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Guaranteeing the independence of the judges of a Multilateral Investment Court: A must for building the Court's credibility*

by
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A main reason for the backlash against investor-state dispute settlement (ISDS) is that ISDS does not adequately guarantee the independence and impartiality of arbitrators. In particular, the fact that many arbitrators also act as legal counsel and represent both investors and states is perceived as problematic.

To fix this (perceived) inadequacy, reforms must be pursued and enacted speedily. Various options exist. One extreme option would be to completely abolish ISDS and simply rely on domestic courts to resolve claims between foreign investors and states. This would be an undesirable option because, in many countries, the rule of law and the independence of the judiciary are compromised. Thus, a robust international legal infrastructure for ISDS remains necessary, though it should be simultaneously complemented by the strengthening of domestic legal systems.

Recently, the EU Commission submitted to UNCITRAL's Working Group III the basic outline of what a future Multilateral Investment Court (MIC) may look like.[1] The MIC would be a standing two-tier dispute-settlement mechanism with full-time adjudicators. One of the most dramatic changes to the current ISDS system is that only states would select and appoint MIC judges, thus eliminating any participation of claimants which, so far, appoint one of the three arbitrators. Admittedly, states would not make the selection for specific disputes. However, states are invariably respondents in investor-state disputes, so the proposed system may raise concerns about the MIC's independence and impartiality, including by affecting the principle of equality between the parties.

It is therefore absolutely crucial that the MIC's institutional design is very carefully considered and crafted. In particular, if a future MIC does not live up to the standards of independence and impartiality expected of a modern international court or tribunal, there is little point in even contemplating such a reform, as it is unlikely to fare any better than the current regime.

How to guarantee independence and impartiality?

Independence and impartiality are the cornerstone of a judicial system's credibility. While judicial "independence" demands that judges make their decisions purely based on the law and the facts of a case, free from any external pressures, "impartiality" requires that judges are not objectively or subjectively biased in their decision-making in a particular case. Given the significance of judicial independence and impartiality to the success of any future MIC, this issue needs to be subjected to detailed discussion and deliberation in UNCITRAL's Working Group III.

To guarantee the MIC's institutional independence, the Court must possess operational (administrative and financial) independence, as well as decisional independence (decisions should be enforceable). To ensure the individual independence of MIC judges, judicial selection should be based on merit and undertaken transparently, and security of tenure should be ensured (non-renewable terms that are relatively lengthy promote individual independence). To implement a robust impartiality regime, a judicial code of conduct ought to be enacted, rules for recusal should be properly enshrined in law and a judicial complaints mechanism should be established. For any future MIC to be considered independent and impartial, it should thus possess at least the following features:[2]

- An independent registry controlled by the court, administrative freedom on staffing matters and appropriate funding to ensure financial independence.
- A scheme ensuring the enforceability of court decisions.
- Implementation of non-renewable terms of judicial appointments that are approximately 7-9 years long, and other aspects guaranteeing financial security of judges.
- Establishment of an independent panel or body of experts playing a substantive role in the judicial selection process that operates in a transparent way.
- Implementation of a robust regime enhancing judicial impartiality.

Clearly, creating a MIC is resource intensive, time consuming and a significant shift away from the current regime. If reform efforts are to be effective, guaranteeing judicial independence and impartiality should constitute key features of the proposed MIC. Ultimately, to address the legitimacy and credibility deficit of the current regime, the rule of law and the domestic judiciary in most countries must be strengthened. Otherwise, the reform will just amount to changing the label as opposed to bringing about real and meaningful reform.

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[1] See submission of the EU and its member states to UNCITRAL's Working Group III, 24 January 2019, https://undocs.org/en/A/CN.9/WG.III/WP.159/Add.1.

[2] Some of these features have already been incorporated into the EU proposal; see ibid., footnote 1, para. 19 (security of tenure); para. 20 (qualifications); para. 22 (transparent appointment process); paras 30-32 (creating a self-standing enforcement mechanism); and paras 16-18 (ensuring provisions avoiding conflict of interest).

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