

ICCA Congress 2012
Opening Plenary Session
International Arbitration: The Coming of a New Age for Asia (and Elsewhere)
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Distinguished delegates to the ICCA 2012 Congress

Ladies and Gentlemen,

It is my great honour and privilege this morning, firstly to associate myself with the warm words of welcome extended to you by my Prime Minister last evening and my Minister a few moments ago. Singapore is truly delighted to welcome you to our home to participate in this, the largest ever ICCA Congress in history. I would like to congratulate the organisers and the program committee for having put together an outstanding conference program and for giving us this collective opportunity to reflect on some of the big issues that we face as a community.

I would also like to thank the Minister for his thoughtful remarks. This is the first time that the ICCA Congress is being held in South East Asia and the second in Asia. This is perhaps a reflection of the importance of this region to international arbitration and it is thus entirely apposite that my task in this keynote address is to share some reflections with you on the coming of a new age for international arbitration in Asia and beyond.

1 I venture to begin by suggesting that this new age of arbitration is in fact its golden age. Those among us who practice it are extraordinarily privileged to be able to do so

¹ Attorney-General, Singapore. I am indebted to my colleagues Teo Guan Siew and Denise Wong who assisted me greatly in the research for and preparation of this paper and who discussed many of the ideas that are contained here. I am also very grateful to my friends and colleagues from the world of arbitration, Prof Michael Pryles and Mr Johnny Veeder QC who each reviewed an advanced draft of this paper and generously shared their thoughts and suggestions.

at this time. Never before have so many controversies been left to the disposal of arbitrators; and never before has so much autonomy been afforded them. Arbitration practitioners today ply their craft in venues across the world on behalf of users from every conceivable jurisdiction.

- 2 This makes it the best time for us to embark on a course of collective self-reflection when all seems rosy and well. The gathering of such an eminent group of arbitration practitioners at this Congress gives us a unique opportunity to think about these issues, to reflect on what we as a community have done right, but more importantly, on what we could do better; and perhaps to plant the seeds of change so that our industry will remain vibrant and continue to play a critical role in the global administration of commercial justice.

The quantitative evidence

- 3 Let me begin by stating the evidence for the view that this is the golden age. The statistics are impressive: 793 requests for arbitration were filed with the International Court of Arbitration of the International Chamber of Commerce (ICC) in 2010 involving 2,145 parties from 140 countries and independent territories. 95 of these cases were allocated to ICC Hong Kong; and another 10% selected seats or venues in South and South East Asia. In 2010, the China International Economic and Trade Arbitration Commission (CIETAC) handled 1352 cases, nearly 5 times the number it handled in 1992; and between 2000 and 2010, the caseload of the Singapore International Arbitration Centre (SIAC) rose from 58 to 198 new cases.

The qualitative evidence

- 4 A second sign of this golden age is the degree of judicial deference accorded to arbitration in the name of party autonomy. In *Tjong Very Sumito v Antig Investments*² the Singapore Court of Appeal observed that “an unequivocal judicial

² [2009] 4 SLR(R) 732 at [28].

policy of facilitating and promoting arbitration has firmly taken root in Singapore”, and it went on to say -

“Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitrations... In short, the role of the court is now to support, and not to displace, the arbitral process.”³

- 5 This judicial tone has been echoed around the world, including in England⁴, Australia⁵, New Zealand,⁶ Hong Kong⁷ and Korea⁸; and it represents the prevailing mainstream philosophy of the courts today towards arbitration. This is a relatively recent phenomenon and it has taken some doing for Judges to let go of the cherished ideal of a unified system of adjudication within a country. It was long considered that arbitration entailed a usurpation of judicial power by private entities and was therefore to be closely watched and carefully monitored.
- 6 But, in the second half of the 20th century, as global trade grew, so did the pressure for the development of a workable system of international dispute resolution and with it we saw the growth of efforts to harmonise arbitration laws so as to construct an acceptable international framework. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial

³ *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) 732 at [29].

⁴ *Lesotho Highlands Development Authority v Impregilo SpA and others* [2006] 1 AC 221 at 230-231, per Lord Steyn, quoting Lord Wilberforce’s comments during the Second Reading in the House of Lords of the 1996 Arbitration Bill (Hansard (HL Debates), 18 January 1996, col 778) and the preface to Lord Mustill’s and Stewart Boyd QC’s Commentary on the 1996 Act (Commercial Arbitration: 2001 Companion Volume to the Second Edition, preface); *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264, *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep 192.

⁵ *Comandate Marine Corp v Pan Australia Shipping Pty Limited* (2006) 157 FCR 45.

⁶ *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318; *Amaltal Corp Ltd v Maruha (NZ) Corp Ltd* [2004] 2 NZLR 614.

⁷ *PCCW Global v Interactive Communications* [2007] 1 HKC 327; *Ocean Park v Proud Sky* [2007] HKCFI 1221.

⁸ *GKN* case, Korean Supreme Court, 10 April 1990, 89 Daka 20252, as cited in *International Commercial Arbitration: An Asia-Pacific Perspective*, by Simon Greenberg and others, 2011, Cambridge University Press, at page 454.

Arbitration, which was adopted on 21 June 1985,⁹ was ground breaking in its efforts to rationalise and propose a uniform legal framework for the conduct of arbitrations that would gradually displace the patchwork of hitherto disparate pieces of domestic legislation. And in providing a model text for States to adapt and adopt, the Model Law also paved the way for a new paradigm of minimal curial intervention by specifying very restrictive and defined circumstances in which the intervention of the courts could be sought.

- 7 Recognising that what the business community desires is a fast and ultimately, a conclusive method for resolving commercial disputes, the courts have gradually eased their supervisory control over arbitration in line with the norms reflected in the Model Law and the ubiquitous New York Convention. The impressive statistics coupled with the prevailing attitude of judicial deference, that has been exhibited across the globe are clear signs that arbitration has arrived as a vitally important partner in the business of international dispute resolution.

