

**The British Institute of International and Comparative Law**

**50th Anniversary Event Series**

***Investment Protection and the Rule of Law: Change or Decline?***

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by

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***A Few Words of Welcome***

Distinguished guests, dear colleagues, chers amis:

Thank you to the organizers of this conference for the invitation to speak today. I am both honoured and flattered to participate in this event celebrating the golden anniversary of the British Institute of International and Comparative Law.

Since its inception, the Institute has been singularly influential in promoting the rule of law in international affairs. It has been devoted to encouraging the understanding, development and practical application of international and comparative law.

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\* With thanks to my colleagues, Alison FitzGerald and Renée Thériault, members of Ogilvy Renault's International Arbitration Team, for their assistance in preparing this address.

I have been asked to share with you today my thoughts on international investment protection: past, present and future and the Rule of Law. In so doing, my mission is two-fold. First, to highlight the dramatic, and I would add rapid, change that has taken place in the international legal investment landscape. And second, to consider some of the recent challenges and areas of debate in the field with a view to reaching some conclusions, however tentative, about where investment protection is going in the future and whether or not in its journey, it will continue to be influenced by the Rule of Law.

By way of introductory remarks, I observe that the Institute itself has dutifully taken on a leadership role in the field by establishing a centre for investment treaty research and policy discussion -- The Investment Treaty Forum. As may be gleaned from the Forum's mission statement, it builds upon the Institute's existing activities in the fields of public international law and international commercial arbitration. Considering the remarkable pace at which international investment protection continues to evolve, we are all keenly aware of the importance of serious debate and the need for authoritative comment in the field. The Forum has set out to achieve this by, in its words, "sharing the reputation enjoyed by the Institute for independence, even-handedness and academic rigour, and by drawing on the expertise of Forum and Institute members". Its Director, Norah Gallagher, accepted to lead this initiative in early 2008, and as a Patron of the Forum, I wish to congratulate Norah on her awesome contribution in the short year since she has been at the helm.

***The Birth and Development of the International Investment Protection System:  
Gradual Change or Quantum Leap?***

It will not have gone unnoticed that the Institute shares its golden anniversary with that of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, one of the countless gems in the United Nations' legal crown. The role of the New York Convention, in fulfilling the promise of international arbitration generally and investment arbitration in particular, speaks volumes about a theme close to my heart, the United Nations as an agent of progress in the international legal field. It is by no means a coincidence that the UN Charter itself defines its mandate in a manner that is reminiscent of the Institute's own *raison d'être*, encompassing "the progressive development of international law and its codification". With 143 signatory States and counting, the adoption of the New York Convention fifty years ago has proven immensely fruitful in this regard, even if the UN's wider task in relation to peace and security continues to evolve and take shape.

In preparing for this address, I was reminded of a paper entitled "The International Rule of Law" written in the early nineties by our dear friend and colleague, the late Sir Arthur Watts, one of the most highly regarded, and widely liked, British international lawyers of his time. Arthur observed in 1993 that "[t]he transition from the establishment of international order by the hegemonic power of one, or a few States, to the full establishment of the international rule of law is a still-continuing process".<sup>1</sup> And so it has, and continues to be, in the field of international investment protection.

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<sup>1</sup> Sir Arthur Watts, "The International Rule of Law" (1993) 36 *German Yearbook of International Law* 15 at p. 45.

Along similar lines, my friend and colleague, Steve Schwebel, in a recent piece aptly entitled “A BIT about ICSID”, reminds us of how far we have travelled by asking that we “[c]onsider where the law of foreign investment has been not only for the last twenty-five years but the last fifty, from the time when Western imperialism expired and the ranks of capital-importing independent States expanded essentially from Latin America to include Asia and Africa”.<sup>2</sup> Steev adds: “If we recall the constellation of countries circa 1960, there was a legal as well as economic gulf between capital-exporting States and capital-importing States. There was a great gulf on the substance of the governing law – if any. There was a great gulf on international legal process – if any.”<sup>3</sup>

Whilst it is true that expropriation claims have been a live issue in international law “since antiquity”<sup>4</sup>, it is equally true that the protections afforded to foreign investors with expropriation grievances today are of an unprecedented magnitude, in large part due to the ever-growing network of investment treaties, in particular bilateral investment treaties or BITs. In a mere 50 years, the number of BITs has gone from 0 to nearly 3000 by some accounts – a quantum leap in historical terms. And there is no turning back: The emergence of BITs, coupled with “dethroning the State from its status as the sole subject of international law”<sup>5</sup>, have fundamentally altered the international investment landscape.

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<sup>2</sup> Stephen M. Schwebel, “A BIT about ICSID” (2009) (to be published in the ICSID Review – Foreign Investment Law Journal) at p. 1.

<sup>3</sup> *Ibid.*

<sup>4</sup> Tom Ginsburg, “International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance”, (2005) *International Review of Law and Economics* 107 at p. 109.

