

# Hong Kong Summit Report

## Introduction to the Session

**This House believes that the New York Convention does more harm than good to developing economies**

*Sheila Ahuja<sup>1</sup>*

### Introduction

On 13 May 2015, in an event that comprised a series of intellectually stimulating and highly entertaining sessions, the first session, following welcoming remarks to kick off the event, was a debate on the topic of bridging cultures with the motion: *This House believes that the New York Convention does more harm than good to developing economies.*

The session comprised high profile speakers, introduced below, and a prestigious panel of judges – Mr Karl-Heinz Böckstiegel, Independent Arbitrator, Mr Fernando Mantilla-Serrano of Latham & Watkins and Ms Zia Mody of AZB & Partners. Mr Böckstiegel, who chaired the session, opened the floor to the speakers by setting the scene and inviting the speakers to be “*as aggressive as possible*”.

Speaking in favour of the motion were Mr Makhdoom Ali Khan of the Supreme Court of Pakistan, and Ms Lucy Reed of Freshfields. Speaking against the motion were Mr Dominique Hascher of the Supreme Judicial Court of France and Ms Adrianna Braghetta from the Governing Board of ICCA.

### Arguments in favour of motion

Mr Khan and Ms Reed’s submissions comprised various key messages to demonstrate that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**NY Convention**”) was unfair to developing countries, including that it was undemocratic, was grossly out-dated, and impeded the allegedly desired improvement of developing countries’ court systems.

Mr Khan’s speech focused on the following two arguments: (i) that the NY Convention set such a low criteria for the enforcement of awards that it impeded capacity building in the developing world; and (ii) that the enforcement process as facilitated by the NY Convention was in itself unfair and harmful to the developing world, in that deep pockets had more room to play with the system until it produced the desired result. In explaining the first argument, Mr Khan paraphrased the

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words of Justice Robert Jackson of the United States Supreme Court, saying that "*arbitrators are not final because they are infallible but they are infallible because they are final*". He then asked whether they should be final, stating that most civilised legal systems recognised at least one appeal as a requirement of the process, and therefore it was questionable as to why this requirement passed the arbitration world by. His latter argument was explained by the example of the case of *Dallah v Pakistan*<sup>2</sup>, in which *Dallah* having exhausted all its options in the English courts simply moved on to the French courts to restart the process, ignoring successfully the principles of *res judicata*, *stare decisis* and issue estoppel.

Ms Reed continued the affirmative angle of the debate with the following three arguments: (i) that because of the NY Convention, local courts in less developed countries were "*languishing in terms of caseload, judicial resources, judicial training, legal infrastructure and even ethics*"; (ii) that developing economies were hostage participants to the NY Convention as they had no choice but to join the Convention and were "*coerced*" to stay in it; and (iii) the NY Convention was a "*legal antique*" as it was no longer useful for anyone, and especially not for developing countries. With respect to this last argument, Reed demonstrated her point by reference to Article II(2) of the NY Convention, which defines an agreement in writing as including an "exchange of letters or telegrams", and made the point that this was desperately archaic against the backdrop of statistics in the Economist that Africa is expected to have more than 930 million mobile phones by 2019, which amounts to almost one phone per African.

## Arguments against motion

Mr Hascher and Ms Braghetta's aim was to demonstrate that the NY Convention enhanced the quality of legal systems and national judiciaries in developing countries, provided legal certainty to its users and placed developing economies in a stronger position to attract foreign investment.

Mr Hascher took the lead in explaining why the motion should fail by making the following arguments: (i) that the multiplicity of legal systems was a source of incoherence and conflict, and some coherence could be achieved through the adoption of uniform standards in the form of the NY Convention; (ii) that the NY Convention enhanced the quality of the national legal systems and judiciaries of the developing countries. In his first argument, Hascher explained that given its role in harmonising the criteria for enforcing arbitral awards, the NY Convention was "*certainly the most important step that states can make today towards the generalisation of an efficient pro-arbitration recognition and enforcement scheme which is enforced among more than 154 countries around the world, of which more than half are already developing countries*". As to Mr Hascher's second argument, he explained that the efficiency of arbitration is directly linked to the quality of the judicial system, and that arbitral proceedings could not develop harmoniously without the

<sup>2</sup> *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46; and *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.



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION



assistance and under the control of state courts. He explained his viewpoint that the NY Convention granted a society the effective right of access to arbitral justice and public justice, and did so in a non-discriminatory manner. Ultimately the jurisprudence created in the context of enforcing awards under the NY Convention contributed to the advancement of the legal system of that society, such that courts may find themselves adopting the dynamic approach of the NY Convention. Mr Hascher made the further, and important, point that the NY Convention "*organises a dialogue*" between the setting aside of awards and enforcement of awards in local courts.

Ms Braghetta continued the arguments against the motion and commenced by explaining that the affirmative arguments were generic complaints about the NY Convention rather than arguments in pursuance of the motion. She also commented in her introduction that the reality is that the developed world is having to listen and pay attention to what the developing world has to say, and the latter has become a "*huge force*" in international arbitration. She made the following specific points: (i) the NY Convention, far from harmful, serves as a helpful minimal standard for developing countries to observe to become a jurisdiction in which investors may find themselves enforcing arbitral awards; (ii) that it is precisely because they have ratified the NY Convention that developing countries adapt their approach towards and treatment of foreign awards, including in refraining from conducting a review of the merits of such foreign award. In the latter argument, Ms Braghetta elaborated that developing countries readily adopted the NY Convention so as to foster development in their arbitral regime and thus attract foreign investment. She commented that Ms Reed's suggestion that such economies were hostage participants was therefore untrue. She ended with an example of a developing economy – Brazil, where she comes from – which ratified the NY Convention 13 years ago in 2002. Ms Braghetta made the interesting observation that prior to its accession to the NY Convention, and despite having a good piece of arbitral legislation which largely mirrored the NY Convention, Brazil was not able to secure significant foreign interest or investment. Its accession to the NY Convention however contributed to its subsequent success on that front, to the point where it is now the third largest jurisdiction to use international arbitration (according to ICC data).

### **Rebuttals and surrebuttals**

Given the controversial nature of the topic and the strong arguments presented, the speakers were given the opportunity of presenting rebuttals and surrebuttals including in relation to a procedural objection raised in the debate.

Mr Khan in rebuttal summarised that the arguments against the motion were only to the effect that if a country has not joined the NY Convention it will not be considered safe for arbitration or as a business or as a venue. But, he submitted, the question was whether the club was a good one to begin with: "*One is at times reminded, in spite of the popularity of the club, of what*

*Groucho Marx famously said, 'I would not like to be the member of a club which will have a person like me as a member.'*

Ms Reed added that the NY Convention was tyrannical, and without it justice systems would be more equal. She also made the point that the name 'NY Convention' was not liked for being Western, given New York already had the United Nations and the best bagels in Broadway!

Mr Hascher in response argued that the NY Convention put developing countries on an equal footing with developed countries; that it was the common constitution for world trade, world commerce and arbitration. He concluded by saying that developing countries do participate in the interpretation and application of the NY Convention as equal participants alongside developed countries, and that for developing countries to walk out of the NY Convention would "*not be going back to yesterday but the day before yesterday*".

Ms Braghetta added to Mr Hascher's arguments by insisting – in response to Mr Khan – that developing countries do want to participate in the club because it is a reasonable one. She ended with an interesting comparison of the NY Convention to the Panama Convention, which is a convention founded by and for the benefit of Latin American countries and largely mirrors the NY Convention. She concluded that this demonstrated that the developing countries from this region had decided to use the same system as created in 1958 by "*the founding fathers of the NY Convention*".

