PROGRESS TOWARDS A MULTILATERAL INVESTMENT COURT? EU MOMENTUM-BUILDING AND DIVISIONS IN UNCITRAL WORKING GROUP III

This article considers the European Commission's proposal for the development of a multilateral investment court system and reform of investor-state dispute settlement, following the report by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III of its 35th session in New York on 23-27 April 2018.

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In the past few years, discontent about **investor-state dispute settlement (ISDS)** has been fomenting in various parts of the world but nowhere more so than within the EU. The European Commission's focus on ISDS has been so intense that far-reaching reform has been portrayed by many as inevitable. The Commission's proposal is for the development of a multilateral investment court system (MIC).

The proposal is ambitious, but may not be realistic or achievable. Last year, the ISDS debate moved into the auspices of the United Nations Commission on International Trade Law (UNCITRAL) Working Group III (WG III), which had its 35th session in New York on 23-27 April 2018. It is recognised in the report of the 35th session that this "constitute[s] a unique opportunity to make meaningful reforms in the field" (see *Legal update, UNCITRAL Working Group III issues report on latest ISDS discussions)*. Certainly, the involvement of high level government representatives from across the world and the transparent nature of WG III's process suggest this forum provides the conditions for systemic reform. However, the features of the WG III process expose the Commission's plans to global scrutiny at a relatively early stage in their development, potentially before the Commission has managed to gain significant support for wholesale change. One of the EU delegation, in its capacity as an observer, noted in the 34th session that the EU was "confident that UNCITRAL is a forum where a solution can be found" even where the delegates start from different positions (see *Legal update, UNCITRAL Working Group III issues report on 34th session*). The question will be whether the conclusion of the deliberations will lead to the reform that the Commission wants.

THE EU'S "POSITIONING"

In the past few years, the EU institutions have devoted significant capacity to the reform of ISDS. Discussions about ISDS have taken place within the European Parliament, with numerous questions having been tabled on the topic. In its resolution of July 2015, the European Parliament "stressed the need to... replace the ISDS system with a new system for resolving disputes between investors and states which is subject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings" and include an appellate mechanism.

This represented a rejection by the European Parliament of the reformed version of ISDS contained in the Commission's May 2015 concept paper (see *Legal update, Cecilia Malmström publishes concept paper on reform of ISDS in the TTIP*). Once the majority of the European Parliament rejected ISDS, the Commission had to react

accordingly as the approval of the European Parliament is required for international agreements. The Commission has thus developed its thinking over a number of years towards a commitment to the eventual establishment of an MIC. Moreover, it has held a number of stakeholder meetings, garnered support for the MIC at member state level and indeed taken opportunities to extend this support internationally.

On 20 March 2018, the EU Council published negotiating directives authorising the Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes between investors and states (see *Legal update, Council of the European Union adopts and publicises negotiating directives for multilateral investment court*). The negotiating directives have their foundation in the Commission's Recommendation for a Council Decision authorising the opening of negotiations for a convention establishing a multilateral investment court, published in September 2017 (*Legal update, European Commission authorises negotiations to establish multilateral investment court*). However, the timing of the publication and the significance of the negotiating directives in terms of the EU's position in the UNCITRAL discussions cannot be overlooked.

The EU itself is not a member of UNCITRAL, but its member states are. It is recorded in the negotiating directives that:

> "... [i]n accordance with the principles of sincere cooperation and of unity of external representation as laid down in the Treaties, the Union and the Member States of the Union participating in the negotiations **shall fully coordinate positions and act accordingly throughout the negotiations**" (emphasis added).

The negotiating directives further confirm that:

> "... [i]n the event of a vote, the Member States which are Members of the United Nations Commission on International Trade Law **shall exercise their voting rights in accordance with these directives and previously agreed EU positions**" (emphasis added).

The Commission therefore appears to be in a strong position: in theory at least, it can anticipate that the currently 28-strong bloc will support and progress its MIC proposal within the discussions in the UNCITRAL WG III (as the UNCITRAL process continues, the EU is continuing to maintain pressure: notably, of the three submissions received by UNCITRAL Working Group III in advance of the 35th session, one has been received from the EU (see *Legal update, UNCITRAL Working Group III on ISDS reform publishes submission from EU*)). Such support may be considered to be consistent with the approval of the negotiating directives by the Council in the first place, given the Council is comprised of the heads of state or head of government of the EU member states.

