THE TRANSNATIONAL PROTECTION OF PRIVATE RIGHTS: ISSUES, CHALLENGES AND POSSIBLE SOLUTIONS

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I. Introduction

1. In the wake of the two World Wars that rocked the international order in the 20th Century, the right of nations to self-determination was enshrined in Article 1 of the Charter of the United Nations.[1] Among the most important developments of the post-war era has been the disintegration of the colonial empires and a consequent massive increase in the number of States and polities.[2] With this, came a proliferation of borders that each contained different sovereign legal systems and laws.

2. At the same time, the rebuilding and reconstruction of the post-war world created both the impetus and the opportunity to focus on development and economic growth.[3] So even as the number of *discrete* States and polities increased, the world witnessed a rapid increase in the *connectedness* of its economies and its cultures. Thomas Friedman observed in his international

[*] I am deeply grateful to my colleague, Justin Yeo, for the considerable assistance he gave me in the research and preparation of this Lecture and for his valuable contributions to the ideas which are contained here.

[1] Chapter I, Article 1, Part 2 of the UN Charter states that the purposes of the United Nations are, *inter alia*, "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". See online <http://www.un.org/en/documents/charter/chapter1.shtml>.

[2] Malcolm Shaw, *International Law*, 6th Ed (Cambridge) at 38.

[3] The post-World War II economic expansion is widely recognised as a period of economic prosperity which occurred in the mid-20th Century following the end of World War II in 1945.

bestseller, *The World is Flat*,[4] what might now be accepted as conventional wisdom: that increased connectivity has resulted in the accelerated flattening of the world, facilitating the phenomenon of globalisation. But globalisation occasions the need for a more homogenous and harmonised legal framework that can accommodate the vast increase in economic relationships which cross borders that might not previously have existed or been quite so firm.

3. With the fragmentation of the colonial empires and the "birth of scores of new states in the so-called Third World",[5] developed and developing countries found themselves separated by massive gulfs in terms of their relative states of social, economic and political development. In these circumstances, there were always going to be difficulties in attaining transnational harmonisation in law, policy and practice pertaining to commercial transactions.

4. At the dawn of a new millennium, we face the challenge of dealing, on a global scale, with movements in opposite directions. On the one hand, the emphasis on decolonisation and self-determination in the post-war era has seen a movement *towards* building barriers and fixing legal and political boundaries between jurisdictions. On the other hand, globalisation sees a movement to break economic barriers and transcend boundaries. While the first movement sees growth in the number of individual systems of law, the second calls for laws and legal systems that are not so tightly constrained by jurisdictional boundaries so that they can more effectively support the immense growth in transnational trade and commerce.

[4] Thomas Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (Farrar, Straus and Giroux, 2005).
[5] Malcolm Shaw, *International Law*, 6th Ed (Cambridge) at 38.

5. My focus today is on the legal protection of private economic rights in the transnational arena. The term "international economic law" has been adopted as a shorthand reference for regulation in this immense field.[6] For conceptual and analytical clarity, I propose to approach my subject by considering the regulation of transnational economic relationships at three different levels.

   (a) First, where a party's rights are not regulated or governed by any contract, but where there is nonetheless a need to protect one's interest or rights in commercial property;

   (b) Second, where there is a contract between the parties, by which they look to protect their rights as between themselves; and

   (c) Third, where a foreign investor looks to protect its investment against unlawful interference by a host State.

6. These are not exhaustive of the range of regulatory mechanisms that affect transnational economic relationships. For instance, even though "international trade law" (or "world trade law")[7] relates to international rules and conventions that seek to manage trade relations between States, yet these do impact directly on individual actors. While this is certainly important in international commerce, I do not discuss it as a discrete category given the constraints of time, and instead focus on the three levels, which relate to private actors being *directly* involved in protecting their private economic rights.

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[6] See, *eg*, the terminology adopted by the Legal Information Institute of the Cornell University Law School, online: <http://www.law.cornell.edu/wex/international_economic_law>.

[7] The terminology "international trade law" is adopted, *inter alia*, by the Legal Information Institute of the Cornell University Law School, online: <http://www.law.cornell.edu/wex/international_economic_law> and <http://www.law.cornell.edu/wex/International_trade>. The terminology "world trade law" is adopted, *inter alia*, in text books (*eg* Simon Lester, Bryan Mercurio & Arwel Davies, *World Trade Law* (2nd Edition) (Hart Publishing, 2012); and Henrik Horn & Petros Mavroidis, *Legal and Economic Principles of World Trade Law* (Cambridge, 2013), commentaries (*eg Max Planck Commentaries on World Trade Law*) and by universities (*eg* the National University of Singapore, which offers a course on "World Trade Law", online: <http://www.law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LL4060B&Sem=1>).

7. I begin with a brief overview of the existing legal order at each of the three levels, focusing my observations and analyses on selected fields of law. I look to identify some of the key issues and thereafter close with a section where I share some thoughts on what might lie ahead.

II. Issues and Challenges

A. Level One: The protection of commercial interests in the absence of a contractual relationship

8. Contracts are the lifeblood of commerce. Yet there are many instances where there is a need to protect commercial property in the absence of any contractual arrangements. This can arise in many discrete areas of law, including, for instance, the wide range of economic torts, such as conspiracy, trade libel, conversion, and so on.

9. I focus today on the transnational protection of intellectual property ("**IP**") rights. IP is essentially a jurisdiction-bound area of law and the drawbacks that exist in this area are clearly exposed in an increasingly transnational marketplace.[8]

1. *Snapshot of the international IP regime*

10. IP rights are traditionally "territorial" in nature.[9] They are conferred by individual jurisdictions for rights owners to reap, within that jurisdiction, the economic

[8] See William Cornish, David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th Ed) (London, Sweet & Maxwell / Thomson Reuters, 2013) at para 1-31, where the learned authors suggest that IP law has wider associations with territoriality than other civil rights of action in general.

benefits of their protected subject matter. They had their genesis in a world that was vastly different from ours today, and may be traced at the very least to legislation in the 17th and 18th centuries,[10] when there was hardly any need for the protection of IP rights to be robust across national borders. IP was mainly exploited within a limited geography and there was little scope for the extra-territorial infringement of IP rights. In these circumstances, the territorial nature of the regime did not pose much difficulty.

11. The incidence of cross-border IP interests has grown significantly in recent years.[11] There are numerous actors,[12] including the World Trade Organisation ("**WTO**"), the World Intellectual Property Organisation ("**WIPO**"), as well as State Governments, national judiciaries and national regulatory boards. There are also many new sources of law, including free trade agreements ("**FTAs**"), bilateral investment treaties ("**BITs**"),[13] and the jurisprudence of national courts. With so many different actors and sources of law, the need for harmonisation of the international IP framework has been the subject of discussion for some time.

12. Developments in the technology patents industry provide a sign of our times. In the massive Apple-Samsung patent dispute, the late Steve Jobs memorably declared that he was willing to "go to thermonuclear war", "spend[ing] [his] last

[9] Daniel Lifschitz, "The ACTA Boondoggle: When IP Harmonization Bites Off More Than It Can Chew" (2011) Loyola of Los Angeles International and Comparative Law Review 197 at 201. It has been observed that the territorial nature of IP rights has several potential ramifications. For instance, the scope and validity of an IP right in a particular country may be determined by that country's law independently of equivalent rights over the same subject-matter in other countries; or the IP right may only affect activities pursued within a particular geographical territory; or the IP right may only be asserted by a particular country's nationals and other persons as the national law permits; or the IP right may be asserted only in the courts of the country for which it is granted. See William Cornish, David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th Ed) (London, Sweet & Maxwell / Thomson Reuters, 2013) at para 1-31.

[10] Susanna Leong, *Intellectual Property Law of Singapore* (Academy Publishing, 2013) at paras 01.001 and 01.025.

[11] Benedatta Ubertazzi, "Exclusive Jurisdiction in Intellectual Property" (Mohr Siebeck Tubingen, 2012) at 4. See also Marketa Trimble, "When Foreigners Infringe Patents: An Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the U.S." (2011) 27 Santa Clara Computer and High Technology Law Journal 499 at 544, where the author notes that in the US Federal District courts, the number of IP cases involving at least one defendant from a foreign jurisdiction increased by 20% from 2004 to 2009.

[12] Graeme Dinwoodie, "The International Intellectual Property Law System: New Actors, New Institutions, New Sources" (2007) 10(2) Marquette Intellectual Property Law Review 205 at 210.

[13] Which typically impose TRIPS-plus standards, and which ratchets up the global standard through the TRIPS "Most-Favoured-Nation Treatment" principle.

dying breath" and "every penny" in Apple's vast reserves to "right [Android's] wrong".[14] Apple commenced patent litigation against Samsung in April 2011, and by July 2012, the "thermonuclear war" had reached the shores of the United States, South Korea, Japan, Germany, the United Kingdom, France, Italy, the Netherlands and Australia.[15] At last count, the two technology giants were involved in more than 50 lawsuits globally over claims for damages that ran into the billions of dollars.

13. We should not be surprised if more such disputes follow. In fact, a whole new patent licensing industry has already emerged, with certain technology companies reverse-engineering new devices for the purpose of helping patent owners to prove that the devices of others infringe their patents.[16]

2. *Some difficulties with the international IP framework*

14. Not only do these massive international IP disputes involve huge amounts of money, they also have to be fought in a multitude of jurisdictions, with potentially different standards being applied and different outcomes being reached.

[14] Walter Isaacson, *Steve Jobs* (2011) at 512. See "Steve Jobs vowed to 'destroy' Android" (21 October 2011) online: <http://www.bbc.co.uk/news/technology-15400984>.
[15] Godfrey Lam, "Staging the Mobile Phone Wars", 4th Judicial Seminar on Commercial Litigation (Singapore) at para 6 (article on file with author).
[16] Kate Porter, "Ottawa home to robust, controversial patent licensing industry" (26 November 2013), online: <http://www.cbc.ca/news/canada/ottawa/ottawa-home-to-robust-controversial-patent-licensing-industry-1.2440034>.

