 1, 2016 and yet faces numerous additional ISDS claims.[27] Moreover, disputes may arise regarding the interpretation and application of the survival clause. Similar issues exist with respect to a state that withdraws from provisionally applying the treaty, as Russia has done.[28]

When terminating IIAs in general, parties are free to agree to modify or exclude the impact of a survival clause at the same time.[29] For example, they can agree to a shorter survival period or to its elimination, such as when replacing the IIA with a newer version. For example, Australia recently agreed to end its older BITs with Hong Kong[30] and Uruguay[31] upon entry into force of newer agreements, while also agreeing to abrogate the earlier survival clauses.

While all the ECT parties might conceivably agree to terminate the treaty along with its survival clause, overriding the survival clause is not an option when one or a few ECT parties seek to withdraw from the treaty. Removing or revisiting the survival clause, for example to replace it with a shorter period or allow a waiver in certain circumstances, is something the ECT parties should at least be discussing.

Similarly, the absence of provisions in the ECT for termination or expiry of the treaty itself should be reconsidered in the current modernization process, particularly in view of the potential adverse impact of the current treaty on the SDGs and the Paris Agreement.

Author

Tania Voon is a Professor in Law at the University of Melbourne and a Member of the Roster of Panelists for the Energy Charter Treaty.

[26] Energy Charter Treaty, *supra* note 13, Art. 47(3).

[27] See, for example, *Eskosol SPA in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's request for immediate termination and Italy's Jurisdictional objection based on inapplicability of the Energy Charter Treaty to intra-EU disputes, May 7, 2019. Retrieved from https://www.italaw.com/sites/default/files/case-documents/italaw10512.pdf

[28] See Voon, T. & Mitchell, A. (2017). Ending international investment agreements: Russia's withdrawal from participation in the Energy Charter Treaty. *AJIL Unbound. 111*, 461–466. Retrieved from https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E44E5A4DAB45B4767CC357EC948B189A/S2398772317001039a.pdf/div-class-title-ending-international-investment-agreements-russia-s-withdrawal-from-participation-in-the-energy-charter-treaty-div.pdf

[29] See Voon, T., Mitchell, A. & Munro, J. (2014). Parting ways: the impact of mutual termination of investment treaties on investor rights. *ICSID Review, 29*(2), 451–473; Voon, T. & Mitchell, A. D. (2016). Denunciation, termination and survival: the interplay of treaty law and international investment law. *ICSID Review, 31*(2), 413–433.

[30] Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China, March 26, 2019 (not yet in force), Art. 40.2. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4893/australia---hong-kong-investment-agreement-2019-

[31] Agreement between Australia and the Oriental Republic of Uruguay on the Promotion and Protection of Investments, April 5, 2019 (not yet in force), Art. 17.5. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4895/australia---uruguay-bit-2019-

INSIGHT 2

UNCITRAL Working Group III: Promoting alternatives to investor–state arbitration as ISDS reform

Jane Kelsey

The October 14–18, 2019 session of UNCITRAL Working Group III on ISDS reform will be crucial to the outcome. However, its discussion of solutions to the crisis confronting the international investment regime risks becoming a choice between the Multilateral Investment Court (MIC) sponsored by the EU and "modernization" of procedural aspects of traditional investment treaties exemplified by the CPTPP. Neither will provide an adequate or effective solution to the crisis. The net needs to be cast much wider.

Several states participating in the UNCITRAL process have already adopted viable alternatives to ISDS. This paper identifies four such options and assesses how they might satisfy the broad concerns identified by the working group to date—lack of consistency, coherence, predictability and correctness of arbitral decisions; arbitrators and decision-makers; cost and duration of ISDS; and third-party funding—and other aspects the working group must take into account, including dispute prevention, exhaustion of local remedies, participation of affected local communities and regulatory chill.[1]

1. State–state arbitration

Several recent reforms have opted for state–state investment arbitration. The USMCA, signed in 2018, provides a three-year window for investor–state claims in respect of legacy investments under NAFTA Chapter 11.[2] After that, Chapter 14: Investment of the USMCA will only be enforceable between Canada and the Unites States through state–state panels.[3] South Africa's Protection of Investment Act of 2015 provides for state–state arbitration after exhaustion of domestic legal remedies, with the states' consent.[4] Brazil's Cooperation and Facilitation Investment Agreements (CFIAs) allow for state–state arbitration where the matter has not been satisfactorily resolved through the early intervention processes of an ombudsperson or joint committee.[5] The SADC Model BIT of 2012 expresses a preference for state–state arbitration over ISDS, with options for the state to bring a dispute on behalf of an investor or to resolve a dispute over the interpretation or application of the treaty.[6]

Assessment: State–state dispute settlement shows greater respect for state sovereignty than ISDS and potentially a more careful balancing of public policy considerations.[7] Fewer investment disputes are likely to end up in formal arbitration, reducing overall

[1] UNCITRAL. (2019, April 9). *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its thirty-seventh session ((New York, 1–5 April 2019)* (A/CN.9/970). Retrieved from https://undocs.org/en/A/CN.9/970

[2] Agreement between the United States of America, the United Mexican States, and Canada, November 30, 2018, Annex 14-C (Legacy Investment Claims and Pending Claims), para. 3. Retrieved from https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereafter USMCA].

