Looking into the Future: Challenges to Investment Across Borders

Joan A. De Venecia, Home Development Mutual Fund (Pag-IBIG Fund)

The fourth session of the 2015 HKIAC Summit, which was moderated by Justin D’Agostino, the Global Head of the Dispute Resolution Practice of Herbert Smith Freehills, gathered a most distinguished set of panellists, experts all in the world of investment treaty arbitration, to reflect on and critique certain developments and recurring issues in investor-State dispute settlement (ISDS) that impact on its internal and external legitimacy and prospects for the future, with a view to ensuring the continued integrity, credibility and sustainability of the system in both process and outcome.

The panellists, composed of Nassib G. Ziadé (Chief Executive Officer of the Bahrain Chamber for Dispute Resolution), Jeremy Sharpe (Chief of Investment Arbitration in the Office of the Legal Adviser at the U.S. Department of State), Professor Hi-Taek Shin (Professor of Law at the Seoul National University School of Law) and Johnny Veeder (an international arbitrator with the Essex Court Chambers and a member of the ICCA governing body), were grouped into sub-panels to give their personal views on five interrelated issues and debates currently confronting the ISDS – issues surrounding arbitrators, the parties, and the process.

On repeat appointments of arbitrators from Western Europe and North America

Mr. Ziadé first tackled the hot-button issue of repeat appointments of arbitrators particularly in ICSID arbitration and whether the low rate of appointments of individuals from developing regions of the world harms the quality and value of jurisprudence rendered by tribunals, and more broadly, the institution’s legitimacy.

Mr. Ziadé opened the discussion by noting that the vast majority of ICSID arbitrator appointments, whether on a first time or on a repeat basis, involve Western Europeans or North Americans, with developing countries and their counsel contributing to the trend by rarely appointing nationals from the developing regions of the world as arbitrators. To Mr. Ziadé, this gives rise to the systemic issue of the precedential value and weight to be accorded to ICSID jurisprudence given that the system cannot assure the representation of all the principal legal systems of the world in its development and evolution.

Closely tied to this issue is the desirability of repeat appointment of arbitrators in ICSID arbitration, a phenomenon that, like the issue of the low rate of appointment of arbitrators coming from developing countries, may be attributed to the fact that parties expect their appointees to be experienced and well-learned in the field in which the disputes fall, impelling them to appoint the same individuals (usually coming from developed regions) repeatedly to adjudicate these disputes. Mr. Ziadé acknowledged that the usual defense to this is party autonomy, which remains a pillar of international arbitration that should not be interfered with save for the most compelling reasons.

While Mr. Ziadé has no problem with repeat appointments per se, he expressed the view that the excessive appointments of the same arbitrators may lead to at least three problems: they may lead to
challenges for conflicts of interest, they prevent the widening of the pool of qualified arbitrators, and they often delay the disposition of cases simply because the arbitrators are over-committed.

Mr. Ziadé advocates the interventionist approach for ICSID on this issue and believes that it is ICSID that must take the lead role in addressing this lack of diversity in arbitrator appointments that can potentially harm the legitimacy of the institution and the outcome of its proceedings. He proposes, first, that ICSID create a system for a broadened selection of arbitrators, starting with having ICSID appoint someone other than the usual suspects when it has the chance to do so, keeping in mind the need to geographically diversify its pool of arbitrators.

Second, Mr. Ziadé proposed that ICSID issue a series of guidelines for the benefit of parties and their counsel, with a view to clamping down on the practice of some arbitrators of overbooking appointments, such as through the delegation of essential duties to administrative secretaries. These guidelines may include proscriptions against taking on more than a certain number of cases at any one given time, as well as rules on what constitutes excessive repeat appointments of an arbitrator by the same party or the same law firm, similar to the IBA Guidelines on Conflicts of Interest in International Arbitration that set forth the standards for evaluating such repeat appointments. The ICSID guidelines to be crafted should also provide rules to address the more complicated question of an arbitrator appointed by the same party to several differently constituted tribunals when the cases have raised similar factual or legal questions.

