

LALIVE LECTURE 2021

“A Tale of Two Systems: The Public and Private Faces of Investor-State Dispute Settlement”

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I. Introduction

1. Good afternoon to those of you joining us from Geneva, and to those joining us from elsewhere, I wish you a very good day. Let me first thank Michael for that very generous introduction, as well as the team from LALIVE and the Graduate Institute for inviting me to deliver this year's Lecture. The list of those who have come before me is long and illustrious, and I am deeply grateful for the opportunity to make a modest contribution to this prestigious series.

2. To borrow from Charles Dickens, it might not be wrong to say of investor-state dispute settlement (“ISDS”) that it finds itself in the best of times, and also in the worst of times. On certain metrics, investment arbitration seems to be revelling in a golden age. Since the first Bilateral Investment Treaty (“BIT”) was signed just over half a century ago, more than 3,300 investment treaties have been concluded, and over a thousand investor-state arbitrations have been

filed.¹ ICSID now boasts 155 parties,² and it was recently reported that ICSID proceedings in 2020 involved States from every geographic region of the world.³

3. Yet, looking past the numbers, one finds something of a well of discontent amongst its users. Some States complain of a perceived pro-investor bias amongst investment arbitrators, who, like most investor-claimants, tend to hail from the global North.⁴ They also resent what they perceive to be an unjustified encroachment into their domestic regulatory space. Investors, on the other hand, bemoan the fragmentation of investment law into a patchwork of inconsistent decisions, and consequently, the perceived lack of a stable and predictable legal backdrop against which they may plan their affairs.⁵ Compounding all of this, there appears to be some concern amongst the public over the fact that an anonymous panel of lawyers sitting behind closed doors

¹ As at 31 July 2020, there were 1,061 known treaty-based ISDS cases, of which 311 cases are presently pending: UNCTAD, “Investment Policy Hub: Investment Dispute Settlement Navigator”, <<https://investmentpolicy.unctad.org/investment-dispute-settlement>>; UNCTAD reports that there are 2,897 BITs, of which 2,343 are presently in force. There are also 417 treaties with investment provisions, of which 324 are presently in force: UNCTAD, “International Investment Agreements Navigator”, <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

² ICSID, “Database of ICSID Member States”, <<https://icsid.worldbank.org/about/member-states/database-of-member-states>>.

³ ICSID, “Annual Report: 2020”: <https://icsid.worldbank.org/sites/default/files/publications/annual-report/en/ICSID_AR20_CRA_Web.pdf> at p 22.

⁴ Andrea Bjorklund, Daniel Behn & Susan Franck *et al*, “The Diversity Deficit in International Investment Arbitration” (2020) 21 *Journal of World Investment & Trade* 410 at fn 35 (“Diversity Deficit”).

⁵ Stephan W Schill, “Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach” (2011-2012) 52 *Va. J Int’l Law* 57 at p 66 (“Schill”).

are making decisions with potentially far-reaching and significant implications for their physical, social and economic well-being, through a process in which they are neither seen nor heard.⁶

4. Coming together, these diverse concerns suggest a mounting loss of public trust and confidence in the system of investment arbitration; and this, in turn, has led to some retreat from ISDS not just in the historically capital-importing States of the global South, but also amongst the traditionally capital-exporting States of the global North.⁷

5. As such, it seems fair to conclude that ISDS now does face a something of a “legitimacy crisis”.⁸ This is cause for concern. As Lord Sumption had argued in his 2019 Reith Lectures, a large part of the reason *why* we obey the institutions of state and the rules they promulgate is because we believe them to be *legitimate*; without legitimacy, rules would have to be enforced by coercion

⁶ Barnali Choudhury, “Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?” (2008) Vanderbilt Journal of Transnational Law at p 2 (“Choudhury”).

⁷ See, eg, Investment Treaty News, “Venezuela’s Withdrawal from ICSID: What it Does and Does Not Achieve” (13 April 2012), <https://www.iisd.org/itn/en/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve>; UNCTAD, “Denunciation of the ICSID Convention and BITs: Impact on Investor-State Claims” (December 2010), https://unctad.org/system/files/official-document/webdiaeia20106_en.pdf; Stop Investor-State Dispute Settlement, “Withdrawal from investment treaties: An omen for waning investor protection in Asia-Pacific?” (12 May 2017), <https://isds.bilaterals.org/?withdrawal-from-investment>; Luke Nottage, “The ‘Anti-ISDS Bill’ before the Australian Senate” (27 August 2014), Kluwer Arbitration Blog <http://arbitrationblog.kluwerarbitration.com/2014/08/27/the-anti-isds-bill-before-the-australian-senate/>.

⁸ See UNCITRAL Note A/CN.9.917 (20 Apr 2017) at para 12; see also the citations at Schill at fn 21.

and force.⁹ This applies *a fortiori* to institutions operating on the *international* plane. These generally do not command any coercive power to compel compliance, and their ability to contribute to the maintenance of a rules-based international legal order depends even more heavily on winning respect and an acceptance of their legitimacy.¹⁰

6. It is therefore a worthwhile endeavour to examine ISDS's crisis of legitimacy, and consider whether and how it might be averted. The criticisms of ISDS are multifaceted and touch on issues of both substance and procedure. Today, I intend to focus on the adequacy of the *procedural design* of the system of investor-state arbitration and how this might be affecting the *qualitative* sense of ISDS's state of health, in terms of whether and how that might be causing investment arbitration not to be perceived as a *legitimate* means of dispute resolution.

7. In a lecture I delivered at the Singapore International Arbitration Centre Virtual Congress last year, I examined the relationship between legitimacy and the Rule of Law, and proposed that the core values of the Rule of Law lie at the *foundation* of institutional legitimacy. On this view, public trust and confidence in an institution's decision-making processes – in other words, respect for their

⁹ Jonathan Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books London, 2019) at pp 24-25. Lord Sumption examined *why* we obey the institutions of the state, such as the justice system. The answer, he argued, lies not in the coercive power of the state but rather our respect for the legitimacy of its institutions.

¹⁰ Tallberg & Zurn, "The legitimacy and legitimation of international organizations: introduction and framework" (2019) 14(4) *The Review of International Organizations*, Springer, 581.

legitimacy – derives from their broad, even if not universal, adherence to those core values and principles of the Rule of Law.¹¹

8. Building on this, I suggest that the crisis of legitimacy facing investment arbitration today can be traced, at least in part, to its failure to uphold certain core values and principles of the Rule of Law – in particular, transparency, accountability and consistency – which are of especial importance in the ISDS context. My thesis is that the reason *why* investment arbitration struggles to uphold these values lies in the dissonance between the public face of ISDS – meaning the *public* nature and significance of investment disputes – and its private face – meaning the *private* arbitral process by which investment disputes are resolved.

9. I will develop my argument in three parts.

(a) I begin with the *public* face of ISDS, by which I refer to the significant public *impact* of ISDS decisions and the *public* nature of its function. *Investment* arbitration, unlike *commercial* arbitration, often involves the regulation of governmental action, and its effects can often ripple far beyond the instant dispute. The informal system of precedent that has taken root in investment arbitration means that each award entails not just the adjudication of a dispute, but the *articulation* of legal

¹¹ Sundaresh Menon CJ, “SIAC Virtual Congress Lecture” (“SIAC Lecture”) at paras 11-14.

principles and norms aimed at shaping the behaviour of others beyond the dispute.