### **Deliberations by the panel**

The speakers were then asked questions by the panel of judges. Mr Fernando Mantilla-Serra posed the question (to Ms Reed) whether the motion actually intended to say that parties would be better off without the recognition of the validity of arbitration agreements such that the NY Convention was not invoked and matters were taken to state courts instead?

Ms Mody asked (Mr Khan and Ms Reed) whether it was true that the motion wrongly assumed that the only beneficiaries of the NY Convention were developing countries because it attracted foreign investment, whereas the reality was that it was not a one-way street anymore and investors from developing countries also benefitted from the developed countries adopting the NY Convention when they made investments in these regions?

Mr Böckstiegel, added two questions: (i) when discussing benefits and difficulties of the NY Convention, was it not important to consider whether there were any alternatives available?; and (ii) did the speakers see a realistic chance of the NY Convention being renegotiated if it has room for improvement?

Ms Reed started by responding that most of the panel's questions went to the underlying point that but for the NY Convention coming into play so early, there would have been much more

pressure for the development of a convention to enforce court judgments, and that would have put pressure on development and improvement in all court systems including, in answer to Ms Mody's question, pressure against problems in the US court system but more so achieving improvement in the developing country's court systems. She concluded by stating that the NY Convention could not be amended because of the fear of opening it up, and thus the "*status quo of unequal members of a club...will stay in effect*".

Mr Hascher's response commenced with the point that the NY Convention was more international than an instrument of court judgments would be because of the input of developing countries rather than it just being a treaty of the developed countries. He added that whilst a renegotiation of the NY Convention was possible, it would likely render it a complicated code. He said the NY Convention should just be left the way it is with its five articles, as they did work and worked in the benefit of all. Ms Braghetta pointed out in addition that no suggestion had been made by those in favour of the motion for there to be improvements to the NY Convention that were dedicated only to developing countries, which in itself reinforced that the treaty was there and was good for all.

Following an observation from the audience, the panel of judges held a unique open 'in-camera' session in front of the entire audience – which in itself was an interesting moment to observe – and shared their thoughts and observations of the motion. Mr Böckstiegel questioned which party bore the burden of proof, and highlighted the limitation on the motion which was not against getting rid of the entire NY Convention, but only that it did more harm than good to developing countries. He also posed the question to his panel as to whether their choice was only between dismissing the motion or admitting it, or whether they had the option of coming out somewhere in between.

Ms Mody kicked off the deliberation by stating that the NY Convention was what we had and there were no real alternatives, and that the undeniable merits of uniformity and greater autonomy did not outweigh the benefits of the NY Convention. She therefore concluded that there was not much harm to developing countries. Mr Mantilla-Serra commented that that it must not be forgotten that the beneficiaries of the NY Convention were mostly users of international trade, and that for developing economies it has been very positive to have this confirmation of the validity of the arbitration agreement which leads to the possibility to develop arbitration in these countries. He then made the point - against the NY Convention - that it may give the impression to developing economies that the NY Convention was enough and they need not do anything further. He concluded by saying his vote would be cast against the motion.

Mr Böckstiegel, having heard his panel's comments, stated that he was also inclined to dismiss the motion as the NY Convention did less harm than the benefits it provided to developing countries. He added, *obiter dicta*, that there was room for improvement in the NY Convention, and questioned whether it could feasibly be expected to be changed.



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## **Conclusion**

Finally, the panel, having unanimously decided that the motion should be dismissed, also invited the audience to comment and vote in respect of the motion; of a room full of participants, only 1 hand was for the motion and the rest were against. In case there was any doubt as to the level of confidence in the NY Convention, this outcome speaks for itself.

## **Hong Kong 2015 Summit**

### **Bridging Cultures Connecting Futures**

#### **Session 2**

### **New Regionalism and South-South Trade**

**Report by Alejandro I Garcia, Winston & Strawn, London**

#### **1. Overview**

The second session in the ICCA Hong Kong 2015 Summit was entitled “New Regionalism and South-South Trade”. It was moderated by Salim Moollan of Essex Court Chambers, London, UK. The session was divided into three sections; scene-setting for presentations, presentations and Q&A. The first scene setter was Ross O’Brien, the Hong Kong Director of The Economist Corporate Network, who highlighted the increasing importance of South-South trade within the global economy. The second scene setter was Mark Feldman, an Associate Professor of Law of the School of Transnational Law of Beijing University. In addition to providing economic analysis, he discussed the legal trends in South-South trade. The first speaker, Alfredo Bullard Gonzalez, a Peruvian lawyer, discussed the impact of free trade and institutional reform in Latin America. Then Olufunke Adekoya, a senior advocate from Nigeria, discussed whether the economic developments highlighted by the scene setters have had an impact on the development of international dispute resolution in the South and particularly in Africa. Finally, Judge Abdulqawi Ahmed Yusuf, the Vice President of the International Court of Justice, discussed the legal framework that has underpinned South-South relations since the early 1970s, with a particular focus on investment treaties. Alejandro I. Garcia of Winston & Strawn in London acted as rapporteur of this session.

#### **2. Presentations of the two scene setters**

##### **2.1. Ross O’Brien**

Mr O’Brien indicated that the phenomenon of South-South trade is of fundamental import to global growth: South-South trade is the global economy’s only source of growth. He added that his belief is that trade amongst and between emerging market regions is going to define economic growth, stability and innovation for the foreseeable future.

He added that since the advent of the global financial crisis some long-term trends have intensified.

Global exports in the last 10 years have been in the region of \$1.5 trillion a year. The collective demand from advanced economies has essentially been flat since the global financial crisis. Export demand from the rich world is still less than it was at the end of 2007. From 2007 onwards, all the growth and increasing demand has come from consumers in developing countries, mostly Asia, but increasingly Africa and Latin America.

Trade between emerging economies grew three times over the last seven years. The entirety of the global economy is now 40 per cent composed by emerging market demand. That is up from less than 30 per cent a decade ago.

Most of the 20 of the world's biggest manufacturing destinations are in emerging economies in Asia, where unemployment and inflation are low. They represent about 2-2.5 billion workers, roughly half the global workforce today. Not only are global consumers from the emerging world today; they are also the main and primary centres of global productivity.

Even China, with declining birth rate levels and being increasingly expensive to produce, cannot be written off as a manufacturing destination. China is taking measures to keep its position. For example, it is beginning to reinvent the Special Economic Zone ("**SEZ**") that it started in Shenzhen.

China is also transforming the way in which it is relating to other emerging economies from not only a trade and investment but a bilateral lending front. The Asia Infrastructure Investment Bank has been received with significant enthusiasm, not just from other Asian economies but also European economies as well. This type of initiative is helping speed up the pace of globalisation.

In a different context, in the ASEAN area there has been very significant growth in regional investment.

Despite the increasing economic integration in Asia, Mr O'Brien pointed out that there is also an increasing amount of regional tension. These tensions do not appear to have a net negative impact on the way in which emerging economies in Asia trade with each other.

In conclusion, the growth in the global economy is going to be defined by its emerging economy simply because that is where the consumers are coming from and that is where the demand for goods and services is coming from. While Asia has some large bumps, particularly South Asia, it is Africa that has the largest boom.

Those two key points of connectivity between emerging Asia and emerging Africa are a central corridor for global growth. Global growth is going to be driven and defined by the increasingly sophisticated, increasingly aspirational demands of consumers in the largest growth pockets of the world today. It is not that the rich world is irrelevant in general, but in a demographic sense, it is.

