

An Arbitrator's Perspective of BITs and their Relation to Other International Law Obligations –

by Karl-Heinz Böckstiegel *

**Paper given at the Conference
50 Years of Bilateral Investment Treaties –
Taking Stock and Look to the Future
Frankfurt
1 – 3 December 2009**

Outline

- 1. Introductory Note**
- 2. Where do we come from ?**
1st BIT, ICSID Convention, Iran-United States Claims Tribunal, United Nations Compensation Commission.
- 3. Where are we presently ?**
BITs world wide, ECT, NAFTA, CAFTA, ICSID, UNCITRAL Rules, Permanent Court of Arbitration, ICC, LCIA, national arbitration institutions, Softwood Lumber cases, drawbacks such as by Russia and certain Latin American states.
- 4. The Relationship between BITs and Other International Law Obligations**
 - 4.1. Regular Features**
Vienna Convention on the Law of Treaties, ILC Draft Articles on State Responsibility, ICSID Convention, Customary International Law.
 - 4.2. Specific Features**
Most favoured Nation Clauses, European Law, New York Convention
- 5. Where are we going ?**
Substantive protection, procedural protection of investments, role of arbitrators.

* Prof. Dr. jur; Independent Arbitrator; Member of Law Faculty of University of Cologne as Professor Emeritus. Chairman of the Board, German Institution of Arbitration (DIS). Patron of Chartered Institute of Arbitrators. Practice as arbitrator and president of arbitration tribunals in many national and international arbitrations of ICSID, ECT, ICC, LCIA, NAFTA, CAFTA, UNCITRAL, PCA, DIS, AAA, SCC and others.

President of International Law Association (ILA) 2004-2006; President of German Association for International Law. 1993-2006; President of London Court of International Arbitration (LCIA) 1993-1997; Panel Chairman of the United Nations Compensation Commission 1994-1996. President of Iran-United States Claims Tribunal, The Hague, 1984-1988. Chair, „Arbitration of the Century“, IBA Conference Amsterdam 2000.

Publications: 12 books authored and 35 books edited. More than 300 articles. Libri Amicorum: 1) Law of International Business and Dispute Settlement in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel; Editors: Briner, Fortier, Berger, Bredow; Cologne 2001, 824 pages. 2) Air and Space Law in the 21st Century – Liber Amicorum Karl-Heinz Böckstiegel; Editors: Kröll, Benkö; Cologne 2001, 496 pages.

1. Introductory Note

At the beginning of my presentation, two personal notes would seem appropriate.

First, since this conference is held in the hall named after the legendary Hermann Josef Abs to whom much tribute has been paid at the Conference as the visionary promoter of an international investment scheme as early as the 1950s: My interest in the topic goes back as long as my first research efforts after my law studies. When, in 1960, I spent a year in Geneva doing research at the magnificent library of the United Nations, both publications I produced dealt with the protection of property in international law. My Doctoral Thesis with the property protection under the European Convention on Human Rights, and a separate publication with the property protection under customary international law to which Hermann Josef Abs wrote the Preface.

Second, my perception of our topic, though I have dealt with it in my university research over many years, is today inclined to be influenced by my practice as an arbitrator in many investment cases under the rules of ICSID, the ECT, ICC, LCIA, UNCITRAL, NAFTA, CAFTA, and others, and also by my experience in various functions I have held in a number of international legal and arbitration institutions.

2. Where do we come from ?

In order to appreciate the present and future perspectives of investment protection and particularly of the BITs and of related dispute settlement, we should shortly realize where we come from. In the 1950s, investment protection was already a widely discussed topic, because Abs, Shawcross and others on one hand already realized its significance for a globalisation of trade and investment, and on the other hand had a sufficient reputation with governments and the international business community to get concrete efforts started for a promotion of investment protection. The **first BIT** between Germany and Pakistan was the first instrument of international law resulting therefrom. Parallel to this bilateral approach, these personalities and the associations they initiated for the promotion of investment protection started efforts for a multilateral convention on the protection of investments. But as we all know, these efforts including those at the OECD failed for many years. Only, much later, the Energy Charter Treaty became the first global multilateral instrument which actually became law. In addition, the European Union, the European Convention on Human Rights, NAFTA and CAFTA were realized as regional instruments.

