STEINKRAUS-COHEN LECTURE, UNITED NATIONS ASSOCIATION, 3 MARCH 2009: "INTERNATIONAL DISPUTE SETTLEMENT: DEVELOPMENTS & CHALLENGES"

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Mr. Chairman, Your Excellencies, My Lords, ladies and gentlemen,

It is an honour and a pleasure to give the 7th Ruth Steinkraus-Cohen lecture to this Association, and I am grateful to David Wardrop for his kind invitation.

It is a particular challenge to speak to an audience, which, though interested in the United Nations, varies greatly in its familiarity with international law. I hope that when I have finished you will not be reminded of the story about the balloonist who lost his way in a fog and was drifting aimlessly when he saw a man walking across a field below him. He shouted down to him "Can you please tell me where I am?" The walker replied: "Yes, you are in a balloon, about fifty feet above a field, in England". The balloonist said "You must be an international lawyer". "I am, but how did you know?" "Because what you told me was 100 per cent accurate and 100 per cent useless".

The subject I have chosen, "International Dispute Settlement: Developments & Challenges" is a huge one, and I shall immediately narrow it by excluding non-legal methods of dispute settlement such as negotiation or mediation. I will confine myself to third party dispute

settlement by the application of law: adjudication and arbitration, the latter being a process whereby parties take a dispute to a decision-maker chosen by them in a forum and with a procedure also chosen by them, rather than the matter being decided by a judge operating under a fixed procedure in a predetermined venue.

By way of background, I should begin by reminding you of a striking difference between international adjudication and national - what we also call "domestic" or "municipal" - litigation. It is that, in international society, the jurisdiction of courts (and of course arbitral tribunals) depends on the *consent of the parties*.

When I started studying international law there were only three international courts, and none of them at all busy. The European Court of Human Rights decided only 16 cases between 1960 and 1975,[1] and the European Court of Justice was initially not much more in demand. The so-called World Court was in no better case. It had been set up in 1920 under the name of the Permanent Court of International Justice, and in 1945 it had been re-founded under the title International Court of Justice and made the "principal judicial organ of the United Nations". But despite its grand title, it was not at first a very active organ. In the 25 years after the establishment of the UN, it rendered only some 23 judgments, of which eight were to the effect that it did not, in the ultimate

[1] Though, admittedly, a somewhat larger number was dealt with by the European Commission of Human Rights, which acted as a type of filter for the Court.

analysis, have jurisdiction, or that the case was for some other reason inadmissible. During the same quarter of a century, it also rendered 12 non-binding advisory opinions to organs of the UN or certain other international organisations. Altogether, this averages out at slightly over 1 substantive decision a year – and I well remember the time in the 1960s when it had no – I repeat no – cases on its docket. Not very impressive, then.

There were also a handful of ad hoc arbitrations between states, but I do mean a handful.

Today, the picture is very different. As well as the International Court of Justice (which is significantly more active than once it was, with 15 cases currently pending) we now have a multiplicity of other international courts. There are several criminal ones – above all, the International Criminal Court, but also the Criminal Tribunals for Former Yugoslavia & Rwanda, and somewhat analogous ones for Sierra Leone and Cambodia. I shall not deal with these in any detail in the remainder of this lecture, however, simply because criminal courts have their own special characteristics and problems. Returning to the civil side, so to speak, we also have the International Tribunal for the Law of the Sea; the Appellate Body and panels of the Word Trade Organisation; courts of justice of regional economic bodies, of which the European Court of Justice in Luxembourg is the most active, but not the only, example; courts and

quasi-judicial bodies supervising global or regional human rights conventions; an assortment of mechanisms for resolving disputes regarding fishing, the environment, and so on. Turning to arbitration, the amount of inter-*state* arbitration has increased substantially; but what has been truly remarkable is the volume of international arbitration between states, on the one hand, and foreign investors on the other. I am not talking about what are essentially private law disputes arbitrated under the auspices of the International Chamber of Commerce in Paris, the London Court of International Arbitration, and so on. I mean real treaty-based arbitration, where public international law plays a part, and often quite a large one.