This has already been impacting demand to those regions. This demographic shift is going to redefine the flows and the directionality of capital, people, talent for the foreseeable future.

## **2.2. Mark Feldman**

Mr Feldman's presentation was hinged upon the following premise: that the South will play a far greater leadership role in the 21st century economy than ever before, and we will see that leadership role in five different settings; namely, (1) in terms of economic output; (2) in respect of the international development architecture; (3) the 21st century international economic law regime; (4) the changing nature of global investment; and (5) the South-South relationships becoming both more interdependent, and at the same time more complex.

First, with respect to global economic output, by around 2025, the OECD says the combined GDP of China and India will surpass the combined GDP of the G7 economies. OECD considers that by 2060, the China-India combined GDP will surpass the combined GDP of the entire OECD area, meaning 34 OECD member countries. Regardless of whether or not these predictions turn out to be accurate, the fundamental point is clear: in terms of global economic output in this century, the South will become the leader.

In respect of the second setting, this is the role of the South in reshaping the international development architecture, Mr Feldman noted that since their inception the World Bank and the Asian Development Bank have always been chaired, respectively, by American and Japanese nationals. Two newly-established international development banks will reshape the international development architecture of the global economy. The first, the New Development Bank, will be led by the BRICS countries with headquarters in Shanghai. The first president of the New Development Bank will be Indian; the first chairman of the Board of Governors, Russian; the first chairman of the Board of Directors, Brazilian; and the first regional centre will be located in South Africa.

The second international development bank that will have a significant impact is the Asian Infrastructure Investment Bank, proposed by China, with headquarters in Beijing. The Asian Infrastructure Bank has 57 founding members states, including half of the EU and all of ASEAN.

One of the projects undertaken by these new development banks work consist of China's "One Belt, One Road" initiative. It has been estimated that the Belt and Road initiatives will impact more than 4 billion people in more than 65 countries, and that annual trade with participating nations could climb to \$2.5 trillion within a decade.

Third, the South will take on a greater leadership role with respect to the development of a 21st century international economic law regime. In Asia, 16 states continue to make progress on a trade agreement that, if completed, would cover about 3 billion people and nearly 30 per cent of

global trade, this is, the Regional Comprehensive Economic Partnership (“**RCEP**”). Most of the 16 states negotiating the RCEP agreement are from the South: China, India, all 10 ASEAN states.

These negotiations reflect a larger phenomenon, the development of so-called South-South bilateral investment treaties (“**BITs**”). In fact, one recent empirical study has found that about 40 per cent of the global network of investment treaties are composed of these South-South BITs.

In most key respects, these South-South BITs basically resemble investment treaties generally. There are, however, a few differences. Scholars have noted that national treatment more frequently will not be included in South-South BITs. It is more common to see limitations on free transfers in South-South BITs. The basic wording is the same to that in many North-South BITs.

There are however two recent instruments that have been introduced by members of the South, which if they were to gain transaction would represent, a distinct form of treaty practice; and those instruments are model investment treaties issued by the Southern African Development Community (“**SADC**”) and by India.

The SADC model excludes altogether a most favoured nation (“**MFN**”) obligation. Another noteworthy aspect of the SADC model is what could be characterised as a very narrow fair and equitable treatment provision, which includes clarifying language limiting the scope of the obligation to actions that are an outrage, in bad faith, wilful neglect of duty.

With respect to India’s model, India likewise has drafted what could be characterised as a very narrow, fair and equitable treatment provision.

Fourth, according to UNCTAD, in 2013, the South invested over \$500 billion abroad, 39 per cent of global foreign direct investment compared with only 12 per cent in the early 2000s. This is likely to give rise to an active treaty practice as the South now looks to secure protections for their own investors abroad.

Fifth, on the independent and complex South-South relationships, the China-Africa relationship is of particular interest. Over the past 15 years, the Forum on China-Africa Cooperation has held 10 senior officials’ meetings and five ministerial conferences.

### **3. Interventions of the three speakers**

#### **3.1. Alfredo Bullard Gonzalez**

Mr Bullard highlighted the importance of clear rules in respect of free trade. He first highlighted the good results arising from APEC, the Asia-Pacific Economic Cooperation. He mentioned that free

trade reduces transaction costs to business to the improvement of the quality of the institutions of the relevant countries.

Development requires a series of essential ingredients. First, a clear definition of property rights. Second, enforceability of contractual rights. Third, "smart" regulation or deregulation. Fourth, elimination of barriers to the market including bureaucratic red tape. Fifth, improvement of governmental capacity and efficiency of the government. Sixth, an efficient dispute resolution system.

In most Latin American countries, arbitration developed only in the last 10 or 15 years. Thus, the laws and practice in Latin America have benefited from the trial and error learning curve of other countries with a longer arbitration tradition. Because of this, some Latin American countries avoided a generation of problems experienced in other countries, and went directly to the development of the most advanced frameworks for arbitration in the world. Arbitration centres, arbitrators and lawyers typically cost less in Latin America than in developed countries. The price-quality relationship is thus favourable. More broadly, this is a competitive advantage of the South-South trade. Not all countries in Latin America have the same stance on arbitration. Some have showed greater commitment with free trade and the development of a related institutional framework, including arbitration.

An example of initiatives that have boosted free trade in the region is the so-called Pacific Alliance formed by four Latin American countries: Mexico, Colombia, Peru and Chile. These countries, according to Mr Bullard, show a better economic performance with better rates of economic growth and poverty reduction than other countries in the region. Mr Bullard suggested that there is a correlation between GDP growth and increase in the use of arbitration in the four countries that belong to the Pacific Alliance. Growth based on free trade generates further development of arbitration.

By contrast, Mr Bullard continued, other countries in the region, including Venezuela, Ecuador, Bolivia or Argentina have a different approach to free trade and arbitration.

### **3.2. Ms Olufunke Adekoya**

Ms Adekoya agreed with the view that there is a shift in the global economy. Against this background, she wondered whether this new reality has had any impact upon international dispute resolution services. Ms Adekoya suggested that up to now, arbitration has been seen, and probably to an extent correctly perceived, to be North led. Preferred destinations for arbitrations were London, Paris, Stockholm and Geneva. The international dispute resolution services of choice were the LCIA and the ICC.

Then she discussed whether this reality has changed. From the African viewpoint, Ms Adekoya added, although there is a rise in South-South trade and a greater sense of regionalism in the South, the fact that arbitration is North-driven has not changed. Where the parties are both from the South, for example, a contract between Nigerian and Chinese entities, the North is still seen as a preferred dispute resolution arena. Many arbitration centres have been established in the South, including in Nigeria. The establishment of these centres has not brought African arbitration to the African continent.

Ms Adekoya also wondered whether arbitration practitioners from the South, either as counsel or arbitrators, have got a “fair share of the pie” in terms of cases. In relation to Africa, this does not seem to be the case: disputes are still going to arbitration in the North. Even arbitration counsel and arbitrators in African arbitrations are coming from the North.

It may be that this is due to insufficient experience on the part of African counsel and arbitrators. ICCA may have a role to play in this respect.

Mr Moollan stated his view that the arbitration community is becoming more aware of the need for capacity building in international arbitration if the South is actually to have a voice in the field.