But the reason we are all here for this conference is, of course, that the bilateral approach not only prevailed, but became such a success story and resulted in such a great number of BITs that they truly now create a network of bilateral protection with a multilateral effect.

And one of the new features of most of the BITs was and is that they include provisions on dispute settlement directly between the foreign investor and the host state. This was an innovation of high practical importance, because investors did not depend any more on going to the national courts of the host state or on the diplomatic protection of their home states in case of expropriation or other interference with their investment. Rather, they now had the right to directly start legal proceedings against the host state before

independent arbitral tribunals. Finally, the investor could not only claim to have legal claim, but now he also had a forum for enforcing it.

Nevertheless, it took some years until this legal right was in practice realized by actual arbitration proceedings. The formation of **the ICSID Convention** was a turning point. Due to its initiation by the World Bank it was soon ratified by a considerable number of states. But even then, I still remember that, Aaron Broches, then Vice-President of the World Bank and the first Secretary General of ICSID, told me for years how disappointed he was by the very few arbitration cases actually brought to ICSID.

Similarly to the BITs, a bilateral, but more specific mile stone was the creation of the **Iran – United States Claims Tribunal** in The Hague after the Iranian revolution. Here, two states in extremely difficult political relations nevertheless agreed by the Algiers Accords in a treaty of international law to create an international tribunal which had the competence to decide all disputes between the two states and their citizens and enterprises related to their investments and contracts in the other country. This led to more than 4000 cases being brought to the Tribunal. From my own time as President of that Tribunal I am aware that the work of the Tribunal was by no means an easy task and sometimes the Tribunal was at a stand still and had to be revived. But it must be considered as quite an encouraging achievement that all claims dealing with claims of a total of more than 60 billion Dollars, with very few exceptions, have been decided and the decisions rendered were complied with in spite of the continuing extremely difficult relationship between the two states.

In our context, it should also at least be recalled that, after the first Iraq war, an effective dispute settlement machinery was set up to deal with the many claims of contractors and investors suffering damage from the Iraqi invasion. The **United Nations Compensation Commission** created by the Security Council for that purpose, though in many ways not a normal arbitration tribunal as I know from my own time as a Panel Chairman, succeeded to decide thousands of claims and its decisions were enforced using the income from the so-called oil-for-food-program.

3. Where are we presently ?

My short look into the past may have been enough to illustrate the long development up to the present situation and also enough to realize the significance of the 50 years of BITs and of the huge number of **BITs ratified worldwide** both regarding the substantive protection of foreign investments and the procedural protection by the availability of dispute settlement machineries. The BITs have created a universal system of substantive and procedural investment protection which is a fundamental and most relevant part of the international legal and economic order.

While these BITs, by themselves, are treaty law and do not present customary international law, their validity in so many bilateral relations between so many states world wide might be taken as an indication of what the general opinion is regarding certain aspects of investment protection also for third states outside a particular BIT. However, as BITs differ considerably in detail, such a consideration may only be possible in connection with what is found to be common denominators which might be the minimum standard of protection granted by all or by far most BITs.

And to avoid any misunderstanding, let me point out that each and every BIT has to be applied and interpreted by itself using the criteria offered by the Vienna Convention on

the Law of Treaties. This also implies that the decisions of other Tribunals regarding a similar or the same BIT or provision in a BIT are by no means binding for an arbitral tribunal though they may be taken into account in interpreting a BIT.

My focus in this presentation is on the procedural protection of investments. It seems to be taken for granted nowadays that a foreign investor, if he feels that the host state has breached its obligations, can start arbitration proceedings before an independent tribunal. Indeed, the BITs and the **Energy Charter Treaty** as well as the regional instruments such as **NAFTA and CAFTA** I mentioned provide not only a wide-ranging network of substantive protection, but at the same time a judicial protection either by their own arbitration provisions or by granting the investor the option to start arbitration proceedings against the host state under the rules of ICSID, UNCITRAL or other arbitral institutions.

