PANEL DISCUSSION: SHIFTING TRENDS IN INVESTMENT ARBITRATION

This event was sponsored by the Columbia International Arbitration Association and the Vale Columbia Center on Sustainable International Investment.

Recent nationalizations and arbitral awards or annulment decisions suggest that we may be at a turning point in investor-state relations. The purpose of this panel discussion was to assess the impact and implications of this evolving situation. Panelists discussed investor and state positions and expectations with regards to these recent shifts and their potential impact on the future of investment arbitration.

The panelists were Miriam K. Harwood (a partner in the New York office of Curtis Mallet-Prevost, Colt & Mosle) and Craig S. Miles (a partner in the Houston office of King & Spalding). Janet M. Whittaker (Legal Consultant at ICSID) moderated the discussion. The event was opened and closed by Karl P. Sauvant (executive director of the Vale Columbia Center on Sustainable International Investment) and Louis-Alexis Bret (an LLM student at Columbia Law School and member of the Columbia International Arbitration Association).

Is the investment arbitration system biased in favor of either investors or states?

Panelists pointed out that there are as many commentators claiming that investment arbitration is biased in favor of investors than commentators blaming the system for being biased in favor of states. Arguments that the system was somewhat biased towards investors are based on the following observations. States, always acting as respondents, have generally less time to prepare their cases as they have to respond in a limited time-frame to claims that might have been prepared well in advance. Moreover, state parties encounter difficulties in appointing experienced arbitrators who have not consistently ruled against host-states. This is because the recent investment jurisprudence could be characterized as generally pro-investor.

Panelists also raised some arguments suggesting that the investment arbitration system could be biased against investors. No evidence has emerged that ICSID cases contained any pro-investor bias and, in fact, successful claims generally allowed to recover only a limited fraction of the claimed amounts. Moreover, some states could be tempted to pose as victims of an unfair and flawed arbitration system while refusing to pay the awards rendered against them. Investors suffer both from this perception and these actions. Finally, panelists argued that the impact of investment awards is rather limited and that no states have been compelled to change their policies because of ICSID.

The fair and equitable treatment standard and its recent evolution

Panelists agreed that the lack of a commonly accepted definition of the fair and equitable treatment standard generated uncertainty. A major issue of discussion was whether fair and equitable treatment should be understood as a stabilization standard. Panelist argued that fair and equitable treatment clauses could be powerful tools in the hands of investors. However, it would be dangerous to forbid states to change any rule when both legal and economic assumptions constantly change. The fair and equitable treatment standard should therefore rather be understood as a guarantee of due process than as a compelling standard of stabilization. Panelists also agreed that investors do not expect the law to be frozen, and that fair and equitable treatment clauses are different from stabilization clauses. However, the fair and equitable

standard should prevent states from enacting policies aimed at breaching their contractual obligations. Investors regret the recent structural shift towards expropriations and nationalizations from some host-states. Finally, and with regards to the evolution of the fair and equitable treatment standard, panelists observed that if arbitrators are not bound by precedent, one could nevertheless agree that a "common law of ICSID" is emerging.

Recent annulment decisions

As a preliminary remark, panelists observed that despite the recent past, only three percent of ICSID awards were actually annulled. They insisted on the fact that investment awards remain largely unchallenged. Panelists argued, however, that the recent wave of annulment proceedings raised new uncertainty with regards to investor-state arbitration. Three annulment decisions particularly attracted the panelists' attention: CMS v. Argentina, Enron v. Argentina and Sempra v. Argentina. [1] In particular, the CMS annulment decision was criticized for opening the door for the two following decisions, even if the annulment panel ultimately refused to annul the award. Panelists also discussed the conclusions reached by the Sempra and Enron committees. The Sempra committee was also criticized for its extensive interpretation of Article 52(1) of the ICSID Convention when considering that the arbitral tribunal manifestly exceeded its powers. Panelists concluded by pointing out that the number of applications for annulment was actually decreasing and that one should therefore expect annulment proceedings to become less prevalent in the years to come.

Resolution of investment disputes via alternative dispute resolution mechanisms

Panelists agreed that parties should be encouraged to negotiate or settle their disputes amicably at different stages of the dispute. Panelists considered that mediation could be a particularly useful tool in inducing settlement talks. They suggested that this mediation process could be activated at two stages: First, before the constitution of the arbitral tribunal when parties are still negotiating an amicable resolution of the dispute. Second, after the tribunal is constituted and parties started exchanging pleadings. Panelists emphasized the potential benefits of that later approach, explaining that it was very important for parties to have an opportunity to renegotiate after having gathered sufficient information and better defined their position with regards to the issues at stake.

Whether an investment treaty bar is emerging

Finally, Panelists believed that an investment treaty bar is currently emerging. They regarded this development as largely positive and described the evolution towards a limited number of players as a step towards increased quality of service and efficiency. Panelists also agreed that firms focusing on representing either states or investors constitute a welcome development. Parties, counsels and arbitrators are all likely to benefit substantially from that approach.

Alexis Foucard and Louis- Alexis Bret

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[1] *See, CMS Gas Transmission Company v. The Argentine Republic,* ICSID Case No. ARB/01/8, Decisions of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (Sept. 25, 2007); *.Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (July 30, 2010); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (June 29, 2010).