Offprints of
THE JOURNAL OF WORLD INVESTMENT

The Brave New World of Global Arbitration

Bernardo M. CREMADES and David J.A. CAIRNS

Geneva April 2002 Vol. 3 No. 2

Publisher and Editor

JACQUES WERNER

Associate Editors

THOMAS WÄLDE GUIGUO WANG

Editorial Assistant

JAMES BOYCE

Correspondence and Subscriptions

All correspondence, including subscriptions, should be addressed to:

The Publisher, The Journal of World Investment,
P.O. Box 5134, 1211 Geneva 11, Switzerland
Tel. (41–22) 310 34 22 Telefax (41–22) 311 45 92
E-mail: wernerp@iprolink.ch

Website: www.wernerpubl.com
features abstracts, authors' biographies
and tables of contents of current and back issues

The Journal of World Investment is published bi-monthly.
Annual Subscription: Sfr. 490 or US$ 350 including airmail postage
Single copies: Sfr. 90 or US$ 70

For U.S. Subscribers:

Periodicals postage paid at Rahway, N.J., U.S.A. Mailing Agent: Mercury Airfreight International Ltd. Postmaster please send all correspondence to: The Journal of World Investment, c/o Mercury Airfreight International Ltd., 2323 Randolph Avenue, Avenel, N.J. 07001.

NOTE TO AUTHORS

The Editor will be pleased to consider contributions provided they are not submitted for publication elsewhere. Articles must be presented in their final form, double-spaced, in English. Special attention should be given to quotations, footnotes and references, which should be accurate and complete. Due to strict production schedules, it is not possible to amend texts after acceptance or send proofs to authors for correction. The submission of a text indicates that authors consent, in the event of its publication, to the automatic transfer of all copyrights therefor to the publisher of The Journal of World Investment.

Published by Werner Publishing Company Ltd.

ISSN 1424–1196 Mode of citation: 3 J.W.I. 2

The Brave New World of Global Arbitration

Bernardo M. CREMADES* and David J.A. CAIRNS**

INTRODUCTION

Globalization is a defining concept of the present age. Initially a convenient expression to capture the combined effect of new technologies and trade liberalization on international business, the concept has now expanded and become politicized to the point of being an almost daily preoccupation of the media. It has been called the herald of a new world order and has been damned for oppression, exploitation and injustice. In Western democracies, globalization has been the subject of mass protests, and attitudes to globalization might be rapidly becoming a fundamental difference between the politics of the right and of the left. Indeed, the debate over globalization has been described as the major ideological battle of the beginnings of the 21st century.[1]

Globalization has been defined as "a dynamic process of growing liberty and worldwide integration of the markets for labour, goods, services, technology and capital ..."[2] The causes of globalization are many, but amongst the more important are the development of new technologies (especially in communications) and a series of international political and economic developments that have resulted in the liberalization of world trade. Globalization is characterized structurally by the global corporation (often without any clear national identity), international organizations (such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organization), integration and interdependence of world financial markets and borderless commerce through the Internet. On a technological level, its characteristics include acceleration (things move faster than ever before), amplification (a product or idea can reach and impact on a much greater number of people than ever before), volatility, asymmetry (small operators can compete or act globally), interconnectivity, decentralization, disintermediation (more direct communication between business and

* Senior Partner, B. Cremades y Asociados, Madrid; President of the Spanish Court of Arbitration; Vice-President of the London Court of International Arbitration; President of Committee D (Arbitration and ADR) of the Section of Business Law of the International Bar Association; Chairman of the Global Center For Dispute Resolution Research; member of the Institute of World Business Law of the International Chamber of Commerce; member of the International Council for Commercial Arbitration. He may be reached at: «b.cremades@bcremades.com».

** Associate, B. Cremades y Asociados, Madrid; Solicitor, England & Wales, and New Zealand. He may be reached at: «d.cairns@bcremades.com».

[1] José Carlos Fernández Rozas, *Sistema del Comercio Internacional*, Civitas Ediciones, Madrid, 2001, at 303.

[2] Guillermo de la Dehesa, *Comprender la Globalización*, Alianza Editorial, Madrid, 2000, at 17.

other institutions and customers, clients and end users), dislocation and virtualness (the disappearance of national boundaries).[3]

The philosophical foundations of globalization are a series of freedoms, particularly freedom to trade, freedom to invest capital and freedom of establishment of business in other countries.[4] As explained by Ibrahim F.I. Shihata, former Senior Vice President and General Counsel of the World Bank and Secretary-General of the International Centre for Settlement of Investment Disputes:

> "Prevalent theory advocates the greatest possible freedom in the transnational movement of production factors. This means, in particular, the elimination of quantitative trade restrictions, such as import permits and quotas, the reduction of tariffs and the free admission of capital and services. This approach is seen by its proponents not only as best guaranteeing international competition but also as offering the most effective mechanism of rational resource allocation on the international level on the basis of comparative advantage ..."[5]

The lifeblood of globalization is foreign direct investment (FDI), which usually consists of equity investment by a firm in a foreign country. Globalization has increased the flows of FDI at a rapid rate; indeed, the compound growth rate of FDI between 1985 and 1998 has been estimated at almost 14 percent per annum. The benefits of FDI to the recipient nations include technology transfer, lower prices and higher quality of goods and services, high wages, more competitive internal markets and economic growth generally. However, FDI is also accused by anti-global activists as being a means by which multinational corporations indiscriminately move activities from one country to another in pursuit of the cheapest possible labour, thereby impoverishing local citizens, damaging the environment and producing no lasting benefit.[6]

The dramatic technological advances driving globalization and the rapid rise in political consciousness and debate over globalization create the impression that this is a recent phenomenon. In fact, recent years have seen not the emergence of a new phenomenon but rather an increase in the pace of development, and in political awareness, of a process which had been under way for a considerable time. Indeed, it has been suggested that the present process of globalization has plausibly been in train since as early as 1950.[7] Nor, it is hardly necessary to add, is the process complete.

---

[3] David J. Rothkopf, *Foreign Policy in the Information Age*, in Richard L. Kugler and Ellen L. Frost (eds.), *The Global Century: Globalization and National Security*, NDU Press, Washington, D.C., 2001, at 221–226.

[4] de la Dehesa, *supra*, footnote 2, at 18.

[5] Ibrahim F.I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 9 ICSID Rev.–FILJ, 1994, at 48, relying on United Nations Conference on Trade and Development, *World Development Report, 1991: The Challenge of Development*, United Nations, New York and Geneva, 1992, at 96–98. Mr. Shihata went on to consider the requirements of entry and admission of foreign investment under national legislation, bilateral and multilateral investment treaties and World Bank Group Guidelines and concluded that there was "a clear worldwide trend towards greater liberalization and globalization of trade and investment schemes ... the drive for liberalization is especially true among developing and transition countries which, unlike the developed ones, have generally had greater restrictions ..."

[6] This description of FDI is taken from Edward M. Graham, *Fighting the Wrong Enemy: Antiglobal Activists and Multilateral Enterprises*, Institute of International Economics, Washington, D.C., 2000, at 3–7.

[7] de la Dehesa, *supra*, footnote 2, at 17.

I. GLOBALIZATION AND ARBITRATION

The last four decades have been a period of expansion for international commercial arbitration. This globalization of international commercial arbitration began with the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The success of the New York Convention in terms of the number of adhering States, the respect it has achieved from national courts and its felicitious drafting that has not required amendment has provided a solid base for the subsequent growth of international commercial arbitration and has been a beneficial influence on the international harmonization of arbitration law.[8] Indeed, the New York Convention has been described by one authority as being perhaps "the most effective instance of international legislation in the entire history of commercial law ..."[9] The Convention has been complemented by regional harmonization initiatives such as the 1961 Geneva European Convention on International Commercial Arbitration, the 1975 Panama Inter-American Convention on International Commercial Arbitration and the 1993 Treaty for the Harmonisation of African Business Law (OHADA).[10] Another strong impetus to the international harmonization of arbitration law has been the Model Law on International Commercial Arbitration concluded by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 and (as at 15 February 2002) forming the basis of the arbitration law of thirty-nine separate jurisdictions. The parallel creation of the Model Law in six languages (Arabic, Chinese, English, French, Russian and Spanish) and the availability of jurisprudence on the Law in these six languages through the Case Law on UNCITRAL Texts (CLOUT) is likely to consolidate its harmonizing influence.[11]

The exponential increases in FDI flows necessitated more effective protection of foreign investment, and arbitration was able to meet this need. The modern growth of arbitration in the field of foreign investment dates from the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) which established the International Centre for Settlement of Investment Disputes (ICSID). Initially, the ICSID workload was lean, averaging a single case a year in its first twenty years. Since the mid-1980s, its workload and importance has expanded with the explosion of international instruments enabling investors to use the ICSID procedures to arbitrate investment disputes against foreign States. Multilateral instruments that provide for investor-State arbitration include the

---

[8] On the history and significance of the New York Convention, see generally the keynote addresses of Pieter Sanders, Gerold Herrmann and Albert Jan van den Berg in *Improvising the Efficiency of Arbitration Agreements and Awards: 40 Years of the Application of the New York Convention*, ICCA Congress Series, No. 9, 1999; Richard J. Graving, *Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality*, 10 ICSID Rev.-FILJ, 1995, 1–53.

[9] Sir Michael Mustill, *Arbitration: History and Background*, 6 J. Int'l Arb. 2, 1989, 43–56, at 49.

[10] On these instruments, see Emmanuel Gaillard and John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration*, Kluwer, The Hague, 1999, paras. 273–300; Albert J. van den Berg, *The New York Convention 1958 and the Panama Convention 1975: Redundancy or Compatibility?* 5 Arb. Int'l, 1989, 214–229.

[11] Gerold Herrmann, *The UNCITRAL Model Law—Its Background, Salient Features and Purposes*, 1 Arb. Int'l, 1985, 6–39.

1994 Energy Charter Treaty[12] and three multilateral agreements in the Americas—the 1992 North American Free Trade Agreement (NAFTA);[13] the 1991 Colonia Protocol on the Reciprocal Promotion and Protection of Investments in Mercosur;[14] and the Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States[15]—with a fourth agreement—The Free Trade Agreement of the Americas—presently under negotiation and a priority of the Bush Administration.[16]

There has also been an exponential growth in bilateral investment treaties (BITs), so that as at 1 January 2000 there were 1,857 BITs involving 173 countries. BITs normally include provisions relating to the definition of a foreign investment (which in most cases includes tangible and intangible assets and, often, intellectual property), the admission of investments, standards of national, most-favoured-nation (MFN) and fair and equitable treatment, compensation for expropriation and dispute settlement. The dispute settlement provisions almost invariably provide for both State-to-State and investor-State arbitration, with the latter usually providing (at the option of the investor) for recourse to either the competent tribunals of the State party, ICSID arbitration pursuant to the Washington Convention (or the ICSID Additional Facility Rules, if appropriate) or arbitration pursuant to the UNCITRAL Arbitration Rules. These developments mean that investor-State arbitrations are now an established and extremely important feature of modern international commercial arbitration.[17]

---

[12] The Energy Charter Treaty was signed at Lisbon on 17 December 1994 and entered into force on 16 April 1998. For the Treaty text, see 10 ICSID Rev.–FILJ, 1995, 258–361. As at 21 August 2001, forty-four countries and the European Communities had ratified the Treaty; see generally the Website of the Energy Charter Conference at «http://www.encharter.org». A characteristic of the energy sector is the exposure of unusually large capital investments in foreign States to political risk over long periods of time, and so the need for a multilateral agreement; see generally Thomas Wälde, *Investment Arbitration under the Energy Charter Treaty—From Dispute Settlement to Treaty Implementation*, 12 Arb. Int'l, 1996, 429–466.

