UNCITRAL Working Group III: Would an Investment Court De-politicize ISDS?

Kluwer Arbitration Blog
March 25, 2020

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Please refer to this post as: Fernando Dias Simões, 'UNCITRAL Working Group III: Would an Investment Court De-politicize ISDS?', Kluwer Arbitration Blog, March 25 2020,
http://arbitrationblog.kluwerarbitration.com/2020/03/25/uncitral-working-group-iii-would-an-investment-court-de-politicize-isds/

Arbitrators under the Crossfire

While investor-state dispute settlement (ISDS) was created with the purported goal of depoliticizing investment disputes, it is currently at the centre of heated political debates. Investment arbitration follows the commercial arbitration paradigm, with disputing parties playing a direct role in the composition of the tribunal. This is perceived as a tool of control over the arbitrators' interpretative space. Party-appointed arbitrators are frequently portrayed as 'hired guns' who replicate the divide between host states and foreign investors.

UNCITRAL's Working Group III has identified several concerns regarding arbitrators, *inter alia* the lack of precise definition of the applicable ethical requirements in practice, the existence of potential conflicts of interest, the qualifications required to serve as arbitrator, and the impact of third-party funding on the independence and impartiality of arbitrators. Chief among these concerns is the way the appointment mechanism is structured. The Working Group is currently considering different models for reshaping the way adjudicators are selected, ranging from the creation of a pre-established list to the establishment of a permanent adjudicatory body. Still, UNCITRAL is aware that any reform effort should not promote further

(re)politicization of investment disputes.

The proposal that has received the most attention thus far is the creation of a permanent investment court. The investment court model would replace the current regime – where every arbitral panel is purposefully established by the parties after the dispute emerges – with a system where the adjudicatory body is already in place when the proceedings are initiated. The main goal is to 'break the link' between the parties and the adjudicators, which seems to be at the root of many of the system's perceived shortcomings.

Potential Risks

One of the major problems with this model is that it turns states into the exclusive gatekeepers of the composition of the adjudicatory body. The new system implies a paradigm shift regarding the selection of adjudicators, moving from a disputing party framework to a treaty or contracting party context. While in the investment court model 'disputing parties would have no or little influence on the selection and appointment of adjudicators', UNCITRAL's Working Group III nevertheless admits that 'the respondent State might retain a diluted control over the appointment of the judges'.

The new framework would shrink the influence of disputing parties while increasing that of states party to the system. The problem remains nevertheless: appointees may be perceived to represent the specific political views of appointing states. This paves the way for accusations of partiality and favouritism in the composition of the tribunal, potentially (re)politicizing investment disputes. The reality is that it is extremely difficult to dispel the appearance of politicization of the process when states are the only source of appointment.

Tools to Mitigate Political Influence

Several tools may be employed to reduce the discretion of states and provide some checks and balances on the qualifications and expertise of appointed adjudicators. Greater transparency and inclusiveness would also help to mitigate possible attempts to instil politics into the appointment process.

Any reform should ensure that the selection and appointment mechanism is more transparent and open. This would help to moderate the choice of individuals for reasons other than merit and therefore increase the legitimacy of the system. Several tools can be used to increase the visibility of the process such as the advertisement of openings, consultation with stakeholders, publication of candidates' resumes, public hearings, and debates in national parliaments. The process should welcome direct applications by potential candidates, thus extending the selection phase beyond the circle of names already in the mind of government officials.

Another tool that can be built into the selection process – and which also promotes transparency – is the existence of a screening phase. Advisory panels or appointment committees have been employed in different international courts and tribunals to guarantee that candidates fulfil the necessary requirements to perform the job. The existence of a screening mechanism would prompt government officials to put forward better candidates, rendering the selection process more objective while increasing the legitimacy of the system. The thorniest issue seems to be the composition of such a screening body. Kaufmann-Kohler and Potestà underline that the selection of members for this panel will probably raise as many eyebrows as the adjudicators they are going to screen. Again, we enter the discussion about who chooses the decision-makers, and how. In abstract, a screening mechanism could render the selection process more objective and merit-based and therefore less politicized. However, the advantages of such a mechanism should not be overstated. The very creation of this type of mechanism indirectly acknowledges that sometimes states do not appoint the most qualified candidates. The contribution of such mechanisms to depoliticize nomination and appointment processes in other international courts and tribunals is debatable.

