

MIAC 2012

The Mauritius International Arbitration Conference 2012

An African Seat for the 21st Century

Papers from the joint conference of the Government of Mauritius,
LCIA-MIAC Arbitration Centre,
ICC, ICCA, ICSID, LCIA, PCA and UNCITRAL
held in Mauritius on 10 and 11 December 2012

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Foreword

*Hugo H. Siblesz**

It is with sincere pleasure that I present this volume of the proceedings of the Mauritius International Arbitration Conference held in December 2012. Like the inaugural event of the same name held two years previously, this conference brought to the region a very eminent gathering of leading practitioners specializing in international arbitration and related disciplines, senior public officials, and heads of major international arbitration institutions. The theme of the conference, “An African Seat for the 21st Century,” reflects the prospects and challenges that Mauritius has embraced in positioning itself as a modern jurisdiction of choice for the African continent and beyond.

Mauritius launched itself as a new platform for international arbitration in Africa with the passing of the Mauritius International Arbitration Act 2008 (the “IAA”). The IAA designates the Secretary-General of the Permanent Court of Arbitration (“PCA”) as the appointing authority for arbitrations seated in Mauritius and empowers this office with important statutory functions of procedural oversight. Pursuant to the 2009 Host Country Agreement between Mauritius and the PCA, the PCA opened its first office outside of The Hague in Mauritius in 2010. From its Mauritius office, the PCA carries out case management, promotes PCA dispute resolution services in the African region, and through education and outreach builds the capacity of Mauritius as an arbitral centre.

Since 2010, the project to develop Mauritius as an international arbitration centre has continued apace. As recalled by Dr. The Hon. Prime Minister Navinchandra Ramgoolam in his Opening Address, Mauritius in July 2011 signed a joint venture agreement with the London Court of International Arbitration (“LCIA”) for the creation of a state-of-the-art arbitration centre, the LCIA-MIAC, which since July 2012 has been fully operational. In June 2012, Mauritius made a successful bid to host the 2016 Congress of the International Council for Commercial Arbitration, which will see that Congress taking place in Africa for the first time in its sixty-year history. This conference itself demonstrates the ongoing commitment of Mauritius, as expounded by the Hon. Prime Minister in his Opening Address, continuously to review and improve its legislation, as and when necessary. Indeed, as anticipated, Mauritius has further improved the

* Secretary-General, Permanent Court of Arbitration, The Hague.

attractiveness of its arbitration legislation with amendments designed to clarify and streamline the IAA and introduce new rules of court, adopted under the International Arbitration (Miscellaneous Provisions) Act 2013.

Reflecting upon this commitment by Mauritius in a global context, I cannot but share the view expressed by Ms. Patricia O'Brien, the then Legal Counsel of the United Nations and Under-Secretary General for Legal Affairs in her Keynote Address to the Conference, that the conference theme, "An African Seat for the 21st Century" is significant not only for the African continent but also for the promotion of international arbitration more broadly, as a conduit for the strengthening of the rule of law in the region and beyond.

Like the inaugural conference, the December 2012 conference was co-sponsored by six international organisations, namely the PCA, the LCIA, the United Nations Commission on International Trade Law, the International Centre for Settlement of Investment Disputes, the International Council for Commercial Arbitration, and the International Chamber of Commerce International Court of Arbitration.

As remarked by Mr. Salim Moollan, the then Chairman of UNCITRAL and the present Chairman of the UNCITRAL Arbitration Working Group, in his Welcoming Address to the December 2012 conference, the debates at the preceding conference were, necessarily, somewhat theoretical, and concentrated on the innovative features introduced by the IAA. The present conference took the opportunity, two years on, to examine how that theory is taking effect in practice to shape an African seat for the 21st century.

Amongst the distinguished speakers at the conference were the Prime Minister, Chief Justice, Solicitor-General, and President of the Bar Association of Mauritius; the Legal Counsel of the United Nations; a former Attorney-General of Nigeria; serving and former judges from the French *Cour de cassation*, the Supreme Court of India, the Supreme Court of Singapore, the Supreme Court of the United Kingdom, the Court of Appeal of England and Wales, and the Court of Appeals of New York State; Secretaries-General, and senior representatives of the sponsoring arbitral institutions; and leading academics, arbitrators and practitioners from across the globe. The present volume follows the structure of the conference, in which the contributions of the speakers were presented in six panels.

The first section is on a practical application of the **court's duty to stay court proceedings in favour of arbitration**, beginning with a report by Maître Patrick Matet on the negative effect of *compétence-compétence* and a report by Mr. Christopher Adebayo Ojo giving an African perspective on the role of national courts in arbitration. There follows a presentation of

the practical problem in the form of pleadings on the moot case study of *Development Fund of Militantis v. Bensalem Bank* by Mr. Matthew Gearing *Q.C.* and Ms. Angeline Welsh. Responding to the practical problem with perspectives from their home jurisdictions are Maître Matet (France), Mr. Ojo (Nigeria), Mr. Justice Bellur Narayanaswamy Srikrishna (India), and Mr. Jamsheed Peeroo (Mauritius).

The second section is concerned with a practical application of the **court's role in supporting arbitration during the course of the arbitral proceedings (the *juge d'appui*)**. It begins with a presentation of the practical problem by Mr. Reza Mohtashami in the form of a moot case study where the facts relate to the sale of a piece of Mauritian artwork. Responses to the practical problem from the perspectives of their respective jurisdictions are presented by the Rt. Hon. Lord Justice Richard Aikens (England and Wales), Mr. Justice Quentin Loh (Singapore), Ms. Fatma Karume (Tanzania) and Mrs. Urmila Boolell (Mauritius).

The third section concerns a practical application of the **court's role in the recognition and enforcement of awards**. The practical problem is presented by Mr. Charles Nairac in the form of a moot case study in the matter of *Flying Dodo Ltd. v. Republic of Xanadu*. Responses to the practical problem from their jurisdictional and institutional perspectives are presented by Judge Judith Kaye (U.S.A.), the Rt. Hon. Lord Hoffmann (U.K.), Ms. Lise Bosman (South Africa and the PCA), and Ms. Anne-Sophie Jullienne (Mauritius).

The second part of this volume is devoted to **investor-State arbitration**, beginning with the fourth section, in which Dr. Michael Waibel presents a report on the lessons to be drawn from **empirical research into arbitrator background, appointments, and outcomes**. Responses to the report are presented by Mrs. Lucy Reed, who considers whether empirical research can help in appointing arbitrators, and Professor Albert Jan van den Berg, who examines the methodological and systematic limitations on conducting empirical research in this field.

The fifth section concerns the highly topical subject of **investor-State arbitration and the restructuring of sovereign debts**, with a report to the conference presented in French by Professor Sophie Lemaire. Responses to the report are presented by V.V. Veeder *Q.C.*, who looks at the issue in the context of recent developments in jurisprudence in the United States of America and the provisions of the United Kingdom Debt Relief (Developing Countries) Act 2010, and Mr. Devashish Krishan, who assesses the adequacy of the system of investment arbitration for disputes of this nature in the context of its core legal principles.

The final section concerns the question of **managing uncertainty risks in international investment agreements**, with Dr. Diane Desierto's detailed report on the use of the International Covenant on Economic, Social and Cultural Rights to adapt our understanding of the notion of regulatory risk in order to accommodate the evolving obligations of States. In response to the report, Mr. Krishan and Dr. Yas Banifatemi give diverse perspectives on the question whether the system of investment arbitration is adequately equipped to allow for the dynamic evolution of States' economic, cultural and social obligations.

Thanks are due to all those involved in planning the conference, particularly Mr. Salim Moollan, at whose initiative this conference series has been convened. The Government of Mauritius supported the conference through the work of the Board of Investment in organizing the event, and through the publication of the present volume. I would like to thank the International Bureau of the PCA for compiling the presenters' contributions and preparing them for publication, in particular the PCA Legal Counsel and Representative in Mauritius, Ms. Fedelma C. Smith; Senior Legal Counsel Ms. Lise Bosman; Legal Counsel Ms. Hyun Jung Lee and Ms. Fiona Poon; Assistant Legal Counsel Mr. Kevin Lee, Ms. Yanying Li, Mr. Brian McGarry, Ms. Jennifer Nettleton, and Mr. Romain Zamour; Case Managers Ms. Willemijn van Banning and Ms. Helen Pin; and the PCA's Mauritius Office Legal Intern, Ms. Nismah Adamjee.

At the time of writing, the PCA is witnessing unprecedented levels of activity in its case docket. Of the arbitrations presently being administered by the PCA, over half involve parties from Africa, Asia, or the Indian Ocean. It is encouraging that Mauritius, given its unique geographical, cultural, and legal setting, is not only well-placed to cater for the arbitration of international disputes in the region, but is so actively committed to developing its capacity in this role. It is my hope that the material presented in this book will serve not only to support the project to build "An African Seat for the 21st Century" but also to promote the development of the field of international arbitration in all parts of the world, thereby strengthening the international rule of law.

Hugo H. Siblesz
Secretary-General
Permanent Court of Arbitration
The Hague, March 2014

Welcoming Address

*Salim Moollan**

Hon. Prime Minister,
Hon. Chief Justice,
Mr. Speaker,
Honourable Ministers,
Mrs. Patricia O'Brien, The Legal Counsel of the United Nations,
Honourable Chief Justices and Justices,
Distinguished Delegates,
Ladies and Gentlemen,

To those of you who have travelled from abroad, welcome to Mauritius. To all of you, welcome to the Mauritius International Arbitration Conference 2012.

It is almost two years to the day since the launch conference of our international arbitration platform. On that occasion, six panels of internationally recognised experts helped us to “rethink” key areas of international arbitration law and practice, as we aimed to cast away preconceptions and to identify how users of dispute resolution services can best be served today.

Our debates were, of necessity, somewhat theoretical, focusing on the innovative features of our international arbitration regime, on *negative compétence-compétence and separability*, on *arbitrability of internal company disputes*, on *our decision to remit most of the functions of the juge d'appui to the Secretary-General of the PCA*.

Two years on, we will look at how that theory is taking effect in practice to shape an African Seat for the 21st Century. Our three panels on commercial arbitration have worked hard to prepare practical problems, which eminent judges and practitioners from *Dubai, France, Hong Kong, Mauritius, Nigeria, New Zealand, Singapore, South Africa, Tanzania, the United Kingdom and the United States* will debate before us, in what we hope will be lively and interactive sessions.

* Barrister-at-Law, Essex Court Chambers (London) and Chambers of Sir Hamid Moollan Q.C. (Mauritius); then Chairman of UNCITRAL; Chairman of the UNCITRAL Arbitration Working Group; Vice-President of the ICC International Court of Arbitration (Paris); Senior Visiting Lecturer in International Arbitration Law, King's College London.

Our three panels on investment arbitration will for their part focus on cutting-edge problems in an area which is of critical importance to the development of our continent, at a time when investment into Africa is growing at a record pace. Much of that investment will attract the protection of investment treaties, which will themselves provide for the resolution of disputes between investors and host States through international arbitration. Can the panels which hear these disputes be trusted? Are countries at risk with respect to their sovereign debt obligations? Do these treaties unduly restrict the freedom to regulate of host countries? These are some of the issues we will be debating.

When we met two years ago, Prof. Paulsson remarked that “*the world of international arbitration would come to a shuddering stop if the leaders of our six co-hosting institutions were so beguiled by the raptures of this enchanting island that they simply refused to depart*”. It would appear that this warning has either not been passed by the UNCITRAL Secretariat to the Office of Legal Affairs in New York, or that the Head of the OLA simply chose to ignore it at her peril.

Whichever it is, we are delighted and honoured that The Legal Counsel of the United Nations is with us today, and has agreed to be the keynote speaker for our conference. Her presence here emphasises the crucial role of effective and legitimate dispute resolution within the United Nations’ wider mandate of upholding the rule of law.

And we are deeply grateful that our Prime Minister has made the time to be with us again, following his keynote speech at our launch conference. His presence here today despite the pressing demands on his time is a further indication of the continued level of commitment behind international arbitration in Mauritius.

I now give the floor to our keynote speaker. I wish you all a good and thought-provoking conference.

Keynote Speech

*Patricia O'Brien**

It is a pleasure to be here today in this beautiful country. I would first like to thank the Prime Minister and the Government of Mauritius for the invitation to this conference and for the privilege of introducing it with this keynote speech. I would also like to thank Mr. Salim Moollan for his work with the United Nations Commission on International Trade Law – UNCITRAL – and also commend his efforts in assisting Mauritius to establish itself as a centre of reference in the field of international arbitration.

The topic of today: “An African Seat for the 21st Century” is important and relevant, in particular for the African continent. It is also significant for the promotion of international arbitration more broadly, as a conduit for the strengthening of the rule of law in the region and beyond.

Mauritius has taken a huge leap towards becoming a centre of excellence not only in the realm of arbitration, but also in the realm of commerce and investment, and in strengthening the rule of law in the region.

The drive of Mauritius to create an arbitration centre of excellence is remarkable. In so doing, Mauritius has taken significant steps towards the promotion of the rule of law in Mauritius and towards enhancing its attractiveness and that of the region, for the effective and peaceful resolution of international disputes. This conference is a testament to the commitment of Mauritius to position itself as a credible and enduring platform in the domain of international arbitration.

THE WORK OF THE UN IN RELATION TO INTERNATIONAL ARBITRATION

Let me say a few words about the UN’s direct contribution to international arbitration; both commercial and investment arbitration.

You are all familiar with UNCITRAL, the UN’s core legal body in the United Nations system in the field of international trade law. It is serviced by the Division of International Trade Law, which is one of the

*

Then The Legal Counsel of the United Nations, Under-Secretary-General for Legal Affairs.

units of my Office, the Office of Legal Affairs.

UNCITRAL plays a key role in the field of international arbitration specifically and in the promotion of the rule of law, more generally, at an international level. UNCITRAL's work in the harmonization and modernization of commercial law has proved to benefit both capital exporting and receiving States alike. It has promoted the flow of so much needed investment from certain parts of the world to others. It has helped in strengthening the legal guarantees available (the rule of law one should say) both for investors and for States, thereby creating a climate of confidence and trust; an indispensable condition for the promotion of sustainable development and growth.

Let me highlight in this connection also the work of UNCTAD, with which some of you may be less familiar.

UNCTAD, or the United Nations Conference on Trade and Development, was established in the 1960s over growing concerns about the place of developing countries in international trade. At that time, UNCTAD was institutionalized with a series of bodies and a permanent secretariat, which is part of the UN Secretariat. The work of UNCTAD has been particularly felt in recent years in the area of investment and investment arbitration more specifically. UNCTAD has played an important role in terms of technical assistance and capacity building of trade negotiators and government officials involved in trade-related issues, of which international arbitration is just one part. Particularly relevant has been the role of UNCTAD in helping developing countries to participate as effectively as possible in international rule-setting for investment, including investment arbitration.

THE WORK OF THE UN IN RELATION TO THE RULE OF LAW

The rule of law, in all its possible iterations, plays a central role in the UN's agenda.

In the Preamble of the Charter of the United Nations, the signatories of the Charter, the peoples of the United Nations, affirmed their determination "*to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained*".

The rule of law is at the heart of the mission of the United Nations and is a concept that my Office works hard to promote and achieve, as a principle embedded in the UN Charter, and as a key to avoiding conflict and achieving long-lasting peace.

As the Legal Counsel of the United Nations, I am charged with the

task of promoting and strengthening the rule of law, at the national and international levels, and to support the Secretary-General's efforts in the pursuit of justice and the end of impunity for war crimes, crimes against humanity, genocide and other serious violations of international law. It is my mission to help the UN to act in accordance with the rule of law. My Office plays an instrumental role within the UN in helping with the concrete and practical application of the rule of law.

Within the UN, the rule of law has been described as: *“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”*.

At its core, the concept embodies principles of fairness, accountability and transparency; the fundamental principles of the international legal order.

In this context, private international law has a critical role to play in establishing and reinforcing such legal order. Indeed, the legal certainty required for promoting entrepreneurship, investment and job creation is fundamental to the rule of law. Therefore, efforts towards the recognition and enforcement of property rights and contracts internationally through reliable mechanisms of dispute resolution, such as arbitration, are steps in the right direction.

Similarly, we should not forget the relevance of national laws. Whilst the resolution of international disputes provides a framework for the development of international best practice that may be incorporated domestically, a sound basis in national law and practice for the resolution of disputes equally promotes a strong and durable judicial infrastructure. A solid judiciary is actually indispensable for the good functioning of arbitration and of the rule of law in general.

As was put by former Secretary-General, Kofi Annan, in his report of 2005 entitled “In Larger Freedom”:

“Every nation that proclaims the rule of law at home must respect it abroad and every nation that insists on it abroad must enforce it at home.”

Let me now move on to the role – I think – international arbitration plays in facilitating and strengthening the rule of law, and the work of the UN in supporting that aim.

INTERNATIONAL ARBITRATION AND THE RULE OF LAW

International arbitration has long been seen as the optimal way to address and resolve disputes between business parties. In the investment context and often in the purely commercial context, it depoliticizes the dispute, assures neutrality in adjudicating the dispute, and is perceived as an economical, speedy, and flexible procedure.

Moreover, it is seen to be offering a fair amount of control over the procedure and assures that awards are easily enforceable abroad, thereby creating a sense of legitimacy.

International arbitration, therefore, enables parties in dispute to achieve recognition and enforcement of their property rights and binding commitments, which form the basis for any commercial activity.

The UN, through the work of UNCITRAL, has played an instrumental role in making this possible; in promoting better legal standards with a view to achieving legal certainty in order to build confidence between business parties, be it States or private entities. This has undoubtedly had an effect in encouraging the flow of investment North-South and South-South alike and in the promotion of development.

No doubt, better legal standards and fair, stable, predictable legal frameworks generate inclusive, sustainable and equitable development. They foster economic growth and employment and facilitate entrepreneurship and investment.

But international arbitration, as a peaceful and reliable mechanism of resolving disputes, has proved to also assist positively in the consolidation of the larger structure of the international rule of law.

Instruments such as the 1958 New York Convention, the 1985 Model Law on International Commercial Arbitration, amended and updated in 2006, and the 1976 UNCITRAL Arbitration Rules, recently amended and updated in 2010 have contributed decisively to the development and promotion of international standards in the field of international arbitration. These are standards that are a mere reflection of the basic principles of fairness, accountability and transparency, of the rule of law that I was referring to earlier. Let this be a tribute to the work of UNCITRAL as a forum for the discussion between Member States in this domain.

But let me talk briefly about what I referred to earlier as the larger structure of the international rule of law.

In September this year, the first meeting of Heads of State and Government on the rule of law at the national and international levels was held in New York on the sidelines of the 67th session of the General Assembly.

I had the privilege of participating in such a historic meeting where the Heads of States and Government of the 193 Member States, including Mauritius, reaffirmed their commitment to international law and justice, to an international order based on the rule of law, which are indispensable foundations to a more peaceful, prosperous and just world.

The draft declaration adopted at that meeting not only reaffirmed the Member States' commitment to the rule of law but recognized that the respect for and promotion of the rule of law should guide all of their activities and accord predictability and legitimacy to their actions. The draft declaration also recognized that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws, and are entitled without any discrimination to equal protection of the law.

Most importantly, in the context of this conference, the draft declaration recognized as well the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship. In this regard, Member States commended, as we do today, the work of UNCITRAL in modernizing and harmonizing international trade law.

To take just one example, the 1958 New York Convention is a most extraordinary acknowledgment by an overwhelming majority of States in the world of the importance of arbitration, and of the need for arbitral awards, no matter where they were issued and no matter who the parties involved, to be effective and enforceable anywhere.

The success of this text is a tribute to the role of arbitration as a means of settling international disputes, and indeed to the perception of States that common legislative standards should exist with a view to fostering development, economic growth and employment.

But the development of the New York Convention and the continuous work undertaken by UNCITRAL in harmonizing its application are not the only examples of the Commission's achievements.

Already in 1979, UNCITRAL recognized that domestic courts' ability to impose restrictions on the enforcement of awards might result in domestic courts in different countries interpreting such restrictions in different ways. Hence, the need for renewed efforts to harmonize domestic laws relating to international arbitration.

These efforts culminated in the 1985 Model Law on International Commercial Arbitration; a model intended to encourage a more uniform approach to arbitration worldwide. As you all know, it was revised in 2006.

By adopting the Model Law, States have expressed, as Mauritius

did in 2008, a commitment to using internationally agreed legal standards, thereby reinforcing their commitment to the rule of law internationally and their credibility as reliable business partners.

In this regard, the work of UNCITRAL in developing a standard on transparency in the settlement of investment disputes is of high importance. Transparency, as part of the broader principle of good governance, is an indispensable element when matters of public interest are at stake. Whilst I am sensitive to the need for confidentiality in disputes, at certain stages and for the achievement of certain goals, accountability and transparency need to be taken seriously as part of any future system of international rule of law. This will bring greater legitimacy and will certainly strengthen international arbitration as a reliable dispute resolution mechanism.

Let me just say that under the leadership of the Secretary-General, Ban Ki-moon, the United Nations has achieved significant progress in making accountability, at all levels, the cornerstone of the architecture of the international legal order and a centrepiece of his agenda. As the Legal Counsel, I can only support the work of the Secretary-General in this regard. Slowly but surely we are witnessing the birth of a new age of accountability.

In this new era, and also in the context of this conference's theme, nobody is above the law, including Heads of State. Leaders will be held accountable for their actions in all aspects of their functions, as part of a higher principle of good governance and respect for the rule of law.

In fact, in the same draft declaration that I referred to earlier, the Heads of State and Government stressed the importance of the rule of law as an essential element in addressing and preventing corruption.

As stated in the draft declaration, they are convinced of the negative impact of corruption in obstructing economic growth and development, and eroding public confidence, legitimacy and transparency.

Indeed, transparency is an important means to achieve accountability; to eradicate corruption. I wish UNCITRAL, and its Secretariat, the best of luck in the effort to achieve the right balance. It is not an easy task but it is one worth striving for.

Now, let me turn to Mauritius' achievements, which in my view deserve our greatest recognition and admiration.

THE ACHIEVEMENTS OF MAURITIUS

It is with great pleasure that I stand here today to commend the Government of Mauritius for its efforts in creating a new platform in the region for

international commercial and investment arbitration, and for its efforts more broadly to position itself as a champion of the rule of law in the region and beyond.

Let me mention some of those achievements.

Mauritius is a party to the major UN human rights instruments, such as the two International Covenants on Civil and Political Rights and Economic and Social Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Mauritius has also developed domestic legislation consistent with those instruments. In 2002, Mauritius ratified the Rome Statute of the International Criminal Court and, as far as I understand, has developed national legislation, with the assistance of the ICRC, to ensure its implementation.

Insofar as arbitration is concerned, Mauritius acceded to the New York Convention and ratified it in 2004. In 2008, it adopted an arbitration law based on the UNCITRAL Model Law. In 2009, it concluded a host country agreement with the Permanent Court of Arbitration. And in 2011, it entered into an agreement with the LCIA for the establishment and operation of a new arbitration centre in Mauritius, to be known as LCIA-MIAC Arbitration Centre. Mauritius is in this way sending clear signals of its commitment to support a progressive and modern rule of law in the field of international business transactions and beyond.

These efforts have the added value of being a home-grown initiative that reflects the changes in the balance of powers worldwide; in the flows of capital and economic cooperation nowadays. Indeed, North-South cooperation is slowly being replaced by a South-South cooperation and even a triangular cooperation, including in the field of rule of law. It is a healthy change of dynamics, one that is reflective of a slow but thorough process of democratization worldwide.

At the end of the Second World War, nearly every country in Africa was subject to colonial rule or administration. Mauritius did not gain independence until 1968. With the UN's founding and the massive decolonization effort undertaken thereafter, Africa is now independent and the African Union boasts over 50 member States, including Mauritius.

It is surely a well-received honor for Mauritius to have bid successfully to host the Congress for International Council for Commercial Arbitration in 2016. From what I understand, this is the first time that the biennial ICCA event will be held in Africa in its fifty-year history.

Mauritius is also strategically located between Asia and Africa. I

am certain that the talented pool of lawyers and judges present here today will surely know how to continue developing and modernizing Mauritius' legal infrastructure to consolidate what has already been achieved to date.

Quite apart from the beautiful surroundings in which we find ourselves, as the Legal Counsel of the United Nations, I celebrate the progressive, ambitious and forward-looking drive of Mauritius to modernize its legal regime and to take advantage of its strategic location. It is indeed an honor for me to be able to witness such developments today.

What Mauritius is in the process of achieving in the region is no doubt a remarkable step forward which may have extraordinary positive consequences for the sustainable development of a continent that has such enormous potential.

Mauritius has taken the tools that the United Nations has developed in a multilateral context, and run with these, creating a solid foundation for a true African seat of arbitration for the 21st century, and beyond.

It is my hope, certainly, that Mauritius' star, the Star and Key of the Indian Ocean, continues to shine for international arbitration, for the rule of law, and for the region.

Thank you very much.

Opening Address

*Dr. The Hon. Navinchandra Ramgoolam, G.C.S.K., F.R.C.P.**

I am delighted to be opening this second Mauritius International Arbitration Conference.

Let me extend a very warm welcome to the representatives of the six institutions co-hosting this conference, namely the United Nations Commission on International Trade Law (“UNCITRAL”); the Permanent Court of Arbitration (“PCA”); the International Centre for Settlement of Investment Disputes (“ICSID”); the International Chamber of Commerce; the London Court of International Arbitration (“LCIA”); and the International Council for Commercial Arbitration (“ICCA”).

I also welcome all the eminent speakers and delegates who have travelled from many parts of the globe to participate in this conference in spite of their busy schedule.

I am also glad to note that a number of barristers from my own chambers in London, Thomas Moore Chambers, are here.

And we are privileged to have among our speakers some very distinguished Judges and Jurists: these include the Rt. Hon. Lord Hoffman, former member of the Judicial Committee of the House of Lords and a former President of the Anglo-German Legal Association; Judge Patrick Matet, *Premier Conseiller de la Cour de cassation*; Mr. Justice Quentin Loh of the Supreme Court of Singapore; the Rt. Hon. Lord Justice Aikens of the English Court of Appeal; and Mr. Justice Srikrishna, former Judge of the Supreme Court of India.

A very warm welcome to you all. And I would like to extend a particularly warm welcome to our keynote speaker; Under-Secretary-General, Mrs. Patricia O’Brien, the Legal Counsel and the Head of the Office of Legal Affairs of the United Nations.

Mrs. O’Brien’s presence here today is a reminder that the Mauritian International Arbitration project is, at its core not a commercial venture.

It is about the legitimacy of international arbitration in Africa and in the developing world, and it is about the rule of law – as Mrs. O’Brien has said – in a different way, as long as there will be humans, there will be disputes.

* Prime Minister of the Republic of Mauritius.

I wish here to thank in particular, Mr. Salim Moollan, who has really been the driving force behind the whole project.

Some six years ago, we started this project with a view to developing Mauritius as a state-of-the-art and a safe place for the resolution of business and investment disputes.

This also happens to be commercially sound, for a number of reasons:

- (1) Like Singapore in South East Asia, and like Switzerland in Europe, Mauritius is very much part of its region – Africa – but it is also uniquely open to the rest of the world; and
- (2) Mauritius has the necessary infrastructure to become a centre for the resolution of international disputes. In that respect, we have made sustained efforts to make our business environment more attractive. And these efforts have been internationally acknowledged:
 - The Doing Business 2013 Report of the World Bank ranks Mauritius 1st in Africa and 19th worldwide;
 - The Economic Freedom Index of the Wall Street Journal ranks Mauritius 1st in Africa and 8th worldwide; and
 - In terms of governance, the Mo Ibrahim Index of African Governance has ranked Mauritius first out of the 53 African countries for the fourth year in a row.

Our experience in the financial services industry demonstrates the confidence which foreign investors have in our jurisdiction, and the ease of doing business in our country. Mauritius has about 24,000 Global Business Licence companies, and a thriving global business sector channelling and servicing investments to Africa, India and China.

We are the largest foreign direct investor into India, and are fast becoming the hub for all transactions involving Africa, both for the traditional users of our financial services industry – large and medium-sized

U.S. and European corporations – and for a new wave of investors coming in particular from China and India.

Foreign law firms are fast establishing a presence here following the reform of our Law Practitioners' Act five years ago.

Mauritius has an established and stable democratic system of Government, based on the Westminster model.

I always delight in pointing out that since Independence in 1968, we have had four Prime Ministers and all four have suffered defeats at the polls. That includes me. It is an occupational hazard in a real democracy!

I am glad to tell you that I became Prime Minister again in 2005. And as you have all witnessed, while you have been here, we have been campaigning for the local elections, in a peaceful and democratic manner as it is traditionally done in Mauritius.

I am hoping to have some cause for celebrations this afternoon even though we are at midterm and the world economy is still in recession. I better not digress further, and come back to the main theme.

Mauritius is a democracy with a deeply rooted respect for the rule of law, which is a unique blend of civil and common law:

- Our civil law is based on the *Code Napoléon* while our criminal law is based on the common law;
- While Mauritius belongs to both the Commonwealth and the *Francophonie*, our ultimate Court of Appeal remains the Judicial Committee of the Privy Council - which has traditionally sat only in London, but now also sits in Mauritius; and
- Judges of our Supreme Court are strongly supportive of arbitration and of the country's efforts to establish itself as a centre for international arbitration, as their presence here today further reaffirms.

Finally, and crucially, Mauritius has the great advantage of being, and also of being perceived as, a neutral country from both a developed world and a developing world perspective.

We have therefore every confidence that the Mauritian International Arbitration Project will be successful. But it is not primarily about commercial gains. It is, as I noted a moment ago, about legitimacy and about the rule of law.

It is palpably obvious that there exists a gap today between a formal discourse which emphasises the “inclusiveness” of international arbitration; and a perception, in the developing world, that international arbitration is heavily weighted towards the developed world. Most of the leading arbitration law firms and nearly all of the leading arbitrators are at present in the developed world.

While developing countries are consistently – and rightly – encouraged to accept the process of international arbitration as an effective means of dispute resolution, be it as part of their commercial deals or as a necessary corollary of investment flowing into their countries from developed countries, there is a risk of arbitration being perceived as a ‘foreign’ process imposed from abroad.

The Mauritian International Arbitration Project aims to ensure that the developing world has its say in the process and in its development, and for international arbitration progressively to become part of the legal culture of our region.

The aim is accordingly to create a platform run for the benefit of the region as a whole, to build capacity in the field of international dispute resolution, so that – within a generation – Africa can draw on the expertise of specialist African arbitrators and lawyers.

Most of you will be well aware of the steps which we have taken since 2006 to move towards this aim:

- We enacted an International Arbitration Act in November 2008, based on the UNCITRAL Model Law but with significant improvements aimed at making the jurisdiction as attractive as possible for international users in search of an efficient, neutral and safe seat;
- We then signed a Host Country Agreement with the Permanent Court of Arbitration (PCA) in 2009, and the PCA has, for the first time in its history, appointed a Permanent Representative outside The Hague. I am delighted that the new Secretary-General of the PCA, His Excellency Mr. Hugo Siblesz, is with us today and will be chairing one of the panels on investment arbitration tomorrow;
- We held a launch conference for the new platform in December 2010, which attracted a large number of delegates from all over the world, as well as our leading practitioners. Following the success

of that launch conference, it was decided to make the event a biennial one, hence this gathering here today; and

- We went on to sign a joint venture agreement with the London Court of International Arbitration in July 2011 at the Commonwealth House in London, for the creation of a state-of-the-art international arbitration centre. The Mauritius International Arbitration Centre (MIAC), is now fully operational, having published its rules of arbitration and conciliation. In addition to administering arbitral cases for those who opt into its rules, MIAC will help in generating interest in the field, through a pro-active Users' Council, and will also channel the training assistance offered to us by institutions, such as the UNCITRAL, the *Comité Français de l'Arbitrage* and the English Bar Council.

And I am glad to say, our efforts are already being internationally recognised. For instance:

- Mauritius currently chairs the UNCITRAL Working Group, having cumulated the Chairmanship of both the Commission and the Working Group last year; and
- In June this year, the International Council for Commercial Arbitration (ICCA) awarded the right to host the 2016 ICCA Congress to Mauritius. This is the first time the ICCA Congress will be held in Sub-Saharan Africa.

These steps are starting to translate into practice, with an increasing number of parties adopting Mauritian arbitration clauses in their contracts, and with the Permanent Court of Arbitration having received its first enquiries under the International Arbitration Act, and with the first cases coming to our Court under the Act.

In the meantime, work is on-going to improve the attractiveness of our arbitration platform:

- Specific rules of court for international arbitration are being finalised to meet the needs of international users and of our Mauritian practitioners, and to ensure that users receive prompt and expert assistance from our courts;

- We are also in the process of removing the reservation of reciprocity which we made when acceding to the New York Convention in 1996. That removal, together with a repeal of the Section of the *Code de procédure civile* which deals with the recognition of foreign awards, will ensure that all foreign arbitral awards will benefit from the recognition and enforcement regime of the Convention in Mauritius;
- A specific amendment is being considered to Section 23 of the International Arbitration Act to streamline the procedure for application for interim measures in international arbitration cases, as the procedure provided for in the Act is proving somewhat cumbersome in practice;
- The legislative and regulatory framework will continue to be kept under review and improved, as and when necessary; and
- With respect to logistics, Mauritius is already well equipped to host arbitral hearings of every type. Government is nonetheless dedicated to supporting the opening of modern hearing facilities. This hearing centre will also be a convenient location for the Mauritius offices of the PCA and of MIAC.

It is therefore clear that Government is fully committed to creating the right conditions to prompt international users to choose Mauritius as the place for the resolution of their business and investment disputes.

But let me make it crystal clear, as I have consistently said – since the inception on this project, that Government is acutely aware that its role is, and will only ever be, to ensure the existence of the most favourable conditions for international arbitration in Mauritius with absolutely no interference in this field beyond that assistance.

By way of example, the joint venture agreement between Government and the London Court of International Arbitration (LCIA) creates the material and financial conditions for the Centre to exist, but leaves it to the LCIA to run and administer the Centre with absolutely no interference from Government.

Similarly, our Host Country Agreement provides the PCA with the necessary funding to maintain its presence in Mauritius, but leaves the PCA with complete independence and freedom in its operations, including of course when discharging its quasi-statutory functions under the International Arbitration Act.

Finally, I should also reiterate that our new platform for international arbitration is intended to provide a legal and logistical environment where all forms of international arbitration can thrive.

The creation of the Mauritius International Arbitration Centre is meant to provide an easily accessible solution for those users who seek a fully integrated Mauritian-based dispute resolution process. It is not meant to shut out or pre-empt other forms of *ad hoc* and institutional arbitration, such as ICC arbitration, SIAC arbitration or indeed LCIA arbitration, and there is to be no particular preference for MIAC over other institutions.

We know that our International Arbitration Project can only succeed with the continuing support and assistance of all the institutions which are co-hosting this conference, and we look forward to many more years of successful collaboration with all of you.

Undoubtedly, this conference will provide an opportunity for leading practitioners and others in the field to focus on the practical application of our law, following the lucid exposition of its theoretical underpinnings at our launch conference two years ago.

This conference will give all of you an opportunity for fruitful exchanges, but I also very much hope that you will be able to experience the beauty and the friendliness of our island and its people.

I now have the pleasure to declare the Mauritius International Arbitration Conference 2012 open.

PANEL I

**THE COURT'S DUTY TO STAY COURT
PROCEEDINGS IN FAVOUR OF ARBITRATION:
A PRACTICAL APPLICATION**

Introductory Remarks

*John Beechey**

Distinguished delegates, ladies and gentlemen, this is a horrible job: I have the misfortune to have to bring you back in from the sunshine, I am sorry about that. My name is John Beechey, I am from the other ICC and it is my privilege to moderate this session.

We thought we might try to be a little more interactive than perhaps is the tradition at conferences such as this, and so there will be effectively four sections to this panel.

First of all there will be a paper, which will be presented by Maître Patrick Matet, the *conseiller à la Cour de cassation* in Paris.¹

After that, we will go into 'practice mode' and I will introduce a problem which will then be presented in the nature of the court application by two advocates.

They will be kept in their place by three judges and then, thereafter, we will have something of a commentary from those three judges whom I will introduce when we get to that point.

Then the fourth phase, and which I hope you will take advantage of, even though by then you will surely be hungry, will be questions and answers.

So in order to start the session, I would like to give the floor to Maître Patrick Matet who will introduce the paper, "*Effet Négatif du Principe Compétence-compétence*".

* President, ICC International Court of Arbitration (Paris).

¹ The present volume further includes a paper by Mr. Christopher Adebayo Ojo, on *The Role of National Courts in Arbitration: An African Perspective*.

Report to the Conference: Effet Négatif du Principe Compétence-compétence

*Patrick Matet**

Le principe compétence-compétence fait partie de ces règles qui singularisent l'arbitrage. La raison d'être de ce principe tient au fait que le droit a dû trouver une règle qui permette de résoudre la question de la concurrence éventuelle entre les justices arbitrale et étatique. Ce mode de résolution du conflit de compétence en assure également un règlement pacifique, ce qui s'inscrit dans l'analyse développée ce matin par Madame O'Brien.

Le premier constat qui s'impose à nous quand est évoqué le principe compétence-compétence, est d'admettre qu'il existe une alternative qui oppose la compétence de l'arbitre et celle du juge étatique, et que cette alternative n'a de sens qu'au regard du caractère juridictionnel de l'arbitrage, sur lequel les travaux du Professeur Jarrosson nous ont si bien éclairés.

Le principe compétence-compétence,¹ qui permet à l'arbitre d'être juge de sa compétence, en constitue un effet positif. Ce principe a été consacré, comme vous le savez, au niveau international à l'article 6 de la Convention de Genève de 1961 sur l'Arbitrage commercial international.²

* Conseiller à la Cour de cassation (Paris).

¹ Sur ce point, E. Gaillard souligne que, si un tel principe n'existait pas, il serait étrange de voir un arbitre établir une sentence dans laquelle il nierait sa propre compétence. « L'acte se trouverait par son propre contenu » : il faut donc se fonder sur une autre règle que celle issue de la convention d'arbitrage qui est elle entachée d'un vice, et c'est en ce sens que le droit objectif de l'arbitrage reconnaît aux arbitres la possibilité de statuer sur leur propre compétence (E. Gaillard, « L'effet négatif de la compétence-compétence » in J. Haldy, J.-M. Rapp, P. Ferrari (eds.) *Etudes de procédures et d'arbitrage en l'honneur de Jean François Poudret*, Lausanne 1999, p. 388).

² L'article VI paragraphe 3 de la Convention de Genève dispose que lorsque, « *avant tout recours à un tribunal judiciaire, une procédure d'arbitrage aura été introduite, les tribunaux judiciaires des États contractants, saisis ultérieurement d'une demande portant sur le même différend entre les mêmes parties ou d'une demande en constatation de l'inexistence, de la nullité ou de la caducité de la convention d'arbitrage, sursoient, sauf motifs graves, à statuer sur la compétence de l'arbitre jusqu'au prononcé de la sentence arbitrale* ». L'article 8 de la loi-type CNUDCI prévoit que le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend.

Cet article prévoit un sursis à statuer sur la compétence du juge étatique jusqu'au prononcé de la sentence arbitrale. Aussi, une partie de la doctrine y discerne la reconnaissance d'un effet négatif au principe compétence-compétence.

Mais, le droit français fait une application beaucoup plus radicale de l'effet négatif. En effet, ce droit fait bénéficier l'arbitre d'une priorité chronologique pour statuer sur sa compétence. L'effet négatif s'adresse principalement au juge étatique, en lui interdisant de statuer sur les contestations relatives à l'existence ou à la validité de la convention d'arbitrage tant que les arbitres ne se sont pas eux-mêmes prononcés. Au début des années 80, le droit français a posé le principe compétence-compétence en matière d'arbitrage interne, puis la jurisprudence l'a consacré en matière d'arbitrage international. Un grand arrêt du droit de l'arbitrage rendu par la Cour de cassation en 1999, l'arrêt *Zanzi*,³ a donné une véritable autonomie au principe compétence-compétence en matière d'arbitrage international, en statuant au visa de ce principe compétence-compétence. Il s'agit, désormais, d'une règle fondamentale du droit français qui est prévue au Code de procédure civile depuis la réforme de l'arbitrage qui est intervenue le 13 janvier 2011.⁴

Cette règle de l'effet négatif, qui est consacrée par le droit français, l'est moins ou peu par d'autres droits, mais elle connaît une extension remarquable et récente, notamment en droit mauricien depuis 2008.⁵ La règle de l'effet négatif n'est pas la simple transposition, dans le domaine de l'arbitrage, de la disposition classique selon laquelle tout juge est juge de sa compétence. En effet, en raison de l'effet négatif, le droit français dénie totalement au juge étatique le pouvoir de statuer sur la validité de la Convention d'arbitrage, et à cet égard, il est remarquable que la juridiction étatique puisse se déclarer incompétente, au moins

³ Cass. 1^{re} civ., 5 janvier 1999, *Marco Zanzi c/ de Coninck et autres*, n° de rôle B 96-21.430 ; *Dalloz* 1999, IR p. 31 ; *RTD com.* 1999, p. 380, obs. E. Loquin ; *Rev. Crit. DIP* 1999, p. 546, note D. Bureau ; *Rev. Arb.* 1999, p. 260, note Ph. Fouchard.

⁴ L'article 1448 dispose que « *lorsqu'un litige relevant d'une convention d'arbitrage est porté devant une juridiction de l'État, celle-ci se déclare incompétente, sauf si le tribunal arbitral n'est pas encore saisi et si la convention d'arbitrage est manifestement nulle ou manifestement inapplicable* ».

⁵ S. Moollan, *Rev. Arb.* 2009, p. 933 : Article 5 de la loi mauricienne sur l'arbitrage international, entrée en vigueur le 1er janvier 2009. Cet article reconnaît l'effet négatif de la compétence-compétence et prévoit que le juge étatique doit renvoyer à l'arbitrage lorsque l'une des parties allègue que le différend fait l'objet d'une convention d'arbitrage, sauf si la partie adverse démontre qu'il existe une très forte probabilité que la convention d'arbitrage soit caduque, inopérante ou non susceptible d'être exécutée.

temporairement, alors que la juridiction concurrente n'est pas encore constituée.⁶

La première question qui se pose est de savoir : à quoi tient la vigueur du principe et de la règle de l'effet négatif ?

Pour expliquer le jeu de l'effet négatif, la doctrine avance plusieurs raisons, à savoir une économie de moyens, la volonté de déjouer les manœuvres dilatoires des parties, et une confiance accordée, avec faveur, à l'arbitrage.⁷

A l'évidence, l'effet négatif peut s'appuyer sur l'argument de l'économie de moyens. Mais cet argument se retourne, car pour une économie de moyens, il peut être soutenu qu'il est préférable de faire juger immédiatement et sans attendre la question de la compétence arbitrale par le juge étatique.⁸

Une deuxième explication qui est avancée est celle d'une faveur pour l'arbitrage dans le droit français. Je ne suis pas convaincu par cette explication. Il est certain que l'existence d'un contentieux parallèle devant les juridictions étatiques sur la validité de la convention d'arbitrage, alors que l'arbitrage se déroulerait, serait source de perturbations graves. Or, le principe compétence-compétence ne fait pas, en lui-même, obstacle aux manœuvres perturbatrices des parties : je dirais même qu'il est susceptible de les aggraver en raison de l'effet positif qui accorde à l'arbitre, en même temps qu'au juge étatique, la faculté de statuer sur la compétence.

Cependant, l'efficacité de la convention d'arbitrage commande d'éviter toutes les manœuvres dilatoires de la partie qui voudrait se libérer de la convention d'arbitrage qu'elle a pourtant souscrite. La règle de l'effet négatif est celle qui résout les conséquences de l'existence d'une dualité de compétence entre celle de l'arbitre et celle du juge étatique. Comme l'a fait observer le Professeur Gaillard, un ordre juridique ne peut tolérer une telle concurrence entre la justice étatique et la justice arbitrale. Dans ces conditions, l'effet négatif permet de rationaliser le contentieux. Cette rationalisation pourrait être obtenue en prévoyant un préalable devant les juridictions étatiques pour régler la question de la validité de la convention d'arbitrage, comme cela se fait dans un certain nombre de droits. Mais, ce

⁶ Selon Ph. Thery, « la déclaration d'incompétence profite à un juge en l'état futur d'achèvement ». (Ph. Thery, *Rev. Arb.* 2002, p.371 et s.).

⁷ Sur ce point, voir. E. Gaillard; « ...trois considérations de nature très différente », d'une part la réalisation d'économie de moyens, d'autre part, le souci de déjouer les manœuvres dilatoires et pour finir, l'argument de la centralisation des contentieux (L'effet négatif de la compétence-compétence (voir E. Gaillard, *op.cit.* à note 1, p. 398.).

⁸ Ph. Dlebecque s'est exprimé en défaveur de la règle de l'effet négatif (Les Cahiers de l'Arbitrage, n°2, 2012).

mode de résolution du conflit de compétence met à néant l'effet positif du principe qui attribue compétence à l'arbitre pour statuer sur sa propre compétence.

A mon sens, l'argument déterminant qui milite pour faire jouer la compétence prioritaire de l'arbitre est celui de la prévisibilité de la règle pour les parties. Ainsi, les parties savent qu'en droit français, il est inutile de tenter de se soustraire à la clause d'arbitrage en cherchant une instrumentalisation du juge étatique en lui soumettant une contestation sur la validité de la convention d'arbitrage, alors que l'arbitre est compétent pour la trancher.

Il est évident qu'un aller-retour devant l'arbitre pour simplement lui faire dire que la clause d'arbitrage est nulle, lorsqu'à l'évidence elle l'est, ne permettrait pas de vider rapidement le conflit de compétence.⁹ Aussi, le code de procédure civile français a prévu que, dans l'hypothèse où la clause serait manifestement nulle, le juge étatique pourrait retenir sa compétence. La jurisprudence a ajouté que le juge étatique peut ne pas se dessaisir lorsqu'il se trouve en présence d'une clause manifestement inapplicable. Comme toute exception, ces exceptions au principe du jeu de l'effet négatif doivent être interprétées restrictivement, pour au moins deux raisons. Première raison, pour éviter un contentieux périphérique à l'arbitrage, lequel est, d'ailleurs, contraire à l'économie procédurale. Et deuxièmement, pour éviter la duplication des arguments devant le juge étatique saisi de l'inapplicabilité de la convention d'arbitrage, avec un risque d'une décision contradictoire avec celle de l'arbitre sur la compétence.

Afin d'éviter ces risques, le droit français demande au juge étatique, saisi en dépit de l'existence d'une convention d'arbitrage, de se limiter à déterminer si, *prima facie*, la convention semble valide. En matière d'arbitrage, la recherche qu'opère le juge est limitée à l'apparence. Ainsi, le juge étatique doit-il rechercher si, en apparence, la convention d'arbitrage est manifestement nulle ou inapplicable. Ce qui constitue l'indice de l'absence de caractère manifeste est le fait qu'il faille une interprétation des faits ou de la volonté des parties. La Cour de cassation a mis en exergue la notion de « doute » qui est fondamentale pour l'interprétation du caractère manifeste. C'est la raison pour laquelle, si plusieurs interprétations sont envisageables, la clause d'arbitrage n'est pas manifestement inapplicable. S'il existe un doute, ce doute ne doit pas être levé par le juge étatique, il ne peut l'être que par l'arbitre.¹⁰ Avec un peu

⁹ A. de Fontmichel, « Les tentatives de paralysie de l'instance arbitrale devant le juge étatique » (Les Cahiers de l'arbitrage, n°2, 20 oct 2011, p.407).

¹⁰ E. Loquin, « Le doute profite à l'arbitrage » (E.Loquin, obs. RTD com. 2006, p. 764).

d'excès, certains auteurs en ont déduit que la nullité ou l'inapplicabilité doit crever les yeux ; ce qui est simplement certain, c'est que le juge du fond n'est pas autorisé à entrer dans le détail de la convention d'arbitrage, et que la nullité ou l'inapplicabilité manifeste, c'est celle qui est évidente, c'est celle qui est incontestable.

Pour ne pas compromettre l'effet négatif du principe compétence-compétence, la Cour de cassation impose donc une grande rigueur dans l'application de cette règle. C'est pour cela, comme je l'ai dit, que, dès qu'il existe une apparence de convention d'arbitrage, il est exclu qu'elle soit manifestement nulle ou inapplicable. Par exemple, la clause d'arbitrage qui désigne deux juridictions arbitrales différentes et inconciliables entre elles, est certes une clause qui est ambiguë mais cette clause existe et témoigne de la volonté des parties de recourir à l'arbitrage, et donc ne présente pas de caractère manifestement nul ni manifestement inapplicable, comme l'a décidé la Cour de cassation dans un arrêt du 4 juin 2009. Il existe encore une apparence de convention d'arbitrage lorsque la clause compromissoire énumère de façon limitative les différends de nature à être soumis à l'arbitrage ; seul le tribunal arbitral est compétent pour connaître de l'interprétation de la clause d'arbitrage, a jugé la Cour de cassation.¹¹

La jurisprudence a également décidé que le fait qu'une partie forme des demandes d'indemnisation, sur un fondement contractuel du chef de rupture brutale des pourparlers, est impropre à exclure la compétence arbitrale dès lors que les parties ont, plusieurs années auparavant, conclu un contrat de distribution entre elles et que ce contrat comportait une clause d'arbitrage. Dernier exemple, la Cour de cassation¹² a admis récemment que l'application au litige d'une loi de police n'est pas de nature à retirer à l'arbitre sa priorité pour statuer sur sa compétence car, *prima facie*, même si le droit applicable au fond du litige est une loi impérative, cela ne permet pas d'en déduire que l'on soit en présence d'un litige inarbitrable et, donc, que la clause soit manifestement inapplicable.¹³ Dans tous ces exemples, on discerne, en apparence, l'existence d'un lien entre le différend et le contrat contenant la clause compromissoire et il incombe à l'arbitre, en priorité, de dire s'il est compétent ou non.

¹¹ Cass. 1^{re} civ., 17 janvier 2006 n° 04-12 781.

¹² Cass. 1^{re} civ., 8 juillet 2010 n° 09 67 01.

¹³ Un litige oppose deux sociétés à propos d'un contrat de distribution de produits. La société française attaque son adversaire pour rupture abusive du contrat. La société suédoise se prévaut de la clause d'arbitrage. La société française réplique que la rupture brutale du contrat en contravention avec l'article L. 442-6 du code de commerce est un délit civil, sans rapport avec le contrat, et qu'il ne s'agit pas de la mise en jeu de la responsabilité contractuelle.

A l'inverse, le juge étatique peut retenir sa compétence si la clause est manifestement inapplicable. Par exemple, une partie poursuivait l'exécution d'un contrat de gage qui ne contenait pas de clause compromissoire mais qui prévoyait une clause attributive de compétence. Son adversaire soutenait qu'un autre contrat d'approvisionnement conclu avec la même partie comportait, lui, une clause d'arbitrage. La Cour de cassation approuve la Cour d'appel d'avoir dit que le litige portait sur un autre contrat, et en conséquence, la clause était manifestement inapplicable, car les parties avaient voulu distinguer les deux contrats par des clauses contraires.

Enfin, en présence de parties faibles, en l'espèce de salariés, la chambre sociale de la Cour de cassation,¹⁴ a limité la portée du principe de priorité de l'arbitre pour statuer sur sa propre compétence en présence d'une clause compromissoire incluse dans un contrat de travail et a admis que la juridiction du travail procède à un examen des éléments de fait et de droit, avant de déterminer sa compétence.¹⁵

Le droit d'arbitrage est à la recherche constante d'un point d'équilibre entre les pouvoirs des arbitres et ceux des juges étatiques. Cette ligne de partage sur les compétences concurrentes, le droit français a choisi de la fixer en fonction d'une priorité chronologique de l'arbitre.

Mais la question qui est constamment posée, de façon tout à fait légitime, est de savoir si cette règle de l'effet négatif ne sacrifie pas les intérêts de la justice étatique.

En premier lieu, c'est oublier que la règle ne poursuit qu'un seul objectif, celui d'empêcher les confits de juridiction par la conduite parallèle de procédures étatiques et arbitrales. Cela ne signifie pas que les juges français renoncent à leur office. A cet égard, une étude menée par le Service de documentation de la Cour de cassation a mis en relief que, sur 46 appels de décisions des tribunaux ayant statué sur une exception de compétence de la juridiction étatique en présence d'une convention d'arbitrage, les juridictions étatiques ont estimé que la clause d'arbitrage était manifestement nulle ou inapplicable dans 12 dossiers. Cela montre à mes yeux que l'interprétation jurisprudentielle n'est pas aussi restrictive que celle que les contempteurs du système français avancent.

¹⁴ Soc., 30 novembre 2011, pourvoi n° 11-12.905 11-12.906, Bull. 2011, V, n° 277.

¹⁵ L'obstacle fondamental que constitue le coût de l'arbitrage se pose également en matière de litige de la consommation. Il ne faudrait pas que le coût d'une procédure d'arbitrage conduise le consommateur à renoncer à faire valoir ses droits vis-à-vis des professionnels devant les arbitres. Certes, la Cour de cassation a validé la clause compromissoire dans un contrat international de consommation. (Cass. 1^{re} civ., 21 mai 1997, Bull Civ. I, n°159, p. 107).

Ces critiques omettent également de rappeler que l'application de l'effet négatif dans le système français entraîne seulement une incompétence judiciaire temporaire du juge étatique. En effet, la décision de l'arbitre sur sa compétence demeure soumise au contrôle du juge étatique lors du recours sur la validité de la sentence, ce juge n'étant nullement tenu de retenir la solution de la sentence sur la compétence de l'arbitre.¹⁶

La règle de l'effet négatif s'inscrit donc dans la compénétration des justices arbitrale et étatique et, à ce titre, un auteur français a estimé que la reconnaissance de l'effet négatif du principe compétence-compétence est le signe de la maturité d'un droit par rapport à l'arbitrage. Pour ancrer cette reconnaissance,¹⁷ le droit a donc choisi cette expression judicieuse qui, par la répétition des mots « compétence » marque les esprits afin que chacun des acteurs de l'arbitrage ne puisse en ignorer la force et la valeur.

¹⁶ Cass. 1^{re} civ., 6 octobre 2010, *pourvoi n°08-20.563*; il n'existe aucune limitation à son pouvoir de rechercher en droit et en fait tous les éléments (donc il n'est pas lié par les constatations de fait ou de droit de l'arbitre) pour statuer sur la compétence pour apprécier si l'arbitre a statué sans convention d'arbitrage, et cela que l'arbitre se soit déclaré compétent ou incompétent.

¹⁷ Les parties à l'arbitrage international peuvent se réserver la faculté de contester d'emblée la compétence arbitrale devant le juge étatique. L'article 1506 du Code de procédure civile ne renvoie pas au troisième alinéa de l'article 1448, selon lequel toute stipulation contraire au présent article est réputée non écrite. A l'inverse, un auteur fait valoir que la mise à l'écart de cet alinéa de l'article 1448, en matière internationale ouvre la voie à des clauses qui renforceraient l'effet négatif de la compétence-compétence, en interdisant aux parties de faire valoir à ce stade toute nullité ou inapplicabilité, même manifeste (S. Bollé, *Rev. Crit. DIP* 2011, p. 553).

Report to the Conference: The Role of National Courts in Arbitration – An African Perspective

*Christopher Adebayo Ojo**

Arbitration is regarded as an alternative dispute resolution mechanism, albeit a substitute to litigation in the courts. The popular rationale for arbitration – and which recommends it over the traditional system of resolving disputes through the courts – is that it is more efficient, more cost effective and faster than litigation. It is also believed that parties to the process have the ability to control it. Notwithstanding these benefits, and the supposed autonomy of the arbitral process, both formal rules and experience show that arbitration and the court system hardly run on parallel lanes. The courts play an enormous role in the arbitral system, and depending on one's perspective, this role may strengthen or weaken the system of arbitration. In my view, some of the courts' involvement is inevitable, because of their unique position as a part of the broader government of a State, a position that enables them to invoke or trigger the coercive power of the State for purpose of enforcement of both their judgments and awards of arbitral bodies. I doubt if the participation of national courts in arbitration is peculiar to Africa. Certainly, the seeming ambivalence in totally divorcing the courts from the arbitral process manifests both in the law and practice of arbitration in Africa.

However, conscious of the possibility that excessive or unrestrained court interference in arbitration might negate the *raison d'être* of the entire process, most jurisdictions in Africa seek to curtail such involvement, by limiting it in expressly authorised instances, even if such

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instances are numerous. For example, Section 34 of the Nigerian Arbitration and Conciliation Act¹ provides that “*a court shall not intervene in any matter governed by this Act except where provided by this Act*”.² It is doubtful whether such a provision has any practical utility in limiting the role of courts in arbitration. Admittedly, in the absence of such provision, the courts retain all their traditional jurisdictions and powers over matters including those subject to arbitration. But as we shall see shortly, under most arbitration statutes, the circumstances under which courts can intervene in arbitral proceedings are just too many, so as to render such a limiting provision meaningless. Be that as it may, a cursory look at the statutory and practical landscape of arbitration in Africa reveals that the courts play some significant roles in arbitration.

I. INITIATION OF ARBITRATION

The courts have the power, in effect, to initiate arbitration. This is the practical result of the courts’ power to grant stay of proceedings in any matter before them, if they are satisfied that the matter is covered by a valid and subsisting arbitration agreement between the parties. This power or duty on the part of the courts, finds expression in the arbitration statutes of all the major jurisdictions in Africa.³ These provisions enlist the court in the promotion of the arbitral process by enabling them to compel a party who had so agreed, to take their matter to arbitration. The Ghanaian Act goes further to empower its courts, even in the absence of a prior arbitration agreement, but with the consent of the parties, to refer a dispute before them to arbitration.⁴ This is a kind of submission agreement. The Nigerian Act contains a provision which allows arbitral proceedings to be commenced or continued notwithstanding the pendency in court of a case relating to the same matter.⁵

¹ Cap. 19 LFN 1990 (hereinafter “Nigerian Act”).

² See also Section 10 of the Kenyan Arbitration Act Cap. 49, 2010 (hereinafter “Kenyan Act”) for a similar provision. See also Kwadwo Sarkodie, “Arbitration in Ghana – The Alternative Dispute Resolution Act 2010” (noting that the Ghanaian statute does not have such a provision).

³ See for example, Sections 4 and 5 of the Nigerian Act; Section 6 Arbitration Act of Tanzania; Section 6 Arbitration Act 42 of 1965 of South Africa (hereinafter “South African Act”); Section 7 of the Alternative Dispute Resolution Act of 2010 of Ghana (hereinafter “Ghanaian Act”).

⁴ Section 7 of the Ghanaian Act.

⁵ Section 4(2) of the Nigerian Act.

II. APPOINTMENT AND REMOVAL OF ARBITRATORS

Another area in which the courts play a significant role is the appointment and removal of arbitrators. One of the touted benefits of arbitration is party autonomy. By this principle, the parties control the process. One important aspect of the control is that the parties appoint the arbitrators. This is the norm in most cases. The parties can agree on the number of arbitrators and on the method by which such arbitrators can be appointed in the event of a dispute. But there may be occasions when the stipulated method fails because one of the parties failed to exercise the power of appointment. The courts in Africa, as in most regions of the world, have default powers to make the appointment in such situations.⁶ In the event of a default on the part of one party in appointing an arbitrator, the Kenyan Act reposes the default powers in the other party in the first instance. That other party may appoint his or her own arbitrator as the sole arbitrator whose award would be binding on both parties. But the defaulting party can apply to court for such appointment as sole arbitrator to be set aside. The court may grant the application upon good cause being shown. It is then that the court may itself, and with the consent of the parties, exercise the power to appoint a sole arbitrator.⁷ In most jurisdictions, although the parties may stipulate the method by which the appointment of an arbitrator may be challenged, the courts do have the power to confirm or uphold the challenge⁸. It is therefore clear that the courts might be intrinsically involved in the composition of the arbitral tribunal which is a not-insignificant role to play.

III. ENFORCEMENT AND SETTING ASIDE

Perhaps the most consequential role that the courts play in the arbitral process is the function of enforcing or setting aside an award rendered by an arbitral tribunal. The courts have played this role for as long as arbitration has been in existence. As earlier indicated, this is a function that only the courts can do since arbitral institutions and tribunals cannot trigger the coercive powers of the State. Most jurisdictions in Africa codify this function and stipulate procedure for enforcement of awards.⁹ In these jurisdictions, an award may, on application to court, be made an order of

⁶ Section 8 of the Tanzanian Act; Section 12 of the South African Act; Section 7 of the Nigerian Act.

⁷ See generally Section 12 of the Kenyan Act.

⁸ For example, Section 14 (3)-(6) of the Kenyan Act; Section 13 of the South African Act; Section 18 of the Ghanaian Act.

⁹ Sections 31 and 32 of the Nigerian Act; Section 36 of the Kenyan Act; Section 31 of the South African Act.

court or be enforced in the same manner as a judgment or order. This is a crucial aspect of the arbitral process because in the absence of the possibility for enforcement, an arbitral award is not worth the paper on which it is written. It is the mechanism provided by the courts for enforcement that gives value to the entire arbitral process and indeed to the entire system of arbitration. Therefore, the national courts in Africa play a very pivotal role in arbitration in Africa. The South African Act contains a provision which says that “*a court to which application is so made, may before making the award an order of court, correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.*”¹⁰ This provision must be approached with caution lest it provides cover for the court to vary or modify awards or to substitute their opinions for those of arbitral tribunals.

Ancillary to the power of the courts to enforce an award is their power to set aside the same. The conventional wisdom is that an arbitral award is final and not subject to appeal. Therefore, the general rule is that a court may not set aside an award simply because it will itself reach a different decision than that contained in the award. The statutes in most of the jurisdictions in Africa circumscribe the instances where a court may set aside an award. A common thread that runs through most of these statutes is the inference that the courts can only do so for a fundamental defect in the process culminating in the award.¹¹ The grounds for refusal of recognition or for setting aside are detailed and are not the subject of our discussion here. Suffice it to say that the national courts in Africa have the competence to refuse recognition of arbitral awards or to set same aside. This is a very decisive function.

In relation to the actual conduct of a reference, in most jurisdictions, the national courts have practical, even if not formal supervisory jurisdiction over arbitral tribunals. For instance in Ghana, on the application of any party, a court may determine any question of law that arises in the course of the proceedings if it is of the view that the question substantially affects the rights of the other party.¹² In Kenya, such

¹⁰ Section 31(2) of the South African Act.

¹¹ Most of the statutes express this differently. See Section 33 of the South African Act; Section 16 of the Tanzanian Act; Section 37 of the Kenyan Act; Sections 29 & 30 of the Nigerian Act; Sections 57-59 of the Ghanaian Act. But the common trend is that an award can be set aside or recognition of an award may be refused on the grounds of arbitrator misconduct or if the award touches on issues outside the scope of the reference. Cases in most jurisdictions expand and expound on the breadth of these grounds.

¹² See Section 40 of the Ghanaian Act.

application can also be made to the court provided the parties have so agreed.¹³

In South Africa, an arbitral tribunal “*may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel*”.¹⁴

These provisions, and others which enable the courts to provide opinions on questions of law, are a clear recognition of the difficulty which arbitrators may face, especially if they are not lawyers or legal experts. Although in most cases, arbitrators decide disputes based on the contracts or agreements between parties, these contracts or agreements almost always have legal undertones. There is no denying the fact that some arbitrators may not know how to resolve some of the legal issues that may arise in the course of the proceedings. Thus, the national courts in Africa are empowered to assist these tribunals. But the point must be made that recourse to the courts through the mechanism of case stated, must be used sparingly and only in very difficult or complex legal questions. Otherwise, that mechanism would rob the arbitral process of its utility because every party fearing a potential adverse ruling from the tribunal might rush to the courts. This would impede the efficiency associated with arbitration especially since the decision or opinion of the courts would be subject to appeal in some jurisdictions.

IV. ADMINISTRATIVE SUPPORT

The national courts also lend administrative support to arbitral tribunals in Africa. In most of the jurisdictions, they assist the arbitral tribunals in securing the attendance of witnesses. They issue the necessary subpoenas.¹⁵ Again, this is a very essential role. Without the assistance of the courts, an arbitral tribunal would be helpless in the event a witness refuses or fails to appear before it. Such occurrence would certainly frustrate the arbitral process.

¹³ Section 39 of the Kenyan Act.

¹⁴ Section 20 of the South African Act.

¹⁵ Section 23 of the Nigerian Act; Section 13 of the Tanzanian Act; Section 28 of the Kenyan Act; Section 16 South African Act.

Additionally, in some jurisdictions, the courts have powers to extend the time for commencing arbitration,¹⁶ and for making an award.¹⁷ Some jurisdictions enumerate the powers.¹⁸

There is no denying the pervasive powers of national courts in arbitral processes in Africa. Certainly, such enormous powers can be used for good or ill. It is gratifying that for the most part, the courts tend to play the role of facilitating the process instead of thwarting it. This positive attitude on the part of the courts is reflected in the stance which they take that they should be deferential and respect agreements and therefore decline jurisdiction where necessary. They also take the position that litigants who commit to arbitration in their contractual agreements should respect such commitments.¹⁹

CONCLUSION

As is the case in most regions, there is substantial interface between the courts and arbitral processes in Africa. This interconnectedness is both necessary and healthy. Arbitral tribunals lack access to the coercive powers of the State except through the medium of the courts, and therefore cannot on their own, enforce their decisions or compel other support to their processes. The courts are not hungry of jurisdiction. On the contrary, the complaint is that most court dockets are congested. Thus, they could use the help offered by arbitration. Thus, the courts are willing, able and ready to support the arbitral process by playing very significant roles in the smooth running of the system of arbitration in Africa. The arbitral process will be best enhanced by a harmony with the court system, not by contest with it. Happily, in practice, the courts always try to respect and uphold arbitration agreements and strive to hold parties to their bargain.

¹⁶ Section 7 of the Tanzanian Act.

¹⁷ Section 14 of the Tanzanian Act.

¹⁸ Examples would be Ghana (Sections 22, 26, 28, 39, 40 of the Ghanaian Act) and South Africa (Section 21 of the South African Act, which provides for general powers of the court in relation to a reference).

¹⁹ This stance is exemplified by the Nigerian case of *Nissan Ltd v. Yogoatham* (2010) 4 NWLR Part 1183 135. See also *Aye-Fenus v. Saipen* (2009) 2 NWLR Part 1126, 483 which held that in an application to set aside an award, a court is not sitting on appeal over the tribunal and that the general rule in arbitration is that the parties choose the process for better or worse. Thus, neither party can challenge an award which is good on its face merely because the award does not favour that party.

Presentation of the Practical Problem: *Development Fund of Militantis v. Bensalem Bank*

*Matthew Gearing Q.C. and Angeline Welsh**

John Beechey: We are now going to consider the issue of the court's duty to stay proceedings in favour of arbitration, I hope, with a practical illustration.

We have convened for this purpose an eminent Bench: Mr. Adebayo Ojo, the former Attorney General and Minister of Justice in Nigeria; Mr. Jamsheed Peeroo, a barrister here in Mauritius; who will be presided over by Mr. Justice Srikrishna, formerly of the Supreme Court of India.

Once I have introduced the problem, then, I think at that point, Patrick and I will retire gracefully to the sides and leave Mr. Justice Srikrishna in charge up here to moderate, and I hope, intervene in the debate.

What are they debating? You have the facts in your papers. Let me say here, any coincidental reference to any other nation is purely coincidence, and nothing else.

I. BACKGROUND OF THE DISPUTE

A. Background Facts

1. The 2011 Loan Agreement

This dispute concerns loan arrangements entered into by:

the Development Finance Fund of Militantis, which is a statutory organisation whose board is staffed by Government appointees and members of the business community (the **Development Fund**); and

the Bensalem Bank Limited (the **Bank**), which is the major commercial bank in the State of Bensalem.

* Respectively, Partner, Allen & Overy (Hong Kong); Counsel, Allen & Overy (London).

On 14 July 2011, the Development Fund and the Bank entered into a loan agreement whereby:

The Bank agreed to lend USD 200 million to the Development Fund in order to finance the building of a railway linking Militantis' two main cities Nayak and Samaru;

The Development Fund agreed to pay the Bank interest at 11% on a monthly basis and to repay the principal at the end of a 10 year period; and

If the Development Fund defaulted, it was agreed that the principal would become immediately due and payable and default interest of 16% would apply compounded monthly.

This loan agreement is referred to as the **2011 Loan Agreement**.

The Development Fund and the Bank agreed that any disputes arising out of and in connection with the 2011 Loan Agreement would be referred to arbitration seated in Nayak, Militantis.

2. *The 2011 Loan Agreement is challenged by the GTM*

Six months after the 2011 Loan Agreement was entered into, in January 2012, news of the loan filtered into the local press causing a public outcry. In particular a public interest group named "Greater Transparency in Militantis" or "GTM" began to call into question the validity of the 2011 Loan Agreement.

GTM's central allegation was that, for the 2011 Loan Agreement to be valid, the Development Fund required the prior approval of Parliament. This is because the Militantis Finance and Audit Act required Parliamentary approval for all borrowing entered into by the Government above USD 10 million, and none had been obtained. The Development Fund on the other hand denied that the Finance and Audit Act applied to it, as it was a separate statutory authority and not a government entity.

3. *The 2012 Settlement Agreement is entered into*

As the result of public pressure, the Development Fund failed to pay the first and second monthly instalments which fell due on 14 February and 14 March 2012 respectively.

On 16 March 2012, the Bank wrote a letter to the Development Fund calling an event of default and threatening to commence arbitration proceedings if the Bank refused to reimburse the monies owed under the 2011 Loan Agreement. However, by then, the Development Fund had already entered into a series of contracts with third parties in order to begin construction of the railway and so was not in a position to return the funds it had received from the Bank.

On 18 March 2012, when the Development Fund received the Bank's letter, the Minister of Finance of Militantis, who is Chairman of the Development Fund, called the Bank's Managing Director and arranged a meeting in Nayak.

At that meeting, which took place on 30 March 2012, the Development Fund and the Bank concluded an oral settlement agreement. It was agreed that the parties would treat the 2011 Loan Agreement as non-existent and that the Development Fund would return the funds loaned from the Bank, minus USD 2 million. This was to be paid for by funds held by the Development Fund for other government projects, such as the building of a new sports stadium. There is no written evidence of the settlement agreement.

This oral agreement is referred to as the **2012 Settlement Agreement**.

4. *The Central Bank investigation and directive*

Public pressure continued to grow in relation to the matter and, in April 2012, the Government of Militantis directed the Central Bank to investigate the arrangements between the Development Fund and the Bank. The Central Bank has the power to make certain directives as a result of its findings, including that the Bank repays the funds received under the 2012 Settlement Agreement to the Development Fund. These proceedings are referred to as the **Regulatory Proceedings**.

During May 2012, Militantis' Finance Minister (and Chairman of the Development Fund) made several statements in the press, including that he believed that the 2012 Settlement Agreement is valid and binding.

5. *The Development Fund commences proceedings in the Courts of Militantis*

On 1 June 2012, the Development Fund started proceedings before the courts of Militantis seeking a declaration that the 2012 Settlement

Agreement is valid and binding. These proceedings are referred to as the **Civil Court Proceedings**.

The Bank applied to stay these proceedings on the basis that any dispute arising in relation to the 2012 Settlement Agreement is to be resolved in arbitration as it is governed by the arbitration clause in the 2011 Loan Agreement.

The Development Fund objected to the application for a stay on three bases:

The 2012 Settlement Agreement did not contain an arbitration agreement;

There was no dispute between the Development Fund and the Bank as both took the view that the 2012 Settlement Agreement was valid; and

There are pending regulatory proceedings which would determine the issue, and hence render the arbitration proceedings redundant in any event.

Pursuant to the Militantis International Arbitration Act, the Civil Proceedings were transferred to the Supreme Court of Militantis to determine the issue.

B. Relevant Contract Provisions

The arbitration clause from the 2011 Loan Agreement is as follows:

“Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement including any dispute as to its existence, validity, interpretation, performance, breach or termination or the consequences of its nullity and any dispute relating to any non-contractual obligations arising out of or in connection with it shall be referred to and finally resolved by arbitration under the UNCITRAL Arbitration Rules which Rules are deemed to be incorporated by reference into this Clause.

The number of arbitrators shall be 3 (one appointed by each Party and the third appointed jointly by the two Parties’ arbitrators).

The seat or legal place of arbitration shall be Nayak, Militantis.

This clause shall be governed by the laws of Militantis.”

C. Relevant Statutory Provisions

Mauritius International Arbitration Act 2008

Section 3:

...

(8) In matters governed by this Act, no Court shall intervene except where so provided in this Act.

Section 4(1)(b):

An arbitration agreement –

...

(b) shall be in writing.

Section 5:

- (1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.*
- (2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a prima facie basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.*
- (3) Where the Supreme Court finds that the agreement is null and void, inoperative or incapable of being performed, it shall transfer the matter back to the Court which made the transfer.*
- (4) Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced*

or continued, and one or more awards may be made, while the issue is pending before any Courts.

Indian Arbitration and Conciliation Act 1996

Section 45:

Notwithstanding anything contained in Part I or in the Code of Civil Procedure, 1908 (5 of 1908), a judicial authority, when seized of an action in a matter in respect of which the parties have made an agreement referred to in Section 44, shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

French Code of Civil Procedure

Article 1448 (paragraphs 1 and 2):

When a dispute subject to an arbitration agreement is brought before a court, such court shall decline jurisdiction, except if an arbitral tribunal has not yet been seized of the dispute and if the arbitration agreement is manifestly void or manifestly not applicable.

A court may not decline jurisdiction on its own motion.

Article 1507:

An arbitration agreement shall not be subject to any requirements as to its form.

II. SUBMISSIONS OF THE PARTIES

Counsel for the Bensalem Bank: *Matthew Gearing Q.C.*

Counsel for the Development Fund: *Angeline Welsh*

The Supreme Court of Militantis: *Justice Bellur Srikrishna*
Christopher Adebayo Ojo
Jamsheed Peeroo

Moderator: *John Beechey*

* * *

John Beechey: So, we have convened our Bench of the Supreme Court and before the Bench will appear Mr. Matthew Gearing for the Bank, and Ms. Angeline Welsh for the Development Fund.

Matthew Gearing: Good morning, Sir. I am representing the Bensalem Bank. My friend, Ms. Welsh is for the Development Fund and with the greatest respect to this most eminent Bench, I do say to the several hundreds of people who are here in the public gallery today to observe these proceedings, that you should not be here, Sir. And the reason that you should not be here Sir, is that this matter is entirely straight forward.

The Development Fund has commenced proceedings before their own courts seeking to impugn the validity of two agreements: the 2011 Loan Agreement and the related 2012 Settlement Agreement. The problem with that Sir, the essential problem, is that the parties agreed that any disputes arising out of, or in connection with, the 2011 Loan Agreement would be referred to arbitration.

All my clients seek to do is to honour the contractual bargain. They seek to proceed to arbitration, they are out of pocket. My friend, Ms. Welsh seeks to put a stop to all of that. You, Sir, very simply, should refer this matter to arbitration. I will say, in case that is not sufficient, I will give you a little bit more background. The 2011 Loan Agreement was for a very substantial sum of money, USD 200 million, which was advanced for a public purpose in Militantis: the construction of a very substantial railway line. My clients entered into the Agreement and very promptly advanced the USD 200 million. Somewhat conveniently, one may think there was then a political controversy of scandal in the State of Militantis; it was suggested in the press and via various public interest groups that the 2011

Loan Agreement was void because the Development Fund did not obtain consent of Parliament to borrow funds in excess of USD 10 million.

First, two instalments were repaid in the spring of this year. The scandal then reached a head, and payments were stopped. My clients accelerated the loan; the parties, then sensibly at this stage, entered in settlement discussions. They concluded a settlement agreement. The terms of the 2012 Settlement Agreement were that Ms. Welsh's clients would repay the amount of the principle USD 200 million, less USD 2 million, which would be applied to community projects in Militantis. So far, so good. Unfortunately, the political climate in Militantis has become more difficult and my clients remain substantially out of pocket, which is why we are here before you.

Now, the law is entirely straight forward. The relevant section is Section 5¹ of the Militantis International Arbitration Act which bears an uncanny, some may say, a striking resemblance, to the Mauritius International Arbitration Act 2008. For those following in the public gallery, you may be interested to know that you can find the text on page 4 of your hand-out.

Now, members of the Bench, this is a unique piece of legislation. My application is essentially made in reliance on Section 5(2) of the International Arbitration Act and there are three salient points. First of all, I draw your attention to the words "unless a party shows". That means, members of the Bench, that the burden is on Ms. Welsh to show you what then follows in the Section. And the next second point, which is of great significance, is that she needs to meet the burden of a very strong probability. That is not my inference; that is not my aspiration; that is what the statute says. And she needs to show you a very strong probability on, thirdly, a *prima facie* basis. And again the Act provides for you to approach this, and there is no room for doubt here. Ms. Welsh needs to show you, on a *prima facie* basis, that the arbitration agreement is null and void,

¹ Section 5 of Militantis International Arbitration Act 2008

- (1) Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.
- (2) The Supreme Court shall, on a transfer under subsection (1), refer the parties to arbitration unless a party shows, on a *prima facie* basis, that there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed, in which case it shall itself proceed finally to determine whether the arbitration agreement is null and void, inoperative or incapable of being performed.

inoperative or incapable of being performed. So, you do not need to hear evidence, you do not need to delve into the details of this matter. You simply need to approach it on a high level *prima facie* basis. And unless Ms. Welsh can show you and unless she can get over the burden, the very high burden which is before her, you must refer this matter to arbitration.

I make one final point which is that you will no doubt hear, I anticipate – having crossed swords with Ms. Welsh many times, I no doubt expect you will hear – pleas to the public interest, to the national interest, to the importance of this matter. Those, members of the Bench, are utterly irrelevant. And indeed, if you have any doubts on that point, Section 3(8) of the Militant International Arbitration Act provides that “no Court shall intervene, save as provided for in this law”.

So, the only permissible basis of the Court's intervention here, is Section 5(2), section to which I have drawn your attention. So with that, members of the Bench, I ask you please to refer, to stay the proceedings commenced by Ms. Welsh's clients and to refer this matter immediately to arbitration. Thank you.

Justice Bellur Srikrishna: Mr. Gearing, before you take your seat, I have a question for you. Can you clarify the issue of whether the Fund is a government agency or an independent body?

Matthew Gearing: If I may say so, that is an issue for the arbitrators. My understanding is that the Development Fund is an agency of the State. There may well be in due course, submissions before the arbitral tribunal as to whether or not the status of the Development Fund is sufficient to bring it within the terms of the Finance and Audit Act in Mauritius. But that with respect Sir, is not an issue for you. That is an issue, an inquiry upon which the arbitrators would embark when considering this question upon a reference from you, Sir.

Justice Bellur Srikrishna: Thank you.

Jamsheed Peeroo: Mr. Gearing, I have a question: the dispute before us today, are you arguing that it contains an arbitration agreement?

Matthew Gearing: My position, Sir, is that the arbitration agreement which is operable in this case, is the arbitration agreement which is contained in the 2011 Loan Agreement. It is an agreement which is undoubtedly in existence; it is in writing and my essential submission is that the arbitration

agreement is broad enough to extend to the terms of the Settlement Agreement which was entered into in the subsequent year, 2012.

Justice Bellur Srikrishna: In other words, you are saying that whether the settlement is good or bad, we really go on what the original agreement itself is?

Matthew Gearing: Yes, Sir.

Justice Bellur Srikrishna: And therefore, there is some kind of inextricable link between the two?

Matthew Gearing: Well, I am certainly saying that disputes relating to the 2012 Settlement Agreement come within the scope of the arbitration agreement contained in the 2011 Loan Agreement. This is because the arbitration agreement in the 2011 Loan Agreement is drawn in the broadest possible terms.

Justice Bellur Srikrishna: One last question which I would like to ask you: in some jurisdictions, the statute says that even if the rest of the agreement is invalid, the arbitration clause would stand alone as an arbitration agreement. Do you have such a provision in your statute?

Matthew Gearing: Sir, indeed. I believe in Section 20 of the *Militantis International Arbitration Act*, which does indeed provide that arbitration agreements are separable. Of course, that is essentially the international accepted principle with which we are all familiar. So, even if Ms. Welsh were able to demonstrate to you that somehow, there was a fatal flaw, fatal invalidity in the terms of the 2011 Loan Agreement and in terms of the 2012 Settlement Agreement, that would not affect *ipso facto* the validity of the agreement to arbitrate contained in the 2011 Loan Agreement.

Angeline Welsh: Thank you, Sir.

Mr. Gearing would have this as a simple matter but it is anything other than a simple matter. This is a dispute which is of great public importance. It deals with a disgraceful mismanagement of public funds by the former chairman of the Development Fund and the Bank. It relates to a loan of USD 200 million. This is an extremely significant sum of money for a poor country such as *Militantis*. It also raises legal issues of great public importance. The legality of the 2011 Loan Agreement is called into question because parliamentary approval was not sought and obtained as required by the Finance and Audit Act.

The Finance and Audit Act provisions are so important – they are replicated in the Constitution of Militantis. Instead, those provisions required that borrowing over USD 10 million requires parliamentary approval. But yet, the Development Fund and the Bank entered into a loan of USD 200 million, in complete disregard of this provision. Leaving aside the terms of the Finance and Audit Act, the fact that the Bank and Development Fund did not go to Parliament to seek approval for such a large sum of money is indicative of the impropriety that we have seen in this situation.

And what did these two entities do when they were caught red-handed by the Greater Transparency in Militantis? What did they do? They settled this dispute in a backroom shady deal. There is no proper documentation of this supposed 2012 Settlement Agreement. Instead, it was agreed that this disgraceful matter would be settled through the use of other important government funds from other important government projects, such as the new sports centre. The Bank is now asking for this matter to be referred to arbitration. What the bank is doing is asking for this disgraceful affair to be hushed up, to be determined behind closed doors. And I would urge this Court to determine these issues, the validity of these agreements, in the public interest, in a public forum, in the appropriate place which is the Militantis Court.

Justice Bellur Srikrishna: Ms. Welsh, sure enough, despite all the political ramifications and the popular sentiments, there is a fundamental legal question that you have to address. Section 5 says that we shall automatically transfer the action to the Supreme Court, unless there is a very strong probability that the arbitration agreement may be null and void, inoperative or incapable of being performed. Mr. Gearing just now advised us that there is a provision in the statute that even if the rest of the 2011 Loan Agreement is bad, the arbitration agreement can stand alone.

So why can we not act on that? What is the reason for this not being acted upon?

Angeline Welsh: Sir, I have three answers to your question, which means that this Court should not refer this matter to arbitration, notwithstanding the terms of Section 5 of the Militantis International Arbitration Act. The first is that, there is no arbitration agreement in the 2012 Settlement Agreement. We will look at that in more detail. Further, the 2011 arbitration agreement, the only arbitration agreement, which my friend Mr. Gearing mentions, does not extend to the 2012 Settlement Agreement.

Finally, even if you were to find that there is a *prima facie* arbitration agreement, the issues which are raised in this dispute are not

issues which are capable of being settled by arbitration. That is because they are issues which will be contrary to the public policy of Militantis. And I will deal with that in greater detail in a short while.

The importance of my first two points, that there is no arbitration agreement in existence for the 2012 Settlement Agreement, effectively takes me outside the terms of Section 5 of the Militantis International Arbitration Act because if there is no arbitration agreement, this Court cannot consider whether there is an arbitration agreement which is null and void, or inoperative, or incapable of being performed.

My third point is a point about whether this matter is capable of being referred to arbitration.

Justice Bellur Srikrishna: Ms. Welsh, are you suggesting that the 2012 Settlement Agreement is a stand-alone agreement with no relation whatsoever with the 2011 Loan Agreement?

Actually if you look at the facts, the 2012 Settlement Agreement only says that they have agreed that the previous agreement shall stand cancelled and annulled and the liability to pay back capital minus USD 2 million. So how can you say that the two agreements are totally unconnected? And the moment you show us some kind of a substantive connection, why would they not be subsumed under Section 5? That is number one.

Number two, the question as to whether the first agreement or the second agreement was violative of a provision of law and therefore, inoperative or incapable of being enforced, is a question that can be addressed to the arbitral tribunal and the arbitral tribunal can certainly decide it because that is a question of their own jurisdiction and of their own competence. Why do you say that it cannot go to an arbitral forum for decision?

And finally, the statute does provide some kind of a recourse against a decision of the tribunal on this question of competence also – so, the parties are really not bereft of a remedy. So, why should we not send it to the arbitral tribunal for a decision on its own jurisdiction? If there is a wrong decision, we will rectify it, and if it is the right decision, the tribunal will go ahead on the merits.

Angeline Welsh: Sir, if I may respond to each of your points in turn.

The first issue which is raised is the existence of the arbitration agreement, its supposed connection with the 2011 Loan Agreement. The factual matter is that the arbitration agreement which is referred to here is contained in the 2011 Loan Agreement. That is an agreement which is prior

to and superseded by the 2012 Settlement Agreement. One therefore has to look at the 2012 Settlement Agreement and the proper construction of that Agreement and in order to determine whether the 2011 arbitration agreement extends to the 2012 Settlement Agreement.

Justice Bellur Srikrishna: Ms. Welsh, permit me to interrupt you. The 2012 Settlement Agreement is an annulment of the 2011 arbitration agreement by consent. The question as to whether the 2012 annulment is good or bad will determine the fate of the 2011 Loan Agreement. So why can it not be a part of the process of arbitration? We see no difficulty in that.