EU-SINGAPORE IPA: A "WIN" FOR THE COMMISSION?

There have been a number of opportunities for the Commission to test the appetite of other countries for a move away from investment arbitration for resolution of investor-state disputes. Most recently, the Commission has concluded an important trading and investment partnership with Singapore by way of the EU-Singapore Free Trade Agreement and EU-Singapore Investment Protection Agreement (EUSIPA) (neither of these are ratified: the EUSFTA will be ratified by the EU and Singapore, whereas the EUSIPA must be ratified by both the EU and its member states, and Singapore) (see *Legal update, Bilateral trade: European Commission proposes Council Decisions on signing and conclusion of EU-Singapore Free Trade Agreement and Investment Protection Agreement*).

Under the EUSIPA, investor-state disputes will be resolved by a permanent two-tier investment court established for that purpose. (This represents the EU's "investment court system". The "cornerstones" of the "investment court system" are described by the EU as including a permanent investment tribunal of first instance and an appellate tribunal, with members of both appointed by the parties to the agreement and subject to strict rules of independence and a code of conduct; with expertise in public international law and possessing the qualifications required in their respective countries for appointment to judicial offices or be jurists of recognised competence.) Moreover, both the EU and Singapore commit to "pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes".

This commitment is significant. As one of the richest countries in the world in terms of GDP per capita, Singapore may find itself contributing to any MIC in a way that is wholly disproportionate to its historic use of ISDS (either as

respondent or by its investors). This may have suggested that it would be predisposed to reject the proposal. It has not done so and, as a member of the Association of Southeast Asian Nations (ASEAN) and current ASEAN chair, Singapore may be able to influence other countries in the region to take the same path.

However, the EUSIPA does not necessarily represent the wholesale rejection of investment arbitration by Singapore, or indeed indicate a shift away from investment arbitration in the Asia-Pacific region. Finalisation of the text of the EUSIPA comes shortly after the conclusion of another important trade agreement in that region, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (see *Legal update, Limitations on ISDS provisions in revised CPTPP*). In the CPTPP, both the substantive investor protections and the procedural framework for dispute resolution have developed from those contained in more traditional **bilateral investment treaties** (BITs) and **multilateral investment treaties** (MITs); both could be seen to be more protective of state interests. This may or may not be why 11 states (notably including Singapore and three other of the ten ASEAN member states) have agreed that investor-state disputes under the CPTPP will be resolved by ad hoc arbitration (other than side letters agreed by New Zealand with five signatories to the CPTPP – Brunei Darussalam, Malaysia, Peru, Vietnam and Australia, which either exclude of restrict use of ISDS) (see *Legal update, 11 countries sign CPTPP*). Interestingly, the government of Korea has proposed an intersessional Asia-Pacific meeting on ISDS reform in advance of the 36th Session of WG III: this meeting may shed further light on current thinking amongst the governments in the region.

The EUSIPA text is significant for another reason: enforcement. The negotiating directives recognise the importance of an effective way of enforcing the decisions of an investment court but do not indicate how the EU envisages this will be achieved. Article 3.22 of the EUSIPA contains a commitment by the parties to recognise an award rendered pursuant to the EUSIPA as binding, and "enforce the pecuniary obligation within its territory as if it were a final judgment of a court in that party" (language transposed almost word for word from the **ICSID Convention**). The text also confirms that final awards are arbitral awards relating to claims that are considered to arise out of a commercial relationship for the purposes of the **New York Convention**. This does not provide a perfect solution for enforcement of decisions of the EUSIPA investment court; states that are not party to the EUSIPA are not bound by its terms and therefore their domestic courts may not recognise a decision of the court as an arbitral award in this way. However, it does indicate that the negative view of investor-state arbitration within the EU (Trade Commissioner Malmström has described ISDS as "the most toxic acronym in Europe") has not dissuaded the EU from using current systems for the enforcement of arbitral awards to suit the investment court agenda.

