

## **18<sup>th</sup> Commission\***

Les aspects juridiques du recours à l'arbitrage par un investisseur contre les autorités de l'Etat hôte en vertu d'un traité interétatique

*Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties*

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### INTRODUCTION

1. The Commission has been created at the Session of Bruges (2003) and Andrea Giardina was appointed as Rapporteur. The members of the Commission are: Mr. Audit, Ms Bastid-Burdeau, Sir Lawrence Collins, Messrs Dominicé, El Kosheri, Fadallah, Gaja, Pierre Lalive, Lankosz, Lee, Orrego Vicuña, Ranjeva, Remiro Brotons, Schwebel, Sucharitkul, Treves, Vinuesa.

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2. The Commission met both in Krakow and in Santiago. Before the Krakow Session, the Rapporteur submitted an initial comprehensive Index and Outline of the items which could be the object of the study and discussions by the Commission in view of the presentation of a future Report to the Institut. In Krakow, the Commission decided that, in consideration of the continuous and rapid developments in the subject matter, given the increase in the available materials, especially arbitral awards, treaty practice and national legislation, as well as commentaries and authorities, it was advisable to provisionally concentrate its attention on a restricted number of possible issues. Priority was given to three issues, namely the notions of (i) investment and (ii) investor, two rather basic and traditional issues which are continuously enriched by new developments, and (iii) the s.c. regulatory measures, which are particularly interesting due to the debate they have been generating in doctrine and case law as to their distinction from the various forms of indirect expropriations.

3. The situation remained confirmed in Santiago, and at present it is not substantially modified. Actually, due to the progressive new developments in case law with relating comments and doctrine, the evaluation of these three issues revealed not to be an easy task, especially in consideration of the evident implications and connections of the specific problems of investment arbitration with various general and basic problems of both private and public international law to which the Institut will devote its careful consideration.

4. Therefore, here in Naples the Commission, but especially its Rapporteur, intends to draw the attention to the items which seem ready for a general discussion, such as those relating to the three specific subjects provisionally selected for preliminary examination: Investment, Investors and Regulatory Measures. Then, offering to the general discussion the comprehensive Outline and the entire scope of work of the Commission, hopefully advices and inputs will be received from Confrères and Conseurs as to the priorities and/or delimitations to be adopted for the future work of the Commission, and the directions along which the future work will be developed. Conclusively, a series of general issues are proposed for consideration.

5. Hence, this presentation will focus, in Part I, on the three issues which have been selected for preliminary examination. Then, in Part II,

the other items included in the general Outline of the Commission's scope of work will be described in their essential features and envisaged implications in order to favour a general discussion and obtaining the maximum possible contributions and directions which appear necessary at the present early stage of the common work. Finally, in Part III, some general issues are proposed for consideration.

## **PART I**

### **THE THREE ISSUES SELECTED FOR PRELIMINARY EXAMINATION**

#### **1. The Investment**

##### **A. According to the BITs**

6. The precedents are represented by the Treaties of Friendship, Commerce and Navigation and the rules of customary international law on the treatment of foreigners and customary rules on diplomatic protection.

7. The reasons for the extraordinary success of the BITs from the late '50s till today appear to be mainly due to the lack of certainty as to the content of the international customary rules caused by the emerging of new principles of International Law, such as that of the permanent sovereignty of States over their natural resources and the attempt to codify, by the UN General Assembly in 1974, new general rules concerning the economic rights and duties of States.

8. As well known the traditional areas covered by BITs are: the definition of the protected investments and investors; the admittance of investments and their treatment with particular reference to the transfer of profits; the regime of expropriations and nationalizations; the settlement of disputes between contracting States and, above all, disputes between private foreign investors and host States. For the purpose of this Presentation, the attention will be focused only on the areas relating to the issues selected for preliminary examination.

9. A broad definition of investment has been generally adopted in the treaty practice. The traditional indication of certain types of investments is not in any case restricted to usual property rights, but also includes other rights and interests. Consequently, the resulting lists of acts and/or activities which constitute investments simply represent examples of investments and do not exclude that other acts and/or activities may qualify as such.

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10. A typical example of this sort of definition may be the one contained in the UK Model BIT of the 1990s, according to which: "*Investment means every kind of assets*" indicating five principal forms of investment, such as "(i) *movable and immovable property and any other related property rights; (ii) shares in, stocks bonds and debentures of, and any other form of participation in a company or business enterprise; (iii) claims to money and claims to performance under a contract; (iv) intellectual property rights, technical processes, and know-how; (v) rights conferred by law or under contract to undertake a commercial activity, including search for, cultivation, extraction or exploitation of natural resources*"

11. In recent practice, definitions have become more precise and expanded. For instance, very detailed *rights* are indicated and protected in the treaties stipulated by the USA. In particular, the income produced by the investments themselves is also generally considered to be an investment, provided, however that it is re-invested. Moreover, always in the USA BITs, also activities simply connected with the actual investments are protected as well.

12. Given the non-exhaustive nature of the definitions adopted and their somehow tautological character (Fadlallah, *Liber Amicorum R. Briner*, 2008) problems may arise in order to determine whether a certain activity can be considered an investment protected by a BIT. In this regard various, sometimes contrasting, solutions have been proposed by case law and doctrine. In any case broad and generous definitions largely prevail.

13. The only point of relative consensus seems to be that sales, and probably other purely commercial transactions, are excluded from the definition of investment because the operation can be considered concluded with the payment of the price. Evidently, the definition is a problem of interpreting the BIT that has to be applied, in compliance with the hermeneutic criteria and principles applicable to all international treaties, which are embodied in the 1969 Vienna Convention on the Law of Treaties and have to be respected. It follows that the treaty's purpose and object will be conclusive, as they can be derived from the text of the treaty as a whole, including the preamble, and from the context in which the treaty has been concluded.

