Kluwer Arbitration Blog

Interviews with Our Editors: Illuminating Investment Treaty Arbitration and Institutional Services with Antonio R. Parra, Former Deputy Secretary-General of the ICSID

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Antonio R. Parra led a lengthy and luminous career of international public service, having held various roles in the OPEC Fund and the World Bank. Of special interest to our readers is that from 1990 to 1999 Mr. Parra was Legal Adviser at the International Centre for Settlement of Investment Disputes (ICSID), and then from 1999 to 2005 (when he retired), he was ICSID's first Deputy Secretary-General. During his service at ICSID, the institution grew in prominence

and scale to become the premier institution for investor-State dispute settlement (ISDS). Even still, many working at the ICSID Secretariat speak of the lasting legacy of Mr. Parra's contribution. It's an honor and a privilege to have him share his perspective with our readers.

1. *Mr. Parra, your vision and leadership have been instrumental to shaping the practice of ISDS. Yet, you have also made significant contributions to academia, having published several books and served ICSID Review – Foreign Investment Law Journal as Managing Editor, and then Editor-in-Chief. In your view, how does academic input influence ISDS practice?*

The influence of scholarly writings on ISDS practice is clear from a glance at written pleadings and arbitral decisions in the field. Contributions of scholars are frequently cited by parties and arbitrators on the myriad procedural and substantive legal issues that arise in the cases.

In launching the *ICSID Review—Foreign Investment Law Journal*, Ibrahim Shihata, General Counsel of the World Bank and Secretary-General of ICSID during most of the 1980s and 1990s, observed that such contributions could help to clarify the law applicable to foreign investments and assist in its balanced and progressive development.

The article that Shihata published in that first issue of the *ICSID Review*, had a large impact on the practice, and in particular growing acceptance, of ISDS at ICSID. Entitled "Towards a Greater Depoliticization of Investment Disputes: the Roles of ICSID and MIGA," the article was based on a paper that Shihata had presented at a 1985 international arbitration conference in Rio de Janeiro. In the paper, Shihata showed how the ICSID system respected considerations underlying the Calvo Doctrine followed in Latin America, notably by precluding the home State of an investor from espousing its national's claim if the matter was being or could be dealt with by an ICSID arbitral tribunal.

On re-publication of the article in 1991, Shihata observed that, when he presented the paper six years earlier, only four Latin American countries had signed the ICSID Convention but that the number of Latin American signatories had since doubled (and now encompasses almost all countries of the region).

2. *Do you believe that the ICSID Convention facilitates and promotes Foreign Direct Investment (FDI) by protecting investments and investors? From your perspective, what are the greatest threats facing the ICSID system and how can they be addressed?*

Encouraging increased foreign investment certainly was regarded by ICSID's founders as the basic objective of the ICSID Convention. They did not, however, see ICSID as serving this objective merely by protecting investments. Rather, they considered that the availability of balanced international facilities for the settlement of investment disputes could help to foster an atmosphere

of mutual confidence conducive to stimulating greater investment flows. (I am paraphrasing the 1965 Report on the ICSID Convention of the Executive Directors of the World Bank, who had formal responsibility for drawing up the Convention.) The founders were clear-eyed about the impact of the Convention. They foresaw that countries with good investment climates would continue to attract investments even if they did not become parties to the Convention or use ICSID's dispute settlement facilities. However, adherence to the Convention could, the founders expected, enable countries seeking more investment to "provide additional inducement" for investment (in the words of the Report of the Executive Directors). The Convention obviously can be counted a success in this respect. The extent to which it may be credited with actual rises in investment flows, a much larger question, is probably impossible to measure, if only because the factors determining investment decisions are so varied and subjective. But given the central role that ICSID plays under most bilateral investment treaties, reference might be made in this connection to studies finding a positive correlation between such treaties and investment flows.

As dangers for ICSID, now approaching its 60th anniversary, I think that many would highlight recent moves, ironically of advanced economy countries, to narrow or even eliminate the scope for recourse to ISDS under their investment treaty arrangements—keeping ISDS only for disputes arising out of Mexico-U.S. investments under the new USMCA; the termination, in view of their ISDS clauses, of intra-E.U. bilateral investment treaties; and the proposal championed by the E.U. to replace ISDS mechanisms with a permanent multilateral investment court (MIC).

