ICSID – NUMERO UNO, NOT ANYMORE?

*Ankita Mishra and Disha Kapoor**

I. Introduction

The rapid explosion in the use of international investor state arbitration has brought the ICSID system on its knees. The increasing frequency with which it is being utilized, on one hand indicates, that on some kind of platform, international investor state arbitration has peaked at a level of acceptance and has become a part of the natural hierarchy of foreign investment governance. All this may seem very obvious today but it is hard to imagine that 30 years prior, this was a phenomenon unheard of, as there were very few BITs in existence at that time.[1] As it is with all of us, popularity that highlights an achievement is simultaneously a tugging source of strain on it as well. The very design of ICSID represents the acceptance of certain tradeoffs that today, have become unacceptable. The magnitude of the downside of these tradeoffs might have been incomprehensible in 1966 when ICSID was established. The merits of finality of judgments and efficiency in these cases were understandably paramount. However, as ICSID's caseload has increased manifold over the past few years, it has encountered obstacles that threaten its legitimacy in the eyes of many observers.[2] Some of these obstacles are arbitral awards that lack logical reasoning, incompatible interpretations of identical treaty provisions or otherwise contradictory reasoning in similar cases and interpretations of fundamental provisions that throw into doubt whether or not the system is serving its intended purpose. The mentioned obstacles are in part exacerbated and in part caused by ICSID's faulty design, its lack of an appellate mechanism, including its non-precedential nature, and the extreme procedural difficulties in reforming ICSID. Such problems have been creating

* NLU,Odisha

1 Kenneth Vandevelde, 'A Brief History of International Investment Agreements', 12 U.C. Davis J. Int'l L. &Pol'y 157, 172 (2005)

2 See generally: The Backlash Against Investment Arbitration: Perceptions and Reality (Michael Waibel et al.eds., Kluwer Law International, 2010); Charles N. Brower and Stephan W. Schill, Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?, 9 Chi. J. Int'l L. 471 (2009); Charles N. Brower, A Crisis of Legitimacy, Natl L. J. B9 (Oct. 7, 2002); Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, 73 Fordham L. Rev 1521 (2005)

situations that many consider unsustainable which further raises serious questions about ICSID's viability going forward.

The rapid propagation of investor-state arbitrations during the past decade has inevitably resulted in the development of contrasting views on a lot of issues in the arbitral case law as well as legal writings. Perhaps the most hotly debated and yet unresolved topic in investment arbitration today concerns the level of protection offered to investors as well as related questions of arbitral jurisdiction. To take an example, the direct consequence of mostfavored- nation clauses or the effect of the so-called umbrella clauses on the jurisdiction of arbitral tribunals, are some of the many puzzling questions that have yet to yield a consistent case law[3]. The impact of such international law mechanisms that are well-established in treaty law on the protection offered to investors is thus, a central topic when we address today's unresolved issues of investment arbitration. A related question, maybe much more enduring, is the extent to which the arbitrators having the authority to decide similar questions, in particular when such questions prop up under the same investment treaty or even similarly drafted investment treaties must give weightage to the decisions previously rendered by other tribunals. To put it simply, we don't know whether a precedent system exists in investment arbitration. These topics will be addressed in turn.

Legitimacy is a very central concept that affects the effective functioning of a governance institution on which public actors rely on most of the times, but it is especially crucial with respect to international institutions. Legitimacy as such in the political context refers to the authority that is conferred, by public acceptance on a governance institution.[4] With respect to the domestic context - legitimacy matters as governments wish for their institutions to be imbued and reflect democratic values. However, it is not necessarily fundamental to the functioning of a domestic institution, as a government's coercive power may serve as the source of authority for an institution. On the other hand, if we have to talk about the international scenario, this power to coerce simply does

3 Yas Banifatemi, 'Unresolved Issues in Investment Arbitration' - speech given at the Congress organized by UNCITRAL for its 40th annual session in Vienna, June 25-July 12, 2007, on MODERN LAW FOR GLOBAL COMMERCE

4 Dolf Sternberger, "Legitimacy" in International Encyclopedia of the Social Sciences, Vol. 9, 244.

not exist. What happens with international governance systems is that they are decentralized and exist only as a result of the will of their subjects – the idea of a greater power by which to bind subjects to the control of these bodies simply does not exist.[5] Therefore, legitimacy is a prerequisite to the existence and functioning of international institutions i.e; without public acceptance, international institutions would serve little purpose.

If we sit and think more precisely about exactly what are the legitimacy challenges that ICSID faces and how its design relates to those challenges - we must be clear about what we mean by legitimacy. The scholars who have dealt seriously with the concept of legitimacy in law tend to follow the Weber conception of legitimacy: "that it is essentially a property of a governance system that explains why people adhere to rules when they otherwise don't have to (i.e., in the absence of coercion)".[6] Thomas Franck has provided a definition of legitimacy tailored for the context of international rules: "Legitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process."[7] Hence, the most important factor in legitimacy is perception and this is especially clear with respect to the international realm. When a state considers an institution to be illegitimate, then it may try to withdraw from the institution and a significant amount of withdrawals will obviously threaten the institution's survival.[8] We can see that this is a consequence that must be avoided if investor-state arbitration is to retain its effectiveness as a dispute resolution method, as a method of investor