In practice, this has led, as we all know, to a still growing number and variety of investment arbitrations never seen in the past. In that context, I am inclined to see certain recent new trends. While ICSID continues to have a great number of pending and incoming cases, I seem to see more often than before that investors or states turn to other arbitration institutions. One reason might be that the ICSID procedures provide for a rather intense involvement of the ICSID staff in the continuing administration of cases and that the present limited staff may not always prove to be sufficient for a speedy and efficient administration of that many cases. I am aware that, under the leadership of its new Secretary General, efforts are made to improve and speed up the procedures. But, in order to improve its objective logistical capacity, it would certainly be helpful if the World Bank could increase the budget of ICSID to deal with that difficulty.

From my own case load, I particularly see investment cases initiated by the Parties more than before under the **UNCITRAL Rules**. And often they include a case administration by the **Permanent Court of Arbitration** at The Hague not only as the appointing authority, but also for the administration of the procedure. Further, I have been personally involved as an arbitrator in investment cases initiated under the rules of the **ICC**, the **LCIA** and also of national arbitration rules such as of **the Stockholm Chamber of Commerce, the Swiss Rules and the Vienna Rules**.

And even for disputes between governments, though the BITs contain specific dispute settlement provisions, states may decide to prefer other fora as I could recently experience when I was asked to chair the so-called Softwood Lumber Cases for which the two governments of Canada and the United States had chosen the arbitration rules of the LCIA and the proceedings worked quite efficiently leading to three Awards complied with by the two states.

On the other hand, some **drawbacks** must be noted.

One example is that **Russia** gave notice of its intention in August 2009 not to ratify the Energy Charter Treaty (ECT), though, according to Art. 45(3) ECT this does not effect the protection of investments made in Russia during the provisional application of the ECT according to its Art.45(1).

Other examples are that particularly in **Latin America** some states such as Bolivia, Ecuador and Venezuela have turned to policies trying to avoid investment arbitration before international tribunals. Three basic options are considered and sometimes used in this regard, as was recently reported during the IBA Conference in Madrid: 1) A state

may introduce in its national law or even its constitution provisions forbidding access to international investment arbitration. The effect of such provisions in national law may be limited by Art. 27 VCLT and ICSID Art. 72 both providing that a state may not rely on its domestic law to justify a breach of a treaty which also protects BITs. 2) The second option is the withdrawal from a treaty such as the ICSID Convention or the BIT itself which of course can only effect future investments. 3) The third option is that the host state uses its negotiating power to include in contracts with a foreign investor and the host state or its state entities express waivers of the right to go to international arbitration. The effect of such contractual provisions would obviously depend on the details and circumstances of the contract and the relevant provisions of the BIT to be applied.

An interesting very recent development is on the other hand that, in September 2009, **Russia** ratified the new BIT with **Venezuela** which provides for dispute settlement either by arbitration under the Rules of UNCITRAL or of the Stockholm Institute.

And in the **United States**, also in September 2009, a report of the Advisory Committee to the US State Department identified some fundamental disagreement regarding the future US model BIT including the appropriateness of investor-state arbitration.

4. The Relationship of BITs with Other International Law Obligations

The organisers of our conference have asked me to also focus on my experience as an arbitrator regarding the relation between BITs and other international law obligations. This relation has some regular features appearing practically in almost every case, but also some specific ones depending on particular circumstances.

4.1. Regular Features

The regular features are well known and may only be mentioned very shortly. Since every BIT is a treaty under international law, its application and interpretation is subject to the **Vienna Convention on the Law of Treaties** (VCLT), either because the BIT states have ratified that Convention, or because it is today generally considered as part of customary international law. Therefore,

- Article 24 (Entry into Force)
- Art. 25 (Provisional Application)
- Art. 26 (Pacta sunt Servanda)

are of permanent relevance in BIT cases.