Angeline Welsh: Sir, we have to take things in chronological order here. There was a Loan Agreement in 2011 which contained an arbitration agreement that was settled by the 2012 Settlement Agreement. The 2012 Settlement Agreement was an oral agreement. We do not know precisely what the terms of the 2012 Settlement Agreement are. My friend has not shown us whether there is an arbitration agreement which is referred to in the 2012 Settlement Agreement. There is no documentation which supports it; it was concluded in the midst of charged public debate regarding legitimacy of the 2011 Loan Agreement and the settlement of the dispute concerns very important points of interpretation of the legislation and the Constitution of Militantis. All of these would point to the resolution of the dispute regarding the 2012 Settlement Agreement in the forum of Militantis courts and not arbitration.

The question of whether the 2012 Settlement Agreement actually settles the 2011 Loan Agreement and whether one is able to go back in time to the 2011 Loan Agreement is an issue which must be decided first. So if you accept that the 2012 Settlement Agreement is not subject to an arbitration agreement, then you should determine the validity of the 2012 Settlement Agreement. And any issue regarding the legitimacy of the 2011 Loan Agreement would be determined in the arbitration proceedings, but that would be at a future point in time.

Turning to my submission regarding these issues which are raised, being incapable of being determined in arbitration, Sir, this is a question which you can decide. Section 5 of the Militantis Arbitration Act says that you should not refer these matters to arbitration if I have shown to you, on a *prima facie* basis that there is a strong probability that the issues to be determined here are not capable of being resolved by arbitration. I say there is a strong probability that they cannot be determined by arbitration.

Justice Bellur Srikrishna: I believe the statute does have a provision that any agreement in contravention of public policy is bad. Right? If that is so, when the matter comes before an arbitral tribunal, that is one of the fundamental questions that a tribunal has to address itself to. You are saying that it is bad because of the public policy that you strongly advocated. This is something that has to be decided by the tribunal. Why should it not be decided with the tribunal?

Angeline Welsh: Sir, because my submission to you is that this is an issue of arbitrability. This is a matter which concerns the authority of the Development Fund to enter into a Loan Note with the Development Fund with a value of great significance, of USD 200 million. There are issues for the interpretation of the Constitution. One cannot get issues of more public importance. There is also an investigation by the Central Bank; there are regulatory proceedings which are looking into what happened here. If the tribunal were to determine such issues, my submission to you is that they would be in conflict with public policy in *Militantis*. And so, the award would be unenforceable here. These raise issues which are not arbitrable *i.e.*, not capable of being settled by arbitration, and the Court should not refer this matter to arbitration. Even if you were to accept that it might be capable of submission to arbitration, you should not refer it because that issue will come back to this Court, inevitably in due course. It will be a waste of all parties' time and money to have these issues determined in private arbitration proceedings.

My final submission: this whole episode represents a disgraceful set of affairs. This Court should not permit the issues of this magnitude and nature to be determined in private dispute resolution proceedings. If ever there was an issue for the *Militantis* Court, this is one that you should determine now.

Christopher Adebayo Ojo: Ms. Welsh, before you take your seat, perhaps you will be kind enough to clarify two points.

One is on the status on the Fund. Is it a separate statutory authority or a government entity? Because I noticed that some of the members of the board are independent businessmen, so I want you to clarify that point. The second point is that I want to invite your attention to the arbitration clause which is contained in the 2011 Loan Agreement. It says that: “*Any dispute, claim, difference or controversy arising out of, relating to or having any connection with this Agreement including any dispute as to its existence, validity, interpretation, performance, breach or termination...*”

Do you think there is a connection with the 2012 Settlement Agreement and the 2011 Loan Agreement?

Angeline Welsh: My answer to your first point is that whether or not the Development Fund is caught by the Financial and Audit Act is an issue for interpretation of that legislation. The constitutional provision replicates this provision and that is something, if one reads that provision, very clear on its face.

The second issue which you have raised with me is the connection between the 2011 Loan Agreement and the 2012 Settlement Agreement. My answer is that the 2012 Settlement Agreement supersedes the 2011 Loan Agreement. So, whatever has been agreed in the 2011 Loan Agreement has been superseded by what was agreed in 2012. We do not have, yet before this Court, witness evidence as to what the terms of that Agreement are. What we do know of it suggests that there may be a sort of issue which would not be referred to arbitration but would be before this Court. There needs to be a forth factual inquiry into the terms of the 2012 Settlement Agreement with cross-examination and so forth. But certainly, there is no existence of an existing arbitration agreement in the 2012 Settlement Agreement at this stage.

Jamsheed Peeroo: Ms. Welsh, you mentioned that there are questions of public policy that cannot be resolved in arbitration but only by the Supreme Court. But you failed to identify precisely what these questions are. Could you enlighten us on this, please?

Angeline Welsh: The questions of public policy here is an interpretation of the Constitution of Militantis. And the issue here is whether the arbitral tribunal would ever be able to interpret the Constitution of Militantis. That is a matter which is solely for the jurisdiction of the Supreme Court. The concept, as you know, of public policy, can be a very broad notion. So, I would respectfully submit to you that this issue is sufficient in order for this matter not to be capable of resolution in private arbitration proceedings.

Matthew Gearing: Ms. Welsh said that she had three points. In reality, with respect, she had only one. And that point was that this matter, she said, was so important that it should be referred to you for substantive determination. That Sir, is an unreal submission; that is not the world in which we live in, and that is not the framework of modern international arbitration; that is not the framework of the Militantis International Arbitration Act or indeed the Model Law, or indeed any other international arbitration statute with which

I am familiar. We do not live in a world where arbitration is relegated to second-class or common garden disputes. Yes, this is an extremely significant matter. Yes, it involves a very large sum of money, but so do a great many arbitrations these days all over the world. I think there is a very serious question as to whether my clients, who are not from Militantis, would have agreed to advance the sum of USD 200 million without the security of an international arbitration agreement.

Ms. Welsh says that there may be a challenge to public policy, that is, assuming that the matter is referred to arbitration, my clients prevail. Of course, there may be a challenge to public policy to an award under Section 38 of the Militantis International Arbitration Act. But that of course is a matter for then. It is not a matter for now. The only question for you now is whether or not Ms. Welsh has demonstrated a strong *prima facie* case, the burden of proof is hers, that the agreement to arbitrate is null and void, inoperative or incapable of being performed. I suggest, Sir, she clearly has not. Thank you.

III. THIRD-PARTY INTERVENTION BY THE GREATER TRANSPARENCY IN MILITANTIS MOVEMENT

John Beechey: Before Mr. Gearing leaves the podium, there is an unexpected development in this case. It turns out that the Greater Transparency in Militantis Movement is an organisation with about the deepest pocket in the charitable world and it has contrived to put together a legal team, comprising of Lord Hoffmann, Lord Justice Aikens, Prof. van den Berg, Mrs. Lucy Reed and Mr. Johnny Veeder.

The Supreme Court of Militantis does not entertain interventions from the public gallery but there is an intervention that one of its members is itching to make.

Gentlemen, for your consideration before you hold your final deliberations, Prof. van den Berg has been nominated as the Speaker, I think, with Mr. Johnny Veeder.

V. V. Veeder: First of all, John is quite right. We are an NGO. We are enthused by this morning's speech by Mrs. O'Brien. We believe in the Rule of Law. We have a second priority which we should disclose. We are very strongly in favour of retrospective increases of judicial salaries. But that has nothing to do with this debate of course.

Now, number two, which is very important, I will not say anything because Prof. van den Berg is going to do it all.

Albert Jan van den Berg: Good morning Ladies and Gentlemen. I am the President of the Movement, and what we hear is that there is a real scandal. We should do something about it and for that reason we have hired the best of the best we could find. He is an English barrister who will tell you that this is all procured by corruption. Now, Mr. Veeder, I give you the floor.

V. V. Veeder: I thought you might do this. I think you will feel that there is a certain script being followed in this application. It was quite clear that this was all set up, in advance indeed. Some of the facts presented to you seem to be skewed, somewhat in favour of one party, and against the other party. So our purpose, really, is just to put the true facts to you, which are the 2012 Settlement Agreement, as agreed, and which contains no arbitration clause, but the 2011 Loan Agreement does. But, we have two witnesses here, sitting over there, who will come up and give evidence because they were privy to the signing ceremony of the 2011 Loan Agreement in which large fat envelopes were handed over to the Minister, who purported to sign for *the State*. Now, that is corruption, but much more significant, that is a lack of consent. There is no valid existing arbitration clause. And if you attack the arbitration clause on facts such as these, how can this possibly go to a private arbitration sitting somewhere in Paris or London? This is a matter where there is no consent to arbitrate, the arbitration clause which has been invoked by Mr. Gearing so eloquently. By the way, why are his clients not here? I will tell you, they are all in jail. That is why. No consent, no arbitration agreement, this is the paradigm case which shall not go to arbitration. I call upon Prof. van den Berg to add a few words.

Albert Jan van den Berg: I do not have a legal degree or any other degree in law, so I will leave to the Court to hear the two witnesses as announced by Johnny Veeder.

Justice Bellur Srikrishna: If we have to take evidence, then it is better that the matter is referred to the arbitral tribunal because it will not be a matter of *prima facie* decision then.

Matthew Gearing: This is highly irregular. We have had no notice of this application, no notice of this evidence, no witness statements. I have two short points.

First of all, Sir, your inquiry is a *prima facie* one, that does not admit a trial of the matter.

Secondly, assuming against me the factual scenario posited entirely without evidence, but posited by my friend, Mr. Veeder who says that the 2011 Loan Agreement was procured by big fat envelopes and he says that vitiates the existence of the agreement to arbitrate. There is a distinction which he seeks to conflate, which is an important one between the *prima facie* existence of the agreement to arbitrate and its validity.

I would be able to demonstrate that the agreement to arbitrate is in *prima facie* existence. It exists as a *prima facie* matter. There may then well be a question of validity, if Mr. Veeder can even get close to proving the fact which he says, I accept there would be questions of validity to be tried, but it is a question of validity, and therefore, it is a question properly for the arbitral tribunal. It is not a question for you, Sir.

Albert Jan van den Berg: Mr. President, could you please rule on our motion because there is no opposition from the other side?

IV. DECISION OF THE SUPREME COURT OF MILITANTIS

Justice Bellur Srikrishna: Having heard the two learned counsel, and also the learned interventionists, this Court is of the considered opinion that the two agreements, the 2011 Loan Agreement and the 2012 Settlement Agreement are both inextricably connected, and any dispute as to the validity of the 2012 Agreement and as to whether such an agreement could have been entered into are also intricately connected. These questions would necessarily fall within the ambit of Section 5 of the Act.

We are not satisfied that the arbitration agreement does not exist, or that it is incapable of being operated upon, or that it is *prima facie* void and illegal. In these circumstances, this Court is of a considered view that the matter needs to be referred to the arbitral tribunal, and it is for the arbitral tribunal to rule upon its own competence, and then decide upon the merits of the dispute. Thank you very much.

Response to the Practical Problem: *Development Fund of Militantis v. Bensalem Bank*

Moderator: *John Beechey*

Rapporteurs: *Matthew Gearing Q.C.*
Angeline Welsh

Panel: *Justice Bellur Srikrishna**
Christopher Adebayo Ojo
*Jamsheed Peeroo***

John Beechey: In view of the previous response, Greater Transparency has now decided invisibility as the best course, because they wish to seek to recuse the judge, but I think, on balance, a fear of the cells is enough to drive them off the stage!

Indeed, the impromptu intervention added a bit of extra spice, and it was good to see that Mr. Matthew Gearing was so swift on his feet because he was not expecting any of that.

Now, the three panel members, Mr. Justice Srikrishna, Mr. Adebayo Ojo, and Mr. Jamsheed Peeroo shall give their views as to what they would do if faced with similar presentations, a similar underlay of facts in their own jurisdictions. They will comment on the sort of fact pattern as in the previous response, and what they think would follow under the equivalent of Section 5 of the legislation in their home jurisdiction.

I. INDIA

Justice Bellur Srikrishna: In India, the Arbitration and Conciliation Act 1996 has a somewhat similar provision, and I have been party to a judgment of the Supreme Court which, by two to one majority, held that the issue has to be considered only *prima facie* at this stage. When an application of this nature is moved, it is not the function of the court to go into any in-depth

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analysis because all that it has to do is to consider whether the bar against arbitration has to be lifted. I would, unhesitatingly, have done it in my jurisdiction, and would also do it in any case where such an opportunity would arise.

II. NIGERIA

Christopher Adebayo Ojo: Two things would weigh primarily on my mind, and the first one would be the usual, public policy. If you noticed, I did ask Counsel, Ms. Angelina Welsh whether the Fund is a government agency or a statutory body. I am of the view that because there are businessmen on the board of the Fund, it is a purely separate entity from the State.

The second point is that even though the arguments proffered by Ms. Welsh were quite persuasive and attractive, going by the specific provision of the arbitration clause contained in the 2011 Loan Agreement, and also Section 5 of the Militantis International Arbitration Act, which matches with Section 5 of the Act in Nigeria, Section 6 of the one in Kenya, Section 6 of the Ugandan Act, Section 6 of the South African Act, and also Section 6 of the Tanzanian Act, and Section 9 of the English Arbitration Act, I find that there is a connection between the 2012 Agreement and the 2011 Agreement, and therefore, they ought to be referred to arbitration in my jurisdiction.

III. MAURITIUS

Jamsheed Peeroo: From the Mauritian law perspective, after hearing arguments on Section 5 of the Mauritian International Arbitration Act 2008, the issue is: where do we draw the line on a *prima facie* verification of the Court? That is the first step before the Court can decide to actually verify an arbitration clause.

Does the Court simply look at any arbitration agreement between the same parties before saying: “I am fully satisfied, I will refer it to arbitration”? Or does the Court read the arbitration agreement, look at its scope and consider whether the dispute is covered by it?

On the current facts, we do not even have to go there: we just have to look at the arbitration agreement itself and we can see that it is so widely drafted that it will cover a subsequent agreement.

Now the question that arises is: would parties intend to enter into a settlement agreement avoiding arbitration and intend to extend their pre-arbitration agreement to that settlement agreement? Can we really expect parties to intend such a mechanism, a dispute resolution mechanism in the

settlement agreement resolving a dispute? It seems absurd. But would that be an argument to prevent the Court from referring the matter to arbitration?

In my submission, no, because if you look at the arbitration agreement, it says: any dispute including the termination of the 2011 Loan Agreement would be dealt with by arbitration. So, clearly it is included. So on a very first reading of this clause, Mauritian courts would be expected to refer the matter to arbitration. One second point that needs to be commented upon is the issue of public policy. Now, it is a principle of Mauritian law that the Supreme Court has an exclusive jurisdiction to interpret the Constitution of Mauritius. How would that apply in the context of an international arbitration? Do we expect an arbitral tribunal to interpret our Constitution? It is strongly arguable that this is not the case.

The arbitral tribunal would be expected to apply the Constitution but in matters regarding its interpretation, in my view, it would have to be the Supreme Court that would carry out such an exercise. Thankfully, under the International Arbitration Act 2008, there are mechanisms whereby parties can, with the consent of the arbitrator, apply for the determination of questions of Mauritian law to the Supreme Court.

John Beechey: Thank you very much.

Questions & Answers

John Beechey: I would like to invite Patrick to come and sit back upstairs, if you will, and take some questions. The floor is now open.

Mr. Ratan Singh: I am Ratan Singh, from India. There are a good number of English cases which say that whenever a serious allegation of fraud is made, it is for the party against whom such allegation is made to opt for a public trial. There are a series of cases on that line and, last year, the Indian Supreme Court has also relied upon one such judgment which says that: “whenever you have serious allegations of fraud against a party, it is for him to decide whether he wants to go for public trial, and if he opts for public trial, then the matter would not be referred to arbitration”. So this issue somehow missed the debate.

Matthew Gearing: Yes, I think if it had been the case, that my client had procured the 2011 Loan Agreement by fat brown envelopes worth of cash, I think I honestly would have been in quite a lot more difficulty because a lot of cases, and obviously, we are here under the Mauritian International Arbitration Act 2008, seek to draw a distinction between existence and validity; there is a reasonable argument in this case law to support it. So, at least out of England, to suggest that if you can produce to the Court, evidence, colourable evidence of fraud, you say that vitiates the agreement, you would have to show that it vitiates the agreement to arbitrate to be inseparable. But I think that if you could do that on a *prima facie* case, then I might have been in some difficulty.

Otherwise, if there was just an allegation of fraud surrounding the agreement itself and not specifically directed at the agreement to arbitrate, then in the ordinary course, that would need to proceed to arbitration. So, the allegation of fraud needs to be specifically directed at the agreement to arbitrate. It might have consequences later but that is not what we are talking about here.

Justice Bellur Srikrishna: The Supreme Court judgment, gentlemen, referred to in the above question, does not precisely say that you get up and make an allegation of fraud and that would be an end to arbitration proceedings.

Salim Moollan: I was a bit disappointed to see that learned counsel for the Claimant, versed as he is, in the laws of Militantis, assuming of course that

the *Travaux Préparatoires* are similar to those of another jurisdiction, failed to refer to the *Travaux*. And I think it is just a message I would like to get across, that it is something that ought to be used because great effort was taken by the Parliament of Militantis to provide that these *Travaux* have the same status. They have been compiled in order to assist with the interpretation of the Act. Paragraph 42, I believe, of the *Travaux Préparatoires* of Militantis, is quite helpful to your case, Mr. Gearing. In an initial assessment of whether there exists a very strong probability that the arbitration agreement is null, void, inoperative or incapable of being performed, the Supreme Court should not engage into a full trial or even a mini trial of the relevant issues, but should assess on a *prima facie* basis. The burden of proof for the party lies on the party to impugn the arbitration agreement and importantly, where doubt remains after a *prima facie* assessment, that doubt must be resolved in favour of referral to arbitration without a full trial or mini trial of the unresolved issues. I think Mr. Veeder would have been well advised to read those words before coming and taking our time on the podium.

John Beechey: I think you have got to remember that poor Mr. Veeder was simply the “brief”.

Mr. Babajide Ogundipe: My name is Babajide Ogundipe, from Nigeria. We recently had a number of cases fairly similar to the scenario that was painted before us. And what happened in that case was that the third party went to the Court and sued the two disputing parties in the arbitration and got an order from a Federal High Court in Nigeria, making a declaration that the entire arbitral proceedings were invalid because the arbitrators decided issues of tax law and constitutional law which, it was contended, the arbitrator panel was not able to decide. Actually, the issues were not arbitrated. And those decisions are going to take their way up to the Supreme Court. I was just wondering if the members of the panel had any views on that sort of situation. If it arose, how would they approach that problem?

Christopher Adebayo Ojo: I am aware that this case is still on-going and the tax authorities in Nigeria contended that tax matters and public policy are not for an arbitral panel to decide. So, I think it is best to wait for the reaction of the courts in Nigeria before taking a decision on that. That is my view.

Matthew Gearing: I wonder in that situation if when you are talking about tax, whether there would be a distinction between matters concerning public duty or collection of tax. But, separately what one often sees in concession agreements is tax concessions granted by the State to the investor. And what is often said is that those are matters of contract and I do not know what the position is in Nigeria, obviously. But in many situations, those issues would be seen to be arbitrable, because that would be essentially a contractual bargain between the investor and the State or a state entity concerning the terms on which the investment is made, and one of those terms is that for example, royalties are limited to a particular amount or whatever the tax agreement would be.

Mr. Babajide Ogundipe: If I could come back on that, if I may, with your permission, of course. The dispute in Nigeria had this characteristic. The contractual provisions were replicated in a statute, and that was where the problem arose. The statute had certain provisions and I was counsel in one of those cases and, the argument which was presented to the arbitrators was that it is all very well having those provisions in a contract, but when you have similar provisions or exactly the same provisions in a statute, the arbitrators are not in a position to give a decision that would bind everybody with regard to how the statute provisions are to be applied. The arbitrators, in my case, went against this, but that argument was taken to the Court and the Court accepted it.

Matthew Gearing: In that situation, why are the arbitrators giving a decision which binds everyone? Why are the arbitrators simply not giving a decision binding the parties?

Mr. Babajide Ogundipe: The argument was that it might be an *inter partes* agreement, I mean, it might be an *inter partes* decision. But, given the nature of this particular dispute, there was a similar dispute between 3 or 4 different companies. And to run the risk of having one panel giving one decision, applying the statute, and the tax authorities who were outside, taking completely different views on the situation and leaving the party with a situation where, whatever the arbitral award was, the tax authorities were able to say: "we do not agree and apply something completely different". So, the argument was, it was a total waste of everybody's time, let us have it decided in court.

John Beechey: Ladies and gentlemen, it is now my task to thank you for your patience and for your good humour, particularly Mr. Johnny Veeder

and Prof. van den Berg for intervening so splendidly, I am very grateful. I think the unruly Court is adjourned up here, so enjoy your lunch.

PANEL II

THE COURT'S ROLE IN SUPPORTING ARBITRATION DURING THE COURSE OF THE ARBITRAL PROCEEDINGS: A PRACTICAL APPLICATION

Introductory Remarks

*Prof. David A.R. Williams Q.C.**

Good afternoon everybody and welcome to the afternoon session.

I am from another small island nation, New Zealand. I am moderating the session as the representative of the President of the International Council for Commercial Arbitration, Professor Jan Paulsson, who is unfortunately unable to be here in person. Professor Paulsson, as the President of ICCA, sends his best wishes and asks me to note that ICCA strongly supports the development of the Mauritius International Arbitration Conference. As you heard from the Prime Minister this morning, ICCA has indeed chosen Mauritius as the venue for the 2016 ICCA Conference. On the subject of ICCA, you will have seen in your delegate packs, a little brochure about ICCA explaining its aims and objectives and inviting you to consider membership.

Turning to the business at hand, today's overall theme is the role of the courts in international arbitration and our sub-topic is the courts' supporting role during the arbitral proceedings, with particular reference to three matters.

First, the ability of a tribunal or a court to grant interim measures, a power which is the broad equivalent to interim relief and interim injunctions granted by a court. The second topic is arbitral challenges. And finally, something with which we all, either as arbitrators and counsel, have frequently to deal: applications for extensions of time.

We have before us in your papers a hypothetical problem raising various issues that arise in respect of those matters under the Mauritian International Arbitration Act. It is not lengthy. It has a very distinctive local flavour since it concerns a possible acquisition of a very valuable painting by the Mauritian Museum.

After a few introductory observations from me on the subject of interim measures, I will be handing over the podium to my friend and colleague, Mr. Reza Mohtashami, who is the author of this interesting problem. He will then lead our speakers in a free-ranging discussion on the practical questions arising from the problem.

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We have one hour and fifteen minutes to deal with the problem, to discuss its implications. Then a further thirty minutes when we shall encourage questions from the floor. When we reach that point, I will return to the podium again.

It is now appropriate to introduce our splendid panel of speakers and I begin with Reza Mohtashami, who is the author of the problem. He is an experienced practitioner and partner in Freshfields and has extensive experience in over 60 international arbitrations in various places around the world. He, as well as being counsel, sits as an arbitrator. He is with the Freshfields office in Dubai, in the United Arab Emirates and leads the firm's global arbitration practice in the Middle East.

And joining us on the panel, first is Judge Judith Kaye, former Chief Judge of the State of New York. She is presently focusing on arbitration and litigation. But of course, she is extraordinarily widely known for her extensive and impressive service on the highest State Court in New York, where she served for many years, first as a judge at that Court and then the Chief Judge.

Then we come to the Honourable Lord Hoffmann, whose biography in the brochure runs to three lines only; appropriately so because he is so widely known and respected. He was a Lord of Appeal in Ordinary from 1995 to 2009 and he is well known as, first, a famous commercial counsel at the Bar, and then for his stellar judicial career. Sitting in the House of Lords, he has authored numerous leading judgments in arbitration.

Then, we are privileged to have with us Ms. Lise Bosman who is an adjunct professor at the University of Cape Town, but more importantly for our purposes today, Legal Counsel of the Permanent Court of Arbitration. As many of you will know, and you will soon find out a lot more about it, the Mauritian International Arbitration Act 2008 has several provisions which bring in to the operation of the arbitral system the Permanent Court of Arbitration, and we are very grateful that Lise is with us here as counsel to the PCA to discuss the role of the PCA under this Act.

And last, but by no means least, is Ms. Anne-Sophie Jullienne, a barrister, of Mauritius. She is a member of the English, French and Mauritian Bars. She has extensive experience working for American law firms in London before returning here in 2010. She continues to specialise in commercial litigation and international arbitration. Likely, she is very important to our panel because she is the representative of the practising Bar in Mauritius and able to help us understand its present operation and how it will operate under the new international regime.

As I have said, we have three distinctive problems and the nature of the second topic, arbitral challenges, and the third, extensions of time, are probably quite well-known to all of us, whether it be in relation to court practice or arbitral practice.

The issue of interim measures is perhaps a little more challenging and the panel members thought it would be appropriate if I say a few broad general words about interim measures which is the first problem we will discuss.

As I am sure you know, an arbitral tribunal, like a court, may need to make orders during arbitral proceedings so as to require a party to act or refrain from acting a certain way until the conclusion of proceedings.

Such orders may include orders to protect assets, to maintain the *status quo*, to preserve evidence which may be needed at the hearing. And these orders have come to be known in the arbitral context as interim measures.

One crucial difference between the power of the courts and those of arbitral tribunals in making interim protective orders is that arbitral tribunals may only make orders against parties to the proceedings whereas the court is not so limited.

It is for this reason that the Mauritian Act, like most if not all national laws with which we are familiar, provides that the courts might make such orders against known parties and make other orders where, for one reason or another, the arbitral tribunal is unable to act.

A prime instance of that would be where the tribunal is yet to be appointed. What do we understand by interim measures? The Act itself contains a definition of interim measures and this, you may read for yourself in the Mauritian Act, in Section 21.

Interim measure means a temporary measure by which a party is required at any time before an award is made in relation to a dispute to do all or any of the following:

- (a) “[m]aintain or restore the *status quo* pending the determination of the dispute;
- (b) take action that would prevent, or refrain from taking action that is likely to cause current or imminent harm or prejudice to the arbitral process itself;
- (c) provide a means of preserving assets out of which a subsequent award may be satisfied;

- (d) preserve evidence that may be relevant and material to the resolution of the dispute; or
- (e) provide security for costs.”

The authority of the court in these limited circumstances to intervene is made clear by Section 6 of the Mauritian Act, which says that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure and for the court to grant such a measure.

Just a final word about the delicacy of the task of the court. The court should be acting to support arbitration, not to take it over. The Model Law and the Mauritian Act recognised, as I have said, that in some circumstances, an arbitration tribunal would be unable to act and it is necessary to make the court intervene.

The purpose of interim measures is not to encroach on the procedural powers of the arbitrators but instead to reinforce them and to render more effective the decision which the arbitrators will ultimately arrive on the substance of the dispute. It is a delicate question as to whether the court should intervene.

Alan Redfern in his treatise says that where the arbitral tribunal has the power to issue interim measures, it “will need to consider very carefully whether or not to exercise this power”,¹ and that in effect,

“the tribunal may have to make an overall assessment of the overall merits of the case, possibly at a very early stage of the proceedings to determine whether or not the claimant’s case is sufficiently strong as to merit protection. The tribunal must then consider whether by granting the relief sought, it would in effect be prejudging the result of the arbitration and so preventing one of the parties from pursuing a course of action that it was entitled to pursue.”²

So, I sum up by saying whether it is a court which has been called upon to intervene or the arbitral tribunal deciding whether to intervene, this is a sensitive area where great caution must be exhibited.

¹ L. W. Newman and R. D. Hill (Eds), *The Leading Practitioners’ Guide to International Arbitration* (New York: Huntington, 2008), p. 228.

² *Ibid*, p. 229.

With those introductory words on interim measures, I now invite Reza to come up and commence the discussion of the problems.

Presentation of the Practical Problem: The *Mauritian Art Case*

*Reza Mohtashami**

Good afternoon everyone. As David has said, the focus of our panel is on the court's intervention during the arbitration proceedings. This is a role that typically falls to the supervisory courts at the place of arbitration.

As you can imagine, the courts have multiple opportunities either to support or disrupt the arbitration.

In our panel, we will look at three separate scenarios which may well arise during the course of an arbitration and which call for the intervention of the supervising authorities. The general background to the hypothetical problem is in your conference materials and then there are three sets of discrete facts for the three scenarios.

So, let me start off by just quickly reading the background to the dispute for those of you who do not have a copy at hand or would prefer to hear or listen through the interpretation.

An international art dealer (*Dealer* or *Respondent*) based in Europe discovers that one of her pieces is an extraordinary and valuable work of Mauritian art. There is a great deal of local and international attention over this discovery. However, recognising the work's value to Mauritian heritage, the Dealer decides to sell the artwork to the National History Museum of Mauritius (*Museum* or *Claimant*) at a significantly reduced price. The dealer enters into a sale and purchase agreement (*SPA*) with the Museum in October 2012.

The SPA contains a dispute resolution clause with the following three key provisions:

1. *Any dispute arising out of or in connection with this SPA shall be settled by final and binding arbitration under the 2012 Arbitration Rules of the International Chamber of Commerce (ICC), including Appendix V which incorporates the Emergency Arbitrator Rules.*

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2. *The number of arbitrators shall be three. Each party shall nominate one arbitrator for appointment by the ICC Court of Arbitration, and the two party nominated arbitrators shall nominate the President of the Tribunal.*
3. *The seat of arbitration shall be Mauritius.*

Shortly after the conclusion of the SPA, an anonymous art collector (**Collector**) outside of Mauritius learns of the discovery and approaches the Dealer with a highly lucrative offer to buy the artwork. Effectively, the collector is trying to bypass the Museum in buying the art. Abandoning her fleeting commitment to the artistic heritage of Mauritius, the Dealer now wants to sell this unique work of art to the Collector and retire to the Seychelles. She informs the Museum that she will no longer honour her contractual obligation under the SPA to sell the artwork to the Museum.

I. INTERIM MEASURES

A. Key Facts

The Museum wishes to enforce the SPA and therefore commences arbitral proceedings, also seeking interim relief from an emergency arbitrator pursuant to Article 29 and Appendix V of the ICC Rules. At the same time, the Museum wants to block the possibility of the Dealer selling the artwork to the international Collector and therefore seeks an interim injunction against the Dealer to block any sale to third parties by applying to the Mauritian courts pursuant to the *Mauritius International Arbitration Act (MIAA)*.

B. Relevant Provisions of the MIAA

Section 5(1):

Where an action is brought before any Court, and a party contends that the action is the subject of an arbitration agreement, that Court shall automatically transfer the action to the Supreme Court, provided that that party so requests not later than when submitting his first statement on the substance of the dispute.

Section 6(1):

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the Supreme Court or a Court in a foreign State an interim measure of protection in support of arbitration and for the Court to grant such a measure.

Section 23(1):

The Supreme Court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their juridical seat is Mauritius...and it shall exercise that power in accordance with the applicable Court procedure in consideration of the specific features of international arbitration.

Section 23(2):

Unless the parties otherwise agree, the power to issue interim measures under subsection (1) shall be exercised in accordance with subsections (3) to (6).

Section 23(3):

Where the case is one of urgency, the Court may, on the ex parte application of a party or proposed party to the arbitral proceedings, make such order as it thinks necessary.

Section 23(4):

Where the case is not one of urgency, the Court shall act only on the application of a party to the arbitral proceedings made -
(a) on notice to the other parties and to the arbitral tribunal; and,
(b) with the permission of the arbitral tribunal or the agreement in writing of the other parties.

Section 23(5):

The Court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by

the parties with power in that regard, has no power or is unable for the time being to act effectively.

Section 23(6):

Where the Court so orders, an order made by it under this section shall cease to have effect on the order of the arbitral tribunal or of any such arbitral or other institution or person having power to act in relation to the subject matter of the order.

II. CHALLENGING AN ARBITRATOR

A. Key Facts

The Museum has successfully enjoined the Dealer from transferring the contested artwork to the Collector. The arbitration continues and the parties turn to constituting the arbitral tribunal.

The Museum nominates as arbitrator a lawyer practising in Mauritius. In accepting the nomination, the arbitrator discloses a connection to the Claimant, namely that he had recently (in the past 12 months) advised the Museum with respect to a dispute in connection with an unrelated matter, which is now concluded.

Thirty-five days after the disclosure made by the Claimant's nominated arbitrator, he is challenged by the Dealer on the basis of a lack of independence and impartiality under Article 14.1 of the ICC Rules. The Museum resists the challenge on the basis that the challenge is untimely under Article 14.2 and therefore inadmissible under the ICC Rules. The nominated arbitrator also resists the challenge and so the matter is referred to the ICC Court.

The ICC Court rejects the challenge without giving reasons. The Respondent wishes to appeal the ICC Court's decision.

B. Relevant Provisions of the MIAA

Section 14(1):

Subject to subsections (3) and (4), the parties are free to agree on a procedure for challenging an arbitrator.

Section 14(3):

Where a challenge under any procedure agreed by the parties or under the procedure set out in subsection (2) is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the PCA to decide on the challenge.

III. EXTENSION OF TIME LIMITS

A. Key Facts

With the arbitral tribunal constituted, the parties' written pleadings and evidence exchanged, the proceedings are approaching the final merits hearing. One month before the hearing is scheduled to commence, the Dealer notifies the tribunal and the Museum of a change of counsel. The Dealer applies to the tribunal for an order to postpone the hearing by a few months and to allow the Dealer to submit an amended defence. The application is made on the ground that maintaining the existing schedule would deprive the Dealer of a full opportunity to present its case.

The Museum resists the application which it views as a dilatory tactic and urges the tribunal to maintain the existing hearing dates. The arbitral tribunal agrees and rejects the application of the Dealer on the basis that the procedural timetable, including the hearing dates, had been agreed between the parties and that there is no legitimate justification to depart from that agreed procedure. The Dealer views the tribunal's ruling as a violation of its due process rights and wishes to challenge the decision.

B. Relevant Provisions of the MIAA

Section 30(1):

Unless the parties otherwise agree, the PCA may extend any time limit agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in this Act as having effect in default of such agreement, including any time limit for commencing arbitral proceedings or for making an award.

Section 30(3):

The PCA shall not exercise its power to extend a time limit unless it is satisfied that –

- (a) any available recourse to the tribunal, or to any arbitral or other institution or person vested by the parties with power in that regard, has first been exhausted; and*
- (b) a substantial injustice would otherwise occur.*

Section 30(4):

(4) An order under this section –

- (a) may be made whether or not the time limit has already expired;*
- (b) may be made on such terms as the PCA thinks fit; and*
- (c) shall not affect the operation of any applicable rule of limitation or prescription.*

So that is the simple background to the hypothetical problem, and now we turn to the first of the three scenarios.

Response to the Practical Problem: The *Mauritian Art Case*

Moderator: *Prof. David A.R. Williams Q.C.*

Rapporteur: *Reza Mohtashami*

Panel: *The Rt. Hon. The Lord Hoffmann, P.C.**
*Judge Judith S. Kaye***
*Anne-Sophie Jullienne****
*Lise Bosman*****

I. INTERIM MEASURES

Reza Mohtashami: Turning to the first of the three scenarios, here are the facts. The Museum wishes to enforce the SPA and therefore commences arbitral proceedings under the ICC Rules, and at the same time seeks interim relief from an emergency arbitrator under Article 29 of the ICC Rules of Arbitration. Now, at the same time, the Museum wants to block the possibility of the dealer selling the artwork to the international collector, while the ICC is in the process of setting up the tribunal. And therefore, the dealer wants to approach a court of competent jurisdiction to get an interim injunction as well. So, those are the facts for the first scenario.

I should add that you all have a copy of the Mauritian International Arbitration Act 2008 (hereinafter referred to as the "Act") with you in your pack as well as a copy of the ICC Rules of Arbitration, which you may want to refer to as we go along.

Let us turn to our debates amongst the panellists. Anne-Sophie, can you first talk us through the issue of whether the Mauritian courts have the power to order an injunction sought by the Museum, which is likely to

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**** Senior Legal Counsel, Permanent Court of Arbitration (The Hague); Executive Director of the International Council for Commercial Arbitration (ICCA); Adjunct Professor in Commercial Arbitration at the University of Cape Town.

be an *ex parte* application, I would have thought, and, if so, which is the competent court in Mauritius?

Anne-Sophie Jullienne: The starting point is to be found in Section 38 of the Act, which makes it clear that the Court shall intervene in matters relating to the Act only to the extent that it is widely provided so in the Act. So this is a provision which is in line with modern international arbitration legislations and which aims at keeping the courts away from arbitral proceedings and having recourse to the courts only to the extent that it is strictly necessary and that the tribunal itself cannot act or cannot act effectively. So, the first question is: is there a specific provision in the Act which provides for interim remedies that can be obtained before the Court?

Section 23 (1) states:

“The Supreme Court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their juridical seat is Mauritius, as a Judge in Chambers has in relation to Court proceedings in Mauritius, and it shall exercise that power in accordance with the applicable Court procedure in consideration of the specific features of international arbitration.”

So, the Court’s general power to grant interim measures is contained in that Section. There is a specific provision regarding *ex parte* measures, which is at subsection (3), and it says that the Supreme Court may grant an *ex parte* order, but only to the extent that there is an urgency. This is the first step. But there are a number of strict conditions that need to be complied with thereafter for the Supreme Court to be able to grant that *ex parte* order.

The relevant section is subsection (5), which states that:

“The Court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the parties with power in that regard, has no power or is unable for the time being to act effectively.”

So, it is really the Court here acting in support of arbitration because the procedure that has been put in place or the circumstances of the case means that the tribunal itself cannot act or cannot act effectively.

In our scenario, there is no arbitral tribunal constituted as of yet, but the parties have agreed to the ICC Rules and to Appendix V, which provides an express right to the parties to appoint an emergency arbitrator. I will pass this question onto the panel in a minute, but before I get there, a number of questions need to be answered. Does the emergency arbitrator appointed by the parties under the ICC Rules have the power to grant an interim measure? An *ex parte* measure? And if that is the case, is that measure going to be effective?

Reza Mohtashami: Anne-Sophie, which court here in Mauritius should you apply to if you want an interim injunction?

Anne-Sophie Jullienne: You will go to the Supreme Court and the Act provides that such an application will be heard by a panel of three judges. This is the current state of the law.

Reza Mohtashami: Turning to our judges, if I may: Judge Kaye and Lord Hoffmann.

I would like to ask you to put yourselves in the position of the Museum's Counsel. You are trying to get an injunction quickly and yet you have potentially a number of options before you. You have got the arbitral tribunal or the emergency arbitrator, in this case, pending the constitution of the tribunal itself. You have got the Mauritian courts, the Mauritian Supreme Court which would be competent; you have also got the court in the country where the European dealer is based. It does not matter which European country, let us take England for argument's sake.

Could you, starting perhaps with you Lord Hoffmann, talk us through the various considerations in favour of these different options and tell us where you would end up from a tactical perspective as the Museum's Counsel?

Lord Hoffmann: Well, the international art dealer, as Reza said, we are not told where she is. She is thinking of retiring to the Seychelles when she has got the money. So, let us assume she likes offshore islands and she is living in Jersey. First of all, is this a case for interim relief?

Plainly it is, because we are not told who the anonymous purchaser is, of course, he is anonymous. But if he is living in some republic where the rule of law is unknown, then if he has got the item, you are never going to see it again, and he could be given it at any moment. So, obviously one needs urgent action.

Secondly, this is not a case in which it could possibly be said that a court, in granting interim relief, would be pre-empting any decision in the arbitration.

On the contrary, granting interim relief may be the only way of saving the arbitration because if the item has gone off to some distant place, there is no point in going on with the arbitration, because the Museum in Mauritius wants the thing; it does not want compensation in money. I mean, it will want compensation in money, if necessary, but what it really wants is the thing and the only way to do that is to get specific performance.

Then comes the question, as this is a case for interim relief, so, where do we go?

The choices are, first of all, there is an emergency arbitrator appointed under the ICC Rules. Well, the trouble with the ICC Rules is that they do not allow for an *ex parte* application. You have to give the other side an opportunity to present their case before the emergency arbitrator makes an order.

And that is no good either because this is rather like a *Mareva* injunction; you do not want the dealer to know that you are applying for an order until the order is in place. So you need an *ex parte* order, so that rules out the ICC: well, perhaps by ICC standards it is pretty quick, but it looks like a fairly leisurely timetable that has been set up .

So you have to go to a national court, but which national court to go to? Remember, these interlocutory injunctions are not enforceable in another jurisdiction. They are not like final judgments where you can get enforcement in another jurisdiction. They only operate in the country in which they are made. So, you can go to the Mauritius court, but there is a risk there that the dealer may say: “Well, all right, I will never go for a holiday in Mauritius and I don’t care what the Mauritius court says.”

The best thing is to go to the court where the dealer is living; that is likely to be most effective. So, my advice would be, to ring up a lawyer in Jersey and say: “Go around this afternoon to the court and get an *ex parte* injunction, and then we will proceed from there”.

Judge Judith Kaye: Since you addressed the questions to the judges, I will address the question in that manner.

First, I want to add that I am struck by the coincidence that many of the speakers here are from “small” islands. We, as mentioned earlier, have Professor David Williams, who is from the island of New Zealand; and we have Lord Hoffmann, who is from England and has just referred to getting a lawyer in Jersey. And, of course, you have me – from the island of Manhattan.

In fact, making my way to Mauritius, I happened to read a book about Manhattan, which I recommend to all of you, called *The Island at the Center of the World*. But, looking around at all the delegates from all over the world here today, I am willing to concede that the book is wrong today because right now the island at the centre of the world is Mauritius.

Next, I am so pleased to speak just after Lord Hoffmann, because I now have the unique privilege – which I do not get everyday – to affirm Lord Hoffmann's remarks.

This question really goes to the heart of this panel's topic – the court's role in supporting arbitration during the course of arbitral proceedings. And the hypothetical presented here adds urgency to the court's role because it appears that even after a contract is signed to return a treasured piece of Mauritian heritage back to Mauritius, there is still a chance that the art will be put on the block, as it were, and lost to the Mauritian people. And so I concur with Lord Hoffmann's analysis – which is to find out where the dealer is (Jersey) and get a Jersey court to stop the transfer of the piece pending arbitration, because that court has the most immediate power over the dealer.

But that said, sometimes you may feel that the court where the dealer is might not be the best place to bring such an action. This usually happens when the relevant courts are reluctant to issue equitable relief, or when the courts may not be granted the power to provide interim relief in aid of arbitration. So you always need to look at the law of the place you are going to be.

So, this problem also gives other options. First, you can go to the ICC's emergency arbitrator. Now, I do want to add that the enforceability of an emergency arbitrator's award by a court is somewhat of a loaded question; while I suspect most jurisdictions would enforce such an award, it may not be considered a "final award" for the purposes of the New York Convention. This appears to be an open question in the United States.

Next, of course, you may seek relief from relevant courts, such as the courts of the seat of arbitration. I hasten to add that for New York-venued arbitrations, statutory authority for interim relief in aid of arbitration is found in our Civil Practice Law and Rules, which, in Section 7502(b), grants courts the authority to issue interim relief in aid of arbitration, and the federal courts have found that they have similar powers under the Federal Arbitration Act.

But why stop there? If the issue is important enough, and you have the financial resources to bear it, why not make an application to all of these places – Jersey, the emergency arbitrator *and* the seat of arbitration?

But the key concern for me, and I think for many judges, when we face such an application will be to enforce the parties' agreement to arbitrate. When you have provided for interim relief in the sale of a unique object, I would suspect that most New York judges, like many of my compatriots around the world, would issue interim relief pending the parties' agreement upon dispute resolution – here, ICC arbitration.

Reza Mohtashami: From an enforcement perspective, which of our three options would you consider to be more enforceable in Jersey? So let us take Jersey. You are trying to enjoin a dealer based in Jersey. Would you find it easier to enforce an order from an arbitral tribunal or an emergency arbitrator for that matter, or from the Mauritian courts? Or should we adopt Judge Kaye's suggestion of a belt and braces approach of doing both?

Lord Hoffmann: There is no question of a Jersey court or I think any other court enforcing an order of the Mauritian court. Courts do not enforce each other's interlocutory orders, so that is out.

The order of the emergency arbitrator would be enforced but it takes far too long to get one *ex parte*. So, that is the disadvantage of that one.

Reza Mohtashami: Thank you. Lise, turning to you now, from a Southern African perspective, what powers would the court have if the seat of our arbitration was not Mauritius but it was, for example, Namibia or South Africa?

Lise Bosman: There is the question of variation within the region. Of the 15 Member States of the South African Development Community, SADC, only four have, to date, adopted the UNCITRAL Model Law.

Mauritius, obviously we know about, and the others are Madagascar, Zambia and Zimbabwe, all of which have adopted the 1985 version of the Model Law, which do give both the courts and arbitrators the possibility of issuing interim relief.

Two other countries in the region, Angola and Mozambique, do have fairly modern arbitration statutes that are broadly Model Law compliant.

But, what is remarkable in looking at the region as a whole is that there are some six countries that are still using very outdated pieces of legislation that are based on much older versions of the English Arbitration Act 1996. So, for instance, South Africa, Namibia, Botswana and Malawi have Acts based on the 1950 English Arbitration Act, Lesotho's 1980 Act is

based on the 1950 and 1979 English Arbitration Acts, and Swaziland distinguishes itself by having a 1904 statute based on the 1889 version.

Now, all of these pieces of legislation do confer powers on the courts that we generally regard to be fairly interventionist in the context of modern arbitration statutes. These powers also include the power to issue orders for interim relief. And they do not give exactly the same power to arbitrators in all these jurisdictions. That power can be conferred by the parties in the context of an arbitration agreement or a reference to arbitration rules that contain that power. So, in arbitrations based in those jurisdictions, what one would do in practice, is to go straight to the courts.

Reza Mohtashami: Thank you for that. Turning to our judges again, a suggestion has been made that cross-examination of witness evidence proffered in support of an application for an interim injunction be permitted to the party defending the application. What is your view on that?

Is this something that you have countenanced in the past or that you see as being feasible in circumstances where urgency really is the key?

Lord Hoffmann: It can be done and one could possibly, I am not sure, but possibly construct the scenario in which it would be appropriate, but it seems to me that in 99 cases out of 100, it is perfectly useless to have cross-examination at the interim measures stage because at the interim measures stage you are not going into the merits of the dispute. The whole point of the interim measures is to preserve the position without deciding the merits of the dispute.

So, you are not going to make any finding on who is telling the truth after a cross-examination. All that you are interested in is whether there is an arguable case, one side or the other. A cross-examination would generally show that there is something to argue about. So, the answer therefore is usually, almost invariably, no, it is a waste of time.

Judge Judith Kaye: Again, I am very glad to affirm Lord Hoffmann's remarks. The very premise that we are operating under is that unless a court steps and prevents a private sale which appears to be in violation of a prior sales contract with another party, the prior sales contract is simply going to become a nullity. And faced with this situation, while the right to be heard is fundamental, if the opportunity to exercise that right has not yet arisen, a temporary order can still be granted. So, while there might possibly be an argument for cross-examination, the word "counterintuitive" comes to mind.

Reza Mohtashami: Thank you, Judge Kaye. Anne-Sophie, turning to you now. Let us assume that the Supreme Court of Mauritius has granted an interim injunction against the dealer, what then happens to that injunction as the arbitration proceedings take their normal course as the tribunal is constituted and starts considering the merits?

Anne-Sophie Jullienne: Because the rationale behind the Act is to give powers to the court in support of the arbitration process rather than giving powers to the court in the place of the tribunal, Section 23(6) provides that the order of the Supreme Court will cease to have effect upon the order of the arbitral tribunal or the body in which the powers are vested.

This means that once the arbitral tribunal is constituted, then the parties will, in practical terms, ask to continue or discontinue the injunction. This is also in line with the attempt in the Act to limit the intervention of the court.

Reza Mohtashami: Before moving on, among the panellists, would you agree that this is an occasion where an injunction is warranted pending the constitution of the tribunal? Or would anyone disagree with that? No? I dare say, that is the right answer.

II. CHALLENGING AN ARBITRATOR

Reza Mohtashami: Moving on to the second scenario: Here, the Museum has successfully enjoined the dealer from transferring the contested artwork to the collector and the arbitration continues.

The parties turn to appoint the tribunal. The Museum nominates its arbitrator, a lawyer practising in Mauritius who, in accepting the nomination, discloses a connection to the Museum, namely that he had in the past 12 months advised the Museum with respect to a dispute in connection with an unrelated matter. That matter is now concluded, so the disclosure is made. Then, 35 days after that disclosure, by the Museum's nominated arbitrator, that arbitrator is challenged by the dealer on the basis of a lack of independence and impartiality under the grounds set out in Article 14.1 of the ICC Rules.¹

¹ Article 14 of the ICC Rules of Arbitration provides:

- (1) A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
- (2) For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or

The Museum resists the challenge on the basis that the challenge is made out of time because under Article 14.2, challenges to be admissible have to be brought within 30 days of the disclosure.

The nominated arbitrator himself also resists the challenge which means that the matter is referred to the ICC Court. The ICC Court rejects the challenge and, in its usual fashion, does not provide reasons for its decision. The dealer is not happy with the result and now wishes to consider his options to see whether he can somehow appeal the ICC Court's decision. So those are the facts.

Turning to you Anne-Sophie, under the Mauritian International Arbitration Act, what are the grounds on which arbitrators may be challenged for independence or impartiality or otherwise? And is there a right of recourse open to the Museum after having lost its challenge before the ICC Court?

Anne-Sophie Jullienne: Section 13(3) of the Act provides that a challenge can be made only if circumstances exist that give rise to justifiable doubts as to the impartiality or independence of the arbitrator or if he does not possess qualifications agreed to by the parties. This is what is contained in the Act but there is also a provision in the ICC Rules which is not inconsistent with subsection (3) of the Act and it provides that a challenge of an arbitrator, whether for an alleged lack of impartiality or independence or otherwise, shall be made by submission to the secretariat specifying the facts and circumstances on which the challenge is based.

These are the grounds on which one can rely to challenge an arbitrator. As for the procedure, would you like me to deal with the procedure under the Act or under the ICC Rules?

Reza Mohtashami: Under the Act, please. What rights of recourse are available to the Museum under the Act?

Anne-Sophie Jullienne: A party, failing an agreement regarding, well, if there is no other procedure agreed between the parties as to the challenge, a party who intends to challenge an arbitrator shall, within fifteen days after

confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.

- (3) The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

becoming aware of the circumstances that give rise to the challenge, shall send a written statement of the reasons to the arbitral tribunal.

And unless the arbitrator withdraws or the other party agrees that he ought to withdraw, then we need to look at the provision of Section 14(3) which states:

“Where a challenge under any procedure agreed by the parties or under the procedure set out in subsection (2) is not successful, the challenging party may, within 30 days after having received notice of the decision rejecting the challenge, request the PCA to decide on the challenge.”

So, if the challenge was not successful before the tribunal itself, then there exists recourse to the PCA. The powers granted to the PCA here are statutory powers.

And, I would like to draw your attention to a word that is in Section 14(3) which may seem confusing at first, and I will repeat the beginning:

“Where a challenge under any procedure agreed by the parties or under the procedure set out in subsection (2) is not successful, the challenging party may, within 30 days...bring a challenge to the PCA.”

And there is the word ‘may’ in there, and at first, it may seem a bit confusing because we may ask ourselves: does this mean that we have an option to go to the PCA or not? But it seems quite clear to me that it is not an option and if there is a challenge, then the challenge ought to be submitted to the PCA. The reason why there is the word ‘may’ here is simply because if the procedure has not been followed then one can always choose not to challenge the arbitrator or not to make a challenge on the basis that the procedure has not been complied with.

Reza Mohtashami: Thank you, Anne-Sophie. Just to be clear, in the context of an ICC arbitration like the one we are facing in our hypothetical problem, there already is a procedure agreed amongst the parties in dealing with challenges and that is the procedure set out in the ICC Rules under Article 14 whereby challenges under the grounds of lack of independence or impartiality are heard by the ICC Court. So that is the agreed procedure between the parties. Then, what the Mauritian International Arbitration Act

in Section 14(3) does is, as Anne-Sophie has said, give a right to bring that challenge before the PCA if the initial challenge before the ICC Court is unsuccessful.

Lise, as a representative of the PCA, I suspect you know what the next question is going to be. First of all, the PCA, for those who do not know, stands for the 'Permanent Court of Arbitration' based in The Hague. Lise, would you like to run us through how the PCA will practically deal with such a challenge?

There you are, sitting in your office in the Peace Palace. You receive an e-mail from the parties headlined "Application under Section 14 of the Mauritian International Arbitration Act," what then happens?

Lise Bosman: Perhaps it is worth just dwelling for a moment on what the PCA, the Permanent Court of Arbitration, already does, for those of you who do not know. As Reza said, the PCA is based in The Hague in the beautiful Peace Palace and now has an office and a representative in Mauritius. And it administers a large number of cases all involving at least one State.

Since 1976, the PCA has also performed a number of functions under the UNCITRAL Rules in *ad hoc* arbitrations, including – in his capacity as the Appointing Authority – the PCA Secretary-General dealing with challenges to arbitrators. So, there is already a depth of experience at the PCA on this subject matter.

As you would have seen from looking at the Mauritian Act, the procedure for dealing with a challenge appeal, what the PCA would do, is not actually set out in the Mauritian Act, with the exception of there being a 30-day time limit to file a request.

So, in the absence of an agreement by the parties about how to deal with it, what the PCA would do, would be to invite comments from the parties and the challenged arbitrator, usually in two rounds of comments.

We would consider any reasons provided by the first decision-maker on the challenge issue, or by the co-arbitrators if they had been the first deciding authority in the first instance; apply the relevant standards in the Act and in the contract; and then try and issue the decision as quickly as possible to make sure that the arbitration is not delayed in any way.

Reza Mohtashami: Two follow-up questions, Lise: First, would the PCA be giving reasons for its decision; and second, if there are reasons, will those reasons be published?

Because here, the PCA is effectively stepping into the shoes of the Mauritian judiciary. And this has broader consequences, it seems to me, for

the development of Mauritian law than just the particular dispute in this particular arbitration.

Lise Bosman: As far as reasons are concerned, again the Act is silent on this. But the PCA's presumption would be in favour of giving reasons. So, our practice would be to ask the parties whether they would like to receive reasons for the challenge decision. If both parties say that they are not interested, then we would not do so. But if one of the parties says that it would like to receive reasons, then the PCA would issue a reasoned decision.

As to the publication of those decisions, what we may well consider doing in going forward is publishing redacted versions of those challenge decisions. This could perhaps be done in the context of our annual report where we already publish redacted reports on a number of the other decisions taken by the PCA Secretary-General as Appointing Authority, or alternatively in the context of a compilation of challenge decisions.

What we would not do, for instance, is immediately post the reasoned decision on our website, even if redacted, because it would be too easy to actually identify that decision with particular parties in an arbitration that might well be a confidential arbitration.

But we would be considering very seriously publishing in compilation form, a redacted version of those challenge decisions.

Reza Mohtashami: Is there any movement towards posting on the PCA's website some paper that explains the procedure that the PCA will adopt when it receives a challenge decision? It has been very helpful to have you on the panel and explain to everyone what the PCA would do in practice but, as you said, this is not set out in the Act, nor is it set out anywhere else. So, I am just wondering whether there is value to having that additional transparency in the PCA, setting out somewhere what practice it would likely adopt?

Lise Bosman: There is already a lot of information on the PCA website. There is a special page devoted to the Secretary-General's functions under the Mauritian Act, at: www.pca-cpa.org/Mauritius. At least some of the procedures that I have mentioned now are set out on the website already.

Reza Mohtashami: Turning to Lord Hoffmann and Judge Kaye, the Mauritian Act, in providing this right of recourse to the PCA instead of the Mauritian courts in this case, while providing an additional right of recourse

after the administering arbitration institution has had its say, follows the scheme of the UNCITRAL Model Law adopted here by numerous countries including England. But that is not a universally adopted scheme; so France, for example, does not allow the second bite to the apple and I would be interested to have your views as to whether you think this is an important right of the parties or whether it is undue interference in the arbitration process by the courts, or supervising authorities, I should say, in the case of the PCA.

Lord Hoffmann: What you have got here is the need to balance two objects; you cannot have both of them in full measure. On the one hand you want to avoid any possibility, or you want to avoid as best you can, the possibility that one of the parties will be disgruntled because he feels that one of the arbitrators was not entirely impartial. On the other hand, you do not want to give people the opportunity to hold up the arbitration by proceedings in which they are being picky about who the tribunals should be. So you have got to choose there, you have got to strike a balance. It may be said that in giving a right to go to the PCA as well as the procedure before the ICC, you are over-egging the pudding and really, you ought to be satisfied with one shot at challenging the arbitrator. I think I would probably be inclined to that view myself but I can see there are arguments on the other side as well.

So yes, what I do think though, although I must defer to Anne-Sophie here, because it is not for me to construe the Mauritian Act, but I do think that on the proper reading of this Act, once you have gone to the PCA, that is it. There is no further recourse to a court. And even if there were, I cannot imagine that any court would interfere at that stage when you have had two goes at trying to get the arbitrator challenge.

Judge Judith Kaye: I think, on this issue of balancing the avoidance of the possibility of bias against holding up an arbitration, that overwhelmingly the courts in the United States would come down on the side of upholding the arbitration, not stepping in, non-intervention, non-interference, both in the Federal Arbitration Act 1925 and in State law. In fact, we would stay out of it until the arbitration be resolved.

Only then, I think, when an award has been issued and has been presented to the U.S. court for confirmation, enforcement or *vacatur*, would a U.S. court normally step in. In the United States, we do think that it is important for our arbitrators to be neutral and impartial (but always considering that arbitration is meant to be an efficient and effective procedure for dispute resolution). And the standard the United States applies is the standard established for determining arbitrator bias, at least in

the context of a domestic award, which is established by our Federal Arbitration Act, which provides that a court may vacate an award if it was “procured by corruption, fraud or undue means” or “[w]here there was evident partiality...in the arbitrators.”

As our Supreme Court has explained its understanding of judiciary ethics – a tribunal not only must be unbiased but also must avoid even the appearance of bias. But even in that light, we are also concerned with the efficiency of the arbitration proceedings and the enforcement of the award. For example, there was an article called the “Gutter Game” that appeared recently in one of our legal publications, explaining how these issues can be abused, and we are aware of that.

And so, U.S. courts are divided on what is “evident partiality.” The Second Circuit, for example – which is the highest federal appellate court for New York – has said that a party trying to vacate an award for “evident partiality” must show *more* than just the appearance of bias.

“Evident partiality” exists where a reasonable person would have to conclude that an arbitrator was partial to one party of the arbitration. And that is a high standard to meet. The Second Circuit has said that the arbitrator is not held to the standard of a judge, who must avoid the even mere appearance of bias. In contrast, some other U.S. courts have taken the opposite approach – requiring arbitrators to satisfy our judicial standards of ethics, and thus finding “evident partiality” when circumstances manifest an appearance of bias, but in New York, it is frankly a tough standard to meet.

Just incidentally, I should mention that I served on the New York Court of Appeals – our State’s highest court – for 25 years, three months, 19 days and 12 1/2 hours! The entire time I was there, the issue of arbitrator bias never came in front of the Court – but it is starting to raise its head, I understand, before the Court now. So I just missed that boat.

And I also have some statistics. Of the motions for *vacatur* decided in 2010, only 13.9 per cent were successful.

But, to go back to your question, as Lord Hoffmann mentioned, this is about striking a balance. In this case, the U.S. courts would let the arbitration proceed, and deal with bias and partiality issues (if any) after an award was rendered. We just should not mess around with the arbitration ongoing.

Lord Hoffmann: There are cases, in which to abstain from intervention during the course of the arbitration on the question of impartiality is not doing the parties a favour. I just had an application for costs in an ICC arbitration in which the successful party has put in a bill for USD 50 million costs.

Now, if you are going to let an arbitration on that scale go ahead on the basis, "well, come back at the end and we will set aside the award," I do not think that is doing the parties a favour.

But on the other hand, there are these very strong considerations that Judith has said against the court giving any indication that it is willing to hold up the arbitration to decide these questions.

That is why I think Mauritius has got it right by having a provision that if you want to challenge, challenge now. You can have two goes at it; you can go to the PCA but that is it. At that point, it cannot afterwards subsequently be challenged. That seems to be a sensible sort of system. As I say, maybe I would not be inclined to allow the PCA leg of it, but nevertheless, there ought to be some procedure not having to go to the court, internal procedure under which that challenge can be disposed of finally in an early stage.

Reza Mohtashami: Anne-Sophie, let me turn to you to see whether you want to reply to any of that. I also have a follow-up question. If the PCA, in our hypothetical problem, the dealer goes to the ICC Court, loses at the ICC Court stage, then makes another challenge to the PCA under the Act, loses that challenge, is that the end of the story or is there scope for the Supreme Court to get involved in Mauritius?

Anne-Sophie Jullienne: I agree with Lord Hoffmann that the involvement of the PCA at that early stage in the proceedings must be so as to avoid going through a full arbitration proceeding and thereafter challenging the award. I agree that this must be the rationale and one with which I agree.

However, there is a provision in the Act, that is, Section 19(5) which deals with the decisions of the PCA and it says: "*Subject only to the right of recourse under section 39 against awards rendered in the arbitral proceedings,...*" – Section 39 provides for the limited grounds on which one can appeal an award – "*...all decisions of the PCA under this Act shall be final and subject to no appeal or review.*" So, once you have a decision, it is clear that you cannot appeal it at that point.

But it is arguable that once you have your final award, you could potentially, I think it is most unlikely that you would get to that point, but a reading of subsection (5) does say that it is subject to the recourse under Section 39, which provides that you can set aside, if there is an irregularity in the procedure for appointment or the composition of the tribunal. This is at Section 39(2)(iv) of the Act.

Lord Hoffmann: What Section 39(2)(iv) says is, the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with this Act. But my point is, it was in accordance with the agreement. So I cannot see what is the basis of a challenge under that provision. And that seems to me a very sensible law to have.

Reza Mohtashami: Let me try part of my question again, which is: “is there any scope for the Supreme Court’s involvement at all when it comes to challenge decisions, taking Lord Hoffmann’s point that it is unlikely that a challenge to the award relating to the challenge of the arbitrator under Section 39 is likely to be successful?”

Anne-Sophie Jullienne: I am going to give you an example of the case that I have been told, though, I am not familiar with all the circumstances of the case. It is a recent Mauritian case. Apparently, the arbitration started as institutional in accordance with institutional rules, but then it was agreed that it would proceed on an *ad hoc* basis. So, the institutional rules were put on one side, as I understand it, and one of the parties proceeded with appointing an arbitrator without seeking the consent of the other side. And that arbitrator proceeded as though he had been vested with the powers to deal with that arbitration.

What the applicant did in that case was to seek an *ex parte* injunction from the Supreme Court. The *ex parte* injunction was granted and never got to the point where it was made *inter partes* because the matter was settled in the meantime. I think that is an interesting case which brings together the question of interim remedies and that of challenges to arbitrators although we are not strictly speaking, here, of a challenge to an arbitrator. We are talking more about an irregularity in the procedure for appointing arbitrators.

But that as well, is covered in the Act under Section 12(4): (“Appointment of arbitrators”) which states that:

“Where, under an appointment procedure agreed upon by the parties –

- (a) a party fails to act as required under that procedure;

- (b) the parties, or any arbitrators already appointed, are unable to reach an agreement expected of them under that procedure; or
- (c) a third party, including an arbitral institution, fails to perform any function entrusted to it under that procedure,

any party may request the PCA to take any necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.”

So if the appointment procedure fails, you can apply to the PCA to procure the appointment.

Here, we are dealing with appointment of arbitrators and, in my view, this is really a question that is of the realm of the PCA. But the applicant in that case felt that because the arbitrator had proceeded as though he had been vested with those powers, that it justified the urgency of obtaining an *ex parte* measure.

The question that I will raise here is: “was it really justified to have gone to the Supreme Court on the basis that if we have remembered the test set out for interim remedies, you have to show urgency for *ex parte* measures but you also have to show that the body that would otherwise be vested with these powers did not have the power to deal with it or would not have been able to deal with it effectively?” I think there is no doubt that the PCA had the power.

The question therefore becomes one of effectiveness. Was there an issue as to, maybe, the fact that the PCA could not have dealt with it in a timely manner? I am not aware of the facts and arguments that were put in this case. The case – the order, in fact – was never tested because it was never heard *inter partes* but, in my view, this is a way to inappropriately circumvent the provisions of the Act, which clearly gives statutory powers to the PCA.

I accept, however, that it is still rather early days, and there is uncertainty and maybe a bit of fear as to the procedure or how quickly one would be able to obtain an order from the PCA or what the effect of that order from the PCA would be. So, I accept that all of this is very new and that the legal community may feel more comfortable proceeding in the manner that they are used to. But it is my view that we have been given the tools in this Act to deal with these matters in the same way as they would have been dealt with under modern international arbitration. This is a framework that we should make use of with the hope that the powers vested

in the Supreme Court be truly restricted to circumstances where the PCA could not act or could not act effectively. So, I thought it was an interesting case because it mixed interim measures and challenges to arbitrators.

But in my view, at least at that stage, it should not have been an interim measures application; it should have been put to the PCA.

Reza Mohtashami: Thank you. Just a quick comment by Lise before we move on.

Lise Bosman: I would say that the scenario would have also been premature in that the Act provides for there, first, to be a challenge procedure along the lines agreed by the parties and the PCA only steps in as an appeal mechanism.

Secondly, a challenge to an arbitrator is very seldom going to be urgent enough to fit within the scope of a request for urgent relief. The PCA is extremely swift in terms of dealing with challenge decisions, but they are never going to be needed within 24 hours.

III. EXTENSION OF TIME LIMITS

Reza Mohtashami: In the third scenario, the arbitral tribunal has been constituted, the parties' written pleadings have been filed, evidence exchanged, and we are fast approaching the final merits hearing.

One month before the hearing is scheduled to commence, the dealer notifies the tribunal and the Museum of a change of counsel. The dealer applies to the tribunal for an order to postpone the hearing by a few months and to allow the dealer to submit an amended defence. The application is made on the grounds that maintaining the existing schedule would deprive the dealer of a full opportunity to present her case.

The Museum resists the application which it labels as a dilatory tactic, and urges the tribunal to maintain the existing hearing dates. The tribunal so agrees and rejects the application of the dealer on the basis that the procedural timetable, including the hearing dates, have been agreed between the parties and there is no legitimate justification to now change the procedure. The dealer views the tribunal's ruling as a violation of its due process rights and wishes to challenge the decision.

So the question arises: what rights of recourse does the dealer have and to whom? To the ICC? To the Supreme Court? To the PCA?

Anne-Sophie Jullienne: Under the Act, unless the parties have agreed otherwise – for instance, in their arbitration agreement or in institutional rules – an application can be made to the PCA to extend time limits.

An application could have been made under Section 31 of the Act in that case and it is made on notice. However, the test that needs to be satisfied here is that the PCA shall not exercise its power to extend a time limit unless it is satisfied that any available recourse to the tribunal or any arbitral or other institutional person vested by the parties with power in that regard has been exhausted. So, this is a last recourse mechanism. The second condition, which is cumulative, is that if the extension was not granted, then a substantial injustice would otherwise occur.

So this is the mechanism which is provided for in the Act.

Reza Mohtashami: Turning to you, Lise.

Again, while having your cup of tea in your office at The Hague, you receive an application by e-mail on Section 30, this time of the Mauritian International Arbitration Act to vary the time limits, essentially the procedural order for the arbitration. What are the powers of the PCA to deal with this and, again, what considerations will the PCA take into account?

Lise Bosman: The criteria under which the PCA can act are set out quite clearly in Article 30(3) of the Mauritian Act, and that limits the PCA's powers considerably.

In practice, what we would do is to show a high degree of deference to the parties' pre-existing agreements, to tribunals, and also a high degree of deference to a previous ruling by an institution.

This is mandated quite clearly in the *Travaux* to the Act which set out that it is expected that the PCA will take into account and show the required degree of deference to the refusal by a previous institutional ruling.

That being said, we do have the discretion to extend time limits if the conditions are met, and would do so in extreme factual circumstances. Imagine, for instance, a natural disaster that has prevented the final signature pages of an award from being finalised within the deadline of an accelerated arbitral proceeding, or serious illness or death of the party or counsel – fairly extreme scenarios where the PCA would be willing to step in.

Reza Mohtashami: Thank you, Lise. Turning to our Bench of Judge Kaye and Lord Hoffmann again.

Imagine that you are sitting on the Bench when you receive such an application because the arbitration statute in the relevant jurisdiction gives such a power of review to the supervisory court. How would you assess an application such as this?

What degree of deference would you pay to the tribunal that has been dealing with this matter now for some time?

Lord Hoffmann: For the reasons that Judge Kaye gave earlier on, one would be extremely reluctant to interfere with the decision of the arbitrator on the procedural matter like whether he was going to adjourn the proceedings for that length of time. That would be the position in spades here, where there is either the alternative of an application to the PCA or else the parties have deliberately decided to exclude the possibility of an application to the PCA. So, the reluctance of the Court to interfere would require a really very exceptional case before the Court intervened at all, at that stage.

On the other hand, under Section 39, an application to the Supreme Court to set aside the award on the grounds that the party did not have an opportunity to present his case will be entertained. But for much the same reasons, I should think it would be a very rare case in which such an application succeeded in the face of the decision of the arbitrators and a failure to go the PCA or an adverse decision on the part of the PCA.

Judge Judith Kaye: First, thank you, Lord Hoffmann, for relying on my prior observations. I have always felt that relying on Judge Kaye makes very good sense to me.

Again, I affirm Lord Hoffmann: in the U.S., as with the evident partiality issue above, we would not get involved in the process, but instead, we would put the finger on the scale in favour of the arbitrators and the organisation that is overseeing the arbitration.

Reza Mohtashami: Can you see any instances where the court might intervene or would that possibility be so far-fetched as not to arise?

Judge Judith Kaye: I think it is most unlikely. If I can see any possibility ever of such a thing happening in the world, I would have to say there is always a possibility that something might happen. But I think that in the real world, it is just not likely.

Reza Mohtashami: I think, for example, having looked at the *Travaux*, that some of the instances that the draftsmen had in mind were, for example,

where the parties have included in their arbitration agreement deadlines by which the award has to be rendered, which may prove to be simply impractical under certain circumstances.

Judge Judith Kaye: No, I think more and more, now, there is an awakening to the fact that these are voluntary agreements of the parties regarding the procedural timetable for the arbitration, and the parties will more often put timetables into the arbitration agreements so that they can avoid undue delay in getting to an award. So, now is the court supposed to just disregard that or rewrite it? I do not think so.

Lord Hoffmann: I agree with what Judge Kaye said.

Reza Mohtashami: Very good, so thank you very much to our panellists. That concludes our discussion of the three scenarios.

Questions & Answers

David Williams: Thank you very much. We now have thirty minutes for questions from the floor.

Salim Moollan: I do apologise; I do not want to intervene for too long, but just to correct what may be a couple of misapprehensions, in particular on Section 30 of the International Arbitration Act 2008.

Section 30 of the Act does not have the effect of giving anybody or anyone the power to extend the procedural orders by the tribunal.

What Section 30 says is that:

“[u]nless the parties otherwise agree, the PCA may extend any time limit agreed by the parties in relation to any matter relating to the arbitral proceedings or specified in this Act...”.

It does not apply to time limits ordered by the tribunal. The purpose of that provision is exactly as identified by Reza in the *Travaux*, which you find in paragraph 100 of the *Travaux Préparatoires*.

When you have time limits, normally this will arise pre-dispute - we have all come across that. Parties are optimistic about what can be achieved and they will say six months from the time of the reference. If this is an ICC Arbitration, fine, because then there will be the power for the ICC Court to extend time limits. So, it is really to save the parties from themselves and as we have heard from Lise, in very circumscribed circumstances, but it does not even arise, on your fact scenario. So, I think that needs to be made crystal clear. That is meant to apply only to agreements by the parties. So, if you have a procedural order, I can see one situation, a procedural order agreed by the parties, possibly, and that would be collateral damage – agreed. But that would not normally arise in the normal procedures. So, I just wanted to clarify that.

Also, on the Section 14(3), the use of the word ‘may’, this is normal Model Law language and ‘may’ simply indicates that there is an option to challenge before the PCA or not.

And finally, maybe a question to Lise. Within the context of Section 30, which is the power to extend time limits where it exists, there is something in the *Travaux*, where you will pay due deference to what another institution may have done before. Of course, the ICC does not publish reasons; some institutions do publish reasons. Do you think, and

that has not been put to the panel, with respect to Section 14 or 13, but would you expect the PCA to also pay attention and deference to decisions by other arbitral institutions? What about challenges?

Lise Bosman: Absolutely, that is the point I was trying to make earlier, that we are familiar with that exhortation in the *Travaux*; we definitely have to take that rule seriously.

David Williams: Salim, can I just ask you one question? You have run the risk of being interrogated by asking a question yourself.

Could you give us the rationale for the introduction of the PCA into some of the aspects of the Act, because it is a novel innovation and I feel absolutely sure that there is a very sound reason for this? Could you just give us a bit of a steer on that please?

Salim Moollan: Certainly, I mean, that was the subject of one panel at the launch conference and perhaps those who want to read more about it can refer back to the *Travaux*. But the whole idea behind the Mauritian regime is, let us take the amended Model law. Let us see how we can be as attractive as possible to potential international users.

Realpolitik is simply that international parties are wary. Of course, we know we have a very supportive judiciary, but the idea was, let us minimise contact with the courts in the course of the arbitral process. And we looked for institutions that could do that and the one multi-regional organisation that has experience of doing that and does publish reasons for arbitral challenges is the PCA. So, we spoke to the PCA. They were ready to do it. And then what you have is simply very quick processes in the course of the arbitration, because that is what the PCA does. It is very rare for the PCA to take more than 45 days to resolve anything.

But that does not take away the right of the parties – in most circumstances, challenge would be an exception – what Section 19 tells you to do, is that you have to bear with the PCA’s decision. As the same way as we heard negative *compétence-compétence*, arbitral proceedings will not be disrupted. You get on with it.

And if you really have a grievance at the end, then you go and challenge the award.

And just also, perhaps a precision on where the power to extend time limits come from. It is actually something we have taken from the English Act, Lord Hoffmann. It comes from Sections 12, 50 and 79 of the English Act 1996 which has similar powers, which we have cumulated into one.

Hon. Dr. Fitzwanga Nashon: I am Dr. Fitzwanga, *ad hoc* Judge and Sovereign Ambassador of the African Institute of International and Comparative Law. I have a question which perhaps Lord Hoffmann and Judge Kaye may wish to comment upon.

First, would it not be a breach of public interest to allow all proceedings to proceed when there is a reasonable prospect that it may be declared a nullity after the award, having regard to the fact that there is admitted interest?

Two, can an arbitral proceeding and an arbitral legislation exist outside of the constitutional order? What I really mean is, for example the Constitution of Mauritius, or I can be more precise about the Constitution of Kenya 2010, which says that there is not one chance that anybody with a *locus standi* will allow an arbitral proceeding which is tainted with an admission of interest to proceed; anybody with a *locus standi* outside the parties can go to the Supreme Court and have it completely declared a nullity and that is in the Constitution of Kenya 2010.

Lord Hoffmann, I am sure you are very familiar in the course of your career, with the case of *Grand Junction Canal*.¹ I agree the arbitral jurisdiction is a little different from the common law arbitral jurisdictions, but either way, would it not be in the United States, the same situation where somebody would be entitled to challenge an arbitral proceeding tainted with admission of interest because it is unconstitutional?

David Williams: As I understand the question, it is whether it would be appropriate to permit third parties to either involve themselves in arbitral proceedings or challenge awards where there is a suggestion of impropriety in the proceedings. Have I understood the question? Yes, how about the parties themselves?

Lord Hoffmann: Is the question whether it would be proper to allow a third party to take some action in relation to an award where it was thought to be some impropriety in the proceedings or the way in which it was conducted or what?

The arbitration is simply the carrying out of the contract between two other people. It does not have any consequences for a third party. Why should a third party want to object to it?

Hon. Dr. Fitzwanga Nashon: In the public interest, or where it is argued that the arbitral proceeding would affect the constitutional order.

¹ *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 HL Cas. 759.

Lord Hoffmann: No, certainly not. I mean, I cannot think of any grounds upon which a third party should be able to get involved in arbitral proceedings in relation to a contract or an arbitration agreement to which he or she is not a party.

Judge Judith Kaye: Dr. Fitzwanga, can we continue this over coffee?

Prof. Edward Oyelowo Oyewo: I am Edward Oyelowo Oyewo, from the University of Lagos, Nigeria. I am just curious to know, relating to Section 30(3)(b), under what circumstances would we be able to say that there will be substantial injustice if a party is denied the right to present his defence and this amounts to denial of justice and the courts rule against that? Will that not amount to denial of justice?

Lord Hoffmann: Under Section 30, the PCA has to be satisfied that (a) the tribunal has not been able to help you because it does not have the power. For example, if you have a provisional contract to say the award has got to be rendered by the 1st of January, otherwise it is void, and there is no power for the arbitrators to extend that but through no fault of the parties, it is not going to be there by the 1st of January. Well, obviously in such a situation, not to extend it would be a substantial injustice to the party who would otherwise not get a valid award. So, I think that is the sort of situation which is contemplated.

David Williams: I think it is extremely relevant that the phrase ‘substantial injustice’ was chosen here because that is the exact language of serious irregularity in the English Act. So, it has to be something of a major harm to a party before there can be a substantial injustice.

Anne-Sophie Jullienne: In that case, if you had the decision from the PCA, then you may in theory have recourse under Section 39, once the award has been rendered, possibly under the section that deals with, or the subsection that deals with breach of the rules of natural justice during the arbitral proceedings. So in theory, I believe that the Act actually provides for that recourse.

Reza Mohtashami: Just an observation on the question arising out of a case decided earlier this year by the Rt. Hon. Sir Anthony Evans, *P.C., Q.C., R.D.*, the Chief Justice of the Dubai International Financial Centre Courts.

He was facing a situation very similar to the fact pattern of the third scenario whereby one of the parties changed counsel and sought

effectively to delay the hearing that was coming up and to re-plead its case. Interestingly, it was the claimant rather than the respondent.

The tribunal dismissed the application to vary the procedural order, they appealed to Sir Anthony Evans who was sitting as the Supervisory Judge in the Supervisory Courts, who held two things.

First of all, that the tribunal had erred in not throwing out the procedural order and delaying the hearing because of substantial injustice being caused in the very particular circumstances of that case.

But, he also held that as a judge, he had no power to vary the tribunal's procedural order. So his hands were tied; all he could do - and this was an ingenious solution - was to invite the tribunal to reconsider its decision of the party's application and remand the case effectively back to the tribunal with the strong, but implied, caveat that the award risked being annulled if the tribunal did not alter its procedural order. So, that is a very interesting way of dealing with this conundrum.

The tribunal duly tore up its procedural order and postponed the hearing by seven months.

David Williams: Well, of course the question of applications to adjourn hearing dates is the bane of many arbitral lives, and one of the things that needs to be remembered in this setting is that most arbitration laws impose a duty on the tribunal to proceed expeditiously and economically. Obviously, that tells against any casual applications to adjourn. But there are difficult cases; one of the experiences I have had, in certain investment treaty cases in South America, is the practice of government legal departments to appoint lawyers for a fixed term only and often South American defendants will appoint a highly-qualified American firm, but it will be for a term of years. You will ask why they do that.

The object is a very commendable one. It is to eliminate any possibility of improper commercial arrangements by changing the legal representation on a regular and automatic basis. But it is not a matter that brings great joy to the applicants in the case when suddenly it is announced that the legal team defence will be changing in accordance with State rules about the appointment of counsel.

So it is not always easy and then, of course, you have the evasive strategist, the defendant that is determined to avoid the day of judgment as long as possible, who plans a succession of adjournment applications on different grounds usually involving someone's health or unavailability to travel. So, here we are in a very difficult area and the thing that can be said here is that the PCA, which may not be widely known, has extensive experience in dealing with arbitral challenges and procedural matters and,

as has been said, if it was one particular organisation which would be well qualified to carry out this role, it is the PCA.

Now I ask if there are any final questions; if not, I can say this to you, that you have been a very diligent audience going through some reasonably challenging but well-written parts of the Mauritian Act and for those of you who are practising in this field, I am sure you will find, not necessarily today but in the days to come, that the contributions from this outstanding panel have been very valuable. They brought different perspectives but all of them were able to assist very greatly in the task of familiarising ourselves with this new Act. So, I ask that you show your appreciation in the usual way.

PANEL III

THE COURT'S ROLE IN THE RECOGNITION AND ENFORCEMENT OF AWARDS: A PRACTICAL APPLICATION

Introductory Remarks

*Adrian Winstanley, O.B.E.**

Good afternoon ladies and gentlemen, distinguished delegates. I am very pleased to welcome you to the final session of today's proceedings. I am Adrian Winstanley, the Director General of the LCIA, and it is my pleasure to be moderating this panel.

We live in interesting times. We are still in the longest and deepest global recession in living memory with no major economy unaffected. Arbitration and litigation run counter-cyclical to global economic fortunes and it is no surprise that there has been a great surge of commercial disputes in the courts and in arbitral institutions around the world. But whilst the IMF is currently forecasting that global growth may fall below two percent in 2013, throwing some advanced economies back into recession, ten of the twenty economies with the highest projected compounded annual growth rate are African economies. Some of these may not be starting from the same base or yet competing with the most developed economies, but nonetheless, this is a significant indicator of the increasing strength of African economies.

Arbitration has and always has had a vital role to play in oiling the wheels of commerce and industry. Parties to cross-border contracts wish to avoid their respective courts, and generally wish to have their disputes resolved by specialist arbitrators rather than by generalist judges. There is a certain mantra that we recite when promoting arbitration over litigation and I now canter through that mantra: confidentiality, cost-effectiveness, enforceability, finality, flexibility, neutrality, party autonomy and speed. Any one of these could occupy a full session, but the most enduring of them is enforceability, with the underpinnings of the remarkable New York Convention, to which, at the last count, there were 148 State signatories. An award is, after all, not worth the paper it is written on if ultimately it is not complied with or cannot be enforced. This panel will, then, look at the crucial role State courts play in the enforcement of the arbitral award, and it is my pleasure to moderate so distinguished a panel.

Starting from my left, is Justice Quentin Loh. Quentin was appointed as Judicial Commissioner of the Supreme Court of Singapore in

* Director General, London Court of International Arbitration (LCIA).

2009 and a Supreme Court Judge in 2010. Prior to joining the Bench, he was the deputy managing partner of Rajah & Tann, where he was a key member of its international arbitration group as well as the head of the construction and projects, and the insurance and reinsurance practice groups. Quentin has appeared as counsel in many domestic and international arbitrations and sits also as an arbitrator.

To Quentin's left is Fatma Karume. Fatma is admitted to the Bars of Zanzibar and of Tanzania. She has more than 18 years' experience in civil and commercial litigation and arbitration and is the author of many papers on the subject. She is currently the head of the litigation practice at IMMMA Advocates.

To her left is Charles Nairac, to whom I owe a particular debt of thanks for having composed the practical problem that we shall be discussing. Charles is a partner in the Paris office of White & Case where he concentrates on international arbitration with a focus on the construction and energy industries. Charles has extensive experience as counsel in arbitration proceedings and also accepts appointment as arbitrator. He teaches international arbitration at the *Université de Paris-Sud* and the *Université de Nancy*.

To his left is Urmila Boolell. Urmila is a barrister practising at the Mauritius Bar since 1985, and also called to the Bar in the U.K. by Lincoln's Inn. Urmila has extensive experience in all aspects of litigation, specialising in matters relating to Mauritian corporate and commercial law. She has also authored a number of leading publications on Mauritian law.

Last but not least, to Urmila's left is Lord Justice Aikens. Richard Aikens was called to the Bar by the Middle Temple in 1973 and practised as a barrister from Brick Court Chambers between 1974 and 1999, being appointed Queen's Counsel in 1986. He was appointed to the Queen's Bench Division of the English High Court in 1999, and was appointed Lord Justice of Appeal in 2008. He was nominated as one of the U.K.'s *ad-hoc* judges to the European Court of Human Rights in 2011. Lord Justice Aikens has been widely published.

You have in today's pack the practical problem to which the programme refers. Charles, who is the author of this problem, will take us through the scenario that he has created and I will then ask each of the members of the panel to give their answers to the five questions which you will see below the practical scenario.

We shall take the questions out of order, as it has occurred to us belatedly that this was a better order; so they will be run as 1,2,3,5 and 4. There will be time for your questions, which we shall welcome and which you may put in English or in French, as previously.

THE COURT'S ROLE IN THE RECOGNITION AND ENFORCEMENT OF AWARDS:
A PRACTICAL APPLICATION

If any one of you would like to write your question down and pass it to me during the panel discussion, please feel free to do so. Otherwise, please just raise your questions orally when we get to that stage. In either case, it would help if you would indicate whether your question goes to one member of the panel in particular.

With that brief introduction, I am going to hand over to Charles who will run us through the practical problem for this session.

Presentation of the Practical Problem: *Flying Dodo Ltd. v. Republic of Xanadu*

*Charles Nairac**

As a Mauritian in exile, it is a great pleasure for me to be here today. I have only been here for 48 hours and my Mauritian accent is not back yet but catch me with a Phoenix beer in the bar tonight and you will not be disappointed. Let us start with the hypothetical problem.

Flying Dodo Ltd. (hereinafter “Flying Dodo”) is a company incorporated in Mauritius whose purpose is to develop and operate tourist facilities in Asia and in Africa. I should add that when I picked the name Flying Dodo, I did search the internet to make sure that there was no such company and was satisfied that there wasn't. However, on our way in from the airport, Quentin Loh did notice an establishment called “Flying Dodo” and we got a little bit worried, but I am sure the owner will forgive us for using his name in our practical problem!