5 Thomas M. Franck, The Power of Legitimacy Among Nations 16-26, 195-207 (1990); Jonathan I. Charney, Third Party Dispute Settlement and International Law, 36 Colum. J. Transnat'l L. 65, 67 (1997)

6 Alan Hyde, The Concept of Legitimation in the Sociology of Law, 1983 Wis. L. Rev. 379, 387 (1983); Franck, supra note 15, at 17-24

7 Franck, supra note 6.

8 Charles Brower, Structure, Legitimacy, and Nafta's Investment Chapter, 36 Vand. J. Transnat'l L. 37, fn. 72 at 94 (2003); William W. Burke-White, The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System, U. of Penn., Inst. for Law & Econ. Research Paper No. 08-01 (January 24, 2008). Available athttp://ssrn.com/abstract=1088837

protection that few states already accept is of very limited use. A state's perceptions of legitimacy are informed by certain indicators that can be assessed objectively. When we focus then on these indicators, which are components of legitimacy and their relationships with institutional design and processes and outcomes, then we can have a better idea of how to address concerns regarding the legitimacy of an institution like ICSID arbitration.

If we must accept that the way that investors, states and tribunals choose to treat arbitral decisions, then it essentially turns the ICSID arbitration into a system that practically generates rules that guides the conduct of international actors when Thomas Franck's examination of the nature of legitimacy in international rulemaking institutions provides a framework for thinking about the legitimacy of the investor-state arbitration system. What Franck's approach synthesizes is a range of previous scholarly inquiries into the very nature of legitimacy into one coherent theory that is appropriate to the international realm.[9] Thomas Franck postulated that the components of legitimacy for international institutions can be decided on by considering the factors that induce the states to comply with them. By using this analysis, he distilled four indicators of legitimacy: adherence, coherence, determinacy, symbolic and validation.[10] Each of these concepts can be adapted to the context of investorstate arbitration. What Franck means by determinacy is that it is "the ability of a text to convey a clear message to appear transparent in the sense that one can see through the language of a law to its essential meaning."[11] Since the regulations of tribunals have been taken from their award decisions, one can easily analyze the language and logic of an award for clarity to establish whether its legal reasoning reveals its essential meaning to a point where the actors understand how to conform their conduct to the standards that are elucidated by tribunals.

Now we move on to symbolic validation, which basically refers to symbolic cues that are culturally accepted to suggest authority and

9 Thomas M. Franck, The Power of Legitimacy Among Nations 16-26, 195-207 (1990); Jonathan I. Charney, Third Party Dispute Settlement and International Law, 36 Colum. J. Transnat'l L. 65, 67 (1997)

10 Thomas Franck, Fairness in International Law and Institutions 30 (Clarendon Press 1995)

11 Id.

also to the authority conferred by the "deeprootedness" of institutions which is somewhat less significant in international arbitration because the procedures laid out in the frameworks of institutions like ICSID are designed not only to appear symbolically authoritative but also to actually substantively be so and given that most of its activity has come to be seen in the past 15 years, this system is not so deep rooted as to command respect on the grounds of pedigree alone.[12] On the other hand, coherence may potentially be very significant with regard to the legitimacy of investor-state arbitration. External coherence, that is to say - consistency between rules expressed by different tribunals is a very important consideration. Even though it is given that rulemaking is expressed through particularized, unconnected arbitral decisions - the possibility that the ICSID system may generate incoherent or even directly contradictory rules clearly exists today, which actually occurs in practice today.

Finally speaking, the very concept of adherence to rulemaking through investor-state arbitration presents an interesting situation. If we have to define it in simple terminology, adherence refers to the conferral of authority on a primary rule of obligation by a set of secondary rules that reflects an accepted process by which rules are made, interpreted and then applied[13]. Obviously, there is a heavy set of secondary rules (namely, the ICSID convention) which ICSID tribunals adhere to most of the times in making their decisions but the rules do not actually permit any process by which arbitrators may choose to shape legal obligations beyond each case and nor can they guide the de facto rulemaking that tribunals engage in.

Most importantly, what this does is that it makes the other indicators all the more important because adherence to ICSID's processes of rulemaking cannot possibly confer legitimacy upon the decisions passed by tribunals (though we shall later see that there are other more secondary sources of rules such as BITs and contracts, that would provide opportunities for adherence as well). These four indicators

12 See, e.g., Eureko B.V. v. Republic of Poland, UNCITRAL, Partial Award (Aug. 19, 2005); Noble Ventures Inc v Romania, ICSID Case No. ARB/01/11, Award, (2005); SGS Société Générale de Surveillance SA v. Paraguay, ICSID Case no ARB/07/29, Award on merits (Feb. 10, 2012)

together form the basis of the legitimacy that states tend to perceive in such institutions. With respect to investor-state arbitration, determinacy and coherence are the most importance because of the fact that opportunities for symbolic validation and adherence are very restricted.

This designed framework that assesses the legitimacy of international institutions when applied to the system of investor-state arbitration would help us identify the particular ways in which the challenges presented to us by these recent developments in investor-state arbitration might cause a threat to the legitimacy of the system as well as suggesting methods to further enhance the system's legitimacy by directly addressing those components of legitimacy that are threatened as well as buttressing those that are not.