How this has come about is a story with several strands. In the 1960s, the World Bank decided to establish a facility which it called the International Centre for the Settlement of Investment Disputes between States and Nationals of other States – ICSID. This comprises essentially a secretariat, a set of arbitration rules, and an optional panel from whom arbitrators can be chosen. ICSID tribunals have jurisdiction if the host states and the investor both consent. This consent can be given in an investment agreement, in investment legislation or in a treaty, which brings us to another strand in the tale. Because, starting in late 1959, capital-exporting states like Switzerland, Germany and the UK started concluding bilateral treaties, mostly with capital-importing countries for

the promotion and protection of investments – BITs, as they are known. A trickle soon turned into a flood. Today, there are well over 2500 BITs and although we would do well to note (as most commentators have failed to do) that this represents only about a quarter of the possible total, it is still a significant figure. Though BITs' contents vary considerably, typically they provide a high level of protection for investors; and significantly, it is only investors who can sue host States, not the other way round (except by way of counterclaim). I should also mention, for the sake of completeness, a small number of multilateral instruments, such as the North American Free Trade Agreement and the Energy Charter Treaty, though as yet it has proved impossible to agree a global treaty for the protection of investments.

I was very junior counsel in the very first ICSID arbitration. These arbitrations used to be quite rare, but today, largely as a result of the increase in BITs, they are rather frequent. 157 have been decided to date, and just now there are another 124 pending.

Not all BITs provide for an ICSID tribunal to have jurisdiction – there are other possibilities too.

Why, we might ask, has all of this legal work – all of these different kinds of disputes, not just the investment cases - not simply been entrusted to the International Court of Justice?

Well, in some cases this is ruled out by the Statute of the Court, which says that only states may be parties before it. So not investors, or alleged victims of human rights violations, for instance. But even where the disputes were purely State-to-State, Governments have often preferred some other forum. The explanation is partly political. When the Law of the Sea Convention was being negotiated, for instance, in the 70s and early 80s, the ICJ was rather unpopular in some quarters, and partly for this reason it was decided to create a different court for those who preferred it. So the International Tribunal for the Law of the Sea was established. There was also an unwillingness to have regional conventions interpreted and applied by judges who came from outside the region. There was furthermore a perception that specialised matters were better dealt with by specialised courts. For example, whilst the ICJ can deal reasonably satisfactorily with, say, boundary disputes, with all due respect it would have a steep learning curve in dealing with the sorts of cases decided by the Appellate Body of the World Trade Organisation. In other instances the ICJ was eschewed it because it simply did not have the capacity to deal with a high volume of cases.

The processes that have led to this explosion in the number of cases that come before *international* tribunals – mostly globalization - have also led to an explosion in the number of cases involving international law that are dealt with by *national* tribunals. If once it was a red-letter day for people

like me to see (let alone be involved in) a domestic case raising questions of international law; today it is commonplace – due largely to the same causes.

These, then, have been the developments, in outline. Any international lawyer is pretty well bound to feel a warm glow when he or she contemplates this increased role for our discipline.

Let us not be too complacent, though. The rule of law is still very far from being established in the world. Some countries can still commit aggression with impunity – and not just major powers. Many states bend or break the rules if they can get away with it, and human rights are violated on an industrial scale on our unhappy planet.

But even leaving these very serious deficiencies to one side, and concentrating on where the rule of law *has* spread, this very success has thrown up its own problems and challenges, some of which I would like to bring to your attention. They fall into two broad categories: what I might call case-management problems for international courts and tribunals and for Governments; and secondly, the challenges, of inconsistency of the case-law, overlapping or conflicting jurisdiction, and the fragmentation of international law.

I begin with the practical problem of how the courts are to handle the increased volume of cases with reasonable expedition.

Cases in the International Court of Justice can take an inordinate time to decide. One case that I was involved in, *Qatar v. Bahrain*, took 10 years; and another *Cameroon v. Nigeria*, eight years from its inception to final judgment, including all sorts of interlocutory proceedings. Admittedly, these are record durations, but it has been normal for a case in the ICJ to take several years from start to finish. This is by no means all the fault of the Court. States like to take a long time to prepare their pleadings: they usually have multinational teams and several ministries to coordinate, the stakes are high, and so on. And lately the Court has been tightening up a bit on time limits and is making greater efforts to clear its backlog. But I have to say, with great respect, that there is still room for improvement.