(i) *Lack of common standards*

15. While broad frameworks for the protection of IP rights are being harmonised to a growing extent arising from efforts to comply with TRIPS obligations, there remains an essential lack of common standards. In part, this is because the application of the law by national courts has varied tremendously within those frameworks. How a particular State chooses to protect IP rights – which in essence are artificial monopolies – can depend heavily on its relative stage of economic development and indeed even on its moral or other values. As has been observed, while IP is largely a legal construct, it is not just about law and economics; it is often also about politics.[17]

16. In designing the international IP system, the balance sought is that "between universal norms and the national autonomy necessary to legislate a substantive balance appropriate to each nation-state".[18] However, it is extremely difficult to attain meaningful international consensus on how that precise balance should be struck. This is unsurprising, given that the national strategic interests of the various States will not be aligned. For instance, while the United States and the European Union ("**EU**") have tried to encourage other countries to adopt higher IP enforcement standards through ACTA, the increasingly powerful developing countries such as China, India and Brazil have "shown no urgent desire" to join such a system.[19] A particular example draws from the experience in the pharmaceutical industry. States economically dependent on pharmaceutical companies tend towards applying IP laws to protect those interests, while

[17] Peter Yu, "ACTA and Its Complex Politics" (2011) 3 W.I.P.O.J., Issue 1 at 16.
[18] Graeme Dinwoodie, "The International Intellectual Property Law System: New Actors, New Institutions, New Sources" (2007) 10(2) Marquette Intellectual Property Law Review 205 at 206.
[19] Peter Yu, "ACTA and Its Complex Politics" (2011) 3 W.I.P.O.J., Issue 1.

States facing increasing healthcare costs tend towards laws which keep healthcare affordable. The recent decision by the Indian Supreme Court, rejecting Novartis' attempt to seek the evergreening of a pharmaceutical patent illustrates the point.[20]

17. In researching this paper, I did come across an example of the successful harmonisation of IP standards in the Andean region.[21] It seems implausible that this can extend across a wide geography. Indeed, such harmonisation was largely premised on factors that are far more likely to obtain in a regional rather than in an international context.[22] The Andean States were in similar states of development and therefore had similar interests in relation to IP policy. They were thus able to agree to a common set of laws which were clear, detailed and precise. They were also able to agree on common adjudicatory mechanisms. As a check on the system, private actors were also allowed to file complaints against a member State's alleged non-compliance. This confluence of factors which accounts for the extensive degree of agreement that was achieved in that instance is unlikely to occur in the international context in the foreseeable future.

(ii) *Multiplicity of proceedings*

18. Second, as illustrated by the Apple-Samsung dispute, the multiplicity of proceedings across different jurisdictions is largely unavoidable with major

[20] *Novartis AG v Union of India and others*, Civil Appeal No 2706-2716 of 2013, available online at: http://judis.nic.in/supremecourt/imgs1.aspx?filename=40212 (last accessed 25 March 2014).
[21] Laurence Helfer, Karen Alter & Florencia Guerzovich, "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community" (2009) 103(1) American Journal of International Law 1.
[22] Laurence Helfer, Karen Alter & Florencia Guerzovich, "Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community" (2009) 103(1) American Journal of International Law 1.

transnational IP disputes. This arises because where there has been an alleged infringement of IP rights in more than one jurisdiction, the doctrine of *res judicata* does not always or necessarily apply.

19. Nor, as a matter of law, can there be *cause of action estoppel*. A French patent registration is a different juridical and legal creature from its English counterpart. A French judgment on the infringement of a French patent cannot give rise to cause of action estoppel between the same proprietor of the equivalent English rights and the same defendant who is performing equivalent acts in England because the basis of the cause of action is different in each case.[23] While there might arguably be *issue estoppel* where the same legal issue arises for determination and the same legal principle applies in both jurisdictions, this question remains largely unexplored in the case law.[24]

20. The multiplicity of proceedings gives rise to at least three major problems.

    (a) First, there is an immense strain on the resources of the parties. The cost of the Apple-Samsung wars is not known to the public but one can be certain that the figures will be staggering. The same can safely be said about the pharmaceutical patent wars. While lawyers might not be complaining, one wonders if these vast amounts of money would not be better spent on innovation, research and development.

    (b) Second, the need to sustain or defend multiple proceedings potentially engenders injustice in view of economic inequalities between different

[23] William Cornish, David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th Ed) (London, Sweet & Maxwell / Thomson Reuters, 2013) at para 2-70.
[24] William Cornish, David Llewelyn & Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th Ed) (London, Sweet & Maxwell / Thomson Reuters, 2013) at para 2-70, although the learned authors cited *Bristol Myers v Beecham* [1978] F.S.R. 553, which assumes the possibility of issue estoppel arising pursuant to a foreign judgment.

commercial parties. Deep-pocketed multinational corporations might well be able to simultaneously finance large-scale litigation across numerous jurisdictions, but smaller enterprises might not be able to afford the cost involved in protecting their own IP in this way.[25]

(c) Third, national court systems are often called on to bear an immense cost to resolve such disputes.[26] The Australian leg of the Apple-Samsung dispute was so large that it necessitated an "unprecedented" assignment of two federal court judges to hear the case at first instance.[27] The matter commenced in 2011, and the hearings before these two Judges have an estimated end date in April 2014.[28] It might be anticipated that one or both parties could lodge an appeal as has been done throughout the interlocutory stages of the matter. Will a jurisdiction less wealthy than Australia be able to devote such judicial resources to settle a battle between deep-pocketed multinational corporations? And in any case, should taxpayers be financing judicial systems that are deployed to resolve these wars? This is an important question because national courts generally do not recover the full costs of running their operations.

[25] Benedatta Ubertazzi, "Exclusive Jurisdiction in Intellectual Property" (Mohr Siebeck Tubingen, 2012) at 3.
[26] Litigation has numerous externalities, and the immense costs incurred by legal systems cannot be ignored. Steven Shavell notes that litigation involves two externalities: the litigant neither takes into account the legal costs that he causes others to incur, nor recognises the associated effects on deterrence and other social benefits. Between 1960 and 1992, legal expenditures in the United States as a percentage of GDP grew from 0.523% to 1.47: see Steven Shavell, "The Fundamental Divergence between the Private and the Social Motive to Use the Legal System" 26 Journal of Legal Studies 575.
[27] The case filed in the Federal Court of Australia involved Apple claiming that Samsung infringed 19 of its patents on a total of 120 grounds, in nine smartphones and two tablets produced by Samsung. Samsung has claimed that Apple infringed several of its patents in some iPhone and iPad models. See "Legal twist in Apple, Samsung case" (25 Feb 2013), *Financial Review*, online: <http://www.afr.com/p/technology/apple_samsung_patent_hearing_unprecedented_5ubyczd0dP9yFHfzmlsiqM> (last accessed 26 Mar 2014).
[28] "What's Up Down Under With Apple and Samsung?" (18 Nov 2013), online: <http://blog.patentology.com.au/2013/11/whats-up-down-under-with-apple-and.html> (last accessed 26 Mar 2014).

21. All this must also be seen in light of the fact that commercial realities may impose immense time pressure on the parties and the courts to resolve their multi-billion-dollar law suits within a relatively short time.[29]

3. *Brief conclusion*

22. It has been said that the ability to enforce IP rights on a transnational basis is crucial for their effective protection.[30] However, there remains a conspicuous lack of harmonisation on the important issues of jurisdiction, applicable law as well as the recognition and enforcement of judgments in the context of IP rights.[31]

23. In light of the modern reality that invention, innovation and originality are increasingly realised on a far more international and collaborative basis, the lack of harmonisation in the international IP regime and the jurisdiction-bound framework for the protection of IP rights stand as drawbacks or shortcomings in the supportive machinery for this aspect of transnational commerce.

B. Level Two: The protection of commercial interests through contracts

24. I move to the second level of the transnational protection of private rights, where the parties look to protect their commercial interests through contracts. In this area, certainly in the post-war era and especially in the last three

[29] Godfrey Lam, "Staging the Mobile Phone Wars", 4th Judicial Seminar on Commercial Litigation (Singapore) at para 50 (article on file with author).
[30] Benedatta Ubertazzi, "Exclusive Jurisdiction in Intellectual Property" (Mohr Siebeck Tubingen, 2012) at 3.
[31] Benedatta Ubertazzi, "Exclusive Jurisdiction in Intellectual Property" (Mohr Siebeck Tubingen, 2012) at 1-2.

decades or so, international commercial arbitration has become the mechanism of choice.[32] In some cases, these contracts might instead provide for disputes to be resolved through the courts. Where this is so, as the situation now stands, many of the issues raised in the previous section will arise and I do not repeat those observations here.

1. *Snapshot of international commercial arbitration*

25. The rise in transnational contractual arrangements inevitably spawned a corresponding increase in disputes between parties from different jurisdictions and this gave rise to calls for a dispute resolution system that had at least two primary characteristics. First, there had to be a neutral forum for the resolution of disputes, so as to minimise the concern that disputes would be resolved in the unfamiliar judicial and legal terrain of a foreign land.[33] Second, decisions had to be clothed with cross-border enforceability.

26. The latter provided the impetus that led to the emergence of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), and with it, international arbitration became a viable system of international commercial dispute resolution. In contrast to perceptions concerning litigation in national courts, arbitration promises

[32] In this regard, it was observed in the 1980 edition of the American Bar Association's journal that: "[f]ostered by the demands of an expanding international commerce, by the businessman's traditional distrust of foreign adjudication, and by numerous court decisions upholding its awards, international arbitration is distinctly in vogue.": see Francis J. Higgins and William Brown, "Pitfalls in International Commercial Arbitration." *The Business Lawyer*, Vol 35 (April 1980). See also Richard Mosk, "Trends in International Arbitration" (2011) 18 Southwestern Journal of International Law 103 at 105.