[13] The North American Free Trade Agreement between the United States of America, Canada and the United Mexican States was signed in December 1992 and came into force on 1 January 1994. It superseded the Canada–United States Free Trade Agreement, which had entered into force in 1989, did not include Mexico and did not provide for investor-State arbitration. The investment protection (including arbitration) provisions of NAFTA are contained in Chapter Eleven (Articles 1101–1139); see: «http://www.sice.oas.org/trade/nafta/naftatce.asp».

[14] *Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el Mercosur*, between the Republic of Argentina, the Federal Republic of Brazil, the Republic of Uruguay and the Republic of Paraguay, signed on 17 January 1994; see: «http://www.sice.oas.org/trade/mrcsrs/decisions/AN1193.asp».

[15] Treaty on Free Trade Between the Republic of Colombia, the Republic of Venezuela and the United Mexican States, entered into effect 1 January 1995; see: «http://www.sice.oas.org/Trade/G3_E/G3E_TOC.asp».

[16] On the negotiation of The Free Trade Agreement of the Americas, which involves all thirty-four active Members of the Organization of American States, see: «http://www.sice.oas.org/ftaa_e.asp».

[17] See Ibrahim F.I. Shihata and Antonio R. Parra, *The Experience of the International Centre for Settlement of Investment Disputes*, 14 ICSID Rev.–FILJ, 1999, 299, at 303–306; Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID Rev.-FILJ, 1991, 380–399; United Nations Conference on Trade and Development, *Bilateral Investment Treaties 1959-1999*, Doc. No. UNCTAD/ITE/IIA/2, 2000. Pursuant to Article 25 of the Washington Convention, ICSID has jurisdiction only in respect of disputes "between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State ..." In 1978, ICSID established its so-called Additional Facility, governed by the Additional Facility Rules (Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes) to enable ICSID to administer, at the request of the parties concerned, certain proceedings between States and nationals of other States which fall outside the scope of the Washington Convention, including proceedings outside ICSID's jurisdiction "because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State ..." (Article 2(a)).

A new milestone in the liberalization of world trade was achieved in 1994 with the completion of the multilateral trade negotiations of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT).[18] The Uruguay Round also resulted in the establishment of the World Trade Organization on 1 January 1995, the functions of which include administering a new international dispute settlement system through the Dispute Settlement Understanding (DSU) for disputes between States in relation to the Agreements arising from the Uruguay Round.[19]

The dispute resolution provisions of BITs, the success of ICSID and the establishment of the DSU confirm a strong modern trend to determine trade and investment disputes by legal rather than diplomatic means, based on standards of national, MFN and fair and equitable treatment and of "no-expropriation-without-compensation". A similar preference for legal rather than diplomatic approaches to international dispute resolution, which has significantly raised the profile of international arbitration, has also been confirmed by some *ad hoc* developments, such as the work of the Iran–United States Claims Tribunal.

Globalization has coincided with a "revolution" in the international protection of human rights,[20] and some parallels can be drawn between developments in this field and international commercial arbitration. Trade liberalization and the acceptance of binding arbitration of investment disputes has often accompanied or closely followed improvements in civil and political rights as, for example, in certain Latin American countries. Human rights law and modern trade law share a common concern with the protection of nationals of one State within the domestic jurisdiction of another, and in both fields there has been an increasing trend in favour of legal rather than diplomatic dispute resolution and, within the new legal structures, the recognition of private rights of action by individuals against States. Thus, the right to arbitration of a foreign investor against a host State under a multilateral or bilateral investment treaty has its human rights counterpart in private petitions under the European Convention on Human Rights or the Inter-American Commission on Human Rights. Both trade law and human rights law also draw upon established international law doctrines such as exhaustion of remedies and denial of justice.

Globalization has stimulated many significant developments in intellectual property, including an expanded role for arbitration. The development of arbitration in respect of intellectual property rights has traditionally been impeded by doubts as to the

---

[18] "The Uruguay Round negotiations were concerned with two aspects of trade in goods and services. Firstly, there was the goal of increasing market access by reducing or eliminating trade barriers. This objective was met by reductions in tariffs, reductions in non-tariff support in agriculture, the elimination of bilateral quantitative restrictions, and reductions in barriers to trade in services. Second, there was the goal of increasing the legal security of the new levels of market access. The strengthened and expanded rules, procedures and institutions are the Round's contributions to the second goal ..." GATT Research Paper, *The Results of the Uruguay Round of Multilateral Trade Negotiations—Market Access for Goods and Services Overview of the Results*, Geneva, 1994, available at the WTO Website at: «http://www.wto.org».

[19] These Agreements include GATT, the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[20] Thomas Buergenthal, *The Human Rights Revolution*, 23 St. Mary's Law Journal 3, 1991, *idem*, *Human Rights in a Nutshell*, 2nd edition, West Publishing Co., Minneapolis, Minnesota, 1995, at 20.

arbitrability of certain disputes relating particularly to patents and registered trademarks.[21] The inclusion of intellectual property in the definition of investments in some multilateral and bilateral investment agreements[22] confirms the arbitrability of these rights in the international arena. The establishment of the World Intellectual Property Organization's (WIPO) Arbitration and Mediation Centre anticipates a more positive relationship between intellectual property and arbitration in future; if the Centre has not been busy so far, the same applied to the ICSID Centre in the years following its establishment. Globalization, intellectual property and arbitration have also come together in cyberspace, where arbitration (at this stage in a relatively rudimentary form) is the basis for the developing law for the resolution of domain-name disputes.

The most truly global private arbitration institution is the Court of Arbitration of the International Chamber of Commerce (ICC) in Paris, originally established in 1923.[23] Its workload continues to grow, and it currently receives more than five hundred requests to arbitrate each year from all around the world. Other long-established European arbitration institutions, such as the London Court of International Arbitration and the Arbitration Institute of the Stockholm Chamber of Commerce, have continued to thrive, but have been joined by an ever-increasing number of new institutions from other regions of the globe. The China International Economic and Trade Arbitration Commission (CIETAC), established in 1956, is now the busiest arbitration centre in the world in terms of the number of cases, if not their significance, and other successful regional institutions include the Cairo Regional Centre for International Commercial Arbitration, established in 1979, and the Hong Kong International Arbitration Centre, established in 1985.

International arbitration has entered a highly competitive era. States have amended their national legislation and institutions have revised their rules in order to ensure that they continue to attract arbitration business. Announcements of the establishment of new arbitration or alternative dispute resolution (ADR) centres appear regularly. There is more competition than ever before between law firms for a greater slice of the arbitration cake; a large industry has emerged of firms organizing conferences, meetings and seminars and publishing books and journals relating to arbitration. There is a subtle competition amongst arbitrators for appointment. Competition is part of the natural habitat of globalized arbitration.[24]

Globalization has seen the emergence of non-governmental organizations (NGOs) as significant participants in international affairs. NGOs defy precise definition but tend

---

[21] See Jacques Werner, *Intellectual Property Disputes and Arbitration—A Comment on a Recent ICC Report*, 1 J.W.I.P. 5, September 1998, 841.

[22] See, for example, Article 1(6) of the Energy Charter Treaty, *supra*, footnote 12; and Article 1 of the Colonia Protocol, *supra*, footnote 14.

[23] For a profile of the work of the Court of Arbitration of the ICC, see W. Lawrence Craig, William W. Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd edition, Oceana Publications, Dobbs Ferry, New York, 2000, Chapter 1.

[24] Bernardo M. Cremades, *International Arbitration: A Key to Economic and Political Development*, Conference Paper, 5th Biennial Dispute Resolution Conference, International Federation of Commercial Arbitration Institutions, New York, 14 May 1999.

to be non-profit organizations devoted to specific issues (such as human rights or the environment) or to representing particular interests (such as labour, business and professional groups). Their activities are wide and varied but include informing, advising, monitoring, lobbying and generally representing the viewpoint of their members, interest or constituency at local, national and international levels. At international levels, it is not uncommon to see NGOs involving themselves (or trying to involve themselves) in advocating new initiatives, policy formation, political and media debate, multinational negotiations, treaty and rule-making and seeking a role before international tribunals or in compliance mechanisms. Their growth and progress has been enormously enhanced by communications, media and Internet usage. Some NGOs are experts in lobbying and the use of the media to mould public opinion and create political pressure, and some advocate protest and even confrontational tactics.[25]

Up until the 1990s, international trade and investment agreements did not attract much attention from NGOs, except for trade and industry groups. This changed with the debate over NAFTA, which attracted opposition from environmental NGOs that feared that free trade would lead to the transfer of businesses to Mexico to avoid Canadian and American environmental controls. NGO opposition to NAFTA hardened when, rightly or wrongly, it began to be believed that investors might use the dispute resolution provisions to strike down environmental protection measures. This issue became prominent in 1997, when Ethyl Corporation brought a complaint against the Canadian government under the investment protection and arbitration provisions of Chapter Eleven of NAFTA, arguing that a regulation prohibiting a gasoline additive violated the national treatment and anti-expropriation provisions. The Canadian government withdrew the regulation and settled the case after the Arbitral Tribunal issued a Preliminary Award on Jurisdiction.[26] Nevertheless, since this time, environmental and other NGOs have been suspicious of the potential of NAFTA's investor-State arbitration provisions to undermine environmental protection measures and now actively monitor and publicize the progress and implications of NAFTA arbitrations. Recently, their attention has particularly been directed at the claims of Methanex Corporation against the United States over the prohibition by the State of California of another gasoline additive, MTBE, and of Metalclad Corporation against Mexico in relation to a permit for a hazardous waste landfill.[27]

---

[25] See generally Palitha T.B. Kohonâ, *The Role of Non-State Entities in the Making and Implementation of International Norms*, 2 J.W.I. 3, September 2001, 537–578.

[26] *Ethyl Corporation v. Government of Canada*, Preliminary Award on Jurisdiction, dated 24 June 1998. For the text of the Preliminary Award (and the pleadings) of this claim, see: «http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-e.asp». See also, Henri C. Alvarez, *Arbitration under the North American Free Trade Agreement*, 16 Arb. Int'l, 2000, 393–430, at 421–427.

[27] See generally Graham, *supra*, footnote 6, at 35–39. The arbitration in *Methanex Corporation v. United States of America* is being conducted under the UNCITRAL Arbitration Rules and is still in progress; the pleadings are available online at the Methanex Website: «http://www.methanex.com». *Metalclad Corporation v. United Mexican States* was conducted pursuant to the ICSID Additional Facility Rules, and a Final Award, in favour of Metalclad, was delivered on 30 August 2000 and is available at: «http://www.worldbank.org/icsid/cases/awards.htm».

There has also arisen recently a more radical fringe of protest groups, usually with a more shadowy structure and leadership, organized through the Internet, opposed to globalization and which have protested vocally and insistently. These groups have successfully targeted and disrupted trade-related international meetings in both Europe and the United States.

This brief survey of globalization and international arbitration would not be complete without mention of the failure of the Multilateral Agreement on Investment (MAI). The negotiation of the MAI under the auspices of the Organisation for Economic Co-operation and Development (OECD) began in 1995, and was intended to "provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection with effective dispute settlement provisions ..."[28] The draft MAI provided for both State-to-State and investor-State arbitration. The MAI negotiations terminated without agreement in December 1998. The negotiating States had encountered various problems, including an inability to deal with issues of investment incentives and taxation, intractable issues relating to cultural industries and intellectual property and a lack of key political and business support. In 1997, partially as a result of Ethyl Corporation's NAFTA challenge, the MAI began to attract significant opposition amongst environmental and consumer NGOs and labour organizations. As opposition grew, it began to act as a catalyst for all groups opposed to globalization, resulting in mass street protests against the MAI in Paris, Geneva and Washington.[29] In this way, the MAI negotiations signalled another step in the politicization of investor-State arbitration, which had now become an institutional target for the loose anti-globalization movement.