[3] Id., Art. 14.2(4); Chapter 31.

[4] South African Government. (2015). *Protection of investment act 22 of 2015.* Retrieved from https://www.gov.za/documents/protection-investment-act-22-2015-15-dec-2015-0000

[5] See Brazil's CFIAs concluded since 2015 at https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil

[6] SADC. (2012, July). *SADC model bilateral investment treaty template with commentary*, Art. 28 and p. 53. Retrieved from https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf

[7] See Bernasconi-Osterwalder, N. (2014, October). State–state dispute settlement clause in investment treaties. *IISD Best Practices Series*. Geneva: IISD. Retrieved from https://www.iisd.org/library/best-practices-series-state-state-dispute-settlement-clause-investment-treaties

cost and duration. However, state–state arbitration would not resolve concerns about lack of consistency, coherence, predictability and correctness of arbitral decisions, unless major changes were also made to arbitral procedures. Where there was standing consent to state–state arbitration, power asymmetries could still apply, and the chilling effect of diplomatic pressure on governments to change their proposed actions might even intensify.

2. Early intervention through national and inter-state dialogue and dispute resolution

Institutional mechanisms for dispute prevention and, where necessary, facilitated resolution of disputes at an early stage enhance the prospects of durable investment that benefits both foreign investors and the host state. This is preferable to after-the-fact remedies such as the current ISDS regime, which lead to long and expensive litigation and encourage an adversarial relationship that can fatally damage the relationship between investor and host state.

Early intervention may be through a contact point or involve dialogue between the state parties, including opportunities for stakeholders with an interest in the particular measures to participate. Where those avenues fail to resolve the matter, the state parties might have the option of international arbitration on terms set down in a bilateral agreement or adopted on a case-by-case basis.

Brazil's CFIA model agreement, outlined in the paper submitted by the country to the working group in March 2019,[8] follows this approach. Policy space is further protected by excluding certain matters from the arbitral inquiry: security exceptions; investors' compliance with domestic legislation; corporate social responsibility; investment measures combating corruption and illegality; and provisions on investment and environment, labour and health.

Assessment: Alternative Dispute Resolution (ADR) has the potential to address all the concerns that are slated for consideration in Phase 3: lack of consistency, coherence, predictability and correctness of arbitral decisions; arbitrators and decision-makers; cost and duration of ISDS; and third-party funding. The sovereignty of both states is fully respected. Foreign investors have avenues for redress within a framework that encourages long term investment, yet are subject to host states' public policy priorities. More flexible institutional mechanisms can provide for participation by affected interests in resolving disputes, while the removal of threatened ISDS litigation minimizes the negative chilling effect on regulatory decisions.

3. Domestic legislation and enforcement with limited or no international arbitration

States can enact protections for foreign investors in domestic legislation that is enforced exclusively within the nation's courts, which may be supplemented by mediation or by consensual state–state arbitration after the exhaustion of domestic legal remedies.

South Africa's Protection of Investment Act of 2015 provides all investors, foreign and local, with explicit protections and access to the courts, while ensuring those rights and the state's obligations are consistent with the national constitution and other fundamental legal instruments. Enforcement through domestic courts ensures the law will be interpreted by judicial officers who are well versed in the relevant jurisprudence. The act also provides for a special investor–state mediation regime.[9] The South African judicial system operates on precedent, with a permanent judiciary and a highly respected Constitutional Court. Significantly, some foreign investors still have rights to pursue ISDS disputes under BITs, including through survival clauses in agreements that South Africa has terminated, but none has done so.

Assessment: Reliance on domestic legislation can address concerns over the lack of consistency, coherence, predictability and correctness of arbitral decisions; arbitrators and decision-makers; and cost and duration of ISDS; and may also address third-party funding. Precedent-based interpretation of investor protection rules through domestic courts increases the

[8] UNCITRAL. (2019, June 11). *Possible reform of investor-State dispute settlement (ISDS). Submission from the Government of Brazil* (A/CN.9/WG.III/WP.171). Retrieved from https://undocs.org/en/A/CN.9/WG.III/WP.171

[9] South African Government (2015), *supra* note 3.

predictability of interpretations, with opportunities for appeal. Where investors lack confidence in the quality of the domestic courts, they would be in a position to assess the relative benefits and risks of proceeding with the investment and take additional precautions, such as risk insurance, if they deem it appropriate. Mediation provides foreign investors with a less costly, more expeditious and non-adversarial option. Affected communities can be given the rights to participate in domestic judicial proceedings and third-party funding can be governed by domestic rules. Removing the threat of ISDS litigation would reduce the negative chilling effect on regulatory decisions.