For ICSID, these might best be considered opportunities instead of dangers. Retreat from ISDS, in the sense of investment treaty arbitration, may enlarge possibilities for resort to contract-based arbitration, which still represents a significant proportion of ICSID's caseload. ICSID conciliation and fact-finding facilities may at last find users. If a MIC materializes, it may only be after a long time, given the complexity of the project. But ICSID's superb infrastructure and skilled Secretariat might make it an ideal host for the MIC. In all these ways, as well as by still administering investment treaty arbitrations, ICSID would be continuing to serve its objective of promoting international investment.

3. *In recent years, ISDS has seen backlash from external stakeholders, including NGO activists and journalists, which perhaps has led to a legitimacy crisis and demands for radical reforms. From your perspective, what could be one or two reforms to the ISDS system that would meaningfully address legitimacy-based concerns?*

It may be useful, when we think about the legitimacy crisis of ISDS, to keep in mind what we mean by legitimacy in this context. In several of its very good notes on *IIA Issues*, UNCTAD has referred to the legitimacy of ISDS as its authority, in the eyes of the public at large, to assess the validity of a State's acts. Because of the structure of investment treaty arbitration, we can only look for that authority in the arbitration and substantive treatment provisions of the underlying treaty. Consternation about the outcome of a case may often best be directed at these provisions as permitting or indeed demanding the outcome. Makers of investment treaties and other stakeholders increasingly recognize the need for greater care in the elaboration of the provisions, especially those on indirect expropriation. Investment treaties however remain a patchwork of varying norms, probably becoming even more diverse as newer treaties slowly replace older ones. A solution

might consist in the conclusion of a global investment treaty, though countries may be discouraged from attempting this difficult task again, after the repeated failures to finalize such a treaty at the OECD. A set of non-binding guidelines on the treatment of foreign investment was issued under World Bank auspices in the early 1990s. Reissuance by such a universal organization of widely accepted updated guidelines, for countries to emulate in their investment treaties and laws, might well help to address legitimacy-based concerns about ISDS.

4. *Relatedly, recent years have seen significant ISDS reform efforts, including the ICSID rule amendment project and UNCITRAL Working Group III, with significant input from various stakeholders, including the States and investors themselves. From your perspective, what are the top three issues to be addressed?*

From such ambitious and wide-ranging reform processes, it is difficult to choose just three topics to discuss. Among the many overlapping issues being addressed in the UNCITRAL and ICSID processes, three of particular interest to me are issues relating to challenges of arbitrators, security for costs, and frivolous claims. In these and other respects, the ICSID process is more advanced and focused, dealing just with the institution's own rules.

In accordance with the ICSID Convention, challenges of an arbitrator for lack of independence, or for ineligibility to serve on the arbitral tribunal, have been decided by the other arbitrators, unless they are equally divided, in which case the challenge has been decided by the Chair of the Administrative Council of ICSID (the President of the World Bank). Having unchallenged arbitrators, at least in the first instance, decide the challenge of their fellow arbitrator has rightly been termed unsatisfactory by the annulment committee in a recent ICSID case.

Requests for a tribunal to direct a party to provide security for costs have been handled within the framework of the article of the ICSID Convention on provisional measures, under which an arbitral tribunal may grant provisional measures to preserve the respective rights of either party. The requests made on this basis for security for costs have seldom been granted. In several instances, the tribunals considered that they could not issue provisional measures in respect of rights that were hypothetical or to be created only in the event of the requesting party prevailing in the proceeding.

By a provision added to its Arbitration Rules in 2006, ICSID introduced a procedure for the early dismissal of claims manifestly lacking legal merit. In subsequent proceedings, the provision has been interpreted as covering claims that are unsustainable from the jurisdictional as well as substantive viewpoints, although this was not clear from the provision (which I feel free to criticize because I was its initial drafter).

These shortcomings, and many others, are addressed in the outstanding package of new amendments prepared by ICSID. Thus, under the new amendments, if unchallenged arbitrators find themselves unable for any reason to rule on the challenge of their colleague, they will be deemed to be equally divided on the challenge, which will then be decided by the Chair of the Administrative Council; orders for security for costs will no longer be treated as provisional measures under the ICSID Convention; and the Arbitration Rules will put beyond doubt the possibility of early dismissal of claims that are manifestly ill-founded as to jurisdiction.