That is not to say, however, that the ICJ is the only international court to suffer these problems. The European Court of Justice, for instance, tried to deal with its own overload partly by creating a Court of First Instance to deal with certain classes of case, and in 2005 staff litigation was hived off to a special tribunal.[2] (The most litigious creature on the planet is the international civil servant.) The European Court of Human Rights, for its part, despite reforming its procedures, is simply unable to deal with most cases in an acceptably expeditious manner. On 1 November 2008, there were some *95,000* applications pending.[3] This is particularly ironic when it is recalled that it regularly holds national courts in breach of the

[2] The workload of the ECJ has increased from 79 cases in 1970 to 574 in 2005.
[3] Source, European Court of Human Rights, http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresENG10ansNov.pdf

European Convention on Human Rights for taking, say, five or six years to decide a case, when it regularly takes at least as long itself.

What is also striking about these examples is that the problems arise despite the fact that the members of these Courts are full-time. Whilst some commentators have suggested that the problems could be at least ameliorated by increasing the number of judges or the number of simultaneous hearings - perhaps by having separate but equal panels, perhaps by having more tiers - Governments tend to jib at the expense, and also there are fears that this would lend to a dilution in quality. There is a limit to the number of top class international lawyers who would be willing to give up an interesting, varied and lucrative practice in order to do, perhaps repetitive work, possibly in some disagreeable place or, at best, some pleasant, but rather quiet backwater.

When it comes to investment arbitration, the problems are not the same. There is no shortage of people willing and - in most cases - able to sit as arbitrators; and the process is, in general, expeditious. Other problems, real or perceived, do arise, however. One is that many arbitrators are drawn from the ranks of practitioners. Naturally they have to avoid conflicts of interest. These are not just the usual ones that lawyers have to look out for, but rather more recherché ones. Some claim, for instance, that there is a conflict of interest if X is sitting as an arbitrator in a case

where a particular point arises, when he or she is also trying to establish that same point as counsel in a different case.

Another issue concerns the privacy of the proceedings. *Litigation* between *States* is open and public. Even the pleadings are generally published. Inter-State *arbitration* can be different. But what I want to draw your attention to is the recent controversy over the question of openness of proceedings between States on the one hand, and ***private investors*** on the other, and the somewhat related question of intervention in the proceedings by third parties.

Investment arbitration between States and private investors has tended to follow the model of *private* law arbitration, including to a large extent its secrecy. From early on, it is true, ICSID adopted the practice of publishing information about what cases had been brought, between whom, and what stage procedurally they were at. But the rules also provided that the award itself could not be published without the consent of both parties. Usually the parties do consent, but the publicity comes only after the proceedings are completed. Until then, the public at large can be kept in the dark about what are the issues, what is at stake, and what is being argued.

But recently, some have questioned this culture of secrecy. There are, I think, two main reasons.

1. The first is that it is thought beneficial to the development of a consistent body of arbitral case-law if parties and arbitrators have the benefit of previous tribunals' thoughts on the same issue – for quite often the issues *are* the same, or at least similar.

2. The second argument is perhaps more substantial. It is that the issues involved in investment disputes are *not* purely private. For one thing, the State itself is not a private, but a public, entity. Furthermore, matters of great moment might turn on the outcome, possibly for the investor's home State, but certainly for the host State. Take, for example, the arbitrations that have taken place and the others that are continuing in relation to action taken by Argentina against utility companies in the throes of its economic crisis a few years back. The sums involved amount to billions of dollars, and from one perspective what is at stake is a Government's freedom to control important sectors of the economy in a time of crisis. This is clearly a matter of public interest, as are all or most other investment arbitrations.

There are arguments against, however. One, that commercial confidentiality could be jeopardized, does not impress me so much: there are ways of ensuring that it is protected. But what is often forgotten is that secrecy has another advantage. If the quarrel is carried on in the full glare of publicity, or even if the parties know that the award, perhaps even the pleadings, are going to be published, they are less likely to reach a settlement or even to temper their position. Instead, they will want to justify even conduct that they know is not justifiable, and the host State may be afraid of not being thought to have defended the national interest with sufficient vigour.

If it were up to me, I might therefore be a bit hesitant about encouraging greater publicity for investment arbitration. But the pressure is undoubtedly there.