The political pressures on the institutions of globalization were reflected in the Ministerial Declaration of the Fourth Ministerial Conference of the WTO at Doha, Qatar in November 2001. This Declaration recognized the need "at the national and multilateral levels ... to promote a better public understanding of the WTO and to communicate the benefits of a liberal, rules-based multilateral trading system."[30] It also recognized that the relationship between trade issues and environmental protection required more attention and confirmed that "the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive."[31] Finally, the Ministerial Declaration implicitly confirmed the national sovereignty of host States in recognizing that a multilateral framework to secure transparent, stable and predictable conditions for long-term cross-border investment

---

[28] OECD Declaration, 1995, as quoted in Graham, ibid., at 23.

[29] On the content and failure of the MAI, see Graham, ibid., Chapters 2 and 3; and Yoshi Kodama, *Dispute Settlement under the Draft Multilateral Agreement on Investment—The Quest for an Effective Dispute Settlement Mechanism and its Failure*, 16 J. Int'l Arb. 3, September 1999, 45–88.

[30] Ministerial Declaration, adopted on 14 November 2001, World Trade Organization, Ministerial Conference, Fourth Session, Doha, Qatar, WT/MIN(01)/DEC1, para. 10.

[31] Ibid., paras. 6 and 31–33.

should "take due account of the development policies and objectives of host governments as well as their right to regulate in the public interest".[32]

Finally, the economic crisis in Argentina and that country's suspension of payments on its sovereign debt obligations in December 2001 presents a new challenge to the international system of protection of FDI. During the decade of the 1990s, Argentina actively encouraged FDI, offering protection to foreign investors by signing fifty-three separate BITs as well as the Colonia Protocol. In the immediate aftermath of its suspension of payments, there were statements by political leaders and street protests directed against foreign investors. The government of Argentina now faces a very difficult task of balancing its obligations to foreign investors with the expectations of its frustrated and increasingly impoverished local population. In January 2002, Argentina enacted broad emergency legislation that includes measures that are expropriatory under the current interpretations of this standard, although the right to compensation was also acknowledged in this legislation.[33] Nevertheless, it seems clear that, in Argentina, the right of a sovereign State to regulate its economic affairs in the public interest, in the short term at least, is going to prevail over the rights of foreign investors. The Argentina crisis is also going to set back the negotiation of The Free Trade Agreement of the Americas (FTAA). More fundamentally, it might also reveal and test the political limits of investment protection based on treaty rights enforced by international arbitration.

II. GLOBALIZATION AND ARBITRAL DOCTRINE

The globalization of international commercial arbitration has been accompanied and facilitated by many doctrinal and structural developments within arbitration law and practice. Some of the more important of these developments have been the following.

A. PARTY AUTONOMY AND THE CHANGING ROLE OF NATIONAL COURTS IN RELATION TO INTERNATIONAL ARBITRATION

International arbitral practice in recent decades has increasingly emphasized the normative value of party autonomy. Party autonomy is a recognition of the value of economic freedom and, in particular, freedom to contract, which is at the heart of globalization.

If party autonomy is to be an effective doctrine, then it must be supported not only by arbitrators and arbitral institutions but also by national courts. This has in fact occurred, and the role of national courts *vis-à-vis* international commercial arbitration has generally shifted from control to self-restraint and facilitation of the effective

[32] Ibid., paras. 20–22.
[33] *Ley de Emergencia Pública y de Reforma del Régimen Cambiario* of 6 January 2002 (*Ley 25.561*).

exercise of powers by arbitral tribunals. The complementary nature of party autonomy and judicial restraint has been explained by Horacio A. Grigera Naón in these terms:

> "In other words, for an international commercial arbitration culture to develop, a parallel culture, favouring the autonomy of and providing support for the international commercial arbitration process, needs to be developed at the level of national jurisdictions. The evolution of an international commercial arbitration culture is then closely associated with the development of a parallel culture, shared by national jurisdictions all over the world, which minimises the interference and maximises the support of national judiciaries *vis-à-vis* international commercial arbitrations ...
>
> ...
>
> This means the creation of a legislative background and policies advanced by the judiciary that are conducive to facilitating the exercise of the parties' autonomy in the fashioning of their arbitral proceedings. Such a background must on one hand shield the sphere of private ordering from the interference of courts and authorities, while on the other making available the support of those local courts to permit the arbitral proceedings to continue when faced with the recalcitrance of an unwilling party ..."[34]

The modern, light-handed attitude of national courts is seen in such diverse doctrinal developments as the general recognition of the competence-competence doctrine and the severability of the arbitration agreement, the expansion of the domain of arbitrability[35] and the development of the jurisdiction of arbitrators in respect of interim relief and precautionary measures.[36] The greater self-restraint of domestic courts in respect of international commercial arbitration is also seen in the application of public policy as a ground for the refusal to enforce an arbitral award.

This trend has been encouraged by the UNCITRAL Model Law. It has at times involved the reversal of a tradition of judicial supervision of arbitration, as in England, or even hostility towards arbitration, as in Latin America. Indeed, the abandonment in Latin America of the traditional hostility to arbitration, including the Calvo Doctrine, has been expressly related to the acceptance of the economic philosophies at the heart of globalization.[37]

B. DELOCALIZATION OF ARBITRAL LAW

This relaxation of the control of national courts over arbitration has been

---

[34] Horacio A. Grigera Naón, *Latin American Arbitration Culture and the ICC Arbitration System*, in Stephan N. Frommel and Barry A.K. Rider (eds.), *Conflicting Legal Cultures in Commercial Arbitration*, Kluwer Law International, London, 1999, 117–146, at 120.

[35] See Eric A. Schwartz, *The Domain of Arbitration and Issues of Arbitrability: The View from the ICC*, 9 ICSID Rev.–FILJ, 1994, 17–46, at 18: "... it is fair to say that in many of the principal venues used for international commercial arbitration (e.g. France, Switzerland, the Netherlands, the United States) there has been increasing acceptance, in recent years, of the arbitrability (at least in the context of international commercial transactions) of matters that were once considered to be outside the scope of arbitration."

[36] See generally Gaillard and Savage, *supra*, footnote 10, paras. 1302–1345.

[37] Alejandro A. Escobar, *Introductory Note on Bilateral Investment Treaties Recently Concluded by Latin American States*, 11 ICSID Rev.–FILJ, 1996, 86–93, at 86–87; Grigera Naón, *supra*, footnote 34, at 122 and 128–129; *idem*, *Arbitration in Latin America: Overcoming Traditional Hostility*, 5 Arb. Int'l, 1989, 137–172 and 188.

accompanied by the delocalization of substantive and procedural arbitral law.[38] It is now accepted that parties may agree to have their dispute determined according to either the common rules of more than one jurisdiction[39] or the principles of *lex mercatoria*.[40] In the absence of any choice of law by the parties, an arbitral tribunal often does not consider itself bound by the conflict of laws rules of any jurisdiction and chooses directly (by "*voie directe*") the appropriate applicable law without reference to any choice of law rule.[41] Similarly, it is now accepted that the law of the seat of the arbitration does not need to govern the procedure of the arbitration, which might not be governed by any national law.[42]

C. INVESTOR-STATE ARBITRATIONS

A new type of international commercial arbitration has appeared with the development of investor-State arbitration for the protection of FDI. Investor-State arbitration differs fundamentally from traditional international commercial arbitration in that its basis lies in treaties between States (either multilateral or bilateral) rather than in private agreements. This treaty basis and the State party involvement mean that public international law has a prominent role in investor-State arbitrations. A new field of arbitral activity—a hybrid between private arbitration and inter-State arbitration—has thus been created and is developing rapidly.

The development of investor-State arbitration has required changes to long-established attitudes, particularly by States which previously approached disputes with foreign investors from the perspectives of sovereignty and possible exceptions based on immunity from jurisdiction and execution under the influence of ideas such as the Calvo Doctrine in Latin America. The desire to participate in the benefits of foreign investment, and also the greater familiarity with and confidence in international arbitration, has encouraged States to accept the direct neutral dispute resolution of arbitration in place of insistence on resort to their national courts or the handling of disputes on a State-to-State basis through diplomatic channels.

The *sui generis* character of investor-State arbitrations has required the re-examination and adaptation of some fundamental concepts and doctrines of arbitral law. A good

---

[38] See generally Pierre Mayer, *The Trend Towards Delocalisation in the Last 100 Years*, in Martin Hunter, Arthur Marriott and V.V. Veeder (eds.), *The Internationalisation of International Arbitration*, Kluwer Law International, 1995, at 37–46.

[39] For example, the *tronc commun* doctrine; see Mauro Rubino-Sammartano, *The Channel Tunnel and the* Tronc Commun *Doctrine*, 10 J. Int.'l Arb. 3, September 1993, 59–65; *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1992] 2 All E.R. 609; *Yearbook of Commercial Arbitration*, Vol. XXVIII, 1993, 446–456.

[40] See generally Gaillard and Savage, *supra*, footnote 10, paras. 1443–1499; Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID Rev.–FILJ, 1996, 208–231.

[41] On the direct choice method, see Gaillard and Savage, ibid., paras. 1552–1553; on the development of arbitral practice on this issue, see Yves Derains and Eric A. Schwartz, *A Guide to the New ICC Rules*, Kluwer Law International, The Hague, 1998, 221–224. Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration provides: "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

[42] See Gaillard and Savage, ibid., paras. 1169–1192.

example relates to the nature of the arbitration agreement in investor-State arbitrations. The issue is of considerable practical importance, given that the enforceability of awards under the New York Convention is premised on a valid arbitration agreement and that Article 25 of the Washington Convention requires the parties' "consent in writing" to submit their dispute to ICSID jurisdiction. The right to initiate an investor-State arbitration is treaty-based; normally there is no contract between the parties and the right is unilateral in that it can be exercised by the investor but not the State. In such circumstances, is the arbitration based on any agreement at all, or on some novel form of compulsory jurisdiction? It is now recognized that investor-State arbitrations are based on an arbitration agreement between the parties but that this agreement does not need to be created through a mutual contemporaneous exchange of promises. A State entering into a bilateral or multilateral investment treaty makes an open offer to investors of another State. The investor's acceptance of that offer, and so the formation of the arbitration agreement, does not arise until the investor commences arbitration. This reasoning was explained in the Preliminary Award on Jurisdiction in *Lanco International Inc. v. The Argentine Republic*,[43] referring to an earlier award in *American Manufacturing and Trading, Inc. v. Republic of Zaire*,[44] as follows:

> "... consent to ICSID arbitration by a State may come from a bilateral treaty. In this regard, the award in *American Manufacturing and Trading, Inc. v. Republic of Zaire* (SINZA Award) establishes ... that consent for the purposes of Article 25(1) is understood to be given by the State party to the dispute in the bilateral investment treaty from the moment the State extends a generic invitation to all the investors who are nationals of the other Contracting State to submit the settlement of their possible disputes to ICSID jurisdiction. In contrast, the consent of the investor who is a national of the other Contracting State, must be given by the investor in writing, since the consent of the State is not binding on the investor.
>
> §44 In the case before us the consent of the Argentine Republic arises from the Argentina–U.S. Treaty, in which the Argentine Republic has made a generic offer for submission to ICSID arbitration.
> ...
>
> The written consent by the Argentine Republic is set forth in the Argentina–U.S. Treaty; as concerns the investor ... such consent was set forth in its letter of 17 September 1997, and in the request for arbitration, which was filed with ICSID on 1 October 1997 ..."