The Reasons behind the Rise

- 8 What accounts for this? Neutrality of the forum, confidentiality, the specialist competence of the tribunal and the ease of enforcement across borders are certainly key advantages which arbitration has over the traditional court-based forms of dispute resolution that are inevitably rooted in national systems of law and these have undoubtedly played a part in the growth of arbitration. But on the other hand, they have always been there and cannot alone explain the meteoric rise that we have witnessed in the last decade or so.
- 9 Perhaps the best explanation for arbitration's rising popularity is its critical role in supporting the globalisation of trade. This coupled with the growing harmonisation of the "look and feel" of arbitration have made arbitration the natural choice of dispute resolution mode that is written into international contracts. As the drivers

⁹ http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

of the industry increasingly come to share a common vocabulary, it seems likely that the importance of arbitration can only grow.¹⁰

Notable Features of Modern-Day Arbitration

10 Interestingly, the character of arbitration and of the arbitral process has changed even as its incidence has grown. Many of us will recall the not too distant days of the past where arbitration was seen as the poor cousin of the litigation process providing a “quick and dirty” way for resolving a commercial dispute. Today it has morphed into quite a different animal, and all within a very short span of time. I highlight a few of these distinctive features.

Rise of institutional arbitration

11 First, is the clear preference for institutional arbitration, at least in the context of international commercial arbitration. This is in large part due to the growing repute of such institutions, many of which have invested time and resources refining their procedural rules, strengthening their processes and improving the quality of the arbitrators on their panels.

Harmonisation

12 Secondly, the widespread adoption of the UNCITRAL Model Law has promoted unprecedented harmonisation of national laws governing international arbitration. And equally across the various sets of arbitration rules, one finds a significant degree of similarity between them.¹¹ This is unsurprising since the rule-makers are by and large international arbitration practitioners with extensive experience and hence a deep knowledge of the problems that can arise and how these can be overcome by suitable rules.

¹⁰ *The Growth of International Arbitration* by Michael Pryles, MEL4_492420_1 (W97).

¹¹ “Where Is International Commercial Arbitration Going? - Seminar on International Commercial Arbitration delivered by Hefin Rees on 13th May 2010 at <http://hefinrees.wordpress.com/2010/06/14/where-international-commercial-arbitration-is-going/>.

Growth in Investment Treaty Arbitration

13 A third important feature of today's arbitral landscape is the proliferation of investment treaty arbitration. In the last decade, investor-state arbitration has evolved into a robust system of adjudication to resolve disputes arising out of a web of more than 3000 bilateral investment treaties, regional free-trade agreements and multilateral agreements. This has given rise to what Gary Born has described as the second generation of international adjudication, represented by international commercial and investment tribunals, with real power to exercise what is effectively compulsory jurisdiction and to render enforceable awards that can be coercively executed against States and their commercial assets.¹²

14 This is a comparatively recent phenomenon, and its most significant impact has been that national governments have increasingly found their freedom to act in their own domestic space being curtailed by the interpretations placed by arbitral tribunals on investment treaties. These treaties would often have been entered into at a time when States never expected to encounter such a flood of treaty based claims nor the sorts of interpretations being placed upon these treaties. Striking examples of this include recent claims brought by tobacco companies against countries such as Australia and Uruguay in relation to the alleged indirect expropriation of intellectual property rights said to arise out of plain packaging legislation. Yet more recently, in ***White Industries v India***¹³ a tribunal seated in Singapore held that pursuant to the MFN clause that was found in India's BIT with Australia, the Australian investor could take advantage of an "effective means of enforcement" obligation found in India's BIT with Kuwait and on that basis hold India liable for failing to provide an effective

¹² "A New Generation of International Adjudication", Gary Born, Duke Law Journal, Vol. 61, no. 4, p. 775, January 2012.

¹³ In the Matter of an UNCITRAL Arbitration in Singapore under the Agreement between the Government of Australia and the Government of the Republic of India on the Promotion and Protection of Investments, between *White Industries Australia Limited and The Republic of India*, Final Award, November 30, 2011, available at <http://www.iareporter.com/downloads/20120214>.

means for the investor to enforce a commercial arbitration award it had obtained some ten years earlier against its local partner, an Indian state-owned enterprise.

15 This development has a real economic impact on the States. By way of illustration, after Argentina's economic collapse in 2001, the Government decided to allow the peso to decline in value against the dollar. By 2004, the peso stabilised and the economy began to recover. But as a result of this decision, claims were brought against Argentina founded on the investment treaties it had concluded in the 1990s. By 2006, more than 30 claims were pending for a staggering estimated sum of \$17 billion in claimed compensation, an amount equivalent to the entire annual budget of the national government.

16 Similarly, in 2001, a tribunal constituted in Sweden ordered the Czech Republic to pay amounts totalling approximately USD 353 million to a Dutch company, owned by an American, that had invested in a TV broadcasting business.¹⁴ The tribunal found that the broadcast licensing regime and media policies of the Czech Government's Media Council, which eventually prompted the Dutch company to divest itself of a TV station, had violated the country's bilateral investment treaty with the Netherlands. The amount of damages ordered was roughly equivalent to the country's entire health care budget. These cases illustrate that an entirely new source of state accountability and liability has emerged. The potential size and impact of such awards mean that government agencies just cannot afford to ignore the seemingly expansive treaty obligations they have undertaken.

Emergence of a Substantive Law of Arbitration

17 In truth, we are now seeing the emergence of a global free-standing body of substantive arbitration law, a development foreshadowed by Lord Wilberforce during the Second Reading in the House of Lords of the 1996 Arbitration Bill,¹⁵ as

¹⁴ *CME Czech Republic B.V. (The Netherlands) v The Czech Republic*, September 13 2001. See *Investment Treaty Arbitration and Public Law* by Gus Van Harten (2008, Oxford University Press) at p 7.

¹⁵ Hansard (HL Debates), 18 January 1996, col 778.

cited by Lord Steyn in *Lesotho Highlands Development Authority v Impregilo SpA and others* [2005] UKHL 43. What His Lordship might not have predicted, was that at least in the sphere of investment treaty arbitration, this body would have a distinctive public law character.

18 Investment treaties were designed to encourage foreign direct investment by providing an additional safeguard of a foreign investor's commercial interests and protecting this from being adversely affected by government action in the host State. What was contemplated, at least initially, was unlawful taking by expropriation or damage through unfair and inequitable treatment. In signing these treaties, the State typically gives its broad and advance consent for arbitration to be deployed as a mechanism to resolve individual claims from a potentially indeterminate class of investors and this holds good for a significant length of time.

