SECOND SYMPOSIUM ON INTERNATIONAL INVESTMENT AGREEMENTS

International Investment Agreements and Investor-State Dispute Settlement at a Crossroads: Identifying Trends, Differences and Common Approaches

SYMPOSIUM PROCEEDINGS

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SESSION I: EVOLVING INVESTMENT TREATY PRACTICE AND REGIONAL PERSPECTIVES

Welcome address by OECD Secretary-General Angel Gurría

Ladies and gentlemen,

Let me start by welcoming everyone to this Symposium. With us today are a wide range of stakeholders, representatives of over 42 countries, the private sector, academics and civil society.

I would like to thank UNCTAD for co-organising this Symposium with us and the International Centre for Settlement of Investment Disputes (ICSID) for their active role in this important policy area.

In fact, the OECD, UNCTAD and ICSID all play significant and complementary roles in the field of investment agreements. The OECD and UNCTAD analyse investment agreements and developments in the arbitration of investment disputes. They publicly report on developments in investment treaties as part of their mandate from G20 Leaders to monitor new investment measures. The ICSID, on the other hand, is the main forum for investor-state dispute settlement.

I would also like to address a warm welcome and thanks to our distinguished co-chairs, Ms. Li Ling, who just retired as Director General for Treaty and Law in China's Ministry of Commerce and Mr. Raúl Sáez, who is the Ambassador of Chile to the OECD.

International investment is a driving force for sustained economic growth and development. International investment agreements provide security and predictability for investors. They anchor governments' efforts to provide transparent and stable business climates, which is essential if we are to achieve a stronger and job rich recovery.

The landscape of International Investment Agreements is evolving rapidly.

The OECD hosted its first Symposium on International Investment Agreements in 2005. That Symposium was mostly exploratory. We wanted to understand emerging issues and share experiences and this alone allowed us to achieve some important progress. We are proud that those discussions led to improvements to the ICSID Convention.

Today, five years later, the investment landscape has changed significantly.

The world itself has changed and new players have come to the fore. All the G20 countries have a very dynamic presence in the investment field. So much that the traditional conceptual division between capital exporters and capital importers is losing its relevance, while it used to be a way to define the two parties to an investment agreement. Traditionally, they were thought of as instruments to protect the interests of investors from developed countries who were investing in developing countries, including by giving them the right to take the host government to international arbitration.

This traditional configuration is now out of date: we see a growing number of investors from developing and emerging economies making use of this right to international arbitration.

In fact, there has been a dramatic increase in the number of investor-state disputes: ICSID alone is arbitrating over 350 disputes today and other arbitration fora are equally engaged. In the meantime, we have seen a rapid growth in the number of investment agreements, including among developing countries. Over 3000 investment agreements exist today.

As the number of governments involved in investment disputes rises, they are responding by paying more attention to the scope of their treaty obligations. They are thus clarifying language in their agreements. They also try to strike a better balance between the need to protect investors and the necessary flexibility to regulate in the public interest. Some are even renegotiating or terminating their bilateral investment treaties.

Regional initiatives and approaches are also growing. With the entry into force of the Lisbon Treaty, the European Union is rethinking its approach to investment agreements. The ASEAN Comprehensive Investment Agreement is also a notable new development.

This means that priority for international co-operation needs to change. Governments must work together to bring coherence to treaty interpretations and create mutual understanding of each other's practices. We must improve the investment treaty system so that it can benefit all countries alike. For instance, the G20 Seoul Summit called on the OECD and other organizations to help strengthen the existing arrangements to promote investment in low income countries.

A main purpose of the OECD’s work is to foster dialogue that can produce collectively agreed high standards. The OECD, with its tradition of dialogue and shared learning, can help governments and other stakeholders to talk, to analyse, and to develop mutual understandings on international investment agreements. Together with our partners, together with you, we can achieve a lot.

This is what we hope to do today.

This Symposium is designed to improve our understanding of different approaches in investment-treaty making and to identify common ground.

We will also explore ways to improve the investment dispute settlement system;

Last, but not least, we will launch a global forum for dialogue and work between the OECD, UNCTAD, ICSID and other organisations active in this field.

Ladies and gentlemen,

I have no doubt that your discussions will make progress on the issues I have outlined. I wish you a fruitful exchange and look forward to learning about your achievements at this Symposium.

Thank you.

Welcome address by Ms. Anna Joubin-Bret,
Senior Legal Advisor, Division on Investment and Enterprise, UNCTAD

Mr. Secretary-General, Distinguished Investment Experts and Members of the OECD Investment Committee, Dear Colleagues,

Allow me to add UNCTAD's welcoming words for this second OECD-UNCTAD Symposium on International Investment Agreements.

I am very happy to see lots of familiar faces in this room, meaning that the community of investment experts has gathered here, and some of you having come from very far away, I'd like to emphasize that we are very honored by our presence.

The OECD and UNCTAD have enjoyed a long-standing and fruitful cooperation on international investment issues over the years. We have a common objective to contribute to a sound legal framework for investment, and to make investment work for development.

Our joint activities have taken many forms, including our first joined symposium on IIAs in November 2005 – Katia will remember-, our ongoing G20 investment policy monitoring work, our cooperation in investment policy reviews, our involvement in the updating of the OECD Guidelines for Multinational Enterprises, our co organizing the global forum for international investment, and, as a new addition to our cooperative agenda, the follow-up to the G20 action plan for development.

Today's Symposium is another highlight in our collaboration.

As mentioned in our invitations and in the agenda, the core objective of today's meeting is to take stock of the variety of approaches to investment treaties and making the latest developments in this area known to the community.

As you know, today we have more than 2700 BITs and more than 280 Economic Cooperation Agreements, as was mentioned by the Secretary General, with investment provisions.

How to make the AAI regime work for sustainable development and growth is therefore of crucial importance.

This assessment is done against the backdrop of the global economic and financial crisis, where FDI flows have been severely impacted and where the FDI recovery has been slower than expected.

UNCTAD 4th Global Investment Trends Monitor, issued on 14th October of this year, reported that the level of FDI flows for 2010, as a whole, will be about 25% lower than the average pre-crisis levels, and 40% lower than those in the peak year of 2007.

Against this backdrop, we must not forget that IIAs are negotiated with a view to attracting investment.

Beyond all controversies about FDI determinants, IIAs are considered an important policy instrument to attract FDI.

It is hence not surprising to note that in 2010, a total of 126 new IIAs have been concluded – so far-, this number including double tax agreements. The trend of rapid treaty growth is expected to continue in 2011 with more than 100 FTAs and other economic agreements with investment provisions currently under negotiation.

This goes to show that the IIA system continues to develop rapidly, and that there is a real need to analyze these developments to understand how the pieces of this puzzle fit together, and we hope that the Symposium will help us all in this respect.

We as UNCTAD would also like to make use of your presence and of your brains for the Symposium, namely in the afternoon session, as an opportunity to get your feedbacks and inputs on the working draft of a new UNCTAD paper, namely the sequel to the Pink Paper Series on Investor-State Dispute Settlement.

Almost ten years after the publication of the first Pink Series Papers, we have begun to update the series with sequels that will offer more details and more technicalities and try to reflect the rapidly developing practice, both treaty practice and arbitral practice.

The sequels, two of which are already available, namely the one on MFN treatment and scope and definition, are designed to help negotiators and government officials to make sense of the growing complexity and sophistication in this area; that Secretary General Gurría was mentioning earlier.

We view the topic of investor-State dispute settlement as a cross-cutting one.

It serves as an enforcement mechanism for all the substantive IIA obligations. And indeed, all of today's panels will probably touch the point: ISDS.

Over the past decade, the ISDS mechanism has revealed many problems, inconsistent decisions by arbitral tribunals, including divergent interpretations of identical or similar treaty provisions and different outcomes in cases based on identical facts, very high cost of litigation, slow resolution of disputes – ISDS cases have tended to take several years. In almost all cases, arbitration results in the

severance of the relationship between the investor and the host State, which goes against the objectives of States entering into these very agreements.

And finally, States are concerned about frivolous and vexatious claims and are concerned that they cannot control the process once it unfolds.

Here are just some of the issues, but these alone are sufficient to start considering whether the process is optimum and if not, what could be done to address its deficiencies and possibly improve it.

So we very much look forward to your comments on our draft paper on ISDS and how we could make the paper more useful as a basis for discussion for our audience.

Coming back to the IIAs generally, there is a need to ensure that they actually do play their proper role and that their potential costs do not outbalance their potential benefits.

It's crucial that IIAs are recognized as a development instrument.

Having many IIAs negotiators in this room, we very much look forward to your experiences in this context. And we hope that you also will share your views and best practices on how to strengthen the developmental dimension I mentioned of IIAs, a cross-cutting issue for all sessions in this meeting.

Ladies and Gentlemen, Distinguished Experts, Dear Colleagues,

I am confident that your expert knowledge, your practical expertise, your creativity, will allow us to have a rich and interesting debate, and I hope that some useful policy directions will emerge from this, policy options that will help us make the IIA regime work for sustainable and equitable development.

I thank you in advance for your contribution to this important endeavour.

And I give the floor to Ms Li Ling to introduce the first session.

Introductory remarks by co-chairs:

Ms. Li Ling, Former Director General, Director of Treaty and Law, MOFCOM, China

Ladies and Gentlemen, Good Morning,

It is a pleasure to attend the Symposium on International Investment Agreements organized by the OECD and UNCTAD for the first time. I am very pleased to co-chair the Symposium with His Excellency Raul Saez.

In the past ten years, many issues and challenges have been raised in regard to international investment agreements.

How to balance the interests of investors and host countries?

What are the major issues arising from the submissions of disputes to international arbitration?

Is it the procedure of arbitration, or the cost and the length of arbitration, or the inconsistency of awards and interpretations by arbitral tribunals? Is it necessary to set up a peer mechanism for investment arbitration?

There are many questions,a nd I think today's Symposium will provide a very good opportunity for experts from various fields and different countries to exchange views and ideas and share experiences and lessons.

I hope that this Sympodium will allow us to have a further understanding of some of the issues I mentioned and may be to find some common ground on these issues.

I give the floor to the co-chair, Mr. Saez.

H.E. Mr. Raul Saez Raúl Sáez,
Former Head of Financial services negotiations, Chile

Good Morning,

I would like to thank the OECD and UNCTAD for inviting me to co-chair the Symposium. It is an honor for me to be co-chairing the symposium with Ms. Li Ling.

The OECD and UNCTAD are providing us with the unique opportunity to review the recent experience in international investment agreements, both at the bilateral and regional levels to discuss the current status and the future of investor-State dispute settlement system and analyze the implications of two keys provisions of investment treaties.

As it has already been said, the number of agreements has grown significantly in the last two decades, but also the number of investor -State disputes, which are very often quite controversial in domestic politics.

The experience from negotiations and the analysis of the rulings have led many countries to re-examine their approach to treaty negotiations, and innovate both in regard to the text, the drafting of the Agreements, to the renovate of the obligations contained in the agreements and also to introduce changes in the procedures for the investor-State dispute, to resolve some of the issues, for example, excessive controversies with investors.

However governments continue to believe that international investment agreements are a complement to good institutions and effective domestic enforcement of contracts and protection of property rights, which presumably is what attracts foreign investors.

However, on the other side, we also have to recognize that there is a growing concern, particularly after high profile legal cases, about the degree to which these legal instruments affect governments' ability to regulate domestic activities or to change those regulations in light of new policy or development priorities.

There is also an issue as to what extent these agreements are exposing policy makers to potentially large-scale liability, when structural reforms are introduced.

So I believe that this is a very opportune exercise, an exercise of reviewing and a stock-taking of investment agreements, and an opportunity to launch a dialogue between government officials, international organizations and legal experts in an area which is of increasing economic, institutional and legal importance.

I will not extend myself further on additional comments to begin this Symposium, which I think is going to be a very fruitful day of discussions among different experts.

SESSION I-A. EVOLVING INVESTMENT TREATY PRACTICE

Introductory remarks
Ms. Li Ling, Former Director General, Director of Treaty and Law, MOFCOM, China

Today's Symposium is divided into one morning session and two sessions in the afternoon.

The morning session will be devoted to the topic of the rapid evolution of investment treaty practice and the regional approaches and perspectives.

The morning session will be moderated by Mr. Wesley Scholz.

Mr. Scholz is the Director of Investment Affairs, US Department of State and the Vice-Chair of the OECD Investment Committee. He has negotiated numerous BITs and has been a very active member of the OECD Investment Committee for several years.

Mr. Scholz also oversees the Department participation in regional investment fora including APEC, NAFTA and FTAA. He co-chaired the investment Working Group of the Heiligendamm-L'Aquila Process Dialogue. He also coordinates the Department of State participation on the Committee on Foreign Investment in the United States which addresses national security concerns related to mergers and acquisitions resulting in foreign control of U.S. companies.

Prior to joining the Office of Investment Affairs, Mr. Scholz was Director of the Office of International Commodities at the Department of State from 1989 to 1995. During his tenure, he was the lead U.S. negotiator in the successful negotiation of an agreement amending the UN Convention on Law of the Sea to address U.S. and other countries objections to the deep seabed mining provisions clearing the way for entry into force of the Convention and U.S. consideration of accession.

Mr. Scholz received a B.A. in philosophy from Marquette University in 1972, a J.D. cum laude from the University of Wisconsin School of Law in 1977, and a LL.M. in Law and Marine Affairs from the University of Washington School of Law in 1979.

I give the floor to Mr. Scholz.

Mr. Wesley Scholz, Vice-Chair of the OECD Investment Committee, Director, Office of Investment Affairs, Bureau of Economic, Energy, and Business Affairs, U.S. Department of State

As Mrs. Ling said, the first session this morning will be on investment treaty practice and perspectives. The first half of this morning session will be primarily from the perspective of individual countries' experiences. The second half of the session will be focusing on some of the regional perspectives.

Secretary-General Gurria and our two co-chairs of the Symposium have done a very good job in setting the context for our discussions. So I won't add very much to what they have already said, other than making note of one fact that might be useful to receive some attention and thoughts during the discussions today, and that is the question of investment provisions being incorporated into trade agreements. That is a trend that people have commented on and have noted in the past but in past discussions we had in UNCTAD or at the OECD, no one has really explored the implications of that and the advantages and potential disadvantages of integrating investment provisions into trade agreements.

I think that is an issue that does deserve some attention and, even though none of the speakers may have addressed that issue, to the extent that people have thoughts on that, it could be useful to hear a little bit about that subject as well.

Evolution of India's Treaty Practice

Mr. Prabodh Saxena,
Joint Secretary (Bilateral Cooperation), DEA, Ministry of Finance, India

Thank you so much, it is a pleasure to be here in the Symposium and a privilege to give the perspective of India.

I will start with simple facts about Indian Investment Agreements, we call them Bilateral Investment Promotion and Protection Agreements. We have already signed 79 BIPAs, out of which 69 have been enforced.

India is an old civilization but as a country, is very young. There are still millions of Indians who have lived in pre-independent India. In the perspective of the Symposium, I can divide the sixty years of its existence into two parts: pre-1991 and post-1991.

The pre-1991 years

In 1991, our foreign reserves had come to such a low level that our government had to sell and pledge about 67 tons of gold to salvage the crisis. That was also the year for us to decide as to how we take the economy further. In 1991, we consciously decided to open up the country to international trade, to integrate with the world, and to welcome foreign direct investment. That is how we started working on a framework for Bilateral Investment Agreements.

The 1993 model BIPA

We drafted our model text in 1993 and, in March 1994, we signed our first Bilateral Investment Agreement with the United Kingdom. In addition, we have also signed three Protocols to the BIPA with countries which have recently joined the European Union, namely, Czech Republic, Bulgaria and Romania. We have re-negotiated with them to accommodate their new obligations emanating from EU membership.

The issue of a comprehensive agreement has also arisen. I am also very keen to understand the implications of these comprehensive investment agreements vis à vis the BIPAs. Because even if we are currently negotiating BIPAs with various countries the comprehensive investment agreements are becoming the flavor of the day(we have these agreements with many countries and many more are under negotiation). And the time will come when we will have to resolve problems such as how we

reconcile between an investment agreement and the investment chapters of these comprehensive agreements.

So far, we had very little --I would say negligible exposure to international arbitration. But this is now widely believed that sooner or later, we may also face the heat of international arbitration.

In 1993, when we came up with the international investment agreement, we were basically a recipient of foreign direct investment and we wanted to project India as a country where the investors would feel comfortable. Therefore, if you look at the 1993 model text, it was basically a text which provided the obligations of the State towards investors. If you look at it, it basically says that we will give Most Favored Nation treatment to investors and investments, and we will give national treatment to investments - but not to investors due to our own regulatory framework. The bilateral investment agreement in the model text spoke about the standards of fair and equitable treatment; and also about protection against expropriation. And at that point of time, we did not include creeping expropriation. That came in 2003.

We also included in our model text the unfettered right to repatriate profit on investment and provided an elaborate dispute mechanism both for investor-state, and between the two contracting parties.

Our main objective with this model bilateral investment agreement, was basically to invite foreign investors. The only time the model investment treaty mentioned regulation was when it stipulated that we can derogate from the obligation only in two circumstances: essential security interests and extreme emergency.

The evolution of the BIPA policy

In 1993, when India was primarily trying to receive foreign direct investment, we were less concerned about domestic regulations and regulatory framework.

But as the times have changed, the distinction between capital exporting and capital importing countries got blurred. For instance, if you look at years 1997 and 1998, our ODI was almost negligible. There was no overseas direct investment from India. We were only recipients of foreign direct investment.

In 2000 and 2001, we had some outward direct investment which increased in 2003-2004. In 2005 and 2006, ODI and FDI were almost equal. Capital import and capital export were almost at the same level.

In 2007 and 2008, before the financial crisis, we saw a huge increase both in ODI and FDI. And in 2008 and 2009, FDI declined everywhere in the world, but India was still receiving an important amount of FDI and we started investing outside.

This is the background against which our model text progressed. Initially, India's intentions were to seek inward investments. We are now having outward investment which is as important as inward.

When we started signing bilateral investment agreements, 21 out of our first 25 BIPAs were concluded with developed countries. Subsequently, almost all of our BIPAs have been concluded with emerging countries, particularly in Asia, Africa and South America.

Therefore, in 2003, ten years after we have operated the model text, we decided to make several modifications in our model and we introduced a side letter on indirect expropriation. So the notion of creeping expropriation was included into the model text for the first time in 2003.

As I mentioned earlier, initially we wanted to make derogations only in cases of extreme emergency and in cases of essential security interests. As the country became a good destination for FDI, we also introduced certain domestic regulations, notably a denial of benefits of these obligations vis-a-vis those investors who have come in disguise. If the investment is basically owned by somebody with whom we have no diplomatic relations, or against whom there is an economic embargo, or if the investor ultimately belongs to a country and is coming through another country in which he has no substantial business interest, the host country would therefore have the authority to deny the benefit of a bilateral investment agreement.

That is how, over a period of time, regulations have been included into a model text which was primarily an invitation to foreign direct investment.

Though the 1993 model text was actually modified in 2003 but the fact of the matter is that since 1993, there has been a silent evolution. Our most comprehensive drafts negotiated in the last few years are extremely different from the initial model text. So when we start a negotiation, many provisions are not there in the model text, but by the time we conclude the negotiations, many more regulations were introduced.

- The first regulation is that investment has to be in accordance with laws and regulations; we have now emphasized it further. And specifically in our recent negotiations - it was always implicit - we have now made it explicit that investment financing illegal activities will not receive protection of the bilateral investment agreements.

- We have also agreed to restrict the unfettered right to repatriate profits for various factors: it can be restricted to safeguard the rights of the creditors, in case of bankruptcy, or in case of insolvency. It can also be restricted to comply with various awards, whether of judicial bodies, administrative bodies and similar other bodies.

- Similarly, we have also agreed that investor right to carry with him the profits back is subject to compliance with labour obligations.

- With many countries, particularly the countries which have recently entered the EU, we have modified our investment agreements to provide for restrictions on transfer of profits in case of balance of payments problem, or in case of serious macroeconomic conditions. For our comfort, we have made it very specific, that all these issues should be solved according to the IMF standards. It should not be left to the host country to declare that there is a serious problem of balance of payments or that there are important macroeconomic problems. All this should be done within the framework of IMF. That will give comfort to both the parties.

- We also have reserved the right to the host countries to take measures which are required for financial services, for prudential reasons. The two contracting parties are fully competent to take measures to protect public order, to protect human and animal, plant life or health. We have also started making a special mention in our BIPAs of environmental concerns and conservation of exhaustible natural resources and we also have a commitment towards international peace and security.

So although the model text as modified in 2003 may not appear to contain all this, ultimately, if you look at what we have negotiated in the last three-four years, you will see a shift, initially towards domestic regulation, and now towards what is known as sustainable development.

As I mentioned above, although we have negotiated with almost half of the world, the major change for India was to negotiate as an ODI country, in particular with countries of Africa, Middle East and Latin America. It is very interesting to note that the US is our third largest investor and --if we lift the veil of investments coming from Mauritius-- maybe US is our largest investor, despite the fact that we don't have a bilateral investment agreement so far. But investors will definitely feel more comfortable if the legal framework of investment agreement is there.

Another challenge is to negotiate with NAFTA partners, because their model is quite different from ours.

And we have also agreed, in our recent negotiations with Canada to make references to issues of labor and environment. We are open that there may not be any ban or restrictions as far as nationality is concerned, with respect to senior management appointments. Additionally, non party submissions before arbitral tribunals is under active consideration.

So we have moved on and now, we have to further engage with countries in Africa, which are in a situation similar to the one we were twenty years ago when we, ourselves, were not very sure as to how foreign direct investment would affect our domestic investors. We know that they have their own concerns, they want particular advantages, particular favors, particular privileges to be assigned to domestic investors.

Similarly on the NAFTA side, we have to deal with countries which have both pre-establishment and post-establishment protection of investment. So India currently has to negotiate more difficult BIPAs, whether it is with Africa, with Middle East, or whether it is with the US or with Canada. We now have to reorient ourselves to meet the new challenges. This is the way our bilateral investment agreements have evolved in the last eighteen years, and will evolve in the coming years.

Finally, when I look back at the history of the last eighteen years, I would say that our experience to a large extent has been similar to that of any developing country. I think it is a strength of the international investment agreement regime that all of us, all over the world, agreed on certain fundamental principles.

We should give comfort to investors and we should also ensure that host countries take measures, both for their own sake in terms of acute economic crisis, and also to give effect to the fact that the world is now moving towards sustainable developmental goals.

India therefore is neutral, independently on whether is negotiating with a developed or with a developing country.

We also appreciate and understand that the issues of predictability and consistency on investor-state dispute settlement are of great importance and each side is feeling the heat, whether there is the United States or Canada on the developed side, or even Argentina. India sooner or later, will be compelled to respond to investment jurisprudence as it moves, a reference of which was made in my opening remarks. Therefore it is very important that we have consistent and predictable texts.

European investment policy and French investment treaty practice following the entry into force of the Lisbon Treaty

Mr. Julien Cléach,
Deputy Head of Unit, Investment, finance Crimes and Sanctions, Directorate-General of the Treasury, Ministry of Economy, Finance and Employment, France

I would like to thank you for giving me the opportunity to share the experience of France in negotiating international investment treaties and to speak about the upcoming evolution of its treaty practice.

The transfer of competence following the entry into force of the Lisbon Treaty, one year ago, requires us to implement a far-reaching reform of our investment policy. This however must be undertaken in a controlled way.

We do not see this change as a hurdle, but rather as a great opportunity to do a meaningful fine-tuning of our practice.

This Symposium and the overall discussions at the OECD and UNCTAD will give us food for thought on this issue.

The first ever bilateral investment treaty was signed by Germany in 1959. Thirteen years later, in 1972, France concluded its first investment agreement.

In the last fifty years, France has concluded one hundred treaties. All were negotiated with a view to providing investors with the most comprehensive protection.

Whatever the future holds in this area, the protection of investors will remain a core principle of our investment policy. This approach is not bound by an ideology. Our position is steered by pragmatism by pragmatism: the agreements policy and its underlying principle of protection have proved their effectiveness for the last fifty years.

It is a fact that investment is an important source of economic growth, job creation and innovation. Investors' protection is indeed a crucial element to take into consideration when deciding to invest overseas. Such a protection policy has facilitated the economic growth of many emerging economies, while allowing private sector's stakeholders to expand and diversify their business worldwide.

In this context, most European Union Member States, and in particular France, wish to maintain the status of their current networks of IIAs.

For the sake of legal certainty, which is crucial to economic prosperity, treaties that have already been signed with third States should indeed stay in force. However, we are looking forward to the substitution of existing treaties by EU treaties or by new bilateral treaties negotiated with our partners. We must honor the commitments that we have been taking for the last fifty years towards our partners all over the world and towards our domestic firms investing abroad.

The principle *pacta sunt servanda* must then be preserved. However, this should not prevent us from evolving. In order to make this tool of international economic policy sustainable, three main areas should be developed: consistency of standards, policy spaces; and the investor-state dispute settlement.

As of the consistency of standards, the profusion of IIAs, which was mentioned by the Secretary-General in his opening remarks, raises many questions that remain unanswered.

The new European policy will promote negotiations of Free Trade Agreements that provide market access, together with investors' protection.