[33] See, *eg*, Steven Seidenberg, "International Arbitration Loses Its Grip", American Bar Association Journal (April 2010) available online at: <http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/> where the author notes that arbitration "offers parties a neutral forum, where neither side has the 'home court' advantage of litigating in its nation's courts". See also *International arbitration: Corporate attitudes and practices 2006* (Queen Mary, University of London (School of International Arbitration)), available online: <http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf> at p 5, which states "So why do nine out of ten corporations seek to avoid transnational litigation? The most common explanation is anxiety about litigating under a foreign law before a court far from home, with a lack of familiarity with local court procedures and language".

neutrality, international enforceability of awards, flexibilityand confidentiality.[34] It also held the promise (at least initially) of a faster and less expensive form of dispute resolution as well as the avoidance of some of the complexity and excessive legalism and formality of traditional judicial proceedings.[35]

27. Parties began to turn to international arbitral tribunals for relief, with national courts serving as supplemental aids to support those arbitral proceedings.[36] By the turn of the millennium, arbitration had become a commonplace mode of dispute resolution provided for in an immense range of commercial arrangements,[37] and by the end of the first decade of the new millennium, arbitration perhaps had become "the preferred method of resolving international commercial disputes".[38] There is empirical evidence to support this in the impressive statistics put forward by arbitral institutes.

2. *Some difficulties with international commercial arbitration*

28. But even as international commercial arbitration might be seen as the preferred mechanism for resolving cross-border transactional disputes, a targeted survey of corporate counsel published in 2013 by the School of International Arbitration at Queen Mary, University of London, bears noting. The report indicates that

[34] Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 2nd Ed, 1991)at paras 1-42, 1-43, 1-44 and 1-53.
[35] Francis J. Higgins & William Brown, "Pitfalls in International Commercial Arbitration." (April 1980) 35 *The Business Lawyer* 1035 at 1036.
[36] See *e.g.* Art 9 of the UNCITRAL Model Law on International Commercial Arbitration
[37] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence", Keynote Address at the 26th LawAsia Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27-30 October 2013) at para 23.
[38] Steven Seidenberg, "International Arbitration Loses Its Grip", American Bar Association Journal (April 2010) available online at: <http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/>. Commentators have gone so far as to state that international arbitration has become the established method of determining international commercial disputes. See *e.g.* A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th ed, 2004) at para 1-01, where it was pointed out that the International Chamber of Commerce recorded 344 requests for arbitration in 1986 and 580 requests in 2003; S D Franck, "The Role of International Arbitratiors", 12 ILSA J In'l & Comp L 499 at p 499

corporate counsels refer 47% of their international disputes to arbitration and this is the same proportion that is referred to litigation.[39] Even allowing for the fact that arbitration might not be an option for the parties in many of these cases due to the absence of arbitral agreements, or because the subject matter is not arbitrable, and so on,[40] the statistic does seem surprising.

29. Certainly in the course of the last couple of years, there has been a chorus, perhaps a cacophony of voices, suggesting that this might be due to a number of issues that threaten the continuing vitality of international commercial arbitration. I briefly touch on four areas.

(i) *Judicialisation, delay, laboriousness and rising costs*

30. Among the more frequently raised concerns is the contention that international commercial arbitration has lost its edge in avoiding the delays, contentiousness, and costliness of judicial trials. The flexibility and relative informality of arbitration was once its key advantage.[41] Ironically, that flexibility might allow the practitioners of arbitration to create highly litigious and legalistic proceedings that increasingly simulate or even surpass litigation in terms of the amount of time required to complete the dispute resolution process and with it, the amount it will ultimately cost. Arbitration is increasingly "formal, costly, time-

[39] 2013 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, titled *Corporate choices in International Arbitration: Industry perspectives*, available online: <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>, at p 7.

[40] 2013 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, titled *Corporate choices in International Arbitration: Industry perspectives*, available online: <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>, at p 7, which notes that "Several interviewees commented that, for certain cases, the use of litigation is unavoidable. This is because arbitration is sometimes unavailable by operation of law – for example, in non-contractual claims like breach of patent rights, as well as in potentially non-arbitrable disputes (e.g. in employment)."

[41] See, *eg*, *International arbitration: Corporate attitudes and practices 2006* (Queen Mary, University of London (School of International Arbitration)), available online: <http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf> at p 7.

consuming, and subject to hardball advocacy".[42] Litigation seems to have percolated into the groundwater of arbitration, resulting in a marriage of convenience that some have called "arbigation"[43] or "off-shore litigation".[44]

31. What is perhaps surprising is that the criticism levelled at arbitration on the grounds that it is characterised to an increasing degree by "judicialisation"[45] or "legalisation",[46] is not a wholly new development. A quarter century ago in 1989, Lord Mustill observed that commercial arbitration was developing into a process with "all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties".[47]

32. How did this come to pass? There are a number of reasons for this, and I venture three.

    (a) First, the adversarial influence of Anglo-American legal practice has perhaps contributed to the transplantation of legalistic litigation methods, practices and strategies into international commercial arbitration.[48]

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[42] This statement was made in Thomas Stipanowich, "Arbitration: The 'New Litigation'" (2010) University of Illinois Law Review 1 at 8, in the context of American business arbitration, but it applies similarly to international commercial arbitration. This view is also supported by the 2013 International Arbitration Survey conducted by the School of International Arbitration at Queen Mary, University of London, titled *Corporate choices in International Arbitration: Industry perspectives*, available online: <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf >, at pp 5, 21-22. And see Francis Higgins, William Brown & Patrick Roach, "Pitfalls in International Commercial Arbitration" (1980) 35 The Business Lawyer 1035 at 1042, recognising that whether arbitration is more or less costly than court adjudication may depend on the precise ambit of discovery obligations and procedures.

[43] L Tyrone Holt Esquire, "Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill Effects" (2009) 7 DePaul Business & Commercial Law Journal 455 at 455, citing Jeffrey W Stempel, "Forgetfulness, Fuzziness, Functionality, Fairness, and Freedom in Dispute Resolution: Serving Dispute Resolution Through Adjudication" (2003) 3 Nev L J 305 at 314.

[44] Elena V Helmer, "International Commercial Arbitration: Americanized, "Civilized," or Harmonized?" (2003) 19(1) Ohio State Journal on Dispute Resolution 35 at 46.

[45] Thomas Stipanowich, "Arbitration: The 'New Litigation'" (2010) University of Illinois Law Review 1 at 8; Elena V Helmer, "International Commercial Arbitration: Americanized, "Civilized," or Harmonized?" (2003) 19(1) Ohio State Journal on Dispute Resolution 35 at 36.

[46] Elena V Helmer, "International Commercial Arbitration: Americanized, "Civilized," or Harmonized?" (2003) 19(1) Ohio State Journal on Dispute Resolution 35 at 36.

[47] Michael John Mustill, "Arbitration: History and Background" (1989) 6 Journal of International Arbitration 43 at 56.

[48] Thomas Stipanowich, "Arbitration: The 'New Litigation'" (2010) University of Illinois Law Review 1 at 23. George M von Mehren & Alana C Jochum, "Is International Arbitration Becoming Too American?" (2011) 2 The Global Business Law Review 47 at 49-50. Roger P Alford, "The American Influence on International Arbitration" (2003) 19(1) Ohio State Journal on Dispute

(b) Second, the increasing formality of arbitration today probably has much to do with the reality of the commercial world. Large commercial transactions featuring multiple parties and contracts have become far more common today[49] and the disputed amounts are now "regularly in the hundreds of millions or even billions".[50] With the stakes going up, winning has become all-important and all-consuming.

(c) Third, much delay and laboriousness might arise out of the absence of appellate mechanisms. The lack of an avenue for appeal is traditionally justified on the ground that finality is achieved more quickly. But as the practice of arbitration evolved, the absence of appeals has encouraged parties to approach the process as a "one shot" contest in which the winner takes it all, and parties pour extensive resources into the battle. One might question the efficiency of such a process as compared to the traditional mechanisms where issues are distilled as they progress through the appellate ladder with greater focus and precision at each rung. The absence of appeals has also diverted more attention towards the setting aside of arbitral awards. Setting aside an award is a limited opening that offers possible recourse for a disgruntled party but the success of an application to set aside an award depends in large measure on the supervisory court's approach towards arbitration in general and how it interprets the circumstances of each case in particular.[51] Arbitrators

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Resolution 69. Elena V Helmer, "International Commercial Arbitration: Americanized, "Civilized," or Harmonized?" (2003) 19(1) Ohio State Journal on Dispute Resolution 35 at 46.

[49] S I Strong, "Increasing Legalism in International Commercial Arbitration: A New Theory of Causes, A New Approach to Cures" (2013) 7(2) World Arbitration & Mediation Review 117 at 119.

[50] Steven Seidenberg, "International Arbitration Loses Its Grip", American Bar Association Journal (April 2010) available online at: <http://www.abajournal.com/magazine/article/international_arbitration_loses_its_grip/>. The author was citing the view of Joseph R Profaizer, of counsel to Paul, Hastings, Janofsky & Walker in Washington DC.

[51] Toby Landau QC, Opening Keynote Address at the Singapore International Arbitration Forum (2 December 2013)

are generally keen to avoid even tenuous grounds for the setting aside of an award, and so as to "bullet-proof" the award, there is sometimes a tendency to be more liberal in admitting evidence, allowing more extensive document production processes, and granting extended hearing time.[52]

(ii) *Lack of ethical standards*

33. A second area of concern pertains to whether there is a need for a widely accepted set of ethical standards or guidelines in the context of international commercial arbitration. In the past, arbitration was a small industry that could be effectively governed by implied understandings amongst actors in the industry. But the internationalisation of arbitration has resulted in an exponential increase in the number of arbitral institutions, cases, and practitioners. It is impossible for the industry to continue to depend on implied norms, understandings, peer standards and shared values when these might no longer exist. The absence of widely accepted standards must enhance the risk of unpredictability in how this great diversity of practitioners might conduct themselves.