19 But more than just a procedural mechanism for resolving investment disputes, investment treaty arbitration has come to set standards against which the exercise of public authority by the contracting States are going to be reviewed. In that sense, it mirrors the role of administrative law in reviewing governmental action in the domestic context – hence the suggestion made elsewhere that what we are witnessing is the emergence of an international administrative law that regulates the conduct of States through a private adjudicative mechanism.¹⁶

20 This is exciting at several levels. But it also gives cause for concern. While those practising in this field have a general understanding that “indirect expropriation” refers to any Government measure that has the effect of eroding the value of an

¹⁶ Benedict Kingsbury and Stephan Schill, “Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law”; “*Investment Treaty Arbitration as a Species of Global Administrative Law*” Gus Van Harten & Martin Loughlin, *European Journal of International Law*.

investment,¹⁷ it is probably not settled whether legislative or policy changes, which have a legitimate public interest purpose, will also be caught by the principle.¹⁸

21 Secondly, although arbitration awards only bind the parties, it is inevitable that other States will consider the outcomes of decided cases and consider adjusting their own laws to safeguard against potential claims. In the absence of a binding system of precedent, the existence of even a few adverse views can mandate a change of policy, potentially impeding the efficient workings of Government.

22 The arbitrators, men and women often schooled and experienced in commercial law, find themselves having an unexpectedly weighty hand in shaping economic and monetary policy, tax incentives and perhaps even employment laws. From the perspective of the government, national policy and legislation will now have to be assessed for legality vis-a-vis the State's international treaty obligations, as interpreted by an autonomous, privately funded adjudicative body usually consisting of foreign nationals. This has the potential to constrain the exercise of domestic public authority in a manner and to a degree perhaps not seen since the colonial era.

23 These concerns may well contribute to the recent wave of hostility towards BITs and international investment arbitration. In 2007, Bolivia formally denounced the ICSID Convention; Ecuador followed in 2009. In 2009, Norway abandoned its draft model BIT public opinion was polarised either to the view that the model did not provide investors with enough protection or to the opposite view that it would restrain the

¹⁷ W. Michael Reisman & Robert D. Sloane, "Indirect Expropriation and Its Valuation in the BIT Generation," 74 *The British Yearbook of International Law* 115 (2004). G.C. Christie had described this principle as "even though a State may not purport to interfere with rights to property, it may, by its actions, render those rights so useless that it will be deemed to have expropriated them" (*G.C. Christie, What Constitutes a Taking Under International Law*, (1962) 38 BYBIL 307 at 311).

¹⁸ OECD Working Paper on International Investment Number 2004/4, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law", September 2004.

Government's ability to regulate in the public interest.¹⁹ In April 2011, the Australian Government issued a Trade Policy Statement to announce that while it had included investor-state arbitration clauses in past international economic agreements, it would no longer do so in the future.²⁰ And in 2012, Venezuela announced its intention to withdraw from ICSID and renegotiate 25 BITs and has since given formal notice to this effect to the World Bank.

Transformation of the Arbitral Process

24 A fourth major feature of arbitration today are changes in the arbitration process itself. Arbitration was once much vaunted for being faster, cheaper, less formal and more efficient than the more cumbersome court process. Arbitrators were not expected to be legal experts. Their decisions mattered only to the parties before them and more often than not, these were commercial actors who wanted a quick, final outcome to resolve their differences.

25 Today, arbitration is a highly sophisticated, procedurally complex and exhaustive process dominated by its own domain experts. The lack of an avenue of appeal and minimal curial intervention were meant to simplify things. Instead, these factors have given rise to the realisation that there is little room for error in arbitration. The modern era of arbitration is characterised by insulated arbitral decision-making with minimal review. For our clients, arbitration has become a one-strike proposition leading to the escalation of costs, as parties inevitably chase the best arbitrators and the best lawyers to give themselves the best chance of winning their case.

26 Arbitrators, mindful of the principles of natural justice and the fact that there is no appeal against their decision, are sometimes compelled to endure protracted submissions and responses to submissions on every conceivable point.

¹⁹ <http://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/>

²⁰ <http://www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

27 Detailed frameworks and rules with an emphasis on legal accuracy, precision and certainty have overtaken the *ad hoc* compromise-oriented system. Just as arbitration has taken centre stage in the resolution of high value international commercial disputes, it has also become an increasingly complex and formal process burdened by formidable costs.

28 This, in a nutshell, is where I think we have found ourselves today. The golden age of arbitration bears a number of distinct hallmarks that may perhaps be surprising to those who shared our trade just a few decades ago. The worry is that these changes have occurred at breakneck pace and have far outstripped any central organising thought process on their potential consequences and pitfalls.

Potential Hotspots in this Golden Age

Institutional Arbitration

29 We would do well then to ask ourselves if indeed we might have missed some potential hotspots. Firstly in relation to the trend towards institutionalisation in arbitration, there are certainly advantages to this, but, on the other hand, the fact that we need to facilitate and smoothen the arbitral process is itself a reflection of the growing complexity and judicialisation of arbitration. By way of illustration, broad-ranging document production is still reasonably commonplace in arbitration. Hearings can last quite a long time with much time spent on examination and cross-examination of witnesses. More recently, institutions have taken to providing for the appointment of an emergency arbitrator even to deal with temporary measures.

30 This increasing judicialisation comes at a cost. Expedition, informality and efficiency, the attributes traditionally associated with arbitration, are sacrificed. Are we saddling ourselves with a creature that is no longer suited to the needs of the business community? And will the prohibitive costs, procedural complexity and increasing mystique of arbitration lose us our vital constituency?

Growth in Investor Treaty Arbitration and the Emergence of a Substantive Law of Arbitration

31 I have touched on the phenomenal growth of investor state arbitration, the resultant emergence of a substantive law of arbitration and the impact that these trends have had on the rule-making ability of nation States. In light of these trends, the modern arbitrator must recognise that international investment arbitration at least is no longer simply a manifestation of party autonomy in the resolution of private disputes. The arbitrator today is the custodian of what is rapidly becoming the primary justice system integral to the proper functioning of international trade and commerce.²¹

32 But who are the arbitrators to whom such important tasks have been entrusted? They tend mainly to come from a fairly small and select group of specialised and arbitrators principally from Europe and the United States with experience in commercial law rather than in policy making. They are often unlikely to be attuned to the nuances of domestic public interest of the countries affected by their awards. This private model of international adjudication has allowed a select few individuals drawn from narrow specialities within international and commercial law to rule on issues of public policy and legality of state regulatory actions, with little or no accountability to the constituency. Such an adjudicative mechanism bypasses the traditional protections and the often delicate and carefully arranged balance of interests that are built into the domestic administrative law framework.