<sup>5</sup> Stephen M. Schwebel, “A BIT about ICSID” (2009) (to be published in the ICSID Review – Investment Law Journal) at p. 4.

In these brief remarks, I will elaborate on examples which illustrate, in my view, how the emergence of BITs has fostered a far more secure and fair investment environment and, indeed, a greater respect for the rule of law. A few well known facts need to be recalled.

As we all know, the very first BIT was concluded between Germany and Pakistan 50 years ago this year, in 1959. The number of BITs grew at a slow pace in the years that followed, but surged in the late eighties and early nineties from approximately 500 to over five times that number today. No less than 179 countries have entered into one or more such agreements.<sup>6</sup> It is projected that investment inflows worldwide will be close to US\$1.5 trillion by 2010.<sup>7</sup> By any measure, and whatever may be the impact of the present economic turmoil, such figures are startling.

Just as telling is the pace at which international investment treaty arbitration has evolved. One recent empirical study surveyed a sample of reported investment treaty claims, of which over 90% had proceeded under the Arbitration Rules established pursuant to the Washington Convention. When one considers that only 10 years ago, the ICSID Secretariat had handled but a handful of cases since its creation in the 1960s, and that in the last 10 years, nearly 300 treaty claimants have elected to proceed under the ICSID Rules, one can only observe with amazement how far we have come in terms of establishing an effective framework for the

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<sup>6</sup> UNCTAD's World Investment Report 2008.

<sup>7</sup> Susan D. Franck, "Empirically Evaluating Claims About Investment Treaty Arbitration" 86 (2007-2008) *North Carolina Law Review* 1 at p. 7, quoting the Economic Intelligence Unit, *World Investment Prospects to 2010: Boom or Backlash* 6 (2006).

resolution of investment disputes.<sup>8</sup> At this juncture, I cannot help but share with you my pride as a Canadian at the recent appointment of Ms. Meg Kinnear as ICSID's first full time Secretary General. I am confident that Meg will continue to foster ICSID's success.

Statistics aside, an informed observer of what some have called the "movement toward treatification"<sup>9</sup> will know that BITs were initially entered into between an industrialized country on the one hand, and a developing country on the other. The goal, at least initially, was to refrain host country action against the interests of the investors by ensuring that legal commitments made to investors could resist the forces of change often demanded by the political and economic life in host countries. Thus, the first generation of BITs were structured to achieve this goal by (i) subjecting the host State to a set of international legal rules applicable to its dealings with foreign investors and (ii) giving the foreign investors themselves the right to bring a claim in international arbitration against the host country in the event of a violation of those rules. In the absence of BITs, foreign investors were limited to the host country laws alone for the protection of their investments, which was considered by many to be an impediment to global economic development.<sup>10</sup> Indeed, for many investors, the risks were simply too great:

"Host governments can easily change their own domestic law after a foreign investment is made, and host country officials may not always act fairly or impartially toward foreign investors and their enterprises. Investor recourse to local courts for protection may prove to be of little

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<sup>8</sup> Barry Appleton, "Comparing ICSID and *Ad Hoc* Treaty Arbitration" (2007) 2(3) *Global Arbitration Review* 11 at p. 11.

<sup>9</sup> Jeswald W. Salacuse, "The Treatification of International Investment Law" (2007) 13 *Law and Business Review of the Americas* 155 at p. 156.

<sup>10</sup> Jeswald W. Salacuse & Nicholas P. Sullivan, "Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain" (2005) 46(1) *Harvard International Law Journal* 67 at p. 75.

value in the face of prejudice against foreigners or governmental interference in the judicial process. Indeed, these fears were realized in the 1960s and 1970s when numerous instances of interference and expropriation of foreign investments by host country governments occurred.”<sup>11</sup>

The BIT movement, and its incorporation of international arbitration as a mechanism for the resolution of treaty disputes, is, in essence, a movement beyond the Calvo doctrine in the sense that, whilst the principle of non-intervention among States has been respected, the companion principle of absolute equality between foreigners and nationals in respect of recourse to local national courts has not.<sup>12</sup>

Since the first generation of BITs between capital-exporting countries and capital-importing ones, there has been a flurry of “BITs amongst equals”, so to speak. This has been the source of some debate – particularly in relation to the impending Lisbon Treaty – to which I will return in a moment, but it bears mentioning at this juncture that most BITs today, regardless of the particular status of the country parties thereto, share similar if not identical substantive and procedural protections. Does this mean that all BITs are the same? I have tackled this question elsewhere, inspired in my answer by the writings of Christoph Schreuer who refers to such factors as the presence of model BITs and the comparative bargaining power of the negotiating parties:

“BITs are typically based on model treaties. Many States have model BITs which serve as a starting point for negotiations with a prospective treaty partner. To what extent the final product will resemble a country’s model will depend on the relative weight of the negotiating partners, on whether the other country also has a model

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<sup>11</sup> *Ibid.*.