(iii) *Unpredictability in enforcement due to ad hoc nature of courts' oversight*

34. A third area of concern is the *ad hoc* nature of national courts' oversight of arbitration, the inherent consequence of which is that from time to time there

[52] Thomas Stipanowich, "Arbitration: The 'New Litigation'" (2010) University of Illinois Law Review 1 at 13 and 15.

will be inconsistent and even conflicting results in enforcement. The *Dallah* cases[53] provide a good illustration of this point, where the English and French apex courts were separately called upon to decide the issue of whether the government of Pakistan was bound by the arbitration agreement, notwithstanding that it was not, in terms, a party to the contract. On identical legal issues and identical facts, the apex courts in these two countries came to diametrically opposed conclusions on the enforceability of the award.

35. As we in the Singapore Court of Appeal recently observed, while the New York Convention sets out a common framework with a common set of grounds for the enforceability of awards, the enforceability of a particular award ultimately depends on the interpretation that is placed on those grounds by national courts.[54]

(iv) *Unpredictability in arbitral decisions due to lack of jurisprudence*

36. I mention a final area of concern, namely the lack of consistency and predictability that might sometimes stem from the lack of publicly available jurisprudence.

37. It is true that there is a growing body of *lex arbitralis materialis* containing transnational substantive rules which arbitrators can draw upon or refer to in deciding disputes.[55] International commercial arbitral tribunals increasingly

[53] See *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763.
[54] *PT First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57 at [75]
[55] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence", Keynote Address at the 26th LawAsia Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27-30 October 2013) at para 29, citing Loukas Mistelis, *Unidroit Principles Applied as "Most Appropriate Rules of Law" in a Swedish Arbitral Award*, Uniform Law Review / Revue de droit uniforme, vol. VIII (2003-3) 631.

refer to and rely on other awards as precedents in their decision-making processes.[56]

38. But the coherence of jurisprudence emanating from tribunals remains challenged by the confidentiality of arbitral proceedings, as well as the absence of appeal and error-correction mechanisms. As an increasing number of major and complex commercial cases are heard by arbitral tribunals rather than by municipal appellate courts,[57] this threatens to hinder the development of a coherent freestanding body of substantive international commercial law, and over time, this must add to the cost of transnational trade.

3. *Brief Conclusion*

39. The system of international commercial arbitration has undoubtedly been a boon for international commerce in many ways and it is, rightly, to be very warmly applauded. But for present purposes, I suggest that it does not hold a complete solution and as the field expands with an ever-increasing number of practitioners from an ever-broadening diversity of regions, we can expect some of these difficulties to become more pronounced.

[56] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence", Keynote Address at the 26th LawAsia Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27-30 October 2013) at para 29, citing Fouchard, Gaillard, Goldman on *International Commercial Arbitration*, Gaillard and Savage (Kluwer Law International, 1999) at p 802.
[57] Richard Mosk, "Trends in International Arbitration" (2011) 18 Southwestern Journal of International Law 103 at 107.

C. Level Three: The use of arbitration to protect investments

40. I turn to the third level at which private rights are protected in the transnational arena. This is where States bind themselves by treaties to act appropriately in relation to the private investments of foreign nationals. This is done on terms that entitle the investor in his own right to take action by way of arbitration against the offending State.

1. *Snapshot of investor-State arbitration*

41. Following decolonisation in the post-war period, numerous multilateral approaches were taken to develop the substance of international economic law systematically and in a more universally agreeable manner.[58] In keeping with the post-war abhorrence of war and the use of force, States moved away from "gunboat diplomacy" in economic relations, seeking instead multilateral international agreements for the protection of the private rights of their nationals.

42. However, as has been the case with the international IP regime, multilateral solutions remained elusive because the interests of developed and developing countries were divergent.[59] Developed countries then devised bilateral solutions[60] in the form of BITs to protect the investments of their nationals from uncompensated expropriation by developing countries.[61]

[58] Max Planck Encyclopedia of Public International Law, entry on "Investments, Bilateral Treaties" at para 8.
[59] Max Planck Encyclopedia of Public International Law, entry on "Investments, Bilateral Treaties" at para 9.
[60] The bilateral approach had the potential to create a "depoliticized and technocratic environment" that would enable private decision-making while avoiding wide consultation with a large and diverse group of stakeholders. See Max Planck Encyclopedia of Public International Law, entry on "Investments, Bilateral Treaties" at para 78.
[61] The first BIT was entered into between Germany and Pakistan in 1959. The adoption of the 1966 ICSID Convention (also known as the Washington Convention) saw a significant development in the realm of investment dispute resolution.

43. In just over half a century, investor-State arbitration has evolved into a robust system of transnational adjudication, dealing with disputes that arise out of a web of more than 3,000 BITs, regional FTAs and multi-lateral agreements.[62] It involves a unique mix of international law, international commercial arbitration and private and public law.[63] The upshot of this system is that private investors no longer have to rely on diplomatic protection. Under BITs, investors can directly challenge State actions that negatively affect their investments.

44. Judge Charles Brower argues, in a draft article, which I have had the benefit of reading, that investment treaties limit political discretion, avoid "'internal' political methods" for resolving disputes, and therefore work to promote the rule of law.[64] In this way, these treaties and the tribunals called upon to apply them play hugely important roles in shaping an evolving body of international law.[65]

2. *Some difficulties with investor-State arbitration*

45. Just a month ago,[66] the United States Supreme Court rendered its judgment in *BG Group plc v Republic of Argentina.* The key issue in that case was whether it was the courts or the arbitrators who should decide certain "threshold" questions.[67]

[62] Chief Justice Sundaresh Menon, 'The Impact of Public International Law in the Commercial Sphere and its Significance to Asia' (Lecture jointly organised by the International Council of Jurists and the University of Mumbai, Mumbai, 19 April 2013) para 14.
[63] Anthea Roberts, "Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System" (2013) 107 American Journal of International Law 45.
[64] Charles Brower & Sadie Blanchard, "What's in a meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States" (January 2014 draft) at 69.
[65] Michael Hwang SC & Kevin Lim, "Issue Conflict in ICSID Arbitrations" in *Selected Essays on International Arbitration* (Singapore Academy of Law, 2013) 472 at para 65.
[66] The decision is dated 5 March 2014.
[67] The 7-2 split decision by an eminent bench is illustrative of the difficult questions that can sometimes be raised in investor-State arbitration.

46. While this was reportedly the first matter pertaining to investor-State arbitration brought before the United States Supreme Court,[68] the United States is no stranger to investor-State arbitration. Indeed, one of the first impressions I had of the power of investor-State arbitration was formed here in the United States, during the early years of this century. I had just become a partner of a major law firm here, and my introduction as an arbitration lawyer was almost inevitably a prelude to a conversation about the case of *Loewen Group v United States*.[69]

47. *Loewen* was the first arbitration under the Investment Chapter of the North American Free Trade Agreement ("**NAFTA**") that was based on allegations that an American trial had been conducted in a manner that amounted to a denial of justice under NAFTA and international law.[70] But it is by no means an isolated case in the international scheme of things.

The case concerns the distinction between questions of "arbitrability" (*ie* whether there is an agreement to arbitrate at all, and the enforceability and scope of that agreement), which are decided by courts, and questions on "procedural preconditions" (*ie* whether there was adequate notice, whether waiver or estoppel were applicable, *etc*), which are decided by arbitrators. There was a provision in the UK-Argentina BIT entitling a party to proceed unilaterally to arbitration provided the dispute was first submitted to a court in the country where the investment was made ("local litigation requirement"). In 2003, Argentina changed the way it calculated gas "tariffs", and this negatively impacted the BG Group. The BG Group sought arbitration against Argentina for violating substantive provisions of the BIT (expropriation and denial of fair and equitable treatment). BG Group did not first seek relief in the courts of Argentina. Argentina argued that the arbitration was improper because BG Group did not comply with the local litigation requirement. The panel disagreed and awarded BG Group $185 million. BG Group sought to confirm the monetary award in US courts, while Argentina sought to vacate the award arguing that the panel lacked jurisdiction.

The majority (*Breyer, J, with whom Scalia, Thomas, Ginsburg, Alito and Kagan JJ joined, and Sotomayor J joined in part*) noted that a BIT is simply a contract and should be interpreted in a manner similar to ordinary private contracts. The majority concluded that whether the "local litigation requirement" was excused in this case was for the arbitrators to decide, as it was a "purely procedural precondition to arbitrate". It therefore upheld the arbitrators' decision under the "considerable deference" standard.

The minority (*Roberts CJ, with whom Kennedy J joined*) focused on the fact that the treaty was not a contract between the parties to the dispute, and was instead a "unilateral standing *offer*" by Argentina and UK to arbitrate with investors if the local litigation requirement was met. The minority viewed the "local litigation requirement" as a condition to the formation of an agreement between the investor and the State. The issue should be analysed as one of contract formation, and therefore would be for the court to decide on whether there was any agreement to arbitrate at all.

[68] Hogan Lovells *et al*, "U.S. Supreme Court decides first case related to international investment treaty arbitration" (13 March 2014), online: <http://www.lexology.com/library/detail.aspx?g=5bf8ae15-fead-4f53-a07f-16afe58119ef>. See also the article by the International Institute of for Conflict Prevention & Resolution at http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/850/BG-Group-v-Argentina-CPR-Reviews-US-Supreme-Court-Decision.aspx

[69] *Loewen Group, Inc and Raymond L Loewen v United States of America*, ICSID Case No ARB(AF)98/3, Award (26 June 2003).

[70] Stefan Matiation, "Arbitration with two twists: *Loewen v. United States* and Free Trade Commission Intervention in NAFTA Chapter 11 Disputes" (2003) 24(2) U Pa J International Econ L 451 at 458.