4. Exhaustion of domestic remedies

A requirement to exhaust local remedies recognizes that domestic courts are the most appropriate jurisdiction to hear a grievance arising in the public domain and to rule on the relevant facts and law.[10] Doing so shows respect for the country's institutions and allows the state to resolve the matter before it is elevated to an international tribunal. If and when international tribunals become involved, they act as a supplement to, instead of a substitute for, domestic courts. Where relevant, the domestic court record can help the international tribunal conduct its own review. As UNCTAD observed, increased reliance on domestic courts, coupled with support for states whose legal systems are less developed, can also strengthen the rule of law and consistency of domestic jurisprudence and remedy some deficiencies that are used to justify ISDS.[11]

There are many possible permutations. The investor could be required to seek domestic remedies before the relevant domestic court or administrative tribunal within a specified period of becoming aware of the state's action. Where a government measure or action has already been litigated in domestic courts, its elevation to the international level could be limited to state–state arbitration and subject to the host state's consent. Alternatively, an investment arbitration claim might have to be filed within a specified period after the conclusion of domestic proceedings on the same measure or fact situation.

In accordance with customary international law, the investor should have access to an international forum after it has pursued domestic judicial or administrative remedies for a minimum period without satisfactory resolution. But that could be subject to mandatory consultation or negotiation, again with strict timelines. Equally strict timelines might apply for submitting the claim to international arbitration.

States might also adopt a hybrid approach. Domestic investment law or an international agreement could reserve certain disputes for the domestic courts; for example, those involving taxation, natural resources or obligations in treaties with Indigenous Peoples. Access to international arbitration could exclude certain investments that national courts have found were made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process, where claims relate to those decisions or the same factual matters.[12] Similar restrictions could apply to investors or investments that domestic courts found were in breach of labour, environment or human rights laws.

The USMCA subjects claims involving Mexico and the United States to a four-year limitation for lodging an ISDS dispute.[13] The investor must first seek redress from the host state's domestic courts with respect to the measures alleged to constitute a breach until they obtain a decision or 30 months from when the proceeding was initiated, whichever is sooner.[14] Accordingly, there is an 18-month window for lodging an investment claim. However, an investor can seek to bypass the domestic court phase where it claims recourse to domestic remedies is obviously futile[15] or under other customary international law exceptions to the exhaustion requirement.[16]

[10] See Brauch, M. D. (2017, January). Exhaustion of local remedies in international investment law. *IISD Best Practices Series*. Geneva: IISD. Retrieved from https://www.iisd.org/library/iisd-best-practices-series-exhaustion-local-remedies-international-investment-law

[11] UNCTAD. (2015, June 25). *World investment report 2015: Reforming international investment governance.* Geneva: UNCTAD, p. 149. Retrieved from https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245

[12] See CETA, October 30, 2016, Art. 8.18(3). Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01)

[13] USMCA, *supra* note 2, Art. 14.D.5(1)(c).

[14] Id., Art. 14.D.5(1)(a)–(b).

[15] Id., Art. 14.D.5(b), footnote 25.

[16] See Draft Articles on Diplomatic Protection, [2006] 2 Y.B. Int'l L. Comm'n 24, U.N. Doc. A/CN.4/SER.A/2006/Add.l (Part 2), Art. 15. Retrieved from http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf

The 2018 India–Belarus BIT, which applies the 2015 Indian Model BIT,[17] requires the investor to pursue domestic judicial or administrative remedies related to the measure for at least five years from when it became aware of the measure.[18] Where the investor finds no satisfactory resolution, it can pursue ISDS at ICSID or under UNCITRAL rules within even stricter timelines than USMCA.[19] A fork-in-the-road clause requires the investor who initiates arbitration to abandon any ongoing domestic proceedings with respect to the same measure.[20] The agreement also prohibits a tribunal from reviewing the merits of a decision of a domestic judicial authority.[21]

A third example is the BIT between Morocco and Nigeria signed in 2016. Access to ISDS is conditional on a combination of a Brazilian-style CFIA Joint Committee process and exhaustion of local remedies in the courts of the host state.[22]

Assessment: The combination of exhaustion of local remedies, strict timelines and preserving certain matters for domestic courts respects the regulatory sovereignty of the host state and the jurisdiction and authority of domestic courts and is likely to channel most disputes to those courts. If a matter proceeds to international arbitration, the strict timelines could also prevent abuses of process, especially where there is a fork-in-the-road clause. This approach might shorten duration and hence cost. However, concerns over certainty, predictability and third-party funding would continue. Affected communities would have no additional rights to participate in the arbitral process beyond standard ICSID and UNCITRAL rules. The potential for regulatory chill would remain.

Conclusion

As Phase 3 proceeds, Working Group III will need to propose credible, durable and effective solutions to the deep-seated, systemic problems confronting the international investment regime. These are just some of the options for the process side of the equation, which need to be complemented by fundamental changes to the unbalanced investor protection rules. Failure to look beyond the two limited reforms that have dominated the working group discussions on process to date will doom the current UNCITRAL initiative to irrelevancy.

Author

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[17] Government of the Republic of India. (2015, December). *Model text for the Indian bilateral investment treaty*. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download

[18] Treaty between the Republic of Belarus and the Republic of India on investments, September 24. 2018 (not in force), 15.2. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/3839/belarus---india-bit-2018-

[19] Id., Arts. 15 and 16.1.

