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In search of transparency and consistency: ICSID reform proposal

By Prof. Gabrielle Kaufmann-Kohler, Professor, Geneva University;

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1. The state of the question

1.1 Investment arbitration under attack

Initially, the organisers asked me to speak about proposals for the appellate review of investment treaty awards. This was then a hot topic and I hastened to accept. In the meantime things have changed. It is unclear now whether plans for introducing an appeal mechanism have died or whether they are simply dormant and will be revived in the future. What *is* certain is that no one knows and that this issue is no longer of immediate relevance. For this presentation to make practical sense, I have therefore changed its focus to give a more general account of ICSID's reform proposals in investment arbitration.

We all know that investment arbitration is booming. We also know that it has come under heavy criticism lately, from NGOs, media and certain governments. Arbitral tribunals are "shadow governments" dispensing "justice behind closed doors" and even sometimes engaging in "arbitral terrorism"[1].

Although these formulations are certainly excessive, they nevertheless reflect a legitimate concern. Investment arbitration is based on the model of commercial arbitration, yet it differs from most[2] commercial arbitrations by one significant element: investment arbitration often involves issues of major public interest. This public interest cannot remain without influence on the process. It calls for transparency in the proceedings and consistency in the results. Transparency is about opening the doors of the hearing room. Consistency is about delivering coherent decisions and avoiding contradictory results that undermine the credibility of investment arbitration overall and jeopardize the development of investment law.

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* Text of a presentation made on the occasion of the Investment Treaty Workshop held on 27 September 2005 at the IBA Annual Conference in Prague. Headings and footnotes have been added.

1 Michael GOLDHABER, *Arbitral Terrorism*, American Lawyer / Focus Europe, summer 2003.

2 Not from all, because certain commercial arbitrations involve aspects of public interest. Moreover, certain so-called commercial arbitrations, e.g. arbitrations conducted under the rules of the ICC, are in reality investment arbitrations, because the respondent is a State and the dispute arises out of an investment contract.

With the expansion of treaty arbitration, there will be more and more awards dealing with the same issue, sometimes even involving the same measure taken by the same State under the same legislation. The Argentine emergency law is a foremost example.

The problem is that the model used - commercial arbitration - is not transparent. It is said to be private and confidential (with exceptions obviously), and it is not concerned with consistency, due to the fact that it deals with one-off contracts.

1.2 ICSID Reforms

Faced with these concerns, ICSID has launched proposals for reform:

- In October 2004, ICSID issued a discussion paper[3] which, in addition to increasing the efficiency of the process in various ways[4], addressed transparency and consistency, the latter by the creation of an appellate mechanism.

- After a consultation process, ICSID followed up with a working paper in May 2005[5]. This paper pursued the efficiency and transparency proposals, but dropped the appeal because it was felt "premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised […]"[6].

As a result, ICSID will not presently set up an appeals facility. However, States, specifically the United States and its treaty partners, may well do so with respect to certain treaties. One such example is the Central American Free Trade Agreement (CAFTA), which was just approved by the US[7]. It provides that the contracting states will have to establish an appellate mechanism within 15 months of its entry into force to "provide coherence"[8] in the interpretation of the treaty. The risk thus exists of a

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[3] ICSID Secretariat, *Possible Improvements of the Framework for ICSID Arbitration*, 22 October 2004.
[4] In particular by introducing the possibility of exchanging briefs on provisional remedies prior to the constitution of the arbitral tribunal and by providing for summary judgement on manifestly ill-founded claims.
[5] ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005.
[6] *ibid*, p.4
[7] *Central American Free Trade Agreement*, http://www.ita.doc.gov/cafta/; the CAFTA has been approved by the legislatures of the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and the US. Approval is pending in Costa Rica. The Agreement is not yet in effect, and shall enter into force on a date to be agreed upon by the parties.
[8] *Central American Free Trade Agreement*, Chapter Ten "Investment", Annex 10F.

proliferation of separate appellate facilities, which is hardly a pleasing perspective for the consistent development of investment law.

The efficiency and transparency proposals were upheld in the May 2005 paper, subject to a consultation in the summer of 2005. Surprisingly enough, these proposals generated a lot of sometimes strong government reactions. They are now being revised and it is expected that they will be approved within the coming months. These proposals all relate to the amendment of the ICSID Arbitration Rules and are thus subject to the approval of the Administrative Council of the World Bank. No amendments of the ICSID Convention are contemplated, as these would require unanimity, an impossible undertaking.

2. Transparency

After examining the status of the reform, let us now focus on the main aspects of transparency, and then turn to consistency. Transparency deals primarily with third party access to the proceedings, e.g. with the access of an environmental NGO in an arbitration about a waste disposal facility. There is a very delicate balance between transparency and efficient dispute resolution. Transparency and efficiency may well be clashing policies and the whole purpose of the reform is to reconcile them. Third party access as it is addressed in the reform involves attendance at hearings (2.1) and the submission of amicus curiae briefs (2.2). It does not cover access to the record (2.3).