48. In the 2009 case of *Saipem v Bangladesh*,[71] an International Centre for Settlement of Investment Disputes ("**ICSID**") tribunal held that certain orders of a Bangladesh court amounted to expropriation because the orders effectively took away the fruits of an arbitration award made in favour of the investor. More recently, in the 2011 case of *White Industries v India*,[72] an Australian company brought an investment treaty claim against India on the grounds that it was unable to enforce an ICC award that had been rendered about a decade earlier. The tribunal held that pursuant to the most favoured nation ("**MFN**") clause in the India-Australia BIT, the company could take advantage of the "effective means of enforcement" obligation found in a subsequent BIT that India had entered into with Kuwait. The tribunal therefore held India liable for failing to provide an effective means of enforcing the ICC award.[73]

49. The fact that the actions of national governments or courts might result in an international wrong by the State is not an entirely new or fresh development in international law.[74] However, the *Loewen*, *Saipem* and *White Industries* cases[75] illustrate an important change in the actors who are now empowered to dispute and decide issues of State accountability and in the circumstances in which they may do so.

[71] *Saipem SpA v The People's Republic of Bangladesh* (ICSID Case No. ARB/05/7), Award (30 June 2009).
[72] *White Industries Australia Limited v The Republic of India*, Final Award (30 November 2011), <http://italaw.com/sites/default/files/case-documents/ita0906.pdf> accessed 29 November 2013.
[73] On this basis, the tribunal awarded White Industries the amount of AUD4.08 million, which was the amount due under the ICC award.
[74] Giulia Carbone, "The Interference of the Court of the Seat with International Arbitration" (2012) Journal of Dispute Resolution 217 at 237. This principle was codified, at the turn of the century, in Article 4(1) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which expressly states that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions...": see online: <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.
[75] Other than *Loewen, Saipem* and *White Industries*, there have been a number of claims raised by investors claiming that their rights were violated by national courts: see Giulia Carbone, "The Interference of the Court of the Seat with International Arbitration" (2012) Journal of Dispute Resolution 217 at 238.

50. These tribunals, on the one hand, have taken pains to explain that they do not sit as final super-courts of appeal; on the other hand, they have shown a readiness to review decisions of national courts.[76] This raises some quite important questions. Is there now an emerging recognition that States might be held accountable by investor-State arbitral tribunals for the decisions of their courts? Or, as in the *White Industries* case, for the efficacy of their judicial systems as a whole? How will a line be drawn between a judicial determination that gives rise to a treaty claim on the ground that it was wrong enough to constitute an illegal interference with the claimant's property rights, and one which does not?

(i) *Concerns relating to procedural mechanisms*

51. The investor-State arbitration regime was based on the international commercial arbitration model. It is questionable whether this is appropriate for adjudicating disputes involving sovereign States and public interests.[77] I make just three brief points.

52. First, the composition of investor-State arbitral tribunals has come under great scrutiny. The regime has allowed a select few individuals to review and evaluate State actions even though they are largely unaccountable to the constituencies that their decisions affect.[78] While these arbitrators are widely

[76] Giulia Carbone, "The Interference of the Court of the Seat with International Arbitration" (2012) Journal of Dispute Resolution 217 at 241.
[77] Ruth Teitelbaum, "A Look at the Public Interest in Investment Arbitration: Is it Unique? What should we do about it?" (2010) 5 Berkeley J Int'l L Publicist 54 at 54, observing that "The transparency movement in investment arbitration – a movement driven by non-governmental organizations (NGOs) – believes that arbitration, a private method of dispute settlement, is an inappropriate means of adjudicating disputes involving sovereigns".
[78] See Pia Eberhardt & Cecilia Olivet, *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Corporate Europe Observatory and the Transnational Institute, 2012) at 8, online:

respected and experienced in commercial and other areas of law, and might in fact have experience working in and advising governments and international institutions,[79] they are not necessarily attuned to the domestic public interests and policy concerns of the sovereign States in the cases before them.[80] There is also a perceived lack of representation amongst arbitrators from developing countries including from Asia.[81] One study notes that even where there is Asian representation in ICSID tribunals, this generally consists of a small group of repeat players.[82]

53. Second, there are concerns with issue conflicts.[83] Issue conflicts may arise in various ways, perhaps most notably where the arbitrator concurrently acts as counsel in another case pertaining to similar issues so that a decision made as arbitrator may impact the case in which the arbitrator is concerned as counsel. Issue conflicts are potentially serious in the investor-State arbitration context because these often concern the interpretation of BITs that contain similar provisions and give rise to similar legal issues.[84] As the pool of investor-State arbitrators is small, it is perhaps not unusual for an individual to be called to rule

<http://www.tni.org/sites/www.tni.org/files/download/profitingfrominjustice.pdf>. See also Sebastian Perry, "Investment arbitration under fire from think tank", *Global Arbitration Review* (27 November 2012).

[79] Charles Brower & Sadie Blanchard, "What's in a meme? The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States" (January 2014 draft) footnote 199 and accompanying text.

[80] Sundaresh Menon, 'The Coming of a New Age for Asia' at paras 19, 22 and 32.

[81] The 2013 ICSID report showed that 48% of arbitrators, conciliators and *ad hoc* committee members in 2013 were chosen from Western Europe, with just 17% from South and East Asia and the Pacific region.

[82] Luke Nottage and J Romesh Weeramantry, 'Investment Arbitration in Asia: Five Perspectives on Law and Practice (2012) 28 Arbitration International 19, 33 citing SM Pekkanen, H Gao & .Ahn, 'From Rule Takers, Shakers to Movers: How Japan, China and Korea Shaped New Norms in International Economic Law', (Second Biennial General Conference of the Asian Society of International Law, Tokyo, Aug 1–2, 2009).

[83] An issue conflict is a conflict of interest stemming from an arbitrator's relationship to the subject matter of the dispute, rather than his relationship with the disputing parties. See Nassib G Ziade, "How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?" (2009) 24(1) ICSID Review 49 at 49; Dennis Hranitzky & Eduardo Silva Romero, "The 'Double Hat' Debate In International Arbitration" New York Law Journal (14 June 2010), citing Anthony Sinclair & Matthew Gering, "Partiality and Issue Conflicts" 5(4) Transnational Dispute Management (July 2008); Michael Hwang SC & Kevin Lim, "Issue Conflict in ICSID Arbitrations" in *Selected Essays on International Arbitration* (Singapore Academy of Law, 2013) 472 at para 3.

[84] Dennis Hranitzky & Eduardo Silva Romero, "The 'Double Hat' Debate In International Arbitration" New York Law Journal (14 June 2010). The recurring legal issues include jurisdictional questions (*eg* the definition of "investment" and the use of a most-favoured nation clause) and substantive questions (such as the requirements for direct or indirect expropriation, the minimum standards of treatment in international law that include the notions of fair and equitable treatment and full protection and security, and the concept of discriminatory acts) (see Michael Hwang SC & Kevin Lim, "Issue Conflict in ICSID Arbitrations" in *Selected Essays on International Arbitration* (Singapore Academy of Law, 2013) 472 at para 64 citing Nassib G. Ziade, "How Many Hats Can a Player Wear: Arbitrator, Counsel and Expert?" 2(1) ICSID Rev-FILJ 49 (2009) at 50).

on an issue as an arbitrator in relation to which he is taking, or will take, a particular position as counsel.[85]

54. Third, concerns have been raised with regard to the lack of public participation in investor-State arbitration. The confidentiality of investor-State arbitration proceedings flowed from its roots in international commercial arbitration. However, in view of the public interest in investor-State arbitration, there has been a push for increased transparency.[86] This has been reflected, to some degree, in the amendments to the ICSID Arbitration Rules [87] and the introduction of transparency-enhanced procedures in new investment treaties such as the US-Singapore FTA,[88] as well as the recently announced EU-Canada FTA ("**CETA**").[89]

(ii) *Concerns relating to substantive law*

55. But there are concerns that relate to the substantive law as well.[90] Investment treaties started as *lex specialis* instruments that emerged in a time of

[85] Dennis Hranitzky & Eduardo Silva Romero, "The 'Double Hat' Debate In International Arbitration" New York Law Journal (14 June 2010)
[86] Ruth Teitelbaum, "A Look at the Public Interest in Investment Arbitration: Is it Unique? What should we do about it?" (2010) 5 Berkeley J Int'l L Publicist 54 at 54-55.
[87] ICSID Arbitration Rule 32(2) provides: "Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information." (Available online: https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)
[88] The US-Singapore Free Trade Agreement (6 May 2003) includes a section titled "Transparency of Arbitral Proceedings", and provides in Article 15.20(2) that "The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure." Available online: <http://www.fta.gov.sg/ussfta/chapter_15_us.pdf>.
[89] European Commission, 'EU-Canada CETA: main achievements' <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>, at 3.
[90] I have explored some of these deficiencies elsewhere, and do not propose to provide a detailed analysis of the deficiencies here: see Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at paras 34-46.

ideological divergence between the developed and developing world.[91] The negotiations of BITs between States were often protracted and painstaking. Such treaties were skeletal because of a conscious desire not to hamstring the development of a system for investor-State dispute settlement by arguing over the contentious issue of what the substantive law should look like.[92]

56. But the consequences of having a system that rests on bare-bones provisions that are left to be fleshed out by individuals appointed to hear disputes when they arise are that: first, many disputes can and will arise because they are not obviously excluded given the open-ended way in which the obligations have been framed; and second, a great deal of law is going to be made by those entrusted to decide these cases as and when they arise. This also means that some of the traditional concepts that underlay investment treaties might be stretched beyond what the parties to the treaties might have contemplated them to mean.[93]

57. For instance, the concept of "expropriation" was historically concerned with the physical seizure or transfer of tangible property or the nationalization of foreign-owned assets.[94] It has, however, been extended to a broad range of economic assets, including contractual rights.[95]

58. Another example relates to MFN clauses. Such clauses were originally intended to ensure that host States would not discriminate in terms of the

[91] M Sornarajah, 'Evolution or revolution in international investment arbitration? The descent into normlessness', in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2012), 634.
[92] Sundaresh Menon, Closing Address at the Singapore International Arbitration Forum (2 December 2013).
[93] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference).
[94] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 37.
[95] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 37.

competitive opportunities offered to treaty partners.[96] But tribunals have interpreted MFN clauses broadly, seemingly allowing investors to pick and choose from the provisions present in BITs between the host State and other third-party States. This can sometimes enable an investor to construct a cause of action that might never have been in the contemplation of the contracting States.[97] The obligations of the contracting States might therefore be defined by a patchwork of the most favourable provisions contained in a raft of treaties linked by MFN clauses, potentially undermining the calibrated result of inter-State negotiations.[98]

59. Moreover, there is no single body that has the capacity or competence to rationalise, to reconcile or to moderate the emerging jurisprudence of these *ad hoc* tribunals. There is no avenue of appeal to help strip away some of the errors, incoherence or inconsistencies in the arbitral jurisprudence.