[20] Id., Art. 15.6.

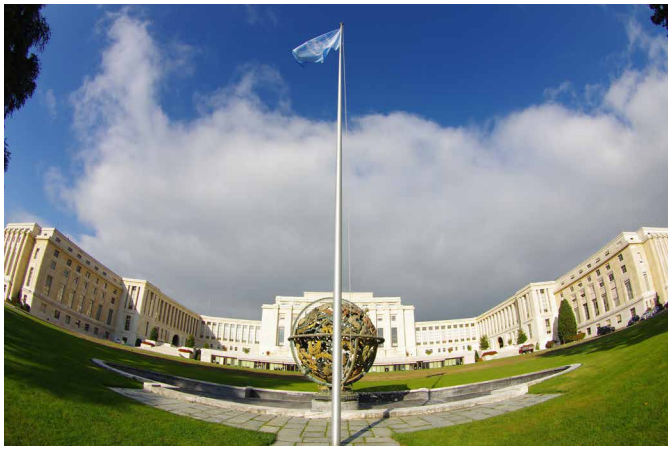
[21] Id., Art. 13.4(i).

[22] Reciprocal investment protection and promotion investment agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, December 3, 2016, Art. 26.5. Retrieved from https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/3711/morocco---nigeria-bit-2016-

INSIGHT 3

The Revised Draft of a Treaty on Business and Human Rights: Ground-breaking improvements and brighter prospects

Carlos Lopez



The revised draft of an international treaty on the issue of business and human rights[1] released on July 16, 2019 presents important changes and much-needed improvement in relation to the so-called zero draft published in 2018.[2] It is also a far more coherent, well-constructed and mature text than its predecessor. The revised version was prepared by the chairperson of the Open-ended Intergovernmental Working Group (OEIGWG) mandated by the United Nations (UN) Human Rights Council to elaborate such a treaty.[3] The text makes crucial choices aimed at resolving contentious questions that have bedevilled negotiations and hopefully will constitute a turning point in the process. The new draft will form the basis for negotiations at the textual level, beginning with the fifth session of the OEIGWG to be held October 14–18, 2019.

Among the most important changes is that the revised draft affirms that the scope of the proposed treaty encompasses all business enterprises, not just transnational companies, while still emphasizing businesses with transnational activities. In addition, it aligns the provisions on prevention and due diligence with the UN Guiding Principles on Business and Human Rights (UNGP)[4] and proposes a comprehensive article on legal liability of business enterprises that is more in line with prevailing international law and national practice than the respective provisions in the zero draft. The revised draft also brings some novelties such as new articles on implementation (Art. 15) and settlement of disputes (Art. 16), while providing more streamlined and complete language related to access to remedy, justice and reparations. It also presents articles that address the situation of human rights defenders, providing them with special protection in their work promoting business enterprises' responsibilities for human rights.

Broad scope: An important clarification

The revised draft breaks with the zero draft's presumption that the scope of the treaty was limited to regulating the transnational activities of business enterprises. Instead, it clarifies that the proposed treaty will cover all business enterprises and all their activities. Nonetheless, the revised draft emphasizes that it

[1] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (IGWG). (2019). *Revised draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.* Retrieved from https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf ["Revised draft"].

[2] IGWG. (2018, July 16). *Zero draft of a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.* Retrieved from https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf ["Zero draft"]. See also Lopez, C. (2018). Toward an international convention on business and human rights. *Investment Treaty News, 9*(3). 13–16. Retrieved from https://www.iisd.org/itn/2018/10/17/toward-an-international-convention-on-business-and-human-rights-carlos-lopez

[3] Human Rights Council. (2014, July 14). *Resolution 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights* (A/HRC/RES/26/9). Retrieved from http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/26/9; see also Zhang, J., & Abebe, M. (2017, December). The journey of a binding treaty on human rights: Three years out and where is it heading? *Investment Treaty News, 8*(4), 3–4. Retrieved from https://www.iisd.org/itn/2017/12/21/the-journey-of-a-binding-treaty-on-human-rights-three-years-outand-where-is-it-heading-joe-zhang-and-mintewab-abebe; Zhang, J. (2015, November). Negotiations kick off on a binding treaty on business and human rights, *Investment Treaty News, 6*(4), 10–11. Retrieved from https://www.iisd.org/itn/en/2015/11/26/negotiations-kick-off-on-a-binding-treaty-on-business-and-human-rights

[4] UN OHCHR. (2011). *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework.* Retrieved from https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

addresses particularly those businesses with transnational activities. Art. 3(1) reads:[5]

> This (Legally binding instrument) shall apply, except as stated otherwise, to all business activities, including particularly but not limited to those of a transnational character.