(b) I then turn to the *private* face of ISDS, by which I mean the private arbitral *process* by which investment disputes are settled. The question is whether the arbitral process, which was designed with the resolution of *private* commercial disputes in mind, remains fit for purpose in the international investment law context, given the public face of this type of dispute. The seeming mismatch between the *public* character and significance of ISDS's functions, and the traditionally *private* nature of the arbitral process raises a legitimate concern that it may not be.

(c) I will conclude by briefly considering the ongoing efforts for reform of the system. Though there is much to commend an incremental reform of the system of arbitration, that, I suggest, can only be an interim step on the path to deeper process reform.

II. The Public Face of ISDS: Objectives and Impact

10. Let me begin with the public face of ISDS. The first aspect of that public face is the significant public impact that the ISDS process has on constituencies beyond the disputing parties. This requires an understanding of the context in which investment arbitration developed and the problems it was designed to solve. Please indulge me in a brief sketch of its history.

11. Investment arbitration today is commonly thought of as being synonymous with the settlement of disputes between sovereign States and private investors. But it is worth remembering that this was not always so. For much of the past five centuries since the advent of the Age of Sail brought with it the beginnings of *global* trade in a real sense, disputes as to the limits of a Sovereign's power in relation to a foreign alien's investments were commonly settled on the international plane between the Sovereigns directly.¹² How such disputes were resolved tended to involve a mix of power and politics – gunboat diplomacy, for those investors whose home States could muster the requisite force; and inter-state diplomacy and negotiation for those who could not.

12. It seemed therefore that so long as investment disputes remained to be resolved in a political arena, the means of addressing such disputes would inevitably involve thorny issues of politics and international relations. It was in this context that investor-state arbitration was conceived of as a process that would, hopefully, depoliticise the settlement of investment disputes by removing them from the realm of power and placing them instead firmly within the realm of law.¹³

¹² Schill at 74.

¹³ In the words of Aron Broches, one of the ICSID's chief architects, the ICSID Convention offered "a means of settling directly, on the legal plane, investment disputes between the State and foreign investor, and would insulate such disputes from the realm of politics and diplomacy": see Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018) ("*The Rise of Investor-State Arbitration*") at p 162.

13. Whether investment arbitration has succeeded in doing so remains debatable. But what is certain is that investment arbitration has *not* removed issues of public policy from the settlement of investment disputes.¹⁴ While investment arbitration, in theory, entails no more than the private adjudication of a dispute between an investor and a host State, the practical reality is that that process of adjudication frequently, if not *inevitably*, engages the interests of a host of constituencies.

14. I suggest that ISDS adjudication can and often does affect the interests of polities *beyond* the disputing parties in at least two senses: (i) first, by influencing and constraining States' exercise of their power to make domestic policy; and (ii) second, by contributing to the development of international investment law. I discuss each in turn.

A. *Influencing and constraining state power*

15. The first aspect of ISDS's public nature and function derives from its role in influencing and constraining the exercise of governmental power. There are,

¹⁴ While Broches did not raise issues of public policy in his opening speech, the representatives of some jurisdictions remained concerned that ICSID's jurisdiction could affect domestic policymaking. The expert-designate from Thailand, for example, argued that consent was an inadequate limit on ICSID's jurisdiction given that that jurisdiction entered the terrain of public policy. That said, many other expert-designates (with the exception of those from Thailand and India) seemed prepared to accept that public policies enacted in good faith would be unaffected by the ICSID Convention, and did not take seriously the idea that ICSID jurisdiction might restrict their policy autonomy: *The Rise of Investor-State Arbitration* at p 158.

at least, three aspects of sovereign power which ISDS adjudication can potentially affect.

i. Constraining legislative and executive power

16. The first of these is legislative and executive power. The settlement of investment disputes entails keeping two sets of competing interests in balance: the investor's interest in investment protection, and the host State's legitimate interest in legislation and regulation in pursuit of a host of competing *non*-investment interests and social objectives.

(a) For instance, measures aimed at advancing public health and safety form the subject of a number of landmark ISDS cases. Thus, in *Philip Morris v Australia*, the tribunal considered whether tobacco plain packaging legislation aimed at discouraging the consumption of tobacco products constituted an expropriatory measure.¹⁵

¹⁵ *Philip Morris Asia Limited v The Commonwealth of Australia* (PCA Case No 2012-12). See also the *Methanex v USA* arbitration concerned a state government ban of a certain gasoline additive to stop it from polluting surface and groundwater: *Methanex Corporation v United States of America* (1999); and the *Vattenfall v Germany* arbitration, where the issue in question was Germany's decision to phase out nuclear power generation in the wake of the 2011 Fukushima Daiichi nuclear accident in Japan: *Vattenfall AB and others v Federal Republic of Germany (II)* (ICSID Case No ARB/12/12).

(b) Other governmental actions implicated in ISDS cases include measures aimed, amongst other things, at ensuring public access to basic utilities¹⁶ and addressing environmental and conservation issues.¹⁷

17. While investment arbitration does not directly result in the “striking down” of such measures, it can be seen that awards of damages can have a significant “chilling effect” on government regulation and action.¹⁸ This is not difficult to imagine given the very substantial sums that such awards can reach: there are now at least 50 known cases in which compensation of more than US\$100 million was awarded.¹⁹ These high stakes mean that even the *risk* of a claim

¹⁶ *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID Case No ARB/05/22) (“*Biwater*”) concerned measures aiming at ensuring public access to drinking water.

¹⁷ See *Sociedad Anonima Eduardo Vieira v Republic of Chile* (ICSID Case No ARB/04/7).

¹⁸ Eric Crosbie and George Thomson, “Regulatory chills: tobacco industry legal threats and the politics of tobacco standardised packaging in New Zealand” (2018) 131 NZ Med J 25, noting that recent studies illustrate that policymakers are increasingly aware of trade and investment law and incorporate these understandings into the policymaking process. Though *cf* other studies which state that while there are some findings which raise the possibility of ISDS’s influence on regulatory development processes, there is no consistent observable evidence to suggest regulatory chill: Christine Cote, “A Chilling Effect? The impact of international investment agreements on national regulatory autonomy in the areas of health, safety and the environment.” (2014) London School of Economics Thesis Papers: <etheses.lse.ac.uk/897/8/Cote_A_Chilling_Effect.pdf>.

¹⁹ Jonathan Bonnitcha and Sarah Brewin, International Institute for Sustainable Development, “Compensation Under Investment Treaties: What are the problems and what can be done?” (December 2020): <<https://www.iisd.org/system/files/2020-12/compensation-investment-treaties-en.pdf>>. The *Yukos* arbitrations, for example, resulted in an award of more than US\$50 billion against the Russian Federation, equivalent to 10% of Russia’s national budget or 2.5% of its GDP: Energy Charter Secretariat, “Brief Fact Sheet on the Arbitral Awards in the Proceedings brought by the Yukos’ Shareholders against the Russian Federation under the Energy Charter Treaty, on their Setting Aside and their Enforcement” (21 July 2015): <https://www.energycharter.org/fileadmin/DocumentsMedia/IAP/20150721/IAP20150721-S1-Fact_Sheet_Yukos.pdf> (“*Yukos* Fact Sheet”), referring to *Yukos Universal Limited (Isle of Man) v The Russian Federation* (PCA Case No 2005-04/AA227).

being commenced may sometimes be enough to delay or deter government action; in the wake of Philip Morris' claim against Australia's plain packaging legislation, New Zealand decided to defer the enactment of similar legislation until the conclusion of the Australian ISDS proceedings over concerns that New Zealand could face a similar challenge.²⁰ In this way, and given the sheer size of potential awards, ISDS can be seen to significantly influence and even constrain the ability of States to pursue objectives that might sincerely have been aimed at bettering the physical, social or economic well-being of their people.

ii. Questioning the exercise of judicial power

18. Apart from constraining the exercise of State power in the form of legislative and administrative acts, ISDS also claims the right to pass judgment on the legality of *judicial* acts and omissions, at least in some circumstances.