60. Amongst the most famous of the cases which exemplify the perils of such a system are the *Lauder* arbitrations, which concerned separate arbitrations brought by Lauder and his investment company against the Czech Republic. Despite the almost identical factual matrix, parties and legal norms,[99] two tribunals came to completely contradictory conclusions[100] with regard to the important issues of expropriation as well as fair and equitable treatment.[101]

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[96] United Nations Conference on Trade and Development, 'Most-Favoured-Nation Treatment' in UNCTAD Series on Issues in International Investment Agreements II (2010) <http://unctad.org/en/docs/diaeia20101_en.pdf> (last accessed on 29 November 2013).
[97] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 44.
[98] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 46.
[99] Christian J Tams, "An Appealing Option? The Debate about an ICSID Appellate Structure" in *Essays in Transnational Economic Law* (No 57, June 2006) at 20.
[100] The London tribunal refused to award any damages, while the Stockholm tribunal ordered $355 million in damages.
[101] See *Lauder v. Czech Republic*, Final Award, pp 187-91 (2001) (UNCITRAL) and *CME Czech Rep. B.V. v. Czech Republic*, Partial Award, pp 5-7 (Sept. 13, 2001).

3. *Brief conclusion*

61. One writer has suggested that the international arbitration framework may be inherently unsuited to handling issues involving sovereign and public interests, and that perhaps these matters should be carved out as being "un-arbitrable".[102]

62. I am not sure that I fully agree with this view. But what does emerge from recent developments is that some States have attempted to recapture the authority to interpret treaties.[103] Under the Singapore-United States FTA, a joint committee of government officials may issue binding interpretations of the agreement. The Malaysia-New Zealand FTA and the ASEAN-Australia-New Zealand FTA also incorporate express provisions for tribunals to request joint decisions from the parties declaring their interpretation of any disputed provisions. Under the CETA, the EU and Canada may issue binding interpretations on "what they originally meant in the agreement" and to participate in arbitrations in relation to questions of interpretation.[104]

63. Elsewhere, there has been something of a backlash against investor-State arbitration. Within the past seven years, Bolivia (in 2007),[105] Ecuador (in 2009)[106] and Venezuela (in 2012)[107] have withdrawn from the ICSID

[102] Ruth Teitelbaum, "A Look at the Public Interest in Investment Arbitration: Is it Unique? What should we do about it?" (2010) 5 Berkeley J Int'l L Publicist 54 at 59-62.
[103] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 55.
[104] European Commission, 'EU-Canada CETA: main achievements' <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>, at 3-4.
[105] Bolivia served a written notice of its denunciation of the ICSID Convention on 2 May 2007, and the denunciation took effect six months after the receipt of notice, *ie* on 3 November 2007. See the "List of Contracting States and Other Signatories of the Convention". online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.
[106] Ecuador served a written notice of its denunciation of the ICSID Convention on 6 July 2009, and the denunciation took effect six months after the receipt of notice, *ie* on 7 January 2010. See the "List of Contracting States and Other Signatories of the Convention". online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

Convention. In April 2011, the Australian Government 2011 issued a Trade Policy Statement to announce that while it had included investor-State arbitration clauses in past international investment agreements, it would no longer do so in the future.[108]

III. Solutions

64. The constraints of time permit only the briefest survey of the proverbial tip of the iceberg that is international economic law today.

65. Our traditional systems for the resolution of disputes featured a design with a jurisdictional focus. But these strain to cope with a world in which there are extensive transnational economic relationships. Arbitration evolved to provide a part of the answer. The success of arbitration has rested to a large extent on the fact that it enjoys a transnational character by virtue of being underpinned by the New York Convention in the case of commercial arbitration and, in the case of treaty arbitration, also by the relevant bilateral or multi-lateral investment treaty. This has seen the role of the courts in this enterprise somewhat side-lined, although there are exceptions, the most notable being perhaps the London commercial courts which have seen a considerable increase in caseload involving either one or all foreign parties.

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[107] Venezuela served a written notice of its denunciation of the ICSID Convention on 24 January 2012, and the denunciation took effect six months after the receipt of notice, *ie* on 25 July 2012. See the "List of Contracting States and Other Signatories of the Convention" online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>.

[108] Australian Government Department of Foreign Affairs and Trade, "Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity" (April 2011) at 14. And see "Gillard Government reforms Australia's trade policy" (12 April 2011) online: <http://trademinister.gov.au/releases/2011/ce_mr_110412.html >.

66. Is it possible to reimagine our paradigm? In suggesting possible solutions, perhaps we could begin by considering the themes that emerge from the discussion thus far. I suggest that, at a broad level, there are perhaps five:

(a) First, to cope with the transnational trading environment of today, it might be timely to recognise that courts have a potentially significant role to play in the resolution of commercial disputes, alongside arbitration. This could be significantly enhanced and aided if there is a framework to avoid the need to re-litigate the same issue across many different jurisdictions;

(b) Second, to the extent possible, it would be highly desirable to have consistency in outcomes when the same sort of issue has to be resolved by different tribunals. This might arise in the context of a single award being enforced in two different jurisdictions, as was the case in *Dallah*, or in the context of a similar substantive question being tried by two different tribunals;

(c) Third, it would be desirable in a world where our economic activities transcend borders with ever greater frequency to strive for convergence in substantive commercial laws to the extent this is possible. This is an important part of assuring consistency in outcomes and if it is achievable it would reduce transactional cost as well;

(d) Fourth, arbitration is likely to remain the predominant method for the resolution of transnational commercial disputes. But amidst the considerable growth in the diversity of practitioners, in the range of debates and issues and in the sheer incidence of disputes, there might perhaps be a need to refresh our outlook and approach to a number of

matters including the way we conduct arbitrations and whether we should develop more consistent approaches to such things as ethics; and

(e) Fifth, investor-State arbitration, despite some signs of a backlash, remains the best available method for the protection of private investments from the acts of a foreign host State. But the emerging question is how the interests and intentions of the States that negotiated those treaties might be accorded sufficient consideration.

67. If, for a moment, we could embark on a thought experiment, putting aside the limitations of our current thinking and our beliefs about the international order, how would we envisage responses to these challenges and themes?

68. In a lecture I delivered at Lincoln's Inn in London late last year, I suggested that the harmonisation of commercial law and of commercial dispute resolution processes is a good we should work towards because it will reduce the transaction costs of cross-border business.[109] Without such harmonisation, investors will have to expend resources on securing compliance with various regulations in various jurisdictions, and may also have to price in the additional risks which accompany enforcement processes should disputes arise.[110] The uncertainty engendered by the need to translate legal relationships across the boundaries of different legal systems reduces investment, consumption and economic performance.[111]

[109] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", Commercial Bar Association Annual Lecture 2013 (14 November 2013) at para 49
[110] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", Commercial Bar Association Annual Lecture 2013 (14 November 2013) at para 49
[111] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", Commercial Bar Association Annual Lecture 2013 (14 November 2013) at para 49, citing Helmut Wagner, "Costs of Legal Uncertainty: is Harmonization of Law a Good Solution?" delivered at the fortieth annual session of UNCITRAL (available online: http://www.uncitral.org/pdf/english/congress/WagnerH.pdf (last accessed 25 November 2013)) at p 1

69. In the same lecture, I suggested that we might approach such a project by way of a three-act script.[112] I develop these themes by proposing ideas that might move us toward a better and perhaps fuller model for the transnational protection of private rights. In essence I suggest that we should strive towards recognising that courts might play an enhanced role in the resolution of transnational commercial disputes alongside arbitration; that this would assist in the development of convergence in substantive commercial law; and together with this, the arbitration community should continue to re-examine and refresh its practices.

A. Act One: Harmonisation of laws on recognition and enforcement of judgments

70. Act One concerns the harmonisation of laws on the recognition and enforcement of judgments. This has been achieved to a considerable extent in the context of international arbitration pursuant to the New York Convention and the Model Law.

