Kluwer Arbitration Blog

The Future of ISDS: Can't See the Wood or the Trees

Maarten Draye, Emily Hay (Hanotiau & van den Berg) · Wednesday, February 20th, 2019

On 22 November 2018, the Belgian Ministry of Foreign Affairs, Foreign Trade and Development Cooperation hosted a High Level Event on the Reform of Investment Protection. Distinguished panellists from arbitral institutions, international organisations, academia, civil society, arbitration users and legal practitioners presented diverse views on the need for reform of the system of investor-State dispute settlement ("ISDS"), the progress of current reform efforts, and the potential multilateral investment court ("MIC"). These insightful contributions surveyed the many and varied perspectives from which to view the current state of ISDS, and its future. At the end of the day, however, the distinct impression was that the various stakeholders in this debate are talking at cross-purposes, making it difficult to see either the wood or the trees.

Status of Current Reform Initiatives

A first wave of reforms is undertaken by ICSID. Meg Kinnear, Secretary-General of ICSID explained that the fourth comprehensive reform of the ICSID arbitration rules is well underway. The proposed amendments were published in August 2018, and are open for comment by States and the public until 28 December 2018. A vote on the amendments to the rules is expected in 2019 or 2020.

In order to keep ICSID's procedural rules fit-for-purpose, there is a range of proposed reforms, including:

- a new provision for consolidation or coordination of like cases;
- an obligation to disclose the existence and source of third party funding;
- strong provisions in favour of greater transparency of awards, decisions, and orders, including deemed consent and the publication of excerpts; and
- the availability of expedited procedures, anticipated to be useful in particular for small and medium enterprises.

The reform proposals are based on ICSID's day-to-day experience in the management of cases, which puts it in a unique position to know what works and what does not. See more details on the proposed reforms here.

In parallel, UNCITRAL has tasked its Working Group III to study ISDS reform. Anna Joubin-Bret, Director of the International Trade Law Division at UNCITRAL, reported

that at its thirty-sixth session in November 2018, Working Group III completed the second phase of its mandate, reaching consensus that reform is desirable to address concerns about the current system of ISDS. These concerns fall into three broad categories:

- lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals;
- concerns about arbitrators and decision makers, including lack of independence and impartiality, limitations in challenge mechanisms, lack of diversity, and qualifications; and
- concerns regarding the costs and duration of proceedings.

The next and third phase of the work of Working Group III will be to discuss and determine what reforms should be developed to address the specific concerns. Due attention will be given both to concerns based on facts, as well as concerns based on perception. See the draft report of the thirty-sixth session of Working Group III here.

Ms. Joubin-Bret emphasised that this Working Group is a government-led process. This reflects the fact that it was States who initiated the design of the current system, and in her view they should be the ones to reform it.

Which Reforms, Why and How?

According to some stakeholders in civil society who voiced their objections during the event, the question should not be what reforms to undertake, but whether we should rather abolish the system of investor protection altogether. The concerns of these groups are more existential and question why investors should receive favoured treatment. Their assertion that investors are offered protection which is not available in other areas such as human rights, climate, labour rights, etc., may very well be on point. It risks, however, throwing away the baby with the bath water.

While it is difficult to measure the immediate impact of bilateral investment treaties on the levels of foreign investment, Patrick Baeten, Deputy GC at Engie, pointed out that investors want certainty and will always look at the level of investment protection when investigating long-term commitments. He predicted that, failing adequate protection (regardless of its form), investment gaps would not be filled, or at least not at the same cost. Moreover, many speakers, including James Zhan, Senior Director of Investment and Enterprise at UNCTAD, pointed out that the current discussion on reform should not be limited to ISDS or other issues of procedure, but also include substance. Treaties can be revised to include obligations for investors which can be enforced by host States.

For those who accept that investment protection should continue to exist in one form or another, there remains a great variance in opinions on the level of reform to ISDS necessary. For some practitioners, the system is imperfect but with some self-regulating tweaks could be sufficiently improved. Others propose largely maintaining the current system, but adding an appeal mechanism to address issues of consistency, predictability and correctness. Those in favour of a more dramatic rethink may support an MIC, or some form of court with international jurisdiction in combination

with recourse to domestic courts. Reference was made to the recent report by the IBA on "Consistency, efficiency and transparency in investment treaty arbitration", which details some of the challenges facing ISDS and proposes solutions to foster the legitimacy of the system.

In her keynote speech, European Commissioner for Trade Cecilia Malmström expressed the EU's view that the MIC is the only option on the table that can effectively address these concerns. According to the EU, only a permanent body to resolve investment disputes can create predictability and consistency, bring about the necessary expertise in the system, effectively address costs and duration, and assure equal representation. The EU plans to put forward this idea at the multilateral level during the next phase of UNCITRAL Working Group III's discussions.

Does an MIC Address the Concerns Raised?

At the time of the conference, no detailed proposals for an MIC had been made public. It was therefore unclear what form the court would take, whether it would be an independent institution in its own right, or whether it would make use of the secretariat and facilities of other institutions which already exist. It was further unknown what kind of judges would sit on the court, how they would be appointed, and what rules would govern their service.[1)] Even speaking in general terms, many speakers doubted whether an MIC could address the concerns with the current ISDS system that have been identified. The speakers therefore advocated that, at this stage, full consideration should be given to all potential reform options, and to measure those options against the objectives sought to be achieved. Professor Loukas Mistelis of Queen Mary University pointed out that, if an MIC is created, one option could be to maintain the current system of ISDS, with the MIC to function as an appellate body.

A further question lingers over the feasibility of bringing an MIC into existence in the current global climate, in which multilateralism already faces serious challenges, and a number of other multilateral efforts in the economic sphere have stalled or are dysfunctional.

Again recalling the importance of substantive standards, several contributions also highlighted that while proposed reforms to ISDS are mainly procedural, the importance of the nature and wording of standards of treaty protection should not be underestimated. Mr. Zhan of UNCTAD pointed out that the overwhelming majority of ISDS cases are brought under old generation treaties. In this connection, Professor Bernard Hanotiau of Hanotiau & van den Berg commented that divergent treaty wording, some of which is unclear or inconsistent with other treaties, is often the very reason why ISDS tribunals reach different interpretations of treaties in different cases.

Conclusion

This event illustrated once more how divided different participants in the debate are on the issue of ISDS, and more generally, on investor protection. At the same time, it demonstrated the need for a continued exchange of views in pursuit of solutions that

cater to diverse stakeholders.

Civil society groups question the existence of an entitlement to investor protection itself. This approach does not seem to be shared by most lawmakers. However, the EU, one of the main political forces in the debate at UNCITRAL, has made it clear that it sees an MIC as the only way forward.

Meanwhile, practitioners acknowledge to varying degrees that change is necessary, but point out that an MIC will likely fail to address many of the concerns with ISDS. Indeed, it may create new ones. At this stage, it seems doubtful that such technical remarks will fall on fertile soil, since the idea of an MIC which has been planted by the EU appears cultivated in large part on political ideology.

While States are legitimately in the driver seat of ISDS reform, discussions between experts and lawmakers must continue, in order to benefit from the input of those with daily experience of legal practice and procedure. In this way, every potentially viable variety of tree will be given due consideration *before* a decision is made whether to replant the forest entirely, or whether to seek better results through forest management.

References

↑1 Meanwhile, on 18 January 2019, the EU submitted two papers containing concrete reform proposals to UNCITRAL.

This entry was posted on Wednesday, February 20th, 2019 at 8:35 am and is filed under Arbitration, BIT, International arbitration, Investment Arbitration, ISDS, ISDS Reform, Multilateral Investment Court
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.