This unity of market access and protection of investment was made impossible by the division of competencies before the entry into force of the Lisbon treaty. This innovation is therefore welcome, as it will give some stronger consistency to our investment policy.

We do believe that the OECD and UNCTAD should be seized of the issue and promote share of best practices. Market access must be one of our primary goals in this area.

OECD member countries that have adhered to the OECD Declaration on investment have thereby subscribed to the principle of market liberalization. Liberalization must be the starting point of our endeavour to create greater consistency in our FDI practice.

Secondly, I would like to touch upon the issue of policy spaces. This is one of the most important recent trends that should be taken into account in the European treaty practice. While our ultimate objective must remain investment protection, the host State's right to regulate domestic matters in the public interest has to be taken into consideration as well.

The transfer of competence to the European Union is therefore a great opportunity. In a changing global economic landscape, it is crucial to operate a shift in the way we negotiate international investment treaties.

In this regard, we do believe that treaty negotiations should take place at a European level, hence the transfer of competence following the ratification of the Lisbon treaty.

As a result of the inclusion of foreign direct investment in the Common Commercial Policy, the European Parliament has emerged as a new stakeholder in this area. This new state of play is an opportunity to consider in greater depth the inclusion of policy spaces into our future agreements.

French treaty practice already includes a cultural exception. We might also start considering the inclusion of social and environmental exception clauses. The OECD and UNCTAD have a key role to play in the area. We do believe that the OECD Investment Committee, after the completion of the update of the OECD Guidelines for Multinational Enterprises, should address the issue of how to include most efficiently these provisions into international investment treaties. To this effect, it will be necessary to identify the best way to strike a balance between responsible business conduct and investment protection. This work will also be useful for multilateral negotiations that are likely to take place in the coming years.

The third point that I want to discuss is with regards to investor-State dispute settlement. This is the issue that most urgently needs to be addressed by OECD, UNCTAD, and arbitration institutions. We welcome the fact that discussions on ISDS should take place in the course on the year 2011 in the OECD Investment Committee. Here again, our ultimate goal must be consistency. In a context of proliferation of standards and disputes, arbitral jurisprudence faces the challenge of consistency. We need to take up this challenge with no preconceptions; we could start considering, for example, the establishment of an appellate body within the ICSID system that would be meant to ensure a right interpretation of treaties and give consistency to the various standards. It is not a new idea, but it is high time to start discussing it again.

Investment arbitration should also be given more transparency and accessibility and it needs to be made more understandable, especially for SMEs.

Such reflection would help us to find responses to the challenges that we are facing with regards to arbitral jurisprudence: consistency, control of manifest error of law, legitimacy, and enforcement of awards.

Should we want to make the ISDS system sustainable, we will have to initiate an in-depth reflection on these key issues.

International investment treaty practice is at a turning point. This is not only a European evolution; it is a global challenge that concerns us all. Our ultimate goal is to give more consistency to the standards and the jurisprudence. We also aim to strike a balance between investment protection and other objectives pursued by public as well as private actors. Investment treaties will therefore be in a position to beneficiate to every stakeholder and will have a positive effect on economic development.

Latest developments in Colombia's treaty practice

Mr. Camilo Fernandez de Soto,
Adviser to the Directorate of Foreign Investment and Service, Ministry of Trade, Industry and Tourism, Colombia

J'aimerais tout d'abord remercier l'OCDE et la CNUCED pour l'organisation de cette Conférence. Je vous prie d'excuser le vice-ministre Gabriel Duque qui a eu un empêchement de dernière minute.

On behalf of the government of Colombia, I would like to thank you for the opportunity to speak to the distinguished audience and share the views and experience of our country.

I also want to let you know that one of the priorities of President Juan Manuel Santos is to work closely with the OECD, given the importance of this organization. My duty today is to give you a glance of what Colombia has been doing in recent years regarding international investment agreements.

Nowadays, there are over 2700 BITs. According to UNCTAD, 82 were concluded and 19 were renegotiated for the single year of 2009, each with different standards that evolved through times as the international experience progressed on this subject.

Colombia has already enforced 3 BITs with Peru, Spain and Switzerland, and 3 FTAs with Mexico, Chile and the Northern triangle. In addition, signed or pending approvals are BITs with China, India, the United Kingdom and Korea, and FTAs with the United States, the European Union, Canada and FTAA.

By 2011, Colombia will have negotiated 19 international investment agreements with 39 countries and 21 double taxation agreements with 22 countries.

Our model BIT has clarifications and exceptions and is currently under review.

The situation in our country is particular. Because of constitutional restraints, the aggressive strategy to subscribe to these agreements came late during the last decade. As a result, we benefited from the lessons learnt by other countries who concluded a lot of these agreements in the 1990s. An example of this is that our Constitution requires that we create a public order exception in order to enable the State to adopt measures when needed.

The simplicity of standards included into our agreements led to a more relevant interpretation by tribunals when actual disputes over its context took place.

Therefore when drafting our model BIT, we had the knowledge and awareness of the true meaning of the provisions in the BIT, if true meaning can be said. Thus, it was easier for Colombia to address those concerns and to create a consistent public policy for the negotiation of international investment agreements.

Consequently, our model BIT establishes specific clauses to cover our interests.

- First, one of the priorities is the exclusion of public debt operations from the definition of investment and therefore by the scope of application of the treaty.

- The underlying rationale not to consider public debt as an investment in international investment agreements is that public debt contracts entered into by the Colombian government entail a commercial risk and include a particular dispute settlement procedure available to creditors, and have led to some controversies when they arose out of our public debt instruments.

- Colombia has different approaches in order to safeguard the macroeconomic and financial stability.

- Such is the case of the use of capital control to prevent and mitigate the financial crisis. Thus, we have included a broad balance of payments temporarily safeguard exception or a control entry exception that allows the country to deploy domestic laws pertaining to capital controls.

- Also, in order to comply with the objectives pursued by the State to ensure welfare, health and security which can manifest through different means and as such it is very difficult to pinpoint where and how the government might need to act.

- Colombian model BIT recognizes that enforcement of difficult measures might affect the investors' expected gains and thus, indirect expropriations might be involved. In order to prevent these situations, Colombia maintains an objective towards clarifying as much as possible what might constitute indirect expropriation.

- Furthermore, regarding MFN, we made the clarification that the Most Favored Treatment we granted in similar circumstances does not encompass mechanisms for the settlement of investment disputes, which are provided for in international investment agreements.

In addition to that, in our review, we are also considering adding that clarification to the definition of the agreement. Additionally, we have also explicitly included in our model BIT a couple of more elements related to our public policies.

- First, in order to submit a claim to arbitration or to a local court or administrative tribunal, local administrative remedies must be exhausted.

- Second, the application of the Colombian environmental tradition that nothing shall be construed to prevent a contracting party from adopting, maintaining or enforcing any measure that is considered appropriate to ensure that investment activity in its territory is undertaken in accordance with environmental law of the party, provided that such measures are proportional to the objectives.

- Finally, based on case analysis, we reject the inclusion of the so-called Umbrella Clause in our international investment agreements.

As a final point, I would like to add that it is very important to highlight the role of international cooperation which has been has been one of the keys to our success. And it is going to be of great assistance in the future. For instance; UNCTAD has helped us with the training of our negotiators, and with the strengthening of our institutional framework.

On the regional side, cooperation is also very important. We have been working in the creation of an advisory center in international investment law. The purpose of this project is to support the creation of a regional advisory center on investor-State dispute settlement, dispute avoidance, and issues in international investment law, serving Latin and Central American countries, with a view towards assisting these countries in dealing effectively with investor-State disputes, arising out of international investment agreements, and State contracts, both in terms of developing capacity to handle such disputes and means to engaging dispute avoidance and dispute mediation.

SESSION I-B: REVOLVING INVESTMENT TREATY PRACTICE AND REGIONAL PERSPECTIVES

Latest developments in the European Investment Policy, following the entry into force of the Lisbon Treaty

Mr. Ignacio Iruarrizaga,
Acting Head of Services and Investment Unit, DG Trade, European Commission

I will briefly take you through what we are doing on investment at the Union, following the entry into force of the Lisbon Treaty.

As most of you are familiar with, in the pre-Lisbon treaty context we had a division of responsibilities between member States and the European Community at the time, whereby member States were negotiating investment protection agreements of which they signed around 1200, covering 147 non EU members. The EC at the time – the EU now- was dealing with negotiations of market access both in the context of multilateral agreements, as in GATS for instance, where it was the EU that was negotiating and taking commitments on services, and on bilateral agreements where we have been negotiating in different FTAs, market access both for service and non services. We have done that in Korea, on agreements with Colombia, Peru, or Central America, and we are currently negotiating on market access in different FTAs with Canada, India, with several EuroMed countries or with Mercosur.

So that was the division of responsibilities.

That has changed following the entry into force of the Lisbon Treaty.

Now, as you are aware, FDI is explicitly mentioned as forming part of the common commercial policy in article 207 of the Treaty. The common commercial policy is explicitly mentioned in the treaty as one of the areas of exclusive policy of the EU, which basically means that only the Union can legislate and adopt legally binding acts in that area. So now the Foreign Direct Investment is an exclusive competence, part of the common commercial policy and therefore negotiations in this area are handled by the Union as a whole, the Union represented by the European Commission.

This new setting will offer us the opportunity to negotiate together market access and investment protection matters, which we think will give us a better negotiating leverage and will offer us

opportunities to entrench what we already do, notably in the context of broad economic integration agreements, FTAs or other types of broad agreements with third countries.

Now, what are the practical implications? What are we doing to move this new EU competence forward?

We are working basically on two strands.

One, which is very important, is to ensure the stability of what we have inherited from the previous system. We are working to make sure that existing investment agreements by member States, not only BITs, are grandfathered under EU legislation. So we consider that there is no question of the validity of member States' agreements under international law, but we also want to clarify that under domestic law there is no problem either, and we will try to achieve that through an internal grandfathering of those agreements.

The second strand of work is on the development of a common policy. We have to now work together in developing common policies and there are two issues: one is what we are going to be doing together as the Union as a whole; and what can member States still be doing on their own within certain parameters, what we have referred to as the possible empowerment of member States to still negotiate individual investment agreements with third countries.

So these are the two big strands of work.

How are we doing that?

In July last year, the Commission approved two initiatives. One was a draft of the Regulation that we presented to the Parliament and the Council for approval. Then we also adopted a Communication on how we will carry out our future trade policy in this area. The regulation deals basically with two issues; one is, as I mentioned, the grandfathering under EU law of existing agreements, because existing agreements as having been signed at a national level present an issue of competency and compatibility with EU law following the entry into force of the Lisbon Treaty. We want to make clear through that Regulation that that problem is addressed by a firm and fair grandfathering. So that is the main issue.

The second question that we are tackling in the Regulation is to create of mechanism allowing the Union to empower individual member States to continue negotiating bilateral treaties with countries with whom there is no either appetite for signing treaties at a EU level, or simply it is not practicable to do that because we will not be able to negotiate agreements with the large number of countries with whom an individual member State may have a particular interest in signing an agreement. So the Regulation creates the conditions to allow that empowerment of the member States, under certain

parameters. This sort of empowerment is provided under certain conditions that are laid down in the Regulation.

So that is the Regulation, and I will explain you in a minute where we are with it.

The second initiative that we undertook in 2008 was a Communication from the Commission laying down the key parameters of the future policy. We set out some basic principles; we indicate that in principle we should ensure that no EU investor will be worse off as a consequence of agreements at EU level than they are now, under the Umbrella of existing member States' investment agreements.

We also indicate there that we will work to ensure that EU policy on investment will be guided by the principles and objectives of the EU external action, not only the promotion of the rule of law, human rights and sustainable development. We also indicate in the Communication that whatever we do in the field of investment we have to be compatible with the late policies of the Union.

We also mention in the Communication what are going to be our geographical priorities, in terms of with whom we are going to be negotiating. We set out the basic parameters that will help us; with whom we will negotiate, we will basically be looking at markets with significant economic growth or growth prospects; and we will be considering the issue of the stability or instability of those markets.

What we will be negotiating? Normally we will be negotiating market access and investment protection together and we will be doing that in the framework of FTA negotiations, at least initially. We may also consider some stand-alone agreements; we mentioned in particular in the Communication the possibility of negotiating stand-alone investment agreements with Russia or China.

In terms of the standards that we will be including in agreements, this is very much a work in progress, in discussion with the Council and the European Parliament. But in the Communication we indicate that in principle, and quiet logically, because we want to ensure continuity in the practice, we will be inspiring ourselves at the EU level on the best practices already developed by member States. We mentioned the key standards that we will be looking at: non discrimination, fair and equitable treatment, full protection and security and protection against expropriation, freedom of transfer, etc.

So we basically make a brief enumeration of key principles that are inspired on the practice already developed by member States.

We also refer to the importance of having a future agreement at the EU level, both investor to State dispute settlement and State to State dispute settlement mechanisms. In that regard, on investor to State, we mentioned some challenges in terms of transparency or in terms , , of considering the possibility of developing an appellate mechanism in the future, as Julien was saying before. And the question of transparency is an area where the European Parliament is very insistent. Different MPs

have underlined the importance of working on transparency at the EU level, and this is very much a work in progress for us; this is an area where we are working on developing our practice together with our member States.

Where are we now on the two issues of the Communication and the Regulation?

The Communication by the Commission doesn't need any approval by any other institutions, it reflects the policy choices of the Commission as a whole. However the Council has approved its own conclusions on the Communication presented by the Commission. Those conclusions are a large support to the broad lines of the Commission's communication.

Now the Parliament is analyzing the Communication as well. It's going to take a few months for the Parliament to finish its work on policy issues, once they conclude their policy analysis. Naturally we will have to seriously take into consideration the guidance that will emanate from the Parliament in that regard.

As far as the Regulation is concerned, as Julien mentioned, the Regulation follows the so-called ordinary legislative procedure in the EU jargon, which basically means it has to go through our two legislative Chambers, the Parliament and the Council. We are discussing at both institutions the draft regulation and it's going to take a little while for that exercise to be concluded.

Just to finalize my intervention, you should be expecting a progressive change. You will see more of EU role, you should not expect a revolution, we are going to keep the existing BITs in force, we don't want to upset the protection that our investors enjoy today in third countries, but little by little you will see action from the Union as a whole in investment protection as much as you have seen it in market access.

As we indicated in the Communication, you will probably see negotiations on the investment protection as part of some of the FTA negotiations ongoing, notably with India, Canada and Singapore.

Regional Developments and Perspectives in the APEC region

Mr. Toru Shimizu,
Vice-Chair of the OECD Investment Committee, Director, Ministry of Foreign affairs, Japan

In the last fifteen years, we have been undertaking a lot of actions for creating a better climate for investment in the APEC region. This year, in Yokohama in November, the leaders gathered and reached a number of conclusions including on investment. In 2010, we also initiated the APEC Strategy on investment and this encompasses many relevant factors for creating that good climate.

Regarding the methodology of the APEC actions:

- One approach is to identify commonality and particularity. This is undertaken, for example, in the studies on core elements of BITs and other kind of investment agreements of APEC economies; the further analysis on how to interpret relevant provisions and articles of those international agreements, and how to interpret, how to use the dispute settlement articles of the relevant agreements.

- A second point is to take concrete steps, particularly on facilitation and promotion. A comprehensive legal framework would be ideal, but APEC, as you know, is composed of various, different economies with different stages of development. So we need to pay due attention to those different economic development stages, if we were to reach some outcomes. For example, promotion is very much needed to give some assistance to ODA, or some kind of capacity building action. We have been undertaking this kind of promotion actions in the APEC framework, Facilitation actions are also very important, notably to increase the level of transparency.

- The third point is our practical approach, in the sense that in the APEC actions, we are rather flexible taking into consideration these different elements of participating economies. So sometimes, we put some kind of target, but not in a straight manner. This kind of practical approach is characteristic of our endeavors in the APEC region.

I would then like to focus on *the APEC process*.

As I have just mentioned, APEC actions are made of gradual but concrete steps, and the three examples I would like to mention are:

- *The non binding investment principles* (1994): they are originally non binding principles, but some of those principles are already incorporated in bilateral or regional investment agreements of the members' economies.

- *The Osaka action agenda* (1995): this is the action agenda relating to investment.

- *The Core Elements Study*: it started in 2007, and we have been continuing this Core Elements Study with the help of UNCTAD and other relevant international organizations.

I have already presented the second point, which consists of sustained efforts based upon the diversity of the region.

And I just mentioned the third point: pragmatism and mutually beneficial. We are taking a flexible approach to enhance our mutual understanding in the field of investment.

How to make the maximum use of IIAs?

Three points should be made:

- The first one is the enhanced understanding of IIAs through our analytical studies of the core elements and other actions of the APEC.

- The second is the preventive role of IIAs. A better understanding of elements surrounding the IIAs is needed to avoid misconceptions and misunderstandings to prevent all sorts of disputes among economies.

- Thirdly, the stabilization of the business environment; not to mention the most needed background for increasing the investment level.

Finally, I will present the *basic structure of the APEC strategy for investment* adopted this year in Yokohama.

Here we have three pillars.

One is "the advanced principles and practices" and is aimed at finding out some commonalities among different kinds of agreements already existing among member economies.

I have already mentioned the facilitation, the second point, and the investment promotion.

By having this strategy for investment in the future of the APEC economies, we could reach further steps to create a better environment for investors.

ASEAN Approach on Regional Development and Perspectives

Mr. Rizar Indomo,
Director for Regional Cooperation, Investment Coordinating Board, Indonesia

Good Morning,Thank you for inviting me on this occasion.

We do progressively improve the investment environment in the ASEAN framework. We have a number of initiatives that have already started since 1987.

I will start by an overview and a presentation of the background: What are the evolutions of the ASEAN investment agreements? Why do we make changes? I will then present the ***2009 ACIA-ASEAN Comprehensive Investment Agreement***- , which is the latest agreement; and also some initiatives with dialogue partners as a package of the FTA agreements.

I would like first to bring to your attention the context of economic development, and then move to the investment field as well as to provisions that are incorporated in these agreements.

When ASEAN was established in 1967, it was initially not dedicated to investment matters.

During the first 20 years (1967 to 1987) the focus was more on the activities of governments to maintain their relationships with each other and to maintain peace, security and stability in this geographical area.

The first agreement on investment, the so-called ***ASEAN Investment Guarantee Agreement,*** was issued in 1987. It covered only the promotion and protection of investments. It can be categorized as a typical old model BIT. ASEAN Members started developing Free Trade Areas Agreements in 1992 .

From 1970 to 1997, FDI inflows to ASEAN have increased drastically. In 1997-1998, the FDI inflows slowed down due to the economic crisis.

Following this crisis, in 1998, ASEAN member States set up a new agreement for investment, ***the ASEAN Investment Area (AIA),*** which included, in addition to promotion and protection elements, liberalization provisions. The objective was to restore investors' confidence, to preserve the existing investors and to give some predictability to the investment regime.

In 2007, the total GDP in the ASEAN region reached 1.4 trillion dollars.

Suddenly, the second financial crisis happened, after which the ASEAN members looked at another Initiative to develop the ***ASEAN Comprehensive Investment Agreement 2009 (ACIA).*** At that point, ASEAN focused on the development of investment agreements as a response to the crisis in the area of investment.

The amount of flows of FDI into ASEAN are quiet consistent with the GDP growth. Moreover, the investment initiative was made as a response to the development of FDI into the ASEAN region.

For you information, I would also like to mention a few facts on ASEAN population, GDP, regional trade and inflows of FDI in 2009:

The total population of ASEAN has reached 590.6 million people, recorded to be the third largest in the region after China and India.

Total GDP ASEAN reached USD 1.49 trillion.

Total trade merchandise in ASEAN amounted to USD 1.54 trillion.

Total FDI inflows in ASEAN reached USD 39.6 billion.

As I mentioned earlier, the ASEAN Investment Area Agreement (AIA) was signed in 1998 and the ***Investment Guarantee Agreement (IGA)*** was signed in 1987. The IGA was more a region-wide investment agreement including elements of protection and promotion, while the ASEAN investment Area was designated to further enhance the process of FDI policy in ASEAN - through liberalization, promotion, facilitation and harmonization

The ***ASEAN investment Area 1998 Agreement (AIA),*** was a response to the global economic conditions after the crisis and was also aimed at fulfilling the objectives of ASEAN economic community, which is considered as a free flow of investment and single market and production base. These orientations should be supported by all issues of economics, including trade, services and investment. Therefore, the ***ASEAN investment area agreement (AIA***) changed into the ***ASEAN Comprehensive Investment Area Agreement 2009***. This agreement evolved from merely protection provisions to liberalization elements. ACIA includes four pillars: the promotion, protection, liberalization and facilitation elements.

The objective is to support the objectives of a single market and production base and free flow of investments by 2015. So there is a timeframe, a clear objective, which is attained through the liberalization process, protection, facilitation and promotion.

Within the ASEAN framework, liberalization has been done progressively rather than as a radical change.

The timeframe set up for 2015 is a time to work on these progressive changes by all ten countries.

We adopt a standstill approach with a single reservation list.

It covers five sectors: manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidentals to these five sectors.

It also accommodates the expansion of scope of the agreement to cover other sectors in the future.

It excludes un-regulated and new emerging sectors.

Its benefits are also extended to ASEAN investors and foreign-owned ASEAN-base investors. So it is also given to foreign investments that already exist in ASEAN countries.

It gives flexibility to ASEAN member States to modify the commitment with clear procedures and compensatory adjustment mechanism.

We understand that it is in the best interest of investors to carry out the standstill approach in a good manner.

However, we do believe that under certain circumstances, when there is a difficulty in each of the domestic economies of the ASEAN countries, there must be flexibility to modify the commitment with a compensatory adjustment mechanism put in place. But the modification of the commitment will not affect the existing investors that are already operating in the ASEAN market.

Flexibility is given to newer ASEAN member States, the ASEAN Four, on special and differential treatment.

The second pillar is the *protection* element, ensuring the balance between investment protection demands and legitimate regulations in the countries.

It covers investment terminology with approval in writing by the competent authority. This is the most common practice in ASEAN.

It also covers the traditional expropriation compensation, fair and equitable treatment, measures to safeguard the BOP, general exceptions and the denial benefit principle.

And there is a more comprehensive dispute settlement by promoting conciliation, consultation, negotiation mechanisms. These developments are really complementing the existing dispute mechanisms that are already put in place.

Facilitation simply aims to provide more user-friendly services to investors. We are providing investment database across ASEAN. We continue to improve streamlining and harmonizing the investment procedure or approvals (the behind-the-borders investment issue). We continue promoting the dissemination on investment community and establishing one-stop investment centre to serve investors in ten of the ASEAN countries.

Finally, the *promotion* pillar simply consists of activities that try to sell ASEAN as an area for free flows of investment, a single market and production base, through organizing missions, inbound and outbound promotion, exchange on information related to investment promotion, seminars, capacity building, and other activities.

Regional Approaches: Negotiations on a TransPacific Partnership

Mr. Raimundo Gonzalez,
Head of Services and Investment and Air Transport Department, Ministry of Foreign Affairs, Chile

The TPP, a ***Trans-Pacific Partnership Agreement***, is being negotiated between nine countries.

This Agreement has its origin in the P-4, the so-called *Pacific-4 Agreement*, which was signed between Chile, New-Zealand, Singapore and Brunei, all APEC Member Economies. The P4 Agreement has an evolution clause for future addition of other countries. In this benchmark the United States was the first country to express their interest in becoming a Member. Afterwards other APEC Economies joined.

Today we are negotiating an Agreement with the original P-4 countries, plus the United States, Australia, Peru, Malaysia and Vietnam.

It is a very interesting agreement because there are both different and similar interests and sensibilities among the negotiating countries. We had three rounds of negotiations.

In regards to investment, this agreement is based on the Pacific-4.The P-4 has Chapters relating to goods and services. But even though there was a negotiation on investment, the P-4 members were not able to conclude that negotiation.

However, when negotiations for the TPP where initiated, all countries expressed their interest to negotiate an investment agreement.

Of course, I cannot say very much because we are in a negotiation phase. But what I can say is that this investment Agreement is based on a NAFTA approach in the sense that it will have a negative list approach with high standards disciplines.

This is what I can briefly tell you about these negotiations. We still have road ahead continuing with these negotiations.

Regional perspectives: Emergence of a new rule-making

Mr. Roberto Echandi,
Former Ambassador of Costa Rica to the EU; Senior advisor, World Trade Institute

Thank you very much to the OECD and UNCTAD for inviting me to participate in this activity.

In the few minutes I have, I would like to do two things.

One is to give you the perspective of a small developing country regarding the trends, what are we seeing after twenty years, very quickly.

In the investment area, we are very far from where we would like to be. We would like to have a coherent system; we would like to have a lot of things. We are also very far from where we should be.

But fortunately, we are no longer in the place where we were a long time ago, at least twenty years ago. And I say this because investment disputes and investment relations have existed for ages, since colonial times. The only difference is how we govern it and how we solve disputes.

As a Latin American, I really celebrate the fact that investment is the flavor of the moment in most academic fora. We can agree or disagree, we can be controversial, but we are talking about law.

We are talking about the *emergence of a rule-oriented system*. And that is far away from the gunboat diplomacy and political pressures that used to characterize the area. We should never lose that from sight.

The second point that I want to make is the importance of this rule-oriented system. As small countries that do not have big markets, neither important natural resource, law is the only way that we have to defend our interests in an interdependent and interactive world.