71. But there is room to consider the same in the context of court-based dispute resolution mechanisms. The Hague Convention on Choice of Court Agreements ("**the Hague Choice of Court Convention**"), which aims to do for court judgments what the New York Convention has done for arbitral awards, is an interesting development.[113] It will be applicable in business-to-business contracts that contain choice of court clauses. Thus far, the EU, the United

[112] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", Commercial Bar Association Annual Lecture 2013 (14 November 2013) at para 52 *et seq*.
[113] See "The Hague Convention of 30 June 2005 on Choice of Court Agreements – Outline of the Convention" online: <http://www.hcch.net/upload/outline37e.pdf>

States and Mexico are signatories to the Convention, though only Mexico has as yet ratified it.[114] The Convention will enter into force with the ratification of just one more State.[115] It is exciting to note that the European Commission proposed, on 30 January 2014, that the EU "approve" the Convention.[116]

72. When it is in force, the Convention could prove to be a game changer in the international dispute resolution framework. It is a multilateral treaty that aims to increase the efficacy of choice of court agreements in transnational disputes, and has the potential of widening the effect and enforcement of court judgments in contracting States.[117] It will establish "uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters", [118] and will provide greater certainty for parties in transnational commercial contracts.[119] It therefore holds the promise of a significant step towards the improved harmonisation of international commercial law.[120]

73. Because the Convention would apply to judgments of courts that are selected by the parties, in a way that mimics the emergence of favoured seats of arbitration, this might see the emergence of a network of commercial courts which have wide international acceptance for competence, integrity and commercial sensibility functioning alongside the existing framework for international commercial arbitration. The success of the commercial courts in London alongside London's dominance as a centre for arbitration suggests that

[114] See online: <http://www.hcch.net/index_en.php?act=conventions.status&cid=98>.
[115] See Article 31(1) of the Hague Choice of Court Convention, online: <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>.
[116] Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements (30 Jan 2014).
[117] Yeo Tiong Min, "International Litigation in Asia: Will the Hague Choice of Court Convention Make Any Difference?", online: <http://www.jsil.jp/annual_documents/2013/1012224.pdf> at para 18.
[118] See the Hague Convention on Choice of Court Agreements, online: <http://www.hcch.net/index_en.php?act=conventions.text&cid=98>.
[119] Antonin I Pribetic, "The Hague Convention on Choice of Court Agreements" 10(1) The Globetrotter 2 at 2
[120] Antonin I Pribetic, "The Hague Convention on Choice of Court Agreements" 10(1) The Globetrotter 2 at 2

litigation and arbitration are not necessarily competing in a zero-sum game. Rather, there is room for a wide range of options for the successful resolution of transnational commercial disputes. The success of the commercial courts in London also suggests that parties are not necessarily as nationalistic as they might once have been thought to be, about which courts can resolve their disputes as long as there is the assurance of competence, integrity and trustworthiness

74. I do not suggest that a court-based approach will overcome all the problems. The field of IP rights that I started with is a difficult one because IP rights are legal constructs and will ultimately be significantly shaped by idiosyncratic policies. But one can imagine the benefits to be had in the transnational protection of private rights if there was a framework for the effective transnational enforcement of the decisions of a respected and competent court.

B. Act Two: Improvements in and convergence of dispute resolution processes

75. The second Act concerns the improvements in as well as the convergence of dispute resolution processes.

1. *International Arbitration*

76. Arbitration is presently the primary dispenser of justice in international legal disputes. It plays a hugely important role in regulating commercial as well as investor-State relationships.

77. International arbitral think tanks and institutions, and – in the context of investor-State arbitration, States themselves – might work together better in developing responses to the issues faced.

78. Last year, we convened the 2013 edition of the Singapore International Arbitration Forum. It was entitled "Adventures with Blank Sheets: A Day of 'Blue Sky' Experimental Thinking on the Structure and Practice of International Arbitration".[121] It brought together an excellent cast of practitioners, academics and judges. There was surprisingly wide consensus that there were significant areas for improvement. For instance, many speakers thought that there was a need for arbitration to move away from simulating litigation. It was also thought that arbitrators should be encouraged to be involved in cases from an early stage, and to conduct "active case management" throughout the lifetime of the case. They should work towards tailoring ideal solutions or encouraging amicable settlements;[122] and have greater regard to the *pareto* principle; impose limits on hearing time, page lengths and the scope of document production; and make the necessary costs orders against recalcitrant parties. These are valuable and sensible ideas but are we content to seed them as ideas and wait to see if they take root? The difficulty with this is that the arbitration industry is dominated by insiders who tend on the whole to be reasonably comfortable with the status quo. Why fix something if it ain't broke yet? Moreover, the most important and influential voices often belong to some of the busiest practitioners. As a result it might be asking a lot to expect that reforms or refreshed practices will naturally and spontaneously occur.

[121] See online: <http://www.siaf.sg/>.
[122] Sundaresh Menon, Closing Address at the Singapore International Arbitration Forum (2 December 2013).

79. Be that as it may, much of the international arbitral case load is administered by a relatively small number of arbitral institutions which are aided by the presence on their boards of some of the leading arbitrators in the world. Is it beyond hope:

    (a) That they might design ethical codes and regulations that might one day be internationally harmonised?

    (b) That they might add teeth to those codes by specifying sanctions and establishing formal processes for managing ethical misconduct of counsel or of arbitrators?[123] The February 2014 "final draft" version of the London Court of International Arbitration ("**LCIA**") Rules is an example of this.[124]

    (c) That they might establish accreditation procedures[125] and create arbitrator databases,[126] thus enhancing transparency in arbitrator choice?[127]

    (d) That they might stimulate the use of best practices in how we conduct arbitration?

80. The theme of the just concluded ICCA Congress 2014 was "Legitimacy: Myths, Realities, Challenges".[128] This featured a painstaking process of reviewing current practices in arbitration from a variety of perspectives to ascertain whether the concerns expressed over arbitration are myths or realities. Allowing

[123] Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity", Chartered Institute of Arbitrators International Arbitration Conference (22 August 2013) at para 51.
[124] A "final draft" dated 18 Feb 2014 has been uploaded on the LCIA website. Article 18 (on party representation) is certainly more substantial in the draft than in the existing LCIA Rules. There is also an Annex that provides general guidelines for the Parties' legal representatives. Article 18.6 provides for sanctions, including (a) a written reprimand; (b) a written caution as to future conduct in the arbitration; (c) a reference to the legal representative's regulatory and or professional body; and (d) any other measure necessary to maintain the general duties of the arbitral tribunal. See online: <http://www.lcia.org/Default.aspx>.
[125] Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity", Chartered Institute of Arbitrators International Arbitration Conference (22 August 2013) at para 52.
[126] Sundaresh Menon, "Some Cautionary Notes for an Age of Opportunity", Chartered Institute of Arbitrators International Arbitration Conference (22 August 2013) at para 54.
[127] Sundaresh Menon, "Contemporary Challenges in International Arbitration", seminar hosted by the School of International Commercial Arbitration, Queen Mary, University of London and the Singapore International Arbitration Centre (London, 27 September 2012), video available online: <http://www.arbitration-icca.org/AV_Library/Queen-Mary-University-of-London.html>.
[128] See online: <http://www.iccamiami2014.com/>.

for the fact that there might be some divergence of views on each of the angles examined, the presence of prominent and respected practitioners on each side of the debate suggests the safe conclusion that there are some myths, some realities and an awful lot of challenges. This is not to attack arbitration; rather it is to provide the impetus for arbitration to raise its game.

81. Separately, the idea of introducing appellate mechanisms in international arbitration as a means for error-correction and precedent-creation has been floated before.[129] If it were possible to construct an acceptable mechanism, it could go some way towards bringing legitimacy and coherence to the disparate web of arbitral decisions in the interpretation of treaties.[130]

82. It may be thought unlikely that States would agree on a true appellate structure to unify the system of disparate investment treaty decisions. After all, a proposal for an appellate mechanism was tabled by the Secretariat of the ICSID a decade ago and it has not gained traction.[131] Although the Appellate Body of the WTO[132] shows that it is possible to have an effective and coherent system of appeals to resolve international disputes, the success of that system

[129] In the context of investor-State arbitration, see Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2006/01, OECD Publishing, online <http://dx.doi.org/10.1787/631230863687> at 10. See also Susan Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 Fordham Law Review 1521.

[130] In the context of investor-State arbitration, this could ensure that the interpretive approaches adopted at first instance give the necessary weight to treaty texts, as well as expressions of State intent in preambles and statements of objectives. On the issue of interpretive approaches in investor-State arbitration, see further Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 48 *et seq.*

[131] ICSID Secretariat, "Possible Improvements of the Framework for ICSID Arbitration", online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDPublicationsRH&actionVal=ViewAnnouncePDF&AnnouncementType=archive&AnnounceNo=14_1.pdf>.

[132] Under the WTO appellate mechanism, appeals are permitted, although these are limited to issues of law and questions of interpretation. Each appeal is heard by three members of a seven-member Appellate Body set up by the Dispute Settlement Body and broadly representing the range of WTO membership. See "Understanding the WTO: Settling Disputes", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm#appeals>

owes much to the particular supranational character of the WTO and the fact that it deals with inter-State disputes.[133]

83. However, in recent years, it has become evident that even decisions and practices of apex national courts might be subject to the review of investor-State tribunals. Perhaps because of this, more consideration is being given to the stipulation of rights of appeal with regard to investment disputes.

84. For example, the US Bipartisan Trade Promotion Authority Act[134] identifies as a negotiating objective the provision for an appellate mechanism "to provide coherence to the interpretations of investment provisions in trade agreements".[135] A similar requirement for States to consider whether to establish a bilateral appellate or review body was included in the US FTAs with Chile, Singapore and Morocco, as well as in the 2004 US Model BIT.[136] Similar provisions were also included in the recent US FTA with five Central American countries and the Dominican Republic.[137] Canada and the EU have also declared in the CETA communique that the CETA will, for the first time in the EU, provide "for the possibility to establish an appellate mechanism".[138] Until and unless a meaningful system of appeals emerges, I envisage that States will look to play a greater part in the interpretation of investment treaties by ensuring some controls over the qualifications or even the identity of

[133] Sundaresh Menon, "International Investment Arbitration in Asia: The Road Ahead" (4th Annual Singapore International Investment Arbitration Conference) at para 62.
[134] (US Trade Act of 2002). This has been the basis for concluding several US FTAs.
[135] 19 USC s 3802(b)(3)(G)(iv). See also Karl P Sauvant, *Appeals Mechanism in International Investment Disputes* (New York: Oxford university Press, 2008) at 232, and Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2006/01, OECD Publishing, online <http://dx.doi.org/10.1787/631230863687> at 9.
[136] Yannaca-Small, K. (2006), "Improving the System of Investor-State Dispute Settlement", OECD Working Papers on International Investment, 2006/01, OECD Publishing, online <http://dx.doi.org/10.1787/631230863687> at 9.
[137] See the US-Dominican Republic-Central American FTA. Chapter 10, Article 10.20 at para 10. Available online: <http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf >.
[138] European Commission, 'EU-Canada CETA: main achievements' <http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf>, at 3.

prospective arbitrators and by creating the right to address tribunals on the interpretation of treaties or even by retaining the right to issue bilateral statements of interpretation.