33 The broad and open-textured way in which treaty commitments are defined, coupled with the length of time over which they are expected to operate without any supervision or control by electoral mechanisms, mean that the discretion vested in private arbitrators to interpret these rules is likely to have a considerable impact on States.²² This shift of power from the States to the arbitral tribunals, has resulted

²¹ Catherine A Rogers, "The Vocation of the International Arbitrator" 20 (2005) Am. U. Int'l. Rev. 957.

²² Benedict Kingsbury and Stephan Schill, "Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative law".

in jurisprudence that has been colourfully described as “a house of cards built largely by reference to other tribunal awards and academic opinions”, “unconstrained by the discipline of the treaty parties’ practice or expectations”.²³

34 This evolving body of substantive investment arbitration law also suffers from a lack of coherence and consistency because its development has been piecemeal. With no central organising structure or unifying appellate control and no doctrine of binding precedent, the results are often conflicting. Any attempt by the courts to provide oversight is fragmentary and restricted: fragmented because enforcement of awards can be sought before the courts of any of the many signatories to the New York Convention, and restricted because of the principle of minimal curial intervention.

Transformation of the Arbitral Process

35 Turning to the potential trouble spots associated with the transformation of the arbitral process, first, arbitration is now seldom the *economic* alternative. As earlier discussed, the complexity and comprehensiveness of the modern-day process has led to an explosion of costs to the detriment of the clients who are its end-users. In large and complex arbitration, costs claims for legal fees and disbursements can go up to between 20 and 40 million dollars.²⁴ Besides runaway counsel fees that significantly drive the costs of arbitration up, arbitrator and institutional fees are also on the rise. In two recent cases, the courts in Sweden and the United States dealt with challenges that arbitrator and institutional fees were excessive.²⁵ The Swedish Supreme Court held that the courts had jurisdiction to hear challenges and revise the quantum of arbitral fees, even if these were fixed by the Stockholm Chamber of Commerce, though on the facts the substantive bid to set aside the award failed and there was no subsequent judicial determination or suggestion that the fees were in

²³ Anthea Roberts, “Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States” AJIL Vol 104 (April 2010) 179.

²⁴ Winston & Strawn LLP Briefing on International Arbitral Practice, September 2007.

²⁵ *Soyak Int’l Constr. & Investment Inc. v. Hobér, Kraus & Melis*, No. Ö 4227-06 (3 Dec. 2008) (Swedish Supreme Court). *Coffee Beanery v. WW, L.L.C.*, No. 07-1830, 2008 U.S. App. LEXIS 23645 (6th Cir. Nov. 14, 2008).

fact unreasonable. In Singapore, there has been an attempt (without success) to challenge the costs awarded by a tribunal as being disproportionate and contrary to public policy.²⁶ Such cases signal a growing frustration among users. Of course, the parties have themselves to blame, as the preoccupation with choosing a “big name” arbitrator and counsel team inevitably translates to higher fees as well as inefficiencies and delays due to the excessive commitments of such “big names”. But then isn’t this a natural consequence of a free market model of adjudication?

36 Beyond the costs issue, arbitrators have wrested for themselves the power to grant final, binding and authoritative rulings on disputes, with little intervention from the courts. But in doing so, they have put pressure on themselves, and in turn on other members of the community, to ensure that they get the right answers. End users clamour for accountability. This coupled with the fact that arbitrators are judges for hire has put a spotlight on the tension between the personal commercial interest of the arbitrators and their public duty to do justice.

37 The threat of moral hazard is particularly great in the arbitration process. Arbitration has been characterised, somewhat uncharitably, as ultimately a profit-making venture, with arbitrators being in essence business people in search of appointments. In contrast to the traditional vocation of a judge, arbitrators do not have tenure, are drawn from the same ranks of legal professionals, and earn substantial fees for the cases that they handle. Their earnings depend on the amount of time they are engaged in cases. There is therefore an incentive to promote one’s attractiveness as a prospective appointee.²⁷

²⁶ *VV and anor v VW* [2008] 2 SLR(R) 929.

²⁷ Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1998).

38 This problem is exacerbated by the practice of unilateral appointments.²⁸ One particularly troubling statistic that emerges from one study is that practically all dissenting opinions in arbitrations had been written by arbitrators who had been nominated by the losing party.²⁹ Just as damaging are the embarrassing cases of blatant leakage of confidential arbitral deliberations by an arbitrator to his nominating party and controversial inexplicable rulings subsequently explained by the undue pressure that had been exerted by the nominating party.³⁰

39 Specifically as regards investment treaty arbitration, there have been assertions either of a perceived pro-investor bias on the part of commercial arbitrators or perhaps less frequently, a pro-state bias on the part of some public international lawyers active in this field. In relation to the former, it is, after all, in the interest of the entrepreneurial arbitrator to rule expansively on his own jurisdiction and then in favour of the investor on the merits, because this increases the prospect of future claims and is thereby business-generating.³¹ This hints of a modern-day uber-sophisticated ambulance-chasing plaintiffs' lawyer. The pro-investor attitude has even been cited as the reason arbitrators from the developing world often rule in favour of investors from traditionally capital-exporting countries, this being the "price" that has to be paid to gain credibility and access to the privileged club of elite international arbitrators.³²

²⁸ Jan Paulsson, "Moral Hazard in International Dispute Resolution" Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010.

²⁹ The percentage has been said to be more than 95%: see Alan Redfern, "Dissenting Opinions in International Commercial Arbitration: the Good, the Bad and the Ugly" 2003 Freshfields Lecture, 20 *Arbitration International* 223 (2004). In the field of investment arbitration, it seems that nearly 100% of all dissenting opinions are from the arbitrator nominated by the losing party: see Albert Jan van den Berg, "Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration", in Mahnoush Arsanjani et al. (eds.), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* at p 824.

³⁰ Jan Paulsson, "Moral Hazard in International Dispute Resolution" Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair, University of Miami School of Law, 29 April 2010 at p 5-6.

³¹ Gus Van Harten, *Investment Treaty Arbitration and Public Law* 126-128 (2007).