Flying Dodo entered into discussions with the Ministry of Tourism of the Republic of Xanadu with a view to obtaining a concession for the development of a mega casino and a two-thousand room hotel in the world-renowned big game nature reserve of Xanadu. Negotiations went on for several months and a Concession Agreement was eventually signed by Flying Dodo and the Tourism Development Corporation of the Republic of Xanadu Ltd., known as “TDC”, a company fully owned by the Ministry of Finance of Xanadu. The Minister of Tourism explained that while the agreement had to be signed by the TDC, as a practical matter, Flying Dodo would only deal exclusively with the Ministry of Tourism throughout the implementation of the project. The Concession Agreement designated Xanadian law as the applicable law, and provided that any disputes would be referred to arbitration in Xanadu under the rules of the LCIA-MIAC. And I want to note here, that in the paper, I mistakenly referred to the rules of MIAC. Of course, such rules do not exist, it is the LCIA-MIAC Rules. Thank you, Adrian for bringing that up.

Flying Dodo promptly started mobilising for the construction of the resort and true to its word, the Ministry of Tourism handled all the issues relating to the licenses, site access, *etc.*, that were required before construction could begin. At the same time, growing waves of protest

* Partner, White & Case LLP (Paris).

against the project took place in Xanadu and abroad, and the Government of Xanadu came under intense pressure to cancel it. The TDC was eventually dissolved by the Minister of Finance of Xanadu and shortly thereafter, a representative of the Ministry wrote to Flying Dodo to notify the termination of the Concession Agreement.

Flying Dodo protested of course, and made every possible attempt to revive the project but all its efforts were in vain.

Four years after the termination, relying on the arbitration clause in the Concession Agreement, Flying Dodo brought arbitration proceedings claiming damages from the Republic of Xanadu directly, as opposed to the TDC that had been dissolved. Now, turning to the award that was issued by the arbitral tribunal.

First of all, applying a doctrine of Xanadian law, the tribunal found that it did have jurisdiction over the Republic of Xanadu because the Concession Agreement had been negotiated, performed and terminated by the Government of Xanadu who had thus implicitly consented to the arbitration agreement.

Second, the tribunal rejected Xanadu's argument that the action was time-barred under Xanadian law. *Third*, the tribunal held that the termination of the Concession Agreement was wrongful and awarded €15 million in damages to Flying Dodo. *Fourth*, the tribunal granted Flying Dodo's request for post-award interest at the rate of 8% per annum.

The tribunal's award on the second item (the time-bar issue) and the fourth item (the interest issue) was, on any view, inconsistent with Xanadian law, which provides for a 3-year statutory limitation for this type of action, and has a mandatory law reflecting Xanadian public policy, limiting any interest to 5% per annum.

Flying Dodo is now seeking to enforce the arbitral award before the courts in various jurisdictions where Xanadian assets have been located. At the same time, the Republic attempts to resist enforcement in those jurisdictions, and has also brought an action before the courts of Xanadu to have the arbitral award annulled.

In all of these actions, the Republic of Xanadu relies on the following three arguments:

- (i) the Republic is not a party to the arbitration agreement and that there is therefore no arbitral jurisdiction;
- (ii) the arbitral tribunal erred in the manner in which it applied the Xanadian statute of limitations; and

- (iii) the tribunal's decision is contrary to Xanadian public policy pertaining to interest.

For the purpose of this exercise, we are assuming that Xanadu and all other jurisdictions whose courts have been seized on this matter, have signed and ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). We might be referring to it during our discussion.

QUESTIONS

- I. Can the courts review the arbitral tribunal's findings on the three bases raised by Flying Dodo?
- II. What matters should enter the scope of the public policy exception to recognition and enforcement?
- III. Pending issuance of the Xanadian court's decision on the application to set-aside, should the other courts where enforcement is sought, stay the enforcement proceedings?
- IV. In due course, the court of Xanadu granted the application to set-aside, on the basis that the Republic was not a party to the arbitration agreement. What weight, if any, should the other courts, where Flying Dodo seeks enforcement, give to the Xanadian set-aside decision?
- V. Let us assume, to the contrary, that the Xanadian court rejected the application to set aside and recognised the award, in a detailed decision explaining that, under Xanadian law (1) the arbitral tribunal had properly found that Xanadu was a party to the arbitration agreement; (2) the court has no power to revisit the tribunal's application of the statute of limitations; and (3) the inconsistency with Xanadian law on interest does not constitute a breach of Xanadian public policy that would justify setting aside the award. What weight, if any, should the other courts, where Flying Dodo seeks enforcement, give to the Xanadian decision?

I now hand over to Adrian who will take us through the various questions.

Response to the Practical Problem: *Flying Dodo Ltd. v. Republic of Xanadu*

Moderator: *Adrian Winstanley*

Panel: *The Rt. Hon. Lord Justice Aikens**
*Justice Quentin Loh***
Charles Nairac
*Fatma Karume****
*Urmila Boolell*****

Adrian Winstanley: Each of the panellists will now be invited to comment upon the questions raised in the practical problem from the point of view of their respective jurisdiction.

I. CAN THE COURTS REVIEW THE ARBITRAL TRIBUNAL'S FINDINGS ON THE THREE BASES RAISED BY FLYING DODO ?

A. England and Wales

Lord Justice Aikens: So, ladies and gentlemen, we are imagining, as the hypothetical asked us to do, that there is an attempt to endorse this arbitration award in the English courts and that is being resisted by the Republic. Now, I have an advantage or perhaps it is a disadvantage in that the case on which this problem is based is one that I had to deal with as a judge. It is the case of *Dallah v. The Government of Pakistan*,¹ and all these problems, not specifically the interest or the limitation one, but similar problems arose in the case before me and I held, and I will explain why in a minute, that the Government of Pakistan in that case was not a party to the arbitration agreement.

* Lord Justice of Appeal, England and Wales.

** Judge, Supreme Court of Singapore.

*** Barrister-at-Law, Ishengoma Karume Masha & Magai (Dar es Salaam).

**** Barrister-at-Law and Head of Chambers, Banymandhub Boolell Chambers (Mauritius).

¹ *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2008] EWHC 1901 (Comm.); [2009] EWCA Civ 755; [2010] UKSC 46 (hereinafter "Dallah").

My decision was upheld by the Court of Appeal and their decision was upheld by the Supreme Court of the United Kingdom. The counsel who represented Dallah then decided that they would try their luck in the courts of France and the court that deals with arbitration awards and challenges to them is the *Cour d'Appel de Paris*. The *Cour d'Appel de Paris* had no trouble whatsoever in saying that the Government of Pakistan was a party to the arbitration agreement and I understand that that matter is shortly to go before the *Cour de cassation*. So, you can see immediately that these kinds of questions do not necessarily produce the same answers in different jurisdictions.

Now, how would the English court approach this problem? The English Arbitration Act of 1996, Part III, gives effect in English law to the New York Convention and as you all know, Article V of the New York Convention deals with the circumstances in which you can challenge a New York Convention award when it comes to enforcement.

The particular basis of challenge which is relevant for our purposes is now in the Arbitration Act 1996, Section 103(2) which sets out the various Articles of the Convention and the one we are concerned with on the first of the three issues that is posed is the argument that the Republic is not a party to the arbitration agreement. In terms of the English Act, that is dealt with under Section 103(2)(b), and that provides that recognition or enforcement of the award may be refused if the person against whom the Act is invoked proves that the arbitration agreement was not valid under the law to which the parties subjected it.

So, in terms of our problem, that means that the Republic would have to prove that it was not a party to the arbitration agreement according to the law of Xanadu because it is Xanadian law to which the agreement was subjected. Now, how does the Republic go about proving that?

Well, if this case were being dealt with in England, it would have to go about doing it by bringing evidence to demonstrate that the Republic was not a party to the agreement and proving it on a balance of probabilities. A party would be entitled under English law to bring whatever evidence was admissible by the law of evidence before the court in order to prove its case. But it is a question of proving your case and unless you do so on the balance of probabilities, then the award will stand.

As I say, in the case I was concerned with, I held that the Government of Pakistan had proved it was not a party to the arbitration agreement; that is the question here, and it is a question of fact. So, you can be just as much the judges of this issue as I can, and maybe at some stage, you will take a show of hands on the material you have as to whether you think the Republic was or was not.

Now, what about the other two points? These are whether or not the arbitral award can be set aside on the basis that the arbitrators erred in applying the Xanadian Statute of Limitations. Well, we will come to that perhaps when we come to the second question but I think it is also encompassed by the first question because it is based on the three points raised by Flying Dodo. I think the answer would be found under English law, but the only way they could challenge it so far as the statute of limitations is concerned, is by saying that it would be contrary to public policy to do so which is a matter also dealt under Section 103 and in this case, subsection (3). Well, I doubt very much that that would be regarded as something which is contrary to English public policy and I think it would be English public policy that would probably count.

Now, the third question is in relation to interest but we know that it is contrary to Xanadian public policy to have a rate of interest of more than 5%. Well, I think it is an open question as to whether that would be set aside as a matter of public policy. Now, I am going to remain neutral on that but that is the only way I could see that that could be reviewed by the English court.

B. Singapore

Justice Quentin Loh: The Singapore courts give primacy to the autonomy of the parties and arbitral proceedings and that includes finality and we will only intervene in those instances prescribed or allowed under the Singapore International Arbitration Act 1994 and the Model Law.

For enforcement, we do have our own Section 31 of the International Arbitration Act which basically mirrors the grounds in Article V of the New York Convention. I can, I think, deal with grounds (2) and (3) first, *i.e.*, the limitation point, and the public policy issue and the rate of interest.

The Singapore courts will not reopen findings of fact and law or of substantive merits of an award. Errors of law, of fact *per se*, are not grounds to refuse enforcement unless they fall within the Article V grounds, and we have a Singapore Court of Appeal decision which says that errors of law, of fact *per se*, do not engage the public policy of Singapore, for example, under Article 34(2)(b)(ii) of the Model Law, when they are not a ground to set aside under Article 34(2)(a)(ii). So, in all likelihood, any challenge of the award on grounds (2) and (3) would be dismissed.

I now turn to ground (1). There has been a lot of debate in Singapore whether we should follow the formalistic and non-detailed examination of an award or whether we should follow the English practice

of a detailed *de novo* re-hearing. I have looked at the Paris Court of Appeal judgment. It consists of nine pages and one paragraph that is the essential decision; to compare that to the Supreme Court decision of *Dallah*, the Court of Appeal judgment, the Supreme Court judgment and Richard's judgment. They all go into pages and pages. So, they did a *de novo* re-hearing.

Well, I am sad to say that for some of those who prefer the formalistic and non-detailed examination approach, we are likely to follow the English position because we already have cases, which in effect, carried out a *de novo* re-hearing at the enforcement stage provided it is on one of the grounds within the UNCITRAL Model Law or the New York Convention.

This is what the Court of Appeal said in a 2011 case, *CRW v. P.T. Perusahaan Gas Negara*:

“No State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award or at least without allowing the parties an opportunity to address the Court if there has been a violation of due process or other irregularities in the arbitral proceedings. Singapore courts infrequently exercise their powers to set aside but will unhesitatingly do so if a statutorily prescribed ground for setting aside an award is clearly established.”²

So, that is what our Court of Appeal has said. So, I think like *Dallah* and the *CRW* decision, the Singapore court will probably consider Xanadian law through expert evidence since it is both the governing law and the law of the seat to see if the court agrees that under Xanadian law, the Government could be said to be a party to the arbitration agreement.

I would end by saying that when we carry out this exercise, the Singapore judges, will be very mindful to guard against our own concepts of contract like the place of pre-contract or post-contract conduct. Our own views on that should not allow us to colour our judgment when we are looking at a foreign law.

² *CRW v. P.T. Perusahaan Gas Negara* [2011] 4 SLR (R) 305, para. 26.

C. France

Charles Nairac: Under French Law, there are a limited number of grounds on which an award can be refused recognition, and those are listed in article 1520 of the Code of Civil Procedure. Let us go through them briefly.

There are only five of them, and the first is:

“The arbitral tribunal wrongly upheld or declined jurisdiction.”

This one is of course very relevant to our hypothetical. It relates to the first argument raised by the Republic in these various actions. On that basis, the French courts would certainly accept to review the award, and that review would be a full *de novo* review of the issue. A French judge, when appreciating whether or not there is arbitral jurisdiction, will, formally at least, show no deference to what the arbitrators think about their jurisdiction.

Turning to Quentin Loh's comment about the length of the Paris court decision, it is true that a French court decision will typically not be as long as a decision that you would see coming out of the English courts or the Singaporean courts, and I am not surprised that the Court of Appeal decision here was nine pages. Wait until you see the *Cour de cassation* decision, Quentin, it will probably be half a page! There is a different tradition in the way that decisions are drafted, and it is important to know that a *Cour de cassation* decision will be issued on the basis of a detailed report prepared by a “reporting judge” or *juge rapporteur*.

Let us now turn to the next ground for annulment.

“The arbitral tribunal was not properly constituted.”

I do not think this one is relevant to our hypothetical. The third is:

“The arbitral tribunal ruled without complying with the mandate conferred upon it.”

This is not relevant to our hypothetical, nor is the fourth:

“Due process was violated.”

The fifth ground is:

“Recognition or enforcement of the award is contrary to international public policy.”

This is a bit of a catch-all. In a number of jurisdictions, the public policy exception has been used in a very liberal manner to refuse the enforcement of awards. I will come to that when we discuss question II.

D. Tanzania

Fatma Karume: With regard to Tanzania, the first thing I would like to inform the delegates today is that we did ratify the New York Convention on the 13th of October 1964. But, because we are a dualist country, we needed to pass a domestic law to put into effect the New York Convention. Unfortunately, this has not been done to date. So, the first assumption that we are working upon in the case of Tanzania would have to be that Xanadu were part of the Geneva Convention because that is the Convention which we have promulgated into our domestic law.

If we got to a stage, a situation, where the award was one which was covered by the New York Convention but not the Geneva Convention, then we would have to make arguments to the court to actually apply the New York Convention without having legislative backing of that. We do have a Court of Appeal decision that says that the court could do that, or simply apply our international treaties, but for this purpose, I would just adhere to the Geneva Convention.

Now, with regard to the first question which is whether Xanadu is a party to the arbitration agreement, under Section 30 of our Arbitration Act, the court, upon enforcement, has to first look at whether the award was made in pursuance of an agreement for arbitration.

So, this is by virtue of Section 31(a) and therefore, the court will look into that. The onus, of course, is not on the person who is the respondent in the petition but it would be the party wishing to apply for enforcement because we have a dual system in the sense that the court would have to first look at whether the arbitral award was made in pursuance of an agreement before it would even hear arguments, for example, against enforcement as such. So, that would be the answer to that question.

Secondly, we have something in the Act under Section 30(3) which is extremely wide, indeed, and this allows the court to look into any aspects of an award; into the validity of the award and on any conditions

whatsoever. So, under Tanzanian law as it stands today, all those three questions could be looked into by the High Court.

E. Mauritius

Urmila Boolell: Unlike Tanzania, Mauritius has chosen to wear both the braces and the belt. So, we have the New York Convention embedded in our law independently of the International Arbitration Act 2008. The New York Convention came into effect into our law and was adopted in 2001. And when the International Arbitration Act came into force, those provisions of the New York Convention were substantially replicated within the new law. We can therefore, envisage situations where we may have recourse to the New York Convention in situations which may fall outside the ambit of the International Arbitration Act.

I think to answer the questions we have here: the first thing I would like to say is that I do not see the word “review” mentioned anywhere in our law. The question here is whether the courts in Mauritius would review the arbitral tribunal’s findings in Xanadu. What I see under Section 39 of our Act is the word “exclusive” – the heading reads “exclusive recourse against award” and the word used is “setting aside”.

Now, I do understand that there is a lot of academic discussion that goes on as to when an award is set aside as opposed to being annulled. I understand that the setting aside of an award is lesser of the two evils to the extent that it allows one aggrieved party who may not have an award recognised in one jurisdiction to go elsewhere and have it recognised, whilst an annulled award apparently is dead. Again, that is a debate. But independently of this, to answer the questions that we have here, we have to say that our Act provides for all the exceptions to recognition under Article V(1)(a)-(d) of the New York Convention. It must be pointed out however, that these provisions are not yet tried and tested as far as international arbitration is concerned in Mauritius.

We have here the privilege of having a number of our judges sitting in the audience: I think they are in a better position than me to answer the question as to how they would deal with those three questions but, if I can have just an odd hit at it, just on the basis of what we have heard from everybody else and what we think our law would say here, I think of whether Xanadu is a party to the arbitration agreement or not. As Lord Aikens has just said, this is a question of fact. I find it most unlikely that our courts here would want to go and delve into the question of fact which may have already been discussed over and approved on by another arbitral body in another seat.

The second one is whether the arbitral award erred in applying the statute of limitations. Again, I would stand corrected, but I believe that with the spirit of the New York Convention and in the way it has been brought into our law, the *penchant* would be towards recognition rather than not enforcing the award. I would suggest that perhaps our courts would not be inclined to venture into uncharted territory.

We are then left with the third question, concerning public policy. I know this question comes in more detail in the second question, but I think that for the present purposes, I would say that our law mentions at Section 39(2)(b)(ii) that the arbitral award may be set aside if the court finds that the award is in conflict with the public policy of Mauritius. Now, we are a jurisdiction that has chosen to make the distinction between domestic and international arbitration, and I understand that in some jurisdictions the concept of public policy is not normally that of the public policy that would pertain to that particular jurisdiction, it would normally take what is, I think, known as ‘transnational public policy’.

I would perhaps go into more detail in the next question but my feeling would be that the Mauritian courts would tend to have a very broad view of what would amount to public policy of Mauritius as mentioned in the Act. But, we would also perhaps tend to look at constitutional considerations, if there are any, because we do have a written Constitution. But, perhaps we could explore this question in more depth when we come to the second question.

II. WHAT MATTERS SHOULD ENTER THE SCOPE OF THE PUBLIC POLICY EXCEPTION TO RECOGNITION AND ENFORCEMENT?

A. England and Wales

Lord Justice Aikens: Under the Arbitration Act 1996, there is a provision, Section 103(3), that says that enforcement may be resisted on the ground that it is contrary to public policy. It does not say *English* public policy but I think that the way the Act would be read by an English court would be to have regard to the Convention and that definitely refers to the public policy of the country where enforcement is sought.

So, the question, shortly, would be whether or not failure to adhere to the provisions on limitation and the limits on interest would be contrary to English public policy and therefore, lead to the non-enforcement of the award. I am confident that the answer would be no; those failures are not contrary to English public policy and as the general rule is – as has already been pointed out – that you do not refuse to enforce on the grounds that

there has been an error of fact or an error of law, then there would be no bars to enforcement under an English court's jurisdiction in respect of those issues.

B. Singapore

Justice Quentin Loh: Section 31(4)(b) of our International Arbitration Act refers to the public policy of Singapore and under the Article V(2)(b) of the New York Convention, it refers to the public policy of the country of enforcement, *i.e.*, Singapore.

So, when you talk about the public policy of Singapore as contemplated by these provisions and including Article 34(2)(b)(ii) of the Model Law, you can validly ask: what does this encompass; local public law, Singapore public law, a broader public law? Well, the answer for Singapore law is that it encompasses a more narrow scope. It has to be considered in an international, as contradistinct from a domestic context. It has to be construed with the legislative purpose of the International Arbitration Act with its international focus and policy of limited curial intervention.

So, the exception can only operate in instances where upholding or enforcing the award is, and I quote from a Court of Appeal case:

“one that would shock the conscience or is clearly injurious to the public good or wholly offensive to the ordinary, reasonable and fully informed member of the public or where it violates the forum's basic notions of justice and morality.”³

Well, I have already referred you to the Singapore Court of Appeal case which says that errors of fact, of law *per se* do not engage the public policy of Singapore.

Let me give you an example; this is a case in a High Court instance.⁴ *A* brings an action for a limited claim under a construction contract for USD 927,000. It is a specific claim for disruption, costs under specific provision due to a suspension order of works. He reserves all his rights for his other claims. *B* raises one defence on the contract and brings a massive equitable set of under ten cross claims amounting to USD 20 million. *B* accepts that if he prevails, he is not entitled to a monetary award because it falls outside the notice of arbitration.

³ *P.T. Assurans v. Dexia Bank* [2007] 1 SLR (R) 597, para. 59.

⁴ *VV v. VW* [2008] 2 SLR (R) 929.

Well, in the event that *B* won, the arbitrator would tax *B*'s costs at USD 2.8 million. Think of that: a USD 927,000 limited claim met by equitable defence of set off USD 20 million fought over a huge number of days, and costs were awarded at USD 2.8 million.

Well, *A* of course was not very happy and he applied to the Singapore court to set aside the award and one of its main grounds was public policy. It was manifestly excessive and it offended the rule of proportionality in awarding costs. The court held that it was not the public policy of Singapore courts to ensure that costs payable to any party in an international arbitration were assessed on any basis on any particular principle including the proportionality concept and it threw out the challenge.

So, that is how narrowly public policy is viewed in Singapore. Well, let me raise this question: what happens if we have a statute in Singapore that makes certain things illegal, for example, if the statute says that any discrimination against anyone on race, gender or religion is illegal? And if I have an arbitration clause that says: no woman shall be appointed an arbitrator. Does that attract public policy? Suppose I said: no Christian should be an arbitrator. Does that attract the public policy of Singapore?

Well, there was an interesting case in England called *Jivraj v. Hashwani* where they required the arbitrator to be a senior member of the Ismaili community.⁵ Well, we have never had such a decision foisted on us and maybe with that I would pass it over to Richard.

C. France

Charles Nairac: I previously went through the five grounds that can justify an annulment or non-recognition under French law. The fifth ground you might recall related to situations where the award is contrary to “international public policy”. There is one word added to the provision of the New York Convention that Quentin Loh referred to: Article V(2)(b) of the Convention refers to the public policy of the country where enforcement is sought, not to “international public policy”.

So, France has gone one step further than the New York Convention and distinguishes between internal public policy and international public policy. In assessing whether or not there is a violation of international public policy, a French court will only focus on the solution of the award, not the reasoning. It wants to ascertain whether the outcome of the arbitration is contrary to international public policy and in doing so,

⁵ *Jivraj v. Hashwani* [2010] UKSC 40.

the threshold is high. In that respect, the situation is comparable to that in Singapore and England. As French law stands, the violation must be – in French – *flagrante, effective et concrète*. What this means exactly goes beyond the scope of my comments here today, but let us just note that the use of these three adjectives reinforces the notion that the violation must be a serious one. It must be “flagrant, effective and concrete”. Other expressions used in French cases include that the award must “offend in an unacceptable manner the French legal order”, or result in a “manifest violation of a fundamental rule of law”.

So, we are not talking here about an issue of 5% interest or 6% interest. We are not talking about a statute of limitations issue, we are in my view talking about much more serious stuff – corruption, criminal behaviour, *etc.*

D. Tanzania

Fatma Karume: With regard to public policy under our Act and this is Section 30(1), an award must not be contrary to the public policy or the law of Tanzania. So, the court will not enforce an award that is contrary to the public policy or the law of Tanzania.

The question though is how far the courts will go in this regard? In a recent case, *Dowans v. Tanesco*,⁶ there was an award made against Tanesco, which is our utility company, a power utility company, an arbitral award for a sum in excess of about USD 60 million. The award caused a lot of noise, public outcry in every busy body you can think of; there were about five of them, five institutions or so, jumped on the bandwagon and tried to stop the enforcement of the award in the High Court of Tanzania. The judge, Judge Mushi, threw out all the busy body applications and proceeded to hear the application against the enforcement, which was made by the power utility company, Tanesco.

One of the arguments in that particular application was that it was contrary to Tanzanian public policy to enforce this particular award. Judge Mushi said in his decision that – and I am not so sure I agree with this – given the fact that the issue of the definition of public policy was one which the parties had agreed to take to the arbitral tribunal, then the courts would not interfere even if the arbitral tribunal's decision was contrary to Tanzanian public policy. This case is now going to go to the Court of Appeal. I do not know how it will go there, but basically this is a decision we have on the public policy discussion in Tanzania.

⁶ *Dowans Holdings SA and another v. Tanzania Electric Supply Co. Ltd*, ICC Award No. 15947/VRO, 2009.

So, the exception it seems so far to the public policy issue is, if you take a question of public policy to the tribunal and the tribunal decides on the matter even if the decision is actually contrary to public policy, our courts seem to be prepared to uphold it. So far, I do not know how the Court of Appeal will go.

E. Mauritius

Urmila Boolell: There is no definition for the term ‘public policy’ in our Act and in the New York Convention, and I do not think in any other international instruments we have come across.

So, under Mauritian law, I think we would have to proceed by deduction. If we look at Section 39(2)(b)(iii)-(iv), we can deduce that by having the public policy of Mauritius” on its own under (ii) and, having separately under (iii) fraud or corruption and, under (iv) breach of the rules of natural justice, we can assume that the definition of public policy in Mauritius would probably exclude considerations of either fraud, corruption or natural justice.

Again, this is just a possible interpretation and it has not been tried and tested yet, but we suppose that this could be the case. I imagine when our courts will have to face this problem, they would certainly be guided, I think, by other jurisdictions where the New York Convention has been applied and how the policy has been applied in other cases as well. Quite apart from what we have heard today, I would probably give a couple of cues as to where we could possibly go from here.

There is possibly the route taken by the English courts in cases where public policy has been taken as an exception to the laws in the country of the application of the award. For example, in the case of *Soleimany v. Soleimany*,⁷ it is a Court of Appeal case. The public policy prevented the enforcement of an award ordering the payment of sums on the basis of an agreement to carry out a business which was illegal in the State where it was pursued.

It was held in that case by the Court of Appeal:

“An English court will not enforce a contract governed by the law of a foreign and friendly State or which requires performance of such a country if performance is illegal by the law of that country. This rule applies as much to the enforcement of an arbitration

⁷ *Soleimany v. Soleimany* [1999] Q.B.785.

award as to the direct enforcement of a contract in legal proceedings.”

So perhaps that is one possibility.

Another possibility that perhaps joins the situation Charles talked about is the Swiss approach which adopts a very stringent test where the values and principles forming part of a system are taken into account.

In the case of the Swiss Federal Tribunal in *Eco-Swiss Chinatown Ltd v. Benetton International*,⁸ the Swiss court held that it is far from certain that in all parts of the globe, the same principles would be considered fundamental. There are multiple civilisations in the world and they may be based on different fundamental principles, even opposite ones. Therefore, the Swiss legislator when choosing the term ‘*ordre public*’ necessarily had in mind the value system and the principles that constitute a civilisation to which Switzerland belongs. Now, one could imagine that this could be very stringent. So, that is another possibility.

The third consideration, I think, is the floodgate argument whereby there is a risk that the public policy exception could be used as a means of literally eroding the right to enforcement which is what is provided for as a first principle under the New York Convention. I think our courts would be very careful not to overstretch this principle to allow all sorts of situations to amount to public policy. I think if I were just to have a pitch on where we might go in Mauritius, I think the Hong Kong scenario is probably the one that would make more sense to us, which is perhaps a broad one of justice and morality.

As an example, there is the case of *A v. R* where the Hong Kong court held that if the public policy exception were to be raised, there must be something more, like a substantial injustice arising out of an award which was so shocking to the court’s conscience as to render enforcement repugnant.⁹ So, this is perhaps the line. Perhaps in questions and answers we might hear the views of sitting judges, or whether they would agree with that stand.

⁸ *Eco-Swiss Chinatown Ltd v. Benetton International* [1999] 2 All ER (Comm) 44.

⁹ *A v. R* [2009] 3 H.K.L.R.D. 389.

III. PENDING ISSUANCE OF THE XANADIAN COURT'S DECISION ON THE APPLICATION TO SET-ASIDE, SHOULD THE OTHER COURTS WHERE ENFORCEMENT IS SOUGHT STAY THE ENFORCEMENT PROCEEDINGS?

A. England and Wales

Lord Justice Aikens: The English position is very similar to the French one in this respect. The wording of Article VI of the New York Convention, reproduced more or less exactly in Section 103(5) of the Arbitration Act 1996.

There are two particular considerations that will be taken into account by the English court. The first is: how would any decision not to adjourn the attempt to recognise or enforce in England affect any outcomes in the proceedings in the curial court, *i.e.*, in this case in the Xanadian court? The guiding principle would be that the English court would not wish to do anything that would undermine the ruling of the curial court.

The other consideration is to ask the question: whether or not there are any parts of the award which are not being challenged in the curial court. If there are not any, then the English court will try and separate the two and go ahead and deal with those parts that are not subject to challenge in the curial court.

B. Singapore

Justice Quentin Loh: Sorry, this is a short point: we have no decisions on this point at all, either in *obiter* or *ratio*. So, I remember being taught when I first started arbitration that a party facing an adverse award had two choices. He could either apply to the courts of the seat to set aside the award, in which case if he succeeded, there was no award to be enforced, or he could wait until the enforcement stage and resist the enforcement in the country of enforcement.

Now, that is of course, being called by some a traditional view which was without much reasoning or without much thought or analysis. Well, I would say that if this were the rule, then it would seem that an enforcement court should wait for the decision of the courts of the seat and in doing this, look for the reasons we would use to sustain our decision. I think we would use Article V(1)(b) as well as Article VI.

C. France

Charles Nairac: The starting point here in terms of our reasoning should be the New York Convention which states in Article VI that the court before which the award is sought to be relied upon *may* – that's the important word, *may* – if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to provide suitable security.

Turning to France, there is no provision in the Code of Civil Procedure that provides for such an adjournment in the context of arbitration. There is, on the contrary, a long string of cases in which the courts have decided consistently that whatever happens at the seat of the arbitration before the courts of the seat of the arbitration should have no influence on the decision of the French court to enforce an award.

The position of French courts is, I find, neatly summarised in the *Putrabali* case.¹⁰ Here is a quote from the decision:

“An international arbitral award which is not anchored in any national legal order is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.”

That encapsulates the French philosophy and following that logic, there would be simply no reason in France to suspend the proceedings before the French court until a decision is issued by the courts of the seat in Xanadu.

D. Tanzania

Fatma Karume: Well with regard to our law, the courts simply will not proceed to enforce a foreign arbitral award unless the proceedings have become final in the country in which the award was made. It is a pre-condition to enforcement.

So, that is pursuant to Section 30(1)(d) of our law. So long as there are proceedings going on in the seat of the arbitration challenging the arbitral award, our courts will not proceed with the enforcement.

¹⁰ Cass. Civ. 1, 29 June 2007, *Société PT Putrabali Adyamulia (Indonesia) v. Société Rena Holding et Société Moguntia Est Epices*.

E. Mauritius

Urmila Boolell: I think that the approach in Mauritius would be a very conservative one, in line with our law, Section 39(5), which actually has a slight variance from the New York Convention. The court, when asked to set aside an award may, where appropriate, and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action that in the arbitral tribunal's opinion, will eliminate the ground for setting aside the award. It is quite clear that the legislator in our case wanted to allow the arbitral proceedings to carry on and reach its conclusion as much as possible without interference, whilst those proceedings are carrying on.

I would suggest that there are a number of reasons why we would tend to adopt a conservative approach quite apart from what the Act says. I think there is a tremendous risk that different courts could reach different conclusions with regard to enforcement, and if conflicting decisions were reached, it may well defeat the whole purpose behind the New York Convention, which is to ensure uniform treatment of arbitral awards. That is one possibility.

The second one is if you have conflicting enforcement decisions which may be reached years after an arbitral award has already been given, this may also have an effect of thwarting the whole arbitral process and I think overall, the stand that we would take in Mauritius would be to respect the fact that the parties have decided to go to arbitration. If there is a situation where those proceedings are not totally resolving the issues between them, I think the courts in Mauritius would allow that to carry on before deciding whether it needs to intervene or not.

IV. LET US ASSUME, TO THE CONTRARY, THAT THE XANADIAN COURT REJECTED THE APPLICATION TO SET ASIDE AND RECOGNISED THE AWARD, IN A DETAILED DECISION EXPLAINING THAT, UNDER XANADIAN LAW,

- (1) THE ARBITRAL TRIBUNAL HAD PROPERLY FOUND THAT XANADU WAS A PARTY TO THE ARBITRATION AGREEMENT;**
- (2) THE COURT HAS NO POWER TO REVISIT THE TRIBUNAL'S APPLICATION OF THE STATUTE OF LIMITATIONS; AND**

(3) THE INCONSISTENCY WITH XANADIAN LAW ON INTEREST DOES NOT CONSTITUTE A BREACH OF XANADIAN PUBLIC POLICY THAT WOULD JUSTIFY SETTING ASIDE THE AWARD.

WHAT WEIGHT, IF ANY, SHOULD THE OTHER COURTS, WHERE FLYING DODO SEEKS ENFORCEMENT, GIVE TO THE XANADIAN DECISION?

A. England and Wales

Lord Justice Aikens: Well, the answer so far as the English court is concerned is: a great deal of notice. I think the English court's view would be that *prima facie* there is an issue estoppel, because that is a decision that has been made by the competent court, the Xanadian court, which is the curial court. It is a final decision, it is decisive, it is between the same parties and on the basis that we have set out here, it is precisely clear what has been decided. Those are all the elements which would be needed to make up an issue estoppel. That would mean that if these things had happened when this decision had been made by the Xanadian court and then the matters came back to the English court, I think the English court would say "the award will be enforced".

The only possible way of getting round that conclusion would be if somehow there was some underlying reason why the decision of the Xanadian court could somehow be attacked and at the moment, short of saying: well it was procured by fraud or something like that. I cannot see any basis for it. So, essentially if that was the course of events, then the English court would follow the decision of the Xanadian court and would itself enforce the award.

B. Singapore

Justice Quentin Loh: I think we would take a similar view. I think that the Singapore court would take a note, a careful note, of the Xanadian court's decision and give it weight and consideration, especially since it is the law of the seat and the governing law.

Having said that, although I think that the Singapore court is still free to hear the parties on any challenge under the prescribed grounds, no one has decided in Singapore that an issue estoppel arises, but there is enough academic writing to push us in that direction.

Additionally, although I think unless questions of corruption or new evidence arises on corruption, it is unlikely that Singapore courts will depart from what the Xanadian court has ruled, and I find it difficult to think of a case where a Singapore court as an enforcement court would find cause to disagree.

However, I would end by saying this: I think the Amsterdam Court of Appeal decision of *Yukos v. Rosneft*¹¹ has opened a whole can of worms where one court can say of another court that the judgment at the seat was given by a partial or dependent court. I think that one of the criticisms was that there was very little evidence of that before the Amsterdam Court for them to draw such a conclusion, but without overstepping my bounds, there are cases and countries where this might apply. What do the judges in the enforcement court do? They are put in a very invidious position to make a judgment that the courts of another country are partial or dependent.

I just hope I am not one of the first judges having to do that.

C. France

Charles Nairac: In French law, it is in fact quite different. A French judge would not be in the position of having to make that awkward determination. As per the philosophy that I mentioned earlier, French courts would not give any *res judicata* effect to the foreign court decision recognising the award in Xanadu. A French court would make its own assessment of whether it should recognise the award in France and in doing so, it would not give any deference, in a formal manner at least, to the Xanadian court decision.

D. Tanzania

Fatma Karume: There is no precedence on this issue that I have come across, but I am grateful to Mr. Justice Loh and his Lordship Justice Aikens because they have just reminded me of issue estoppel. Under Tanzanian law, we would look into issue estoppel.

However, the question to the court would be: “How far would you take your responsibility under the Act itself, particularly, Section 30 which requires you to look into certain aspects of the foreign award? Would you say that issue estoppel would basically estop you from having that responsibility?”

¹¹ Decision of the Amsterdam Court of Appeal rendered on 28 April 2009 in Case No. 200.005.269/01, *Yukos Capital S.A.R.L. v. OAO Rosneft*.

So, I do not know which way they would go. If I were to make the decision, I would rely on issue estoppel and stop there.

E. Mauritius

Urmila Boolell: So, we now have an original award that stands good and it is endorsed by the courts of the arbitral seat. I think under Mauritian law, the party now seeking to have this award set aside will have a really difficult time and he would have to show that under Section 39 (there is quite a burden of proof), the award now should not be maintained under Section 39 of the International Arbitration Act or under the general provisions of the New York Convention.

What I would say is that although this provision in itself may not have been tried and tested in Mauritius by our courts, Mauritius is not new to enforcing foreign arbitral awards or foreign judgments. We have under our existing Code of Civil Procedure, criteria which are already applicable for the enforcement of foreign arbitral awards. They are not very different to those pertaining under the New York Convention and the trend so far has been to the courts to adhere to the wishes of the parties and to implement the arbitral award if those criteria were satisfied.

So, I would imagine that should this situation come to our courts, the trend would tend to be one of respect towards the final decision before the arbitral seat.

V. IN DUE COURSE, THE COURT OF XANADU GRANTED THE APPLICATION TO SET-ASIDE, ON THE BASIS THAT THE REPUBLIC WAS NOT A PARTY TO THE ARBITRATION AGREEMENT. WHAT WEIGHT, IF ANY, SHOULD THE OTHER COURTS, WHERE FLYING DODO SEEKS ENFORCEMENT, GIVE TO THE XANADIAN SET-ASIDE DECISION?

A. England and Wales

Lord Justice Aikens: The *prima facie* position would be governed by Section 103(2)(f) of the English Arbitration Act 1996. There would be no enforcement because one of the specific grounds on which enforcement may be refused, (I will come back to the 'may' in a minute), is that the award has been set aside by a competent authority of a country in which or under the law of which the award was made. The only question is whether or not there is a remaining discretion because subsection (2) says "recognition or enforcement of the award *may* be refused" which implies

that there is a residual discretion to enforce despite the award being set aside by a court of a country in which the award was made and under the law of which it was made.

That issue was considered by all three courts in England in the *Dallah* case and all of us agreed that although there was a residual discretion, in fact, it was a discretion which was only to be exercised in very exceptional circumstances. So again, unless there was something that was very inherently wrong or could be inherently attacked as to the judgment of the Xanadian court, I think the answer is that there would be no enforcement in the English court, once it is said that the award has been set aside by the Xanadian court.

B. Singapore

Justice Quentin Loh: I am not sure. We do not have a decision on this either *obiter* or *ratio*. No one has ever really brought this up. We have the same provision which says that you may refuse enforcement if the award has been set aside or suspended by a competent authority of the country under the law of which the award was made. We also have Article V of the New York Convention.

So, I find that this is a very difficult question to answer. If you follow the continental or the French position, there will be a whole lot of literature; the common law's supporters disagreeing and vice versa, and there is actually no consensus on this. The starting point is Article V(1)(e) of the New York Convention. The word 'may' entails discretion, but as Richard has said, it does not mean that you have to exercise it except under very unusual circumstances. I do not know what the answer is. If the court at the seat sets aside or annuls the award under, let us say, Article 34(2)(a) under the grounds (i) to (iv), or Article 34(b)(ii) (bribery and corruption), it may be that an enforcement court might be more willing to deny recognition or enforcement.

But, suppose the court of the seat sets aside an award because of the very peculiar standard within the seat or because it went into a substantive review of the award and disagreed with the arbitrators or because it was some issue of the seat's local law non-arbitrability issue or local public policy, then, would a Singapore court just deny recognition? I am not sure.

And then, of course as I have said, there is this problem of *Yukos v. Rosneft* and we should address this directly at some time or another. What happens if you feel that the court that set it aside did so because of the "fat brown envelope"? But, I would suggest that unless the proof was there,

most courts would be very unwilling to just jump to the conclusion based on press reports.

C. France

Charles Nairac: As a practical matter, the outcome would be very similar in France although the process would be a little different. Certainly, the French courts would be free to enforce an award even though it has been annulled at the seat. As I mentioned earlier, there is ample authority to that effect.

Turning to our hypothetical, the French courts would not be bound by the annulment decision at the seat; they might consider it but would make their own determination of whether or not to enforce the award without any formal regard given to the annulment decision at the seat.

D. Tanzania

Fatma Karume: Well, the answer in Tanzania is very simple indeed. The courts do not have a choice; there is no discretion.

Section 30(2)(a) of the Arbitration Act reads as follows:

“subject to the provisions of this subsection, a foreign award shall not be enforced under this part if the court is satisfied that the award has been annulled in the country in which it was made.”

So it is as simple as that. There is no discretion if the award is annulled in Xanadu; the courts in Tanzania will not enforce it.

E. Mauritius

Urmila Boolell: I think our law is quite clear. If we look at the terms of Section 39, the heading itself is quite revealing, it says “exclusive recourse against award,” but more importantly, Section 39(2) states: “*an arbitral award may be set aside by the Supreme Court only where [...]*”. My reading of “*only where*” would be that this is supposed to be very restrictive.

This is not supposed to stretch to situations which go beyond those seven exceptions listed out in Section 39 or in the New York Convention such that the spirit of the New York Convention, which is that of enforcement, should prevail.

So my take on this would be that there would be no discretion as the question may be put under English law. That would be applicable, but I think, the seven exceptions would be looked at in our case if the Xanadian award would be set aside. We would have to look in detail whether the seven exceptions would be applicable, failing which there would be no further recourse.

Salim Moollan: Perhaps I may put to rest what seems to be a confusion.

Section 39 does not apply to the enforcement of arbitral awards in Mauritius. Section 39 is the setting aside provision for arbitrations with their seat in Mauritius. You will find that in Section 3(1)(c)(ii) of the Act, which provides that Sections 5, 23 and only a couple of others, apply to foreign-seated arbitrations. It is very important to realise this because that has been the downfall of Indian arbitration. Once a court starts using ‘setting aside’ jurisdiction against foreign awards, you are in trouble. We have not done so here.

The New York Convention applies pursuant to the 2001 Act to all recognition applications in Mauritius. There are, in the Model Law, Model Articles 35 and 36, which essentially replicate the provisions of the New York Convention, and which a country may choose to enact into its law, because certain countries, of course, are not parties to the New York Convention and might want to have Articles 35 and 36. These had not been adopted in Mauritius, you will see that in paragraph 129 of the *Travaux Préparatoires* of the International Arbitration Act 2008. It is absolutely crucial to understand that distinction. You can only have a ‘setting aside’ under Section 39 for arbitral proceedings seated in Mauritius.

For the whole discussion on the present panel – about an award rendered in an arbitration seated in Xanadu and the enforcement of that award here, you would not even be looking at the International Arbitration Act, save for the amendments which it made to the 2001 Act (the New York Convention Act). So, you look at the 2001 Act (the Act on the Recognition and Enforcement of Awards), and this is where you will find the proper regime. This is very important because, for instance, Section 39(5) of the 2008 Act is only a provision which would apply to arbitral proceedings seated in Mauritius. You may, as the court that is hearing an application, decide that “well, actually I can see that the tribunal got it wrong, and I will remedy that error here, in my jurisdiction”. You cannot do that on a recognition and enforcement application.

So, it has some very important ramifications. As a further example, the point just made about Section 39(2); that provision would not apply. You look at the New York Convention, Article V uses the word

'may'. Article V(1)(e) says that you should normally recognise an annulment, but then you have 'may' in the *chapeau* of Article V(1).

You will have, one day, (I am sorry to have to say that to the judges), to grapple with exactly the same problems as the French courts have, as the English courts have, because we are out of the regime of the Geneva Convention, we are under the regime of the New York Convention and therefore, we will have to decide that issue.

Underpinning this is how you look at arbitration. Is it something which is territorial, is it something which is linked to the seat? And therefore, once the seat has said this award no longer has any validity, that is the end of the question. Or is it something which is transnational?

And very briefly, by way of information, as you heard the Prime Minister say this morning, it is true that we still have some provisions of the *Code de procédure civile* that deal with the recognition and enforcement of foreign awards which would have applied to non-New York Convention awards. That is being abrogated and we are getting rid of the reciprocity reservation in the New York Convention. So, foreign users in Mauritius as well as all the users in Mauritius, will have the simple regime of the New York Convention that is to be found in the 2001 Act.

Adrian Winstanley: Thank you to all of the panellists. Charles intentionally posed some difficult questions for us in a scenario with which we may be familiar in practice, and we have had references to cases well-known and less well-known. Although there may be more in common than at odds amongst the jurisdictions that we are dealing with, the message remains that you must choose your governing law and place of arbitration with some care.

Questions & Answers

Adrian Winstanley: Well, I know that it has been a long and very warm day, but if there are any questions, we are very happy to take them before we close the day.

Justice Christopher Madrama Izama: I am Christopher Madrama Izama, Judge at the High Court of Uganda. My question is very simple. I just want to know when considering these two elements, that is, when you are discussing the fact that the Republic is not a party to the arbitration agreement, and the issue the arbitral tribunal had in applying the Xanadian statutory limitation. I do not want to go into the public policy aspect which has been well discussed.

My question is whether the reluctance of the countries interfering with the enforcement of a foreign arbitration award – is that an extension of the rule that the arbitral tribunal is not bound by the rules of law of the national law which applies to the arbitration? The reason why I am asking this question is that here, we have the English courts applying a national law to find out whether the Republic is a party. But to what degree do we go, to apply the national law to an arbitral award where they have ignored some of these rules of the national law, and which in our statute says is not bound by the rules of law which means the substantive law of a contract? Thank you.

Adrian Winstanley: If I have understood the question; it is that tribunals are not bound by the law of the seat of arbitration. Is that the question you are raising? Are we ignoring for the moment the substantive applicable law of the contract, and talking about the procedural law?

Justice Christopher Madrama Izama: It is substantive law, and the issue is of limitation. So, refusing to recognise that, is it an extension of the rule that the arbitral tribunal is not bound through the rules of law, which I tend to mean the rules of substantive law, the rules of a contract?

Charles Nairac: Tribunals do apply the substantive law, typically the applicable law chosen by the parties in the contract. The notion that arbitral tribunals are not bound to apply the law needs to be put to rest. They will apply the law in the same manner that a judge would apply the law, that is their obligation. Now, whether they do it properly, that is another matter. They might not apply it correctly and we had some examples in our hypothetical problem.

Lord Justice Aikens: There is perhaps a bit of a distinction between, first, the situation before the arbitral tribunal and, secondly, when an issue arises as to whether or not the award is to be enforced, when the question is: “are the parties a party to the arbitration agreement itself?” This is because there is (and I agree with you here) a certain latitude in front of the tribunal and, as has been pointed out more than once, errors of law in themselves will not normally under English law be a reason for setting aside an award; nor indeed will errors of fact. But the provisions of the English Arbitration Act are really quite strict on the question of how you approach the issue of enforcement when the question at issue is the validity of the arbitration agreement. And as I have said, the issue of validity includes the question whether or not the two sides before the court were a party to the arbitration agreement.

The Act provides that the court has to consider the question of validity either according to the law to which the parties subjected it or failing any indication of that law, under the law of the country where the award was made. And whatever latitude there may be before the tribunal, when the matter comes before the court, *i.e.* it comes before a judge, there can be no doubt that the matter must be considered *au pied de la lettre*. It is to be decided according to the law and nothing but the law, and so there is no room for manoeuvre.

So in the *Dallah* case,¹ when it came before me, there was no indication in the contract as to which law the parties had subjected the arbitration agreement. The award had been made in Paris, that was the seat of the arbitration. So, I had to consider whether or not, as a matter of French law, the two parties were party to the agreement. Because it was foreign law, not English law, that was a question of fact: I had to listen to expert evidence on what the French law was. Of course, the French courts have told me that I had it all wrong, but never mind that. The point is that when you get to the court, I think the court is much more circumscribed as to what it can consider by comparison with an arbitral tribunal itself.

Devashish Krishan: Well, I would just like to come back to possibility (4), that is, where the courts of Xanadu set aside the award in favour of Flying Dodo and Flying Dodo nonetheless takes it abroad to enforce.

What would be the panellists’ thinking about advice given to the Republic of Xanadu to take its court judgment and to seek recognition and enforcement of its court judgment abroad? And on the other hand, what would be the possibility for Xanadu, for the countries where the New York

¹ *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2008] 2 Lloyd’s Rep. 535.

Convention, the discretion, would be applied in favour of Xanadu? What about for Flying Dodo to go on Article VII of the New York Convention which allows for a more favourable sort of regime, if there is one, and I think that has been done in France in the past. I was wondering on both sides what would be your reactions to that sort of advice.

Justice Quentin Loh: The first thing I think is all courts are quite wary of parties that do forum shopping and I think in this case, the Xanadian court would hold a special place because it was the law of the seat and the governing law, and any decision by the Xanadu courts would receive great respect and weight in Singapore.

I suppose as a matter of tactics and strategy, the party that loses wants to make sure that he puts his asset in a jurisdiction that he finds more favourable to him. For the same reason, if you know that the governing law gives an opponent special advantages, for example, under U.S. law, they consider the whole group of companies as one, they do not even consider strongly separate corporate entities, so you might not want to argue if U.S. law was the law of the seat, whether you were a party or not to the arbitration agreement. You might also think U.S. law – I am not saying I am right on U.S. law, I am just taking it as an example – U.S. law is more favourable to the *alter ego* theory, so you are the only shareholder and are the only director with your wife, you will find that the U.S. will say: “yes, you are about to set up a company where there are only two directors and shareholders, it is you and your wife, so you are liable”. So, in a case like that, a party might find it is not worthwhile trying to set aside at Xanadu, he will fail. And more than that, he will then end up with the court at the seat, affirming the award. So, a party like that might prefer to wait and see where you try and enforce it.

I do not know if I have answered your question about going to different fora.

Devashish Krishan: Well, I was actually just curious to know if the Republic of Xanadu will take its court judgment and come to Singapore, England, Tanzania, France or Mauritius, what would be the outcome of that? Because you are recognising a court judgment, it is a different application from recognising the award. So, on the rules of court judgment, would there be more possibilities?

Justice Quentin Loh: Oh, a judgment! Well, there is a world of difference between a judgment and an award and that is why we are all sitting here. If I get an award, I can enforce it in the 148 countries that are signatories to

the New York Convention. But if I have got a court judgment from Xanadu, I cannot enforce it as a matter of right in Singapore. We only do so under reciprocal enforcement statutes or treaties and it is very limited. For example, one would have thought that the Commonwealth jurisdictions would have a lot of 'Reciprocal Enforcement of Foreign Judgments' Acts in place because we were all part of the same system but actually, there are not more than two or three. I would not have been able to enforce a Singapore judgment in England as a matter of right. I would have to start all over again.

If you go between Singapore and Malaysia, yes, you can register a Singapore judgment as a Malaysian judgment like an award. I think New South Wales gives us the same right, but very few other countries do.

Under the Reciprocal Enforcement of Foreign Judgments Act 1959, I do not think there is any country in the list.

Adrian Winstanley: Now, I have seen other hands but I am very sorry that I am going to insist that we bring matters to a close now. It has been a long day; we are past our time. I want to thank very much indeed the panel who served me so extremely well. You have done all the hard work for this afternoon's session. And to all of the delegates for your attention, notwithstanding the lateness of the hour and the heat, I look forward to seeing those of you later who will be at dinner. Thank you very much.

PANEL IV

**ARBITRATOR BACKGROUND, APPOINTMENTS
AND OUTCOMES:
SHOULD WE TAKE EMPIRICAL RESEARCH
SERIOUSLY?**

Introductory Remarks

*Dheerendra Kumar Dabee, G.O.S.K., S.C.**

Good morning to you all. We did start with a slight delay this morning but this is typical of the second day of a new conference, especially when it is being held by the beachside.

This panel, of which I will be the moderator, will be exploring the question: “What value is there in carrying out empirical research in investment arbitration?”

The focus will be on investor versus host States arbitration arising under investment treaties. Various hypotheses have been tested by scholars and academics against data or datasets collected from a number of arbitrations. For example, we look at certain statistics to make this point. Some 85% of investment arbitrations have been initiated by investors from developed countries against host States which are developing countries and about 70% of arbitrators adjudicating investment arbitration cases are from developed countries. This sometimes has led to allegations or perceptions that developing host countries/respondents may not be getting a fair treatment from arbitrators. Empirical research, which is the topic this morning, seeks to investigate whether such allegations or hypotheses are supported by the related data.

There has been a big increase in the number of investment disputes during the last decade and this has led to a growing interest of academic economists and political scientists to study the arbitral process in order to better understand how investment arbitration works and what role arbitrators play in the arbitral process.

The study and research has focused on questions such as the following:

To what extent is the existence of investment treaties important? Where and how must multinational corporations invest abroad? Do they have a considerable impact on the flow of foreign investment? And even if they do not, might the treaties have other important benefits such as the depoliticisation of investment disputes?

Secondly, what are the costs of investment treaties? To what extent does investment treaty arbitration put strains on public finances, especially of developing countries? Even the hypothetical case that was the

* Solicitor-General, Republic of Mauritius.

subject of discussions during the first panel yesterday morning revolved around a dispute concerning a figure of USD 200 million. Just to make the point that these can have strains on the public finances of developing countries.

Third, why did States enter into investment treaties in the first place? Did those States fully understand the implications of the treaties when they spread very rapidly in the 1990s?

Our panel will be focusing on another very important empirical question: “Does the experience and socialisation of arbitrators affect how they decide?” One critique of investment arbitration centres on the role of arbitrators, and other roles the same individuals may play in the arbitral process. Some arbitrators serve as counsel in other cases and doubts have been raised as to whether arbitrators are truly impartial and independent, in part because many arbitrators wear several hats simultaneously. They may be arbitrators, experts and counsel.

Arbitrators, for example, serving as ICSID arbitrators are most of the time not doing it as a full-time job. They would be involved in advising claimants; advising host States in other arbitration cases ;and others are also involved in carrying out academic research. And the focus of this panel is on the research that investigates the relationship between the background of arbitrators and outcomes in investment arbitration.

The findings of such research could help defuse some critiques of investment arbitration or help bring about reforms. I will not be saying more on the subject; our eminent experts will shortly be talking to you and review the subjects.

Let me instead proceed to introducing the three panellists this morning. The *rapporteur* is Dr. Michael Waibel on my left, who is a lecturer at the University of Cambridge and a fellow of the Lauterpacht Centre for International Law. His research focuses on international economic law. He will be surveying the existing empirical literature on arbitrators and examining the usefulness of empirical research for practitioners. At the same time, he will be highlighting the pitfalls in relying on such research when advising clients, and our two commentators are prominent arbitration practitioners.

We have Professor van den Berg on my far left, who is a partner at Hanotiau & van den Berg in Brussels. He has extensive experience as an arbitrator and counsel in commercial and investment arbitration cases. He is also a professor of law at Erasmus University (Rotterdam) and a visiting professor at the University of Miami School of Law. He has extensively published and lectured on international arbitration. Professor van den Berg was conferred the Arbitration Lawyer of the Year Award by the

International Who's Who of Business Lawyers in 2006 and 2011. His comments will focus on what is political and the coding instructions for the data set used by Michael Waibel in his study. He will also be considering insights from cognitive psychology for the behaviour of arbitrators.

Mrs. Lucy Reed is a partner at Freshfields and she is currently based in Hong Kong. She co-heads the Freshfields International Arbitration Group and chairs the Institute for Transnational Arbitration and serves on the LCIA Court and ICC Arbitration Commission. She is the past president of the American Society of International Law; she sat on the Eritrea-Ethiopia Claims Commission and directed the Claims Resolution Tribunal for dormant accounts in Switzerland. While working for the U.S. State Department, she was the U.S. agent to the Iran-United States Claims Tribunal. She is ranked as a top-tier international arbitration practitioner by Chambers USA 2011. Lucy Reed will be commenting on some of the central findings of Dr. Waibel and she will be, I understand, suggesting that caution be used in relying on or generalising from such empirical work, in particular in view of the small size of the sample that has been used.

Before I call on Dr. Waibel to present his report, let me say that the structure of the proceedings as we proceed will be as follows: each of our panellists, starting with Dr. Waibel, will be addressing you and talking to you and with you for about 20 minutes, and we will try also to make up for the time lost earlier today. And thereafter, there will be the opportunity given to some of the presenters, a few minutes, so that they can respond to each other, and finally we will open the floor for general discussion.

Report to the Conference

*Dr. Michael Waibel**

I am delighted to be here this morning to speak to you about arbitrator background and outcomes: What is the relationship? The central question that I am interested in is: Does it matter how an arbitrator has spent his or her formative years? Do experiences accumulated over a lifetime matter for how arbitrators decide cases? We heard yesterday from the Prime Minister in his opening address that most arbitrators are from developed countries. If we look at ICSID arbitration, 18% of all ICSID arbitration cases, that is 72 cases in total, have been brought against African States. We have, however, only 16 African nationals who have ever sat as arbitrators in ICSID arbitrations; 19 if you count those with double nationality, of a nationality also of a developed country.

This type of concern is a normative – namely, that arbitrators are being drawn primarily from developed countries and that this composition of tribunals may affect outcomes. Now, I am not interested today in these normative concerns, important as they are. What I am interested in is positive empirical work. To carry out a dispassionate analysis of the data, coming up with some hypotheses and confirm whether these hypotheses find support in the data. Now, to illustrate why there is value in empirical work, let me go briefly outside investment arbitration to one of the most celebrated articles by economists in the empirical field.

This is an article written in the early 2000s by Donohue and Levitt. Levitt may be familiar to you. He is one of the authors of the famous book *Freakonomics*. They co-authored a paper entitled *The Impact of Legalized Abortion on Crime*.¹ And their starting point is really a puzzle in the United States. That puzzle is that since 1991, the United States had experienced the sharpest drop in murder rates since the Great Depression in 1933. And the question they are interested in and exploring in their paper is, why. Now, various theoretical explanations have been advanced for why there was such a sharp drop in murder rates, and as you can imagine, this was a charged political question.

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¹ John J. Donohue III and Steven D. Levitt, *The Impact of Legalized Abortion on Crime*, 116 *The Quarterly Journal of Economics*, 379-420 (2001).

A first possible explanation: the rate of incarceration of criminals had increased; the number of police on the streets had increased; the police had employed better policing strategies; there had been declines in drug trade or the economy was doing well, and as a result, there were fewer murders. A problem with many of these explanations is that they are often quite city-specific. So if you look at New York, the trends were somewhat different from Los Angeles, *etc.* Now, what they found in this ground-breaking empirical paper is that an important factor driving the decline in murder rates was the decision of the U.S. Supreme Court in 1973 to legalise abortion. This worked through two channels: first, it reduced with a lag of about 20 years the size of the cohort, *i.e.* adolescent men who were most likely to commit crimes. Second, it reduced the number of births to mothers living in less favourable socio-economic conditions, again, leading to a decline in murder rates with a lag of about 20 years. This counter intuitive finding was controversial, both on the left and on the right. This is what the best empirical work does. Now, I am not suggesting that in investment arbitration we have as much controversy as we have in the United States about abortion. But we do observe, especially more recently, two extreme schools in the academic literature and also more generally in commentary on investment awards.

One school says, without much critical scrutiny, that signing investment treaties is always beneficial for developing countries and that investment arbitration, without question, is a great thing for developing countries and for countries more generally. The other extreme school holds that investment arbitration really is a reincarnation of imperialism, of global capitalism, at its worst. Given these hyperbolic statements, there dispassionate empirical analysis can add value, but I would like to add that empirical analysis has serious limitations and always needs to be taken with many grains of salt.

Now, I should add, at the outset, two health warnings. I am not talking about conflicts of interests or challengeable interests of arbitrators. What I am interested in is what drives the decisions of arbitrators, often subconsciously. How do their backgrounds and their socialisation affect how they decide cases? So, it is not about the integrity of the arbitrators; it is about what drives the decisions even though they may not be aware of those driving factors. A well-known empirical study recently done in Israel about sentencing in criminal proceedings showed that Israeli judges tend to be more lenient in sentencing when they had just had a meal.² Nobody is

² Shai Danziger, et al., *Extraneous factors in judicial decisions*, 108 Proceedings of the National Academy of Sciences of the United States of America, 6889–6892 (2011).

suggesting that these judges are deciding cases based on what they had for breakfast on purpose. But there are many factors and we will hear more from the commentators, that might influence how judges, and by extension arbitrators, decide. The second health warning that I should mention is that all I am presenting today on my own research is very much work in progress. So, nothing is conclusive. As I mentioned, I am interested in a positive empirical analysis leaving aside the normative questions whether reform of investment arbitration is warranted or whether the criticisms are founded or not.

Some empirical work is descriptive. This type of work involves gathering data and summarising the data using statistics, *etc.* The researcher can also perform an analytical empirical work, that is, using regression analysis to see whether there are patterns in the data using statistical techniques.

We have assertions that there is a causal link between the background of arbitrators and how they decide. Now, is that true when we look at the data? So, the essential idea here is that an arbitrator's background, an arbitrator's policy preferences might play some role in how they decide cases. And this is based on the idea that arbitrators, just like judges or everybody else, are live human beings. So, they are not machines but they might bring their policy preferences to bear on the cases before them. There is a growing literature looking at courts, primarily, and one of the most well-known examples is a book by Cass Sunstein and co-authors entitled *Are Judges Political?*. Cass Sunstein and co-authors show that when looking at U.S. Circuit court opinions, there is evidence of ideological voting that is based on the political affiliation, democrat or republican, of the appointing president who has appointed the judge concerned in a range of areas.³

So, for example, they find that there is such political voting when it comes to capital punishment. Conversely, they find no evidence in a statistical sense of such political voting in takings and expropriation cases. Sustain's study is an example drawn from the domestic literature on domestic courts. We have a small but growing literature on international courts and tribunals. Posner and de Figueiredo looked at political voting before the International Court of Justice and found that the nationality of the judge played some role.⁴

³ Cass R. Sunstein, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution Press, 2006).

⁴ Eric Posner & Miguel de Figueiredo, *Is the International Court of Justice biased?*, 34 *Journal of Legal Studies*, 599 (2005).

Eric Voeten, who is a political scientist, looked at the European Court of Human Rights and found very little evidence that the national origin of the judge influenced his or her vote.⁵

Another study of the European Court of Human Rights by Bruinsma found that judges from former communist countries, who had worked most of their lives for the State concerned, were generally, that is on average, more supportive of their Government.⁶ Susan Franck has been a pioneer in empirical work and investment arbitration. In her early work, she has found little evidence that it mattered whether the arbitrator was from a developed country for how they decided cases.⁷ Daphna Kapeliuk has recently written two papers, the first looking at lead arbitrators defined by her as arbitrators who have sat in four or more investment cases. She shows that there are no biases among such arbitrators and that, contrary to popular perception, there is no tendency to split the difference.⁸ She also looked in a second paper in 2012 at whether arbitrators with experience vote differently from arbitrators without experience; whether there is a difference in outcome and whether they are more likely to dissent.⁹ She found no evidence for either proposition.

Now let me just give you very briefly, looking at a little bit more detail at two of these studies; the first, Bruinsma, on the European Court of Human Rights. In Figure 1, in the first row you see majoritarian opinions and separate opinions, and you have different types of judges. The judges in column 3 are from old Member States, that is, essentially Western European Member States, and the judges in column 4 are from new Member States; respondent judges (column 6) are judges in particular cases where their own State was the State against which the complaint had been brought. The first row shows the number of times these judges have agreed with the majority. In the second row, you see the number of times they have issued a separate opinion.

Now what is interesting here is that there is a difference between old Member States and new Member States. Judges from old Member States are more likely to issue separate opinions than judges from new

⁵ Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 International Organization (2007).

⁶ Fred Bruinsma, *The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)*, 28 Recht Der Wirtschaft 7 (2007).

⁷ Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 Harv. Int'l L.J., 435 (2009).

⁸ Daphna Kapeliuk, *The Repeat Appointment Factor - Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell Law Review (2010).

⁹ Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Treaty Arbitration*, 31 Rev. Litig., 267 (2012).

Member States. And also if you look at *ad hoc* judges, they are much more likely than judges, on average, to write a separate opinion, that is, they tend to vote on average in favour of the State that appointed them for a particular case.

Bruinsma (2008), Majoritarian and Separatist Positions					
	Elected Judges	Old Member States	New Member States	Ad hoc Judges	Respondent Judges
Majoritarian	1246	711	535	12	566
Separatist	523	377	146	29	303
N	1769	1088	681	41	869

Figure 1: Bruinsma (2008)

Kapeliuk (2012), one of the most recent empirical studies on investment arbitration, looked at two questions. On the one hand at whether the experience of arbitrators and outcomes are correlated, *i.e.* does it matter how much experience an arbitrator has and how cases are decided. The first row shows the scenario where the claimant arbitrator is experienced whereas it is the respondent arbitrator's first case, that is the arbitrator appointed by the host State. You have the inverse in the second row and then you have a fairly large residual category where either both have no experience or both are experienced. The win and loss rates for these two scenarios are similar.

Kapeliuk (2012), Experience and Outcome

Panel Composition	Outcome		Total
	Claimant wins	Respondent wins	
Claimant arbitrator = experienced & respondent arbitrator = novice	5	4	9
Claimant arbitrator = novice & respondent arbitrator = experienced	8	8	16
Other	13	16	29
Total	26	28	54

Figure 2: From Kapeliuk (2012)

Based on this result you may be convinced at least at first sight, that it does not matter whether an arbitrator has any experience. However, for those of you with substantial experience in investment arbitration, this seems to be a counter intuitive conclusion. This essentially descriptive empirical work and, as you see here in this column, we have a very small sample size, with a sample of only 54 cases, more than half of which is in the residual category. So, you can question whether this particular empirical study is all that reliable on this particular point.

Looking briefly at the second question that Kapeliuk investigated, namely, whether there is a relationship in a statistical sense between experience and how likely an arbitrator is to dissent?

Column 1 in Figure 3 shows the number of dissents; column 2 shows the number of cases where the arbitrators were unanimous. The first noteworthy thing about this table is that the number of dissents seems to be fairly small. And again, you do not see any significant difference between newcomers and experienced party arbitrators. The empirical challenge again though, is the very small number of dissenting opinions. In total in these cases thus far, we have 21 dissenting opinions. That is not a lot and you cannot do statistical analysis of dissents for that reason.

Kapeliuk (2012), Experience and Dissents

Experience Status	Dissent		Total
	Dissent	No Dissent	
Newcomer party-appointed arbitrator	8	53	61
Experienced party-appointed arbitrator	3	44	47
Total	11	97	108

Figure 3: Kapeliuk (2012)

Let me then come to my own ongoing work, which is carried out with Yanhui Wu, an economist. We have formulated a set of hypotheses which you see in Figure 4 numbered H1 through H5. These are really just conjectures based on some of the existing writing.

Waibel & Wu: Hypotheses

- H1: Arbitrators who have spent a substantial part of their career in private practice (attorney-arbitrators) are more likely to affirm jurisdiction and uphold liability
- H2: Arbitrators with a skewed appointment record will tend to favor the type of party that routinely appoints them
- H3: Arbitrators with substantial experience in government will be more deferential to host states
- H4: Arbitrators who belong to the same legal family will tend to assert jurisdiction less often and hold the host state liable on fewer occasions
- H5: Arbitrators from developing countries are less likely to hold the host country liable than their developed country counterparts

Figure 4: Waibel & Wu

The first hypothesis is: Arbitrators who are also attorneys are more likely to favour the investor by either upholding jurisdiction or affirming liability. Second, arbitrators who have been appointed, say 90% of the time, by a host State, are more likely on average to agree with the arguments of a host State than an arbitrator who has been appointed 90% of the time by the investor. Similar to the idea that was developed and examined by Bruinsma, arbitrators with substantial experience in government will on average be more deferential to governments. The fourth hypothesis is that arbitrators belonging to the same legal family in the sense of legal origin will tend to assert jurisdiction and uphold liability less often when the host State comes from the same legal family. So, for example, a Spanish arbitrator who sits in a case involving Argentina, according to this hypothesis, would be less likely than, say, a U.S. arbitrator, to uphold jurisdiction and affirm liability.

And finally, we have the hypothesis that Susan Franck investigated in her work: developing country arbitrators decide cases differently. In order to investigate this question, we have assembled the personal characteristics of all 402 ICSID arbitrators that have been appointed to date and we used their personal characteristics as explanatory variables in our statistical analysis. Now, ideally of course, you would want to go directly to the arbitrators and ask them: what are your political leanings; what is your view of the law? Of course, as you know, this direct approach is not going to get you very far. Arbitrators will often say: “I cannot tell you that”, or “I do not want to tell you that”. Another alternative, similarly infeasible, is to read the arbitrator's mind.

What we are trying to do is to use the next best proxy that we can observe for the arbitrators' true policy preference. As mentioned, we cannot observe the arbitrators underlying policy preferences. We try to infer those from the arbitrators accumulated life experience. We have used a wide range of sources in order to gather this data including Martindale's obituaries in major newspapers for arbitrators who have passed away, and just lots and lots of internet searching to find information about particular arbitrators.

Just to give you an idea of how this works, I have reproduced here one entry from our arbitrator data set. The individual is Professor Rudolf Dolzer. This tells you that Rudolf Dolzer was born in 1944. He is male, like most arbitrators. He has German nationality, he has 12 years of higher education, he obtained a PhD degree, his legal origin is German. He is a specialist in public international law, as opposed to being specialised in commercial law. He is a full-time academic. We do not have information on party affiliation for many arbitrators but we have collected it for some, such as Professor Dolzer. Rudolf Dolzer was Head of staff to German

Chancellor Helmut Kohl for four years. So, we infer from that that he is probably of a conservative political persuasion. We decompose the number of years of experience in the different branches of Government. He has spent four years as Head of Staff to German Chancellor Kohl; so, he has four years of experience in the executive branch. He has zero years of experience as a judge; and zero years of experience working in a corporate sector. The variable ‘counsel to investors’ indicates whether the arbitrator counsels investors in other cases. The variable ‘IO’ stands for the number of years of experience in international organisations. We then also collect data on whether the arbitrator is affiliated with a particular law firm; Professor Dolzer, in my current example, has no ongoing relationship with any particular law firm; the dataset then also contains information on how many times the arbitrator has been appointed as a president – in the case of Professor Dolzer, zero; how many times has he been appointed by the investor?; how many times has he been appointed by the respondent State?; is the arbitrator an elite arbitrator as defined by Daphna Kapeliuk (2010), that is, has the arbitrator been appointed four or more times?: Professor Dolzer has not been appointed more than four times.

Then, we collected information on the universities attended by the arbitrator. Professor Dolzer studied at Heidelberg and Harvard Law School. Now, we define elite education in the following arbitrary way, namely whether the arbitrator studied at Harvard, Yale, Stanford, Oxford or Cambridge. We could define ‘elite’ arbitrators in other ways and test how robust that is, so, I would like to emphasise that this is only one way of looking at elite education.

The interest of looking at elite education is that you might think elite education is a better predictor than developing country status of the arbitrator. You might think that many arbitrators come from privileged backgrounds (compared to the general population), especially if they come from developing countries. So, it is much more useful to look at whether they had in fact enjoyed an elite education, say, in one of these five institutions than to look at their nationality. Nationality therefore, according to this theory, would not be very meaningful. And the final piece of information we have collected on each arbitrator is the number of times Professor Dolzer has appeared as an expert for the investor and the number of times he has appeared and as expert for the respondent State.

Now, let us turn to some descriptive statistics on the arbitrators who have been appointed to ICSID tribunals. Figure 5 gives these descriptive statistics for all our 402 arbitrators. In the first column, you see the president; in the second column, the arbitrator appointed by the investor and in the third column, the arbitrator appointed by the host State. The first

row shows that there seems to be more women among those arbitrators appointed by host States, compared to arbitrators appointed by investors. From a normative point of view, you could say this is very encouraging. However, if you look a bit more closely at the data, you will discover that this is driven by a single arbitrator who tends to be appointed by many host States and by some host States multiple times.

We also see other interesting differences in this summary table. As you would probably expect, host States tend to appoint, on average, more arbitrators from developing countries than the investors. In addition, more arbitrators appointed by host States are full-time academics compared to those appointed by the investor. You also see a difference if you compare the number of years of experience the president has as compared to party-appointed arbitrators. Presidents on average have more years of experience in the executive branch, for example, which is not surprising, given that the presidents are on average more experienced (and older) when appointed to an ICSID tribunal than the two party-appointed arbitrators. This variable legal origin tells you whether the arbitrator appointed by the investor and the arbitrator appointed by the respondent share the same legal origin. And then you have finally elite education and elite arbitrator.

Arbitrators: Descriptive statistics			
	President	C-Arbitrator	R-Arbitrator
Male	94%	96%	88%
Developing status	22%	21%	42%
PIL	42%	31%	48%
Academic	37%	24%	36%
Private Practice	65%	81%	62%
Executive	5,3 y	3,1 y	3,5 y
Legislature (y)	0,2 y	0,7 y	0,3 y
Judicial (y)	4,7 y	2,3 y	3,2 y
Counsel to investors	59%	73%	50%
Legal Origin (Common)	39%	51%	35%
Legal origin match host	43%	38%	55%
Elite Education	34%	42%	31%
Elite Arbitrator	66%	49%	50%

Figure 5

In conclusion, let me come to our very preliminary results. You will recall my ‘health warnings’ from the beginning. It is very important to be

conservative about interpreting these results. These are purely statistical patterns, and in particular they do not imply that there is causation in the sense that *because* an arbitrator is from a developing country, *for that reason* the arbitrator tends to be more favourable to host States than an arbitrator from a developed country. These are purely correlations.

We find so far very little evidence that it matters for outcomes whether the arbitrator is a specialist in public international law, contrary to what some in the literature have said, or whether the arbitrator is teaching full-time at university or whether the arbitrator has experience in government.

Conversely, we do find some support for our second hypothesis, namely that the track record of appointments tells us something about the arbitrators' policy preferences. For those of you who are very active in arbitration, this will probably not surprise you. This might only confirm what you already know. But it is an interesting finding for those from outside arbitration such as political scientists and economists who often think about judicial politics in the context of national courts where you do not have appointments. What is interesting here, though I think also for those in arbitration is that it is really the track record of appointments that seems to matter. It is not who appointed you in the particular case. More important in the statistical sense is whether you have been appointed 10 times by the host State or 10 times by the investor rather than, have you been appointed by the State or the investor in a particular case.

We have some initial evidence that it may matter whether you are in a full-time private practice. Someone who is in full-time private practice is somewhat more likely to uphold jurisdiction and liability, and whether you are from a developing country.

The most interesting findings, so far, is that legal origin seems to matter. An arbitrator who has the same legal origin as the host country, holding all else equal, will tend to review the actions of the host country more favourably. You might ask, why is that the case? Our theory is, the reason why arbitrators tend to be more sympathetic to host countries of their own legal family is that at a very basic level, they are more familiar with that legal system. So, a common lawyer will be more familiar with another common law jurisdiction. Hence, *on average*, such an arbitrator will be more inclined to hold, broadly speaking, that the conduct of the host State is reasonable given its own law and international law.

Finally, we have some preliminary evidence that the voting pattern of the president and party appointed arbitrators differs. One needs to be very careful about interpreting empirical studies. My own reading of all existing empirical studies, including my own with Yanhui Wu, is that none

of the studies have established causality. In other words, we are not on firm ground. None of these studies is robust enough to formulate government policy one way or another. I would not advise any Government to change its approach to investment treaty negotiation as to whether they want to include investment arbitration, for example, on the basis of existing empirical research.

Normative questions such as these require much more robust findings – and one that no single empirical study, no matter how well done, can deliver. I would also caution against using these findings in the selection of arbitrators and especially, I would like to emphasise this point again, underscore that these findings are very different from what you would need to challenge an arbitrator.

There are a couple of concerns that are particularly important when it comes to robustness. One is that we have a fairly small sample size and Lucy Reed will discuss that in her comment. We may be missing important variables.

Perhaps, it also matters in investment arbitration what the arbitrator had for breakfast and for how long the arbitrator has not eaten. Perhaps the arbitrator's religion matters. Perhaps the arbitrator's ongoing relationship with appointing counsel also matters. All these factors may matter. We have not considered them in our analysis and that might bias our results. Maybe the whole methodology is open to question. So, the explanatory model could be inaccurate. If this is true, then these results do not tell us all that much.

The key point in conclusion is that we need to have more empirical work. That empirical work can be useful in starting a conversation based on data. We also need to have empirical work cross-checked to see whether it is robust. If we leave out, for example, an arbitrator who has been appointed 35 times by the host State, do the results change? If we leave out the country with the highest number of arbitrations brought against it, do the results change? In other words, if we drop Argentina from the analysis, is there any difference in the results? Or are the results driven to a large extent by Argentina? We have done these basic robustness checks; Argentina is not driving our results, but a lot more in terms of robustness checks should be done. So again, please take all this with many grains of salt. Thank you very much.

Response to the Report: Empirical Studies of Arbitrator Conduct

*Lucy Reed**

Let me begin by thanking Dr. Waibel for his presentation, and the conference organizers for inviting me to offer these comments in reply. I will start with some general thoughts about the proper role empirical methods can play in the practice of international investment arbitration, before making more specific points regarding the research Dr. Waibel has just shared with us. My focus will be on whether an empirical approach helps us in appointing arbitrators.

I. EMPIRICAL ANALYSIS CAN BE USEFUL

I admit that I am interested in empirical studies of international dispute resolution. As a graduate of the University of Chicago Law School, a fondness for the empirical approach is almost a part of my intellectual DNA. There have been numerous empirical studies of the behavior of judges and juries. Scholars are increasingly interested in empirical studies of international law.¹

The bottom line is that an empirical approach may – *may* – at times prove valuable to international arbitration practitioners like me as well. Why?

First, statistics help us to identify the patterns in things, or serve to confirm or disprove the patterns we think we perceive.

Investment arbitration differs from litigation in many ways, not least, as we common law lawyers are often reminded, in that there is no binding precedent. The last case, strictly speaking, does not control the next. By definition, arbitrators change from case to case. But similar

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¹ See Gregory Shaffer & Tom Ginsburg, “The Empirical Turn in International Legal Scholarship”, 106 *Am. J. Int'l L.* 1, 6 (2012) (suggesting that the growth in empirical international law studies reflects growing post-Cold War confidence that international law is more than an “epiphenomenal” ornament to an international system driven by “realist” power politics).

questions often arise, and patterns may be found in how these questions are answered.

Although we technically have no binding case law in arbitration, patterns of arbitral decision-making may nevertheless exert a precedential effect. Past decisions set expectations about what should be decided going forward.²

Second, statistics may have an increasingly practical role to play with the proliferation of closely similar Bilateral Investment Treaties (*BITs*) and the expanding ICSID docket. There are some 2,800 BITs in force today, and there is every reason to expect that the ICSID caseload will continue to grow. Compared to a trickle of cases in the 1970s and 1980s, 2012 alone saw a record: 39 new cases registered with ICSID.³ These, of course, are not all of the treaty disputes, and only a slice of international disputes, currently under arbitration. Even so, it is already difficult to keep up to date simply by being well read in the field.

So, statistical analysis of awards – at least historical, descriptive statistical analysis – could become a helpful tool for simply digesting new decisions. Practitioners might use statistics to identify patterns of outcomes in, for example, jurisdictional challenges under common BIT provisions, in how tribunals have resolved liability issues under common substantive provisions – expropriation, fair and equitable treatment, full protection – of BITs, and in the amounts of costs and damages awarded.

But using statistics prospectively or in a normative way is a different matter. Practitioners might use empirical analysis to inform advice to clients on how to structure investments so as to gain the best treaty protection, or on the likely success of potential claims. Here, statistical analysis of how tribunals – in the abstract – are likely to decide may have its place. I have yet to be convinced of the value of any empirical studies for predicting the conduct of individual arbitrators in a given case.

In all these ways, empirical analysis may help us to assess whether the international investment arbitration system is predictable, that is, the

² See, e.g., *El Paso Energy Int'l Co. v. Argentine Republic*, Decision on Jurisdiction, ICSID Case No. ARB/03/15, IIC 83 (2006), para 39: (“[T]he present Tribunal knows of no provision, either in [the Washington] Convention or in the BIT, establishing an obligation of *stare decisis*. It is, nonetheless, a reasonable assumption that international arbitral tribunals, notably those established within the ICSID system, will generally take account of the precedents established by other arbitration organs, especially those set by other international tribunals.”).

³ Thirty-nine new ICSID cases were registered in FY2012. This is the most cases registered at ICSID in a single fiscal year and is a 20% increase over the number of cases registered in FY2011. See ICSID Annual Report (Sept. 6, 2012).

extent to which tribunal decisions resemble the application of known rules treating like cases alike. Predictability is an element of legitimacy.

It is theoretically possible that the attention of strong empirical scholars may itself contribute to predictability in investment arbitration. If arbitrators look to reliably reported patterns of “jurisprudence” on repeat issues, they may conform their decision-making accordingly. Empirical study of arbitral decisions may, with other factors, fortify the consensus around certain legal principles.

III. STRONG EMPIRICAL STUDIES

But let us return to arbitrator selection. We now have the benefit of a number of strong and insightful empirical studies of investment treaty arbitration.

In addition to Dr. Waibel, Professor Susan Franck is a pioneer in the use of empirical analysis to explore claims that ICSID arbitration is biased in favor of investors or against less developed State respondents.⁴

Some empirical scholars have studied not just outcomes, but also arbitrator behavior. Professor Daphna Kapeliuk, for example, has used empirical methods to analyze the behavior of repeatedly-appointed or “elite” arbitrators.

Professor Kapeliuk’s results are consistent with Dr. Waibel’s: she finds that “elite” arbitrators appointed by respondents are more likely to vote with the chair than with the claimant-appointed arbitrator, and that conversely, claimant-appointed arbitrators are “more inclined to award something to claimants,” than the others.⁵

More surprisingly, her data also indicate that appointing a more experienced arbitrator will not, statistically speaking, confer an advantage on the appointing party.⁶ This is an intriguing finding, but not one that has garnered much attention. I am pleased to see it confirm my personal policy

⁴ See Susan D. Franck, “Empirically Evaluating Claims About Investment Treaty Arbitration”, 86 N.C. L. Rev. 1 (2007); Susan D. Franck, “Development and Outcomes of Investment Treaty Arbitration”, 50 Harvard Int’l L. J. 435 (2009).

⁵ See Daphna Kapeliuk, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators”, 96 Cornell L. Rev. 47, 54 (2010).

⁶ Daphna Kapeliuk, “Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Treaty Arbitration”, 31 Rev. Litig. 267, 311 (2012). (“The results of this Study empirically demonstrate that the selection of an experienced party-appointed arbitrator, as opposed to a newcomer, does not increase an appointing party’s prospects of prevailing. The research found no statistically significant relationship between panel composition distinguished by the prior experience of party-appointed arbitrators and outcome in ICSID investment treaty disputes.”).

of appointing “younger” arbitrators whenever possible, for the unscientific reason that I find they work hard and are up to date.

IV. COMMENTS ON DR. WAIBEL’S PAPER

A. Comments on Party-Appointed Arbitrator Behavior

Turning specifically to Dr. Waibel’s paper, he focuses on empirical analysis of how arbitrators behave, especially with regard to “arbitrator background,” exploring perceptions of pervasive bias.⁷

Dr. Waibel presents his paper as directed at “the untested hypothesis that investment arbitration is systematically biased,” seeking “to answer the question whether arbitrators do in fact systematically favor one side, be it the host State or the investor.”⁸ He and his co-author, Professor Yanhui Wu, used a dataset of 350 ICSID arbitrators and 388 concluded and pending ICSID cases.⁹

I understand the key conclusion of Dr. Waibel’s paper to be that by a statistically significant margin, “arbitrators appear to be influenced... by their policy views and do not simply apply the law as it stands when deciding investment cases.”¹⁰

He and Professor Wu conclude that:

“... arbitrators with a track record of appointments by claimants in ICSID cases are significantly more likely to affirm jurisdiction and liability of host countries. Conversely, arbitrators with a preponderance of appointments by the host State show the opposite trend. The result is not explained by the arbitrator having been appointed by the claimant (the host country) in a particular case, but the track record of appointments. This result confirms our intuition that past host country and claimant appointments are a good proxy for the arbitrator’s policy preferences.”¹¹

⁷ Waibel & Wu at 10: “This paper is the first to analyze the effects of arbitrator background and the strategic interaction among ICSID arbitrators on outcomes.”

⁸ *Id.* at 5.

⁹ *Id.* at 7.

¹⁰ Dr. Waibel suggests that this may be “the most notable result” of his and his co-author’s research. *Id.* at 40 (“The most notable result is that Hypothesis 2 is supported: arbitrators repeatedly appointed by a party are more likely to make decision in favor of that party.”).

¹¹ Waibel & Wu at 7. *See also id.* at 8, 9, 38.

I am not sure I agree with this conclusion. Dr. Waibel's result strikes me as empirical confirmation of what common sense would cause us to expect in the first place, that past outcomes or policy preferences are predictors of future outcomes. Despite the talk of "bias" in Dr. Waibel's paper, I also prefer to think that patterns reflect good legal analysis.¹²

In any system where parties have the responsibility (and right) of appointing an arbitrator, they should be expected to appoint arbitrators with a sympathetic – though neutral – outlook. If counsel are representing an investor, they will look for an arbitrator known to rule in favor of investors – not in a knee-jerk way, but on a recurring issue of treaty interpretation or law, against a background of comparable facts. If counsel are representing a State, they will do the same. This is their responsibility within the parameters of the system of investment arbitration. In what I hope are not too uncharitable terms, these findings are an insight in search of a scandal.

In fact, I submit that it is reassuring that the data confirm that the parties' choice of arbitrators is not a choice without value, in reflecting that party-appointed arbitrators are being chosen *for* their principles, rather than for lack of principles.¹³

B. More Interesting Findings

I am surprised at Dr. Waibel's finding that "more than half of the arbitrators wear a second hat as counsel" to investors in treaty arbitrations.¹⁴

In my experience, the growing consensus among practitioners – at least in international law firms – favors a wall between arbitrators and counsel to avoid issue conflicts. At Freshfields, we have adopted a policy against our lawyers sitting as arbitrators in treaty cases. I wonder if the inclusion in Dr. Waibel's dataset of earlier ICSID cases, predating our growing concern with issue conflicts, may have created an outdated picture.