But this is not important only for the external dimension. I want to stress this point.

This morning, Anna and the Secretary General stated that this is about development. This is about how, at the end, we can use these rules to foster economic growth in a sustainable way in our countries.

A lot of research has been done on whether investment agreements attract FDI or not. We can debate a lot on that. But I would like to make this point: sometimes the international agreements are important, not necessarily because the investors come because there is an agreement or not, it is

important because of the impact that the international pressure, through international law, can have on domestic economies to put the house in order, to foster the rule of law internally, and therefore to generate a better investment environment.

And there, the second trend that I see is that we always have to ponder this external/internal dimension of international investment law.

Going to the external part, there is a very interesting thing that has happened to us in the last twenty years. We are talking about case law.

There is a very interesting dynamic: for example, we see a dynamic between investment disputes and investment rule making. There is a dialogue between countries.

It is very interesting because, if I summarize the research that have been done on this, there are five key trends in these lessons that have driven especially capital exporting countries, the traditional capital exporting countries, in reshaping their positions towards investment, that we have seen today.

This is important because then we see a *new rule making*. Where is that evolving to?

- A *greater position in the definition of investment.* It is clear that no one wants to predict everything. Yes, it is broad, but if you see the legislative practices, there is more precision there.

- *Clarification of the context of certain key, substantive provisions* of investment protection. Actually the two key ones: minimum standard treatment, equitable treatment and expropriation. You see the rule-making as a response to the case law, a new wording, new language there.

- *Promotion of transparency*, and here I want to stress that a lot of former BITs were negotiated with the paradigm of the 1960s, which was more focused on natural resources investments, but anyway, didn't have any transparency obligations. And now we see agreements that not only have transparency obligations, but also change the concept of transparency. Transparency is no longer an exchange of information between governments. Transparency now is beginning to be a due process of law in domestic regulation vis-à-vis all the investment stakeholders, domestic and foreign investors, which I think is very interesting for the domestic rule of law.

- The clarification that the investment protection and liberalization should not be pursued at the expenses of other *key public policy objectives*. We need to find a good balance. We see more and more often in some countries and some agreements that we have more exceptions,

more positive language. Issues like environment, or like labour rights are becoming to be part of that.

- And last but not least, *innovations in the investor-State dispute settlement*. It is very interesting to compare the old BITs with the new investment agreements –most of them, by the way, take place within FTAs- most of the innovations are taking place at a regional level. We see improvement for greater predictability and control of the parties. The countries try to control more the outcome of what a panel might say, through different mechanisms, and also to foster judicial economy. There are also very important innovations in new investment agreements also more transparency and legitimacy of the system.

The key point then is that from a quantitative perspective, this is not the majority of agreements. But we see an evolution from a qualitative perspective.

So it is a very positive trend that we see here, but the problem is how to synchronize this evolving investment law, because we still have other agreements that are not as sophisticated or have not responded to the new scenario of this case law.

From the perspectives of small countries, that is very difficult because sometimes, when we are at the table, it is very difficult for us to innovate, for very simple reasons. The counterpart usually comes with a template because any negotiating position has to be based on consensus between Capitals.

And that is difficult for countries that have very limited powers, even if they had the right ideas.

However the issue then, and I want to be provocative to the OECD, is that there is a role on how to synchronize that evolution in the rule-making. Some capital exporting countries are going far in introducing these innovations, and some others that are quite lagging behind. It is a different speed.

Having said that, what can we do?

Going to *regionalism*, as far as we can do it, we have tried to use this evolution in investment rule-making and transfer to our own regional areas. In the case of Central America, with which I am more familiar, we did actually use these negotiations with a more powerful partner to negotiate among ourselves at similar levels of sophistication of rules among the five Central American countries.

I want to stress this. It took ages for us. If we had not had that external pressure, it would have been even more difficult, as small economies, to promote and to lead the rule-making. If you have this dynamism through the FTAs, sometimes –not in all contexts- but sometimes, you can foster these innovations at a domestic level.

Regionalism can be very useful to clean some of the former BITs that were negotiated in different contexts.

And I want one second to stop here to introduce another idea.

Most of the BITs were crafted in an area of domestic protection. Protection clauses were the key point. Natural resources were the prevailing kind of patterning FDI. That is not the case anymore. We are now more market-seeking, efficiency-seeking in investment, and therefore of course it makes also a lot of sense to negotiate investment in the context of regional agreements. That has pros and cons. I don't have time to develop all of them; we can discuss them later in the discussions.

But the key point that I do want to make is that the regionalism has enabled us sometimes to get rid of some BITs. Instead of having 3 or 4 BITs, where we have a regional agreement we just overcome or replace the former regulation with the new one.

That is certainly the case of the relationship between the US and Central American countries.

Last but not least, this template brings a big challenge for the European Union. We just finished the negotiation of an agreement. Member States of the EU have 1200 BITs, so in this perspective of using a regional approach to clean, the EU has a huge opportunity to contribute in that systemic approach of investment governance.

I would also caution to, and that has to do also with the interaction between our systems and regionalism and the multilateral system; and in the negotiations with our European friends, we had a very interesting discussion on the relationship between GATS and investment law. There are some areas where we could find and identify some short-circuits there. This is not the topic of today but I just want to flag that that is an issue of research that should be studied with care.

At the end of the day, there is a lot to be done but we are very far from where we used to be a long time ago. And I want to be optimistic regarding the outlook vis-à-vis all the challenges that we will have to face.

On Innovative Path for BIT Practice[*]

Mr Zeng Huaqun,
Law Professor and Director of International Economic Law Institute, Xiamen University,

[*] This paper is the text of the author's speech at the Second Symposium on International Investment Agreements/ International Investment Agreements and Investor-State Dispute Settlement at a Crossroads: Identifying Trends, Differences and Common Approaches hosted by OECD and UNCTAD on 14 December 2010.

China;

Bilateral investment treaties (BITs) have emerged as one of the most remarkable recent developments in international law.[1] Currently the developed capital-exporting states promote "liberal" BITs by their continuous economic and political priorities. "Investment liberalization" appears to be the trend of the times and affected greatly BIT practice and other international investment systems.[2] Some scholars also advocate "investment liberalization" and related international regimes.[3]

BIT practice is at the crossroad. The international society has to revisit the South-North issue reflected in the development of BIT practice, and to recognize the negative impact of unilateral protection for capital-exporting states and transnational investors. For the healthy and sustainable development of BIT practice, it is necessary to identify the imbalance elements of BIT practice and to explore the innovative path for future BITs practice.

I. Imbalance or un-equality in BIT practice

In the history of BIT practice, there is an issue on imbalance and/or un-equality between developed states and developing states due to historical and practical reasons. Today the issue is more serious than ever before.

1. Innate brand and continuous priority for developed states in BITs

The early mode of BITs may be traced back to friendship, commerce, and navigation treaties (FCNs), the US traditional instrument for dealing with its foreign economic relations. After 1911, US began to add some provisions on overseas investment protection to these treaties. After the World War II, since the status of US as a capital exporting state was promoted remarkably, overseas investment became one of the main vehicles for its international transactions, and FCNs accordingly became the

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1 Jason Webb Yackee, Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties, 33 Brooklyn J. Int'l L. 405 (2008).

2 For example, the main novel features of recent BIT practice of OECD member states include: the pursuit of high standards, from the traditional focus of investment protection towards the inclusion of more extensive liberalization disciplines, key investment protections have been redefined, new language has been added to guide the application of the expropriation articles, and investor-state dispute settlement is becoming more widely accepted. OECD Secretariat, Novel Features in OECD Countries' Recent Investment Agreements: An Overview, Document for Symposium Co-organized by ICSID, OECD and UNCTAD on Making the Most of International Invest. 4-5 (2005).

3 For the analysis on BIT as instruments of liberalization, see Kenneth J. Vandevelde, Investment Liberalization and Economic Development: the Role of Bilateral Investment Treaties, 36 *Columbia Journal of Transnational Law* 504-514 (1998).

main instruments for performing its overseas investment policy. US conclude a series of twenty-one FCNs with a wide variety of developed and developing states. The treaties became more concerned with investment-specific needs. A "major purpose" of them was "to protect … investment abroad".[4] For the emphasis on overseas investment, there are big changes in the whole structure and contents of US FCNs. More than half of the contents in these treaties relates to investment protection. The significance of the treaties for protecting overseas investment is greatly enhanced. The provisions on investment in FCN include mainly the protection for foreigner and their properties, the treatment of foreigners' properties, nationalization or expropriation and standard of compensations etc. It is evident that these provisions refer to the core content of coming BITs, providing experience of regulating transnational investment relations for the future BIT practice. Other capital exporting states, like Japan etc., also take FCN as main traditional instrument for protecting their overseas investment.

For further serving the policy for protecting their overseas investment, Germany created the first particular treaty on promotion and protection of investment with Pakistan in 1959, taking the investment provisions from FCNs as central contents of these new treaties.[5] The contracting parties to the BITs are typically European states and developing states. Germany and other European states took the lead in this regard.[6] With the decision of US to adopt BIT as an overseas investment protection device the BIT's number started to increase sharply.[7] Gradually BITs are widely accepted by states around the world and have become the most popular form of investment treaty regime.[8]

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4 Jason Webb Yackee, supra note 1, 405.

5 The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments was concluded in 1959. It contains many substantive provisions that have become common in subsequent BITs. See Andrew Newcombe, Lluis Paradell, Law and Practice of Investment Treaties, Standards of Treatment, *Wolters Kluwer*, 42 (2009); Jason Webb Yackee, supra note 1, 405.

6 Switzerland, France, Italy, United Kingdom, the Netherlands, and Belgium followed Germany's BIT practice in a relatively short time. See Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries", 24 *The International Lawyer* 656-657 (1990).

7 Axel Berger, China's New Bilateral Investment Treaty Programme: Substance, Rational and Implications for Investment Law Making, Paper for the American Society of International Law International Economic Law Group (ASIL IELIG) 2008 biennial conference "The Politics of International Economic Law: The Next Four Years", Washington, D. C., November 14-15, 2008, p.4.

8 According to statistics of UNCTAD, there are 2750 BITs by the end of 2009. United Nations Conference on Trade and Development, World Investment Report 2010, 81. www.unctad.org 03/08/2010. For general picture of BIT practice, see UNCTAD, Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking, *United Nations* (2007). Latin American states, home of the Calvo Doctrine, shifted their position on BITs and began signing BITs in the late 1980s. Over the past two decades, they have signed more than 500 BITs with countries around the world. See Mary H. Mourra (ed.), Latin American Investment Treaty Arbitration, the Controversies and Conflicts, *Wolters Kluwer*, 1 (2009).

In the more than half century, most BITs mimic, at least in broad strokes, the Draft International Convention on Investments Abroad (commonly known as the Abs-Shawcross Convention) and OECD 1967 Draft Convention on the Protection of Foreign Property.[9] Due to their common origins, the terms used and subjects covered in different BITs appear remarkably similar over time and across countries. For example, capital-exporting states have long been preoccupied with convincing host states to provide certain generally applicable standards of treatment, like most favored nation (MFN) treatment, national treatment and/or "fair and equitable" treatment, for foreign investors and foreign investment.[10]

Tracing to its source, BITs are essentially created by developed capital-exporting states and served for their foreign policies. It is understandable that due to the "innate brand" there are undue emphasis on powers, rights and interests of capital-exporting states and/or their overseas investors in BITs. The innate priority for developed states also reflects the historical weak and passive position of developing states.

2. Un-equal positions and bargaining powers in BIT negotiation

In theory BIT is a result of bilateral negotiation between contracting states, aiming at providing equal legal protection for them. In practice, they are usually agreements between developed capital exporting states and developing capital importing states. The rules and standards for investment protection are largely depended on the expectation, positions and bargaining powers of the contracting parties. To some extent the preparation of model BIT reflects the un-equal positions and bargaining powers between developed states and developing states in BIT negotiations.

Developed states devoted considerable time and efforts to the preparation of model BIT, to serve as a basis of their BIT negotiations.[11] Preparing the model normally involved intensive consultation

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[9] For the brief history of the BITs, see Jeswald W. Salacuse, supra note 6, 656-661.

[10] Jason Webb Yackee, supra note 1, 415-416.

[11] It seems that there are two types of BIT models: one is the European model, the traditional one; the other is the US model, including provisions on some new elements and complicated dispute settlement regime. See the typical European BIT Models: German Model Treaty-2008: Treaty between the Federal Republic of Germany and […….] concerning the Encouragement and Reciprocal Protection of Investments (13 Articles in total); and Draft Agreement between the Government of the Republic of France and the Government of the Republic of [……] on the Reciprocal Promotion and Protection of Investments (2006) (11 Articles in total). There are 37 Articles in the 2004 US Model BIT: Article 1: Definitions; Article 2: Scope and Coverage; Article 3: National Treatment; Article 4: Most-Favored-Nation Treatment; Article 5: Minimum Standard of Treatment; Article 6: Expropriation and Compensation; Article 7: Transfers; Article 8: Performance Requirements; Article 9: Senior Management and Boards of Directors; Article 10: Publication of Laws and Decisions Respecting Investment; Article 11: Transparency; Article 12: Investment and Environment; Article 13: Investment and Labour; Article 14: Non-Conforming Measures; Article 15: Special Formalities and Information Requirements; Article 16: Non-Derogation; Article 17: Denial of Benefits; Article 18: Essential Security; Article 19:

with relevant government agencies and representative of private sector. In general model BIT serves several purposes for developed states. First, its preparation is an occasion to study the entire issues of investment protection, to consult with interested governmental and private sector organizations, and to formulate a national position on the question. Second, the model is considered as an efficient means of communicating to counterpart a concrete idea of the model that the developed state seeks. Thirdly starting all negotiations with the same model is a way to attain the goal of unifying its BITs with various developing states. Finally the model gives developed state a negotiating advantage, since the party who controls the draft usually controls the negotiation. By preparing a model that becomes the basis of discussion, developed state has determined the agenda of BIT negotiation and has established the conceptual framework of BIT.[12]

Most of developed states use the model as essential means for their BIT practice, and therefore have clear objectives and strong confidence in the negotiations. On contrary most of developing states have not prepared model BITs. Accordingly they are in the position of merely accepting or slightly reacting to the model BIT prepared by their counterparts. Only a few developing states have prepared their model BITs. These models are often influenced by the developed states' model BITs due to historical, practical and/or technical elements. Furthermore it is difficult to expect some of the developing states which are signatories to these treaties to have legal departments sophisticated enough to understand the nuances in the variations in the language that is used in these treaties.[13]

It is worth noticing that BIT negotiation may achieve third party-benefit arrangement. It may interfere with investor-state negotiation by granting investors unwaivable protections and safeguards that they might or might not have been able to convince a host state to grant them in direct negotiation. It indicates that the main function of BITs is to limit host state bargaining power from the outset.[14]

Disclosure of Information; Article 20: Financial Services; Article 21: Taxation; Article 22: Entry into force: Duration and Termination; Article 23: Consultation and Negotiation; Article 24: Submission of a Claim to Arbitration; Article 25: Consent of Each Party to Arbitration; Article 26: Conditions and Limitations on Consent of Each Party; Article 27: Selection of Arbitrators; Article 28: Conduct of the Arbitration; Article 29: Transparency of Arbitral Proceedings; Article 30: Governing Law; Article 31: Interpretation of Annexes; Article 32: Expert Reports; Article 33: Consolidation; Article 34: Awards; Article 35: Annexes and Footnotes; Article 36: Service of Documents; Article 37: State-State Dispute Settlement. The text is divided into three sections: Section A (Article 1 to Article 22), Section B (Article 23 to Article 36) and Section C (Article 37).

12 Jeswald W. Salacuse, supra note 6, 662-663.

13 M. Sornarajah, The International Law on Foreign Investment, 2nd edition, *Cambridge University Press*, 207-208 (2004).

14 Jason Webb Yackee, supra note 1, 458.

3. Deviation of objectives and functions in BITs

3.1. Different motives and objectives of BITs

The motives and objectives for concluding BITs are different between developed states and developing states due to their different positions and roles in international investment activities.

The movement to conclude BITs is initiated and driven by developed states. Their primary objective is to create clear international legal rules and effective enforcement mechanisms to protect investment by their nationals in the territories of foreign states. The essence of this protection is to defend the investment and the investor from exercises of host states' power with respect to such matters as expropriation, treatment, transfer of currency abroad, and restrictions on operations. These treaty rules and enforcement mechanisms are intended to supplant local legislation and institutions and also to avoid disputes over the content and applicability of customary international law. A secondary objective of developed states is to facilitate the entry of their investments by inducing their counterparts to remove impediments in their regulatory systems.

The primary objective pursued by developing states in negotiating BITs is to improve foreign investment climate and encourage foreign investment for the development of national economy. The basic assumption is that a BIT with clear, enforceable rules to protect the foreign investor reduces the risks that the investor would otherwise face. Developing states have sometimes entered into BIT negotiations with the expectation that the capital-exporting state would take affirmative measures to encourage its nationals to invest in the territories of its counterparts of BITs. Capital-exporting states, however, have steadfastly refused to agree to any provision obligating them to encourage their nationals to invest in the foreign state. On the contrary, many BITs have terms that encourage the host state to create favorable investment conditions in its territory. For some developing states, signing a BIT may be a condition to securing other benefits, such as participation in the capital-exporting state's overseas investment guarantee programme or obtaining increased political and economic support.[15]

3.2. Deviation of functions in BITs

It has been said that BITs have two-fold purpose: to offer legal protections to investors and home states with respect to investment in host states, and to encourage the flow of investment.[16]

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[15] Jeswald W. Salacuse, supra note 6, 661.

[16] Some say that another purpose of BITs in the eyes of some developed states was to counter attacks on the traditional law of expropriation by developing states in the 1950's through 1970's. See Paul E. Comeaux, N. Stephan Kinsella, Protecting Foreign Investment under International Law, Legal Aspects of Political Risk, *Oceana Publications Inc.*, 101-102 (1997).

In reality the first main function of BIT is protection for transnational investment. It should be further pointed out that although almost all BITs provide the mutual investment protection for investors from two contracting parties, the one-way capital flow between developed states and developing states is very clear.[17] Therefore only investors from home developed states enjoy the protection provided by host developing states.[18] It is obvious that the mutual nature of the investment protection in BITs is only a formal one. In substance, the high level of the investment protection in BITs provide unilaterally the powers, rights and interests for capital-exporting states and their overseas investors, and impose related obligations and duties on capital importing states at the same time. It may be safely concluded that the function for protection of transnational investment in BITs is to serve developed capital exporting states and their overseas investors unilaterally.

Furthermore in recent BITs practice, the host states' power on foreign investment admission is transformed gradually to investors' "establishment rights", restriction on performance requirements by host states and host states' obligation on "investment liberalization". The four requirements for expropriation (i.e. for a public purpose, in accordance with due process of law, non-discriminatory and accompanied by compensation) and the Hull rule (i.e. adequate, effective and prompt payment for the properties seized) for the compensation of expropriation are widely applied and strengthened in BITs. There are increasing provisions on giving foreign investors unilateral direct right to initiate arbitral proceedings against host state in ICSID.[19]All these new developments further increase the deviation of functions of BITs, putting more undue emphasis on foreign investors and foreign investment while ignoring and crippling the host states' policy objectives for investment promotion and the host states' power on regulating foreign investment.

The second function of BITs is to promote transnational investment. The function may be considered as common objective and common interest of developed states and developing states. Developed states promote their overseas investment for strengthening their economic power and

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[17] Many developing states, desperately short of capital, would strongly oppose any measure that encouraged their own nationals to invest their capital abroad, rather than at home, therefore the titles of certain BITs refer to "Encouragement and Reciprocal Protection of Investments" rather than the more common designation, "Reciprocal Encouragement and Protection of Investments". See Jeswald W. Salacuse, supra note 6, 662.

[18] Paul E. Comeaux, N. Stephan Kinsella, supra note 16, 102.

[19] These provisions have caused practical consequence. Over the past ten years, there has been a surge of investor-state arbitrations based on BITs. At least 42 new cases were registered in the first eleven months of 2005. By the end of 2006, the total number of treaty-based arbitrations has risen to 259, 161 of which were brought before the ICSID. See Mary H. Mourra (ed.), supra note 8, 17-18. China became a Contracting Party of the Washington Convention on 1 July 1992 and accepts the jurisdiction of the ICSID in an increasing number of BITs. The first claim of Chinese investor registered on 12 February 2007, Tza Yap Shum v. Republic of Peru, will be just the beginning of ICSID disputes with Chinese participation. See Monika C. E. Heymann, "International Law and the Settlement of Investment Disputes Relating to China", 2008 *Journal of International Economic Law*, 507 (2008).

competitive abilities, while developing states receive foreign investment for their economic development. In BIT practice, however, the obligation of "investment promotion" is vague. Does it mean that developed capital exporting states bear the obligation of promoting their private investors to invest in host states, or that developing capital importing states take the responsibilities of improving their investment climate for promoting foreign investment? In BIT practice, "investment promotion" is definitely not an obligation for developed capital exporting states, and is an obligation of improving investment climate for developing capital importing states. In fact concluding BIT itself is also one of the important means for improving investment climate of developing states.

Comparing with protection and promotion of investment, "investment liberalization" is higher objective which developed states pursuit for. In BIT regime, "investment promotion" for host states means that the investment projects approved by them meet the needs of host states' highest interest. "Investment liberalization", as the favorite term for capital exporting states, means the liberal investment climate created by host states and evaluated by transnational investors.[20] Developed states, which profited from global free trade, controlled sufficient political and economic power to secure their preferred policies regarding liberalization, privatization and foreign investment. They have been able to do so through means of the WTO regime, regional trade agreements (RTAs) and BITs.[21] In the deadlock of negotiations on Multilateral Agreement on Investment (MAI) and investment issues of WTO, developed states pay much attention to the inclusion of investment liberalization clause in BITs and RTAs. Recent BIT practice of the OECD states indicates that the contents of these BITs are from the traditional focus of investment protection towards the inclusion of more extensive liberalisation disciplines.[22]

II. Seeking Innovative Path of BIT Practice

For correcting the imbalance and un-equality of BIT practice, international society, especially international organizations and developing states have to seek innovative path of BIT practice. The followings are three suggestions.

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[20] Jeswald W. Salacuse, Towards a Global Treaty on Foreign Investment: The Search for a Grand Bargain, in Norbert Horn (ed.). Arbitrating Foreign Investment Disputes, *Kluwer Law International* 78-79 (2004).

[21] M. Sornarajah, A Developing Country Perspectives of International Economic Law in the Context of Dispute Settlement, at Asif H. Qureshi (ed.), Perspectives in International Economic Law, *Kluwer Law International* 83 (2002).

[22] OECD Secretariat, Novel Features in OECD Countries' Recent Investment Agreements: An Overview, Document for Symposium Co-organized by ICSID, OECD and UNCTAD on Making the Most of International Invest, p.4

1. Reaching consensus by principles of "equity" and "sustainable development"

The international society, states and international lawyers might reach consensus based on the universal accepted principles of "equity" and "sustainable development" in seeking innovative path of BIT practice.

Based on "equity" principle, the principle of fair and equitable treatment is almost adopted by all BITs as a general treatment rule applying to foreign investment and foreign investors. The "equity" principle should also be applied to the relationship between capital-exporting states and capital-importing states, and the relationship between foreign investors and host states.[23]

The principle of "sustainable development" is also universally accepted as a general rule for economic development and international relationship. It should be adopted as general principle in BIT practice. In fact, more and more BITs include the principle in the preamble. The principle should not only be applied to contracting parties of BITs, but also applied to the development of BIT practice as a whole.

2. Drafting new BIT model by international organizations

It is evident that world-wide international organizations, especially UNCTAD and OECD, are more neutral and independent than individual state in preparing a model BIT with equal and balanced consideration for capital-exporting states and capital-importing states.

The new model should be designed to serve for protection, promotion, and regulation of international investment, so as to realize the balanced powers, rights and interests between capital-exporting states and capital-importing states, and between host states and foreign investors. To these aims, developing states should enjoy absolute power on investment admission, performance requirement, etc., and bear the obligations of protection for foreign investment in their territories. Developed states have to take the responsibilities for regulating their overseas investment and preventing host developing states from harm and/or damage caused by negative conducts of foreign investors, especially multinational corporations,[24] while attaining the international legal protection for their overseas investment.

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[23] For the detailed analysis on equity as reflected in international economic law, see Janusz Gilas, International Economic Equity, 14 *Polish Yearbook of International Law* 66-79 (1985).

[24] The obligations of multinational corporations include mainly the obligation not to interfere in domestic politics, obligations relating human rights, liability for violations of environmental norms and obligation to promote economic development. See M. Sornarajah, supra note 13, 171-181.

3. Conducting new BIT practice between developing states

In current international regime, it is unrealistic to expect developed states to change their stance by their own in future BIT practice. For developing states, how to conduct the BIT negotiations between two developing states? Do they follow the developed states' model, or seek a new way to conclude a new type of BIT? It seems that developing states do not pay much attention to the importance of creating and developing a new type of BIT from their own practice. Most of these BITs just follow the developed states' model. Some of them even follow the new developments of developed states' model, such as provisions on giving the investors' unilateral direct right to ICSID.