A BIGGER TEST: EU-JAPAN

The EU continues to discuss ISDS in the context of its negotiation of an economic partnership agreement with Japan. The text of the EU-Japan Economic Partnership Agreement (EUJEPA) has been agreed with the only outstanding issues to be resolved being investment protection and ISDS (see *Legal update, Bilateral trade: European Commission adopts proposals for Council Decisions on signing and conclusion of EU-Japan Economic Partnership Agreement*). It is apparent that the investment court proposal is causing some disquiet.

Over the years, there has been some inconsistency in the way ISDS (and investment protection) has been viewed by Japan. Further, Japan has demonstrated some flexibility towards the inclusion (or not) of traditional ISDS provisions in its trade and investment agreements, with the decision apparently based on circumstance rather than principle (Japan's concluded a number of BITs in 2016, which came into force in 2017, all of which contain a reference to ad hoc arbitration, whereas the Japan-Philippines Economic Partnership Agreement makes clear that an arbitral tribunal will not have jurisdiction over an investor-state dispute arising under the investment chapter without the mutual consent of the parties to the dispute (see Article 106). More recent anecdotal evidence suggests that Japan remains **as yet** unconvinced about an investment court for the EUJEPA or the broader MIC initiative: the permanent multilateral court will likely place a significant financial burden on Japan (which, as host state, has never faced an investment claim) and may not represent the best system for Japanese investors.

This latter point is a significant concern for a capital-exporting nation. On 26 April 2018, the EU confirmed that no conclusion has been reached on "the mechanism for resolving investment protection disputes". Given that the investment chapter is already hived off, the differences should not interfere with the swift ratification of the rest

of the EUJEPA. However, the parties have confirmed that a further meeting will take place before the summer break in 2018, with the ambition of resolving the issue. Notably, the Japanese delegate made clear during the 34th session of WG III that his mandate was to engage in discussion on a "step by step" basis and that, whilst the Japanese delegation was open to future discussion about the reform of ISDS, Japan was not prepared to talk to a future solution, including a permanent court, prematurely.

UNCITRAL WORKING GROUP III: MORE DIVISION THAN CONSENSUS AND AN EARLY POLARISATION OF THE DEBATE?

The 34th session of WG III was intended to focus on evaluation and identification of problems rather than solutions, but, in any case, saw a degree of polarisation between groups of member states which considered that the current system should be the focus of specific improvements, and those which wish to adopt a more wholesale systemic reform. The audio recordings reveal that, whilst the EU may have garnered **some** support for systemic reform (and continued to push for this in its observations), there remained considerable work to be done in convincing a number of states, not least the US.

The report from the 35th session has just been published. At a superficial level, there is less evidence of the apparent polarisation of opinion perceptible from the report of the 34th session. On the contrary, the general sense one gets from the more recent report is of a more consistent focus on shaping the current system to address concerns. Whilst the report indicates some support for creation of a permanent judicial body, this does not resonate throughout. The audio recordings are not yet available; a more detailed consideration of the dialogue amongst the delegations will give more insight into the direction that reform of ISDS may take. If the outcome of WG III is not to establish a MIC, the EU may nonetheless seek to establish a plurilateral court to replace the separate investment courts set up to determine investor-state disputes under various of its free trade and investment agreements (at the time of writing, the EU-Vietnam Free Trade Agreement (see *Legal update, Bilateral trade: European Commission publishes text of EU-Vietnam Free Trade Agreement*), the EUSIPA, the Comprehensive Economic and Trade Agreement between the EU and Canada (see *Legal update, Bilateral trade: EU-Canada CETA trade agreement provisionally enters into force*), and the EU-Mexico Global Agreement (see *Legal update, Bilateral trade: EU and Mexico reach agreement on trade part of negotiations for a modernised EU-Mexico Global Agreement*) all envisage the establishment of separate investment courts, although it is not clear whether the same EU nationals could be appointed to more than one of those courts concurrently). The support of its counterparties to those agreements may not be guaranteed.