

Keynote Address: In Defence of Bilateral Investment Treaties

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It is a pleasure and privilege to join in welcoming this distinguished audience to the opening of ICCA Miami.

Some sixty-three years ago, the Government of Iran, led by Prime Minister Mossadegh, expropriated the concession rights and installations of the Anglo-Iranian Oil Company. Anglo-Iranian had found, extracted and exported Iranian oil for decades. Its concession agreement was a template for oil and other concessions the world over. It provided for international arbitration of disputes and the application of international legal principles in the determination of those disputes. The Government of Iran refused to arbitrate pursuant to the concession agreement. By blocking access to the agreed forum, Iran thereby committed the international delict of a denial of justice. The concession agreement provided for default arbitral appointment by the President of the Permanent Court of International Justice (PCIJ). The President (or Vice President acting in his stead) of the International Court of Justice (ICJ) declined to exercise a power of appointment entrusted to the PCIJ President. Exercising its right of diplomatic espousal on behalf of Anglo-Iranian, the Government of the United Kingdom then brought proceedings against Iran in the ICJ. It alleged multiple violations of international law, including Iran's refusal to arbitrate pursuant to the concession agreement. Iran successfully challenged the treaty bases of jurisdiction invoked by the United Kingdom, so the Court was not empowered to pass upon the merits of the dispute. Anglo-Iranian sought to interdict the sale of oil from the concession areas through "hot oil" suits, with a measure of success. The Mossadegh Government was eventually overthrown; the Shah, who had fled abroad, returned; and it is accepted that in the overthrow of Mossadegh, the intelligence services of the United States and the United Kingdom had a hand. Thereafter the Iranian Oil Consortium Agreement was negotiated, on the one part between Anglo-Iranian and a group of the major international oil companies, and on the other part the Iranian Government. The export of Iranian oil resumed unhindered. That regime flourished until the Iranian revolution of 1979. The Consortium Agreement was ruptured in its wake. But, as an element of the release of the American diplomats taken hostage by Iran, the claims of the American members of the Consortium were remitted to arbitration before the Iran-United States Claims Tribunal, a Tribunal that over the last thirty-four years has amassed a body of valuable jurisprudence. The claims of the successor to Anglo-Iranian, British Petroleum, went to *ad hoc* arbitration. The BP case was eventually settled, while claims of the American oil companies before the Tribunal were adjudicated and paid.

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Why do I recall these events in these summary terms? I do so because they suggest that if, in 1951, the then Iranian Government had abided by its contractual, and international legal, obligation to arbitrate disputes arising under the Anglo-Iranian Concession, much that is deplorable that has taken place since very probably would not have happened. Foreign subversion would not have occurred. The position of secular and democratic elements of Iranian society, and Iran's national and international policies and relations, would be very different. For these and others reasons, the history of the Anglo-Iranian Oil Company expropriation is an object lesson demonstrating that the displacement of gunboat diplomacy by international arbitration is a very real achievement.

Today that achievement is under attack. That attack is not mounted by advocates of *realpolitik* but by those who profess to be progressives. My purpose in today's remarks is to examine whether the criticism directed at arbitration between investors and States is well founded.

But before I address these critical contentions, permit me to place international investment arbitration, and the treaties from which its jurisdiction and substantive legal principles largely derive, in historical context. The value of investment arbitration can only be understood in that context.

At the time of the expropriation of the Anglo-Iranian Oil Company, the middle of the 20th Century, there was a longstanding legal as well as economic gulf between capital-importing and capital-exporting States. There was a great gulf on the substance of the governing international law – if any. There was a great gulf on international legal process – if any.

The depth of that gulf was certified by the Supreme Court of the United States in the *Sabbatino Case* when it observed in 1964 that: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."¹

On one side of that divide, capital-exporting States expounded a minimum standard of customary international law for the treatment of foreigners and their property. They could not be denied justice; they were entitled not merely to national treatment but to a minimum standard of treatment that included observance of contracts and, in the event of a taking of their investments, to prompt, adequate and effective compensation.

On the other side of the divide, capital importing States adhered to the Calvo doctrine of national treatment. The alien and his property were subject to national law and national courts and were entitled to no more than was afforded to nationals of the host State, however little that might be. Customary international law governing the treatment of alien property did not exist.

All this was well rehearsed by the Russian Revolution, where foreign property was impartially expropriated with the same compensation as that afforded to Russian nationals, that is, none; by the Mexican nationalization of oil; and, after the Second World War, by the takings in a number of instances of which the Anglo-Iranian expropriation was perhaps the most notable.

