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SHEDDING LIGHT ONTO INVESTMENT ARBITRATION
November 1st, 11.00AM – 1.00PM

Moderator: *Sofia Plagakis, CIEL*

Panelists: *Nathalie Bernasconi-Osterwalder, Managing Attorney, Geneva, CIEL*
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Combating Corruption Through more Transparent Dispute Settlement Processes
Presentation by Nathalie Bernasconi-Osterwalder, CIEL

We are here today to talk about investment arbitration in the context of corruption. I would like to first briefly talk about what we mean here by investment arbitration. Then I will explain that investment arbitration is too secretive, and that there is a need to reform procedural rules to make investment arbitration more transparent and therefore more capable of exposing corruptive practices in transnational investments.

I am using the term investment arbitration to mean the settlement of disputes arising between a host state and a foreign investor. Here, arbitration is typically initiated by the investor, and the host state is typically the respondent. In order for international arbitration to apply, the parties to the dispute need to agree to international arbitration, for

example through a contract, or what we will call here, a “host-government agreement”. But in some cases, arbitration between a host State and an investor can be based on an investment treaty between the host State and the home State of the investor. In this case, the host State offers the possibility to the foreign investor from the home State to request arbitration for breach of treaty.

Only ten years ago, arbitration between foreign investors and host States was still quite rare, but the number of investor-State arbitrations has multiplied rapidly. Especially arbitration based on investment treaties is a very recent phenomenon. Today, we have a complex web of over 2500 investment treaties in effect between States, most of them negotiated after 1995. Many of the treaties give the right to investors to sue the host State for the violation of specific investment protection provisions included in the treaty. Thus, any host State signing such a treaty, opens itself up to being sued for damages by any investor from the home state. Investors have launched well over 300 arbitrations against host states under treaties over the past 15 years or so, often against some of the poorest countries. Many cases have involved investments in natural resources. New investment treaties continue to be negotiated, sometimes as stand-alone treaties, sometimes as chapters in free trade agreements. The number of cases against poor states is likely to grow.

In addition to arbitrations based on treaties, host States are facing arbitrations based on contracts they have signed with foreign investors. Both types of disputes – treaty or contract-based -- involve the public interest, simply because one party is the government. Moreover, the public interest is implicated because cases involve alleged wrongdoing by a government or governmental agency, and a number of known cases have specifically addressed the issue of corruption. In addition, especially treaty-based arbitration, frequently involves important domestic policy issues such as environmental and health protection, exploitation of minerals, forests, water and other natural resources, and the delivery of public services. Finally, investment disputes can result in large awards affecting the public purse. Several recent cases have resulted in awards against host States in the range of over US\$100 million.

Despite the diverse public interests involved, arbitration proceedings can remain largely secret. Under some procedural rules, most, if not all phases of international dispute settlement can remain confidential if one party so requests. This means that the public can remain unaware of the existence of a dispute, even where important public policies are involved, including corruption. Worse, even the final awards can remain undisclosed if not both parties agree to publication.

Let's take one recent example that involved corruption: The World Duty Free case against Kenya. In that case the investor had concluded an agreement for the construction and operation of duty-free complexes at two airports in Kenya. Many years later, the investor sued the government of Kenya for breach of contract. Kenya, however, countered that the agreement between the investor and Kenya was procured as a result of a payment of a bribe. The investor admitted to the payment of 2 million dollars to the then President of Kenya, but explained that he was told that this was a custom and that business could not be made in Kenya without such donation. But the tribunal did not accept this argument and found that even where corruption was common practice, corruption would be intolerable. It concluded that in light of domestic laws and international conventions condemning corruption, there had been a violation of the international public order and that therefore, contracts obtained by corruption could not be upheld.

This is an example how international arbitration should work: This decision, conducted under the International Centre for the Settlement of Investment Disputes (ICSID), was made public. In fact, the entire process and the related documents were made public in this case. The disclosure informed the citizens of Kenya about the corrupt practices of its the government (or former government), and it informed the Kenyan citizens and the rest of the world about a corrupt investor. The disclosure of information also permitted other foreign investors in Kenya and elsewhere to know that if a contract involves corruption it might become unenforceable in arbitration tribunals, a forceful disincentive.

But unfortunately, other procedural rules are less transparent than the 2006 ICSID Rules. Even the arbitration rules of the United Nations – those under the United Nations Commission on International Trade Law (UNCITRAL) – allow for secret arbitration, so that cases involving public interests, including instances of corruption, can be decided quietly behind closed doors without the public ever knowing the arbitration took place.

But now there is an opportunity for change: UNCITRAL is currently revising its Arbitration Rules for the first time since 1976, in its Working Group II on Arbitration. UNCITRAL Rules are primarily used for arbitrating commercial disputes between private parties. But they are also used for investment arbitration, including in disputes initiated by foreign investors against host States, based on an investment treaty. In fact, UNCITRAL Arbitration Rules are now thought to be the most commonly employed set of arbitration rules in investment disputes, *after* those of ICSID.

One would think the obvious: In 1976, when the UNCITRAL Arbitration Rules were adopted, investment arbitration was rare, and treaty-based investment arbitration was non-existent. Therefore, the rules were primarily crafted with pure commercial arbitration in mind. It is not difficult to make the argument that commercial arbitration between private parties should be confidential. But today, we *know* that UNCITRAL Rules apply to investment arbitration between States and investors. Therefore, it seems only natural that the Working Group revising the Rules would take this into account. But two years ago, when the revision process started, it did not! In fact, there was surprising resistance by a number of countries, especially from Europe. The influential “Milan Club of Arbitrators” was also strongly opposed to introducing transparency into UNCITRAL Rules. However, with the pressure of several governments in favor of transparency, including among others Canada, Argentina and a number of other Latin American countries, South Africa, Norway and Switzerland, the issue was finally brought to the Commission, the governing body of UNCITRAL. In early July this year, the Commission gave the specific mandate to the Working Group to address the transparency issue.

The UNCITRAL revision process is just one but important step to making investment arbitration more transparent. Another way to introduce transparency is through the international investment treaties themselves. The elaboration of model clauses to use in international investment treaties as well as in host-government agreements might also be useful. The US and Canadian treaties, for instance, all make transparency mandatory, as does a recent regional agreement in Africa, the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement. Thus, there have been important moves towards transparency, but reform in the UN Rules remains one of the most important milestones that States will have to take in the near future.

Before closing, let me just briefly take this discussion one step further. We have spoken so far about disputes between investors and States, arguing that, because the public interest is involved, the disputes, both in terms of process and substantive outcome, must be public. This will, among other things, help expose corruption, allowing, for example, signatories of the OECD Bribery Convention to gain knowledge about corruptive practices of their companies abroad. But the discussion should not end here: not only disputes between investors and States can involve and expose corruption. Corruption has come up repeatedly in cases among private parties, as well. In fact, there have been a number of commercial cases involving corruption, the first most famous known award rendered in 1963. That case involved an agreement between a British company and an Argentinean engineer acting as an agent in energy related projects. The arbitrator found that a substantial part of the commission to the Argentinean agent was used for bribes. Here, the arbitrator therefore declined jurisdiction. A number of other arbitrations have followed suit, condemning bribery, though they took a slightly different approach in their legal reasoning. Should these arbitrations not be made public as well? What types of reforms would be required to implement a publication requirement? Or, taking this a step further, do arbitrators have a compulsory obligation to report incidents of bribery?

I am looking forward to Lucinda's and Jake's views on this and will leave the questions standing for now. Thank you very much for your attention.