Quite often, also Art. 27 VCLT is invoked by the investor, as it provides that a state may not invoke the provisions of its internal law as a justification for its failure to perform a treaty. That provision, however, has to be seen in context with specific provisions in the BIT referring to certain application of the domestic law of the host state and, in ICSID cases as well with Art. 42(1) of the ICSID Convention which refers to the law agreed by the parties and otherwise to the law of the host state and also to the rules of international law.

Most often applied in investment arbitrations are probably Articles 31 and 32 of the Vienna Convention which provide explicit rules for the interpretation of treaties and for supplementary means of interpretation.

Primarily regarding procedural aspects of the case, a regular feature is at least in ICSID arbitrations that, with regard to a number of issues, the relation between the BIT and the **ICSID Convention** has to be established by the tribunal. This is not always a simple task. Often, the two treaties will be supplementary to each other allowing simply to apply their provisions in addition to each other. But with regard to some aspects, the BIT – as a bilateral treaty - may be considered as the *lex specialis* in relation to the multilateral ICSID Convention. And in other respects, the ICSID Convention could be the *lex specialis* as it deals with the specific matter of dispute settlement and is referred to by the BIT.

Regarding issues of substantive law, a regular feature of investment arbitrations is that, in addition to the provisions of the BIT itself, the ***Draft Articles on the Responsibility of States for Internationally Wrongful Acts***, elaborated by the International Law Commission and accepted by the General Assembly of the United Nations, have to be applied to establish the consequences of any breaches of the BIT. While these Draft Articles are obviously not a treaty, they are generally considered by now as representing principles of customary international law and in the practice of cases the parties rely on them and tribunals accept them as such.

But also beyond the issues dealt with in the BIT and the ILC Draft Articles, **customary international law** may provide substantive investment protection or give guidance for the interpretation of certain principles such as denial of justice, unfair and inequitable treatment, both direct and indirect expropriation. This relationship also comes up regarding the protection against the taking of contractual rights, either by umbrella clauses in the BIT or by including contractual rights as part of *property* or vested rights protected in customary international law. Since, compared to customary international law, the BIT is the more specific instrument, its express provisions would seem to give the primary indication of what standard of protection applies for the investment and investor. And if a conflict is found between these protective standards, the BIT provisions would seem to prevail. This does not necessarily exclude that, due to other provisions or a general interpretation of the BIT, in addition rules of customary international law have to be applied.

4.2. Specific Features

In addition to these regular features of a relationship to other parts of treaty or customary international law appearing in almost every investment dispute, some specific features come up more and more frequently with considerable effect on the procedural and substantive outcome of the case.

A recently much discussed issue is the application and interpretation of ***Most Favoured Nation Clauses*** (MFN Clauses) which are contained in many BITs. Particularly the question whether MFN-clauses can be applied to extend jurisdiction of an arbitral tribunal beyond the arbitration clause in the particular BIT itself by applying a further going arbitration clause in another BIT is highly disputed. While there is no space here to discuss the details, let me indicate that my own view in this regard is further elaborated by what we said in our Rosinvest Case Award on Jurisdiction. As you may

know, this is one of the Yukos cases and our Award has been published. We came to the conclusion that there is no general answer to the question and that a specific interpretation is required for each BIT, each arbitration clause in the BIT, each MFN clause in the context of the BIT, and each arbitration clause in another BIT to which one may be referred. In the specific circumstances of the Rosinvest Case and in application of Articles 31 and 32 of the Vienna Convention for the interpretation of the respective provisions, we came to the conclusion that the MFN clause in the BIT between Russia and the United Kingdom led to the application of the wider arbitration clause in the BIT between Russia and Denmark thereby extending the jurisdiction of the Tribunal beyond the more limited arbitration clause in the Russia-UK BIT.

A further more recent issue is that of the relation between BITs of member states of the European Union and **European Law** itself.