Mutual consent, privity of contract, the formation of the arbitration agreement and the commencement of the arbitration proceedings might therefore all be simultaneous in an investor-State arbitration.[45]

Another novel feature of the new territory of investor-State arbitrations is its quasi-

---

[43] ICSID Case ARB/97/6, Preliminary Decision on Jurisdiction, 8 December 1998; 40 I.L.M. 457, March 2001.

[44] ICSID Case ARB/93/1; *Yearbook of Commercial Arbitration*, Vol. XXII, 1997, 60.

[45] For further discussion of consent in investor-State arbitrations, see Bernardo M. Cremades, *Arbitration in Investment Treaties: Public Offer of Arbitration in Investment Protection Treaties*, in Robert Briner, L. Yves Fortier, Klaus P. Berger and Jens Bredow (eds.), *Law of International Business and Dispute Settlement in the 21st Century: Liber Amicorum Karl-Heinz Böckstiegel*, Carl Heymanns Verlag KG, Köln, Berlin, Bonn and München, 2001, 149–164; Jan Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.–FILJ, 1995, 232–257.

public character, or at least an inescapably public element. This is at odds with the conventional nature of arbitration as a private form of dispute resolution. The State involvement in investor-State arbitrations means that these arbitrations might potentially raise issues of political accountability, democratic decision-making and open government. It is along this not yet fully understood boundary between the public and the private interests in investor-State arbitrations that lie some of the greatest challenges, and dangers, to the future of international commercial arbitration.

D. The Relevance of Public International Law

The growth of investor-State arbitrations has confirmed a new importance of public international law to international commercial arbitration. Bilateral and multilateral investment instruments create investor rights based on such concepts of public international law as expropriation and most-favoured-nation and national treatment. In arbitrations arising from these instruments, such other public international law concepts as denial of justice, exhaustion of remedies and the scope of State responsibility are likely to require consideration. There is now the challenge of a much broader legal canvas to the practitioners of international commercial arbitration.

E. Cultural Changes in Arbitral Practice

The increase in international transactions has of necessity substantially increased the professional interaction of practitioners from different legal traditions. Conferences, workshops and professional associations, such as the International Bar Association, have further increased the opportunities for the interchange of ideas. There has been a growth of comparative arbitration scholarship, which has encouraged attempts to identify the best practices in international arbitration and to harmonize arbitral rules and practices. An example of the former might be the debate over the ethical duties of arbitrators,[46] and of the latter, the harmonization of arbitral procedure through the merging and adaptation of Continental and common-law elements in arbitral procedure as seen, for example, in the *IBA Rules on the Taking of Evidence in International Commercial Arbitration.*[47]

Finally, globalization has introduced to arbitration a new ethnic and cultural diversity of practitioners and arbitrators. Until recently, international commercial arbitration could be described as rather elitist. Those who submitted to arbitration expected the decision of a renowned legal professional from a Continental European

[46] See Gaillard and Savage, *supra*, footnote 10, paras. 1042–1047.

[47] The Preamble to the *1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration* states that the Rules are particularly intended for arbitrations "between Parties from different legal traditions ..." The Rules were intended to reflect a "harmonisation of the procedures commonly used in international arbitration ..." See International Bar Association Working Party, *Commentary on the New IBA Rules of Evidence in International Commercial Arbitration*, Business Law Int'l, 2000, 14, at 15.

country, almost always a university professor. This position has changed radically. Globalization has created the globalized law firm, usually of English or American origin, and these large firms have had substantial impact on international arbitration practice. There are now arbitration institutions and distinguished, specialist practitioners in all regions of the world.[48]

III. Some Challenges of Globalization to International Commercial Arbitration

This Section shifts the focus from changes already experienced by international arbitration to an attempt to identify and discuss some of the important challenges of globalization still to be faced. The investor-State arbitration, in particular, raises a number of original and interesting problems.

A. Cultural challenges

While the culture of arbitration is now more truly global than previously, this process is still far from complete, and indeed there are some indications that further progress is under threat. There have been expressions of concern that international arbitration remains too Western and, in fact, is becoming more legalistic and adversarial under the impact of United States-style litigation practices. The result is a risk that thorough preparation and the pursuit by counsel of every possible advantage for their clients becomes an end in itself to the point, as memorably described by Jan Paulsson, that "reflection and insight ... drown in a miasma of formalism, procedural wrangling, and volumes of paper requiring vast teams of lawyers even to digest—let alone prepare".[49] Even the ideal of procedural due process in arbitration, which is in itself commendable and has been firmly embraced by the arbitral community and, one would have hoped, was universal rather than culturally specific, has contributed to this dynamic of the legalization of proceedings and adversarialism.[50] As a result, arbitration proceedings are in danger of becoming more expensive and protracted even than litigation, and a good deal of millennium writing was devoted to the threat posed to arbitration by ADR.[51]

The adversarial culture of common-law jurisdictions has been strongly condemned

---

[48] See Cremades, *supra*, footnote 24.

[49] Jan Paulsson, *Lessons of the Last Decade: The Promise and Dangers of Globalisation and Practice Under the LCIA Rules*, in Hunter, Marriott and Veeder (eds.), *supra*, footnote 38, at 61.

[50] See Y. Taniguchi, *Is there a Growing International Arbitration Culture? An Observation from Asia*, in Albert J. van den Berg (ed.), *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Congress Series, No. 8, 1996, 31–40, at 37.

[51] See, for example, F.S. Nariman, *The Spirit of Arbitration*, 16 Arb. Int'l, 2000, 261–278; Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, 16 Arb. Int'l, 2000, 379–392.

within those jurisdictions for its costs, delay and complexity,[52] and international arbitration must avoid the replication of these faults. The adversarial culture has provided fertile soil for a flourishing ADR industry, which has successfully re-branded familiar concepts of conciliation and negotiation and presented them as an alternative to litigation and, increasingly, arbitration. Conciliation (or mediation) and negotiation have in the past enjoyed a complementary rather than alternative relationship with arbitration and have been part of the practice of arbitration. The creation of a new specialism of mediation and its insertion into the arbitral process through "multi-tiered" arbitration clauses introduces another layer of professionals into the arbitration process, because lawyers no longer have, or no longer have the time or inclination to exercise, the settlement skills previously expected of them. A more constructive response would address the adversarial attitudes that are the root of the problem.

There is a philosophical association between the underlying values of globalization of competition and free trade and of the theory of the adversarial system that the free presentation of competing cases by the parties before an impartial adjudicator is the most efficient means to uncover truth. Indeed, a leading common-law jurist once described the adversary system as "forensic *laissez-faire*".[53] Where legal counsel formulate their claims and defences with precision, seek discovery, cross-examination or procedural orders from the tribunal only when strictly necessary, select from a substantial volume of potential proofs and legal arguments only the most relevant, analyse the evidence presented coolly and rationally and deliver to the tribunal refined and highly focused legal submissions, then the efficient determination of the correct outcome might indeed be the result. Most practitioners no doubt consider that this is exactly what they do, but to an arbitrator it certainly does not always appear to be so. In any event, the success of forensic *laissez-faire* depends heavily on the professionalism, self-restraint and willingness to be constructive of the participating lawyers. If this is not forthcoming, then arbitrators must be prepared to impose their will on the arbitration on the basis of the parties' presumed intent at the time of entering into the arbitration agreement that the arbitration would be conducted in an orderly and constructive manner.

However, ultimately it is the lawyers, and not the parties or the arbitrators, that have effective control of modern arbitration. As the number of practitioners involved in international arbitration expands and includes more practitioners that are not specialist international arbitration practitioners, it is inevitable that the lawyers seek to impose on international arbitration features of the litigation systems with which they are familiar. The fact that the Anglo-Saxon system of litigation requires such sustained legal

---

[52] See Lord Woolf, *Interim Report to the Lord Chancellor on the Civil Justice System of England and Wales*, H.M.S.O., London, 1995. On Lord Woolf's condemnation of the adversary system and his reforms through the new Civil Procedure Rules, see David J.A. Cairns, *England's Procedural Revolution* and *Procedures under Woolf*, New Zealand Law Journal, 2000, pages 323 and 395, respectively.

[53] Jerome Frank, *Courts on Trial: Myth and Reality in American Justice*, Princeton University Press, Princeton, New Jersey, 1949, Chapter VI.5.

involvement, and is correspondingly lucrative for its practitioners, perhaps also provides an incentive to model international arbitration in its image.

International arbitration will ultimately lose its appeal to international business, particularly non-American business, if it comes to resemble too closely United States-style litigation, and so it is imperative that the international arbitration community continue to work on means to maintain the historic advantage of flexibility. It must avoid too much procedural refinement. It must actively seek to blend and adapt useful features of different legal traditions. It might also look to the re-vitalization of the doctrine of *amiable compositeur.*

The increasing legalization and adversarial nature of international arbitration exacerbates the risk of the rejection of global arbitration by cultures that feel excluded by it, with possible consequences of a greater reluctance of national courts in some regions to enforce international awards and, more generally, a breakdown of the universalist aspirations of international arbitration into regional blocks.[54] There have been some salutary warnings from the Arab world, for example, of distrust of international arbitration. Mr. Ahmed Sadek El-Kosheri at the International Council for Commercial Arbitration (ICCA) Conference at Seoul in 1996 said:

> "In general, the legal community throughout the Arab world is still manifesting its hostility to transnational arbitration ... The continuing attitude of certain Western arbitrators characterized by a lack of sensitivity towards the national laws of developing countries and their mandatory application, either due to the ignorance, carelessness or to unjustified psychological superiority complexes, negatively affected the legal environment required to promote the concept of arbitration in the field of international business relationships ..."

The distinguished speaker concluded by expressing a hope "that the era of a universal, less formalistic 'arbitration culture', more liberated from its existing ties with the Western 'litigation culture' is not far away ..."[55]

Accordingly, it is now more important than ever for arbitration lawyers to appreciate different cultural perspectives on dispute resolution and not to insist on familiar doctrines and rules from their domestic legal systems. The modern arbitrator needs to be aware of, but also rise above, different cultural factors and needs to communicate confidence in his impartiality and neutrality to the parties. In short, there must be a more interactive approach to arbitration.[56]

---

[54] Compare Paulsson, *supra*, footnote 49, at 62–63.

[55] Ahmed Sadek El-Kosheri, *Is there a Growing International Arbitration Culture in the Arab-Islamic Juridical Culture?* in van den Berg (ed.), *supra*, footnote 50, 47–48, at 48. See also Abdel Hamid El-Ahdab, *How well is the Arbitral System Performing in Investment Disputes?—The View of the Arab Countries*, 2 J.W.I. 1, March 2001, 199–202, at 200: "... the Arab countries consider that the arbitral system in investment disputes is a foreign jurisdiction in the hands of foreign arbitrators and foreign lawyers, and that the awards are foreign even if the applicable law is that of the Arab countries."

[56] See generally, Bernardo M. Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, in Frommel and Rider (eds.), *supra*, footnote 34, 147–168.