(a) In exercise of this claimed right, ISDS tribunals have considered whether the operation of the justice system in a host State may give rise to a breach of an investor's rights. In *White Industries v India*, the tribunal held that backlogs in a judicial system resulting in a 9-year delay to the

²⁰ Although the New Zealand Cabinet found itself "satisfied that plain packaging is an important tool to improve the health of New Zealanders", it was decided that a "wait and see" approach would be taken so as to manage the legal risks arising from the challenge against Australia's measures: Tariana Turia, "Government moves forward with plain packaging of tobacco products" (20 February 2013): <<https://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products>>.

enforcement of an arbitral award amounted to a breach of the host State's obligation to provide an "effective means of asserting claims and enforcing rights" under the relevant BIT.²¹

(b) ISDS tribunals have also considered themselves competent to question *decisions* of the courts of the host State in limited circumstances. *Eli Lilly v Canada* involved a direct challenge against a jurisprudential development of Canadian patent law. The investor had argued that the development of the "promise of the patent" principle by the Canadian courts constituted a "dramatic change" in Canadian patent law which violated its legitimate expectations.²² Although the tribunal ultimately rejected the claim on its facts, holding that the "promise of the patent" principle was an incremental development, what is significant is the tribunal's view that even *substantive* decisions of the national courts of a host State may not be exempt from scrutiny in the ISDS process.²³ While there remains considerable doubt as to whether this is correct or

²¹ *White Industries Australia Limited v The Republic of India* (2010) at para 11.4.15. See also Allen & Overy, "India liable under bilateral investment treaty for extensive judicial delays" (19 April 2012): <<https://www.allenoverly.com/en-gb/global/news-and-insights/publications/india-liable-under-bilateral-investment-treaty-for-extensive-judicial-delays>>.

²² *Eli Lilly and Company v Canada* (ICSID Case No UNCT/14/2) ("*Eli Lilly v Canada*") at paras 227 and 269. Recognising that it was, in effect, ruling upon the legality of a development of common law, the tribunal observed that "the present case is one in which the facts are the law" (at para 311).

²³ See *Eli Lilly v Canada* at para 219, acknowledging "the possibility that a decision of a court, or other judicial conduct, that falls so far below accepted minimum standards... that 'had a result that was so surprising that propriety and competence had to be questioned'... might engage the liability of the respondent State".

even appropriate,²⁴ the fact is that some ISDS tribunals have claimed such jurisdiction.

19. In a similar, albeit separate, vein, ISDS tribunals have also been asked to pronounce upon the legality of *criminal proceedings* initiated against claimant-investors. The *Yukos* arbitrations, for example, involved allegations that criminal proceedings commenced against the claimants' key executives were part of a course of State conduct amounting to an expropriation of the investment.²⁵ It would therefore appear that the reach of the ISDS process has on occasion extended beyond the judicial realm, into the exercise of *prosecutorial* power.

iii. Interaction with other international obligations

20. Thirdly, ISDS can produce results that may constrain or even conflict with State policy on the *international* plane. At least one State has been accused of breaching its investment treaty obligations by transferring a claimant's funds to a second state in support of criminal investigations and proceedings instituted

²⁴ See Chief Justice Robert French, "Investor-State Dispute Settlement – A Cut Above the Courts?", speech delivered at the Supreme and Federal Courts Judges' Conference on 9 July 2014 at p 12. Chief Justice French noted that the National Centre for State Courts in the United States, in an apparent reaction to the decision of the NAFTA tribunal in *Loewen Group Inc v United States* (which concerned a complaint against a decision of a Mississippi State Court involving the investor-claimant as defendant), has made calls for the US Trade Representative and Congress not to approve investment agreement provisions unless they "recognise and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses".

²⁵ See *Yukos* Fact Sheet at p 2.

against the claimant in that country.²⁶ Another striking example of a collision between competing sets of international obligations is the *Achmea* case, where the Court of Justice of the European Union held that ISDS regimes provided for in intra-EU BITs were inconsistent with EU law;²⁷ a clear example of how ISDS can interact with a host State's policy not just in the domestic sphere but also on the international plane.

21. To be clear, in outlining these examples, I am not taking a position, on this occasion, on the propriety or desirability of such matters being dealt with through the ISDS framework. My narrower point, through these examples, is that the significant public dimension of ISDS becomes evident.

²⁶ The Swiss Justice Ministry announced in 2015 that Switzerland had been accused of illegally transferring monies in the claimants' Swiss bank accounts to the Turkish government in breach of the Swiss-Turkish BIT. Switzerland maintains that the funds were transferred to the Turkish authorities as part of a cooperative investigation into a fraud scheme allegedly conducted by the claimants: Jarrod Hepburn, IA Reporter, "Uzan Family May Return to ICSID, as Switzerland Reveals Details of Threatened Investor Claim" (17 March 2015): <<https://www.iareporter.com/articles/uzan-family-may-return-to-icsid-as-switzerland-reveals-details-of-threatened-investor-claim>>.

²⁷ See *Slovak Republic v Achmea BV* (Case C-284/16); V Argyropoulou, "ISDS Reform in the EU: Are We There Yet" in *The Investor-State Dispute Settlement System: Reform, Replace or Status Quo?* (Wolters Kluwer, 2020). Specifically, the CJEU held that ISDS provisions in intra-EU BITs were inconsistent with the principle of autonomy under EU law. The principle of autonomy recognises EU law as an independent source of law which cannot be interfered with or affected by international agreements. Since ISDS tribunals could be called on to interpret EU law in rulings that would be binding upon Member States, which rulings would not be subject to judicial oversight by EU Member State national courts or the CJEU, ISDS tribunals could prevent disputes from being resolved in a manner that ensures the "full effectiveness of EU law" and were therefore incompatible with EU law.

B. Development of international investment law

22. And there is a second dimension to ISDS's public function, which is the role it plays in the development of international investment law. Unlike international *commercial* arbitrators, who exercise a primarily *rule-applying* function, investment arbitrators regularly engage in *rule-making*.²⁸ ISDS tribunals now systematically turn to earlier decisions for guidance, in particular when interpreting and applying the standard substantive investment protection rights contained in most BITs.²⁹ The wide-ranging influence of ISDS awards is also reflected in the reactions of *third-parties* to such awards.³⁰ For example, the decision in *Maffezini v Spain*,³¹ in which the investor was permitted to invoke the most-favoured nation ("MFN") clause in the Argentina-Spain BIT to apply the more favourable dispute settlement provisions of another treaty, led various

²⁸ It has been suggested that this may be due in part to the fact that there is significantly more room for the development of investment law than there is the law of commerce: Gabrielle Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity or Excuse?" (2007) 23 *Arbitration International* 357 at pp 374-375.

²⁹ Hwang & Lim at fn 169. The tribunal in *Waste Management Inc v United Mexican States (I)* (ICSID Case No ARB(AF)/98/2), in interpreting the standard of fair and equitable treatment, did not interpret fair and equitable treatment independently by using the methods of treaty interpretation under international law, but instead couched the meaning of the standard in terms of arbitral precedent: Schill at p 82.