C. Need for Caution in Empirical Studies of Arbitration

I applaud Dr. Waibel for warning that empirical data should be used with caution. ICSID cases are a small data set, not comparable to the data available on national court decisions.¹⁵ By contrast, in "Are Judges

¹² See, e.g., *id.* at 3 (noting that "[c]laims that ICSID is one-sided abound," as well as "growing concerns about the design and neutrality of arbitral tribunals.").

¹³ See *id.* at 37.

¹⁴ *Id.* at 30.

¹⁵ See Cass Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political?* (2006) at 17.

Political?”, an acknowledged inspiration for Dr. Waibel’s work, Professor Cass Sunstein and his colleagues examined more than 6,000 published, three-judge panel decisions and nearly 20,000 individual judges’ votes, from U.S. federal appeals courts. The investment arbitration dataset will never approach this scale.

Based on such a small data set, it is dangerous to offer observations about, for example, what women do as arbitrators. Women represent 5% of an already small group of ICSID arbitrators.¹⁶ To assert, as Dr. Waibel does, that women arbitrators are “more likely to affirm jurisdiction,” is basically to report on what Professors Gabrielle Kaufmann-Kohler and Brigitte Stern have done in a few cases.¹⁷ This is interesting, but it is not the foundation of statistical analysis for use in arbitrator selection. At very least, although writing for political scientists, Dr. Waibel should include more emphatic “health warnings” so the uninitiated will not abuse his findings.

Let us now assume that past decisions by an arbitrator may be predictors. To repeat, past decisions are only helpful to the extent that the cases concerned are similar. But of course, every case is different, and parties are never evenly matched, in facts, in law, or in the skill of their counsel.

Drs. Waibel and Wu tried to compensate for this problem by convening a five-member committee to classify the difficulty of the ICSID cases comprising their data set.¹⁸ Let us also assume this committee did a good job, but this step nonetheless represents the intrusion of qualitative – subjective – methods into what is supposed to be a quantitative exercise.

The inescapable fact is that many of the factors we actually weigh in appointing arbitrators are not quantifiable. The top international arbitration counsel do not need empirical data about arbitrator conduct to help them appoint arbitrators, “elite” or otherwise. They would tell you that arbitrator selection is less a science than an art, guided by (their) insight and experience, rather than by metrics.

I realize the danger here: this attitude sounds exclusive, but it has the ring of (some) truth. How else but subjectively, and ideally with actual in-the-room experience, can we weigh expectations of how individual arbitrators will interact? How else to assess their ability to manage a politicized proceeding? Such human factors are not easily subject to “empirical” measurement.

¹⁶ See Waibel & Wu at 28.

¹⁷ *Id.* at 35 (“First, female arbitrators are more likely to affirm jurisdiction. There is not a single case in our dataset in which a female arbitrator declined jurisdiction.”).

¹⁸ See *id.* at 33 n. 58.

This is why, when shouldering the responsibility of selecting arbitrators who make unappealable decisions, we tend to appoint those we know. The challenge for the arbitration community, then, is to take responsibility for widening the field.

Some scholars have tried to take empirical studies in this direction. Professor Kapeliuk's research on "collegial dynamics" comes to mind. But even if, as Professor Kapeliuk suggests, the presence of a highly experienced arbitrator as a given party's appointee will not, as a statistical matter, predictably sway her less experienced peers,¹⁹ an "elite" arbitrator may have exactly this effect in a specific case. That is the calculus practitioners undertake.

CONCLUSION

To close, Dr. Waibel and his colleagues are to be commended for taking the study of international arbitration in a new direction. I look forward to the rest of the discussion.

¹⁹ See Kapeliuk, 31 Rev. Litig. at 311.

Response to the Report

*Prof. Dr. Albert Jan van den Berg**

To start, I would like to note that I am a supporter of empirical research in this context, not only because one can see whether there is a correlation between the arbitrator background and the outcome of an arbitration, but also to answer the larger question of whether investor-State arbitration is still a viable system. Such empirical research, however, should be nothing but sound. What does this presuppose? First of all: transparency and replicability of the method. It also presupposes a good dataset, a good codebook and proper statistical analysis. These three elements are notably present in Dr. Waibel's presentation with the title "Arbitrator background, appointments and outcomes: Should we take empirical research seriously?" Nevertheless, his presentation contains certain areas of concern, which prevent me from being prepared to rely on this empirical research. Therefore, I will begin today's presentation by highlighting those areas of concern.

Dr. Waibel's presentation sets out the following "research question": "Does arbitrator background matter for outcomes?" According to Dr. Waibel, the researchers conducting the study seek to answer such questions, by determining whether there is "a causal link between characteristics of arbitrators and outcomes in investment arbitration". This exercise, however, is not a causality analysis, but merely a correlation. As we know, correlation does not imply causation. Consequently, there is a risk that the researchers encounter the problem of random systematicity, that is, the problem of coincidentally rushing into conclusions, which at best indicate some trends.

Furthermore, certain comments may be made on the studies that are listed as the sources of Dr. Waibel's report and that according to him, constitute the "empirical work on arbitrators".

Firstly, the study of Cass Sunstein and others ("Are Judges Political?") does not constitute "empirical work on arbitrators" and should, therefore, be distinguished. This is because Sunstein's study addresses domestic courts only and, in my view, the dynamics of appointing judges in domestic cases is different from that of appointing arbitrators in

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international investment cases. For example, in international investment cases, the most common arbitrator appointment method is for each side to appoint an arbitrator, with the two appointed-arbitrators, the parties jointly or the institution to appoint the presiding arbitrator.

The studies of Eric Posner and Miguel de Figueiredo (political voting on the ICJ), of Erik Voeten (ECHR: “largely no predispositions”) and of Fred Bruinsma (ECHR: “former diplomats more supportive of governments”) should also be distinguished for the same reason. Although these studies are interesting, they are of little help for the discussion of empirical research in investor-State arbitration.

The study of Susan Franck, the pioneer of descriptive empirical research, concludes that there is “little evidence of a relationship between development status and ICSID arbitration outcomes”. Moreover, earlier studies by Ms. Franck, which are not listed on Dr. Waibel’s presentation, conclude that it is only in 38.5% of the investor-State cases that investors had won and tribunals had awarded damages. The most recent one is even 35.8%. Such studies serve as a response to Gus van Harten’s 2006 conclusion that most investment arbitration awards are rendered in favour of investors. What is certainly interesting is that in a recent study, Mr. van Harten conceded that investors do not always win and, nonetheless, stated that what needs to be investigated is how arbitrators interpret treaty provisions. Mr. van Harten found that arbitrators interpret treaty provisions in favour of investors. Thus, having lost on the numbers, Mr. van Harten attempted to reach his 2006 conclusion via a different route.

The 2012 study of Daphna Kapeliuk, depicted at Figure 2 and Figure 3 of Dr. Waibel’s report, addresses the relationships between “Experience and Outcome” and between “Experience and Dissents”.

Regarding the relationship between “Experience and Outcome” (Figure 2, above p. 154) Ms. Kapeliuk concludes that an investor wins in five or eight cases, depending on whether the arbitrator is experienced or not. However, what is the meaning of the word “win” in this case? It is stated to be “zero” or “one”. For example, if an investor has won only USD 10 million, that constitutes a win, irrespective of what the amount of the claim was. I submit to you that there is a large difference between a claim for USD 100 million and an award for USD 10 or 50 million. In each case, has the investor won or lost? Therefore, Ms. Kapeliuk’s conclusions cannot be definite, without knowledge of both the amounts of claim and ultimate award.

Ms. Kapeliuk’s conclusion on the relationship between “Experience and Dissents” depicted in the chart at Figure 3 of Dr. Waibel’s report (above, p. 155) is also troubling. Firstly, it is not clear from the face

of the chart whether, for example, a newcomer party-appointed arbitrator who has dissented has sat on the same panel as the experienced party-appointed arbitrator who has not dissented. Therefore, the total number of cases of 108 for the purposes of determining a percentage of dissents cannot be verified. Secondly, Ms. Kapeliuk had only looked at ICSID awards to reach the conclusion that there is a 13% of total dissents in the case of a newcomer party-appointed arbitrator, a 6% of total dissents in the case of an experienced party-appointed arbitrator or an average 10.1% of total dissents in all cases. Had Ms. Kapeliuk also looked at other cases which are available in investment treaty arbitration, particularly UNCITRAL cases, as I did when I conducted a study on the issue, she would have seen that there is a total of 34% of dissenting opinions. Consequently, the uncertainty of the total number of cases depicted in the chart, as well as the verified 34% of dissenting opinions overall, whether or not adjusted by the experience of an arbitrator, contradict what Ms. Kapeliuk writes on this data, that “the seven dissents on the merits in this sample do not indicate the existence of bias in party-appointed arbitrators’ voting patterns”. In fact, I believe that it is the current use of dissenting opinions that calls into question the neutrality of arbitrators.

Regarding a number of “Waibel & Wu: Hypotheses” listed at Figure 4 of Dr. Waibel’s report (above, p. 155) and relating to arbitrators’ characteristics that may have an impact on the outcome of the case, two remarks may be made. Firstly, the use of the plural form “arbitrators” on this slide raises the question of whether the characteristics that have an alleged impact on the outcome of the case can be attributed to all three members or the majority of an arbitral tribunal that causes a specific outcome. It seems unlikely that an entire arbitral panel or the majority of it would “have spent a substantial part of their career in private practice”, would have “a skewed appointment record” or “a substantial experience in government”, would “belong to the same legal family” or would come from “developing countries”. Secondly, the fourth hypothesis which provides that “[a]rbitrators who belong to the same legal family will tend to assert jurisdiction less often and hold the host States liable on fewer occasions” operates on the mistaken assumption that the world consists of only two legal systems. This is because, according to Dr. Waibel and Dr. Wu, belonging to the “same legal family” would mean belonging either to the common law system or the French law system.

The suggestion of Dr. Waibel that an arbitrator’s background, as “explanatory variable”, can be used as a proxy for arbitrator policy preferences, is inconclusive. As Dr. Waibel himself notes, a correlation between an arbitrator’s background and his policy preferences leads to

“unobserved” conclusions and, therefore, to unconfirmed inferences about each arbitrator’s politics.

Figure 5 of Dr. Waibel’s report (above, p. 158) with the caption “Arbitrators: Descriptive statistics” sets forth characteristic percentages for each arbitrator of a three-member arbitral panel. Of particular interest are the results for the following three characteristics: “Counsel to Investors”, “Legal Origin” and “Elite Education”.

With respect to the characteristic “Counsel to Investors”, Lucy Reed has already questioned the percentages regarding each member of the tribunal having also taken the role of counsel to investor. It seems that in determining the percentages relating to this characteristic, sources that date back to the 1970s, that is, at the beginning of the study, were taken into account. Consequently, the percentages do not reflect the present continuous decrease of double-hat situations in investment arbitration. Lucy Reed’s own firm is an example as she told us.

As regards the characteristic “Legal Origin”, the percentages relating thereto seem problematic due to the fact that Dr. Waibel and Dr. Wu categorise arbitrators either under the common law or the French law system only.

Similarly, the percentages relating to the characteristic “Elite Education” are questionable, as Dr. Waibel and Dr. Wu note that there are only four law schools that would fall under this category: Harvard, Yale, Oxford and Cambridge. If this is indeed the case, Professor Sophie Lemaire, as well as all of us, will be shocked to know that Paris II, the school from which Professor Lemaire has graduated, is not an elite school.

Likewise, the characteristic “Elite Arbitrator” mentioned as a variable at Figure 5 of Dr. Waibel’s report raises similar question marks. According to Dr. Waibel’s Codebook, an elite arbitrator is supposed to be an arbitrator who has had “four or more appointments in ICSID arbitrations to date”. As I have only been appointed once, it seems that I am not considered to be part of the group. Interestingly, however, another chart which was published last week depicts my name as an elite arbitrator among 15.¹ This is a chart that has shocked some arbitrators, either because their name was on it or because it was absent from it. The reactions caused by

¹ *Movers and Shakers of Investment-Treaty Arbitration: An Elite 15*, published by Corporate Europe Observatory, *Profiting from Injustice*, in Chapter 4, *Who guards the guardians? The Conflicting Interests of Investment Arbitrators*, on 27 November 2012. Available at: <<http://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators>>.

this chart urged me to make an effort of finding out whether the different characteristics or variables that I have touched upon earlier in my presentation exist with respect to these 15 elite arbitrators. My conclusions were, for example, that all elite arbitrators, except from one, are not acting as counsel. Furthermore, the arbitrator with the most appointments in investment cases, specifically 39 appointments, is in fact a woman. Moreover, this arbitrator has in all cases been appointed by the respondent party.

As we have seen, in his presentation, Dr. Waibel gives an overview of the dataset and the variables relating to arbitrators. Subsequently, Dr. Waibel attempts to correlate the dataset and the variables to various arbitrations in a manner that the outcome of the arbitration can be linked with such dataset and variables. In order to do that, however, Dr. Waibel asks experts in investment arbitration, James Crawford, Zachary Douglas, Christoph Schreuer, Stephan Schill and Martins Paparinskis to act as assessors and to measure how strong the investor's legal case is. They were to do so by coding, that is according to Dr. Waibel's Codebook:

“Each assessor is asked the following questions for each case: For each arbitration case listed below, please give a global evaluation of how strong the investor's legal case [is]. Please disregard the ultimate outcome of the case. The coding should reflect your *ex ante* assessment of the likelihood of success before the arbitration is filed, separating the jurisdiction stage from the merits. Please leave blank where you are unable to evaluate.”

Regarding the strength of an investor's jurisdictional case, the assessors have to assess whether the case is “very weak”, “weak”, “balanced”, “strong” or “very strong”. My question to Dr. Waibel is: How do the assessors know whether the case is strong or weak? In order to know that, an assessor must not only read the award but also the submissions, the witness statements, the documents and the transcripts. Have the assessors done so for every case? In most cases, the assessors seem to only be in possession of the award. Similarly, such issues arise with respect to assessing the strength of the investor's case on the merits.

Further variables that raise certain concerns are those of “numeracy” and “political affiliation”. According to Dr. Waibel's Codebook, “numeracy” is defined as follows:

“Whether the arbitrator is economically numerate, could have a decisive influence, when it comes to measuring damages, an economically numerate arbitrator[] will be able to exert considerable influence over his colleagues”: “[assign:] 0 [if] No significant quantitative training (post high school)”; “[assign:] 1 [if] Intermediate (economics, *etc.*)”; “[assign:] 2 [if] High degree of quantitative training (university degree in maths, physics, chemistry, PhD in economics).”

This definition requires one to have studied economics in order to be numerate. Another variable is “political affiliation”. The Codebook defines it in this manner:

“If an Arbitrator served in a senior/ ministerial position in a Social democratic government, code as ‘Progressive’. If an arbitrator served as an appointed member of a U.S. administration headed by a Republican President, code as ‘Conservative’”.

This type of coding would imply that if an arbitrator is supporting the Obama administration, that arbitrator is probably progressive. Yet, what if the Obama administration is, for example, compared with that in the Netherlands? In such case, the arbitrator may as well be qualified as conservative. Therefore, the variable as defined cannot meaningfully assist in reaching accurate conclusions.

These are the limits I find in Dr. Waibel’s study. This is not to say that the study itself is not valuable. Actually, in my view, it is valuable. However, I would suggest two things: Firstly, Dr. Waibel and Dr. Wu may wish to revise their Codebook and dataset. Secondly, Dr. Waibel may wish to do a causal statistical analysis and not only a correlative one.

In addition, I do not think that only empirical research conducted in this manner is helpful. What we must also do is look into the area of collegial games, or the game theory, as to how the three arbitrators interact with each other, as well as in the area of cognitive psychology; for example, what Chris Guthrie has written on the inside of the judicial mind.

With that, I hope that I have given some food for thought. Thank you.

Response to the Panel

Dr. Michael Waibel

First of all, I am extremely grateful to my two commentators for having spent, I think, many hours engaging with this research project and I truly appreciate these comments from practice, which will help refine this research.

I would fully agree with Lucy that arbitrator selection is an art, not a science. It is important to emphasise that our goal is very limited and even if we are ultimately successful in reaching our goal, I do not think we are there yet. Our limited goal is to improve our understanding of the past in ICSID arbitrations; we do not want to make any predictions about the future. So, I think law firms, and everyone else engaged in the practice of investment arbitration, can add value for their clients by advising them who best to pick as an arbitrator. This is not an area that we want to intrude on and to which this type of research can contribute.

Lucy also mentioned that the number of ICSID cases is tiny compared to the thousands of cases in the study by Cass Sunstein, and that we may not have enough for meaningful statistical analysis. The question is, does the limited data we have limit the types of questions we can ask? In some cases it clearly does. Now, in all empirical research and this applies especially in investor-State arbitration, or in commercial arbitration for that matter, access to data for empirical researches is a great challenge. So, to the extent practitioners are able to help us with access to data, this can help improve the quality of empirical research.

According to Lucy, and I fully agree, it would be interesting to study how arbitrator backgrounds have evolved over time. If you carry out empirical research, you have to carefully limit your questions, and this is simply not a question we have looked at. And it would be very difficult to carry out quantitative empirical research on how arbitrator background has evolved for the very simple matter that most investor-State arbitrations have been registered after 1990. In other words, we do not have a sufficiently long period of time for a statistical analysis, but I fully agree that looking at how these backgrounds have evolved would be very useful. Lucy also commented on an initial finding of the paper that female arbitrators seem to be somewhat different from male arbitrators.

Now, I did not mention this finding because this one is very preliminary and based on a small number of female arbitrators. What we did find quite striking is that we have a total of 37 decided cases in which

we had at least one female arbitrator. Now, I should mention that this is of course, based on a limited pool of female arbitrators; we only have 16 female arbitrators in these cases in total. This is not enough for meaningful statistical analysis. However, one aspect that we found intriguing that apparently there is not a single case thus far in which a female arbitrator has declined jurisdiction, but I want to emphasise again that we need more cases and more female arbitrators before we can start doing meaningful analysis on gender in ICSID arbitration.

Moving on very briefly to Albert Jan, in terms of legal origin, yes, I fully accept that there are serious limitations to legal origin analysis. We have used that metric because it has been widely used in empirical work following the work by Andrei Schleifer and the World Bank's Doing Business reports, among others. It does reduce complexity in that in legal origin analysis, there are only five different legal families; common law, French legal tradition, German, Scandinavian and socialist. Now, you can say and you would be fully right to criticise that grouping the diversity of the world's jurisdictions into just five families is a gross simplification of reality. But this is what you need to do in empirical work. I would make the same point in response to how we coded particular variables.

I am very grateful for Professor van den Berg's input. But we have to make very difficult choices and we have to simplify quite a lot to make it manageable. Consider the example of the strength of the investors' case. This variable does simplify reality. We did not, for example, ask our poor evaluators to look at all the transcripts; and in many cases; of course they would not have access to all the transcripts. What we asked them is, to say, to give us a point estimate using their entire experience as an arbitrator, as counsel, *etc.* Is this case a good one, from an *ex ante* perspective? Yes or no? How likely do you think it is, if you were advising a client on this case, that you would tell him there is a 60% likelihood that you will succeed on jurisdiction, but I am really concerned about your prospects in the merit "phase"? So, the question is really, is this a good enough proxy? And we believe it is a good proxy. The point is to get sufficiently close to what we are really interested in: is there enough valuable information that we can use in empirical analysis? Thank you.

Questions & Answers

Dheerendra Kumar Dabee: I thank Dr. Waibel for his response to the panel and now open the debate to questions from the floor.

Diane Desierto: Good morning and thank you, Dr. Waibel for your presentation. I just have a question on the identification strategy when you were setting up this model. I thought it was interesting that you presented us the regression results but not the model itself, and part of the reason why I am interested is that you have various variables; you have numerous variables that you have formulated in a regression model and I am not quite sure how you factored interaction between variables. I would have thought, for example, that economists would have even just tried to limit testing, say, the effect of gender on the whole universe of cases and how that might bear into decision-making insofar as arbitral awards are concerned; and that is already a huge variable for which other variables must be tested for and controlled for. I am sort of concerned if everything was just aggregated and, as a result, we find here more correlations that might be problematic and might not have been as the standard error application but that, I think, might be interesting to discuss.

Michael Waibel: Yes, forgive me for not discussing the identification strategy, partly for lack of time. So, essentially, we run dozens of regressions and we progressively add more variables, and of course, we check whether the results change. So, we start out with a very simple model where we have two explanatory variables and a couple of control variables; then we add another explanatory variable, *etc.* And yes, we have looked carefully at standard errors; sometimes, our estimates at the moment are not very precise, which has to do with the small sample size that we can effectively use because we have very little data on some variables that we would like to test. So, we do have about 145 cases but many observations fall away because our data set is as yet incomplete.

Mr. Edwin Glasgow: My name is Edwin Glasgow, I come from London and occasionally from Mauritius. May I just make one brief observation on behalf of the local practitioners. I am sure I speak for all of us of the quality people that we have had addressing us. That is an enormous privilege. Nobody has ever accused me of being elite and I would not put myself in the same category. I do, however, have the honour of coming here, fairly regularly, as an arbitrator, as a mediator, and occasionally as a teacher, and I

have learned to have enormous respect for the quality of the local practitioners here, on behalf of whom very little has been said. I think that we would do a great disservice to the MIAC, the work which is enormously welcome; I think it is an extraordinary initiative. But if we move from this session where we have been talking about the qualities and selection of arbitrators, without any acknowledgment at all of the quality that is to be found in the ordinary practitioners in this country, I think it would be a great shame.

The English do not have a good record when it comes to colonialism and I hope that this is not an example of it. May I just tell you one tiny story I learned for myself when arbitrating in Zambia. On the banks of the Zambezi, there is an impressive stone plaque. On the top of it, there is a brass plate which records that in this spot, Dr. Livingstone discovered the Victoria Falls. I have long cherished the image of a small Zambian boy going home to his mother and saying “Mummy, Mummy, a clever Scotsman with a bible has just discovered that there is a waterfall at the bottom of our garden.”

I do hope that the MIAC and my colleagues in London will not have the same approach to this wonderful country and its wonderful people. Thank you for allowing me to make that brief observation.

Dheerendra Kumar Dabee: Thank you very much for your comment. I think this use of the word ‘elite’ came from one of the papers which has been the subject of the present study. And it was not meant in any way to classify some as being elites, others as not being elites. It was just for the sake of our discussion, but your comments are well appreciated.

Mr. Edward Torgbor: My name is Edward Torgbor. I practise as an arbitrator in Kenya. I have been looking at what is said as a research question. I realise that in fact, about five questions and it seems to me that unless the research question is specifically framed, to give rise to an expectation and a destination, we will get a little bit lost in the process of dealing with arbitrators’ background, causal link, policy preferences, non-legal factors, and personal characteristics. So, while you are still on the subject, I would suggest that you either reframe the research question or narrow it down a bit more effectively.

Michael Waibel: Sorry that my slide is unclear. There is a single research question but I tried to formulate it broadly so that it would cover the existing empirical work on arbitrators. The question is, simply, does the

background of arbitrators conceived broadly affect outcomes? That is the question.

Judge Judith Kaye: There is one statistic that stands out to me. That is the one on gender. Do you genuinely feel you have the basis for saying if you pick a woman, you will have someone more likely to sustain jurisdiction?

Michael Waibel: Well, I understand this is a politically very difficult subject, but, what the data does indicate is that we have 37 cases in which we had a female arbitrator and in not one of those cases was jurisdiction denied. But it is a small sample and I would not generalise on the basis of that, I am fully there with you. It is an interesting starting point for further empirical investigation.

Albert Jan van den Berg: This is probably an issue, because I know at least one case, the *East Kalimantan* case,¹ where the chair was a woman, Prof. Gabrielle Kaufmann-Kohler, and jurisdiction was denied. How do I know it? - because I was one of the arbitrators too. It is, in my view, not correct to say that in all cases, if there is a female arbitrator, that jurisdiction will be upheld.

Justice Christopher Madrama Izama: I am Justice Christopher Madrama Izama, from Uganda. I just want to add my voice to the other speakers' and the Professor's here. What I want to know is whether you are researching whether knowledge can tell you that variables which you think may affect the outcome of the arbitration, actually measure where those variables take into account the merits of the case, to see whether it leads to bias? What I am trying to say is, does it show that the variables are too biased on the merits of the case? Can you measure that they will not look into the merits in order to come to the outcome of the case? Because, what I see is, when you look at all the variables, you can never measure whether they were not influenced by the case to come up with a decision.

In other words, you are unable to measure, in any scientific way, that because somebody comes from Singapore, he is likely to rule in a particular way without looking at the merits of the case. In other words, you will be looking at bias. What bias? Are these arbitrators biased because of their background?

¹ *Government of the Province of East Kalimantan v. PT Kaltim Prima Coal, Rio Tinto plc, BP, p.l.c., Pacific Resources Investments Limited, BP International Limited, Sangatta Holdings Limited, Kalimantan Coal Limited*, ICSID Case No. ARB 07/3 (Arbitration based on contract); Award on Jurisdiction, 28 December 2009.

Ms. Jainee Shah: I am Janiee Shah, an advocate from India. To simply add to what my friend from Uganda just mentioned, I want to understand how these variables have not been correlated to the fact that the arbitrators are deciding on the basis of the law of the seat of the arbitration, that is, the law of the forum where the case is being decided. So, you could consider this in correlating the variables in the background. The distinction on the basis of developed and developing countries is immaterial when you look at it from the background of the law on the basis of which the arbitrators are deciding the case.

Lucy Reed: If we understand your question correctly, I think you have to underscore that in the investor treaty cases, the law is generally international; law and treaty interpretation, and much less often, the law of the country of the seat. So it is probably not a factor that Michael looked at, and since I have stolen the microphone; I do want to underscore for everyone how clear and humble Michael has been about saying this is the beginning of studies and we should not be looking at things like, women always decide in favour of jurisdiction although I like that finding because maybe we will get appointed more often if you keep advertising that! So, thank you.

Dheerendra Kumar Dabee: As we now formally bring this session to a close, I am informed that you are all invited to refreshments just on the right in the lobby. Thank you again for your questions.

PANEL V

**INVESTMENT ARBITRATION:
DEALING WITH THE SOVEREIGN DEBT CRISIS**

Introductory Remarks

*Salim Moollan**

Good morning to you all. It is a great pleasure to be moderating the second panel on investor-State arbitration. This panel was supposed to be moderated by Professor Emmanuel Gaillard, who most of you will remember for his brilliant presentation at our launch conference. Unfortunately, Professor Gaillard had to cancel at short notice, which means you have the great advantage of having a moderator who comes to the subject with a completely uncluttered mind and absolutely no knowledge of the topic.

But we do have a very knowledgeable panel to tackle what is probably one of the most controversial topics in the field at the moment, dealing with the sovereign debt crisis. Can this be done through investment arbitration? Because it is being done, there are cases ongoing, where restructuring arrangements have been challenged by way of investment arbitration, so where is this going? Is this development a concern? Is investment arbitration the right tool? These are the issues which this panel will be addressing and for obvious reasons, I think this will be of general interest to everyone in the room beyond the narrow remit of the technical issues of arbitration.

To report to your conference, you have a very eminent *rapporteur*, even though we learned today from Professor van den Berg on our previous panel, she has no elite education. I must correct Albert Jan however, Professor Lemaire is not from Paris II, she is from Paris-Dauphine, which is, as most of you will know, the best University in France, in the field of economics, and also has a very active law faculty. Being able to master both disciplines is of prime importance for the topic we are dealing with on this panel. Also, for those who believe that going through the French aggregation system is no elitism, I would kindly remind them that the French have been teaching the rest of the world international arbitration now for decades; and it is only now that the English are trying to catch up,

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although they do it by way of empiricism as always, with apologies to Michael Waibel, rather than through a nice Cartesian deductive analysis.

Anyway, you can read more about Sophie in your programme, so I will not say much more about her, save that she has impeccable credentials for having been taught by both Charles Jarrosson and Pierre Mayer; although Charles Jarrosson, in the room today, disclaims anything to do with the presentation if it is not good. Now to respond to the reports, we have, in that order, Professor Johnny Veeder, you will find his CV in your programme. Johnny needs no introduction: he has been practising at the English Bar from 1972 to date, he is a specialist in commercial law and international trade and he is a world renowned arbitrator. That is what the story used to be; I hear that Johnny is now very much out of work and has taken to representing NGOs, normally aided and abetted by Professor van den Berg.

To respond from a very different perspective, I believe, we also have Mr. Devashish Krishan. Devashish has had a stellar career in a number of law firms and has now chosen to set up on his own in New York where he provides research assistance, particularly in the field of investment arbitration. We are particularly grateful to Devashish because he has also agreed to step in into the next panel as unfortunately, Mr. Makhdoom Ali Khan, the former Attorney-General of Pakistan, could not be with us. So without further ado, I give the floor to our *rapporteur*, Madame Lemaire.

Report to the Conference: L'Arbitrage d'Investissement et la Restructuration de Dettes Souveraines (de l'Expérience Argentine au Cas Grec)

Sophie Lemaire *

En même temps qu'elle a permis à l'arbitrage CIRDI de se déployer en alimentant un contentieux spectaculaire, la crise argentine de 2001 a ces dernières années révélé des relations particulièrement étroites entre le droit des investissements et les crises financières.

Or, depuis cette date, poursuivant son perpétuel mouvement, la crise s'est déplacée pour atteindre l'Europe où elle s'est installée en 2008¹. Dans ces conditions, de nouvelles questions se posent. Jusqu'à présent peu sujets à l'arbitrage d'investissement, les Etats européens récemment touchés doivent-ils anticiper un contentieux comparable à celui de l'Argentine dès lors qu'ils ont adopté des mesures d'urgence — pour le renflouement des banques, la restructuration des établissements financiers ou même de la dette souveraine — très proches de celles qui ont alimenté les arbitrages argentins² ?

S'agissant des interventions étatiques dans le secteur bancaire, la réponse est d'ores et déjà positive puisque des demandes d'arbitrage ont récemment été formées. C'est le cas par exemple de la requête déposée en septembre 2012 devant le CIRDI par deux sociétés d'assurance chinoises qui estiment que la Belgique a violé le Traité de protection des investissements conclu avec la Chine le 6 juin 2005, lors du rachat en 2009 de la banque Fortis par le Français BNP-Paribas, et lui réclament en conséquence près de 3 milliards d'euros³.

Mais au-delà, tout porte à croire que la crise européenne est également susceptible de banaliser un contentieux arbitral d'un type nouveau né avec la crise argentine qui touche directement la restructuration

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¹ P. Krugman, *Pourquoi les crises reviennent toujours*, 2nd éd., Points, 2009.

² S. Manciaux, « Analyse de la crise économique actuelle au regard du droit des investissements internationaux », *Revue de Droit bancaire et financier*, n° 5, Sept. 2009, étude 31.

³ Affaire *Ping An Life Insurance Company of China, Limited and Ping An Insurance Group Company of China, Limited c/ Royaume de Belgique*, CIRDI, ARB/12/29.

de dette souveraine. Or, à supposer que cette prédiction se confirme, cela marquerait une étape importante dans l'évolution du droit des investissements. Mais, s'agirait-il pour autant d'une évolution souhaitable?

L'importance des enjeux impose d'y réfléchir. L'étude se déroulera en trois temps:

- (I) Il conviendra d'abord de revenir sur *les données* de la relation qui unit désormais le droit des investissements et les crises de dette souveraine; afin
- (II) d'en évaluer *le potentiel* en termes de condamnations des Etats endettés; et
- (III) d'examiner *les perspectives* qu'elle préfigure en vue de son encadrement éventuel.

I. LES DONNÉES

Le premier contact entre le droit des investissements et la restructuration de dette souveraine est récent puisqu'il date de la requête enregistrée par le CIRDI en février 2007 dans la désormais célèbre affaire *Abaclat contre Argentine*⁴.

Pour faire face à la crise dans laquelle elle a sombré en 2001, l'Argentine a proposé en 2005 à ses créanciers, porteurs d'obligations d'Etat, d'échanger leurs titres contre des titres de moindre valeur (environ 27 % de la valeur initiale). Si la majorité a accepté, certains parmi lesquels une association de banques italiennes — la *Task Force Argentina* (TFA) — ont refusé la proposition et fait le pari d'obtenir le remboursement complet de leur placement par la voie contentieuse. Alors que de nombreux créanciers ont alors saisi les juridictions étatiques désignées par les clauses attributives de juridiction insérées dans les titres, la TFA a eu l'idée originale de fédérer les porteurs italiens de titres argentins et d'agir collectivement devant le CIRDI sur le fondement du traité de protection des investissements conclu entre l'Argentine et l'Italie en 1990. Cette procédure est actuellement en cours: en substance, la TFA y reproche à l'Argentine d'avoir violé l'interdiction d'exproprier sans indemnisation et la clause de traitement juste et équitable figurant dans le traité.

⁴ Affaire *Abaclat et autres c/ Argentine*, CIRDI, ARB/07/5.

S'est ainsi produite une confrontation inédite entre *deux paramètres* qui ne l'étaient pas moins, à savoir: d'une part, les modalités actuelles de restructuration des dettes d'Etat et, d'autre part, l'essor récent du droit des investissements.

Sans entrer dans le détail des *restructurations de dettes souveraines*, il paraît important de souligner que, s'il n'en a pas toujours été ainsi⁵, à l'heure actuelle, la restructuration consiste généralement pour l'Etat qui fait défaut à renégocier sa dette pour en obtenir la réduction. Or, si la dette ou une partie de la dette existe sous forme de titres négociables — d'emprunts obligataires, ce qui est de plus en plus courant — l'Etat doit alors procéder à un échange des titres en circulation contre des titres de valeur inférieure: en général, de nouveaux titres décotés dont, en outre, les taux d'intérêt sont moindres et les échéances de paiement plus longues⁶.

Pour revenir au cas argentin, c'est ainsi que lors de l'échange de 2005, les titres souverains ont perdu environ 70% de leur valeur initiale.

Et si de telles mesures peuvent mécontenter certains créanciers qui souhaitent agir en justice contre l'Etat, jusqu'à présent, ceux-ci n'avaient quasiment aucun espoir de voir leurs démarches aboutir. Ni la justice étatique ni la justice arbitrale n'offraient de perspectives sérieuses de condamnation de l'Etat.

Devant les juges de l'Etat en crise, les créanciers récalcitrants à l'échange n'ont — on s'en doute — quasiment aucune chance de succès.

Devant les juges étrangers, leurs espoirs sont à peine plus importants. En effet, si leurs démarchent prospèrent, les décisions de condamnation demeurent majoritairement lettre morte faute d'exécution, soit parce que l'Etat ne possède pas suffisamment d'avoirs à l'étranger soit parce que son immunité d'exécution protège son patrimoine.

Et les créanciers de l'Etat nourrissent d'autant moins d'espoir en la justice étatique que, depuis une dizaine d'années, les Etats insèrent quasi systématiquement dans leurs obligations une clause visant à éliminer ce contentieux: c'est la *Collective Action Clause* ou clause d'action collective⁷

⁵ Sur l'historique des restructurations, V. notamment P. Krugman, *Pourquoi les crises reviennent toujours*, précité note 1.

⁶ D. Carreau, « Dettes d'Etats », *Repertoire Dalloz droit international*, n° 34.

⁷ Ni les titres argentins échangés en 2005 ni les titres émis par les Etats européens jusqu'à une période récente n'intégraient de telles clauses mais les CAC se multiplient aujourd'hui. En effet, depuis le début des années 2000, les Etats-Unis promeuvent le procédé. Sur les différentes variétés de *collective action clauses*, V. le document établi par le FMI, « *The design and effectiveness of Collective Action Clauses* », 6 juin 2002 : www.imf.org/external/np/psi/2002/eng/060602.htm. Et sur l'impact de telles clauses, K. P. Gallagher, « *Mission Creep: International Investment Agreements and Sovereign Debt Restructuring* », *Investment Treaty News Quarterly*, déc. 2011-janv. 2012 (www.iisd.org).

(CAC). Schématiquement, la CAC prévoit qu'en cas d'événement de crédit, ou de crise, les porteurs d'emprunts obligataires ou leurs représentants se réuniront pour négocier la restructuration de la dette — donc un éventuel échange — sachant qu'une majorité qualifiée (souvent 75%) peut rendre obligatoire le plan restructuration qui s'impose alors à tous. Les créanciers récalcitrants se voient alors interdire toute contestation.

Ajoutons que, en marge de la justice étatique, l'arbitrage commercial de type classique ne constitue pas une alternative sérieuse pour les créanciers de l'Etat. Faute de clauses d'arbitrage dans les emprunts d'Etat⁸, la voie s'avère en effet sans issue.

Dans ce contexte, *l'essor récent du droit des investissements et plus spécialement de l'arbitrage d'investissement* a fait naître de nouveaux espoirs⁹. On sait que l'un et l'autre ont aujourd'hui gagné en maturité grâce à l'élaboration dans les dernières décennies d'un réseau mondial de traités bilatéraux de protection des investissements (TBI) et d'accords de libre échange. Or, les offres d'arbitrage qui figurent dans ces traités pourraient le cas échéant permettre aux créanciers récalcitrants à l'échange de titres de contourner les obstacles précédemment évoqués pour attirer l'Etat devant des tribunaux arbitraux¹⁰.

Les créanciers italiens de l'affaire *Abaclat* sont les premiers à avoir tenté leur chance¹¹. Et si, faute de décision définitive, nul ne connaît encore l'issue de leur initiative, celle-ci n'est pas demeurée isolée.

S'agissant de l'Argentine, deux autres arbitrages CIRDI ont été engagés en 2007 et en 2008 à nouveau par des italiens sur le fondement du TBI Argentine-Italie de 1990, dans les affaires *Ambiente Ufficio*¹² et *Giovanni Alemanni*¹³.

Au-delà de cette première configuration, dans le cadre de la crise européenne, des menaces très proches pèsent maintenant sur la Grèce qui, en mars 2012, a elle aussi procédé à un échange de titres souverains pour effacer 107 milliards d'euros de dette. Concrètement, les titres grecs ont brutalement perdu plus de 50% de leur valeur d'origine et certains

⁸ D. Carreau, « Dettes d'Etats », *Repertoire Dalloz droit international*, n° 51.

⁹ Sur cet essor, V. not. Ch. Leben, « La théorie de contrat d'Etat et l'évolution du droit international des investissements », *op.cit.*. Et du même auteur, « Arbitrage CIRDI », *Rép. Dalloz Dr. International*.

¹⁰ Bien sûr, l'immunité d'exécution ne disparaît pas du seul fait de l'arbitrage d'investissement mais le fait que CIRDI dépende de la Banque mondiale confère à ses décisions une autorité tout à fait singulière à l'égard des Etats. Sur ce point, V. *infra* III A/.

¹¹ Affaire *Abaclat et autres c/ Argentine*, CIRDI, ARB/07/5.

¹² Affaire *Ambiente Ufficio S.p.A. et autres c/ Argentine*, CIRDI, ARB/08/9.

¹³ Affaire *Giovanni Alemanni et autres c/ Argentine*, CIRDI, ARB/07/8.

créanciers se sont déjà manifestés: une première requête a été déposée devant le CIRDI, le 20 mai 2013, par la banque slovaque Poštová banka et son actionnaire chypriote Istrokapital, qui mettent en cause la Grèce sur le fondement des TBI Grèce-Slovaquie du 3 juin 1991 et Grèce-Chypre du 30 mars 1992¹⁴.

En pratique, l'enchaînement de ces événements impose de se demander si les créanciers récalcitrants à l'égard des mesures étatiques prises pour lutter contre les crises financières peuvent sérieusement nourrir l'espoir d'une condamnation de l'Etat. Autrement formulé, quel est le potentiel de l'arbitrage d'investissement en cas de restructuration de dette?

II. LE POTENTIEL

A ce stade où seules deux décisions sur la compétence ont été rendues dans les affaires *Abaclat*¹⁵ et *Ambiente Ufficio*¹⁶ contre l'Argentine, la réflexion reste entièrement prospective. En effet, si chacun des deux tribunaux s'est déclaré compétent, aucune sentence au fond n'a encore été rendue.

Cela étant, à l'examen, la condamnation par le CIRDI d'un Etat qui restructure sa dette apparaît parfaitement possible.

Pour s'en convaincre, en s'attachant particulièrement à l'exemple argentin, examinons les questions qui pourraient conduire à cette solution dans l'ordre logique, en respectant la démarche des tribunaux arbitraux qui s'interrogent d'abord sur leur compétence (A) et qui abordent ensuite le fond du litige, c'est-à-dire l'éventuelle responsabilité internationale de l'Etat débiteur (B).

A. La compétence du tribunal arbitral

Comme en témoignent déjà les deux décisions CIRDI rendues dans les affaires *Abaclat* et *Ambiente Ufficio*, la question de la compétence du

¹⁴ Affaire *Poštová banka et Istrokapital c/ Grèce*, CIRDI, ARB/13/8. V. *Investment Treaty News*, Numéro 4, Volume 3, Juin 2013, p. 15 : www.iisd.org/pdf/2013/iisd_itn_june_2013_fr.pdf.

¹⁵ Affaire *Abaclat et autres c/ République d'Argentine*, CIRDI, ARB/07/5, décision sur la compétence et la recevabilité du 4 août 2011 : <http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf>. Sur cette décision V. not. B. Poulain, *Cahiers de l'arbitrage*, 2011.1059 ; E. Onguene Onana, *Journal de droit international*, 2012.286 ; K. P. Gallagher, « Mission Creep : International Investment Agreements and Sovereign Debt Restructuring », *ITN Quarterly*, déc. 2011-janv. 2012 (www.iisd.org) ; S. Lemaire, *Revue de l'arbitrage*, 2013. 477, n° 1 et s.

¹⁶ Affaire *Ambiente Ufficio S.P.A et autres c/ Argentine*, CIRDI, ARB/08/9, décision sur la compétence et la recevabilité du 8 février 2013 : <http://www.italaw.com/sites/default/files/case-documents/italaw1276.pdf>.

tribunal arbitral saisi de différends relatifs à la restructuration de dette souveraine comporte comme à l'accoutumée de multiples facettes. Mais l'essentiel consiste à déterminer si l'acquisition d'obligations d'Etat constitue un investissement étranger au sens du droit des investissements¹⁷.

Parce qu'en l'absence de définition officielle de l'investissement les modalités de qualification peuvent varier d'un tribunal arbitral à l'autre, alors même que les deux décisions précitées ont déclaré que les titres souverains appartenaient à la catégorie des investissements protégés par le TBI invoqué et par la Convention de Washington de 1965, il faut souligner ici que les réponses à cette question pourraient être contredites dans d'autres affaires.

Cela étant souligné, il convient d'observer que, comme l'attestent les deux décisions, rien n'interdit *a priori* et de manière dirimante cette qualification: *ni la rédaction des TBI ni la Convention de Washington* qui fonde la compétence du Centre ne s'y opposent de façon évidente.

Du côté des TBI, la question ne posera en principe pas de difficultés. Bien sûr, leur rédaction et la définition des investissements protégés varient d'un texte à l'autre. Ainsi, alors que certains intègrent expressément les titres financiers et encore plus spécialement les titres publics dans la liste des investissements protégés¹⁸, d'autres sont susceptibles de les exclure¹⁹, ce qui écarterait toute discussion. Mais la plupart des textes définissent l'investissement de manière extrêmement large comme s'entendant de « *any type of assets* » (tous types d'avoirs) et se contentent d'y adjoindre une liste d'illustrations non exhaustive, ce qui permettrait à l'évidence d'y intégrer les titres souverains.

Autrement dit, sauf exclusion expresse, l'acquisition d'obligations d'Etat pourra le plus souvent apparaître comme une opération d'investissement au sens du TBI invoqué.

Du côté de la Convention de Washington de 1965, la question de savoir si l'acquisition de titres souverains constitue un investissement au sens de l'article 25, d'après lequel « *la compétence du Centre s'étend aux différends d'ordre juridique entre un Etat contractant (...) et le*

¹⁷ Sur cette question, V. les commentaires de la décision *Abaclat* : not. B. Poulain, *Cahiers de l'arbitrage*, 2011.1059 ; E. Onguene Onana, *Journal de droit international*, 2012.286 ; K. P. Gallagher, « Mission Creep : International Investment Agreements and Sovereign Debt Restructuring », *ITN Quarterly*, déc. 2011-janv. 2012 (www.iisd.org) ; S. Lemaire, *Revue de l'arbitrage*, 2013. 477, n° 1 et s.

¹⁸ Tel était le cas du TBI Argentine-Italie de 1990 invoqué dans les affaires *Abaclat* et *Ambiente Ufficio* dont l'article 1(1) visait les instruments financiers les plus divers : « *Bonds, private or public financial instruments or any other right to performances or services having economic value* ».

¹⁹ Sur ces exclusions éventuelles, V. *infra* III B/.

ressortissant d'un autre Etat contractant qui sont en relation directe avec un investissement », n'emporte pas *a priori* une réponse aussi tranchée car le texte ne fournit aucune définition de l'investissement.

C'est la raison pour laquelle, sur ce sujet, les arbitres sont en réalité libres de suivre différentes *méthodes* de qualification, comme l'illustre la jurisprudence²⁰. Mais, là encore, aucune ne semble s'opposer *a priori* à la protection des acquisitions de titres souverains.

Très accueillante, *la méthode subjective* qui se fonde entièrement sur la volonté des parties telle qu'elle résulte du TBI invoqué impose de revenir à la conclusion précédente: sauf exclusion expresse du traité, acquérir un titre souverain peut constituer un investissement.

D'apparence plus rigoureuse, *la méthode objective*, laquelle dans une volonté de rationalisation a conduit la jurisprudence à énoncer le *Salini Test* et ses 4 critères — apport, durée, risque et contribution au développement économique de l'Etat — n'est en réalité guère plus exigeante. En pratique, il s'agit d'un test à géométrie variable, dont les critères sont le plus souvent appréciés avec une telle souplesse qu'il n'est en aucun cas impossible qu'un tribunal arbitral considère que — s'agissant d'obligations d'Etat — la définition est respectée.

C'est d'ailleurs ce qui ressort implicitement mais nécessairement des décisions rendues dans les affaires *Abaclat* et *Ambiente Ufficio* dans lesquelles les tribunaux arbitraux ont procédé à un examen superficiel des critères en question pour conclure qu'ils étaient remplis²¹.

Cela étant dit, force est de constater que la qualification d'investissement protégé au sens de la Convention de Washington et des TBI invoqués demeure sujette à controverse et pourrait donner lieu à de vifs débats s'agissant de titres souverains. Dans l'affaire *Abaclat*, elle a ainsi conduit — d'autant plus significativement que le geste est rare — l'un des arbitres à la démission pour marquer son désaccord avec la décision sur la compétence²².

Sans entrer dans la polémique, prenons l'exemple du critère de l'apport: des doutes demeurent sur son existence en cas d'acquisition de

²⁰ Sur les diverses méthodes de qualification, V. not. E. Gaillard, « Reconnaître ou définir? Réflexions sur l'évolution de la notion d'investissement dans la jurisprudence du CIRDI », in *Le droit international économique à l'aube du XXIème siècle — En hommage aux Professeurs D. Carreau et P. Juillard*, Pédone, 2009, p. 17.

²¹ V. la décision *Abaclat* précitée, § 480 et s. et la décision *Ambiente Ufficio* précitée, § 470.

²² Chacune des deux décisions rendues dans les affaires *Abaclat* et *Ambiente Ufficio* ont par ailleurs donné lieu à la rédaction d'opinions dissidentes : V. dans l'affaire *Abaclat*, celle du Prof. *Abi-Saab* : <http://www.italaw.com/sites/default/files/case-documents/ita0237.pdf>. et, dans l'affaire *Ambiente Ufficio*, celle de l'arbitre *S. Torres Bernàrdez* : <http://www.italaw.com/sites/default/files/case-documents/italaw1487.pdf>.

titres souverains. En effet, peut-on parler d'apport à l'Etat s'agissant de titres acquis sur le marché secondaire, alors même que les sommes échangées à ce stade n'ont pas vocation à être directement versées à l'Etat?

Dans le même esprit, une autre question se pose: l'acquisition de titres sur le marché secondaire peut-elle être localisée sur le territoire de l'Etat hôte comme l'imposent la plupart des TBI? Si, dans l'affaire *Abaclat*, le tribunal a majoritairement considéré que l'opération d'émission et d'échange de titres souverains sur le marché primaire et le marché secondaire devait être envisagée dans sa globalité et qu'il n'était en conséquence pas possible de localiser l'acquisition d'obligations sur le marché primaire et leur négociation sur le marché secondaire ailleurs qu'en Argentine, l'affirmation pourrait être discutée²³.

Mais il ne s'agit pas ici d'alimenter ces débats. Contentons-nous de constater que même si la qualification d'investissement n'est pas évidente, elle n'est ni invraisemblable ni impossible et ce, d'autant moins que l'Etat ne possède pas de réelle parade contre cette solution. Les *collective action clauses* elles-mêmes, qui privent pourtant les porteurs récalcitrants de leur droit d'agir en justice quand une majorité qualifiée a accepté l'échange, resteraient très vraisemblablement sans effet devant les tribunaux arbitraux. En effet, si ces clauses intégrées dans les titres d'Etat mettent en échec les actions engagées selon les droits nationaux qui les régissent — et qui s'analysent comme de simples *contract claims* —, tout porte à croire qu'elles n'auraient pas d'effet sur *les treaty claims* engagées sur le fondement des TBI²⁴.

²³ V. sur ce point, l'opinion dissidente précitée du Professeur Abi-Saab (§ 77 et s.), selon lequel: «*The alleged investment, the security entitlements, are not located in Argentina*», notamment parce que les titres ont été échangés sur des marchés situés à l'étranger.

²⁴ Sur la distinction des *treaty claims* et des *contract claims*, V. not. J. Crawford, «*Treaty and Contract in Investment Arbitration*», *Arbitration International*, 2008, 251 ; I. Fadlallah, «*La distinction Treaty Claims — Contract claims et la compétence de l'arbitre CIRDI : faisons-nous fausse route?*», in *Le contentieux arbitral transnational relatif à l'investissement* (ss. la dir. De Ch. Leben), Anthémis, 2006. 205 ; P. Mayer, «*Contract claims et clauses juridictionnelles des traités relatifs à la protection des investissements*», *Journal de droit international* 2009. 71 ; A. Pellet, «*Adieu Philippines. Remarques sur la distinction entre les réclamations conventionnelles et contractuelles dans le droit de l'investissement international*», in *Mélanges offerts à Dominique Carreau et Patrick Juillard*, Pédone, 2009, p. 97 ; Ch. Schreuer, «*The coexistence of local and international law remedies*», *Transnational Dispute Management*, vol. 2, issue n° 4, August 2005. 10 ; S. Lemaire, «*Treaty claims et contract claims : la compétence du CIRDI à l'épreuve de la dualité de l'Etat*», *Revue de l'arbitrage*, 2006, p. 353. Et sur la mise à l'écart des *collective action clauses* à l'égard des *treaty claims*, K. P. Gallagher, «*Mission Creep : International Investment Agreements and Sovereign Debt Restructuring*», *op. cit.*, spec. p. 4 ; M. Waibel, «*Opening the Pandora box: sovereign bonds in international*

Autrement dit, l'offre d'arbitrage contenue dans le TBI aurait toutes ses chances d'être valablement mise en oeuvre à l'égard des emprunts obligataires. Et ce premier résultat sur la compétence conduirait le tribunal arbitral à s'interroger, au fond, sur l'éventuelle responsabilité de l'Etat qui restructure sa dette à l'égard des créanciers récalcitrants à l'échange.

B. L'éventuelle responsabilité internationale de l'Etat

Au fond, il s'agit de déterminer si l'Etat qui impose un échange de titres est susceptible d'être condamné par un tribunal arbitral pour violation des standards qui figurent classiquement dans les traités d'investissement internationaux.

Sur ce sujet, en l'absence de sentence, il n'existe pas de certitude. Mais aucune règle de protection figurant classiquement dans les traités ne semble de nature à exclure catégoriquement la responsabilité de l'Etat qui restructure sa dette.

A l'inverse, plusieurs standards paraissent susceptibles de fonder sa condamnation²⁵.

Le premier d'entre eux, l'interdiction d'expropriation sans compensation, pourrait certainement jouer s'agissant d'échanges forcés d'obligations qui réduisent sensiblement la valeur des titres en cause et privent sans contrepartie les créanciers d'une partie de leur investissement²⁶.

Autre standard, la clause de traitement national — laquelle garantit que les investisseurs étrangers ne seront pas traités moins favorablement que les nationaux — pourrait être invoquée dès lors que les conditions d'échange varieraient en fonction de la nationalité des détenteurs de titres²⁷. Or, lors d'une restructuration de dette souveraine, la discrimination en faveur des ressortissants de l'Etat, qui bénéficient par exemple de paiements prioritaires, n'est pas rare afin de soutenir l'économie nationale²⁸.

arbitration", *American Journal of International Law* (2007), vol. 101, p. 711, : http://papers.ssm.com/sol3/papers.cfm?abstract_id=1566482 et du même auteur, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, 2011, spéc. p. 262.

²⁵ K. Gallagher, « The New Vulture Culture : Sovereign debt restructuring and trade and investment treaties », IDEAs Working Paper (2011) sur : ase.tufts.edu/gdae/publications/articles_reports.

²⁶ K. Gallagher, « The New Vulture Culture : Sovereign debt restructuring and trade and investment treaties », *op. cit.*, spéc. p. 18.

²⁷ K. Gallagher, « The New Vulture Culture : Sovereign debt restructuring and trade and investment treaties », *op. cit.*, spéc. p. 17.

²⁸ U. Panizza, « Is Domestic Debt the Answer to Debt Crises ? » : academiccommons.columbia.edu/.../Panizza_IPD_SovDebt_Working_Paper.pdf.

Enfin, un troisième standard serait encore susceptible de jouer en cas d'échange de titres souverains: c'est la clause de traitement juste et équitable²⁹. Si, d'après la jurisprudence arbitrale, sa violation peut résulter de l'insatisfaction des attentes légitimes de l'investisseur étranger en termes de réglementation³⁰, l'échange de titres souverains qui n'était bien sûr pas prévu au moment de la souscription pourrait être considéré comme tel.

Plus encore que l'Argentine, la Grèce risque d'ailleurs très sérieusement une condamnation pour violation de la clause de traitement juste et équitable³¹. En effet, si — en soi — toute loi de restructuration de dette peut être considérée comme ayant déçu les attentes légitimes des investisseurs, l'Etat grec est allé plus loin encore. Afin de sécuriser l'opération d'échange de titres, sa loi du 23 février 2012³² a introduit une *collective action clause* rétroactive³³. Or, si les *collective action clauses* constituent des outils efficaces de sécurisation des échanges qu'il n'est pas rare d'insérer dans les titres eux-mêmes³⁴, leur introduction rétroactive par le législateur au moment de l'échange est tout à fait inédite. Concrètement, le procédé a permis à la Grèce de forcer environ 20% de créanciers récalcitrants à l'échange de mars 2012. Pour autant, comme cela a été signalé précédemment, une requête d'arbitrage a été transmise au CIRDI: certains créanciers opposés à l'opération reprochent désormais à l'Etat grec l'édiction de cette législation qui a rétroactivement modifié les modalités de leur investissement. Plus précisément, ils considèrent que l'insertion d'une *collective action clause* rétroactive dans la loi d'échange constitue une violation des standards de traitement juste et équitable

²⁹ K. Gallagher, « The New Vulture Culture : Sovereign debt restructuring and trade and investment treaties », *op. cit.*, spéc. p. 19.

³⁰ V. le document très complet établi par la Conférence des Nations-Unies sur le commerce et le développement: *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, à consulter sur : unctad.org/en/Docs/unctadaddiaeia2011d5_en.pdf. Et aussi, J. Cazala, « Protection des attentes légitimes : l'exigence d'un engagement spécifique », *Cahiers de l'arbitrage*, 2012, 940.

³¹ Sur ce sujet, S. Lemaire, « La rétroactivité en droit des investissements internationaux », *Semaine juridique édition Entreprise et Affaires*, 2013, dossier 1515, p. 29.

³² V. : <http://www.minfin.gr/portal/en/resource/contentObject/id/7ad6442f-1777-4d02-80fb-91191c606664>.

³³ Hubert de Vauplane, « Offre d'échange de la dette grecque : ce que l'on ne vous a pas dit... » : <http://alternatives-economiques.fr/blogs/vauplane/2012/03/03/offre-dechange-de-la-dette-grecque-ce-que-lon-ne-vous-a-pas-dit/>.

³⁴ V. not. K. P. Gallagher, « *Mission Creep: International Investment Agreements and Sovereign Debt Restructuring* », *Investment Treaty News Quarterly*, déc. 2011-janv. 2012 (www.iisd.org).

contenus dans les TBI Grèce-Slovaquie et Grèce-Chypre³⁵. Et, rapprochée de la jurisprudence arbitrale récente qui condamne sévèrement la rétroactivité de la loi comme contraire au standard du traitement juste et équitable³⁶, la loi grecque semble courir tous les risques d'être considérée comme ayant déçu les attentes légitimes des investisseurs récalcitrants à l'échange, ce qui devrait alors conduire le tribunal arbitral à priver la rétroactivité de tous ses effets et à remettre en cause l'échange de titres imposé aux investisseurs demandeurs.

Ainsi la condamnation de l'Etat, auteur de l'échange de titres souverains, sur le fondement d'un TBI paraît loin d'être invraisemblable. Elle semble même d'autant plus envisageable que, si plusieurs pistes de défense de l'Etat peuvent être envisagées, aucune n'est de nature à contrer efficacement les griefs évoqués.

D'emblée, on écartera les plus périlleuses: c'est le cas notamment de la thèse, selon laquelle l'article 62 de la Convention de Vienne de 1969 sur le droit des traités³⁷ pourrait permettre à l'Etat d'invoquer la suspension de ses obligations nées des TBI³⁸ du fait d'un « *changement fondamental de circonstances* ». En effet, parce que la mise en œuvre de ce texte impose un

³⁵ A cet égard, il paraît important de relever que seul le second de ces textes, le TBI Chypre-Grèce, contient une clause de traitement juste et équitable insérée en son article 2 § 2 (original grec). Mais, alors même que le TBI Slovaquie-Grèce est resté silencieux sur ce thème, la clause de la nation la plus favorisée qui y figure (v. V. Art. 3 TBI Slovaquie-Grèce du 3 juin 1991) permettrait certainement d'importer le standard de traitement juste et équitable en provenance d'autres traités et, par exemple, de se reporter sur ce point à l'article 2 § 2 du TBI Chypre-Grèce ou encore à l'article 2 § 2 du TBI Grèce-Tunisie, d'après lesquels : « *Les investissements effectués par des investisseurs de l'une des parties contractantes bénéficient d'un traitement juste et équitable* » (TBI Grèce-Tunisie du 31 octobre 1992, entré en vigueur le 21 avril 1995, à consulter sur : unctad.org/sections/dite/iaa/docs/bits/greece_tunisia_fr.pdf).

³⁶ V. les affaires *Total S.A c/Argentine*, CIRDI, ARB/04/1, décision sur la responsabilité du 27 décembre 2010 : <http://www.italaw.com/sites/default/files/case-documents/ita0868.pdf> et *ATA Construction, Industrial and Trading Company c/ Jordanie*, CIRDI, ARB/08/2, sentence du 18 mai 2010 : <http://www.italaw.com/sites/default/files/case-documents/ita0043.pdf>.

³⁷ L'article 62 intitulé « *Changement fondamental de circonstances* » prévoit :
 « 1. *Un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion d'un traité et qui n'avait pas été prévu par les parties ne peut être invoqué comme motif pour mettre fin au traité ou pour s'en retirer, à moins que :*
 a) *L'existence de ces circonstances n'ait constitué une base essentielle du consentement des parties à être liées par le traité; et que*
 b) *Ce changement n'ait pour effet de transformer radicalement la portée des obligations qui restent à exécuter en vertu du traité ».*

³⁸ En faveur de cette thèse, V. H. Ferré et K. Duggal, « The world economic crisis as a changed circumstance », *Columbia FDI Perspectives*, No. 43, Août 2011 : <http://www.vcc.columbia.edu/content/world-economic-crisis-changed-circumstance>.

changement *fondamental*, lequel n'existe que dans des hypothèses extrêmes et très rares³⁹, elle risque d'être sérieusement contestée en cas de crise financière.

A l'heure actuelle, la piste la moins fragile consisterait certainement à se référer aux facteurs exonérateurs de responsabilité connus du droit international général, plus spécialement à l'état de nécessité codifié par l'article 25 du Projet d'articles sur la responsabilité de l'Etat de la Commission de droit international⁴⁰ et qui figure, dans certains TBI, sous forme de clause dite de « réserve de l'ordre public » ou de « respect des intérêts essentiels »⁴¹. Ces défenses ont souvent été utilisées par l'Etat argentin dans le contentieux arbitral⁴² lié à la crise de 2001. Néanmoins, les résultats ne sont pas entièrement convaincants. Statistiquement, l'Etat argentin n'a pu être exonéré que dans un faible nombre de cas, notamment parce qu'en cas de crise, il est difficile d'exclure d'emblée toute contribution étatique à la survenance de la situation, ce qui désactive pourtant l'exonération⁴³.

³⁹ En pratique, le « *Changement fondamental de circonstances* » ne joue quasiment jamais. V. P. Daillier, M. Forteau et A. Pellet, *Droit international public*, LGDJ, 8^{ème} éd., 2009, n° 203.

⁴⁰ L'article 25, intitulé « *État de nécessité* », prévoit :

- « 1. *L'État ne peut invoquer l'état de nécessité comme cause d'exclusion de l'illicéité d'un fait non conforme à l'une de ses obligations internationales que si ce fait :*
- a) *Constitue pour l'État le seul moyen de protéger un intérêt essentiel contre un péril grave et imminent ; et*
 - b) *Ne porte pas gravement atteinte à un intérêt essentiel de l'État ou des États à l'égard desquels l'obligation existe ou de la communauté internationale dans son ensemble.*
2. *En tout cas, l'état de nécessité ne peut être invoqué par l'État comme cause d'exclusion de l'illicéité :*
- a) *Si l'obligation internationale en question exclut la possibilité d'invoquer l'état de nécessité ; ou*
 - b) *Si l'État a contribué à la survenance de cette situation ».*

Sur cette disposition, V. le commentaire officiel de la Commission de droit international : untreaty.un.org/ilc/texts/instruments/francais/.../9_6_2001_francais.pdf.

⁴¹ Par ex., l'art. 11 du TBI modèle américain indique que le traité ne peut empêcher « *l'une des parties de prendre toutes mesures nécessaires au maintien et au rétablissement de l'ordre public, au respect de ses obligations en matière de maintien et de rétablissement de la paix et de la sécurité internationale ou à la protection de ses intérêts essentiels* ».

⁴² Sur l'Etat de nécessité, V. not. A. Martinez, « *Invoking State Defenses in Investment Treaty Arbitration* », in *The Backlash Against Investment Arbitration*, dir. M. Waibel et al., Kluwer Law International, 2010, p. 315. Et plus récemment, K. Chubb, « *The State of Necessity Defense : a burden, not a blessing to the international investment arbitration system* », *Cardozo Journal of Conflict Resolution*, vol. 14, 2013, p. 531.

⁴³ Concrètement dans les affaires argentines, le taux d'exonération s'élève environ à 1/3 des sentences, ce qui reste très minoritaire. V. sur ce sujet, L. Peterson, « *Latest split amongst ICSID arbitrators over Argentina's necessity defense reflects wider chasm, role*

Ainsi est-il temps de dresser un premier bilan du potentiel de l'arbitrage d'investissement et de reconnaître qu'au fond, si rien n'est pour l'heure certain, il n'est pas possible d'exclure une condamnation de l'Etat qui restructure sa dette sur le fondement du droit des investissements.

Un tel constat impose de réfléchir aux perspectives que préfigurerait cette solution.

III. LES PERSPECTIVES

Réfléchir aux perspectives ouvertes par l'existence de ce nouveau contentieux de la dette souveraine, impose non seulement d'en mesurer les risques (A) mais aussi d'envisager les remèdes qui pourraient, le cas échéant, permettre de les juguler (B).

A. Les risques

Le premier risque lié à une condamnation arbitrale de l'Etat qui restructure sa dette — et de l'Etat argentin en particulier — serait à l'évidence un *risque conjoncturel* de contamination. En pratique, l'expérience argentine pourrait en effet essaimer non seulement en Europe mais aussi, à plus long terme, dans toute région sujette à la crise financière.

Ayant procédé à une opération d'échange de titres assortie d'une clause d'action collective rétroactive en mars 2012, la Grèce se présente comme la prochaine cible de telles procédures. Elle offre par ailleurs toutes les caractéristiques requises: partie à la Convention de Washington, elle a ratifié 38 TBI, parmi lesquels une majorité prévoit le recours à l'arbitrage d'investissement⁴⁴. C'est donc sans surprise que l'Etat grec a d'ores et déjà fait l'objet d'une plainte émanant d'une banque slovaque et de son actionnaire chypriote devant le CIRDI. Parce qu'environ 20% des porteurs de titres souverains étaient hostiles à l'échange qui leur a été imposé, d'autres actions pourraient suivre⁴⁵.

Ajoutons que, parce qu'il n'était pas entièrement volontaire, l'échange grec a été qualifié d'événement de crédit par l'*International Swaps and Derivatives Association* (ISDA), ce qui a déclenché la mise en œuvre des *Credit Default Swaps* (CDS) adossés aux titres grecs, pour une

of State practice in treaty interpretation also studied », *International Arbitration Reporter*, 2012 : www.iareporter.com/articles/20120129/print.

⁴⁴ Néanmoins, parmi eux, certains traités étant anciens, ils ne contiennent pas d'offre d'arbitrage.

⁴⁵ V. *Financial times*, 12 mars 2012, « *Germans seek lawsuit over greek debt swap* » : un cabinet d'avocats allemand en a fait part à la presse de la volonté de ses clients d'engager une requête sur le fondement du traité Allemagne-Grèce de 1961.

valeur estimée à 4 milliards de dollars. Or, rien n'interdirait aux vendeurs de protection — fonds d'investissements ou de fonds de pension — à l'égard desquels les CDS ont été mis en œuvre et qui sont en quelque sorte les victimes par ricochet de l'échange, de tenter à leur tour d'agir contre l'Etat grec en invoquant la clause de traitement juste et équitable qui figure dans un TBI.

A travers l'exemple grec, on réalise que l'expérience argentine constitue un risque important de contamination. Au-delà, le nouveau contentieux arbitral de la dette souveraine présente des risques plus profonds que l'on pourrait qualifier de *risques structurels*.

A ce propos, plusieurs recherches ont déjà été menées qui visent à identifier les effets des arbitrages d'investissement sur les restructurations de dettes d'Etats. Or, si chacun reconnaît que la menace de tels contentieux peut avoir des effets vertueux sur le comportement des Etats débiteurs, elle présente surtout de réels dangers.

Côté vertueux, il faut signaler que sous la pression d'une procédure arbitrale, l'Etat peut être amené à rouvrir les négociations avec ses créanciers. Ce fut d'ailleurs le cas de l'Argentine qui, en 2010, a émis une nouvelle offre d'échange de titres acceptée par une majorité de plaignants. Ainsi, alors que — dans l'affaire *Abaclat* — la *Task Force Argentina* (groupement des banques italiennes) avait fédéré environ 180 000 créanciers lors du dépôt de la requête d'arbitrage en 2007, leur nombre a été rapporté à 60 000 suite à l'échange de 2010.

Dans la même logique, parce que CIRDI dépend de la Banque mondiale, on peut penser que les Etats débiteurs seront particulièrement attentifs à l'exécution des sentences rendues dans ce cadre. Sur ce point, l'expérience argentine ne paraît toutefois pas convaincante.

Surtout, les dangers structurels que représente la menace d'un arbitrage d'investissement, spécialement devant le CIRDI, semblent l'emporter.

Le premier d'entre eux concerne le comportement des créanciers de l'Etat, les détenteurs d'obligations qui, parce qu'une nouvelle voie contentieuse leur est ouverte, peuvent être tentés de rejeter le plan de restructuration proposé par l'Etat en espérant obtenir plus par la voie de l'arbitrage d'investissement⁴⁶.

⁴⁶ Comp. la réaction du FMI à la décision de condamnation de l'Argentine au remboursement de près de 1 milliard d'euros aux fonds spéculatifs américains NML Capital et Aurelius Capital Management par les juges new yorkais : le fonds s'inquiète à l'idée que la condamnation des Etats qui restructurent leur dette n'incite désormais les créanciers à refuser l'échange qui leur est proposé. V. : http://www.lemonde.fr/economie/article/2013/08/27/dette-argentine-le-remboursement-des-fonds-vautours-creerait-un-precedent_3466964_3234.html.

Plus largement, ce nouveau contentieux risque même de fragiliser les relations internationales.

En effet, tout porte à croire que les relations interétatiques pourraient se trouver affectées: un refus d'exécution par l'Etat hôte de l'investissement d'une condamnation devant le CIRDI peut conduire l'Etat d'origine de l'investisseur à réagir. Dans cet esprit, par communiqué du 26 mars 2012⁴⁷, le département du commerce extérieur des Etats Unis — le gouvernement de Barack Obama — a écarté l'Argentine de son système généralisé de préférences (SGP), au motif que le gouvernement argentin ne s'était pas acquitté de l'indemnisation obtenue par différentes sociétés américaines auprès de tribunaux CIRDI⁴⁸.

Au-delà, l'arbitrage d'investissement pourrait aussi contribuer à fragiliser les relations de l'Etat débiteur avec certaines organisations financières. Dès 2010, un auteur, Mickaël Waibel, suggérait que le refus par un Etat débiteur d'exécuter une sentence CIRDI puisse entraver son accès à la Banque mondiale et au FMI⁴⁹. L'histoire a confirmé cette hypothèse. En septembre 2011, Washington a déclaré que ses représentants s'opposeraient à l'octroi de tout prêt à l'Argentine par les banques multilatérales de développement, notamment la Banque interaméricaine de développement⁵⁰.

Face à de tels risques, la question se pose de savoir si le bénéfice d'une nouvelle protection contentieuse des porteurs de dette souveraine est réellement justifié ou si, au contraire, il ne s'agirait pas d'une source supplémentaire de fragilisation du système économique mondial. L'interrogation paraît d'ailleurs d'autant plus fondée qu'avec le développement du *third party funding* dans l'arbitrage d'investissement⁵¹, l'obstacle financier à la saisine des tribunaux arbitraux n'existe quasiment

⁴⁷ V. : <http://www.ustr.gov/about-us/press-office/press-releases/2012/march/us-trade-representative-ron-kirk-comments-presidenti>.

⁴⁸ Schématiquement, le SGP donne accès à des tarifs douaniers préférentiels aux pays en développement.

⁴⁹ M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, 2011, spéc. p. 319.

⁵⁰ Et parce que le vote des Etats Unis n'a pas suffi à bloquer les prêts de la BID à l'Argentine, il y a des tentatives aujourd'hui de rallier la Grande-Bretagne à cette position.

⁵¹ V. not. B. Cremades, « Third Party Funding in International Arbitration », sept. 2011 : <http://www.cremades.com/en/publications/third-party-funding-in-international-arbitration/> ; E. De Brabandere et J. Lepeltak, « Third Party Funding in International Investment Arbitration », *ICSID Review – Foreign Investment Law Journal*, 2012, pp. 379-398 ; I. Tortorola, « Third Party Funding in International Arbitration » : http://investmentpolicyhub.unctad.org/Upload/Documents/Tortorola_Third%20Party%20Funding%20in%20Arbitration.pdf.

plus, ce qui favorisera l'essor de telles procédures. Dans ce contexte, quels seraient les remèdes envisageables?

B. Les remèdes

S'agissant de remédier aux dangers causés par l'existence d'un nouveau contentieux arbitral de la dette souveraine, plusieurs pistes peuvent être explorées.

D'aucuns proposent une alternative publique à la privatisation du contentieux par l'arbitrage avec la création d'une autorité internationale de restructuration des dettes souveraines à laquelle serait adossé un organe juridictionnel international spécialisé, comme l'avait envisagé au début des années 2000 Anne Krueger alors directrice générale adjointe du FMI⁵².

Mais, en attendant qu'un tel projet voie le jour, le meilleur remède consisterait certainement dans une négociation plus attentive des traités de protection des investissements — TBI ou Accords de libre échange — s'agissant des opérations de restructuration des dettes souveraines⁵³.

A cet égard, l'Union européenne se trouve en première ligne: particulièrement sujette à la crise actuelle, elle est en outre désormais exclusivement compétente pour négocier tout nouveau traité de protection des investissements depuis l'entrée en vigueur en 2009 du Traité de Lisbonne.

Mais, de quelles options dispose-t-elle dans ce cadre? Plusieurs voies existent dont certaines sont d'ailleurs inspirées par des expériences déjà menées par d'autres Etats et notamment par les Etats-Unis.

La solution la plus radicale consiste certainement à exclure la restructuration de la dette souveraine du champ de protection des traités⁵⁴, comme c'est déjà le cas dans l'ALENA dont l'article 1410, intitulé « *Exceptions* », prévoit :

« 1. Aucune disposition de la présente partie ne pourra être interprétée comme empêchant une Partie d'adopter ou de maintenir des mesures raisonnables, pour des raisons prudentielles telles que (...) : c) la préservation de l'intégrité et de la stabilité du système financier d'une Partie ».

⁵² Sur ce mécanisme, voir le site internet du FMI (www.imf.org) et les articles consacrés au *Sovereign Debt Restructuring Mechanism* (SDRM).

⁵³ K. Gallagher, « The New Vulture Culture : Sovereign debt restructuring and trade and investment treaties », *op. cit.*, spéc. p. 20 et s.

⁵⁴ *Ibid.* spéc. p. 27.

Sans aller aussi loin, il paraît possible d'envisager d'intégrer la restructuration de dette au sein de la protection garantie par le traité tout en lui ménageant un régime particulier⁵⁵ : par exemple, en ne la soumettant qu'à certains standards du traité, notamment la clause de traitement national et à la clause de la nation la plus favorisée, comme le prévoit implicitement mais nécessairement l'annexe G du TBI Etats Unis-Uruguay du 4 novembre 2005 intitulée « *Sovereign Debt Restructuring* », qui exclut expressément la soumission de la restructuration de la dette à la plupart des standards du traité (expropriation, traitement juste et équitable)⁵⁶, ce dont on déduit *a contrario* que les autres s'appliquent.

En tout état de cause, il serait certainement utile de préciser le sens de la clause de « réserve de l'ordre public » ou de « respect des intérêts essentiels » qui figure dans la majorité des TBI en y insérant une référence à la restructuration de dette afin de pouvoir exonérer l'Etat de sa responsabilité dans cette hypothèse. Tout au moins, la clause devrait clairement préciser qu'en cas de crise, l'Etat en cause est seul juge des mesures qu'il estime nécessaires pour le maintien de son ordre public et qu'il adoptera unilatéralement, ce qui figure dans certains traités — par exemple, l'article 18 du TBI modèle américain : « *Nothing in this Treaty shall be construed (...) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests* »⁵⁷ — mais non dans l'ensemble des textes actuellement en vigueur.

Et même, pourquoi ne pas imaginer d'insérer dans les traités de protection des investissements une sorte de *collective action clause* qui, contrairement à celles qui figurent dans les titres souverains eux-mêmes et ne visent que les *contract claims*, pourrait jouer à l'égard des *treaty claims*?

Enfin, au-delà de ces suggestions qui nécessiteraient une intervention institutionnelle, certaines solutions pourraient procéder des tribunaux arbitraux eux-mêmes, c'est-à-dire des spécialistes de l'arbitrage d'investissement qui, à travers des décisions récentes, ont paru manifester de réels doutes sur la pertinence de l'intervention du CIRDI dans le contentieux des placements financiers.

⁵⁵ *Ibid.*, spéc. p. 20 et s.

⁵⁶ V. le texte du TBI Etats Unis-Uruguay du 4 novembre 2005 : www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file748_9005.pdf.

⁵⁷ V. TBI modèle américain de 2012 : <http://www.state.gov/documents/organization/188371.pdf>.

A cet égard, il faut citer la sentence rendue le 2 novembre 2012 dans l'affaire *Standard Chartered Bank c/ Tanzanie*⁵⁸. Dans cette affaire, la requête émanait d'une banque anglaise qui — via sa filiale à Hong-Kong — avait consenti un prêt à une société tanzanienne chargée de la construction et du fonctionnement d'une centrale électrique proche de Dar-es-Salaam. Alors que la société tanzanienne avait suspendu les remboursements, devant le CIRDI, la banque accusait l'Etat d'avoir nui à son investissement et d'avoir violé plusieurs standards du TBI Angleterre-Tanzanie. Pour que la question puisse être examinée, encore fallait-il déterminer si le prêt litigieux pouvait être qualifié d'investissement. Si, dans le passé, certains prêts avaient reçu cette qualification devant le CIRDI⁵⁹ et si, en l'espèce, le TBI invoqué ne paraissait pas à première vue s'y opposer, le tribunal a néanmoins rejeté la demande de la banque anglaise. De l'étude exégétique de certaines dispositions très ordinaires du TBI, le tribunal a en effet déduit que le texte exigeait que l'investisseur ait procédé à un investissement actif: «*For the tribunal, the text of the BIT reveals that the treaty protects investments made by an investor in some active way rather than simple passive ownership*»⁶⁰, ce qui n'était pas le cas en l'espèce où la banque anglaise s'était contenté de participer financièrement et passivement à l'opération.

Confrontée à l'actuel contentieux de la dette souveraine, cette solution accentue les doutes et les réserves évoqués: le créancier qui acquiert des titres souverains sur les marchés financiers participe-t-il activement à l'opération litigieuse? Rien n'est moins sûr. Et, dans le sillage de cette interrogation, c'est la pertinence de l'arbitrage d'investissement et spécialement de l'arbitrage CIRDI pour traiter le contentieux de la dette d'Etat qui doit être sereinement mais sérieusement questionnée et ce, au premier chef, par les tribunaux arbitraux eux-mêmes.

CONCLUSION

Le point de départ de cette étude consistait à déterminer si le droit des investissements et plus spécialement l'arbitrage d'investissement qui entretiennent aujourd'hui des rapports très étroits avec la crise financière

⁵⁸ Affaire *Standard Chartered Bank c/ Tanzanie*, CIRDI, ARB/10/12, sentence du 2 novembre 2012. La solution n'est pas isolée car elle figure dans les mêmes termes dans une seconde sentence non publiée du 16 juin 2012 rendue dans l'affaire *Alapli Elektrik B.V. c/ République de Turquie*, CIRDI, ARB/08/13.

⁵⁹ V. not. Aff. *Fedax c/ Venezuela*, CIRDI, ARB/96/3, décision sur la compétence du 11 juillet 1997.

⁶⁰ *Id.*, § 225.

doivent jouer un rôle dans la restructuration des dettes d'Etat. Pour les investisseurs étrangers, à l'évidence, l'option est alléchante.

Mais les risques qu'elle implique ne sauraient être ignorés dès lors que ce contentieux est susceptible de fragiliser des Etats qui sont d'ores et déjà en situation d'extrême faiblesse.

Dès lors, comme souvent, la question rejaillit sur la formulation des traités de protection des investissements eux-mêmes, dont le dispositif mérite d'être renforcé sous cet angle.

Au-delà, parce que la restructuration de dettes constitue un enjeu mondial majeur, sa soumission aux tribunaux arbitraux met en lumière la responsabilité des arbitres, spécialistes du droit des investissements, et leur obligation d'assurer la régulation d'un contentieux dont ils ne sauraient ignorer les dangers.

Response to the Report

V. V. Veeder *Q.C.**

Ladies and Gentlemen, good morning. I have three apologies to make, in fact: one, I used to be called Brigitte Stern in the original program but I changed my name for today's purposes. Secondly, I am not a Professor like Brigitte, I am a *professeur extraordinaire*, as they say in Belgium, which is no Professor at all. And thirdly, I am going to speak in English because as we heard from Sophie, this is a bilingual country where English is still spoken.

Now it is my task to be the first response to Professor Lemaire's excellent report. I agreed with almost all of it, Dev is going to follow and he may disagree with almost all of it differently.

I am going to touch on three points given we are short of time.

First, upon the efficacy and the robustness of the present system of investment arbitration in the face of the financial crises;

Secondly, I am going to touch upon the *NML* case¹ which is currently pending before the New York courts and is doubtless destined for the U.S. Supreme Court. It is an extremely important case on sovereign debt; and

Thirdly, I am going to touch upon something that may be little known but should be better known, and that is the United Kingdom's 2010 Act, the Debt Relief (Developing Countries) Act, as a possible model for other countries including the Member States of the European Union and of course Mauritius.

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¹ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012).

I. EFFICACY OF INVESTOR-STATE ARBITRATION IN THE FACE OF FINANCIAL CRISES

The first issue is efficacy. As Sophie has reported, Argentina's crisis was profound and serious. At that time it was the largest sovereign default in history, but it has since been overtaken. But if we look at investment treaty claims, that aspect of the crisis is relatively modest and that gave rise to a relatively small number of investment arbitrations. Now, these are the known figures: the total claims were about USD 15 billion, which compared to the overall debt, was relatively small. It gave rise to 43 ICSID arbitrations, 30 ICSID decisions and awards and three UNCITRAL awards. After more than 10 years, Argentina has paid nothing; but time is running out because trade sanctions have been applied by the United States in favour of U.S. investors as award creditors and trade sanctions are pending within the European Union and possibly the WTO.

So, the end is not in doubt as regards these ICSID and UNCITRAL cases. Argentina will eventually have to pay. As regards the nature of these arbitrations, there are, from South America, 11 arbitrators; North America, 17 arbitrators (including 3 from Mexico); Western Europe, 20 arbitrators; and North Africa, 2 arbitrators. So, in all, 50 arbitrators have contributed to the ICSID and UNCITRAL awards and decisions so far.

Before Mr. Glasgow formulates an objection – that there is nobody on this panel for Mauritius or Southern Africa, a comment with which I agree totally when he made it – in this particular case, we should bear in mind that this crisis concerned only nine bilateral investment treaties signed by Argentina with the USA, Spain, France, United Kingdom, Benelux, Germany, Italy, Chile, and the Netherlands. So, the focus of the debate was very far from Sub-Saharan Africa: Argentina appoints generally arbitrators geographically close to them and the Western European and North American investors tend to appoint investors from those States.

ICSID did rather better. It selected members of eight *ad hoc* committees, appointing 21 members, including members from Australasia, China, Hong Kong, Nigeria and Singapore. So these are the statistics. Post Argentina, what do we think is going to happen? Well, the system has survived, subject to the enforcement and performance of its awards. Also, I simply repeat what I am told, this debate is no longer about money. It is estimated that Argentina could settle all its investment arbitration claims and awards for a figure significantly less than USD 2 billion. Now, it has USD 2 billion. So why does it not do so? We shall no doubt hear of future difficulties in the months and years to come but eventually the sums will be paid and the system regarding Argentina's crisis, would have worked. But

having survived this crisis, could it survive the next likely crisis, the collapse or potential collapse of certain Euro States?

We have heard Sophie say that this Euro crisis was simply the contamination from the financial crisis outside Europe. We must beg to differ because this is a self-inflicted wound by the European Union on its own Member States who chose to enter the Euro zone without sufficient political and economic foresight. It is certainly not a crisis limited to Greece; Greece may be followed by Portugal, by Cyprus, by Spain, maybe by Italy, and politeness prevents me from naming any further countries.

Now, the big problem with the future of investment arbitration if there are a succession of euro collapses is the *Abaclat* decision.² Sophie mentioned that case; it changed the rules of the game. Originally, 180,000 bondholders, later reduced but still a very substantial number were allowed by a majority ICSID tribunal decision to bring claims as investors under the BIT and permitted to bring a mass claims arbitration. Now this decision, to my mind, shows that investment arbitration works by adapting to new circumstances and fashioning remedies to right a possible wrong not only for the big boys, the big investors, the banks and the large corporations, but also for the little people, the small Italian retirees who put their faith in State bonds to their great error.

Could ICSID handle not 180,000 such individual bondholders from failed Euro-zone States, but claims by millions? I doubt this, without a massive rewriting of the ICSID Convention which cannot be done for political reasons. Sophie went through various remedies but it is far too late for the European Commission under the Lisbon Treaties to start rewriting BITs. It is certainly possible to make use of ‘collective action clauses’ contractually in bonds issued by Euro-zone States which is going to happen increasingly. But whether that can be elevated into a treaty protection is an interesting question to which I do not know the answer.

Sophie also mentioned another solution which was abandoned, the Sovereign Debt Restructuring Mechanism (the “SDRM”) that was raised by the first Deputy Managing Director of the IMF in 2001. This was to install a bankruptcy mechanism for sovereign countries. It might be absolute, or a period of administration or something else; or at least, just to freeze the situation to allow the country in a difficult political and economic situation to work its way out of those problems. That seemed a good idea at the time, it was supported by many European Union Member States, but it was stopped. It was primarily stopped by bankers themselves who worked both sides of the street helping failed States and helping banks because they

² *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccana and Others v. The Argentine Republic*).

regarded it as a moral hazard, that is, if you make default less painful, you would get more defaults, and if you got more defaults, you would have more irresponsible borrowing because the irresponsible borrowing States would find it more easy to borrow without the great fear of what happens when a country defaults.