There is only one dispute in which I am personally involved as an arbitrator which deals with that issue. Since it has been published, and obviously without prejudice to further submissions by the parties and considerations of our tribunal, I can say that it is a case under the UNCITRAL Rules between Electricité de France and Hungary administered by the Permanent Court of Arbitration in The Hague. It particularly concerns long term contracts between Hungarian state institutions and a foreign investor which were cancelled by Hungary after the European Commission had decided that they were in breach of European Law and had to be terminated. Our case has just started, but two similar cases under the ICSID Rules introduced by AES and Electrabel against Hungary have already gone further and been reported on. Procedurally it is of interest that in both earlier cases the European Commission requested and was permitted to submit *amicus curiae briefs* and that in our case the parties and the tribunal agreed to invite the Commission to do the same.

A more fundamental issue that I am not acquainted with from my own cases, but only know from reports and commentaries, is that the European Commission has started infringement proceedings against Austria and Sweden and more recently against Finland pursuant to Art. 226 ECTreaty claiming that certain obligations the states accepted in their BITs towards investors were in breach of European Law. In all three of these cases, the European Court has already issued decisions accepting that claim. While this is not the place to discuss these issues in detail, one major question in this context is what effect such a Decision has for the BIT. The BIT being a separate treaty under international law is not lower in any hierarchy to European Law and therefore the validity of BIT-provisions cannot be affected directly. If the BIT contains a clause to the effect that the investor is subject to the national law of the host state and since European Law is part of the national law of the EU-member states, it would have to examine whether that BIT-clause also provides the state the authority to withdraw those rights from the investor which turn out to be in breach of European Law. Otherwise the BIT remains valid, the investor can rely on the protection it grants, and the only effect may be that the state has a duty under European Law to terminate the BIT as soon as possible. In that latter scenario, the procedural protection by the arbitration clause and the substantive protection by other BIT-provisions remain in place and applicable for the period until such a termination takes effect.

On the other hand, as discussed in more detail in other contributions to this conference, after its coming into force, the **Lisbon Treaty** extends the European Union's competence over trade policy to include "*foreign direct investment*" which means that the EU now may negotiate and sign BITs including dispute settlement provisions and

control the treatment of foreign direct investment within the EU. It will be interesting to see how the EU will deal with the many BITs concluded by its member states with other EU member states and even more so with third states up to now, and with the new BIT just signed between Germany and Pakistan on the first day after the Lisbon Treaty entered into force. It can only be hoped that the interest of investors and BIT states to continue with the agreed protection schemes will be the major consideration to be taken into account. Insecurity and unpredictability in this context should certainly be avoided in the interest of international investment and the interests of both investors and host states. And it will also be important that both investors and host states continue to have a clear and independent dispute settlement machinery available.

Finally, let me report on a recent arbitration I chaired and in which the parties introduced some very innovative issues into the application of BITs and particularly their relationship to the **New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards**. Since this is an ICC case, there is a general duty of confidentiality. But – as it not seldom happens nowadays – soon after we had issued our Award, it was reported by one of the online reporting services. Nevertheless I feel I should only report on it in more abstract terms.

A claim was raised by a government institution of an eastern European state against another eastern European state as an investor under the BIT between the two states. Therefore, the tribunal had to decide first whether not only private persons or enterprises, but also government institutions could qualify to be *investors* under the BIT. Since the definition of the term *investor* in that particular BIT expressly provided different wording for what could be an investor from the two states and, for the claimant, a wording was used obviously trying to take into account that in this formerly socialist state many economic activities were still performed by state institutions, we came to the conclusion that indeed, for the case at hand, the government institution qualified as an *investor* under that specific BIT.