In this way, the revised draft attempts to bring a balanced focus on the transnational (or cross-border) activities of business enterprises while also applying its substantive provisions to other businesses that do not have cross-border activities. Many state delegates along with NGO and business observers requested this balanced approach during the IGWG sessions,[6] and some states, including EU members, had even justified their absence from the debates on account of the limited scope proposed in the zero draft and predecessor documents. The revised draft takes away this objection—assuming it was sincere—paving the way for a negotiation focused on the substance of the treaty provisions, leaving behind issues and arguments that are mostly political in nature.

Legal liability

A major improvement can also be seen in the area of legal liability, where some of the zero draft provisions are preserved, but the bulk of the article (currently Art. 6) has been substantially redrafted and streamlined. Standing out, in particular, are certain provisions which aim at creating a comprehensive system of legal liability for human rights abuses committed by business enterprises or with their participation. For instance, Art. 6(1):[7]

States Parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability for human rights violations or abuses in the context of business activities, including those of transnational character.

This provision potentially encompasses civil, criminal and administrative liability but also the various modalities and models of civil liability, including torts based on negligence, strict liability and other forms of civil liability. The implementation of this provision, and others, will necessitate adequate guidance that can be provided, among other sources, by the monitoring body to be created under the treaty.

There are several other provisions in Art. 6 that have enormous importance and deserve extensive commentary beyond the present article. For instance, Art. 6(6) posits a standard of legal responsibility of one company in relation to the harm caused by another company, no matter where the latter is located, when the former company controls or supervises the activities that caused the harm. However, the reach of this provision is obscured by the reference to "contractual relationship" between the two companies, which is an unnecessary limitation to the potentially vast ways in which companies relate to one other.

But out of all the provisions it is Art. 6(7) that stands out for its potential reach and impact in terms of legal responsibility and reparations for victims:[8]

> Subject to their domestic law, State Parties shall ensure that their domestic legislation provides for criminal, civil or administrative liability of legal persons for the following offences.

These offences include: war crimes, crimes against humanity and genocide; torture; cruel, inhuman or degrading treatment; enforced disappearance; extrajudicial execution; forced labour; forced eviction; slavery; forced displacement of people; human trafficking, including sexual exploitation; and sexual and gender-based violence.

The draft treaty also requires that domestic law provide legal liability for "acts that constitute attempt, participation or complicity in a criminal offence in accordance with Article 6(7)" but controversially also keeps the reference to "criminal offences as defined by their domestic law,"[9] where there is no need to do so.

This article provides, for the first time, a list of well-defined offences that would normally trigger criminal sanctions in accordance with principles

[5] Revised draft, *supra* note 1, Art. 3(1).
[6] Human Rights Council. (2019, March 6). *Addendum to the report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights*, UN Doc A/HRC/40/48/Add.1, pp. 70-78. Retrieved from https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/A_HRC_40_48_Add.1.docx
[7] Revised draft, *supra* note 1, Art. 6(1).
[8] Revised draft, *supra* note 1, Art. 6(7).
[9] Revised draft, *supra* note 1, Art. 6(9).

of international law. However, in the context of business enterprises that are legal persons, such liability could be civil, administrative or criminal, given the divergent practices and legal systems across jurisdictions. This article follows, in an imperfect way, the formula adopted in the first Optional Protocol to the Convention on the Rights of the Child, on the sale of children and child pornography, which contains a similar provision providing for legal liability of legal entities for their involvement in offences defined in the protocol. That optional protocol requires states to criminalize the commission of a series of offences by natural persons including child pornography and, in Art. 3(4), requires states to create legal liability for legal entities also for the same offences, using the following formula:[10]

> Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative.

A provision of this type is a welcome addition to the draft treaty because a series of offences catalogued as crimes under international law (or for which international law requires criminalization) had to be given separate treatment in the treaty, given their special gravity. But many states do not recognize in their legal systems the criminal responsibility of business corporations. Several states, including Argentina and Russia, made clear in past sessions of the OEIGWG their opposition to formulas that would require them to adopt legal criminal liability for business enterprises as legal entities. In this context, the revised draft treaty leaves states the choice of what type of liability (criminal, civil or administrative) they will set out in the law, and is probably the most realistic, while, at the same time, effective in achieving the objective of applying sanctions that are commensurate to the gravity of the offences committed. Although it would be better to have a straight requirement for criminal liability in this treaty, practice of states under other treaties with similar provisions shows that states tend to enact some form of criminal liability when serious or grave offences are at stake, or at least, to apply the most severe sanctions against the culprits, to reflect the serious nature of the offence committed.

Although Art. 6 will surely generate some controversy in relation to the list of included offences, their definitions, or even the convenience of having a separate provision for serious offences, its inclusion is a step forward that overcomes previous objections to the language used in the zero draft broadly referring to "crimes under international law," in breach of the principle of legality, which demands clear definitions of offences for the sake of legal certainty. It is also a positive provision for those states that accept criminal liability of business legal entities, but have only a limited set of offences for which such liability applies. These states would have to expand the realm of offences that business may commit to those listed under the new treaty, as a minimum.