Another question inevitably arises in relation to the vanguard role of the International Centre for Settlement of Investment Disputes ("ICSID" more popularly referred to as the "Centre") that was established by the Washington Convention of 1965 for the development of investment arbitration: keeping in light ICSID's undeniable statistical success during the last decade, will other arbitration fora grow enough to compete with ICSID arbitration with regard to investor-State disputes?

For how long will ICSID remain the preferred the option in investment arbitration? Statistically speaking, the number of ICSID cases has steadily been increasing since 1997. In just a decade, the number of cases pending before the Centre has shot up from 48 in 1997[14] to more than 119 pending cases by year end of 2007. Despite the phenomenal success of the Centre and the clear advantages to a party settling one's dispute within the rationally tried and tested framework set out by the Centre, the development of arbitral practice as well as State practice has evolved to highlight the idiosyncrasies of ICSID arbitration[15].

13 The Reasons Requirement in International Investment Arbitration 5-16 (Guillermo Aguilar Alvarez & W.Michael Resiman eds., 2008)

14 E. Gaillard, LA JURISPRUDENCE DU CIRDI, 2004, p. 422. By comparison, in 1987, only 11 cases were pending before the Centre, id., p. 199

15 Loukas A. Mistelis, Julian D. M. Lew, 'Pervasive Problems in International Arbitration' p 13

The specific aspects that relate in particular to the objective jurisdictional conditions of the existence of an "investment" made by an "investor" pursuant to Article 25 of the ICSID Convention. What is of interest to the future development of ICSID arbitration are also the possible impact of the newly introduced Rule 41(5) of the ICSID Arbitration Rules and the effect of the denunciation of the ICSID Convention by State parties.

A. Defining 'investment' under the ICSID convention

It isn't unobserved today to note that the ICSID Convention and more specifically Article 25 of this Convention, which governs the Centre's jurisdiction, did not define an investment and that this omission was not unintentional. Keeping this in light, arbitral tribunals have developed their own body of case laws, attempting to establish the criteria to determine whether an investment as such qualifies to be so under the ICSID Convention. There has been a general agreement that an investment has to satisfy three criteria, namely (i) a participation to the risks of the transaction, (ii) a contribution made by the investor, and (iii) certain duration for the project. The unresolved issue however, lies in the role played by a potential fourth measure– to be found in the Preamble of the ICSID Convention itself –that for an investment to be protected, it must contribute to the economic development of the host State. Arbitral tribunals have approached this question in one of the three prescribed ways. The first approach, as demonstrated by the Tribunal in CSOB v. the Slovak Republic[16] is that while a contribution to the economic development of the host State may exist in a given case, it is not a formal prerequisite for a finding that an investment exists:

"[…] it would seem that the resources provided through CSOB's banking activities in the Slovak Republic were designed to produce a benefit and to offer CSOB a return in the future, subject to an element of risk that is implicit in most economic activities. The Tribunal notes, however, that these elements of the suggested definition, while they tend as a rule to be present in most investments, are not a formal

16 CSOB v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision on Jurisdiction dated May 24, 1999, 14 ICSID REVIEW 251 (1999)

prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention."[17]

The next approach that was illustrated by the decision in Salini v. Morocco,[18] is to consider the contribution to the economic development of the host State to be a fourth requirement for an investment to be protected under the ICSID Convention:

"[...] the doctrine generally considers that investment infers: contributions, a particular duration of performance of the contract and a participation in the risks of the transaction. While reading the Convention's preamble, we may choose to add the contribution to the economic development of the host State of the investment as an additional condition."[19]

The third and final approach, discussed notably in Lesi-Dipenta v. Algeria[20] is that the contribution to the economic development of the host State should not be considered as an independent requirement for a finding that an investment exists, even though it could be implicitly included in the other three criteria.

The issue was again raised before the ad hoc Committee in Patrick Mitchell v. The Democratic Republic of Congo[21]. The Committee concluded that "[i]t is thus quite natural that the parameter of contributing to the development of the host State has always been taken into account, explicitly or implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty."

17 Id., paras 76 and 90.

18 Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICISD Case No. ARB/00/4, Decision on Jurisdiction dated July 23, 2001, 42 INTERNATIONAL LEGAL MATERIALS 609 (2003), 6 ICSID REPORTS 400 (2004), para 52.

19 Salini v. Morocco, supra 6

20 Consorzio Groupement L.E.S.I.-Dipenta v. People's Democratic Republic of Algeria, ICISD Case No. ARB/03/8, Award (in French) dated January 10, 2005, 19 ICSID REVIEW 426 (2004).

21 Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7, Decision of the Ad Hoc Committee on Annulment dated November 1, 2006

Finding that the tribunal had not provided "the slightest explanation as to the relationship between the 'Mitchell & Associates' firm and the DRC" – what the Committee did was to annul the award for failure to state reasons on the qualification of those services as an investment. This decision was received in the investment arbitration community with criticism[22].