³² Susan D. Franck, "Development and Outcomes of Investment Treaty Arbitration" 50(2) (2009) *Harvard International Law Journal* 435.

40 Unbridled criticisms of how arbitrators are invariably profit-driven and biased, or that they always act strategically so as to be repeat players, are undoubtedly overstated. However, it is undeniable that the typical conditions that assure impartiality in the judicial sphere are lacking in arbitration. Whereas judges are segregated from the rest of the legal professional community, arbitrators are largely drawn from precisely the same pool of professionals. The “usual suspects” in the industry may be arbitrator in one case and lawyer in the very next, often trading places in the process with another in the same select group. And while forum shopping is frowned upon in the judicial context, parties actively seek out arbitrators whom they believe would be pre-disposed to rule in their favour. The self-correcting mechanism of disclosure of interest is also open to criticism because of the inherent “conflict within a conflict” problem.³³ Because disclosure depends on self-diagnosis, the decision to make such a disclosure may itself be against the self-interest of the arbitrator, if it were likely to result in foregoing a substantial fee.³⁴

41 It is perhaps surprising then that we experience a shortage of high quality arbitrators. This would seem somewhat paradoxical since the barriers to entry into the industry are low. Yet, the increasing complexity and stakes inherent in international arbitration mean that it may not suffice simply to select a decent lawyer. You need someone attuned to the intricacies of international arbitration, experienced, known and respected and in the circuit. Increasingly, the prospective appointee may need a good working knowledge of public international law and at the same time the necessary creativity of mind.

The Beginning of the End?

³³ Catherine A. Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct” (2005) 41 *Stan. J. Int’l L.* 53.

³⁴ *Ibid.*

42 Do these telltale signs of trouble signify the beginning of the end or are they just minor blips that we can overcome? To answer this, it may be helpful to first identify three broad trends.

Dissatisfaction with an unregulated industry

43 As we contemplate these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators, it seems surprising that there are no controls or regulations to maintain the quality, standards and legitimacy of the industry. This has much to do with how modern arbitration developed from an initially small and closely-knit group of honourable practitioners who saw arbitration as the discharge of a duty to help resolve the disputes of people of commerce in a fair, even-handed and commercially-sensible manner rather than as a business proposition. We look back at this in-built informal mechanism of peer-group controls with nostalgia: but this “age of innocence” as it has been famously described has very much come to an end.³⁵ Is it time then for us to give up our cherished notions of autonomy and subscribe to an international regulatory regime?

44 There are certainly arguments to support such a notion. The national courts are ill-suited to fulfil such a role. Minimal curial interference has meant that only the most egregious of arbitrator misconduct is likely to warrant non-enforcement by the national courts. Further, there is a timing difficulty in that the judicial challenge to set aside any award or resist its enforcement takes place only **after** the substantive arbitration proceedings are already complete.³⁶ Nor do professional liability lawsuits against errant arbitrators provide a solution, as most countries provide for absolute or at least qualified immunity for arbitrators.

³⁵ Jan Paulsson [cited in Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1998) at p 37.

³⁶ Catherine A. Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct” (2005) 41 *Stan. J. Int’l L.* 53.

45 What options are we left with? With the growing move towards institutional arbitration, we might turn to the arbitral institutions to play the role of primary regulators. While such institutions do serve as gatekeepers in providing a screening mechanism for entry into the club, their rules on conduct, disclosure and disqualification are typically wide and broadly framed, and the present qualitative standards may leave too much to the discretion of the individual arbitrator.³⁷

46 Some degree of incumbent bias might also be expected. Members of the same institution are slow to condemn the behaviour of a fellow arbitrator, especially in the field of international arbitration where the principal players enjoy such close relations. A systemic overhaul may thus be needed to put in place a regulatory regime that will act as a much needed check and balance against these failures.

A Growing Disconnect with its Users

47 Second, there is a growing sense of disconnect between arbitrators and their consumers. Confidentiality is one of the reasons for arbitration flourishing as the premium mode of resolution for transnational commercial disputes. But this necessarily makes arbitral decision-making more opaque, even for arbitants.

48 In the days when commercial disputes were less complicated, parties were willing to accept the rough and ready dispensation of justice. This is not so today when commercial transactions are far more detailed and technical, with modern parties demanding more transparency and assurance that their contractual rights are enforced with legal precision and accuracy. Reference has also been made to the increasingly public law character of the international arbitration process. With it comes a greater call for visibility and public accountability in decision-making.

³⁷ Catherine A Rogers, "The Vocation of the International Arbitrator" 20 (2005) Am. U. Int'l. Rev. 957.

49 But the information asymmetries that persist in the system inevitably give rise to frustration and a growing disparity between the perspectives of the users of arbitration and those who are in the profession. The professionals tend generally to be very satisfied with the satisfying intellectual challenge and good revenue that comes with arbitration work. Users, on the other hand, are often astounded by the complexity, costs and time taken. Quite apart from how expensive international arbitration is, the ambiguity and lack of predictability as to the costs involved are also serious concerns. No coherent doctrine or approach to determining costs exists in the field of international arbitration. Tribunals make decisions on costs with minimal reasoning and without regular citation of authorities.³⁸ All these factors culminate in international arbitration being an enigmatic adjudicative process, and over time this *must* undermine its credibility and with it, public confidence as well.

50 While the “judicialisation” of arbitration has certainly meant that it increasingly resembles litigation for instance in terms of the availability of interlocutory tools such as discovery, the inner workings of the arbitral decision-making process remain much less visible and open. Challenges to arbitrators are still not widely publicised, and information concerning an arbitrator’s track record continues to be generally available only to a select group of insiders. Academics and researchers complain about the lack of information and statistics.³⁹

Tension between Courts and Arbitration and a growing hostility?

51 The trends I have thus far described have coincided with, and perhaps may even be the reason for some tentative signs suggesting a modest return to greater judicial oversight of arbitration.

³⁸ *Ibid.*

³⁹ Catherine A. Rogers, “Transparency in International Commercial Arbitration” 54 (2006) U. Kan. L. Rev. 1301 at 1325.

52 First, the courts are subjecting arbitral awards to greater scrutiny by requiring more detailed reasoning, and to ensure the integrity of the decision-making process.

