Investor-State Dispute Settlement Reform at UNCITRAL: A Looming Constitutional Moment?

2017 Roll of Honors – Changes to the Masthead

Some constitutional moments, like the transformation of France’s Third Estate into a National Assembly on 17 June 1789, come with a big blast and are recognizable as such almost immediately by its contemporaries. Others are quieter, more subtle; they creep in rather than explode, but are no less fundamental in transforming socio-institutional arrangements. The work of the United Nations Commission on International Trade Law (UNCITRAL) on ‘Investor-State Dispute Settlement (ISDS) Reform’, which started for good in late 2017, may well be the beginning of such a constitutional moment in international economic governance.

While Working Group III, tasked to address ISDS reform, is for now still focused on the first two of its three-step mandate – problem-analysis and assessing the desirability of reform – it will most certainly reach the final stage of its mandate and ‘develop any relevant solutions’. This is when a constitutional moment looms, in the argumentative showdown and decision on how to achieve systemic ISDS reform: whether through further institutionalization, for example by creating a permanent multilateral investment court, as supported by the European Union, or through more limited procedural reforms of investor-State arbitration, as championed by the United States. A third, minority position, supported above all by Brazil, would prefer a state-to-state system.

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an appeals body for investor-state arbitral awards or as a two-tiered investment court – it will bring about a watershed, a truly constitutional moment, in international economic governance comparable to the creation of the World Trade Organization (WTO) almost 25 years ago.

The creation of a permanent body could ensure the coherent and consistent application of international investment law, contribute to its further development, and help alleviate many of the other legitimacy concerns the present ISDS system has raised. The creation of such a body would be an appropriate way to address the ‘constitutional challenge’ the present ISDS system has posed for core constitutional principles common to many domestic legal systems, such as democracy, the rule of law, and human rights. That this is where the whole process is headed is underpinned both by the genesis of the UNCITRAL process, where the issue of further institutionalization loomed large, and the atmosphere in Vienna, which has been described as ‘highly political’ and ‘polarized’, as is typical and appropriate on the eve of constitutional moments.

Moreover, the current UNCITRAL process has the potential of delivering a constitutional response in the form of further institutionalization of ISDS. It provides a deliberative and transparent platform that allows for the type of debates that should precede constitutional moments. Already with respect to the choice of forum, the process has avoided traps of earlier negotiations of

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5 In fact, one of the driving forces in initiating the UNCITRAL process were prospects of developing the legal framework necessary for further institutionalization of ISDS. See UNCITRAL, ‘Possible Future Work in the Field of Dispute Settlement: Reforms of Investor-State Dispute Settlement (ISDS) – Note by the Secretariat’ UN Doc No A/CN.9/917 (20 April 2017) paras 29–32 and Gabrielle Kaufmann-Kohler and Michele Potestà, ‘Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a Permanent Investment Tribunal or an Appeal Mechanism? – Analysis and Roadmap’ (3 June 2016) <www.uncitral.org/pdf/english/commissionsessions/unc/unc-49/CIDS_Research_Paper_-_Can_the_Mauritius_Convention_serve_as_a_model.pdf> accessed 17 January 2018.

6 The start of the first UNCITRAL session on ISDS reform even saw the need for delegates to resort to a vote to break a deadlock over who was to chair the Working Group, possibly already driven by the looming issue of further institutionalization. For accounts of the Vienna session see Luke Eric Peterson, ‘UNCITRAL Meetings on ISDS Reform Get Off to Bumpy Start, as Delegates Can’t Come to Consensus on Who Should Chair Sensitive Process – Entailing a Rare Vote’ (IARreporter, 9 December 2017); Anthea Roberts, ‘UNCITRAL and ISDS Reform: Not Business as Usual’ (EJIL:Talk!, 11 December 2017).