The first to comment on Mr. Ziadé’s presentation was Mr. Sharpe, who framed the issue as a proverbial push-and-pull between the desire from arbitration practitioners to see much greater diversity in the appointment of arbitrators on the one hand, and the significant pressure on counsel to deliver to the clients what they seem to want, which is some indication of how these arbitrators might be expected to rule on any particular case, on the other. He then looked to current U.S. practice, which is unusual in two respects: first, the U.S. almost always appoints an arbitrator in investment cases that has not sat previously in any investment arbitration case, save for just one instance; and second, the U.S. has a much better record of appointing female arbitrators than is customary, with women garnering 25 percent of such appointments, neither of whom is Brigitte Stern or Gabrielle Kaufmann-Kohler. Mr. Sharpe believes that this is largely due to the fact that the U.S. represents itself, allowing it to think more about the arbitrators’ qualifications and expertise rather than his or her decisions in any particular prior case.

Next to comment was Mr. Veeder, who disagreed with Mr. Ziadé’s premise that ICSID tribunals suffer from a diversity problem. He pointed to an exercise done a couple of years ago that looked into the nationalities of the arbitrators who were involved in ICSID, both at the tribunal level and the ad hoc committee level. It showed a massive difference in nationalities, about 42 for both, which, for Mr. Veeder, reflects the growing diversity in the field and, contrary to Mr. Ziadé’s thesis, the absence of a looming crisis situation in respect of appointments of individuals claimed to be coming predominantly from developed countries.

Mr. Veeder also stated that there is nothing inherently wrong with repeat appointments of arbitrators as long as there are no issue conflicts or problems. Employing the football analogy, he noted that nobody complains about repeat appointments of the great Lionel Messi when he plays for Barcelona. To him, the arbitration world is far more positive and diverse than the one described by Mr. Ziadé. If there is one area of concern for Mr. Veeder, however, it is the dearth of women appointed as arbitrators, a situation that needs to be addressed urgently.
For his part, while Professor Shin agreed that diversity is one of the values that ICSID arbitration needs to pursue, to him the more pressing issue is still how to address the legitimacy crisis as perceived by broader stakeholders and civil societies as to the establishment of the arbitral tribunal, as well as the impartiality and independence of arbitrators. Professor Shin thought that with due respect to Mr. Ziadé’s suggestions, a more nuanced and balanced approach is needed to address this issue.

*On whether investment arbitration tribunals ought to prohibit the concurrent wearing of arbitrator and counsel hats*

Mr. D’Agostino opened the next sub-panel with a bit of history — the Court of Arbitration for Sport used to have a revolving door policy whereby arbitrators could also act as counsel and vice versa, but the CAS some years ago prohibited individuals from wearing both hats. The question then is whether there is wisdom in carrying over this policy to investment arbitration.

Mr. Ziadé viewed the issue as one that might potentially give rise to a conflict situation, or to quote Judge Thomas Buergenthal, one that ‘raises due process of law issues’. This is especially true in investment arbitration where the resolution of disputes frequently requires the interpretation of investment treaties that contain similar provisions and engender a small set of similar oft-recurring legal issues. One refrain is that arbitrators should not be put into a position where they are tempted, either consciously or subconsciously, to take procedural decisions or to draft awards in such a way as to advance their client’s position in a simultaneous case in which they are acting as counsel. The opposing view is that in most cases, the tribunal’s decisions are based on factual rather than on legal issues and that conscientious arbitrators will in any event decide their cases strictly on the basis of the facts and law before them, and will not be unduly influenced by factors extraneous to the merits of that particular case.

Mr. Ziadé’s personal view is that the concurrent wearing of the arbitrator/counsel hats ought to be prohibited upon the premise that “it is very hard indeed to imagine how an individual could humanly succeed in achieving a total compartmentalisation”. Even if, for the sake of argumentation, an arbitrator is able to distance himself or herself from his or her role as counsel, as the District Court of the Hague stated in its judgment in the *Telekom Malaysia v Republic of Ghana*, ‘account should in any event be taken of the appearance of his not being able to observe said distance’.

Mr. Ziadé noted that the CAS is not the first body that has decided to prevent arbitrators and mediators appearing before it from acting as counsel. Long before, the International Court of Justice issued in 2002 a Practice Direction discouraging the appointment of agents and counsel before the Court as judges *ad hoc*. There were a few eminent international lawyers who had to give up taking cases as judges *ad hoc*, but the states were soon able to find alternate candidates and the system could continue functioning normally.