14. Some of the interpretative elements that may be drawn from the preamble of a given BIT seem particularly important for the purposes of

contributing to the complete definition of investment adopted in the text of the agreement. In the first place, the parties, by means of a BIT, intend to promote the investment of resources provided by individuals or companies from one State in the territory of another. Secondly, it is apparent that the parties generally assume that the flow of private capital promoted by BITs contributes to the economic development of the party receiving the investment.

15. In any case, the concept of investment should be determined in each individual and specific case by a precise application of the text of the treaty concerned, taking into account its object and purpose and the context in which it has been concluded. In this connection the analysis of the preambles plays an important role. It should be remembered that all BITs contain definition of investment, and that if the definitions adopted have certainly evolved over time, their scope and precision have progressively improved.

16. Then the attention will be devoted to what appears to be a new phase of BITs started with the USA Model and the Canadian Model, both of 2004. They will be examined and compared with the solution adopted and the results achieved by the mechanisms provided for by NAFTA and the Energy Charter Treaty from the second half of the nineties onwards.

The analysis will be conducted, taking into account relevant doctrine and authorities, such as, for the USA Model, Schwebel, ASIL Proc., 2004 and *Liber Amicorum* R. Briner, 2008, and, for the Canadian Model, McIlroy, JWIT, 2004.

#### **B. According to Multilateral Treaties (namely the Washington Convention of 1965)**

17. The problem of the definition of investment in the BITs becomes more serious in multilateral conventions, namely the Washington Convention of 1965 instituting ICSID. This is especially true in recent years, after the consolidation of the international practice of the *s.c. arbitration without privity* (cf. below).

18. Moreover, as well known, the 1965 Washington Convention does not contain an explicit definition of investment in its Article 25. However, from the Preamble of the Washington Convention and from the arbitral practice of ICSID Tribunals, general criteria of reference have been deduced and applied. Consequently, these criteria need to be verified and

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observed in every single case (cf. Fadlallah, 2008; Schlemmer, *Int. Inv. Law*, 2008).

19. The criteria generally identified are, according to the s.c. *Salini* test (cf. below): *a*) a certain duration in time of the operation, on the basis of which instantaneous transactions, such as purchases and sales, or other transactions where the dealing is concluded by the payment of a price are normally excluded; *b*) the operator's expectation of profit on and remuneration from the investment; *c*) the risk taken by the investor, which is not the case if the host state itself takes on itself the *alea* of the same investment. This risk ought, moreover, to be distinguished from the mere risk of non-performance of the contract by the other party to the operation; *d*) a certain value of the resources brought in by the investor; *e*) the contribution made by the operation to the economic development of the host state, as indicated by the Preamble to the Washington Convention.

20. Consequently, purely commercial transactions or those that are of brief duration ought as a rule to be excluded from the ICSID's concept of investment. It should be noted, however, that in a case that raised considerable interest, *Fedax v. Venezuela* of 1998, an ICSID Tribunal, while fully accepting the fundamental, general criteria set out above, qualified a request for payment of bills of exchange issued by Venezuela in connection with a contract for a loan concluded between the parties, which was a typically commercial transaction, as one relating to an investment. The result was achieved by stressing Venezuela's basic public interest in issuing bills of exchange, in the context of its legislation on public credit, and the close relation between the transaction in question and the economic development of the country.

21. Other ICSID awards are of interest as they have affirmed the existence of an investment according to the Convention in various specific cases. They are: *CSOB v. Slovak Republic* of 1999 relating to a loan; *ME Cement v. Egypt* of 2002 relating to a licence; *Salini v. Morocco* of 2001 relating to a contract for civil works; *SGS v. Pakistan* of 2003 and *SGS v. Philippines* of 2004, both relating to service contracts.

22. The few cases in which the activity of the private party was not considered an investment under the Convention have been amply debated. Mention is to be made of the awards: *Mihaly v. Sri Lanka* of 2003 relating to pre-contractual expenses; *Nagel v. Czech Republic* of

2003, relating to certain credits considered to be merely hypothetical by the Tribunal; *Joy Mining v. Egypt* of 2004, relating to a request for liberation of performance guarantees; *Patrick Mitchell v. Democratic Republic of Congo* of 2006, where the activity of a counsel in that specific case was not considered an investment by the *Ad Hoc Committee*. Then, in the case *Malaysian Historical Salvors v. Malaysia* of 2007 it was considered, as in *Mitchell*, that the contribution to the economic development of the host State is essential to the definition of investment according to the Convention (cf. Ben Hamida, *Gaz. du Palais*, 2007, 4; Schlemmer, *Int. Inv. Law*, 2008).

23. In particular, there is no reasonable doubt as to the qualification of oil-related activities as an investment, as they are regulated by the relevant contracts with the state and with the competent state entity, both in terms of duration and expected remuneration, with the correlated element of risk and the contribution to the economic development of the host state.

24. In regard to the definition of investment, it seems important to stress that, in the initial application phase of the Washington Convention, the need for a definition of the term investment did not seem essential, when the ICSID's jurisdiction and the competence of the tribunals were based exclusively on an arbitration clause or agreement directly and individually stipulated in the investment contract by the investor and the host State. This definition has now become of considerable importance when ICSID arbitration can be based as follows: on the part of the State, by the adoption of a domestic law or the conclusion of a BIT and, on the investor's part, by the direct submission of a request for arbitration to the Centre. This form of arbitration is commonly called *arbitration without privity* (the expression is Paulsson's, *ICSID Rev.*, 1995, cf. however for some reflections and critical remarks: Ben Hamida, 2003, Prujiner, 2005, Alexandrov, 2005). In respect to this form of arbitration it is suggested that an objective and clear definition of investment becomes necessary because of the absence of a direct and specific agreement of the parties offering evidence that the envisaged activity of the foreign citizen or company is considered by them as an investment under the Convention.

