ADI/ILA 150 ANS/YEARS

2023 PARIS

Newsletter

Nº15, April 2023

Interview with Eduardo Silva Romero

Co-Chair of Dechert's International Arbitration Global Practice
Chair of the ICC Institute of World Business Law
Professor Emeritus, University of Rosario (Bogotá, Colombia)

1) Investment arbitration (and investment law as a whole) has been heavily criticised in recent years. What are the reasons for this and how could this affect your practice?

Investment arbitration is, and always has been, a fragile institution. Its fragility was brought to the forefront in recent years with, for instance, the rulings of the European Court of Justice in *Achmea* and *Komstroy* which, in effect, mean the end of investment arbitration based on intra-EU BITs. Another example is the increasing loss of faith of States in investment arbitration, which has resulted in States terminating their Bilateral Investment Treaties ("**BITs**") (India and Indonesia, among others) and/or withdrawing from the Energy Charter Treaty (Italy or, most recently, France).

With States and State entities being the most dissatisfied users of the investment arbitration system, the main criticisms are, to name a few, lack of transparency in the decision-making process, the perceived lack of independence of arbitrators, the long duration and high cost of arbitration proceedings, inconsistency in arbitral tribunals' decisions, as well as the high amounts awarded to investors in damages.

This does not mean to say, however, that investment arbitration is disappearing. As long as there are investments, investment disputes will exist. And these disputes need to be resolved. While some States have resorted to excluding investment arbitration altogether from their BITs (for instance, Brazil-Mozambique BIT), others have chosen to reword their BITs to ensure an increased symmetry between States and investors.

As a result, my day-to-day practice has, to date, barely been impacted, if at all, as States continue to resort to the investment arbitration system despite the criticisms proffered against it. As such, while Bolivia and Ecuador terminated their BITs in the past years, Colombia and Venezuela entered into a new BIT in February of this year, while Mexico became a party to the ICSID Convention in 2018 before Ecuador re-joined in 2021. Similarly, intra-EU investment arbitration has continued to exist, and arbitral tribunals continue to assert their jurisdiction over these claims.

This being said, the termination of intra-EU BITs in 2020, as well as, more generally, the increasing loss of faith in the investment arbitration system will most certainly lead to the decline of investment arbitration as we know it.

In this issue

ILA FRANCE
INTERNATIONAL LAW ASSOCIATION
BRANCHE FRANÇAISE DE L'ASSOCIATION DE DROIT INTERNATIONAL

2) Investment arbitration has always oscillated between contract and treaty. Do you see a new trend towards preferring contract over treaty arbitration, and what are the reasons for this?

Investment arbitrations often involve issues arising from an international commercial contract – typically known as a 'State contract' – entered into between an international corporation (*i.e.*, a foreign contractor) on one side, and a State or State entity on the other in relation to a given, often long-term, project to be carried out in the State.

These State contracts typically contain a dispute settlement provision clause in favour of State's domestic courts or in favour of commercial arbitration, be it ICC or another institution. This has famously given rise to jurisdictional and/or admissibility issues before investment arbitral tribunals, which need to decide on the conflict of having both treaty and contractual claims before them, particularly in cases where the BIT contains a so-called "umbrella clause" which, at least in theory, serves to elevate contractual claims to the level of treaty claims. Investment tribunals have been known to take a different approach to these issues, which has led to uncertainty and, in my opinion, contributed to the general dissatisfaction with the investment arbitration system.

I strongly believe that, in the long-term, we will see a rise in international commercial arbitrations based on State contracts. While these arbitrations are not referred to as "investment arbitrations" as they do not arise from an investment treaty, they nevertheless often involve issues of investment, and the foreign contractor will be able to invoke a number of protection mechanisms to safeguard its investment project. For instance, *force majeure* and hardship clauses will, in certain circumstances, enable a foreign contractor to maintain the *equilibrium* of its long-term contract with the State in cases where political or economic changes have arisen that make it excessively onerous to perform the contract.

In short, international commercial arbitration arising from State contracts will provide a strong alternative to today's investment arbitration, as it can ensure equality between the parties by providing that the State shall not submit any dispute arising therefrom to its own courts, by providing that general principles of international law will apply to the dispute, or, even, by including a stabilization clause which will protect the contract against any changes in the State's domestic legislation.

3) You were an early supporter of the 150th anniversary of the ILA. In your opinion, what are the challenges that investment law and arbitration must overcome in the near future, and with what means?

Investment arbitration, and more generally investment law, is, in my opinion, already undergoing a fundamental shift. Many States are committed to redrafting their BITs to provide rights and protection not only to the foreign investor, but also to the State, and imposing obligations onto the investor, such as compliance. This, in turn, means that arbitrations may have to adapt to increased counterclaims by States. These new BITs are also increasingly accounting for climatic concerns and, more generally, sustainable development. These improvements are key to the survival of investment arbitration.

