COMMENTARY

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THE DOMESTICATION OF *RARAE AVES*

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The first generation of ICSID awards and jurisdictional decisions, from the mid-1960s to the mid-1980s, were to such a degree *rarae aves* that international lawyers like me knew them all by name, and were interested in every detail that transpired about this new international forum. The cases were a source of fascination; it made sense to produce an *in extenso* collection of all pronouncements of ICSID arbitrators (awards, decisions, orders), and so the *ICSID Reports* were launched – one might say inevitably.

As the years went by, however, the trickle became a flood. From having experienced an average of one registered case per year in its first quarter-century (1966–90), ICSID was confronted with an average of some 21 cases per year during the second (1991–2015). In the first half of 2019 alone, there were 22 new cases. This brought the total number of cases to 728.[1]

In the course of this quantitative expansion, the endeavour represented by the *ICSID Reports* had suffered from something like a negative economy of scale. It had become at once unmanageable for the editors – and overwhelming from the perspective of the relevant readership. The overall process of ICSID arbitration had become broadly familiar, and did not warrant publication of the usually lengthy recitations of the procedure in such a multitude of cases. As for the substantive parts of awards, they often involved fact-intensive accounts of only marginal interest to anyone except those who might be involved in a case arising from the same context – such as multiple arbitrations arising from a single episode of governmental measures. As for legal issues, there has been sufficient *jurisprudence constante* to make it unnecessary to study the merely confirmatory decisions. And may one add candidly that as a matter of quality of analysis not every award merits attention.

Well, one might then say – *le ICSID Reports est mort, vive le ICSID Reports!* A new collection now takes its place, the fruit of very considerable adjustments required to overcome the outdated characteristics of its predecessor and make the project worthwhile. The adjustments in question are rather obvious, and can be identified succinctly in two self-explanatory words: selectiveness and analysis. Each of these features requires substantial resources, and if carried out successfully will provide great value to arbitrators, advocates, and commentators.

Specifically with respect to the analytical component of this ambitious project, it should be noted that it could not have commenced with the first series of volumes for the simple reason that the body of decided cases at the time was insufficient to

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[1] ICSID, *The ICSID Caseload – Statistics, Issue 2019-2*, available at: https://icsid.worldbank.org.

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provide grist for the mill of a thematic approach. It will be fascinating to see how the new venture might affect the way we think of legal relations between nation States and foreign investors.

As the stream of decisions in this new area rapidly picked up breadth and speed, critical minds applied themselves to evaluating the output. This is as it should be. Equally, however, some of the critics seemed to proceed on the basis that the standard against which awards should be assessed was their personal notion of perfection rather than against the alternatives.

As we all know, even the supreme courts in the most incorruptible legal systems are not immune from vociferous criticisms, and of course arbitrators are to some extent limited by the pleadings of the parties. When lawyers fail to perceive the best arguments, there are limits as to what arbitral tribunals can do. But let us be more specific, and consider the charges of inconsistency and inadequate reasoning.

As for the former, one must wonder if the complaints come from those who have had no experience of other adjudicatory bodies. Predictability is to be desired, encouraged, strived for – but certainly not *expected*. The outcome of the application – by adjudicators chosen from a vast multinational pool – of an open-textured and possibly evolving standard such as "fair and equitable treatment" will not be a matter of scientific measurement. So much depends not only on the facts, but the resourcefulness in discovering the facts and the skill deployed in their presentation. Outcomes may be unpersuasive or disappointing, depending on the observer, but unlikely to be demonstrably wrong.

Or put it this way: imagine that an aggrieved party asks ten lawyers whether its claim of a breach of the fair and equitable standard is likely to prevail, and that seven say that such an outcome is likely, but three say the contrary. Now imagine ten parallel universes in which it is possible for that party to enlist each of those ten lawyers to bring its case before ten different arbitral tribunals. Let us suppose that those who said that the case was good had seen how it could be pleaded effectively, and that the three others presented it as best they could, but with doubt. If the first seven win, and the three others lose, do we not have precisely the ten predicted outcomes? It is surely impossible to say that the three failures represented "wrong" decisions.