Although other tribunals followed suit,[23] the case law today on the definition of an investment under the ICSID Convention is clearly unsettled as to the requirement of a contribution to the economic development of the host State. For example, it was in contradiction with the Committee's emphasis on the fact that the economic development of the host State "does not mean that this contribution must always be sizeable or successful; and of course, ICSID tribunals don't need to evaluate the real contribution of the operation in question. The Committee's finding that services cannot be considered as an investment because they did not contribute to the economic development of the host State was in contradiction with the clear and specific language of the bilateral investment treaty between the Democratic Republic of Congo and the USA which defined "investment" as specifically including "service contracts". It is sufficient for the operation to contribute in one way or another to the economic development of the host State. This concept of economic development is extremely broad in any event but also variable depending on the case."[24]

In the face of such inconsistency, we can see why an investor would choose UNCITRAL arbitration over ICSID arbitration on the basis of the same bilateral investment treaty because they would reasonably not need to establish a contribution to the economic development of the host State, which the arbitral case law has found to be of extreme

22 W. Ben Hamida, Two Nebulous ICSID Features: The Notion of Investment and the Scope of Annulment Control – Ad Hoc Committee's Decision in Patrick Mitchell v. Democratic Republic of Congo 24(3) JOURNAL OF INTERNATIONAL ARBITRATION 287 (2007)

23 See in particular Malaysian Historical Salvors v. The Government of Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction dated May 10, 2007, para. 135 ("[…] to determine whether the Contract is an 'investment', the litmus test must be its overall contribution to the economy of the host State, Malaysia"). This award is currently the subject of annulment proceedings

24 Patrick Mitchell v. Democratic Republic of the Congo, supra note 9

importance in the Preamble of the ICSID Convention. This rigidity that has been introduced into the definition of an "investment" has resulted in the development of different regimes of investment protection–to the detriment of legal predictability and certainty–either within the ICSID case law or based on the choice of other another forum by the investor, making other options such as UNCITRAL arbitration (if provided by the relevant instrument) much more attractive to investors.

B. Defining "investor" under the ICSID Convention and the question of dual nationality

The question of dual nationals is specific to ICSID arbitration and the application of Article 25(2)(a) and the earliest decision to deal with this question was Champion Trading v. The Arab Republic of Egypt[25]. In this case, the Tribunal did not take into account the rule of effective nationality under international law in order to determine whether the claimants were, effectively, nationals of the host State. In this respect, the Tribunal held that dual nationals who hold the nationality of the host State cannot bring a claim under the ICSID Convention.

The exclusion of dual nationals under the ICSID Convention was further reaffirmed in Soufraki v.United Arab Emirates[26]. The Tribunal in the aforementioned case found that the timing of the determination of the nationality was to be a crucial question. The dates that were used by the Tribunal to determine the claimant's nationality for the sole purposes of the bilateral investment treaty at issue were the date of the parties' consent to ICSID arbitration as well as the date of the registration of the claimant's request for arbitration by ICSID. The question was revisited in Siag and Vecchi v. The Arab Republic of Egypt[27] too. In this case, both the claimants had previously been Egyptian nationals but had lost their Egyptian nationality by operation of the law prior to bringing their ICSID claim. Simultaneously, the claimants also held Italian and Lebanese nationality. In this case, the Tribunal upheld its jurisdiction since the claimants had lost their Egyptian nationality.

25 Champion Trading v. The Arab Republic of Egypt, ICSID Case No. ARB/02/9, Decision on Jurisdiction dated October 21, 2003, 19 ICSID REVIEW 275 (2004), p. 288.

26 Soufraki v. United Arab Emirates, ICSID Case No. ARB/02/7

27 Siag and Vechi v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Decision on Jurisdiction dated April 11, 2007

In his dissenting opinion, Professor Orrego Vicuña focused on the requirement in the ICSID Convention that a claimant not have the nationality of the respondent State "on the date on which the parties consented to submit" the dispute to arbitration and noted that in cases where a State gives its consent by way of an investment treaty - the date on which both parties consent to arbitration may not occur until much later and possibly as late as the notice of arbitration and argued about the importance of the timing of the acquisition and loss of nationality. He raised the possibility of requiring the investor not to hold the nationality of the respondent State at the time the investment was made and his suggestion was that, in order to avoid the possibility of investors manipulating their nationality up until giving their consent to arbitration and to "prevent many kinds of abuse" - we can suggest that the ICSID Convention must be interpreted as requiring that an investor not have the nationality of the respondent State at the time of the expression of consent of both the investor and the host State.

Considering the exclusion and the timing requirements contained in Article 25(2) of the ICSID

Convention as regards natural persons, a natural question arises as to whether or not ICSID arbitration is the most favorable option with respect to the case of dual nationality, specifically speaking when such dual nationality is in doubt, for example because an investor has lost the nationality of the host State before submitting an ICSID claim or maybe because an investor has the nationality of the host State without such nationality being effective. To the extent that the same exclusion may not exist under other dispute resolution arrangements offered by the relevant investment treaties, the UNCITRAL Arbitration Rules for example, these other options might be viewed by some investors as being more advantageous to them.