³⁰ See Schill at fn 91.

³¹ *Maffezini v Kingdom of Spain* (ICSID Case No ARB/97/7); see Edoardo Stoppioni, "Jurisdictional Impact of Most-Favoured-Nation Clauses", Max Planck Institute Luxembourg, Department of International Law and Dispute Resolution: <www.mpi.lu/fileadmin/mpi/medien/research/MPEiPro/EiPro_Sample_Jurisdictional_Impact_of_MFN_Clauses_2017-Feb.pdf>. In a similar vein, Panama and Argentina reported exchanged diplomatic notes after the decision in *Siemens AG v Argentine Republic* (ICSID Case No ARB/02/8) to clarify that the MFN clause in their BIT did not extend to issues of dispute settlement.

other States to insert so-called “anti-*Maffezini*” clauses in their BITs to avoid the extension of their MFN clauses to issues of dispute settlement.

C. *The quasi-constitutional role of ISDS*

23. It follows from what I have presented thus far that ISDS does *more* than serve as a mechanism for the vindication of the private economic rights of investors. Rather, ISDS adjudication can and often does have a significant *public* impact, and therefore entails the discharge of a wider *public* function. While investment arbitration might, at first blush, appear to be nothing more than a dispute resolution mechanism concerned only with a *private* contract-like ordering between foreign investors and the States hosting their investments, I suggest that international investment law and ISDS have, in reality and in practice, claimed a far broader mandate. This extends to the establishment of a *public* law framework by articulating and applying norms of behaviour to govern international investment conduct and ultimately involves the systematic, objective control of State conduct.³² Further, those effects on state sovereignty are direct and immediate, regardless of whether the State in question subscribes to a dualist or monist theory of international law. This is not unlike the process of judicial review in domestic national courts and, in this sense, international investment law and the process of ISDS might even be said to take on a somewhat *quasi-constitutional role* as a form of supranational *public law*.

³² See generally, Schill at p 85; see also Choudhury at p 11.

24. Two points follow from this important proposition. First, if indeed investment law discharges *public* law functions, this raises serious questions as to whether the arbitral process through which these functions are discharged conforms to core *public* law values, such as transparency, accountability and consistency. I shall return to this point shortly when I discuss the *private* face of ISDS.

25. Second, it would appear that much of the present publicly voiced angst over ISDS might be attributed to a belated realisation of this very point – that ISDS is not simply a means of private dispute resolution between two disputing parties, but has become a quasi-constitutional process which, in effect, confers upon unelected, privately selected arbitrators a *de facto* power to determine the limits of government power and public policy.

26. Yet, these concerns should not be thought to be new, even if their potential impact might have been underestimated in some senses.³³ In the United States, for example, concerns were raised as early as 1965 by the head of the Securities and Exchange Commission that the investment arbitration regime might be used to challenge US financial regulations. These concerns

³³ While Broches did not raise issues of public policy in his opening speech, the representatives of some jurisdictions remained concerned that ICSID's jurisdiction could affect domestic policymaking. The expert-designate from Thailand, for example, argued that consent was an inadequate limit on ICSID's jurisdiction given that that jurisdiction entered the terrain of public policy. That said, many other expert-designates (with the exception of those from Thailand and India) seemed prepared to accept that public policies enacted in good faith would be unaffected by the ICSID Convention, and did not take seriously the idea that ICSID jurisdiction might restrict their policy autonomy: *The Rise of Investor-State Arbitration* at p 158.

were, however, given short shrift by the State Department, which assuaged the concerns with assurances that claims under the ICSID Convention would not be made *against* the United States, and noting that “[t]he support of the United States for the Convention is primarily designed to establish another mechanism for the peaceful settlement of investment disputes between investors *and the less developed countries*” (emphasis added).³⁴

27. Across the Atlantic, somewhat similar sentiments were held in the United Kingdom. One British memo, addressed to officials attending their first ICSID meeting, clearly shows how this thinking percolated through the negotiations and influenced the balances of power struck in the draft text. It reads:³⁵

“One of our main concerns... has been to ensure that there is no bias in favour of governments, as opposed to private parties to disputes, *since the British interest will relate almost entirely to the latter*” (emphasis added).

28. It would thus appear that while concerns were surfaced in at least some quarters of the historically capital-exporting States of the ‘developed’ world, that ISDS could potentially affect policy- and law-making, those were brushed aside on the assumption that investment treaty claims would only ever point in one direction – namely *by* investors in the historically capital-exporting ‘developed’ North *against* States in the capital-importing ‘developing’ South. This might

³⁴ *The Rise of Investor-State Arbitration* at p 175.

³⁵ *The Rise of Investor-State Arbitration* at p 149.

account, at least in part, for the willingness to overlook the process design limitations that inhered in ISDS.

29. That assumption certainly has not aged well.³⁶ Indeed, with the shifting geopolitical realities and social and economic trends, in particular in the course of this century, it is untenable even to think in terms of the developed North needing to protect its corporate investors from the dangers of venturing into the emerging markets. In truth, it is essential that the true extent of the *public* impact and reach of the ISDS process be apprehended by all of us.

III. The Private Face of ISDS: Process and Procedure

30. I come to the second part of my address: the *private* face of ISDS, more specifically, the private nature of the arbitral process and procedure. Let me begin by returning to the point which I had left earlier – that is, the mismatch between ISDS's *public* functions and the inherently *private* nature of the arbitral process by which those functions are to be discharged that underlies some of the criticisms of ISDS.

31. The hallmark of the arbitral process is, at least traditionally, a party-focused approach that prizes party autonomy. Developed within a purely commercial paradigm, arbitration could afford to be concerned only with the interests of the disputing parties and providing them with the utmost autonomy

³⁶ Several well-known ISDS decisions involve claims brought against States in the global North; see, for example, *Loewen Group, Inc and Raymond L Loewen v United States of America* (ICSID Case No ARB(AF)/98/3).

in terms of the process by which their dispute would be resolved. Over time, and reflecting its development in this primarily private and commercial milieu, it may be said that arbitration has, *by design*, chosen to prioritise certain values favoured by the parties over other core Rule of Law values.³⁷ Thus, private arbitration generally favours the parties' desire for confidentiality over the values of transparency and open justice; the party-appointment of arbitrators over concerns to assure the fact and even the appearance of the impartiality and suitability of the adjudicators; and the general preference of commercial parties for speed and finality over consistency and accuracy.

32. I do not propose, on this occasion, to question the validity of these trade-offs. My point, rather, is that given the *public* character of ISDS, we have to ask serious questions as to whether the balances struck in the paradigm of *private* commercial arbitration ought to yield to different balances that duly recognise that ISDS adjudication is not a purely private process, but one that engages vital public interests.

33. To consider this in the light of the public character of ISDS, we should especially consider three sets of Rule of Law values: (i) transparency; (ii) impartiality, independence and accountability; and (iii) consistency and predictability.

³⁷ SIAC Lecture at paras 50, 51 and 53.

A. *Transparency*

34. I begin with transparency. I suggest that there are at least two reasons warranting a sharper focus on transparency and accessibility.

(a) First, as I have just argued, ISDS decisions often touch on important issues of public policy that could affect the well-being of the general public. It is a foundational principle of democratic governance and the Rule of Law that one ought to have a say in matters which affect one's interests.³⁸ This weighs in favour of giving the public a right to know about such proceedings.³⁹

(b) Second, the principle of open justice is directly linked to the preservation of public trust and confidence in the ISDS process.⁴⁰ Transparency allows for public scrutiny of the process, and is therefore useful even if only to allow the public to see that the ISDS process is conducted according to law, and in a manner consistent with standards of fairness and due process.