5. *In 2009, following unfavorable outcomes in several investment disputes, Ecuador notified the World Bank of its denunciation of the ICSID Convention. Ecuadorian leaders went as far as adding a provision (Article 422) to the Ecuadorian Constitution to prevent future governments from entering new International Investment Agreements (IIAs) that could 'yield sovereignty' to international arbitration. Now, a decade later, Ecuador has taken steps to rejoin the ICSID Convention. At the very least, this example illustrates that State views on IIAs and related dispute resolution can evolve over time depending on the context. From your perspective, how can ICSID best be mindful over sovereignty concerns and criticism while promoting the benefits of ISDS? Should we revisit the utility in academic discourse on "de-politicization" of investment disputes?*

Sovereignty concerns were indeed invoked for Ecuador's denunciation of the ICSID Convention in 2009. In my understanding, the denunciation was precipitated, not so much by experiences of Ecuador in particular cases, as by the decision in 2007 of members of the Bolivarian Alliance for the Americas—ALBA—to withdraw from the ICSID Convention, a decision acted upon, among ALBA members, by Bolivia and Venezuela as well as Ecuador. Attracting much attention around the time of Ecuador's denunciation were government statements calling into question the neutrality of ICSID arbitration. As you suggest in your question, it is crucial for such debates to be grounded in fact. In 2010, the same year that the denunciation of Ecuador took effect, ICSID redoubled its efforts to meet this need with the inauguration of its semiannual publication, *The ICSID Caseload—Statistics*. ICSID has also become very active in offering courses and training on ICSID arbitration to government officials and the public at large. Such efforts have been doing much, to use your words, to promote the benefits of ISDS, particularly ICSID procedures, while remaining mindful of the concerns and criticism.

6. *Several times in past posts on the Blog our contributors have commented on whether India should join the ICSID Convention. On this debate, India has emphasized the perception of ICSID being "pro-developed countries" and also underscored the lack of review as a major disadvantage (i.e. the self-contained, detached structure). On the other hand, it has been argued that the Indian economy would benefit from a transparent, reliable, and predictable legal framework for investor/investment protection, and therefore that joining the Convention would "enhance investor confidence and promote incoming investments". In your view, which of the two better reflects reality and why?*

On the first side of this debate, I would disagree with the contention that ICSID is "pro-developed country." Its governing body, the Administrative Council, comprising one representative of each member, each with one vote, is overwhelmingly composed of representatives of developing countries. Moreover, the respondents in ICSID cases, most of them governments of developing countries, have prevailed in more than half of the cases decided by tribunals. It is interesting that, on this side of the debate, the exclusion of review by national courts of ICSID arbitral awards is cited as "a major disadvantage." The exclusion was put in the ICSID Convention precisely to help governments of developing countries obtain enforcement of awards rendered in their favor without

being subject to undue delays or defenses based on local laws. (For compliance with awards rendered against governmental parties, it was considered sufficient that such compliance would, under another provision of the Convention, represent an international law obligation of the government concerned.)

On the other side of the debate, adherence to the ICSID Convention might facilitate increased investment in India but the first of the quoted posts on your Blog considers adherence by India to be "highly unlikely." It seems from that and the second quoted Blog post that much of the reluctance about joining the ICSID Convention stems from the potential of ICSID claims being brought against India. But adherence to the ICSID Convention does not in and of itself obligate a country to submit all or indeed any of its investment disputes to ICSID. Importantly for an investment exporter such as India, adherence will make its nationals eligible to use ICSID's dispute resolution facilities for disputes with host countries of their investments abroad. To the extent it is not already doing so, it might be useful for India, in its further consideration about the possibility of joining the ICSID Convention, to keep in view its position as a home country, as well as a host country, for foreign investments.

7. *Could you please share with our audience two negative trends and two positive trends you have observed with ISDS in the last five years?*

Two aspects of ISDS nowadays that I would single out for criticism are a continued lack of diversity among members of arbitral tribunals and the continued lack of an international appeals facility such as the one proposed at ICSID in 2004 (in a report written by me). According to my last count, only about 20 percent of the individuals appointed as ICSID arbitrators have been nationals of emerging or developing countries and only about 10 percent women. Responsibility for this rests, of course, mainly with parties to proceedings, who make most of the appointments. In suitable contexts, where parties to investment treaties agreed to incorporate the envisaged appeals facility rules by reference into their treaties (and took steps to make the necessary modification of the ICSID Convention as between themselves), the mechanism might have enhanced the credibility and consistency of ISDS, if only under the particular investment treaty or treaties concerned.

Two positive developments that I would highlight are the growing popularity of investor-State mediation and the intensified attention being paid to ways of cutting the duration of arbitration proceedings. On mediation, I refer especially to the mediation rules that ICSID has included in its proposed rule amendments. On duration, I particularly have in mind the proposed ICSID amendments more extensively stating time limits, counting them more strictly, and offering parties the option of agreeing to expedited arbitration proceedings with shortened timeframes.

Thank you, Mr. Parra, for sharing these insightful views. We appreciate your time and continue to wish you the best!

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

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