<sup>12</sup> Michel Calvo, “Comments on the 7<sup>th</sup> Geneva Global Arbitration Forum” (1999) 16:2 *Journal of International Arbitration* 129 at p. 130.

BIT that it wants to promote and on the general circumstances of the negotiations.”<sup>13</sup>

Be that as it may, prior to the advent of the BIT, international investment protections were essentially the product of customary international law, whereas today, “treaties have become the fundamental source of international law in the area of foreign investment”.<sup>14</sup> Naturally, this has been pivotal in the encouragement and protection of foreign investment, and indeed BITs often make this explicit in the very title and preamble of the instrument. It has also heightened the importance of international investment law, which is now considered to be “of immense practical concern to a much wider audience, including the practicing bar, environmentalists, nongovernmental organizations, multinational companies, and governments, both industrialized and developing, who sometimes question the consequences of what they have created over the last four decades”.<sup>15</sup> To be sure, investment treaties can no longer be ignored when embarking upon international investment transactions. As a result, “participants adjust their behaviour to avoid or minimize the costs of non-compliance, thereby restoring equilibrium in investment arrangements, bolstering international investment law’s credibility and promoting international investments”.<sup>16</sup> And so the wheel turns, at least in principle.

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<sup>13</sup> Christoph Schreuer, “Diversity and Harmonization of Treaty Interpretation in Investment Arbitration”, 7 February 2006 at p. 8 (quoted in Yves Fortier, “The Canadian Approach to Investment Protection: How Far Have We Come?”, to be published in 2009).

<sup>14</sup> Jeswald W. Salacuse, “The Treatification of International Investment Law” (2007) 13 *Law and Business Review of the Americas* 155 at p. 157.

<sup>15</sup> *Ibid.* at p. 163.

<sup>16</sup> Tai-Heng Cheng, “Power, Authority and International Investment Law” (2005) 20 *American University International Law Review* 465 at p. 467.



The emergence of BITs has not occurred in isolation: the creation of organs such as the European Court of Justice and the World Trade Organization, as well as multilateral instruments such as NAFTA and the Energy Charter Treaty, and of course the Washington Convention, to name but a few, have all contributed to a multiplication of the “voices” now heard in international law.<sup>17</sup> Some might say that with all these voices, the room has grown noisier or, to quote my friend Professor Reisman, the system has become somewhat more complex. Which brings me to share with you his keen observations in this regard:

“In international law, as elsewhere, the whole is not greater than the sum of its parts. The international legal system is not a unified and coherent decision-maker. It is a complex and modular process in which governments, the secretariats of inter-governmental organizations and an array of private actors operating within and outside of states pursue interests genuinely common to all of them. [...] In this complex process, everyone is seeking increased trade and investment and appreciates their centrality in the achievement of many other development and political transformation goals. But they often disagree on the fine print. International law must balance claims for respect for the special requirements of national communities, which is their very *raison d'être*, and concern for which is one of international law's central postulates, against the need for sustaining the international Rule of Law so that economic activity can continue to flow freely about the globe. International law must accomplish this in an environment in which short-term political interests, often driven by intense domestic constituent pressures as well as by power considerations, may lead to critical states actors to try, in cases of special concern to them to set aside the law for *raison d'état*.”<sup>18</sup>

As an arbitrator who has seen his fair share of international investment disputes, I can assure you that the task of accommodating the competing interests

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<sup>17</sup> Andrea Kupfer Scheider, “Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized” (2006) *Journal of Dispute Resolution* 119 at p. 128.

<sup>18</sup> Michael Reisman, “Economic Development, National Sovereignty and International Arbitration”, paper prepared for delivery to the Arbitration Congress in Santa Fe de Bogotá, Columbia, 3 November 2005 at p. 11 and 13.

described by Professor Reisman is a challenging one indeed, to be undertaken one case at a time, on the merits of each claim, as argued by the parties and deliberated upon by the tribunal. But as pointed out by Judge Schwebel, given the “immense number of treaties, the virtual universality of their adherence, and the predominant consistency of their terms, there is room for the view that they have reshaped the body of customary international law in respect of the treatment and taking of foreign investment”.<sup>19</sup> Judge Schwebel in fact surmises that certain core features of BITs, such as those regarding fair and equitable treatment as well as prompt, adequate and effective compensation, “have seeped into the corpus of customary international law, with the result that they are binding on all States including those not parties to BITs”.<sup>20</sup> That is an interesting observation which may be deserving of another conference someday.

I will leave it to Judge Schwebel to defend his views, but I will take the opportunity to share with you some thoughts on the relationship between investor-State arbitration and the development of the rule of law. However trite, the investment arbitration community must remember, first and foremost, that an arbitral tribunal’s duty is to apply the law. It is not to play politics. In fact, “depoliticizing” investment disputes goes to the very essence of BITs and other international investment agreements, to insulate them from the political playing field and address them as part of the commercial arbitration one. This is not only essential to ensuring greater enforceability of international investment awards, but

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<sup>19</sup> Stephen M. Schwebel, “A BIT about ICSID” (2009) (to be published in the ICSID Review – Investment Law Journal) at p. 5.