³⁸ Choudhury at p 5.

³⁹ Diversity Deficit at p 419.

⁴⁰ SIAC Lecture at para 28.

35. However, ISDS has generally taken place under the conditions of confidentiality and privacy traditionally associated with commercial arbitration.⁴¹

(a) By and large, there is no public access to ISDS proceedings unless the parties agree;⁴² and while awards are published more frequently, most other documents, such as the pleadings or transcripts, remain private.

(b) Moreover, even where the specific institutional rules permit non-party input in the form of *amicus curiae* submissions, these are not envisaged or designed to afford an effective voice to the particular *communities* whose rights or interests may be at stake, as is often the case in ISDS disputes involving projects with environmental or public health ramifications. Ironically, it is those directly affected who are sometimes *excluded* from such processes where, for example,

⁴¹ Calamita & Zelazna, "The Changing Landscape of Transparency in Investor-State Arbitration" (2016) Austrian Yearbook on International Arbitration ("Calamita (2016)") at p 271. Born, "International Commercial Arbitration" ("Born") at section 20.01, citing *Del Coalition for Open Government Inc v Strine*, 733 F.3d 510, 518 (3d Cir 2013): "Confidentiality is a natural outgrowth of the status of arbitrations as private alternatives to government-sponsored proceedings. [W]e would be surprised to find that private arbitrations – taking place before private arbitrators in private venues – had historically been accessible to the public."

⁴² In *Aguas del Tunari SA v Republic of Bolivia* (ICSID Case No ARB/02/3), the tribunal denied citizens' and environmental groups standing at the arbitration due to the disputing parties' unwillingness to grant consent to their participation. Though see *Suez and Vivendi v Argentina (II)* (ICSID Case No ARB/03/19), where local groups and NGOs were granted limited *amicus* standing despite objections from the investor, the tribunal noting that the public interest warranted the need for *amicus*. In *Biwater*, the tribunal allowed 5 NGOs to submit a single brief, though they were denied access to the oral hearings due to objections from the investor; see also *Methanex*: see Magraw & Amerasinghe, "Transparency and Public Participation in Investor-State Arbitration" (2009) 15(2) ILSA Journal of International and Comparative Law ("Magraw & Amerasinghe") at p 353.

“neutrality” and the absence of any interest in the outcome of the case might be a requirement for appointment as *amicus*.⁴³

36. The adoption of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (“UNCITRAL Transparency Rules”) in 2013 may, from some perspectives, be seen as an encouraging sign. The UNCITRAL Transparency Rules provide for public access to documents and hearings, as well as public participation in ISDS proceedings.⁴⁴ While this gives some cause for cautious optimism,⁴⁵ many ISDS arbitrations are still conducted under conditions of privacy and confidentiality. This could be a result of the limited scope of the UNCITRAL Transparency Rules, which only apply to arbitrations arising from treaties concluded after the date of its adoption – 1 April 2014. A

⁴³ Columbia Center on Sustainable Investment, International Institute for Environment and Development and International Institute for Sustainable Development, “Third-Party Rights in Investor-State Dispute Settlement: Options for Reform” (15 July 2019): <ccsi.columbia.edu/files/2019/07/uncitral-submission-third-party-participation-en.pdf> at p 6. The lack of effective arrangements for the participation of affected entities closes a possible route to hold the parties to ISDS proceedings to account, and this, in turn, can have a serious impact on the legitimacy of the system: Durham University, IIED, “Reforming investor-state dispute settlement: what about third-party rights?” (February 2021): <<https://pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf>>.

⁴⁴ The UNCITRAL Rules on Transparency marks a departure from the position that arbitrations are generally private or confidential, and transposes aspects of the principle of open justice to ISDS proceedings. Under the Transparency Rules, key documents such as the Notice of Arbitration, pleadings, witness statements, transcripts and the Award will be made publicly accessible on a “Transparency Registry” maintained by the UNCITRAL Secretariat; hearings will be made public by default; and third parties who can demonstrate a “significant interest” in the matter may be allowed to participate and make submissions. That the UNCITRAL Transparency Rules were approved unanimously by UNCITRAL’s 60 members seems further evidence of a growing recognition for the need for transparency in ISDS: see Ribeiro & Douglas, “Transparency in Investor-State Arbitration: The Way Forward” (“Ribeiro”) at p 65.

⁴⁵ Several new US and EU BITs now include provisions on transparency: see Calamita (2016) at pp 278-279.

separate Convention, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, or the Mauritius Convention, extends the application of the UNCITRAL Transparency Rules to the more than 2,600 international investment agreements concluded before that date, but to date, only seven States have ratified it.⁴⁶ It would appear, therefore, that until instruments like the Mauritius Convention gain widespread adoption, investment arbitration has at best a limited claim to upholding the principle of transparency.

37. Of course, this is not to suggest that transparency – in the form of rights of public access and participation – is necessarily a panacea that cures all ills. Greater rights of public participation might allow tribunals to be better apprised of wider interests implicated in the dispute, but this does not resolve the deeper issue of *private* tribunals having neither the political or democratic mandate, nor, necessarily, with respect, the institutional competence, to address issues which touch on *public* policy. I return to this issue later.

B. Impartiality, independence and accountability

38. The second set of values concerns the impartiality, independence, and accountability of arbitrators. I begin with accountability, which is a broad principle flowing from the public face of ISDS discussed earlier. If we accept that international investment law is in many respects a *public* law discipline which

⁴⁶ Durham University, iied, “Reforming investor-state dispute settlement: what about third-party rights?” (February 20219):
<<https://pubs.iied.org/sites/default/files/pdfs/migrate/17638IIED.pdf>>.

checks the exercise of governmental power and creates norms that limit and restrain State power generally, then it seems problematic that the adjudicators who discharge these functions are seldom, if ever, from the States whose regulations are under scrutiny, often do not have experience in public law or public administration, and yet are empowered to make decisions that potentially implicate the interests of many millions following a private process, typically without the involvement of those who might be affected.

39. The accountability deficit has at least four aspects:⁴⁷

(a) First, and unlike national court judges, investment arbitrators often have no relationship to the state in question or its domestic polity and are not accountable to that public.

(b) Second, investment arbitrators are not obliged (and are, in any case, are not equipped) to take the wider public interest or public policy issues into account; they are bound to apply the applicable international or commercial law, and nothing more. The relevant public policy concerns will often have a deeply domestic focus and arbitrators will typically have neither the means nor necessarily the qualifications to grapple with this. To put it simply, they have neither the mandate nor the

⁴⁷ Choudhury at pp 1-2, 32-34.

capacity to hold public consultations or base their decisions on polycentric considerations of public policy.

(c) Third, investment arbitration tends to be shrouded in relative confidentiality, and therefore investment arbitrators are not accountable to the public in the way national judges are through open hearings or media reportage.

(d) Fourth, unlike the decisions of national court judges, which are subject to potential legislative override, investment arbitrators' decisions are not subject to any such safeguards and are, with very limited exceptions,⁴⁸ immediately enforceable.

40. The issue of accountability is a much simpler prospect in the context of private *commercial* arbitration, where the primacy accorded to party autonomy (including the autonomy to choose one's adjudicators) comfortably rests on the notion that the result of the process affects nobody but the parties themselves. This, as I have argued, does not hold true in the context of ISDS.