Consistency with international law: Other agreements, including on trade and investment

The revised draft also brings changes with regard to the relationship of the treaty to other international treaties, notably those related to international trade and investment. The zero draft had two provisions that explicitly targeted that relationship:[11]

6. States Parties agree that any future trade and investment agreements they negotiate, whether amongst themselves or with third parties, shall not contain any provisions that conflict with the implementation of this Convention and shall ensure upholding human rights in the context of business activities by parties benefiting from such agreements.

7. States Parties agree that all existing and future trade and investment agreements shall be interpreted in a way that is least restrictive on their ability to respect and ensure their obligations under this Convention, notwithstanding other conflicting rules of conflict resolution arising from customary international law or from existing trade and investment agreements.[12]

[10] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, New York, May 25, 2000. Retrieved from https://undocs.org/A/RES/54/263

[11] Zero draft, *supra* note 2, Art. 13(6)–(7).

[12] Human Rights Council, *supra* note 6, pp. 44–51.

Most states targeted these provisions with strong criticism during the 4th session of the OEIGWG in October 2018. Such criticism ranged from stern warnings of possible conflicts between treaty obligations to outright opposition to the presumed superiority of the present treaty obligations over obligations under trade and investment agreements. Only Namibia had a supportive opinion, while South Africa called for clearer language underlining the need to address constraining investment agreements.

To address those concerns, the revised draft treaty replaces the contentious paragraphs for a single paragraph of more limited reach, but one that aims at ensuring compatible interpretation and application of trade and investment agreements with the present treaty on business and human rights:[13]

> States Parties agree that any bilateral or multilateral agreements, including regional or sub-regional agreements, on issues relevant to this (Legally Binding Instrument) and its protocols, shall be compatible and shall be interpreted in accordance with their obligations under this (Legally Binding Instrument) and its protocols.

This approach, although arguably less ambitious than the zero draft, may in the end prove to be the most easily acceptable by states and effective given the realities of international law. However, future work may attempt to rescue some of the elements from the zero draft or add some new elements to the draft treaty. For instance, some consideration may be given to the idea that states should "ensure upholding human rights in the context of business activities by parties benefiting from such agreements,"[14] given that an increasing number of trade and investment agreements have provisions on the promotion of responsible business conduct. States may also assume the obligation to subject trade and investment agreements to specific vetting and approval procedures, among others.

Conclusion

The revised draft treaty is a welcome and crucial step forward in the process of establishing a legally binding instrument in the field of business and human rights, overcoming most of the most serious—and even the less serious—objections relating to the scope of the treaty and its complementary character in relation to other instruments. There are still many aspects of the treaty and its provisions that require refinement during the process of negotiation. Others, such as the provision relating to jurisdiction, require further development or completion. The revised draft treaty is sufficiently clear and comprehensive so as to be the subject of serious negotiations.

The changes, particularly those relating to the scope of the treaty and the incorporation of the UNGPs in the preamble and in Art. 5 on prevention, directly address the stated concerns of a substantial block of stakeholders that have so far been reluctant to participate meaningfully in the process, especially the EU and its member states. With these major obstacles removed, all eyes will be on these states to see the extent of movement on their parts. Serious engagement by the EU and similarly situated states would send a strong signal regarding their commitment to human rights in this field and brighten the prospects for an ultimately positive outcome from the negotiation process.

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[13] Revised draft, *supra* note 1, Art. 12(6).
[14] Zero draft, *supra* note 2, Art. 13(6).

INSIGHT 4

ICSID Rule Amendment: An attempt to remedy some of the concerns regarding ISDS identified by UNCITRAL WG III

Rafael Ramos Codeço & Henrique Martins Sachetim

1. Introduction

In the midst of the ISDS crisis and the UNCITRAL Working Group III (WG III) discussions to reform the investment arbitration regime, the ICSID secretariat initiated consultations with ICSID member states and the general public to identify areas of the ICSID rules where reform would be needed. This marks the fourth rule amendment process and is the most extensive review to date.[1]

The consultation resulted in 16 areas for potential rule amendment,[2] which coincide with several concerns identified by UNCITRAL member states—notably the lack of consistency of arbitral awards, the lack of independence and impartiality of arbitrators, the lack of transparency, as well as the high costs and excessive duration of ISDS proceedings.

This article analyzes whether and how the current ICSID rule amendment process could remedy concerns identified by the UNCITRAL WG III with respect to investor–state arbitration and improve the functioning of the ISDS regime.

[1] See the ICSID webpage about the rule amendments, available at https://icsid.worldbank.org/en/amendments

[2] See the list of topics for potential ICSID rule amendment, available at https://icsid.worldbank.org/en/Documents/about/List%20of%20Topics%20for%20Potential%20ICSID%20Rule%20Amendment-ENG.pdf

2. Improving consistency of ICSID arbitral awards

Although ICSID tribunals settle investment disputes on the basis of diversely worded treaty provisions, they tend to develop a homogeneous application of international investment law. However, ICSID could do significantly more to enhance the consistency of the awards issued by its numerous tribunals.[3]

Proposed Arbitration Rule 45 innovates by introducing options for voluntary consolidation of claims, subject to the parties' consent.[4] These options include the appointment of the same arbitrators to hear otherwise separate cases, organizing joint hearings and ensuring that the awards are rendered simultaneously. The consolidation of claims tends to reduce the costs of proceedings and improve the consistency of the awards in cases where the background of the disputes is identical or similar. This novelty replicates provisions already in place for the permanent courts recently negotiated by the European Union in its agreements with Canada and with Vietnam.[5]

The first version of the working paper guiding the ICSID rule amendment process included, for consideration of member states, a provision (AR 38 bis) on mandatory consolidation ordered by a tribunal.[6] However, the provision is no longer featured in the second and third working papers, which propose voluntary consolidation only.