<sup>20</sup> *Ibid.*

also key to ensuring that “the infrastructure of international law can sustain a robust global economy”.<sup>21</sup>

And this, I put to you, has a heightened resonance today amidst the global recession we all face. Will the global recession mean more or fewer investor-State arbitrations? I think that we are likely to see more investor-State arbitrations, not fewer, and that the nationalization, whether complete or partial, of financial institutions may give rise to a new form of investor-State disputes. It is, therefore, all the more pressing that we turn our minds to the health of the investment treaty system, and its ability to deliver practical, meaningful solutions, through a legitimate process, to today’s investment disputes.

Many have emphasized that “[t]he rule of law is essential to those participating in the global economy”<sup>22</sup>. I could not agree more. The issue, fundamentally, is one of legitimacy, as Professor Susan Franck has astutely explained:

“Without the clarity and consistency of both the rules of law and their application, there is a detrimental impact upon those governed by the rules and their willingness and ability to adhere to such rules, which can lead to a crisis of legitimacy. Legitimacy depends in large part upon factors such as determinacy and coherence, which can in turn beget predictability and reliability. Related concepts such as justice, fairness, accountability, representation, correct use of procedure, and opportunities for review also impact conceptions of legitimacy. When these factors are absent individuals, companies and governments cannot anticipate how to comply with the law and plan their conduct accordingly, thereby undermining legitimacy.”<sup>23</sup> (emphasis added)

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<sup>21</sup> Daniel P. Price, “Chapter 11 – Private Party vs. Government, Investor-State Dispute Settlement: Frankenstein or Safety Valve?” 26 (2000) *Canada-United States Law Journal* 107 at p. 112.

<sup>22</sup> Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration : Privatizing Public International Law Through Inconsistent Decisions” (2004-2005) 73 *Fordham Law Review* 1521 at p. 1584.

<sup>23</sup> *Ibid.*

As an arbitrator, I might add that while there is certainly room for improvement in the international investment area, the field remains a relatively new terrain which is maturing exponentially. But, it is still flexible and adaptable. The time is ripe for a look at possible means of improving the development of the rule of law in the field of investor-State arbitration, and I will share a few musings with you in this regard.

***The Sustainability of the International Investment Protection System: The Next Fifty Years and Beyond***

I take as my starting point some of the criticisms levelled at the international investment protection framework and, in particular, the investment treaty arbitration process. I propose to consider whether and, if so, how these criticisms are being addressed, in order that we may have a better understanding of the “critical path” towards enhanced legitimacy and sustainability of the international investment protection system as a whole.

None of these criticisms will come as a surprise to any of you. Indeed, the words “transparency”, “consistency” and “equity” ring loudly in the ears of all actors in the system. And whether or not you agree with a particular criticism, I submit that the concerns expressed cannot be ignored, lest we truly imperil the system.

***Beginning with Transparency.*** The lack of transparency in investment treaty arbitration is perhaps the most widely shared criticism of the system – and the area

in which the most progress has been made to date.<sup>24</sup> As I have said elsewhere, parties, arbitrators and arbitral institutions have begun to grapple with the tension between the traditional closed-door model of international commercial arbitration and the arbitration of disputes involving governments accountable to their citizens.

This is not to say that this issue has been easy or uncontroversial among the core participants in investment treaty arbitration. Many parties, both States and investors, continue to insist on confidentiality in disputes under various institutions and rules frameworks.<sup>25</sup> This reality is critical to understanding the landscape against which the trend towards transparency is taking shape. The ground is indeed shifting toward greater transparency.<sup>26</sup>

Transparency initiatives are taking place in both an *ad hoc* and an institutional environment, and involve efforts to open the arbitral process to the public through various mechanisms, such as the participation of third parties or *amici curiae*, the holding of open hearings, and the publication of awards as well as other documents prepared in the course of an arbitration proceeding. The new ICSID Arbitration Rules, which entered into force in 2006, are an excellent example of progress on all of these fronts. If one also considers the developments within the NAFTA Chapter 11 framework and the growing body of arbitral awards

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<sup>24</sup> Meg Kinnear, "Transparency and Third Party Participation in Investor-State Dispute Settlement", a paper presented at the symposium organized by ICSID, OECD and UNCTAD, titled "Making the Most of International Investment Agreements: A Common Agenda", in Paris, on 2 December 2005.

<sup>25</sup> Karl-Heinz Bockstiegel, "Transparency and Third-party participation in Investment Arbitration", in Rainer Hoffman and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) at p. 209.