REPORT OF WEBINAR ON INTERNATIONAL INVESTMENTS :

International Investment Law in the Quest for its Legitimacy

Natalia Chaeva, *PhD in Law, in-house counsel and member of the ADI/ILA 2023 Communication Committee*

Today, the questions surrounding international investment law have taken on particular importance, and it is precisely the legitimacy and relevance of this subject that have been the subject of the White Paper on international investments prepared by Claire Crépet Daigremont and Arnaud de Nanteuil (coordinators) with the steering committee whose composition is here. On 3 April 2023, this White Paper was discussed during the webinar by a panel of distinguished lawyers from different backgrounds and legal cultures.

The main challenges identified by this collective work are the need to take better account of human rights, environmental law and sustainable development, the need to strike an appropriate balance between the need to protect international investment and the need to protect the rights of the host state, and the geographical universality of the rules in the face of the development of regional instruments. However, investment law as we know it is not destined to disappear, as it will remain in traditional sectors (such as natural resources) and investment disputes will continue to be brought before international arbitral tribunals.

The discussions were structured around three lines of thought, some of the key points of which will be presented here.

Firstly, the requirement to take into account the interests of actors other than investors and states, and in particular local communities, has been emphasised. The new investment treaties create more obligations for investors. There is also an opening up of investment arbitration to third parties (ICSID Arbitration Rules 2012 and 2022). Nonetheless, investors' obligations cannot be invoked in the arbitral proceedings and affected communities are excluded from decision-making by the arbitral tribunal. It has been suggested that the host state of the investment would be best placed to maintain the balance between the interests of investors and local communities, by making foreign investment conditional upon respect for human rights. Also, state contracts could be designed so that the local involvement of investors could determine the extent of their legal protection.

Secondly, consideration of public interests can be achieved through the exclusion of public policy objectives from investment arbitration claims, as is provided for in Canada's 2021 Model Foreign Investment Promotion and Protection Agreement. Similarly, the exclusion of national security measures is specifically addressed by the essential security clauses inserted in the 2012 US Model. One speaker stressed the need to assist developing states in the elaboration of relevant domestic rules. Finally, it was mentioned that there is a renaissance of state contracts. These instruments have the merit of carrying well-defined rules, adapted to the activities of a particular company in the limited context of a specific host State. However, several speakers insisted that, on the one hand, these contracts must remain internationalised and, on the other hand, international investment law cannot be transformed into contract law, as this would impact on the interests of the affected communities, and more generally the general interest. At the same time, a multilateral investment treaty dealing with substantive rules still seems unrealistic in view of historical failures. The trend today is towards regionalism with an ambition to achieve some plurilateral understanding of some basic concepts.

In the area of dispute settlement, contributions are expected from UNCITRAL Working Group III, whose latest developments have led to the adoption of a code of conduct for arbitrators and rules for mediation with a practical guide. As one speaker pointed out, investment arbitration should be modelled more closely on commercial arbitration in terms of its efficiency and the consideration of the investor's duty of care. Finally, investment arbitration will need to address emerging issues such as digital assets.

Each panelist concluded the webinar with a number of recommendations. These included progress on the enforcement of arbitral awards, the possibility of making counterclaims on the basis of investor obligations that could form a cause of action, the interaction between public law and international arbitration, etc. As one speaker put it, it would be especially important to identify a few key topics that need to be addressed as a matter of priority.

RAPPORT OF WEBINAR ON BUSINESS AND HUMAN RIGHTS

Lisa Aerts, *PhD Candidate, University of Paris 1 Panthéon-Sorbonne, member of the ADI/ILA 2023 Communication Committee*

On 20 April, just a few days before the 10th anniversary of the appalling collapse of the Rana Plaza, a prominent panel met to discuss the issue of "Business and Human Rights". If this sad anniversary underlines the importance of the subject, it also allows us to put into perspective the road travelled and the difficulties to come, underlined by the White Paper serving as a basis for the debates prepared by Catherine Pédamon and Humberto Cantú (coordinators) and an international steering committee.

The proliferation of texts, their multiple nature and their application to many fields underline the complexity of the subject and the need for an orderly and coherent approach. The first question obviously concerns the nature of these standards. The future European directive has ushered in a paradigm shift in international law from an era of soft law to an era of hard law, sanctions and remedies. If at the national level, France had been a pioneer, many States have followed such as Germany, Switzerland, Norway and soon Belgium. This national legal arsenal will be crucial to ensure the application of international standards. However, another problem is immediately apparent: that of consistency. The panel, like the White Paper, highlights and regrets the inconsistencies, sometimes even contradictions, between the various texts. The question then arises as to which model to adopt: should we retain this heterogeneity, which allows for a certain flexibility in approaches, or should we harmonise or standardise?