[3] Fauchald, O. K. (2008). The legal reasoning of ICSID tribunals–an empirical analysis. *European Journal of International Law, 19*(2), 301–364.

[4] For the current (third) version of the proposed Arbitration Rules and Administrative and Financial Regulations (AFRs), in English, French and Spanish, see ICSID Secretariat. (2019, August). *Proposals for amendment of the ICSID rules* (Working paper #3, v. 1). Retrieved from https://icsid.worldbank.org/en/Documents/WP_3_VOLUME_1_ENGLISH.pdf [hereafter "Working Paper"].

[5] See Comprehensive Economic and Trade Agreement between Canada and the European Union, October 30, 2016 (entered into force provisionally September 21, 2017), Art. 8.43.1. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22017A0114(01); and Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, June 30, 2019 (not in force), Art. 3.59.1. Retrieved from https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1551257348905&uri=CELEX:52018PC0691

[6] ICSID Secretariat. (2018, August). *Proposals for amendment of the ICSID rules* (Working paper #1, v. 3). Retrieved from https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf

3. Addressing the lack of independence and impartiality of arbitrators

Without going so far as abandoning the current scheme of party appointments, the amendments attempt to improve selected provisions that could affect the arbitrators' independence and impartiality. For example, revisions are proposed to the process of challenging arbitrators, including the introduction of an expedited schedule for parties to file a challenge, as well as an enhanced declaration of independence and impartiality.[7]

Moreover, the ICSID secretariat, together with the UNCITRAL secretariat, is working on a code of conduct for arbitrators aimed at ensuring the consistency of ethical requirements across all the major sets of rules used for ISDS.[8] Once final, this code of conduct would become an amendment to the ICSID arbitration rules. It will be crucial for ICSID to ensure that the new code of conduct will be binding on all ICSID arbitrators and annulment committee members.

Proposed Arbitration Rule 19 increases the information disclosure requirements from appointed arbitrators. The new format of the declaration requires the disclosure of significant relationships within the preceding five years between the appointee and the parties, the parties' counsel, other members of the tribunal or third-party funders, and of any involvement of the appointee in other investor–state cases, in any capacity.[9] These provisions could prevent conflicts of interest during the selection process by providing the parties with more complete information on how to instruct a disqualification claim. However, they fall short of prohibiting "double hatting," the controversial arbitrator–counsel dual role.

4. Promoting the transparency of proceedings

The proposed Arbitration Rule 66 aims for the greater participation of non-disputing parties (NDPs). The possibility of NDPs making written submissions has existed in the ICSID rules since 2006. The changes incorporate new provisions based on practice and experience to date and are meant to further codify how NDP participation is currently regulated, without creating mechanisms to make it easier or more effective.

Proposed Arbitration Rule 66(6) states that "the Tribunal may provide the [NDP] with access to relevant documents filed in the proceeding, unless either party objects."[10] Even though an NDP is granted permission to file an amicus curiae submission, the tribunal may still decide not to provide it with access to the relevant documents. This significantly hinders the ability of the NDP to make a meaningful submission. ICSID's choice to use the word "may" rather than "shall," together with establishing criteria based on which a party is allowed to oppose an NDP submission, significantly limits the capacity of this provision to enhance the transparency of ISDS proceedings.

Moreover, parties would still be able to prevent the NDP from accessing any document that they might classify as confidential. The novelties also include additional criteria for consideration as to whether to allow written submissions from an NDP, such as the identification of its activity or any affiliation with a disputing party, and whether the NDP has received any assistance with its filing. This will allow the tribunal to better assess whether there are any relationships between the NDP and a party. However, the amended rules would continue to offer limited opportunities for effective participation of affected non-party stakeholders, despite the public interest issues often involved in ISDS proceedings.

Third-party funding is thought to exacerbate pathologies in the ISDS regime by fuelling speculative claims, as well as its asymmetric operation in favour of claimants.[11] However, proposed Arbitration Rule 14 treats third-party funding as a transparency issue; it merely imposes the obligation on the parties to inform whether they have third-party funding, the source of the funding, as well as the requirement of keeping such disclosures updated throughout the proceeding. The identity of the funder is required to be disclosed to potential arbitrators before their appointment.