B. THE PROBLEM OF OVERLAPPING JURISDICTIONS AND REMEDIES

There are four possible sources of law in an investor-State dispute which involve a variety of different dispute resolution mechanisms:

(i) *International law*: In certain circumstances investors may be entitled to the diplomatic protection of their home States. The home State can exercise diplomatic protection in respect of an investor where that investor has suffered a wrong and has exhausted its remedies in the domestic courts of the host State but has been denied justice in accordance with the principles of international law.[57]

(ii) *Multilateral and bilateral investment treaties*: Such treaties are an autonomous source of rights, particularly rights to national, most-favoured-nation and fair and equal treatment, to compensation in the event of expropriation and to international arbitration, normally under the Washington Convention, the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. There is a notable imbalance between investors and States in the rights established by these treaties, as there are very limited rights in favour of the States against foreign investors and, in particular, there is no right of the State to arbitration. The right of the investor to arbitration derives from "the open offer" by the State in the treaty; in contrast, if the State party wishes to commence arbitration against the investor, there must be a conventional arbitration agreement. In Hohfeldian terms, under multilateral and bilateral investment treaties the investor has a *right* to arbitrate an investment dispute as Claimant and a *privilege* to arbitrate an investment dispute as Defendant, whereas the State party has *no right* to arbitrate as Claimant but a *duty* to arbitrate as Defendant.[58]

(iii) *National law*: Both investor and State have rights and duties under the national law of the host State, including the municipal law relating to contracts and investments. Disputes are usually resolved in the courts or administrative tribunals of the host State.

(iv) *Contracts*: There might also be a contract between the investor and the host State (or a State enterprise in the host State). This might provide for either the exclusive resolution of disputes in domestic courts or administrative tribunals, or international commercial arbitration or make no provision in this respect.

This multiplicity of sources of law and dispute resolution mechanisms creates a real risk of overlapping and duplicated claims. This risk has, to a certain extent, been recognized and addressed in the Washington Convention and in investment treaties.

---

[57] Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford University Press, Oxford, U.K., 1998, 548–553.

[58] Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J., 1913, 16–59.

Thus, Article 27 of the Washington Convention provides, in effect, that where an investor utilizes the Convention to commence an arbitration it then forgoes its entitlement to diplomatic protection.[59] Further, many investment treaties require either irrevocable election by an investor between international arbitration and domestic litigation or an express waiver of other dispute settlement procedures as a precondition to access to investor-State arbitration. For example, Article 8 of the France–Argentina Bilateral Investment Treaty[60] provides for an election:

> "1. Any dispute relating to investments, within the meaning of this agreement, between one of the Contracting Parties and an investor of the other Contracting Party, shall, as far as possible, be resolved through amicable consultations between both parties to the dispute.
>
> 2. If such dispute could not be solved within six months from the time it was stated by any of the parties concerned, it shall be submitted, at the request of the investor:
> - either to the national jurisdictions of the Contracting Party involved in the dispute;
> - or to international arbitration ...
>
> Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final."

Article 1121 of NAFTA provides for a waiver:

> "Article 1121: Conditions Precedent to Submission of a Claim to Arbitration
>
> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
> ...
>
> (b) the investor ... waive[s its] right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure ... that is alleged to be a breach ..., except for proceedings for injunctive, declaratory or other extraordinary relief, ..."

Notwithstanding these mechanisms, however, the overlapping sources of law have created substantial complexities in investor-State arbitrations and are likely to continue to do so. For example, *Waste Management, Inc. v. United Mexican States*[61] involved the proper application of Article 1121 of NAFTA, where the Claimant sought compensation from Mexico for alleged breaches of NAFTA by various Mexican state-owned entities (including an entity called BANOBRAS and the City Council of Acapulco). The Claimant

---

[59] Article 27 reads as follows:

> "(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.
>
> (2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute."

[60] *Acuerdo entre el Gobierno de La Republica Argentina y el Gobierno de La Republica Francesa para la Promoción y la Protección Recíproca de las Inversiones*, el 3 de Julio de 1991 (the quotation in the text is a translation; the authentic texts are in Spanish and French).

[61] ICSID Case ARB(AF)/98/2, Arbitral Award dated 2 June 2000, reported in 15 ICSID Rev.–FILJ, 2000, 214.

had already commenced litigation against BANOBRAS in Mexican courts and also an arbitration against the City Council of Acapulco based on Mexican municipal law. The Claimant provided the waiver required by NAFTA Article 1121 with the following rider:

> "This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico."[62]

When asked by ICSID to clarify this waiver, the Claimant stated:

> "Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico."[63]

The Mexican government submitted that a waiver in these terms did not satisfy Article 1121 of NAFTA and therefore the Tribunal had no jurisdiction. The Tribunal, by a majority, found for the Mexican government. In the view of the majority, there was a sufficient possibility of a factual overlap between the relief in the domestic proceedings and the NAFTA arbitration to disqualify the claim. The majority reasoned as follows:

> "For the purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA. The term 'alleged' ['*presuntamente*' in the Spanish version] appearing in Article 1121 is clearly indicative of the framework within which we have to operate at this very early stage of the arbitration proceedings, which means that the elements of comparison to be used at the time of verifying compliance with the waiver are the presumed or supposed violations of NAFTA invoked by the Claimant and the actions effectively in progress before other courts or tribunals at that time ...
>
> In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a Member State of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.
>
> In the present hypothesis, this Tribunal understands that the domestic proceedings initiated by [the Claimant] fall within the prohibition of NAFTA Article 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions, namely non-compliance with the obligations of guarantor assumed under a line of credit agreement requiring BANOBRAS to defray invoices not paid by Acapulco city council, and non-compliance by Acapulco city council through its failure to pay said invoices."[64]

---

[62] Ibid., at 219.
[63] Ibid., at 221.
[64] Ibid., at 235–236.

The overlap of an investment treaty and a contract as competing sources of law is a significant current issue for investor-State arbitrations. Major jurisdictional questions have arisen in at least two recent decisions where a BIT has given the investor a right to ICSID arbitration while a concession contract between the investor and a State entity has provided that domestic administrative tribunals will have exclusive jurisdiction over disputes between the parties. At a conceptual level, this apparent conflict between a BIT and a concession contract is simple to resolve. If the investor seeks to enforce a right granted by the BIT, then the proper forum or natural judge is an ICSID or UNCITRAL arbitral tribunal; however, if the investor seeks to enforce a contractual right, then the jurisdiction clause in the concession contract prevails and the natural judge is the domestic tribunals. Conceptually, the problem is even simpler if the concession contract is not with the State itself but with a State entity, because the different sources of law create rights not only in distinct *fora* but also against different defendants:

- BIT claims (international commercial arbitration) against the State itself; and
- concession contract claims (before the domestic tribunals) against the State entity.

Despite this conceptual simplicity, problems arise when the same facts support both BIT and concession contract claims. In *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*,[65] the Tribunal decided that the BIT claims involved allegations that would also amount to breaches of the Concession Agreement, which was a matter within the exclusive jurisdiction of domestic courts, and that it was:

> "... impossible for the Tribunal to distinguish or separate violations of the BIT from breaches of the Concession Contract without first interpreting and applying the detailed provisions of that agreement. By Article 16.4, the parties to the Concession Contract assigned that task expressly and exclusively to the administrative courts of [a province of the Defendant State]."[66]

The Tribunal stated that the Claimants would only be able to pursue a claim under the BIT (presumably on the basis of a lack of fair and equitable treatment) when they had exhausted their remedies in the domestic courts of the Defendant State and suffered a denial of justice there. This Award is subject to annulment proceedings but, whatever the outcome of the annulment proceedings, the Award is an excellent demonstration of the complexity that arises from the different sources of law in investor-State disputes.

C. PRIVATE RIGHTS AND PUBLIC OBJECTIVES

International commercial arbitration is conventionally a form of private, if not always confidential, dispute resolution. Accordingly, only the parties to the arbitration agreement have any right to participate, the arbitrators apply the applicable law and

[65] ICSID Case ARB/97/3, Award of the Tribunal of 21 November 2000; 40 I.L.M. 457, 2000.
[66] Award of the Tribunal, ibid., at p. 3.

trade usages and do not need to involve themselves in wider public policy issues (except in rare cases, such as corruption) and the enforcement of the award affects only the parties to the arbitration. However, the modern investor-State arbitration procedure is not compatible with this model of arbitration. The investor-State arbitration has already forced an adaptation of the concept of an arbitration agreement, as noted above, and further adaptations can be expected, particularly in light of the hostile criticism of NGOs and anti-globalization groups attracted by some high-profile investor-State arbitrations.

The mere fact that an investor-State arbitration involves a State party means that it raises public and not merely private issues. The potential of the investor-State arbitration mechanism to bring to light a conflict between the free trade obligations of a State and competing social policy objectives complicates the task of an arbitral tribunal. Consider, for example, the following description of arbitration under the investor-State arbitration provisions of NAFTA from an article in The New York Times:

> "Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small group of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned and environmental regulations challenged. And it is all in the name of protecting the rights of foreign investors under the North American Free Trade Agreement ..."[67]

These objections—loss of sovereignty, lack of accountability and transparency and the subversion by international arbitral tribunals of policy, particularly environmental policy, of democratically elected institutions—represent challenges which the international arbitration community must acknowledge and, if necessary, meet by adapting its institutions and practices.

This challenge should not be underestimated. A broad range of interests in the international community have questioned whether free trade has gone too far too quickly, from the street protestors of the anti-globalization movement, to NGOs, to business and political leaders calling for a "more ethical" approach to trade issues or "globalization with a human face". There is greater recognition, now institutionalized, of the desirability of more political control over globalization.[68] These perspectives have received considerable coverage in the media and have affected and will continue to affect trade negotiations and policy. They have some direct implications for international arbitration that the arbitration community must face. Some possible lines of development to meet what might be called the "public credibility challenge" of investor-State arbitration are considered in the following Sections.

---

[67] *NAFTA's Powerful Little Secret: Obscure Tribunals Settle Disputes, but Go Too Far, Critics Say*, The New York Times, 11 March 2001.

[68] See Fernández Rozas, *supra*, footnote 1, *Capitulo* V.

1. *The Indirect Expropriation or "Regulatory Takings" Issue*

There is widespread support for the proposition in international law that a State may only expropriate foreign property if prompt, adequate and effective compensation is provided for, but the rule is not without qualifications.[69] Any breach of this principle has traditionally been addressed through diplomatic exchanges. However, multilateral and bilateral investment agreements now almost invariably contain provisions providing for compensation in the event that an investor suffers expropriation at the hands of a State party and have therefore created a right of action, enforceable by arbitration, against States for expropriation.[70] For example, Article 1110 of NAFTA provides in part:

> "1. No Party shall directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and [the general principles of treatment provided in] Articles 1105(1); and
> (d) upon payment of compensation in accordance with paragraphs 2 through 6.
>
> 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ..."

This definition is very broad; it includes "direct" and "indirect" expropriation and also measures "tantamount to ... expropriation". This language demonstrates an intention that Article 1110 would protect investments from more than a direct physical taking such as nationalization. The inclusion of indirect expropriation and measures tantamount to expropriation thus raises the issue of the extent to which Article 1110 (and similar provisions in BITs) applies to what in the United States is known as regulatory takings.

A regulatory taking is a reduction in the value of an asset as a result of government regulation.[71] A provision in a multilateral or bilateral investment treaty prohibiting indirect expropriation combined with investor-State arbitration provisions gives an investor the ability to seek compensation for losses arising from regulations which reduce the value of its assets. The initiation of such an arbitration does not challenge the legitimacy of the regulation-making power nor necessarily impugn the policy objectives of the regulations, but the distinction between a claim for compensation and a challenge to the legitimacy of regulations is easily lost in the politics of environmental, public health and safety, and similar issues. The result is that such an arbitration might present to the tribunal some highly charged political questions.

---

[69] See generally Brownlie, *supra*, footnote 57, 533–538.

[70] On the expropriation provisions of BITs generally, see Rudolf Dolzer and Margaret Stevens, *Bilateral Investment Treaties*, Kluwer Law International, The Hague, 1995, Chapter 4.