### **3.3. Judge Abdulqawi Ahmed Yusuf**

As a general remark, Judge Yusuf suggested that the law is not keeping pace with the shift to the South. From a historical viewpoint, in the 1970s, Judge Yusuf pointed out, the UNCTAD Secretariat launched the first South-South negotiations, aiming at creating an alternative to the North-South axis. This initiative was launched due to the failure of the New International Economic Order, advocated by developing countries. Against this background, the idea of the UNCTAD Secretariat was to probe the possibility of a new international economic order along South-South lines. At the time, trade at the South-South level was almost non-existent. Investment flows also did not exist amongst South countries.

Judge Yusuf, pointed out that, as discussed in earlier presentations at this session, the landscape has changed dramatically in recent years. The law has caught up in the area of South-South trade through the elaboration of the principles governing the Global System of Trade Preferences among the Developing States (“**GSTP**”), but still lags behind reality in respect of investment flows.

With regard to investment, South countries have never tried to lay down specific standards or principles that should be applicable amongst themselves. Many South countries accepted the model BITs received from the North. Some South countries, however, have decided more recently to have their own model BITs. That is how the COMESA Agreement was devised in the Eastern-Southern Africa economic community. The model BIT of the South African Development Community (“**SADC**”) was also developed. India and China have model BITs. All these BITs were

in essence conceived for North-South investments, although they might be used also for South-South investment.

This being said, there are some peculiarities in some BITs concluded between countries of the South. First, with respect to security, public health and safety, some South-South BITs contain carve outs. Further, some of these BITs contain safeguards for balance of payment difficulties. Examples of such clauses are to be found in the China-Tanzania BIT or the India-ASEAN Investment Agreement.

Some South-South BITs also remove or limit the application of the MFN clause. Others do not provide for national treatment protection.

A new generation of BITs has more recently been concluded between China and Africa. They include the requirement of exhaustion of local remedies and exclude disputes on health, safety and environmental measures and disputes relating to denial of benefits of BITs to certain investors.

Despite these initiatives, it is difficult to pinpoint specific policy standards which inform in a consistent manner the South-South BITs. The guiding principles of the South-South Cooperation, which were announced in the Nairobi Outcome Document of the South-South Cooperation Conference of 2011, are not necessarily reflected in the South-South BITs. Judge Yusuf added that the standards and clauses, already alluded to by him, that are included in certain South-South BITs, and may be considered to distinguish such BITs from their North-South counterparts, do not appear to be a product of a coherent or deliberate policy common to a large group of Southern States or to countries of the South as a whole.

Should the countries of the South wish to become “rule-makers” with respect to international investment, they will have to start by establishing specific standards and principles applicable to South-South investment flows.

#### **4. Q&As**

During the Q&A session, Mr Moollan, Mr Garcia and a member of the audience asked questions. Mr Moollan asked the panel whether China could still be considered a South state.

Judge Yusuf commented that according to the criteria elaborated by UNCTAD in the 1970's in the context of the generalized system of preferences, this is a matter of self-election. Thus, in principle, a country claiming developing status has to declare itself as a developing country. He added that China has always considered itself as a country which belongs to the South.

Mr Feldman commented that notwithstanding the extremely significant scale of development in China over the past 30 years, China still has hundreds of millions of people who are living on very

limited income. Per capita income that is still well below US\$10,000 a year. This would then suggest that it is still a developing country.

Mr O'Brien had similar views. He indicated that in less than four years, China will be the world's largest economy in pure market terms, but it will still have per capita income levels that are going to be a quarter or a third of those of the US.

Ms Adekoya said that from a Nigerian perspective, China, although an investor, remains a developing economy.

Mr Garcia asked the panel whether there is a new generation of BIT that considers the fact that developed states are increasingly at the receiving end of investment treaty claims.

In response, Mr Feldman referred to what Professor Salacuse termed as the "Grand Bargain" for investment treaties. The bargain being that the developed world gets investment protection, the developing world gets investment promotion. He added that this grand bargain has completely broken down. China is now, if Hong Kong is included, number two in the world in outbound investment. When China and the US are negotiating an investment treaty, each side has their own offensive and defensive interests.

A member of the audience asked about the exclusion in general of the MFN provisions from the India model BIT. Mr Feldman pointed out that a more tailored approach would have been to exclude the application of the MFN clause in respect of certain issues rather than applying a blanket exclusion.

**Hong Kong 2015 Summit: Bridging Cultures Connecting Futures**

**Rapporteur's Report for Session 3: Breakout Session II**

***Do Anti-Corruption Investigations and Anti-Bribery Legislation Influence or Affect  
International Arbitration?***

*Catherine S.M. Duggan<sup>3</sup>*

In this breakout session, chaired by Robert Pé of Gibson Dunn, the panelists were asked to discuss whether "it is possible for violations of domestic anti-corruption legislations to influence the outcomes of international investment arbitrations and should that be the case?" These questions were addressed by Christopher Stephens, General Counsel of the Asian Development Bank, Ellen Gracie Northfleet, an independent arbitrator and former Chief Justice of the Federal Supreme Court of Brazil, Kate Yin, a partner with Fangda in China, and AB Mahmoud, Managing Partner of Dikko & Mahmoud in Nigeria, former Solicitor General and Attorney General for Kano State.

Two themes emerged during the course of the session. First, bribery and corruption pose an enormous challenge to global economic and social development. The panelists agreed that the problem must be taken seriously within international arbitration proceedings, both as part of an effort to combat the scourge of corruption, and because unchecked corruption could undermine confidence in international arbitration itself. Second, it is not only hard to establish whether allegations of corruption are true, particularly given the limitations of arbitration proceedings, but can be difficult even to know whether certain behaviors constitute violations of domestic law. The panelists were in agreement that violations of domestic anti-corruption legislation clearly do influence international arbitrations. They cautioned, however, that what arbitrators should do when faced with allegations of corruption is a much more nuanced, evolving question.

Mr. Stephens set the scene by describing the enormous volume of transactions in areas prone to corruption, as well as the potential damage corruption poses to investment and economic development. Using infrastructure as an example, he noted that every year the ADB alone is involved in thousands of transactions and contracts that "almost invariably" require arbitration of principal disputes. Looking only at the work of the ADB, World Bank, African Development Bank, Inter-American Development Bank, and European Bank for Reconstruction and Development, hundreds of thousands of contracts and billions of dollars of transactions are being made in

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<sup>3</sup> Visiting Scholar, Saïd Business School, Oxford University

countries where incentives for corruption are high and governments are unable or unwilling to police it. If the mechanisms for resolving disputes in these transactions do not work, then these failures stand to jeopardize the success of these projects.

Corruption represents a serious challenge to a state's capacity to manage economic activity through regulatory and legislative processes, as well as to its ability to provide adequate legal frameworks that will consistently, predictably, and ethically enforce contractual obligations. Although treaties and domestic anti-corruption legislation are critical, these efforts are "only the start." Where corruption obstructs contract enforcement, Mr. Stephens concluded, it may undermine confidence among domestic and private investors, thereby impeding investment—and, ultimately, economic development and poverty alleviation.

Against this backdrop, Ms. Gracie Northfleet delved more deeply into the implications of corruption for international arbitration. Echoing the trends identified by Mr. Stephens, she noted that it would not be surprising to have corruption become an increasingly important issue for arbitration tribunals. She noted the efforts by governments and international organizations to enforce clear rules of conduct to minimize corruption, including the United States Foreign Corrupt Practices Act of 1997, the OECD Anti-Bribery Convention of 1997, the UN Convention against Corruption of 2005, the United Kingdom's Bribery Act of 2010, Italy's anti-corruption law of 2012, and Brazil's law of 2014.

