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Has the time arrived for permanent investment tribunals?

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One of the main advantages of international investment law is that it depoliticizes potential disputes between investors and host States by providing a neutral venue to settle them. Arbitration, a concept borrowed from international commercial disputes, has been the mean used therein. However, investment disputes are essentially different from commercial disputes. Not only are issues of public policy, sovereignty and international law constantly at stake and in a way not commonly seen in commercial arbitration, but the source of law and the players differ noticeably.

Legitimacy of the investment arbitral tribunals has been a weak area of international investment law.¹ For example, questioning the authority of arbitrators to limit the scope of a sovereign decision of a State and imposing payments for actions seemingly legal has been common.

The same can be said about consistency of the investment arbitral tribunals which frequently decide similar issues –albeit occasionally based on different treaties—in markedly different manners.

Likewise the system of investment arbitration has been widely criticized.² Some criticize the process of appointments and the interchangeable role of some arbitrators as advocates and adjudicators.³ Others criticize the weak representation of arbitrators from developing countries, while others criticize the usefulness of the panels' lists, the repetition of same appointments, the gender representation⁴ and the lack of public law focus.⁵

Proposals of appellate bodies on investment disputes both in the context of ICSID and in some BITs and FTAs have targeted some of these issues.

In addition the volume of investment treaty cases has grown significantly. In ICSID alone, more than 330 cases have been registered since its creation.⁶ Only in 2011, 38 cases were filed. This shows that disputes between Investors and States are surging in a way not imagined in the 1960s when the establishment of a permanent secretariat along

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¹ See Franklinn Berman, "Evolution or revolution?" in EVOLUTION IN INVESTMENT TREATY TREATY LAW AND ARBITRATION (Brown and Miles)

² See M. Sornarajah, "Evolution or revolution in international investment arbitration? The descent into normlessness", in EVOLUTION IN INVESTMENT TREATY TREATY LAW AND ARBITRATION (Brown and Miles)

³ See Hans Smit, 'The pernicious institution of the party-appointed arbitrator,' Columbia FDI Perspectives, No. 33, December 14, 2010. See "Giorgio Sacerdoti, 'Is the party-appointed arbitrator a "pernicious institution"?' A reply to Professor. Hans Smit' Columbia FDI Perspectives, No. 35, April 15, 2011 at last paragraph.

⁴ See Gus Van Harten, 'The (lack of) women arbitrators in investment treaty arbitration,' Columbia FDI Perspectives, No. 59, February 6, 2012.

⁵ See Stephan W. Schill, 'The public law challenge: Killing or rethinking international investment law?,' Columbia FDI Perspectives, No. 58, January 30, 2012.

⁶ ICSID, Caseload statistics 2012-11

with arbitration was the mechanism sought out to provide a neutral solution to the potential disputes between investors and States.

Moreover, along with recent withdrawals from ICSID, some voices have advocated for the creation of permanent investment tribunals.⁷ And some new economic integration ventures are exploring that option.⁸

Significantly, the idea of permanent investment tribunals on international investment law has a precedent in the Unified Agreement for Investments of Arab Capital in Arab States.⁹

Thus, the time has come to propose permanent investment tribunals to be created through international agreements and comprised of judges, not arbitrators. The judges would form different standing tribunals within a center to which disputes could be assigned at random. This would assure in cases of a conflict of interest that another judge from the center would be chosen. The judges would be appointed to the tribunals in advance by the dispute resolution center and cases would be activated upon the submittal of a claim. In other words, the judges would not be precluded from undertaking other professional activities prior to being assigned to a case. The format used by the Inter-American Commission of Human Rights can be a source of inspiration. Members are appointed for a period of time and cases are allocated according to internal rules. Of course, the investment tribunal appointees would have to meet certain ethical and professional requirements, such as having sufficient knowledge of international investment law. This structure would guarantee both that investors are satisfied with the level of competency of the judges and that States are satisfied with the permanency, transparency and predictability of the dispute resolution framework.

The parties to a dispute would have the option to agree or not to settle the disputes before such permanent investment tribunals. The consent would be granted via treaties, laws, notifications or submission of dispute as it currently occurs.

States setting up permanent investment tribunals could fund them, as they do in the WTO or in other regional permanent courts. Part of the funds would be used to pay the adjudicators who would receive a salary for their duties. In perspective many States could compare the amount paid in investment arbitration costs with the costs of funding permanent tribunals.

These tribunals would probably compete with arbitral tribunals to which consent has already been granted. But over time and as the reputations of these new tribunals evolve

⁷ See Karsten Nowrot, "International Investment Law and the Republic of Ecuador: From Arbitral Bilateralism to Judicial Regionalism", Essays on Transnational Economic Law, Martin Luther University, 2010.

⁸ Silvia Karina Fiezzoni, 'UNASUR Arbitration Centre: The Present Situation and the Principal Characteristics of Ecuador's Proposal', Investment Treaty News, December 2011.

⁹ UNIFIED AGREEMENT FOR THE INVESTMENT OF ARAB CAPITAL IN THE ARAB STATES, in International Investment Agreements: A Compendium, Volume II. Regional Instruments.

they should be able to attract more disputes. In addition, under future treaties, States could formally grant consent to submit disputes to these tribunals in exclusive or alternative basis.

Investors in turn would be motivated to seek out a permanent investment tribunal for reasons of neutrality, consistency, predictability and lower costs.

Neutral international dispute resolution centers to settle disputes between investors and States are needed in a scenario where States look to attract investments as a means to financially support their development. But the perception of many States that arbitration is unsuitable to deal with issues of public policy, public interest, sovereignty and regulatory powers of the State, *inter alia*, in a legitimate, professional consistent, transparent and efficient way is something that needs to be considered for the sake of the system of investment protection.

The creation of permanent investment tribunals could seem a titanic task at the moment requiring political consensus and diplomatic maneuvering of many States. But the buzz is turning loud on the need to reform the adjudicative mechanism of international investment law.