The other particularity of the case presented also a new issue: An award by an arbitral tribunal issued in London under the LCIA Rules had been brought before the domestic courts of the state who was the respondent in our case and these domestic courts had recognized and ordered enforcement of the LCIA award in application of the New York Convention of 1958 which had been ratified by all three states involved, i.e. the home state of our claimant and the respondent state in our BIT arbitration as well as the United Kingdom. Thereafter, enforcing the decision of the domestic courts, property belonging to our claimant had been seized and auctioned. The claimant in our case now submitted that this action by the domestic courts amounted to an expropriation under the BIT and that, since both the LCIA-award and the procedure of the domestic courts allegedly had defects, this was a breach of the BIT and compensation or damages were due. While in this presentation there is no room to go into details, I can only shortly report on the conclusion we reached in our Award.

The Tribunal first noted that court decisions can also be expropriations and are thus a subject matter touched by the BIT. Court decisions are also a matter dealt with by the New York Convention. While the scope of these two treaties are different, the former dealing with the promotion and protection of foreign investment and the latter dealing with the recognition and enforcement of foreign arbitral awards, nevertheless, both treaties can be applied to the specific subject of court decisions. Limited to that specific subject, therefore, we have a situation where two successive treaties relate to the same subject matter.

The principle ruling on such a relationship between two treaties is given by Art. 30 of the Vienna Convention on the Law of Treaties. The conclusion from the application of §§ 3, 4 of Art. 30 VCLT would be that, at least with regard to the limited subject of court decisions, the earlier treaty, i.e. the New York Convention, would apply only to the extent that its provisions are compatible with those of the latter treaty, i.e. the BIT. However, since the New York Convention is a multilateral treaty, the reference in § 5 to Art. 41 VCLT also comes into play which deals with agreements to modify multilateral treaties between certain parties only.

In that context, the Tribunal was not persuaded that the BIT actually intended to or did modify the New York Convention. First, the text of the BIT did not provide any support for such an intention of the Contracting Parties. Indeed, though the New York Convention has been ratified by more than 140 states and many of these states have also concluded a great number of the BITs presently in force, it seems that, to the best knowledge of the tribunal, this was the first time that a national court decision enforcing a foreign arbitral award under the New York Convention was challenged as an alleged expropriation under a BIT.

In the view of the Tribunal, it was rather clear why an interpretation to the effect that that the BIT actually intended to or did modify the New York Convention has never been submitted or even accepted before: The introductory sentence of Art. V of the New York Convention provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:”

And then follow the well known very few accepted reasons for such a refusal. Compared to the BIT, the New York Convention is a *lex specialis* which deals with one very particular action of state organs, i.e. court decisions recognizing foreign arbitral awards, and provides a multilateral framework to facilitate the recognition and enforcement of such awards. Its accepted intention and effect, as can be seen from its Art. III, is that only under the very limited conditions listed in its Art. V such recognition and enforcement may be denied and that, particularly, no other appeals or remedies shall be available against such foreign arbitral awards. That is why the Convention places on states that have ratified the New York Convention, as expressly mentioned both in Art. III and in the introductory sentence of Art. V, the obligation not to refuse recognition and enforcement of the foreign arbitral award unless one of the listed and very limited conditions mentioned in Art. V are fulfilled. The Tribunal saw no basis either in the text or context of the BIT that the Contracting Parties to the BIT intended to modify this obligation they both had under the New York Convention.

Therefore, the Tribunal concluded that the New York Convention excludes the jurisdiction of any other court or arbitral tribunal over decisions of national courts under Art. V of the Convention.

A further consideration under Art. 30 VCLT confirms the result that the BIT cannot be accepted as modifying the New York Convention in view of the rights resulting from the New York Convention for states who are third parties to the BIT. Since it was an LCIA award in an arbitration the seat of which was London which the courts enforced in the case at hand, and since the United Kingdom as a member of the New York

Convention is a beneficiary under that Convention regarding the recognition and enforceability of arbitral awards made in the UK. The UK's international legal rights from the New York Convention would be infringed if a BIT between two other states could agree to add additional thresholds for the recognition and enforcement of arbitral awards made in the UK. This could particularly be considered as contrary to the interplay between sections 3 and 4(b) of Art. 30 VCLT.