Court cases are unpredictable. If they were not, there would be no need for courts of appeal. This unpredictability extends beyond issues of fact. If it did not, there would be no need for supreme courts.

Of course at some point propositions of law tend to become settled matters, and deviations can justly be disapproved. Similarly, inconsistent findings by the same arbitrator with respect to matters of principle are disturbing. But there is no basis to *assume* that such developments are more frequent in the field of international arbitration than in the most advanced national legal systems,[2] or for observers to

[2] What Rudolf Dolzer wrote in 2001 with respect to the contours of the notion of indirect expropriation remains true today – and will perhaps continue indefinitely to pose the same intractable issues – when he observed "a widespread assumption in both business and legal communities that the international takings doctrine is in disarray, the jurisprudence is inconsistent, and the results are often unpredictable. To some extent, this belief can be founded on the review of the relevant international tribunal and judicial decisions . . . But in the domestic orders, the legal solution is also considered far from clear, and

conclude that there is something wrong when an arbitral tribunal does not decide a matter in the way they (without actually having heard the evidence) think they would have. What is true for indirect expropriation goes as well for other succinct abstractions such as fair and equitable treatment, more favourable treatment, discrimination, state of necessity, international public policy, and denial of justice.

When considering the adequacy or otherwise of reasoning, it is natural to have in mind Article 52(1)(e) of the ICSID Convention, which exposes awards to annulment if they "fail to state the reasons on which [they are] based". Just over a decade ago, in the academic year 2005–6, this requirement became the focus of a seminar on international investment arbitration conducted by Michael Reisman and Guillermo Aguilar at the Yale Law School. Each student chose to examine and evaluate the reasons of a single case, and ten studies selected by the instructors were published in book form under the title *The Reasons Requirement in International Investment Arbitration: Critical Case Studies*.[3]

The back cover of the volume noted that the requirements of Article 52(1)(e) "are not merely a legitimizing ritual but are supposed to function as a control mechanism", and that the ten student papers "subjected the reasoning in some of the most important recent investment awards to rigorous analysis and appraisal".

Among the arbitrators whose awards were examined we find – leaving aside eminent professors and former senior advisors on international law in ministries of foreign affairs – one past President of the International Court of Justice, another past and one future judge of the self-same ICJ, three former national supreme court judges, and four other former national appellate court judges. One might think that a fair percentage of their awards might pass muster in the eyes of their ten student critics. Alas – where there is a will there's a way, and clearly the way to achieve recognition for a seminar paper is not to admire, but to tear down. Here are the comments made by the student critics on each of the ten awards, in the order in which they appear in the book:

Mondev v. *United States* (1992): "... the complexity of the case and what has been termed, in a broader context, as 'powerful pressures on the members of the tribunal to be obscure rather than rational'[4] could not justify ... inadequate reasoning of the critical factual findings and major premises in the award".

Feldman v. *Mexico* (2002): "... numerous flaws in the reasoning, from arguments that are not sound because of false premises, such a failure to cite sources for international law, to arguments that are not valid because of poor

legal doctrine does not allow hard and fast rules and predictions", R. Dolzer, "Indirect Expropriation: New Developments?" (2001) 11 *New York University Environmental Law Journal* 64, at 66.

[3] G. Aguilar Alvarez and W. M. Reisman (eds.), *The Reasons Requirement in International Investment Arbitration: Critical Case Studies* (Leiden: Martinus Nijhoff Publishers, 2008).

[4] Quoting from "How Well Are Investment Awards Reasoned?", *ibid*., Chapter 1 (positing at p. 30 that such circumstances could arise when the drafters seek to be "minimally offensive to a respondent government", when "judicial parsimony" is exercised by deciding a case on "firm principles" and "obviating elaborate reasoning for other claims", or if there is "accommodation" among three arbitrators that "lead to a distortion in reasoning").

inferences, caused by failure to adhere to requirements of the burden of proof, and by inattention to the parties' specific claims".

LG&E v. *Argentina* (2006): "... inadequate reasons are provided with respect to arbitrary and discriminatory treatment, indirect expropriation, and the state of necessity".