C. The new accelerated procedure under Rule 41(5) of the ICSID Arbitration Rule

As per the new Rule 41(5) of the ICSID Arbitration Rules which provides a party with an opportunity to file an objection with the arbitral tribunal that a claim is manifestly without legal merit, such

objection resulting, in the dismissal of the claim, if successful. This objection is supposed to be filed within 30 days of the constitution of the tribunal or in the case of any event, before the tribunal's first session. This rule came into effect on April 10, 2006 and had been resulted from the consultations undertaken by the ICSID Secretariat during 2004 as well as 2005. It was further justified by the fact that:

> "[…] the Secretary-General's power to screen requests for arbitration does not extend to the merits of the dispute or to cases where jurisdiction is merely doubtful but not manifestly missing. What happens in such cases is that the request for arbitration must be registered and the parties invited to proceed to constitute the arbitral tribunal. It is suggested to make it clear, by the introduction of a new paragraph (5), that the tribunal may at an early stage of the proceeding be asked on an expedited basis to dismiss all or part of a claim on the merits.

The change would be helpful in addressing any concerns about the limited screening power of the Secretary-General."[28]

There is no such parallel to Rule 41(5) among other arbitration rules, which includes the UNCITRAL Arbitration Rules or the Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (AISCC). Although the ICC Pre-Arbitral Referee Procedure is similarly concerned with expedited procedures - it is directed towards a temporary solution and does not affect the merits of an arbitration which, if initiated in a case, will be a separate proceeding with arbitrators different from the referee who decided the claim[29]. While this provision has not yet been tested in the waters, it is logically possible for us to foresee a number of difficulties as regards its implementation. One of the most important questions is whether the respondent State may use this provision as a procedural weapon to add an extra layer of proceedings and thus

28 Suggested Changes to the ICSID Rules and Regulations, Working Paper of the ICSID Secretariat, May 12, 2005, available at http://ita.law.uvic.ca/documents/052405-sgmanual.pdf, p. 7.

29 See Article 1.1 of the ICC Rules for a Pre-Arbitral Referee Procedure: "These Rules concern a procedure called the 'Pre-Arbitral Referee Procedure', which provides for the immediate appointment of a person (the 'Referee') who has the power to make certain Orders prior to the arbitral tribunal or national court competent to deal with the case (the 'Competent Authority') being seized of it." The powers of the Referee are set forth in Article 2 of the Rules.

delay the arbitration. No doubt, Rule 41(5) does make it clear that the tribunal's decision "shall be without prejudice to the right of a party to file an objection pursuant to [Rule 41] paragraph 1[on jurisdiction] or to object that a claim lacks legal merit in the course of the proceeding." There is a slight chance that that the respondent State takes advantages of the Rule to submit its objections piecemeal or the same objections could be presented at different stages of the arbitral proceeding.

There are chances that this Rule may raise issues relating to the arbitrators' impartiality–or at least appearance of impartiality–because the arbitrators who get to decide on an objection under Rule 41(5) are the same as those who will decide the dispute and in the event the objection is dismissed, on questions of jurisdiction and the merits of the dispute. In some cases where a party's objection is not unanimously rejected, the question still remains as to whether or not the arbitrator who has found that the claim is manifestly without legal merit under the expedited procedure of Rule 41(5) will have prejudged the claim when the remainder of the arbitral proceeding would address the same or related questions bearing on the tribunal's jurisdiction and/or the merits of the dispute.

Most importantly, Rule 41(5) does not prescribe how to deal with an objection – it simply states that the tribunal "shall decide after giving the parties the opportunity to present their observations on the objection". Few questions that we can raise - Will the actual procedure that will be adopted at a Rule 41(5) hearing allow for witnesses to be called? Will decisions be published? What sort of time limits will there be? Even if we consider that a successful objection under this Rule will effectively bring the case to an end, questions of procedure are still of crucial concern to ensure that a claimant has a fair opportunity to present its claim.

D. The damaging consequence of the denunciation of the ICSID Convention

In April 2007, member States of the Alternativa Bolivariana para la América Latina y El Caribe (ALBA), - Bolivia, Venezuela, Nicaragua and Cuba declared their intention to withdraw from the International

Monetary Fund as well as the World Bank. Bolivia has been the first–and so far only–State to implement this resolution and has submitted a notice of denunciation of the ICSID Convention on May 2, 2007[30]. Pursuant to Article 71 of the Convention, this denunciation was supposed to take effect six months after its receipt by the Centre of Bolivia's written notice of denunciation that is on November 3, 2007. However, at this time, the exact consequences of Bolivia's denunciation are unclear to us. One of the important questions is what will become of the denouncing State's existing rights and obligations under the Convention after denunciation. Even though Article 72 of the ICSID Convention covers the situations where a denouncing State, one of its nationals or, one of its constituent subdivisions or agencies, has given consent to the jurisdiction of the Centre prior to the notice of denunciation:

"Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary." The notion of "consent to the jurisdiction of the Centre" will hence be at the heart of this derogatory regime, is the least we can say. To say it simply, the main issue will be whether general consent to ICSID arbitration given by a State in an investment treaty constitutes ongoing "consent to the jurisdiction of the Centre" even after that State's denunciation of the ICSID Convention. It has been held by some authors that the denouncing State's consent must be "perfected" before the notice of denunciation.[31] Some others believe that in cases in which the investor has accepted the State's general consent prior to the receipt of the notice of denunciation by the Centre or within the six-month period set forth in Article 7 - the effectiveness of the existing rights and obligations might raise a little difficulties as the host State is still a Contracting Party at those times. In the more difficult situations where the investor's acceptance of the general offer by the host State

30 ICSID News Release of May 16, 2007, Bolivia Submits a Notice under Article 71 of the ICSID Convention, available on the ICSID Website at www.worldbank.org/ICSID.