Ms. Gracie Northfleet drew a distinction between the problem of corruption within arbitration proceedings and the fact that arbitration may offer parties an opportunity to enforce—or "launder"—contracts obtained through illegal conduct. Criminal conduct by arbitrators is the "least likely" type of corruption to occur.<sup>4</sup> Less rare are fraudulent or criminal acts by other actors during arbitration proceedings, including false testimony, forged documents, and unlawful surveillance of the parties or arbitrators. Even more commonly, arbitrations may be associated with contracts obtained through fraud or corruption—particularly since firms are most likely to prefer arbitration to local courts in areas where problems of corruption and judicial weakness are most serious.<sup>5</sup>

These various possibilities for corruption influence arbitrations in different ways. Parties can use allegations that corruption occurred during arbitration proceedings to try to convince national courts to set awards aside on public policy grounds. Suggestions that contracts themselves were obtained through illegal activities may be used to try to convince arbitral tribunals to void a contract. This influence represents a shift: until recently, Ms. Gracie Northfleet notes, tribunals treated allegations of corruption with great caution, since they did not see their jurisdiction as going beyond the commercial dispute at hand.

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<sup>4</sup> Quoting Vladimir Pavic, "Bribery and International Commercial Arbitration—the Role of Mandatory Rules and Public Policy." *Victoria University Wellington Law Review* (2012) Vol. 43 pp. 667.

<sup>5</sup> Citing Jayne Bentham, Stephen Moses, and Joseph Lewin, "Arbitration and corruption: sheltering wrongdoing or a new tactical game?" *Lexis®PSL Arbitration*, July 29, 2014.

In fact, the increasing influence of corruption allegations in arbitrations has encouraged parties to make false claims of corruption in an effort to influence these outcomes.<sup>6</sup> This misuse of arbitration is made possible by the confidentiality of the proceedings, as well as by the fact that arbitrators lack subpoena powers that would enable them to compel parties to share evidence of corrupt practices. At present, if a party refuses to hand over documents that might provide this type of evidence, “all a tribunal can do is to draw an adverse inference from the failure.”

A second concern stems from uncertainty regarding the standard of proof that an arbitration tribunal ought to apply when considering an allegation of corruption. What should a tribunal adopt as “clear and convincing proof”—the common law criminal standard of “beyond a reasonable doubt,” the civil law standard of the “balance of probabilities,” or something in between? The difficulty of considering these allegations is compounded when particular behaviors are illegal under some countries laws but not others, as is the case with facilitating payments.

Arbitrators, Ms. Gracie Northfleet concluded, “should be careful in drawing the fine line between the need to root out corruption and the competing duty to defend the robustness of the process and the enforceability of the awards.” They should “not shy off from acknowledging corruption when it is evident,” and should seek to “avoid the perception that arbitration might be a safe haven for corruption by laundering corrupt contracts, acts, and practices.” They should, moreover, do this without admitting challenges to arbitral awards based on non-substantiated allegations of corruption.

Ms. Yin’s remarks expanded on the complexities and inconsistencies of domestic corruption laws, using illustrations from China. It is clear, she began, that domestic anti-corruption laws have influenced arbitration decisions. Some states have turned to corruption allegations as a defense in investor-state arbitrations, hoping to have the investment contract declared void. *World Duty Free Co., Ltd. v. Republic of Kenya* is the “classic” example of such an argument. The arbitration tribunal, relying on international public policy, Kenyan, and English law, agreed with Kenya that the contract at the center of the arbitration was void because it had been obtained with a bribe. In other examples, government officials are alleged to have secretly participated in investments through a commission or agency agreement (*Wena Hotels Ltd. v. Arab Republic of Egypt*), or through shares in, or other benefits from, an entity involved in the investment (*Metalclad Corporation v. United Mexican States*). Foreign investors have complained that they were subjected to unlawful expropriation or unfair treatment as a result of their refusal to comply with demands for bribes from government officials (*EDF (Services) Ltd. v. Romania*).

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<sup>6</sup> Citing Florian Haugeneder and Christoph Liebscher, “Chapter V: Investment Arbitration” in Christian Klausegger, Peter Klein, et al., eds., *Corruption and Investment Arbitration: Substantive Standards and Proof* (Austrian Arbitration Yearbook, C.H. Beck, Stämpfli & Manz, 2009), 539–564.

In commercial arbitration cases, Ms. Yin noted, principals will sometimes refuse to pay commissions to agents, claiming that the agent was involved in a corrupt act. Chinese arbitration cases have declared contracts void when they were procured through corrupt conduct. For example, the China International Economic and Trade Arbitration Commission ruled that the two supplemental trademark agreements were invalid as a result of a bribe paid before the agreements were signed (*Wang Laoji v. Jia Duo Bao*).

Yet the normative question, whether these violations influence arbitration awards, is a more nuanced one. Some cases present a “clear scenario” in which violations of these domestic laws can be used as a defense. Less clear-cut examples, on the other hand, might involve a country in which facilitation payments were the norm, even though they were illegal. If a foreign investor made such a payment, then the government might choose not do anything about it on the grounds that it was consistent with common practice. Here it is less obvious that the state should be allowed to use corruption as a defense in an arbitration.

Nonetheless, Ms. Yin argued, “there are good reasons why violations of domestic anti-corruption legislation should be considered in arbitration.” These include: standards about the way agreements are treated when they are in violation of moral standards or international public policy; the ‘clean hands doctrine’ that is widely recognized in international investment law; and the enormous negative implications of corruption for social and economic development. International arbitrators are often in a better position to deal with corruption than a country’s domestic courts, since arbitration tribunals may be more independent and professional—and better financed—than local prosecutors and judges.

Yet it can be exceedingly difficult to establish what even constitutes corruption. There are sometimes inconsistencies even in the interpretation and enforcement of domestic legislation within the same jurisdiction. In China, for example, anti-bribery laws associated with commercial transactions are “broad and vague.” Ms. Yin noted that “there isn’t a set of commercial bribery laws,” but that relevant laws are “scattered around in different legislations,” with enforcement powers awarded to various government agencies.

To illustrate, Ms. Yin pointed to an example of a recent case in which the global multinational corporation Siemens was investigated by the Chinese government. The company was accused of “commercial bribery” under the Anti-Unfair Competition Law for allegedly providing a thousand hospitals with free medical equipment so that it could sell them the relevant reagents used in the equipment.<sup>7</sup> This practice is, in fact, commonplace: hospitals in China, which do not have the

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<sup>7</sup> For a summary of the allegations, see Adam Jourdan and Engen Tham, “Exclusive: Siemens healthcare unit probed by China regulator for bribery – sources” *Reuters*, May 2, 2015. Available at <http://www.reuters.com/article/us-china-corruption-siemens-idUSKBN0NO01120150503#KuA0Xc4Mh2SoG881.97> (accessed December 5, 2015).



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION



budget to purchase medical equipment, often demand that companies provide equipment free of charge as a condition for purchasing other products from the manufacturer.

Cases in which the government is involved, Ms. Yin argued, are invariably characterized by “shades of grey.” In the Siemens case, for example, the hospitals in question are state-owned enterprises. One can, as a result, reasonably ask whether it is fair for public procurement contracts to be found to be void as a result of the free provision of medical equipment to state hospitals.

Another issue stems from the inconsistent enforcement of anti-corruption legislation, which, in these areas, is not always motivated by a simple interest in enforcing the law. Ms. Yin recalled a case in which a provisional government circulated an internal memorandum encouraging officials to collect fines to meet its revenue needs; the enforcement of these fines, she noted, was “not really fair.” Under some circumstances, companies facing allegations of violations are forced to settle “just to get on with business.” It would, she observed, “be inappropriate for such a settlement to be used as evidence of bribery.”

