

DESIGNING A MULTILATERAL INVESTMENT COURT: ISSUES & OPTIONS

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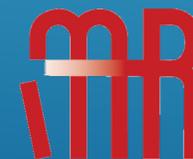
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- ▶ States opting in should specify multilateral investment court as exclusive non-domestic forum for investor claims against them under treaty
- ▶ This prevents abusive forum shopping by investors-no turning back to arbitration
- ▶ At the same time, inherent jurisdiction of standing supranational courts such as European Court of Justice would not be altered

EXCLUSIVITY OF FORUM

- ▶ The court should have the competence to decide ALL investment disputes regardless of whether they arise from alleged conduct of the host state or the investor.
- ▶ This means that **any party** suffering harm as a consequence of conduct related to an investment should have standing.
- ▶ This eliminates unjustifiable asymmetry of traditional ISDS where only investors or investments have standing.

JURISDICTION/STANDING

- ▶ All sources of international law as stated in Art. 38 of ICJ Statute should be included as applicable law.
- ▶ In addition soft law instruments such as corporate codes of conduct or guidelines or principles of social responsibility should be included, where the relevant party/parties have undertaken to comply with them.
- ▶ Where an IIA is the basis of the claim, any law stated as applicable law in the IIA would be incorporated as applicable law under the multilateral court instrument.

APPLICABLE LAW

- ▶ In order to be able to bring a claim before the multilateral investment court a natural or juridical person must also consent to be subject to the jurisdiction of the court as a defendant.
- ▶ Corporations who aren't willing to be held accountable in the court should not be able to bring claims there against states.
- ▶ Member states of the court should bind themselves to undertake all necessary measures, consistent with their constitutions, to ensure that their nationals, particularly corporations under their legal control, are subject to the jurisdiction of the court and are barred from access to any alternative forum of an arbitral character for the settlement of an investment dispute under international law.

SUBJECTION OF NATURAL AND JURIDICAL PERSONS TO THE JURISDICTION OF THE COURT

- ▶ Among the main rationales for a multilateral investment court is to move away from the inconsistent incoherent jurisprudence of arbitral tribunals.
- ▶ Accordingly arbitral awards under IIA should not have persuasive authority beyond that of the judgment of any quasi-judicial body, and the judges of the multilateral investment court shall not normally base their decisions on legal interpretations given in arbitral awards.

RELEVANCE OF INVESTMENT ARBITRATION CASE LAW TO THE COURT

- ▶ Suggested language: “The court shall not apply the provisions of an investment treaty to a host state unless it is bound as a signatory to that treaty and the treaty is fully in force for that state, regardless of any MFN provision in the treaty on the basis of which the claim is brought.”
- ▶ Suggested language: “The court shall not adjudicate any dispute that has its juridical basis in a contract unless there is no other forum in which the parties can obtain justice or unless the parties to the contract have specified the court as the forum. The court shall decline jurisdiction wherever it believes that the effect of invoking the jurisdiction of the court is to override an agree to settle the dispute under municipal law or in a domestic forum. This applies notwithstanding any provision in the treaty on the basis of which the claim is brought that could be read as elevating contractual claims or disputes to disputes under the treaty.”

RELATIONSHIP OF THE COURT TO JURISDICTION-EXPANDING ABUSES OF MFN AND UMBRELLA CLAUSES IN IIAS

- ▶ Clear and convincing evidence of corruption, fraud or other criminality on the part of the claimant should be a bar to the jurisdiction of the court.
- ▶ Nevertheless the court should have a residual discretion to take jurisdiction where the interests of international justice would be ill-served by refusing the claim.

“CLEAN HANDS”

- ▶ A state party to the court should be able to pose questions of law to the court outside of any dispute.
- ▶ This would help to prevent “regulatory chill”, giving a state some assurance as to the boundaries in which it can exercise its right to regulate without violating the treaty.
- ▶ Nevertheless an advisory opinion would not be binding on the court in any subsequent dispute, although it would be given persuasive authority.