[71] On the terminology used in this area, see Rudolf Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID Rev.–FILJ, 1986, 41–65, at 44; Dolzer and Stevens, ibid., 98–102. On the regulatory taking issue, with particular reference to the MAI debate, see Graham, *supra*, footnote 6, 41–46.

Article 1110 was recently interpreted and applied in *Metalclad Corporation v. United Mexican States*.[72] This arbitration involved the construction of a hazardous waste landfill which had been authorized by the Federal Government of Mexico. The project attracted public protests and demonstrations. Subsequently, municipal authorities refused necessary construction permits and the Governor of the State of San Luis Potosí declared the area an ecological preserve, which had the effect of barring forever the operation of the landfill. The Tribunal found that this conduct constituted expropriation under Article 1110, explaining the meaning of expropriation in these terms:

> "103. Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State ..."

The breadth of the expression indirect expropriation creates uncertainty amongst businessmen, government officials and their legal advisers as to the proper boundary between legitimate regulation without compensation and a regulatory taking or indirect expropriation. This uncertainty increases the probability of disputes arising that require arbitration and, therefore, of awards that deal with (or appear to deal with) conflicts between trade obligations and domestic or social policy choices. Such awards will inevitably be seized upon for political purposes, with the consequence of more complaints of secret and anonymous tribunals and fears of the erosion of democracy and sovereignty. The broad-but-vague right of foreign investors to compensation for expropriation has and will continue to bring investor-State arbitrations into conflict with groups that use domestic regulation to advance their own political agendas, such as environmental and public health groups, and arbitration's lack of democratic accountability means that it might easily be portrayed by such groups, as well as by nationalistic politicians and anti-globalization activists, as a tool of big business. The credibility problem facing investor-State arbitrations is that, constitutionally and politically, the public implications of the right of compensation for expropriation sit very uncomfortably with a private institution.

The scale of this issue should not be underestimated. While the most controversial expropriation arbitrations to date have involved environmental regulation, difficulties might arise in almost any sphere of economic activity subject to regulation. The inclusion of intellectual property within the definition of "investment" in many BITs is likely to raise particularly delicate issues. Pharmaceutical patents, for example, are a prominent form of intellectual property that have recently attracted extensive media attention in the context of their effects on the price and accessibility of AIDS drugs in Africa. Populous nations in other parts of the world, particularly India and Brazil, have

---

[72] *Metalclad Corporation v. United Mexican States*, ICSID Case ARB(AF)/97/1; the Final Award of 30 August 2000 is available at: «http://www.worldbank.org/icsid/cases/awards.htm».

also sought for some time to shift the balance between protection of pharmaceutical patents and cheaper more accessible medicines in favour of the latter. Some OECD countries have pharmaceutical pricing policies based on the system of reference pricing whereby pharmaceuticals with a same or similar therapeutic effect are priced together irrespective of their patent positions. Under such systems, newer patented drugs have often had their prices lowered to the levels of their older, off-patent predecessors, thereby depriving the manufacturer of the monopoly profit from the patent necessary to recover its research and development costs. The policy objective of such schemes is to reduce the price of pharmaceuticals, which would be defeated if a subsequent payment had to be made to compensate the patent-holder for the reduction in value of its rights. The complex issues raised by such regulatory systems are much more appropriately addressed in international trade negotiations or through democratic political processes at a domestic level than by arbitral tribunals.

At a broader level, sovereign risk or the risk of adverse legislative change is inseparable from commercial activity. Foreign investors should be encouraged to recognize sovereign risk in their investment decisions; for example, a pharmaceutical company that invests in a country with an established reference pricing policy should not be able to seek compensation for expropriation when adverse regulatory decisions are made in respect of its products. There are also insurance systems to cover the political risks arising from foreign investment.[73] In short, more attention might be given to alternative means of meeting the costs to foreign investors of regulatory takings, thereby reducing the political exposure of international arbitration.

The breadth of issues that arbitrators might be called upon to decide under the rubric of indirect expropriation shows how far globalization has pushed international arbitration from its traditional function as a form of consensual, private dispute resolution. However, arbitration risks becoming a victim of its own success as the breadth of claims for indirect expropriation exposes an Achilles heel of a lack of democratic credibility or public accountability. It is significant that the recent Ministerial Declaration of the WTO Meeting at Doha, Qatar saw a need to confirm the right of host States " ... to regulate in the public interest ...";[74] international arbitration must not appear to undermine that right. There is a real possibility of a backlash against international arbitration if arbitrators fail to recognize and face the political limitations of their role.[75] New standards of political and economic sensitivity and the ability to deal with legal arguments in an appropriate context are now required from arbitrators. This in turn might require the re-conceptualization of some facets of arbitration; some

[73] See Dolzer, *supra*, footnote 71, at 56–58.

[74] Ministerial Declaration, *supra*, footnote 30, paras. 20–22.

[75] Compare Paulsson, *supra*, footnote 45, at 257: "Future prospects ... may depend on whether national governments—many of whom may not have appreciated the full implications of the new treaty obligations discussed in this article—take fright and reverse their tracks. This may in turn depend on the degree of sophistication shown by arbitrators when called upon to pass judgment on governmental actions ... A single incident of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash ..."

tentative steps have already been taken in new directions in respect of the rules of confidentiality and third-party participation in investor-State arbitrations.

2. *Confidentiality and Third Party Participation in Investor-State Arbitration*

The privacy of arbitration creates suspicion in controversial regulatory takings cases. It fuels allegations of a secretive, undemocratic process, which is damaging to the image of both trade liberalization and arbitration. It also complicates the reporting obligations of global multinationals to their investors and to stock exchanges (in respect of matters that might be of a sufficient scale to affect the value of the corporation) and also State disclosure under public-right-to-know legislation, such as the Freedom of Information Act in the United States.[76] The Arbitral Tribunal in the *Metalclad* arbitration recognized that there was no express obligation of confidentiality under NAFTA or the ICSID Additional Facility Rules (applicable in that case) but nevertheless expressed a wish in the interests of "the orderly unfolding of the arbitral process" and "the maintenance of working relationships between the parties" that the parties during the proceedings "were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound ..."[77] Although this standard is more liberal than much arbitral law or many institutional rules, it is still not sufficiently open for the special circumstances of investor-State arbitrations.

The damaging allegations of excessive secrecy could be met in part by the recognition within the dispute resolution clauses in multilateral and bilateral investment treaties of a public right of information. This might be limited in respect of genuinely commercially sensitive information, but the fact that a matter is subject to arbitration should not afford grounds for any presumption of either confidentiality or privacy. The presumption in the interests of public confidence in investor-State arbitration should be that, unless confidentiality can be justified, in whole or in part, and is ordered by the tribunal, then the parties are free to publicize the award and other orders of the tribunal, the submissions of both parties, and other documentation relating to the arbitration.

The NAFTA Free Trade Commission has recently sought to defuse criticisms of the secrecy of international arbitrations in exactly this way. In its *Notes of Interpretation of Certain Chapter Eleven Provisions* issued on 31 July 2001,[78] the Commission stated:

---

[76] In *Mondev International v. United States of America*, ICSID Case ARB(AF)/99/2, the United States received a Freedom of Information Act request for the release of certain documents submitted during the proceedings. The Claimant objected to their release. The Tribunal has issued two orders relating to this question (dated 25 January 2001 and 27 February 2001) but these orders are as yet unpublished.

[77] *Metalclad*, *supra*, footnote 72, para. 13.

[78] See Department of Foreign Affairs and International Trade of Canada at: «http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-e.asp». For the role of the Free Trade Commission, which comprises Cabinet-level representatives from the United States, Canada and Mexico, or their designees, see NAFTA, *supra*, footnote 13, Article 2001. The Free Trade Commission's interpretations of NAFTA provisions are binding on arbitral tribunals; see NAFTA Article 1131(2).

"Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

A. Access to documents

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

2. In the application of the foregoing:

(a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.

(b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
(i) confidential business information;
(ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
(iii) information which the Party must withhold pursuant to the relevant arbitral rules ..."

A step beyond public information is provision for some public involvement by special interest groups. NAFTA recognizes that the usual rule that only the parties to an arbitration may participate might not be appropriate in the context of a multilateral agreement by providing that a NAFTA Member State may "make submissions to a Tribunal on a question of interpretation of this Agreement" in cases where it is not a party.[79] However, the law of some countries enables groups with a special interest in litigation involving issues of public concern to make submissions as *amici curiae*,[80] raising the question of how far such a procedure may be appropriate in investor-State disputes. This question has recently been explored in the NAFTA arbitration in the *Methanex* case.

The *Methanex* case raises the question of whether a law of the State of California banning the use of the gasoline additive MTBE constitutes a breach of Article 1110 of NAFTA. The Tribunal received two petitions seeking permission to submit *amicus curiae* briefs to the Tribunal. The first was from the International Institute for Sustainable Development (IISD), a Canadian based research, policy and advocacy NGO whose objectives include advocating trade and investment policies that advance sustainable

[79] Article 1128 of NAFTA provides: "On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement."

[80] For a review of the role of *amici curiae* before national courts and international tribunals, see Dinah Shelton, *The Participation of Non-Governmental Organisations in International Judicial Proceedings*, 88 Am. J. Int'l Law, 1994, 611–642.

development. IISD based its petition on "the need to take account of the legal principles of sustainable development ... Recognition of this requirement remains absent from the pleadings submitted to date by the parties ..." IISD also argued that granting permission for *amicus* briefs would help:

> "... to remedy the public perception of NAFTA's Chapter 11 process as closed, secretive, non-transparent and one-sided as well as being not disposed to take account of the environmental issues at stake in the cases brought under it ..."

The second petition was a joint application by NGOs called Communities for a Better Environment, the Earth Institute and the Centre for International Environmental Law which argued that the arbitration raised issues of constitutional importance concerning the balance between governmental authority to implement environmental regulations and property rights.[81] The Respondent (the United States of America) and Canada supported *amicus* appearances in NAFTA's arbitrations in principle, while Mexico opposed them.

The Tribunal found that the broad procedural discretion afforded by Article 15(1) of the UNCITRAL Arbitration Rules to "conduct the arbitration in such manner as it considers appropriate" included the power to accept *amicus* submissions. However, the Tribunal refused further requests from the petitioners to make oral submissions at the hearing (which the Tribunal said was incompatible with Article 25(4) of the UNCITRAL Arbitration Rules) or to receive copies of documents generated during arbitration. In making these orders, the Tribunal explicitly recognized the importance of the public interest in the arbitration:

> "There is an undoubtedly [*sic*] public interest in this arbitration ... The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm."[82]

The *Methanex* Decision forms a valuable precedent in international arbitration. In order to maintain public confidence in investor-State arbitrations, the power of receiving submissions from third parties must be recognized, although (as in the *Methanex* case) this power must be exercised with care and with proper regard to the procedural rights of the parties.

---

[81] A background paper on the IISD application, its petition, the submissions of the United States, Canadian and Mexican governments and the Decision of the Tribunal are available on the IISD Website at: «http://iisd.ca/pdf/trade_methanex_background.pdf».

[82] *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, dated 15 January 2001, para. 49. A similar decision was recently reached in *United Parcel Service of America v. Government of Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as *Amici Curiae*, dated 17 October 2001 (available at: «http://www.state.gov/documents/organization/6033.pdf») where the Tribunal held that it had a power to accept written *amicus* submissions following consultation with the parties.