Ms. Yin concluded by briefly touching upon a number of grey areas that arbitrators ought to keep in mind when dealing with violations of domestic anti-corruption legislation. One example, recalling a problem also described by Ms. Gracie Northfleet, is that some behavior is considered corruption in one country but not in another—including facilitation payments, which are illegal under Chinese law but fall within an explicit exception of the United States Foreign Corrupt Practices Act. Nor is it always clear which behaviors constitute extortion by public officials. Another grey area includes the circumstances under which a company can be considered innocent: is an investor blameless if it does not give a bribe only because negotiations over the bribe failed?

Finally, Ms. Yin observed, inadequately nuanced approaches to considering corruption in international arbitrations may have unintended and undesirable implications. In areas where bribery is rampant and governments have taken no action to enforce their domestic anti-corruption legislation, then allowing states to use corruption as a defense in international arbitrations might actually encourage corruption. States may, under these circumstances, have incentives to tolerate corruption among government officials as a way to shield the state from liabilities arising out of investment disputes.

The final panelist, Mr. Mahmoud, drew on his experiences in Nigeria to provide examples of the complex roles corruption can play in international arbitration. Although the answer to the question of whether violations of domestic anti-corruption legislation influence the outcomes of international arbitration was “an obvious yes,” he cautioned that “such a straightforward answer glosses over” some of the “intricate and complex questions,” including legal and jurisprudential questions, with which arbitrators dealing with issues of corruption “will inevitably have to contend.”

He made note of two recent arbitration cases in which issues of corruption played a central role. The first case, *World Duty Free Co., Ltd. v. Republic of Kenya*, which Ms. Yin's discussed, also



INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION



raised a “troubling” question in the fact that the arbitration tribunal made a finding of bribery against the president of Kenya, who was not a party to the arbitration. The second case, *BSG Resources Limited v. Republic of Guinea*, currently before the ICSID arbitration panel, was triggered by United States Foreign Corrupt Practices Act investigations, which appear to have established that fraud occurred. The case is, he argued, a “clear indication” that these sorts of investigations will influence arbitrations, especially on behalf of legislation with an extraterritorial reach.

Mr. Mahmoud narrated two of his own experiences. The first involved a petroleum company that had hired containers from a subsidiary of the government-held Nigerian National Petroleum Corporation. The hiring company claimed that the containers, which had been used to transport petroleum products to Europe, had not met European standards, and submitted a claim for fines and tonnage that eventually reached \$400,000. There was “no evidence” for the claims made by the petroleum company, leading Mr. Mahmoud to conclude that “this was a fraud.” Troublingly, the case was assigned to a sole arbitrator who approached Mr. Mahmoud privately and suggested that he should advise his client to settle rather than “having to contend with a huge award.”

In light of these concerns, Mr. Mahmoud and his client filed an action in a Nigerian court. They contended that the claim was fraudulent on its face and asked the court to declare that it was therefore not suitable for arbitration, as well as to grant them leave to revoke the authority of the arbitrator and the arbitration agreement. The lower court did exactly that, and its finding was upheld by the Court of Appeal in Nigeria.

Mr. Mahmoud’s second example illustrated the difficulties of demonstrating fraud. He described an agreement between the government and a contractor that inadvertently left out a detailed description of the services to be rendered. The contractor, after a year of work, produced four useless floppy diskettes and issued the government with a bill for \$1 billion. The government’s effort to take the matter to court was unsuccessful, and the case went to arbitration. Mr. Mahmoud, having come “to the inevitable conclusion that this was a fraud,” set about demonstrating this fraud to the arbitration tribunal. He and his team were “satisfied and convinced that we had presented evidence beyond a reasonable doubt,” and were confident that the tribunal would dismiss the claim. Instead, the tribunal awarded half a billion dollars to the contractor. The government, after making some effort to have the award set aside, eventually paid it.

Mr. Mahmoud concluded by citing some of the key questions asked at the recent OECD integrative forum. Should anti-corruption clauses in investment and trade agreements be cited to help arbitrators address issues of corruption? Should there be guidelines developed by international arbitration centers to assist arbitrators on how to identify corruption and how to deal with collusion? What are the rights and duties of arbitrators as they investigate corruption? “It is high time,” he argued, “that the community of international arbitrators begins to address the point: how do we devise the tools of dealing with issues of corruption?”

The panelists had time to address two questions from the audience. The first, from Jose Perez, a member of the Supreme Court of the Philippines, asked how corruption could be an arbitrable issue in places where corruption was a criminal offense outside the jurisdiction of the arbitration tribunal. Mr. Stephens noted that an arbitration panel might find that a breach of contract had occurred if the contract's clauses prohibiting bribery or collusion had been violated. More importantly, however, one of the fundamental challenges of arbitration is in determining which law even applies, and this difficulty would be particularly acute in the situation described by Justice Perez.

The final question came from Eric Schaeffer of Germany, who asked what he should do, as an arbitrator, if the parties did not raise issues of corruption but he had "a feeling that corruption might have something to do with their dispute." Ms. Gracie Northfleet responded, noting that while arbitrators once avoided questions of corruption under those circumstances, there appeared to be a trend toward confronting issues of corruption even if the parties did not raise them. "I would say," she concluded, "that arbitrators should not turn a blind eye," particularly since the result of the finding would have consequences for the resulting award.

The panel ended as Mr. Pé thanked the panelists.

**Hong Kong 2015 Summit**  
**Bridging Cultures Connecting Futures**

**Introduction to the Session**

**Looking into the Future: Challenges to Investment Across Borders**

The fourth session of the 2015 HKIAC Summit, which was moderated by Justin D'Agostino, the Global Head of the Dispute Resolution Practice of Herbert Smith Freehills, gathered a most distinguished set of panellists, experts all in the world of investment treaty arbitration, to reflect on and critique certain developments and recurring issues in investor-State dispute settlement (ISDS) that impact on its internal and external legitimacy and prospects for the future, with a view to ensuring the continued integrity, credibility and sustainability of the system in both process and outcome.

The panellists, composed of Nassib G. Ziadé (Chief Executive Officer of the Bahrain Chamber for Dispute Resolution), Jeremy Sharpe (Chief of Investment Arbitration in the Office of the Legal Adviser at the U.S. Department of State), Professor Hi-Taek Shin (Professor of Law at the Seoul National University School of Law) and Johnny Veeder (an international arbitrator with the Essex Court Chambers and a member of the ICCA governing body), were grouped into sub-panels to give their personal views on five interrelated issues and debates currently confronting the ISDS – issues surrounding arbitrators, the parties, and the process.

*On repeat appointments of arbitrators from Western Europe and North America*

Mr. Ziadé first tackled the hot-button issue of repeat appointments of arbitrators particularly in ICSID arbitration and whether the low rate of appointments of individuals from developing regions of the world harms the quality and value of jurisprudence rendered by tribunals, and more broadly, the institution's legitimacy.

Mr. Ziadé opened the discussion by noting that the vast majority of ICSID arbitrator appointments, whether on a first time or on a repeat basis, involve Western Europeans or North Americans, with developing countries and their counsel contributing to the trend by rarely appointing nationals from the developing regions of the world as arbitrators. To Mr. Ziadé, this gives rise to the systemic issue of the precedential value and weight to be accorded to ICSID jurisprudence given that the system cannot assure the representation of all the principal legal systems of the world in its development and evolution.