The divide early manifested itself in the United Nations under the banner of "permanent sovereignty over natural resources". In 1962, after a decade of preparation, a resolution of that title came up for negotiation and adoption. The result was a reaching

1. 376 U.S. 398, 428 (1964).

across the divide that achieved a constructive accommodation of positions. UN General Assembly Resolution 1803 (XVII) repeatedly affirmed the permanent sovereignty of a State over its natural resources. But these recitals were balanced by a recognition that “capital imported ... shall be governed by the terms thereof, by the national legislation in force, and by international law”. Expropriation required “appropriate compensation” in accordance with national and international law. Moreover, Resolution 1803 (XVII) strikingly provided that “Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith” – thus requiring the observance of contracts with foreign investors. In all, this was a proportionate resolution which recognized that foreign investment was governed by international as well as national law.

But soon after, confrontation displaced accommodation. Subsequent General Assembly resolutions on “permanent sovereignty over natural resources” excluded the governance, even the relevance, of international law. With the oil crisis of 1973, and the pain engendered by the immense surge in the price of oil, especially felt in the developing world, the UN Group of seventy-seven developing countries was led by OPEC to maintain that international economic problems were all the fault of the West. What was needed was a “New International Economic Order”. North/South dispute came to a head in 1974 with the General Assembly’s adoption of the “Charter of Economic Rights and Duties of States”.² That Charter excluded international law in the treatment and taking of foreign property and asserted the sole governance of the domestic law of the host State as interpreted and applied by its courts. Key industrialized democracies voted against the Charter. At that juncture, the outlook for universal or even broad agreement in this sphere on either legal process or principle seemed remote.

This informed audience is familiar with two initiatives that changed that outlook to a presence far more beneficent. The first – the creation of the International Centre for Settlement of Investment Disputes (ICSID) – was one of process. The second – bilateral investment treaties (BITs) – was built on the first and successfully surmounted the divide not only over process but principle as well.

The then General Counsel of the World Bank, Aron Broches, saw in the 1960s at the time of the UN debates on permanent sovereignty over natural resources the difficulties of reaching meaningful and sustainable universal agreement on the principles at stake. His ingenious contribution was to sidestep what seemed to be a sterile substantive confrontation with procedural creativity. The Bank would not take sides between the developed and developing worlds. Rather it would create a facility for the impartial arbitral settlement of inevitable international investment disputes. Broches and his colleagues prepared the ground carefully in a series of regional conferences in which States and their legal advisers were fully consulted. He brought the persuasiveness of his vivacious personality to bear both with the legal advisers of governments and the Executive Directors of the Bank to put his insight across. The result was the conclusion in 1965 of the Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States.

That Convention was and remains a remarkable achievement. Professors Dolzer and Schreuer in their valuable book, *Principles of International Investment Law*, offer this appraisal:

2. General Assembly Resolution 3281 (XXIX).

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“At first sight, the Broches concept (‘procedure before substance’) seemed to be a limited and modest one.... In retrospect, it has become clear that the creation of ICSID amounted to the boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment. This is so because of the combination of five pertinent features of ICSID: (a) foreign companies and individuals can directly bring suit against their host State; (b) state immunity is severely restricted; (c) international law can be applied to the relationship between the host state and the investor; (d) the local remedies rule is excluded in principle and (e) ICSID awards are directly enforceable within the territories of all states parties to ICSID.”³

While ICSID got off to a slow start, as international institutions often do, today there are 150 States Parties to the Washington Convention. As of December 2013, ICSID has registered 459 cases. It currently is administering 183 arbitrations. Moreover, investor/State arbitration flourishes with the assistance of other institutions and rules, among them, the Permanent Court of Arbitration, the Stockholm Chamber of Commerce, the London Court of International Arbitration, the International Chamber of Commerce and the American Arbitration Association’s International Center for Dispute Resolution. This year the Permanent Court of Arbitration is administering nine arbitrations between States, fifty arbitrations between investors and States pursuant to bilateral investment treaties, and another thirty-one arbitrations founded in contracts between States and foreign investors. There are also numbers of *ad hoc* arbitrations between States and foreign investors, mostly applying the UNCITRAL Rules. The ICJ currently has eleven cases between States on its docket, and other international tribunals are not idle. In all, international litigation over international legal disputes is at the highest tide in history.

