

Concept Note

ISDS Reform from the Perspectives of Developing Countries

12 September 2024, 12.15 hr.

62nd AALCO Annual Session, Bangkok Thailand

Background

1. Investor-state dispute settlement (ISDS) has been an integral part of international investment agreements (IIAs) providing a unique enforcement mechanism for these agreements. It has however raised the question on legitimacy of the international investment protection regime as the risk on the part of governments being taken to arbitration by an investor has curtailed policy space and resulted in “regulatory chill” in various countries.

2. The United Nations Commission on International Trade Law (UNCITRAL) has mandated its Working Group III in 2017 to work on possible ISDS reform, for example on how to deal with the inconsistency of arbitral decisions, conduct of arbitrators, and high cost of ISDS cases, particularly from the perspectives of least-developed and developing countries.

3. To execute this mandate, Working Group III has conducted deliberations among its members and observer organizations as well as engagement with various stakeholders. The process thus far has encompassed three phases, namely, Phase 1 (identification and consideration of concerns regarding ISDS), Phase 2 (consideration of desirability of reform in light of identified concerns) and Phase 3 (development of any relevant solutions to be recommended to the Commission if reform is desirable). Between 2017-2019, Working Group III had focused on Phase 1 and Phase 2.

4. After the first two phases, Working Group III has subsequently worked on seven reform elements, which are (1) codes of conduct, (2) investment mediation and dispute prevention, (3) multilateral advisory centre, (4) procedural rules reform and cross-cutting issues, (5) multilateral permanent investment court, (6) appellate mechanism, and (7) multilateral instrument to implement reforms.

Latest Developments

5. To date, Working Group III has produced four documents, namely, (1) UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, (2) UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution, (3) UNCITRAL Model Provisions on Mediation for International Investment Disputes, and (4) UNCITRAL Guidelines on Mediation for International Investment Disputes. These documents were submitted to the Commission at its 56th session in July 2023.

6. At its 48th session in April 2024, Working Group III concluded its consideration of a draft statute of an advisory centre on international investment dispute resolution, which was later adopted in principle by the Commission at its 57th session in July 2024. In addition, the Commission has also recommended using an informal process, whereby all interested Member States of the United Nations as well as Regional Economic Integration Organizations (REIOs) will be invited to work on issues concerning the operationalization of the Advisory Centre, such as: ways to establish the Advisory Centre within the United Nations system based entirely on extrabudgetary resources; criteria to determine the location of the headquarters and regional offices of the Advisory Centre; and anticipated budget based on the workload and ensuring sustainable operation.

7. To facilitate this informal process, Thailand has proposed to host an informal meeting in Bangkok on 2-4 December this year to discuss these operationalization issues with a view to expediting the establishment of the Advisory Centre, which once established will provide

training, support and assistance with regard to international investment dispute resolution, and also enhance the capacity of States and REIOs in preventing and handling international investment disputes, in particular for least-developed and developing countries. In addition, Thailand has expressed its interest in hosting the Advisory Centre in Bangkok given that the city can provide modern conveniences at reasonable costs as well as excellent connectivity and infrastructure.

Objectives

8. The 62nd Annual Session of the Asian-African Legal Consultative Organization (AALCO) to be hosted in Bangkok, Thailand, provides a great opportunity to update AALCO Member States about the progress made on ISDS reform under Working Group III given that not all AALCO Member States are members of the UNCITRAL.

9. In addition, the side event can be a platform for AALCO Member States to discuss how they can benefit from ISDS reform, for example, the Advisory Centre, to build their legal capacity and represent them in arbitration.

Format and Panelists

10. The event will be conducted in English and in a panel format on 12 September 2024, 12.15 hrs., during the 62nd AALCO Annual Session, with participants from AALCO Member States and other stakeholders.

11. Briefing on the background and latest developments of the ISDS reform (15 min.)

- By Dr. Jae Sung, Senior Legal Officer at the International Trade Law Division of the UNCITRAL

- Reform elements include code of conduct for arbitrators, model provisions on mediation for international investment disputes, an advisory centre on international investment dispute resolution, and appellate mechanism for ISDS

12. Presentation on how least-developed and developing countries can participate in and benefit from this reform process (10 min.)

- By Dr. Amnart Tangkiriphimarn, Associate Dean for International Affairs and International Programs of the Faculty of Law, Thammasat University and Director of the international LL.B. Program

13. Sharing Thailand's experience and insights in UNCITRAL Working Group III (10 min.)

- By Dr. Kraijakr Thiratayakinant, Counsellor at the Department of Treaties and Legal Affairs, Ministry of Foreign Affairs of Thailand

14. Q&A and discussion (10 min.)