41. I turn next to the impartiality and independence of adjudicators, which is a basic principle of natural justice. By most indications, the institution of party-

⁴⁸ ICSID awards, for example, are immediately enforceable and not subject to challenge in any court; post-award remedies are limited to those available under the review process provided for under the ICSID Convention. Non-ICSID awards are subject to curial review in setting aside or enforcement proceedings, though the grounds for annulment or refusal of enforcement tend to be limited under most national *lex arbitri*.

appointed arbitrators remains a popular feature of arbitration.⁴⁹ Despite its popularity, of course, it remains an issue of abiding controversy.⁵⁰ Leading practitioners like Professor Jan Paulsson have argued that the practice is a “moral hazard”, and such concerns may not be unwarranted.⁵¹ Party-appointed arbitrators have also been found at the heart of at least one recent and extremely damaging public scandal. In 2017, news broke of a corruption scandal involving a Brazilian company, Odebrecht, which had bribed its appointed arbitrator to render arbitral awards so as to give corruptly-induced contractual modifications a veneer of legality.⁵² It seems then, that the risk of partiality and bias, though, undoubtedly quite low, is not imaginary.

42. In private *commercial* arbitration, which concerns the parties and them alone, one could justifiably argue that it is for them to decide whether to take the risk of such concerns materialising, since they are best placed to assess and bear the risks. But given the public character of *investment* arbitration and its

⁴⁹ Born at section 12.01A, see fn 11. See the QMUL White & Case, “2018 International Arbitration Survey: The Evolution of International Arbitration” at p 7, stating that the ability of parties to select their own arbitrators was seen as the fourth-most valuable characteristic of international arbitration; see also the QMUL 2020 Survey, which focused on investment arbitration, where all respondents interviewed said that they valued the ability of parties to select the arbitrators: QMUL and Corporate Counsel International Arbitration Group, “2020 QMUL-CCIAG Survey: Investors’ Perceptions of ISDS” (May 2020) at p 17.

⁵⁰ SIAC Lecture at para 35.

⁵¹ Statistical evidence suggests that almost all dissenting opinions are written by the arbitrator nominated by the losing party: see SIAC Lecture at fn 70, citing Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013) at p 163.

⁵² Carlos Ríos Pizarro, “Mixing Righteous and Sinners: Summary of the Odebrecht Corruption Scandal and the Peruvian Jailed Arbitrators” (10 December 2019), Kluwer Arbitration Blog <<http://arbitrationblog.kluwerarbitration.com/2019/12/10/mixing-righteous-and-sinners-summary-of-the-odebrecht-corruption-scandal-and-the-peruvian-jailed-arbitrators/>>.

potential to affect constituencies beyond the disputing parties, serious consideration might be given as to whether it is appropriate to place the appointment of adjudicators entirely in the hands of the parties, or whether more safeguards are warranted.

43. This is an issue of particular relevance to ISDS given that the pool of international arbitrators and practitioners here is far smaller than in international commercial arbitration. This makes potential conflicts of interest more likely to occur.⁵³ Two are of particular concern.

44. The first results from what is often described as “double-hatting”,⁵⁴ which occurs where practitioners *simultaneously* sit as arbitrator and act as counsel in different cases.⁵⁵ The concern is that double-hatting may result in situations which lend themselves to the *perception* of bias, such as where co-arbitrators in a first case act as counsel and arbitrator in a second case,⁵⁶ or where arbitrators and counsel switch roles in different arbitrations.⁵⁷ Be clear; I am not

⁵³ *Halliburton Company v Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)* [2020] UKSC 48.

⁵⁴ Some have called this “one of the most significant problems of the investment arbitration regime”: see Corporate Europe Observatory, “Profiting from Injustice” (“Profiting from Injustice”) at fn 37.

⁵⁵ Langford, Behn and Lie, “The Ethics and Empirics of Double Hatting” 6:7 ESIL Reflection (2017), finding that this occurred in 47% of all cases. Within 190 of these cases, there were also participating legal counsel double-hatting elsewhere as arbitrators: Langford, Behn & Letourneau-Tremblay, “Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?” (“Empirical Perspectives”) at fn 207.

⁵⁶ See Fry & Stampalija, “Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes” (“Fry & Stampalija”) at p 250 for examples.

⁵⁷ See Fry & Stampalija at p 250 for examples.

suggesting that such situations inevitably result in bias; rather, even if one takes the (justifiable) view that the risk of *actual* bias is adequately managed by relying on the professionalism and moral scruples of those in the community of arbitrators, such situations can give rise to the *appearance* of bias.

45. The second type of conflict is “issue conflict”, which refers to conflicts of interest that arise from the arbitrator’s relationship not to the parties or counsel, but from her dealings concerning the *subject matter* of the case.⁵⁸ Where an arbitrator hears a case involving a particular issue that also arises in a separate case in which that arbitrator is acting as counsel, concerns might arise as to whether her decision rendered as *arbitrator* was influenced by the position she would be professionally and ethically bound to advance as *counsel* in the other case.⁵⁹

46. The growing involvement of third-party funders in ISDS adds a further layer of complexity to the challenge of ensuring the independence and

⁵⁸ To the extent that the worry is that an arbitrator may struggle to keep an open mind having expressed a view on the same issue on a previous occasion, such fears seem unfounded, especially when one considers that such situations readily present themselves in the context of adjudication before national courts. As Jan Paulsson pithily put it: a litigant “will be certain to address perfectly open minds only if he is prepared to be judged by very young children”: cited in Hwang & Lim at para 11.

⁵⁹ Thus, in *Telekom Malaysia v Ghana*, an arbitrator’s appointment was challenged on the basis that he would not be able to impartially consider Ghana’s argument based on the award in another case, *Consortium RFCC v Morocco*, because that arbitrator was acting as counsel in that case, seeking the annulment of that award. The challenge was brought to the District Court of the Hague, which upheld the challenge, holding that the arbitrator would, in his capacity as counsel in the *Morocco* case, be duty-bound to put forward all conceivable objections against that award, and that it would therefore be impossible for him to avoid the appearance of being biased against reliance on the *Morocco* award.

impartiality of arbitrators.⁶⁰ A number of arbitrators have reportedly taken up consultancy roles with third-party funders,⁶¹ and the fact that there is currently no systemic requirement in ISDS proceedings for the disclosure of such relationships (or even the involvement of third-party funders) makes it more difficult to address the problem.⁶²

C. Consistency and predictability

47. I turn finally to the twin values of consistency and predictability. These again are of heightened importance given the public character of ISDS for at least three reasons.

(a) First, inconsistency is but one step removed from arbitrariness, which, in many ways, is the antithesis of fairness and justice. After all, how can diametrically opposed decisions on what is essentially the same

⁶⁰ It is difficult to assess exactly how widespread this issue is, though, according to one estimate from a major funder, at least two-thirds of ICSID cases filed in 2013 involved claimants which had sought resources from a major funder. There is a general consensus within the arbitral community that the TPF presence is significant and increasing: Guven, “Regulating Third-Party Funding in Investor-State Arbitration Through Reform of ICSID and UNCITRAL Arbitration Rules: Holding Global Institutions to their Development Mandates” (“Guven”) at p 288, fn 1.

⁶¹ Brekoulakis & Rogers, “Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy” (2 October 2019): <<https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/papers/13-rogers-brekoulakis-tpf-isds-af-13-2019-version-2.pdf>> at pp 11 and 13.

