Kluwer Arbitration Blog

The Death of ISDS?

Sergio Puig (University of Arizona, James E. Rogers College of Law) · Friday, March 16th, 2018 · Institute for Transnational Arbitration (ITA), Academic Council

For many years, investor-state dispute settlement (ISDS), supported by thousands of bilateral investment treaties (BITs), has served as the main mechanism for deciding investment disputes. This controversial system permits affected investors to sue states for damages before arbitral panels on the grounds that their investments have been treated unfairly. For many commentators, the main problem with the current system is that it is based on a model of commercial arbitration with ad hoc tribunals consisting of party-appointed arbitrators and limited oversight even though it implicates public law and policy. These tribunals lack any appeal process that can provide interpretative guidance (other than a narrow annulment process), giving rise to inconsistent results that, it is charged, violate basic rule of law norms. While serving as arbitrators, the professionals also represent clients, thus wearing "double hats," raising challenges to their legitimacy and impartiality.

In response to increased critique of this system, countries and commentators have proposed a range of alternatives involving more or less judicialization. On one side, the E.U. has promoted a two-tiered multilateral investment court alternative before which investors would have a private right of standing. On another side, Brazil and others have proposed alternatives involving mediation, possibly backed by state-state dispute settlement processes, or public enforcement in which the state decides whether to espouse an investor's claims, thus screening the claims that are brought. Yet, the international court system (ICS) has drawn unparalleled attention.

To be sure, this is not the first time that a foreign investment courts is proposed. In fact, the 1974 Convention of the Settlement of Investment Disputes between Host States of Arab Investments and Nationals of Other Arab States (superseded by the Unified Agreement in 1981), called for the creation of the now active Arab Court of Investment. Unlike such regional effort, the proposed new system has the potential and the political backing to extend beyond a discrete geographical region and be widely used. Though subject to many hurdles, it has a running chance of replacing the current ISDS system. At its core, the new ICS would create permanent bodies, consisting of a court of first instance and an appellate court, with the judges nominated from a pre-vetted list of panelists who will be bound by rules that eliminate or severely limit the ability of judges to also serve clients ("double hatting"), among other important innovations. The EU has already crystallized its proposal in new free trade agreements signed with Canada (in October 2016) and Viet Nam (in December 2015), and it proposes the ICS alternative in its current trade and investment treaty negotiations, including with the United States under the proposed Transatlantic Trade and Investment Partnership (TTIP).

The implications of the proposed ICS model need to be carefully thought through and debated. The issue of structural bias in the different models is a critical aspect to be assessed. So far however, the important issue of deciding who decides on investment disputes has been insufficiently nuanced as it has almost entirely focuses on comparing the potential ICS with ISDS, the current system in place. This comparison is understandable given the attention that ISDS attracts among legal scholars and uneasiness among civil society organizations. But, these are only two types of alternative forms of adjudication, and other non-adjudicatory options also exist, such as market mechanisms (i.e., insurance for political risk, and ad hoc state-investor contractual negotiations). While I believe that an adjudicatory mechanism makes much sense, the question is not whether ICS is more or less bias than ISDS, but rather what the relative tradeoffs of them are—their merits and limitations—compared to a range of other institutional alternatives.

In a forthcoming Article, Greg Shaffer (UC-Irvine) and I explore this question and present a conceptual framework for assessing governance mechanisms of investment adjudication comparatively. We chart the myriad ways in which different options allocate decision-making authority and the tradeoffs resulting from each choice. Unlike most critics of the ICS proposal, we argue that the issue is not whether biases exist in such a system, but rather, how it compares to its non-idealized alternatives, including ISDS in terms of particular goals: fairness, peace, and efficiency. We argue, not without important caveats, for the serious consideration of the ICS as well as other mechanisms for investment dispute settlement, including an improved (and more constrained) version of the current ISDS system.

To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.

This entry was posted on Friday, March 16th, 2018 at 7:48 am and is filed under BIT, Investment Arbitration, ISDS
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.