Closely tied to this issue is the desirability of repeat appointment of arbitrators in ICSID arbitration, a phenomenon that, like the issue of the low rate of appointment of arbitrators coming from developing countries, may be attributed to the fact that parties expect their appointees to be experienced and well-learned in the field in which the disputes fall, impelling them to appoint the

same individuals (usually coming from developed regions) repeatedly to adjudicate these disputes. Mr. Ziadé acknowledged that the usual defense to this is party autonomy, which remains a pillar of international arbitration that should not be interfered with save for the most compelling reasons. While Mr. Ziadé has no problem with repeat appointments *per se*, he expressed the view that the excessive appointments of the same arbitrators may lead to at least three problems: they may lead to challenges for conflicts of interest, they prevent the widening of the pool of qualified arbitrators, and they often delay the disposition of cases simply because the arbitrators are over-committed. Mr. Ziadé advocates the interventionist approach for ICSID on this issue and believes that it is ICSID that must take the lead role in addressing this lack of diversity in arbitrator appointments that can potentially harm the legitimacy of the institution and the outcome of its proceedings. He proposes, first, that ICSID create a system for a broadened selection of arbitrators, starting with having ICSID appoint someone other than the usual suspects when it has the chance to do so, keeping in mind the need to geographically diversify its pool of arbitrators. Second, Mr. Ziadé proposed that ICSID issue a series of guidelines for the benefit of parties and their counsel, with a view to clamping down on the practice of some arbitrators of overbooking appointments, such as through the delegation of essential duties to administrative secretaries. These guidelines may include proscriptions against taking on more than a certain number of cases at any one given time, as well as rules on what constitutes excessive repeat appointments of an arbitrator by the same party or the same law firm, similar to the IBA Guidelines on Conflicts of Interest in International Arbitration that set forth the standards for evaluating such repeat appointments. The ICSID guidelines to be crafted should also provide rules to address the more complicated question of an arbitrator appointed by the same party to several differently constituted tribunals when the cases have raised similar factual or legal questions. The first to comment on Mr. Ziadé's presentation was Mr. Sharpe, who framed the issue as a proverbial push-and-pull between the desire from arbitration practitioners to see much greater diversity in the appointment of arbitrators on the one hand, and the significant pressure on counsel to deliver to the clients what they seem to want, which is some indication of how these arbitrators might be expected to rule on any particular case, on the other. He then looked to current U.S. practice, which is unusual in two respects: first, the U.S. almost always appoints an arbitrator in investment cases that has not sat previously in any investment arbitration case, save for just one instance; and second, the U.S. has a much better record of appointing female arbitrators than is customary, with women garnering 25 percent of such appointments, neither of whom is Brigitte Stern or Gabrielle Kaufmann-Kohler. Mr. Sharpe believes that this is largely due to the fact that the U.S. represents itself, allowing it to think more about the arbitrators' qualifications and expertise rather than his or her decisions in any particular prior case. Next to comment was Mr. Veeder, who disagreed with Mr. Ziadé's premise that ICSID tribunals suffer from a diversity problem. He pointed to an exercise done a couple of years ago that looked into the nationalities of the arbitrators who were involved in ICSID, both at the tribunal level and the *ad hoc* committee level. It showed a massive difference in nationalities, about 42 for both, which, for Mr. Veeder, reflects the growing diversity in the field and, contrary to

Mr. Ziadé's thesis, the absence of a looming crisis situation in respect of appointments of individuals claimed to be coming predominantly from developed countries.

Mr. Veeder also stated that there is nothing inherently wrong with repeat appointments of arbitrators as long as there are no issue conflicts or problems. Employing the football analogy, he noted that nobody complains about repeat appointments of the great Lionel Messi when he plays for Barcelona. To him, the arbitration world is far more positive and diverse than the one described by Mr. Ziadé. If there is one area of concern for Mr. Veeder, however, it is the dearth of women appointed as arbitrators, a situation that needs to be addressed urgently. For his part, while Professor Shin agreed that diversity is one of the values that ICSID arbitration needs to pursue, to him the more pressing issue is still how to address the legitimacy crisis as perceived by broader stakeholders and civil societies as to the establishment of the arbitral tribunal, as well as the impartiality and independence of arbitrators. Professor Shin thought that with due respect to Mr. Ziadé's suggestions, a more nuanced and balanced approach is needed to address this issue

*On whether investment arbitration tribunals ought to prohibit the concurrent wearing of arbitrator and counsel hats*

Mr. D'Agostino opened the next sub-panel with a bit of history – the Court of Arbitration for Sport used to have a revolving door policy whereby arbitrators could also act as counsel and vice versa, but the CAS some years ago prohibited individuals from wearing both hats. The question then is whether there is wisdom in carrying over this policy to investment arbitration.

Mr. Ziadé viewed the issue as one that might potentially give rise to a conflict situation, or to quote Judge Thomas Buergenthal, one that 'raises due process of law issues'. This is especially true in investment arbitration where the resolution of disputes frequently requires the interpretation of investment treaties that contain similar provisions and engender a small set of similar oft-recurring legal issues. One refrain is that arbitrators should not be put into a position where they are tempted, either consciously or subconsciously, to take procedural decisions or to draft awards in such a way as to advance their client's position in a simultaneous case in which they are acting as counsel. The opposing view is that in most cases, the tribunal's decisions are based on factual rather than on legal issues and that conscientious arbitrators will in any event decide their cases strictly on the basis of the facts and law before them, and will not be unduly influenced by factors extraneous to the merits of that particular case.

Mr. Ziadé's personal view is that the concurrent wearing of the arbitrator/counsel hats ought to be prohibited upon the premise that "it is very hard indeed to imagine how an individual could humanly succeed in achieving a total compartmentalisation". Even if, for the sake of argumentation, an arbitrator is able to distance himself or herself from his or her role as counsel, as the District Court of the Hague stated in its judgment in the *Telekom Malaysia v Republic of Ghana*, 'account should in any event be taken of the appearance of his not being able to observe said distance'.

Mr. Ziadé noted that the CAS is not the first body that has decided to prevent arbitrators and mediators appearing before it from acting as counsel. Long before, the International Court of Justice issued in 2002 a Practice Direction discouraging the appointment of agents and counsel before the Court as judges *ad hoc*. There were a few eminent international lawyers who had to give up taking cases as judges *ad hoc*, but the states were soon able to find alternate candidates and the system could continue functioning normally.

One alternative to the total ban of the concurrent wearing of arbitrator and counsel hats is to institute a policy of full disclosure, *i.e.*, to allow the same individual to undertake both roles subject to a requirement that the proposed arrangement be disclosed to the parties and be accepted by both parties.

Under this arrangement, each time an arbitrator is appointed to an investment treaty arbitration, when he or she is also serving as counsel in another investment treaty arbitration, the newly-appointed arbitrator must disclose at the outset of the arbitration the fact that he or she is serving as counsel in a concurrent investment treaty arbitration. Such a disclosure would take place irrespective of the legal issues raised in the two cases.

If one or both parties were for any reason to object to the arbitrator's role as counsel, that arbitrator would have to choose between the arbitrator and counsel appointments. Similarly, if an arbitrator in the middle of an investment arbitration would like to undertake a counsel role in another investment arbitration, he or she will have to disclose this desire immediately to the parties in the first arbitration. If there is an objection, the arbitrator will have to choose between the two roles.