⁶² Frank Garcia and Kirrin Hough, “Third Party Funding in International Investor-State Arbitration” (2016) 22(16) ASIL at p 4: <<https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2201&context=sfp>> see UNCITRAL WG III, “Possible reform of investor-State dispute settlement (SIDS), Third-party funding - Possible solutions”, A/CN.9/WG.III/WP.172 at para 7, noting that “third-party funding in ISDS remains largely unregulated”.

subject matter *both* be fair? Investment arbitration's ability to produce broadly consistent outcomes is central to public perceptions of its fairness, and, in turn, its legitimacy.

(b) Second, one of the most significant aspects of the public character of investment law and ISDS is its capacity to guide the behaviour of investors and states. In order that ISDS may discharge this function, stability and predictability are key. International investment law is still developing,⁶³ but useful normative standards cannot emerge without a sufficient measure of consistency of application.⁶⁴

48. A third, allied reason for seeking greater consistency and predictability in ISDS is that investment law seems, in some ways, especially susceptible to inconsistent decisions, perhaps because of two features:⁶⁵

(a) First, the principles of investment law, as contained in international investment treaties, tend to take the form of relatively broad, open-textured legal concepts which are open to different interpretations. Two

⁶³ International investment law only emerged in its current form in 1959 when Germany and Pakistan adopted a bilateral agreement. ICSID was not established till 1965, and significant case law in international investment law did not begin to take shape until the early 1990s with the end of the Cold War: International Bar Association, "Consistency, efficiency and transparency in investment treaty arbitration" ("IBA 2018 Report") at p 6.

⁶⁴ Consistency is therefore essential to the development of investment law and the Rule of Law in investor-state disputes: see Gabrielle Kaufmann-Kohler, "Is Consistency a Myth": <<https://lk-k.com/wp-content/uploads/Is-Consistency-a-Myth.pdf>> at p 145.

⁶⁵ IBA 2018 Report at p 6.

cases in point are *National Grid plc v Argentina*⁶⁶ and *BG Group plc v Argentina*,⁶⁷ both of which concerned the standards for “fair and equitable treatment” and “protection and security” under Art 2(2) of the UK-Argentina BIT. In both cases, it was alleged that certain emergency legislation adopted by Argentina in the wake of its 2002 financial crisis had destroyed the remuneration regime provided for under the relevant concessions, thereby resulting in the unlawful withdrawal of the “protection and security” granted to the investment. The two tribunals reached opposite decisions based on two differing interpretations of essentially the same words; the *BG Group* tribunal rejected the investor’s claims on the basis that “protection and constant security” referred only to the protection of the *physical* security of the investment, whereas the *National Grid* tribunal allowed the claim because it found no reason to limit the application of the protection to the physical security of physical assets.⁶⁸

(b) The second feature is their tendency towards factual similarity and even, in some cases, factual *identity*. It is not uncommon for several

⁶⁶ *National Grid plc v The Argentine Republic* (2003).

⁶⁷ *BG Group plc v The Republic of Argentina* (2003).

⁶⁸ Julian Arato, Yas Banifatemi, Chester Brown *et al*, “Working Group No 3: Lack of Consistency and Coherence in the Interpretation of Legal Issues” (30 January 2019): <https://www.cids.ch/images/DOcuments/Academic-Forum/3_Inconsistency_-_WG3.pdf> at paras 17-21; Elizabeth Whitsitt, “Tribunal rebuffs defense of necessity in recently published award: National Grid plc v Argentine Republic” (2 March 2009): <<https://www.iisd.org/itn/en/2009/03/02/tribunal-rebuffs-defense-of-necessity-in-recently-published-award-national-grid-p-l-c-v-argentine-republic/>>.

investors to challenge the same state measure or group of measures in separate cases before different tribunals, thus contributing to the risk of inconsistent arbitral decisions.⁶⁹ For example, both *CMS v Argentina*⁷⁰ and *LG&E v Argentina*⁷¹ involved the suspension of tariff adjustments in privatised utility companies. The facts in both arbitrations were similar,⁷² but the two tribunals came to opposite conclusions on the question whether Argentina's financial crisis amounted to a state of necessity.⁷³

49. In its present form, investment arbitration does not seem well-placed to address these concerns of inconsistency and incoherence. This is because arbitration, with its traditional focus on the *private* resolution of individual disputes, generally lacks a robust procedural means for enforcing consistency whether from the bottom-up – through, for example, a formal system of precedent – or from the top-down, through an appellate mechanism. The result is that inconsistency and unpredictability remain among the challenges facing investment law and ISDS.

⁶⁹ IBA 2018 Report at p 7.

⁷⁰ *CMS Gas Transmission Company v The Argentine Republic* (ICSID Case No ARB/01/8).

⁷¹ *LG&E Energy Corp, LG&E Capital Corp, and LG&E International Inc v Argentine Republic* (ICSID Case No ARB/02/1).

⁷² The respective investors sought an upward adjustment of the said tariffs, whereas Argentina maintained that a tariff freeze was essential due to an ongoing economic crisis. The issue was whether Argentina could rely on the defence of necessity.

⁷³ The *LG&E* tribunal found that Argentina's financial crisis amounted to a state of necessity, notwithstanding that the tribunal in *CMS* had reached the opposite conclusion some 18 months earlier: see Michael Waibel, "Two Worlds of Necessity in ICSID Arbitration: *CMS* and *LG&E*" (2007) 20 *Leiden Journal of International Law* 637 at pp 643-644.

50. Let me take stock of the ground we have covered thus far.

(a) I began by suggesting that the *legitimacy* of a system is, at least in part, predicated on its ability to conform broadly to basic Rule of Law values which are the hallmarks of procedural fairness and justice. Three values, in particular – transparency, accountability, and consistency – take on heightened importance in the context of *investment* arbitration because of its *public* character and function.

(b) The question this raises is whether the arbitral process, which is, at its heart, a *private* process designed for *private* dispute resolution, remains capable of upholding these values, adherence to which seems *essential* given the significant *public* dimensions to the settlement of investment disputes.

(c) I then suggested that it may not, and that ISDS's ability to fully adhere to these Rule of Law values has been hindered by several features of the arbitral process – including confidentiality, party-appointment of arbitrators, the lack of an appellate mechanism or a formal system of precedent – all of which are reflections of arbitration's origins as a *private* means of dispute resolution, and its tendency therefore to prioritise objectives favoured by the parties over full adherence to core Rule of Law values.

51. Tying these threads together, my point is that ISDS's struggle to sustain those Rule of Law values – leading therefore to its loss of legitimacy – might be

seen to some degree as the result of a mismatch between the *public* nature and significance of its functions, and the traditionally *private* nature of the process by which those functions have been discharged.

52. Given this, the question that arises is: how then might the process of ISDS be reformed so that it remains fit for purpose notwithstanding the significant *public* dimensions of its functions?

IV. The Way Forward: Matters for Consideration

53. This brings me to the final part of my address, which considers briefly the way forward and the various proposals for reform.

54. If we accept that ISDS's ability to sustain the values of impartiality, transparency and consistency are important to secure its legitimacy, then I suggest that we must be prepared to reconsider the suitability of certain longstanding and cherished features of the arbitration process for ISDS.

55. At least one part of the solution might therefore lie in the reform of the existing arbitral process so that it more closely adheres to those values. Indeed, many of those features of private commercial arbitration, which became problematic in the ISDS context, while longstanding and much cherished, do not *define* the arbitral process, and therefore seem amenable to incremental change. Let me explain briefly.

