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Investment Arbitration under the Spotlight - What next for Asia

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The topic chosen by the Organizers for the Herbert Smith Freehills Lecture 2014 – is:

> **"Investment Arbitration under the Spotlight – what next for Asia?**

Let me assure you at the very start that *International Investment Arbitration* in Asia is alive and well, and also much in vogue around the world[1]. The 'Spotlight' on it is only because it is under considerable stress: not at all surprising, since International Arbitration itself has never been too popular amongst nation-states around the world!

Back in the year 1907 – more than 100 years ago – an outspoken American Lawyer, Elihu Root – who was also

Secretary of State to two U.S. Presidents – said (in a speech to the Arbitration and Peace Congress in New York):

> (Quote)
> "It has seemed to me that the great obstacle to the universal adoption of arbitration is not the unwillingness of civilised nations to submit their disputes to the decision of an impartial Tribunal. *It is the apprehension that the Tribunal selected will not be impartial."*[2]

To me, this reads like a breath of fresh-air. Nowadays, views are not expressed quite so candidly.

In Paris, way back in 1983, at the 60th Anniversary celebrations of the ICC Court of International Arbitration, I was eye – witness to a clash between a distinguished proponent, and an equally distinguished opponent, of international arbitration. During one of the sessions, Judge Howard Holtzmann (Arbitrator Emeritus from the United States), confident that he was expressing a widely-accepted view, stressed the idea of Judge and Arbitrator being "partners in a system of

international justice". But Judge Keba Mbaye, (then President of the Supreme Court of Senagal, later a Judge of the International Court of Justice and also its President) differed. He said that "the notion that there is a system of International Justice will not be shared by some countries notably those in Africa, Asia and Latin America who still see arbitration as a 'foreign' judicial institution imposed upon them".

Mbaye recalled the hostility of African Courts to arbitrators by foreign tribunals, and said: (I quote)

> "as everybody knows, arbitration is seldom freely agreed to by the developing countries. It is often included in contracts of adhesion, the signature of which is essential to the survival of these countries".[3]

He also complained (at the time, a valid complaint) that developing countries were rarely the venue of an international arbitration, and, even more rarely, produced arbitrators.

Keba M'baye was a jurist – but he was a jurist with a vision. At the Paris Conference he expressed the hope that "International Arbitration" would gradually gain third world acceptance – and ultimately secure *third world confidence.*

As to third world acceptance of investment treaty-arbitration the process had started with efforts to have a multi-lateral treaty but this was not successful – because there was disagreement between capital-exporting states and capital – importing states as to the standards to be prescribed for treatment of foreign investors. So, in the nineteen-sixties, capital-exporting states entered into investment treaties with individual capital-importing states: The era of *Bilateral Investment Treaties* had begun: treaties between two nation-states that were dedicated to the promotion and protection of foreign investment (in the Host-State).

At about this time, there also came into existence and operation a World-Bank-sponsored International Convention – "the Washington Convention 1965 – on the Settlement of Investment Disputes between States and Nationals of Other States". This Convention provided a system for the settlement by conciliation and arbitration of *investment disputes* between a State party to the Convention and nationals of the Other State. When the Convention opened for signatures in the mid-1960s it was hailed as a great achievement of World Bank diplomacy. The Washington Convention put in place for the first time a general system of compulsory arbitration against Contracting States for all matters relating to international investments – at the instance of private actors in international economic relations. Signatories to the Washington Convention 1965 now include – *forty-six* countries on this vast Asian Continent – of which *thirty-five* are not as yet 'high-income' (the World Bank criteria for 'developed' countries):

– only *eleven* are in that category.[4]

By entering into a bilateral investment treaty, States act in their public international role as treaty-parties. And by *consenting,* that disputes with investors of the Home-State will be determined by arbitration, the Host State accepts a process closely resembling international commercial arbitration, in which the Host State is cast as the only respondent in claims brought by the investor (of the Home State)."[5]

BITs oblige governments to conduct their relations with foreign investors in a transparent fashion. Some reciprocal if not identical obligations lie on the foreign investor, one of which is the obligation to make investments in accordance with the host State's law. As often observed in decisions of ICSID tribunals –