A testimony from the professional world sheds light on the advantages and disadvantages of each hypothesis. While multinationals fear disparities in standards that make their organisation more complex and expose them to risks that vary from one country to another, they may also be faced with cultural and social conceptions that are so diametrically opposed that a “one size fits all” approach would be impossible and would negate these characteristics. Thus, some companies are calling for a more coherent binding regulatory framework, providing greater legal certainty without imposing a single (usually Western) view of work. In this respect, the panel stresses that a "smart mixed" set of legislation combining voluntary and binding measures, integrating local particularities and the need for a common framework, is indispensable. This delicate balance between the transnational, the international, the national and the local, the compulsory and the voluntary has yet to be found.

If the normative framework is still to evolve, the means for settling disputes between companies and populations and for sanctioning human rights violations also remain to be defined. While the OECD Contact Points were mentioned in the debate, other solutions were also discussed. National courts obviously have an important role to play, but in the light of recent court cases, the question of jurisdiction needs to be clarified. According to the panel, it must be ensured that the courts of the State of the parent company (or leader of the value chain), but also of the place of the damage, can be seized. Beyond national litigation, arbitration can also be considered as an appropriate dispute resolution method. However, in order not to perpetuate the pitfalls that are regularly blamed on these procedures, it is necessary to ensure a high degree of transparency and to allow the parties to choose arbitrators who are familiar with the characteristics of this type of dispute.

While the draft of the legally binding instrument on the activities of transnational corporations and human rights, is still under preparation at the United Nations and intend to address all these issues ; the thread running through the debate has emphasised the urgency of the situation so as to bring about solutions without waiting for the UN working group which, created one year after the collapse of the Rana Plaza, is still undecided as to the appropriate measures to be taken on the 10th anniversary of the accident.

EVENT SCHEDULE FOR THE 150TH ANNIVERSARY

Please note that registration for the 18, 19 and 20 June 2023 Symposium is still possible and will close on 31 May 2023. You may register for the webinars and the Symposium online and/or in person here.

The table below intends to give a synthetic view of all the events we are organising in 2023. For more information, please visit the webinars and the Paris event page on our website

https://www.ilaparis2023.org/en/webinars/
https://www.ilaparis2023.org/en/paris-2023-hybrid-event/

PROGRAMME DE ÉVÉNEMENTS DU 150ÈME ANNIVERSAIRE NB:VEUILLEZ NOTER QUE LES HORAIRES SONT CET		
JANVIER	FÉVRIER	MARS
12/01 - 13H-16H30 VERS UNE PLUS GRANDE LÉGITIMITÉ DU DROIT INTERNATIONAL LE RÔLE DES PARLEMENTS	01/02 - 12H-15H ANTROPOCÈNE	07/03 - 13H-16H GOUVERNANCE MONDIALE
24/01 - 14H-17H L'ÉNERGIE	14/02 - 14H-17H LES ODD AU-DELÀ DE 2030	16/03 - 14H-17H ALIMENTATION AGRICULTURE
AVRIL	MAI	JUIN
03/04 - 14H-17H LES INVESTISSEMENTS INTERNATIONAUX	04/05 - (HORAIRE À CONFIRMER) LA SANTÉ	18-19-20 JUIN SYMPOSIUM (ÉVÉNEMENT HYBRIDE)
20/04 - 14H-17H ENTREPRISE ET DROITS DE LA PERSONNE HUMAINE	16/05 - 14H-17H LA LUTTE CONTRE LA CORRUPTION	
25/04 - 14H-17H L'OCÉAN	23/05 - 14H-17H LES DÉFIS DU NUMÉRIQUE POUR LE DROIT INTERNATIONAL	
	31/05 - 14H-17H LE RÈGLEMENT DES DIFFÉRENDS	
JUILLET	AOÛT	SEPTEMBRE
05/07 - 14H-17H L'ÉTAT CIVIL	24/08 - 14H-17H LA PROPRIÉTÉ INTELLECTUELLE	04/09 - (HORAIRE À CONFIRMER) L'ESPACE EXTRA-ATMOSPHÉRIQUE
12/07 - 14H-17H L'AVENIR DU DROIT DU TRAVAIL		12/09- 14H-17H CRIMES DE MASSE ET IMPUNITÉ
		14/09 - 14H-17H LES DROITS DE LA PERSONNE HUMAINE
		25/09 - 14H-17H LE DROIT AU SERVICE DE LA DÉMOCRATIE ET DE L'ÉTAT DE DROIT
OCTOBRE	NOVEMBRE	DÉCEMBRE
19/10 - 14H-17H LES MIGRATIONS	02/11 - (HORAIRE À CONFIRMER) LA FINANCE INTERNATIONALE	14/12 JOURNÉE DE CLÔTURE
	14/11 - 14H-17H LA FISCALITÉ	
	21/11 - 14H-17H LE PATRIMOINE CULTUREL	

https://www.ilaparis2023.org/

The Newsletter ADI/ILA 2023 n°16 will be published after the June Symposium.