The second reason was U.S. opposition to an increased IMF power because this bankruptcy regime would be organised by the IMF. As you know, the IMF is always headed traditionally by a French citizen. The situation has changed greatly to a better effect, but it is still headed by a French woman, I wonder whether Washington will accept her any more than they did with her predecessors. So, the SDRM is not a solution.

All we are left with then, is investor-State arbitration and gunboats, and between the two, I would choose investor-State arbitration.

II. *NML V. ARGENTINA*

We move now to my second point, concerning the litigation in New York known as the *NML* case, a very interesting story which is as yet incomplete.

We start in 1994, when Argentina, pursuant to a Fiscal Agency Agreement (“FAA”), began to issue U.S.-denominated debt securities (“FAA bonds”) with a provision for the application of New York law and New York jurisdiction. The FAA had a *pari passu* clause. The relevant wording of that clause, onto which the New York courts have latched is: “the payment obligations of Argentina under the FAA bonds shall at all times rank, at least equally, with all its other present and future unsecured and subordinated external indebtedness”. This is the definition which covers non-Argentine currency obligations including USD bonds. Very importantly, in the early days in 1994, the bonds did not include ‘collective action clauses (“CACs”)’. Sophie explained the purpose of CACs; and they are missing from FAA bonds. They were only invented apparently in 2002.

If we go back to the beginning of the story in 2001, we have the Argentine crisis as a result of which the government declared a moratorium on its sovereign debt of over USD 102 billion. Part of that comprised of the FAA bonds; and a declaration was made by the government, successively renewed and entrenched by domestic legislation, that they would never ever pay anything on the FAA bonds.

So, no principal or interest has ever been paid under these bonds since 2001. But at some time, we think nearer 2012 than 2001, the *NML* plaintiffs acquired FAA bonds. *NML* is a subsidiary of Elliott Associates, who are very skilled indeed at long-term planning. They waited and they waited; but in 2005, the Argentine Government produced exchange bonds

to replace the FAA bonds with a 75% haircut. Many commercial banks and many others agreed that it was better to get 25% than nothing, and so they exchanged the FAA bonds for the exchange bonds. These bonds had CACs but given that the old FAA bonds did not, Argentina could not force the holdouts to surrender their FAA bonds. So, as a result, about 9% in value of FAA bondholders held out and that included the *NML* plaintiffs.

We now move to New York and the Southern District of New York, a very experienced court in this particular area. Faced with legal proceedings brought by *NML* against Argentina, it gave summary judgment on the basis that Argentina had violated the *pari passu* obligation “when it made payments currently due under the Exchange Bonds, while persisting in its refusal to satisfy its payment obligations currently due under *NML*’s Bonds.”³ Clearly, by paying out under exchange bonds and refusing to pay out under the FAA bonds, there was certainly an element of non-*pari passu*. It gets worse. Later that year, the Southern District restrained Argentina from varying the payment mode under the exchange bonds. They could have switched payment from New York to London or Frankfurt or Singapore to avoid the effect of the Southern District decision; but they were now suck with New York.

The other thing that happened was that the judge ordered specific performance of the *pari passu* obligation, so if they were going to pay the exchange bonds they had to pay the FAA bonds to *NML*.

There was an appeal to the Second Circuit and on the 26th October 2011, the District Court’s decision was substantially upheld. But there was a remission back to the District Court because the judge had to explain how Argentina was to effect a *pari passu* payment; was it by reference to the original face value of the FAA bonds, or simply the face value of the exchange bonds?

Having done that, the judge ordered Argentina to pay into escrow if they were going to pay the exchange bonds the sums due to *NML* under the FAA bonds of some USD 1.33 billion; and last week, the Second Circuit stayed that order pending an appeal for which they fixed the hearing in February 2013.⁴

Argentina faces a very serious position because it is not being subjected to execution on the judgment. It is simply being ordered to

³ *NML Capital, Ltd. v. Republic of Argentina*, Not Reported in F.Supp.2d, 2011 WL 9522565 (S.D.N.Y.).

⁴ *NML Capital, Ltd. v. Republic of Argentina*, (2d Cir. 2012), unreported, available at <<http://www.shearman.com/~/media/Files/Old%20Site%20Files/Arg10NMLCapitalvArgentina20121128CourtOfAppealsOrder.pdf>> (last visited 25 February 2014).

perform its contractual obligation, its *pari passu* obligation. But it has a very, very awkward choice, I think the date of 17th December 2012, which is the final date, when it has to decide: Does it pay what is due under the exchange bonds? If it does not, their value may be severely damaged on world capital markets. Does it pay both the exchange bonds and the FAA bonds? This is what the judge wants them to do; but if they do that, the government will be violating Argentine legislation. Or does it defy the orders by the District Court, which is a very dangerous thing to do?

Now, that is why this is a very important case, the judgment is worth reading but it is also very clear that this is not the end of the story. This litigation is going to run and run, and as I have said already, it is going to run most likely to the U.S. Supreme Court. It would show that litigation in some jurisdictions which are subject to the terms of the bond are much more effective when it comes to enforcement, than for ICSID arbitration awards.

III. THE UK DEBT RELIEF (DEVELOPING COUNTRIES) ACT 2010

My final topic is the Debt Relief (Developing Countries) Act 2010 (the “DRDC Act”). Under English law, the DRDC Act limits the amount of money that commercial creditors can recover from certain developing countries in legal proceedings in the United Kingdom, including the enforcement of almost all foreign judgments and again almost all foreign awards, even if otherwise enforceable under the New York Convention in English law.

In certain measures known as the Heavily Indebted Poor Countries (“HIPC”) Initiative, the IMF and the World Bank calculate the proportion of reduction required in a State’s external debts in order to return that State in a financial crisis to a sustainable level for the future. All creditors, multilateral, bilateral and commercial, are expected to provide the proportion of reduction they would need to achieve this overall reduction. Many governments, multilateral lenders and commercial creditors do so, but not all commercial creditors, because we have the so-called raptor and vulture funds. I do not intend these terms to be pejorative, and some in the audience will think they are, but they are merely descriptive and in fact, these terms are used by the vultures themselves.

In England, this legislation was prompted by a case in the High Court, involving Zambia; you can read it for yourself, it is reported in the law reports.⁵ This was a raptor fund that bought, in odd circumstances, a

⁵ *Donegal International Ltd. v. Zambia*, [2007] EWHC 197 (Comm); [2007] 1 Lloyd’s Rep. 397.

Zambian State debt to Romania for USD 3.2 million. The face value of the obligation was USD 55 million, it goes back to communist times. When they brought proceedings in England they did not claim USD 3.2 million, they claimed USD 55 million, which for Zambia is an enormous sum of money. The claimants got judgment for the USD 3.2 million and Zambia got conditional leave to defend for the balance. But it was this case which made people realise that there was something wrong in providing State aid to Zambia which simply freed up external creditors to make very large commercial claims.

Now the DRDC Act is complicated. First of all, it does not even apply to countries like Zambia. It applies to 40 countries in even more difficult economic situations. You will not find Argentina amongst these 40 countries nor will you find Greece, nor indeed any Member State of the European Union. We are talking about 40 States in permanent financial crisis, they are developing countries with structural problems, a foreign debt and a lack of foreign currency which are beyond any traditional solution and most are in Africa. And hence, the political and legal space for an African initiative from Mauritius.

Now, how does the 2010 Act work? Section 3, which defines the debt recoverable, provides in relevant part as follows:

“(1) The amount recoverable in respect of—

(a) a qualifying debt; or

(b) any cause of action relating to a qualifying debt,

is the relevant proportion of the amount that would otherwise be recoverable in respect of the qualifying debt or cause of action.

(2) For the meaning of “the relevant proportion”, see section 4.”⁶

As I said this is awkward wording, but the amount of the face value of the debt is forced to be reduced by reference to a relevant proportion. Section 3 then takes you to Section 4, which provides:

⁶ Debt Relief (Developing Countries) Act 2010, Section 3 (1) (2), available at <<http://www.legislation.gov.uk/ukpga/2010/22/section/3>> (last visited 25 February 2014).

“(1) *In this Act any reference to the relevant proportion, in relation to a qualifying debt, is to be read as follows.*

(2) *Where the qualifying debt is one to which the Initiative applies, the relevant proportion is —*

$$\frac{A}{B}$$

where —

A is the amount the debt would be if it were reduced in accordance with the Initiative (on the assumption, if it is not the case, that completion point has been reached, for the purposes of the Initiative, in respect of the country whose debt it is); and

B is the amount of the debt without it having been so reduced.

(3) *Where the qualifying debt is a debt of a potentially eligible Initiative country, the relevant proportion is 33%.”⁷*

In Section 4(2), we have the beginnings of a mathematical equation: A over B , and I will not go into the details of what it means. However, in effect, it means that there is a haircut applied usually in excess sometimes, well in excess of 70%.

The sting, for the raptors, is in Section 5,⁸ because according to Section 5, the Act applies to any judgment, and I here refer to foreign judgments, and any arbitration award made before or after the commencement of the DRDC Act. That is, regardless of the applicable law, regardless of the contractual rights and wrongs, regardless of the law of the seat where there will be a court judgment or an arbitration award. So, this trumps everything and the result is a haircut.

⁷ Debt Relief (Developing Countries) Act 2010, Section 4, available at <<http://www.legislation.gov.uk/ukpga/2010/22/section/4>> (last visited 25 February 2014).

⁸ Section 5: Judgments for qualifying debts *etc.*

(1) This section applies to —

- (a) a judgment on a relevant claim given by a court in the United Kingdom before commencement;
- (b) a foreign judgment given (whether before or after commencement) on a relevant claim; and
- (c) an award made (whether before or after commencement) on a relevant claim in an arbitration (conducted under any laws).

It is a pity that this initiative, which comes from the World Bank and the IMF, has not been followed in any other country. I think, the concern within the European Commission for the Euro zone crisis, has not permitted it to lift its eyes above the horizon to the 40 States who are in much greater financial difficulties than Greece, Portugal, Cyprus and I will not go on. But it is a statute that could be taken up by jurisdictions such as Mauritius because I cannot see an argument against it. We are talking about countries that have to be helped. It does not help them for State courts to enforce awards and judgments by certain funds, which have bought them for a tiny proportion of the face debt and go on to obtain enforcement of the full amount of the debt.

There is, of course, a sad ending to the story because there are some things even Parliament cannot do. It cannot trump European Law, and this is an exception in Section 7 for European law, where unfortunately, the required European Parliament and the European Commission can trump whatever is decided by the U.K. Parliament in this particular field.⁹ So,

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- (2) “Relevant claim” means —
 - (a) a claim for, or relating to, a qualifying debt; or
 - (b) a claim under an agreement compromising a claim within paragraph (a).
 - (3) The amount of the judgment or award is to be treated as equal to the amount it would be if the court, tribunal or arbitrator had applied section 3 in relation to the relevant claim.
 - (4) Subsection (3) does not apply in relation to a claim if the effect of it so applying would be to increase the amount of the judgment or award.
 - (5) In this section —
 - “judgment” includes an order (and references to the giving of a judgment are to be read accordingly); and
 - “foreign judgment” means a judgment (however described) of a court or tribunal of a country outside the United Kingdom, and includes anything (other than an arbitration award) which is enforceable as if it were such a judgment.
 - (6) This section applies to anything that gives effect to a compromise of a relevant claim as if in subsection (3) after “if” there were inserted “the relevant claim had not been compromised and”.

⁹ Section 7: Exception for overriding EU or international obligations

- (1) Nothing in this Act applies to a foreign judgment or an arbitration award of a kind required by European Union law, or by an international obligation of the United Kingdom, to be enforced in full even in cases where such enforcement is contrary to the public policy of the United Kingdom.
- (2) Accordingly, this Act does not apply to —
 - (a) a foreign judgment that is certified as a European Enforcement Order (within the meaning of Regulation (EU) No.805/2004 of the European Parliament and of the Council),
 - (b) a foreign judgment that is an enforceable European Order for Payment (within the meaning of Regulation (EU) No. 1896/2006 of the European Parliament and of the Council), or
 - (c) an award to which section 1 of the Arbitration (International Investment Disputes) Act 1966 applies (awards made under the Convention on the

something that the U.K. is required to do by European law is cut out from the scope of the statute. But more seriously for us, because the ICSID Convention as enacted in our law in the 1966 Act does not permit English courts to refuse the enforcement of an ICSID award on the grounds of public policy, the DRDC Act does not apply to ICSID awards. There are no cases, to my knowledge, under the 2010 Act, but there will be.

CONCLUSION

So, I come to my conclusion very briefly. I answer it just as Sophie did – the system deals successfully with sovereign debt crises and the arbitral legal system is, I think, coping so far, just. But it faces still further and more difficult challenges, particularly ICSID with the consequences of the *Abaclat* decision. Could it fail? Of course, it could. Nothing is perfect and there are problems that still have to be fixed in the field of investment arbitration, but left alone free of political and other more malign influences, it could and should survive.

But I am an arbitrator, and I will finish with the famous story of the Denning Inquiry in the last century. You may recall, for those of you who are as old as me, that Lord Astor was asked about the compromising circumstances in which he had met a young lady called Miss Mandy Rice-Davis and he said: “I never met her.” When Miss Rice-Davis was questioned, she said: “Well he would say that, wouldn't he?” And as an arbitrator, albeit not an elite like some in the room, I say exactly the same.

settlement of investment disputes between States and nationals of other States).

(3) “Foreign judgment” has the meaning given by section 5(5).

Response to the Report

Devashish Krishan^{*}

As I am supposed to comment on Professor Lemaire's paper, I will refrain from commenting on Professor *extraordinaire* Veeder's paper, subject, save to say that the 2010 Act to which he referred to may not necessarily be the boon that it is made out to be because the sort of hidden side of the story is that as a result of the 2010 Act or after 2010, we see the United Kingdom reducing its official aid to the same countries. So, effectively, it is really passing the burden onto the private sector and if that is the situation, then inquiry is entirely where we want to end up. Now, I am not a doctor and nor am I a professor. So, I am going to touch on the report as it was presented to you. I have a few basic points to make; first is that I entirely endorse everything that has been said, largely; and let us go back a bit in history. Until 1899, it was perfectly proper, and in fact it was an entitlement of countries, to go to war to collect on sovereign debt.

Until 1899, we do not have a single legal rule which prohibited this. This only came in 1899; this is about 110 years ago. Sovereign debt, on the other hand, has a history of over five or six hundred years. So, to get to that stage and from there to get to this stage where we are now debating issues of going before courts and arbitral tribunals and doing it all in a very proper way that upholds the rule of law, is quite an achievement, and that is again what we must hold on to; and whether that signifies going back to gunboat diplomacy or other means of enforcement. Well, perhaps in particular circumstances, there is a need for the State power to come back in and re-politicize these disputes such as perhaps in the case of Argentina. But one would hope, and one would expect that all solutions which we are trying to reach would prevent us from going down that path and instead try and entrench the idea of litigation and arbitration as a peaceful and non-political method of settlement of disputes.

So, I do not believe that the solution lies in renegotiating BITs, or in excluding sovereign debt from coverage of BITs because we have not given the system a chance, and I think we should.

So on the jurisdiction issue as presented, the first question that arises is the question, as posed was "Is sovereign debt an investment?"

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Well I will put it the other way round: “If sovereign debt is not an investment, then what is it?” And the issue to me is not so much about: “Is sovereign debt a part of what people like to call investments or what they conceive of the investments?”

There is another part of the definition of investments which is being overlooked, that is, an investment in order to be protected by the system or by a conventional investment treaty...that investment must be made in the territory of the host State. We have heard of bonds being issued in New York by countries in South America. Are these investments in the territory? Although the ultimate benefit might come back to the territory, the bond itself is issued in New York. The country which issued it or who was getting the benefit of it, does not have sovereign right to abrogate it, as we have seen with the *NML* litigation.¹

So in those circumstances, what does Argentina do? Except than to say that, look this is a bond issued in New York, the New York courts have jurisdiction on it, they are ruling on it, we have our own legislation, clearly this cannot fall within the ICSID Convention because I have nothing to do with this; this is all a New York problem. You have a problem, you go to the New York courts, why are you coming to ICSID and going after me? So, I think that the issue needs to be teased out a little bit as to whether the investment, whether the issuance of a bond is truly an investment in the territory of the country that is taking benefit of the bond.

On the merits issue, I mean, we did not really get into this, but we have a rule in international law and that is so long-established under the law of expropriation, which is that a simple breach of a contract is not an expropriation; a simple default on a debt does not give rise to State responsibility under the rules of international law. Why is that so? I mean, the reason that comes about is to give States the flexibility to default once, twice maybe. But the rule is that it is only when the State formally repudiates the debt that it becomes an expropriation. That has been a traditional understanding.

We have another strain of case law under the fair and equitable treatment provision which talks about legitimate expectations. Salim touched upon that. Now the legitimate expectations – what sort of doctrine has been developed? The proposition holds as follows: an investor has certain legitimate expectations on the basis of which he or she makes an investment, so that those expectations upon which he or she has relied on and thereafter, put up some hard cash on; and if a sovereign State, later on, frustrates those expectations without any other sort of justification for them,

¹ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012).

then that sovereign State is held responsible under the rules of fair and equitable treatment, and that is considered to be unfair and inequitable treatment. Now, when you look into the case law, how does one judge a legitimate expectation? The documentation that is relied on by arbitral tribunals typically include things like licenses, road shows, other forms of documentation, exchanges between the host State and the investor, including contracts.

So we have two peculiar strands going around. One strand says: a breach of contract does not give rise to liability, that is under the rules of expropriation. But under the rules of fair and equitable treatment, a breach of legitimate expectations, in my opinion a commitment of a lower order, gives rise to liability. That will be interesting to see, and one must remember: in expropriation, property title passes to the State but in fair and equitable treatment, it does not. So, we have a situation here where a sovereign defaults on a debt and it is not held liable for expropriation and therefore, it does not get back the debt instrument or ownership of the debt instrument. On the other hand, its default gives rise to an international claim, an international responsibility but the investor gets to hold on to the debt instrument. This is peculiar and it seems to me counterintuitive.

So, those were my points on the paper itself. There are two additional points that I would like to make. First, I would like to describe the case where, if Professor Brigitte Stern were here, she would have been able to tell you more as she was the sole arbitrator; it is called *Booker plc v. Guyana*.²

Booker, as some of you may know, is an English sugar company but they are not very sweet in the way they deal with countries. In 1974, Booker had certain factories in Guyana and they were taken over by the State; and there was a lot of back-and-forth and over time, Guyana accepted: "Okay I owe you X amount of money". It did not pay that money because Guyana is a heavily indebted poor country.

Eventually, Booker got tired of waiting and in 1978, it brought an arbitration under the ICSID Additional Facility Rules. This led to an outcry among the NGO community, especially in places like London. There were demonstrations outside Booker's offices by the Jubilee Group. Their objection was this: Guyana was trying at the time to be part of the HIPC Initiative of the International Monetary Fund.

What is this initiative? It is essentially a methodology by which the IMF and rich donor countries can channel aid to heavily indebted poor countries, otherwise known as HIPC. One of the requirements of such

² *Booker plc v. Co-operative Republic of Guyana*, ICSID Case No. ARB/01/9.

funding is that the recipient country treats all its creditors equally. The fear was that, by getting an arbitral award, Booker's debt would be prioritized over other debt and therefore, Guyana would forcibly be in breach of the HIPC Initiative and therefore, ineligible for the rate.

Now, fortunately we never had to face the circumstances. As a matter of fact, the issue never came to a head because the case was settled. But in today's financing by the IMF, whether it be in Europe or in South America, I believe that there are still similar rules that you have to treat creditors equally. And do arbitral awards give more priority or less priority to certain debts? That is a question which needs to be raised.

The last point: sovereign debt practitioners are generally highly conservative. These collective action clauses, built up in 2002, got acceptance ten years later – it took ten years. I was discussing this with Michael Waibel yesterday. We see a resistance among sovereign debt practitioners and holders of bonds to use arbitration in their debt instruments simply because there are no interpretive issues involved, it is purely enforcement. I have an amount, you have to pay me, you do not pay me, I take you to court, and it is as simple as that. We do not have to interpret what this clause means.

We also see that the NGOs today are encouraging the use of arbitration in sovereign debt and not court litigation because they believe arbitration is all about compromise and arbitrators do not apply the law. But, on the other hand, we have the same NGOs who argue that ICSID is an illegitimate system because it should not be dealing with public policy issues. So, we have a bit of a contradiction here: is arbitration the right model, or is it the wrong model for the sovereign debt both at the contract level as well as at the treaty level? I am pleased that today the system is: we are where we are, and we are going to give it a fair shot. So, let us see how that develops. It is too early to tell whether investment law is adequate for the financial crisis because we have not seen the financial crisis yet.

Questions & Answers

Salim Moollan: I thank the panellists for their presentations. The floor is now open.

Mr. Jayaraj Chinnasamy: I am Jayaraj Chinnasamy, from the Seychelles. I would like to pay my compliments to Professor Lemaire for her very comprehensive report on a very esoteric subject. It is not everybody's object, even in public international law; it is actually a subject that is intriguing more and more.

For example, this *Abaclat* case¹ has opened Pandora's box in terms of issues that can arise, and interferes between private interest, market interest and the sovereign interest of public international law. Now this, for example, in the 80s, when the debt crisis was threatening the existence of several countries, especially Latin American countries, Alan Garcia who was contesting election in Peru, gave a slogan: "Repudiate" and then he said another one: "Debt are debt" and he won the elections after that. But nothing happened to him and nothing happened to that country and the banks were going on investing the money in Peru and everywhere.

That is why, the issue is continuing from the early 80s till today, but what is happening is that nobody has got any solution to solve it. For example, we have a restricted interpretation of sovereign immunity, but sovereign immunity cannot be reduce to nothing. When a sovereign comes to the market, it has to act like one of those people belonging to the market. But at the same time, international law protects the sovereign States from bankruptcy and there is no bankruptcy applicable to the sovereign State.

Now, in this context, in arbitration, the question is whether the investment could be defined? For example, the 1965 Convention² defines investment at that point in time, but many decades have now gone by.

Now, I do not know the majority opinion in *Abaclat*, what is the criteria: they had bond holders and direct investment in a foreign territory. It is actually a very significant question and it is unfortunate that none of the panellists addressed the question raised by the dissenting judge. That, I feel is likely to give answers for a public international lawyer. I am not speaking for any side, but I am speaking in terms of what other issues raised by the main, the dissenting award, and then what is the reason for that? I think that, a panel like this or in the future should explore because what is

¹ *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna a Beccara and Others v. The Argentine Republic*).

² Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID or the Washington Convention) 1965.

happening is that there is a confusion, notwithstanding that the 2010 Act in England is applicable only to sovereign debt, to a sovereign country, not to private creditors of sovereign borrowers. But in 80s, you had Paris club, London club, and you had James Baker. All those things are gone. What is the new element that made that arbitration panel to come to the conclusion of this definition of investment?

And the fundamental question is that I think Argentina opposed the arbitral tribunal to taking jurisdiction. And it is a fundamental question of law that jurisdiction is not assumed, it is actually supplied. If this is the case, especially in a private and public international context, I think these issues are very sensitive. I think there is a lot of research required to be done from both sides to reach an equitable solution. Otherwise, you will have too many cases after the *Abaclat* case. Thank you very much.

Salim Moollan: Thank you very much. I think all panellists have recognised that there are no solutions and we are trying to find where the ground lies and the reason why the panel did not go into the ‘*Abaclat* controversy’, a huge controversy. The biggest controversy at the moment, in this field, is that if you start going into that, there are no right or wrong answers, unfortunately, it is a field that is developing. Then, you could not have had the lucid *exposé* which I think we had which allows all of us here to grasp the subject matter and I did not understand Professor Lemaire or indeed, Mr. Johnny Veeder arguing for any definition of ‘investment’ today. We were just being told these are the various definitions you would find; in *Salini*,³ a test has been advanced. Is it possible that the tribunal would find jurisdiction? Absolutely. Is it possible that the tribunal would find on the merits against the State? Absolutely. So, on that basis, what are the risks and what are the possible remedies. But you are quite right, it is a very extensive problem.

Now, I would love to wade into the *Abaclat* controversy and I had fully expected now to present you with Prof. van den Berg, alive on the pillory here, but he has sensibly kept away from this session. But, unless he has been dis-instructed, his lawyer from yesterday is here. So, I do not know whether you want to add anything Johnny.

V.V. Veeder: I have no instructions.

Michael Waibel: Just a question on the *NML* case. Even if the U.S. Supreme Court wrote to agree with the idiosyncratic interpretation of the

³ *Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco*, ICSID Case No Arb/00/04, Decision on Jurisdiction, 23 July 2001.

pari passu clause, do you think this would really have major implications for the resolution of the Euro zone debt crisis? The background for my question is that in most of the Euro zone government bonds or indeed in U.K. government bonds, you do not have *pari passu* clauses, so why are we very worried about *NML* in Europe?

V.V. Veeder: Sorry, I must have expressed myself badly earlier. I was expressing that in the context of the Argentine crisis where the Argentines have a terrible timing problem and to make a decision this month, they did not get any help on that from the U.S. Supreme Court.

I suspect what will happen is that the *pari passu* clause, interpreted by the Southern District judge will force them to pay both bonds in full. That is an extraordinary way of getting execution of a judgment without executing the judgment, by finding a way around it, by ordering specific performance of the *pari passu* obligation. But, I totally agree with you, it will not arise in the Euro zone context, because as I understand it, if not already, very soon, all Euro zone State obligations will have collective action clauses. So, in a sense, you will not get holdouts; you will not get Elliott Associates or raptor funds able to take advantage. Sophie has mentioned that there are holdouts being represented, I think, by German lawyers who bring claims under the German-Greece BIT. I do not anticipate for what I have seen, that the *pari passu* clause will play any part in that debate, but it will be awkward for Greece.

Salim Moollan: Thank you very much for that. With regard to Johnny's response to Professor Lemaire's report, I would like to thank him for his thought-provoking response to the report. Our Solicitor General is here, the Parliamentary Counsel is here, so I am sure they will have listened with interest to your suggestion. They are likely to look very closely at the 2010 U.K. Act, not alone, but with our African neighbours as well, and see whether this is something which might work in Mauritius and in the wider region. We would not have the problem of the EU Judgment Regulation, obviously, but we would have a similar problem in that the ICSID Convention has force of law in Mauritius as in the United Kingdom. And also perhaps, just to make a link with the panels of yesterday, I could well see that in England, that would be one of the few instances, the application of the 2010 Act, where the public policy exception to the New York Convention would in all probability be triggered.

And finally, perhaps, hearing you comparing investment arbitration with gunboat diplomacy; the concern I was expressing is not so much that it is an alternative. The concern is whether we are now getting

into an era where investor-State arbitration is leading us back to gunboat diplomacy as awards are being rendered and ultimately, as we heard, are not being honoured and the investor country starts wanting to take action against host countries.

Before we close this session, if I may, I just wanted to rebound quickly having had a chat with Edwin Glasgow over the tea break. One thing which emerged from my discussion with Edwin is that he was not there for the welcome drinks on Sunday and there was a very important announcement there which he missed, of which I would like all of you to be aware, and that is Mauritian practitioners and beyond, every one interested in Mauritius: after the publication of the MIAC Rules, the most important step to follow is the establishment of the LCIA-MIAC Users' Council.

So, the announcement was made on Sunday that this is being done, and I want to reassure everyone that it is of cardinal importance that this Users' Council now be implemented and that this Center, which is only starting its activity, becomes fully 'Mauritian' through your active participation. So, that is on the cards, and I think the information seemed to pacify Mr. Glasgow to some extent.

I think we shall have now to bring proceedings to a close. If we could show our panellists our appreciation for an amazing panel, really.

Thank you very much.

PANEL VI

**SOVEREIGN POLICY FLEXIBILITY FOR
SOCIAL PROTECTION:
MANAGING UNCERTAINTY RISKS IN
INTERNATIONAL INVESTMENT AGREEMENTS**

Introductory Remarks

*Hugo H. Siblesz**

Ladies and gentlemen, good afternoon. Be so kind as to take your places. I have the reputation of being rather punctual, being Dutch. And the experience is that as long as you do not start, people will still stay outside. So, the best remedy is to start. I am Hugo Siblesz, your moderator for the last panel of these two very pleasant and interesting days.

As a former diplomat in this ambiance of highly expert arbitration practitioners, I am reminded of one way of describing my profession: someone who knows a bit about everything, but very little about anything in particular. Therefore, it was with some hesitation that I have accepted this role of moderator. My only close encounter with elements of today's subject occurred decades ago when, as a junior employee of the Netherlands' Foreign Ministry, I was responsible for drafting the Netherlands' bi-annual reports to the Committees overseeing the implementation of the ICPCR, ICESCR and CERD. So, I am quite pleased to see that today some of those Conventions play a role (in dimensions to be discussed here today) in respect of my new field of responsibility as Secretary-General of the Permanent Court of Arbitration (PCA).

The PCA is one of the arbitral institutions under whose auspices this conference is held, in these splendid surroundings and thanks to the efforts of our hosts, particularly the Government of Mauritius. The PCA is privileged to be associated to this event, and sees it as one of the many benefits of having established here, at the invitation of the Government, an overseas presence thus supporting also the policy of the Government to create a platform in the region for international commercial and investment arbitration.

Dans la bonne tradition bilingue de cette magnifique Ile Maurice, je continuerai mes propos préliminaires en français. Cette tradition devrait cependant être trilingue, puisque les Néerlandais y ont été présents pendant un temps; d'où le nom Maurice, c'est-à-dire du prince Maurice, frère et successeur aux Pays Bas de Guillaume d'Orange, dit le Taciturne.

Tout d'abord, je souhaiterais saluer les efforts du pays hôte, la république de Maurice, pour avoir su rassembler tant de professionnels de notre métier d'arbitrage. Sans aucun doute, la qualité des orateurs y aura contribué. C'est maintenant à nous de rendre hommage à ces efforts par la

* Secretary-General of the Permanent Court of Arbitration.

qualité de notre débat. En tant que Secrétaire Général de la CPA, je suis fier que mon institution soit associée aux efforts du gouvernement de Maurice, et notamment celui de créer une série de rencontres autour de l'arbitrage. Cette série de rencontres doit nous permettre de nous interroger sur le rôle de l'arbitrage dans la résolution des conflits opposant un ou plusieurs investisseurs à un Etat ou entité étatique. La CPA entend contribuer à ce débat en organisant un séminaire dans le cadre du centenaire du Palais de la Paix à La Haye au mois de septembre prochain.

Mais pour illustrer la continuité de ce débat il m'apparaît opportun de rappeler, dans le cadre du sujet qui nous occupe aujourd'hui, la discussion engagé il y a deux ans, ici à l'Ile Maurice, sous le titre de *Rethinking the Substantive Standards of Protection under Investment Treaties*.

Two years ago, the debate concerning the interface between the interests of individual investors versus the sovereign discretion of a State to regulate for the “public good” was framed in terms of the need for “deference” by the tribunal vis-à-vis the respondent State or its institutions, and on the basis of what criteria – how to determine where the State’s discretion ends, and where the investor’s rights begin? – deference to, but not blind acceptance of the State’s authority to determine the ‘public interest’; deference vis-à-vis the decisions of national courts in determining the content of its national laws but not at the price of accepting denial of justice by the State’s legal system, or deference to subsequent practice by the States parties to the treaty concerned.

Today that debate, under the lengthy, if not, cumbersome title of “Sovereign Policy Flexibility for Social Protection: Managing Uncertainty Risks in International Investment Agreements” is to continue from a different angle on the basis of a report by Dr. Diane Desierto.

Dr. Desierto is Assistant Professor at Peking University School of Transnational Law, where she specializes in international human rights, international humanitarian law, foreign investment, and dispute resolution. She is a partner at DAPD Law in the Philippines. She has worked as a law clerk at the International Court of Justice and has held fellowships at the Max Planck Institute in Heidelberg, and the University of Michigan Law School.

We will then hear reactions to the report by this bright young scholar from two seasoned and distinguished practitioners. Mr. Makhdoom Ali Khan, former Attorney-General of Pakistan, is regrettably unable to join us today, due to unforeseen circumstances. Kindly stepping in to assist is Mr. Devashish Krishan, to whom we are grateful.

Mr. Devashish Krishan is a lawyer who has previously served on the legal staff of the Permanent Court of Arbitration, and has worked with law firms in London, Washington, D.C., and Mumbai. He has widely published in the fields of international law, investment promotion and protection, and international arbitration.

Dr. Yas Banifatemi is a partner at Shearman & Sterling in Paris, where she is the head of the firm's Public International Law practice. She teaches International Investment Law at Panthéon-Sorbonne. She has appeared as counsel and sat as an arbitrator extensively both in international commercial and investor-State arbitrations.

The debate this afternoon will proceed in a "classical" format. Dr. Desierto will begin with the presentation of her report. We will then hear comments from Dr. Banifatemi and Mr. Krishan. Next, we will open the debate to questions from the floor, and finally the *rapporteur*, Dr. Desierto, will present her responses to the comments and questions.

I now have the pleasure to give the floor to Dr. Desierto.

Report to the Conference

*Dr. Diane A. Desierto**

This Report focuses on the design of regulatory risk in international investment agreements (IIAs), and its counterpart treatment in investment arbitral practices. It demonstrates that the uneven conception and treatment of regulatory risk in investment arbitrations stands to threaten the basic premise of regulatory predictability in IIA design. IIAs do not intend to entrench static or hermetically sealed regulatory frameworks, but rather, are designed to enable States Parties to the IIA as well as investors (as third-party beneficiaries of the IIA), to mutually, fairly, and transparently predict and estimate the economic returns and risks of investment. Thus, while the substantive standards of protection in the IIA provide criteria for future legal assessment of host States' conduct towards investors, they must also be seen to establish the regulatory boundaries that States Parties to the IIA deem acceptably predictable for the duration of any investment to be covered under the IIA.

Part I (Regulatory Predictability in IIAs: Paradoxes over Policy Flexibility) of this Report describes the evolving substantive content and structural architecture of IIAs, and shows how various strategies have been deployed to maintain and constrain the regulatory prerogatives of a host State – from substantive standards (*e.g.* legality clauses, stabilization clauses, exceptions clauses, expanded definitions of investment and treaty applicability provisions, balance of payments provisions, among others), to procedural devices (*e.g.* dependence on *jurisprudence constante* in tribunal interpretations, States Parties' joint decision mechanisms, authoritative interpretations and treaty compliance monitoring devices). As will be seen in Part I, these strategies rarely differentiate between regulatory risk in ordinary business cycles, and regulatory risk endogenous to financial or economic crises. A crystal example of the lack of differentiation may be seen from the disparate analytical treatment of regulatory risk in the issues of indirect (creeping) expropriations vis-à-vis non-compensable regulatory

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takings, as against the issue of “legitimate expectations” under the fair and equitable treatment (FET) standard. As investment arbitrations have shown, it has become entirely possible for a tribunal to find that, while a host State is not liable for indirect expropriation when it imposes a regulatory change, the same regulatory change may be found to have violated investors’ “legitimate expectations” and thus lead to a breach of the fair and equitable treatment standard, for which the host State is (often and problematically) found liable for compensation. Rather unusually, the value of compensation for these FET breach is frequently pegged at the level of the same indirect expropriation claim that the tribunal previously rejected.

Part II (Managing Regulatory Risk from Social Protection Measures) proceeds to show that the estimation of regulatory risk from the design of IIAs can, and should, foreseeably include States Parties’ continuing dynamic obligations under the International Covenant on Economic Social and Cultural Rights (ICESCR). It shows, first, that the due diligence process can be revised to identify areas of host State policy flexibility that should be anticipated during the life of an investment as part of ICESCR compliance – host States’ ICESCR compliance are now susceptible of empirical investigation and inclusion in investors’ regulatory risk assessments. Second, the ICESCR may have utility as an interpretive device read into the IIA – whether as part of the interpretation of standards of “treatment” made obligatory upon States Parties, or within the process of valuation of compensation for breaches of non-expropriation standards of the IIA. Finally, Part II also posits that an investor’s home State which is a party both to the ICESCR as well as any given IIA, assumes counterpart duties to ensure the extraterritorial application of the ICESCR to its nationals in other jurisdictions, including a duty to ensure that such nationals do not act in ways that cause States to violate the fundamental obligation to ‘respect’, ‘protect’, or ‘fulfill’ ICESCR rights.

Part III (Regulatory Risk Assessment for Diverse Investment Assets) then shows that different types or forms of investment require an appropriate analysis of the valuation method for each form. The assessment of regulatory risk for hedge funds, for example, may be tied more generally to the assessments of a country’s macroeconomic political risk (usually based on inflation, the risk-free rate of a government security, among other variables). By contrast, it may be more appropriate to perform a regulatory regime assessment that is industry-specific for foreign direct investments (such as physical infrastructure or utilities), particularly where the regulatory process will entail inevitable impacts on ICESCR compliance. As seen in recent developments in Socially Responsible Investment (SRI) benchmarking and the UN Principles on Responsible Investment, it is not

impossible to assess regulatory risk with a view to indexing the host State's continuing social protection obligations under the ICESCR.

In the **Conclusion (Shedding the Myth of Static Investment Regulation in an Era of Social Protection)**, this Report shows that, while regulatory predictability is a key objective of IIAs, it need not exclude dynamic host State regulations so long as the latter can be transparently tracked and verified by States Parties to the IIA. The kind of regulatory risk that should be deemed rightly compensable under IIAs should be tailored more towards host State conduct that prohibitively creates moral hazards and incentivizes adverse selection (fuelled by the information asymmetry that favors the host State), ultimately resulting in violations to investors' due process rights and foreseeable contractual expectations. The fundamental task of new IIA design must enable both investors and States Parties to endogenously factor in the costs of policy uncertainty as a result of the continuing demands upon host States to comply with the ICESCR. In this sense, 'dynamic' host State regulations (or the degree of policy flexibility that must be maintained to ensure that a State's social protection measures to comply with the ICESCR remain in place during the life of an investment), should not be prohibited or penalized *ex ante*, as compensable breaches of an IIA. Where States Parties and investors have been transparently informed at the outset of this continuing dimension of regulatory risk on the ultimate price of investment, there can be no justifiable claim to compensation.

I. REGULATORY PREDICTABILITY IN IIAS: PARADOXES OVER POLICY FLEXIBILITY

While regulatory risk has several specific meanings,¹ in general, as a type

¹ See for example, Henry Ergas, Jeremy Hornby, Iain Little, John Small, *Regulatory Risk*, unpublished paper dated March 2001, available at: <http://www.accc.gov.au/content/item.php?itemId=259604&nodeId=5b9b453c797625a34529b1fce397a622&fn=Ergas+paper.pdf> (last accessed 10 September 2012) ("Regulatory risk arises when the interaction of uncertainty and regulation changes the cost of financing the operations of a firm."); Günter Knieps and Hans-Jörg Weib, *Reduction of Regulatory Risk: A Network Economic Approach*, Discussion Paper No. 117, *Institut für Verkehrswissenschaft und Regionalpolitik*, September 2007, available at: <http://www.vwl.uni-freiburg.de/fakultaet/vw/publikationen/diskussionspapiere/Disk117.pdf> (last accessed 10 September 2012):

"According to Kolbe, Tye, Myers (1993, p. 33) "there appears to be no generally accepted definition of regulatory risk". However, the analysis of different versions of regulatory risks has a long tradition within the economic theory of regulation (*e.g.* Ahn, Thompson, 1989), and becomes increasingly relevant within debates of regulatory reform

of risk, this concept involves the presence of uncertainty that could lead to some damage or loss.² For purposes of analyzing international investment agreements (IIAs) alongside their counterpart interpretive developments in arbitral practices, this Report focuses on the most parsimonious definition: “regulatory risk [is] the risk that regulatory agencies will change policy decisions.”³

The above definition is broad enough to capture industry-specific regulatory risk (e.g. the “risk arising from the quality of regulatory rules governing a particular industry, and from their application and enforcement”⁴), as well as economy-wide regulatory risks (e.g. “risks arising from the application and enforcement of regulatory rules, both at the economy-wide and the industry - or project-specific level”⁵). Regulatory risk may also be seen as an element of wider systemic risk, which arises from “gaps in regulatory oversight and the possibility that the failure of a

of network industries (e.g. Ergas et al. 2001). Several definitions of regulatory risks are known from the literature. According to Wright et al. (2003, p. 118) the most obvious definition states that “regulatory risk arises whenever regulation affects the cost of capital of the regulated firm”. According to Kolbe et al. (1993, p. 33) “Here we define regulatory risk as the risk due to an asymmetric distribution of possible plant value outcomes”, and explicitly reject the application of the definition of regulatory risk as the impact of regulation on the cost of capital (see p. 33 footnote 56). Kolbe et al. (1993, pp. 37) focus on the regulatory risks due to some disallowances of the invested capital from the rate base or changes in the regulatory oversight. Ahn and Thompson (1989) analyze the way in which uncertainty in the application of a given regulatory instrument itself affects value (differing from the effect of regulation on the cost of capital). They analyze the risks involved in the process of rate of return regulation differentiating between the uncertainty of the initiation of a rate case (triggering rule risk) as well as the uncertainty involved in the actual assignment of the allowed rate of return (setting rule risk). Buckland, Fraser (2001) analyze the links between regulation and the risk faced by the regulated firm investigating the extent to which observed variation in betas is associated with regulatory factors (regulatory structure, regulatory review procedures etc.)...

² See Stanley Kaplan and B. John Garrick, 1 *Risk Analysis* 1 (1981), at p. 12 (“The notion of risk, therefore, involves both uncertainty and some kind of loss or damage that might be received...Risk includes the likelihood of conversion of that source into actual delivery of loss, injury, or some form of damage.”).

³ Guy L.F. Holburn, *Assessing and managing regulatory risk in renewable energy: Contrasts between Canada and the United States*, 45 *Energy Policy* (2012), 654-655, at 654.

⁴ Vlado Vivoda and Terry O’Callaghan, *Regimes, Mining Investment, and Regulatory Risk in the Asia-Pacific Region*, unpublished paper available at: <http://regulation.upf.edu/dublin-10-papers/514.pdf> (last accessed 10 September 2012), at p. 3.

⁵ Theodore H. Moran, *Political and Regulatory Risk in Infrastructure Investment in Developing Countries: Introduction and Overview*, 3 June 1999, unpublished paper available at: <http://www.dundee.ac.uk/cepmlp/journal/html/vol5/article5-6a.html> (last accessed 10 September 2012).

large interconnected firm could lead to breakdown in the wider financial system”.⁶

Over a decade ago, Thomas Wälde discussed this species of risks for foreign investments in private infrastructure as emerging “non-conventional forms of political risk”:

“Modern versions of the “political risk” for infrastructure investment have less to do with a formal “taking” of property, but rather with the way government regulatory powers are used - or with omission by government to develop and exercise its regulatory powers “properly”. It is in essence the concept of good governance and its impact on foreign investors which is here at stake. The wide spread of privatisation of hitherto publicly owned and operated infrastructure facilities and services means that the foreign investor is now exposed to manifold influences on the “normal”, commercial functioning of its enterprise. Such influences can come directly from government responding to the domestic political process, but they can also develop by emulation from other countries or on the basis of international guidelines and recommendations. Pressure from non-governmental organisations – directly on governments or by influence on home governments and home State or international financial institutions - can equally lead to a change in significant project variables which can be detrimental to the project's financial health...

The most visible form of this risk is the government renegeing on prices or other obligations contained in laws, licenses or contracts. The reason is that prices are in particular politically sensitive, and political interest makes governments want to keep them down, irrespective of costs (in particular sunk costs). Such risk is heightened with respect to monopolistic infrastructure assets where visibility is greater and where competition – as a way of controlling potential for abuse of dominant market power – is absent. Since foreign investors try to obtain contractual guarantees

⁶ First articulated by U.S. Federal Reserve Chairman Ben Bernanke in 2009. See Corey Boles, “Bernanke Offers Broad Definition of Systemic Risk”, Wall Street Journal, 18 October 2009. See also Iman Anabtawi and Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 Notre Dame Law Review 1349 (August 2011), pp. 1362-1379.

against such natural governmental attitudes, the politics of infrastructure investment will meet the obstacle of contractual commitments – and treaty protection is then sought against government attempts to free themselves from such commitments. But such contemporary forms of political risk consists not only in formal and explicit action by the governments, usually in the forms of legislation and captured by the modern term of “economic regulation”, but it can also consist in action by several groups of economic actors which may be semi-state, quasi-state, subnational state and non-state actors...⁷

Admittedly, the relative impact of IIAs in reducing political and regulatory risk remains an open question.⁸ Such a broader academic debate only serves to further underscore the importance of a focused analysis on regulatory risk, within the evolving design of IIA architecture as well as in its practical usages articulated in investment arbitral jurisprudence. To date, it has been increasingly acknowledged that the design of IIAs bears particular significance to the management of such political and regulatory risks.⁹ This Report aims to supply initial insights into the role of regulatory

⁷ Thomas Wälde, *The Effectiveness of International Law Disciplines, Rules and Treaties in Reducing the Political and Regulatory Risk for Private Infrastructure Investment in Developing Countries*, draft August 1999 paper for the World Bank Conference on Political and Regulatory Risks in Private Infrastructure Investment, September 1999, available at: <http://www.dundee.ac.uk/cepmlp/journal/html/vol5/article5-5.html> (last accessed 10 September 2012).

⁸ Eric Neumayer and Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, pp. 225-252 in KARL P. SAUVANT AND LISA E. SACHS (EDS.), *THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS* (Oxford University Press, 2009) [hereafter, “SAUVANT & SACHS”]; Peter Egger and Michael Pfaffermayer, *The Impact of Bilateral Investment Treaties on Foreign Direct Investment*, in pp. 253-272 in SAUVANT & SACHS; Jennifer L. Tobin and Susan Rose-Ackerman, *When BITs have some bite: The political-economic environment for bilateral investment treaties*, 6 *The Review of International Organizations* 1 (2011) 1-32.

⁹ See TIMOTHY IRWIN, MICHAEL KLEIN, GUILLERMO E. PERRY, AND MATEEN THOBANI (EDS.), *DEALING WITH PUBLIC RISK IN PRIVATE INFRASTRUCTURE* (World Bank Publications, 1997), at p. 63; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *EXPROPRIATION, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II*, October 2012, pp. 139-140: “Expropriation and regulation are different in nature. The former focuses on the taking of an investment; it is a targeted act. The latter is part of the common and normal functioning of the State where impairment to an investment can be a side effect. Expropriation is always compensable, whereas regulation is not. Drawing a line between the two is not easy but is of paramount importance: The international rules on expropriation should not diminish or alter in any degree the ability of States to regulate in the public interest. At the same time, regulation must not be used as a disguised

risk in IIAs and arbitral practices. It is especially relevant to ongoing controversies where host State governments have been hard-pressed to abandon regulatory commitments to foreign investors, in order to meet the increased demands for social protection measures during economic crises.¹⁰

A. Regulatory Predictability as the Design Premise of IIAs

The history behind the rapid evolution of bilateral and regional IIAs shows that the neoliberal race to attract foreign investment initially began through a North-South paradigm¹¹ often accompanied by markedly uneven bargaining power between capital-exporting and capital-importing States.¹² Whether this asymmetric bargaining dynamic has changed alongside the modern configurations of South-South and South-North investment flows¹³ is not the object of this Report. It will suffice to note that, despite numerous criticisms about the lack of undisputed causality between IIA design and investment promotion,¹⁴ the overwhelming majority of States nevertheless

mechanism to expropriate foreign property...State has a number of policy options at their disposal in order to address specific concerns, minimize risks and achieve desired policy objectives. When making relevant choices, it is crucial to keep in mind that an expropriation provision should not undermine or weaken the right of States to exercise their police powers and regulatory functions.”

¹⁰ See Diane A. Desierto, *Conflict of Treaties, Interpretation, Decision-Making on Human Rights and Investment during Economic Crises*, Transnational Dispute Management (2012), special issue on Aligning Human Rights with Investment Protection.

¹¹ KENNETH J. VANDEVELDE, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (Oxford University Press, 2010), at Chapter 2.

¹² M. SORNARAJAH, *THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* (Oxford University Press, 2010 ed.) pp. 19-28, 53-54, 177 (“[a]nother feature of bilateral investment treaties is that they are made between unequal partners. They entrench an inequality that has always attended this area of international law. They are usually agreed between a capital-exporting developed state and a state keen to attract capital from that state...”) [hereafter, “SORNARAJAH 2010”].

¹³ See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *SOUTH-SOUTH COOPERATION IN INTERNATIONAL INVESTMENT ARRANGEMENTS*, (UNCTAD Series on International Investment Policies for Development, 2005); UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *WORLD INVESTMENT REPORT 2011: NON-EQUITY MODES OF INTERNATIONAL PRODUCTION AND DEVELOPMENT*, pp. 2-23, 69-73.

¹⁴ See Jonathan Bonnitich, *Outline of a normative framework for evaluating interpretations of investment treaty protections*, pp. 117-144, at pp. 131-132 in CHESTER BROWN AND KATE MILES (EDS.), *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* (Cambridge University Press, 2011) (“A survey of scholarship examining the connection between bilateral investment treaties (BITs) and FDI reveals fourteen studies that claim statistically significant findings to support the hypothesis that signing BITs increases FDI. This count includes: studies that find that only some types of BITs increase FDI;

continue to conclude IIAs.

Leaving aside the contested debate regarding the degree to which an IIA does (or does not) meet the empirical objectives of investment promotion, the phenomenon of IIA proliferation may also be understood from both a normative and functionalist perspective. Normatively, an IIA represents the tangible result of a mutual decision by States Parties to bind themselves to “precommitments”,¹⁵ a strategy which helps resolve the problem of enforcing government promises during the inevitable intervening time between a government promise and its performance. As Tom Ginsburg and his co-authors explain, international investment agreements resolve these problems “by making the government promise enforceable through international arbitration. The treaty regime makes the government’s commitments more credible because it removes the adjudication of disputes from the government’s hands and raises the possibility of externally imposed sanctions down the road. This in turn makes performance more likely.”¹⁶ The substantive standards of protection

two studies reporting apparently contradictory findings – one that only U.S. BITs increase co-signatories’ FDI and another that most BITs increase FDI but U.S. BITs do not increase co-signatories’ FDI from the U.S.; a study that finds only a ‘minor and secondary’ relationship between BITs and FDI; and a study that finds that BITs increase FDI but with diminishing returns of FDI to each additional BIT a country signs. A further five studies reject the hypothesis that BITs increase FDI.”).

¹⁵ “Precommitment” theory, particularly for international law, is attributable to Professor Tom Ginsburg and his co-authors in their landmark 2008 journal article. See Tom Ginsburg, Svitlana Chernykh, Zachary Elkins, *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 1 University of Illinois Law Review 201 (2008), at 211-212 (“To the extent that international law binds states and limits the options of policy-makers, it can serve as a precommitment device...Precommitment allows states to communicate to other states that they are serious about their promises. Certainly not all international agreements among states are precommitments, in the sense of giving up future choices to guard against preference shifts. States have many other reasons for entering into agreements. But some kinds of agreements certainly act as precommitments.”).

¹⁶ *Id.* at footnote 15, pp. 212 and 214 (“International commitment devices work in three different ways. International obligations can generate information on the behavior of politicians in future periods. This is relevant when the behavior in question is difficult for the domestic constituents to observe...*Second*, politicians can, in effect, bond their behavior by making sure that any future violation of the promise will generate costs imposed by international actors. A government promise to submit to international arbitration for investment disputes means that the government may have to pay compensation if it violates its promises. It is the simple cost associated with violation, rather than information generated from abroad, that renders the mechanism useful for enhancing the commitment. *Third*, politicians can make a credible commitment by delegating decision-making authority to an independent international actor. In this mode, the politician guards against her future preference shifts by completely ceding decision-making authority...”).

in an IIA thus operate to precommit States Parties against *unforeseeable or unreasonable* regulatory changes. As a “precommitment” device, the IIA ultimately guarantees a certain level of regulatory predictability to States Parties and the investor-nationals of such States Parties as third-party beneficiaries of the IIA.

Regulatory predictability is economically significant to the ultimate investment decision, precisely because the host State’s regulatory regime “can affect (positively or negatively) not only the project return and risk, but also [the] asset value of the group as a whole...[through] the immediate impact on operating costs...the effect of uncertainty about future standards and property rights...[which] can require considerably increased ‘hurdle rates of return’ to invest in a particular country...[and] the influence on the asset value of a group as a whole due to the reaction of shareholders, consumers, and employees in the home country to group subsidiary operations abroad.”¹⁷ To the extent that an IIA contains transparent and determinable obligations of its States Parties, it establishes a common baseline of expectations of the quality of regulatory predictability that investors and host States could rightfully anticipate during the life of a covered investment.

On the other hand, a functionalist¹⁸ view of IIAs would recognize that the continued global proliferation of these types of treaties is not a random simultaneous phenomenon either.

The International Institute for Sustainable Development (IISD) identifies three factors behind the marked growth of IIAs:

- 1) the deliberate agenda push in favor of IIAs by global economic institutions such as the UN Conference on Trade and Development (UNCTAD), in order to create an

¹⁷ See Valpy Fitzgerald, *Regulatory Investment Incentives*, REPEC Oxford Working Paper No. 80, February 2002, available at: <http://www3.qeh.ox.ac.uk/RePEc/qeh/qehwps/qehwps80.pdf> (last accessed 10 September 2012), at pp. 3-4.

¹⁸ Recall Morgenthau’s conception of functionalism in international law as an intertwined analysis of rules and social phenomena. See Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *American Journal of International Law* 2 (April 1940), pp. 260-284, at 274 (“...international law is a social mechanism working towards certain ends within this same civilization which, in turn, as far as determined by it, become a function of this same international law. By systematizing the rules of a given international law under the viewpoint of this dual functional relationship between rules and social forces, the functional theory will arrive at a real scientific understanding of the material element of the legal rules...”).

- “added security” that would spur increases in foreign direct investment;
- 2) the international institutional preference for IIAs as “risk management tools”, where investment or political risk insurance would depend on whether developing States have concluded an IIA; and
 - 3) capital-exporting States’ increased concern for investment protection, given the scale, frequency, and volume of their foreign direct investments spurred by worldwide liberalization and globalization trends.¹⁹

Moreover, where the provision of international aid, finance, bilateral or region sovereign lending attaches a requirement for recipient States to extend additional legal protections to foreign investors beyond those contained in their domestic laws,²⁰ it would be inevitable that more IIAs would be concluded.

Furthermore, another functionalist view could also explain the proliferation of IIAs. It is also very likely that States are concluding IIAs in order to minimize opportunities for cross-border “regulatory arbitrage”²¹ – a situation where investment pricing differences (in this case, the expected transaction costs from investing in a particular country) arise due to the fact that “the same transaction receives different regulatory treatment under different regulatory regimes.”²² Foreign investors may prefer to invest in jurisdictions that commit to substantive standards of protection under an IIA, rather than in other jurisdictions that eschew similar international commitments in favor of using local law to protect investors against takings and other injurious deprivations. International investors may prefer IIA-covered jurisdictions in order to take advantage of the lower risk of non-compensability in those jurisdictions, for situations where the host State expropriates the investment or otherwise engages in morally hazardous conduct causing economic deprivation to the investor. According to some scholars, the presence of an IIA itself “provides a strong incentive for a host State to honor its obligations under international law and its agreements

¹⁹ Nathalie Bernasconi-Osterwalder, Aaron Cosbey, Lise Johnson, and Damon Vis-Dunbar, *Investment Treaties and Why They Matter to Sustainable Development*, (International Institute for Sustainable Development, Canada, 2012) pp. 4-5.

²⁰ SORNARAJAH 2010, pp. 174-175.

²¹ See Victor Fleischer, *Regulatory Arbitrage*, 89 Texas Law Review 227 (2010).

²² *Id.* at p. 244.

with the investor.”²³ Ultimately, States could very likely be concluding IIAs so as not to lose out on potential similar investment prospects to competitor States that already make such guarantees in IIAs. In this sense, States compete through IIAs to offer similar, if not better, commitments of regulatory predictability to foreign investors.

Whether viewed from the normative or functionalist perspective, the proliferation of IIAs bears testament to how States value the need to maintain and guarantee regulatory predictability, at least sufficiently enough for these States to accept the trade-off that future exercises of regulatory powers could be subjected to claims against the State for alleged international responsibility. The State’s authoritative decision-makers may choose to incur this trade-off not just for the supposed ability of an IIA to attract foreign investment from new capital-exporting sources, but also for the fact that these decision-makers might also stand to reap other immediate *indirect* political and economic gains from choosing to entrench regulatory predictability through an IIA.²⁴

Some of these collateral or indirect benefits from successfully negotiating an IIA could likely include:

- 1) obtaining favorable counterpart international lending or sovereign financing terms as part of a basket of international commitments with an IIA partner;
- 2) opening new market access through a broader free trade agreement that includes the IIA;
- 3) garnering favorable perceptions and increased support from domestic constituencies and local businesses;
- 4) institutionalizing an international investment regulatory policy that is consistent with the decision-makers’ own

²³ Paul E. Comeaux and N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 New York Law School Journal of International and Comparative Law 1 (1994), at C2-1 to C2.37, at C.2-3, reproduced in: <http://www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf> (last accessed 10 September 2012).

²⁴ See Andrew T. Guzman, *Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Virginia Journal of International Law 639 (1997-1998), at 686-688.

- political views on resource allocation and development strategies; and
- 5) paving the way for other additional forms of strategic cooperation in the future with the new State partner under the IIA.²⁵

Moreover, it is also possible that a State's authoritative decision-makers see few costs in entering into an IIA – where the duration of an IIA's applicability stands to outlast politicians' electoral terms, these decision-making elites could be less concerned with the possibility of any future political fallout if the State were to be held internationally responsible under the IIA for regulatory actions that injure foreign investors.²⁶ Under these circumstances, the functional gains from concluding an IIA make it only more politically expedient to do so than otherwise.

Regardless of the motivation for concluding an IIA, what is crucial for assessing its design is detecting how regulatory predictability could be achieved when States Parties to the IIA impose constraints on their own present and future regulatory powers with respect to covered investments

²⁵ See Diane A. Desierto, *For Greater Certainty: Balancing Economic Integration with Investment Protection in the New ASEAN Investment Agreements*, 5 *Transnational Dispute Management* (2011) special issue on Resolving International Business Disputes by ADR in Asia; Oliver Morrissey, *Investment Provisions in Regional Integration Agreements for Developing Countries*, University of Nottingham CREDIT Research Paper No. 08/06, available at: <http://www.nottingham.ac.uk/credit/documents/papers/08-06.pdf> (last accessed 10 September 2012); John Whalley, *Why Do Countries Seek Regional Trade Agreements?*, pp. 63-90 in JEFFREY A. FRANKEL (ED.), *THE REGIONALIZATION OF THE WORLD ECONOMY* (University of Chicago Press, 1998). See also Gus van Harten, *Five Justifications for Investment Treaties: A Critical Discussion*, 2 *Trade Law and Development* 1 (2010) (“...states might have decided to conclude investment treaties – however unequal in fact or in law – because they perceived other benefits of doing so (or other risks of not doing so)...the choices of states are made in a political context that goes beyond consideration of markets and the movement of capital flows or in themselves...”).

²⁶ See Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 *Northwestern University Law Review* 2 (2011) 635-688, at 638 (“...the politicians who accept or oppose international legal constraints on their authority come from all sides of the political spectrum, and they often do so because of the perceived political threats or opportunities arising from such constraints. And although international legal commitments are often framed as institutional arrangements rather than as prescribed policy outcomes, partisan politicians tend to rank these commitments based upon their expectations regarding future policy outcomes. Such expectations may depend on the partisan beliefs regarding the likely preferences of other states that are party to the international commitment (or the elites within those states) as well as the preferences of actors who will ultimately have the authority to enforce or interpret such commitments.”).

under the IIA. In 1999, Thomas Wälde advanced the intuitive argument that States could reduce political and regulatory risks if they conclude international investment treaties.²⁷ This argument presupposes that a State's willingness to commit to a certain quality of investment protection linearly predicted its future conduct to investors. But such an intuition does not necessarily hold true if one takes into account the complex history of actual investor-State disputes administered under the ICSID system.²⁸ On the contrary, States' IIA breaches submitted to the investor-State dispute settlement mechanism firmly show how some States indeed deviate from the conduct promised under the IIA. As such, it is not exactly that IIAs *causally* reduce regulatory or political risks of investing in any given State, but rather, the IIAs establish the minimum regulatory predictability that States Parties bound themselves to observe, on pain of compensation should they fail to abide by this minimum.

Furthermore, while the willingness to commit to an IIA could well be an endogenous variable for estimating regulatory risk within the host State, it is not the only variable to consider when attempting a future forecast of how that host State would be likely to change its policy decisions relating to foreign investment.²⁹ There are numerous empirical methods in the estimation of regulatory risk in relation to foreign investment,³⁰ for which the analysis of regulatory risk in IIAs and arbitral practices should only serve as a starting point, albeit a fundamentally critical one. This Report attempts to supply the latter gap in the literature,

²⁷ *Id.* at footnote 8.

²⁸ See ANTONIO R. PARRA, *THE HISTORY OF ICSID* (Oxford University Press, 2012), at pp. 119-320 (for the most comprehensive discussion on the features of ICSID investor-State disputes from its earliest beginnings in 1965 to the year 2010).

²⁹ For a global survey of various indicators of regulatory risk, including a country's "protectionist" policies, see Karl P. Sauvant, *Regulatory Risk and the growth of FDI*, pp. 67-79 in *THE ECONOMIST, WORLD INVESTMENT PROSPECTS TO 2011: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF POLITICAL RISK* (2007), available at: http://graphics.eiu.com/upload/WIP_2007_WEB.pdf (last accessed 10 September 2012).

³⁰ See NINA D. BUBNOVA, *GOVERNANCE IMPACT ON PRIVATE INVESTMENT: EVIDENCE FROM THE INTERNATIONAL PATTERNS OF INFRASTRUCTURE BOND RISK PRICING* (World Bank Publications, 2000), at pp. 14-52; Harri Ramcharan, *Foreign direct investment and country risk: Further empirical evidence*, 28 *Global Economic Review* 3 (1999) 49-59; Anastassios Gentzoglani, *Regulatory Risk, Cost of Capital, and Investment Decisions in the Telecommunications Industry: International Comparisons*, unpublished paper available at: <http://userpage.fu-berlin.de/~jmueller/its/conf/berlin04/Papers/Anastassios.pdf> (last accessed 10 September 2012); Paolo M. Panteghini and Carlo Scarpa, *Irreversible Investments and Regulatory Risk*, CESIFO Working Paper No. 934, April 2003, available at: <http://www.cesifo-group.de/portal/pls/portal/docs/1/1189820.PDF> (last accessed 10 September 2012).

in order to contribute to current scholarship that already explores the role of regulatory regimes in the actual economic returns and risks of IIA-covered investments.³¹ As a highly subjective discipline,³² risk analysis and empirical estimation can also benefit from insights into IIA design, as well as the treatment of regulatory risk to date by arbitral tribunals. Sections B and C of this Part I turn to these matters, respectively.

B. IIA Design: Methods for Maintaining and Constraining the Regulatory Prerogatives of the host State

An IIA will reflect how States Parties choose to constrain regulatory prerogatives, or conversely, carve out future policy flexibility to meet public interest objectives from investment protection guarantees. IIAs will typically contain some combination of, if not both, *structural devices* as well as *substantive standards*.

1.0. Structural devices

Rather than completely deferring to individual arbitral tribunals' interpretation of IIA standards on a case-by-case basis,³³ States are

³¹ See Susan D. Franck, *The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future*, 12 U.C. Davis J. Int'l L. & Pol'y 47 (Fall 2005), at 55-68; Kathryn Gordon, *Investment Guarantees and Political Risk Insurance: Institutions, Incentives, and Development*, pp. 91-122 in OECD INVESTMENT POLICY PERSPECTIVES (2008); See René Stulz, *On the Effects of Barriers to International Investment*, 36 Journal of Finance 4 (September 1981), at 923-934; Alan G. Ahearne, William L. Grier, and Francis E. Warnock, *Information costs and home bias: an analysis of US holdings of foreign equities*, 62 Journal of International Economics (2004) 313-336, at 320-322 (outlining measures for direct and indirect barriers to foreign investment, including capital controls and transactions costs); Piet Sercu and Rosanne Vanpée, *Estimating the Costs of International Equity Investments*, 12 Review of Finance 4 (2008) 587-634 (which employs variables in its model such as capital export controls, implicit costs from information asymmetries, explicit trading costs and direct controls on international capital flows).

³² See Reid W. Click, *Financial and Political Risks in US Direct Foreign Investment*, 36 Journal of International Business Studies 5 (September 2005), 559-575, at 561 ("Political risk is defined as the possibility that political decisions or political and social events in a country will affect the business climate in such a way that investors will lose money or not make as much money as they expected. It has not yet been investigated in finance, owing primarily to lack of high-quality data. In contrast to the widespread availability of data on financial variables, the underlying sources of political risk are not readily measured.").

³³ On vast literature involving the question of investment arbitral tribunals' degree of deference to domestic judicial review findings, see Caroline Henckels, *Indirect*

increasingly incorporating other mechanisms within the IIA to retain control over, and possibly harmonize, IIA interpretation.³⁴

These include:

- 1) *ad hoc* joint decision mechanisms;
- 2) treaty-based institutional commissions;
- 3) inter-State consultative mechanisms;
- 4) incorporation of other subject matter-specific treaties (*e.g.* environmental, labor, human rights); and
- 5) inter-State bilateral appellate mechanisms to review arbitral awards under the IIA's investor-State dispute settlement mechanism, or the outright omission of investor-State dispute settlement mechanisms under the IIA.³⁵

The following subsections discuss how each of these respective structural devices could assist States in managing the balance between investors' perceived regulatory risks and the host State's need to retain policy

Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor State Arbitration, 15 *Journal of International Economic Law* 223 (2012); Stephan W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of New Public Law Approach*, 52 *Virginia Journal of International Law* 57 (2011); William Burke-White and Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 *Yale Journal of International Law* 283 (2010); Rahim Moloo and Justin Jacinto, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, forthcoming Chapter 13 in KARL P. SAUVANT (ED.), *YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2011-2012* (Oxford University Press, 2013), draft version available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2036243 (last accessed 10 September 2012).

³⁴ United Nations Conference on Trade and Development (UNCTAD), *Interpretation of IIAs: What States Can Do*, IIA Issues Note No. 3 (December 2011), available at: http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (last accessed 10 September 2012).

³⁵ For a recent general survey on approaches for States to control the interpretation of their IIAs, see United Nations Conference on Trade and Development (UNCTAD), *Interpretation of IIAs: What States Can Do*, IIA Issues Note No. 3, December 2011, available at: http://unctad.org/en/Docs/webdiaeia2011d10_en.pdf (last accessed 10 September 2012).

flexibility within the IIA to continue meeting regulatory and public interest objectives.

1.1. Ad hoc joint decision mechanisms

The *ad hoc* joint decision mechanism is a relatively recent device in the newer generations of IIAs, and it may be utilized in the future to enable States to control the interpretation of an IIA so that States continue to retain sufficient policy flexibility to respond to domestic public interest and regulatory objectives.³⁶ As seen from Article 30(3) of the United States Model Bilateral Investment Treaty (BIT),³⁷ States Parties to an IIA reserve the right to issue a “joint decision” declaring their interpretation of any provision of the IIA, which would be binding on any present or future arbitral tribunal constituted under the IIA’s dispute settlement mechanism.

The States Parties may issue the joint decision interpreting an IIA standard (such as, for example, the fair and equitable treatment standard) at any stage, with or without reference to pending investor-State disputes, and with or without reference to contemporaneous interpretations by other international tribunals of the same IIA standard contained in other IIAs. Other joint decision mechanisms are present in Article 30(3) of the 2005 United States-Uruguay BIT,³⁸ Article 30(3) of the 2008 United States-Rwanda BIT,³⁹ Article 29(2) in relation to Article 18(2) of the 2007 India-

³⁶ See Diane A. Desierto, *Joint Decisions by States Parties: Fair Control of Tribunal Interpretations?*, Kluwer Arbitration Blog, 8 June 2012, available at: <http://kluwerarbitrationblog.com/blog/2012/06/08/joint-decisions-by-state-parties-fair-control-of-tribunal-interpretations/> (last accessed 10 September 2012).

³⁷ Full text of the 2012 United States Model BIT available at: <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last accessed 10 September 2012). Article 30(3) of the US Model BIT states: “A joint decision of the Parties, each acting through its representative designated for the purpose of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.”

³⁸ Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay BIT 2005), S Treaty Doc No. 109-9 (2006), Article 30(3): “A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.”

³⁹ Treaty Between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment (United States-Rwanda BIT 2008), available at: http://www.ustr.gov/sites/default/files/uploads/agreements/bit/asset_upload_file743_14523.pdf (last accessed 10 September 2012), Article 30(3): “A joint decision of the Parties,

Mexico BIT,⁴⁰ Article X(6) of the 2009 Canada-Czech Republic BIT,⁴¹ Article 27(3) of Chapter 11 (Investment) of the 2010 ASEAN-Australia-New Zealand Free Trade Agreement.⁴²

While these mechanisms openly permit States Parties to the IIA to agree on any interpretation of IIA provisions that would prevail over any arbitral tribunal, they problematically do not refer to international law as the Parties' guiding principles when deciding on any future agreed interpretation of the IIA. Neither do the joint decision mechanisms provide for any internal control or guidance for the States Parties when their interpretation frontally collides with an arbitral tribunal's legal interpretation of an IIA standard, issued by arbitrators in observance of their fundamental duties to maintain independence and impartiality. There has not yet been an occasion to resolve the potential jurisdictional tension between arbitral tribunals' exercise of their competences to interpret and apply the IIA to concrete investor-State disputes, and how States Parties to the IIA might strategically wield the joint decision mechanism to minimize or avoid liability under the IIA by controlling the latter's ultimate interpretation at any stage of a given investor-State dispute.

each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision."

⁴⁰ Agreement between the United Mexican States and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (India-Mexico BIT 2007), IC-BT 742 (2007), Article 29(2): "The Contracting Parties agree to consult each other on having a joint interpretation on Article 7 [Expropriation] in accordance with paragraph 2 of Article 18 ["An interpretation jointly formulated and agreed upon by the Contracting Parties with regard to any provision of this Agreement shall be binding on any tribunal established under this Section."] of this Agreement at any time after the entry into force of this Agreement."

⁴¹ Agreement between the Government of Canada and the Government of the Czech and Slovak Federal Republic for the Promotion and Protection of Investments (Canada-Czech Republic BIT 2009), available at: http://www.sice.oas.org/Investment/BITSbyCountry/BITs/CAN_Czech_Ad_e.asp (last accessed 10 September 2012), Article X(6): "An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article."

⁴² 2010 Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area, available at: <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf> (last accessed 10 September 2012), Article 27(3) of Chapter 11: "A joint decision of the Parties, declaring their interpretation of a provision of this Agreement shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision."

1.2. *Treaty-based institutional commissions*

Treaty-based institutional commissions or inter-State consultative bodies could pose less of a danger of undue interference with arbitral tribunals' competences in specific pending investor-State disputes. While the IIA interpretations of treaty-based commissions are generally binding on arbitral tribunals, they are nevertheless issued presumably with a more institutional view of the interpretation's consequences for the future implementation, oversight, supervision of the IIA. A treaty-based institutional commission also has the advantage of entrenching regular consultations and dialogue between the States Parties to the IIA, and thus may be said to have a more long-term view of the IIA's implementation when it issues an interpretation, as opposed to an *ad hoc* joint decision mechanism which may be triggered purposely only to affect the outcome of specific pending investor-State disputes.

One example of such a treaty-based institutional commission is the North American Free Trade Area (NAFTA) Free Trade Commission,⁴³ which was set up as an institution composed of cabinet-level representatives from the three contracting States, with the specific powers to "supervise the implementation" of the treaty,⁴⁴ "oversee its further elaboration",⁴⁵ and "resolve disputes that may arise regarding its interpretation or application".⁴⁶ The Free Trade Commission issued Notes of Interpretation in 2001,⁴⁷ although admittedly it has since been criticized for the seeming *de facto* amendment of NAFTA treaty provisions as a result of the Notes.⁴⁸ Other IIAs that establish institutional commissions authorized to undertake IIA interpretation binding upon future arbitral tribunals include: Article 10.22(3) of the 2004 Dominican-Republic-Central America-United States

⁴³ North American Free Trade Agreement (NAFTA), Chapter 11: Investment, IC-MT 002 (1992), Article 2001 (The Free Trade Commission). *See also* Jeswald Salacuse, *The Emerging Global Regime for Investment*, 51 *Harvard International Law Journal* 427 (2010), at 456.

⁴⁴ *Id.* at footnote 43, Article 2001 (2)(a).

⁴⁵ *Id.* at footnote 43, Article 2001 (2)(b).

⁴⁶ *Id.* at footnote 43, Article 2001 (2)(c).

⁴⁷ *See* Notes of Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, July 31, 2001, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en&view=d> (last accessed 10 September 2012).

⁴⁸ *See* Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, and Lessons for the FTAA*, 97 *Proceedings of the Annual Meeting (American Society of International Law)* (April 2-5, 2003), 251-257, at 255-257.

Free Trade Agreement (DR-CAFTA),⁴⁹ Article 40(3) of the 2006 Canada-Peru BIT,⁵⁰ Article 40(2) of the 2009 Canada-Jordan BIT,⁵¹ and Article X(6) of the 2010 Canada-Slovakia BIT.⁵²

1.3. *Inter-State consultation mechanisms*

In contrast to *ad hoc* joint decision mechanisms and treaty-based institutional commissions, inter-State consultation mechanisms in an IIA have the least potential for disrupting arbitral independence and impartiality in handling investor-State disputes. They are not likely to affect the substantive content of an IIA, but rather, could serve as a structural device to facilitate continuing communications between States Parties to the IIA. This structural device could be particularly useful for States Parties to transparently articulate and make record of any ongoing regulatory and public interest concerns that could affect the future implementation of the IIA. Examples of these consultation mechanisms include Article 12 of the 1996 Greece-Chile BIT,⁵³ Article 12 of the 1989 Netherlands-Ghana BIT,⁵⁴

⁴⁹ Dominican Republic-Central America-United States Free Trade Agreement, Chapter 10: Investment (DR-CAFTA 2004), IC-MT 012 (2004), Article 10.22(3) (Governing Law): “A decision of a provision of this Agreement under Article 19.13(c) (The Free Trade Commission) shall be binding on a tribunal established under this Section, and any decision or award issued by the tribunal must be consistent with that decision.”

⁵⁰ Agreement between the Government of Canada and the Government of the Republic of Peru for the Promotion and Protection of Investments (Canada-Peru BIT 2006), IC-BT 014 (2006), Article 40(3): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation.”

⁵¹ Agreement between Canada and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investments (Canada-Jordan BIT 2009), IC-BT 1154 (2009), Article 40(2): “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section, and any award under this Section shall be consistent with such interpretation.”

⁵² Agreement between the Government of Canada and the Slovak Republic for the Promotion and Protection of Investments (Canada-Slovakia BIT 2010), IC-BT 1533 (2010), Article X(6): “An interpretation of this Agreement agreed between the Contracting Parties shall be binding on a Tribunal established under this Article.”

⁵³ Agreement between the Government of the Hellenic Republic and the Government of the Republic of Chile on the Promotion and Reciprocal Protection of Investments (Greece-Chile BIT 1996), IC-BT 1475 (1996), Article 12: “Representatives of the Contracting Parties shall, whenever necessary, hold consultations on any matter affecting the implementation or interpretation of this Agreement. These consultations shall be held on the proposal of one of the Contracting Parties at a place and at a time to be agreed upon through diplomatic channels.”

⁵⁴ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana (Netherlands-Ghana BIT 1989),

Article VIII of the 1993 Spain-Philippines BIT,⁵⁵ Article XI of the 1997 Denmark-Philippines BIT,⁵⁶ Article 43 of the 2009 ASEAN Comprehensive Investment Agreement,⁵⁷ Article VIII of the 1995 Czech Republic-Philippines BIT,⁵⁸ Article 8 of the 1985 Netherlands-Philippines BIT,⁵⁹ Article VIII of the 1999 Philippines-Pakistan BIT,⁶⁰ Article 7 of the 1997 Germany-Philippines BIT,⁶¹ and Article 29(1) of the 2007 India-Mexico

IC-BT 938 (1989), Article 12: "Either Contracting Party may propose the other Party to consult on any matter concerning the interpretation or application of the Agreement. The other Party shall accord sympathetic consideration and shall afford adequate opportunity for such consultation."

⁵⁵ Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Republic of the Philippines (Spain-Philippines BIT 1993), 1842 U.N.T.S. 91, IC-BT 1369 (1993), Article VIII: "Both Parties agree to consult each other at the request of either Party on any matter relating to the investment between the two countries, or otherwise affecting the implementation of this Agreement."

⁵⁶ Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of the Philippines Regarding the Promotion and Reciprocal Protection of Investments (Denmark-Philippines BIT 1997), IC-BT 893 (1997), Article XI: "The Contracting Parties agree to consult each other at the request of either Party on any matter affecting the implementation of this Agreement. The consultations shall be held on the proposal of one of the Contracting Parties at a place and date agreed upon through diplomatic channels."

⁵⁷ 2009 ASEAN Comprehensive Investment Agreement (ACIA), Article 43: "The Member States agree to consult each other at the request of any Member State on any matter relating to investments covered by this Agreement, or otherwise affecting the implementation of this Agreement."

⁵⁸ Agreement between the Czech Republic and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Czech Republic-Philippines BIT 1995), IC-BT 592 (1995), Article VIII: "The Contracting Parties agree to consult each other at the request of either Contracting Party on any matter relating to investment between the two countries, or otherwise affecting the implementation of this Agreement."

⁵⁹ Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments, Article 8: "The Contracting Parties agree to consult each other at the request of either Contracting Party on any matter relating to investment between the two countries, or otherwise affecting the implementation of this Agreement."

⁶⁰ Agreement between the Government of the Republic of the Philippines and the Government of the Islamic Republic of Pakistan for the Promotion and Reciprocal Protection of Investment (Philippines-Pakistan BIT 1999), IC-BT 668 (1999), Article VIII: "The Contracting Parties agree to consult each other at the request of either Contracting Party on any matter relating to investment between the two countries, or otherwise affecting the implementation of this Agreement."

⁶¹ Agreement between the Federal Republic of Germany and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Germany-Philippines BIT 1997), IC-BT 123 (1997), Article 7: "The Contracting Parties agree to consult each other at the request of either Contracting Party on any matter relating to investment between the two countries, or otherwise affecting the implementation of this Agreement."

BIT.⁶²

By proactively availing of the IIA's inter-State consultations mechanism to periodically inform counterpart State Parties of any public interest developments that might conceivably result in administrative or legislative actions affecting regulatory frameworks, a host State can improve transparency, manage expectations between States, and ultimately help diminish investors' perceived regulatory risks.⁶³

1.4. *Incorporation of other treaties*

Some IIAs purposely contain structural devices that enable cross-references to other treaty obligations that involve social protection measures and public interest objectives. Article 18(2) of the 2002 Austria-Malta BIT, for example, specifically provides that the application of the European Convention on Human Rights "shall not be excluded".⁶⁴ Clause 1 of the Protocol to the 1998 Japan-Pakistan BIT prohibits the interpretation of the treaty in a way that would derogate from intellectual property rights agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, "and other treaties concluded under the auspices of the World Intellectual Property Organization."⁶⁵ Article 5(3) of

⁶² Agreement between the United Mexican States and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (India-Mexico BIT 2007), IC-BT 742 (2007), Article 29(1): "A Contracting Party may propose to the other Contracting Party to carry out consultations on any matter relating to this Agreement. These consultations shall be held at a place and at a time agreed by the Contracting Parties."

⁶³ On the importance of transparency and disclosure of relevant information to stakeholders to help lower regulatory risk, see Paulo Correa, *What it takes to lower regulatory risk in infrastructure industries: An assessment and benchmarking of Brazilian regulators*, World Bank Gridlines Note No. 29, September 2007, pp. 1-4, at p. 2, available at: <http://www.ppiaf.org/sites/ppiaf.org/files/publication/Gridlines-29-What%20it%20Takes%20to%20Lower%20Regulatory%20Risk%20-%20PCorrea.pdf> (last accessed 10 September 2012); Peter L. Smith and Björn Wellenius, *Mitigating Regulatory Risk in Telecommunications*, World Bank Private Sector Note No. 189 (July 1999), at p. 6 (on adopting open regulatory processes) available at: http://www.wto.org/english/tratop_E/serv_e/telecom_e/workshop_dec04_e/mitigating_regulatory_risk.pdf (last accessed 10 September 2012).

⁶⁴ Agreement between the Republic of Austria and Malta on the Promotion and Mutual Protection of Investments (Austria-Malta BIT 2002), IC-BT 1425 (2002), Article 18 (2): "The application of the European Convention on Human Rights shall not be excluded."

⁶⁵ Agreement between Japan and the Islamic Republic of Pakistan Concerning the Promotion and Protection of Investments (Japan-Pakistan BIT 1998), IC-BT 655 (1998), Protocol, Clause 1: "Nothing in the Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which they are parties, including Agreement on Trade-

the 2004 Belgium-Luxembourg Economic Union-Serbia and Montenegro BIT reaffirms the States' Parties "commitments under international environmental agreements".⁶⁶ While Article 12 of the 2005 United States-Uruguay BIT holds that "it is inappropriate to encourage investment by weakening or reducing the protections afforded in *domestic* environmental laws",⁶⁷ Articles 13(1) and 13(2) of the same treaty makes references to "*internationally* recognized labor rights".⁶⁸ On the other hand, other IIAs tend to provide rules governing the application of other international agreements along with the IIA, usually calling for the application of the

Related Aspects of Intellectual Property Rights, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, and other treaties concluded under the auspices of the World Intellectual Property Organization." *See also identical provisions in* Agreement between Japan and the People's Republic of Bangladesh Concerning the Encouragement and Promotion and Protection of Investment (Japan-Bangladesh BIT 1998), Protocol Clause 1; Agreement between Japan and Mongolia Concerning the Promotion and Protection of Investment (Japan-Mongolia BIT 2001) Protocol Clause 1; Agreement between the Government of Japan and the Government of the Republic of Korea for the Liberalisation, Promotion and Protection of Investment Protocol Clause 1.

⁶⁶ Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and Serbia and Montenegro, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Serbia and Montenegro BIT 2004), Article 5(3): "The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognized and implemented by their national legislation." *See identical or similar provisions in* Article 5(3) of the Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Republic of Sudan, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Sudan BIT 2005); Article 5(3) of the Agreement between the Belgian-Luxembourg Economic Union, on the one hand, and the Federal Democratic Republic of Ethiopia, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Ethiopia BIT 2006); Article 13(3) of the Agreement between the Belgo-Luxembourg Economic Union and the Government of the Republic of Guatemala on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Guatemala BIT 2005); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Great Socialist People's Libyan Arab Jamahiriya, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Libyan Arab Jamahiriya BIT 2004); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Republic of Mauritius, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Mauritius BIT 2005); Article 5(3) of the Agreement between the Belgo-Luxembourg Economic Union, on the one hand, and the Government of the Republic of Peru, on the other hand, on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Peru BIT 2005).

⁶⁷ Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay BIT 2005), S Treaty Doc No. 109-9 (2006), Article 12(1). *Italics added.*

⁶⁸ *Id.* at footnote 67, Articles 13(1) and 13(2). *Italics added.*

“more favorable” provision to the States Parties without indicating the criteria for determining the “favorability” of the applicable agreement. Examples of these types of references to the application of other treaties include: Article 11 of the 1993 Slovenia-Slovakia BIT,⁶⁹ Article 10 of the 1994 Hungary-Bulgaria BIT,⁷⁰ and Article 13(1) of the 1994 Czech Republic-United Arab Emirates BIT.⁷¹ Apart from these modes of referring to other applicable treaties, current IIAs seldom contain language that explicitly integrates international human rights treaties, environmental, or labor agreements as part of subsisting obligations to be observed alongside IIA obligations.

Significantly, no IIA to date has ever expressly integrated the International Covenant on Economic Social and Cultural Rights – the one treaty that most comprehensively implicates a host State’s dynamic and continuing obligations to enact social protection measures in the public interest in times of economic prosperity as well as economic crises.⁷² The absence of any express incorporation of these treaties, as well as the marked

⁶⁹ Agreement on Reciprocal Investment Protection and Promotion between the Republic of Slovenia and the Slovak Republic (Slovenia-Slovakia BIT 1993), IC-BT 1522 (1993), Article 13(1): “When any matter is treated simultaneously by this agreement and some other international agreements of which the two parties hereof are signatories, or the matter is governed by the general international law, then the most favourable provisions shall apply to both parties hereof and their respective investors, on a case-by-case basis.”

⁷⁰ Agreement between the Republic of Hungary and the Republic of Bulgaria on Mutual Promotion and Protection of Investments (Hungary-Bulgaria BIT 1994), Article 10: “Should national legislation of the Contracting Parties *or present or future international agreements* applicable between the Contracting Parties or other international agreements entered into by both Contracting Parties contain regulations, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by this Agreement, such regulation shall to the extent that it is more favourable prevail over the present Agreement.” *See similar or identical provision in* Article 11 of the Agreement between the Czech Republic and the Republic of Bulgaria for the Promotion and Reciprocal Protection of Investments (Czech Republic-Bulgaria BIT 1999).

⁷¹ Agreement between the Government of the Czech Republic and the Government of the United Arab Emirates for the Promotion and Protection of Investments (Czech Republic-United Arab Emirates BIT 1994), Article 13(1): “Where a matter is governed simultaneously both by this Agreement and by other international agreements to which both the Contracting States are parties or general principles of law commonly recognized by both Contracting States or domestic law of the host State, nothing in this Agreement shall prevent either Contracting State or any of its investors who own investments in the territory of the other contracting State from taking advantage of whichever rules are the more favourable to their case.”