"respect for the integrity of the law of the host state is a critical part of international investment law".[6]

The most innovative aspect of a Bilateral Investment Treaty (BIT) is the opportunity it provides to investors of capital-exporting states (the Home State) to directly enforce against the Host-State substantive rights in respect of investments made in it. In addition, such Investors are also provided with an agreed forum to redress alleged wrongs: a forum for dispute resolution (by arbitration) that excludes the National Courts of the country where the investment is made – foreign investors having little or no confidence in the Courts of the Host-State.[7]

Judge Charles Brower (alongwith Richard Lillich) find this not at all surprising. In their Introduction to a book (containing articles) titled: "International Arbitration in the 21st century", they write that:

> "parties to international transactions choose to arbitrate eventual disputes *not* because arbitration is simpler than litigation, *not* because arbitration is cheaper than litigation, not because arbitration is final and binding and therefore substantially unreviewable, *not* because arbitrators may have greater expertise than national judges. *They arbitrate simply because neither will suffer its rights and obligations to be determined by the other party's state of nationality. In a word "a distrust of national courts".*[8]

For this reason – if for no other – The Washington Convention 1965 (for Settlement of Investment Disputes between States and Nationals of other States) has been a great success – 159 nation States around the world are now parties to it (including 46 from the continent of Asia); equally successful has been that other multilateral International Convention – The New York Convention 1958 [*the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958*] – to which 147 countries around the world are now parties (including 21 from the continent of Asia).

Judge Keba M'baye's hope expressed at the 60th Anniversary celebrations of the ICC, in Paris, has been fulfilled – at least in part. There is now third-world acceptance of international (investment) arbitration.

But, international investment arbitration has not – not as yet – gained third-world[9] confidence; and there are critics from the First World as well! Their criticisms are documented and are in the public domain:-

(1) ***First***: Kluwer Law International gathered together and published, in the year 2010, a series of articles critical of international investment arbitration in a book titled "*The Backlash Against Investment Arbitration – Perceptions and Realities*": In the Foreword it is mentioned that "States receiving investments are now rethinking the costs and the benefits they derive from these arrangements".

(2) ***Second***: on 31-08-2010 – nearly 50 professors of international law and economics – (many from the First World[10]) issued a 'Public Statement' – expressing views that were not at all flattering to the Bilateral-Investment Treaty regime[11]. It said:

(i) that investment treaty arbitration as currently constituted was not a fair, balanced or independent method for the resolution of investment disputes, and should not be relied on for this purpose.

(ii) that there were strong moral as well as policy considerations for governments to withdraw from investment treaties and to oppose investor-state arbitration; and

(iii) that Investment contracts (not investments treaties) should be the preferred choice since: (as the Public Statement put it): "they allow for greater care to be taken and greater certainty to be achieved in the framing of the parties' legal rights and obligations".

(3) ***Third***: Just two years after the Public Statement of 2010, more than a hundred lawyers in countries around Asia and the Pacific Region addressed an open-letter (in May

2012)[12] to those who were negotiating the Trans-Pacific Partnership (TPP)[13] (the TPP is still under negotiation today!). The letter urged the rejection of investor-state dispute settlement: BECAUSE:

(i) foreign investor protection under Bilateral Investment Treaties and their enforcement through investor-state arbitrations undermines the justice system in various countries;

(ii) all investors, regardless of nationality, must have access to an open and independent judicial system for the resolution of disputes, including disputes with the State Government;

(iii) in decisions issued under the present system foreign investors are increasingly granted more rights than are provided to domestic firms as well as investors under the Host State's Constitution and court system;

(iv) members of Arbitral Tribunals permit (or turn a blind eye to) lawyers who rotate roles: at times as arbitrators and at times as advocates for investors – in a manner that would be totally unethical for Judges; and

The letter concluded that investment arbitration, as currently constituted, was not a fair, independent, and

balanced method for the resolution of disputes between sovereign nations and private investors.