3. *Forum Shopping and Procedural Abuses*

The proliferation of multilateral and bilateral investment instruments creates the risk that foreign investors might, in fact, have greater protection for their investments than domestic investors. This, in turn, might seem to support the argument, used by groups politically opposed to globalization, that international arbitration favours foreign interests over domestic interests. An example of this potential problem concerns the protection normally granted by investment treaties against expropriation.

It is a principle of international law (as noted above) that the property of foreigners should not be expropriated without compensation. There is similar protection from expropriation in the domestic law of many jurisdictions (for example, the Fifth Amendment of the United States Constitution[83]). However, in many other jurisdictions, there is no such protection (New Zealand, for example[84]), which creates an additional political dimension to arbitrations involving foreign investors and also an incentive for investors to seek to enter a jurisdiction indirectly via another jurisdiction in order to improve their investment protection.

An example of this type of problem was recently considered by the Tribunal in *Banro American Resources, Inc. v. Democratic Republic of Congo*.[85] This arbitration arose from a mining agreement between a Canadian company, Banro, and the Government of the Congo. The agreement provided that any dispute between the State, on the one hand, and Banro and its Congolese subsidiary Sakima, on the other, would be submitted to ICSID arbitration. The agreement also provided that Banro could transfer its shares in Sakima to any parent or affiliated company, in which case the transferee would be subject to all the rights and duties arising from the agreement. Canada, however, was not a Party to the Washington Convention, so an ICSID Tribunal (pursuant to Article 25 of the Convention) did not have jurisdiction over any dispute between a State party and a Canadian national. After a dispute arose under the mining agreement, Banro transferred its shareholding in Sakima to Banro American, a United States affiliate, and nine days later commenced an ICSID arbitration in the name of Banro American, relying on the latter's United States nationality (the United States being a Party to the Washington Convention). At around the same time, Banro also availed itself of diplomatic intervention by the Canadian government.

The Democratic Republic of the Congo objected to the jurisdiction of the Tribunal on the basis, *inter alia*, that the transfer of shares was "concocted" to create jurisdiction which did not otherwise exist. The Tribunal agreed, stating that a multinational corporation cannot manipulate its nationality in an investment dispute so

---

[83] The prohibition on expropriation without compensation in the Fifth Amendment of the Constitution of the United States of America reads as follows: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[84] See Rt. Hon. Sir Geoffrey Palmer, *Westco Langan v. A-G*, N.Z.L.J., 2001, 163–168.

[85] ICSID Case ARB/98/7, Award on Jurisdiction, dated 1 September 2000.

as to avail itself of both diplomatic protection under international law and the ICSID dispute resolution jurisdiction. The Tribunal stated:

> "103. The legal consequences linked to whether or not a State is a party to the ICSID Convention are, as can be noted, of cardinal importance, and it is after weighing the consequences that a Government makes the decision to accede to the ICSID Convention or to remain outside the system. Since Canada opted not to become a party to the Convention, it is free to provide diplomatic protection to its nationals who invest overseas; similarly, it can be subject to diplomatic intervention by the State of which a foreign investor is a national. The Banro Group, however, was not free to submit to the Democratic Republic of the Congo both diplomatic intervention on the part of the Canadian Government, availing itself of the nationality of its parent company, Banro Resource, and an arbitration proceeding before an ICSID tribunal by availing itself of the American nationality of one of its subsidiaries, Banro American.
>
> ...
>
> 117 ... The problem before the Tribunal involves considerations of international public policy and is governed by public international law. The Tribunal cannot allow the requirements of nationality imposed by the Washington Convention to be neutralized by investors who are seeking to avail themselves, depending on their own interests at a given point in time, simultaneously or successively, of both diplomatic protection and ICSID arbitration, by playing on the fact that one of the companies of the group does not have the nationality of a Contracting State party to the Convention, and can therefore benefit from diplomatic protection by its home State, while another subsidiary of the group possesses the nationality of a Contracting State to the Convention and therefore has standing before an ICSID tribunal.
>
> 118. The Tribunal is fully aware of the need for a judicial regulation of the relationships arising out of foreign private investments. It is thus, with reluctance, that the Tribunal declared that it had no competence. It felt, however, that it was essential to maintain the fundamental consensual characteristic of the ICSID mechanism conferred by the Washington Convention, with regard to the host State, the foreign investor or the State of which the investor is a national. The ICSID mechanisms will be all the more efficient and effective if the conditions to their applications provided by the relevant texts are better respected ..."[86]

Whether a transfer of shares in this manner is objectionable is, of course, always a question of fact and intention. *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*[87] involved a similar question of a transfer of a majority shareholding in the Claimant, this time from a Mexican company to a United States company. The United States, but not Mexico, is a Party to the Washington Convention, so this transfer had the effect of bringing the claim *prima facie* within ICSID jurisdiction. However, in contrast to the *Banro American* arbitration, the transfer of the shares contractually had to be carried out with the express approval of the Defendant government, which was sought and granted. Accordingly, the Tribunal found that the Defendant government had consented to arbitrate with "a national of another Contracting State" within the meaning of Article 25 of the Washington Convention and so, in contrast to the *Banro American* case, found that it had jurisdiction over the investment dispute.

---

[86] Ibid., paras. 103, 117 and 118.

[87] ICSID Case ARB/00/5, Decision on Jurisdiction, dated 27 September 2001, forthcoming in ICSID Rev.–FILJ.

D. . THE ACCOUNTABILITY OF ARBITRATORS

The pressures of globalization on arbitration are likely to raise issues regarding the independence and impartiality of arbitrators. The political dimension of investment treaties means that any circumstances that might be construed (even unreasonably) to indicate a possible lack of impartiality or independence might be seized upon to discredit not only a particular award, but also the institution of investor-State arbitrations. At the same time, arbitrators are likely to be tested by more tactical challenges and also by the greater scrutiny of the possible connections between arbitrators and parties. Many arbitrators are partners in global law firms, and globalized multinationals are the primary users both of international commercial arbitration and the global law firms, so the possibility of some connection being found is greater than might be expected.

The problem of accountability is likely to be particularly acute for ICSID arbitrators, as investor-State arbitration attracts the greatest public scrutiny and criticism. Under Article 57 of the Washington Convention, a Party may "propose the disqualification" of an ICSID arbitrator on account of any fact indicating "a manifest lack of the qualities required by paragraph (1) of Article 14". Article 14(1) requires persons designated as arbitrators to be persons:

- of high moral character;
- of recognized competence in the fields of law, commerce, industry or finance; and
- who may be relied upon to exercise independent judgment.

Article 58 provides that the decision on a proposal to disqualify will be made by the other two members of the Tribunal.[88]

Challenges under Article 57 are likely to increase.[89] In a recent case, the Chairman on his appointment disclosed that the law firm of which he was a partner had previously acted for one of the Claimants. The Claimant was a global multinational and the Chairman's law practice was an international firm of more than four hundred lawyers. The firm's work for the Claimant bore no relation at all to the dispute before the Tribunal, the Chairman had not himself done any work for the Claimant, the fees were "inconsequential" in terms of the firm's total billing and, although the relationship was continuing, the remaining work was trivial and the firm had agreed not to accept any

[88] There is further elaboration of the procedure for dealing with a proposal to disqualify in Rule 9 of the ICSID Arbitration Rules; see generally, Christoph Schreuer, *Commentary on the ICSID Convention: Articles 57 and 58*, ICSID Rev.–FILJ, 1999, 521–534.

[89] Ibrahim F.I. Shihata, the Secretary-General of ICSID, writing in 1988, said that at that time there had only been one challenge to an ICSID arbitrator pursuant to Article 57; see Ibrahim F.I. Shihata, *The Experience of the International Centre for the Settlement of Investment Disputes in the Arbitral Process and the Independence of Arbitrators*, ICC Publication 472, 1991, at 19. This was ICSID Case ARB/81/1, *Amco Asia Corp. v. Republic of Indonesia*, Decision on a Proposal to Disqualify an Arbitrator, 24 June 1982, unpublished; but see M. Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l and Comp. L., 1989, 26.

further instructions from the Claimant until the arbitration was complete. The Defendant State challenged the appointment of the Chairman on the grounds that he failed to satisfy the criteria under Article 14(1) of the Washington Convention of being able to be "relied upon to exercise independent judgment".

In their Decision pursuant to Article 58 of the Washington Convention, the other two members of the Tribunal formulated the applicable standard for a manifest lack of independent judgment under Article 14(1) and Article 57 as follows:

> "But in cases where (as here) the facts are established and no further interference or impropriety is sought to be derived from them, the question seems to us to be whether a real risk of lack of impartiality based upon those facts (and not on any mere speculation or inference) could reasonably be apprehended by either party. If (and only if) the answer is yes can it be said that the arbitrator may not be relied on to exercise independent judgment. That is to say, the circumstances actually established (and not merely supposed or inferred) must negate or place in clear doubt the appearance of impartiality ... Once the other arbitrators or Committee members had become convinced of this conclusion, there would no longer be room for the view that the deficiency was not 'manifest'."[90]

On the facts, the two members of the Tribunal found that a manifest lack of independent judgment was not established. They stated as follows:

> "Turning to the facts of the present case, it is true that a partner of [the Chairman] had (and still has) the Claimants or one of their affiliates as a client. But we do not think that this, in and of itself, is enough to justify disqualification in the circumstances of this case. Relevant on the other hand are the following facts: (a) that the relationship in question was immediately and fully disclosed and that further information about it was forthcoming on request, thus maintaining full transparency; (b) that [the Chairman] personally has and had had no lawyer-client relationship with the Claimants or its affiliates; (c) that the work done by his colleague has nothing to do with the present case; (d) that the work concerned does not consist in giving legal or strategic advice to the Claimants but concerns a specific transaction, in which [the Chairman's law firm] are not the lead firm; (e) that the legal relationship will soon come to an end with the closure of the transaction concerned."[91]

They also said that, had it been necessary, "the *de minimis* rule would have provided a further basis for rejecting the proposal of disqualification."[92]

The logic and reasonableness of this decision seems beyond question. However, the Tribunal arguably did not give sufficient weight to the *global* dimension of the arbitration, which was put in the following way by the Defendant State in its submission:

> "8. Bear in mind also that, even hypothetically considering that the relationship between [the Claimants] and [the Chairman's law firm] was not of economic significance, the truth is that the former is an extremely large multinational corporation of global dimensions that is engaged in multibillionaire operations in various and different jurisdictions.

---

[90] Unpublished case, Decision on the Challenge to the President of the Committee, dated 3 October 2001, para. 25.

[91] Ibid., para. 26.

[92] Ibid., para. 27.

> Without hesitation, we are referring to a client that is significant for any law firm, and that has an importance that should be appraised not only with relation to the services already rendered, but also bearing in mind the services that, as a consequence of this relationship, may be rendered in the future.
>
> In this context, given the economic importance of the petitioner, of the amounts at stake and the potential legal consequences of the process, the [Defendant State] has to remark that the professional link between the firm in which [the Chairman] is a partner and [the Claimants], affects the necessary ... reliance upon [the] exercise [of] independent judgment ... that should be present in any process and, specially, in one with the importance of the instant case."[93]

States might be understandingly reluctant to draw attention to the possible political implications of an award in their submissions, but an arbitration that might determine questions of responsibility within complex federal or national political structures or require a substantial disbursement of State funds by way of compensation or damages requires sensitivity by arbitrators in dealing with challenges. It may be, in all the circumstances, that the standard of independence of arbitrators required by the Washington Convention is not sufficiently high.