It should be pointed out that South-South cooperation has great implication in establishing new international economic order and new international investment norm. In the negotiation of BITs between developing states, as equal partners with common historical mission and objectives, both contracting parties may constitute new international investment practice and norms in accordance with the principles established in the Charter of Economic Rights and Duties of States. The new international investment practice and norms in turn may have certain impacts on BITs between developed states and developing states and the trend of BITs as a whole. China, as the largest capital-importing and potential big capital-exporting developing state, should take more responsibilities and get something accomplished for innovation of BITs.

Predictability and Consistency: Expectations for States and Investors

Mr. Barton Legum,
Partner, Head – Investment Treaty Arbitration, Salans LPP, Paris, France

The lack of predictability and consistency in international investment law has become a common complaint of the current system. But in many respects this complaint is like a resident of a camping tent who complains that the air conditioning does not work very well. The *architecture* of the *structure* that surrounds us is not suited to provide either central air conditioning or predictability and consistency.

In investment law, this architectural feature is found in both the applicable law and the dispute resolution system that applies that law. What I hope to do in my presentation is to explore these features in our current structure and whether states and investors really expect, or want, anything else.

The Substantive Law

Today, international investment law is defined by over 2,700 bilateral investment treaties negotiated over a half-century by hundreds of different combinations of countries. As might be expected, the provisions of these treaties are different from each other in important respects, although their text is also similar – sometimes deceptively similar – in many respects.

An example: the most-favored-nation provision in the investment chapter of the Peru-U.S. free trade agreement requires MFN treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."[1] The most-favored-nation provision in the Angola-U.K. bilateral investment treaty requires MFN treatment "as regards the[] management, maintenance, use, enjoyment or disposal of . . . investments."[2] The text of the two provisions is certainly similar.

But the context of the two provisions varies in a critical respect. The Peru-U.S. FTA explains, in a footnote to the MFN provision, that the provision's text "does not encompass dispute resolution mechanisms."[3] The Angola-U.K. BIT, by contrast, explicitly confirms that the obligation of MFN treatment *will* apply to dispute resolution mechanisms.[4] These two treaties, in short, use remarkably similar language to remarkably different ends: in one instance to reject MFN treatment of arbitration and in the other instance to embrace it.

This example drives home the observation made by the tribunal in the *OSPAR Convention* case:

> "The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to,

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1 Free Trade Agreement, Dec. 7, 2005, Peru-U.S., art. 10.4 (available at http://www.ustr.gov/assets/Trade_Agreements/-Bilateral/Peru_TPA/Final_Texts/asset_upload_file925_8697.pdf) (last visited on Apr. 2, 2006).

2 Investment Promotion and Protection Agreement, July 4, 2001, Angola-U.K., art 3(2) (available at http://www.fco.gov.uk/Files/kfile/Print%20Angola%205525,0.pdf) (last visited on Apr. 2, 2006).

3 *See* Free Trade Agreement, Dec. 7, 2005, Peru-U.S., art. 10.4 n.2 ("For greater certainty, treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" referred to in paragraphs 1 and 2 of Article 10.4 does not encompass dispute resolution mechanisms, such as those in Section B, that are provided for in international investment treaties or trade agreements.") (available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file925_8697.pdf) (last visited on Apr. 2, 2006).

4 *See* Investment Promotion and Protection Agreement, July 4, 2001, Angola-U.K., art 3(3) ("For avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Article 1 to 11 of this Agreement.") (available at http://www.fco.gov.uk/Files/kfile/Print%20Angola%205525,0.pdf) (last visited on Apr. 2, 2006). Article 8 sets forth the investor-State dispute resolution procedure, and Article 9 sets forth the State-to-State mechanism.

inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*."[5]

While international investment treaties may have similar or identical texts, because they were negotiated at widely varying times between diverse States with varying intentions, different content will be, and *should be*, given to that text under established principles of treaty interpretation.

I do not want to overstate the differences in content of the existing body of investment treaties – there are treaties with very similar text, contexts and objects and purposes. But as this morning's discussion of new trends in investment treaties underscores, there is also a substantial body of treaty text that is not, and is not intended to be, business as usual. The house that we are living in today is not well suited to consistency in the substantive law.

The Procedure

The interpretation procedure provided for under investment treaties also is not one designed to achieve results that are consistent and coherent in broad terms. The arbitrators appointed to a tribunal under these treaties are appointed for a single case. That particular configuration of arbitrators will likely see that one case together, and never any other case. Their mission is to achieve justice in that one case. Arbitrators have no contractual relationship to parties other than those before them; they have no duty to take the interests of non-parties into account.

Similarly, the interest of the parties who present argument before the arbitral tribunals is to win that particular case. When a party or counsel for a party receives an arbitration award, the first page they turn to is the last page – the one with the result. They read the reasoning of the tribunal, if ever, much later – after the press releases have been issued, after the calls to ministers and board members have been made.

I am not suggesting that the conduct of parties and counsel in investment arbitration is different from that of their counterparts in litigation before national courts. My point is, again, that the architecture of the current investment treaty arbitration system is not one suited to promoting consistency and coherence across multiple parties, treaties and issues.

Expectations of States and Investors

How then, do these architectural features interact with the expectations of States and investors? If we were discussing wishes rather than expectations, I would say that most investors and many States

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[5] Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ire. v. U.K.), ¶ 141 (Final Award of July 2, 2003) (available at http://www.pca-cpa.org/ENGLISH/RPC/OSPAR/-OSPAR%20final%20award%20revised.pdf) (last visited on Apr. 2, 2006) (quoting ITLOS Order of Dec. 3, 2001).

would wish to see in place a single, multilateral agreement on investment with a standing tribunal to resolve disputes under that agreement. That would provide an environment where real consistency and coherence could emerge.

But a multilateral agreement on investment has proved to be elusive, and likely will continue to be so for years to come. I do not think that any State or investor expects a level of consistency from the current system that is equivalent to that of a single multilateral agreement. Nor would that be realistic.

Within the limits of the current system, my own view is that the level of consistency and coherence that has been achieved is very good, considering those limits. The discussion this morning of innovations in treaty making underlines this point. The States who have put in place those innovations do not want total consistency. They do not want the new, clarified provisions of their treaties to be read to mean the same thing as the previous generation or treaties that other States with different interests have entered into. They want consistency, but within the limits of the specific text, context and object and purpose of the treaty text at issue.

On the procedural side, investment arbitration tribunals have demonstrated, despite being constituted to decide a single case, an intense focus on placing their reasoning within a broader context of tribunals dealing with similar treaty provisions and similar facts. My own view is that, within the limits of the current system, investment arbitration tribunals are doing rather well.

In conclusion, is the current system delivering the kind consistency and coherence that one would expect from a multilateral agreement with a standing tribunal to interpret it? No. A system with 2,700 treaties negotiated between different countries over a fifty-year period is not structured to deliver that kind of consistency, and it would be inappropriate if it did. Is the current system delivering the kind of consistency that one should expect given its limitations? I believe that it is.

SESSION II: INVESTOR-STATE DISPUTE SETTLEMENT: IS THE SYSTEM AT A CROSSROADS?

Introductory remarks:
Ms. Lucy Reed, Partner, Freshfields Bruckhaus Derringer LLP, New York, United States

I know a challenge when I see one, and that is to moderate this group of great experts. The topic of this session is: *investor-State dispute settlement; is the system at a crossroads ?*

We are going to explore recent procedural innovations in investment treaty practice to improve the legitimacy and efficiency of investor-State dispute settlement mechanisms – presuming that legitimacy and efficiency need to be improved, which we should probably discuss – as well as salient current issues and recent developments in the system of investor-State dispute settlement.

As advertised, this is an opportunity amongst the panel and for those of you in the audience to do a brainstorming and stocktaking. We are not going to be able to discuss at length any issue that arises today, but we will be identifying issues for continuing discussions and developments in this community. In the United States, this would be like a Law School exam, where we are supposed to spot issues and not take the time to resolve them.

Before we start, we are going to have 5 minutes each for our wonderful hosts from UNCTAD and OECD to introduce some of the topics.

Presentation of UNCTAD's work on ISDS issues

Ms. Anna Joubin-Bret
Senior Legal Advisor, Division on Investment and Enterprise, UNCTAD

We are currently working on a paper that is in an advanced draft stage. That is on investor-State dispute settlement, precisely the topic of today. but we are looking at it from a rather limited perspective, from the point of view of what the treaties say, and how the treaties have evolved over time to go from relatively short and broad, open dispute settlement provisions to more sophisticated ones, that go into greater detail, particularly on the procedural aspect, but also that limit the scope of application and limit the consent and other features that are specific to investor-State dispute.

With this in mind, we have prepared a paper that very much takes stock of what have been trends in recent treaties. So you will see a whole review of different provisions, and we tried to highlight what are the specificities, the specific angle that is taken by that country in negotiating these treaties.

Then, after this stocktaking part, we are offering some options for negotiators of investment treaties.

In these options, we are trying to highlight not only the options themselves, but also the implications of having a broad dispute settlement clause as opposed to a more narrow or restrictive one, in terms of scope, or having a very detailed list of elements that parties include in the treaty itself rather than leaving it to arbitral tribunals or to arbitration rules, in that case.

So you will find that in a Section III of this paper, and in addition to that, I am just flagging it here, we are offering some options to help pave the way forward in improving the current investor-State dispute settlement system, trying to make countries think outside of the current box, particularly trying to emphasize alternatives to dispute resolution, which is one of the topics on which we have been working a lot in the recent years.

I also want to flag the possibility not only to have recourse to alternatives but also to have a more active participation on the part of States in the various arbitration institutions, where things are going on, where discussions are taking place and where the States have their role to play, particularly in institutions like UNCITRAL or ICSID, where very often we have – and I think Eloise is going to talk about that at length- we have lots of empty seats, and States that are coming back, saying: we have a problem with the way this or that is ruining the predictability or the consistency that we had in mind when concluding these treaties.

So, very briefly, what we would like to get from you is feedback, careful reading, identifying what is missing, what we may have got wrong, which is a possibility. I am looking at my colleague Serguei, who has been doing most of the work on this paper. Serguei, I am sure there are areas where we got it wrong, but there may also be areas where we got it right, so in this case, don't hesitate to give us positive feedbacks as well. It always helps.

That is the first of the papers on which we are really looking for peer review. That is why we have been posting it on the G-15 website, the G-15 being this group of universities that is acting and think tanking for us and that is giving us feedback and inputs in the work we do.

If you scroll down on this webpage, you will find four more recent papers that we have written recently and that I encourage you to look at.

One is on scope and definition; the another one is one fair and equitable treatment, the third one on MFN, all topics that I am sure you are very keen to see more about.

So you can go to this website and download it from there.

Presentation of OECD's Work on ISDS issues:

Ms. Katia Yannaca-Small,
Legal Advisor on International Investment Law, Investment Division, Directorate for Financial and Enterprise Affairs, OECD

First, I would like for those governments who did not participate in the Investment Committee and the Freedom of Investment Roundtable discussions, which include, in addition to the OECD members, the governments of the G20 and other non-members, over 15 total, and for the non-governmental participants, very briefly present the OECD work in the field of investor-State dispute settlement.

The OECD plays this unique role in bringing governments together and providing a forum where these governments, OECD and non-OECD and relevant institutions, can discuss and have been discussing for the last seven years, issues relating to investment agreements and arbitration.

These discussions allowed them to articulate their concerns and improve their understanding of the different provisions of investment agreements and the way they have been interpreted by arbitral tribunals.

This past work includes for instance discussions on the fair and equitable treatment, MFN, indirect expropriation, the right to regulate, definition of investment, nationality of investors, umbrella clause, essential security interests and property rights.

In addition, when ICSID was proposing amendments to its rules and regulations, in particular on transparency and an appeals mechanism, it came here to present and propose the amendments to the OECD and non OECD governments participating in the investment Committee. And although the discussions on an appeals mechanism, as we all know, did not go further, the OECD governments' statement in favor of transparency played a role in the amended ICSID rules on transparency.

Today, five years since the first OECD-UNCTAD-ICSID Symposium on Investment agreements, we are here again to take stock of recent developments in investor-State dispute settlement, with a view to proposing ways to improve the system and to continue offering a forum for dialogue on these issues, between governments and relevant organizations.

It responds to very new interests by OECD and non OECD governments, which were expressed in recent discussions in the context of the Freedom of Investment Roundtable.

The outcome of today's discussions will fit into the OECD proposed programme of work for the next year or so.

In order to take the pulse of governments and be attentive to their concerns and priorities, we have circulated a questionnaire which presents governments a list of topics on investor-State dispute settlement, along the lines of the one we will be discussing here today, and request them to indicate their priorities.

The results of this questionnaire, along with the outcome of the discussions in the Symposium, will provide a basis for a thematic choice of the topics we will be working on.

However, we are still receiving replies and encourage those governments who have not replied yet to do so, in order to help provide a broad base for our findings.

The top priorities to emerge from this present examination will be first discussed in legal experts' and governmental meeting in March, with the participation of ICSID and UNCTAD. The results will be reported to the October meeting of the Freedom of Investment Roundtable. Depending on the extend of discussions and the way the governments want to proceed, this work may last between one and two years. At the end of this period, we hope to have some concrete proposals on how to improve the system, which could take the form of clarification, statements, recommendations issued by governments on particular issues.

We are looking forward to fruitful discussions on some of the most challenging topics in this field today, which will give us the tools needed to go forward.

Mr. Vernon MacKay
Deputy Director, Investment Trade Policy Division, Department of Foreign Affairs and International Trade, Canada

First, it is no surprise that Canada has been asked to participate in this panel as we have a fair amount of experience in dealing with investor-state claims under international investment agreements. All of Canada's experience in this area has been under Chapter 11 of the NAFTA.

Is the system of international arbitration at a crossroads? We do not believe, as some here today do, that the system is at a crossroads and in need of a change in direction. Nevertheless, there have been some bumps in the road that have led Canada to make improvements to its model bilateral investment agreement. So, while there has been need to do a little recalibration, we have not seen, nor do we see now, need for wholesale change to the system of international arbitration as it applies under international investment agreements.

Canada has had 28 claims brought against it under Chapter 11. That is quite a few. All but one of these claims were brought by U.S. investors; the other by a Mexican investor. Of these, eight have proceeded to arbitration, with five having proceeded through the whole process to awards; three are still in arbitration. A number of cases have been notified but are pending further action; some are what we refer to as "stale claims" as they have not been active for several years but are not withdrawn.

Canada carried out a review of its bilateral investment treaty, including the investor-state dispute settlement (ISDS) provisions, during the period 2001-2003. There were a number of issues we studied closely, including the lack of openness and transparency in our existing ISDS provisions and the perceived lack of balance between investor protection and the right to regulate in the public interest. We believe the clarifications and changes we have made to our model treaty since the NAFTA have addressed these issues. Through providing for greater access to documents and hearings and the making of submissions by non-disputing parties (amicus briefs), our model treaty has increased the transparency of investor-state proceedings. Our clarifications to key substantive provisions of the treaty have served to highlight the balance between investor protection and the right to regulate already inherent in our investment agreements, including Chapter 11 of the NAFTA.

With respect to innovations that might allow countries to address concerns arising from their bilateral investment treaties, Canada has found the NAFTA Commission to be a useful tool that the Parties to the Agreement may employ to make improvements. The Commission allows the Parties to issue 'notes of interpretation' to clarify their intent with respect to substantive provisions. Moreover, in Canada's current model investment treaty, we have a provision that allows the Parties to agree to issue 'supplemental rules of procedure' to address shortfalls in the treaty's ISDS provisions that may arise.

Canada agrees that there is a need for the OECD, in cooperation with other international organizations such as UNCTAD, to provide greater opportunity for countries to share experiences with one another on issues relating to the implementation of international investment agreements. Some countries have significant experience with international arbitration under these agreements while others have little to none. As Canada proceeds with its bilateral investment treaty negotiating agenda, we find that many countries are reluctant to consider innovations to their treaties, and often this seems to be because they have had very little experience with international arbitration. More occasions to share experience and benefit from the analysis of the aforementioned organizations would be helpful and promote greater coherency in the network of international investment agreements.

We have reviewed the questionnaire distributed by the OECD in advance of this conference. We think that there is need for more work on promoting transparency in the ISDS system. More work could also be done, as proposed, on the cost and length of proceedings. We have noted that the average length of an arbitration involving Canada has been five years; one even went to nine years. The longer these cases take to conclude, the more costly they become. In our experience, to litigate a case can cost up to five million dollars. While Canada has not pushed for consideration of an appeal mechanism, several participants today have spoken favourably of work on this topic, and we could agree that this may be an area deserving further study.

Finally, let me say that we fully support the work of the OECD and UNCTAD, in cooperation with ICSID and UNCITRAL, on the issues we have been discussing here today.

Recent Developments in the ISDS System: Revision of Awards; Conflicts of Interests

Mr. Gabriel Bottini,
Coordinator, Department of International Affairs, Procuración del Tesoro de la Nación, Argentina

Thanks to the OECD and UNCTAD for inviting me.

I would like to address three issues, which I think are important and are creating some concerns.

The first issue I would like to address is **the issue of revision of awards,** not just within the ICSID system but in general. I would like to respond to a criticism that I have heard recently, particularly in relation to the recent annulments in the *Enron* and *Sempra* cases, that ICSID annulment committees seem to be somehow pro-annulment, in a way, or that there have been too much of annulment in the ICSID framework.

Frankly, I don't think that is the case. If you take the example of Argentina, and I think Argentina provides a good example here, we have five recent annulment decisions. In three of the cases, there was an annulment, one of them was a partial annulment. In two of the cases, the annulments were rejected.

I might come back to the cases which were annulled afterwards. But I would like to concentrate for a second on the cases that were rejected.

These two cases are the *Azurix Case*, and the *Vivendi Case*.

In ***Azurix,*** I would like to refer to three points of that decision:

- In terms of procedure, the *Azurix* Annulment Committee basically states that the tribunal has an unfettered discretion to adopt procedural orders. I wonder how you can prove that there has been a manifest breach of procedure at least by the tribunal, if the tribunal has an unfettered discretion to adopt procedural orders. So you might agree with that view or not, but this is certainly not a very generous view of annulment.

- The other statement by the *Azurix* Committee I would like to comment on was the issue of challenge. For the Azurix Annulment Committee, if there has been a challenge, and, if from the point of view of procedure, the procedure was followed in order to process that challenge, that is the end of the matter. There will be no annulment in terms of deviation

from due process or incorrect constitution of the tribunal as long as the procedure to process that challenge was followed. This is again a very restrictive view of the issue of challenges. Because in that view, it doesn't matter how serious or grave a conflict of interest was, as long as the challenge procedure was followed, that is the end of the matter.

- The last issue is the issue of the applicable law. The Committee stated that it doesn't matter how serious, how egregious a mistake on applicable law is, that is not a ground for annulment. Of course we are all familiar with distinguishing between error in the application of the law and non application of the law as a ground for annulment. But I would put to you that in this issue I agree with what Dr Arthur Watts in his expert opinion, stated in the annulment procedure of *MTD v. Chile*, that, when an error is so gross, so egregious, this signifies a non application of the law.

So again, we have a case, the *Azurix Case v. Argentina*, where a very restrictive view on annulment was adopted.

In the ***Vivendi case,*** which of course has a lot of ramifications with the *Azurix case*, I would only like to point out again the issue of challenge. Because there, the Annulment Committee found that the position of one of the arbitrators was inconsistent with the duty of independence and impartiality of an arbitrator and that this arbitrator had failed to comply with her duties of disclosure. But still, the Annulment Committee did not annul on this ground, basically adopting the theory of "actual bias". Since Argentina did not prove that this arbitrator knew about the conflict of interests by the time the award was rendered, no annulment should be granted.

So as you can see, you have two cases where a very restrictive view on annulment was taken within the ICSID framework.

And I would like to contrast this with what is happening in domestic courts. In domestic courts, if you take very investor-friendly jurisdictions, such as the US, France, and the UK, you will see that – I would not speak of a tendency, because it's always tricky to speak of tendencies - but you can see for instance interesting developments.

Take the very recent decision of the Supreme Court of the United Kingdom in the *Dallah* case. You have the Supreme Court of the United Kingdom asserting its power to review a decision on jurisdiction by an arbitral tribunal. The UK Supreme Court even said that it was not limited, not bound by decisions of the arbitral tribunal. So, you have a local court showing less deference to arbitral tribunals, asserting their power to revise, and actually not allowing the recognition on enforcement of an ICC award.

This has happened in France. The Court of Appeals in Paris, very recently, also annulled an arbitral award in a case regarding damages because the arbitral tribunal departed from what the party

had asked in terms of damages. So again, a very investor-friendly jurisdiction annulling an award this year, due to a damages issue.

So I don't think there is a tendency at ICSID in terms of pro-annulment, but at the same time I see very interesting developments in local jurisdictions, being more demanding, less deferential to arbitral awards.

And I think this is a positive development.

Indeed, arbitral proceedings are more and more touching upon very fundamental issues of public policy. We need to be more demanding, more exacting, we need to have the best practices in arbitration.

Finally, two last issues in terms of **conflict of interests.**

I believe that there have been some positive developments in the arbitration world. But I also mentioned the *Vivendi* case as a troubling instance in which "actual bias" was required. "Appearance of bias" is the correct term under the ICSID Convention.

Finally, as a creation of law, I believe some arbitral tribunals got it wrong in terms of their functions.

Let me just go back to conclude to a very basic point of public international law. Jurisprudence is not a primary source of international law. Arbitral tribunals do not create the law. At least within the context of international investment law, States are the ones that create the law. And the tribunals do not have the power to create the law, and they do not have a duty to preserve the consistency of the system.

If this is debatable whether the Supreme Court of a country has such a duty, and this would depend on the state of the law in each country, how can one say that an *ad hoc* tribunal has a duty to preserve the legitimacy of the system? They have to apply the law, they don't create the law. They have to apply the law to the facts.

ICSID: Institutional Developments and current issues

Ms. Eloïse Obadia
Senior Counsel, ICSID

First, on behalf of Meg Kinnear, the Secretary-General of ICSID, I would like to indicate that ICSID is glad to participate in this Symposium, co-organized by UNCTAD and the OECD. We believe that these types of discussions are helpful to the field of investment protection, because it is a field which is constantly evolving and facing new issues.

I will talk about some of the main institutional developments of ICSID for 2010 and focus on one of the main current issues: annulment. It will be complementary to what Gabriel has just said.

The **membership** continues to grow. On one hand you have Ecuador which left ICSID; on the other hand Haiti became a member in November 2009. Qatar signed the Convention in September 2010, and we have heard that we may have a new country signing and ratifying the Convention this week. Right now, we have 144 members and 156 signatories. This shows that the system is still alive and relevant. Please note that based on the most recent statistics at the time of publication of this note, ICSID counts 147 members and 157 signatories.

Regarding the caseload: as of December 1st 2010, we had registered 329 cases, both under the Convention and the Additional Facility cases. It is important to note that more than half of those cases have been registered in the last five years. Just over one third of all ICSID cases are currently pending before the Centre. We estimate that in the future, we should have 25 to 30 new cases per year. Based on the most recent statistics at the time of publication of this note, the Centre had registered 359 cases with 130 cases pending.

We also provide administrative services for non-ICSID cases, and in particular investor-State cases under the UNCITRAL Arbitration Rules. For those cases, our services range from full administrative services to simply organizing hearing facilities depending on the wishes of the parties.

Regarding **the profile of the caseload**, the main source of consent is BITs and multilateral investment treaties. They represent 69% of the caseload in fiscal year 2010. It is also interesting to note that while they are the primary source of the cases, in this past fiscal year, we have seen a number of cases arising from investment contracts and investment legislation. We do not know if it is a new trend, but it was worth mentioning it. For fiscal year 2011, BITs continued to be the primary source of

consent covering 68% of the cases while a decent part of the cases were brought on the basis of consent contained in investment contracts and investment legislation (24%).

Regarding **the economic sectors**, as in the past, the emphasis is on the energy sector, with 40% of the cases.

Regarding **the regional distribution by State party involved,** it is also diverse: 30% of cases involve countries from South America, 22% from Eastern Europe and Central Asia, and 15% from Sub-Saharan Africa. We also see is a trend towards the involvement of new players in investment arbitration, especially from Central Asia. If we look at the distribution of the new cases that we have registered in fiscal year 2010, what we see is that out of the 27 new cases registered, we have 24 different States involved, and only one State, Venezuela, named in four cases. We can also report an increasing use of the system by investors from developing countries bringing cases to ICSID. We have a record high of 25% of our cases brought by those investors from developing countries. During fiscal year 2011, ICSID noted the same trends: out of the 32 cases registered, 20 different States were involved, and seven of them were named in several cases.

Based on this new trend and the involvement of new players in the field, we have developed a **training session called *ICSID 101***, which is meant to describe the process from the beginning to the end to new players. We had a first training in June 2010, in Washington D.C., and one recently in Bogota. More recently we have provided this training to different audiences in Washington D.C. and in Bern.

ICSID has had several other **institutional initiatives** with a view to be more efficient and transparent that I will briefly mention. We have increased our staff, we are improving our technology. It is also important for the users to know that we address the timeliness and the cost of the proceedings. We are registering our cases in less than a month. It doesn't mean that we have less careful screening of the requests, this is the result of an increased staff and a full time Secretary-General.

Also, if the Respondents were to be concerned, I would remind them that we have the provision 41(5), which enables a party to raise preliminary objections on the ground that the claim is manifestly without legal merit. In the last two weeks, we had the two first awards based on this ground.