One alternative to the total ban of the concurrent wearing of arbitrator and counsel hats is to institute a policy of full disclosure, *i.e.*, to allow the same individual to undertake both roles subject to a requirement that the proposed arrangement be disclosed to the parties and be accepted by both parties. Under this arrangement, each time an arbitrator is appointed to an investment treaty arbitration, when he or she is also serving as counsel in another investment treaty arbitration, the newly-appointed arbitrator must disclose at the outset of the arbitration the fact that he or she is serving as counsel in a
concurrent investment treaty arbitration. Such a disclosure would take place irrespective of the legal issues raised in the two cases.

If one or both parties were for any reason to object to the arbitrator’s role as counsel, that arbitrator would have to choose between the arbitrator and counsel appointments. Similarly, if an arbitrator in the middle of an investment arbitration would like to undertake a counsel role in another investment arbitration, he or she will have to disclose this desire immediately to the parties in the first arbitration. If there is an objection, the arbitrator will have to choose between the two roles.

To Mr. Ziadé, this proposed practice of prior disclosure by the prospective arbitrator and acceptance by both parties does not impose an unreasonable burden, minimises the risk of challenges to arbitrators, and enhances transparency and trust in the system.

Mr. Veeder completely agreed with and joined Mr. Ziadé’s proposals, noting that the issue is really a question of appearances and legitimacy. To him, it is very disturbing for clients to see a member of an arbitration tribunal – a person who as counsel in a quite different case, with different parties, perhaps a different forum – argue the very point which they would seek to argue before that person. This reality is ever more present in investment arbitration, where because the wording is so similar from treaty to treaty, clients do feel very uncomfortable when they think that they do not have a fair hearing because the arbitrator has already argued the point the other way in another case.

Mr. D’Agostino sought reactions from the audience, and Peter Goldsmith of Debevoise London argued that the proposed policy of full prior disclosure does not go far enough. According to Lord Goldsmith, there is currently in Europe a growing negative reaction to investor-state dispute settlement systems. One of the reasons for this lack of confidence in the ISDS is because people cannot understand how the arbitrators who are deciding these cases can also simultaneously accept the role of counsel paid to take a particular position. They cannot understand how somebody can properly do that. To remedy this situation, Lord Goldsmith suggested a radical solution – the outright ban of the holding of dual roles of arbitrator and counsel at any one time – precisely to restore confidence in the ISDS, which for him remains a good system for resolving disputes and for promoting the rule of law.

*On whether, given the highly-developed, robust administrative and judicial systems in the EU and US, there is still a need for ISDS in the TITP*

The context of this next topic is, as explained by Mr. D’ Agostino, that traditionally bilateral investment treaties (BITs) are entered into by States to secure investment into countries with administrative and judicial systems perceived as unreliable and presenting risks of undue intervention in private economic activities. The EU and U.S., however, have developed robust administrative and judicial systems. With the forging of the Transatlantic Trade and Investment Partnership (TTIP), is investment treaty arbitration, at least in the TITP, still needed?

Professor Shin began the sub-panel discussion by recalling the Korean experience back in 2006, and again in 2011 in connection with the Korea-U.S. Free Trade Agreement (FTA) negotiations. This Korea-U.S. FTA includes an investment chapter and ISDS clause based upon the 2004 US Model BIT. At that time, the arguments against the ISDS included constitutional law argument and many arguments similar to what are currently heard in European countries today. From developing countries’ perspective, it is very hard to understand why these European countries that have initiated the bilateral investment treaty practice backed by ISDS are suddenly showing cold feet in negotiating similar agreements with
the U.S. A recent Chatham House report on ISDS in fact states that the U.S. and EU could face charges of hypocrisy if they were to insist on an ISDS mechanism in investment treaties with developing countries without embedding one in TTIP.

For Professor Shin, doing away with the ISDS mechanism in the TTIP has implications extending beyond the EU and U.S. If this happens, it will be extremely difficult for the EU or U.S. to persuade their existing and future counterparties to accept the rules of ISDS, and the government of those countries will also have a hard time justifying the inclusion of such provisions in their agreement with the EU or U.S. Professor Shin predicts that in some countries or some jurisdictions, there can be a demand by civil society to renegotiate BITs or FTAs to eliminate those ISDS provisions altogether.