<sup>26</sup> L. Yves Fortier, "Arbitrating in the Age of Investment Treaty Disputes" (2008) 31:1 *University of New South Wales Law Journal* at pp. 290-91. See also Carl-Sebastien Zoellner, "Third-Party Participation (NGOs and Private Persons) and Transparency in ICSID Proceedings" in Rainer Hoffman and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 179 at p. 197.

dealing with different aspects of the transparency issue, the gains made towards greater transparency in a very short period of time are remarkable.

It bears recalling at this juncture that the investment protection system is, at its core, based on consent. This consent encompasses not only consent to arbitrate in the narrow sense of this term, but consent to the entire system of investment treaty arbitration, its evolution and future developments. It follows that increased transparency could, in certain situations, require a new definition of the scope of State consent to investment treaty arbitration.

In this connection, my friend Professor Brigitte Stern has observed that developments in transparency, and in particular the involvement of *amici curiae*, are changing the very model on which the system is predicated. In her words:

“[T]here has been a progression from a consensual commercial arbitration system between two parties connected by contractual links to a completely different quasi-obligatory international arbitration system to which investors may seek recourse, once they deem that an action by the state, on whose territory they have invested, poses a serious threat to their economic interests. It is therefore clear that not only problems involving disputes between contracting parties are at stake, but also that issues related to various regulatory State actions directly related to the public interest may be raised in this new type of arbitration. [...] [T]he participation of the *amici curiae* in investor-state arbitration is [...] consistent with the changing nature of investor-state arbitrations and the complex issues of public policies that tribunals are increasingly being called upon to address. [...] [T]his system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society.”<sup>27</sup>

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<sup>27</sup> Brigitte Stern, “Civil Society’s Voice in the Settlement of International Economic Disputes” (2009) *ICSID Review – Foreign Investment Law Journal* 280 at p. 347.

We must not forget, in the momentum carrying us towards greater transparency, that there are costs to this trend, and the question of who bears those costs is as relevant to the legitimacy of the system as the goal of transparency itself.<sup>28</sup> The cost-benefit analysis of increased transparency ought not to prevent the arbitration community from adopting proposals that are likely to improve the system's functioning and enhance its legitimacy. However, as Noah Rubin recently observed, the costs of various transparency measures are not necessarily apportioned equally among the system's participants, nor are their benefits.<sup>29</sup>

Returning to the point I made earlier in respect of the de-politicization of disputes through use of the arbitral model of dispute resolution, a concern with "pre-award transparency", that is the participation of *amici curiae*, the publication of pre-award decisions, and open hearings, among other measures, is that both claimants and respondents can use this kind of access as a weapon, contrary to the very principle of neutral, non-political dispute resolution.<sup>30</sup> And so it follows that "[p]oliticized disputes are less predictable in outcome than legal disputes, and therefore hinder FDI flows by making them more expensive".<sup>31</sup>

***Turning now to Consistency.*** This leads me to the second area of criticism levelled at the international investment protection system – consistency in arbitral decision-making. Interestingly, the source of this call for greater coherence has been ascribed by some to the very transparency of many investor-State arbitrations.

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<sup>28</sup> Noah Rubins, "Opening the Investment Arbitration Process: At What Cost, for What benefit?" in Rainer Hoffman and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 179 at pp. 217-222.

<sup>29</sup> *Ibid.* at pp. 220-221.

<sup>30</sup> *Ibid.* at p. 222.

<sup>31</sup> *Ibid.*

The implications of such inconsistency for investors and States are fundamental. As Professor Franck has explained, “[s]ome public international law rights have been articulated for the first time in investment treaties – such as the right to ‘fair and equitable treatment’ and a Sovereign’s obligation to ‘observe its commitments’.” Tribunals, she says, “have applied these standards differently and made divergent findings on liability. Rather than creating certainty for investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.”<sup>32</sup>

There are suggestions in some quarters that participants in the international investment protection system are unable to know or determine with any certainty their rights and obligations in a given situation. The criticism has given rise to a call for the establishment of an appellate system or body to remedy this perceived situation. Such a system or body would, as the theory goes, reduce the risk of inconsistent decisions, lend legitimacy to and institutionalize the process of investor-State dispute settlement and contribute to the system’s overall sustainability.<sup>33</sup> Taking these and other elements into consideration<sup>34</sup>, every now and then critics clamour for the creation of an appellate structure within the international investment protection system which they aver would ensure predictability, clarity and coherence in the interpretation of investor and State

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<sup>32</sup> Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration : Privatizing Public International Law Through Inconsistent Decisions” (2004-2005) 73 *Fordham Law Review* 1521 at p. 1523.

<sup>33</sup> Doak Bishop, “The Case for the Appellate Panel and its Scope of Review”, a paper delivered at the Second Conference of the BIICL’s Investment Treaty Forum on “Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?” (7 May 2004) at p. 9.