We have also introduced a calendar for the arbitrators, so we ask them to fill this calendar as soon as the tribunal is constituted to see when they are available.

I want to turn now to the current issue: the **question of annulment.**

As you now, under the ICSID Convention, the awards are binding and are not subject to review by local courts. As a consequence, the Convention contains its own system of post-award remedies, which includes the annulment. Everyone agrees that the annulment process should not be an appeals mechanism.

There are five grounds for annulment that are aimed at reviewing the legitimacy of the decision making process, rather than the substantive correctness of the award. However, there is sometimes a thin line between reviewing the process and addressing the substance.

Some Committees have been criticized for going beyond their mandate.

Although as an institution we cannot address the substance of these awards or decisions, which stand on their own, we cannot ignore the criticisms that have been voiced. Because the proper functioning of the annulment mechanism is vital to the credibility of the system and to its very existence. Consequently, we take these comments very seriously.

But I would like to bring the matter into perspective and look at the record.

In fact, there have been few annulments in the whole ICSID history. We have had 4 annulments in full and 6 partial annulments, out of 294 cases registered under the ICSID Convention. If you look at the rate of annulment for all registered ICSID cases, it is a ratio of 3%. In fiscal year 2010, we have registered 3 new annulment cases. In the first quarter of fiscal year 2011, we have registered 4 new annulment cases. This compares to the 17 applications which we had in the past two fiscal years. As of September 2011, out of the 320 arbitration cases registered, 11 awards had been annulled in part or in full.

Obviously, with the increased number of cases registered, we have a number of annulment applications which is also increasing, as well as possibilities for awards to be annulled.

In the decade 2001-2010, we have had 95 awards, 34 annulment applications and 7 awards, either annulled partially or in full. Of course this number is higher than in the past decades, but this is linked to the fact that we have more cases and awards.

There has been a lot of discussion on the past year because we have had 7 annulment decisions issued in 2010: 4 refused to annul, 2 annulled and 1 partially annulled. Some commentators have said it is a new area for ICSID jurisprudence, or it is the fourth generation of annulment decisions.

As I said before, we cannot comment on these specific decisions but at least we can reaffirm the Centre’s clear view that the standard of review of the ICSID Convention is and remains a limited and extraordinary remedy.

What are the solutions proposed? Some have said we should have a standing Committee, but it presents issues with the fact that there are some specific rules for the appointment of the members of the Committees, problems of nationality…

Others have proposed to reinstate the discussions on an appeals mechanism.

Whichever solution is suggested, it seems that it would have pros and cons. It either requires a modification of the Convention or the creation of new rules. We believe that the system is working and we should not reinvent the wheel, but, as was said before, I think there is room for improvements and we are welcoming any suggestion in this respect.

Revision of ICC's rules and practices to accommodate investor-state disputes

Mr. Jason Fry,
Secretary General, International Court of Arbitration, ICC

Good afternoon Ladies and Gentlemen,

My thanks to UNCTAD and the OECD for giving me the opportunity to speak to you today. I feel a little bit of an interloper here, as an institution that is known primarily for its involvement in the administration of commercial disputes.

I heard mentions this morning of the institutions in relation to investment cases. ICSID was mentioned, UNCITRAL - of course not as an administering institution - and the Stockholm Chamber of Commerce, but no mention was made of the ICC! Why is the ICC relevant at all in this regard?

The ICC is one of the largest and best known international arbitral institutions and, since its creation in 1923, we have administered out of 17.500 cases. Its composition of caseload is truly international.

Last year we had parties from 128 different countries and arbitrations sitting in 53 different countries around the world. We are currently administrating 1500 cases. Out of that caseload, between 10 and 12% involve States or State-owned entities. It is true that most of these cases arise out of contracts concluded between the State or a State-owned entity and a private party.

But there are some cases that have been brought under bilateral treaties or investment laws.

The Court has dealt with eight bilateral investment treaties cases to date, seven of which are currently pending.

The International Court of Arbitration is a very international body, it is comprised of 120 court members from 90 different countries around the world, and the Secretariat itself is also very international. We have 80 people, some 40 lawyers from approximately 27 different countries, speaking 25 different languages.

So we are, although not a body established by international treaty, nonetheless a very international organization.

The ICC is currently about to start a process to revise its rules on arbitration. We hope that this process will draw to a close next year and the rules will be approved and come into effect for the second half of 2011.

An important feature of the rules' revision process was to examine the role that the rules play in solving disputes between State parties and private entities, and in particular, see whether these rules were compatible with their use in investment treaty arbitration.

To facilitate that task, a taskforce of the ICC Commission on arbitration was established to study and identify the essential and distinctive features of arbitration involving States or State entities, and to determine whether there are any special procedural considerations that should apply to such proceedings, including investment disputes pursuant to bilateral, multilateral treaties or State investment laws.

The mandate of this taskforce was also to look at the ICC "practices in relation to such cases and to identify whether or how changes should be made to the ICC rules of arbitration better to accommodate such disputes".

That taskforce has made a number of recommendations to the ICC taskforce and drafting Committee examining the current rules. A number of changes have already been approved by the ICC Commission, based upon recommendations made by the taskforce.

I would give just three examples:

Firstly, Definition Section, the introduction to the rules which previously referred to arbitration, disputes being referred to the ICC Court of Arbitration as "business disputes": the word business has been removed. Beyond doubt, the question is to whether an investment dispute can be referred to the ICC Court of Arbitration.

Secondly, the article 17 of the rules currently contains a mandatory obligation on the arbitral tribunal to consider the contract between the parties. This provision has been amended effectively to require the tribunal to consider the contract, if any, thereby allowing the tribunal freedom to apply principles of public international law pursuant to investment treaties.

The third example is the amendment to the process by which arbitrators are currently appointed under the ICC rules. The ICC rules have one unique and distinctive feature with respect to the appointment process, and that is that the ICC "seeks a nomination from a national committee of the ICC, where the parties were not able to agree on a sole arbitrator or the chairperson for the arbitral tribunal." Because of some sensitivities on the part of States that the ICC and its national committees may be thought to represent primarily the business community, it was felt that this provision should be

amended, such that nominations or at least appointments could be made directly by the ICC Court, rather than proceeding through a national committee.

The work of the taskforce continues. There are other recommendations that have been made and that are being currently debated. I will give you a list, because this may go back to some of the issues that we will discuss later.

Should reasons be given by the International Court of Arbitration for contested confirmations of arbitrators or decisions to remove an arbitrator? Should these reasons be given and should they be made public?

At the moment, the rules provide that decisions on challenges are confidential.

Secondly, there was a tension between confidentiality and transparency. At the moment the rules contain no provision providing specifically for confidentiality. There is a debate on whether one should be introduced or not. But naturally there is a tension between such a provision and perhaps the need for greater transparency.

There is a question whether arbitral decisions and arbitration awards should be published. Particularly if they involve considerations of public international law under investment treaties. That comes back to the debate that was conducted earlier about the importance of having some consistency and some jurisprudence in the body of developing law.

There is a new trend: introduce into rules provisions on emergency arbitrations. This is a provision you would find in the American Arbitration Association rules but also recently introduced in the rules of the Stockholm Chamber of Commerce, which is one of the institutions referred to in the Energy Chart Treaty.

Should the ICC embark upon a set of emergency arbitrator rules? If so, should they be on an opt-in or opt-out basis?

Is it right that a State that has made an open offer to arbitrate under a treaty finds itself bound by an emergency arbitration proceeding, which could proceed with very short notice and result in a potentially enforceable interim measure?

There is a question of impartiality and the related topic of issue conflicts. Should arbitrators, when they are accepting appointments, making disclosure, give consideration as to whether they are truly impartial? And in doing so, should they consider whether they may have an issue conflict in relation to issues in the dispute?

There was a question that was touched upon earlier: the involvement of third parties, or *amicus* briefs in the proceedings. The rules do not currently provide for that but they do not exclude it either.

Last but not least, is the extent to which the arbitral tribunals or the institution itself should give greater consideration to the use of ADR referred to in the ICC's nomenclature as amicable disputes arbitration?

The ICC actually has quite a lot of experience, in relative terms, dealing with mediation involving State parties. It would be in the commercial context rather than under investment treaties.

Perspective of the United Nations Commission on International Trade Law (UNCITRAL)

Ms. Claudia Gross,
Legal Officer, UNCITRAL Working Group on Arbitration

First, let me thank you for having invited an UNCITRAL representative to take part in the Symposium and for having organized it so well. It is a great honour for me to be here with so many distinguished participants.

As a matter of introduction, I would like to clarify that UNCITRAL, the United Commission on International Trade Law, is not an arbitral institution. UNCITRAL was established by the UN General Assembly in 1966 to harmonize international trade law and to coordinate the work of organizations active in the field of international trade law.[1] UNCITRAL produces legal texts (conventions, model laws, legislative guides, recommendations, contractual rules and legal guides). The purpose of UNCITRAL's legislative and technical assistance activities is to further the harmonization of international trade law. The UNCITRAL Secretariat often receives requests for appointing arbitrators, providing legal advice in relation to arbitration cases, etc., but this is not UNCITRAL's mandate. In the years since its establishment, UNCITRAL has been recognized as the core legal body of the United Nations system in the field of international trade law. I thought it would be beneficial to clarify this, in particular as I am sitting beside arbitral institutions.

UNCITRAL, which is composed of sixty member States representing different legal traditions and including countries at different stages of economic development, meets once a year. Annual sessions of UNCITRAL are also attended by observer States (i.e. all States of the United Nations are invited to take part in the sessions of UNCITRAL's and its working groups), as well as by international governmental and non-governmental organizations. It carries out its work through working groups, of which there are currently six, active in the following fields: Procurement, Arbitration and Conciliation, Online Dispute Resolution, Electronic Commerce, Insolvency Law and Security Interests). The UNCITRAL Secretariat, of which I am part, serves UNCITRAL and its working groups; the secretariat prepares background documents and studies.

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[1] See General Assembly resolution 2205 (XXI), sect. II, para. 8.

One of the texts developed by UNCITRAL is the 1976 UNCITRAL Arbitration Rules which are recognized as a very successful text. They are used in variety of circumstances and they cover a broad range of disputes, including investor-State disputes.[2]

In 2006, the Commission decided that the 1976 UNCITRAL Arbitration Rules should undergo a revision[3], with the objective to up-date the Rules and to take account of the developments in trade and arbitral practices over the past thirty-years.

At the first session that was dedicated to the revision of the 1976 UNCITRAL Arbitration Rules,[4] one delegation had raised the question of including in the revision specific provisions on investment arbitration. The decision of the Working Group, also confirmed by the Commission,[5] had been to avoid including specific provisions to deal with particular instances of application of the UNCITRAL Arbitration Rules. It was agreed that the generic applicability and the flexibility of the rules should be preserved. It may also be noted that the mandate given by the Commission was to preserve, in the revision of the Rules, their drafting style, their flexibility, and to avoid making the Rules more complex.

However, the fact that the Rules were applied in investment arbitration has been taken into account in the revision of the Rules. The Working Group has been cautious to use a language in the Rules that would be adapted to both types of commercial and investment arbitrations. For instance, the 1976 Rules make reference to a "contract" in article 1, paragraph (1): "Where the parties *to a contract* have agreed in writing that disputes in relation *to that contract*..." The wording of the 2010 Rules reads: "Where parties have agreed that disputes between them in respect of a defined legal relationship, whether contractual or not..." Article 1, paragraph (1) was drafted to thus cater also for application of the Rules in the context of arbitration under investment treaties. Paragraph (2) of article 1 was included in order to prevent retroactive application of the revised version of the Rules.[6] It states now that the UNCITRAL Arbitration Rules as revised in 2010, come into effect on the 15 August 2010. Parties to an arbitration agreement concluded after that date shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules. However, that presumption does not apply where the

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2 *Official records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), para. 184.

3 Ibid., para. 187.

4 See Report of Working Group II (Arbitration and Conciliation) on the work of its forty-fifth session (Vienna, 11-15 September 2006) (A/CN.9/614).

5 *Official records of the General Assembly, Sixty-third Session, Supplement No. 17* (A/63/17), para. 313.

6 See, for example, the Report of Working Group II (Arbitration and Conciliation) on the work of its forty-eight session (New York, 4-8 February 2008) (A/CN.9/646), para. 75.

arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date. When drafting this provision, the Working Group had in particular investment treaties in mind, which had been concluded before 15 August 2010.

There is another interesting point on the revision of the UNCITRAL Arbitration Rules, which I would like to bring to your attention. As the Commission adopted the UNCITRAL Arbitration Rules, as revised in 2010, some delegations raised the question whether the Rules should include a provision on State immunities. However, the inclusion of such a provision was regarded as unnecessary and not appropriate in view of the generic nature of the Rules, which was not intended to affect the system of immunities and privileges of States and State entities. [7]

During the process of revising the UNCITRAL Arbitration Rules, the need to promote transparency in treaty-based investor-State arbitration had been expressed by some States and non-governmental organizations. The Commission took note of the need to undertake work in that field. It mandated the Working Group to embark on the topic of transparency in treaty-based investor-State arbitration immediately after the conclusion of its work on the revision of the 1976 UNCITRAL Arbitration Rules.[8]

In 2008, the Commission decided that it was too early to make a decision on the form of a future instrument on treaty-based investor-State arbitration and left broad discretion to its Working Group II (Arbitration and Conciliation) in that respect. In 2010, the Commission entrusted Working Group II with the task of preparing a legal standard on that topic. The Commission further decided that the Working Group should note any other topic which might surface during its deliberations with respect to transparency in treaty-based investor-State arbitration that might also require future work by the Commission. It was agreed that any such topic might be brought to the attention of the Commission.[9]

The 2010 OECD/UNCTAD Symposium on international investment agreements and investor-State dispute settlement took place immediately after the first session of Working Group II on transparency in treaty-based investor-State arbitration. That first session of the Working Group had been the occasion of an interesting exchange of ideas on the kind of legal standard that could be developed. There were different ideas proposed on the form that the legal standard on transparency could take. The various possible forms discussed at that session were a model statement of principles, which could include rules on transparency, guidelines, model clauses to be then included in an investment treaty, stand-alone rules or rules on transparency as a supplement to the UNCITRAL Arbitration Rules. At that session, the possible content of the legal standard was also discussed.

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[7] *Official records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 118.

[8] Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 314.

[9] Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 191.

Another point of discussion had been whether the mandate to develop a legal standard on transparency in treaty-based investor-State arbitration was not limited to transparency under the UNCITRAL Arbitration Rules, but to arbitration rules in general. A further topic at that session had been whether it would be desirable that the legal standard that UNCITRAL would develop be also applicable to existing investment treaties and not only to future investment treaties. That point had been found very important in view of the high number of investment treaties already concluded at that time.[10] The Working Group embarked on a preliminary discussion of the various possible means to achieve certainty as to the application of rules on transparency to existing investment treaties.[11]

At the time of preparation of the publication of the proceedings of the 2010 OECD/UNCTAD Symposium on international investment agreements and investor-State dispute settlement, the Working Group has had two more sessions devoted to the topic on transparency in treaty-based investor-State arbitration. The current status of the development of the legal standard on transparency in treaty-based investor-State arbitration is as follows:

As to the form of the legal standard, the Working Group precedes its discussion on developing the content of the highest standards on transparency on the basis that the legal standard be drafted in the form of rules. This approach is based on the agreement of delegations which had favoured the drafting of guidelines on the understanding that the rules would only apply where there was an express reference to them (opt-in). The Working Group agreed that the content of the rules would have to be revisited in case it would decide, at a later point, that the application of the rules was based on an opt-out approach.[12]

As to the content of the legal standard on transparency, the Working Group is currently working on the basis of the following structure:[13] article 1 would be on the scope of application, article 2 on the initiation of arbitral proceedings, article 3 on the publication of documents, article 4 on the publication of arbitral awards, article 5 on the submission by third persons, article 6 on the submissions by non-disputing Parties, article 7 on hearings, article 8 on possible exceptions to the rules on transparency and article 9 on a repository of published information ("Registry"). The possible exceptions to the

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[10] See the Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4-8 October 2010) (A/CN.9/712), para. 85, which states that the application of any new standard on transparency which the Working Group was developing to existing investment treaties was said to have an important practical impact as there were more than 2,500 investment treaties in force to date, but less than 10 treaties had been concluded in 2010.

[11] Ibid., paras. 85-94.

[12] See the Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session (New York, 7-11 October 2010) (A/CN.9/717), paras. 26 and 58 and the Report of the fifty-fifth session (Vienna, 3-7 October) (A/CN.9/736), para. 41.

[13] See the Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fifth session (Vienna, 3-7 October) (A/CN.9/736), para. 11.

rules on transparency under article 8 currently include protection of sensitive and confidential information as well as protection of the integrity of the arbitral process. With respect to the registry responsible for publishing information under the rules on transparency, the question had been discussed whether there should be only one institution fulfilling that function or whether there should be a variety of institutions available to undertake that function.

The applicability of the rules limited to arbitration under the UNCITRAL Arbitration Rules or generally to arbitral proceedings regardless of the applicable arbitration rules had been further discussed without a decision yet taken. At the fifty-fifth session, arbitration institutions primarily commented that they viewed the application of the transparency rules in conjunction with their institutional rules as unlikely to create difficulties.[14]

With respect to the applicability of the legal standard to existing treaties, the Working Group considered various instruments. Those instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the "Vienna Convention") or amendment or modification pursuant to articles 39-41 of the Vienna Convention.[15] The Working Group found all instruments interesting, not mutually exclusive of each other and will consider that matter further at a later stage.

For further information please consult the UNCITRAL website <www.uncitral.org>, where all UNCITRAL documents are available and are free to download.

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[14] Ibid., para. 28.

[15] Ibid., paras. 134-135.

Recent Developments on Transparency in ISDS
(open hearings, amici curiae and publication of awards)

Prof. Kate Miles,
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In observing recent trends emerging in investor-State arbitration, it becomes apparent that there is an increasing appreciation of the importance of procedural issues. In particular, one of the most significant factors is the understanding that the procedural frameworks and the specific rules themselves can impact not only on the practical aspects of the conduct of hearings, but can also shape the cultural setting for the hearings and the way in which substantive issues are considered.

A key element in this regard has been the development of transparency measures and non-disputing party participation, which is the subject for my intervention this afternoon. And the areas on which I will focus are three-fold:

1. The first is to mention several significant procedural developments that have taken place within specific sets of arbitral rules and treaties and their application in recent disputes. I will spend most of my time this afternoon discussing these elements and the controversies that have arisen in the debate on whether or not to introduce further transparency measures;

2. The second is a more generalized and thematic discussion on the implications of the conceptual shift from transparency as solely an issue of host State conduct to also an issue about transparency within the process of investor-State arbitration itself; and

3. The last issue is again a more conceptual one — examining the implications of recent trends towards reframing investor-State dispute settlement as a component of global administrative law and, perhaps, some of the more problematic aspects of doing so.

So, briefly, on this point about the shift in our understanding or emphasis on transparency within investment disputes. I think it is indicative of the evolving nature of investor-State arbitration that we are getting shifts of quite such a significant character. And what makes this type of development so interesting is that it can evolve in, perhaps, unanticipated ways, and we can expect it to continue to do so. So, what we have seen emerging here, as currently one of the most controversial issues in the field, is the state of transparency within the arbitral process itself. This is a very different approach to that previously seen to transparency in investment disputes, where it was largely to do with arguments surrounding the conduct of the host State and reviewing State decisions or actions to determine

whether or not they were taken with adequate transparency on the part of State officials. These sorts of considerations tend now to emerge under the banner of fair and equitable treatment in which the application of transparency and due process is not innately contentious. Where we've seen the shift in controversy with respect to transparency at a conceptual level is in this new context of application to the conduct of the investor-state arbitration process itself. So, it's an interesting development that illustrates not only the evolving state of the law, but also the recent emphasis on procedural issues as significant in themselves.

Recent developments regarding transparency in rules

As a general observation, looking at further trends in this area, steps have been taken to increase transparency and non-disputing party participation in investor-State arbitration through a number of different mechanisms. This can be seen in the express inclusion of such measures in more recent investment treaties, through the creative use of rules by arbitral tribunals such as in the *Methanex* dispute, and then in the revision of procedural rules, as seen with ICSID, to take better account of transparency concerns.

We have heard from others today specifically on the recent developments within ICSID and the UNCITRAL rules. But I don't think it can be emphasized enough, the importance of these rules for the particular procedural outcomes in the conduct of hearings. And although contentious procedural issues in ICSID proceedings do, of course, remain — there is room to go further— the 2006 changes introduced new measures that were designed to answer the criticisms of a lack of transparency and public participation in investor-State disputes while still seeking to maintain the smooth running of the dispute for the parties involved. Whether the content of the *amicus* briefs filed under these new rules has had any impact on the substantive outcome of disputes is questionable and, in fact, almost impossible to ascertain at this stage. What can be said, however, is that these rules have had an impact on the conduct of investment disputes.

Transparency and public participation in recent disputes

So, looking at recent instances where the new rules under ICSID have been invoked:

In *Biwater v. Tanzania*, requests were made by non-disputing parties to have access to documents, to file submissions, to be present during the oral hearings. The tribunal's decisions were unsurprising in many respects: that the tribunal would receive submissions from non-disputing parties, but that access to the documents was not necessary; and, that, as the claimant objected to the request for an open hearing, access to the oral hearings would not be possible. Now, there is no doubt that the issue of closed hearings has increased the intensity of the controversy around the processes of investor-state arbitration and fuels legitimacy concerns. As for the involvement of the non-disputing party in the process in *Biwater*: did the *amicus* brief make any difference in the decision-making process of the tribunal? Well, the tribunal stated that it "has found the *Amici's* observations useful.

Their submissions have informed the analysis of the claims … and where relevant, specific points arising from the *Amici's* submissions are returned to in that context."

One thing to consider in this, however, is that with a procedural issue such as transparency, openness and public participation, the point is not so much whether in any particular case the actual substantive submissions from an *amicus* brief were influential in the outcome of the dispute. I think it is more generalized than that — it is more that a culture of openness, where there are procedures for receiving *amicus* briefs, then the system as a whole benefits; questions of legitimacy die down; the wider process itself is no longer on trial and you can get back to focusing on the substantive issues in dispute.

There are two other disputes that I wanted to mention this afternoon, largely because of the identity of the non-disputing party that petitioned to make submissions under the new ICSID Rules, being the European Commission. These are *AES Summit v. Hungary* and *Electrabel v. Hungary*.

These disputes involved power purchase agreements and changes of agreed upon prices for electricity and alleged violations of protections guaranteed under the Energy Charter Treaty. The EC petitioned to submit an *amicus* brief on the basis that such power purchase agreements are incompatible with European Community Law. The EC was permitted to make the submission but it hasn't been made publically available. In making its substantive decision, the *AES* tribunal did refer to the EC's submission, but in much the same way as was done in the *Biwater* award, it did little more than note that it took the submission into consideration. I suspect that this is likely to be the way in which tribunals will tend to address the issue of the role of *amicus* submissions within particular disputes and not actually go into which aspects were, or were not, considered or the impact, or not, of the submission. It is, perhaps, an understandable approach to take, making it clear that the submission was considered but precluding any analysis of the extent of any influence

Now, one issue that I did want to raise concerns the role of the EC in these proceedings, with respect to the rationale for greater transparency and public participation. Because the quintessential non-disputing party traditionally envisaged when such measures have been advocated is obviously that of the environmental or human rights NGO or a grassroots activist group presenting perspectives from affected communities. The EC, of course, is a very different kettle of fish altogether. And a very interesting point on this has been made by **Christina Knahr** from the University of Vienna, querying whether the intervention of a political heavyweight such as the EC might carry undue weight in the deliberations of the tribunal or as amongst the various petitioners and whether this introduces an additional layer of politicization into the dispute, shifting the dynamics of the arbitral process.

Global administrative law

These are simply a few of the issues to consider in observing some of the trends that are emerging in the context of transparency and participation in investor-state dispute settlement. But before I close,

I also wanted briefly to draw your attention to an additional trend in some commentary on investor-state arbitration — to frame it as a component of 'global administrative law'. A tendency to describe investor-state arbitration as the embodiment of the rule of law, good governance and neutrality is emerging - and to describe this as 'global administrative law'. I want simply to raise one or two problematic aspects of this.

Investor-State arbitration is, indeed, part of a web of administrative functions and entities at both domestic and international levels that have been performed for decades. So to assign a particular label as 'global administrative law' has implications that go beyond the fact of the occurrence of these functions. **Susan Marks** has described this as the 'power of naming'. In particular, in the context of investor-State dispute settlement, it is whether it contributes to a legitimising of the system, simply by association with the terminology, just at the time when that system is facing challenges about its legitimacy. In other words, it is very difficult to argue that there are problems with a system that is framed as in itself being the embodiment of the rule of law, good governance and so forth. So, here is the paradox: global administrative law is said to be concerned with issues of transparency, public participation, and due process, and in the context of investor-State disputes, this is said to be reflected in the review of host State conduct for transparency and due process, but the irony is that these considerations have a particularly selective application, because the procedural framework for investor-State arbitration itself does not allow for full transparency, public participation, or review of awards.