As for the legal principles applied in arbitrations between foreign investors and States, it may be recalled that, in 1959, Germany concluded the first bilateral investment agreement, with Pakistan. That treaty built upon the numbers of treaties of friendship, commerce and navigation. From that beginning, some 3,000 bilateral investment treaties – “BITs” – have sprung. The majority are in force, as are important multilateral treaties that incorporate essential elements of BITs, the Energy Charter Treaty, the North American Free Trade Agreement, and the Central American Free Trade Agreement. These three multilateral treaties in their provisions for arbitral recourse are equal to many bilateral treaties in force.

At the same time however, the European Union may be phasing out the BITs between its Members while, so far, maintaining those with other States and negotiating new BITs, such as one with Burma. Yet there are reports that the European Union, led by Germany, may favor excluding investor/State arbitration from the trade agreement under negotiation with the United States. Moreover, South Africa and Indonesia are reported to have decided not to renew their many BITs when they expire. Yet new BITs, such as that between Australia and the Republic of Korea, appear to be in the process of conclusion. Three Latin American States have withdrawn from ICSID. Since their

3. Rudolf DOLZER and Christoph SCHREUER, *Principles of International Investment Law* (2008) p. 20.

withdrawal however ten States have ratified the ICSID Convention. So the prospects for the ubiquity of investor/State arbitration appear to be mixed.

Bilateral investment treaties bridge the substantive divide between the traditional positions of capital-exporting and capital-importing States in largely concordant terms designed to promote and protect foreign investment. Those terms are more precise and far-reaching than the content of customary international law earlier invoked by capital-exporting States. By the terms of typical BITs, foreign investment is assured of fair and equitable treatment, full security and protection, and no less than national and most-favored-nation treatment. The foreign investor is assured of management authority and control. The terms of commitments entered into in respect of foreign investment are to be observed. If there is a taking by the State of the foreign investment, by means direct or indirect, the host State is treaty-bound to pay prompt, adequate and effective compensation. Moreover, the great majority of BITs enable the foreign investor to require the host State to arbitrate treaty disputes, through ICSID or otherwise.

That entitlement to international arbitration is one of the most progressive developments in the procedure of international law of the last fifty years, indeed in the whole history of international law. It is consistent with the development of international human rights, including the right to own property, and with the dethroning of the State from its status as the sole subject of international law.

BITs now run not only between North and South but between East and West. There are more than 600 South/South BITs, that is, bilateral investment treaties between two developing States. The Russian Federation and other successor States of the Soviet Union, and the People's Republic of China, are parties to scores of BITs, as is Cuba. While early Chinese BITs were more limited than those pioneered by Western Europe, the cascade of Chinese BITs of recent years approach the norm, as China becomes not only a major capital importer but exporter.

There are few areas of international law and life that have been the subject of some 3,000 concordant treaties: most-favored nation provisions come to mind but it is not easy to call up another. In view of that immense number of treaties, the virtual universality of adherence to them, 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. That is to say, it may be argued that pervasive, core provisions of BITs, namely those providing for the international legal standards of fair and equitable treatment and prompt, adequate and effective compensation, by the fact of being prescribed in some 3,000 bilateral investment treaties and three multilateral treaties, 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. That arguable thesis has a measure of support in a few arbitral awards.⁴ In any event, bilateral investment treaties have remarkably refashioned both the process and the principles of international law in respect of the treatment and taking of foreign property.

4. *Mondev International Ltd. v. United States of America* (ICSID Case No ARB(AF)/99/2), Award of 11 October 2002, and *CME Czech Republic B.V. v. Czech Republic*, Final Award of 14 March 2003, paras. 497-498.

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That development has produced diverse appraisals. I have just given a positive view. What are the elements of a negative view, of the claim that there is a “legitimacy crisis” affecting investor/State arbitration?

The essential contentions advanced by the critics of international investment arbitration are these:

- International investment tribunals are biased in favor of multinational corporations and against defendant States, or in the least appear to be biased.
- They are or appear to be biased because international investment arbitrators are predominantly drawn from the ranks of commercial arbitration and from the West.
- They are or appear to be biased because investment arbitrators, many of whom have acted or continue to act as counsel, are or may be influenced by their desire for further appointments rather than only the merits of the case.
- Repeated appointments give rise to questions of “issue conflict” because such arbitrators pass upon questions on which they have passed upon earlier or have argued or written about as counsel or commentators.
- International investment arbitration is asymmetrical because investors can bring claims against States while States cannot bring claims against investors.
- Investors are placed on an equal plane with States, despite investors having their monetary interests in view whereas the State promotes the public interest.
- International investment encroaches upon the ability of States to regulate in the public interest, it constrains their “policy space”.
- International arbitral awards repeatedly conflict with one another in the absence of an international appellate court that could impose order on disorder. A tenured international court, constituted only by States, should replace international investment arbitration. In the meantime, States that have suffered adverse arbitral awards are free to ignore them.