2.1 Access to the hearings

In the reform proposal, attendance of the third party at hearings is left to the tribunal's discretion. At present, a non-party can only attend a hearing with the consent of the parties[9], which was for instance granted in the Methanex case[10].

2.2 Amicus curiae briefs

[9] Rule 32 (2), ICSID Convention on Arbitration Rules.

[10] Methanex Corp. v. United States of America, *Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae"*, 15 January 2001, http://www.naftaclaims.com/disputes_us_6.htm; *see also* United Parcel Service of America Inc. v. Canada, *Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae*, 17 October 2001, http://www.naftaclaims.com/disputes_canada_ups.htm; Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. Argentina, *Order in Response to a Petition for Transparency and Participation as Amicus Curiae*, 19 May 2005, http://www.investmentclaims.com/.

The submission of a *amicus curiae* briefs[11] involves defining under what conditions a third party may qualify as an *amicus*. Guidance can be found on these conditions in WTO or NAFTA practice[12].

Recently, an ICSID tribunal in an Argentinean water concession case accepted the principle of a *amicus curiae* briefs under the current Arbitration Rules. It also specified the conditions for the tribunal to grant leave to file *amicus curiae* briefs. These conditions included showing that the non-party had a significant interest in the matters in controversy, that its input would be within the scope of the dispute and likely to enlighten the tribunal. They also included a requirement to provide information on the activities of the NGO, any relationship it may have with the disputing parties or even with persons connected with disputing parties, and its funding[13].

2.3 Access to the record

The ICSID proposals do not deal with third party access to the record. For the a *amicus's* input to be pertinent to the resolution of the dispute and capable of enlightening the arbitrators, the *amicus* must be informed of the terms of the debate before the tribunal. There are various ways of ensuring such information. If the reform proposals are not amended to cover this aspect, future tribunals will have work out a solution.

As mentioned earlier, these transparency proposals are not unchallenged and their future contours may be slightly adjusted. Hence one needs to await the revised proposals to form a final view on the amendments.

3. Consistency

Let me now turn to consistency and look first at the appeal (3.1) and then touch on two other possible solutions, consolidation of proceedings and preliminary rulings (3.2).

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[11] On this topic, see namely Brigitte STERN, *L'intervention des tiers dans le contentieux de l'OMC*, RGDIP, 2003, pp.219-264; Loukas MISTELIS, *Confidentiality and Third-Party Participation: UPS v. Canada and Methanex Corp. v. USA*, in: International Investment Law and Arbitration (Todd WEILER ed.), 2005, pp.169-199 (pp.183-199).

[12] NAFTA Commission Statement, *Recommendation on Non-disputing Party Participation*, 7 October 2003, http://www.ustr.gov.

[13] Aguas Argentinas, et al. v. Argentina, see note 10 above.

3.1 Appeal

On the appeal, I will limit myself to addressing the three most critical issues: single v. multiple facility (a); composition of the appellate body (b); and grounds for review (c).

(a) Single v. multiple facility

In its October 2004 paper, ICSID advocated the establishment of a single appeals facility that could be opted in for ICSID and other types of arbitration, especially UNCITRAL arbitration, which is often offered in investment treaties. A single facility would certainly be preferable over multiple facilities set up under different treaties such as the ones that may develop under CAFTA, other free trade agreements[14] or various BITs[15].

Indeed, a single facility is much more likely to ensure overall consistency in the development of investment law. However, there is one caveat to this preference of a single facility: a single facility is worthwhile only if the denationalized or depoliticized character of ICSID, which is its major achievement, is preserved. Indeed, it has been suggested that appellate panels should be constituted by nationals of the states involved. This would be contrary to the fundamental purpose of the Washington Convention and, if these suggestions were to materialize, ICSID should refrain from setting up such a single facility.

(b) Composition of the appellate body: a caste of super-arbitrators?

The second issue with respect to an appeals mechanism is the composition of the appellate body. The quality of the mechanism will largely depend on the quality of its members. This is one of the major hurdles that has so far dissuaded pursuing the single facility.

One possibility may be to create a permanent judicial body, a kind of ICJ for investment disputes. The ICSID proposal, however, was different. It contemplated a facility with 15 members who would sit in panels of three. This seemed preferable to

[14] See for example the US-Singapore FTA, section 15.19(10); or the US-Chile FTA, section 10.19(10).