25. Thus, the question which arises in the practice with an increasing frequency is that of a possible definition of investment contained in an applicable BIT, which is different or broader than that resulting from the

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general objective criteria derived from the Washington Convention. Since the BITs constantly refer to ICSID as a mechanism for dispute settlement between states and foreign investors, it is necessary to verify whether ICSID jurisdiction and the competence of the tribunals can be affirmed in all those cases in which the definition of investment given by the applicable BIT does not in fact correspond to that of the Washington Convention. In such cases the conclusion suggested by various authorities seems to be that the clause contained in the BIT and constituting the basis for the recourse to ICSID becomes non effective because of the absence, in the case at issue, of a basic substantive prerequisite of the same ICSID mechanism (cf. Broches, 1982; Schreuer, 2001; Fadlallah, 2008).

26. It is to be recalled in this respect that the founding fathers and first commentators of the Washington Convention, in the initial context described above, either felt the question of the definition of investment to be of limited interest (Delaume, 1966) or considered it to be essentially integrated and absorbed with the question of the jurisdiction of the Centre (Broches, 1966). Other commentators simply stressed the parties' wide discretionary powers in this regard (for all, Tupman, 1986).

27. As to national legislation founding the ICSID jurisdiction, two cases are usually cited. The first is the initial one, the s.c. *Pyramids Case, Southern Pacific Properties (SPP) v. Egypt*, decided on jurisdiction in 1985, in which Egypt's agreement to arbitration according to the ICSID Convention and, therefore, the Centre's jurisdiction and the competence of the Tribunal, were based on Article 8 of Egyptian law n. 47/1974 on investments. The second is the *Tradex Hellas v. Albania* case, decided on jurisdiction in 1996. In that case Albania's agreement to ICSID arbitration was based on Article 8 of Albanian Law n. 7764/1993 on investments.

28. With regard to bilateral treaties, the first case in which a BIT clause providing, *inter alia*, for recourse to ICSID was held capable of establishing the Centre's jurisdiction following an investor's unilateral recourse is the decision rendered in 1990 in the case *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka* (on the mentioned BIT clauses basing the jurisdiction of ICSID tribunals, cf., for all Gaillard, 2003; Sacerdoti, 2004; Bernardini, 2008).

29. An interesting French decision is to be recalled and compared in this connection. The Court of Appeal of Paris, and then the *Cour de*

*Cassation*, annulled an arbitral award on the ground of the absence of the arbitration agreement, which had not been in fact directly stipulated by the parties, but which the private party alleged that it was concluded through a mechanism similar to that usually applied in ICSID practice. It was alleged that the arbitration agreement consisted in, on one hand, the request for arbitration filed with the ICC by the private party and, on the other hand, the consent expressed by the responding State in the bilateral treaty between Romania and Lebanon which contained a provision envisaging ICC arbitration as a means of dispute settlement. The alleged construction was rejected by both French courts (on the decision of the *Cour de Cassation* of 19 March 2002, cf. Liberti, RDA 2004).

## **2. The Investor**

30. All BITs define the essential characteristics of the protected investors, both in case of individuals and in the case of companies and other legal persons.

31. For individuals, the nationality is commonly determined and ascertained in conformity with the law of the state that grants it. Problems arise only in particular cases, when the investor has dual or plural nationalities. If the investor is a national of a third state in addition of being a national of one of the contracting states, then based on the principle of effective nationality established by the International Court of Justice in its decision of 1955 in the *Nottebohm* case, the prevailing nationality is that of the state with which the investor has the closest link. Should the investor be a national of both states which are parties to the BIT, the solution traditionally accepted with regard to diplomatic protection of nationals is that the investor in question is not considered a foreigner by the host state (Geck, 1987; Mauro, 2003). The most recent trend emerging from the case-law of the Iran-United States Claims Tribunal from the mid-1980s should however be mentioned, according to which even in this case the criterion of effective nationality has to be applied. This was stated in the decision by the *Full Tribunal* in the case A/18 of 1984 (on the case-law of the Iran-US Claims Tribunal in this matter cf. Mauro, 1999)

32. In the sector of investments, it should be noted how the 1965 Washington Convention, establishing ICSID, at Article 25, para. 2, a) follows the traditional orientation of the BITs and excludes the Centre's jurisdiction in the case that the investor with dual nationality is also a

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national of the host state against whom arbitral proceedings have been initiated. It is to be mentioned in this regard that in the case *Hussein Nuaman Soufraki v. United Arab Emirates* of 2004, the jurisdiction of the Centre was denied because the investor could not provide sufficient evidence to be a national of a contracting State. Consequently the tribunal did not consider necessary to rule on the issue of the dominant nationality of the investor (cf. Schlemmer, 2008). As to the points in time when the prerequisites as to nationality have to exist, cf. the dissenting opinion of Orrego Vicuña in the case *Waguih Siag and Clorinda Vecchi v. Egypt* of 2007 (decision on jurisdiction). Most recently the issue of the investor nationality has been decided in the ICSID case *Mr. Tza Yap Shum v. Peru* of 2009 affirming, on the basis of the Chinese applicable law, the Chinese nationality of a person born in China and residing in Hong Kong.

33. Differently from the Convention, the United States Model BIT (2004) adopts the criteria of dominant and effective nationality of the individuals even when USA nationality competes with that of the other state party to the BIT. According to the definitions contained in Article 1 of the USA Model, under the indication “*investor of a Party*” it is specified that “*a natural person who is a dual national shall be deemed to be exclusively a national of the state of his or her dominant and effective nationality*”.