ADVISORY JURISDICTION

- ▶ Expertise in public international law
- ▶ In addition, as Appleton/Stephenson ABA Report suggests:
"Seeking additional sources of expertise, such as knowledge of comparative constitutional and administrative law or regulatory process, may also great benefit the composition of the Investment Court."
- ▶ Candidates should be qualified to be judges in their home state

QUALIFICATIONS OF FIRST-INSTANCE JUDGES

- ▶ While states parties to the multilateral investment court will decide on judicial appointments it may well be desirable to have a committee of eminent jurists, and perhaps some stakeholders, to scrutinize the candidates and give their non-binding views (this could be modeled on the process in the European Court of Justice).
- ▶ The views of such a committee should be public (transparency-see Appleton/Stephenson ABA Report)
- ▶ The committee should also have the authority to suggest names of desirable candidates that have been overlooked by states parties

APPOINTING PROCESS

- ▶ Critics of the project of a multilateral investment court sometimes argue that investors would lose something of great value—the opportunity to appoint an adjudicator who they believe will understand their perspective on the dispute.
- ▶ One way of addressing this concern is to allow for ad hoc judges to join the panel of standing judges.
- ▶ But the ad hoc judges should possess qualifications comparable to those of standing judges. They would be chosen from a roster of distinguished jurists, including sitting judges of other supranational courts (ICC, ICJ, etc.)
- ▶ Considerations of gender and other diversity and equity shall be actively taken into account. The committee should have a sub-committee on diversity and equity that fully participates in its deliberations.

AD HOC JUDGES?

- ▶ Permanent secretariat should provide interns and clerks to individual judges.
- ▶ Qualifications for clerks should be, ideally, a previous clerkship in an international court or tribunal of a non-arbitral nature or a clerkship in a domestic high court. Junior professors or researchers with a PhD or equivalent should be eligible without a prior clerkship.
- ▶ Considerations of gender and other diversity and equity shall be taken into account in the selection of clerks and interns.
- ▶ A senior court official should head the Secretariat, someone with such experience in a domestic court or tribunal or a non-arbitral international court or tribunal.

SECRETARIAT

- ▶ The court should have the power to award damages, and the states parties of court should agree that these awards should be considered as subject to the recognition and enforcement provisions of the New York Convention (see EU proposals).
- ▶ Serious consideration should be given to whether and to what extent the court should be able to award remedies other than compensatory damages (injunctions, preliminary measures, restitution, moral or punitive damages etc.)

REMEDIES/DAMAGES

- ▶ “One of the principal reasons for the proliferation of billion-dollar damage claims in investor-state cases is the ingenuity of claimants and their experts in giving what ordinarily would be considered surrealistic valuations the appearance of a sound theoretical foundation. In many cases, this involves breaking new ground by convincing tribunals to apply DCF even in the absence of a track record of profitability – something the World Bank Guidelines consider inappropriate – then providing all sorts of technical and industry analyses to support the most optimistic cash flow projections that pass the laugh test, and finally spinning theories to support the lowest possible discount rate to bring the cash flows back to the valuation date, which of course results in the highest net present value.” George Kahale, Partner/Chair, Curtis, “Wild, Wild West of International Law and Arbitration”

QUANTIFICATION OF COMPENSATORY DAMAGES

- ▶ Place an absolute ceiling on the amount of compensatory damages the court can award (perhaps \$100,000,000) based upon expectations of future profits (as opposed to proven losses).
- ▶ define compensatory damages as compensation for proven losses including opportunity cost of forgoing other investment opportunities while the project was operational.
- ▶ Parties shall make legal and factual submissions to the court on damages, but shall not be able to call expert witnesses or rely on outside consultants for their damages submissions.
- ▶ The court shall have an official with the role of Damages Master. The Damages Master shall in consultation with the judges of the court, establish appropriate methodologies and approaches to the quantification of damages. These shall normally guide the Court. In cases where the calculation of damages raises complex issues, the Damages Master may designate an Expert to assist the court.
- ▶ The Damages Master shall normally have been a senior financial official of a member state of the court (treasury, central bank, finance ministry) or a senior financial official of an international organization.

SOLUTIONS TO INFLATION OF DAMAGE AWARDS