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*The implication for international rule making of the choice of arbitration to solve disputes – The example of investment law*

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Introduction – Some background information

(NB - I will not speak of ADR, because ADR methods are based on norms outside law and, by essence, cannot create legal norms on the substance)

This topic not only poses the question of private enforcement, but adds two other layers to the basic issue: (1) Is private enforcement by arbitration different from private enforcement in court? (2) It is easy to understand that private enforcement may be an effective mean for the application of the law. It may be a complete different story to argue that private enforcement may also develop the law itself.

1) Some historical background

Privatization of adjudicatory means of dispute resolution is an on going process and not specific to investment. However, the investment area is telling because resort to arbitration has been progressive and only recent.

The first step was to create ICSID. But that's a special system (to be elaborated orally). The first Treaties using an ICSID clause are those between Italy and Chad on the hand, Ivory Coast on the other hand.

Then, it seems that the first "classic" arbitration clause to be found in an investment Treaty is that between France and Syria (1977). The clause provides for ICC arbitration if ICSID not available. The next step is a Treaty between the USA and Haiti (1983) (not sure what kind of arbitration was provided for in that clause)

In Multilateral Treaties, the trend is parallel to the one identified in Bilateral Treaties. Ad hoc arbitration was incorporated in the Islamic Conference Organization Treaty adopted in Bagdad 1-5 June 1981. In 1987, the ASEAN choose ad hoc arbitration under UNCITRAL rules instead of ICSID or the Regional Center of Arbitration at Kuala Lumpur.

2) What are the features important for the analysis of the topic?

- 2.1. Classic arbitration personnel may not have the expertise
- 2.2. Classic arbitration depends on the will of the parties
- 2.3. Legitimacy issue
- 2.4. Confidentiality
- 2.5. Can there be a system of precedent?
- 2.6. Judicial review
- 2.7. What if a rule making process depends entirely upon practice?
- 2.8. Does it make a difference that one of the parties is a State?
- 2.9. Does it make a difference that disputes may concern more than just the parties involved?

We may want to have a look at what the Tribunal said in the Saipem-Bengla Desh jurisdictional decision:

"The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law".

Almost every single concept in the above pronouncement may be challenged. For example, do we actually have a "single community" among States and investors, or are they part of two separate communities?

3) Reading material

Late 2007, UNCTAD has issued a study "Investor-State Dispute Settlement and Impact on Investment Rulemaking" which may be of interest to participants. It can be found at [http://www.unctad.org/en/docs/iteia20073\\_en.pdf](http://www.unctad.org/en/docs/iteia20073_en.pdf). However, the study is oriented towards proving that arbitral decisions have influenced countries to change the content of their treaties. It does not cover many of the issues we think should be addressed in analyzing the topic proposed.