A mechanism that has also been featured in the selection process in different international courts and tribunals is a consultation phase. Consultations are a useful tool to enhance acceptance of the system and therefore promote its credibility and legitimacy. The trickiest question is whether the consultation process should also be open to investors. UNCITRAL seems to be open to the possibility of listening to business and industry-affiliated associations. Without returning to the now contested party-appointment system, this would give investors an opportunity to voice their concerns regarding the composition of the adjudicatory body and therefore attenuate the transition from a disputing party

system of appointment to a regime where that power rests exclusively with treaty parties. Just because investors are no longer allowed to appoint one arbitrator does not mean that their opinion cannot be heard. Consultation with all interested stakeholders – including investors – on the membership of the investment court may help to reinforce the legitimacy and independence of the new system. By affording investors an opportunity to contribute to the process, it might also help mitigate the perception that the court is unilaterally set up by states, thus reducing potential accusations of politicization.

Another mechanism that should be implemented, as it is typical of permanent courts, is the random assignment of cases. The idea behind this mechanism is that parties will not be able to determine the specific adjudicator who decides a particular dispute. A clear, objective method of case assignment prevents the allocation of cases based on outside influence (including political considerations) and thereby helps to foster individual and institutional independence. This tool helps to weaken the direct connection between appointers and adjudicators in charge of a particular case; however, it does not necessarily dispel the image that the court, as a whole, might be biased as states still have the power to nominate (although in advance of any specific dispute) the adjudicators who will sit on the bench. Just because a panel of arbitrators was not hand-picked for a specific dispute, *ex post*, that does not mean that the whole court will be perceived as unbiased, *ex ante*. In this regard we move from the traditional relationship between disputing parties and the arbitral panel to a connection between appointing states and the whole court. A move towards a permanent adjudicatory body entails a greater emphasis on institutional independence.

The Way Forward

The traditional process of selection and appointment of adjudicators in investment disputes has attracted substantial criticism, potentially leading to growing re-politicization of investment disputes. The truth, however, is that investment dispute settlement can never be fully depoliticized: these disputes are intrinsically political and therefore their settlement always takes place in a politically charged environment. Regardless of the forum chosen, there seems to be an inevitable political element associated with any dispute that involves public policy. In this regard investment arbitration is no different from other types of international

adjudication.

While parties' ability to choose their adjudicators has been described as a 'keystone' of arbitration, this feature contributes to a system that is increasingly perceived as politically polarized and unable to offer an exclusively legal, objective adjudicatory process. Still, concerns about the capacity for selection processes to result in the appointment of independent and impartial adjudicators also exist in domestic and even international courts. There is no irrefutable evidence that international judges are more independent and impartial than arbitrators. The selection and appointment of arbitrators raises some problems but the same can be said about other adjudicatory bodies. This is not to say that there are not valuable lessons to learn from the experience of other adjudicatory bodies. Indeed, knowing more about how appointment mechanisms have a bearing on the conduct of international courts and tribunals is a matter of increased scholarly and practical relevance.

The process of selection and appointment of investment adjudicators should be based on the expertise and experience of candidates and not on their political preferences or loyalties. However, because international courts are set up by states and function in a politically charged milieu, political considerations may influence and even lead to outright politicization of the process. This risk is especially high in a system where states (as one class of disputing party) have exclusive control over the screening and appointment of candidates.

A revamped system should incorporate a combination of the tools discussed above to ensure that candidates are above all chosen because of their professional skills and merit. The experience of other international courts and tribunals demonstrates that such measures do not fully eradicate political preferences from the process but at least mitigate their impact by filtering candidates through a stringent set of checks and balances.

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