Related to the question of openness is the matter of participation in arbitral proceedings by third parties. I am not talking about intervention by parties with a legal interest, such as co-investors,[4] but rather whether third persons who do not have a legal interest in the investment, but nevertheless have a point of view, should be entitled to express that view to the tribunal. Self-styled *amici curiae.* It might be another company, a

[4] This issue has caused problems, but relatively minor ones, in the ICJ.

local government body, or a non-governmental organization from the host country or from some other country or countries.

Arguments in favour of allowing this type of intervention in international law proceedings are obvious, and at first sight it they may seem incontrovertible: a bit like motherhood and apple pie. But there are in fact some respectable arguments against.

1. For one thing, NGOs are self-elected and self-appointed guardians of the public interest, and in some instances their legitimacy can be questionable. Whom do they represent, and how many members do they have? Do they come from within the host country, or outside? Again, they may be simply front organizations for other undisclosed interests.

2. Furthermore, intervention of this type inevitably complicates and prolongs arbitral proceedings. It also means that, at least to some degree, confidentiality is compromised.

3. Intervention is also likely to increase the contentiousness of the proceedings.

In short, the benefits of third party intervention are not necessarily all one way. Nevertheless, there has been a groundswell in favour of allowing it. It was first felt in the WTO, where the Appellate Body agreed to allow it in certain circumstances. And recently, ICSID has amended its own Arbitration Rules to permit it when, and to the extent, that the tribunal thinks it appropriate.[5] How this will work out remains to be seen.

These, then, are some of the case-management problems for international courts and tribunals. I now want to say something briefly about the practical problems for *parties.*

The large increase in the number of fora and the volume of matters dealt with there has also created a case-management problem for *Governments (*not to mention private parties engaged in these proceedings). Mostly for developing countries – and not only the least developed. But sometimes even for the most highly-developed. Whereas, in the old days, it would be rare for a State to be involved in international proceedings even once in a generation, these days it is far more common, and a State may well find itself engaged in several different fora, whether as claimant or respondent, at the same time. The problem is that most of these countries lack people with sufficient experience in international litigation, still less

[5] Arbitration Rules, Rule 37.

in specialized branches such as boundaries or investment. Or they have them, but not enough of them.

One might think that this problem can be solved by bringing in "hired guns" – private practitioners, whether law firms or individual practitioners such as myself. But it is not so simple. First of all, international litigation and arbitration is an expensive business. In the World Court and some other tribunals, costs run into millions of pounds. And secondly, it is not just a question of finding the money and hiring the lawyers, valuers, geographers, historians and what have you. I have been involved in cases where the governments concerned, for one reason or another, put together a team that was too large and, more importantly, where some of the people were, I am sorry to say, worse than useless. You have to know whom to hire and how to co-ordinate them, and that requires a whole set of skills of its own, which few possess.

So much for the case-management issues.

The final topics I would like to mention are related: they concern inconsistency in international judgments and awards; overlapping or conflicting jurisdiction; and the failure to integrate different branches of international law.

The ICJ, like international tribunals generally, does not have a system of binding precedent such as obtains in common-law countries. Nevertheless, the Court pretty scrupulously follows its previous decisions, and when it was the only international court (or, later, one of only a handful) there was little chance of a decision being rendered that was inconsistent with a previous one. Today, with the increase in international courts and tribunals, many of the latter ad hoc, the risk is considerably greater, and there is also a problem of overlapping or even conflicting jurisdiction or decisions. Let me give a couple of examples, by no means unique.

A Dutch company, CME, controlled by Ronald Lauder, an American billionaire, entered into a joint venture with a well-connected Czech to set up an independent TV company which proved highly successful and lucrative. However, incited by the Czech partner, the authorities of the Czech Republic started to interfere, through a process that ultimately led to the withdrawal of the licence, with huge losses to CME and Mr. Lauder. He instituted arbitration proceedings, as the controlling shareholder, under the Czech-US BIT. However, his Dutch company, CME, also instituted separate arbitration under the Czech-*Netherlands* BIT. Each arbitration had its own panel. They proceeded more or less concurrently, the Lauder panel sitting in London, and the CME panel in Stockholm. On 3 September 2001 the tribunal sitting in London rendered

an award to the effect that the Czech Republic was not guilty of any breach of the BIT (save in one minor respect). But 10 days later the Stockholm-based tribunal, though fully conversant with the other panel's award, nevertheless held that the Czech Republic *was* guilty of several grave breaches of the Netherlands BIT, and in a later award on quantum in 2003, held the Czech Republic to be liable to pay the claimants US$270 million, plus interest.