34. With regard to companies and other legal persons, the starting point for any reconstruction of the topic according to customary international law is obviously the decision of the International Court of Justice in the *Barcelona Traction* case, according to which diplomatic protection of companies is a right for the State in which the companies have been incorporated and have their registered office, and not for the State of which the majority of shareholders are nationals, provided, however, that connections with the State in which the companies have been set up are real and not fictitious.

35. In this respect, Article 25, para. 2, b) of the Washington Convention provides that the Centre’s jurisdiction shall extend to legal persons who are nationals of the State hosting the investment, when, “*because of foreign control,*” the parties have agreed they should be treated as nationals of another Contracting State for the purposes of the Convention. This provision led to a considerable volume of case law and numerous comments in legal literature, up to more recent decisions such as the ICSID cases *Tokios Tokelès v. Ukraine*, decided in the matter of

jurisdiction on 29 April 2004, (cf. Carlevaris, RDA 2004, with numerous references to practice and doctrine), *El Paso v. Argentina* of 2006, and *Noble Energy v. Ecuador* of 2008, on the matter of indirect shareholding. With regard to the protection of the investment of foreign minority shareholders in a local company, cf. the ICSID award of 2003 in *CMS Gas Transmission Company v. Argentina* (cf. the note by Alexandrov, 2005, and in general, Orrego Vicuña, 2005). Lastly, as to the requirement that the company having initiated the arbitration has to continue to maintain the nationality of a Contracting State, the 2003 case in *Loewen v. USA* is to be mentioned (cf. Acconci, Italian YIL, 2004). Moreover the notion of investor has been discussed in relation to entities and corporate bodies not possessing legal personality in the ICSID case *Renta v. Russian Federation* of 2009.

36. In conclusion on this point it is suggested that also the prerequisites *ratione personarum* established by the Washington Convention have to be punctually respected in all cases of ICSID arbitration. This implies that when an arbitration is based on a State's agreement expressed in a BIT which may adopt definitions different from or broader than those contained in the Washington Convention, the ICSID arbitration, possibly chosen by the investor, ought nevertheless to be conducted in full compliance with the criteria for jurisdiction *ratione personarum* (personal jurisdiction) as set out in the Convention.

37. The problem might not raise and the solution might be different in cases in which the relevant BIT makes further reference to other methods, either judicial or by arbitration, to settle disputes between investor and host State, and these different ways are chosen by the investor. In such cases if the BIT's criteria for establishing jurisdiction may correspond to those of the selected mechanisms, no difficulty will arise. Actually, mechanisms different from ICSID do not, in general, place limits on the criteria for establishing the subject-matter and the personal jurisdiction adopted in the BITs. This is the case, for example, of arbitration under the UNCITRAL Rules, or under the Rules of the International Chamber of Commerce, or the Rules of the Institute of the Stockholm Chamber of Commerce, which are also frequently proposed in bilateral investment treaties.

38. The differences between the ICSID mechanism and the other mechanisms alternatively provided for in the BITs, as to the prerequisites *ratione materiae* (the definition of investment) and *ratione personarum*

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(the definition of protected investors), may contribute to explain the persisting success of also these other forms of arbitration for the settlement of the investment disputes based on BITs. Obviously, also other factors play an important role on the selection of an ICSID or a non-ICSID mechanism. They mainly relate, first, to the impact of ICSID arbitration on the diplomatic protection of investors by their national States, according to Article 27.1 of the Convention, establishing that States shall refrain to exercise their protection in respect to disputes that their nationals have consented to submit or have submitted to ICSID arbitration, unless the other Contracting State has failed to abide by the award rendered in the dispute. Secondly, these factors relate to the real international character of ICSID arbitration and its independence from any national law. For the effects and enforcement of the awards as final judgements of a State court cf. Article 54, and for their possible challenge only before an *Ad Hoc Committee* cf. Article 52 and 53. In any case also the jurisdictional prerequisites *ratione materiae* and *personarum* mentioned above play a precise role in the selection by the investors of the settlement mechanisms (cf. Bernardini, *Liber Amicorum B. Cremades*, 2009).

### 3. The Regulatory Measures

39. The topic of Regulatory Measures has been selected by the Rapporteur and the Commission for preliminary examination in order to study a stimulating issue which appears capable of offering interesting points for a general discussion and, consequently, obtaining advice and directions for the future work.

40. The analysis of the topic proposed here does not intend to rediscuss the traditional rules of treaty law and/or customary law concerning expropriations, nationalizations, and generally speaking, the takings of foreign property. For the purpose of this Section of the Presentation, these traditional rules are taken as granted and considered as accepted. The choice is made in order to better focus on the peculiarity of the measures that are the object of the examination.

41. Thus, the traditional rules taken here for granted, can be summarized as follows:

- a) Foreign property may not be expropriated except for:
  - (i) public purpose,

- (ii) on a non-discriminatory basis,
- (iii) in accordance with due process of law, and
- (iv) against compensation

b) The compensation has to be:

- (i) (i) prompt,
- (ii) (ii) adequate, and
- (iii) (iii) effective

42. According to these traditional rules, the term expropriation is usually comprehensive also of nationalizations, for which no specific rules are provided. Moreover, expropriations may be direct or indirect, the latter including any measures having equivalent effect to an expropriation (cf. Higgins, RCADI, 1982, III; Orrego Vicuña, Int. Law Forum, 2003). Examples of these traditional solutions can be found in numerous BITs and in the Draft MAI of 1998 (cf. Yannaca-Small, OCSE, 2005; Reinisch, Int. Inv. Law, 2008).

43. In application of the above rules and solutions, the s.c. Regulatory Measures have been generally considered as a sort of indirect or creeping expropriations.