These criticisms are more colorful than they are cogent.

In point of fact, have international investment tribunals produced biased awards, biased in favor of investors and against States? The revealing research of Professor Susan Franck concludes that of 144 publicly available awards, as of January 2012, where arbitrators resolved a dispute arising under a treaty, States won 87 cases, awarding no damages to the investor, and investors won 57.⁵ ICSID statistics show that of its disputes decided in 2013, jurisdiction was declined in 31%, the award dismissed all claims in 32%, and an award upholding claims in part or in full issued in 37%.⁶ Those figures in the large hardly suggest bias against States.

Professor Franck, using data from published final awards, further shows that where the investors won damages, they won far less than claimed. That may suggest that investors tend to take an expansive view of their claims, but it hardly tends to show bias against States. The figures also show that about a quarter of investment claims are dismissed at the jurisdictional stage. If investment arbitrators were truly influenced by the prospect of remuneration for extended proceedings and the prospect of further

5. Susan D. FRANCK, “Promoting Conflict Management,” ICSID Review, p. 14.

6. The ICSID Caseload, Statistics (Issue 2013-2), Chart 7a, p. 28. See also p. 14.

appointments, why would they terminate so many arbitral proceedings at the jurisdictional stage? Moreover, the large majority of international arbitral awards are unanimous, a fact that suggests that arbitrators are not unduly responsive to the interests of the party that appointed them.

Arbitrators of investment disputes may be predominantly drawn from those who act as commercial arbitrators, or even as practitioners, though in fact there are a number of leading international arbitrators who have been government officials or national or international judges or who are academics. International investment disputes tend to be substantial disputes. It is unsurprising that the parties tend to choose arbitrators of experience. Before a lawyer is chosen to be an arbitrator, he will need to have acquired a reputation, normally in the practice of law. If practitioners were to be excluded from international arbitral appointments, it is not apparent how arbitral tribunals would be composed of persons knowledgeable in the law and in the ways of adjudication. As for arbitrators continuing to act as counsel, the number of those who can make a living solely as arbitrator is not large. At this very gathering, which brings together the leading international arbitrators of the world, many also act as counsel. Some of the most distinguished arbitrators of our or any time were or remain practicing lawyers. Most of them may be from the West, a fact which is sustained by arbitral appointments by States, including non-Western States, as well as appointments by claimants and institutions, but there is a distinct and welcome trend towards diversity. There is room for many more female arbitrators, a development that will surely come as it has in the practice of law and in national and international courts.

Should arbitrators be subject to challenge because of “issue conflict”, because, as arbitrator or counsel, or as a published commentator on the law, they have dealt with or passed upon a BIT provision that is at issue in the current case? Think of how many judges would be surprised to be asked to recuse themselves in a case in which a constitutional or statutory provision is at issue because, in a prior case, they had been required to pass on that provision. If the justices of the Supreme Court of the United States were required to interpret the commerce clause in one case, can it be seriously maintained that they cannot sit in another case where the commerce clause is in issue? Or is it rather and rightly presumed that a judge or arbitrator of integrity and ability will deal with the facts and law of each case on their merits?

Of course there is no such thing as perfect objectivity. Each of us sees the world through his or her own eyes, each of us is a prisoner of his or her own experience. But nevertheless the institutions of judging and arbitrating have long been accepted instruments of civilization. If international arbitrators who have dealt with a question of fair and equitable treatment, or the umbrella clause, or a security reservation, in one case are subject to challenge where that question is at issue in another case, will not the result be that novices will tend to rule the roost, that the ranks of experienced arbitrators will be decimated?