31 Ch. Schreuer, THE ICSID CONVENTION: A COMMENTARY, Cambridge University Press, 2001, p. 1286.

is contained in an investment treaty occurs after the denunciation of the ICSID Convention has taken effect and the host State has ceased to be a Contracting Party, effect must be given to the wording of the arbitration clause in the relevant investment treaty or contractual arrangement: where an unqualified consent to arbitration exists, as opposed to an agreement to its consent, then the rights and obligations attached to such consent should not be affected by the denunciation of the ICSID Convention pursuant to its Article 72.[32]

These questions might be addressed by the arbitral tribunal constituted in the case registered by the ICSID Secretariat against Bolivia in October 2007 despite Bolivia's objections.[33] In the meantime, however, in light of the uncertainties entailed in the application of Article 72 of the ICSID Convention by arbitral tribunals – investors faced with a denunciation may choose to consider other alternatives provided by other relevant instruments.

In view of the limitations that ICSID arbitration tends to impose on the investors and the uncertainties resulting from the case law or the applicable provisions, the question that bothers us today is whether the success of ICSID arbitration will be maintained in the years to come or whether investors will find new interest in the other options existing in the relevant instrument.

In particular, the UNCITRAL Arbitration Rules could gain additional support based on the ongoing amendments to the rules. For example, the proposed change to Article 1(1) of the UNCITRAL Rules to cover disputes "in respect of a defined legal relationship – it does not matter whether it is contractual or not" and not merely "disputes in relation to [a] contract" as is the case today, which can be perceived as a step towards certainty in that the new language will unquestionably cover legal disputes arising from an investment treaty.[34] In addition

32 Article by E. Gaillard (co-authored with Y. Banifatemi), The denunciation of the ICSID Convention, NEW YORK LAW JOURNAL, June 21, 2007, with an analysis of the History of the ICSID Convention in this regard.

33 E.T.I. Euro Telecom International N.V. v. Republic of Bolivia, ICSID Case No. ARB/07/28, registered on October 31, 2007

34 Report of the Working Group II (Arbitration and Conciliation) on the Work of its Forty-Sixth Session (New York, February 5-9, 2007), UN Document No. A/CN.9/619, 22-24

to that, the proposed change to Article 33(1), to refer to the "rules of law" applicable to a dispute rather than simply the "law", which deals with the applicable law, opens up possibilities of the application to UNCITRAL arbitral proceedings not only of the rules specific to one legal system but also of transnational rules and the rules of international law.[35]

John H Jackson once said that any attempt to follow the developments of international economic law "is like trying to describe a landscape while looking out of the window of a moving train – events tend to move faster than one can even begin to describe them."[36] This statement is very accurate right now with respect to international investment law[37]. One of the most vivid examples is numerous attempts by many Latin American countries to reform the landscape of one of the most established and one of the most widely used mechanisms for settlement of investment disputes between states as well as private investors. As what maybe could be regarded as a baby step in this aspect, Bolivia has submitted a notice of denunciation of the ICSID Convention to the World Bank on May 2, 2007[38].

E. Analyzing the legal implications of this move

As per Latin American countries, ICSID arbitration lacks the guarantee of due process because of its failure to address the broader needs of society as well as generally inconsistent decisions and awards, impartial and not transparent proceedings, the lack of hierarchy of investment tribunals and no prescribed system of precedent or appeals[39].

35 As regards the application of international law under the ICSID Convention, see E. Gaillard and Y. Banifatemi, The Meaning of 'and' in Article 42 (1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, 18 ICSID REVIEW 375 (2003)

36 Jackson, Legal Problems, XV

37 See also for example Reinisch, in: Reinisch/Knahr (eds.) International Investment Law 201 (207) ("a hotspot of international law").

38 World Bank Group, "Bolivia leaves the ICSID," http://web.worldbank.org/WBSITE/EXTERNAL/BANCOMUNDIAL/EXTSPPAISES/LACINSPANISHEXT/ BOLIVIAINSPANISHEXT/0,print:Y~isCURL:Y~contentMDK:22766950~pagePK:1497618~piPK:217854~th eSitePK:500410,00.html

39 K. F. Gómez, "Latin America and ICSID: David versus Goliath?" Research Paper, University of Zaragoza, Zaragoza, 2010.

Thus, some of Latin American Countries are trying to change their position on ICSID and are considering reviving some aspects of the Calvo Doctrine. The most critical examples of recent hostility can be found in the cases of the ALBA declaration, the denunciation of ICSID Convention by Bolivia and Ecuador, Venezuela's anti-arbitration measures and the proposal to study the creation of an Arbitration Centre in the UNASUR[40]. Additional examples are the fact that Brazil (the most successful country in Latin America attracting flows of FDI) is not a signatory of the ICSID Convention nor has it ratified any of the BITs executed during the 1990s Argentina's experience with investment arbitration as the most sued country in ICSID, that Mexico still seems very reluctant to enter the ICSID system (notwithstanding its being part of NAFTA).