44. The following examples demonstrate the above conclusion and deserve to be considered:

- a) ICSID case *SPP v. Egypt* of 1992, where full compensation was awarded to the investor, notwithstanding that the breach of contract was determined by cultural and environmental reasons. However, loss of gain was not awarded for the period subsequent to the entry into force of the UNESCO Convention on the protection of the cultural heritage;
- b) ICSID case *Santa Elena v. Costa Rica* of 2000, where full compensation was awarded to the investor in a case of breach determined by environmental reasons;
- c) ICSID case *Metalclad v. Mexico* of 2000, where the full compensation was awarded in a case of breach determined by the denial of an authorization by local government notwithstanding the assurances given by the federal government, and the denial was caused by environmental and public health reasons;
- d) ICSID Additional Facility case *Tecmed v. Mexico* of 2003, where a NAFTA Tribunal found that the revocation of a licence for the

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operation of a landfill represented an indirect expropriation, and the revocation was due to environmental and public health reasons.

45. A trend in favour of distinguishing Regulatory Measures from indirect or creeping expropriations started around 2004, qualifying as such measures adopted by public authorities in order to protect legitimate public welfare objectives, *i.e.* public health, safety and environment, and excluding compensation for the consequences of such measures on foreign investments.

46. In this respect, the Energy Charter Treaty of 1996 may be worth recalling as an international precedent for the importance given, in its Article 19, to the environmental aspects of the research and development of natural resources and for the statement, in its Article 18, that each State “continues to hold the rights to...regulate the environmental and safety aspects of the [energy resources] exploration, and development” (cf. Waelde, JWIT 2004).

47. The new developments mentioned above are especially evidenced by the 2004 USA Model BIT. The 2004 Model has been the object of different evaluations and criticisms (cf. for a comprehensive and critical examination, Schwebel, *Liber Amicorum* R. Briner, 2008), but it appears of undoubted importance for the specific topic of Regulatory Measures. Actually, Annex B to the Model BIT, -clarifying Article 6 devoted to expropriations-, contains a final statement according to which “*Except in rare circumstances, non discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations*”.

48. The same solutions, even with identical formulations, are contained in the Annex B to the Canadian Model BIT also of 2004 and in the Annex 10-C to CAFTA-DR (Central American Free Trade Agreement-Dominican Republic) also of 2004 (cf. McIlroy, JWIT, 2004; Edsall, 86 Boston ULR, 2006; Newcombe, 20 ICSID Rev., 2005).

49. The arbitral award of 2005, in the case *Methanex v. United States*, conducted according to the UNCITRAL Rules and under NAFTA, appears to have followed the new approach. The tribunal found that “*As a matter of general international law, a non discriminatory regulation for public purpose, which is enacted in accordance with due process..... is not deemed expropriatory and compensable unless specific commitments*

*had been given by the regulatory government to the then putative foreign investor...". Similar construction and conclusion has been adopted by another UNCITRAL tribunal in the case *Saluka v. Czech Republic*, of 2006, considering that, according to customary international law, a State does not commit an expropriation and is not liable to pay compensation "when it adopts general regulations that are commonly accepted as within the police power of States".*

50. The point which remains open for debate is whether the public purpose alone, as declared by the public authorities, would be sufficient for considering legitimate an adopted regulatory measure and thus depriving the foreign investor of any compensation. In the ICSID case *Azurix v. Argentina* of 2006, the tribunal found that the public purpose alone would not be sufficient and would not automatically deprive the investor of any compensation.

51. In the resulting context, it seems that the case law and doctrine relating to the protection of foreign investors could be usefully compared with the case law of the European Court of Human Rights, applying Article 1 of Protocol 1 to the Convention, where the legitimate exercise of public authority may cause limitations in the use of property, but nevertheless may determine an obligation to provide just satisfaction.

## PART II

### THE OTHER ISSUES INCLUDED IN THE GENERAL OUTLINE

#### A. The International Treaties considered

##### 1. Bilateral Investment Treaties

- The Traditional Models (UK, Switzerland, France, Germany, USA)
- Recent New Models (USA, Canada)
- The Free Trade Agreements (USA- Chile 2003; USA- Singapore 2004)

##### 2. Multilateral Treaties

- The Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States
- The North American Free Trade Agreement
- The Energy Charter Treaty
- The Central American Free Trade Agreement
- The Draft Multilateral Agreement on Investment of 1998

#### B. The notion of Investment (see Part I)

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**C. The notion of Investor (see Part I)**

**D. Treaty Claims as distinguished from Contract Claims**

1. Umbrella clauses
2. Transformation of Contract Claims into Treaty Claims

**E. The Parties' Consent to Arbitration**

1. Arbitration Clause and the Agreement to arbitrate an existing dispute
2. The decline of the *s.c. fork in the road* and the new BIT Models
3. Arbitration Without Privity (**see Part I**)
4. Basis for the Consent of the State
5. Basis for the Consent of the Investor
6. International Treaties (NAFTA Article 1122, Energy Charter Treaty Article 26)

**F. The Law applicable to the Merits of the Dispute**

1. Rules of Law chosen by the Parties
2. The Law of the Host State, including its conflict rules
3. International Law and its role

**G. The Procedural and Substantive Rights of the Investor**

1. The MFN Clause and its impact on the procedural and substantive rights of Investors:
  - a) the MFN Clause in Free Trade Agreements (NAFTA, CAFTA-DR)
  - b) the exhaustion of local remedies and the waiting period for the Investor prior to the submission before an international arbitration tribunal
2. Standards of Compensation for the Violation of Investors' Rights
  - a) Traditional Standard
  - b) Expropriation in violation of procedural and/or substantive applicable law, or the engagements undertaken
  - c) Fair and Equitable Treatment
  - d) Indirect Expropriation
  - e) Regulatory Measures (**see Part I**)