Saluka v. *Czech Republic* (2007): "The discussion on expropriation [is] unreasoned ... inadequate ... confuses and prompts the reader to at least question parts of the eventual outcome." This with respect to what many specialists would consider the gold standard in terms of its exploration of the requirements of fair and equitable treatment – the central issue in that case – drafted by an eminent tribunal chaired by Sir Arthur Watts, the superb craftsman and general editor, in his day, of *Oppenheim's International Law*.

Tokios Tokeles v. *Ukraine* (2004): "... certain aspects exhibit either an absence or inadequacy of reasoning".

Occidental v. *Ecuador* (2004): "The paucity of reasoning is most evident in the substantiation of the award's controlling prescriptions, with the most contentious findings suffering from the least articulation ... glaring lapses in the tribunal's reasoning ... a low-water mark in investor–state arbitral jurisprudence ..."

Wena Hotels v. *Egypt* (1999 and 2000): "In both the jurisdictional and merits phases, the tribunal declined to provide reasons for critical decisions ..."

Thunderbird v. *Mexico* (2006): "... the tribunal did not resolve the questions the parties were putting before it".

Loewen v. *United States* (2002): "... inadequate reasoning has added substantially to the widely felt dissatisfaction among the multiple constituencies of investment arbitration. Claimants are unlikely to feel that they had 'their day in court' because important aspects of their arguments on jurisdiction and the merits were ignored ... For the respondent, the award failed to put an end to the legal proceedings. The lacunae and contradictions in the tribunal's reasoning made the award easily susceptible to a challenge ..."

Petrobart v. *Kyrgyz Republic* (2005): "... in its search to accord maximum protection to the alleged investor, the tribunal did not respect its duty to provide the parties to the dispute with cogent reasons for its major and far-reaching conclusions ... The failure of the tribunal to provide adequate reasoning for its determinations calls the credibility and authority of the final award into question."[5]

What towering intellect would be adequate to satisfy the hyper-critical gaze of these seminar participants?[6] Perhaps Oliver Wendell Holmes, who one imagines

[5] The tribunal was constituted under the rules of the Stockholm Chamber of Commerce and was presided over by a former justice of the Swedish Supreme Court. An application to set aside the award was made to the Svea Court of Appeal, but it failed. The student critic, unappeased, went on to assert that *the reviewing Court itself* failed to resolve the decisive jurisdictional question.

[6] The two instructors/editors, perhaps alarmed by the severity of these criticisms, seemed anxious in their introductory chapter to attenuate the impression of militant hostility when they wrote, perhaps more hopefully than accurately: "Interestingly, in almost all instances, it was felt [*sic*] that the right decision had probably [*sic*] been reached." The next sentence quite fairly, I think, reflects the frustration

would be on anyone's list of the five most penetrating judicial minds in the annals of the English-speaking world? Well, actually no, if one is to recall what Holmes wrote in his famous dissent in *Lochner* v. *New York*: "General principles do not decide concrete cases."[7]

The point here is that when the legal standards are expressed in abstract terms adjudicators, not having any legislative authority, cannot invent granular rules. They must use their judgement, and in so doing will render decisions that engender controversy. After all, every important supreme court decision deals with questions with respect to which good minds have differed. And that is why even judgments of the highest courts are criticised.

Are we then condemned to struggle in frustration, to use Tennyson's lines in *Aylmer's Field*, with

> . . . the lawless science of our law
> That codeless myriad of precedent,
> That wilderness of single instances . . .

That is not my belief. Even the most venerable jurisdictions have an evolving *jurisprudence* in the French sense of the word. It is therefore no slight on the comparatively recent, and some would say explosive, flood of lengthy awards dealing with fundamental issues in the legal relations of States and foreign investors to say that we expect and observe a vibrant process of refinement. And this is precisely the sense in which the editors of *ICSID Reports redux* seek to orient their labours.

The contributions that follow will explain and describe what has been done, and having simply announced the sea change in conceptual approach I will say no more about it.

But having once predicted the flood[8] and experienced it as a participant, I am asked to offer some observations as to what one might perceive as the effect of the sudden quantum leap in international adjudication of claims against States in terms of the evolution of international investment law.