As for the criticism that the international investment process is asymmetrical, that investors can bring claims against States but States cannot bring claims against investors, that is generally so though States can and have brought counterclaims. Arbitral rules, such as those of ICSID and UNCITRAL, expressly authorize counterclaims. In any event, any imbalance is exaggerated, because the State has not only police powers but the police. It can bring the weight of its bureaucracy to bear. The State has so many ways in

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which it can exert pressure upon the foreign investor; the ability of the investor to launch arbitration only mitigates that imbalance. And how is it that the NGOs who complain of asymmetry in investor/State arbitration make no such complaint about human rights courts, where only the alleged abused can bring a claim against the State? Nor does one hear that the United States Court of Claims is asymmetrical because it is the judicial forum for claims against the Government of the United States.

Moreover the critics of investor/State arbitration fail to weigh the importance of its substitution for diplomatic espousal. The exercise of diplomatic protection historically could produce pressure exerted by the more powerful State against the less powerful. Yet paradoxically it was replete with rules which allowed the government of the alien to escape the diplomatic burdens of espousal, such as the local remedies rule and that of continuity in the nationality of claims.

Naturally the investor and the State are on the same legal plane in proceedings in investor/State arbitration. Equality of arms is a fundament of legal proceedings. It is a norm that arbitral tribunals are bound to maintain. That is so whether or not governments are charged with acting in the public interest.

Do BITs invade the freedom of States to regulate, do they constrain the “policy space” of States? BITs are treaties. The very purpose of treaties is to constrain the freedom of States. As the PCIJ fundamentally held in its first judgment on the merits, in *The S.S. Wimbledon*,

“The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction on the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”⁷

States that enter into international engagements in the form of BITs are free to confirm and specify their rights to regulate within their borders, as more recent model BITs and treaties of some States do. Legitimate questions may arise about how far BIT provisions bear upon those rights. If those questions have not been settled by the terms of the BIT, they can be through recourse to the treaty’s machinery for dispute settlement. To cast aside investor/State arbitration because of unrealized apprehension that a few major cases which understandably arouse concern may – may – produce awards adverse to the State would be one of the profoundest misjudgments ever to afflict the procedures of peaceful settlement of international disputes.

Finally let’s turn to the call for an appellate court to govern arbitral tribunals on the ground that arbitral awards conflict. In point of fact, there is a large measure of consistency in investment awards, both on jurisdiction and merits. But there have been conflicting interpretations of some comparable BIT provisions.

Conflicts in interpretation are undesirable. But in view of the decentralized, horizontal nature of the international system, they are not unusual. The international legal structure has never been neat. Even in the relatively centralized, hierarchical

7. *The S.S. Wimbledon, Judgment (Merits)*, 17 August 1923, Series A, No. 1, p. 25.

judicial systems of a State, conflicts among courts are frequent. In the United States, to take the example at hand, conflicts between state courts are common. Even in federal courts, conflicts are substantial. There are conflicts among Circuit Courts of Appeal that persist for years unsettled by a judgment of the Supreme Court.

Moreover much can be unduly made of investment arbitration conflicts that have occurred, as in the case of two awards in the so-called *Lauder* cases against the Czech Republic. The two decisions did not interpret the two concordant BITs conflictually. They rather interpreted the facts differently. Their difference was not of treaty interpretation but of factual causality. Moreover, counsel for the claimants had sought to have both actions joined or the same arbitrators appointed in both proceedings; counsel for the Czech Republic refused. Thus such conflict as there was between the outcome of the two cases was enabled by that decision of the Respondent.

In point of fact, the conflicts ascribed to interpretation of the same treaty provisions often do no such thing. Rather, as in the *Lauder* cases, the conflict derived from the differing facts of each case, or from differing treaty provisions. As an example of the latter, take the MFN provision in the *Maffezini* case and that at issue in the *Plama* case. Their differing wording goes far to explain the allegedly conflicting conclusions that were reached by the two tribunals. Still another such example is found in the differing terms of the umbrella clauses at issue in *SGS v. Philippines* and in *Salini v. Jordan*.

But insofar as there are cases in which there really have been conflicting interpretations of the same BIT provisions, should a tenured appellate court be established to resolve such conflicts?