(4) ***Fourth***: After the academics, and the men and women of the law and in public service have spoken, the journalists too have had their say! The prestigious weekly 'the ECONOMIST', in one of its latest issues (of October 11, 2014), characterised the Investor-State-Dispute Settlement Regime (ISDS) as "The Arbitration-Game". It offered the following comments, in spiced but dignified journalese: viz.

- "that, the first Investor State Dispute Settlement (treaty) between Germany and Pakistan in 1959 was to encourage foreign investment by protecting investors from discrimination or expropriation, but (as ECONOMIST then adds): "the implementation of this laudable idea has been disastrous".

- that Multinationals have exploited woolly definitions of "expropriation" to claim compensation for changes in government policy that happen to have harmed their business.

- that the rise in contentious arbitrations is only because companies or corporations have now learnt how to exploit arbitral clauses, even going as far as buying-off firms in jurisdictions where they do not operate, only to gain access to them!

- that the secretive nature of the arbitration process and the lack of any requirement to consider precedent, allows plenty of scope for (what the ECONOMIST calls) – "creative adjudications".

Strong words – some harsh words – but as Keynes (John Maynard Keynes the greatest English Economist of the 20th century) famously said: "words ought to be a little harsh because they are an assault on the thoughts of the unthinking".[14]

Is all this criticism valid? Are these onslaughts on the "thoughts of the unthinking" justified?

International Arbitrators, including those in the Bradman Class, would not agree. They would say that the entire tribe of

lawyers, law Professors, academics and irate members of the public (and now, even journalists) are hopelessly ill-informed. That may well be. But I would respectfully point out that when one is considering whether awards that emanate from arbitral tribunals (ICSID, UNCITRAL, ad hoc or any other) are *fair*, *balanced* and *accurate*, one does not go to members of these bodies for a dispassionate assessment! It would be a bit like asking Sitting Judges of a Court as to what their views are on the speed, reliability and efficiency of the Justice System that they administer – No – *you have to ask the outsider* – and those outside arbitral halls appear not to be too enthused with the manner in which investment disputes are being currently resolved.

That the widespread criticisms are not all that ill-informed or exaggerated is established by the 2013/2014 Official Reports of the United Nations Conference on Trade and Development

(UNCTAD).[15] In these Reports are listed (what are characterised as) "systemic deficiencies" in the Investment Treaty Regime:–

- First (and perhaps the most important) that "there is no possibility of erroneous decisions of the arbitral tribunal being corrected on a review";

- Second, that Foreign Investors have used investor-State dispute settlement claims to challenge measures adopted by the host-State even when they are in public interest;

- Third, that findings in arbitral decisions are inconsistent - with divergent legal interpretations of identical or similar treaty provisions;

- Fourth, that there is grave concern about the independence and impartiality of arbitrators: and the increasing number of challenges to arbitrators indicates that disputing parties perceive them as biased, or pre-disposed to a particular pre-conceived point of view;

- Fifth, that the actual practice of the investor-State dispute system has put in doubt the oft-quoted notion that arbitration represents a *speedy* and *low-cost method* of dispute resolution;

- Sixth, that arbitrations – go on far too long – many of which take several years to conclude; and

- Seventh, that large and prosperous law-firms dominate international investment arbitrations – charging high fees and employing expensive litigation-techniques: their representatives also indulge in burdensome and excessive document-discovery and long arguments.

UNCTAD has recommended:

- introducing an Appeals facility and creating a Standing International Investment Court: which is definitely needed, but at the present time, there is no institution having authority to create it;

UNCTAD has also suggested:

- that it should be made compulsory for investors to "exhaust local remedies" before resorting to international arbitration; but the suggestion undermines what Lilich and Brower have confirmed: viz. that investors (of the Home-State) have no trust in the National Courts of the Host State.

Even with the SPOTLIGHT on defects and deficiencies, the 'Arbitration Game' (as the ECONOMIST has described it) goes on, with the same vigour as trans-national trade. BITs, which

originated in the year 1959, have now proliferated. And there is no going back.