53 In Australia, the Victorian court in ***Oil Basins Limited v BHP Billiton Limited*** held the arbitrator to the same standard as a judge in terms of the extent to which he would be required to explain his decision.⁴⁰ The meticulous way in which the court tested the consistency of the arbitrator’s reasoning process and his analysis of the evidence resembled the supervisory functioning of an appellate court. This was somewhat echoed in the recent decision of the High Court of Australia in ***Westport Insurance Corporation & Ors v Gordian Runoff Limited*** [2011] HCA 37. In that case, the New South Wales Court of Appeal had departed from the holding in the ***Oil Basins*** decision, recognising that arbitration is a “private consensual mechanism intended to be shorn of the costs, complexities and technicalities often cited ... as the indicia and disadvantages of curial decision making”.⁴¹ On appeal, the High Court of Australia whilst agreeing generally with the New South Wales court that the applicable standard of arbitral reasoning is not necessarily to be equated to the judicial standard, allowed the appeal and held that the arbitral tribunal had given inadequate reasons in the circumstances of that case, with one Judge of the High Court making the following rather scathing remarks about the merits of arbitration:⁴²

“The attractions of arbitration are said to lie in speed, cheapness, expertise and secrecy... But it must be said that speed and cheapness are not manifest in the process to which the parties agreed. A commercial trial judge would have ensured more speed and less expense. On the construction point it is unlikely that the arbitrators had any greater relevant expertise than a commercial trial judge. Secrecy was lost once the reinsurers exercised their right to seek leave to appeal. The proceedings reveal no other point of superiority over conventional litigation.”

⁴⁰ [2007] VSCA 255, 18 VR 346.

⁴¹ *Gordian Runoff Limited v Westport Insurance Corporation* [2010] NSWCA 57 at [216].

⁴² Per Heydon J at [111].

54 The second development relates the willingness of at least some courts to adopt a more expansive notion of review based on public policy. The Indian Supreme Court in **ONGC v SAW Pipes** extended the concept of public policy. Holding that an award would be contrary to public policy if it were “patently illegal”, the Court went on to re-examine the questions of fact and law that had been considered by the arbitral tribunal. This was followed in another recent Indian decision **Venture Global Engineering v Satyam Computer Services Ltd**,⁴³ this time involving a foreign award. In similar fashion, in **European Gas Turbine v Westman International Ltd**, the Paris Court of Appeal said that its control over arbitration must involve in fact and in law **all** the elements which enable the verification of the application or not of a public policy rule, and if such a rule applies, the legality of the arbitration agreement.⁴⁴

55 A third instance of greater judicial involvement has been the courts’ willingness to embark on a detailed examination on the question of the arbitrator’s jurisdiction. The UK Supreme Court in **Dallah Real Estate & Tourism Holding v Pakistan** has been the subject of much comment and I don’t propose to add to this here, save to say that the Court was prepared to launch into a full rehearing as to the validity of the arbitration agreement, not limiting itself merely to reviewing the arbitral tribunal’s decision. This was notwithstanding that the court was not confronted with a case where the arbitral tribunal’s decision was “clearly wrong”; in fact, the court accepted that the tribunal had referred to the correct legal test under the governing French law, but yet disagreed with the view of the tribunal and ruled that there was no common intention for the Pakistan to be a party to the agreement.⁴⁵

⁴³ AIR 2008 SC 1061 (April).

⁴⁴ Bernard Hanotiau and Oliver Caprasse, “Public Policy in International Commercial Arbitration” in Emmanuel Gaillard and Domenico Di Pietro eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May, 2008) at 787, 805.

⁴⁵ Interestingly, after the UK Supreme Court’s decision, the government of Pakistan took up a similar challenge in parallel proceedings in France to set aside the same arbitral award, and the Paris Court of Appeal reached the opposite conclusion, holding that the scope of the arbitration agreement validly extended to Pakistan: Cour d’appel de Paris, 17 février 2011, Gouvernement du Pakistan – Ministère des Affaires religieuses c. Société Dallah Real Estate and Tourism Holding Company, n° R/G 09/28533.

56 In Singapore, in *Kempinski Hotels SA v PT Prima International Development*,⁴⁶ the High Court set aside three international arbitration awards, on the basis that the tribunal had decided on issues that were not pleaded by the parties, thereby acting in excess of its own jurisdiction in determining matters beyond the scope of submission to arbitration.

57 In the US too, we seem to be seeing the beginnings of a modest retreat from judicial deference to arbitration, with recent holdings that appear to make it easier to set aside arbitral awards. Although some had thought that the 2008 decision of *Hall Associates, L.L.C. v. Mattel, Inc.*⁴⁷ had closed the door to any possibility of an additional ground for setting aside an arbitral award over and above the limited grounds stated in the US Federal Arbitration Act (“FAA”), the recent 2010 US Supreme Court ruling in *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp* saw the revival of the judge-made “manifest disregard of the law” doctrine as a basis for setting aside arbitral awards.⁴⁸

58 More recently, and probably rather more surprisingly for many international arbitration practitioners, the US Court of Appeals for the District of Columbia Circuit in *Republic of Argentina v BG Group PLC* vacated a US\$ 185.3 million Final Award against Argentina in an UNCITRAL arbitration, thereby effectively erasing the fruits of a four-and-a-half year arbitration between the parties.⁴⁹ The court did so on the ground that the arbitral tribunal exceeded its authority by ignoring the parties’ agreement that the courts of the host state Argentina would resolve the dispute and that resort to arbitration could only be had if no final court ruling was forthcoming within 18 months. This was notwithstanding the fact that, as the arbitral tribunal

⁴⁶ [2011] 4 SLR 633.

⁴⁷ [128 S. Ct. 1396, 170 L. Ed. 2d 254, 2008 A.M.C. 1058 \(U.S. 2008\)](#).

⁴⁸ [130 S. Ct. 1758 \(2010\)](#).

⁴⁹ 665 F.3d 1363 (2012).

had noted, submission to the Argentine courts could practically be seen as futile because Argentina had by emergency decrees restricted access to its courts. The decision signalled a departure by US jurisprudence away from earlier holdings by ICSID and UNCITRAL tribunals, which had not insisted on strict adherence to the 18-month local court pre-condition⁵⁰.