This summary of relevant considerations must suffice here to explain why the Tribunal concluded that it had no jurisdiction for the BIT-claim raised. So much to the first, but highly interesting case regarding a conflict between a BIT and the New York Convention.

The only other known case in which a conflict was alleged to exist between a treaty dealing with foreign investment and the New York Convention was the ICSID case *Bayindir v. Pakistan* in which I also was a member of the tribunal. But it concerned quite a different issue. First, it concerned not a BIT but the ICSID Convention, and second it concerned a later ratification of the New York Convention during a pending ICSID arbitration including a contract claim which allegedly created a conflict to the ICSID Convention.

5. Where are we going ?

Finally, if we shortly consider possible perspectives for the future, one may distinguish between substantive and procedural investment protection.

In a globalised world, international investment is bound to continue to grow. In so far as states need and want foreign investment, they will realize that foreign investors will most of the time only decide to come to host countries if they have sufficient legal protection. Therefore, world wide **substantive protection** may still grow by the conclusion of further BITs though the great number of already existing BITs does not leave too much room in that respect. The success of the Energy Charter Treaty seems to show that a multilateral protection is not impossible to reach and may, at an appropriate time and perhaps regarding particularly relevant fields of investment, start replacing the bilateral protection by BITS.

Re-negotiation of BITs may become more important. This might be due to fundamental political changes in a given country, or due to the experience that states have had with the implementation of their BITS, or due to their joining new regional groupings such as the European Union to whose legal standards the BITs may have to be adapted. And in particular, BITs of member states of the European Union may even be supplemented by BITs concluded by the EU itself after the recent coming into force of the Lisbon Treaty.

Regarding the **procedural protection** of investments, recent experience has shown that some states who have lost investment arbitration cases may feel inclined to either terminate their submission to such machineries as ICSID, or turn to other arbitral institutions in case they are not satisfied, rightly or wrongly, by certain dispute settlement procedures or by resulting decisions, or try to avoid submission to international arbitration all together. However, generally it will continue to be a determinative factor for investors that not only do they have a substantive legal protection, but also independent judicial machineries to enforce them and states who are eager to gain the benefits of foreign investment will have to provide such procedural security. In that context it may be noted that China has recently re-negotiated some of

its BITs including an arbitration clause with a wider scope, probably in view of its growing own investments in foreign countries, and that even the recent new BIT between Russia and Venezuela contains an arbitration provision. In spite of certain drawbacks, therefore, generally I submit that international arbitration will continue to be highly relevant both with a preventive effect by being provided for in BITs and by being implemented for the resolution of disputes in practice.

A final word on the **role of arbitrators** in the future development of investment protection law and particularly BIT-law. In practice, I see two basic approaches in investment arbitration: One is that arbitrators use their awards to engage in wide ranging excursions into general questions of international law in an effort to contribute to the further development and advancement of that law. The other is, and I am a firm supporter of this approach, that the mandate of arbitrators and arbitral tribunals is limited by the arbitration agreement of the parties and the arbitration rules or treaty authorizing the jurisdiction of the tribunal. Therefore, I feel arbitrators and tribunals are authorized and mandated only to decide the case at hand and on the relief sought in that case, no less and no more. What is not needed in that context, is irrelevant for that function and should not be included in the arbitral award, no matter how innovative and important the arbitrators feel their considerations are.

This does not exclude the relevance of arbitral awards for future decisions and the future interpretation of international law and BITs in particular. Article 32 VCLT permits recourse, as supplementary means of interpretation, not only to a treaty's "preparatory work" and the "circumstances of its conclusion", but indicates by the word "including" that, beyond the two means expressly mentioned, other supplementary application of Article 31 VCLT. Article 38.1(d) of the Statute of the International Court of Justice provides that judicial decisions and awards are applicable for the materials can also be understood to constitute "supplementary means of interpretation" in the sense of Art. 32 VCLT. While in this way, the decisions of arbitrators and tribunals do have an impact for the further development, this is not an excuse to turn awards into a treatise on issues of international law which have no bearing for the deciding the case at hand.