⁷² *See* Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises*, George Washington, International Law Review (Fall 2012).

silence within the IIAs on the normative or hierarchical relationship between the host State's other international obligations in human rights treaties with its IIA obligations, heightens regulatory risk by fomenting uncertainty to all States Parties to the IIA as well as their respective investor-nationals. If a host State were to invoke compliance with an international human rights treaty as its justification for a social protection measure that incidentally results in non-compliance with IIA obligations, there is an increased burden for the host State to prove that its conduct is not pretextual and indeed carves out a justification against liability. As will be shown in Section B. 2.0 ('Substantive standards'), such a defense has yet to be accepted by arbitral tribunals.

1.5 *Bilateral appellate mechanisms; Omission of investor-State dispute settlement mechanism*

Investor-State disputes under IIAs are predominantly referred to the arbitration procedures under the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (otherwise known as the ICSID Convention).⁷³ The ICSID arbitration system does not contain any full-blown appeals procedure to review arbitral awards' factual and legal findings, instead providing for limited annulment procedures in Article 52 of the ICSID Convention.⁷⁴

States Parties tend to rely on the "self-contained"⁷⁵ dispute settlement system under the ICSID Convention, and thus rarely contemplate building any bilateral appellate mechanism into their IIAs. The 2005 United States-Uruguay BIT provided for the possibility of creating such a bilateral appellate mechanism,⁷⁶ but none of the other IIAs concluded by the

⁷³ See CHRISTOPH SCHREUER, LORETTA MALINTOPPI, AUGUST REINISCH, AND ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* (Cambridge University Press, 2011) [hereafter, "ICSID COMMENTARY"].

⁷⁴ ICSID COMMENTARY, pp. 890-1095.

⁷⁵ See Organisation for Economic Cooperation and Development (OECD), *Improving the System of Investor-State Dispute Settlement: An Overview*, pp. 183-224, at p. 185 in OECD, *INTERNATIONAL INVESTMENT PERSPECTIVES* (2006 ED.), available at: <http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/40079647.pdf> (last accessed 10 September 2012).

⁷⁶ Treaty Between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-Uruguay BIT 2005), Annex E (Possibility of a Bilateral Appellate Mechanism): "Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism."

United States contain such a provision. Unlike this unusual practice, IIAs would usually state that an arbitral award “shall not be subject to any appeal or remedy other than those provided for in [the ICSID] Convention.”⁷⁷ In this sense, carving out a bilateral appellate mechanism from the investor-State dispute settlement mechanism under the IIA, well outside of the self-contained dispute settlement procedures in the ICSID system, problematically introduces more uncertainty over the future enforceability of arbitral awards issued under the IIA.⁷⁸

On the other hand, a State may choose to ensure that it has full policy flexibility by altogether omitting any investor-State dispute settlement mechanism in the IIA. This structural omission insulates the host State from investors’ direct recourse to investor-State arbitration, thereby diminishing the possibility that the host State could be held liable to pay compensation for IIA breaches against investors. Moreover, investors would be forced to seek legal remedies from local courts of the host State, or apply with their respective home States to exercise diplomatic protection over their claims. While removing the investor-State dispute settlement mechanism from an IIA would thus make it much easier for a host State to implement policy changes at its own wherewithal in the future, it would also correspondingly increase regulatory risks for foreign investors. This is best illustrated in the Australian Government’s April 2011 announcement that it would reject any investor-State dispute settlement mechanism from

⁷⁷ See for example, Agreement between the Federal Republic of Germany and the Republic of Indonesia concerning the Encouragement and Reciprocal Protection of Investments (Germany-Indonesia BIT 2003) Article 10(3); Agreement between the Kingdom of Saudi Arabia and the Belgo-Luxembourg Economic Union concerning the Reciprocal Promotion and Protection of Investments (Saudi Arabia-Belgium-Luxembourg Economic Union BIT 2001) Article 10(3)(b); Agreement between the Government of the Kingdom of Denmark and the Government of the Republic of Zimbabwe concerning the Promotion and Reciprocal Protection of Investments (Denmark-Zimbabwe BIT 1996), Article 9(3)(b).

⁷⁸ Other scholars have referred to the need for an authoritative centralized appellate mechanism that would generate consistent jurisprudence and avoid normative fragmentation. See Tomer Brode, *Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration*, 6 Loyola University Chicago International Law Review 173 (2008), at 180-181; Christian J. Tams, *An Appealing Option? The Debate About an ICSID Appellate Structure*, 57 Essays in Transnational Economic Law, June 2006, pp. 38-40, available at: <http://www.telc.uni-halle.de/sites/default/files/altbestand/Heft57.pdf> (last accessed 10 September 2012).

its IIAs,⁷⁹ potentially making foreign investors in this particular jurisdiction more vulnerable to regulatory risks due to the increased possibility of unpredictable government policy changes affecting investments years down the line.

2.0. *Substantive standards*

States may choose to adopt language in the substantive standards of an IIA to ensure that they retain policy flexibility to meet regulatory and public interest objectives, alongside their IIA obligations.

These substantive standards include:

- 1) “in accordance with host State law” clauses;
- 2) stabilization clauses;
- 3) exceptions clauses or “measures not precluded” clauses;
- 4) the investment definition clause or similar treaty applicability provisions; and
- 5) balance of payments provisions and other financial crises provisions.

As will be shown in the following sections, the main difficulty with relying on the IIA’s substantive standards to underwrite a host State’s policy flexibility to meet regulatory and public interest objectives, is that the actual width of the latter appears a matter for the interpretive appreciation by arbitral tribunals on a case-by-case basis. Arbitral tribunals have not been consistent at all in defining the actual policy space of host States in relation to these substantive standards.⁸⁰ States would be ill-advised to depend too

⁷⁹ Kyla Tienhaara and Patricia Ranald, *Australia’s rejection of Investor-State Dispute Settlement: Four potential contributing factors*, Investment Treaty News, International Institute for Sustainable Development, July 12, 2011, available at: <http://www.iisd.org/itm/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/> (last accessed 10 September 2012).

⁸⁰ See Suzanne A. Spears, *Making way for the public interest in international investment agreements*, pp. 271-297 in CHESTER BROWN AND KATE MILES (EDS.), *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION* (Cambridge University Press, 2011); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 *Journal of International Economic Law* 4 (2010) 1037-1075.

heavily on the ambiguity of the language of some IIA substantive standards to defend their policy flexibility to implement social protection measures consistent with regulatory and public interest objectives.

2.1. “In accordance with host State law” clauses

Several international investment law experts have taken the position that “in accordance with host State law” clauses might possibly provide an interpretive link to international human rights treaties when the latter are fully incorporated into, and deemed a part of, a host State’s law.⁸¹ Stephan Schill observed that these clauses generally appear either as “clauses that tie compliance with domestic law directly to the definition of ‘investment’ protected under international investment treaties”, or as “clauses linking compliance with domestic law to the provision on admission of new investments...with a limitation of the scope of the application of the relevant investment treaty to existing investments made in accordance with host State law”.⁸²

Furthermore, the “in accordance with host State law” clause does *not* require an investment’s compliance with every host State regulation, administrative issuance, or law – it generally refers to those species of host State law that are of such fundamental importance that they must be included in the due diligence to be conducted by the investor and the host State.⁸³ While there is a line of arbitral awards that narrowly identifies host

⁸¹ Christoph Schreuer and Ursula Kriebaum, *From Individual to Community Interest in International Investment Law*, pp. 1079-1096, at 1095, in ULRICH FASTENRATH, RUDOLF GEIGER, DANIEL-ERASMUS KHAN, ANDREAS PAULUS, SABINE VON SCHORLEMER, CHRISTOPH VEDDER (EDS.), *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF JUDGE BRUNO SIMMA* (Oxford University Press, 2011); Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, pp. 45-62, at 59-60 in PIERRE-MARIE DUPUY, FRANCESCO FRACIONI, AND ERNST-ULRICH PETERSMANN (EDS.), *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION* (Oxford University Press, 2009) [hereafter, “DUPUY, FRACIONI, & PETERSMANN”].

⁸² Stephan Schill, *Illegal Investments in Investment Arbitration*, working paper available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979734 (last accessed 10 September 2012). An example of two “in accordance with laws and regulations” clauses that fulfill the two functions described by Schill are Articles 3(2) and 3(3) of the Croatia BIT discussed in paras. 190 and 197 of *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, Award, ICSID Case No. ARB/01/7, 25 May 2004.

⁸³ *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25, 16 August 2007, at para. 396 (“[w]hen the question is whether the investment is in accordance with the law of the host State, considerable arguments may be made in favour of construing jurisdiction *ratione materiae* in a more liberal way which is generous to the investor. In some circumstances, the law in question of the host State

State's corporate registration requirements as the only "law" contemplated by this clause,⁸⁴ there are also other arbitral awards that suggest that the clause applies to other sources of law that are consistent with the teleological purposes of an IIA,⁸⁵ such as anti-dummy legislation, bribery laws, and contractual fraud, and central bank regulations.⁸⁶ For States thus concerned with maintaining policy flexibility to meet their social protection obligations under international human rights, environmental, and labor treaties, these treaties must be flagged to the investor at the outset of the process of establishing an investment, in such a way that the host State's compliance with these treaties cannot be left out of the due diligence process.

Part II (*Managing Regulatory Risk from Social Protection Measures*) submits some suggestions for reforming the due diligence process in international investment transactions to purposely track and identify the host State's parallel continuing obligations under the International Covenant on Economic Social and Cultural Rights.

may not be entirely clear and mistakes may be made in good faith. An indicator of a good faith error would be the failure of a competent legal counsel's legal due diligence report to flag that issue."). On the other hand, a host State unsuccessfully attempted to argue the "non-resident" character of tax treatment in order to deny that an investment met the territorial requirement "in accordance with its laws and regulations", in *SGS Societe Generale de Surveillance SA v. Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004, at paras. 99-112.

⁸⁴ *Veteran Petroleum Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, at paras. 20-21; *Yaung Chi Oo Trading Pte Ltd v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1, 31 March 2003, at para. 62; *Stag and Vecchi v. Egypt*, Decision on Jurisdiction and Partial Dissenting Opinion, ICSID Case No. ARB/05/15, 11 April 2007, at paras. 198-201; *Middle East Cement Shipping and Handling Co SA v. Egypt*, Award, ICSID Case No. ARB/99/6, 12 April 2002, paras. 131-138.

⁸⁵ *Salini Costruttori SpA and Italstrade SpA v. Morocco*, Decision on Jurisdiction, ICSID case No. ARB/00/4, 23 July 2001, at para. 46. This standard was expressly adopted by the arbitral tribunal in *Mytilineos Holdings SA v. Serbia and Montenegro and Serbia*, Partial Award on Jurisdiction and Dissenting Opinion, UNCITRAL, 8 September 2006, at para. 152.

⁸⁶ *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, Award, ICSID Case No. ARB/03/25, 16 August 2007 (involving local anti-dummy legislation); *World Duty Free Company Ltd. v. Kenya*, Award, ICSID Case No. ARB/00/7, 25 September 2006 (involving local bribery laws); *Inceysa Vallisoletane SL v. El Salvador*, Award, ICSID Case No. ARB/03/26, 2 August 2006 (involving local contract principles against undue enrichment and fraud); *Anderson and ors v. Costa Rica*, Award, ICSID Case No. ARB (AF)/07/3, 10 May 2010, para. 55-59.

2.2. *Stabilization clauses*

While stabilization clauses appear in investment contracts,⁸⁷ breaches of these clauses may give rise to an IIA claim.⁸⁸ IIA provisions “on the mutual obligation of parties to provide ‘full protection and security’ and to ensure ‘fair and equitable treatment’ of investments...may confer treaty status on the stabilization clauses in an investment contract.”⁸⁹ These kinds of clauses purposely “aim to ‘stabilize’ the terms and conditions of an investment project, thereby contributing to manage non-commercial (that is, fiscal, regulatory) risk. They involve a commitment by the host government not to alter the regulatory framework governing the project, by legislation or any other means, outside specified circumstances (*e.g.* consent of the other contracting party, restoration of the economic equilibrium, and/or payment of compensation.)”⁹⁰ In principle, a stabilization clause commits a host State to “alienate [] its right to unilaterally change the regime and rights relied upon by, and promised to, the investor.”⁹¹ A stabilization clause would help reduce the regulatory risks of an investment,

⁸⁷ On the argument that foreign investors and host States effectively contract around the risk of changes in the applicable regulatory framework to the investment, *see* Sam Foster Halabi, *Efficient Contracting between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 *Northwestern Journal of International Law and Business* 261 (Spring 2011).

⁸⁸ Note that an arbitral tribunal has ruled that stabilization clauses “do not ‘cap’ damages for the purposes of valuing the claimants’ rights, nor do they establish a ceiling of compensation beyond which the claimants could not have legitimately expected to recover in the event of an expropriation.” *Kardassopoulos v. Georgia and joined case*, Award, ICSID Case Nos. ARB/05/18, ARB/07/15, 28 February 2010, at para. 485.

⁸⁹ *See* Evaristus Oshionebo, *Stabilization Clauses in Natural Resource Extraction Contracts: Legal, Economic, and Social Implications for Developing Countries*, 10 *Asper Review of International Business and Trade Law* 1 (2010) at 25. Although note that an arbitral tribunal expressly rejected viewing an IIA’s fair and equitable treatment standard as bearing the same purpose as stabilization clauses specifically granted to foreign investors. *See EDF (Services) Ltd v. Romania*, Award, ICSID Case No. ARB/05/13, 2 October 2009, at para. 218.

⁹⁰ Lorenzo Cotula, *Regulatory Takings, Stabilization Clauses and Sustainable Development (Session 2.2. The Policy Framework for investment: the social and environmental dimensions)*, unpublished paper, OECD Global Forum on International Investment, 27-28 March 2008, at: <http://www.oecd.org/investment/globalforum/40311122.pdf> (last accessed 10 September 2012).

⁹¹ Paul E. Comeaux and N. Stephan Kinsella, *Reducing Political Risk in Developing Countries: Bilateral Investment Treaties, Stabilization Clauses, and MIGA & OPIC Investment Insurance*, 15 *New York Law School Journal of International and Comparative Law* 1 (1994), electronic version reprinted in: <http://www.kinsellalaw.com/wp-content/uploads/publications/polrisk.pdf>. (last accessed 10 September 2012).

as the foreign investor would, in effect, be entitled to rely wholly (and somewhat statically) on the host State’s regulatory framework at the time of the establishment of the investment. Should the host State fail to maintain this pre-identified regulatory framework, it would be liable to compensate the investor for economic losses arising from changes in the law.

Stabilization clauses have been classified into three categories:

- 1) “freezing clauses” (which are “designed to make new laws inapplicable to the investment”);
- 2) “economic equilibrium clauses” (which “aim to maintain the economic equilibrium of the project”, by providing compensation to the investor if new laws are applied to the investment); and
- 3) “hybrid clauses” (which “require the State to restore the investor to the same position it had prior to changes in law, and the contract states explicitly that exemptions in law are one way of doing this”).⁹²

Among these categories, freezing clauses appear most restrictive upon a host State’s policy flexibility, insofar as it can be shown that the investment would be affected by future regulatory changes. Under a freezing clause, the investment is wholly insulated from the applicability of the host State’s policy or regulatory changes. On the other hand, an economic equilibrium clause does not strictly prohibit a host State from making such policy or regulatory changes, but only provides an economic disincentive against making such changes (*e.g.* the cost of restoring an affected investor to his economic position before the regulatory or policy change was implemented).

Some recent innovations to the design of stabilization clauses expressly exempt from stabilization those changes in law, regulations, or policies, which are reasonably required to ensure that host States meet international human rights obligations.⁹³

⁹² Andrea Shemberg, *Stabilization Clauses and Human Rights (Session 2.2. The Policy Framework for investment: the social and environmental dimensions)*, unpublished paper, OECD Global Forum on International Investment, 27-28 March 2008, at: <http://www.oecd.org/investment/globalforum/40314647.pdf> (last accessed 10 September 2012).

⁹³ Shemberg, at p. 27. *See also* Jernej Letnar Čeranič, *Corporate Human Rights Obligations Under Stabilization Clauses*, 11 German Law Journal 2 (2010) 210-229 (also arguing that

One such example is the issuance in 2003 by British Petroleum (BP) of the “BTC Human Rights Undertaking” for the Baku-Tbilisi-Ceyhan (BTC Co.) pipeline project,⁹⁴ which committed the special purpose vehicle (SPV) constructing the pipeline, BTC Co., to guarantee, among others, that:

- 1) “host Governments be able to regulate human rights and [health, safety and environmental] HSE under domestic law and in accordance with relevant standards... [including] under applicable international labor and human rights treaties”;⁹⁵
- 2) “the HSE and human rights standards [are] dynamic and evolve in accordance with the highest of international standards”;⁹⁶
- 3) the “arbitration clause does not prevent claims by persons in [the] Project State courts re human rights and HSE”;⁹⁷ and
- 4) “economic equilibrium [shall] not be used to seek compensation for actions required under human rights, labor, and HSE treaties”.⁹⁸

BTC warranted that the BTC Human Rights Undertaking was a “legal, valid, and binding obligation” and that BTC Co. has taken “all necessary corporate action to authorize the entry into, delivery and performance by it of this BTC Human Rights Undertaking.”⁹⁹

While this model of contractual guarantees is not yet the predominant norm among foreign investment contracts, proposals have been advanced to redesign stabilization clauses – either to limit their scope of application or to permit their evolving interpretation – to purposely

beyond the interpretation of the stabilization clauses in light of the fundamental human rights obligations of corporate investors, such investor obligations be explicitly included in international investment agreements).

⁹⁴ Full text of the BTC Human Rights Undertaking, 22 September 2003, available at: <http://subsites.bp.com/caspian/Human%20Rights%20Undertaking.pdf> (last accessed 10 September 2012).

⁹⁵ *Id.* at Clause 2(a).

⁹⁶ *Id.* at Clause 2(b).

⁹⁷ *Id.* at Clause 2(c).

⁹⁸ *Id.* at Clause 2(d).

⁹⁹ *Id.* at Clauses 3(a) and 3(b).

ensure that both investors and host States still comply with international human rights, environmental, and labor obligations and standards before, during, and well beyond the investment term.¹⁰⁰

2.3. *Exceptions clauses or “measures not precluded” clauses*

While exceptions clauses or “measures not precluded” clauses have proliferated throughout the universe of IIAs, these clauses appear in multiple textual forms, and correspondingly, provoke diverse interpretations.¹⁰¹ The much-litigated “necessity” defense in the Argentine investment arbitrations,¹⁰² for example, advances a justificatory

¹⁰⁰ See Lorenzo Cotula, *Reconciling regulatory stability and evolution of environmental standards in investment contracts: Towards a rethink of stabilization clauses*, 1 *Journal of World Energy Law & Business* 2 (2008), at 158-179; Sheldon Leader, *Risk management, project finance and rights-based development*, pp. 107-141 in SHELDON LEADER AND DAVID ONG (EDS.), *GLOBAL PROJECT FINANCE, HUMAN RIGHTS AND SUSTAINABLE DEVELOPMENT* (Cambridge University Press, 2011) [hereafter, “LEADER AND ONG 2011”] (arguing in particular at p. 121 that “[i]f lenders and borrowers are to create projects able to give adequate place to the avoidance of damage...it may be necessary at certain points to carve out exceptions to the classic non-recourse model...this might only be a realistic prospect if either the sponsor is required to help meet the company’s shortfall in funds, or the lender relaxes its reimbursement schedule to make room for such delays. Negotiation among the parties, reflecting the impact of CSR (corporate social responsibility), would add this necessary element of flexibility to the positions...”); Lorenzo Cotula, *Freezing the balancing act? Project finance, legal tools to manage regulatory risk, and sustainable development*, pp. 142-173 in LEADER AND ONG 2011 (observing at p. 144 that while “increasingly broad stabilization clauses tend to ensure a level of regulatory stability that far exceeds that accorded by international law under regulatory taking doctrine”, while proposing in p. 162 two options for the construction and treatment of stabilization clauses to reflect sustainable development compliance – “(a) carefully limiting the scope of stabilization clauses; and (b) adopting an evolutionary approach to their application.”).

¹⁰¹ See DIANE A. DESIERTO, *NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION* (Martinus Nijhoff, 2012), at 167-170 [hereafter, “DESIERTO 2012”]; UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *THE PROTECTION OF NATIONAL SECURITY IN IIAs* (2009), available at: http://unctad.org/en/Docs/diaeia20085_en.pdf (last accessed 10 September 2012).

¹⁰² Note that the exceptions clause in these arbitrations typically follow the formulation of Article XI of the 1991 Argentina-US BIT: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of obligations with respect to the maintenance of international peace or security, or the Protection of its own essential security interests.” For some of the divergent interpretations of this clause, see William Burke-White and Andreas von Staden, *Non-Precluded Measures Provisions, the State of Necessity, and State Liability for Investor Harms in Exceptional Circumstances*, in *LATIN AMERICAN INVESTMENT TREATY*

interpretation of the IIA exceptions clause that calls for preventing any breach of an IIA obligation from arising in the first place (and therefore obviating the need for any degree of compensability whatsoever), on the theory that any IIA obligation becomes inapplicable whenever a host State invokes the IIA exceptions or “measures not precluded” clause to defend its “essential security interests”.¹⁰³ To date, the majority of arbitral tribunals have rejected this sweeping interpretation of the IIA exceptions or “measures not precluded” clauses in the Argentine arbitrations, primarily due to interpretive remit of the actual text of the IIA exceptions clause.¹⁰⁴

Other exceptions clauses employ language seemingly more aligned with the enumeration of public health, labor, and public policy exceptions

ARBITRATION: THE CONTROVERSIES AND CONFLICTS (Kluwer, 2008); Jose E. Alvarez and Tegan Brink, *Revisiting the necessity defense: Continental Casualty v. Argentina*, Chapter 8 in KARL P. SAUVANT (ED.), YEARBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY (2010-2011, Oxford University Press); Jürgen Kurtz, *Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis*, 59 *International and Comparative Law Quarterly* 2 (April 2010) 325-371; Diane A. Desierto, *Necessity and Supplementary Means of Interpretation for Non-Precluded Measures in Bilateral Investment Treaties*, 31 *U. Pa. J. Int'l L.* 3 (2010), 827-934, available at:

[http://effect.net.law.upenn.edu/journals/jil/articles/volume31/issue3/Desierto31U.Pa.J.Int'l.L.827\(2010\).pdf](http://effect.net.law.upenn.edu/journals/jil/articles/volume31/issue3/Desierto31U.Pa.J.Int'l.L.827(2010).pdf) (last accessed 10 September 2012); Erlend M. Leonhardsen, *Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration*, 3 *Journal of International Dispute Settlement* 2 (2011); Andrew D. Mitchell and Caroline Henckels, *Variations on a Theme: Comparing the Concept of 'Necessity' in International Investment Law and WTO Law*, forthcoming with Chicago Journal of International Law, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2157250 (last accessed 15 October 2012).

¹⁰³ DESIERTO 2012, at pp. 171-183.

¹⁰⁴ See among others *LG&E Energy Corp and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB 02/1 3 October 2006, paras. 213-266; *Sempra Energy International v. Argentina*, Decision on Argentina's Application for Annulment of the Award, ICSID Case No. ARB/02/16, 29 June 2010, paras. 106-223; *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 25 April 2005, paras. 315-392; *Enron Corporation and Ponderosa Assets, LP v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007, paras. 303-339 (paras. 355-405 in the Decision on the Application for Annulment); *Continental Casualty Company v. Argentina*, Award, ICSID Case No. ARB/03/9, 5 September 2008, paras. 219-285; *BG Group PLC v. Argentina*, Final Award, *Ad hoc* (UNCITRAL), 24 December 2007, paras. 361-444; *National Grid PLC v. Argentina*, Award, *Ad hoc* (UNCITRAL), 3 November 2008, paras. 205-262; *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/19, 30 July 2010, paras. 249-271; *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010, paras. 482-485; *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011, paras. 552-670; *Impregilo SpA v. Argentine Republic*, Final Award, ICSID Case No. ARB/07/17, 21 June 2011, paras. 336-360; *Metalpar SA and Buen Aire SA v. Argentina*, Award on the Merits, ICSID Case No. ARB/03/5, 6 June 2008, paras. 208-211.

in GATT Article XX (“General Exceptions” clause) or GATS Article XIV (“General Exceptions” clause).¹⁰⁵ These kinds of exceptions clauses appear to be quite preponderant where States undertake investment negotiations within the broader context of (or in the shadow of) trade negotiations, such as Article 10.9.3(c) of Chapter 10 (Investment) of the 2004 Dominican Republic-Central America-United States Free Trade Agreement (DR-CAFTA);¹⁰⁶ Article 17 of the 2009 Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement;¹⁰⁷ Article 1106, Section 6 of Chapter 11 (Investment) of the 1992 North American Free Trade Agreement (NAFTA).¹⁰⁸ Other IIAs that facially bear similar language with GATT Article XX or GATS Article XIV provisions are Article 24(2)(b)(i) of the 1994 Energy Charter Treaty;¹⁰⁹ Article 8(3)(c) of the 2005 United States-Uruguay BIT;¹¹⁰ a substantial number of Canadian BITs

¹⁰⁵ See full text of GATT Article XX (General Exceptions) in: http://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm. (last accessed 10 September 2012) and GATS Article XIV (General Exceptions) in: http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm. (last accessed 10 September 2012).

¹⁰⁶ Dominican Republic-Central America-United States Free Trade Agreement, Chapter 10: Investment (DR-CAFTA 2004), Article 10.9.3.(c): “(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f) and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement; (ii) necessary to protect human, animal, or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.”

¹⁰⁷ ASEAN Comprehensive Investment Agreement, Article 17 (General Exceptions) available at: [http://www.aseansec.org/documents/ASEAN%20Comprehensive%20Investment%20Agreement%20\(ACIA\)%202012.pdf](http://www.aseansec.org/documents/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf) (last accessed 10 September 2012), which is almost wholly identical with GATT Article XX and GATS Article XIV.

¹⁰⁸ North American Free Trade Agreement, Chapter 11: Investment, 1992, Article 1106, Section 6:
 “6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures: (a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) necessary for the conservation of living or non-living exhaustible natural resources.”

¹⁰⁹ Energy Charter Treaty, 1994, Article 24(2)(b)(i): “(2) The provisions of this Treaty...other than with respect to subparagraph (i), Part III of the Treaty shall not preclude any Contracting Party from adopting or enforcing any measure (i) necessary to protect human, animal or plant life or health.”

¹¹⁰ Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment (United States-

[e.g. Clause III of the detailed Annex 1 (General and Specific Exceptions) to the 1997 Canada-Lebanon BIT,¹¹¹ Article XVII(2) and (3) of the 1996

Uruguay BIT 2005), Article 8(3)(c): “Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c) and (f) and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures: (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty; (ii) necessary to protect human, animal or plant life or health; or (iii) related to the conservation of living or non-living exhaustible natural resources.”

¹¹¹ Agreement between the Government of Canada and the Government of the Lebanese Republic for the Promotion and Protection of Investments (Canada-Lebanon BIT 1997), Annex 1, Clause III (General Exceptions and Exemptions):

- “1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
 - (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
 - (b) necessary to protect human, animal or plant life or health; or
 - (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.
3. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining reasonable measures for prudential reasons, such as:
 - (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
 - (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
 - (c) ensuring the integrity and stability of a Contracting Party's financial system.
4. Investments in cultural industries are exempt from the provisions of this Agreement. “Cultural industries” means natural persons or enterprises engaged in any of the following activities:
 - (a) the publication, distribution, or sale of books, magazines, periodicals or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing;
 - (b) the production, distribution, sale or exhibition of film or video recordings;
 - (c) the production, distribution, sale or exhibition of audio or video music recordings;
 - (d) the publication, distribution, sale or exhibition of music in print or machine readable form; or
 - (e) radio communications in which the transmissions are intended for direct

Canada-Panama BIT,¹¹² Article XVII of the 1997 Canada-Thailand BIT,¹¹³

reception by the general public, and all radio, television or cable broadcasting undertakings and all satellite programming and broadcast network services.

5. The provisions of Articles II, III, IV, V and VI of this Agreement do not apply to:
 - (a) procurement by a government or state enterprise;
 - (b) subsidies or grants provided by a government or a state enterprise, including government-supported loans, guarantees and insurance;
 - (c) any measure denying investors of the other Contracting Party and their investments any rights or preferences provided to the aboriginal peoples of Canada; or
 - (d) any current or future foreign aid program to promote economic development, whether under a bilateral agreement, or pursuant to a multilateral arrangement or agreement, such as the OECD Agreement on Export Credits.”

¹¹² Agreement between the Government of Canada and the Government of the Republic of Panama for the Promotion and Protection of Investments (Canada-Panama BIT 1996), Article XVII(2) and (3) (Application and General Exceptions):

- “2. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
3. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
 - (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
 - (b) necessary to protect human, animal or plant life or health; or
 - (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”

¹¹³ Agreement between the Government of Canada and the Government of the Kingdom of Thailand for the Promotion and Protection of Investments (Canada-Thailand BIT 1997), Article XVII (Application and General Exceptions):

- “(1) This Agreement shall apply to any investment made by an investor of one Contracting Party in the territory of the other Contracting Party before or after the entry into force of this Agreement.
- (2) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
- (3) Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
 - (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
 - (b) necessary to protect human, animal or plant life or health; or
 - (c) relating to the conservation of living or non-living exhaustible natural

Article XVII of the 1996 Canada-Barbados BIT,¹¹⁴ Article XVII of the 1996 Canada-Ecuador BIT,¹¹⁵ Article XVII of the 1996 Canada-Egypt BIT,¹¹⁶ Clause III of the detailed Annex I (General and Specific Exceptions) to the 1999 Canada-El Salvador BIT,¹¹⁷ Clause III of the detailed Annex I (General and Specific Exceptions) to the 1998 Canada-Costa Rica BIT,¹¹⁸ Clause III of the detailed Annex I (General and Specific Exceptions Special Provisions) to the 1997 Canada-Croatia BIT,¹¹⁹ Article XVII of the 1995 Canada-Latvia BIT,¹²⁰ Article XVII of the 1996 Canada-

resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

- (d) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (e) essential to the acquisition or distribution of products in general or local short supply, provided that any such measures shall be consistent with the principle that all investors are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

(4) The Annexes shall form an integral part of this Agreement.”

¹¹⁴ *Virtually identical to the language in footnote 113.* Agreement between the Government of Canada and the Government of Barbados for the Reciprocal Promotion and Protection of Investments (Canada-Barbados BIT 1996), Article XVII (Application and General Exceptions).

¹¹⁵ *See language in footnote 113.* Agreement between the Government of Canada and the Government of the Republic of Ecuador for the Promotion and Reciprocal Protection of Investments (Canada-Ecuador BIT 1996), Article XVII (Application and General Exceptions).

¹¹⁶ *See language in footnote 113.* Agreement between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments (Canada-Egypt BIT 1996).

¹¹⁷ *Language similar to footnote 112.* Agreement between the Government of Canada and the Government of the Republic of El Salvador for the Promotion and Protection of Investments (Canada-El Salvador BIT 1999), Annex 1 (General and Specific Exceptions), Clause III (General Exceptions and Exemptions).

¹¹⁸ *Language similar to footnote 112.* Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (Canada-Costa Rica BIT 1998), Annex 1 (General and Specific Exceptions), Clause III (General Exceptions and Exemptions).

¹¹⁹ *Language similar to footnote 112.* Agreement between the Government of Canada and the Government of the Republic of Croatia for the Promotion and Protection of Investments (Canada-Croatia BIT 1997), Annex 1 (General and Specific Exceptions Special Provisions), Clause III (General Exceptions and Exemptions).

¹²⁰ *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of Latvia for the Promotion and Protection of Investments (Canada-Latvia BIT 1995), Article XVII (Application and General Exceptions).

Romania BIT,¹²¹ Article XVII of the 1995 Canada-South Africa BIT,¹²² Article XVII of the 1995 Canada-Trinidad and Tobago BIT,¹²³ Article XVII of the 1994 Canada-Ukraine BIT,¹²⁴ Clause III in the detailed Annex 1 (General and Specific Exceptions Special Provisions) to the 1997 Canada-Uruguay BIT,¹²⁵ Clause II of detailed Annex to the 1996 Canada-Venezuela BIT,¹²⁶ and Article XVII of the 1997 Canada-Armenia BIT¹²⁷]; as well as several Japanese BITs which also contain procedural requirements for a State Party implementing a non-conforming measure [*e.g.* non-conforming measures under Article 16 of the 2002 Japan-Korea BIT,¹²⁸ Article 15 of the

¹²¹ *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of the Republic of Romania for the Promotion and Reciprocal Protection of Investments, Article XVII (Application and General Exceptions).

¹²² *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of the Republic of South Africa for the Promotion and Protection of Investments (Canada-South Africa BIT 1995), Article XVII (Application and General Exceptions).

¹²³ *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments (Canada-Trinidad and Tobago BIT 1995), Article XVII (Application and General Exceptions).

¹²⁴ *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of Ukraine for the Promotion and Protection of Investments (Canada-Ukraine BIT 1994), Article XVII (Application and General Exceptions).

¹²⁵ *Language similar to footnote 112.* Agreement between the Government of Canada and the Government of the Eastern Republic of Uruguay for the Promotion and Protection of Investments, Annex 1 (General and Specific Exceptions Special Provisions), Clause III (General Exceptions and Exemptions).

¹²⁶ Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (Canada-Venezuela BIT 1996), Clause II (NAFTA, Group of Three Treaty and Exceptions).

¹²⁷ *See similar language in footnote 113.* Agreement between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments, Article XVII (Application and General Exceptions).

¹²⁸ Agreement between the Government of Japan and the Government of the Republic of Korea for the Liberalisation, Promotion and Protection of Investment (Japan-Republic of Korea BIT 2002), Article 16:

“1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may:

- (a) take any measure which it considers necessary for the protection of its essential security interests;
 - (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or
 - (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons;
- (b) take any measure in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security;
- (c) take any measure necessary to protect human, animal or plant life or health; or

2003 Japan-Vietnam BIT,¹²⁹ and Article 18 (General and Security Exceptions) of the 2008 Japan-Lao People's Democratic Republic BIT).¹³⁰ While these examples of IIA practices purposely reflect States' tangible adoption of international trade law public policy exceptions, the greater majority of IIAs at large do not uniformly refer to GATT Article XX or GATS Article XIV. This makes a centralized interpretation of an "economic security defense"¹³¹ or public policy exception in an IIA difficult to achieve between international investment tribunals confronted with diverse treaty language and contexts. States concerned with retaining sufficient policy flexibility in an IIA to meet social protection objectives in the future should carefully craft the exceptions clause to reflect its precise scope and effects.

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- (d) take any measure necessary for the maintenance of public order. The public order exceptions may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
2. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall not use such measure as a means of avoiding its obligations.
 3. In cases where a Contracting Party takes any measure, pursuant to paragraph 1 above, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 11, that Contracting Party shall, prior to the entry into force of the measure or as soon thereafter as possible, notify the other Contracting Party of the following elements of the measure: (a) sector and sub-sector or matter; (b) obligation or article in respect of which the measure is taken; (c) legal source or authority of the measure; (d) succinct description of the measure; and (e) motivation or purpose of the measure.
 4. Notwithstanding the provisions of paragraph 1 of Article 2 of this Agreement, each Contracting Party may prescribe formalities in connection with investment and business activities of investors of the other Contracting Party in its territory, provided that such formalities do not impair the substance of the rights under this Agreement."

¹²⁹ See identical provision in footnote 128. Agreement between Japan and the Socialist Republic of Vietnam for the Liberalization, Promotion and Protection of Investment (Japan-Vietnam BIT 2003), Article 15.

¹³⁰ See identical provision in footnote 128. Agreement between Japan and the Lao People's Democratic Republic for the Liberalization, Promotion and Protection of Investment (Japan-Lao People's Democratic Republic BIT 2008), Article 18 (General and Security Exceptions).

¹³¹ See Andrea K. Bjorklund, *Economic Security Defences in International Investment Law*, pp. 479-503 in KARL P. SAUVANT (ED.), *YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY* (2008-2009).

2.4. *Investment definition and treaty applicability provisions*

States can also use treaty applicability provisions as further means to retain policy flexibility to meet social protection and public interest objectives. IIA coverage (including the ability for investors to seek direct recourse through the investor-State dispute settlement mechanism in the IIA) could be designed to apply only to investments that comport with a State's development and public policy objectives. The definition of an investment, or including other provisions in the IIA that expressly determine its applicability to certain types of investment, could act as possible filters to reinforce host States' regulatory prerogatives in relation to IIA-covered investments. In practice, however, treaty applicability remains a delicate line that arbitral tribunals tread in very different ways.

Recent controversies, for example, reveal a continuing debate on the requisite elements of an "investment" for purposes of IIA coverage as well as for Article 25(1) of the ICSID Convention.¹³² The polemical question involves determining whether the "contribution to a host State's development" (otherwise known as the *Salini* test)¹³³ should be part of the required jurisdictional criteria that investors must hurdle to be able to avail of the direct recourse opened to covered investors under the IIA's investor-State dispute settlement mechanism. While the majority of arbitral tribunals thus far have preferred to regard this aspect as a mere feature, and not a definitive criterion or threshold requirement to establish the existence of an investment,¹³⁴ some tribunals have chosen to admit "contribution to a

¹³² Diane A. Desierto, *Development as an International Right: Investment in the new Trade-Based IIAs*, 3 Trade, Law and Development 2 (2011) 296-333. See also Diane A. Desierto, *Deciding IIA Applicability: The Development Argument in Investment*, forthcoming chapter in FREYA BAETENS (ED.), INVESTMENT LAW WITHIN INTERNATIONAL LAW: AN INTEGRATIONIST PERSPECTIVE (Cambridge University Press, 2013).

¹³³ *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para. 52: "...doctrine generally considers that investment infers: contributions, a certain duration of the performance of the contract and a participation in the risks of the transaction...In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition."

¹³⁴ *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v. Paraguay*, ICSID Case No. ARB/07/9, Decision on Objection to Jurisdiction, paras. 82, 83, 94, 96 (May 29, 2009); *Pantechniki SA Contractors and Engineers v. Albania*, ICSID Case No. ARB/07/21, Award, paras. 36, 43, 38, (July 28, 2009); *Fakes v. Turkey*, ICSID Case No. ARB/07/20, Award, para. 111 (July 12, 2010); *Alpha Projektholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award, paras. 312-313 (October 20, 2010); *Conorzio Groupement LESI and ASTALDI v. Algeria*, ICSID Case No. ARB/05/3, Decision on

host State's development" in any event as a relatively easy and porous standard for investors to satisfy, so long as some linkage could be shown between the investment and a favorable impact upon the host State's overall macroeconomy (and no matter how attenuated or empirically unverified that linkage is in reality).¹³⁵ The unscientific approach to the concept of "contribution to economic development" has made this a relatively ineffective standard by which investments could be excluded from the coverage of IIAs.¹³⁶ IIA practices show how States also choose to differentiate between aspects of social protection and the public interest for which they will design *relative* policy flexibility (e.g. non-applicability of IIA standards to certain measures), as opposed to *absolute* policy flexibility (e.g. complete inapplicability of the entire IIA). Many IIAs show that States favor institutionalizing relative policy flexibility for most public

Jurisdiction, paras. 72-73 (July 12, 2006); *Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, paras. 114-115 (April 9, 2009); *Malicorp Ltd. v. Egypt*, ICSID Case No. ARB/08/18, Award, para. 113 (January 31, 2011); *Global Trading Resource Corp. and Globex International Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award (November 23, 2010); *RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14, Award, paras. 244, 264 (March 11, 2009); *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, para. 273 (January 14, 2010).

¹³⁵ *Consortium RFCC v. Morocco*, ICSID case No. ARB/00/6, Decision on Jurisdiction, para. 65 (July 16, 2001); *Bayindir Insaat Turizm Ticaret ve Sanayi A S v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, para. 137 (November 14, 2005); *Toto Costruzioni Generali SpA v. Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, para. 86 (September 8, 2009); *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction, paras. 116-117 (July 6, 2007); *Helnan International Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, para. 77 (October 17, 2006); *Saipem SpA v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, para. 101 (March 21, 2007); *Jan de Nul NV and Dredging International NV v. Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, para. 92 (June 16, 2006); *Noble Energy Inc. and Machala Power Cia Ltd. v. Ecuador and Consejo Nacional de Electricidad*, ICSID Case No. ARB/05/12, Decision on Jurisdiction, para. 132 (March 5, 2008); *Ceskoslovenska Obchodni Banka As (CSOB) v. Slovakia*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction and Admissibility, para. 378 (August 4, 2011); *Societe Generale v. Dominican Republic*, LCIA Case No. UN 7927, Award on Preliminary Objections to Jurisdiction, paras. 16, 30 (September 19, 2008).

¹³⁶ For the few awards that denied the existence of a covered investment under an IIA, see *Malaysia Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction (May 17, 2007) paras. 123-124; *Joy Mining Machinery Ltd. v. Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, para. 57 (July 30, 2004); *Mitchell v. The Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, para. 33 (October 27, 2006).

policy areas,¹³⁷ and rarely reserve absolute policy flexibility except for key sovereign functions such as taxation matters.¹³⁸

¹³⁷ See 1998 United States-Bolivia BIT Article II(2)(b) (on intellectual property); 1982 United States-Egypt BIT Protocol, Clause 4 (on ownership of real estate); NAFTA Article 1108 (Reservations and Exceptions); 2004 DR-CAFTA Article 10.9(3)(b) (making some IIA provisions inapplicable to intellectual property, competition laws, procurement, among others); 2005 United States-Uruguay BIT, Article 8(3) [identical to DR-CAFTA Article 10.9(3)]; 2006 Canada-Peru BIT, Article 9(5) (removing public procurement, sovereign subsidies/loans/insurance, and public retirement pension/social security systems from the coverage of national treatment and MFN obligations in the IIA); 2009 Canada-Czech Republic BIT, Article IV(2) (removing sovereign subsidies, grants, and government-supported loans from national treatment and MFN obligations); 2010 Canada-Slovakia BIT, Article IV(2) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary-Azerbaijan BIT, Article 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 2007 Hungary-Jordan BIT, Article 3(3) (removing obligations as a member of a customs, economic or monetary union, common market, or free trade area from the coverage of national treatment and MFN obligations); 1994 United States-Jamaica BIT Article II(9) (which does not apply MFN obligations to advantages accorded by either State to third-country investors under free trade or customs unions agreements or GATT).

¹³⁸ See 2009 Canada-Jordan BIT, Article 10(6) (“The provisions of this Agreement shall not apply to investments in cultural industries.”); 1988 China-New Zealand BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting State...”); 1999 Argentina-New Zealand BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 1985 China-Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 2002 Spain-Bosnia and Herzegovina BIT, Article 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Czech Republic-Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 1993 Poland-Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 1995 Russian Federation-Hungary BIT, Article 11(2) (“The provisions of this Agreement shall not apply to taxation matters.”); 1993 Russian Federation-Denmark BIT, Articles 11(2) and (3) (“This Agreement shall not apply to the Faroe Islands and Greenland...The provisions of this Agreement shall not apply to taxation.”); 1999 Slovenia-Singapore BIT, Articles 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 2002 Spain-Jamaica BIT, Article 12(2) (“The treatment granted under this Agreement shall not apply to tax matters.”); 1995 Singapore-Pakistan BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 2005 Uganda-Belgium-Luxembourg Economic Union BIT, Article 4(4) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 1995 Sweden-Russian Federation BIT, Article 11(2) (“The provisions of this Agreement shall not apply to taxation matters, except as follows: Articles 4, 6, 8, and 9 may apply to taxes imposed by a Contracting Party but only if such taxes have an effect equivalent to

2.5. *Balance of payments and financial crises provisions*

Newer generations of IIAs have started to emulate GATT Article XII and GATS Article XII – provisions in international trade law that authorize States to impose certain restrictions in order to safeguard their balance of payments position.¹³⁹ Recent investment agreements concluded by the Association of Southeast Asian Nations (ASEAN) – a region particularly alert to currency risks and capital flight after its experience with the 1998 Asian financial crisis – all contain extensive provisions authorizing States to take temporary “measures to safeguard balance of payments”, such as restrictions on transfers of capital.¹⁴⁰ These provisions appear more detailed (and are worded in a more expansive and self-judging manner) than other IIAs that only recognize States’ rights to *equitably* exercise sovereign powers to temporarily limit transfers during exceptional balance of payments difficulties.

United Kingdom BITs, for example, often put a cap on the period for imposing restrictions and the extent of such restrictions, also stipulating a mandatory minimum amount to be transferred annually [*e.g.* Article 4(2)(b) of the 1987 United Kingdom-Jamaica BIT,¹⁴¹ Article 6(1) of the

expropriation.”); 1997 Hungary-Singapore BIT, Article 5(2) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”); 2004 China-Uganda BIT, Article 3(5) (“The provisions of this Agreement shall not apply to matters of taxation in the territory of either Contracting Party...”).

¹³⁹ GATT Article XII (Restrictions to Safeguard the Balance of Payments); GATS Article XII (Restrictions to Safeguard the Balance of Payments). See Chantal Thomas, *Balance of Payments Crises in the Developing World: Balancing Trade, Finance and Development in the New Economic Order*, 15 American University International Law Review 6 (2000) 1249-1277, at 1255-1261.

¹⁴⁰ 2009 ASEAN Comprehensive Investment Agreement, Article 16 (Measures to Safeguard Balance of Payments); 2008 Agreement on Comprehensive Economic Partnership among Japan and Member States of the Association of Southeast Asian Nations, Article 21 (Measures to Safeguard Balance of Payments); 2009 Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, Article 11 (Temporary Safeguard Measures); 2009 Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the People’s Republic of China, Article 11 (Measures to Safeguard the Balance of Payments).

¹⁴¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Jamaica for the Promotion and Protection of Investments (United Kingdom-Jamaica BIT 1987), Article 4(2)(b) (“...Resulting payments shall be freely transferable, subject to the right of each Contracting Party in exceptional balance of payments difficulties to exercise equitably and in good faith powers conferred by its laws to place limits on the amount transferred in cases where the

1987 United Kingdom-Antigua and Barbuda BIT,¹⁴² Article 6(4) of the 1990 United Kingdom-Argentina BIT,¹⁴³ Article 6 of the 1987 United Kingdom-Benin BIT,¹⁴⁴ Article 6(1) of the 1988 United Kingdom-Grenada BIT,¹⁴⁵ Article 6 of the 1985 United Kingdom-Haiti BIT,¹⁴⁶ Article 7(2) of the 1987 United Kingdom-Hungary BIT,¹⁴⁷ Article 5 of the 1981 United Kingdom-Malaysia BIT,¹⁴⁸ Article 6(1) of the 1986 United Kingdom-Malta

compensation constitutes a large sum, provided however that the transfer of a minimum of 33 1/3 percent a year is guaranteed...”).

¹⁴² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Antigua and Barbuda for the Promotion and Protection of Investments (United Kingdom-Antigua and Barbuda BIT 1987), Article 6(1) (“...either Contracting Party may in exceptional balance of payments difficulties exercise equitably and in good faith powers conferred by its laws to deter transfer for a limited period, other than transfers of profits, interests, dividends, royalties and fees, which shall not be impeded...”).

¹⁴³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Argentina for the Promotion and Protection of Investments (United Kingdom-Argentina BIT 1990), Article 6(3) (“Each Contracting Party shall have the right in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws and procedures to limit the free transfer of investments and returns. Such limitation shall not exceed a period of eighteen months in respect of each application to transfer and shall allow the transfer to be made in instalments within that period but the transfer of at least fifty per cent of the capital and of the returns shall be permitted by the end of the first year. In no circumstances may such limitations be imposed on the same investor after a period of three years from the start of the first such limitation. Pending the transfer of his capital and returns, the investor shall have the opportunity to invest them in a manner which will preserve their real value until the transfer occurs.”).

¹⁴⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of Benin for the Promotion and Protection of Investments (United Kingdom-Benin BIT 1987), Article 6 *similar to footnote 143*.

¹⁴⁵ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Grenada for the Promotion and Protection of Investments (United Kingdom-Grenada BIT 1988), Article 6(1) *similar to footnote 143*.

¹⁴⁶ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Haiti for the Promotion and Protection of Investments (United Kingdom-Haiti BIT 1985), Article 6 *similar to footnote 143*.

¹⁴⁷ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People’s Republic for the Promotion and Reciprocal Protection of Investments (United Kingdom-Hungary BIT 1987), Article 7(1) (“...subject to the right of each Contracting Party in exceptional balance of payments difficulties and for a limited period to exercise equitably and in good faith powers conferred by its laws. Such powers shall not however be used to impede the transfer of profit, interest, dividends, royalties or fees; as regards investments and any other form of return, transfer of a minimum of 20 per cent a year is guaranteed.”).

¹⁴⁸ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of

BIT,¹⁴⁹ Article 6 of the 1986 United Kingdom-Mauritius BIT,¹⁵⁰ Article 7 of the 1990 United Kingdom-Morocco BIT,¹⁵¹ Article 6(1) of the 1987 United Kingdom-Poland BIT,¹⁵² Article 6 of the 1989 United Kingdom-Tunisia BIT,¹⁵³ Article 6(1) of the 1991 United Kingdom-Turkey BIT,¹⁵⁴].

Hungarian BITs, on the other hand, tend to use more general language focusing on standards of equitableness, non-discrimination, and good faith [*e.g.* Article 13(2)(a) and (b) of the 2007 Hungary-Azerbaijan BIT¹⁵⁵ and the 2007 Hungary-Jordan BIT¹⁵⁶], while several **Netherlands**

Investments (United Kingdom-Malaysia BIT 1981), Article 5 (“...each Contracting Party shall have the right to restrict in exceptional circumstances for balance of payments needs the transfer of such proceeds in a manner consistent with its rights and obligations as a member of the International Monetary Fund.”).

¹⁴⁹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Malta for the Promotion and Protection of Investments (United Kingdom/Malta BIT 1986), Article 6(1) *similar to footnote 148*.

¹⁵⁰ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments (United Kingdom-Mauritius BIT 1986), Article 6 *similar to footnote 148*.

¹⁵¹ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Morocco for the Promotion and Protection of Investments (United Kingdom-Morocco BIT 1990), Article 7 *similar to footnote 148*.

¹⁵² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Polish People’s Republic for the Promotion and Reciprocal Protection of Investments (United Kingdom-Poland BIT 1987), Article 6(1) *similar to footnote 148*.

¹⁵³ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Tunisian Republic for the Promotion and Protection of Investments (United Kingdom-Tunisia BIT 1989), Article 6 *similar to footnote 148*.

¹⁵⁴ Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Turkey for the Promotion and Protection of Investments (United Kingdom-Turkey BIT 1991), Article 6(1) *similar to footnote 148*.

¹⁵⁵ Agreement between the Republic of Hungary and the Republic of Azerbaijan for the Promotion and Reciprocal Protection of Investments (Hungary-Azerbaijan BIT 2007), Articles 13(2)(a) and 13(2)(b) (“(a) Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures that restrict transfers where the Contracting Party experiences serious balance of payments difficulties, or the threat thereof, and such restrictions are consistent with paragraph b. (b) Measures referred to in paragraph (a) shall be equitable, neither arbitrary nor unjustifiably discriminatory, in good faith, of limited duration and may not go beyond what is necessary to remedy the balance of payments situation...”).

¹⁵⁶ Agreement between the Republic of Hungary and the Hashemite Kingdom of Jordan for the Promotion and Reciprocal Protection of Investments (Hungary-Jordan BIT 2007), Article 13(2)(a) and (b) *identical to footnote 148*.

BITs stress the importance of a restriction's consistency with the International Monetary Fund's rules on transfer restrictions [*e.g.* Article 5(3) of the 2002 Netherlands-Yugoslavia BIT,¹⁵⁷ Clause 1 of the Protocol to the 2003 Netherlands-Korea BIT,¹⁵⁸ Article 7(1) of the 1985 Netherlands-Philippines BIT,¹⁵⁹ Article 5(4) of the 1991 Netherlands-Jamaica BIT,¹⁶⁰ Article 5(a) of the Protocol to the 2002 Netherlands-Namibia BIT,¹⁶¹ and

¹⁵⁷ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Federal Republic of Yugoslavia (Netherlands-Yugoslavia BIT 2002), Article 5(3) ("A Contracting Party may adopt or maintain measures inconsistent with its obligations under paragraph 1 of this Article in the event of serious balance-of-payments and external financial difficulties or threat thereof. Such measures: a) shall be consistent with the Articles of Agreement of the International Monetary Fund; b) shall not exceed those necessary to deal with the circumstances described in this paragraph; and c) shall be temporary and shall be eliminated as soon as conditions permit.").

¹⁵⁸ Agreement on the Promotion and Protection of Investments between the Government of the Kingdom of the Netherlands and the Government of the Republic of Korea (Netherlands-Korea, Republic of BIT 2003) Protocol Clause 1 *similar to footnote 151*.

¹⁵⁹ Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments (Netherlands-Philippines BIT 1985), Article 7(1) ("Each Contracting Party shall in respect of investments permit nationals of the other Contracting Party the unrestricted transfer in freely convertible currency of their investments and of the earnings from it to the country designated by those nationals, subject to the right of the former Contracting Party to impose equitably and in good faith such measures as may be necessary to safeguard the integrity and independence of its currency, its external financial position and balance of payments, consistent with its rights and obligations as a member of the International Monetary Fund.").

¹⁶⁰ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and Jamaica (Netherlands-Jamaica BIT 1991), Article 5(4) ("Each Contracting Party retains the right not to apply the provisions of paragraphs 1 and 2 of this Article to the item mentioned under paragraph 1(f) of this Article in cases of exceptional balance of payments difficulties and where large sums are involved. The exercise of this right shall be subject to the following conditions: i) it may be used for a limited period only, and only to the extent necessary; ii) it shall be exercised on a basis of non-discrimination; iii) at the request of the other Contracting Party, there shall be prompt and adequate consultations on the measures taken in exercise of the right referred to in this paragraph; (iv) transfer of a minimum of thirty-three and one-third percent a year is guaranteed.").

¹⁶¹ Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Namibia (Netherlands-Namibia BIT 2002), Protocol Ad Article 5(a) ("In case of serious balance of payments difficulties the Republic of Namibia may limit temporarily, for a maximum period of twelve months, the free transfer of capital pursuant to Article 5(g) only. These restrictions shall be imposed on an equitable, non-discriminatory and good faith basis. In case of such a delay in transfer, the investor shall be paid interest at a normal commercial rate on the amount concerned, from the day the transfer should have taken place until the day on which the transfer actually took place.").

Article 7 of the 1984 Netherlands-Sri Lanka BIT¹⁶²].

A significant number of **Canadian BITs** appear to favor affording host States more flexibility to respond to balance of payments crises [*e.g.* Article IX(3) of the 2010 Canada-Slovakia BIT,¹⁶³ Article XVII(4) of the 2009 Canada-Latvia BIT,¹⁶⁴ and 2009 Canada-Romania BIT,¹⁶⁵ Article IX(3) of the 2009 Canada-Czech Republic BIT,¹⁶⁶ Article VII(2) of the 1991 Canada-Hungary BIT,¹⁶⁷ as well as the 1990 Canada-Poland BIT¹⁶⁸]; while Clause 6 of the Protocol to the 1991 United States-Sri Lanka BIT¹⁶⁹ as well as several **German BITs** tend to contain specific language on

¹⁶² Agreement between the Kingdom of the Netherlands and the Democratic Socialist Republic of Sri Lanka for the Promotion and Protection of Investments (Netherlands-Sri Lanka BIT 1984), Article 7 *similar to footnote 153*.

¹⁶³ Agreement between the Government of Canada and the Slovak Republic for the Promotion and Protection of Investments, Article IX(3) *similar to footnote 148*.

¹⁶⁴ Agreement between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments (Canada-Latvia BIT 2009), Article XVII(4) *similar to footnote 148*.

¹⁶⁵ Agreement between the Government of Canada and the Government of Romania for the Promotion and Reciprocal Protection of Investments (Canada-Romania BIT 2009), Article XVII(4) *similar to footnote 148*.

¹⁶⁶ Agreement between Canada and Czech Republic for the Promotion and Protection of Investments (Canada-Czech Republic BIT 2009), Article IX(3) *similar to footnote 148*.

¹⁶⁷ Agreement between the Republic of Canada and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments (Canada-Hungary BIT 1991), Article VII(2) (“In cases where exceptional balance of payments difficulties exist, and then for a period not exceeding eighteen months, the contracting Party shall guarantee the transfer of any amount mentioned in paragraph 1 of this Article on a *pro rata* basis, provided that the total period for the transfer does not exceed five years.”)

¹⁶⁸ Agreement between the Government of Canada and the Government of the Republic of Poland for the Promotion and Protection of Investments (Canada-Poland BIT 1990), Article VII(2) *identical to footnote 155*.

¹⁶⁹ Agreement between the United States of America and the Democratic Republic of Sri Lanka Concerning the Encouragement and Reciprocal Protection of Investment (United States-Sri Lanka BIT 1991), Protocol Clause 6 (“6. With respect to Article IV, paragraph 1(e), a Party may, in the event of exceptional balance of payments difficulties and in consultation with the other Party, temporarily delay transfer of the proceeds from the sale or liquidation of an investment, but only on the following conditions: a) the transfer of such proceeds may be delayed for a period not to exceed three years from the date the transfer is requested; b) a minimum of thirty three and one third percent of the proceeds may be transferred each year; c) the Party availing itself of this provision shall ensure that the portion of the proceeds whose transfer is delayed can be invested in a manner that will preserve its real value free of exchange rate risk; d) this provision will be used only to the extent and for the time necessary to restore foreign exchange reserves to a minimally acceptable level; and e) the Party availing itself of this provision will ensure that investments under this Treaty are accorded treatment with respect to such transfers in a manner not less favorable than that accorded nationals or companies of third countries.”).

restructuring payment terms [e.g. Clause 4 of the Protocol to the 1995 Germany-Ghana BIT,¹⁷⁰ Clause 5 of the Protocol to the 1982 Germany-Lesotho BIT,¹⁷¹ Article 5(2) of the 1985 Germany-Saint Lucia BIT,¹⁷² Clause 5(b) of the 1990 Germany-Swaziland BIT,¹⁷³ Clause 5(c) of the Protocol to the 1994 Germany-Namibia BIT,¹⁷⁴ Clause 5 of the Protocol to the 1986 Germany-Nepal BIT,¹⁷⁵ Clause 4(c) of the Protocol to the 1981 Germany-Bangladesh BIT¹⁷⁶]. In contrast, Article 6(4) of the 1999

¹⁷⁰ Treaty between the Federal Republic of Germany and the Republic of Ghana concerning the Encouragement and Reciprocal Protection of Investments (Germany-Ghana BIT 1995), Protocol Clause 4 (“In cases of exceptional balance of payments difficulties, the period within which transfers have to be completed may be extended to a maximum of three months. The Contracting Party taking such measure shall ensure that it is carried out in a non-discriminatory manner and is no broader in scope or duration than absolutely necessary.”).

¹⁷¹ Agreement between the Kingdom of Lesotho and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (Germany-Lesotho BIT 1982), Protocol Clause 5 (“Insofar as necessitated by extreme balance of payments difficulties, either Contracting Party may, on the decision of the competent organ, restrict for a limited period the transfer of the proceeds of liquidation in the event of the sale of the whole or any part of the investment. In any case an annual minimum transfer of 20 percent of the proceeds of liquidation is guaranteed.”).

¹⁷² Treaty between St. Lucia and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments (Germany-Saint Lucia BIT 1985), Article 5(2) (“In the event of exceptional balance of payments difficulties, the transfer of the proceeds from liquidation may be restricted to annual instalments of at least 20 percent so that the transfer will be completed within a maximum period of five years from the date of liquidation.”).

¹⁷³ Treaty between the Federal Republic of Germany and the Kingdom of Swaziland concerning the Encouragement and Reciprocal Protection of Investments (Germany-Swaziland BIT 1990), Article 5(b), *similar to footnote 152*.

¹⁷⁴ Treaty between the Federal Republic of Germany and the Republic of Namibia concerning the Encouragement and Reciprocal Protection of Investments (Germany-Namibia BIT 1994), Protocol Clause 5(c) (“In the case of exceptional balance of payments difficulties, the Government of the Republic of Namibia is entitled, for a maximum of three years, to limit the free transfer of the proceeds from the sale or liquidation of an investment of the nationals or companies of the other Contracting Party and to prescribe transfer by instalments. At the investor’s request, amounts not transferred shall be paid into an account in convertible currency and shall accrue interest at the rate quoted on the international market for the currency concerned.”).

¹⁷⁵ Treaty between the Federal Republic of Germany and the Kingdom of Nepal concerning the Encouragement and Reciprocal Protection of Investments (Germany-Nepal BIT 1986) Protocol Clause 5 *similar to footnote 153*.

¹⁷⁶ Agreement between the Federal Republic of Germany and the People’s Republic of Bangladesh concerning the Encouragement and Reciprocal Protection of Investments, Protocol Clause 4(c) (“In the event of exceptional balance of payments difficulties, the transfer of the proceeds from liquidation may be restricted to annual instalments of at least 20 percent so that the transfer will be completed within a maximum period of five years from the date of liquidation.”).

Portugal-Mexico BIT¹⁷⁷ as well as some **Chinese BITs** pose few restrictions on host States' possible balance of payments measures [*e.g.* Article 7(4) of the 2004 China-Uganda BIT,¹⁷⁸ Article 6(2) of the 2004 Finland-China BIT,¹⁷⁹ Article 8(3) of the 1986 China-Sri Lanka BIT,¹⁸⁰ Article 8(5) of the 2008 China-Mexico BIT¹⁸¹].

Czech BITs focus on assessing restrictive measures from international standards of non-discrimination, equitableness, and good faith rather than specific contours of restrictions [*e.g.* Article 6(4) of the 1998 Czech Republic-Costa Rica BIT,¹⁸² Clause 3 of the Protocol to the 1995

¹⁷⁷ Agreement between the Portuguese Republic and the United Mexican States on the Reciprocal Promotion and Protection of Investments (Portugal-Mexico BIT 1999), Article 6(4) ("In case of serious balance of payments difficulties or the threat thereof, each Contracting Party may temporarily restrict transfers, provided that such a Contracting Party implements measures or a programme in accordance with the International Monetary Fund's standards. This restriction would be imposed on an equitable, non-discriminatory and in good faith basis, and may not go beyond what is necessary to remedy the balance of payments situation.").

¹⁷⁸ Agreement between the Government of the Republic of Uganda and the Government of the People's Republic of China concerning Reciprocal Protection of Investments (China-Uganda BIT of 2004), Article 7(4) ("In case of serious balance of payments difficulties and external financial difficulties or the threat thereof, each Contracting Party may temporarily restrict transfers, provided that this restriction: i) shall be promptly notified to the other party; ii) shall be consistent with the articles of agreement with the International Monetary Fund; iii) shall be within an agreed period; iv) would be imposed in an equitable, non-discriminatory and in good faith basis.").

¹⁷⁹ Agreement between the Government of the Republic of Finland and the Government of the People's Republic of China for the Encouragement and Reciprocal Protection of Investments (Finland-China BIT 2004), Article 6(2) ("A Contracting Party may, in exceptional balance of payments difficulties, exercise through equitable, non-discriminatory and good faith basis regulatory measures in accordance with time limits specified by the IMF in such situations and through powers conferred by law.").

¹⁸⁰ Agreement between the Government of the People's Republic of China and the Government of the Democratic Socialist Republic of Sri Lanka on the Reciprocal Promotion and Protection of Investments (China-Sri Lanka BIT 1986), Article 8(3) ("Without prejudice to paragraph 1 of this Article, each Contracting Party may in exceptional balance of payments difficulties exercise effectively and in good faith and for a limited period of time, powers conferred by its laws.").

¹⁸¹ Agreement between the Government of the People's Republic of China and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (China-Mexico BIT 2008), Article 8(5) *similar to footnote 179*.

¹⁸² Agreement between the Czech Republic and the Republic of Costa Rica for the Promotion and Reciprocal Protection of Investments (Czech Republic-Costa Rica BIT 1998), Article 6(4) ("Each Contracting Party shall be entitled, under circumstances of exceptional or serious balance of payments difficulties, to limit transfers temporarily, on a fair and non-discriminatory basis, and in accordance with criteria accepted by international organizations of which both Contracting Parties are members. Limits on

Czech Republic-Philippines BIT,¹⁸³ Article 6(5) of the 2002 Czech Republic-Mexico BIT,¹⁸⁴].

Quite similarly, **Italian BITs** do not specify the exact terms of what should comprise host States' restrictions to protect their balance of payments position, other than to prescribe that such measures should conform to international legal standards of equitableness, non-discrimination, and good faith [*e.g.* Article 6(1)(c) of the 1993 Jamaica-Italy BIT,¹⁸⁵ Article VI(4) of the 2004 Italy-Yemen BIT,¹⁸⁶ Article VI(4) of the 2004 Italy-Nicaragua BIT,¹⁸⁷].

Article 7(3) of the 2003 Spain-Namibia BIT,¹⁸⁸ as well as a

transfers adopted or maintained by a Contracting Party under this paragraph shall be notified promptly to the other Contracting Party.”).

¹⁸³ Agreement between the Czech Republic and the Republic of the Philippines for the Promotion and Reciprocal Protection of Investments (Czech Republic-Philippines BIT 1995), Protocol Clause 3 (“With respect to Transfers (Article VI) it is the understanding of the Contracting Parties that the provisions of this Article shall not prevent either Contracting Party from taking temporary measures, applied on an ‘*erga omnes*’ basis, which are necessary to solve the balance of payments difficulties and are in accordance with the provisions of the international agreements to which both of the Contracting Parties adhere.”).

¹⁸⁴ Agreement between the Czech Republic and the United Kingdom on the Promotion and Reciprocal Protection of Investments (Czech Republic-Mexico BIT 2002), Article 6(5) (“In case of serious balance of payments difficulties or threats thereof, each Contracting Party may temporarily restrict transfers provided that such a Contracting Party implements measures or a programme in accordance with recognized international standards. These restrictions would be imposed on an equitable, non-discriminatory and in good faith basis.”).

¹⁸⁵ Agreement between the Government of Jamaica and the Government of the Italian Republic on the Promotion and Protection of Investments (Jamaica-Italy BIT 1993), Article 6(1)(c) (“the proceeds of the total or partial sale or liquidation by winding up or otherwise, of an investment; provided that, in cases where the proceeds constitute large sums and in periods of exceptional balance of payments difficulties, the transfer of a minimum of 33 1/3 % guaranteed over a period of three years at the relevant rate of interest...”).

¹⁸⁶ Agreement between the Government of the Italian Republic and the Government of the Republic of Yemen on the Promotion and Protection of Investments (Italy-Yemen BIT 2004), Article VI(4) (“In the event that, due to very serious balance of payments problems, one of Contracting Party were to temporarily restrict transfer of funds, these restrictions shall be applied to the investments related to this Agreement, only if the Contracting Party implements the relevant recommendations adopted by the International Monetary Fund in the specific case. These restrictions shall be adopted on an equitable and non-discriminatory basis and in good faith.”).

¹⁸⁷ Agreement between the Government of the Italian Republic and the Government of the Republic of Nicaragua on the Promotion and Protection of Investments (Italy-Nicaragua BIT 2004), Article VI(4) *similar to footnote 186*.

¹⁸⁸ Agreement between the Kingdom of Spain and the Republic of Namibia on the Promotion and Reciprocal Protection of Investments (Spain-Namibia BIT 2003), Article 7(3) *similar to footnote 170*.

substantial number of **Mexican BITs** [*e.g.* Article 9(4) of the 2005 Australia-Mexico BIT,¹⁸⁹ Article 7(6) of the 1998 Austria-Mexico BIT,¹⁹⁰ Article 6(6) of the 1998 Belgium-Luxembourg Economic Union-Mexico BIT,¹⁹¹ Article 6(5) of the 2000 Denmark-Mexico BIT,¹⁹² Article 7(4) of the 1999 Finland-Mexico BIT,¹⁹³ Article 7(4) of the 2000 Greece-Mexico BIT,¹⁹⁴ Article 8(4) of the 2007 India-Mexico BIT,¹⁹⁵ Article 6(4) of the 2005 Iceland-Mexico BIT,¹⁹⁶ Article 6(4) of the 1999 Italy-Mexico BIT,¹⁹⁷

¹⁸⁹ Agreement between the Government of Australia and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Australia-Mexico BIT 2005), Article 9(4) *similar to footnote 187*.

¹⁹⁰ Agreement between the United Mexican States and the Republic of Austria on the Promotion and Protection of Investments (Austria-Mexico BIT 1998), Article 7(6) *similar to footnote 186*.

¹⁹¹ Agreement between the United Mexican States and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments (Belgium-Luxembourg Economic Union-Mexico BIT 1998), Article 6(6) *similar to footnote 187*.

¹⁹² Agreement between the Government of the United Mexican States and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments (Denmark-Mexico BIT 2000), Article 6(5) *similar to footnote 187*.

¹⁹³ Agreement between the Government of the Republic of Finland and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (Finland-Mexico BIT 1999), Article 7(4) *similar to footnote 187*.

¹⁹⁴ Agreement between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments (Greece-Mexico BIT 2000), Article 7(4) *similar to footnote 186*.

¹⁹⁵ Agreement between the United Mexican States and the Government of the Republic of India on the Promotion and Reciprocal Protection of Investments (India-Mexico BIT 2007), Article 8(4) contains some more extensive language than those in most of the other Mexican BITs. (“4. In the event of serious balance of payments and external financial difficulties or threat thereof, a Contracting Party may adopt or maintain restrictions on payments or transfers related to investments, which shall: a) be consistent with the Articles of Agreement of the International Monetary Fund; b) avoid unnecessary damage to the commercial, economic, and financial interest of the investor of the other Contracting Party; c) not exceed those necessary to deal with the circumstances described in this paragraph; d) be temporary and be phased out progressively until the situation specified in this paragraph improves; e) be applied on an equitable, non-discriminatory and in a good faith basis; and f) be promptly notified to the other Contracting Party. The Contracting Party adopting any restrictions under this paragraph shall, upon request by the other Contracting Party, commence consultations with the latter in order to review the restrictions adopted by it.”)

¹⁹⁶ Agreement between the Government of the United Mexican States and the Government of the Republic of Iceland on the Promotion and Reciprocal Protection of Investments (Iceland-Mexico BIT 2005), Article 6(4), *similar to footnote 187*.

¹⁹⁷ Agreement between the Government of the Italian Republic and the Government of the United Mexican States for the Promotion and Mutual Protection of Investments (Italy-Mexico BIT 1999), Article 6(4).

Protocol to the 2000 Republic of Korea-Mexico BIT,¹⁹⁸ Ad Article 4 of the Protocol to the 1998 Netherlands-Mexico BIT,¹⁹⁹ Article 6(4) of the 2000 Sweden-Mexico BIT,²⁰⁰ Article 8(3) of the 2006 Trinidad and Tobago-Mexico BIT,²⁰¹ Article 8(4) of the 2006 United Kingdom-Mexico BIT,²⁰²] all contain similar formulations of balance of payments measures provisions as those found in the Italian BITs.

Finally, in contrast to most of the BITs surveyed here, it is noticeable that most **Australian BITs** confine their treaty language to simply recognizing States' inherent rights, "in exceptional balance of payments difficulties, to exercise equitably and in good faith powers conferred by its law",²⁰³ to restrict outgoing capital transfers. What is starkly evident from the IIAs surveyed here is that the provisions on balance of payments measures often make no reference to the host State's social protection objectives as the bases for policy flexibility needed to meet balance of payments or financial crises. The ultimate legality of capital transfer restrictions is made to depend only on compliance with payment restructuring terms; international standards of equitableness, non-discrimination, and good faith; and consistency with the IMF Articles of Agreement.

The foregoing discussion of substantive standards highlight several IIA design issues for States seeking to maintain policy flexibility to meet social protection objectives.

First, none of these substantive standards appear to have been formulated to date with sufficient particularity to acknowledge that host States' social protection duties warrant some degree of foreseeable policy

¹⁹⁸ Agreement between the Government of the United Mexican States and the Government of the Republic of Korea for the Promotion and Reciprocal Protection of Investments (Republic of Korea-Mexico BIT 2000), Protocol, *similar to footnote 187*.

¹⁹⁹ Agreement on Promotion, Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the United Mexican States (Netherlands-Mexico BIT 1998), Protocol Ad Article 4, *similar to footnote 187*.

²⁰⁰ Agreement between the Government of the Kingdom of Sweden and the Government of the United Mexican States concerning the Promotion and Reciprocal Protection of Investments (Sweden-Mexico BIT 2000), Article 6(4) *similar to footnote 187*.

²⁰¹ Agreement between the Government of the United Mexican States and the Government of the Republic of Trinidad and Tobago on the Promotion and Reciprocal Protection of Investments (Trinidad and Tobago-Mexico BIT 2006), Article 8(3) *similar to footnote 187*.

²⁰² Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments (United Kingdom-Mexico BIT 2006), Article 8(4) *similar to footnote 187*.

²⁰³ See 1992 Australia-Indonesia BIT, Article VII(1); 1994 Australi-Lao People's Democratic Republic, Article 9(1).

flexibility in the interpretation of these IIA standards.

Second, host States that indeed attempt interpretations of these IIA standards to argue for policy flexibility tend to do so long after controversies arise during the investor-State dispute settlement process, and on a piecemeal basis before different arbitral tribunals, each of whom can extrapolate different valences of meaning for the same IIA standard in distinct cases.

Third, none of the IIA substantive standards examined here fully capture the point that host States will very likely have continuing *dynamic* (and not static) international obligations to respect, protect, and fulfill economic, social, and cultural rights, and as such, retaining policy flexibility should be seen likewise as a matter of international legal obligation. Under the present formulations of substantive standards in the IIA, it is difficult to reach well-justified interpretations that fully acknowledge host States' international economic, social, and cultural obligations as part of the corpus of investment obligations. If an IIA's substantive standards were to be framed purposely to permit evolutionary interpretation, there can be little danger of heightening regulatory risk if all IIA parties can mutually and transparently anticipate host States' needs for continuing policy flexibility to meet both IIA obligations as well as social protection obligations in international law. The intention to permit an evolutionary interpretation of IIA standards must be clearly discernible from the "generic" quality of the terms used in those IIA standards. Although there is to date thin investment arbitral practice that admits evolutionary interpretations of IIA standards,²⁰⁴ as will be discussed in **Part II** of this Report, future IIA design could deliberately provide for evolutionary interpretation in conformity with limitations set under international jurisprudence. The International Court of Justice has already discussed possibility that treaty drafters purposely allow for evolutionary interpretation of treaty terms in its 2009 Judgment in the *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*.²⁰⁵

²⁰⁴ See *Mondev International Ltd v. United States*, Award, ICSID Case No. ARB(AF)/99/2, 11 October 2002, para. 123 (in relation to the fair and equitable treatment standard in NAFTA Article 1105(1)).

²⁰⁵ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, para. 66: "where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time, and where the treaty has been entered into for a very long period or is of 'continuing duration', the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning." The Court has previously accepted evolutionary interpretation of treaties in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security*

C. Paradoxes in the Treatment of Regulatory Risk: Fair and Equitable Treatment (FET) and Indirect Expropriation Standards

Investors share responsibility with host States to conduct a complete due diligence that covers all *foreseeable* regulatory risks. The *ad hoc* Committee in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* stressed this particular point when it denied a petition for annulment of an arbitral award, in a case that had involved an investment project that was initially authorized by one government agency, but subsequently found to be inconsistent with the national government's urban development policy.²⁰⁶

The Committee found no basis to annul the arbitral tribunal's decision, which had allocated responsibility equally to both the host State (for breaching the fair and equitable treatment standard) as well as to the investor-claimants (for failing to protect themselves from business risks inherent in the investment), observing that in this particular case, "a foreign investor failed to complete due diligence on a matter fundamental to the investment. Land-use control is a core concern for the State... Whatever contracts foreign investors may make with the owners of rural land cannot be allowed to disrupt the due application of the law of the host State, nor should the vagueness inherent in such treaty standards as 'fair and equitable treatment' allow international tribunals to second-guess planning decisions duly made (as the decisions here were made) in accordance with that law."²⁰⁷ To this end, investors and host States must cooperate to ensure transparency of regulations and regular information flows, especially between government agencies of the same State.

It should stand to reason that regulatory risk must be assessed from the joint perspective of investors as well as host States. However, tribunals have not always taken this approach. Rather, when a host State's regulatory change is alleged to breach an IIA standard, arbitral scrutiny has more often proven to be predominantly focused on the host State's conduct, with a seemingly greater presumptive burden assumed against the host State. In his Separate Opinion in *International Thunderbird Gaming Corporation v.*

Council Resolution 276 (1970), Advisory Opinion, I.C.J. reports 1971, p. 16, at para. 53 (in relation to Article 22 of the Covenant of the League of Nations); *See also* Pierre Marie-Dupuy, *Evolutionary Interpretation of Treaties: Between Memory and Prophecy*, in ENZO CANNIZZARO, *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* (Oxford University Press, 2011).

²⁰⁶ *MTD Equity Sdn Bhd and MTD Chile SA v. Chile*, Decision on Annulment, ICSID Case No. ARB/01/7, 16 February 2007.

²⁰⁷ *Id.* at footnote 206, at para. 107.

Mexico,²⁰⁸ arbitrator Thomas W. Wälde emphasized that because the fundamental function of international investment law is to “promote foreign investment by providing effective protection to foreign investors exposed to the political and regulatory risk of a foreign country in a situation of relative weakness”, the general rule of thumb developed in arbitral jurisprudence is thus:

“...in case of doubt, *the risk of ambiguity of a governmental assurance is allocated rather to the government than to a foreign investor and that the government is held to high standards of transparency and responsibility for the clarity and consistency in its interaction with foreign investors.* If official communications cause, visibly and clearly, confusion or misunderstanding with the foreign investor, then the government is responsible for proactively clarifying its position. The government cannot rely on its own ambiguous communications, which the foreign investor could and did justifiably rely on, in order to later retract and reverse them – in particular in change of government situations...Investors need to rely on the stability, clarity and predictability of the government’s regulatory and administrative messages as they appear to the investor when conveyed – and without escape from such commitments by ambiguity and obfuscation inserted into the commitment identified subsequently and with hindsight...”²⁰⁹

Even the test for determining the reasonableness of a regulatory change appears to focus mainly on host State conduct. According to the arbitral tribunal in *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hungary*,²¹⁰ (a case involving alleged breaches of the Energy Charter Treaty after Hungary implemented regulatory pricing changes) the test for determining whether a regulatory change is an unreasonable or discriminatory measure amounting to a breach of the ECT has two elements: “the existence of a rational policy; and the reasonableness of the act of the State in relation to the policy.”²¹¹ A rational policy exists where it “is taken by a State following a logical (good sense) explanation and with

²⁰⁸ *International Thunderbird Gaming Corporation v. Mexico*, Award, *Ad hoc* UNCITRAL, 26 January 2006, Separate Opinion of Thomas W. Wälde, para. 4.

²⁰⁹ *Id.* at footnote 208, at paras. 4 and 5 of Separate Opinion of Thomas W. Wälde. Italics added.

²¹⁰ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. Hungary*, Award, ICSID Case No. ARB/07/22, 17 September 2010.

²¹¹ *Id.* at footnote 210, at para. 10.3.7.

the aim of addressing a public interest matter”,²¹² while the reasonableness of the challenged measure can be established through “an appropriate correlation between the State’s public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented.”²¹³ Nowhere does this test consider the extent, if any, to which an investor could (and should) have anticipated, foreseen, or mitigated the regulatory risk.

The most interesting paradox in how arbitral tribunals treat and view regulatory risk can be seen from cases involving a host State’s regulatory measure that, on the one hand, is alleged to constitute indirect expropriation, and on the other, also purportedly amounts to a violation of the fair and equitable treatment standard.

Based on its survey of arbitral practices, a 2012 Report of the United Nations Conference on Trade and Development (UNCTAD)²¹⁴ derives four cumulative elements to determine the existence of indirect expropriation:

- 1) an act attributable to the host State;
- 2) interference with property rights or other protected legal interests;
- 3) of such degree that the relevant rights or interests will lose all or most of their value or the owner is deprived of control over the investment;
- 4) even though the owner retains the legal title or remains in physical possession.²¹⁵

States cannot be deemed to have committed indirect expropriation when, “*in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare.*”²¹⁶ Otherwise stated, if a host State can show that it implemented

²¹² *Id.* at footnote 210, at para. 10.3.8.

²¹³ *Id.* at footnote 210, at para. 10.3.9.

²¹⁴ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), EXPROPRIATION: A SEQUEL, Series on Issues in International Investment Agreements II, October 2012, available at: http://unctad.org/en/Docs/unctadaddiaeia2011d7_en.pdf. (last accessed 15 October 2012).

²¹⁵ *Id.* at footnote 214, at p. 12.

²¹⁶ *Saluka Investments BV v. Czech Republic*, Partial Award, PCA-UNCITRAL, 17 March 2006, para. 255.

a regulatory change in good faith, in a non-discriminatory way, and purely for public welfare purposes, arbitral tribunals must regard any deprivation that may be incurred by an investor as a result of said regulatory change as simply a non-compensable regulatory taking or lawful exercise of police power by the host State.²¹⁷

The effect of a regulatory change (e.g. whether indirect expropriation or non-compensable regulatory taking) can be the basis for a separate breach of an IIA's fair and equitable treatment (FET) standard, specifically where the FET standard is understood to grant "protection of the legitimate expectations of investors arising from a government's specific representations or investment-inducing measures".²¹⁸ A 2012 UNCTAD Report on the fair and equitable treatment standard cautions that this concept of extending protection to investors' legitimate expectations through the FET standard "is an arbitral innovation. When economic, regulatory or other conditions, general or specific, to the investment undergo changes negatively affecting the investment's value, they may be seen as a breach of legitimate expectations prevailing at the time the investment is made. While in principle the concept of legitimate expectations may well have a place within fair and equitable treatment, its thoughtless application, looking at the issues at hand from the perspective of the investor only, runs the risk that the true purpose of the FET provision in IIAs will be lost under the weight of investor concerns alone."²¹⁹ This "arbitral innovation" also explains why it is "inappropriate" to invoke the same police powers of the host State (which is the accepted exception to indirect expropriation claims) as a defense against breach of the FET standard.

The arbitral tribunal in *Suez and ors v. Argentina*²²⁰ provided a starkly tautological explanation for the seeming "inappropriateness" of the police powers defense:

²¹⁷ See Tarcisio Gazzini, *Drawing the Line between Non-Compensable Regulatory Powers and Indirect Expropriation of Foreign Investment – A Economic Analysis of Law Perspective*, 7 *Manchester Journal of International Economic Law* 3 (2010), pp. 36-51; Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 *ICSID Review* 1 (2005).

²¹⁸ UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD), *FAIR AND EQUITABLE TREATMENT: A SEQUEL*, Series on Issues in International Investment Agreements II, October 2012, available at: http://www.unctad.org/en/docs/unctaddiaeia2011d5_en.pdf. (last accessed 15 October 2012).

²¹⁹ *Id.* at footnote 218, at p. 9.

²²⁰ *Suez and ors v. Argentina*, Decision Liability, ICSID Case No. ARB/03/17, 30 July 2010.

“148. The police powers doctrine is a recognition that States have a reasonable right to regulate foreign investments in their territories even if such regulation affects property rights. In effect, the doctrine seeks to strike a balance between a State’s right to regulate and the property rights of foreign investors in their territory. *However, the application of the police powers doctrine as an explicit, affirmative defense to treaty claims other than for expropriation is inappropriate*, because in judging those claims and applying such principles as full protection and security and fair and equitable treatment, both of which are considered in subsequent sections of this Decision, a tribunal must take account of a State’s reasonable right to regulate. *Thus, if a tribunal finds that a State has violated treaty standards of fair and equitable treatment and full protection and security, it must of necessity have determined that such State has exceeded its reasonable right to regulate.* Consequently, for that same tribunal to make a subsequent inquiry as to whether that same State has exceeded its legitimate police powers would require that tribunal to engage in an inquiry it has already made. In short, a decision on the application of the police powers doctrine in such circumstance would be duplicative and therefore inappropriate.”²²¹

The discussion above anchors the alleged inappropriateness of the police powers defense to non-expropriation claims on a *non sequitur*. It assumes that the tribunal’s finding on FET *inevitably* considers the *independent* and *separate* international law defense of police powers doctrine. While this defense is admittedly irrelevant to an IIA breach where it is asserted as a matter of domestic law,²²² it is nonetheless relevant to consider it as a separate principle under general international law in the process of determining whether a breach of a primary norm (*e.g.* the non-expropriation standard in the IIA, such as the FET standard) exists in the first place.²²³

²²¹ *Id.* at footnote 220, at para. 148. Italics and underscoring added.

²²² See Vienna Convention on the Law of Treaties, Article 27.

²²³ See *SEDCO v. NIOC*, Interlocutory Award No. ITL 55-129-3, 28 October 1985, 9 Iran-U.S. Claims Tribunal Reports 248, at 275 (“...it is an accepted principle of international law that a State is not liable for economic injury which is a consequence of *bona fide* ‘regulation’ within the accepted police power of States.”) *Id.* at footnote 215, pp. 79-80:

There cannot be any logical duplication in the sense argued by the *Suez* tribunal, because the police powers doctrine is not an element of the FET standard and as such, is posited as an entirely separate and independent defense under international law.