[15] See for example US Model BIT, Annex D, http://www.state.gov/e/eb/rls/othr/38602.htm; US-Uruguay BIT, Annex E, http://www.state.gov/e/eb/rls/fs/22422.htm. The creation of appellate bodies is one of the principal negotiating objectives of the US administration, see 19 USC 3802 (b)(3)(G)(iv); see also Barton LEGUM, *The Introduction of an Appellate Mechanism: the US Trade Act of 2002*, in: Annulment of ICSID Awards (Emmanuel GAILLARD / Yas BANIFATEMI eds.), New York 2004, pp. 289 et seq.

a permanent body that could become politicized, somewhat bureaucratic, and may not attract the very best who may not be able or willing to devote the time needed for a permanent function.

But even as it stands, ICSID's proposal raises a number of questions:

- If there are different panels, who will ensure consistency among them? One solution may be to introduce a consultation mechanism among the 15 members. For instance, the WTO Appellate Body has seven members who sit in compositions of three, but all deliberate on all cases.

- Another question is whether 15 is the appropriate number. It may be too many for an efficient consultation process. It may also be too few when one thinks of conflicts of interests, availability, or nationality requirements.

- Still another question is whether the appellate members could sit as first instance arbitrators or whether we would witness the creation of two castes of arbitrators, an upper caste with super-arbitrators on appeal and a lower caste of inferior arbitrators in first instance. Hardly a good idea.

(c) Grounds for appeal or the irresistible urge to appeal

As a last topic related to appellate mechanism, let me address the grounds for appeal, which is another area of difficulty. It involves clashing policies between finality, which relates to the efficient administration of justice, on the one hand, and the consistency of the results, on the other. It is obvious that appeals would make the process longer and more expensive. It is also obvious that if an appeal exists, practically no government or corporate management having lost a case can afford *not* to file an appeal, be it only for reasons of internal pressures and accountability.

To limit the flood of appeals, one may think of restricting the grounds to clear errors of law and to rule out errors of fact. Even that restriction may not be sufficient to guarantee efficient justice, and there is no consensus on it in any event.

These are just a few illustrations of the dilemmas that led most of those who were consulted, that is most governments with the notable exception of the US, representatives of business and NGOs, to speak out against the introduction of an appeal process. However, the idea of an appellate mechanism could resurface, most likely as separate treaty-bound facilities.

3.2 Other avenues to explore

The fact that the ICSID appeal will not be implemented, or not be implemented now, or not implemented as anticipated by ICSID, does not mean that the problem of consistency has gone away. To answer this problem, two other avenues may be worth considering, consolidation of proceedings (a) and preliminary ruling (b).

(a) Consolidation

Could proceedings raising common questions of law or facts be consolidated? Think of the 37 pending Argentinean cases. They raise a number of identical issues, both on jurisdiction and on the merits. Think of future crises -- Bolivia may be one example and Venezuela another -- not to mention longer-term perspectives. Trying each case as if it were unique involves a waste of resources and a threat to the coherence of the results, as well as a threat to the overall credibility of the system. Against this background, consolidation may provide a partial answer to consistency concerns.

NAFTA contains specific provisions on consolidation[16] and one recent decision shows that it can be implemented[17].

Exploring this avenue will include looking at the following issues: Is consolidation at all desirable? If it is, how can it be implemented: by way of treaties, or otherwise? Could consolidation be introduced more generally for investment arbitrations, whether they are conducted under the ICSID Convention or under other rules? What should the requirements for consolidation be? What purposes does it serve? Efficiency in terms of costs and time? Avoidance of contradictory results? Who should rule on consolidation? What form should consolidation take? Can it be partial? Does consolidation raise difficulties with respect to the consensual nature of arbitration, to confidentiality, to the constitution of the tribunal which will deal with the consolidated case? Are there other mechanisms that can achieve the same goals?

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[16] NAFTA section 11.26.

[17] Canfor, Tembec and Terminal v. USA ("the Softwood Lumber Cases"), *Order of the Consolidation Tribunal*, 7 September 2005, http://www.naftaclaims.com/disputes_us_10.htm; see also Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States (collectively known as the "High Fructose Corn Syrup Cases") for which consolidation was refused on 20 May 2005, http://www.worldbank.org/icsid/cases/cases.htm.

(b) Preliminary Rulings

Another avenue would be to introduce a system of preliminary rulings, well known to European lawyers. In the course of its proceedings, i.e. before it makes a decision (and possibly a mistake), a national court of a Member State of the European Union may or must request a ruling from the European Court of Justice on issues of interpretation of European law[18].

This system works well to harmonize European law. It may also work well to provide consistency in international investment law. It is undoubtedly another avenue to explore further.

With these or other innovations bringing transparency and consistency, let us hope that investment arbitration will gradually incorporate the public policy component of investment disputes, while remaining an efficient means of settling disputes.

[18] Article 234 EC Treaty reads:
"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty
[…]
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."