2. *Court-based mechanisms*

85. If the courts are to play an enhanced role alongside international arbitration in the resolution of transnational disputes, I suggest there are two ways in which this might be done. Neither of these suggestions would require a fundamental overhaul of existing court procedures and practices.[139] The first relates to the creation of specialist courts, while the second relates to developing cross-border connections between national courts.

(i) *The creation of specialist courts*

86. Specialist courts geared to deal with transnational commercial disputes could supplement the work done by the international arbitration system. These could be custom-built to run parallel with the domestic litigation framework and provide commercial parties with recourse to a specialist court with the full range of a court's coercive powers.[140]

87. A well-equipped specialist court with access to the infrastructure of cutting-edge case management systems and supplemented by the use of flexible

[139] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence", Keynote Address at the 26th LawAsia Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27-30 October 2013) at para 56.
[140] Sundaresh Menon, "The Somewhat Uncommon Law of Commerce", Commercial Bar Association Annual Lecture 2013 (14 November 2013) at para 60.

procedures could expedite the dispute resolution process. Each case could be docketed, judicially managed and decided by specialists in the relevant areas of law. It is not at all unlikely that such specialist courts could provide swifter and less expensive access to justice than arbitration and the competition could ultimately work to the benefit of the users. While there might be some loss of party autonomy in the selection of panels and even of procedures, this should be balanced against the advantages that a good commercial court would bring.

88. I should make a brief reference here to our plans to establish an international commercial court. In 2013, a committee comprising international and local jurists was formed to study the possibility of establishing such a court in Singapore.[141] The report of the committee was made available on the internet as part of a public consultation exercise which ended in January this year.

89. While there remain several moving parts in this very substantial project, the Singapore International Commercial Court promises to offer an additional court-based dispute resolution mechanism for parties to resolve international commercial disputes before a group of eminent commercial judges drawn from our existing bench as well as from abroad.

90. It is envisaged that the court will deal with three categories of cases, namely:

(a) where parties consent to use the court after their dispute has arisen;

(b) where parties have previously contractually agreed that the court will have jurisdiction over any disputes arising out of that contract; and

[141] "Report of the Singapore International Commercial Court Committee" (29 November 2013) online: <http://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf>.

(c) where cases are transferred from the Singapore High Court to the Singapore International Commercial Court.

91. Within these three categories of cases, the court may join third parties to the proceedings with or without the third parties' consent.[142] This may help to overcome the drawback in arbitration, that the jurisdiction of an arbitral tribunal is limited only to the parties to the arbitration agreement.[143]

92. Matters will be heard at first instance by a single Judge, although on the application of a party, three Judges may be designated to hear a case.[144] To avoid any possible issues associated with party-appointments, the adjudicatory panels will be institutionally assigned from a panel of eminent jurists from Singapore and elsewhere.

93. To address issues of transparency and confidentiality, proceedings will as a general rule take place in open court, subject to certain exceptions. Transparency might well be attractive to the parties in some cases and this would also facilitate the development of a body of jurisprudence.[145] However, special confidentiality rules may apply for cases which have no substantial connection to Singapore and where the parties so opt.

94. For international cases, there will be wide rights of audience given to international lawyers

[142] *Report of the Singapore International Commercial Court Committee* (November 2013) at para 22
[143] Rajah & Tann LLP, "The Development Of The Singapore International Commercial Court" (December 2013) at 3
[144] *Report of the Singapore International Commercial Court Committee* (November 2013) at para 31
[145] *Report of the Singapore International Commercial Court Committee* (November 2013) at para 32

95. First instance decisions would, subject to the prior agreement of the parties, be appealable to an appeal court. The appellate panel will comprise respected international jurists as well as judges of the Singapore Court of Appeal.

(ii) *Developing cross-border connections between national courts*

96. The second court-based mechanism relates to developing deeper cross-border connections between national courts. National courts, and in particular commercial courts, would benefit from being less insular in their outlook and more open to discussions and debates with the courts in other jurisdictions.

97. A collaborative and consultative approach has proven to be useful even in an area of law as territorially bound as IP. At the Fourth Global Forum on Intellectual Property held in Singapore last year, Chief Judge Randall Rader of the United States Court of Appeals for the Federal Circuit spoke of an IP case in which identical results had been reached on a patent dispute that was going on in the US, UK and Germany.[146] This was achieved because the national judges had discussed and explored how they might reach a common result, subject to the limitations of their national laws.

98. This has also been the experience in the context of cross-border insolvency matters. In a 1994 insolvency matter taking place in both the US and UK,[147] the judges of each court, sensing that they were each being given inaccurate reports of what was going on in the other jurisdiction, established an informal

[146] Neil Wilkof, "Can Patent Judges 'Colloquy' Themselves to Greater Uniformity?" (30 August 2013), online: <http://ipkitten.blogspot.sg/2013/08/can-patent-judges-colloquy-themselves.html>. Wilkof was referring to a comment by Chief Judge Randall Rader of the United States Court of Appeals for the Federal Circuit.
[147] *In re Maxwell Communication Corporation* 170 B.R 800 (Bankr. S.D.N.Y. 1994), aff'd, 186 B.R. 807 (S.D.N.Y. 1995).

protocol to appoint a respected international practitioner to report to both courts on what was happening in each jurisdiction. The success of that experiment prompted the Insolvency Section of the International Bar Association to develop a set of principles which were thought to be of universal application in different regimes.[148] On a related note, the UNCITRAL Model Law on Cross-Border Insolvency was developed in 1997, while the ALI Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases was promulgated at the turn of the century.[149] In the field of international family law, regular communications take place through an established judicial network.

99. Cross-border inter-curial collaboration may also ensure that foreign law will be applied in a consistent manner. In 2009, the Singapore Court of Appeal referred a question of English law arising in a case before the court to the English High Court.[150] The English High Court's decision on that question was subsequently admitted into evidence in Singapore. Inspired by this innovative procedure, the Supreme Courts of Singapore and New South Wales, and subsequently, the Chief Justice of New South Wales and the Chief Judge of the State of New York, signed the respective Memoranda of Understanding on References of Questions of Law to institutionalise referrals of questions of law. Had such referral arrangements been in place between the English and French Courts, the inconsistency in the *Dallah* cases might have been avoided.

[148] James Farley, "Judicial Cooperation: Good practices in the field of cross-border insolvency proceedings in light of the proposed Hague Draft General Principles for Judicial Communications" (Joint European Union – Hague Conference on Private International Law Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks) (15-16 January 2009).
[149] James Farley, "Judicial Cooperation: Good practices in the field of cross-border insolvency proceedings in light of the proposed Hague Draft General Principles for Judicial Communications" (Joint European Union – Hague Conference on Private International Law Conference on Direct Judicial Communications on Family Law Matters and the Development of Judicial Networks) (15-16 January 2009).
[150] *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166

100. There is also much to be said for regular knowledge sharing among commercial courts. Commercial judges from the courts of Hong Kong, Sydney (New South Wales) and Singapore have for a number of years met to discuss issues, share experiences and learn lessons on cutting-edge issues in commercial law. Last year, we invited the High Court of Mumbai to join us and more recently, we have also invited the People's Court of Shanghai to join this regular dialogue.

101. This brings me to Act Three: the convergence of substantive law.

C. Act Three: Convergence of substantive law

102. Improvements in and convergence of dispute resolution processes may form the foundation for deeper convergence of substantive law. It may be possible to eventually develop internationally harmonised or at least convergent substantive jurisprudence.

1. *The development of soft law*

103. The international community has long recognised the need for uniform standards in transnational trade and this has manifested in what might loosely be termed "soft law" instruments. One example in the context of commercial sales is the "Incoterms" project.[151] "Incoterms", short for "International Commercial Terms", are internationally recognised standards that are used in international and domestic contracts for the sale of goods. The Incoterms rules, first published by the International Chamber of Commerce in 1936, provide

[151] Online: <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/> (last accessed 26 Mar 2014).

internationally accepted definitions and rules of interpretation for common commercial terms, and are recognised by UNCITRAL as the global standard for interpretation of terms in transnational trade. Another example in the context of the construction industry is the International Federation of Consulting Engineers ("**FIDIC**") forms. FIDIC publishes international standard forms of contracts for construction and engineering work, together with related materials such as standard pre-qualification forms and business practice documents.[152] The work of such organisations significantly facilitates the international convergence of commercial law. We might envisage a greater emphasis on and efforts directed toward the development of more such norms and principles that serve the international commercial community.

104. Aside from this, strengthening the community of commercial courts might point us more directly towards a deeper convergence of substantive commercial law. These courts, though national in nature for the foreseeable future, would feature judges who are focused on the resolution of transnational commercial disputes and would be well suited to developing a converging jurisprudence of transnational commercial law.

[152] Online: <http://fidic.org/node/13#sthash.on7HSusc.dpuf> (Last accessed 26 Mar 2014).

IV. Conclusion

105. The world today has changed dramatically in a remarkably short space of time. The proliferation of cross-border trade and investment flows has challenged the paradigm of operating in jurisdictional silos.[153] The commercial world is moving at a rapid pace and threatens to leave our legal frameworks in its wake.

106. I have floated some possible ideas to respond to the challenges we face. These will not materialise overnight, or succeed as atomistic national projects. International collaboration, support and paradigm shifts will be required.

107. I have mentioned our plans to establish an international commercial court in Singapore. While it is still early days, we are hopeful that the novel mechanism we are designing and in which we are investing our resources will make a positive contribution to the global infrastructure for the resolution of transnational commercial disputes. It will not be a panacea to all the ills, but it is – at the very least – a statement of our intent to do the best we can in our shared endeavour to enhance the transnational protection of private rights in this new century.

[153] Sundaresh Menon, "Transnational Commercial Law: Realities, Challenges and A Call for Meaningful Convergence", Keynote Address at the 26th LawAsia Conference and the 15th Biennial Conference of Chief Justices of Asia and the Pacific (27-30 October 2013) at para 2.