To Mr. Ziadé, this proposed practice of prior disclosure by the prospective arbitrator and acceptance by both parties does not impose an unreasonable burden, minimises the risk of challenges to arbitrators, and enhances transparency and trust in the system.

Mr. Veeder completely agreed with and joined Mr. Ziadé's proposals, noting that the issue is really a question of appearances and legitimacy. To him, it is very disturbing for clients to see a member of an arbitration tribunal – a person who as counsel in a quite different case, with different parties, perhaps a different forum – argue the very point which they would seek to argue before that person. This reality is ever more present in investment arbitration, where because the wording is so similar from treaty to treaty, clients do feel very uncomfortable when they think that they do not have a fair hearing because the arbitrator has already argued the point the other way in another case.

Mr. D'Agostino sought reactions from the audience, and Peter Goldsmith of Debevoise London argued that the proposed policy of full prior disclosure does not go far enough. According to Lord Goldsmith, there is currently in Europe a growing negative reaction to investor-state dispute settlement systems. One of the reasons for this lack of confidence in the ISDS is because people cannot understand how the arbitrators who are deciding these cases can also simultaneously accept the role of counsel paid to take a particular position. They cannot understand how somebody can properly do that. To remedy this situation, Lord Goldsmith suggested a radical solution – the outright ban of the holding of dual roles of arbitrator and counsel at any one time –

precisely to restore confidence in the ISDS, which for him remains a good system for resolving disputes and for promoting the rule of law.

*On whether, given the highly-developed, robust administrative and judicial systems in the EU and US, there is still a need for ISDS in the TTIP*

The context of this next topic is, as explained by Mr. D' Agostino, that traditionally bilateral investment treaties (BITs) are entered into by States to secure investment into countries with administrative and judicial systems perceived as unreliable and presenting risks of undue intervention in private economic activities. The EU and U.S., however, have developed robust administrative and judicial systems. With the forging of the Transatlantic Trade and Investment Partnership (TTIP), is investment treaty arbitration, at least in the TTIP, still needed? Professor Shin began the sub-panel discussion by recalling the Korean experience back in 2006, and again in 2011 in connection with the Korea-U.S. Free Trade Agreement (FTA) negotiations. This Korea-U.S. FTA includes an investment chapter and ISDS clause based upon the 2004 US Model BIT. At that time, the arguments against the ISDS included constitutional law argument and many arguments similar to what are currently heard in European countries today. From developing countries' perspective, it is very hard to understand why these European countries that have initiated the bilateral investment treaty practice backed by ISDS are suddenly showing cold feet in negotiating similar agreements with the U.S. A recent Chatham House report on ISDS in fact states that the U.S. and EU could face charges of hypocrisy if they were to insist on an ISDS mechanism in investment treaties with developing countries without embedding one in TTIP. For Professor Shin, doing away with the ISDS mechanism in the TTIP has implications extending beyond the EU and U.S. If this happens, it will be extremely difficult for the EU or U.S. to persuade their existing and future counterparties to accept the rules of ISDS, and the government of those countries will also have a hard time justifying the inclusion of such provisions in their agreement with the EU or U.S. Professor Shin predicts that in some countries or some jurisdictions, there can be a demand by civil society to renegotiate BITs or FTAs to eliminate those ISDS provisions altogether.

In response, Mr. Sharpe confessed to being mystified by the argument that because courts are well functioning in certain States, ISDS is no longer necessary. Mr. Sharpe asked if it is any different than commercial arbitration, in a sense, if you have a company from the U.S. and a company from France embroiled in a dispute. They might have equal confidence in the courts of the other State, but nonetheless they conclude an arbitration agreement precisely because they want a neutral forum. To him, choosing the ISDS route has nothing to do, necessarily, with the quality of justice in those States, and the analysis should be no different in evaluating the continued relevancy of the ISDS in the context of the TTIP.

*On whether international investment law is biased in favour of business interests in capital exporting states, and conversely, whether the law is biased against developing countries*

The last sub-panel was led by Mr. Veeder, who noted that the question calls for an assessment, not of any inherent ISDS bias for or against investors, but of whether current international investment law is skewed in favour of business and against developing states.

As regards investment law, the sources of law, as far as treaty arbitration is concerned, are treaties and customary international law. In Mr. Veeder's opinion, if fault is to be assigned for the current state of the law, States must take responsibility, for it is their treaty wordings, it is their decisions to give treaty protections to investors, and it is their decision not to extend equal opportunities to States, say for making a counterclaim or for making independent claims, that have brought ISDS to where it is today. According to Mr. Veeder, this is something that will be looked at for TTIP, and it is to be welcomed because investment treaty protections traditionally have protected only the investor. If it is decided by the EU and by the U.S. to have protections for social justice, for human dignity, for employment rights and employment protections, so be it. This would hopefully rebalance the equation between investors and interests in the host State, and would answer very directly the criticisms to which we do not at present have an answer, which is that BITs are unilateral and favour investors only.

For his part, Mr. Sharpe suggested looking at this allegation of investor bias from a wider perspective, *i.e.*, whether the procedural aspect of investment treaty arbitration places developing nations at a significant disadvantage.

Mr. Sharpe shared that one of the interesting aspects of his current position is meeting with other government lawyers who come in, and they are thinking about the representation of their State. They want to chat with the U.S. or Canada or other States that represent themselves, and they want to know how the U.S. sets up its processes for defending itself. These government lawyers are then informed that the U.S. has a dedicated office within the State Department, the foreign office, to represent it; that that office is indicated in U.S. treaties so that the notices of intent to arbitrate come directly to that office and there is a dedicated team within that office to represent the U.S.; that that same team monitors other cases involving U.S. treaties to seek to intervene and influence the development of the law; that the U.S. has a dedicated fund, an international litigation fund to pay for arbitrators, experts and so forth; and that the same office, the Legal Adviser's office, represents the U.S. in the International Court of Justice and the Iran-US Claims Tribunal, and has decades of experience, has greater familiarity with arbitral institutions, with arbitrators, with the rules, with the substantive law and so forth.

In the case of developing countries, usually the opposite situation obtains – they typically do not have a dedicated office to represent themselves; they do not have the funds in place and getting funds to represent the State can be very time-consuming and cumbersome; that while they are seeking to get outside counsel, time has passed, and in the meantime they may have forfeited the opportunity to challenge the arbitrator appointed by the claimant, and may even lose the chance to appoint their own arbitrator and participate in the constitution of the tribunal with the president. These are all huge disadvantages for these States that have not established the institutional capacity to represent themselves in the way that some other States that have greater experience with investment arbitration. From that perspective, Mr. Sharpe said that many States will have to

institute capacity-building measures, and perhaps seek training from outside institutions like UNCTAD on best practices.

Mr. Veeder provided anecdotal evidence of this state of affairs by recalling States that were sued for the first time in ICSID and that had to deal with the situation where they got late notice at the relevant level of the request for arbitration because the people on whom it had been served did not understand the significance of the document, and that even in that whole country's law libraries, not a single copy of Schreuer existed on the ICSID Convention. In another instance, a BIT surfaced in a request for arbitration but there was not a single record in that country's governmental files of that BIT ever having been signed. Then, suddenly the State had to grapple with the fact that it was defending a major arbitration. With ICSID's lack of resources, Mr. Veeder suggested the creation of some emergency fund to get the State over the first few days and weeks of arbitration with assistance, if only to put them in touch with specialist law firms who can help them.

Mr. Ziadé agreed that these proposals offer a practical solution to the inherent procedural disadvantages developing countries are hobbled with in investment treaty arbitration.