The allegation of a lack of independence in the form of a conflict of interest is a thoroughly familiar concept to the modern global law firm, which normally has internal committees, guidelines and reporting in place to identify and manage potential conflicts. Devices such as information barriers ("Chinese walls") have been developed to neutralize the problem, and law firms in many jurisdictions have robustly rejected, to the point of embroiling themselves and their clients in litigation, allegations of breach of confidentiality and conflicts of interests. It is clear, however, that the standards for self-disqualification of the global law firm in its dealings with commercial clients or in litigation are not sufficiently high for the responsibilities of an international arbitrator, and particularly so for an arbitrator of an investor-State dispute.

It is significant as a point of comparison that the Court of Arbitration of the ICC has shown considerable prudence in dealing with arbitrators whose law firms have some relation with a party, even on an unrelated matter, and normally rejects such arbitrators, even if the relationship is minor.[94] One leading text has asked whether the ICC's approach is "taking the principle of independence too far" but concludes that "arguably, the Court's prudence may serve the interest of the party whose nominee has been refused confirmation, particularly if the alternative candidate is available who is beyond any possible reproach".[95] The advantage of a precautionary approach to the independence of arbitrators is that there is no possibility of a subsequent challenge to the award on the basis of a lack of independence. There is no lingering lack of confidence

[93] Unpublished case, Submission of the Defendant State on Disqualification, dated 23 August 2001.

[94] See Derains and Schwartz, *supra*, footnote 41, pp. 114–115; Craig, Park and Paulsson, *supra*, footnote 23, 228–229; Horacio A. Grigera Naón, *Factors to Consider in Choosing an Efficient Arbitrator*, in Albert J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, Kluwer Law International, The Hague, 1999, 286–313, at 303–304.

[95] Derains and Schwartz, ibid., 115.

in the tribunal by the party that made the challenge and no preoccupation by the other party that one member of the tribunal might be influenced in their decision by a need to justify their independence. This is to the advantage of both parties, and also to international commercial arbitration as an institution.

E. PUBLIC POLICY

The foundation of the success of international commercial arbitration is the system of the recognition and enforcement of awards under the New York Convention. The enforcement of awards pursuant to the New York Convention is performed by domestic courts and so, as already noted, the success of international commercial arbitration owes much to the respect paid by domestic courts at the enforcement stage to the awards of arbitral tribunals and, more generally, to the parties' choice of dispute resolution by arbitration. One of the grounds on which a domestic court can refuse recognition and enforcement of an award under Article V.2(b) of the New York Convention is that "the recognition or enforcement of the award would be contrary to the public policy of that country", so the success of arbitration is always vulnerable to an expansion of public policy-based rejections of enforcement applications.

Public policy differs from country to country and is a notoriously difficult concept to define. Some nations, such as France, distinguish between domestic public policy and international public policy. Some commentators have identified the further category of transnational or truly international public policy. Public policy changes with the ethical values of a community and so is capable of temporal illustration by example but not of comprehensive definition. Accordingly, descriptions are inevitably in general terms, such as that of Judge Joseph Smith of the United States Second Circuit Court of Appeals, who equated public policy under the New York Convention with "the forum State's most basic notions of morality and justice".[96]

Globalization has affected public policy in two distinct ways. Firstly, delocalization of arbitral law has correspondingly increased the significance of public policy as a means of control by national courts of international arbitration.[97] Secondly, globalization has affected notions of morality and justice, and thus the content of public policy. The impact of globalization on the substance of public policy might prove to be substantial. A frequent criticism of trade liberalization and globalization has been that it involves a

---

[96] *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier RAKTA and Bank of America*, 508 F. 2d 969 (1974). For the content of public policy, see Pierre Mayer, *Mandatory Rules of Law in International Arbitration*, 2 Arb. Int'l, 1986, 274–293 and 322–323; Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series, No. 3, 1987, 257–318; Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, in Sanders (ed.), ibid., 177–208; Audley Sheppard, *Final Report on Public Policy as a Bar to the Enforcement of Arbitral Awards*, Report prepared for the International Law Association Conference, London, 2000, available at: «http://www.ila-hq.org/pdf/ComArbitration.pdf».

[97] Marta Gonzalo Quiroga, *Globalización, Deslocalización y Arbitraje Privado Internacional: ¿Utopía o Realidad de un Orden Público Transnacional?* Revista de Corte Española de Arbitraje, 2000, 83–121.

"race to the bottom" in terms of environmental and labour standards and, given the profile of these concerns through the activities of NGOs and anti-globalization groups, a party to an arbitration who is guilty of exploitative practices in these areas might well face resistance to the enforcement of an award on public policy grounds. The importance of this question is put in sharper relief by the public attention and criticism of certain recent NAFTA arbitrations with environmental implications. Some nations may already, or may in the near future, consider certain minimum environmental standards to be part of their public policy. Similarly, the protection of public health or cultural sites forming part of the patrimony of humanity might in future achieve preference over *pacta sunt servanda* in the hierarchy of modern international public policy.[98]

Further, it seems likely that human rights law will have a profound impact on the definition of public policy in future. The relevance of international human rights norms to arbitral procedure, such as the right to natural justice embodied in Article 6(1) of the European Convention on Human Rights, has already been accepted.[99] The revolution in human rights law in recent years provides a strongly articulated set of values for the further substantive as well as procedural development of public policy. A very simple example is provided by the Convention on the Rights of the Child, which entered into force on 2 September 1990 and now has 140 signatories. Article 32 provides:

> "1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.
>
> 2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, State Parties shall in particular:
> (a) Provide for a minimum age or minimum ages for admission to employment;
> (b) Provide for appropriate regulation of the hours and conditions of employment;
> (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article."

The protection of children from economic exploitation would, in many nations, be considered part of their "basic notions of morality and justice" and arguably forms part of transnational public policy. The fact that a successful party in an international arbitration was, or might be, guilty of the economic exploitation of children might raise a delicate factual question for the enforcement court of the degree of connection between the economic exploitation and the contract which was the subject of the arbitration, but it seems undeniable that a human rights abuse could, in an appropriate case, justify a refusal of the enforcement of an award. Indeed, the Milan Court of Appeal has already formulated a modern definition of public policy with human rights at its heart:

---

[98] Ibid., at 115–120.

[99] Jean-Hubert Moitry, *Right to a Fair Trial and the European Convention on Human Rights*, 6 J. Int'l Arb. 2, June 1989, 115–122.

"The issue which remains to be settled in the present case ... is whether the award ... is consistent with public policy ... [R]eference must be made to the so-called international public policy, being a 'body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions'."[100]

It is generally recognized that arbitrators should recognize and apply public policy even though it does not form part of the *lex contractus*. The rationale has been explained by Eric Schwartz, former Secretary General of the ICC International Court of Arbitration, referring to the ICC *amicus curiae* brief in the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*:

"... it has been argued (and there are, in fact, arbitral awards to this effect) that it would be contrary to the arbitration agreement, and therefore outside the arbitrators' authority, to apply legal rules external to the *lex contractus*, particularly if chosen by the parties. Such a rigid view, however, if adopted, could assist parties in circumventing mandatory provisions of law that States may have a legitimate interest in seeing enforced. Out of concern for the integrity (and efficacy) of the international arbitral process, international arbitrators therefore generally recognize today that mandatory provisions of law that are foreign to the *lex contractus* should be applied in an international arbitration in appropriate circumstances. Thus, the ICC noted in its *amicus curiae* brief to the U.S. Supreme Court in the *Mitsubishi* case that:

'... there is a growing tendency of international arbitrators to take into account the antitrust laws and other mandatory legal rules expressing public policy enacted by a State that has a significant relationship to the facts of the case, even though that State's law does not govern the contract by virtue of the parties' choice or applicable conflicts rules.'

This being said, assessing whether particular rules should be applied in the circumstances of a specific case may give rise to complex considerations ..." (footnote omitted)[101]

The integrity of international commercial arbitration requires arbitrators to have regard to the public policy of States that might be related to the parties, the contract or the enforcement of the award. The domestic courts around the world that have facilitated the growth and success of international commercial arbitration by their confidence in party autonomy and arbitral authority could reassert control if this confidence is disappointed by arbitrators that disregard wider public policy considerations. Professor Pierre Mayer has wisely observed:

"Although arbitrators are neither guardians of the public order nor invested by the State with a mission of applying its mandatory rules, they ought, nevertheless have an incentive to do so out of a sense of duty to the survival of international arbitration as an institution ..."[102]

With international arbitration being called upon to resolve an increasing range of politically contentious disputes and with NGOs and public interest groups learning to follow the progress of arbitral proceedings, diffuse their views to a wide audience

---

[100] *Allsop Automatic, Inc. v. Tecnoski snc*, Decision dated 4 December 1992, reported in *Yearbook of Commercial Arbitration*, Vol. XXII, 1997, 725.

[101] Schwartz, *supra*, footnote 35, at 31; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 437 U.S. 614 (1985).

[102] Mayer, *supra*, footnote 96, at 274–293 and 322–323.

through the Internet and increasing their efforts to submit *amicus curiae* briefs, arbitrators in the coming years will require considerable common sense and discretion to maintain the proper balance between their duty to the parties to resolve the dispute according to the terms of the arbitration agreement and the expectations generated by broadening conceptions of public policy. It is therefore essential for international arbitrators to remain abreast with and respect developments in national and international public policy and to recognize that in appropriate cases public policy might include new issues such as environmental policy and human rights norms.

CONCLUSION

Globalization is a predominant characteristic of the world economy of the 21st century. The potential benefits of globalization, in terms of increasing wealth and reducing poverty, in disseminating ideas and increasing international co-operation are immense. Whether globalization will deliver these benefits, at what costs, and what will be the distribution of the costs and benefits are matters that raise complex political and ideological questions that are likely to remain controversial for some time to come.

The international arbitration community has been a great beneficiary of globalization, as much of the dispute resolution that is the inevitable by-product of economic activity has been entrusted to the institutions of international arbitration. In particular, the demand for effective protection of investment flows has fostered the development of a new type of international arbitration—the investor-State arbitration.

International arbitration faces a continuous internal challenge to preserve the confidence of its users throughout the world. It is to be hoped that globalization will facilitate the universalist aspirations of international commercial arbitration. However, if international arbitration allows itself to become too closely associated with a single legal culture or vision of arbitral practice, then the result could easily be diminished use or even rejection of arbitration by governments and business communities in certain regions of the world and a reversal of the generally favourable attitude of national courts towards arbitration. The maintenance of the confidence of national courts also requires arbitrators to be receptive to developments in international public policy, which will in future require attention to a wider range of concerns, including international human rights norms.

The success of international arbitration has made it both highly competitive and more interdependent with other legal and political institutions. Arbitration has developed in a fundamentally new direction with investor-State arbitration by leaving the realm of purely private dispute resolution and entering a sphere with substantial public characteristics. This public role raises an important credibility challenge for international arbitration which, for the first time, is facing demands to justify itself in terms of the values of an open society. These demands raise questions of the

transparency of the arbitral process, the accountability of arbitrators and the compatibility of investor-State arbitration with democratic policy-making and national sovereignty. The pressures of these demands has already had an impact on investor-State arbitrations within the NAFTA framework, with indications of a relaxation of rules relating to confidentiality and third-party participation in arbitrations. Further adaptations can be expected.

This process of adaptation should be viewed positively as the consolidation of the growth and achievements of international arbitration in recent decades. It would be a grave mistake to ignore the challenges of the brave new world of international arbitration. The polarization of political opinion around globalization has led many to seek to soften its image and to distance themselves from doctrinaire economic positions—to recognize that "too much market might kill the market".[103] Similarly, reflection and flexibility is required from the international arbitration community to ensure that it does not become a victim of its own success; to ensure, in short, that too much arbitration does not kill arbitration.

[103] Fernández Rozas, *supra*, footnote 1, at 307.