On 23 May 2008, the "Constitutive Treaty of UNASUR" was ratified by Chile, Colombia Argentina, Ecuador, Guyana, Bolivia, Brazil, Paraguay, Peru, Suriname, Uruguay and Venezuela. On March 11, 2011 this treaty was entered into force. The fact that UNASUR has now come into a formal existence is a very significant development and it is the first regional institution for some time that represents all of the South American countries.

The Operating Rules of UNASUR Arbitration Centre allows settlement of disputes between States and between a State and investor as are referred to it by virtue of any contractual provision or provision in an international instrument (Article 2). The jurisdiction of the Centre precluding disputes concerning health, energy, taxation, education, the environment and other factors, unless and until it is expressly stated otherwise in the relevant treaty or contract[41]. In no circumstances will an arbitral tribunal have jurisdiction to resolve the disputes concerning internal laws of a UNASUR member State and this preclusion would also extend to the economic effects in general. Although the jurisdiction

40 M. H. Mourra, "The Conflicts and Controversies in Latin American Treaty-Based Disputes," In: M. H. Mourra, Ed., Latin American Investment Treaty Arbitration, Kluwer Law International BV, 1st Edition, The Netherlands, 2008

41 C. Coronel-Jones, "The future of international arbitration in Ecuador: the boomerang effect," 22 July 2010. http://www.internationallawoffice.com/newsletters/detail.aspx?g=e46353d6-6931-47da-9acd-a187dcf9cf84.

of UNASUR Centre is not just confined to investment, this stipulation will considerably reduce some matters that are connected with commerce and investment.

The States can require the exhaustion of domestic judicial and administrative remedies as a precondition for the arbitration. In circumstances where a claim arises with relation to an administrative act of a said State, it shall always be necessary to exhaust domestic remedies (Articles 3). The requirement to exhaust the administrative and domestic judicial remedies would force the injured party to wait years before applying to the UNASUR Centre. It is necessary to state a reasonable limit of time for the conclusion of the domestic proceedings to give certainty and security to the parties and ensure the success of this Arbitration Centre[42].

The Tribunal shall be composed of three arbitrators, unless the parties decide that another odd number would be appropriate. In every case, each party shall be allowed to appoint one arbitrator and both parties shall designate by common agreement the president and his/her substitute of the Tribunal within 30 days. If the parties have not selected an arbitrator or there is no agreement on the selection of the president of the tribunal, then the Directorate General of the Centre will designate him/her by lot (Article 9)[43].

If we have to talk about the transparency of the proceedings, any arbitration shall be public (this includes documents, re- cords, evidence, hearings and awards) except for those relating to defense and security of States and the special cases which the parties determine by mutual agreement[44].

42 Ministry of Justice Human Rights and Religious Affairs of Ecuador. "Declaración Final de Cumbre de Poderes Judiciales de UNASUR," 25 June 2010. http://www.minjusticiaddhh. gov.ec/index.php?option=com_content&view=article&id=2518:declaracion-final-de-cumbre-de-poderesjudiciales-de-unasur&catid=276:institucionales&Itemid=59%27

43 "Union of South American Nations Treaty," Articles 1 and 3. http://www.pptunasur.com/downloads/tratadoconstitutivo- UNASUR.pdf

44 Ibid, refer to [31]

For amicus curiae, following the conformation of the tribunal, unless the parties agree otherwise, it can receive unsolicited letters from individuals or legal entities established in the territories of the parties when delivered within 10 days from the date of the tribunal constitution. The amicus curiae need to be concise and directly addressing issues relevant to the matter of fact and law submitted to the tribunal Arbitration's consideration (Article 35).[45] The time limit to receive amicus curiae is very short; it should be modified until the submission of the allegations.

With relation to the award, it shall be decided within a period of 240 days from the date of the constitution of the tribunal, which can be extended up to a limit of 120 days with the agreement of the parties (Article 41)[46]. Moreover, the awards shall be published and have precedential value (Articles 21 and 26). The consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the investment arbitration's system[47]. Unfortunately, ICSID lacks this very feature.

All the situations seem to suggest that the willingness to create a regional Arbitration Centre within UNASUR might turn out to be a firm and slow process, facing a lot of internal and external political obstacles[48]. Ecuador's proposal to constitute the UNASUR Arbitration Centre would need to be reconsidered in regard to some critical points, i.e. the limitation of the Arbitration Centre's jurisdiction and state a reasonable limit of time for the requirement to exhaust domestic judicial remedies and consider the NAFTA Rules in relation to the consolidation claims[49]. However, it is important to note that this proposal improves the consistency and transparency of decisions by the establishment of an appeal mechanism with a system of precedent. It included all the observations made to the ICSID proceedings by Latin American

45 S. Noury and C. Richard, "International Arbitration in Latin America: Overview and Recent Developments. International Arbitration 2008. A practical insight to cross border International Arbitration work: Chapter 38," Global Legal Group, 2008.

46 "Union of South American Nations Treaty," Article 41

47 I. Vincentelli, "The Uncertain Future of ICSID in Latin America," Independent Research Paper, University of Miami School of Law, 2008.

48 C. Leathley, "What will the recent entry into force of the UNASUR Treaty mean for investment arbitration in South America?" Network for Justice in Global Investment, April 2011.