**H. The Proceedings**

1. Confidentiality of the Proceedings
2. Intervention of Third Parties, written or oral pleadings serving as *amici curiae*

#### **I. Enforcement of the Awards and their Judicial Review**

1. The traditional effects of International Arbitral Awards
2. Res Judicata Effect of ICSID Awards
3. Enforcement (ICSID Articles 54 and 55, NAFTA Article 1135)
4. The traditional Judicial Review by the Judge of the Seat of the Arbitration
5. ICSID Control Mechanism
6. Grounds for Review
7. Violation of international Rules of Treaty Interpretation as *excès de pouvoir*

### **Part III**

#### **General issues for consideration**

The specific issues chosen for preliminary examination and the other issues contained in the Outline for the Commission's activity, raise various problems of basic and general character. Among them, the following ones seem to deserve particular attention.

#### **The relations of BITs with customary law**

**The first question** is whether the extremely numerous bilateral treaties on the protection of foreign investments, given to their substantially homogenous content, have determined the creation of a body of international customary law having an identical content and, thus, obliging also States not parties to BITs or in a measure additional to a possibly applicable BIT. For a positive answer to this question, cf. Schwebel, ASIL Proc. 2004.

The related point is how a positive answer to the above question is maintained and/or with what possible qualifications, in view of the some developments relating to environment, public health and human rights, which appear to have recently occurred.

**The second question** is whether a BIT, or even a series of BITs, represent a body of rules which are autonomous, as *lex specialis*, from the

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other rules of general international law, which cannot be used for interpreting or filling the possible *lacunae* of the BITs' regulation.

The related point is whether the above autonomy would be maintained also in respect to peremptory rules of international law

The additional related point is whether the above autonomy is maintained and/or with what possible qualifications, in the case that the BITs make express references to international rules.

#### **The relations of BITs with the selected arbitration mechanisms**

**The first question** is whether in the case that an applicable BIT permits to the parties to choose between different kinds of mechanisms for the solution of their dispute, the rules of the BIT will be the only applicable rules or the rules of the chosen mechanism have also to be respected. The question especially applies to the ICSID requirements in the case of a BIT based arbitration.

**The second question** is whether the different kinds of arbitration mechanisms provided for in the BITs determine different kinds of substantive and/or procedural solutions of the disputes submitted.

The related point is whether possible differences of prerequisites, solutions, and effects of the awards determine the choice of the mechanism made by the parties

#### **The interactions of international law with domestic law**

As to the definition of Investment:

- Is the recourse to municipal law necessary to verify *in concreto* the existence of an Investment? Cf. *Fedax v. Venezuela* of 1998 and *Salini v. Morocco* of 2001.
- Is the legality of the Investment according to municipal law a necessary prerequisite? Cf. *Inceysa Vallisoletana v. El Salvador* of 2006, *World Duty Free v. Kenya* of 2006, *Fraport v. Philippines* of 2007.

As to the definition of Investor:

- Is nationality to be assessed exclusively on the basis of the relevant domestic law? Cf. *Soufraki v. United Arab Emirates* of 2004, where the Tribunal applied Italian law and considered that Italian nationality was not proved by the Investor, and *Renta v. Russian Federation* of 2009, where the Tribunal applied Spanish law and denied the status

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of Investor according to Spain-Russian Federation BIT to certain claimants not possessing full legal personality.

As to Regulatory Measures:

- Are nationalisations to be distinguished from expropriations?
- Are Regulatory Measures to be distinguished from indirect and/or creeping expropriations?

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## DELIBERATIONS DE L'INSTITUT

### Onzième séance plénière

Jeudi 10 septembre 2009 (matin)

La séance est ouverte sous la présidence de M. Degan, troisième Vice-président.

The *President* proposed to resume the discussion on the topic of the 18<sup>th</sup> Commission.

The *Rapporteur* thanked the President, the Secretary General, and the Members of the Institut. He was honoured to present its preliminary report, especially in Naples where he had studied at the University under the guidance of Professors Quadri, Capotorti, Conforti, and Ferrari Bravo. He recalled that the 18<sup>th</sup> Commission had been established in 2003 in Bruges; that a general outline had been proposed before the Krakow session; and that for the preliminary report three subjects had been selected; namely, the definition of investment, the notion of the investor, and regulatory measures. The first two aspects had traditionally been the focus of international investment law but they still raise important issues. The third aspect was selected because it highlighted a recent development in international investment law. The preliminary report dealt with these three topics separately, including a special session on the evaluation of the Commission for each topic, and examined a few more general issues that were suggested for further consideration. The main purpose of the report was to stimulate the discussion and receive comments from the Members.

First, the report addressed the question of the definition of investments. These were usually described in very detailed terms in bilateral investment treaties (BITs). However, these definitions could not be regarded as self-contained. On the contrary, they were rather open definitions. As an example, the Rapporteur referred to the UK Model BIT of the 1990s. The notion of investment was said to be problematic because its definition was usually circular and tautological. Therefore, the question revolved around the interpretation of the clauses providing the definition of investment. Since BITs had to be interpreted according to the general rules set out in the Vienna Convention on the Law of Treaties,

the Rapporteur focused on both the text of such clauses and the objective and purpose of BITs. Two elements were normally present in the preamble of BITs, namely, the intention to promote investments between contracting States, and the contribution of such investments to the economic development of the host State.

As recent developments in international practice, the Rapporteur took into account the USA Model, the Canadian Model, and the Central American Free Trade Agreement (CAFTA), all of 2004, the 2007 Draft prepared by Norway, and the 2009 German regulation on international economic co-operation. Thus, the uniform content of BITs could be said to be part of international customary law and could be used in the interpretation of BITs in case of *lacunae*. Therefore, the question of the relationship between BITs and international customary law was a particularly significant one.