[7] ICSID Secretariat. (2018). *Backgrounder on proposals for amendment of the ICSID rules*. Retrieved from https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf [hereafter "Backgrounder"].
[8] ICSID Secretariat. (2018). *Proposals for amendment of the ICSID rules — Synopsis*. Retrieved from https://icsid.worldbank.org/en/amendments/Documents/Homepage/Amendments-Vol_1_Synopsis_EN,FR,SP.pdf [hereafter "Synopsis"].
[9] Working Paper, *supra* note 4.
[10] Working Paper, *supra* note 4, p. 212.
[11] Howse, R. (2017). Designing a multilateral investment court: issues and options. *Yearbook of European Law, 36*, 209–236.

Even so, "whether minimal or extensive, transparency in third-party funding is insufficient to address the broader concerns identified beyond arbitrators' conflicts of interest."[12]

5. Reducing the costs of proceedings

Proposed Administrative and Financial Regulation (AFR) 14(1) would modify the current rule to entitle members to a fixed fee, measured only by hours of work, rather than the current method of a flat daily fee irrespective of the number of hours worked during the hearings. The new rule aims to ensure that the work performed is compensated more transparently and exactly but has no effect in reducing costs of proceedings. Moreover, proposed Arbitration Rule 3(1) states that all filings would have to be done electronically, unless the tribunal orders otherwise in special circumstances, in an attempt to make the processes faster and less expensive.[13]

Furthermore, proposed AFR 14(2) further regulates requests by tribunal members to be paid more than the ICSID fee (currently USD 3,000 per day), requiring that it must be made through the Secretary-General before the first session and must be justified. The proposed amendments could simplify the financial administration of proceedings, but the potential to make them cheaper is very low.

6. Establishing time limits to expedite cases

Current Arbitration Rule 46 deals with the preparation and timing of the award, determining that the award must be rendered within 120 days after the closure of the proceedings. However, since tribunals normally do not close the proceedings until the award is almost finalized, this provision rarely limits the time for deciding a case.[14] The latest available numbers demonstrate that the average duration of ICSID arbitration proceedings, from the registration of the case until the rendering of the award, is approximately 49 months.[15]

The proposed amendments aim at setting clearer timeframes and implement options for expedited proceedings, featuring additional and shortened timelines. Proposed Arbitration Rule 57 sets clear expectations for tribunal members to render the award in a timely manner, while maintaining flexibility based on the circumstances of each case. It states that awards must be rendered within 60 days after the last submission of an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection, and 240 days after the last submission on all other matters.

Another modification aimed at reducing the duration of ISDS proceedings is the adoption of an expedited schedule for parties to challenge arbitrators. Mentioned as one of the most prominent causes for delays in the conclusion of ISDS cases, challenges to arbitrators are one of the three most significant delaying factors concerning procedural events that occur during an arbitration.[16]

Proposed Arbitration Rule 22 would introduce an expedited schedule for parties to file a challenge, where a specific time limit of 21 days for filing a disqualification motion replaces the former requirement that it should be filed promptly. The proposed rules also require all arguments and supporting documents to be included in the disqualification proposal, transforming what could otherwise be a formally lodged challenge into a complete written submission.

While aimed at reducing the overall duration of ISDS proceedings, the proposed rules on expedited proceedings and schedules with shortened time limits can increase costs for respondent states, requiring their legal defence to be conducted with more intensity to cope with shorter deadlines, and can be burdensome to developing countries who already lack capacity and resources. Therefore, a careful

[12] IISD. (2019, April). *Summary comments to the proposals for amendment of the ICSID arbitration rules*. Geneva: IISD, p. 13. Retrieved from https://www.iisd.org/library/summary-comments-proposals-amendment-icsid-arbitration-rules. See also Güven, B. & Johnson, L. (2019, June). Third-party funding and the objectives of investment treaties: friends or foes? *Investment Treaty News, 10*(2), 4–7. Retrieved from https://iisd.org/itn/2019/06/27/third-party-funding-and-the-objectives-of-investment-treaties-friends-or-foes-brooke-guven-lise-johnson

[13] Backgrounder, *supra* note 7, p. 2.

[14] Working Paper, *supra* note 6, para. 257.

[15] Ibid.

[16] Langford, M., Behn, D. & Létorneau-Tremblay, L. (2019). Empirical perspectives on investment arbitration: What do we know? Does it matter? ISDS *Academic Forum Working Group 7 Paper*, p. 20. Retrieved from https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf

and comprehensive study is necessary to assess the potentially problematic implications of the proposed amendments for respondent states.

7. Conclusion

The areas for potential amendment of ICSID rules have a clear correlation with the concerns with respect to ISDS identified by UNCITRAL WG III. The proposals attempt to address some of the issues of high costs and long duration of ISDS proceedings by setting up clearer rules envisaged to make the process more predictable and simpler.

The proposed changes, however, are neither intended nor designed to make profound changes in the current regime of investor–state arbitration. Instead, they demonstrate a preference to only minimally depart from existing rules, maintaining the status quo and making mere cosmetic changes. Furthermore, it is unclear whether the amendments would effectively reduce costs for respondent states, and ICSID members should carefully consider whether certain proposed duration cuts would not impose additional burdens on state defence. Finally, short of prohibiting double hatting and third-party funding, the proposed amendments merely codify their regulation.

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