59 Greater judicial intervention may also be seen in the recent grant of an anti-arbitration injunction by the Bombay High Court in ***MSM Satellite (Singapore) Pte Ltd v World Sport Group (Mauritius) Limited*** to restrain arbitral proceedings in Singapore.⁵¹

60 A further sign of tension is seen in the court's attitude towards the immunity of arbitrators and arbitral institutions. In ***SNF v International Chamber of Commerce*** the Paris Court of Appeal held that the waiver of liability provision in Article 34 of the ICC 1998 Rules was *void ab initio*, because such a clause would effectively allow the ICC to avoid its core obligation as provider of arbitration services.

61 There are similar signs of a greater tendency to move away from according presumptive finality to arbitral awards in investment arbitration as seen in the recent annulment jurisprudence emanating from ICSID. A trio of decisions in 2010 casts considerable doubt on whether annulment under the ICSID Convention is truly still a limited and extraordinary remedy, as it was originally designed to be.⁵²

⁵⁰ See for e.g., *Maffezini v. Spain* (ICSID Case No. ARB/97/7, 1 September 2000); *Siemens v. Argentina* (ICSID Case No. ARB/028, Decision on Jurisdiction, 3 August 2004); *National Grid plc v. Argentina* (UNCITRAL, Decision on Jurisdiction, 20 June 2006).

⁵¹ Appeal (Lodging) No. 534 of 2010.

⁵² *Sempra Energy International v Argentina*; *Enron Corporation & Ponderosa Asset v Argentina*; *Helnan Hotels v Egypt*. See "ICSID Annulment Awards: the fourth generation?" *Global Arbitration Review*, Vol 5, Issue 5 (October 2010).

62 In the first two of these cases, *Sempra v Argentina* and *Enron Corporation and Ponderosa Assets v Argentina*, both of which concerned treaty arbitration claims against Argentina arising from its emergency measures imposed during its economic crisis, Argentina sought to rely on the defence of “necessity” by reference to Article 11 in the bilateral investment treaty. Reasoning that the bilateral investment treaty does not define the concept of “necessity”, the ICSID tribunals in both cases applied customary international law and reached the conclusion that Argentina had failed to establish a right to invoke the “necessity” exception. In the annulment proceedings that followed, the ad hoc committee in *Sempra’s* case held that the tribunal had erred in equating Article 11 and customary international law, while the ad hoc committee in *Enron’s* case decided that the tribunal had failed to apply certain essential legal requirements for invocation of the “necessity” defence. If anything, these were errors of law that would not *per se* have been a ground for annulment. But both committees characterised this as a complete failure to apply the applicable law. This apparent lowering of the threshold for review was also reflected in the subsequent case of *Helnam International Hotels v Egypt*.

63 The final development of interest concerns the more stringent approach that has been applied to issues of conflict and bias in arbitration proceedings. In *J&P Avax v Tecnimont*,⁵³ the Paris Court of Appeal set aside an ICC partial award on the grounds that the tribunal had not been properly constituted as the chairman lacked independence. The chairman’s failure to disclose that his firm had a pre-existing relationship with the corporate group of one of the arbitrants was not excused by the fact that his firm had 2,200 lawyers across the globe. There have also been recent challenges against arbitrators in the investor-State disputes on the basis that barristers from the same chambers should not be involved as counsel and arbitrator in the same case. In *Hrvatska Elektroprivreda, dd v Slovenia*,⁵⁴ the arbitral tribunal, while saying that there is no such absolute bar, determined in the circumstances of

⁵³ Case No. 07/22164 (Cour d’appel). See *ibid*.

⁵⁴ ICSID Case No. ARB/05/24 (2008)

that case that one of the respondent's counsel could not participate further in the case because he was a member of the same Chambers as one of the arbitrators.

64 Similarly the propriety of arbitrators serving as counsel in other related investor-State disputes has also been questioned in other cases.

65 It remains to be seen how these trends will play out in time to come. But I suggest that these trends collectively suggest at least that the time is upon us to undertake our own course correction to respond to some of these real and grave concerns. Identifying problems is far easier than finding solutions, but I would like to venture to start a conversation about what sort of course correction might help us ensure our industry's viability and vitality in the longer term.

Charting a New Course

Regulatory Framework to Govern the Arbitrators

66 First, at least some of these challenges might be addressed by the institution of a proper regulatory framework to govern arbitrators. This should govern both initial entry requirements and also the subsequent conduct of arbitrators. Of course there are challenges in finding a uniform set of ethical standards and rules of professional conduct that can cut across the differing landscape of legal systems across the globe. But the modern arbitration practitioner has the world for his stage and with signs of the emergence of a global international law of arbitration despite national differences, why shouldn't the same apply in relation to arbitrator standards?

67 A relatively straightforward and minimally invasive first step in this direction might be to develop a code of conduct and practice to guide international arbitrators and international arbitration counsel. The IBA Guidelines on Disclosure has enjoyed some success in guiding arbitrators in tackling disclosure issues. A unified code of conduct that arbitrators can take reference from and measure themselves against could well in time become the grundnorm for a more robust regulatory system.

68 International representation and a diversity of views would be critical. We should be careful not to rely overly on judicial codes of conduct that may not be as appropriate or relevant for the international arbitrator. Rather, the code of conduct would be uniquely applicable to the challenges and choices faced by such arbitrators, including dealings with one's appointing party and its counsel, the duty of a party appointed arbitrator towards all the arbitrants in a case, conflicts of interest, dealing with cultural differences, spelling out some details on how the rules of natural justice should be upheld in the arbitration context, or the approach one should adopt when faced with matters involving national policy. The ethical code should be organic and flexible enough to be relevant alongside arbitral procedural rules. This should be supplemented by rules dealing with the fixing of costs in arbitration and providing guidance in this important area. Perhaps, such a code could even confront the thorny issue of party appointments. If **all** arbitral appointments were to be made by an independent institution, then we would be taking a large and important stride towards guaranteeing the independence of arbitrators and so leave no room for arbitrators to imagine that they are in any way accountable to their party appointers, beyond ensuring that they act fairly and honestly.

69 For such a code of conduct to actually influence behaviour it will need an implementation mechanism. It will not be sufficient for the process of enforcement of arbitral awards to double up as a means to assure ethical arbitral conduct.⁵⁵ Commercial realities dictate that an award be set aside only in the most egregious cases of misconduct. This is an ineffective way to try to ensure that arbitrators conduct themselves in a proper manner. We will instead need a collective and independent mechanism for the maintenance of ethical standards.