<sup>34</sup> Such as the success of the WTO Appellate Body in the global trade context.



obligations,<sup>35</sup> now and then critics clamour for the creation of an appellate structure within the international investment protection system.

The proponents of an appellate system recognize that a proper appeals arrangement will not be implemented easily. Nearly 20 years ago, Eli Lauterpacht, after having reviewed the options before the international society concluded that:

“The solution to this question is so fraught with difficulties that we may find that, despite its idealistic appeal, a proper appeal’s arrangement was not a practical alternative.”<sup>36</sup>

Without dismissing the very real concern of consistency in arbitral decision-making – or the lack thereof –, this suggests that we ought to reflect for a moment on the model against which the investment arbitration system is judged. Is coherence – perfect coherence – a feature of any national judicial system? The short answer is, quite clearly, no. This has implications both for the kind of concerns recognized in the coherence debate as requiring some type of systemic reform and the manner in which we undertake that reform. Jan Paulsson has suggested that “[w]hen critics of international arbitration bemoan the lack of consistency and coherence, they are blaming the process for failing to achieve the impossible – and proposing solutions which would fare no better”.<sup>37</sup> In this regard, Jan reminds us that “[a]djudication of matters of public law is everywhere a

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<sup>35</sup> See, e.g., Valerie Hughes, “The WTO Appellate Body: What Lessons Can be Learned?”, a paper delivered at the Second Conference of the BIICL’s Investment Treaty Forum on “Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System?” (7 May 2004); Jose Alvarez, “Implications for the Future of International Investment Law” in K. Sauvant & M. Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (OUP, 2008) 29 at pp. 29-30, in which Mr. Alvarez notes that the WTO “inspires the envy of investment lawyers” in part through an appeals mechanism that can correct errors of law and direct remedial compliance, where appropriate.

<sup>36</sup> Elihu Lauterpacht, *Aspects of the Administration of International Justice* (Hersch Lauterpacht Memorial Lectures (No. 9), 1991) at p. 111, cited in *ibid.* at p. 18.

<sup>37</sup> Jan Paulsson, “Avoiding Unintended Consequences”, in K. Sauvant & M. Chiswick-Patterson, eds., *Appeals Mechanism in International Investment Disputes* (OUP, 2008) 241 at p. 245.

constraint on collective sovereignty” and “[s]uch is its nature and function”.<sup>38</sup> As a result, the “promised land” of coherence in his view is not an appellate court of investment adjudicators, as some have suggested.

Jan Paulsson’s conclusion that an appellate court falls short of a complete panacea for coherence concerns in the investment protection system is shared by other well respected jurists, although, in some cases, for different reasons. Dr. Tams, for example, has suggested that, in the particular context of the ICSID system, there is virtue in simply highlighting the risk of inconsistent decisions, or to make use of two existing alternatives: consolidating cases, or seeking ICI decisions.”<sup>39</sup> Like others, I find this solution quite compelling because “the factors causing a perceived need for an appellate structure are diverse. They affect only some ICSID matters and not others. They are in part a sign of the times which may change over the next few years.”<sup>40</sup>

Professor Qureshi, approaching the question from a “development perspective”, comments that the consistency arguments for an appellate system should not be placed on “such a high pedestal as other objectives – particularly the development objective”.<sup>41</sup> He explains that:

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<sup>38</sup> *Ibid.*

<sup>39</sup> Dr. Christian Tams, “Is There a Need for an ICSID Appellate Structure?” in Rainer Hofmann and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 223 at p. 250.

<sup>40</sup> Richard Kreindler, “Inconsistent ICSID Awards: Is There a Need for an ICSID Appellate Structure?” in Rainer Hofmann and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 255 at p. 226.

<sup>41</sup> Asif Qureshi, “A Development Perspective to the Introduction of an Appellate process in International Investment Arbitration”, in Rainer Hofmann and Christian Tams, eds., *The International Convention on the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos, 2007) 251 at p. 252.

“[f]rom a development perspective a treaty specific appeal system is favoured. A principal concern about the efforts for introducing a non-ring fenced appellate system in the investment sphere is that it seeks to add to the conference and development of international investment law through a somewhat non-transparent route. Further, the need to inject the development dimension in any proposed appellate system is important. A development friendly appellate system requires in particular a focus on its apparatus of interpretation; on participatory rights and technical assistance.”<sup>42</sup>

So, the jury is still deliberating. In the meantime, I venture to conclude that the system, whilst not perfect, serves all users well.

