



World Investment Forum 2014: Investing in Sustainable Development

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Remarks on some key issues of the current public debate

1. Selection and independence of arbitrators

- We would very much welcome a code of conduct for arbitrators (and also the representatives of the parties). The code of conduct should cover the main conflicts of interests an arbitrator may run into. It should complement the applicable arbitration rules. ICSID- and UNCITRAL Arbitration Rules already demand a declaration of independence and impartiality by the arbitrators.
- It does not appear to be possible to prevent lawyers, who have represented different parties in different arbitration proceedings, from acting as arbitrators in other proceedings, if there is no conflict of interest without considerably reducing the number and the quality of specialised arbitrators. The code of conduct mentioned above, could give guidance and clarity on possible conflicts of interests and its consequences. All States should make efforts to increase the number of possible arbitrators, e.g. by putting more emphasis on arbitration and investment protection in the training of lawyers or by encouraging young lawyers to specialise in this area of law.
- A list of arbitrators for cases, where the parties to arbitration do not reach an agreement on the chair of the arbitral tribunal, already exists for ICSID-arbitrations. Ways should be explored to broaden this system, as a fixed and limited list of arbitrators would considerably reduce the possibility for the parties to select persons with specific capacities and thus raises serious concerns. Arbitrators should have not only knowledge of public international law, but also have full understanding of the subject of the investment dispute and skills in arbitrating.

2. Transparency of proceedings

- Germany highly welcomes the adoption of the UNCITRAL Transparency Rules. They will ensure that ISDS cases under future BITs/FTAs will be conducted in a transparent way and ensure civil society participation and monitoring. These Rules reflect the public interest in ISDS-proceedings and such provide more transparency than in domestic court proceedings in Germany and proceedings in international fora, e.g. WTO and ECJ.
- Key aspects of the UNCITRAL Transparency Rules to ensure more transparency are
 - o Publication of the statement of claim and other procedural documents
 - o Public hearings
 - o Submissions of non-parties
- We encourage all Governments to actively promote transparency with regard to their existing BITs by ratifying the UNCITRAL Convention on Transparency.
- Transparency is secured if ISDS cases are conducted under ICSID Rules or, even more so, under the new UNCITRAL Transparency rules.

3. Duration of proceedings, special proceedings, parallel proceedings
- Arbitral proceedings often last too long. They are sometimes more time consuming than domestic court proceedings. The tribunal should structure the proceedings, use bifurcation to simplify the litigation, where appropriate, and avoid unnecessary burden, e.g. not go into discovery where such an exchange of documents etc. is not necessary.
 - Special arbitration rules should be developed to enable the tribunal to decide in fast and simplified proceedings, where appropriate.
 - The issue of parallel arbitral proceedings which share questions in fact or/and in law should be solved. However, consolidation is a very difficult way out and bears the risk of erroneous decisions, which will make the recognition of an arbitral award more burdensome. The UNCITRAL Working Group II will look into this problem in 2015 and will try to find acceptable solutions.
4. Consistency or Coherence?
- BITs are the outcome of negotiations which reflect the specific interests and concerns of the states which concluded the BIT. Different BITs therefore use different wordings, e.g. NT and MFN with or without qualifiers
 - Therefore consistency can only be achieved under the same BIT and for differences in BITs coherence and not consistency is the achievable goal.
 - Proposals to achieve more coherency:
 - o strengthening the role of the state parties by allowing binding interpretations; retroactive interpretation however could undermine confidence
 - o clearer definitions of substantive treaty provisions
 - But as already explained not by using:
 - o An inappropriate consolidation mechanism
 - o A fixed list of arbitrators.
5. Mandatory negotiation period
- Scepticism seems justified with respect to requirements of a mandatory negotiation period in addition to the customary cooling-off period before parties are allowed to start arbitration. Negotiations are not always possible or recommendable and will further prolong the dispute. Intelligent parties will negotiate in any case before starting costly arbitral proceedings.
6. Appeal/Review/preliminary ruling
- The Current system provides already limited mechanisms for the annulment (ICSID) or set aside (UNCITRAL, SCC, ICC) of awards
 - o Art. 52 ICSID (Tribunal was not properly constituted or has manifestly exceeded its powers, corruption on the part of a member of the Tribunal, serious departure from a fundamental rule of procedure, or failure of the award to state reasons)
 - o Art. VI, V NY-Convention (set aside procedure)
 - Introducing additional instruments (appeal, review, preliminary ruling) implies the following undesirable consequences, especially if existing mechanisms of review are not taken into account:
 - o Increased costs of arbitration
 - o No finality of the award
 - o Only limited contribution to a more coherent jurisprudence (only possible in a multilateral system or if a high number of cases is expected under the same BIT)
 - Possible alternatives: binding interpretations
7. Cost of Arbitration
- The costs of arbitration are generally too high even if both parties share the costs. There should be caps and fee schedules for arbitrators and possibly also for party representatives to contribute to the transparency of costs for the parties and to a better acceptance of arbitration altogether.
 - Germany favours the loser pays principle. This will reduce the risk of unfounded claims and also influence the respondent's decision whether to defend himself or not.
 - Third party financing of arbitration proceedings is a problem which should be solved. As a minimum it should be made transparent to all participants of the proceedings where a proceeding is financed by a third party this and the third party should not have any influence on the subject matter of the claim.