In response, Mr. Sharpe confessed to being mystified by the argument that because courts are well functioning in certain States, ISDS is no longer necessary. Mr. Sharpe asked if it is any different than commercial arbitration, in a sense, if you have a company from the U.S. and a company from France embroiled in a dispute. They might have equal confidence in the courts of the other State, but nonetheless they conclude an arbitration agreement precisely because they want a neutral forum. To him, choosing the ISDS route has nothing to do, necessarily, with the quality of justice in those States, and the analysis should be no different in evaluating the continued relevancy of the ISDS in the context of the TTIP.

On whether international investment law is biased in favour of business interests in capital exporting states, and conversely, whether the law is biased against developing countries

The last sub-panel was led by Mr. Veeder, who noted that the question calls for an assessment, not of any inherent ISDS bias for or against investors, but of whether current international investment law is skewed in favour of business and against developing states.

As regards investment law, the sources of law, as far as treaty arbitration is concerned, are treaties and customary international law. In Mr. Veeder’s opinion, if fault is to be assigned for the current state of the law, States must take responsibility, for it is their treaty wordings, it is their decisions to give treaty protections to investors, and it is their decision not to extend equal opportunities to States, say for making a counterclaim or for making independent claims, that have brought ISDS to where it is today. According to Mr. Veeder, this is something that will be looked at for TTIP, and it is to be welcomed because investment treaty protections traditionally have protected only the investor. If it is decided by the EU and by the U.S. to have protections for social justice, for human dignity, for employment rights and employment protections, so be it. This would hopefully rebalance the equation between investors and interests in the host State, and would answer very directly the criticisms to which we do not at present have an answer, which is that BITs are unilateral and favour investors only.

For his part, Mr. Sharpe suggested looking at this allegation of investor bias from a wider perspective, i.e., whether the procedural aspect of investment treaty arbitration places developing nations at a significant disadvantage.

Mr. Sharpe shared that one of the interesting aspects of his current position is meeting with other government lawyers who come in, and they are thinking about the representation of their State. They want to chat with the U.S. or Canada or other States that represent themselves, and they want to know how the U.S. sets up its processes for defending itself. These government lawyers are then informed that the U.S. has a dedicated office within the State Department, the foreign office, to represent it; that
that office is indicated in U.S. treaties so that the notices of intent to arbitrate come directly to that office and there is a dedicated team within that office to represent the U.S.; that that same team monitors other cases involving U.S. treaties to seek to intervene and influence the development of the law; that the U.S. has a dedicated fund, an international litigation fund to pay for arbitrators, experts and so forth; and that the same office, the Legal Adviser’s office, represents the U.S. in the International Court of Justice and the Iran-US Claims Tribunal, and has decades of experience, has greater familiarity with arbitral institutions, with arbitrators, with the rules, with the substantive law and so forth.

In the case of developing countries, usually the opposite situation obtains – they typically do not have a dedicated office to represent themselves; they do not have the funds in place and getting funds to represent the State can be very time-consuming and cumbersome; that while they are seeking to get outside counsel, time has passed, and in the meantime they may have forfeited the opportunity to challenge the arbitrator appointed by the claimant, and may even lose the chance to appoint their own arbitrator and participate in the constitution of the tribunal with the president. These are all huge disadvantages for these States that have not established the institutional capacity to represent themselves in the way that some other States that have greater experience with investment arbitration. From that perspective, Mr. Sharpe said that many States will have to institute capacity-building measures, and perhaps seek training from outside institutions like UNCTAD on best practices.

Mr. Veeder provided anecdotal evidence of this state of affairs by recalling States that were sued for the first time in ICSID and that had to deal with the situation where they got late notice at the relevant level of the request for arbitration because the people on whom it had been served did not understand the significance of the document, and that even in that whole country’s law libraries, not a single copy of Schreuer existed on the ICSID Convention. In another instance, a BIT surfaced in a request for arbitration but there was not a single record in that country’s governmental files of that BIT ever having been signed. Then, suddenly the State had to grapple with the fact that it was defending a major arbitration. With ICSID’s lack of resources, Mr. Veeder suggested the creation of some emergency fund to get the State over the first few days and weeks of arbitration with assistance, if only to put them in touch with specialist law firms who can help them.

Mr. Ziadé agreed that these proposals offer a practical solution to the inherent procedural disadvantages developing countries are hobbled with in investment treaty arbitration.