The facts were exactly the same, and the provisions of the BITs similar; yet the two tribunals came to very different conclusions. This inconsistency was enough to scandalize some in the international arbitration community. What made it all the more shocking for them, however, was the fact that Mr. Lauder got two bites of the cherry: having lost one case, he could sue and win on the same facts before a different tribunal.[6] Indeed, because of the way that businesses use pyramids of companies, often of differing nationality, it is quite possible for the investor to have *several* bites of the cherry under different BITs. The respondent State, however, has to lose only once for it to have lost definitively.

[6] On the other hand, many think that the London-based tribunal got things badly wrong, so it was only fair that Mr. Lauder got a second chance for redress.

Overlapping, or even conflicting, jurisdiction can also give rise to its own problems. Thus, in the *MOX case*, where the Republic of Ireland sued the UK in relation to a nuclear fuel reprocessing plant, the case went before an arbitral tribunal established under the Law of the Sea Convention; but the European Court of Justice held that the matter had to be dealt with in accordance with the procedures established by EU law.

These problems of overlapping or conflicting jurisdiction, or of inconsistent decisions, are not confined to the plethora of international tribunals: there can also be overlaps of jurisdiction or inconsistent decisions between municipal courts on the one hand, and international tribunals on the other. Is this state of affairs satisfactory; and, if not, can anything be done to remedy it?

Some would say that there is nothing to worry about. To quote Mao Tse-Tung, "Let a thousand flowers bloom, a hundred schools of thought contend": in a Darwinian competition, the best reasoning and the best dispute-settlement mechanisms will prevail. I do not myself feel quite so sanguine. In nature, evolutionary change takes a very long time and often leads to a dead-end. In our context, if Governments are exposed to double or multiple jeopardy, or inconsistent decisions, whilst awaiting evolutionary change, they will feel understandably aggrieved. And the predictability of the law, which is one of its chief virtues, is threatened.

But even if we were to agree that the present state of affairs is unsatisfactory, can anything be done? I am rather doubtful. Some have suggested that the solution is a system of appeals, or at any rate references *à la* European Court of Justice, to the International Court of Justice. Not surprisingly, some members of that august tribunal feel quite warmly disposed to the suggestion. But others are less enthusiastic, and personally I very much doubt that it will fly.

In the first place, I cannot see States agreeing to allow their *domestic* courts to refer questions of international law to the ICJ. And I am not much more optimistic about the possibility of appeals or references to the ICJ from *international* tribunals, not least because the Hague Court would be unable to cope with the workload without significant changes in the way it operates. Furthermore, it is States' perception that specialized bodies are needed to solve specialized problems, not to mention regional courts for regional arrangements.

The fact is that international law is a *fragmented* system, far more than we are used to in municipal law. *Treaty* law, which now governs most areas of international law and is the type of law that international tribunals usually find themselves called on to apply, can and does vary considerably as to whom it covers and what it provides. Sometimes the

parties to treaties are numerically limited – e.g. regional economic agreements; but even if they have a universal vocation it is very rare for all States to become parties. Consequently, there can be layers of treaty obligation, and it is quite possible for different bodies to have jurisdiction over the same or similar cases, with the risk of overlap or even conflict, and with the likelihood of occasional conflicting decisions.

The existence of specialized bodies of law with specialized tribunals has also given rise to another, somewhat unsatisfactory phenomenon, which is the difficulty that has been experienced in integrating different branches of the law. The dispute settlement mechanism of the World Trade Organization, for instance, has been wrestling with the problem of how far it is appropriate to take into consideration environmental or human rights considerations in the context of trade law adjudication.

The UN International Law Commission has recently studied the subject of the fragmentation of international law, but predictably came up with no real solutions. Furthermore, perhaps prudently it deliberately avoided the *institutional* aspects of the subject, which is what I have been talking about here. Fragmentation is an inevitable concomitant of the international system as we know it; so for my own part I cannot see any overall or speedy solution to these further, at least mildly worrying, by-products of the proliferation of international courts and tribunals.

I am very conscious of that I have given a rather simplified account of the developments in international dispute settlement and some of the challenges to which they given rise. But I hope that I have given you at least a flavour, and I thank you for your attention.