More importantly, it should be emphasized that the “arbitral innovation” which supplied the “legitimate expectations” content to the FET standard is *itself dependent on the concept of regulatory risk*. If a tribunal were indeed to construct a fictive account of what an investor’s “legitimate expectations” supposedly were at the time of the establishment of an investment, the same tribunal must also consider that investor’s risk assessment as part of that retroactive assessment. The tribunal cannot afford to be selective, and equate the stipulated contractual value of the investment merely to the investor’s “legitimate expectations”. After all, the stipulated contract value of an investment is jointly determined by the host State and the investor – it is therefore relevant for an arbitral tribunal to inquire as to the extent by which *both* parties conducted due diligence in their assessment of regulatory risk. If the arbitral tribunal finds that a regulatory change did not constitute indirect expropriation but merely a non-compensable regulatory taking pursuant to the host State’s police powers – which are part of the regulatory risks of that investment – it strains credulity that the tribunal would then disregard its own assessment of regulatory risk when it comes to its fictive reconstruction of the investor’s “legitimate expectations” supposedly protected by the FET standard. If the investor’s “legitimate expectations” are accepted as a form of content for the FET standard, it is germane to the tribunal’s inquiry to look into how the investor assessed the regulatory risks at the time of the establishment of

“...Although there is no universally accepted definition, in a narrow sense, this doctrine covers State acts such as: (a) forfeiture or a fine to punish or suppress crime; (b) seizure of property by way of taxation; (c) legislation restricting the use of property, including planning, environment, safety, health, and the concomitant restrictions to property rights; (d) defence against external threats, destruction of property of neutrals as a consequence of military operations and the taking of enemy property as part payment of reparation for the consequences of an illegal war (*citing* IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, Oxford University Press 2008, p. 532)...in present times, the police powers must be understood as encompassing a State’s full regulatory dimension. Modern States go well beyond the fundamental functions of custody, security and protection. They intervene in the economy through regulation in a variety of ways: preventing and prosecuting monopolistic and anticompetitive practices; protecting the rights of consumers; implementing control regimes through licenses, concessions, registers, permits and authorizations; protecting the environment and public health; regulating the conduct of corporations; and others. An exercise of police powers by a State may manifest itself in adopting new regulations or enforcing existing regulations in relation to a particular investor.”

the investment, and in particular, whether the investor prudently ascertained when, and under what circumstances, the police powers doctrine under both international law (and not just the host State's domestic law) could possibly apply to the contemplated investment.

Interestingly, an arbitral tribunal's recent attempt to further delineate and refine the concept of "legitimate expectations" in relation to the FET standard may provide one way to disentangle the Gordian knot over how to consider regulatory risk for both indirect expropriation claims as well as FET claims. In its 2011 Award in *El Paso Energy International Company v. Argentina*,²²⁴ the tribunal conceded that "[t]here can be no legitimate expectation for anyone that the legal framework will remain unchanged in the face of an extremely severe economic crisis. No reasonable investor can have such an expectation unless *very specific commitments* have been made towards it or unless the alteration of the legal framework is total."²²⁵

The *El Paso* tribunal went on to explain:

"A reasonable general regulation can be considered a violation of the FET standard if it violates a specific commitment towards the investor. The Tribunal considers that a special commitment by the State towards an investor provides the latter with a certain protection against changes in legislation, but it needs to discuss more thoroughly the concept of 'specific commitments'. In the Tribunal's view, no general definition of what constitutes a specific commitment can be given, *as all depends on the circumstances*. However, it seems that two types of commitments might be considered 'specific': those specific as to their addressee and those specific regarding their object and purpose. First, in order to prevent a change in regulations being applied to an investor or certain behavior of the State, there can indeed exist specific commitments directly made to the investor – for example in a contract or in a letter of intent, or even through a specific promise in a person-to-person business meeting – and not simply general statements in treaties or legislation which, because of their nature of general regulations, can evolve. The important aspect of the commitment is not so much that it is legally binding – which usually gives rise to the same sort of responsibility if it is violated

²²⁴ *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011.

²²⁵ *Id.* at footnote 224, at para. 374. Italics added.

without a need to refer to FET – but that it contains a specific commitment directly made to the investor, on which the latter has relied. Second, a commitment can be considered if its precise object was to give a real guarantee of stability to the investor. Usually general texts cannot contain such commitments, as there is no guarantee that they will not be modified in due course. However, a reiteration of the same type of commitment in different types of general statements could, considering the circumstances, amount to a specific behavior of the State, the object and purpose of which is to give the investor a guarantee on which it can justifiably rely.’²²⁶

Following the *El Paso* tribunal’s reasoning, there could thus be a different estimation of regulatory risk that applies when a host State’s exercise of police powers (under both domestic and recognized international law) causes economic injury to an investment, *as opposed to* the estimation of regulatory risk that applies when a host State makes a “specific commitment” not to disturb the regulatory framework governing an investment. Arguably, a “specific commitment” partakes of an extraordinary host State guarantee that should diminish the regulatory risk of an investment.

The main difficulty with the attempted differentiation in *El Paso* is how it introduces even more subjectivities to an inherently subjective “arbitral innovation” (*e.g.* the protection of the investor’s “legitimate expectations” through the FET standard). How would an arbitral tribunal find the bright line between a non-compensable regulatory taking, and compensation awarded for breach of the FET standard when an investor’s “legitimate expectations” arising from a “specific commitment” are supposedly violated? Does the investor’s regulatory risk analysis at the time of the establishment of the investment materially differentiate between possible economic injuries to the investment arising from regulatory changes that may be the product of a State’s exercise of police powers, as opposed to those possible regulatory changes that arise despite amorphously determined “specific commitments”? The only way to prevent the blurring overlap between the contemplated regulatory risks at the time of establishment of the investment would be to show that “specific commitments” necessarily include the host State’s commitment *not* to exercise the sovereign police powers at any time during the life of the investment.

²²⁶ *Id.* at footnote 224, at paras. 375-377.

Arbitral jurisprudence involving regulatory changes fail to show any such nuanced differentiation that recognizes the reality of regulatory risk assessment from the joint perspective of both the investor and the host State. As the following awards show, what occurs frequently is that an arbitral tribunal that dismisses an indirect expropriation claim on the ground that the regulatory change is a lawful exercise of the State's police power, would nonetheless subsequently rule that the regulatory change still violates the investor's "legitimate expectations" in a way that breaches the FET standard. The detrimental consequence to this inconsistency is that the "fair market value" compensation denied for an indirect expropriation claim, would be awarded in full, nevertheless, as reparations in the form of compensation for the alleged simultaneous breach of the FET standard.²²⁷

1. *Sempra Energy International v. Argentina*²²⁸

The investor in this case alleged specific reliance conditions²²⁹ offered by various legislative and regulatory enactments (*e.g.* the 1991 Convertibility Law, the 1992 Gas Law and implementing regulations in Gas Decree 1738/92, and the Standard Gas Transportation License under Decree 2255/92 which included applicable basic Rules, an "Information Memorandum" concerning the privatization of the former State-owned transportation and distribution company Gas del Estado, and a "Pliego" explaining the bidding rules and pertinent contractual arrangements).²³⁰ The investor alleged that measures adopted by the Argentine government during the 2000-2002 financial crisis violated these conditions and specific commitments, breaching the 1991 Argentina-United States BIT, including among others, indirect expropriation and the FET standard.²³¹

²²⁷ See Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises*, George Washington International Law Review (Fall 2012).

²²⁸ *Sempra Energy International v. Argentina*, Award, ICSID Case No. ARB/02/16, 18 September 2007.

²²⁹ *Id.* at footnote 228, at para. 85: "85. ...these conditions included: (i) a license for a term of 35 years, with a possible 10-year extension; (ii) the calculation of tariffs in U.S. dollars and their semiannual adjustment according to changes in the U.S. Producer Price Index (PPI); (iii) a commitment that there would be no price freeze applicable to the tariff system and, if one was imposed, that the licensee had a right to compensation; (iv) the commitment that the license would not be amended by the Government, in full or in part, except with the prior consent of the licensee; (v) a commitment not to withdraw the license except in case of specific breaches listed; and (iv) the principle of indifference in respect of subsidies granted by the Government so that the distributor's income would not be altered."

²³⁰ *Id.* at footnote 228, at paras. 82-84.

²³¹ *Id.* at footnote 228, at paras. 94-95.

Among its conclusions, the tribunal found that the Argentine government did *not* commit indirect expropriation, as it was not shown that the challenged regulatory changes resulted in substantial loss of control over the business operation or “virtual annihilation” of the value of the business.²³² Significantly, the tribunal considered the asserted damage to the investor’s legitimate expectation, but ultimately did not accept it as a less stringent standard to establish indirect expropriation.²³³

The tribunal proceeded to hold that the Argentine government did indeed violate the FET standard under the treaty.²³⁴

While it conceded the imprecision of the FET standard,²³⁵ it surprisingly defined a particular function of the FET standard that was nowhere borne out by the text of the treaty or any of its *Travaux Préparatoires*:

“It follows that it would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, *it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of*

²³² *Id.* at footnote 228, at paras. 283, 285:

“283. The question of indirect or creeping expropriation requires a more complex assessment. The Tribunal has no doubt about the fact that such expropriation can arise from many kinds of measures, and that these have to be assessed by their cumulative effects. Yet, in this case, the Tribunal is not convinced that such has happened either...

285. Many of the measures discussed in the instant case have had a very adverse effect on the conduct of the business concerned. This is, however, again a question that the Treaty addresses in the context of other safeguards for protecting the investor. A finding of indirect expropriation would require more than adverse effects. It would require that the investor no longer be in control of its business operation, or that the value of the business has been virtually annihilated. This is not the case in the present dispute.”

²³³ *Id.* at footnote 228, at para. 288: “Legitimate expectation is also an issue which the parties have discussed, and is subject to protection under broadly conceived treaty standards and international law. This does not mean, however, that this right will operate to make the test for indirect expropriation less stringent.”

²³⁴ *Id.* at footnote 228, at para. 304: “Even assuming that the Respondent was guided by the best of intentions, what the Tribunal has no reason to doubt, there has here been an objective breach of the fair and equitable treatment due under the Treaty. The Tribunal thus holds that the standard established by Article II(2)(a) of the Treaty has not been observed, to the detriment of the Claimant’s rights.”

²³⁵ *Id.* at footnote 228, at para. 296.

one or several standards is a determination to be made in the light of the facts of each dispute. *What counts is that in the end the stability of the law and the observance of legal obligations are assured*, thereby safeguarding the very object and purpose of the protection sought by the treaty....

It must also be kept in mind that *on occasion the line separating the breach of the fair and equitable treatment standard from an indirect expropriation can be very thin*, particularly if the breach of the former standard is massive and long-lasting. *In case of doubt, however, judicial prudence and deference to State functions are better served by opting for a determination in the light of the fair and equitable standard.* This also explains why the compensation granted to redress the wrong done might not be too different on either side of the line.”²³⁶

Clearly, the *Sempra* tribunal took it upon itself to assign a “catch-all” function to the FET standard – one that ensured compensation at the same or approximate level as that awarded for indirect expropriations could be awarded for a breach of a non-expropriation standard such as the FET standard. This arbitral policy is itself its own dangerously unique innovation – as discussed elsewhere,²³⁷ there has never been any automatic or substantial equivalence under international law between compensation under the general law of international responsibility (which is the standard of compensation for breaches of non-expropriation standards in an IIA) and compensation for direct or indirect expropriations. Compensation under the general law of international responsibility is not meant to be punitive, and looks toward the equitable outcome given the conduct of both the injured and the injuring State.²³⁸

It was thus problematic that the *Sempra* tribunal deliberately chose to collapse these distinct concepts of compensation, merely because “it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be the same.”²³⁹ The

²³⁶ *Id.* at footnote 228, at paras. 300 and 301. Italics added.

²³⁷ See Diane A. Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 *Manchester Journal of International Economic Law* 2 (2012), 162-183, at 175-180.

²³⁸ See Article 36 of the 2001 International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts.

²³⁹ *Id.* at footnote 228, at paras. 402-403:

402. Article IV of the Treaty establishes the standard for the determination of compensation. ‘Compensation shall be equivalent to the fair market value of the

tribunal then went on to assign “fair market value” as the standard of compensation, since it thought it was a “commonly accepted standard of valuation and compensation” and it was, in any case, the value defined in the treaty for expropriation claims.²⁴⁰ The tribunal ordered payment of compensation in the amount of US\$ 128,250,462 (broken down into the equity value loss, loss on the December 2001 loss, unpaid PPI adjustments, and non-payment of subsidies), plus interest – an amount considerably less than the investor’s claim for US\$ 350 million in damages to its total investment.²⁴¹ In any event, the *Sempra* tribunal clearly omitted any consideration for how the investor and the host State’s joint regulatory risk assessment at the time of the establishment of the investment could have affected the degree and nature of the investor’s “legitimate expectations” during a financial crisis.

2. *Enron Corporation and Ponderosa Assets, LP v. Argentina*²⁴²

As with *Sempra*, the gas transportation and distribution investor in this case

expropriated investment immediately before the expropriatory action was taken or became known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate from the date of expropriation; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

403. It must be noted that this provision addresses specifically the case of expropriation which the Tribunal has concluded has not taken place in the present case. The Treaty does not specify the damages to which the investor is entitled in case of breach of the Treaty standards different from expropriation. Although there is some discussion about the appropriate standard applicable in such a situation, several awards of arbitral tribunals dealing with similar treaty clauses have considered that compensation is the appropriate standard of reparation in respect of breaches other than expropriation, particularly if such breaches cause significant disruption to the investment made. In such cases, it might be very difficult to distinguish the breach of fair and equitable treatment from indirect expropriation or other forms of taking and it is thus reasonable that the standard of reparation might be same.

²⁴⁰ *Id.* at footnote 228, at para. 404: “Fair market value is thus a commonly accepted standard of valuation and compensation. In the present case, the Claimant made its investment in Argentina in 1996 and increased it over the years. The Tribunal is of the view that fair market value would be the most appropriate standard to apply in this case to establish the value of the losses, if any, suffered by the Claimant as a result of the Treaty breaches which occurred, by comparing the fair market value of the companies concerned with and without the measures adopted by Argentina in January 2002.”

²⁴¹ *Id.* at footnote 228, at paras. 92, 482, 486.

²⁴² *Enron Corporation and Ponderosa Assets LP v. Argentina*, Award, ICSID Case No. ARB/01/3, 22 May 2007.

relied on virtually the same conditions established under the regulatory and legislative enactments of the Argentine Government.²⁴³ *Enron* likewise alleged injury from the regulatory changes wrought by certain Argentine measures during the 2000-2002 financial crisis.²⁴⁴ In almost identical language as that used by the *Sempra* tribunal, the arbitral tribunal in *Enron* denied the existence of indirect expropriation as substantial deprivation did not occur in the sense required under the concept of indirect expropriation – “[n]othing of the sort has happened in the case of TGS or CIESA or any of the related companies, so much so that the claimants’ interests in these companies have been freely sold and included in complex transactions...”²⁴⁵

The *Enron* tribunal also found that Argentina had violated the FET standard in Article II(2)(a) of the 1991 Argentina-US BIT.²⁴⁶ Inferring from the text of this treaty’s Preamble (e.g. “fair and equitable treatment of investment is desirable in order to maintain a stable framework for the investment and maximum effective use of economic resources”²⁴⁷), the tribunal concluded that “a key element of fair and equitable treatment is the requirement of a ‘stable framework for the investment’, which has been prescribed by a number of decisions.”²⁴⁸ What was “essential”, in the view of the Tribunal, was that the expectations of the foreign investor derive “from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.”²⁴⁹

Similar to the *Sempra* tribunal’s findings, the *Enron* tribunal found that “it was in reliance upon the conditions established [by Argentina] in the regulatory framework for the gas sector that Enron embarked on its investment in TGS. Given the scope of Argentina’s privatization process, its international marketing, and the statutory enshrinement of the tariff regime, Enron had reasonable grounds to rely on such conditions.”²⁵⁰ One gets a sharp impression from the tribunal’s discussion that regulatory risks indeed materialized due to the violation of those specific conditions: “[w]here there was certainty and stability for investors, doubt and ambiguity are the order of the day. The long-term business outlook enabled by the tariff regime has been transformed into a day-to-day discussion about what

²⁴³ *Id.* at footnote 242, at paras. 41-44.

²⁴⁴ *Id.* at footnote 242, at paras. 87-89.

²⁴⁵ *Id.* at footnote 242, at paras. 244-246.

²⁴⁶ *Id.* at footnote 242, at para. 268.

²⁴⁷ *Id.* at footnote 242, at para. 259.

²⁴⁸ *Id.* at footnote 242, at para. 260.

²⁴⁹ *Id.* at footnote 242, at para. 262.

²⁵⁰ *Id.* at footnote 242, at para. 265.

comes next.”²⁵¹

The *Enron* tribunal likewise relied on an imprecise determination of compensation for the breach of the FET standard. While the investor-claimants pegged their damages to around US\$ 543 million,²⁵² the ultimate compensation award issued by the Tribunal was for US\$ 106.2 million plus interest.²⁵³ The *Enron* tribunal freely acknowledged that it was faced with the problem of “whether a standard mainly related to expropriation, such as fair market value, can be applied to situations not amounting to expropriation”,²⁵⁴ but that it was purposely applying fair market value due to the “cumulative nature of the breaches that have resulted in a finding of liability.”²⁵⁵ Significantly, the *Enron* Tribunal held that the “risk of devaluation or the risk of tariff freeze and pesification” could not have been factored into the assessment of the country risk premium, as such measures were “separately and specifically protected under the Regulatory Framework.”²⁵⁶ The tribunal adopted the fair market value standard in determining compensation, but also included within this standard “the measure of [the investment’s] future prospects”.²⁵⁷

3. *CMS Gas Transmission Company v. Argentina*²⁵⁸

CMS also involved a dispute arising from the impact of Argentine governmental measures on the privatized gas transportation sector governed by specific regulatory commitments.²⁵⁹ The investor argued that its decision to invest in the gas transportation sector was made “in reliance on the Argentine Government’s promises and guarantees, particularly those that offered a real return in dollar terms and the adjustment of tariffs according to the US PPI [Producer Price Index]...it invested almost US\$ 175 million in the purchase of shares in TGN...TGN invested more than US\$ 1 billion in the renovation and expansion of the gas pipeline network.”²⁶⁰ For the investor, these acts along with other injurious measures taken by the Argentine Government during its 2000-2002

²⁵¹ *Id.* at footnote 242, at para. 266.

²⁵² *Id.* at footnote 242, at para. 351.

²⁵³ *Id.* at footnote 242, at para. 453.

²⁵⁴ *Id.* at footnote 242, at para. 362.

²⁵⁵ *Id.* at footnote 242, at para. 363.

²⁵⁶ *Id.* at footnote 242, at para. 378.

²⁵⁷ *Id.* at footnote 242, at para. 384.

²⁵⁸ *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 12 May 2005.

²⁵⁹ *Id.* at footnote 258, at paras. 53-67.

²⁶⁰ *Id.* at footnote 258, at para. 68.

financial crisis, constituted a series of investment treaty breaches – expropriation, the fair and equitable treatment standard, non-discrimination standard, prohibitions against transfer restrictions, and the umbrella clause.²⁶¹ Among its defenses, Argentina argued that the “transportation and distribution of gas is a national public service which must take into account particular needs of social importance. To this end, the Government is under an obligation to ensure the efficient operation of the service and must control the implementation of the contract, including the alternative of amendment or unilateral termination. Thus, the regulation of tariffs is a discretionary power of the Government insofar as it must take social and other public considerations into account.”²⁶²

The *CMS* tribunal found that the investor possessed a “right to tariff calculations in dollars”, and a “right to adjustment of tariffs in accordance with the US PPI”, especially since it had been these specific guarantees that “attracted hundreds of companies to the country with investments over 10 billion dollars.”²⁶³ The legal framework governing the privatization of this sector was designed “to guarantee the stability of the tariff structure and the role calculation in dollars and the US PPI adjustment played therein.”²⁶⁴

Upon a review of the facts and submissions of the parties, the *CMS* tribunal held that there was no expropriation of the investment as there had not been any substantial deprivation of such investment.²⁶⁵ It found, on the other hand, that Argentina breached the fair and equitable treatment standard – a treaty standard that the tribunal held to be “inseparable from stability and predictability”.²⁶⁶ In the tribunal’s view, “a stable legal and business environment is an essential element of fair and equitable treatment.”²⁶⁷ In any event, the tribunal contended that this interpretation “is not different from the international law minimum standard and its evolution under customary law.”²⁶⁸ While the tribunal further declined to hold Argentina liable for alleged investment treaty breaches on arbitrariness and discrimination,²⁶⁹ it did find that the umbrella clause was breached “to the extent that legal and contractual obligations pertinent to the investment

²⁶¹ *Id.* at footnote 258, at para. 88.

²⁶² *Id.* at footnote 258, at para. 93.

²⁶³ *Id.* at footnote 258, at para. 137.

²⁶⁴ *Id.* at footnote 258, at para. 161.

²⁶⁵ *Id.* at footnote 258, at paras. 263-264.

²⁶⁶ *Id.* at footnote 258, at para. 276.

²⁶⁷ *Id.* at footnote 258, at para. 274.

²⁶⁸ *Id.* at footnote 258, at para. 284.

²⁶⁹ *Id.* at footnote 258, at para. 295.

have been breached”.²⁷⁰ The cumulative nature of the treaty breaches, in the Tribunal’s view, warranted its resort to the fair market value standard in determining compensation, notwithstanding the absence of a finding of expropriation in this case.²⁷¹ Argentina was held liable for US\$ 133.2 million plus interest.²⁷²

4. *BG Group PLC v. Argentina*²⁷³

The British investor in this case was a shareholder in a natural gas distribution company incorporated in Argentina (MetroGas), who asserted that it had relied upon the Argentine regulatory framework established during the privatization process in the early 1990s – the Gas Law, the Gas Decree, and the MetroGas License for natural gas distribution.²⁷⁴ Similar to other tribunals that dealt with the impact of Argentine measures taken during its 2000-2002 financial crisis, the *BG* Tribunal did not find that Argentina committed expropriation, especially since “the impact of Argentina’s measures had not been permanent on the value of BG’s shareholding in MetroGas. It might well be that the measures adopted by Argentina were severely causing a fluctuation of BG’s investment during the crisis. However, MetroGas’ business never halted, continues to operate, and has an asset base which is recovering.”²⁷⁵ While the *BG* Tribunal found that Argentina did not breach the full protection and security standard and the non-discrimination standard,²⁷⁶ it found that Argentina breached the reasonableness standard²⁷⁷ as well as the international minimum standard/fair and equitable treatment standard when it “fundamentally modified the investment Regulatory Framework, which...provided for specific commitments that were meant to apply precisely in a situation of currency devaluation and cost variations”.²⁷⁸

The *BG* tribunal awarded total damages to the claimant in the amount of about US\$ 185 million plus interest, legal fees, and costs of the arbitration.²⁷⁹ The investor had claimed US\$ 238.1 million, equivalent to

²⁷⁰ *Id.* at footnote 258, at para. 303.

²⁷¹ *Id.* at footnote 258, at para. 410.

²⁷² *Id.* at footnote 258, at para. 472.

²⁷³ *BG Group PLC v. Argentina*, Final Award, *Ad hoc* (UNCITRAL), 24 December 2007.

²⁷⁴ *Id.* at footnote 273, at paras. 1 and 27.

²⁷⁵ *Id.* at footnote 273, at para. 270.

²⁷⁶ *Id.* at footnote 273, at paras. 328 and 360.

²⁷⁷ *Id.* at footnote 273, at para. 346.

²⁷⁸ *Id.* at footnote 273, at para. 310.

²⁷⁹ *Id.* at footnote 273, at para. 467.

“the loss in the fair market value of its investment in MetroGas”.²⁸⁰ The tribunal stressed that it was “disinclined to automatically import [the fair market value] standard from Article 5 of the BIT [the provision on expropriation]”, but held that this standard “is nonetheless available by reference to customary international law.”²⁸¹ Significantly, the tribunal did not indicate if the supposed “customary international law” standard on “fair market value” that it identified was derived from State practice involving breaches of international obligations that did *not* involve expropriation or any form of unlawful takings. Rather, the tribunal simply transposed the compensation principle defined under the 1928 *Chorzów Factory* case decided by the Permanent Court of International Justice – a case that precisely involved the *expropriation* of a factory in Upper Silesia – as the standard for assessing compensation for *non-expropriation* breaches of the investment treaty in the present case.²⁸²

5. *LG & E Energy Corporation and ors v. Argentina*²⁸³

The claimants-investors in this case have shareholding interests in three local gas distribution companies created and existing under the laws of Argentina, holding gas distribution licenses issued by the Argentine Government.²⁸⁴

The *LG & E* tribunal found that the regulatory framework involved four specific guarantees to investors in the gas transport and distribution centers:

- 1) tariffs would be “calculated in US dollars before conversion into pesos”;
- 2) tariffs would be “subject to semi-annual adjustments according to the US Producer Price Index (PPI)”;
- 3) tariffs were to “provide an income sufficient to cover all costs and a reasonable rate of return”; and
- 4) the tariff system “would not be subject to freezing or price controls without compensation”.²⁸⁵

²⁸⁰ *Id.* at footnote 273, at para. 414.

²⁸¹ *Id.* at footnote 273, at para. 422.

²⁸² *Id.* at footnote 273, at paras. 423-429.

²⁸³ *LG&E Energy Corporation and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006.

²⁸⁴ *Id.* at footnote 283, at para. 1.

²⁸⁵ *Id.* at footnote 283, at para. 119.

The *LG & E* tribunal found that Argentina did not commit expropriation directly or indirectly as a result of the measures taken during the 2000-2002 financial crisis,²⁸⁶ and that such measures did not violate the investment treaty prohibition against arbitrariness.²⁸⁷ However, the tribunal held that Argentina violated the fair and equitable treatment standard, noting that while “certain political and social realities...may have influenced the Government’s response to the growing economic difficulties”, Argentina “went too far by completely dismantling the very legal framework constructed to attract investors.”²⁸⁸ Argentina was also deemed to have acted discriminatorily by “suspend[ing] PPI adjustments for the gas industry two years before enacting the Emergency Law” contrary to other public utility companies.²⁸⁹

In its Award of damages in 2007,²⁹⁰ the *LG & E* tribunal rightly acknowledged the differences between compensation awarded for expropriation, and compensation as a form of reparations for breach of other investment treaty provisions that do not involve expropriation.²⁹¹ In particular, the tribunal noted that as the fair market value standard has already been deemed improper to measure compensation for unlawful expropriation, “it is *a fortiori* not appropriate for breaches of other treaty standards.”²⁹² The tribunal focused its analysis on the appropriate measure of compensation from a perspective of causality: “[t]he question is one of ‘causation’: what did the investor lose by reason of the unlawful acts?”²⁹³ It found that the measures resulted in a “significant decrease in the licensees’ revenues that, in turn, has produced a decrease of dividends distributed to shareholders...the actual damage inflicted by the measures is the amount of dividends that could have been received *but for* the adoption of the measures.”²⁹⁴ The tribunal further declined to include lost future profits as part of its estimation of the quantum of compensation, finding that such future loss is “uncertain and any attempt to calculate it is speculative... Claimants have retained title to their investments and are therefore entitled to any profit that the investment generates and could generate in the

²⁸⁶ *Id.* at footnote 283, at paras. 189-200.

²⁸⁷ *Id.* at footnote 283, at paras. 161-163.

²⁸⁸ *Id.* at footnote 283, at para. 139.

²⁸⁹ *Id.* at footnote 283, at paras. 147-148.

²⁹⁰ *LG & E Energy Corporation and ors v. Argentina*, Award, ICSID Case No. ARB/02/1, 25 July 2007.

²⁹¹ *Id.* at footnote 290, at paras. 35-38.

²⁹² *Id.* at footnote 290, at para. 38.

²⁹³ *Id.* at footnote 290, at para. 45.

²⁹⁴ *Id.* at footnote 290, at para. 48.

future.”²⁹⁵ The tribunal ultimately declared that Argentina was liable to compensate the investor for US\$ 57.4 million plus compound interest.²⁹⁶

6. *Azurix Corporation v. Argentina*²⁹⁷

Azurix is the parent corporation of two subsidiary companies in Argentina that had concession rights for water distribution and sewage disposal management services for the Province of Buenos Aires in Argentina.²⁹⁸ Azurix argued that Argentina violated the Argentina-US bilateral investment treaty because of various actions and omissions of the Province and other instrumentalities “that resulted in the non-application of the tariff regime of the Concession for political reasons; the Province did not complete certain works that were supposed to remedy historical problems and were to be transferred to the concessionaire upon completion; that the lack of support for the concession regime prevented [the concession operator] from maintaining financing for its Five Year Plan; that in 2001, the Province denied that the canon was recoverable through tariffs; and that ‘political concerns were always privileged over the financial integrity of the concession’.”²⁹⁹

The *Azurix* tribunal did not find expropriation in this case, since “the impact on the investment attributable to the Province’s actions was not to the extent required to find that, in the aggregate, these actions amounted to an expropriation.”³⁰⁰ However, it found that Argentina, through the actions or omissions of the Province of Buenos Aires, breached the fair and equitable treatment standard,³⁰¹ the treaty provision prohibiting arbitrariness,³⁰² and the full protection and security standard.³⁰³ The tribunal took the view that “compensation based on the fair market value of the concession would be appropriate, particularly since the Province has taken it over. Fair market value has been defined as ‘the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm’s length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge

²⁹⁵ *Id.* at footnote 290, at para. 90.

²⁹⁶ *Id.* at footnote 290, at para. 115.

²⁹⁷ *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006.

²⁹⁸ *Id.* at footnote 297, at paras. 38-42.

²⁹⁹ *Id.* at footnote 297, at para. 43.

³⁰⁰ *Id.* at footnote 297, at para. 322.

³⁰¹ *Id.* at footnote 297, at paras. 358-378.

³⁰² *Id.* at footnote 297, at para. 393.

³⁰³ *Id.* at footnote 297, at para. 408.

of the relevant facts.”³⁰⁴ Azurix was awarded compensation in the amount of over US\$ 165 million plus compounded interest.³⁰⁵

7. *Suez and ors v. Argentina*³⁰⁶

The investors-claimants in this case were the major shareholders in an Argentine company that held the concession for water distribution and waste water treatment in the Province of Santa Fe in Argentina.³⁰⁷

Claimants alleged breaches of the Argentina-France bilateral investment treaty provisions on expropriation, fair and equitable treatment, and full protection and security, arising from measures taken by the Argentine Government during the 2000-2002 financial crisis leading up to the Province of Santa Fe’s termination of the concession.³⁰⁸

The *Suez* tribunal rejected the claim of expropriation because the claimants had not been deprived of their property rights through the challenged measures.³⁰⁹ It noted in *obiter dictum* that “States have a legitimate right to exercise their police powers to protect the public interest”.³¹⁰ However, the *Suez* tribunal was quick to declare that the police powers doctrine is an “inappropriate” affirmative defense for non-expropriation treaty claims, since a tribunal can be assumed to have “taken account of a State’s reasonable right to regulate” in judging those claims.³¹¹ Notably, the *Suez* tribunal did not indicate what its factual or legal bases were for making such an assumption.

The tribunal further declined to find that the full protection and security clause had been breached, since this provision referred mainly to the protection of investors and investments primarily from physical injury, and *not to* encompass “the maintenance of a stable legal and commercial environment.”³¹² On the other hand, the tribunal held that Argentina violated the fair and equitable treatment standard, through the “Province’s actions in refusing to revise the tariff according to the legal framework of the concession and in pursuing the forced renegotiation of the concession contract contrary to that legal framework”, that “Argentina failed to

³⁰⁴ *Id.* at footnote 297, at para. 424.

³⁰⁵ *Id.* at footnote 297, at para. 442.

³⁰⁶ *Suez and ors v. Argentina*, Decision on Liability, ICSID Case No. ARB/03/17, 30 July 2010.

³⁰⁷ *Id.* at footnote 306, at para. 1.

³⁰⁸ *Id.* at footnote 306, at para. 116.

³⁰⁹ *Id.* at footnote 306, at paras. 135-145.

³¹⁰ *Id.* at footnote 306, at para. 147.

³¹¹ *Id.* at footnote 306, at para. 148.

³¹² *Id.* at footnote 306, at para. 173.

exercise due diligence in certain elements of its treatment of the claimants' investments", ultimately frustrating the "legitimate expectations" of the investor-claimants in this case.³¹³ The decision on damages for breach of fair and equitable treatment and costs were deferred to a subsequent proceeding.³¹⁴

8. *Total SA v. Argentina*³¹⁵

The investor in this case owned shares in Argentine gas transportation companies that held licenses for rendering gas transportation utilities in northern and central Argentina for 35 years, renewable for a further ten years.³¹⁶ Total claimed that its investment decision was based on the specific commitments and guarantees provided in the Gas Regulatory Framework governing the concession.³¹⁷ Total asserted that the emergency measures enacted by Argentina during the 2000-2002 financial crisis "completely destroyed"³¹⁸ that regulatory framework.

The *Total* tribunal did not find that the challenged measures amounted to expropriation, and that furthermore, these measures did not breach the non-discrimination provision in the investment treaty.³¹⁹

However, some of the challenged Argentine measures were still deemed to breach the fair and equitable treatment standard. In parsing this standard, the tribunal carefully delineated the kind of legitimate expectations protected under the fair and equitable treatment standard in an investment treaty: "[i]n the absence of some 'promise' by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor. The expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a *specific legal obligation for the future*, such as by contracts, concessions or stabilization clauses on which the investor is therefore entitled to rely as a matter of

³¹³ *Id.* at footnote 306, at paras. 227 and 228.

³¹⁴ *Id.* at footnote 306, at para. 248.

³¹⁵ *Total SA v. Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010.

³¹⁶ *Id.* at footnote 315, at para. 41.

³¹⁷ *Id.* at footnote 315, at paras. 47-59.

³¹⁸ *Id.* at footnote 315, at para. 68.

³¹⁹ *Id.* at footnote 315, at paras. 199, 217-218.

law.”³²⁰

The tribunal went on to distinguish the kind of regulation that leads to a justifiable reliance or guarantee of stability to the investor, the serious infringement of which results in a violation of the fair and equitable treatment standard:

“Indeed, the most difficult case is (as in part in the present dispute) when the basis of an investor’s invocation of entitlement to stability under a fair and equitable treatment clause *relies on legislation or regulation of a unilateral and general character*. In such instances, investor’s expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor. *This type of regulation is not shielded from subsequent changes under the applicable law*. This notwithstanding, *a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations*. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for “fall backs” or contingent rights in case the relevant framework would be changed in unforeseen circumstances or in case certain listed events materialize. In such cases, reference to commonly recognized and applied financial and economic principles to be followed for the regular operation of investments of that type (be they domestic or foreign) may provide a yardstick. This is the case for capital intensive and long term investments and operation of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of “regulatory fairness” or “regulatory certainty” has been used in this respect. In the light of these criteria when a State is empowered to fix the tariffs of a public utility, it must do so in such a way that the concessionaire is able to recover its operations costs, amortize its investments and make a reasonable return over time, as indeed Argentina’s gas regime provided.

On the other hand, the host State’s right to regulate domestic matters in the public interest has to be taken into consideration as well. *The circumstances and reasons (importance and urgency of the public need pursued) for carrying out a change*

³²⁰ *Id.* at footnote 315, at para. 117. Italics added.

impacting negatively on a foreign investor's operations on the one hand, and the seriousness of the prejudice caused on the other hand, compared in the light of a standard of reasonableness and proportionality are relevant. The determination of a breach of the standard requires, therefore, "a weighing of the Claimant's reasonable and legitimate expectations on the one hand and the Respondent's legitimate regulatory interest on the other." Thus an evaluation of the fairness of the conduct of the host country towards an investor cannot be made in isolation, considering only their bilateral relations. The context of the evolution of the host economy, the reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account...³²¹

Applying the foregoing calibration of the fair and equitable treatment standard and the inherent right of a State to regulate for the public interest, the *Total* Tribunal found that not all of the Argentine measures breached the fair and equitable treatment standard. It decided to separate the quantification of damages for this particular breach (applicable to damage to its shareholder value in the Concessionaire, investment in power generation, and investments in exploration and production of hydrocarbons) to a subsequent phase of the proceedings.³²²

9. *Impregilo SpA. v. Argentine Republic*³²³

Impregilo is one of the partners of an international consortium that had been awarded concessions by the Province of Buenos Aires for the operation of water and sewerage services in a concession area covering seven municipalities in Argentina.³²⁴ Impregilo challenged various measures taken by the Argentine Government originating from the 2000-2002 financial crisis, which had steadily encroached on its rights under the concession until the termination of the Concession Agreement.³²⁵ Impregilo contended that the Argentine Government breached the Argentina-Italy bilateral investment treaty provisions on expropriation, fair and equitable treatment, non-discrimination, full protection and security,

³²¹ *Id.* at footnote 315, at paras. 122-123. Italics added.

³²² *Id.* at footnote 315, at paras. 182-183, 346, 444, 455, 461.

³²³ *Impregilo SpA v. Argentine Republic*, Final award, ICSID Case No. ARB/07/17, 21 June 2011.

³²⁴ *Id.* at footnote 323, at paras. 13-14.

³²⁵ *Id.* at footnote 323, at paras. 20-48.

and the umbrella clause.³²⁶

The *Impregilo* Tribunal held that the Argentine measures did not amount to direct or indirect (creeping) expropriation,³²⁷ but did amount to a breach of the fair and equitable treatment standard.³²⁸ Significantly, the Tribunal emphasized that “the legitimate expectations of foreign investors cannot be that the State will *never* modify the legal framework, especially in times of crisis, but certainly investors must be protected from *unreasonable modifications* of that legal framework.”³²⁹ Contractual rights are not to be equated to legitimate expectations, since the FET standard is not meant to stand as an umbrella clause.³³⁰ The Tribunal thus focused on the treatment afforded to the concessionaire to which the investor was a shareholder, to determine if the “alleged contractual breaches...could affect Argentina’s responsibility under the BIT because they were a misuse of public power or reveal a pattern directed at damaging [the concessionaire] and indirectly, *Impregilo*, as one of its shareholders.”³³¹ On the facts, the Tribunal found that none of the alleged contractual breaches triggered Argentina’s responsibility under the investment treaty, and that neither was there any evidence of “a pattern of acts by State entities aimed at causing damage to *Impregilo* as investor.”³³² What ultimately became determinative of the breach of the fair and equitable treatment standard was the “disturbance of the equilibrium between rights and obligations in the concession...essentially due to measures taken by the Argentine legislator”, and Argentina’s failure to “effectively restore an equilibrium on a new or modified basis” or “to create for [the concessionaire] a reasonable basis for pursuing its tasks as concessionaire which had been negatively affected by the emergency legislation.”³³³ In determining the compensation to be awarded for breach of the FET standard, the Tribunal noted that both the concessionaire and the Province of Buenos Aires “have a shared responsibility for the failure of the concession”, and as such, damages should be based on a “reasonable estimate of the loss that may have been caused to *Impregilo*.”³³⁴ The Tribunal found that the compensation to be awarded should only be based “only on the capital contribution made by

³²⁶ *Id.* at footnote 323, at paras. 192-209.

³²⁷ *Id.* at footnote 323, at para. 283.

³²⁸ *Id.* at footnote 323, at para. 331.

³²⁹ *Id.* at footnote 323, at para. 291. Italics added.

³³⁰ *Id.* at footnote 323, at para. 293.

³³¹ *Id.* at footnote 323, at para. 299.

³³² *Id.* at footnote 323, at para. 309.

³³³ *Id.* at footnote 323, at paras. 330-331.

³³⁴ *Id.* at footnote 323, at para. 378.

Impregilo”, particularly as Impregilo had not been able to show whether the concession was likely to have been profitable if there had been no interference by the Argentine legislator and public authorities.³³⁵ Impregilo was awarded US\$ 21.294 million plus compound interest at 6% until date of payment.³³⁶

10. *El Paso Energy International Company v. Argentina*³³⁷

The American investor-claimant in this case owned direct and non-controlling shareholdings in several Argentine companies engaged in energy generation, hydrocarbon, electricity, and distribution services in Argentina.³³⁸ The claimant alleged Argentina’s violations of the Argentina-United States bilateral investment treaty, as a result of the measures it had taken during the 2000-2002 financial crises, as well as tax issues (such as claims related to export duties established by the Emergency Law and deductions on income tax).³³⁹ The tribunal held that these measures were reasonable and not arbitrary,³⁴⁰ did not amount to expropriation,³⁴¹ and likewise did not constitute *de jure* or *de facto* discrimination³⁴² against the investor. However, the *El Paso* tribunal did find that there was a “cumulative” impact of the challenged measures that “was a total alteration of the entire legal setup for foreign investments”, that could also be viewed in the aggregate as “creeping violations” of the fair and equitable treatment standard.³⁴³ While it accepted that “legitimate and reasonable expectations” could be considered to determine any possible breach of the FET standard, the tribunal nonetheless took pains to explain that such expectations: 1) “can be breached even in the absence of subjective bad faith”;³⁴⁴ 2) “result from a confrontation of the objective expectations of investors *and* the right of the State to regulate”;³⁴⁵ and 3) “necessarily vary with the circumstances”.³⁴⁶

In the view of the tribunal, the FET standard implies that there is

³³⁵ *Id.* at footnote 323, at paras. 381 and 380.

³³⁶ *Id.* at footnote 323, Part VI(E).

³³⁷ *El Paso Energy International Company v. Argentina*, Award, ICSID Case No. ARB/03/15, 27 October 2011.

³³⁸ *Id.* at footnote 337, at paras. 7-13.

³³⁹ *Id.* at footnote 337, at paras. 294-295.

³⁴⁰ *Id.* at footnote 337, at paras. 319-325.

³⁴¹ *Id.* at footnote 337, at paras. 297-299.

³⁴² *Id.* at footnote 337, at paras. 305-316.

³⁴³ *Id.* at footnote 337, at paras. 517-519.

³⁴⁴ *Id.* at footnote 337, at para. 357.

³⁴⁵ *Id.* at footnote 337, at para. 358.

³⁴⁶ *Id.* at footnote 337, at paras. 359-363.

“no unreasonable or unjustified modification of the legal framework”³⁴⁷ and “no modification of the legal framework when *contrary specific commitments* have been made towards the investor”.³⁴⁸ The quantum of compensation for breach of this standard, according to the tribunal, would still be the “fair market value” standard, comparing the fair market value of the investment with and without the challenged Argentine measures.³⁴⁹ The investor was ultimately awarded compensation of US\$ 43.03 million plus compounded interest.³⁵⁰

The foregoing summaries of arbitral awards involving the Argentine financial crisis of 2000-2002 highlight several paradoxes on regulatory risk discussed in this **Part I**. For one, under the definition of regulatory risk adopted in this Report (“the risk that regulatory agencies will change policy decisions”), arbitral tribunals do not appear to differentiate from regulatory risk attendant to the ordinary business cycle, vis-à-vis regulatory risk arising from exogenous macroeconomic crises or price shocks in the host State. While some tribunals have considered that the State’s “right to regulate” might also extend to responding to difficult economic situations, they have not triangulated the impact that regulatory risk may play in both investor and host State expectations of compensation for *non-expropriation* breaches of the investment treaty. The easy transposition of the “fair market value” standard (and based on perfectly competitive market conditions at that) to determine compensation for breaches of the fair and equitable treatment standard is likewise perplexing from the standpoint of regulatory risk. It can make little difference to an investor’s regulatory risk assessment at the time of establishment of the investment that a host State’s exercise of police powers will be acceptable for expropriation, *but not* for all other treaty breaches.

If the purpose of the due diligence process is to enable the investor to accurately assess the risks to the investment (and in a way that more realistic “pricing” of the desired returns or yields from the investment that the investor rightly expects in exchange for letting a host State use its capital), it should suffice for estimation purposes that both the investor and the host State identify the likelihood of the State’s use of its police powers to meet economic crises. Such being the case, it might also be possible that the ultimate value of the investment could already have a “mark-up” that purposefully reflects a higher regulatory risk premium to satisfy the

³⁴⁷ *Id.* at footnote 337, at paras. 365-374.

³⁴⁸ *Id.* at footnote 337, at paras. 375-379. Italics added.

³⁴⁹ *Id.* at footnote 337, at paras. 702-704.

³⁵⁰ *Id.* at footnote 337, at para. 752.

investor's fear of loss from this kind of risk. Despite the proliferation of the "arbitrary innovation" of the "legitimate expectations of the investor" as the proxy variable for determining any breach of the fair and equitable treatment standard, it is highly interesting that none of the tribunals to date have begun to approach the complex issues of regulatory risk in the determination of investor compensation.³⁵¹

Part II proceeds to sketch various proposals for reconsidering regulatory risk assessment in light of host States' continuing social protection obligations under the International Covenant on Economic Social and Cultural Rights.

II. MANAGING REGULATORY RISK FROM SOCIAL PROTECTION MEASURES

A. The ICESCR and its Institutional Enforcement

There are currently 161 States Parties to the International Covenant on Economic Social and Cultural Rights (ICESCR), as well as 70 State signatories.³⁵² ICESCR obligations are binding and actionable norms of international law,³⁵³ comprising both positive rights owed to individuals as well as negative prohibitions upon States.³⁵⁴ A State's obligations under the ICESCR apply both territorially and extraterritorially. In its *Wall Advisory Opinion*, the International Court of Justice did not restrict the scope of application of the ICESCR by a State merely to its own territory, recognizing that the ICESCR "applies both to territories over which a State Party has sovereignty and to those over which that State exercises territorial jurisdiction".³⁵⁵ A year later in its Judgment in *Democratic Republic of Congo v. Uganda*, the Court further stressed the extraterritorial application

³⁵¹ See Diane A. Desierto, *Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses*, 9 *Manchester Journal of International Economic Law* 2 (2012) 162-183; Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises*, 44 *George Washington International Law Review* 102-147 (2012).

³⁵² See Status of Ratifications and Accessions to the International Covenant on Economic Social and Cultural Rights at: <http://www2.ohchr.org/english/law/cescr.htm> (last accessed 10 October 2012).

³⁵³ See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, paras. 112, 131, 133-134.

³⁵⁴ AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), *CORE OBLIGATIONS BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Intersentia, 2002).

³⁵⁵ *Id.* at footnote 354, at para. 112.

of international human rights instruments, saying that these “are applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory, particularly occupied territories.”³⁵⁶ International law scholars accept the extraterritorial application of the ICESCR to “individuals and groups within a State’s territory and to those individuals who are subject to a State’s jurisdiction.”³⁵⁷

There are material differences between the modes of State compliance with the ICESCR, as opposed to the International Covenant on Civil and Political Rights (ICCPR). While Article 2(1) of the ICCPR makes it the “undertaking” of each State Party “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”,³⁵⁸ Article 2(2) of the ICCPR affords each State Party discretion on how to implement the ICCPR: “where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws as may be necessary to give effect to the rights recognized in the present Covenant.”³⁵⁹ On the other hand, the ICESCR contains a progressive and dynamic general obligation for its State Parties “to take steps, individually and through international assistance and cooperation, economic and technical, to the maximum of its available resources, with a view to achieving progressively the realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”³⁶⁰

The Committee on Economic Social and Cultural Rights (hereafter, “the Committee”) explains this fundamental general obligation under the

³⁵⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, I.C.J. Reports (2005) para. 217.

³⁵⁷ Manisuli Ssenyonjo, *Economic Social and Cultural Rights*, pp. 49-89, at 73 in MASHOOD A. BADERIN AND MANISULI SSENYONJO (EDS.), *INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND* (Ashgate Publishing 2010). See also F. Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in FONS COOMANS AND MENNO T. KAMMINGA (EDS.), *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2004), at 183-200.

³⁵⁸ International Covenant on Civil and Political Rights, Article 2(1), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 U.N.T.S. 171. [hereafter, “ICCPR”].

³⁵⁹ ICCPR, Article 2(2).

³⁶⁰ International Covenant on Economic, Social and Cultural Rights, Article 2(1), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3. [hereafter, “ICESCR”].

ICESCR as one that:

“provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect....while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant....While each State Party must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights, the ‘appropriateness’ of the means chosen will not always be self-evident...Among the measures which may be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable....Other measures which also be considered ‘appropriate’ for the purposes of Article 2(1) include, but are not limited to, administrative, financial, educational, and social measures.”³⁶¹

ICESCR obligations thus differ markedly from ICCPR obligations, in that ICESCR obligations have an inherently *evolutionary* and *dynamic* substantive content arising from their “progressive realization”.

The Committee further explains:

“the concept of ‘progressive realization’ constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in Article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is

³⁶¹ Committee on Economic Social and Cultural Rights, General Comment 3 (The nature of States parties obligations (Art. 2, para. 1 of the Covenant), 12/14/1990, paragraphs 1, 2, 4, 5, and 7 available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?OpenDocument) (last accessed 10 October 2012).

foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an *obligation to move as expeditiously and effectively as possible towards that goal*. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”³⁶²

Most importantly, ICESCR obligations have an “obligatory baseline” consistent with this specialized treaty’s *raison d'être* – otherwise known as the “minimum core content” of ICESCR rights that States are required to respect, protect, and fulfill even during economic emergencies or despite resource constraints. In the words of the Committee, it is “of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of rights is incumbent upon every State Party”, and that this minimum core obligation would in any event “also take account of resource constraints applying within the country concerned... In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.”³⁶³ The minimum core content or minimum core obligations of the ICESCR ultimately refer to essential levels “without which a right loses its substantive significance as a human right”,³⁶⁴ thus yielding an “absolute international minimum”, applicable “whatever the State’s level of development and resources” since the ICESCR minimum core obligation entails “the basic level of sustenance necessary to live in dignity...the baseline below which all States must not fall, and should endeavor to rise

³⁶² *Id.* at footnote 361, at para. 9. Italics added. Underscoring in the original.

³⁶³ *Id.* at footnote 361, at para. 10.

³⁶⁴ MAGDALENA SEPÚLVEDA, *THE NATURE OF THE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Intersentia 2003), at p. 366.

above.”³⁶⁵ The Committee’s General Comments thus far have clarified the minimum core content of the right to food,³⁶⁶ the right to health,³⁶⁷ the right to social security,³⁶⁸ the right to water,³⁶⁹ among others. These Comments provide useful guidelines and benchmarks for States not just in their country reporting duties to the Committee,³⁷⁰ but also for undertaking their ongoing and regular national assessments of the “minimum core content” of ICESCR protection. Relatively recent academic literature also offers guidance on quantitative measurements, analytical indicators, and empirical methodologies to determine the “minimum core obligation” of ICESCR rights, considering the peculiar resource constraints, governmental capabilities, and population needs unique to various States Parties.³⁷¹

³⁶⁵ MANISULI SSENIONJO, *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW* (Hart Publishing, 2009), pp. 66-67.

³⁶⁶ CESCR General Comment 12 [The right to adequate food (art. 11)], 1999, para. 17. *See also* Rolf Künemann, *The Right to Adequate Food: Violations Related to its Minimum Core Content*, pp. 161-183 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Intersentia, 2002).

³⁶⁷ CESCR General Comment 14 [The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)], para. 43. *See also* Audrey R. Chapman, *Core Obligations Related to the Right to Health*, pp. 185-215 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Intersentia, 2002).

³⁶⁸ CESCR General Comment 19 [The right to social security (art. 9)], 2007, para. 59. *See also* Lucie Lamarche, *The Right to Social Security in the International Covenant on Economic, Social and Cultural Rights*, pp. 87-114 in AUDREY CHAPMAN AND SAGE RUSSELL (EDS.), *CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* (Intersentia, 2002).

³⁶⁹ CESCR General Comment No. 15 [The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)], 2002, para. 37.

³⁷⁰ On the persuasive weight of the reports and recommendations of the human rights treaty bodies, *see* Philip Alston, *The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law*, p. 763 in L. BOISSON DE CHAZOURNES AND V. GOWLAND DEBBAS (EDS.), *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY: LIBER AMICORUM GEORGES ABI-SAAB* (2001); Markus Schmidt, *United Nations*, pp. 391-432, at 408-409 in DANIEL MOECKLI, SANGEETA SHAH, AND SANDESH SIVAKUMARAN, *INTERNATIONAL HUMAN RIGHTS LAW* (Oxford University Press, 2010) (“...general comments and recommendations offer extremely helpful interpretative guidance to states and other stakeholders....While not legally binding, general comments and recommendations are frequently invoked by states and complainants in the context of reporting and complaints procedures, and sometimes by national courts in their judgments. They have been called a new species of soft law.”).

³⁷¹ *See* George S. McGraw, *Defining and Defending the Right to Water and Its Minimum Core: Legal Construction and the Role of National Jurisprudence*, 8 Loy. U. Chi. Int’l L. Rev. 127 (2011); Sital Kalantry, Joyceln E. Getgen, and Steven Arrigg Koh, *Enhancing Enforcement of Economic, Social, and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, Cornell Law Faculty Working Papers 63, available at:

Finally, it should also be noted that the compliance mechanisms in the ICESCR primarily depend on the periodic and dialogic State reporting process administered by the Committee.³⁷² The Committee is the primary authoritative body of experts mandated to assist the United Nations Economic and Social Council with monitoring States' compliance with the ICESCR.³⁷³ Apart from the State reporting process, an individual complaints procedure was established in December 2008, through the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ("Optional Protocol to the ICESCR").³⁷⁴ The Optional Protocol to the ICESCR empowers the Committee to request urgent interim measures from a State Party "as may be necessary in exceptional circumstances to avoid possible irreparable damage to the victim or victims of the alleged violations".³⁷⁵ After examination of the individual communication, the Committee could transmit its views to the State Party concerned for its consideration and action.³⁷⁶ Significantly, the Optional

http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1065&context=clsops_papers (last accessed 10 March 2012); Edward Anderson, *Using quantitative methods to monitor government obligations in terms of the rights to health and education*, Center for Economic and Social Rights working paper, November 2008, available at: <http://www.cesr.org/downloads/Quantitative%20Methods%20for%20Measuring%20ESCR.pdf> (last accessed 10 March 2012); Eitan Felner, *A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability*, 9 *Sur International Journal on Human Rights*, (December 2008), pp. 109-146, available at: http://www.surjournal.org/eng/conteudos/getArtigo9.php?artigo=9,artigo_felner.htm (last accessed 10 March 2012). On auditing national government policies in light of the ICESCR, see methodology developed in Radhika Balakrishnan and Diane Elson, *Auditing Economic Policy in the Light of Obligations on Economic and Social Rights*, 5 *Essex Human Rights Review* 1 (July 2008), pp. 1-19, available at: <http://www.cwgl.rutgers.edu/globalcenter/publications/auditing.pdf> (last accessed 10 March 2012).

³⁷² See ICESCR Articles 16 and 17. Note that the UN Commission on Human Rights has used the reporting process strategically to articulate States' failure to comply with human rights treaty commitments, with some significant success. See James H. Lebovic and Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 *Int'l Studies Q.* (2006), 861-888.

³⁷³ E.S.C. Res. 1985/17, 1985 U.N. ESCOR Supp. (No. 1) at 15, U.N. Doc. E/1985/85 (1985). See also MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* (Clarendon Press, 1998), at Chapter 3 (The System of Supervision).

³⁷⁴ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution A/RES/63/117, 10 December 2008, full text available at: <http://www2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf> (last accessed 10 October 2012), at Articles 1-2. As of this writing, the Optional Protocol to the ICESCR has not yet entered into force.

³⁷⁵ *Id.* at footnote 374, Art. 5.

³⁷⁶ *Id.* at footnote 374, Arts. 7-8.

Protocol to the ICESCR confers authority to the Committee to conduct confidential inquiries on alleged grave or systematic violations by a State Party of Covenant rights, and thereafter transmitting findings and recommendations to the State Party concerned.³⁷⁷ Finally, the Optional Protocol to the ICESCR enables an inter-State communications procedure where a State Party can invite the attention of another State Party to the fulfillment of ICESCR obligations, culminating with the issuance of a Committee Report on the disputed matter.³⁷⁸

As seen from the foregoing, the dynamic and evolutionary nature of ICESCR obligations introduces complexity to the assessment of a State's compliance (or non-compliance) with the ICESCR. The complexity does not, however, make ICESCR obligations indeterminate, or incapable of application to specific facts. (As the International Court of Justice demonstrated in the *Wall Advisory Opinion*, it is entirely possible to identify breaches of the ICESCR that engage a State's international responsibility.³⁷⁹) When assessing regulatory risk within these States, it is impossible to overlook their continuing and dynamic obligations under the ICESCR to adapt statutes, administrative regulations, and other forms of legislation to continue to satisfy not just the minimum core content of the ICESCR but to "progressively realize" ICESCR rights given a State's resource constraints. For this reason, there may be more policy uncertainty (and in turn, higher expectations of regulatory risk) expected from a State that is far from achieving even the minimum core content or obligatory baseline of the ICESCR. In those situations, it may well be the case that authoritative decision-makers of a State could be expected to prioritize the minimum social protection and economic rights guarantees under the ICESCR. Precisely because a State's fiscal decisions directly determine the degree of compliance with the ICESCR, the corresponding policy uncertainty bears upon regulatory risk.

B. ICESCR-based social protection adjustments to investment due diligence

In its March 2012 Note, the Investment Climate Department of the World Bank Group reported that "political risk is investors' top concern over the

³⁷⁷ *Id.* at footnote 374, Art. 11.

³⁷⁸ *Id.* at footnote 374, Art. 10.

³⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, I.C.J. Reports 2004, pp. 191-192, paras. 133 and 134. See also Scott Leckie, *Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, 20 Hum. Rts. Q. 1 (Feb. 1998), 81-124.

medium term...[in part] due to recent global developments, with investor perceptions of political risk heightened by issues like terrorist threats, economic crises, and developing countries' desire to control their natural resources and civil societies."³⁸⁰ These new manifestations of political risk are consistent with the broad definition of political risk as "risks associated with business or investment in a country which would not be present in another country with a more stable and developed business and economic climate and regulatory regime."³⁸¹ Significantly, aspects of political risk such as regulatory and policy uncertainty, have been found to be the "most serious constraints on doing business in developing countries...[a] business environment characterized by constant policy surprises and reversals, unclear property rights, and uncertain contract enforcement is likely to deter investment and result in poor economic performance."³⁸²

Basic due diligence processes in foreign investment usually involve examining commercial and administrative laws, regulations, and procedures likely to affect an investment. One law firm describes "country diligence" for the purchase of oil and gas assets in foreign countries as a process that requires "interviewing for local law expertise", "obtain[ing] a copy of the host country's Foreign Investment Law", and "obtain[ing] a copy of the law establishing the host country business entities."³⁸³ Beyond this traditional scope of the foreign investment due diligence process, however, some scholars have proposed reforms that would include host States' international human rights commitments in the due diligence review to be conducted jointly by the investor with the host State.³⁸⁴ While it

³⁸⁰ Stephan Dreyhaupt, Ivan Nimac, and Kusi Hornberger, *Political Risk: The Missing Link in Understanding Investment Climate Reform?*, Investment Climate in Practice, No. 20, March 2012, at 1, available at: <https://www.wbginvestmentclimate.org/uploads/In%20Practice%20Political%20Risk.pdf> (last accessed 10 October 2012).

³⁸¹ Claire A. Hill, *How Investors React to Political Risk*, 8 Duke Journal of Comparative and International Law 283 (1998), at 294.

³⁸² Thomas Kenyon and Megumi Naoi, *Policy Uncertainty in Hybrid Regimes: Evidence from Firm-Level Surveys*, 43 Comparative Political Studies 4 (2010), 486-510, at 487. See also Yu-Fu Chen and Michael Funke, *Option Value, Policy Uncertainty and the Foreign Direct Investment Decision*, Dundee Discussion Papers in Economics 139 (2003) (which concludes that policy uncertainty is significantly detrimental to FDI decisions); Brandon Julio and Youngsuk Yook, *Policy Uncertainty, Irreversibility, and Cross-Border Flows of Capital*, unpublished paper (September 2012), available at: <http://ssrn.com/abstract-2024612> (last accessed 10 November 2012).

³⁸³ "Due Diligence Checklist", Thompson and Knight Law Firm, available at: [http://www.tklaw.com/resources/documents/Acquisitions%20A%20Check%20list%20for%20Due%20Diligence%20\(Maryan,%20S.\).pdf](http://www.tklaw.com/resources/documents/Acquisitions%20A%20Check%20list%20for%20Due%20Diligence%20(Maryan,%20S.).pdf) (last accessed 10 October 2012).

³⁸⁴ See Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 International and Comparative Law Quarterly 3 (July 2011); Davia Davitti, *On the*

might seem at first glance that a State's human rights commitments appear tangential to a foreign investor's due diligence concerns, the effect of these competing commitments on the degree of *policy uncertainty* to be expected from the host State makes these commitments significant for an investor's regulatory risk analysis.

An investor that seeks to ascertain the likelihood or probability that a host State would change the regulatory, administrative, or legislative framework at any point during the life of an investment must necessarily identify and anticipate the nature of the host State's long-term commitments to social protection obligations under the ICESCR. It may be reasonable to expect that a host State that fails to meet its minimum core obligations³⁸⁵ under the ICESCR during economic crises, would conceivably prioritize such obligations over that of its obligations to investors (and thus possibly increase its default risk towards the latter).

As emphasized in 2012 by Ariranga Pillay, the Chairperson of the Committee on Economic, Social and Cultural Rights, policy changes to implement the ICESCR should be expected during economic crises:

“The Committee has observed over recent years the pressure on many States Parties to embark on austerity programmes, sometimes severe, in the face of rising public deficit and poor economic growth. Decisions to adopt austerity measures are always difficult and complex, and the Committee is acutely aware that this may lead many States to take decisions with sometimes painful effects, especially when these austerity measures are taken in a recession...

Economic and financial crises, and a lack of growth, impede the progressive realization of economic, social and cultural rights and can lead to retrogression in the enjoyment of those rights. The Committee realizes that some adjustments in the implementation of some of these Covenant rights are at times inevitable. States Parties, however, should not act in breach of their obligations under the Covenant.

...the Committee emphasizes that any proposed policy change or adjustment [] has to meet the following requirements: *first*, the policy is a temporary measure covering only the period of crisis; *second*, the policy is necessary and proportionate, in the

Meanings of International Investment Law and International Human Rights Law: The Alternative Narrative of Due Diligence, 12 Human Rights Law Review 3 (August 2012).

³⁸⁵ *Id.* at footnote 361.

sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights; *third*, the policy is not discriminatory and comprises all possible measures, including tax measures, to support social transfers to mitigate inequalities that can grow in times of crisis and to ensure that the rights of the disadvantaged and marginalized individuals and groups are not disproportionately affected; *fourth, the policy identifies the minimum core content of rights, or a social protection floor*, as developed by the International Labour Organisation, *and ensures the protection of this core content at all times.*³⁸⁶

Thus, to the extent that a host State's *continuing* and *dynamic* commitments to comply with the ICESCR contributes to heightened policy uncertainty that could affect the investment, foreign investors would be well-advised to expand the scope of due diligence review, and concomitantly, the bases for assessing a State's political or regulatory risks. Investors can obtain information on the ICESCR obligations assumed by States, as well as their degree of compliance with these obligations, from the publicly available and standardized periodic reports submitted by States Parties to the Committee pursuant to the ICESCR monitoring process.³⁸⁷ Notably, within the same process, the Committee has enabled receipt of reports and other information from non-governmental organizations (NGOs) to counterbalance and provide informational critiques on State reports.³⁸⁸

³⁸⁶ Letter of Ariranga G. Pillay, Chairperson, Committee on Economic, Social and Cultural Rights, 16 May 2012, to all States Parties to the International Covenant on Economic, Social and Cultural Rights, available at: http://www2.ohchr.org/english/bodies/cescr/docs/LetterCESCR_toSP16.05.12.pdf (last accessed 10 October 2012). Italics added.

³⁸⁷ Economic and Social Council Resolution 1985/17 (which established the Committee on Economic Social and Cultural Rights), to assume the monitoring duties of the UN Economic and Social Council under Part IV of the ICESCR. *See also* Barbara von Tigerstrom, *Implementing Economic, Social and Cultural Rights: The Role of National Human Rights Institutions*, pp. 139-159 in ISFAHAN MERALI AND VALERIE OOSTERVELD (EDS.), *GIVING MEANING TO ECONOMIC SOCIAL AND CULTURAL RIGHTS* (University of Pennsylvania Press, 2001). *See* Report of the Secretary-General, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, HRI/GEN/2/Rev. 6, 3 June 2009.

³⁸⁸ *See* RICHARD PIERRE CLAUDE AND BURNS H. WESTON (EDS.), *HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION* (3rd edition, University of Pennsylvania Press, 2006), at p. 292; COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: REPORT ON THE FORTY-SECOND AND FORTY-THIRD SESSIONS (United Nations Publications, 2010), at pp. 8-19 (on the overview of the working methods of the Committee in relation to the States reports, receipt of information from sources other than States parties, reports

Information sought by the Committee from the States Parties entails obtaining “detailed factual data”, such that the Committee regularly “meets with the representatives of the country after its review. During this meeting, which is open to the public, the [Committee] typically asks for further information or clarification.”³⁸⁹ Other international organizations and UN specialized agencies also regularly furnish information to the Committee to provide a broad-based view of a State Party’s compliance with various ICESCR rights.³⁹⁰

The inclusion of the above data in the due diligence process is not in itself unusual, especially when taken alongside recent proposals for operationalizing “human rights risk assessments”:

“Taking a risk approach to human rights due diligence means answering the question ‘What is the actual, potential or perceived risk of company participation in human rights abuse in the country?’....The empirical work of risk assessment can be done through desktop research and by going to the field...[The] desktop preparation phase serves as an initial scoping, looking for potential sources of risk. It looks at both the status of human rights in a particular country and at the status of human rights in the company’s operational environment. The objective is to establish good background information about the human rights situation relevant for the company’s operations and to identify priorities for deeper investigation...

Step 1: Read the international human rights reports on the country available on the web and list what seem to be the most important

by non-reporting State parties, adoption of concluding observations and general comments by the Committee).

³⁸⁹ DAVID P. FORSYTHE, *ENCYCLOPEDIA OF HUMAN RIGHTS*, VOL. I (Oxford University Press, 2009), at p. 93.

³⁹⁰ W. Benedek, *The Normative Implications of Education for All (EFA); The Right to Education*, pp. 295-312, at p. 307 in ABDULQAWI A. YUSUF (ED.), *STANDARD-SETTING IN UNESCO VOL. I: NORMATIVE ACTION IN EDUCATION, SCIENCE AND CULTURE* (UNESCO Publishing/Martinus Nijhoff Publishers) (“UNESCO has a practice of assisting the CESCR’s discussion of the education part of State reports under the ICESCR through written comments or by being present in meetings as an observer...”). *COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: REPORT ON THE FORTY-SECOND AND FORTY-THIRD SESSIONS* (United Nations Publications, 2010), at p. 165. Note, however, that the Committee has occasional problems, as with any UN treaty monitoring body, with non-submission of reports or delayed reports. See NIGEL D. WHITE, *THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE* (Lynne Rienner Publishers, 2002), at p. 231.

human rights issues in the country...they will provide important information about the sources of human rights risk that the human rights community has been able to identify.

Step 2: Map or list the company's operations, both underway and planned, in that country. Look for such internal documentation as country risk assessments, environmental and social impact assessments...

Step 3: Cross check 1 and 2 looking for obvious connections.

Step 4: Draw up a list of tentative risks, involving the nature of the harm and/or violation involved, the affected people, and potential connections to the company...

Step 5: Engage with relevant company personnel. Explain the objective of the assessment...

Step 6: Contact trusted external experts...Is a particular section of industry under particular scrutiny for some issues?

Step 7: Prepare the staff of the company site for the visit...Especially in large companies, or where country managers or key managers at the corporate headquarters are skeptical, assume that it will take them time to adjust to the idea of human rights related assessments...Be sure to include those who may be in the field outside the head-office in the capital as they will be key to your access to field sites, local authorities, and possibly local communities...

Step 8: Speak with internal stakeholders. These include representatives of various departments in the company [which]...are directly tasked with functions which in fact help ensure respect for many key human rights. The purpose of these discussions is to understand the challenges that the company faces with regard to the human rights affected by their functions. This requires asking questions about potential harms...the level of control over these risks that the departments may have, the obstacles that some departments face in their human rights related efforts, *etc...*

Step 9: Speak with external stakeholders both in the capital, the region, and in the local footprint of the company...Human rights risk assessments are not mechanical processes. It is very difficult to quantify human rights risk. Checklists or compliance questionnaires, while helpful as a starting point or as a cross-check, cannot capture the quality of the risk and, therefore, the range of potential mitigations. It seems likely that the single most effective way to identify, understand, and manage risks are

through dialogue processes, such as stakeholder dialogue or the internal company risk workshop...³⁹¹

While numerous scholars have developed empirical methodologies for statistically estimating State compliance with the ICESCR using representative indicators and benchmarking,³⁹² it must be noted that even the United Nations is itself already well into the process of establishing statistical and empirical databases to track States Parties' compliance with the ICESCR. In 2006, the UN Office of the High Commissioner for Human Rights prepared a Report ("Indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework") in response to the requests of chairpersons of the various human rights treaty bodies.³⁹³

³⁹¹ Mark B. Taylor, Luc Zandvliet, Mitra Forouhar, *Due Diligence for Human Rights: A Risk-Based Approach*, (October 2009) Corporate Social Responsibility Initiative Working Paper No. 53, Cambridge, MA: John F. Kennedy School of Government, Harvard University, at pp. 8-13, 17. Italics added.

³⁹² See among others Edward Anderson, *Using quantitative methods to monitor government obligations in terms of the rights to health and education*, November 2008 unpublished paper, Center for Economic and Social Rights, available at: [http://www.cesr.org/downloads/Quantitative%20Methods%20for%20Measuring%20ESC R.pdf](http://www.cesr.org/downloads/Quantitative%20Methods%20for%20Measuring%20ESC%20R.pdf) (last accessed 10 October 2012), at pp. 8-10 (which focuses more on a basic resource allocation framework and government obligations under the ICESCR, specifying policy variables such as taxation, subsidies, direct provision, and market regulation, as well as constraints such as the national budget); Gauthier de Beco, *Human Rights Indicators for Assessing State Compliance for International Human Rights*, 77 *Nordic Journal of International Law* 1-2 (2008), pp. 23-49 (which emphasizes that human rights indicators be used by treaty bodies, and identifies what kind of data sets would be required for such indicators); Robert E. Robertson, *Measuring State Compliance with the Obligation to Devote Maximum Available Resources to Realizing Economic, Social and Cultural Rights*, 16 *Hum. Rts. Q.* 693 (1994) (descriptively explaining resource allocation under the ICESCR, and how resource allocation ought to be measured from the vantage point of human resources, technological resources, information resources, natural resources, and financial resources); Sital Kalantry, Jocelyn E. Getgen, and Steven Arrigg Koh, *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 *Hum. Rts. Q.* 2 (May 2010), 253-310 (which examines the specific treaty language, scope of the right, appropriate indicators to correlate with the state obligation, benchmarking progressive realization of the right, and identifying violations); Judith V. Welling, *International Indicators and Economic, Social, and Cultural Rights*, 30 *Hum. Rts. Q.* 4 (November 2008), 933-958 (identifying indicators from the ICESCR); Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 *Hum. Rts. Q.* 4 (Nov. 2001), 1062-1097.

³⁹³ Report on Indicators for Monitoring Compliance with International Human Rights Instruments, HRI/MC/2006/7, 11 May 2006, available at: http://hrbaportal.org/wp-content/files/2006_Report_English.pdf (last accessed 10 October 2012).

The High Commissioner stressed the particular utility of setting up quantitative indicators for the task of treaty monitoring:

“...in the context of the ongoing reform of the treaty bodies in general, and the reporting procedure in particular, it has been argued that the use of appropriate quantitative indicators for assessing the implementation of human rights – in what is essentially a qualitative and quasi-judicial exercise – could contribute to streamlining the process, enhance its transparency, make it more effective, reduce the reporting burden and above all improve follow-up recommendations and concluding observations, both at the Committee, as well as the country, levels.”³⁹⁴

The High Commissioner distinguished human rights “indicators” (e.g. “specific information on the state of an event, activity, or an outcome that can be related to human rights norms and standards, that address and reflect the human rights concerns and principles; and that are used to assess and monitor promotion and protection of human rights”),³⁹⁵ from “benchmarks” (e.g. “indicators that are constrained by normative or empirical considerations to have a predetermined value”), which the Committee on Economic, Social and Cultural Rights particularly favors.³⁹⁶ Indicators may be quantitative or qualitative.³⁹⁷

In defining the conceptual framework for human rights indicators, the High Commissioner drew attention to several methodological matters:

“*First*, there is a need to anchor indicators identified for a human right in the normative content of that right, as enumerated in the relevant articles of the treaties and related general comments of the committees. *Secondly*, it is necessary to reflect cross-cutting human rights norms or principles (such as non-discrimination and equality, indivisibility, accountability, participation and empowerment) in the choice of indicators. *Thirdly*, the primary focus of human rights assessment (and its value-added) is in measuring the effort that the duty-holder makes in meeting his/her obligations – irrespective of whether it is directed at promoting a

³⁹⁴ *Id.* at footnote 393, at para. 3.

³⁹⁵ *Id.* at footnote 393, at para. 7.

³⁹⁶ *Id.* at footnote 393, at para. 12.

³⁹⁷ *Id.* at footnote 393, at para. 8.

right or protecting it. At the same time, it is essential to get a measure of the ‘intent or acceptance of’ human rights standards by the State Party, as well as the consolidation of its efforts, as reflected in appropriate ‘outcome’ indicators. While such a focus recognizes an implicit linkage between the intent of a State Party, its efforts in meeting those commitments and the consolidated outcomes of those efforts, the linkage may not always translate into a direct causal relationship between indicators for the said three stages in the implementation of a human right. This is because human rights are indivisible and interdependent such that outcomes and the efforts behind the outcomes associated with the realization of one right may, in fact, depend on the promotion and protection of other rights....Such a focus in measuring the implementation of human rights supports a common approach to assessing and monitoring civil and political rights, as well as economic, social and cultural rights...The adopted framework should be able to reflect the obligation of the duty-holder to *respect, protect, and fulfill* human rights.”³⁹⁸

The High Commissioner then laid out a sequence for developing the conceptual framework defining indicators for substantive human rights:

- 1) identifying the “attributes” of a right (“limited number of characteristic attributes that facilitate the identification of appropriate indicators for monitoring the implementation of the right”),³⁹⁹
- 2) defining the configuration of *structural indicators* (e.g. “the ratification/adoption of legal instruments and existence of basic institutional mechanisms deemed necessary for facilitating realization of the human right concerned”⁴⁰⁰), *process indicators* (e.g. “relat[ing] State policy instruments to milestones that become outcome indicators, which in turn can be more directly related to the realization of human rights...State policy instruments refer to all such measures including public programmes and specific interventions that a State is willing to take in order to give effect to its intent/acceptance of human

³⁹⁸ *Id.* at footnote 393, at para. 13. Italics in the original.

³⁹⁹ *Id.* at footnote 393, at para. 14.

⁴⁰⁰ *Id.* at footnote 393, at para. 17.

- rights standards to attain outcomes identified with the realization of a given human right”⁴⁰¹), and *outcome indicators* (e.g. “attainments, individual and collective, that reflect the status of realization of human rights in a given context...often a slow-moving indicator, less sensitive to capturing momentary changes than a process indicator”⁴⁰²);
- 3) developing sources and data-generating mechanisms (e.g. socio-economic and administrative statistics, events-based data on human rights violations),⁴⁰³ and
 - 4) imposing criteria for the selection of quantitative indicators (e.g. “relevant, valid and reliable”, “simple, timely and few in number”, “based on objective information and data-generating mechanisms”, “suitable for temporal and spatial comparison and following relevant international statistical standards”, and “amenable to disaggregation in terms of sex, age and other vulnerable or marginalized population segments”).⁴⁰⁴

Using the *structure-process-outcome* indicators framework, the High Commissioner has since drawn up lists of illustrative indicators on civil and political rights as well as economic, social and cultural rights, and subjected such indicators to a comprehensive validation process before international experts, members of global academia, non-governmental organizations, international organizations, and national level policy makers.⁴⁰⁵

Among the ICESCR rights covered in the list of illustrative indicators are the right to the enjoyment of the highest attainable standard of physical and mental health, the right to adequate food, the right to adequate housing, the right to education, the right to social security, the right to work,

⁴⁰¹ *Id.* at footnote 393, at para. 18.

⁴⁰² *Id.* at footnote 393, at para. 19.

⁴⁰³ *Id.* at footnote 393, at paras. 24 and 25.

⁴⁰⁴ *Id.* at footnote 393, at para. 26.

⁴⁰⁵ Report on Indicators for Promoting and Monitoring the Implementation of Human Rights, HRI/MC/2008/3, 6 June 2008, at para. 2, available at: http://www2.ohchr.org/english/issues/indicators/docs/HRI.MC.2008.3_en.pdf (last accessed 10 October 2012).

and the right to non-discrimination and equality.⁴⁰⁶ The High Commissioner had also previously issued a Handbook for National Human Rights Institutions on the implementation of the ICESCR.⁴⁰⁷ Notably, in 2012, the Office of the UN High Commissioner for Human Rights issued its consolidated volume, “Human Rights Indicators: A Guide to Measurement and Implementation”,⁴⁰⁸ which further developed the *structure-process-outcome indicators* conceptual framework for determining State compliance with international human rights treaties, particularly the ICESCR.

Thus, while it may be said that the foregoing efforts towards empirical, quantitative, and qualitative verification of State compliance with the ICESCR appear to be incipient,⁴⁰⁹ it cannot be denied that, for purposes of regulatory risk analysis and the foreign investment due diligence process, there is at the very least, a wealth of information from which investors and host States can draw information mutually transparent and reasonably grounded “expectations” regarding the likelihood of legislative, administrative, regulatory or policy changes ensuing from a host State’s continuing and dynamic commitments towards social protection under the ICESCR. In establishing the foreign investment due diligence process, host States may additionally access the expertise and information available to the Committee on Economic, Social and Cultural Rights, particularly towards assisting in the design of ICESCR-based human rights impact assessments of prospective foreign investments.⁴¹⁰ Finally, other recent innovations in the UN system point towards recommended revisions of the foreign investment due diligence process, such as the 2011 Principles for Responsible Contracts issued by the Special Representative of the

⁴⁰⁶ *Id.* at footnote 405.

⁴⁰⁷ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, ECONOMIC, SOCIAL AND CULTURAL RIGHTS: HANDBOOK FOR NATIONAL HUMAN RIGHTS INSTITUTIONS (Professional Training Series No. 12, United Nations, 2005), available at: <http://www.ohchr.org/Documents/Publications/training12en.pdf> (last accessed 10 October 2012).

⁴⁰⁸ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS INDICATORS: A GUIDE TO MEASUREMENT AND IMPLEMENTATION (United Nations 2012), available at: http://www.ohchr.org/Documents/Publications/Human_rights_indicators_en.pdf (last accessed 15 November 2012).

⁴⁰⁹ For critiques of the undue emphasis on indicators, see Ann Jannette Rosga and Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, unpublished paper for the Hauser Globalization Colloquium (Fall 2008), available at: <http://www.iilj.org/courses/documents/SatterthwaiteRosga.TrustinIndicators.pdf> (last accessed 10 October 2012).

⁴¹⁰ See Bruno Simma and Diane A. Desierto, *Bridging the Public Interest Divide: Committee Assistance for Investor-Host State Compliance with the ICESCR*, pp. 1-15 in ESSAYS IN HONOUR OF EIBE RIEDEL (FESTSCHRIFT) (Duncker-Humblot, Berlin, 2012).

Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, (which recommends human rights risk assessment specifically built into different phases of the investment contracting process⁴¹¹), and the 19 December 2011 Report of Special *Rapporteur* Olivier De Schutter to the UN Human Rights Council (“Guiding Principles on Human Rights Impact Assessments of

⁴¹¹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Addendum, Principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations, guidance for negotiators, A/HRC/17/31/Add.3, 25 May 2011, available at: <http://www.business-humanrights.org/media/documents/ruggie/report-principles-for-responsible-contracts-25-may-2011.pdf> (last accessed 10 October 2012). Following are the ten principles:

- “1. Project negotiations preparation and planning: The parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations;
2. Management of potential adverse human rights impacts: Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities should be clarified and agreed before the contract is finalized;
3. Project operating standards: The laws, regulations, and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project;
4. Stabilization clauses: Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State’s *bona fide* efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations;
5. ‘Additional goods or service provision’: Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State’s human rights obligations and the investor’s human rights responsibilities;
6. Physical security for the project: Physical security for the project’s facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
7. Community engagement: The project should have an effective community engagement plan through its life cycle, starting at the earliest stages.
8. Project monitoring and compliance: The State should be able to monitor the project’s compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
9. Grievance mechanisms for non-contractual harms to third parties: Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism; and
10. Transparency/Disclosure of contract terms: The contract’s terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.”

Trade and Investment Agreements”),⁴¹² which proposed a distinct methodology for deriving treaty language that balances human rights protection with investment priorities. The Guiding Principles explicitly require host States to prepare human rights impact assessments to be used in the due diligence and negotiating process for concluding trade and investment agreements, built according to the principles of independence, transparency, and inclusive participation.⁴¹³

C. ICESCR as an interpretive device to an IIA

To reiterate, no IIA to date makes any explicit reference to the ICESCR as either an integral part of the IIA or its enumeration of applicable law. If the ICESCR were to be read into the substantive standards of an IIA as part of the primary norm on investment “treatment” applied to investors by host States (whether through the fair and equitable treatment standard, the national treatment standard, or the MFN treatment standard), the same can be done, so only as a “relevant rule of international law applicable between the parties” under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).⁴¹⁴ Bruno Simma and Theodore Kill have previously argued in favor of a cautious use of this provision of the VCLT, showing that investment treaties enjoy the presumption of compliance with other relevant rules of international law, and that, when properly argued, international human rights norms in particular satisfy the test of “relevance” contemplated in this provision of the VCLT.⁴¹⁵ This approach has not yet been tested in arbitral jurisprudence, particularly since few tribunals invoke VCLT Article 31(3)(c) to justify using human rights treaties to interpret investment treaty standards. In its 2008 Decision on Jurisdiction and Admissibility, the arbitral tribunal in *Micula and ors v. Romania* invoked VCLT Article 31(3)(c) to support its additional consideration of Article 15 of the Universal Declaration of Human Rights, in the process of interpreting a BIT’s nationality requirements for investors.⁴¹⁶ The *Saluka Investments v.*

⁴¹² Report of the Special *Rapporteur* on the right to food, Olivier De Schutter, Addendum, Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, A/HRC/19/59/Add.5, 19 December 2011.

⁴¹³ *Id.* at part IV, at paras. 4.1 to 4.7.

⁴¹⁴ Vienna Convention on the Law of Treaties, Article 31(3)(c).

⁴¹⁵ Bruno Simma and Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps towards a Methodology*, pp. 678-707 in CHRISTINA BINDER, ET AL., INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER (Oxford University Press, 2009).

⁴¹⁶ *Micula and ors v. Romania*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008, at paras. 86-88.

Czech Republic arbitral tribunal also depended upon VCLT article 31(3)(c), in order to take account of the customary international law principle “that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order.”⁴¹⁷ While the *amici curiae* in *Biwater Gauff v. Tanzania* argued generally for a human rights-sensitive interpretation of a BIT, on the reasoning that “human rights and sustainable development issues are factors that condition the nature and extent of the investor’s responsibilities, and the balance of rights and obligations as between the investor and the host State,”⁴¹⁸ the tribunal merely took the observation into consideration in its factual assessment of the investor’s acts and omissions, and not with respect to the interpretation of specific standards of the BIT.⁴¹⁹ Insofar as the reported arbitral awards arising from the 2001-2002 Argentine crisis are concerned, Argentina’s arguments based on human rights norms appear to have been left undeveloped, and certainly did not employ the Simma-Kill methodology for invoking external rules through VCLT Article 31(3)(c).⁴²⁰ In any event,

⁴¹⁷ *Saluka Investments BV v. Czech Republic*, Partial Award, PCA (UNCITRAL), 17 March 2006, at paras. 254-255:

“254. The Tribunal acknowledges that Article 5 of the Treaty in the present case is drafted very broadly and does not contain any exception for the exercise of regulatory power. However, in using the concept of deprivation, Article 5 imports into the treaty the customary international law notion that a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order. In interpreting a treaty, account has to be taken of ‘any relevant rules of international law applicable in the relations between the parties’ – a requirement which the International Court of Justice (ICJ) has held includes relevant rules of general customary international law.

255. It is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner *bona fide* regulations that are aimed at the general welfare.”

⁴¹⁸ *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Award and Concurring and Dissenting Opinion, ICSID Case No. ARB/05/22, 18 July 2008, at para. 380.

⁴¹⁹ *Id.* at footnote 418 at para. 601.

⁴²⁰ *CMS Gas Transmission Company v. Argentina*, Award, ICSID Case No. ARB/01/8, 25 April 2005, paras. 114, 121 [“In this case the Tribunal does not find any such collision between the Argentine Constitution and the arbitration. First because the Constitution carefully protects the right to property, just as the treaties on human rights do, and secondly because there is no question of affecting fundamental human rights when considering the issues disputed by the parties.]; *Siemens AG v. Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007, at para. 79 (“79...In this respect, the Tribunal notes the reference made by Argentina to international human rights law ranking at the level of the Constitution after the 1994 constitutional reform and implying that property rights claimed in this arbitration, if upheld, would constitute a breach of international human rights law. This argument has not been developed by Argentina. The Tribunal considers that, without the benefit of further elaboration and

arbitral tribunals are loathe to invoke VCLT Article 31(3)(c) as a gateway for human rights treaty norms, in the absence of any perceived textual ambiguity.⁴²¹ Using the ICESCR as an interpretive foil to an IIA standard requires meeting the threshold of the unitary system of interpretation under the Vienna Convention on the Law of Treaties.