Any significant institution which absorbs a dramatic and formidable impact is likely to be controversial, and so has been the case with ICSID. Naturally the manner of selection of decision-makers has been a matter of critical scrutiny. So, as we have just seen, has the quality of their decisions.

As to the former, critics of the ICSID system have questioned the recruitment and motivation of arbitrators. The legitimacy of arbitral tribunals is a *sine qua non*. Perfection will never be achieved, but must be the permanent goal.

that can be felt whenever a decision seems more the product of a vote than rigorous collegial ratiocination: "But without the building blocks that reasons reflect, one could not reconstruct or 'reverse engineer' the reasoning of the tribunal." *Op. cit*. p. 1.

[7] 198 U.S. 45, 76 (1905). Privately, Holmes could be more provocative. In a letter to his friend Harold Laski 15 years after *Lochner*, Holmes wrote that in deliberations he would tell his fellow Justices that "no case can be settled by general propositions . . . I will admit any general proposition you like and decide the case either way", Letter of 19 February 1920, in R. Posner (ed.), *The Essential Holmes* (University of Chicago Press, 1992), at 38.

[8] J. Paulsson, "Arbitration Without Privity" (1995) 10 *ICSID Review – Foreign Investment Law Journal* 232.

There is evidently a problem with concurrent service as arbitrator and advocate in different cases ("double-hatting") and unilateral appointment of arbitrators. My views evolve with experience, but at this writing they are as follows.

It should be obvious that an advocate who is seeking to convince a tribunal to adopt a particular legal thesis in case A, or who is a partner of a law firm which has an important client seeking to promote that thesis through another lawyer, may not be accepted as being sufficiently impartial to sit as an arbitrator in case B where the same, or a similar, thesis is being debated. At the very least the situation should be disclosed. Consider this: I may think of myself as careful to avoid situations which I consider borderline, all the while observing that some arbitrators are "even" more (but in my view unnecessarily) punctilious than I, while yet others are (to my thinking) disturbingly insouciant. It is all a matter of individual judgement and conscience, controllable by no one save by the chance revelation of circumstances, and ultimately quite unregulated. Double-hatting in commercial arbitrations has long been accepted and will so remain, because such cases generally depend on unique facts and one-off contracts. The context of investor–State arbitrations, where the broad issues of international law inherent in the relevant treaties are frequently recurrent, is very different. (The same can be said of sports arbitrations, and its continuously arising need to interpret general rules such as the presumption of scientific accuracy of accredited laboratories, strict liability for adverse test results – on the one hand – and – on the other – the failure to respect protocols with respect to the integrity of samples, and the distinctions between the sanctions of suspension and disqualification.)

In sum, it is foolish to pretend that there is no trouble with double-hatting. That does not mean that there must be a blanket prohibition, only that best practices are yet (at this moment) to be found.

As for the prevalence of unilaterally appointed arbitrators, this remains broadly supported inside the world of arbitration but met with great scepticism by outsiders. My view is that this practice – here too – is easily justified in commercial arbitrations, and will remain prevalent there. Treaty-based investor–State arbitrations are far more sensitive, given their tendency to become politicised. Better practice is for entire tribunals to be jointly appointed by the parties, failing which by the relevant arbitral institutions. This puts the burden on institutions to demonstrate and maintain their legitimacy, avoiding sins like capture, entrenchment, and lack of transparency. The leading institutions are acutely aware of this and have made great strides, often underappreciated by dogmatic critics. But the radical transformation of the process into one where the adjudicators are appointed exclusively by States or State-controlled organs would be unfortunate; it would defeat the confidence-building purpose of investment treaties and cause investors to revert to the practice of purely contractual arrangements – or to stay home.

If issues of legitimacy are adequately dealt with, the international community (save for radicals motivated by intuitive iconoclasm and unburdened by acquaintance with the inherent and inevitable realities of adjudicating disputes) should be at peace with the process, and with the manner in which jurisprudential trends achieve the twin goals of reducing the inventory of unsettled issues and absorbing and refining the normative developments of public policy.