70 This could take the form of an international system of accreditation by which arbitrators are recognised and regulated. Arbitral institutions can become the functional equivalent of Bar associations and act as gatekeepers and regulators,

⁵⁵ Catherine A. Rogers, "Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct" (2005) 41 Stan. J. Int'l L. 53.

becoming the authority responsible for accreditation, as well as the reviewing body for complaints of misconduct. The arbitral institution could also impose sanctions based on an internationally approved list of penalty benchmarks that can be developed along with the code of conduct. Similarly, the arbitral institution could also exercise a supervisory role in reviewing costs awards.

71 Perhaps more ambitiously, we may wish to start planting the seeds for an organisation such as this august gathering to spearhead reforms, and provide administrative and regulatory oversight of professional standards. The idea would be to develop a mechanism to bring about greater coherence and consistency in arbitral best practices across the different institutions. A scheme of periodic peer review and mutual evaluation by the arbitral institutions of their rules and procedures can also be instituted so that the community as a whole has a collective interest in ensuring better outcomes for all users of arbitration.

Enhancing Arbitral Accountability

72 Second, we should perhaps enhance arbitrator accountability. While, all arbitrators agree that integrity of the arbitration procedure is paramount, they also say that the need for confidentiality limits any attempt to regulate or monitor compliance. We should distinguish between issues pertaining to the conduct of the arbitrator such as conflicts of interest and allegations of misconduct, and substantive issues relating to the dispute. There is no immediate interest mandating that the former category should remain the subject of party confidentiality. This important divide between conduct of the arbitrator and the merits of the dispute should be firmly borne in mind as we contemplate measures to further enhance transparency in matters relating to arbitrator conduct and ensure that there is external and public scrutiny of the integrity of the arbitral process. After all misconduct of counsel in arbitration proceedings is not shielded from action by any consideration of confidentiality in arbitration proceedings.

73 Over time, this could be developed so that an open-access database of information about arbitrators and their decisions could be made available under the auspices of a respected international body. This would act as an aid to parties in their selection of or even their approach towards arbitrators in future cases. Moving away from glorified and often self-promoting curriculum vitae, the database could serve as a repository of useful and independently audited information on an arbitrator's past cases, reasoned decisions (if necessary redacted to protect legitimate concerns of confidentiality), the instances where the arbitrator ruled or dissented in favour of his appointing party, as well as complaints and feedback from parties. What better way to understand an arbitrator's philosophy as a decider of these issues?

Taking into Account the Unique Circumstances of Developing Nations

74 Third, we need to address the disconnect between the background of many of the best arbitrators in the business and that of the users of arbitration. To redress this, it is imperative that the voices of the developing nations be heard, at two levels. First, arbitral tribunals adjudicating cases involving developing countries have to be aware of the unique needs of the State within the context of the case, particularly in cases impacting economic or social policy. Arbitrators tasked with hearing such cases, perhaps especially in the investment treaty context, must be alive to sensitive issues of national policy and acquire a fuller sense of the political ramifications of the decisions they make especially as these have effects that go beyond those of the individual parties. An avenue should perhaps be opened for them to more heavily engage the relevant Government agencies to acquire sufficient background.

75 The States involved must also play an active role in appointing arbitrators who can fulfil this role. The database of accredited arbitrators would be helpful, but developing States must also be proactive in encouraging leading lawyers from their countries to gain accreditation and to participate effectively in the global discourse on these issues.

76 On a more general level, a concerted effort must be made to engage developing nations in the development of the substantive norms. The emerging law must take into account vastly differing economic and political landscapes.

Further Development of Substantive Legal Norms

77 Fourth, we should examine the normative justification for arbitration providing a form of governance through its providing the platform for the emergence of substantive legal norms that govern states. In the field of investment arbitration, it might perhaps be justified on the basis that exposing States to such liability promotes transparency and accountability, as well as the enhanced protection of individual rights. But there is a need for a serious debate to take place as to whether the concepts of expropriation and fair and equitable treatment, which is what the treaties set out to protect in the first place, should extend as far as they now do. **If** we were all convinced that this global administrative law is fundamentally beneficial, then the next step would be to develop a rich jurisprudence to add flesh and texture to various aspects of the law. The principles of good governance, fair and equitable treatment and respect for individual investor rights need to be more clearly rationalised and articulated. This cannot be the sole province of a small group of arbitrators. Thought leaders from government agencies, practitioners and the academic community must engage in an on-going dialogue to generate an overarching set of legal norms that will govern treaty interpretation.

78 If arbitrators are going to play such an important role in generating norms that affect States then it seems reasonable that they be held accountable by requiring strong and careful reasoning as a condition for upholding their awards. This is simply a reflection of a reality where their decisions are not confined in their relevance to the parties before them.

79 In developing these norms, it is also vital that consideration be given to establishing a structure for review of decisions or for the authoritative articulation of principles through a system of appeals. In this regard, it would be ideal if thinkers from diverse

sources be engaged to test the validity of the conclusions found in the arbitral jurisprudence as well as to educate our arbitrators.

80 All of this needs to be supported by strenuous efforts at capacity building. Beyond the education of new arbitrators, there needs to be a structured programme of continuing professional development for experienced arbitrators and lawyers engaging in arbitration practice. The arbitration community should build upon a transnational collegiate atmosphere in which old rivalries and competition are put aside in favour of a collective sharing of knowledge and experiences.

Conclusion

81 There is a great deal for us to think about as the sun rises over this glorious, golden age of arbitration. We are richly blessed in being able at regular intervals to bring together the very brightest, the very best and the most eminent practitioners of this wonderful craft to exchange ideas, to debate and to learn. And we must make the most of these opportunities to actively consider where we have come from and where we must now head. I end as I began, lauding the advent of the golden age of arbitration and all the benefits that it has brought to those in the industry as well its end users. The growth in numbers is testament to the fact that, despite all the worries and concerns that that I have canvassed, arbitration is still the only choice for many who seek resolution of their disputes.

82 But the time is upon us to reflect on what we must do in order to ensure that the arbitration industry remains sustainable for the next generation and for generations after. We, as a profession, have the collective privilege as well as the responsibility for charting a new course that is commercially viable, yet fair and equitable from the perspectives of State actors as well as individual players. It may take us many years, but finding that equilibrium is a dream that we must never lose sight of, and never give up on. Thank you.