Another way of using the ICESCR as an interpretive device to an IIA would be to accept that a host State's good faith compliance with the ICESCR could be an equitable basis to temper compensation, especially for non-expropriation compensation that is usually not provided for under the text of the IIA. As discussed elsewhere,⁴²² increased policy uncertainty owing to the dynamic nature of ICESCR obligations and State compliance thereto should be reflected in upward estimations of both the investment beta and the equity risk premium in a standard capital asset pricing model, thus resulting in a lower compensation value.⁴²³ Moreover, resort to the "fair market value" standard for determining compensation in non-expropriation breaches of an IIA is pure arbitral discretion: "[t]he customary rule of full compensation is of a very general nature and it does not offer a conceptual framework for the recovery of damages that would be comparable in specificity to the 'value' approach generally applicable in expropriation cases. Rather, it provides a general principle, according to

substantiation by the parties, it is not an argument that, *prima facie*, bears any relationship to the merits of this case."); *Azurix Corporation v. Argentina*, Award, ICSID Case No. ARB/01/12, 23 June 2006, at para. 261 ("261. The Respondent has also raised the issue of the compatibility of the BIT with human rights treaties. The matter has not been fully argued and the Tribunal fails to understand the incompatibility with the specifics of the instant case. The services to consumers continued to be provided without interruption by ABA during five months after the termination notice and through the new provincial utility after the transfer of service.").

⁴²¹ *Berschader and Berschader v. Russian Federation*, Award and Correction, SCC Case No. 080/2004, 21 April 2006, at para. 95; *Azurix Corporation v. Argentina*, Decision on Application for Annulment, ICSID Case No. ARB/01/12, 1 September 2009, at para. 90. Although note that tribunals, have sparingly resorted to VCLT Article 31(3)(c) as a means of treaty interpretation in other contexts that did not involve human rights assertions. See *Yukos Universal Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, 30 November 2009, paras. 260 and 309; *Veteran Petroleum Ltd v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, paras. 260 and 309; *Hulley Enterprises Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 226, 30 November 2009, paras. 260 and 309; *Kardassopoulos v. Georgia*, Decision on Jurisdiction, ICSID Case No. ARB/05/18, 6 July 2007, paras. 207-208.

⁴²² Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises*, 44 *George Washington International Law Review* (2012), 101-147.

⁴²³ *Id.* at footnote 422, at p. 142.

which any loss suffered and established must be compensated in full. The generality of the customary rule provides tribunals with flexibility as to what the precise methodology for assessing damages should be in a specific case.”⁴²⁴

The legal basis for awarding compensation for non-expropriation breaches of an IIA is ultimately, the law of compensation under the general law of international responsibility as codified under Article 36 of the ILC Articles on State Responsibility. This form of compensation is in no way intended to be punitive, exemplary, or expressive,⁴²⁵ and is in fact imposed on condition that such compensation must be *equitably* determined from the perspective of both the injuring party and the injured party: “[a]s to the appropriate heads of compensable damage and the principles of assessment to be applied in quantification, these will vary, depending upon the content of particular primary obligations, *an evaluation of the respective behavior of the parties* and, more generally, a concern to reach an *equitable and acceptable outcome*.”⁴²⁶

Following these rules, it is not too surprising that in the 19 June 2012 Judgment of the International Court of Justice in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)*⁴²⁷ – incidentally the only decision on compensation to date that the Court has issued in a case of diplomatic protection – the total compensation claim of US\$ 11,590,148 (for mental and moral damage, injury to Mr. Diallo’s reputation, loss of earnings during detention and following his expulsion, material damage, and loss of potential earnings), was whittled down by the Court to an award of US\$ 85,000 (for non-material injury suffered by Mr. Diallo) and US\$ 10,000 (for material injury suffered by Mr. Diallo in relation to his personal property).⁴²⁸

⁴²⁴ SERGEY RIPINSKY AND KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW (BIICL, 2008), at pp. 90-91.

⁴²⁵ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Arts. 31-36, p. 99, para. 4. Italics added.

⁴²⁶ International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, at p. 76, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last accessed 2 March 2012). Italics added.

⁴²⁷ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)*, Judgment of 19 June 2012, available at: <http://www.icj-cij.org/docket/files/103/17044.pdf> (last accessed 10 October 2012).

⁴²⁸ *Id.* at footnote 427, at paras. 10 and 61.

Most significantly, the *Diallo* Judgment on Compensation was an occasion for the Court to stress the rule that “[q]uantification of compensation for non-material injury rests on *equitable considerations*”,⁴²⁹ in light of the practices of the Human Rights Committee, the African Commission on Human and Peoples’ Rights, arbitral tribunals and regional human rights courts such as the European Court of Human Rights and the Inter-American Court of Human Rights. Applying this recent approach by the Court to the particular circumstances of an investor asserting non-material injuries arising from IIA standards *that do not involve expropriation* (such as the fair and equitable treatment standard), a host State’s good faith compliance with the ICESCR must be taken, at the very least, by the arbitral tribunal as a substantial equitable basis to prevent awarding compensation levels to an investor at the full “fair market value” ordinarily imposed by the IIA for direct or indirect expropriations. If the IIA is itself silent on the matter of compensation for breaches of non-expropriation standards in the IIA, it is not appropriate or consistent with the equitable process of determining compensation under the general law of international responsibility for the arbitral tribunal to summarily import the just compensation level of “full fair market value” that the States Parties merely intended for cases of direct or indirect expropriation.

A final way in which the ICESCR can be used as an interpretive device to an IIA is to re-examine the obligations of the home State of an investor.

While most IIAs ordinarily will not contain substantive obligations of the home State in relation to regulating the conduct of its investor-nationals,⁴³⁰ it has been proposed that investor and home State obligations be included:

“...directly in the IIAs as opposed to leaving it up to the host country to regulate under its domestic legislation. An example of this is the proposal submitted by China, Cuba, India, Kenya,

⁴²⁹ *Id.* at footnote 427, at para. 24. Italics added.

⁴³⁰ See Vicente Yu and Fiona Marshal, *Investors’ Obligations and Host State Policy Space*, November 4, 2008 unpublished paper, International Institute for Sustainable Development (IISD) 2nd Annual Forum of Developing Country Investment Negotiators, available at: http://www.iisd.org/pdf/2008/dci_inv_obligations.pdf (last accessed 10 October 2012); Peter Muchlinski, *Regulating Multinationals: Foreign Investment, Development and the Balance of Corporate and Home Country Rights and Responsibilities in a Globalizing World*, October 2007 unpublished paper for the Second Columbia International Investment Conference, available at: http://www.law.yale.edu/documents/pdf/Alumni_Affairs/Andrea_Bjorklund_readings.pdf (last accessed 10 October 2012).

Pakistan and Zimbabwe in November 2002 to the WTO's now-moribund Working Group on Trade and Investment (WGTI). In this proposal, these countries suggested that any discussion in the WTO on a multilateral framework on trade and investment should also look at 'legally-binding measures aimed at ensuring corporate responsibility and accountability relating to foreign investors, including measures that clearly spell out investors' obligations and the obligations of their home governments'. These countries stressed 'the right of host members to regulate foreign investors and the need for foreign investors to undertake obligations in line with host members' interests, development policies and objectives' and that investors 'should strictly abide by all domestic laws and regulations in each and every aspect of the economic and social life of the host members in their investment and operational activities.

Further, in order to ensure that the foreign investor meets its obligations to the host member, the cooperation of the home member's government is often necessary, as the latter can, and should, impose the necessary disciplines on the investors. The home member's government should therefore also undertake obligations, including, to ensure that the investor's behavior and practices are in line with and contribute to the interests, development policies and objectives of the host member."⁴³¹

Some of the proposals include directly incorporating binding guidelines, standards, or verifiable benchmarks for human rights compliance by multinational enterprises, such as the OECD Guidelines for Multinational Enterprises as well as the UN Global Compact.⁴³²

The draft Norwegian Model BIT of 2007 attempted to introduce the concept of investor obligations and home State obligations in language that appeared non-binding, although an institutional avenue was opened through the establishment of a Joint Committee of the Contracting Parties, through which the States Parties could discuss these new obligations and mutually decide to amend the Agreement accordingly in the future.⁴³³ However, Norway subsequently revoked this draft Model BIT after much

⁴³¹ *Id.* at footnote 430 (Yu and Marshal), at p. 4.

⁴³² *Id.* at footnote 430 (Muchlinski), at pp. 18-20.

⁴³³ See Peter Muchlinski, *Balancing Investor Rights and the Right to Regulate: The Issue of National Security*, Yearbook on International Investment Law and Policy (2009), p. 48. Full text of the draft available at: <http://www.regjeringen.no/upload/NHD/Vedlegg/hoeringer/Utkast%20til%20modellavtal%20.doc> (last accessed 15 November 2012).

public criticism that the draft text had supposedly failed to achieve the proper balance between investor rights and obligations.⁴³⁴

Short of actual treaty practice indicating specific requirements imposed upon investors and their home States to ensure compliance with human rights obligations, the ICESCR may still be invoked *independent of* the IIA as against the home State that is a party to both the ICESCR and the IIA. As an ICESCR party, the home State is bound to ensure that its nationals do not act in ways that cause violations of the State's fundamental obligations to 'respect', 'protect', and 'fulfill' ICESCR rights.⁴³⁵ In the investment context, home States may find guidance for implementing their fundamental general obligation under Article 2(1) ICESCR through the "UN 'Protect, Respect and Remedy' Framework for Business and Human Rights" (otherwise known as the "UN Framework").⁴³⁶ The UN Framework articulates three core principles arising from international human rights treaty practices: "the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies."⁴³⁷

As an example of this Framework's salience to investment processes, the Special Rapporteur drew attention to the role of "export credit agencies" (ECAs, which "finance or guarantee exports and investments in regions and sectors that may be too risky for the private sector alone"⁴³⁸) as the frequent home State mechanism within investment contracting processes. ECAs, in the Special Rapporteur's view, ought to have a significant role in ensuring due diligence on potential human rights impacts: "relatively few ECAs explicitly consider human rights at any stage of their involvement...a strong case can be made that ECAs, representing not only commercial interests but also the broader public interest, should require clients to perform adequate due diligence on their potential human rights impacts."⁴³⁹

⁴³⁴ Damon Vis-Dunbar, "Norway shelves its draft model bilateral investment treaty", June 8, 2009, Investment Treaty News, available at: <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/> (last accessed 10 October 2012).

⁴³⁵ See ICESCR, Article 2(1).

⁴³⁶ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights", A/HRC/8/5, 7 April 2008, full text available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (last accessed 10 October 2012).

⁴³⁷ *Id.* at footnote 436, at p. 1.

⁴³⁸ *Id.* at footnote 436, at para. 39.

⁴³⁹ *Id.* at footnote 436, at paras. 39-40.

The recommended scope of due diligence to anticipate potentially adverse human rights impacts is described below:

“...The process inevitably will be inductive and fact-based, but the principles guiding it can be stated succinctly. Companies should consider three sets of factors. The *first* is the country contexts in which their business activities take place, to highlight any specific human rights challenges they may pose. The *second* is what human rights impacts on their own activities may have within that context – for example, in their capacity as producers, service providers, employers, and neighbours. The third is whether they might contribute to abuse through relationships connected to their activities, such as with business partners, suppliers, State agencies, and other non-state actors. How far or how deep this process must go will depend on the circumstances.

For the substantive content of the due diligence process, companies should look, at a minimum, to the *international bill of rights and the core conventions of the ILO*, because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies.”⁴⁴⁰

The Special *Rapporteur* further noted that human rights impact assessments can be linked with other forms of (company or regulatory) risk assessments, but in such cases should include “explicit references to internationally recognized human rights.”⁴⁴¹ An appropriate due diligence process will not only ensure that the investor anticipates regulatory risk, but also avoids complicity in creating human rights-related harms.⁴⁴²

The 2011 Guiding Principles on Business and Human Rights further describes the appropriate contours of human rights due diligence:

“17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses and communicating how

⁴⁴⁰ *Id.* at footnote 436, at paras. 57 and 58. Italics added.

⁴⁴¹ *Id.* at footnote 436, at para. 61.

⁴⁴² *Id.* at footnote 436, at para. 73.

impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
 - (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
 - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve...
18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.

This process should:

- (a) Draw on internal and/or independent external human rights expertise;
 - (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation...
19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action...⁴⁴³

⁴⁴³ UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, GUIDING PRINCIPLE ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS

While an ICESCR-adjusted due diligence process better enables the host State and the investor to assess and estimate the regulatory risks of a given investment project, there is little room within a foreign investment contract for the responsibility of the home State of the investor. For this reason, and to ensure that the home State of the investor can also be held to account, the ICESCR obligations assumed by the home State of the investor - and not just the host State of the investment – must be adequately reflected in the IIA to likewise ensure that the home State remains responsible for preventing possible ICESCR violations arising from investor conduct.

III. REGULATORY RISK ASSESSMENT FOR DIVERSE ASSETS

Apart from reforming the investment due diligence process to enable a more accurate assessment of the regulatory risks arising from host States continuing and dynamic substantive obligations under the ICESCR, it is also important to adjust the regulatory risk assessment process considering the risks attendant to the nature of the asset *and* how that will be affected under the assumption that the host State will continue implementing ICESCR obligations during the life of such an investment.

While “investment” holds numerous meanings in IIAs and may encompass various types of economic assets (physical infrastructure, financial assets, contract rights, among others),⁴⁴⁴ the extensive scope of the ICESCR means that it could potentially figure in just about any form of investment.

The ICESCR provides for the right to work and to just and favorable work conditions,⁴⁴⁵ the right to form or join trade unions and the right to strike,⁴⁴⁶ the right to social security,⁴⁴⁷ the right to an adequate standard of living (including adequate food, clothing and housing),⁴⁴⁸ the right to the enjoyment of the highest attainable standard of physical and mental health,⁴⁴⁹ right to education (including compulsory and freely

‘PROTECT, RESPECT AND REMEDY’ FRAMEWORK (United Nations, Geneva and New York, 2011), pp. 18-20, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last accessed 15 November 2012).

⁴⁴⁴ See Julian Davis Mortenson, *The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law*, 51 Harvard International Law Journal 257 (2010), at 271-280.

⁴⁴⁵ ICESCR, Article 6(1), Article 7.

⁴⁴⁶ ICESCR, Article 8.

⁴⁴⁷ ICESCR, Article 9.

⁴⁴⁸ ICESCR, Article 11.

⁴⁴⁹ ICESCR, Article 12.

available primary education, access to secondary and higher education),⁴⁵⁰ and the right to take part in cultural life and benefit from moral and material interests from any scientific, literary, or artistic production.⁴⁵¹

A. Differentiating regulatory risk assessments for asset type

A host State's obligation to "respect, protect, and fulfill" these rights under the ICESCR would necessarily have to differentiate between potential human rights impacts of a foreign direct investment (such as, for example, infrastructure, utilities, and mining operations of investors), as opposed to financial investments traded in the secondary markets. The regulatory risks affecting either type of investment would have to be assessed by also considering the possible impact of the host State's continuing compliance with the ICESCR on the prospects of any future changes (if any) on the particular regulatory framework governing the kind of investment involved.

Karl Sauvant has discussed the different regulatory risks that are emerging according to different types of investment assets:

"[m]uch of [] regulatory uncertainty and threat of FDI protectionism focuses on cross-border M&As, as greenfield FDI continues to be almost uniformly welcome, regardless of the type of investor that undertakes it...From a host country perspective, however, cross-border M&As do not add to its productive capacity (at least immediately), but merely represent a change in ownership from domestic to foreign hands. Moreover, such transactions are often accompanied by restructuring, typically implying job losses or the closing down of activities, in order to increase the efficiency of the assets involved, integrate them profitably into the new parent or simply assure their survival. A more cautious attitude toward cross-border M&As can therefore have a major impact on FDI flows. Caution can be heightened if the acquirers are private equity groups, are from emerging markets, or are state-controlled entities."⁴⁵²

⁴⁵⁰ ICESCR, Article 13.

⁴⁵¹ ICESCR, Article 15.

⁴⁵² Karl P. Sauvant, *Driving and Countervailing Forces: A Rebalancing of National FDI Policies*, Yearbook on International Investment Law and Policy (2008-2009), 215 to 272, at 235. On the proliferation of greenfield foreign direct investments, see Cesar Calderon, Norman Loayza, and Luis Servén, *Greenfield Foreign Direct Investment and Mergers*

Other types of investment assets for which Sauvant also identifies potential regulatory risk concerns include:

- 1) private equity acquisitions of assets “that have a strong social dimension...private equity groups are not regarded as strategic investors interested in, and bound to, the long-term economic development of a host country”;⁴⁵³
- 2) equity acquisitions by emerging market companies in companies that perform sensitive public service or national security functions;⁴⁵⁴ and
- 3) equity acquisitions by sovereign wealth funds (“seen as potential threats and/or strategic competitors...a defensive reaction against the ‘new kids on the block’ can combine with national security concerns to provoke restrictive legislation and action”).⁴⁵⁵

Furthermore, one can also expect differences in the methods of assessing or estimating regulatory risks, when the valuation process for investment also varies in suitability depending on the asset type. The “market or sales comparison approach” derives the estimated value of an investment in comparison with “similar businesses, business ownership interests, and securities that have been sold in the market. The three most important common sources of data used in the market approach are public stock markets in which ownership interests of similar businesses are traded, the acquisition market in which entire businesses are bought and sold, and prior transactions in the ownership of the subject business.”⁴⁵⁶ This method depends considerably on the reliability of comparator data – which may not necessarily be high when it comes to the assessment of regulatory

and Acquisitions: Feedback and Macroeconomic Effects, World Bank Policy Research Working Paper 3192, January 2004, available at:

<http://elibrary.worldbank.org/docserver/download/3192.pdf?expires=1353652969&id=id&acname=guest&checksum=3A6195022FF50D0D7BFC4493F6913C4D> (last accessed 10 November 2012) (showing that the expansion of cross-border mergers and acquisitions is indeed followed by increases in greenfield foreign direct investment in developing economies).

⁴⁵³ *Id.* at footnote 452, at p. 236.

⁴⁵⁴ *Id.* at footnote 452, at p. 237.

⁴⁵⁵ *Id.* at footnote 452, at pp. 238-239.

⁴⁵⁶ IRMGARD MARBOE, *CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW* (Oxford University Press, 2009), at p. 189.

conditions affecting the investment vis-à-vis those affecting the businesses to which the investment is compared. Very “unique” projects will make it difficult to aggregate the “suitable market price” if the project has a specific market that is not easily replicable in other jurisdictions.⁴⁵⁷

On the other hand, the “income approach” focuses on estimating the “expected future financial benefits and discounting them to present value”, which “considers income and expense data relating to the property being valued and estimates value through a capitalization process.”⁴⁵⁸ The main difficulty with this method lies with the choice of the discount rate,⁴⁵⁹ where the risk premium component (including country risk, political risk, regulatory risk) might not adequately capture the host State’s economic circumstances affecting the investment enough to yield a reliable forecast.⁴⁶⁰

As has been rightly observed:

“For the selection of the discount rate, it is important to identify the rates on alternative investments available to potential buyers or investors. *The greatest difficulty lies in the comparability of the investment, in particular in terms of risk...* An enterprise’s risk is usually divided into ‘systematic’ and ‘unsystematic’ (‘specific’ or ‘subjective’) risk. The former entails, for example, general economic conditions, environmental risks, political environment – thus generally events or problems that are equal for all businesses or for the entire industry. Examples of ‘unsystematic’ risks are risks specific to the company, such as the market position of the company...qualification of management, and the financial situation of the business.”⁴⁶¹

⁴⁵⁷ *Id.* at footnote 456, at p. 190, at para. 5.13.

⁴⁵⁸ *Id.* at footnote 456, at pp. 206-207.

⁴⁵⁹ *Id.* at footnote 456, at p. 24

⁴⁶⁰ *Id.* at footnote 456, at pp. 228-232. See Diane A. Desierto, *ICESCR Minimum Core Obligations and Investment: Recasting the Non-Expropriation Compensation Model during Financial Crises*, 44 *George Washington International Law Review* 101 (2012). Note that while some valuation experts assess country risk as the premium over the “risk-free rate” to represent volatility differences between debt and equity markets, the reliability of this “risk-free rate” in an era of prolonged financial crises may be in serious doubt. See Black Rock Investment Institute, *Sovereign Bonds: Reassessing the Risk-Free Rate*, April 2011, available at: https://www2.blackrock.com/webcore/litService/search/getDocument.seam?venue=PUB_IND&source=GLOBAL&contentId=1111135895 (last accessed 10 November 2012).

⁴⁶¹ *Id.* at footnote 456, at p. 246. Italics added.

Further complications from the income approach arise if the valuation includes “future prospects” in relation to the investment contract, where “it has been suggested that in this case, the legitimate expectations of the investor should be taken into account.”⁴⁶² As discussed in **Part II**, the estimation of such legitimate expectations often neglects to consider the investor’s counterpart expectations of regulatory risks, especially those arising from a host State’s continuing and dynamic obligations towards social protection under the ICESCR.

The third valuation approach, otherwise known as the “asset-based or cost approach”, refers to the estimation of the value of an investment “based on the market value of individual business assets less liabilities.”⁴⁶³

This approach does not appear to be amenable to assessing regulatory risk and its potential role, if any, on the ultimate value of an investment, since the method behind this approach focuses on the valuation of discrete asset items, and thus, does not lend itself to the analysis of intangible assets and other external impacts on the value of the investment entity as a whole.⁴⁶⁴

Finally, it must also be emphasized that the methods for estimating or assessing regulatory risks for financial investment assets expectedly differ with methods for assessing regulatory risks for foreign direct investments such as physical infrastructure or utilities operations in the host State.

Risks in a financial investment asset are usually estimated within the standard Capital Asset Pricing Model (CAPM), which in its most basic form, is specified as:

$$E(R_i) = R_F + \beta_i [E(R_M) - R_F]$$

where;

$E(R_i)$ is the estimated value of the capital asset;

R_F is the risk-free rate;

β_i is the investment beta;

$E(R_M)$ is the expected market return; and

⁴⁶² *Id.* at footnote 456, at pp. 232-242, at 232.

⁴⁶³ *Id.* at footnote 456, at p. 268.

⁴⁶⁴ *Id.* at footnote 456, at p. 269, at para. 5.276.

$[E(R_M) - R_F]$ is the equity market premium.⁴⁶⁵

The investment beta is intended to measure the “sensitivity (volatility) of the rate of return on an individual security (or a portfolio of securities) to general rates of return in the public stock markets.”⁴⁶⁶ The higher the investment beta, the more sensitive the value of the investment is to the price fluctuations of the overall market. An investment beta higher than 1.0 reflects greater uncertainty, causing the discount rate to increase, and ultimately decreases the present value of an investment.⁴⁶⁷ The equity market premium, on the other hand, “measure[s] the additional return the investor will require before investing in a portfolio that contains such an investment, as compared with the risk-free investment.”⁴⁶⁸

Variables that determine the equity risk premium have been identified to include:

- (1) investor risk aversion and consumption preferences;
- (2) the health and predictability of the overall economy;
- (3) information about firm earnings and cash flows;
- (4) illiquidity costs (or the costs of trading the asset);
- (5) catastrophic risk (*e.g.* “events that occur infrequently but can cause dramatic drops in wealth”); and
- (6) government policy, where uncertainty about government policy can translate into higher equity risk premiums.⁴⁶⁹

This last determinant of the equity risk premium on government policy is

⁴⁶⁵ EDWIN J. ELTON, MARTIN J. GRUBER, STEPHEN J. BROWN, WILLIAM N. GOETZMANN, *MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS* (John Wiley & Sons, 2009), at p. 332.

⁴⁶⁶ MARK KANTOR, *VALUATION FOR ARBITRATION: COMPENSATION STANDARDS, VALUATION METHODS, AND EXPERT EVIDENCE* (2008), at 164.

⁴⁶⁷ *Id.* at footnote 466, at 165.

⁴⁶⁸ *Id.* at footnote 466, at 165.

⁴⁶⁹ See Aswath Damodaran, *Equity Risk Premiums (ERP): Determinants, Estimation and Implications – The 2012 Edition 6–13* (Mar. 14, 2012) (unpublished manuscript), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027211 (last accessed 10 October 2012).

what will be particularly affected by policy uncertainty to be anticipated from a host State's continuing and dynamic obligations under the ICESCR.

In contrast, foreign direct investment will additionally require examining industry-specific regulatory risks. In the context of the renewable energy sectors in the United States and Canada, Guy L.F. Holburn has argued that variables such as the "institutional structure of regulatory agencies" in the industry or sector, as well as the "degree of autonomy from elected political institutions", will affect the level of regulatory risk since "regulators are more likely to resist political pressures".⁴⁷⁰ On the other hand, specific environmental regulations (as well as future changes) can be expected to apply in particular to the mining industry as well as other forms of long-term infrastructure such as utilities and telecommunications.⁴⁷¹ A host State's continuing and dynamic obligations towards social protection under the ICESCR can be anticipated to play a significant role in the adaptation of industry-specific regulations. The regulatory risk estimation, in this case, should not be cabined into the CAPM but rather designed in a way that introduces other explanatory variables taking into account specific regulatory risks appertaining to the host State's ICESCR compliance in relation to the industry.

The explication of new investment valuation or estimation models, taking into account a broader understanding of regulatory risks arising from ICESCR compliance at the macroeconomic level as well as ICESCR compliance necessitated at the industry level, comprise suggested areas for future research.

B. Normative Guidance for Risk Assessment: UN Principles and the UNCTAD Investment Policy Framework for Sustainable Development

When designing an appropriate regulatory risk assessment process within IIAs that takes into account a host State's fundamental social protection obligations, it should be noted that normative guidance can be drawn from the UN Principles of Responsible Investment (hereafter, "UN Principles") and the UNCTAD Investment Policy Framework for Sustainable Development (hereafter, "IPFSD").⁴⁷² The UN Principles constitute

⁴⁷⁰ *Id.* at footnote 4, at p. 1.

⁴⁷¹ *Id.* at footnote 5. See ASHLEY C. BROWN, JON STERN, AND BERNARD WILLIAM TENENBAUM, HANDBOOK FOR EVALUATING INFRASTRUCTURE REGULATORY SYSTEMS (World Bank Publications, 2006).

⁴⁷² For the full text of the UN Principles, see: <http://www.unpri.org/principles/> (last accessed 10 October 2012). The full text of the IPFSD is available at:

voluntary undertakings of institutional investors to incorporate environmental, social, and corporate governance issues into investment analysis, decision-making processes, ownership policies, and processes, and also encourage compliance reporting in the implementation of the Principles.⁴⁷³

The IPFSD, on the other hand, is composed of Core Principles for investment policymaking for sustainable development, that are in turn fleshed out and applied through National Investment Policy Guidelines, and also serve as the conceptual foundation for policy options and recommendations for various elements in negotiating new IIAs.⁴⁷⁴

While both the UN Principles and the IPFSD are recent initiatives, efforts have already commenced towards gathering baseline data to help determine investors' compliance with the UN Principles and host States' use of the IPFSD. In 2012, the Reporting Framework for the UN Principles was piloted to provide a set of standardized indicators "relevant and to the point for all investors, with separate pathways for direct and indirect investors and specific asset class supplements."⁴⁷⁵ Some institutional investors have voluntarily made available their individual responses to the reporting framework for the years 2008-2011, and the UN has made available aggregated data on these responses in annual Reports on Progress from 2007-2011.⁴⁷⁶ The data obtained under the Reporting Framework will be aggregated and finalized into a comprehensive database with the prescribed indicators for compliance measurement by October 2013. On the other hand, UNCTAD has opened up various sections of the IPFSD (such as Policy Options for IIAs) for public comment and annotation, especially based on particular country experiences.

A November 2012 article by John Kline noted the deficiency in the IPFSD as the lack of a "process implementation tool that can help evaluate the multiple, interactive, effects of FDI proposal across economic, environmental, social, and governmental objectives", recommending a quantitative and qualitative approach to evaluate the extent to which social and environmental regulations and the host State's development priorities

http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf (last accessed 15 November 2012).

⁴⁷³ *Id.* at footnote 472, Principles 1-6 of the UN Principles.

⁴⁷⁴ *Id.* at footnote 472, at pp. 7-9 of the IPFSD.

⁴⁷⁵ The process for the Reporting Framework on the UN Principles is described here: <http://www.unpri.org/reporting/framework.php> (last accessed 10 October 2012).

⁴⁷⁶ For the links to the Reports, *see*: <http://www.unpri.org/reporting/result.php> (last accessed 10 October 2012).

would be affected by proposed foreign direct investment.⁴⁷⁷ As UNCTAD garners more country responses on the IPFSD's impact on national investment policy programming, it is hoped that the individual and aggregated data will be accessible for future research.

These examples are meant to illustrate that, for purposes of determining the regulatory risk of an investment, there are increasing data pools available regarding the host State's social protection commitments and level of compliance. Future research would benefit from tracking these other normative and empirical sources.

CONCLUSION

"...an uncertainty which can by any method be reduced to an objective, quantitatively determinate probability, can be reduced to complete certainty by grouping cases. The business world has evolved several organization devices for effectuating this consolidation, with the result that when the technique of business organization is fairly developed, measurable uncertainties do not introduce into business any uncertainty whatever....the present and more important task is to follow out the consequences of that higher form of uncertainty not susceptible to measurement and hence to elimination. It is this true uncertainty which, by preventing the theoretically perfect outworking of the tendencies of competition, gives the characteristic form of "enterprise" to economic organization as a whole and accounts for the peculiar income of the entrepreneur."

- Frank H. Knight, *Risk, Profit, and Uncertainty* (1921).⁴⁷⁸

"The terms 'certain' and 'probable' describe the various degrees of rational belief about a proposition which different amounts of knowledge authorize us to entertain. All propositions are true or

⁴⁷⁷ John M. Kline, *Evaluate Sustainable FDI to Promote Sustainable Development*, 82 Perspectives on topical foreign direct investment issues by the Vale Columbia Center on Sustainable International Investment, November 5, 2012, available at: <http://www.vcc.columbia.edu/content/evaluate-sustainable-fdi-promote-sustainable-development> (last accessed 15 November 2012).

⁴⁷⁸ FRANK H. KNIGHT, *RISK, UNCERTAINTY, AND PROFIT* (Hart, Schaffner, & Marx, and Houghton Mifflin Co., 1921), Part III, Chapter VII ("The Meaning of Uncertainty"), para. 48. Electronic version available at: <http://www.econlib.org/library/Knight/knRUP6.html#Pt.III,Ch.VII> (last accessed 10 October 2012).

false, but the knowledge we have of them depends on our circumstances, and while it is often convenient to speak of propositions as certain or probable, this expresses strictly a relationship in which they stand to a corpus of knowledge..."

- John Maynard Keynes, *A Treatise on Probability* (1921).⁴⁷⁹

Regulatory risk inimitably involves forecasting the future decisions and policies of a State. There are numerous variables that can affect the trajectory of this particular risk in relation to the longer time horizons of investments as opposed to other commercial transactions. This Report acknowledges the significance of one such variable – policy uncertainty arising from the host State’s continuing and dynamic obligations under the ICESCR. It has attempted to show that the objective of achieving regulatory predictability and stability in modern IIAs need not rule out including dynamic and evolving host State obligations under the ICESCR when assessing regulatory risks. On the contrary, a more realistic estimation of regulatory risk requires factoring in sources of policy uncertainty that can already be detected at the time of the establishment of an investment. The host State’s continuing international obligations towards social protection under the ICESCR is particularly relevant to this analysis, because they involve legitimately competing demands on the State’s fiscal and economic resources during the life of an investment.

As this Report has shown, the compensability of breaches of IIAs that involve observable regulatory risks (*e.g.* the fair and equitable treatment standard vis-à-vis the indirect expropriation standard) has not been a consistent process of determination for arbitral tribunals in the investor-State dispute settlement process. Much of the arbitral jurisprudence generated thus far and identified in this Report reflect uneven conceptions of regulatory risk, and varying theories of how to determine a host State’s liability for compensation when such regulatory risks materialize.

As seen in Part I, the underlying problems behind this inconsistency lie with the textual formulation of specific IIA provisions, as well as heterogeneous arbitral interpretations of such treaty language.

Part II proposes measures to recast the estimation of regulatory risk by building in ICESCR compliance from the prism of IIA design and interpretation; reforming the due diligence process in foreign investment contracting to detect the structure-process-outcome illustrative indicators to

⁴⁷⁹ JOHN MAYNARD KEYNES, *A TREATISE ON PROBABILITY* (original publication 1921, reprint by Dover Publications 2004), at p. 4.

determine the investment's compliance with the ICESCR; amending the valuation process of compensation for non-expropriation standards to reflect the broader conception of regulatory risk arising from the policy uncertainty to be expected from ICESCR compliance; as well as exploring the potential role of the home State of the investor who is the counterparty to the IIA in ensuring ICESCR compliance in foreign investments covered by the IIA.

Part III stresses the importance of differentiating regulatory risk assessment methods in light of the impact of ICESCR compliance obligations on the nature of the particular investment asset.

Regulatory predictability does not equate to static or frozen host State regulations, and investors cannot easily assume that legislation and regulations at the time of the establishment of an investment will remain, and be implemented in, completely the same manner, in perpetuity. The ordinary workings of government recognize adaptation, amendment, and change, and what is most important is to establish a legal framework within which the investor can adequately, sufficiently, and transparently track and predict such regulatory changes as would affect the investment.

It is for this reason that this Report invites attention to the fundamental design of IIAs as well as foreign investment contracts to capture the dynamic and continuing social protection obligations of host States under the ICESCR. It is submitted that the identification of regulatory risks, as well as the management of expectations of such risks, must be the collective and joint enterprise of the host State, the investor, as well as the home State of the investor who is the Party to the IIA. While the information asymmetry on regulatory risks would probably lean more towards the host State who is expectedly privy to its own governmental policies, distribution programs, and fiscal priorities, this does not excuse the investor as well as its home State from active participation in the dialogue on monitoring and assessing regulatory risks, if only to avoid or mitigate damage or loss from such risks materializing in the future.

As the arbitral tribunal in *Generation Ukraine v. Ukraine* rightly observed,

“Predictability is one of the most important objectives of any legal system...It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose...The fact that an investment has become worthless obviously does not mean that there was an act of

expropriation; investment always entails risk...”⁴⁸⁰

Finally, this Report also aimed to demonstrate the critical role of the arbitral tribunal in the valuation process, in particular for investment losses arising from the materialization of regulatory risks. Where the regulatory risk arises from host State conduct that prohibitively creates moral hazards and incentivizes adverse selection, there can be no doubt that the ensuing breaches of the IIA towards the investor would indeed be compensable. The actual degree, however, of this compensability, must be scrupulously scrutinized. As shown in this Report, there has been a disquieting automatic tendency on the part of several arbitral tribunals to equate the fair market value of the investment as the level of compensation for breaches of the IIA that do not even amount to expropriation. Where policy uncertainty anticipated from ICESCR is properly managed and fused into the design of an IIA (as well as the investment contract), dynamic host State regulations or policy flexibility to ensure continued social protection need not be prohibited or penalized *ex ante* as compensable breaches of an IIA. The regulatory risk premium cannot, and should not, be conservatively estimated when the investor has long been made aware of the host State’s continuing and dynamic obligations under the ICESCR, and concomitantly, of the potential changes that ought to be anticipated for the regulatory framework of the investment in order to enable the host State to comply with such social protection obligations. Host States must likewise apprise investors of required compliance with the minimum core obligations under the ICESCR even during economic or financial crises. Where States Parties and investors have been transparently and timely informed of this continuing dimension of regulatory risk on the value of an investment, there can be no justifiable claim to compensation for losses arising from the materialization of ICESCR-adjusted regulatory risk.

⁴⁸⁰ *Generation Ukraine v. Ukraine*, Award, ICSID Case No. ARB/00/9, 15 September 2003, paras. 20.29-20.30.

Response to the Report

*Dr. Yas Banifatemi**

Dans la grande tradition de l'île, je voudrais commencer par exprimer mes chaleureux remerciements au gouvernement mauricien, à Salim qui n'est pas là actuellement, pour ce très très bel évènement et pour m'avoir incluse dans la participation à cet évènement. Comme j'ai pu le dire à Salim, j'étais extrêmement impressionnée depuis des années de voir les accomplissements de Maurice dans le domaine du droit de l'arbitrage à tous les niveaux, et je souhaite longue vie à ces efforts, et je renouvelle mes remerciements et le fait que je sois impressionnée par tous ces efforts.

Returning to English now, I would like, by way of introductory remarks, to make a few points.

Maybe, first of all, thanking Diane for a thorough well-thought report, which I truly recommend everyone to read once it becomes available in its final form. It definitely gave me a lot to think about, and my reactions now are both to what Diane has put in her report and maybe more generally. In doing so, I want to take a step back in relation to investment law and investment arbitration in general. My reasons for doing this are that first of all, this is the last panel of the day and we have no other occasion of discussing more broader issues in relation to investment arbitration and investment law generally and the fact that today, which was dedicated to investment law, we had opportunities to focus on extreme situations and controversial issues, and you will have noticed that in this last panel and in the previous one, we addressed a lot the Argentine cases, but it is important to be cautious about investment law, and investment arbitration is not only about these cases and these extreme situations. It has much broader scope, and I think it is important not to forget this when we discuss this field.

In that relation, and I do not think that Albert Jan is still with us, I was actually surprised earlier today to hear him state the question: "Is the system viable?" I think that this is the heart of the matter. Is the system viable? Is this the right question? Or is the question: "Does the system work – with imperfections perhaps – but does it work?" In that context, I was very grateful to Diane for her non-mannequin way of addressing this

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very difficult topic of regulatory conduct and regulatory risk, and she has said just a few minutes ago that she did not take an ideological prism, so what she has done is very balanced. So, what I want to address, again taking one step back, is the premises on the basis of which we are thinking about these matters, and the field in general.

If we focus on the general investigation, if you look at the topic for today's panel: "Sovereign Policy Flexibility for Social Protection: Managing Uncertainty Risks in International Investment Agreements", one may read two assumptions in this title. First, that international investment agreements do not allow sufficient policy space to address social protection, and, second, that international investment agreements inherently result in uncertainty; it is not clear whether uncertainty is in relation to social protection or if it is more general. Do we agree with these premises? I am not sure. Do I agree with them? I do not think so.

Now, moving on to the topic that Diane addressed, again there is an issue of premises and assumptions. The first premise that Diane is using is the existence of regulatory risk, that she has defined as a risk that regulatory agencies will change policy decisions in respect to an investment. From then on, the question becomes about the impact of investment agreements and whether they should reduce the political and regulatory risk. What she defines as the regulatory predictability, that she says in her report is the design premise of investment agreements, and moving on from that, she then explains that this is the reason for the States to accept the trade-off between the future exercise of their regulatory powers and the risk that they may be subjected to international claims by investors.

If you take these three assumptions, again, I am not sure that I agree with them. To be quite basic, and again, I would like to apologize for being perhaps over-simplistic, but I think that if we are going to discuss the premises, we have to go back to the basics. What are the basics?

Investment agreements are designed to promote and protect investments. What they do is that they recognize a number of substantial rights of nationals in the territory of another State when there is a bilateral agreement, and these undertakings by States are made reciprocally. Salim has referred to this earlier today; investment agreements are entered into and they started in the 60s in the context of depoliticization of disputes between States and private parties, and the entire purpose of these agreements is to attract investments in the host country, and there is, of course, a competitive advantage that States are looking for when they enter into these treaties. If you want to invest in Eastern Europe, you have the option between Bulgaria, Romania, and Hungary. It is evident that as a

potential investor, you look into where you are going to invest and what the regulatory framework is in each of those countries, and that is the due diligence that Diane refers to.

So, in that context, I think the premise is simply that investors know and expect that States will change their regulations, and that the framework will evolve, not that they stay still. So, the premise of investment agreements is not to protect rights against regulatory changes and to ensure regulatory productivity. It is simply to ensure specific protections to specific investors under certain very clearly defined conditions. That by the way, concerns any type of State action. Lucy Reed referred to the fact that the governing law is often international; it is simply because we are talking about State responsibility under international law. And, therefore, any type of conduct, legislative or otherwise, is at stake. It is not only regulatory conduct that is at stake. Talking about that, I think it is important to bear in mind that truly, regulatory conduct does not form the majority of the cases in international arbitration. When I say truly regulatory conduct, I refer to, perhaps, Argentine cases, precisely because that was regulatory conduct, but you have cases where the defendant State really refers to regulatory conduct that may not truly be such, and it is just an excuse to evade its obligations under the relevant treaty.

So, we have to bear that in mind as well, and that is not the entire universe of investment arbitration or investment law. So, that was the first point of my remarks, the premises, where we start from.

Moving on to my second remark, which is actually a second step in the reasoning, and pertains to the essential features of investment arbitration that I said a few words about just earlier. Investment agreements are structurally not identical/similar in most cases. They introduce a set of substantive rights to qualified investors in relation to qualified investments, and quite often, you have the answer in the treaty itself and the word “qualified” is very important. This is what gives the tribunals the power to accept an investment and accept their jurisdiction or not. Here, I just referred to the discussion in the previous panel by asking whether sovereign bonds should be considered as an investment. I think that the answer is in the criteria for an investment, and they have referred to the condition of territoriality, which is one of the conditions that you can actually look into.

Then, these rights are unilaterally accepted by States on a reciprocal basis. This means that each of the States accepts obligations, and only obligations, unilaterally, but justified by the fact that those obligations are also taken by the other State to protect its nationals. More often than not, you will have a dispute resolution mechanism, allowing a dispute to be submitted to a neutral forum. This is hugely important for investors

because you do not want to end up before the courts of the host State, and, that is, I do not think today, a very highly controversial field. People still realize what an important and essential step it was for investors to get direct access to this neutral forum.

When arbitration is provided, generally, arbitral tribunals have the power to fully interpret and apply the treaty. There are exceptions, such as the Soviet model or the Chinese model which actually China is changing now because China, again, on a reciprocal basis, is more interested today in protecting its own investors abroad than it is concerned with the risk of investment arbitration at home. And then, the acceptance (and I think that this is important when one discusses appeal mechanisms and changing the system); the acceptance that the award is rendered on a binding and final basis. The finality of awards is an inherent nature of the arbitration mechanism and I do not think we should forget that either. So, with that, these characteristics of investment agreements do not, as such, undermine policy flexibility, and again, the expectation of investors is that the policies change, and what they are protected against, is different. It is the impact of changes and the impact of regulations when there is an adverse effect on their investment, and that is a factual determination purely made by each tribunal on the basis of the facts of the case, for individual conduct of the State towards that investor. And that, I think, is an important point to make.

And again, in that context, the State's obligations, including social protection, are preserved in other treaties and other instruments, and can be taken into account by arbitral tribunals when they are relevant. They even become an obligation for tribunals when there is a cross-reference in the treaties to other treaties such as inter-trade or in the environment field or even labour, or when there is a policy carve-out in the relevant treaty, and especially in terms of taxation; you will find numerous treaties that have taxation carve-outs where the States preserve their policy freedom in terms of taxation. So, with that simply, the law of treaties governs and allows for the mechanisms to respond to the specific questions that arise and I do not think (and there, referring to Diane's proposals), that it is advisable to introduce human rights mechanisms for the purpose of interpretation of investment treaties and, notably, the notion of treatment in the treaty.

I fully agree with Diane that human rights cannot be taken into that contextually when one is doing the due diligence in terms of making the investment, but in terms of treaty mechanism, I think it is dangerous to take a step further and to introduce a different mechanism and a different logic into the logic of investment protection, which is very specific.

And moving on to my third point, third and last, the question then becomes: "If the system is working with these features, do we need

adjustments?” There are imperfections and I want to take just two examples. I do not want to address the entirety of the universe of investment arbitration, but these are two examples for which I think that concrete proposals exist and can be efficient.

The first one goes to the interpretation of treaties and, again, you heard and reacted to Diane's proposals earlier. I am not sure that I would agree that investment treaties should include obligations for the home State of the investor in relation to human rights and the compliance of the investor with human rights because, again, the modernity of investment agreements and the entire evolution of the fields in the last 50 years is to have allowed this direct relation between the investor and the State, and I am not sure to what extent you want to bring back a bilateral State-State relation into the mechanics.

On another topic, however, there may be a role for the home State of the investor, and that is precisely about interpretation of treaties. This is a highly controversial issue, as you know. The interpretation of most favoured nation (MFN) clauses, the interpretation of umbrella clauses, the interpretation of necessity clauses and, you have heard about uncertainties in the case law in relation to those issues. As you may be aware, the UNCITRAL Working Group II is today looking at transparency issues and, as part of that effort, Working Group II has looked into the possibility of having the home State intervene in relation to the interpretation of the treaty when there is a question of interpretation. That, I think, would be an enormous advantage.

Just taking one example from our own practice, the *SGS v. Pakistan* case¹ (and for that, I very much regret that Makhdoom Ali Khan is not here today) that would have been a possible avenue for discussion. In the *SGS v. Pakistan* case, where the tribunal was asked for the very first time to determine the interpretation of umbrella clauses, Pakistan was putting forward an interpretation based on what the parties wanted in the bilateral treaty between Pakistan and Switzerland. *SGS*, on the other hand, was putting forward, as you may know, another interpretation which was that a breach of a contract under an umbrella clause equates to a breach of an international obligation: the umbrella clause provision. In that case, Switzerland did not wish to intervene because that was precisely to politicize the matter where bilateral treaties are destined to allow a direct relation – depoliticized direct relation – between the investor and the host State.

¹ *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objection to Jurisdiction, 6 August 2003.

When the tribunal rendered its award, however, Switzerland was very disappointed with the result of the award and the holding of the tribunal, which said that the umbrella clause does not mean that such equation can exist. As a result, Switzerland wrote to ICSID to express its dissatisfaction and the fact that when it entered into the bilateral treaty with Pakistan, it had in mind exactly what the investor had said in the arbitration, that was a missed opportunity for the investor, and had Switzerland accepted to intervene, the world might have been different for SGS definitely, and the resulting case law afterwards might have been slightly different as well.

So, that is an area where there would be space for the home State to perhaps intervene, and provide its understanding on the interpretation of the provisions, and Diane has made developments in relation to the different mechanisms that exist under treaties. That would be a very useful progress in investment treaties and that would allow the imperfection of the interpretation of treaties to be addressed, by allowing an authentic interpretation by the State parties rather than second-guessing what the States might have wanted. By definition, the investor does not have access to the *Travaux Préparatoires*. As you know, this is a serious issue for bilateral treaties unlike multilateral treaties such as NAFTA and the Energy Charter Treaty.

My second example for a concrete proposal to address the imperfections goes to the issue of contracts. Again, you know that contracts have raised numerous issues in investment arbitration in the case law as to how the contracts should be taken into account by tribunals and whether or not the tribunal has jurisdiction to determine issues of contract and so forth. What is evident is that perhaps not the majority of cases, but numerous cases deal with contracts, and quite often, if you even have arguments that are made on the basis of the treaty, you also have, at the same time, a contract that is provided by either the State directly or by state entities. Today, defendant States cannot bring counter claims under the contract and that is a difficulty for the State if they have something to bring in defence, saying that perhaps there was a difficulty with the contract, but that difficulty was due to the investor, and they would wish to bring a counter claim but treaties do not allow for that.

So, if one is thinking about suggesting a mechanism, that would be one where the States could bring counter claims under treaties to respond to the conduct of the investor when the contract is at stake.

With that, I would like to finish and again, express my thanks and I would love to discuss all these issues with you.

Response to the Report

*Devashish Krishan**

I am not Makhdoom Ali Khan, and I regret that he is not present at this conference. Any complaints against me, please direct them to Makhdoom Ali Khan.

Now, being the last speaker of the day, I always know that it is an uncertain risky proposition. So, let us wake you guys up. This is a rich paper, and I would highly recommend it. Like it was said by Joan Robinson, the 1950s Cambridge economist, of a rich country like India, everything you see about it is true, and the opposite is true, and it is the same with this. There is a diversity of information in here. It is rich, it is impressive, it is a commendable effort and one must engage with it at that level.

What I would have liked to see is a little bit more diversity in the sources. You will see that the sources are largely people from the North Atlantic world, speaking of the non-North Atlantic world, and what they are thinking is, or ought to be, or was, whereas there is enough scholarship in the non-North Atlantic world, outside of the Atlantic system which does have its own views about these things, including what the nature of investment agreements are, what the nature of long-term contracts are, and how they prevent States from achieving their social goals.

As has been acknowledged, the Argentine cases are a peculiar universe of their own and they are certainly unrepresentative of global law, in my opinion. It is one State versus one investor in various particular sets of circumstances, judged as we heard, by 50 people over nine instruments. This is not 'global law'; this is a very particular system.

In fact, one might even say ICSID is not global law because countries like India and Brazil are not even parties to the ICSID Convention 1965. So, if they are not represented in the system, how can that law apply to them?

One thing that struck me a lot in this presentation is this notion of human rights risk. Does anybody find that odd? A human right is a risk? How can that be? Human rights are basic. They are inalienable; they are a function of life. So, the more we try and calculate or assign values to these

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things, we seem to assume that life is a math problem. But as we know, life is far messier than that. Life is not a math problem. So, the idea that regulations will change is a constant, and I think we need to re-conceptualize, as investors and States, that change is constant and we need to re-tool.

We need not only to re-conceptualize the present issues but start looking at the world differently. For this, I would recommend a book that was recommended to me by somebody who believes in change, *The Age of the Unthinkable* by Joshua Cooper Ramo, who was a former editor of Newsweek, the present managing director of Kissinger & Associates, and who lives between Beijing and New York. A fascinating book about complexity theory; it will open your eyes.

Part one of the paper, the question of treaty design, contract design and tribunal/award design in order to accommodate social protection obligations seems to me a needle-hole problem. We are trying to shove too much into something that may not be tailored or specified for purpose. So, we need to be careful about that. The notion that somehow investors do not respect human rights or will not have complete status is to me questionable; the idea that tribunals will not look at other legal obligations of the State is also to me questionable. I think they do. I think the idea of incorporating equity into the decision-making process is dangerous from an arbitration point of view. As many of us know, tribunals are duty-bound to the contract and the law. They cannot act in equity unless specified and unless agreed to by the parties. If they tend to do that, their award is challengeable, and that is not right.

So, the International Court of Justice might have its view on awarding compensation. Let us be clear about this; there have only been in my research, and this is admittedly not complete, three cases where States actually asked for compensation, and in two, they were granted. One was the *Albania Mining* case against the U.K.,¹ way back in the 1940s, and the second one is the recent *Diallo* case.² We do not know why Mr. Diallo got such a haircut as he did. It could be a problem, could be a whole bunch of different things.

Now, there is a risk to incorporating human rights and other non-investment obligations into a treaty that is designed for investment. Let me

¹ *Corfu Channel* case (*United Kingdom of Great Britain and Northern Ireland v. Albania*) I.C.J. Reports 149, p.4.

² *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) (*Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea*), Judgment of 19 June 2012, available at <<http://www.icj-cij.org/docket/files/103/17044.pdf>>.

give you an example, from a sovereignty point of view, is there not the risk that because as we know democracy and life are not perfect, sometimes there will be problems? There will be labor difficulties, there will be human rights problems. These are political issues domestically; they are domestic issues. The moment you put them in a treaty, do you not internationalize something that is normally within the constraints of the host State sovereignty? If I were to advise as a governor, I would find that slightly offensive if Mauritius and the United States signed a treaty, and there is a labor problem in Mauritius, next thing you know, the Mauritian ambassadors are being summoned before the U.S. Treasury to say: "Hello, what are you doing on your labor issues?" Is there not something wrong with that?

So, I think the law, as it presently stands, does have the tools. I mean, if you look at U.S. constitutional law, they talk of the balancing test. The French have developed the rational connection idea. Germany talks about the proportionality doctrine. England talks about the rule of law. These are constitutional doctrines that have been developed in domestic systems, which accommodate for attention, if there is attention, between private property as an organizing principle, and a State as an organizing principle. And I think, we should try and see what we can do with the present system before trying to re-conceptualize and re-tool what is a system that is really 20 years old. It is in infancy, so, do not throw the baby out with the bath water. This is my point here.

So, I think my last point is the whole issue of the debate between Keynes and Hayek. Now that is really wonderful for economists, but does that really work for Covenants? In the last 60 years, the role of the State has fundamentally changed. This sentence is not mine, this sentence is from the United Nations. In the 1950s to the 1970s, it was the era of public administration where you had a strong centralized State who was the provider of public goods. The emphasis was on provision of goods and centralizing the power rather than minimizing the costs.

Around the 1970s, we moved to the framework of public management where you are now talking about minimizing the cost and making the State more efficient. Since the 90s, we have entered into the era of what is known as Covenants. And what that means is that there are as many complementarities as oppositions between the role of the State and the role of the market. They are not diametrically opposed. The whole challenge is to create frameworks of participatory mechanisms by which foreign investors, States, governments, civil societies and all relevant stakeholders have a means and a mechanism by which they can come

together and solve problems on the table. And that is really what this BIT system is all about.

What is wrong with the State treating foreign investors fairly? In fact, I say they should hold all investors, domestic as well, fair and equitably. What is wrong with that? Why is this considered a constraining factor? You can change a policy, you just have to do it fairly and equitably. And with that, I will end. Thank you.

Questions & Answers

Hugo Siblesz: I thank Dr. Desierto for her presentation, and Dr. Banifatemi and Mr. Krishan for their comments. We now open this session to questions from the floor.

Mr. Nan Jin Lin: I am Nan Jin Lin, from China. Just now, Diane mentioned about Chinese policy. As I have practised law over 20 years in China, and I may possibly be the only person here from China, I would like to give the explanation of what is meant by “policy”. Actually, in Chinese, the word “policy” may have different understandings, and if you take it from a contract view or from a law perspective, it cannot be against any law or regulation.

In China, the Constitution is at the top of the hierarchy, followed by civil law, business law, and regulations, which are made by State Counsel. And all the policies should be made by the government. In such a situation, the court generally or absolutely does not apply the policy as a governing force or governing item to decide a case.

So, from the academic perspective, I think that in any dispute involving the Chinese regime, the policy should be understood in the sense of the cultural background. This is quite a different understanding. Of course, when you read the journals, there is quite a lot written on policy; it means from the political system, from the higher Central Committee. So, policy has a lot of meanings. Under such a situation, I hope that future arbitrators for any dispute involving a Chinese party or the Chinese version of policy will understand that the policy cannot be applied as a governing force to any dispute. Thank you very much.

Mr. Jayaraj Chinnasamy: I am Jayaraj Chinnasamy, from the Seychelles. Firstly, I appreciate the paper set by Diane; it is really a gold mine on the subject.

Secondly, a practical question: In the context of the institutional mechanisms available to settle investment disputes, we find that the choice is either between ICSID, or a court in a foreign country. Now, perhaps, this idea has not been raised earlier because these mechanisms have been there since 1965, but one might look at the United Nations Convention on the Law of the Sea (UNCLOS) which provides a multiple choice for disputes arising under that Convention. Now, there was a big debate about it in the 70s; about the dispute settlement mechanism for law of the sea disputes because such disputes can involve tremendous amounts in terms of

resources. I see a possibility to shift from this existing modalities to a multiple choice as provided by the UNCLOS. This is an observation. Thank you very much.

Diane Desierto: Just a brief answer to the two gentlemen, first to the gentleman from China who is indeed the only Chinese delegate in this conference. I do teach in China but I am a Philippine national. I quite take the point that there is a cultural meaning. Unfortunately, this is where it ties up with Yas's suggestion about making adjustments insofar as interpretation of treaties is concerned. China has not exactly undertaken to publicize any *Travaux Préparatoires* to its treaties. So, my point of reference, for example, would be the ASEAN-China Investment Treaty, which specifies that investments are those which are in accordance with law, regulation and policies. There is a footnote there that identifies what policies are insofar as they are issued by the Central Committee but the transparency mechanism or the mechanism by which this is notified to investors is something that is still baffling the system.

Insofar as the gentleman's question regarding the multiple choice of forum and how this is moved, even from UNCLOS, I am not quite sure if I got the full import of the question, but, I think the shift has happened because of the public nature of investment arbitration and the fact that the relevant applicable law includes principles of international law, and it is an inevitable dialogue to have, precisely because it is not a purely commercial context.

Now, as to the practical aspect of the implementation of it, this is where it is, the second or third generation of my research. I am still at the point where I am trying to justify the re-conceptualization of risk and why this should include even these agreements that States have signed onto before. It is a narrative and it is a point of view. I will go into a little into what Dev has said about it.

I agree, we do not need to put everything through the needle-hole but, in my presentation, what I have intended to lay out is where we are in terms of the thinking of risk and the thinking of the role of possible human rights factors that may contribute to policy uncertainty that heightens this risk and I take his point as well about the possibility of equity being dangerous. Certainly, I do not prescribe it off the board for each and every case, but when there is a case that necessarily engages human rights in a meaningful way, then certainly, this is probably something we should be looking at. Somebody said that there is nothing wrong about thinking that the tribunals regularly engage with this.

Actually, if you think about the first *amicus curiae* briefs that were brought, that involved human rights, particularly the right to water cases in *Suez*,¹ and *Aguas del Tunari*.² Those *amicus curiae* briefs were brought in a rather, somewhat, veil of ignorance. The *amicus curiae*, the non-disputing parties representing did not have access to the submissions of the parties and thus, could only speak in very general terms about the right to water, about the right of access, and were not able to address the fundamental issues in these cases and so, of course, the tribunal that is going to be confronted with a 30-page brief that says: “there is a right to water”, is going to say: “I agree, but I don’t see how this is impacted on by the case in any meaningful way”. “I agree” is what Yas said about possible adjustments and on the clarification of our understanding of contracts, and the fact that the premise and, to this extent, I am sympathetic to the premise of whether or not – in the prevailing literature which seems to have been depicted by many of the scholars – the big policy-space debate and the big legitimacy crisis in investment arbitration.

I do not quite see it in the same light probably as many of those scholars because, if anything, the mechanisms within a treaty, within a contract, and within the arbitration procedure have been available. If this is a matter of just say, Argentina not being successful in most of its pending arbitrations, and applying these kinds of arguments, we also have to be sensitive to what the factual and legal contours of each and every case are. Argentina, for the most part, has relied on a fairly interesting interpretation of necessity that basically says that there is no primary breach of an obligation. Much of my work in the last year has focused on showing that this is not how the doctrine of necessity has evolved.

But I take other points and because I also engaged in the International Human Rights regime and I am aware of its imperfections in compliance and ascertaining compliance, I also hesitate about the full extent and I share Dev’s suspicion about whether or not we just fully accept and say that this is a human rights issue and thus investment must necessarily be of a subordinate quality.

I heard another scholar earlier this year at the American Society of International Law say that it is a paradigm clash between investment arbitrators who are primarily commercially oriented and the public interest, which is human rights. The first thought in my head was: “if you look at what is traditionally understood to be the public interest, investment protection, and economic growth and development are also part of the

¹ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/03/19.

² *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3.

public interest”. So, I do have some tensions and some difficulties with how human rights have been deployed as an argument; for the most part, it has been used in an interpretive manner with little success, but perhaps there is one way of stepping back and in this, I am sensitive to the questions and to the points, the very helpful points that were made by Dev and Yas on how to clarify the system to accommodate these possible adjustments to policy spaces without necessarily throwing the baby out with the bath water.

Yas Banifatemi: May I add to Diane’s answer to the gentleman’s question?

The UNCLOS has indeed options but these are options for the compulsory resolution of disputes. So, you can go to the ICJ or you can go for arbitration. You do have options but these options allow for binding resolution of a dispute. In investment treaties, you also have options; you have options as to arbitration mechanisms. You can have *ad hoc* arbitration, you can have institutionalized arbitration. It can be ICSID. It can be the ICC. And you also have other options. Sometimes, it is not infrequent to have a recourse to the courts of the host State. So, that is one of the options that is proposed and that is accepted by the State parties to the treaties.

Sometimes, on exclusive basis, if you go to the courts of the host State, you cannot then go for arbitration and vice versa. So, you do have options in the investment field as well. It is just different because the system is different, but, you have compulsory resolution of the dispute likewise.

And, perhaps just one word of comment to Diane’s comment about Argentina not being successful. I have a lot of sympathy and respect for what Johnny Veeder said this morning. I think that the economic advantage that Argentina got from all these cases is not to be under looked. And again, I think it was Diane who said, “what do you call being successful?”. One of the very interesting points that Diane made in her report is actually when you look at the Argentine cases, you see that in all cases, Argentina wins on expropriation. There is no expropriation. In any of those cases, however, tribunals decide the impact of the conduct on the investment in terms of fair and equitable treatment, and that is a different matter.

So, again, how do you assess being successful and losing in arbitration cases? We have to be very careful about the way we assess that. Thank you.

Devashish Krishan: Diane, what is your view on the level of compensation if, all right, expropriation requires fair market value, whatever that means. What is wrong with applying the same standard to a fair and equitable

breach? Are we somehow suggesting that unfair and inequitable behaviour is of the law and order of an expropriation? Is that what the suggestion is?

Diane Desierto: I have a discomfort with using fair market value for, say, the breach of fair and equitable treatment because when you have a prior finding that there was no indirect expropriation, no title passed or the economic injury did not approximate an expropriation, admittedly there would be some injury, some deprivation that would warrant a breach, say, of fair and equitable treatment. But the automatic reliance on fair market value and, according to the way it has been defined and used in the cases, it is assessed from the vantage point of perfectly competitive market conditions, perfectly symmetric information between investor and host State or other market participants.

It seems that I am not sure, maybe the awards, or maybe during proceedings, the valuation reports were more extensive. But currently, the way they are depicted in the awards, there is not a lot of justification for the reliance on this standard. So, pending any clarification, it may be the instance that a more appropriate standard is the fair market value in a given case. But to this point, it seems that there is this automatic transition from seeing that there is no indirect expropriation, but we then find a breach of fair and equitable treatment, then, the standard of compensation we are going to use is similar to that for expropriation. It has not been sufficiently reasoned in the awards that were surveyed.

Mr. Ratan Singh: I am Ratan Singh, from India. In a recent investment award against India, the tribunal had construed delay on the part of the national courts in deciding on setting aside proceedings in relation to an arbitral award, as a breach on the part of the host country of its investment treaty obligations. What is the view of the panel on this?

Diane Desierto: May I clarify, there has been a prior finding by a tribunal?

Mr. Ratan Singh: Yes, there was an award in favour of the investor, and that award was challenged by one company, that is a public sector enterprise in India. The challenge has taken years. It is still pending in the Indian Supreme Court. And at that stage, the investor invoked the arbitration clause under this BIT. And the tribunal, while deciding this particular issue, has given an award against India. So, the question is, whether delay on the part of the judiciary can be taken as a breach by the host country?

Diane Desierto: Speaking from some understanding of the interpretations that have been taken of the FET breach, delay in proceedings has been construed as a possible breach of fair and equitable treatment. The Australian BIT, in particular, the most recent model of Australian investment treaties, restricts the breach of fair and equitable treatment to these sorts of procedural delays and denial of procedural due process. So, depending on what the prevailing treaty standard is and what the prevailing factual circumstances are, it might be possible because these are one of the interpretations of FET, right now.

Devashish Krishan: That was actually the Australia-India BIT. It was under the Australia-India BIT but the old one. But one thing on that; there is a hesitation in the Indian circles to have the judiciary somehow examined internationally, but under international law, the State responsibility requires all acts attributable to a State, be it by any state organ. So, if the delay was before an executive branch authority or legislative authority or judicial authority, it is exactly the same. From the point of view of international law, the State, the sovereign, the Republic of India is duty bound to ensure international law across the board to all the people for whom it is responsible.

Mr. Ratan Singh: If a particular investor goes to a particular country, I agree that it is a question of interpreting clauses of a particular treaty. But if a particular investor goes to a country, knowing the judiciary is not independent in that country, can it be taken as a question of debate?

Devashish Krishan: In which country is the judiciary not independent?

Mr. Ratan Singh: There are few cases where it is publicized that the judiciary may not be independent.

Diane Desierto: If I may, this does go into how tribunals would construe the legitimate expectations of an investor and because this has been a fairly porous and malleable standard, even I say, I think if you do introduce the possibility that the investor was indeed notified that this particular procedure could not have taken place or this particular phenomenon could not have taken place, under international responsibility, all acts of all state organs would still be attributable to the State. So, it is a matter, I think, of how legitimate expectations would be framed, but I would be inclined to think that the delay would still be imputable to the State simply under the rules of attribution in international law.

Salim Moollan: Thank you very much. I had asked for the floor before the intervention from the distinguished gentleman from India, but perhaps a point of clarification, and disclosures while I was Counsel on that case, representing India.

It is important to realise what actually happened in that case. The claim was on three bases. Firstly, on denial of justice because of the delay; secondly, on breach of a very specific standard called the ‘effective means’ standard which was brought into the India-Australia BIT through one of the Middle-Eastern BITs; and thirdly, which was the real worry for India, a contention that India was in breach of the New York Convention because it recognises the setting aside of foreign awards, the point we were discussing yesterday at close, if you remember.

And exactly as you said Diane, what happened is that they did look at legitimate expectations. So, they looked at what climate the investor had when he or she invested. We put a lot of evidence before the tribunal as to what we could expect by way of delays before the Indian courts. We won on denial of justice grounds, and on the basis of legitimate expectations. So, that is something.

Of course, the investor has to take the climate as he finds it, but because of the effective means standard imported through that other treaty, and in a prior decision in a case called *Chevron*,³ they found that this was a higher standard and that this imposes a higher duty, which is not across the board and which would neither apply to the executive nor to the legislative. It is an effective means of resolving claims. He said: “Well, that has been breached because it has taken six or seven years in your Supreme Court”.

So that is what happened, and very importantly, they refused to find a breach of the New York Convention.

Now, coming to the point I want to address, on your question of the way in which tribunals approach valuation for breach of the fair and equitable treatment standard, I have to say that I also have some difficulty in following how one makes the job. It is as if you were saying: “Well, you have not succeeded in breach of contract, there is a tort, but it cannot be the same level of liability”. I cannot see that breach. I think what perhaps you are putting your finger on, and I just wanted to raise that...one should be quite frank about that, there is a huge problem, or there has historically been a huge problem with tribunals in general and investment tribunals in particular, about valuation of damages.

³ *Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, Partial Award on the Merits, 30 March 2010.

I think they have not had proper assistance, and there is a huge discipline which is important for us also to bear in mind: developing of financial expertise to tribunals. For instance, I am very happy that we have someone here from one of these firms that have been providing more and more assistance to arbitrators and to parties in order to hopefully get to the right result and looking at the right parameters.

Diane Desierto: Thank you, Salim. This goes into the computation of the equity risk premium, and in some instances where the valuation model used is the standard capital asset pricing model; you have equity risk premium, a beta coefficient with a risk-free rate, less certain values, that are indicated in the standard capital asset pricing model.

That equity risk premium is traditionally aggregated according to the stock market volatility and inflation – those are the usual benchmarks of what equity risk premiums are. But increasingly, work by scholars such as Lubos Pastor and Veronesi at the University of Chicago has started to look at unpacking this equity risk premium to include higher value or higher weight for policy uncertainty.

That is actually where I am proceeding from because these scholars have pointed out that there is a fundamental problem and I think there is a prominent valuator expert who was frequently called to tribunals from the NYU Stern School of Business who posited that the standard use of the discount rate arising from that equity risk premium has been rather conservative and she did call for there being a higher, possibly higher discount rate because States might possibly experience more policy uncertainty.

If that is the case, possibly one way of arguing at this is to say: as a State that is a party to the Covenant that has not been meeting its minimum core obligations, it might be the case that my policy uncertainty weight, that relative composite that will be computed, will actually be somewhat higher. So, it is not an across-the-board haircut but rather a factor in the weighting of the risk premium.

Devashish Krishan: So then, the investor would demand that the State does not sign the International Covenant because if it is not signed, there is no weightage?

Diane Desierto: Well, to date, you have 160 countries that are parties to the Covenant. It would be difficult to ask a State to withdraw from the Covenant wholesale on the basis of investment, but, of course, that is an option which is open to investors.

Ms. Jainee Shah: I am Jainee Shah, from India. I noted Dr. Desierto's observation that arbitral tribunals are reluctant to resort to the Vienna Convention and other human rights treaties. So my question to the panel is, how, in such a scenario, concerning investment vis-à-vis human rights, if there is difficulty with respect to arbitration of a dispute of investment law versus human rights law, do we overcome this kind of challenge to the international legal order?

Yas Banifatemi: I am not sure I understand the question, at least as regards the Vienna Convention on the Law of Treaties. It is very much used by tribunals, BITs and multilateral treaties being treaties, by definition, any issues of interpretation or termination or application or provisional application, whatever issues of treaty law, tribunals will refer to the Vienna Convention on the Law of Treaties, and I do not think that this raises any issue. That was one of the questions, I think. You have addressed human rights, but I think that this is a different realm.

Diane Desierto: I think what I meant was under Article 31(3)(c) of the Vienna Convention; the use of relevant rules of international law. There has been some reluctance understandably because even this method of treaty interpretation follows the unitary system of the interpretation text before a context under the Vienna Convention on the Law of Treaties.

But even that, on the interpretation of the mechanism under Article 31(3)(c), I know there is a huge body of scholarship beginning with Prof. Campbell McLachlan, who likes to use systemic integration and say that this is the avenue by which we bring in other rules of international law. I have a different view on the subject. I do not think in the way Article 31(3)(c) has been applied by the International Court of Justice, and in the way in which it has been noted in practices of States, and noted by the International Law Commission; I do not think it was meant to be the all-expansive gateway to treaty interpretation. So, I am somewhat a little bit more of a textualist here, than possibly others who are partial to bringing in human rights treaties in that way.

That said, how do you bring in human rights treaty? You could do what the United States has done in its Model BIT or the Canadian FEPA for that matter, where they explicitly make provisions now that indicate that the investment will continue to comply with existing labour agreements, with existing environmental agreements. These are options that States themselves have taken upon themselves to govern the investment. There have also been models, as I said earlier, the Austria-Malta BIT, which has

not been tested and which applies the European Convention on Human Rights.

That said, I have the caveat because when we expand the applicable law governing the investment, it also does introduce a quantity of uncertainty and the regulatory predictability that we hope to achieve for the investors as well as the States to accurately price an investment might be undermined. I mean, I am wary because there is so much faith on human rights treaties. Anyone who has studied human rights treaties knows that those treaties in themselves do not carry definitive interpretations either. They are moving and evolving treaty standards that even the committees, the special human rights committees themselves acknowledge, are not always statically determined at a given point in time.

So, I do not know how to specifically answer that question. That is a process question that I am still hoping to reach after I finish this justification question.

Yas Banifatemi: If I may add one point, if you are talking about articulation between different fields of the law and, there, you really have a difficulty between investment logic and human rights logic. You can add layers of difficulties and one of those layers is the fact that investment protection is normally protecting investors coming from abroad, foreign nationals, and foreign companies. Human rights offer protection to nationals, so the host State will be protecting its own nationals in terms of human rights. So, that logic, if you want to take that and integrate them all into one thing, then you face that difficulty, which is: whose human rights are treated by whom against whom, and how do you enforce that?

So, these difficulties add layers.

Ms. Jaine Shah: Investment vis-à-vis human rights; if there is a difficulty with respect to arbitration of a dispute of investment law versus human rights law. That was my question.

Devashish Krishan: If I could just jump in. Let us take a step back. Arbitral tribunals are usually three people who sit and listen to two parties, and parties are meant to plead their cases and they are supposed to decide that case. And this is not a debating society in a tribunal; people pay money for the stuff. So, if the States and if the investor of the respondent frame their case in a certain way, what is the tribunal to do? The tribunals are legends in resolving the dispute, not to sound vague in international legal order. There are techniques of doing that and States should feel free to put their case to whoever they want to.

Perhaps that could be an answer. If we assume democracy as the model, the State is the representative of its people, and those are the people who voted that government in. So, that government is entitled to speak on behalf of all of the people, not some of the people. So, who is this NGO or third party who was unelected to comment and tell me what I should be doing with my State?

Diane Desierto: I am agnostic. I did not mean that I was not engaged in the subject. It is difficult to try and expect human rights arguments to be advanced. You know, if you look at the entire genealogy of human rights, these are rights that are conferred or rather recognised as attaching to individuals and they are asserted against States.

My fundamental problem with that line of reasoning of the State always being the representative of the public interest is that decision-makers, authoritative decision-makers, may not always, in any municipal or international setting, do a poll and try and find out exactly what the interest of their constituents are. Human rights have had to be asserted, even above and beyond, in many instances despite the State's official line or official policy.

That said, in an arbitration, and this is why I think the question is important in an arbitration: how do you bring in human rights? If it is not the State, who is going to bring it up? There is a respondent State that has brought it up. Argentina has tried to bring it up but has not fully fleshed out arguments on the subject. Can you try and let an NGO perform an *amicus* function? I agree with the *amicus* function in that it should illuminate on the public interest dimension to the dispute. But there is still a procedural hurdle. You have *amicus curiae* who are not able to access the pleadings of the parties and thus, when they submit a brief, it does not speak of the issue.

So, in the *Suez* decision, the tribunal said: "we think Argentina could respect both human rights and investment obligations." That was it, because the brief itself from the *amicus*, the NGO group, all it went into was the whole issue on the right to water. It did not speak to the core of a dispute, and if you are unable to effectively put that forward as part of the issues, the arbitrable issues, then it is still an imperfect system.

So, I do not know how and to what extent that is going to be addressed but that is one limitation that I have to bring about. I mean I am not going to say that the State, in any circumstances, will always represent human rights concerns. No, not in many cases.

Hugo Siblesz: Now I have a question: How does the tribunal then deal with the input from this NGO that is not brought before the tribunal by the defendant, the respondent State, as it were against its own defence?

Yas Banifatemi: I was going to address that point. I think that, taking two points, first of all, again, it is an assumption. The assumption is that human rights can be looked at, if relevant, and the very fact that Argentina could bring a defence based on the state of necessity, and whatever they said that was the interest of the population, that in itself is a defence based on human rights. So, the system allows defences made, based on State obligations otherwise. Again, it is a question of assumption.

Going to *amicus curiae* briefs, I think that we have to be very careful about what we propose. The tribunal has full discretion to take into account the reports or the briefs that are submitted to it, and if they bring something to the tribunal, that is added to the briefs of the parties. I have a serious concern with the equilibrium of the metabolism where parties are going to bring *amicus curiae* into the system and say that they should have rights without having any obligations; you add problems as well. Another type of difficulty is where you have the EU Commission wanting to make an *amicus curiae* submission in relation to EU law, and at the same time having the right to say what they want, but when it is a question on the report, saying that they have no obligation or that they do not want to be cross-examined and so forth. So, I think we have to be careful about what we propose and how that affects the rights of the parties in the arbitration, for which they pay.

Hugo Siblesz: We have 30 seconds for one last question, if it is a very urgent one.

Mr. Ronald Somale Hatoongo: I practise law in Zambia and teach law at the University of Zambia. There are times when regulatory taking will be done in bad faith, say by the host State, and there are times when they may pass regulations without realizing that they may lead to substantial deprivation. So, does that have a bearing, say, on the quantum of the award that tribunals may give? I say this in the context of what happens if you are litigating. If, for example, someone commits a tortious act and evidence is adduced before a judge that the act was aggravated, the judge may give punitive damages.

Diane Desierto: Good faith has been taken into account when it involves indirect expropriation cases. That is the short answer since we have 30 seconds.

Hugo Siblesz: I think this was an interesting debate, and we owe gratitude to Diane for having done all this reporting in this research put before this panel and to Yas and Dev for having taken the time to respond to it. In particular, I would like to underline the contribution by Dev Krishan, who has been asked to replace Makhdoom Ali Khan at the very last minute and he has done so remarkably well. Thanks very much, and I think you owe the panel a round of applause.

CLOSING REMARKS

Closing Remarks

*Hon. Y. K. J. Bernard Yeung Sik Yuen, G.O.S.K.**

Distinguished Ladies and Gentlemen, I apologize for making you wait for your tea. There is a saying that the more you wait the better you are going to enjoy it!

You have seen and heard for yourself the learned presentations made by the distinguished speakers over the past two days.

I conceive my role on this platform primarily as a manifestation of the commitment of the judiciary of this country to facilitate international arbitration.

Two years ago, I had the privilege of making the closing speech to the first MIAC conference. That was done in English. Since many speakers have harped on the bilingualism of Mauritius, I shall deliver the bulk of my concluding speech in French. This is a balancing exercise that I have judiciously chosen to perform. This also acknowledges my personal appreciation for the presence of so many French-speaking participants at this second MIAC conference in what is, after all the former Ile de France.

L'heure est venue de clore cette deuxième Conférence de l'Arbitrage International à Maurice (MIAC). Le privilège me revient de le faire en quelques mots qui ne pourront pas, bien entendu, restituer la richesse des communications que nous avons entendues et des débats auxquels nous avons participé.

Beaucoup d'entre vous ont assisté à notre première conférence, il y a deux ans. Ils auront relevé que les sujets abordés cette année se situent dans la lignée de ceux qui furent étudiés en 2010.

En effet, la 1^{re} Conférence avait insisté sur les avantages de la loi mauricienne sur l'arbitrage international, qui donne pleine force à l'accord des parties de recourir à l'arbitrage. Comme vous le savez, la loi mauricienne sur l'arbitrage international consacre l'effet positif de la compétence-compétence dans les mêmes termes que la Loi-type de la CNUDCI, mais elle lui apporte également une adaptation en reconnaissant aussi son effet négatif dans son article 5. Dès lors, la Cour suprême peut tout au plus se prononcer sur la compétence arbitrale dans le cas où l'une des parties démontre *prima facie* qu'il existe une très forte probabilité que la convention d'arbitrage opposée aux juridictions étatiques est caduque, inopérante ou non susceptible d'être exécutée. Cette règle a une importance

* Then Chief Justice, The Supreme Court of Mauritius.

capitale: elle évite de longs débats sur la convention d'arbitrage devant le juge et les concentre devant l'arbitre.

Cette année, la 1^{re} session, placée sous la présidence de M. John Beechey, Président de la Cour Internationale d'Arbitrage de la Chambre de Commerce Internationale, a permis de revenir sur les principes, mais aussi sur **le rôle effectif** des juridictions étatiques et plus précisément sur le devoir des juges étatiques de renvoyer les parties à l'arbitrage.

Ce sujet a été abordé à partir en premier lieu d'une **présentation générale** par M. le Haut Conseiller Patrick **Matet**, de la 1^{re} Chambre civile de la Cour de cassation qui a exposé le sens et les fondements de l'effet négatif du principe de compétence-compétence et expliqué en quoi consiste le droit français, qui a été en très grande partie suivi par le droit mauricien.

Ensuite, c'est à partir d'un **cas pratique** présenté par M. Matthew **Gearing** que le sujet a été envisagé. Il s'agissait d'un **contrat de prêt international** accordé par une banque à un fonds de développement. Il nous a permis de bénéficier des réactions et de l'expérience de mon éminent collègue, M. l'Honorable Justice **Srikrishna**, ancien membre de la Cour suprême indienne, dont le point de vue a été complété par ceux de M. Christopher **Adebayo Ojo**, ancien Attorney General du Nigéria et de Maître Jamsheed **Peeroo**, Avocat à Maurice. Ce débat très vivant a permis de faire émerger toutes les difficultés qu'une telle affaire peut poser, grâce à l'intervention inattendue et tout à fait divertissante du « mouvement en faveur de la transparence » des Professeurs van den Berg et Veeder.

Le rôle concret des juges étatiques ne se limite pas à empêcher que l'arbitrage soit paralysé **au moment où** il est lancé. Il doit être également envisagé au cours d'une période plus étendue dans le temps: celle de l'instance arbitrale.

C'était là le thème du **2^e panel**. Ce panel a lui aussi fonctionné autour d'une approche concrète, mais cette fois au sujet de la **coopération du juge étatique au cours de la procédure arbitrale**. Le juge étatique vient aider, si nécessaire, les arbitres ou l'une des parties à dépasser la difficulté qui risquerait autrement de bloquer la procédure arbitrale – il devient **juge d'appui**, pour utiliser le terme du droit français. Le panel, présidé par le Professeur David **Williams**, a vu M. Reza **Mohtashami** présenter le cas, qui a ensuite été discuté dans un premier temps par le Juge Judith **Kaye**, ancien *Chief Judge* de l'Etat de New York et par Lord **Hoffmann**, et dans un deuxième temps, sous l'angle africain, par Mme. Lise **Bosman**, Conseiller juridique de la Cour Permanente d'Arbitrage et Mme. Anne-Sophie **Jullienne**, Avocate à Maurice. Nous avons été plongés dans un contrat de vente d'une œuvre d'art mauricienne par un vendeur international d'œuvres d'art sans scrupules au Musée national d'histoire

mauricien. Divers scénarios ont été envisagés dans lesquels le juge peut venir aider l'arbitrage: octroi de mesures provisoires, demande de récusation d'un arbitre et prorogation du délai d'arbitrage.

Une fois la sentence rendue, le juge peut alors être appelé à se prononcer sur sa **reconnaissance et son exécution**. C'est le sujet qui a retenu l'attention du **3^e panel**, présidé par M. Adrian **Winstanley**. Le cas autour duquel nous avons réfléchi a été présenté par Maître Charles **Nairac** et a bénéficié des éclairages de Mr. Justice Quentin **Loh**, Juge de la Cour suprême de Singapour, de Lord Justice **Aikens** et de Mmes. Fatma **Karume** et Urmila **Boolell**. Ce cas concernait une société au nom aussi mauricien qu'improbable, la société *Flying Dodo*. Il a pu illustrer les limites du contrôle que les tribunaux étatiques peuvent opérer sur les décisions des arbitres, tant sur leur compétence que sur le fond du litige et sa compatibilité avec l'ordre public.

La 2^e journée, celle d'aujourd'hui, a été consacrée au domaine particulier de **l'arbitrage international d'investissement**. C'est là un domaine complexe où le recours à l'arbitrage est plus qu'ailleurs en développement.

L'angle sous lequel il a été abordé — et cela a fait l'objet du **1^{er} panel** — a d'abord été celui du **choix de l'arbitre**, au regard d'observations empiriques. Le panel a été modéré par notre Solicitor General **Dheerendra Dabee**. Le rapport de M. **Waibel** a été discuté par le Professeur Albert Jan **van den Berg** et Maître Lucy **Reed**. Vous aurez relevé que le sujet est hautement discuté et que les opinions à cet égard sont tranchées.

Le **2^e panel**, présidé par M. Salim **Moollan**, a abordé la question — malheureusement d'actualité — des **rapports entre arbitrage d'investissement et crise des dettes souveraines**. Notre rapporteur, Mme. le Professeur Sophie **Lemaire**, s'est interrogée sur la question de savoir si, avec ce sujet, on n'atteint pas les **limites du domaine de l'arbitrage**. MM. Devashish **Krishan** et Johnny **Veeder** ont, quant à eux, mis en évidence les nouveautés que ce thème apportent au droit de l'arbitrage d'investissement, et les difficultés qu'elles soulèvent.

Le **dernier panel**, que nous venons d'entendre, a abordé un autre sujet d'actualité. Il s'agit de réfléchir à l'interaction entre la protection accordée aux investisseurs par les traités d'investissements, et la souveraineté des Etats à légiférer pour la protection de leurs intérêts essentiels. Ou plus simplement, les traités d'investissements limitent-ils, directement ou indirectement, la souveraineté des Etats? Sous la présidence de M. Hugo **Siblesz**, Secrétaire général de la Cour Permanente d'Arbitrage de La Haye, et autour du rapport de Mme. **Desierto** de l'Université de Pékin qui a essayé d'ouvrir une brèche sur l'incidence des droits de l'homme visés

au Pacte International relatif aux Droits Economiques, Sociaux et Culturels sur le respect des traités d'investissement, nous avons bénéficié des avis de M. Devashish **Krishan**, et de Maître Yas **Banifatemi**. Nous sommes particulièrement reconnaissants à M. Krishan d'avoir assuré au pied levé le remplacement de M. Makhdoom **Ali Khan**, ancien Attorney General du Pakistan, que des circonstances imprévues ont retenu au Pakistan.

Il nous faut remercier l'ensemble des intervenants; nous autres juristes mauriciens avons écouté avec grand intérêt leurs présentations et ferons notre profit de leur expérience et de leur expertise.

Cette 2^e Conférence a permis de labourer en profondeur le sillon déjà tracé par la première Conférence et constitue une nouvelle étape dans notre projet de faire de Maurice un lieu privilégié pour la formation en matière d'arbitrage dans notre région. Et une nouvelle étape, bien sûr, dans notre projet de faire de Maurice une place d'arbitrage reconnue et fiable.

Il ne me reste désormais plus qu'à remercier en votre nom tous ceux qui ont œuvré à la vraie réussite de nos deux journées. Je veux citer ici, bien entendu, le Board of Investment et le Bureau du Premier Ministre qui ont veillé à chaque détail depuis votre atterrissage sur notre île, mais également les services de sécurité, les chauffeurs, le personnel de l'hôtel Intercontinental, et nos interprètes. Je manquerais à mon devoir si je ne mentionnais la cheville ouvrière de cette conférence, mon ami Salim Moollan qui mérite nos applaudissements.

Je vous souhaite pour terminer, et si vous le pouvez, de rester quelques jours avec nous à l'Ile Maurice avant de rentrer chez vous, et vous donne rendez-vous en décembre 2014 pour MIAC 2014. Merci pour votre attention.