And this ties in with the first point I raised at the beginning of my intervention about the conceptual shift in the treatment of transparency in investment disputes. It also brings me full circle to make the point that I think this framing of investor-State arbitration as global administrative law is again an example of the evolving nature of investor-State dispute settlement; that trends in this field often emerge and develop in unanticipated ways; and that, whatever else, it is certainly indicative of the deepening appreciation of the importance of procedural matters within international investment law and arbitration. In other words, a crossroads of evolution, to answer the question that was put to the panel earlier on, or, indeed, perhaps an evolving crossroads. And with that, I will close.

Conflicts of Interest of Arbitrators

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The current state of play shows that there are a number of questions which are central to the discussion on conflicts of interest regarding arbitrators.

It seems that parties and their counsel have become more inventive in the grounds on which they rely in support of challenges to the independence and impartiality of international arbitrators. In addition to the more traditional types of challenges, i.e. those based on a potentially objectionable relationship between an arbitrator and counsel or arbitrator and one of the parties, investment arbitration has also witnessed in recent years a panoply of different kinds of challenges, which can be briefly summarized.

The first types of challenges are those commonly referred to as "issue conflict" challenges. This term is usually employed to refer to objections over the appointment of arbitrators made when the individual in question is also involved as counsel and advocate in other pending cases. The rationale of a challenge in these circumstances is that, to the extent that a nominated arbitrator acts as counsel in a dispute that involves similar or the same legal questions and adopts in that context certain positions regarding issues that are common to both cases, he/she may not be able to maintain an unbiased approach to the same issues in the case where he or she is called to act as an arbitrator. Examples of these types of challenges are provided by the *Telekom Malaysia Berhard v. Republic of Ghana* ("*TMB/Ghana*"),[1] and *Eureko* v. *Poland* cases.[2]

More recently, a new generation of "issue conflicts" challenges has surfaced, whereby objections to an arbitrator's nomination by a party are based on the academic opinions provided by the arbitrator, which arguably show preconceived positions with regard to some of the central issues of the arbitration. An example of this kind of challenge is provided by the *Urbaser* v. *Argentina* arbitration where the Claimant argued that the views expressed by the arbitrator in certain publications on the

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[1] District Court of The Hague, 18 October 2004, Challenge No. 13/2004; Petition No. HA/RK 2004.667; and Challenge 17/2004, Petition No. HA/RK/2004/778, 5 November 2004. Unofficial English translations of the judgments can be found at: www.transnational-dispute-management.com.

[2] Judgement of the Court of First Instance of Brussels, 4th Chamber, 22 December 2006, R.G. 2006/1542/A. An unofficial English translation of the judgment is available at http://ita.law.uvic.ca.

legal question of state of necessity showed a preference or partiality for the position that Argentina would most likely have taken in the case.[3] Thus, for the claimant in *Urbaser* v. *Argentina*, the arbitrator's views in that case were more than the expression of mere doctrinal opinions because they allegedly showed that he had already "prejudged an essential element" of the dispute.[4] However, the two unchallenged members of the tribunal - who decided the challenge - disagreed with the Claimant's position and rejected the request. In their view, the arbitrator's publications did "not meet the threshold of presenting an appearance that he is not prepared to hear and consider each party's position with full independence and impartiality."[5]

New ground is being broken at ICSID by challenges made on the basis of "repeat appointments" of arbitrators: i.e. situations where the same individual is appointed by the same party - or the same counsel representing different parties - in several cases. Since these appointments are made in cases where the factual and legal circumstances are similar, arguably they may represent a different permutation of the "issue conflict" challenges. Examples are: *Electrabel* v. *Hungary, Encana* v. *Ecuador* and *Saba Fakes* v. *Turkey*. The potential threat to the arbitrator's independence and impartiality in these cases is two-pronged: on the one hand, the fact that the same arbitrator is appointed a number of times by the same party or counsel may lead to procedural inequalities because the arbitrator may be privy to information that the other members of the tribunal do not have. In addition, this kind of situation may also indicate a close connection between the same individuals and suggest the existence of potential bias as the arbitrator may be more inclined to rule in favour of the party to whom he/she "owes" the appointment.

There have also been instances where a party accused an arbitrator of bias following an interview he gave to the press. In an interview released during the proceedings in the ICSID case *Perenco* v. *Ecuador* the arbitrator appointed by the investor compared Ecuador to "recalcitrant host countries" and - using an analogy with the Libyan expropriations - suggested that it could not be trusted to abide by the award.[6] The parties had previously agreed to by-pass the ICSID Convention and to refer any challenge in the case to the PCA under the IBA Guidelines on Conflicts of Interest in International Arbitration. The Secretary-General of the PCA sustained the challenge since the comments of the arbitrator were found to be circumstances that gave rise to justifiable doubts as to his impartiality or independence.

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[3] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia ur Partzuergoa* v. *Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, 12 August 2010, available at http://ita.law.uvic.ca.

[4] *Ibid*., at para. 23.

[5] *Ibid*., at para. 58.

[6] *Perenco Ecuador Limited* v. *Republic of Ecuador and Empresa Estatal Pertoleos del Ecuador*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator, 8 December 2009, paras. 27-51, available at http://ita.law.uvic.ca.

There are attempts to challenge arbitrators on the basis of remote connections between them and counsel. In *Alpha* v. *Ukraine*, an arbitrator was challenged because he and counsel for one of the parties were at Harvard Law School together 20 years previously.[7] The challenge was dismissed by the co-arbitrators for lack to prove any fact that would indicate a manifest lack of impartiality or independence on the part of the arbitrator.

One example that stands on its own is that of the *CAA Vivendi* v. *Argentina* case. Here the challenging party - Argentina - was not seeking to disqualify the arbitrator, but rather to annul an award due to an alleged serious departure from a fundamental rule of procedure because it argued that the Tribunal had been improperly constituted.[8] The case is interesting for present purposes because Argentina argued that one of the co-arbitrators would have been disqualified during the proceedings had she disclosed that she sat on the Board of Directors of UBS, a Swiss bank holding shares in Vivendi. Argentina further contended that the arbitrator's lack of disclosure was incompatible with the necessary appearance of impartiality required of an ICSID arbitrator.

While the Committee's decision on this ground for annulment is drafted in unusually harsh terms, the *ad hoc* Committee concluded that there was no sufficient reason to annul the award on this ground, affirming that - "despite most serious shortcomings" - the arbitrator's exercise of independent judgment was not impaired in the circumstances and thus the Tribunal was "functional and operated properly in respect of both Parties".[9] Nevertheless, the Committee did emphasize that the position of bank director and that of arbitrator are incompatible and should not be combined. The Committee also criticized the arbitrator for notifying the Bank of her pending cases and not the parties of her directorship. The consequences of this case may also have repercussions beyond this particular decision since similar challenges were raised against the same arbitrator in three other (still pending) Argentine cases: *Electricidad Argentina and EDF* v. *Argentina, EDF, SAUR and Participaciones Argentinas* v. *Argentina* and *Suez* v. *Argentina*. In fact, the Committee expressly stated that these cases "are still subject to ICSID annulment proceedings and therefore are not yet final".[10]

Treaty tribunals have also been requested by parties to decide whether it was proper for counsel to participate in a case. Examples are *Hrvatska Elektropriveda* v. *Slovenia* and *Rompetrol* v. *Romania.* In the first case the tribunal ruled that a barrister sitting in the same chambers as the President of the

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[7] *Alpha Projektholding GmbH* v. *Ukraine*, ICSID Case No. ARB/07/16, Decision on Respondent's Proposal to Disqualify Arbitrator Dr. Yoram Turbowicz, 19 March 2010, available at http://ita.law.uvic.ca.

[8] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3 (Annulment Proceedings), Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010, available at http://ita.law.uvic.ca.

[9] *Ibid*., at para. 238.

[10] *Ibid*., at para. 213.

Tribunal should be excluded from participating in the case.[11] The circumstances of that case were that: i) the system of the London Chambers was wholly foreign to the Claimant, ii) the Respondent had decided not to inform the Claimant or the Tribunal of the barrister's involvement in the case and iii) the Respondent had refused to disclose the scope of the barrister's involvement, even a few days before the hearing on the merits. The tribunal held that, "as a judicial formation governed by public international law," it had "an inherent power to take measures to preserve the integrity of its proceedings", which was grounded on Article 44 of the ICSID Convention.[12] On that basis, faced with the choice between the Chairman's resignation and the exclusion of counsel, the tribunal found that it was "both necessary and appropriate to take action under its inherent power" and directed counsel to cease to participate in the proceedings.[13]

The Tribunal in the second case, *Rompetrol* v. *Romania*, specified that the *Hvartska* decision was not a binding precedent and took pains to distinguish it.[14] *Rompetrol* was not a case involving barristers from the same Chambers but one based on a prior association between counsel for a party and a member of the tribunal. The Tribunal reasoned that the presumed rationale for the challenge was that the choice of counsel may imply an unfair advantage in the case - given his past relationship with a member of the Tribunal. In rejecting the challenge, the Tribunal emphasized the importance of a party's right to be represented by counsel of its choice.[15] In the circumstances, the Tribunal found that the association in question took place in the past and therefore there was no reasonable possibility of bias that could justify the exclusion of counsel.[16]

This very brief overview of the case law allows me to identify a number of outstanding issues that require consideration.

In the ICSID system, there may be some difficulties when it comes to the entity that decides a challenge request. Under the ICSID Convention (Article 58), a request for disqualification is decided by the other members of the Tribunal and only if they cannot agree, or in the case of a proposal to disqualify a sole arbitrator, or a majority of the arbitrators, the decision is taken by the Chairman of the World Bank. Arbitration Rule 9(4) contains a similar provision ("Unless the proposal [to disqualify]

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[11] *Hrvatska Elektroprivreda* v. *Slovenia,* Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, available at http://icsid.worldbank.org/ICSID.

[12] *Ibid*., para. 33.

[13] *Ibid.*

[14] *The Rompetrol Group N.V.* v. *Romania*, ICSID Case No. ARB/06/3, Decision of the Tribunal on the Participation of a Counsel, 14 January 2010, available at http://ita.law.uvic.ca.

[15] *Ibid*., para. 22.

[16] *Ibid*., para. 26.

relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned.") This practice has invidious effects since it puts the unchallenged arbitrators in the difficult position of deciding the fate of a colleague. As noted by the *ad hoc* Committee in *CAA Vivendi* v. *Argentina*, ICSID arbitrators have shown a marked inclination to raise the threshold for challenges of their fellow arbitrators.[17] Indeed, the majority of the challenges I mentioned earlier were rejected by the co-arbitrators. The decisions of fellow arbitrators may also be perceived by the outside world as protecting the interests of an elitist group of specialists, which is already under attack for being a "Members only" type of club with limited access.

Ideally, it may be preferable for an appointing authority with a more detached position vis-à-vis the case to decide on challenges and disqualifications.

To avoid a decision by the non-challenged arbitrators, parties have on occasion agreed to refer a challenge to a specific appointing authority. An illustration of this practice is provided by the arbitrator's challenge filed by Argentina in July 2007 in the UNCITRAL arbitration *National Grid* v. *Argentina*, where the parties agreed that the challenge would be submitted for decision to the LCIA, rather than the ICC Court, which was the designated appointed authority, ostensibly because the LCIA decision would be reasoned.[18] Another example is provided by the *Perenco* case I mentioned earlier where the parties agreed to by-pass the ICSID Convention and submit any challenge to the Secretary-General of the PCA under the IBA Guidelines.[19]

Another solution could be to establish an independent body, i.e. a "Challenge Facility" or "Authority", composed of highly qualified members which could be charged with deciding upon conflicts of interests and requests of disqualifications of arbitrators. The decisions of this independent body would be reasoned and public. This could lead to the progressive codification of rules on conflicts of interest which might hopefully have the necessary authority to be applied consistently.

An additional problem affecting the system concerns the lack of predictability due to the fact that the standards applied by the existing arbitration rules in approaching and deciding challenges are not uniform. Notably, Art. 57 of the ICSID Convention sets the more demanding requirement of establishing a "manifest lack" of independence on the part of the arbitrator, as opposed to the

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[17] *Compañía de Aguas de Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010, para. 208, available at http://ita.law.uvic.ca.

[18] See *National Grid P.L.C.* v. *Argentine Republic*, UNCITRAL, Award, 3 November 2008, para. 41, available at http://ita.law.uvic.ca.

[19] *Perenco Ecuador Limited* v. *The Republic of Ecuador & Empresa Estatal Pertoleos del Ecuador*, PCA Case No. IR-2009/1, Decision on Challenge to Arbitrator, 8 December 2009, para. 2, available at http://ita.law.uvic.ca.

"justifiable doubts" standards imposed by other rules. In the light of this, it is not surprising that challenge decisions are not consistent. The IBA Guidelines attempted to harmonise the standards for disclosure, but these do not appear to be universally endorsed by arbitral tribunals, probably due to the fact that they are no more than general recommendations or informal guidelines.

An additional issue which has been brought to the fore by recent challenge requests is the question of the internal conflict checks carried out by a potential arbitrator, whether in the context of a multinational law firm or some other institution. It appears that there are still problems with the way conflict searches are organized and conducted. In my view, too many situations can still go undetected under the various conflict search systems and I suspect that more can be done to improve them. For a potential arbitrator, a conflict search can no longer be limited to a simple identification of the parties to a given case, as the conflict may be extended to other companies of the same group, to counsel representing the parties and even to the co-arbitrators. Moreover, the obligation to disclose a potential conflict is a continuing one and therefore the individual concerned is under an on-going obligation to monitor possible conflicts even subsequently to his/her appointment and for the duration of the case.

Finally, there is also a general feeling within the arbitration community that counsel are becoming increasingly aggressive, and that tactical or frivolous challenges are on the rise with subsequent delays and accrued costs. The need for a "Code of Conduct" for counsel before international tribunals is thus being advocated from various quarters. A number of different texts for such a code are at varying stages of development from various professional associations.

But is a code of conduct for counsel really necessary? If we look at the examples I provided earlier, the challenges were brought under the relevant arbitral rules and did not seem to amount to abuse of process or improper tactics. At most, in the *Hvartska* case, the conduct of counsel revealed - as the tribunal pointed out - "errors of judgment".[20] So the solution may simply reside in using tools that arbitral tribunals already have at their disposal to counter abusive conduct by counsel: the imposition of awards on costs, the drawing of adverse inferences or simply the admonishment of counsel at the hearing or - more publicly - in an award. Alternatively, another option could be for the arbitral institutions to adopt rules governing conflicts of interest of arbitrators and ethical standards of counsel. These could be done in the form of annexes to the arbitration rules, form part of such rules and such be binding on arbitrators and the parties counsel appearing before them. In my view, this would be a more satisfactory solution than over-regulation, and the adoption of more non-binding codes, guidelines or new principles, which risk making things more confusing and complicated than they need be.

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[20] *Hrvatska Elektroprivreda* v. *Slovenia,* Tribunal's Ruling regarding the participation of David Mildon QC in further stages of the proceedings, 6 May 2008, para. 31, available at http://icsid.worldbank.org/ICSID.

ICSID Annulment Procedure

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The ICSID annulment system is quite active, at least in quantitative terms, as Mrs. Obadia told us. And as Mr. Bottini has just said, these cases you are looking at, raise an interesting problem with which *ad hoc* Committees are more and more often faced: how to deal with the original award whose interpretation of the applicable treaty is, to the committee's eyes, patently wrong?

As you know, the decision of the *ad hoc* Committee in the *Klöckner* and *Amco* affairs were sharply criticized for practically undertaking a *revision au fond*, a review of the substance of the case, and thus overstepping the limit inherent to the annulment procedure, which is not an appeal. Although this initial failure of the system was rapidly redressed, some of the recent *ad hoc* committee decisions that I mentioned seem to revive this old problem, which we believed to have solved. And I am going to say something different from what Mr. Bottini has just said.

The problem is as follows. Here, we've got an original award. We, as members of an *ad hoc* committee, carefully read it. And we arrive at a conclusion that it is clearly and absolutely wrong. We know that the *ad hoc* committee is not a court of appeals. We cannot overturn the original award to give our own judgment. What shall we do?

There seems to me to be three options. I assure you that none of them offers an ideal solution and we are here to try to find the least evil.

Option 1: We exercise a *de facto révision au fond* or review the substance of the case without however annulling the original award.

Option 2: We exercise a *de facto révision au fond* and annul the original award.

Option 3: We do not look at the substance of the original award.

Option 1: Exercise a de facto révision au fond or review the substance of the case without however annulling the original award.

The *ad hoc* committee in *CMS v. Argentina* took the first option. I suppose that you are familiar with the cases arising from the Argentinean financial crisis in 2001. The arbitral tribunal held that Argentina had violated several provisions of the Argentina-US BIT and it rejected the respondent

State's argument that those violations should be justified by Article 11 of the BIT (security exception) and/or on the basis of the state of necessity under customary international law. The tribunal first held that requirements to invoke the state of necessity under customary international law were not met. It then decided to refuse to apply Article 11 of the BIT, seemingly because it considered that Article 11 set the same conditions as the state of necessity under customary international law.

The *ad hoc* committee thoroughly reviewed the original award which it considered patently wrong. It first found that the tribunal made "a manifest error of law" in assimilating the conditions necessary for the implementation of Article 11 of the BIT to those concerning the existence of the state of necessity under customary international law. It further pointed out that the tribunal made "another error of law" in applying both Article 11 of the BIT and the state of necessity under customary international law without entering into an analysis of their relationship. Nevertheless, the *ad hoc* committee refused to annul the award, while emphasizing, once more, the error made by the tribunal.

Option 2: Exercise a de facto révision au fond and annul the original award

This option was taken, for example, by the *ad hoc* committees in *Sempra v. Argentina* and *Enron v. Argentina*, both of which arose from essentially the same facts and were brought to arbitration on the basis of the same BIT and for the same grounds as in *CMS v. Argentina*. The *Enron* and *Sempra* tribunals followed basically the same line of argument to arrive at the same conclusion as did the *CMS* tribunal.

The *Sempra ad hoc* committee criticized the original award as did the *CMS* committee. But, contrary to the *CMS* committee, it annulled the original award. It held that the tribunal had made a fundamental error in identifying and applying the applicable law by adopting the state of necessity under customary international law as the primary law to be applied. This constitutes a failure to apply the applicable law, that is, Article 11 of the BIT, and thus the tribunal exceeded its powers, according to the *ad hoc* committee.

The *Enron ad hoc* committee also annulled the original award but on quite different grounds. The tribunal in that case relied on the views expressed by an economist when it considered whether the conditions of the application of the state of necessity were met. This means for the *Enron* committee that the tribunal did not in fact apply the applicable customary international law rules. The award was thus annulled for a failure to apply the applicable law, that is, an *excès de pouvoir*.

The *CMS ad hoc* committee decision was severely criticized. I think that the decisions recently rendered by the *Sempra* and *Enron* committees will be similarly criticized. The most concise and powerful criticism addressed to the *CMS* decision is made by Emmanuel Gaillard. He says essentially that the *CMS* committee's decision is not in conformity with the original design of the ICSID annulment system, which is not an appeal system. His argument will apply all the more to the *Sempra* and *Enron* decisions, which annulled the original awards because the *ad hoc* committees considered

them to be wrong. I cannot but agree with this great expert in international investment law and arbitration. But at the same time, I'm pretty sure that the *CMS*, *Sempra* and *Enron ad hoc* committees were well aware that this kind of criticism would be addressed to them. They nevertheless exercised *de facto révision au fond*. Why did they do so?

These committees indeed faced an extremely difficult situation. They had an arbitral award which they consider to be utterly wrong. They thought, I suppose, that they should rectify these awards in one way or another, because if they did not, these completely "wrong" awards would cause serious damages to the legitimacy of the treaty-based arbitration system. Judge Guillaume, the president of the *CMS* committee, clearly said so.

These committees indeed faced a difficult situation, but the approaches adopted by them produce serious problems. In *CMS v. Argentina*, the original award is not annulled, at least for the reason of the wrong application of the state of necessity. This means that the respondent State remains under the obligation to enforce the award. However, is it politically possible or realistic for whichever State in the world to enforce the award of an ICSID tribunal which was declared to be grievously deficient by an ICSID *ad hoc* committee? How can the government of the respondent State, even when it is ready to fulfil its obligations under the ICSID Convention, convince local opponents and people that their State should accept an award held by an impartial organ to be utterly defective? The option adopted by the *CMS ad hoc* committee would thus encourage the respondent State to violate the ICSID Convention.

The solution adopted by the *Sempra* and *Enron ad hoc* committees does not have this problem as they annulled the original awards. But they shed light on a more fundamental problem. Can we systematically suppose that *ad hoc* committees are more competent than tribunals? When they have different opinions, are *ad hoc* committees always right and tribunals always wrong?

The *Mitchell* and *MHS ad hoc* committees, both of which annulled the original award, arrived at precisely opposite conclusions as regards the notion of "investment" stipulated in Article 25 of the ICSID Convention. Necessarily, either of the two is wrong. Can we suppose that the *ad hoc* committees are always right?

It is therefore submitted that the *ad hoc* committees should stick to the original design of the ICSID annulment system. If quality and coherence need to be pursued, we should be content with far less dramatic methods, such as the publication of awards that ensures a critical legal debate. Such a conclusion may seem excessively modest for those advocating more "creative" use of the ICSID annulment system, but we often have to be content with the least evil in a world full of imperfectness. This is why I do not think that ISDS is at a crossroads.

Enforcement of arbitral awards in investment arbitration: taking stock and way forward

Ms. Yas Banifatemi,[*]
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If ICSID and, more generally, investment arbitration is to be understood as a system,[21] one may wonder whether, as any other system, it contains self-adjustment mechanisms allowing it to adapt to the evolution of the law, practice, and mentalities. In this context, it is worthy of note that, while in 1989 Professor Reisman warned about a 'breakdown' in the system when discussing the ICSID annulment mechanism,[22] ICSID arbitration was nonetheless to face its most striking growth in the 1990s with the explosion of the number of arbitrations brought on the basis of bilateral or multilateral investment agreements; yet, in 2009, it became fashionable to express alarm in relation to the 'backlash' against investment arbitration.[23]

Are we, today, at a crossroads and called upon to deeply change a system that will otherwise collapse, or can the system be trusted to naturally adapt to the challenges before it and improve? These questions, to the extent they touch upon the efficiency of the process, have had an impact on the question of the enforcement of investment arbitral awards. The latest practice shows that a trend has developed for States to resist the enforcement of arbitral awards,[24] while successful investors, on the other hand, have sought alternatives to improve the efficiency of the enforcement process (and, ultimately, the arbitral process itself). Each of these aspects will be briefly reviewed in turn.

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[21] *See*, for example, Toby Landau, "Mapping the Future of Investment Treaty Arbitration as a System of Law - Remarks", *in* AMERICAN SOCIEY OF INTERNATIONAL LAW - PROCEEDINGS OF THE 103RD ANNUAL ASIL MEETING (2010), at 326-27. For a nuanced view, *see* the author's remarks, *id.*, at 323-26.

[22] W. Michael Reisman, "The Breakdown of the Control Mechanism in ICSID Arbitration", 1989(4) DUKE L.J. 739 (1989).

[23] *See* THE BAKCLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel *et al.* eds., Kluwer 2010).

[24] *See*, for example, Edward Baldwin, Mark Kantor and Michael Nolan, "Limits to Enforcement of ICSID Awards", 23(1) J. INT'L ARB. 1 (2006); Alan Alexandroff and Ian Laird, "Compliance and Enforcement", *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171-87 (Peter Muchlinski *et al*. eds., OUP 2008).

I. Taking stock

The starting point is the *finality* of awards. The parties' acceptance of arbitration entails their agreement to comply with the resulting award and to abide by the terms of the award. Article 53 of the ICSID Convention and practically all arbitration rules refer to the parties' obligation to carry out the award without delay.[25]

Notwithstanding, issues of *enforcement* do arise in practice. The notion of enforcement covers both the recognition of an award—or, in other words, the confirmation of the *res judicata* effect of the award—and the execution, or forcible compliance with the award when the losing party fails to voluntarily comply with the terms of the award. As regards the recognition of awards, the ICSID Convention, even more so than the 1958 New York Convention, has set forth a simplified recognition system.[26] As regards the execution of awards, in both ICSID and non-ICSID arbitration, the regime for the execution of awards is governed by the law in force in the country where execution is sought. The ICSID Convention makes a distinction between the *types of obligations* binding on the losing party: Article 54 of the ICSID Convention provides that each State will "enforce the *pecuniary obligations* imposed by [the] award". On its face, the provision does not cover specific performance. However, an order of specific performance—on issues as diverse as the restitution of seized property, the return of a withdrawn license, the withdrawal of taxation or currency transfer restriction, the discontinuance of the harassment of the investor's personnel, etc.—is within the powers of arbitral tribunals.[27] In ICSID matters, parties may safeguard this possibility by seeking, during the course of the arbitration, interim measures in the form of specific performance which, if not complied with, can be reflected in an award of pecuniary damages.[28]

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[25] Article 53 of the ICSID Convention, in relevant part, provides: "Each party shall *abide by and comply with* the terms of the award […]" (emphasis added). For language directing to the parties' acceptance to "carry out" any award without delay, *see also* ICC Article 28(6) of the ICC Rules, Article 26.9 of the LCIA Rules, Article 32.2 of the UNCITRAL Rules and Article 40 of the SCC Rules.

[26] Article 54 of the ICSID Convention, in relevant part, provides: "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding […]". Article III of the New York Convention, in relevant part, provides: "Each Contracting State shall recognize arbitral awards as binding […]".