49 T. J. Pate, "The Past, Present and Future of the Arbitral Clause in Foreign Investment Legislation: In Pursuit of the Balance," Research Paper, pp. 73-74.

countries. Furthermore, the influence of the WTO's dispute settlement system regarding the consultation stage, appellation proceedings and the award compliance (the WTO's compliance levels appear to be fairly high are all remarkable[50]. Despite the observations concerning UNASUR Arbitration Centre mentioned above, if Ecuador's proposal is adopted by Latin American countries, it could jeopardize the future of ICSID.

II. Conclusion

This recent explosion in investor-state arbitration under the auspices of the International Centre for Settlement of Investment Disputes ("ICSID") which is clearly the arbitration arm of the World Bank has been the subject of much discussion off late. Indeed, as a result of the perceived impact of investor-state arbitration on public interests, criticism has been followed by the media and elsewhere regarding certain 'aspects' of ICSID arbitration. An editorial on September 27, 2004 published in The New York Times entitled "The Secret Trade Courts" offered the following views: "Some arbitration is necessary in international trade... But the arbitration process itself is often one sided, favoring well-heeled corporations over poor countries, and must be made fairer than it is today. Unlike trials, arbitrations take place in secret. There is no room in the process to hear people who might be hurt...There is no appeal. And the rules of the game are such that when companies seek to recover damages, arbitration panels tend to focus narrowly on the issue of whether a company's profits were affected by a government action. They need not consider whether the action or law in question was necessary to protect the environment or public health, or even to stop a corporation's harmful behavior.

Companies also use arbitration to insulate themselves from the risks of doing business...The trade agreements that set the rules should direct arbitration panels to take a much broader view–to consider not just corporate interests but the needs of governments and citizens. The panels should also be required to invite a wider range of views. Because their decisions have great public impact, arbitration panels owe the public a hearing."[51] It is quite obvious that in the face of such criticism

50 A.T. Guzman, "International Tribunals: A rational choice analysis," University of Pennsylvania Law Review, Vol. 157, No. 171, 2008, p. 197. http://www.pennumbra.com/issues/pdfs/157-1/Guzman.pdf

51 "The Secret Trade Courts", New York Times, September 27, 2004, p.26, col.1

that ICSID recently amended its Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), its Arbitration (Additional Facility) Rules ("Additional Facility Arbitration Rules"),[52] and the Administrative and Financial Regulations.[53] The changes came into effect on April 10, 2006 and govern ICSID arbitrations where the consent to arbitration is given on or after that date, unless the parties choose to agree otherwise.[54]

These changes to ICSID's rules and regulations have been made following an extensive and long consultation process and they arise from a desire to improve and streamline the ICSID arbitration process in the face of harsh criticism such as that found in the above-quoted editorial from The New York Times. These amendments demonstrate an effort to improve confidence in the ICSID arbitration process and to make it less private and classified. Nonetheless, some are disappointed that the amendments do not go as far as the original proposals that were discussed.[55] A significant change that was discussed but was not adopted in the final amendments was the creation of an appeal facility within ICSID with the authority to review awards but this proposal was generally perceived as premature. Consequently, the annulment procedure found in r.52 of the ICSID Arbitration Rules and Art.52 of the ICSID Convention remains the only recourse against an award

52 The ICSID Arbitration Rules govern arbitration of investment disputes between contracting states and nationals of other contracting states, that is, disputes which fall within the scope of the 965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). The Additional Facility Arbitration Rules are Sch.C to the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes ("Additional Facility Rules") and cover arbitration administered by the ICSID Secretariat falling outside the scope of the ICSID Convention. The Additional Facility Arbitration Rules apply where the parties have agreed that the dispute shall be referred to arbitration under those Rules, and the dispute is an investment dispute between parties one of which is not a contracting state or a national of a contracting state, or at least one of the parties is a contracting state or a national of a contracting state but the dispute does not arise directly out of an investment (provided that the underlying transaction is not an ordinary commercial transaction)

53 See www.worldbank.org for the new version of these rules and regulations.

54 See Art.44 of the ICSID Convention. See also ICSID's press release dated April 5, 2006 at www.worldbank.org

55 See for example, "'Watered-down' changes to ICSID investment arbitration," www.brettonwoodsproject.org.

rendered under the ICSID Arbitration Rules.[56] We would say that not adding an appeal facility is a positive development because this maintains the quite limited grounds on which an ICSID award can be annulled and as compared to ordinary international commercial arbitration, one of the main selling features of ICSID arbitration is that an ICSID award is by virtue of the Art.54 of the ICSID Convention recognized as binding and enforceable as if it were a final judgment or that the award has failed to state the reasons on which it is based. Such annulment requests are dealt with by an ad hoc committee of three persons appointed by the Chairman of ICSID's Administrative Council (in other words, the President of the World Bank–see Art.5 of the ICSID Convention) from ICSID's Panel of Arbitrators. In any event, whether one is satisfied or not with the amendments, it will be interesting to see how they are applied and what impact they have on the evolution of ICSID arbitration and its place in international arbitration generally.

56 Convention, Art.52, provides that either party may request annulment of an award by an application in writing to the Secretary-General of ICSID on one or more of the following grounds: (a) that the tribunal was not properly constituted; (b) that the tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the tribunal; (d) that there has been a serious departure from a fundamental rule of procedure