In principle that proposal is appealing. A suitably composed and financed appellate court would not only provide review of the merits but should enhance confidence in the system, as the Appellate Body of the World Trade Organization has in its sphere. But to realize the creation of an appellate court for investor/State arbitration would present many difficulties, as ICSID may have found when it examined the possibility. If States wish to establish an appeals court, they can but they show little disposition to do so. When some fifty States concluded the Energy Charter Treaty after an extended, highly professional negotiation, they could have provided for a court but they opted for arbitration between investors and host States. Does that suggest that those States were unaware of their interests, that they overlooked their regulatory powers, that they were set on depreciating the currency of their courts? And the Parties to the Energy Charter Treaty appear to be satisfied with their choice. As the Deputy Director for Energy of the European Commission put it in an address to the 24th Meeting of the Energy Charter Conference, "This provision [the Energy Charter Treaty's dispute settlement mechanism providing for investor/State arbitration] is a jewel in the crown of the Treaty, and has over the past fifteen years proven its practical value. It gives investors a tool to enforce the rights provided by the Treaty."⁸

Furthermore, if there were to be an effort to achieve agreement on a worldwide multilateral treaty governing the treatment of foreign investment, the prospects of reaching and ratifying such a treaty would appear to be darker still than the outlook for

8. 24th Meeting of the Energy Charter Conference, Address by Mr. Fabrizio BARBASO, Deputy Director for Energy, European Commission.

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establishing an appellate court. The failure to reach agreement in the OECD on a Multilateral Agreement on Investment should be instructive.

In sum, can it really be supposed that States of North and South, East and West, developed and developing, of virtually all political complexions and economic models, some 180 countries, have been misguided in concluding some 3,000 investment treaties, and that it has taken a think tank here and a group of professors there, or labor union officials here, and environmental proponents there, to reveal to the world the error of their ways?

Many of the more than 600 South/South BITs running between developing States have been concluded with the benefit of careful preparation by the Asian-African Legal Consultative Organization. That Organization has strongly supported dispute settlement by ICSID and otherwise. Are we to believe that these pairs of developing States, contracting with each other in the light of advice of their Asian-African Legal Consultative Organization, acted not in their own interests but in the interests of multinational corporations?

What do critics of investor/State arbitration offer in place of investment arbitration? Primarily resort to tenured national courts to settle investor disputes, in the tradition of Calvo. Some national courts handle disputes with foreign investors competently and objectively, some do not. There are tenured courts in too much of the world that may find themselves constrained by state immunities, or which are incompetent, subject to political influence, corrupt, or just nationalistic in their perception of the facts and the law. All state courts in the United States cannot be said to have been uniformly free of such disabilities, as one NAFTA arbitral tribunal had compelling cause to find. It is perfectly reasonable and defensible for foreign investors to prefer international arbitration, just as many thousands of parties engaging in international commerce have for many years.

The processes of international arbitration can be improved. They are rife with tactical challenges to arbitrators. Perhaps arbitral tribunals or institutions should be empowered to impose sanctions on parties or their counsel who abuse the making of challenges.

Annulment proceedings in ICSID for a time seemed to have become reflexive rather than exceptional, though in the last few years the pace of resort to annulment has slowed. Sixty-five annulment proceedings were commenced as of 2013, resulting in the annulment of six awards in full and seven in part. Considering that 180 ICSID awards had been rendered as of that time, the rate of annulment has been low, but the processes have nevertheless been time-consuming and expensive. Some annulment committees, while proclaiming that they are not courts of appeal, proceeded to act as if they were.

Another reform that may merit consideration is institutionalizing security for costs. As it is, special purpose vehicles may bring a thin claim against a State which has the financial burden of defending itself; the State wins the arbitration and is awarded costs, but finds that the special purpose vehicle used by the claimant lacks the funds to pay costs.

It is to shortcomings such as these that reform efforts should be directed.

It is of course of capital importance that the awards of international arbitral tribunals be paid, promptly and in full, certainly once any legitimate legal recourse has been exhausted. It is extraordinary that a group of legal scholars has advocated violation of that

legal obligation.⁹ International institutions, such as the World Bank and the International Monetary Fund, should threaten to suspend, and if needs be, actually suspend lending to States that willfully fail to pay international arbitral awards. When the World Bank, after years of indulging a State that evaded paying awards against it, finally indicated that fresh loans would not be forthcoming, that State made arrangements to pay outstanding awards – to the benefit of that State as well as the claimants whose awards were finally paid in some measure.

International lawyers have been long and rightly concerned with the progressive development of international law. Substitution of national adjudication for international investment arbitration would be a regressive development that is to be resisted rather than furthered. International investment law is a profoundly progressive development of international law which should be nurtured rather than restricted and denounced.

9. Public Statement on the International Investment Regime, 31 August 2010, para. 8:

“There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration, including by refusal to pay arbitration awards against them where an award for compensation has followed from a good faith measure that was introduced for a legitimate purpose.”