*This brings us to Equity.* This brings me, quite naturally, to the last area of criticism I wish to address and which I refer to as “equity”. By equity, I mean, generally, the disparate experience that developed and developing countries may have as participants in the investment treaty system. This experience may be shaped by their respective relationships with investors (*i.e.* investor-State equity), as well as their relationships with each other (*i.e.* inter-State equity).<sup>43</sup>

It has been observed that developing nations bear a disproportionate burden of defending investment treaty claims.<sup>44</sup> The United Nations Conference on Trade and Development, “UNCTAD”, estimates that of the approximately 73 governments involved to date in the defence of investment treaty claims, two thirds

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<sup>42</sup> *Ibid.*

<sup>43</sup> Tai-Heng Cheng, “Power, Authority and International Investment Law” (2005) 20 *American University International Law Review* 465 at pp. 505-512. See also Oscar Schachter, *International Law in Theory and Practice* (Dordrecht/Boston/London: Martinus Nijhoff Pub. 1991) at pp. 1-9 (I refer in particular to Mr. Cheng’s discussion of the relationship between power and the law and, in particular, the ability of powerful States to influence and shape legal rules more so than weaker States and to impose limits on the equal application of the law).

<sup>44</sup> Eric Gottwald, “Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitrations?” (2007) 22 *American University International Law Review* 237 at p. 250.

have been developing country governments.<sup>45</sup> In 2007 alone, UNCTAD estimates that 24 of the 35 new investor State cases brought pursuant to international investment treaties were filed against developing country governments and transitional economies in South-Eastern Europe and the Commonwealth of Independent States.<sup>46</sup>

I will not deal today with the political dimension of these statistics. Rather, I will recall the practical issues which arise from these realities. First, developing countries are more likely to suffer from a lack of adequate resources and expertise to mount a vigorous defence to an investment treaty claim. Second, the lack of transparency in the system, which I have already discussed, can serve as a barrier, in particular to new participants, to fully understand the process and potential risks associated with an investment treaty arbitration. And third, the indeterminacy of meaning in many BIT standards, as also discussed, may result in a correlative uncertainty as to what is required of developing country governments to comply with the treaty.<sup>47</sup>

While these issues are not unique to developing countries, their resolution by least developed country governments are particularly acute “[i]n view of the potentially high amount of damages awarded and the complexity of the issues involved, developing countries require ongoing technical assistance and capacity-building on these matters”.<sup>48</sup>

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<sup>45</sup> UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1 (2008), International Investment Agreements, UNCTAD/WEB/ITE/IIA/2008/3 at p. 2.

<sup>46</sup> *Ibid.* at p. 1.

<sup>47</sup> Eric Gottwald, “Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitrations?” (2007) 22 *Am. U. Int’l. L. Rev.* 237 at pp. 252-260.

<sup>48</sup> UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 1 (2008), International Investment Agreements, UNCTAD/WEB/ITE/IIA/2008/3 at pp. 12-13.

One proposal to address these and other related issues is the creation of a legal assistance center similar to the Advisory Centre on WTO law, which was established in 2001 to provide legal training, support and advice to developing country governments on WTO law and dispute procedures.<sup>49</sup> This call for technical assistance was reiterated by UNCTAD in its 2008 report on international investment agreements.

In this context, it is interesting to note that developing country governments have not sat idly by waiting for the international investment community to reach consensus on a solution to these issues. Rather, governments from around the world seized the initiative in 2007 and organized what has become an annual forum of developing country investment negotiators to discuss and share experiences in connection with investment treaty arbitration.<sup>50</sup> The challenge for all of us is to ensure that such efforts become part of a holistic solution to improve the system for all participants – investors and States, developed and developing countries alike.

### ***Concluding Remarks***

After this litany of criticisms, one may be inclined to despair and conclude that the usefulness of the international investment protection system has been short-lived. I bid you to take heart. As we know from our respective domestic

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<sup>49</sup> Eric Gottwald, "Levelling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitrations?" (2007) 22 *Am. U. Int'l. L. Rev.* 237 at pp. 265-74

<sup>50</sup> See First Annual Forum of Developing Country Investment Negotiators, Singapore, 1-2 October 2007, co-hosted by the International Institute for Sustainable Development and the Centre on Asia and Globalisation, Lee Kuan Yew School of Public Policy at the National University of Singapore, [http://www.iisd.org/investment/capacity/dci\\_forum\\_2007.asp](http://www.iisd.org/investment/capacity/dci_forum_2007.asp); Second Annual Forum of Developing Country Investment Negotiators, Marrakesh, 2-4 November 2008, co-hosted by the International Institute for Sustainable Development, the South Centre, and the Moroccan Department of Investment, [http://www.iisd.org/investment/capacity/dci\\_forum\\_2008.asp](http://www.iisd.org/investment/capacity/dci_forum_2008.asp).

experiences, “[n]o system of dispute resolution is perfect”.<sup>51</sup> Indeed, I share the philosophy of eminent colleagues and scholars that we are living through a period of “growing pains” and that this period was inevitable.<sup>52</sup> As Susan Frank has eloquently explained, “[t]here are inevitably challenging transitions which require a re-examination of the bedrock principles upon which the system was founded. Investment arbitration is now at this critical juncture.”<sup>53</sup>

Furthermore, as may be gleaned from the rigorous debate engaged in respect of these issues, a fair criticism will also recognize the complexity and interdependence of transparency, consistency and equity-related concerns. The fact that these issues are being debated in a concerted, organized manner, is legitimacy enhancing itself. While debate alone will not suffice where action is required to ensure that the international investment protection system continues to meet its aims of fostering a more secure and fair investment environment and promoting greater respect for the rule of law, in my view, users of the investor-State arbitration system are on the right path and I have every confidence that the system will emerge from this period of “growing pains” with even greater vitality.