As far as the Washington Convention was concerned, the Rapporteur pointed out that it raised a particular question in relation to the notion of investment. Since no such definition was provided under that Convention, its application had to rest on the investment agreement between the parties. Moreover, the practice of so-called *arbitration without privity* entailed the particular issue of investors relying on BITs to bring disputes before ICSID arbitrators, in the absence of an explicit consent of the State. Therefore, the question was whether a BIT could serve as the basis for arbitration. According to the Rapporteur, under such circumstances both the requirements under the Washington Convention and those provided under the BIT must be fulfilled. The Commission was hesitant in considering the definition of investment as the central topic of its mandate, due to its reduced practical impact. As to the elements of an investment under international law, the Commission agreed that a necessary pre-requisite was that an investment must have a fundamental international character, as held in the *Tokios-Tokelès* case.

Turning to the notion of investor, the Rapporteur explained that in the preliminary report he dealt with both natural and legal persons. The nationality of investors had to be determined on the basis of domestic law, and this gave rise to interesting cases in which the *effective link* requirement had been strictly applied. The Commission confirmed the importance of this topic and proposed to focus future analysis on the relationship between national and international law as far as nationality

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determination and, in particular, the effective link requirement were concerned.

As to the choice of regulatory measures being the field of specific study of the Commission, the Rapporteur explained that this subject raised particular problems and could stimulate the discussion among the Members of the Institut. The basic idea was to investigate whether regulatory measures could be considered indirect expropriations, and entail no obligation of compensation. Reference was made to the 2004 USA Model, Appendix B, which contained a vague definition of expropriation, leaving the question of regulatory measures open. While traditional case law was in favour of viewing regulatory measures as indirect expropriations, more recent cases had been cited in the preliminary report to show that a different solution could be envisaged.

Finally, the Rapporteur expressed the intention of the Commission to focus its future work on two main areas; namely, the contribution of investment law to the development of customary law and the interaction between international and national law in the field of international investments. He concluded expressing his gratitude to the Members of the Commission for their valuable contribution.

The *President* congratulated and thanked the Rapporteur. He opened the floor to debate.

M. *Lalive* félicite le Rapporteur de la qualité de son exposé. Il invite l'Institut à définir les orientations pour l'avenir face à un sujet aussi complexe. Il rappelle que lors d'une réunion avec quelques membres de la Commission, l'accent avait été mis sur le fait que les travaux de l'Institut sur la question devraient être utiles à toutes les personnes (gouvernements, arbitres et conseils) qui s'interrogent sur les questions d'interprétation de la convention CIRDI et des traités bilatéraux d'investissement (BITs). Il observe que la pratique révèle les hésitations et les erreurs de nombreux praticiens. Il regrette également que les gouvernements soient souvent mal informés par des conseils qui n'ont aucune idée des rapports entre le droit international public et le droit international privé. Il lui semble que l'Institut doit dès lors se concentrer sur des questions d'interprétation. Il porte à l'attention des Membres qu'un congrès s'est tenu en 2009 à Genève avec pour thème "How to make ICSID awards more acceptable to States?". Il estime que le choix de ce thème démontre qu'il existe des problèmes ainsi qu'en témoigne la

décision de certains Etats latino-américains de dénoncer la convention CIRDI. Il lui semble que certains Etats seraient moins réticents vis-à-vis de la convention CIRDI si les arbitres tenaient compte de l'intérêt public ou de la position des gouvernements. Il cite l'opinion dissidente de Sir Frank Berman jointe à la sentence rendue dans l'affaire *Luchetti* et qui insiste sur le fait que lorsqu'il s'agit de décider de la juridiction du CIRDI, il y a un devoir particulier d'explication pour prévenir le risque de l'annulation pour défaut de motifs visée à l'article 52 de la convention. Il fait part de ses doutes sur la notion de *privity of arbitration* ou *arbitration without privity*. C'est une belle formule mais qui crée surtout de la confusion. Il explique qu'il ne saurait y avoir d'arbitrage sans un échange de consentement. Il y a toujours un lien contractuel qui fonde l'arbitrage et la pratique basée sur le traité sur la Charte de l'énergie le révèle.

Mme *Bastid-Burdeau* remercie le Rapporteur et souhaite faire une observation sur l'optique qu'il convient d'adopter. Elle indique qu'il y a une tendance à se référer au CIRDI et à sa jurisprudence. Or, selon les clauses d'arbitrage des traités bilatéraux d'investissement, les investisseurs se voient souvent offrir le choix entre un arbitrage CIRDI et d'autres types d'arbitrage (arbitrage *ad hoc*, arbitrage selon le règlement de la CNUDCI). Elle précise que la perspective des arbitres fluctue selon la procédure d'arbitrage en cause. Elle estime que la 18<sup>ème</sup> commission doit décider de la question de savoir si elle envisage d'étudier tous les types d'arbitrage opposant un investisseur à un Etat ou si elle préfère se limiter à la convention CIRDI.

M. *Bucher* félicite le Rapporteur pour la qualité de son rapport et de son exposé. Il invite l'Institut à mettre l'accent sur ce qui est particulièrement délicat à l'heure actuelle en termes de politique législative. Contrairement au Rapporteur, il ne trouve pas intéressant d'examiner par exemple les conditions de nationalité de l'investisseur. Il indique que la problématique du rôle de l'Etat est actuellement au cœur de l'arbitrage d'investissement. Il précise que s'il y a eu deux retraits de la convention CIRDI, c'est un signal inquiétant. Il suggère que la Commission dirige ses réflexions sur la question du risque politique dans les contrats d'investissement.