[27] *See*, for example, *Enron Corporation and Ponderosa Assets, L.P v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, January 14, 2004, ¶ 81 ("The Tribunal accordingly concludes that, in addition to declaratory powers, it has the power to order measures involving performance or injunction of certain acts.").

[28] *See*, for example, *Antoine Goetz and others v. Republic of Burundi* (ICSID Case No. ARB/95/3), Award, February 10, 1999.

In practice, it is commonly said that ICSID awards do not raise enforcement difficulties and that ICSID cases have been largely settled or paid, with only a few exceptions where enforcement issues did arise (*SOABI v. Senegal*, *Benvenuti & Bonfant v. Congo*, *LETCO v. Liberia* and *AIG v. Kazakhstan*).[29] The latest published statistics do not shed significant light on the issue of enforcement, but show that, as of December 2011, the dispute was decided by the arbitral tribunal in 61% of ICSID cases that were concluded, whereas in the remaining 39% the dispute was settled by the parties or the proceedings were otherwise discontinued. 40 annulment proceedings were initiated, of which 11 resulted in a partial or full annulment of the award, while the application for annulment was rejected in 18 instances and 11 annulment proceedings were discontinued.[30] In themselves, these statistics do not indicate whether or not the winning party ultimately obtained satisfaction. They may indicate, however, the true difficulty encountered by a successful party seeking to enforce a favorable award and faced with the uncompromising tactics adopted by States such as Argentina or Ecuador who refuse to enforce and seek the annulment of arbitral awards rendered against them.[31] Outside the

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[29] On this issue, *see* Antonio Robeto Parra, "The Enforcement of ICSID Arbitral Awards", *in* ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS (R. Doak Bishop ed., JurisNet 2009), at 131-138.

[30] *See* ICSID, "The ICSID Caseload – Statistics" (Issue 2012-1) (available on http://icsid.worldbank.org). On the example of Argentina, which is illustrative of uncompromising tactics of both refusing to enforce and seeking to annul arbitral awards rendered against it, *see* for example references at note 4 above.

[31] On this question, *see also* Edward Baldwin, Mark Kantor and Michael Nolan, "Limits to Enforcement of ICSID Awards", 23(1) J. INT'L ARB. 1, 16-7 (2006):

> "The CMS tribunal rejected Argentina's arguments regarding necessity and national emergency as a defense to Treaty violations and awarded CMS U.S.$ 133 million. Before and after the tribunal's award to CMS, Argentinean officials have made statements that ICSID awards should be subject to domestic court review based on the arguments stated above, as well as other possible bases. For example, Argentina's former Attorney General, Horacio Rosatti, made public arguments that ICSID did not have jurisdiction over Argentina if the Argentine Supreme Court found an award incompatible with the Argentine Constitution. Notwithstanding this and other statements regarding the review of ICSID awards, Argentina, proceeding under the ICSID rules, has brought an annulment challenge to the CMS award rather than use its domestic courts to resist enforcement of the award. Argentinean officials have also been meeting with foreign government officials and some ICSID complainants in an attempt to amicably resolve the outstanding ICSID cases. Although Argentina, of course, may ultimately decide to use the domestic courts to be such a review in the immediate future. Recent actions show that a trend for states to resist the enforcement of arbitral awards may be gaining force.
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> After losing an UNCITRAL arbitration to Occidental Petroleum based on violations of a bilateral investment treaty, the Republic of Ecuador sought to avoid enforcement of the award. Initially, Ecuador brought a jurisdictional challenge to the award in the English courts, as London was the seat of the arbitration. The court held that English courts could entertain the challenge to the jurisdiction of the tribunal even though the right of arbitration was derived from public international law. Although the result may have been different had the Occidental

ICSID system, given the absence of statistics and the fact that only cases having given rise to setting aside proceedings are known, it is difficult to determine whether or not investment awards are enforced voluntarily by losing States. Here too, a few well-known cases show the difficulty of enforcing against certain States; the example of Russia in the *Sedelmayer* case, and the approximately ten years it took Mr. Sedelmayer to obtain the payment of fractions of the award rendered against the Russian Federation, is evocative of the difficulty of forcible execution when the losing State is, as a matter of principle, adamant about complying with an award rendered against it.

Two types of *hurdles* are commonly faced by the winning party. The first is the increasing tendency of losing parties to seek the annulment of awards; in the ICSID system, this difficulty is compounded by the fact that the losing party often seeks the stay of enforcement of the award. The second and most significant type of hurdle is the sovereign immunity of States. The difficulty relates in particular to diplomatic assets. The question, increasingly, has become the manner in which forcible execution may be obtained against State assets without the possibility for the losing State to raise defenses based on the separation of its assets and those of its agencies and instrumentalities or based on its *jure imperii* activity. The tension is between, on the one hand, a State's right to organize its *jure gestionis* activities amongst various State entities—with the understanding that the entity is distinct from the debtor State and therefore its assets should be out of reach to satisfy the State's debts—and, on the other hand, the reality that a given State instrumentality may actually be engaged in the State's commercial activity and its assets may therefore be used to satisfy the State's debts.[32] As shown by the case law in France, forcible execution is sometimes possible against the assets of a State entity when the control of the State over those entities can be shown.[33]

> Petroleum arbitration been conducted pursuant to the ICSID Convention, this case shows that disappointed states cannot always be relied upon to pay awards arising out of investment treaty arbitration without a fight. Incidentally, Ecuador has continued the fight by bringing an action against Occidental Petroleum in local Ecuadorian courts for contract violations based on actions taken by Occidental related to a production sharing contract.").

See also Alan Alexandroff and Ian Laird, "Compliance and Enforcement", *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171-87 (Peter Muchlinski *et al*. eds., OUP 2008), at 1181 ("More recent cases suggest the difficulty of enforcement, or more precisely execution, where the state has refused to comply with investment arbitration awards").

[32] On these issues, *see* Emmanuel Gaillard, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities. Three Incompatible Principles", *in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 4, STATE ENTITIES IN INTERNATIONAL ARBITRATION 179 (E. Gaillard and J. Younan eds., Juris Publishing 2008).

[33] In France, the case law has accepted the execution of awards against certain assets of Société nationale des pétroles du Congo (SNPC) and Société nationale des hydrocarbures (SNH) of Cameroon, in instances where, although the entity was distinct from the State both legally and financially, the State's control was clear. *See* Paris Court of Appeal, July 3, 2003, *Société nationale des pétroles du Congo v. Société Walker International Holdings Ltd.*, Case No. 2002/03185, unpublished, *reproduced in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 4, STATE ENTITIES IN

II. What practical solutions to resolve enforcement difficulties?

Practice shows that the real difficulty for an investor faced with a losing State's refusal to voluntarily comply with an award rendered against it is immunity from execution. This international law limitation, which is inherent to the fact that the respondent in investment arbitration is always a State that can benefit from sovereign attributes, cannot be resolved unless and until an international agreement is adopted in order to determine the types of seizable assets that may satisfy State debts.[34]

Room for improvement exists, however, and alternative solutions have been sought in practice, not only in investment arbitration, but more generally in instances (including in commercial arbitration) where States as respondents may be held liable for pecuniary obligations.

First, in order to anticipate possible obstacles raised by the respondent State against forcible execution should it lose the arbitration, recourse may be had to interim relief in national courts to avoid the dissipation of seizable assets.[35]

Second, in annulment proceedings, in particular in the context of ICSID arbitration, the winning investor may request that security be deposited in exchange for the stay of enforcement; in practice, out of the 19 cases where a stay was granted, 11 were accompanied by security, 7 as irrevocable and unconditional bank guarantees and 2 as official letters of compliance;[36] the effectiveness of this

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INTERNATIONAL ARBITRATION 475 (French original) and 487 (English translation), *aff'd*, Cass. 1e civ., February 6, 2007, *Société nationale des pétroles du Congo (SNPC) v. Société Walker International Holdings Ltd.*, 2007 REVUE DE L'ARBITRAGE [REV. ARB.] 483, and note by Laurence Franc-Menget; Paris Court of Appeal, January 22, 2004, *Société Winslow Bank & Trust Company Limited v. Société nationale des hydrocarbures (SNH)*, Case No. 2002/20287, unpublished, *reproduced in* IAI SERIES ON INTERNATIONAL ARBITRATION NO. 4, STATE ENTITIES IN INTERNATIONAL ARBITRATION, *id.*, at pp. 499 (French original) and 509 (English translation). *See also* Cass. 1e civ., October 1, 1985, *Sonatrach v. Migeon*, 113 JOURNAL DU DROIT INTERNATIONAL [J.D.I.] 170 (1986), and note by Bruno Oppetit.

34 *See* Emmanuel Gaillard, "Effectiveness of Arbitral Awards, State Immunity from Execution and Autonomy of State Entities. Three Incompatible Principles", *supra* note 12.

35 *See* Phlippa Charles, "Section 44, Freezing Injunctions and Foreign Arbitrations: Limitations on Jurisdiction", 12(3) INT'L ARB. L. REV. 34 (2009).

36 *See* "Annex 10: Tables of ICSID Awards and Decisions on Substantive, Procedural and Other Issues (Current through January 2010, Unless Otherwise Stated)", *in* Lucy Reed, Jan Paulsson, Nigel Blackaby, GUIDE TO ICSID ARBITRATION 367-437 (Kluwer Law International, 2nd ed. 2010), at 434 *et seq.*; *Ioannis Kardassopoulos v. The Republic of Georgia* (ICSID Case No. ARB/05/18), Decision of the Ad Hoc Committee on the Stay of Enforcement of the Award, November 12, 2010 (ordering a bank guarnatee to be deposited as security); *Ron Fuchs v. The Republic of Georgia* (ICSID Case No. ARB/07/15), Decision of the Ad Hoc Committee on the Stay of Enforcement of the Award, November 12, 2010 (ordering a bank guarnatee to be depositied as security). *See also* Mark Kantor, "Limits to Enforcement of ICSID Awards", 23(1) J. INT'L ARB. 1 (2006). As regards non-ICSID cases, in *CME v. Czech Republic* the annulment proceeding before Swedish courts was accompanied by the State's deposit of 400 USD in an escrow account (*see* "Czech

mechanism lies in the fact that if the annulment is dismissed, the investor will immediately obtain the execution of the award.[37]

Third, a new trend has seen the light in the form of an assignment of the award; one of the best-known examples is the *CMS* award which was assigned to Blue Ridge Investments, LL.C., a subsidiary of Bank of America.[38]

Certain further practical proposals have been put forward to improve further the efficiency of the enforcement process. For example, a waiver of the immunity from execution may be sought from the host State in the relevant contract or treaty;[39] this possibility, however, should it be practicable in a given context, may have limited effectiveness in relation to diplomatic immunity, understood as the

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Republic Deposits $354,943,542.54 Into Escrow Account - Will be Released to CME if Tribunal's Award Upheld", PR Newswire, April 9, 2003).

37 On the effectiveness of mechanisms such as security, *see* Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, THE ICSID CONVENTION: A COMMENTARY (2nd edition, CUP 2009), p. 1081 ("The option available to *ad hoc* committees of making a stay of enforcement conditional upon the posting of a security for the award's eventual performance serves a dual purpose. It facilitates enforcement. But it may also serve as a possible deterrent to requests for annulment that are motivated primarily by a desire to delay and, possibly, avoid compliance.").

38 *See* Petition to the U.S. District Court for an Order Confirming Foreign Arbitral Award and Entering Judgment Thereon by Blue Ridge Investments, L.L.C., January 8, 2010 (available on http://italaw.com).

39 Although no automatic waiver can be said to be attached to the signature of an arbitration agreement, a contrary example is provided by the case of *Creighton v. Qatar*, in which the French courts decided that entering into an ICC agreement to arbitrate implied a waiver of the immunity from execution (*see* Cass. 1e civ., July 6, 2000, *Creighton v. Ministère des Finances de l'Etat du Qatar*, 2001 REV. ARB. 114, at 116, and note by Philippe Leboulanger; 127 J.D.I. 1054, at 1055 (2000), and note by I. Pingel-Lenuzza; JCP, Ed. G, Pt. II, No. 10512, at 764, and note by Charles Kaplan and Gilles Cuniberti; Paris Court of Appeal, December 12, 2001, *Creighton Limited v. Ministère des Finances et Ministère des Affaires Municipales et de l'Agriculture du Gouvernement de l'Etat du Qatar*, 2003 REV. ARB. 417, at 419, and note by Philippe Leboulanger); Emmanuel Gaillard, "Waiving State Immunity From Execution In France: An Update", NEW YORK LAW JOURNAL, October 5, 2000. *See also Walker International Holdings Ltd. v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004), in which the Court ackowleged the express waiver from immunity contained in the relevant agreement and further determined that the State's acceptance of the ICC Rules precluded the State from asserting a sovereign immunity defense ("16. […] Similarly, the ROC signed an agreement that waives sovereign immunity defenses. The Production Sharing Contract states, "[t]he Congo hereby irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court...." The plain language of "any immunity" indicates that sovereign immunity is also waived. Murphy does not argue, and this court has found no authority, suggesting the contrary. This "procedure" relates to the "arbitration decision" since Walker seeks to garnish funds owed to the ROC to collect on the ICC's judgment. 17. In addition, the ROC agreed to abide by the rules of the ICC which precludes the ROC from asserting a sovereign immunity defense. Rule 28(6) states, "[e]very Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." I.C.C. RULE 28(6). Therefore, we hold that the ROC explicitly waived its sovereign immunity. Accordingly, we need not address a potential implicit waiver.").

core of States' *jure imperii* activity.[40] Further, one may seek the identification by a given State, at the commencement of arbitral proceedings, of the commercial assets that will be available for execution; the practicality of this solution, however, is questionable, as it is doubtful whether States would wish to relinquish in advance this type of defense. Absent realistic prospects in this respect, a more practicable and immediate way forward may be the adoption, by execution courts, of more flexible rules of execution against the commercial assets of States, whether or not administered through a separate legal entity.

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[40] In France, *see* Paris Court of Appeal, August 10, 2000, *Ambassade de la Fédération de Ruissie en France et al. v. Compagnie Noga d'importation et d'exportation*, 2011 REV. ARB. 116, and note by Philippe Leboulanger (deciding that the parties' express waiver of the immunity from execution did not imply an unequivocal desire on the part of the State to also waive its diplomatic immunities: "la seule mention, sans autre précision, dans le contexte des contrats litigieux, que 'l'emprunteur renonce à tout droit d'immunité relativement à l'application de la sentence arbitrale rendue à son encontre en relation avec le présent contrat' ne manifeste pas la volonté non équivoque de l'Etat emprunteur de renoncer, en faveur de son cocontractant, personne morale de droit privé, à se prévaloir de l'immunité diplomatique d'exécution et d'accepter que cette société commerciale puisse, le cas échéant, entraver le fonctionnement et l'action de ses ambassades et représentations à l'étranger […]"); *see also* Paris Court of Appeal, September 26, 2001, *République du Cameroun v. Winslow Bank & Trust*, No. 2001/12633, unpublished, DALLOZ, I.R. 2017 (2001) ("[...] les biens d'un Etat étranger ne peuvent faire l'objet d'une procédure en vue de l'exécution d'un jugement, sauf si cet Etat y a expressément consenti, un tel consentement pouvant notamment résulter d'un contrat écrit; [...] si le contrat de prêt du 14 janvier 1988 contient un consentement de la République du Cameroun à l'exécution forcée, celui-ci est présumé ne pas s'appliquer aux biens et avoirs des représentations diplomatiques de l'Etat ou dont l'utilisation pour ces missions est prévue; [...] la clause usuelle des contrats internationaux de prêt selon laquelle l'Etat accepte de renoncer à l'immunité d'exécution en ce qui concerne l'ensemble de ses biens ou quelle que soit leur destination, ne constitue pas une renonciation à l'immunité d'exécution; [...] l'article 23 (K) et (E) du contrat de prêt du 14 janvier 1988, dont les termes rappelés ci-dessus ne désignent pas expressément les biens utilisés par les missions diplomatiques de la République du Cameroun, n'implique pas un consentement de cet Etat à l'exécution forcée sur ces catégories de biens.")

Mr. Jean-Claude Najar,
General Counsel, General Electric Capital, France and Senior Counsel EMEA
Honorary Founder & Member of the Steering Committee
Corporate Counsel International Arbitration Group (CCIAG)

I would really like to thank the OECD and UNCTAD for inviting me, because Yogi Berra did say that if you arrive at a crossroads you should take it. He also said that it isn't over until it is over, and this is going to be over when the man with the beard has spoken.

We heard a few very important words. Cost, efficiency, predictability, transparency, confidentiality, and there is a man in this room who will relate particularly to what I said: an arbitration is an arbitration.

One says that if it flies like a duck, if it swims like a duck and if it has the color of a duck, it is a duck.

We are in fact talking about basic, plain, venal arbitration. There was a time, when I worked for the distinguished gentleman who is sitting in the front row, William Craig, many years ago, when arbitration came, there were either ICC arbitrations or there were ICSID arbitrations. Nobody spoke about investment arbitration. There was the SPP (case), etc.

The comments that I am going to make, speaking on behalf of the users' community, and wearing more particularly my hat of Founder of the Corporate Counsel International Arbitration Group, go to the efficiency of the proceedings and how vital it is to the user.

I listened very carefully to two things that were said during the morning and the afternoon's sessions: "improve the understanding in treaty-making", said Angel Gurría when he introduced the topic.

Improve the dispute resolution mechanism: yes, *amen*, do improve the dispute resolution mechanism!

He said "this is a global forum for dialogue between the OECD, UNCTAD, and ICSID and other institutions" and I will get to that word of "other institutions". "Improving the process" was Anna Joubin-Bret's avocation to this assembly. Then when the Indian gentleman spoke, he spoke about "giving comfort to investors", and it was very appropriate that it should be an Indian gentleman because GE has invested very extensively in India, particularly in Bangalore, and this is the first country where we have created a so-called one GE entity where all the business is reported into one CEO and we go to market under one branding.

There were some talks about the appeal process: should there be one ?

Anything that adds cost, uncertainty, inefficiency to the system should be, in my view, looked upon very carefully.

Toru Shimizu spoke of better understanding, preventing role and stabilizing. He spoke of the business environment and of the cultural aspect. I am mentioning all of this to tell you that we the lawyers, speak about arbitration, and discuss the notions. But when you go and make an investment in a country, you go and negotiate a deal and it is the eternal issue that we faced for the last three or four decades: the dispute resolution mechanism is always the one that gets negotiated at the very end.

Having been an in-house Counsel for over twenty years and having served in many fields, I can tell you that whether it is investment arbitration or ICC arbitration or whatever arbitration, when two parties are in love and they are about to consummate their union, and in this case it is an investment in that country, and you raise the issue of the dispute resolution mechanism, you will get pretty much rejection from your business executives because they would have no understanding for this man or this woman who, at the end of the game, just as you are about to sign these so many pages, raises an issue that has no relevance to what is happening then.

Obviously the discussion is a bit different three or four years down the road, if a dispute does arrive. And there of course they would want you to have something that has as much efficiency, cost efficiency especially after the crisis, as much procedural efficiency and as much certainty as it has. Some of you may have read David Rivkin, *The Town Elder Model*, when he advocates going back to basics; the times when the *Town Elder* just decided the dispute.

So parties are really looking for as much efficiency and certainty as possible. Our colleague from Costa-Rica, Roberto Echandi, was saying, we are very far from where we should be, we are very far from where we want to be, and I will echo that.

I would end this overfly and this insistence on the practical elements of the dispute resolution mechanism by telling you this.

When we enter into an investment, when we go and seek an investment, we are obviously looking for returns, we are looking for opportunities to maximize our investments, we look at the competitive risks, comparative returns, we look for the right to repatriate the profits on our capital, whether we can use the investment in our worldwide business structure, the tax planning; and then the issues that generally we want to know about in investing is the legal and economic regime, political risks, whether there is a fair playing field, and then whether there is going to be no changes to the playing field. That is the consistency element that most speakers have mentioned one way or the other.

The Community I have the privilege of representing, the in-house Counsels and the CCIAG, this world has changed dramatically. From people who used to go in and draft contracts, in other words some people who would do what they are told, then we have turned into real business partners. So we sit next to our business colleagues and we advise them and preferably we advise them a step ahead of what they are going to do.

Therefore I would leave this assembly with one message: in the efficiency of an arbitral process, and we are talking about investment arbitration; but it is just one branch of arbitration, all the consistencies have a role to play. The arbitrators of course, the institutions, obviously the arbitrators – most of them Law Professors or practitioners, the outside counsels –we heard some distinguished representatives- and the in-house counsels.

My two messages would be:

1° Do remember, when you think about improvements to the system, of the ultimate efficiency and as much predictability as possible, because a system that becomes too complicated, too costly, too lengthy, I happened to share for example Emmanuel Gaillard's view on the appeals procedure, if an arbitration procedure is going to be one or whether there is going to be another step and then and then another step, very soon the demand will come from the business community, why do we need to go to arbitration ? Let's use the court system! It is simpler!

2° My plea to you would be, whatever you do, and this is one example of the successful response to the plea that I am going to make, do not forget about the in-house counsels community. They have a lot to contribute to what you are doing, they bring to you the world from within, they see the difficulties that companies have to face; they are involved in the decision-making, and I think that they are, as I hope I have been, a very valuable partner to these discussions.

Concluding remarks:

Ms. Lucy Reed, Partner, Freshfields Bruckhaus Derringer LLP, New York, United States

I would say that many of us in this room could talk about this subject for many hours and we will be doing that as a community and this conversation can only continue.

As a moderator I haven't offered any of my views on this, although those of you who heard me in Vancouver know that we would have to disagree on several things, including whether tribunals can create international law. But I will hold my tongue on that.

Again, thanks to the OECD and UNCTAD and ICSID and all the participants for allowing this continuation of dialogue. I think that solutions and changes in direction, if there is going to be changes in direction, will not come very quickly and they should not come quickly. They require a lot of examination and scrutiny.

I am going to end by asking the question that I said I would ask, but I agree with Loretta that I should modify the question and that is to ask whether we are at a crossroads in investor-State dispute resolution including the definition of crossroads, the relatively urgent need to stop and consider and assess whether the road on which one we are travelling is the right road to continue.

With that question, how many people think we are *not* at a crossroads in that field?

SESSION III: TWO CORE PROVISIONS OF INTERNATIONAL INVESTMENT AGREEMENTS AND THEIR IMPACT ON THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: DEFINITION OF INVESTMENT AND MOST-FAVOURED NATION TREATMENT.

Introductory Remarks:
Pr. August Reinisch, University of Vienna

Thank you very much. As you will see in a few minutes, this is the most exciting panel that we have here. We will see the Grand Finale on this panel.

We will focus on two very specific topics that recently have given rise not only to annulment, but also to a lot of scholarly comments, and to uncertainty among counsels as well as arbitrators. This is the notion of investment on one hand, and the interpretation of MFN clauses. We will start off with the investment notion.

Investment is very prominently the non defined thing that ICSID is all about. Sometimes we have to look at both IIA notion of investment and the ICSID notion of investment. That, as you can imagine, has given additional uncertainty.

I would like to ask our first two government panelists to share their views.

Definition of Investment in Bilateral Investment Treaties

Mr. Nikos Lavranos,
Senior Policy advisor with the Dutch Ministry of Economic Affairs, Agriculture and Innovation

I was asked to talk about investment. Briefly what I want to do is to start from where we are coming from, from a Dutch perspective; what are the current developments; and what the future trends are.

Where are we coming from? As you all know, the Netherlands is extremely active in terms of investment, attracting investment and also investing outside. On this basis, we hold a very liberal interpretation and definition of investment.

So we have a total, all encompassing definition of investment. That is what we have been using in our 98 BITs and we believe that it has served us extremely well in the past fifty years. That includes in particular also portfolio investment, which is the core issue I will talk about later. By the way, I have been reading an interesting article in the Harvard International Law Review that described the ICSID drafters' intention, and it came to the clear conclusion that the definition of investment should be as broad as possible. There should be no limitation, and that is our starting point when we look into BITs.

What is the current status? If you look at it, of course we have to look at famous cases, *Salini* Case, *Fedex* case, *Joy Mining* and other cases, what we have seen in the course of the time is that a number of elements have been introduced that define what an investment should be.

It is that there should be a risk, there should be the requirement of duration, the requirement of profit, there should be substance, a contribution to the development of the host State, etc.

These are in various combinations of the elements that have been introduced to define what an investment is. That is one trend.

Another trend can be found in the Canadian, the US and NAFTA policy, which works with lists. They work with positive lists trying to define as much as possible an investment. This is supposed to clarify, to provide more security in terms of what falls under the scope of the treaty and what doesn't.

Another trend that I have seen is that some types of investments are sometimes explicitly excluded. This is the most recent trend we have seen, which is in contrast to how we see investment and what is the very purpose of investment.

Another point is the developments in the EU, of which we are of course very much concerned by a number of developments at this moment. The first development is that apparently, the European Commission seems to exclude portfolio investment in its new policy, which I think is not the right way forward because it brings in again the mixed competence issue. We come to that in a minute.

Mr. Arif, who is the Rapporteur of the European Parliament on the future European investment policy, mentioned this issue in his working document. He also explicitly stated that portfolio investments should be excluded. And of course, the famous Mr. Schlyter, who was the Rapporteur of the European Parliament regarding the transitional regulation for existing Member States' BITs, is saying the same.