- (a) First, confidentiality. While this has long been taken for granted as a fixture of the arbitral process, the major international conventions on

international arbitration do not directly address the subject of confidentiality, and many national legal systems do not in fact provide for confidentiality of proceedings absent express provision to this effect by the parties.⁷⁴ In fact, the centrality of confidentiality, even in *commercial* arbitration has come under question in recent years, and there are now some who contend, for instance, that confidentiality in English arbitration should be an opt-in feature rather than a default.⁷⁵

(b) Second, the appointment of arbitrators is undoubtedly a longstanding feature of arbitration.⁷⁶ Yet, apart from appeals to tradition, it is not clear *why* giving parties unbridled control over the appointment of arbitrators should be an indispensable feature of arbitration. Indeed,

⁷⁴ Born at sections 20.02 and 20.03.

⁷⁵ Constantine Partasides QC & Simon Maynard, "Raising the Curtain on English Arbitration" (2017) 33 *Arbitration International* 197 at p 202: "Already we have seen the outcry against investment arbitration that finds its loudest voice in complaints about a lack of transparency. It would be naïve to presume that such complaints are not affecting the world of commercial arbitration. Accusations of shadowy 'private courts' will not get any easier to rebut or explain over time. And mixed in with all of this is the absence of the behavioural advantages that will come with the scrutiny that public information will provide on the performance of the participants in this process." See also Ben Juratowitch QC speaking of *commercial* arbitration: "Justifying secrecy based on the supposed expectations of those who use it will be too narrow a foothold successfully to defend it.": Foden & Repousis, "Giving away home field advantage: the misguided attack on confidentiality in international commercial arbitration" ("Foden & Repousis") at p 403.

⁷⁶ Born at section 12.01A. The late VV Veeder described it as a "historical keystone" to international arbitration: VV Veeder, "The Historical Keystone to International Arbitration: The Party Appointed Arbitrator – From Miami to Geneva", *Proceedings of the ASIL Annual Meeting*, vol 107 (2013), pp 387-405.

several recent FTAs have already replaced the practice of *ad hoc* tribunals and party-appointed arbitrators with standing tribunals.⁷⁷

(c) Third, another salient feature of international arbitration is the absence, in most cases, of the possibility of appellate review of arbitral awards.⁷⁸ However, there seems to be a growing recognition in recent years that the availability of *some* means to correct at least a wildly eccentric or wrong arbitral decision may be useful.⁷⁹

56. It is certainly arguable therefore that these are by no means definitional features of arbitration and that they can be dispensed with without fundamentally altering the nature of the arbitral process. Rather, arbitration's core defining traits are its flexibility and agility – its unparalleled ability to “adapt its procedures to meet the specific needs of disputes and disputants”.⁸⁰

57. This flexibility allows for a calibrated approach to be taken; the options for reform should not be seen as binary, but rather, as resting on a sliding scale of potential balances between giving effect to the parties' desires and expectations of the dispute resolution process on the one hand, and upholding

⁷⁷ See the CETA, the EU-Vietnam FTA and the EU-Singapore FTA, discussed in Sardinha, “Party-Appointed Arbitrators No More” (“Sardinha”) at p 128.

⁷⁸ Born at section 1.02B(5).

⁷⁹ In the 2015 and 2018 editions of the QMUL survey, the lack of an appeal mechanism was ranked the fourth and eighth worst characteristics of international arbitration, respectively.

⁸⁰ SIAC Lecture at paras 67-68.

its legitimacy through adherence to the core values of the Rule of Law on the other. Thus:

(a) A calibrated approach to transparency could be achieved by adjusting variables such as which documents are made public, when and to whom, and which third parties may attend the proceedings.

(b) Likewise, an incremental approach to reform the process for the appointment of arbitrators might involve the retention of party involvement in the selection process, but in an attenuated form, such as by having them select from a pre-approved list, or by instituting a system of 'blind' appointments so the arbitrators are unaware which party appointed them.

(c) The same is true of reform that introduces some means of appellate review. Concerns that this could unduly compromise the values of speed and efficiency could be addressed, for example, by adjustments to the precise *standard* of appellate review.

58. All that having been said, none of these adjustments, whether taken individually or collectively, can claim to be a complete solution to the more fundamental problems that I have alluded to. Let me close by highlighting just two concerns.

59. The first is what I have referred to as the problem of institutional competence. The public nature of investment disputes entails that matters of

public policy are implicated. Greater transparency and public participation should, in theory, enhance the legitimacy of the process and the quality of the decision-making by having the wider political and economic ramifications of the issues in dispute placed before the tribunal. Yet, in practice, it is simply unclear how far tribunals may have regard to such considerations, both as a matter of law and as a matter of *institutional competence*.⁸¹ More fundamentally, deep questions arise when an unelected, privately-appointed panel of arbitrators sits in judgment over the policy choices of a government, which represent the democratic will of an electorate to whom that panel is not accountable.

60. The second concerns the diversity of the adjudicators. There is a growing sense that decision-making bodies should reflect the diverse constituencies that are subject to their decisions, and that a failure to secure this can adversely impact their legitimacy in the eyes of the unrepresented.⁸² Yet, arbitrators from the global North dominate the field of ISDS. According to a 2020 study, of the 695 arbitrators who have sat in at least one ISDS case, only 35% were from non-Western States, and 22 of the 25 most influential arbitrators hail from North America and Europe.⁸³ It is clear who continues to hold the upper hand in the development and application of what I have suggested is a quasi-constitutional

⁸¹ It might be argued that ISDS tribunals are not “guardians of the public interest” and therefore should not have regard to the wider socio-economic implications of the issues in dispute. On the other hand, it is questionable if government policy enacted in pursuance of non-investment public interests should be adjudicated purely on the basis of commercial principles: see Choudhury at p 1.

⁸² Diversity Deficit at p 412.

⁸³ Diversity Deficit at pp 411 and 416.

supranational form of public law, and given the shifting geopolitical, economic and social realities that I have alluded to, this is surely not sustainable. How then might diversity be promoted in a system where, because of the high stakes, a premium is placed on experience in the selection of arbitrators?

61. The answers to these questions probably lie beyond making incremental tweaks to the arbitral process. At the same time, more revolutionary reform such as the establishment of a multilateral investment court may not be a panacea. Indeed, it is unclear if an investment court would resolve the problem of institutional competence, since its judges too would not be accountable to domestic national politics in the way that national judiciaries are.⁸⁴ Likewise, the diversity problem may not necessarily be solved by an investment court, since its representativeness would ultimately depend on its size and on the choices that States make in selecting the judges.⁸⁵

62. There is, in short, no silver bullet to resolve the legitimacy crisis. The road to reform is likely to be long, but, one hopes, it might be made smoother by a commitment to serious and open-minded discussion of these issues, a willingness not to wed oneself to intractable, structural positions, and a genuine

⁸⁴ Some scholars argue that all international courts and tribunals suffer from some measure of a 'democratic deficit', which calls into question their legitimacy and competence to make decisions related to socio-economic conditions at the national level because they consist of adjudicators who are not elected or otherwise democratically chosen. It has been suggested that, for this reason, the democratic accountability of international courts and tribunals might not be as high as that of their domestic counterparts: see Flavia Marisi, "Chapter 6: Interpretation Doctrines" in *Environmental Interests in Investment Arbitration* (Kluwer Law International, 2020) at p 223.

⁸⁵ Diversity Deficit at p 437.

desire to find common ground. The conditions for such an open discussion may in some respects be in place given the reality that the difficulties inherent in the process will affect all of us. In this way, through a process of thoughtful reform, we might lay the ground for the reconciliation of ISDS's public and private faces.

63. Thank you very much.