Mr *Tomuschat* congratulated the Rapporteur both on the style and the substance of his report. He indicated that the case-law was far from being homogeneous. He thought that an interesting question would be to study

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the need to have an appeal board such as the World Trade Organization (WTO)'s Appellate Body.

Mr. *Ranjeva* félicite et remercie le Rapporteur pour la clarté de son exposé ainsi que pour son dévouement. Il souhaite attirer l'attention des Membres sur le non-dit, c'est-à-dire les résistances politiques au recours à l'arbitrage d'investissement. Il indique que la réticence des Etats, notamment des Etats en développement, est liée à la crainte de ne jamais avoir gain de cause dans la mesure où les arbitres ne tiennent pas suffisamment compte de l'intérêt public et des intérêts légitimes des Etats. Il estime également que la réticence des Etats en développement est due au monopole quant aux services de conseil, de consultance et d'ajustement. Il invite l'Institut à réfléchir à une politique d'information et d'éducation en ce qui concerne le droit des investissements et la pratique en matière d'arbitrage d'investissement. Il invite également l'Institut à une démarche d'humilité en ce qui concerne les décisions rendues. Il lui semble que les décisions ne sont parfois pas de nature à recueillir l'adhésion des personnes et institutions concernées. Il estime que ces questions sont fondamentales.

Mr *Abi-Saab* congratulated the Rapporteur for an excellent written and oral report. He remarked that in the ICSID context, general international law had sometimes been misinterpreted. He considered that a bridge should be built between the ICSID and the outside world of public international lawyers. Stressing the qualities of the Rapporteur as both a private international lawyer and a public international lawyer, he encouraged the Rapporteur to bridge this gap. He also emphasized the concept of jurisprudence. He regretted that some arbitrators gave flimsy motives for their awards. Agreeing with Mr Lalive, he underlined that there was a duty on arbitrators to give the reasons for their awards.

Mr *Orrego-Vicuna* invited the Institut to look at how international law evolved in certain areas. For instance insofar as the nationality of investors was concerned, the *Nottebohm* case had been reaffirmed in many awards. In other fields, such as the nationality of corporations, he said that there had been a great evolution. For example, the *Barcelona Traction* case was clearly surpassed by investment awards. He suggested that it would be useful to examine questions such as those relating to expropriation and fair and equitable treatment. He pointed to the NAFTA context where the question arose whether fair and equitable treatment

was a customary international law standard or was a self-standing standard under current international law. He believed that there was a need to recognize the importance of freedom to resort to arbitration. He urged the Members not to put all arbitration procedures in a common box because there were not always common rules.

Mr *El Kosheri* congratulated the Rapporteur. He voiced his full agreement with most of what had been said by the Members. He drew Members' attention to the topic's complexity. He suggested analysing the question of treaty claims and contract claims and also indicated that a discussion on *res judicata* was necessary. He expressed doubts on the importance of having an appellate mechanism in investment arbitration. Finally, Mr El Kosheri invited the Commission to draft a comprehensive report and prepare a draft Resolution for the Institut's next session.

M. *Mahiou* félicite le Rapporteur. Il estime, comme M. Ranjeva, qu'il existe une certaine méfiance vis-à-vis de l'arbitrage d'investissement. Cette méfiance est due tout d'abord à des considérations d'ordre politique. Il lui semble que le monde de l'arbitrage apparaît dans les pays du Sud comme un monde clos dans lequel se dessinent des relations incestueuses entre les arbitres, les conseils et les personnes provenant du milieu des affaires. Il prône la démocratisation de l'arbitrage et pense que l'Institut pourrait jouer un rôle à ce niveau. Il souligne que la réticence vis-à-vis de l'arbitrage d'investissement est également due à une considération d'ordre technique : le manque de qualité des arbitrages rendus dans certains cas. Comme M. Tomuschat, il se demande s'il ne faudrait pas instituer un double degré de juridiction semblable à celui de l'OMC dans le cadre du CIRDI et de la Chambre de Commerce Internationale (CCI).

M. *Fadlallah* félicite le Rapporteur pour son travail remarquable et souhaite que la Commission énumère les problèmes concrets soulevés par ce sujet et les traite selon les suggestions formulées par les membres. Une première remarque concerne la méfiance des Etats envers l'arbitrage, qui doit être attentivement évaluée. Il s'agit souvent d'une impression et il n'y a pas toujours de déséquilibre en faveur des investisseurs. La deuxième remarque concerne la distinction entre *treaty claims* et *contract claims*. Il rappelle que la compétence en matière d'arbitrage est donnée pour les litiges, et ne concerne pas ses causes. Remplacer l'objet de l'arbitrage par le motif sur lequel celui-ci se fonde est un glissement qu'il

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faut éviter. La dernière remarque concerne le double degré de juridiction qui entraîne des risques d'erreur semblables à ceux qui existent au niveau de la première instance. Le droit fondamental à préserver est l'accès à une bonne justice ; il n'est pas sûr qu'une double juridiction l'assure davantage.

The *Rapporteur* thanked the Members for their suggestions and expressed his intention to make four remarks. First, he expressed his intention to focus on practical problems rather than theoretical aspects. Second, he was not convinced that arbitration necessarily entailed an advantage for investors, and that States could rely on balanced arbitrations that did not systematically disregard public policy interests. Third, the *Rapporteur* agreed that arbitrators on investment law could be more careful in the interpretation of general norms of international law, but considered that an appellate mechanism in investment arbitration would not solve all the problems of consistency between different decisions concerning similar or identical cases. Finally, he regarded the impact of investment law on general international law as a fundamental aspect to be taken into account by the Commission.

The *President* thanked Mr Giardina for his reply.

La séance est levée à 12 h 00.