We have seen that there is, at the European level, a trend to exclude portfolio investment. This raises the issue of mixed competence; which was mentioned by Prof. Dolzer but also by the German Constitutional Court in its judgment on the Lisbon Treaty. I think it is quite common ground, at least from the member States perspectives, that portfolio investment belongs to the competence of the member States. Therefore, any future European investment treaty must be mixed, and that of course raises a number of other issues.

When we look at those trends, I think that the advantage of our holistic, all inclusive and all encompassing definition is quite clear, because we are not messing around with definitions. We are not limiting, trying to exclude certain types of investments, which is also useful for future arbitrators in future cases, because they know everything falls under it. There is no discussion on it.

I think this is one important benefit of having a definition of investment that is as broad as possible.

We should adopt a long-term perspective. BITs are concluded for ten, twenty or more years, and we know that nowadays, investment is not only anymore about setting up a factory. We see that investment takes place through shares, takes place through different financial instruments, through different chains of shares and other restructurings. Therefore, if you try to work with lists, or to exclude certain elements of investments, the danger is that they could fall outside the scope of the treaty. We don’t want that because we believe that all investments should be included, even if they are done through shares, etc.

For these reasons, in my view, and in the view of the Netherlands and many other States, I think it is very important to make sure that we use as few as possible limitations, because at the end of the day we want to stimulate investment. We want to stimulate modern types of investment and we don’t

want to create unnecessary policy spaces and other ways that host States can use to limit and to restrict investors. This is not helpful and it also creates the danger of diverging interpretations. We have seen that even the *Salini* test is not applied consistently by all arbitral tribunals. Adding more exceptions, adding more limitations creates only more divergence.

I think the Dutch example is an example that worked very well, that should be continued, also at the European level.

Definition of Investment

Mr. Hasan Aslan Akpinar,
Treasury Expert, General Directorate of Foreign Investment, Undersecretariat of Treasury, Turkey

First of all, I would like to thank OECD and UNCTAD for organizing this event and giving me this opportunity to address this esteemed gathering.

As a government representative, negotiating BITs from the start of my career at the Turkish Treasury, I can say that "the definition of investment" is the "trickiest part" of an investment agreement, and by far, it is the most important provision determining the scope of an investment agreement. A single word or a few words added to or omitted from "the definition of investment" may cost millions of dollars for a host Contracting Party.

That's why; during a negotiation "definition of investment" takes the biggest chunk of time. Also, it creates a lot of tension between delegations during negotiations, and it is one of the main reasons creating deadlocks during negotiations between capital exporting and capital importing countries.

Recent decisions of arbitral tribunals have also proved that "the definition of investment" is a critical part of an investment agreement. In many cases, while respondent states have tried to prove that investors had not made any investment, investors have tried to prove the opposite. This shows us that the classical "open ended definition of investment" provisions in investment agreements are too ambiguous, and they need some up-grades for greater clarity, at least from the view points of hosting Contracting Parties.

The coverage of "the definition of investment" is also closely related with the goals of the Contracting Parties, and it is a fact that the goals of the capital exporting and capital importing countries by signing investment agreements contradicts with each other. While capital exporting countries try to guarantee the best possible protection for all type of investments originating from their countries, capital importing countries sign these agreements in order to attract productive investments to speed- up their development. This clash of interests between the capital exporting and importing countries comes to surface during the negotiations on "the definition of investment".

For a capital importer country, a particular investment should have some characteristics. First of all, the investment should contribute to the economic development of the country by increasing the productive capacity of the country, creating employment, bringing technology and know-how, and

providing access to export markets. Furthermore, with the rise of awareness in many countries for the protection of environment, human rights, and labour rights, nowadays many host countries expect foreign investors to deliver all the classical benefits of FDI by respecting basic moral values of the hosting country as well as its laws and regulations. Additionally, Multinational Enterprises are expected to have Corporate Social Responsibility policies or programs

In this connection, many capital importer countries preferring foreign direct investments with the qualities that I have just mentioned view IIAs as a promotional tool to attract this type of investment. However, due to a lack of institutional capacity, these countries have signed IIAs dictated by capital exporting countries, protecting all types of investments. And when arbitrators are faced with such BITs with open-ended definition of investments, they bring their own interpretation and try to use characteristics such as duration, regularity of profit and return, risk, substantial commitment and significance for the host state development as criterions to decide whether there is an investment made by the investor. As a result, with the rise of international dispute settlement cases in the last decade, countries faced with controversial awards or decisions started to modify their BITs, and integrate new concepts, such as "the contribution to the economic development" as well as "the legality of investments" to characterize an investment.

Even though the concept of "contribution to the economic development" is open to discussion and requires a case by case analysis, the concept of "the legality of investments" is necessary to characterize an investment under a BIT. By using this concept, it is intended to provide the protection of a BIT only to those investments, which were made in accordance with the laws and regulations of a host Contracting Party by respecting all necessary legal conditions for the establishment of an investment, and are not in violation of national laws and regulations. To give an example, a casino established in a particular country where the gambling is prohibited, naturally would not get the protection of a BIT because of it would be in violation of the laws of the hosting country. Likewise, a factory established without taking required permissions from the hosting state, would not be entitled to the protection of a BIT.

When we come to the question whether the scope of investment under the ICSID Convention creating an impasse given the different interpretations by arbitral tribunals, I think that there is no need to give a definition of investment under the ICSID Convention. When we read the ICSID Convention, we should interpret the Treaty within the broader context that it belongs to. First of all, according to the Preamble of the ICSID Convention, ICSID was established under the auspices of the International Bank for Reconstruction and Development, whose primary task was defined as "working with middle-income and creditworthy poorer countries to promote sustainable, equitable and job-creating growth, reduce poverty and address issues of regional and global importance." So, by creating such an international facility for arbitration and conciliation, the Contracting States of the IBRD was considering to promote private international investment in order to reinforce international cooperation

for economic development. This shows us that the scope of investment under the ICSID Convention is limited with "private international investments that are conducive to economic development".

Secondly, even though the ICSID Convention does not define "investment" in its Article 25, it requires the written consent of the parties to the dispute, which is, in practice, a BIT signed by a host Contracting Party, and in its Article 25 (4), it gives the Contracting States the right of notifying the Centre classes of disputes which they would or would not consider submitting to the jurisdiction of the Centre, during ratification or at any time thereafter. This was also expressed openly by the Report of Executive Directors of the World Bank. However, so far only ten (10) Contracting States have submitted notifications for this purpose and two (2) of them withdrew their notifications later on. So, by inserting restrictive definitions of investment to their BITs or using Article 25(4) of the Convention, it is possible for a Contracting State to exclude certain types of investments from the jurisdiction of the Centre. For example, a few states chose not to submit disputes arising investments related to exploitation of natural resources, while my home country, Turkey gave a notification to the Centre to exclude disputes related to the property rights upon the real estates, and limiting the jurisdiction of ICSID only for the disputes arising directly out of investment activities having effectively started. In this connection, I think here we should ask the following question: while there are so many hosting states complaining about the contradictory arbitral decisions, why they do not amend their BITs or use Article 25 (4) of the ICSID Convention to control the damage?

Lastly, with regard to different interpretations or decisions of the arbitral tribunals established under ICSID mechanism, we should not put the blame on the ICSID Convention. Here, I think, the problem is related with the inexplicit provisions of Bilateral Investment Treaties, leaving a wide open space to arbitrators when taking decisions. In this respect, every state having problems due different arbitral decisions should review their BITs and not hesitate to amend them in the light of arbitral decisions.

Definition of Investment: Interpretations by arbitral tribunals

Mr. Arif Ali,
Partner, Crowell &Moring, Washington, D.C., United States

Let me first say that the "Mr. Arif" who was mentioned by Nikos Lavranos is not me! In fact my views are probably quite far from Mr. Arif's.

Secondly, let me depart from most of you in not thanking Katia and Anna, but to congratulate them on what has really been a remarkable conference in substance and in terms of debate. Hopefully you will be having this Symposium in years to come, although you probably won't invite me again in light of what I am about to say.

Let me start off by noting that, from a practitioner's perspective, I agree 100% with what Hasan Akpinar has said. This may well be because I am a Pakistani and Turkey is one of our best neighbors. Even so, I do agree with the approach that he has suggested from a substantive perspective.

That having been said, allow me to offer a few observations.

I think that at this point, arbitral jurisprudence is fairly well settled on what constitutes an investment for purposes of ICSID jurisdiction. Whether you agree with that particular emerging definition or you do not is perhaps a little bit beside the point, because there is today at least some sort of an emerging trend. A good summary of the current state of the case law can be found in the *Saba Fakes* decision[1], which was authored by Emmanuel Gaillard and two other eminent arbitrators[2]. I am sure Emmanuel took a strong drafting hand in that particular decision. Then again very recently, in the annulment decision in *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*[3], (the date of dispatch to the parties was December 1, 2010). I will quote to you a couple of different points, if I may.

The Committee says it is now beyond argument that "there are two independent parameters that are both to be satisfied: what the parties have given their consent to, as the foundation for submission to arbitration; and what the [ICSID] Convention establishes as the framework for the competence of

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1 *Saba Fakes v. Republic of Turkey*, ICSID case No. ARB/07/20, Award, 14 July 2010.

2 Professor Hans van Houtte and Dr. Laurent Levi.

3 ICSID case No. ARB/09/11, Award, 1 December 2010.

any tribunal set up under its provisions." Then the Committee cites a number of different decisions to support that proposition.

I would submit to you my opinion that the emerging jurisprudence, or at least what appears to be a tenuous or tentative consistency of views, is perhaps wrong – or at the very least legitimately open to re-examination. The problem is that it all started with an error that was made many years ago, and I think this error is hard now to rectify.

In my own view -- this a personal view, from an academic perspective -- I think that this suggestion that there is in fact an objective definition of investment in the ICSID Convention is incorrect. And I think that tribunals and annulment committees have stretched to try to come up with concepts and terms that you cannot find in the [ICSID] Convention. Let's just take a look at a couple of different statements which I think support what I believe Hasan and I were saying.

The only place that I can find the word "investment" in so far as this issue is concerned is Article 25 paragraph 1 of the ICSID Convention, which simply states that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment". You don't find anything about the nature or length of the investment, about risk, or some of the other elements of the *Salini*[4] test anywhere in the Convention. What you do find is a reference to economic cooperation and development, which is set out clearly in the preamble to the Convention and, as such, reflects a policy motivation underlying the Convention's development, objectives and eventual promulgation.

What have the committees and tribunals done? They have tried everything that they can do within their powers to circumvent that economic cooperation and development language, to construe it in ways that that language was never intended to be construed. In fact, if you look at the Word Bank Executive Director's report[5], commenting on the [ICSID] Convention, this is language that tribunals have tried to minimize the impact of. "No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre."

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4 *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001.

5 ICSID Convention, Regulations and Rules, ICSID/15, April 2006.

I do think that there are tribunals that have come close to getting it right. One of the tribunals is *Inmaris Perestroika*[6], in which the tribunal said that it is not persuaded that it is appropriate to impose such a mandatory definition of an investment through case law as the contracting States to the ICSID Convention chose not to specify one, and goes on to talk about the importance of the instrument of consent, specifically on the issue of economic development.

I would also commend to you what Judge Shahabuddeen said in the *Malaysian Salvors* annulment decision[7]. I do think he has gone a little far on some of the issues, but on the question of economic development and the rationale that was articulated by Hasan with reference to the negotiating history of the Convention, I think that there needs to be given greater thought to who was promulgating this Convention, at what time in history, and why, and then put in context what dispute settlement was supposed to accomplish with reference to what type of investments.

And very briefly, I think that the interesting issue on the instrument of consent is, what is the law that is governing, that should govern the construction of the instrument of consent, whether it is a bilateral investment treaty, or an investment agreement, or the investment legislation that is serving as the instrument of consent. What is very important to note here is we, as private parties, are not part of the negotiating dynamic between States. Governments can put into their treaties what they want to have as covered or protected investments and they can leave out of treaties what they choose not to. But I think that they assume certain risks and there have to be presumptions against the governments in the instance of ambiguity.

Investors themselves also bear certain responsibilities. At the time of planning an investment, negotiating with the government, or seeking approvals, if there is any ambiguity as to whether or not the investment is protected by the instruments of protection that are available, then they must get clarification, preferably in writing to avoid any ambiguity. My guess is that most tribunals will honor the definition of investment that has been agreed by the consenting parties.

Thank you very much.

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6 *Inmaris Perestroika Sailing Maratime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010.

7 *Malaysian Historical Salvers v. Malaysia*, ICSID Case No. ARB/05/10, Dissenting Opinion of Judge Shahabuddeen, 19 February 2009.

Most-Favoured-Nation Treatment in Investment Agreements: Scope and implications

Mr. Raimundo Gonzalez,
Head of Services and Investment and Air Transport Department, Ministry of Foreign Affairs, Chile

I will make my presentation on the Most Favorable Nation Treatment clause. What I wish to transmit to you is the concerns that some States have when they negotiate.

In *SGS v. Philippines*, it was stated that "ambiguities in investment treaty terms should be resolved in favor of foreign investors". When States negotiate, we always have to have this in mind because, as you all well know, in investor-State dispute settlement procedures, we must be aware of making clear what the intentions of the Parties were when negotiated the different kinds of disciplines of the treaties.

I have three general chapters in this presentation. The first is to determine the extension of the MFN clause; the second is on the MFN clause in the context of investment negotiation; and finally, on options.

The extension of MFN

In many cases, protection vis a vis Treaty shopping has been discussed. In some cases, MFN has been given in favor of the investor because the tribunal has interpreted that protection is the most important element of the Treaty. In other cases, it has been determined that what the investors wanted to achieve was Treaty shopping.

I want to mention three principles that relate to MFN: *Ejusdem Generis*, procedural issues, and jurisdictional issues.

In relation to *Ejusdem Generis,* according to the OECD, this principle is a rule according to which the Most Favourable Nation clause can only attract "matters belonging to the same subject matter or the same category of subject matter as to which the clause relates". It is supposedly a principle which is affirmed by practice and jurisprudence, and supposedly, everybody understands what is *Ejusdem Generis*. That is a supposition. Actually, there are some cases in which this principle has not been applied. The first one is *MTD v. Republic of Chile* in which a "granting of a license" was not a commitment of the Chile-Malaysia BIT. The investor who submitted the claim was a Malaysian national. However a similar commitment of "license granting", was included in the Chile-Denmark and the Chile-Croatia BITs. The Tribunal upheld that the State had the obligation to award a permit

even though it was not part of the basic treaty. Therefore an umbrella applied, although it was not part of the basic treaty.

In *Bayindir*, here we have a case where Fair and Equitable Treatment was not part of the basic treaty. This treaty did not have this substantive commitment. However the tribunal upheld that the investor could take advantage of the third party treatment, which had FET, awarded in the Pakistan-Switzerland BIT, on the grounds that it was a treaty concluded afterwards.

I do not want to enter into details on procedural issues regarding MFN because I am aware that there has been abundant research and doctrinaire development.

All of the cases that are against the State of Argentina, the first one and most famous is *Maffezini*. I wanted to highlight the *Siemens* and *Wintershall* cases which are based on the same BIT, but the conclusions of the tribunals are contradictory.

With regards to jurisdictional issues, there are other cases where the claimants wished to extend the jurisdictional threshold. In most cases, they were upheld against the investor. However, the *RosInvest v. Russian Federation* case was held in favor of the investor. the tribunal decided to accept an extension of MFN to jurisdictional issues, stating that it "was a normal result of the application of the MFN clause".

Finally, what is the extension of MFN ? It is uncertain.

MFN in the context of investment negotiations

The second element is that MFN modifies the outcomes of the investment negotiations and this is where the States play an important role. This is quite evident, but when States negotiate, there is a process where States try to accommodate each other's interest and proposals. A text which contains all of a country's specific proposals does not exist. Therefore there are gains and losses in negotiations. Negotiating implies that flexibility, and the conclusions of negotiations reflect a balance.

The problem comes when you negotiate an Investment Agreement that is part of a broader Treaty, such as a Free Trade Agreement. There the balance is more complex, and the gains and losses are balanced between the different Chapters that the States negotiate. The MFN treatment clause, in the perspective of the State, alters this balance and in some cases permits a treaty shopping, as I stated just before.

Options

Finally, I just wanted to say that negotiations are part of a balance of interests of different countries. But States are responsible in these negotiations and we understand that the MFN clause may alter their result.

Therefore, what some States are doing more and more is to try to clarify the definition of the Most Favorable Nation Treatment clause.

In most of the negotiations in which I have been involved, most countries have actually presented different kinds of proposals that refer to procedural issues, related to MFN. Some other countries have also presented proposals on jurisdictional issues and *Ejusdem Generis.*

Mr. David Pawlak,
Partner, David A Pawlak LLC

I want to thank Katia and Anna for inviting me to participate in this very interesting event. Knowing that I would be the last presenter of the day, I decided that it would be useful to add a bit of levity to the presentation. I want to thank Raimundo for highlighting the key MFN issues that disputing parties and investor-State tribunals face.

In my comments, I will use a familiar fable to challenge the States' representatives here to consider the extent to which there is a real or valid concern about the use of MFN clauses in investor-State dispute settlement.

Specifically, I want to focus on Raimundo's third category of cases (*Salini, Plama, Telenor, Berschader, RosInvest)*: the types of cases where the claimants are invoking MFN clauses to try to expand the narrow scope of a jurisdictional clause that is limited to, for example, compensation for expropriation.

When Raimundo sent me the preview copy of his MFN presentation, I had just finished reading the "Chicken Little" nursery tale to my two and a half years old son. The story also goes by several other names, "Henny Penny", "Ducky Lucky" or "Foxy Loxy," and I am told that this story has its origin in Buddhist scriptures dating from the year 322.

While not all of you may have children, everyone here was a child at some point so maybe this will resonate with you.

Chicken Little may contain a useful lesson in view of all the attention, and sometimes concern, which is raised with respect to MFN clauses, particularly in *fora* such as this one, and among investor-State "stakeholders," to borrow a term from UNCTAD.

Allow me to briefly describe the story of Chicken Little; as you can imagine it is a simple one. The story is that Chicken Little believes that the sky is falling when an acorn falls on her head. Chicken Little creates a stampede among the other animals in her panic to tell the King that the sky is falling. The story is intended to teach the need for investigation and reasoned analysis, or simply that we should not believe everything that we are told.

Given the limited time, I am going to focus on MFN clauses in this third category of cases on the screen (*Salini; Plama; Telenor; Berschader;* and *RosInvest*). Raimundo justifiably noted the *RosInvest* case, and he said this causes us great concern as a negotiating party to treaties. But let's take a step back, and look more broadly at this third category of the MFN cases and their outcomes, to identify whether what we are dealing with here is the sky falling or an acorn tapping the investor-State dispute system on its head.

Before we take that step back, I note that the conventional wisdom is that using MFN clauses to attract more favorable substantive obligations that are not found in the basic treaty is not terribly problematic or not as problematic as using MFN, for example, to override a very narrow jurisdictional clause.

I am not sure, however, why that is the conventional wisdom. For example, I have some doubts that Pakistan was content with the application of the MFN clause in the *Bayindir* case that Raimundo highlighted a few moments ago. If you are a Pakistani negotiator, you might have a concern about that kind to approach to MFN clauses.

Returning the focus to the use of MFN clauses in treaties with a narrow jurisdictional scope, I think this is the area where the Chicken Little story may have the most utility for informing our view of the cases. The common pattern in this category of cases is that the treaties limit investor-State dispute settlement to expropriation only or, even more narrowly, to the amount of compensation for expropriation. These are treaties that are sometimes referred to as "Chinese style" treaties, and I also have heard them described as the "Soviet-area" treaties.

The claimants invoke MFN seeking to expand the narrow jurisdictional scope to a more expansive jurisdictional clause of another treaty entered into by that host State.

The concern on the part of governments and some commentators that the sky may be falling has been raised following several cases that have stated that MFN could be, *could be* I emphasize, used to expand the narrow jurisdictional scope of the basic treaty. Two fairly recent such decisions include *Renta4 v. Russia* and *Tza Yap Shum v. Republic of Peru*. For example, the *Tza Yap Shum* tribunal determined that

> "the words of the MFN clause in itself seem to be open to broad interpretation, which may include, providing access to more favorable procedural protections (that potentially would include ICSID arbitration)."

That tribunal went on to hold, however, that under the specific terms of the treaty between China and Peru, the MFN clause did not in fact serve to expand the jurisdictional scope of the treaty. In broad terms, the *Renta* tribunal's decision under the Spain-Russia BIT is similar in its result.

With colleagues from Bratislava here in the audience, I would be remiss if I failed to mention the most recent decision reaching a similar result on the MFN issue is *Austrian Airlines v. Slovakia*, which is publicly available in redacted form.

In view of *the results* of these recent MFN cases, we see that maybe the sky is not falling. *RosInvest* is the case that Raimundo noted gave rise to concern among States. But that is the lone case of which I am aware where a tribunal in fact relies upon the MFN clause to expand the jurisdictional scope of the basic treaty's dispute settlement provision. And in that case, interestingly, the tribunal was explicit that its holding was not intended to address "the much more general question whether MFN clauses could be used to transfer arbitration clauses from one treaty to another".

We have a pattern that seems to have emerged. First, several tribunals have denied outright the use of the MFN to expand the jurisdictional scope, as for example in the *Plama* case.

Second, where several tribunals have declared, as a general matter, that an MFN clause *may* be used to expand the jurisdictional scope granted to investor-State tribunals, they have not done so *in the result* of the case. This may reflect some misgivings on the part of tribunals about going in that direction.

Third, even in the *RosInvest* case, the one case that applies an MFN clause to expand jurisdiction, the tribunal expressly stated that it was not endorsing the practice of transferring arbitration clauses among the treaties.

In view of this pattern in the case outcomes, the concern of the governments that MFN clauses *could be* used expansively has not materialized in tribunal awards.

In conclusion, I will ask the question: is the sky really falling, or has the MFN acorn merely tapped Chicken Little on the head?

Concluding Remarks:
Pr. August Reinisch, University of Vienna

It seems that the conversation is really going on and on. But I am afraid we have to close this panel. Let me take this opportunity to thank again OECD and UNCTAD, and in particular Anna and Katia for putting together such an interesting whole day symposium like this one, and please join me in thanking all the panelists once more.

I am now giving the floor to the co-chairs who will conclude this.

CONCLUDING REMARKS BY CO-CHAIR H.E. RAÚL SÁEZ

It has been a long day so I will be very brief in my concluding remarks and I will pass the floor to Ms. Li Ling. There is no way I could in these concluding remarks be fair or reflect the quality and deepness of the presentations, interventions and discussions that we had today. I would just try to point out that I think that this exercise is something that we should try to do more often and encourage OECD and UNCTAD to continue in this type of dialogues regarding international investment agreements.

There are trends and discussions regarding the current state and the future of international agreements both from the side of the negotiations at the bilateral and the regional levels, and then what is the evolving situation in the investor-State dispute settlement system; which are I think the basic issues that we touched upon today. A number of issues and questions were raised today that I think deserve further discussions and dialogue. In the morning we saw that we now have a very large number of international investment agreements in place, either as stand-alone agreements, or as chapters in Free Trade Agreements, or also as part of regional integration schemes where more than two countries participate.

The structure under which international investment agreements have been negotiated is evolving, but there are many which are still negotiated as stand-alone as I said, but there is a growing trend to make them part of more comprehensive trade agreements. I think that raises a lot of new issues and I think the decision made by the EU as a result of their commitment under the Lisbon Treaty is perhaps an example of where we are moving.

There is a great diversity in the texts, even when they refer to the same provisions: definition of investment; MFN treatment; national treatment and all those vary from text to text. This has caused consequences for the implementation of reforms and has consequences for the room of maneuver that policy makers have, and of course it has consequences for potential investor-State disputes. That leads to the question: should we have a dialogue about a possible model of bilateral investment treaty or model investment chapter in Free Trade Agreements? Using the words of Mr. Legum, should we try to have an architecture that provides consistency? I think that is an issue that came out this morning. Then in the afternoon many other issues were put on the table when we discussed investor-State dispute settlement: the issue of transparency, predictability, annulment of ICSID awards, the need for perhaps an appellate body – some of the panelists agreed to that it was appropriate to have an appellate body, some others did not see the need for that - and the issue of enforcement of awards. Addressing the choice of arbitrators and the conflict of interests was also raised. And something that I think is particularly important for people like myself who come from Ministries of Finance, the cost and the length of controversies with investors.

In the end of the afternoon, we just finished the session on two provisions, but I think we could have large very significant discussions for a while on other provisions such as fair and equitable treatment, for example transfers and the relationship to transfer commitments and capital controls, which was raised this morning by some of the panelists.

I think clearly we only have managed to put these issues under the spotlight. But clearly further dialogue is needed to address some of the difficulties of the system, which are perceived by practitioners, policy makers and legal experts, and also by the institutions.

The Symposium was very well organized, and it made life easier for the co-chairs having such good moderators and such good participants, which really moderated a good discussion. We should not lose the momentum created by this symposium and OECD and UNCTAD should soon organize some type of follow-up activity or follow-up programme to this symposium.

I finish on congratulating UNCTAD and OECD for leading and starting this discussion.

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