I foreshadowed a few moments ago that I would revert to the issue of the Lisbon Treaty<sup>54</sup>, which has not yet entered into force, and its portents for the international investment protection system. In my view, this is one of those

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<sup>51</sup> Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration : Privatizing Public International Law Through Inconsistent Decisions” (2004-2005) 73 *Fordham Law Review* 1521 at p. 1610.

<sup>52</sup> See *ibid.* See also Doak Bishop, “The Case for the Appellate Panel and its Scope of Review”, a paper delivered at the Second Conference of the BIICL’s Investment Treaty Forum on “Appeals and Challenges to Investment Treaty Awards: Is it Time for an International Appellate System” (7 May 2004).

<sup>53</sup> Susan D. Franck, “The Legitimacy Crisis in Investment Treaty Arbitration : Privatizing Public International Law Through Inconsistent Decisions” (2004-2005) 73 *Fordham Law Review* 1521 at pp. 1610-1611.

<sup>54</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007.

transitions that may require a re-examination of bedrock principles. I am pleased to note that this re-examination is already well underway and that the BIICL's Investment Treaty Forum is actively involved in debating the "grey areas" between European law, on the one hand, and the international investment protection system, on the other.<sup>55</sup>

However, the issues raised by the Lisbon Treaty, to my mind, present challenges of a slightly different nature than those I have just discussed. The Treaty does not challenge or question the legitimacy of the international investment protection system *per se*. Rather, it reflects a new governance arrangement and legal order not contemplated by the current system, that is the localization of exclusive competence over the negotiation and conclusion of international agreements, including investment treaties, in a central body, the European Community, representative of all EU Member States. As Peter Ondrusek observed recently at the Investment Treaty Forum on this subject: "[T]here are not necessarily any real obstacles in principle for the EC to become a party to an international investment-dispute arbitration system. However, there are some obstacles on the part of the current international investor-State arbitration system to be able to accommodate reliably the EC."<sup>56</sup>

One question arising from this development is, in the context of intra-EU BITs, which law applies? And relatedly, are intra-EU BITs incompatible with the

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<sup>55</sup> BIICL, Investment Treaty Forum, "European Law and Investment Treaties: Exploring the Grey Areas", 4 December 2008.

<sup>56</sup> Petr Ondrusek, "EC and Investor-State Dispute Settlement System: Some Thoughts" a paper delivered at the BIICL, Investment Treaty Forum, "European Law and Investment Treaties: Exploring the Grey Areas", 4 December 2008 at p. 2. Mr. Ondrusek identified several obstacles, by reference to the State-State dispute resolution model of the WTO, including the following: an increase in disputes; systemic considerations not present in investor-State disputes; individual access to justice; a risk that the arbitration tribunal "gets it wrong"; and detailed and developed legal standards.

“European legal order”.<sup>57</sup> I note, in this regard, that a highly respected panel of arbitrators, recently addressed this question in the *Eastern Sugar* case.<sup>58</sup> *Eastern Sugar* involved a claim brought by a Dutch investor against the Czech Republic under the 1991 BIT between The Netherlands and the Czech Republic. The Czech Republic challenged the tribunal’s jurisdiction in part on the ground that the BIT was inapplicable beyond the date of the Czech Republic’s accession to the EU, that is, beyond May 1, 2004.

The tribunal ultimately concluded that “EU law has not *automatically* superseded the BIT as a result of the accession of the Czech Republic to the EU”.<sup>59</sup> In addition, the tribunal stated that the BIT and the EU Treaty were not incompatible.<sup>60</sup> The final word has not been written in this context and it remains to be seen how additional challenges will be resolved in the future, in particular once the Lisbon Treaty has entered into effect, if it ever does. These challenges will undoubtedly form part of the “growing pains” experienced by the international investment protection system and the EU in the coming years.

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<sup>57</sup> Christer Soderlund, “Two Case Studies Involving Intra-EU BITs”, paper delivered at the BIICL, Investment Treaty Forum, “European Law and Investment Treaties: Exploring the Grey Areas”, 4 December 2008 at p. 4.

<sup>58</sup> *Eastern Sugar B.V. v. The Czech Republic*, SCC No. 088/2004, Partial Award (27 March 2007). The Final Award in this case was issued on 12 April 2007, with a Partial Dissenting Opinion on the merits by Arbitrator Volterra.

<sup>59</sup> *Ibid.* at para. 172.

<sup>60</sup> *Ibid.* at para. 168.