The question is whether the investment treaty regime can be improved? I believe it can. My SUGGESTIONS are:

SUGGESTION-I – Clauses in BITs must not be simply replicated from some Model – generally offered by the Home State. They must be seriously negotiated at arms' length between the two States: (the Home State and the Host State): and when necessary, with the assistance of those competent and familiar with treaty – making.

Until the end of the year 2013 (for which data is available) it is estimated that there are now in operation a little over 3000 Bilateral Investment Treaties (which includes IIAs – International Investment Agreements as well) – Some of them are tailor-made or custom-built – entered into after prolonged

negotiations – but most of them are 'copy-cat'[16] agreements-adopting (often without even adapting) Clauses from one or another of some 'Model BIT': under- developed and developing States have simply surrendered to developed countries and their coterie of lawyers, the all-important task of drafting relevant and mutually acceptable clauses in a BIT, with the result that: most of the BITs current today contain Clauses favouring investors, with little or no safeguards for the Host State – the State that is in need of foreign-investment. For instance, I have not read a single BIT between States that ensures an agreed or minimum quantum of investment to be made by investors of the Home State in return for the ample set of protections that are offered to them in various standard clauses of a bilateral investment treaty. Again, there are few BITs that attempt to define broad and imprecise expressions (expressions that recur in every BIT: "fair and equitable treatment"; "full protection and security"; "most favoured

nation"; "national treatment"; "expropriation"); the response to this comment has been that arbitral decisions interpreting these clauses have helped to establish a *jurisprudence constante* (a phrase – in French – meaning an unbroken line of precedent). I do not agree. I suggest that the more apposite expression (in French) would be "Jurisprudence flottante" (meaning an uncertain line of precedent!). Because differently constituted arbitral tribunals have been interpreting (differently), broadly-worded but standard expressions used in BITs[17]: leaving users of investment arbitration perplexed and confused.

Prof. Sonarajah of Singapore (an outspoken critic of investment treaty arbitration) has said that BITs between the developed States on the one hand and least-developed and developing-States on the other (within the continent of Asia as well as outside) – are to be characterised by two contrasting words: "NEED" and "GREED": the need of the Host-State for an

investment and the greed of the investor (of the Home State) to take an unfair advantage of the Host State[18]. But if what Prof. Sonarajah has said sounds offensive, there is a sentence from a 2008 UN document[19] that is less so. It reads:

> "If countries are unable to properly understand and assess the content of the agreements to which they have agreed to because of their complexity, the risk arises that they will enter into agreements that they are unprepared to honour fully...." (unquote)

There, we have encapsulated in U.N. language, the fate of BITs that are not mutually negotiated, but all-too-frequently signed on the dotted line by the Host State. Complexities in them (vague and indeterminate words) are (often) not even comprehended by officials in the least developed and/or developing nations. Host States simply put their signature because the investment is needed, and little or no thought is given about the consequences: until something, *hits* the Host State (like a meteor): viz. a claim under international law either

for “expropriation” or for “ denial-of-justice”, the quantum of damages claimed often being far in excess of the Host State’s annual budget!

States do not act rationally when they enter into investment treaties[20]. I recall an International Treaty-Arbitration case – ICSID Case No. ARB/04/14 – Wintershall Aktiengesellschaft vs. Argentine Republic[21] where, sitting on an ICSID Arbitral Tribunal (with distinguished colleagues Professor Piero Bernardini and Dr. Santiago Torres Bernardez) we heard the oral evidence of Professor Christoph Schreuer – Professor of International Law and author of that famous book containing a commentary on the ICSID Convention. This is what Schreuer said to us (in the year 2007):

> “[….] many times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of a model, and are put forward on the occasion of state visits when heads of states need something to sign, and the typical two

> candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural co-operation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, (if you can call it that), say that, 'We had no idea that this would have real consequences in the real world'."[22]

Just a year before – in 2006 – Pakistan's then-Attorney General Mr. Makhdoom Khan, had informed a gathering of investment-arbitration specialists in Washington that such treaties (i.e. BITs) were for – long viewed (in his country) as "photo-op agreements" – something that governments would sign with visiting foreign dignitaries so as to provide an excuse for a photo opportunity! "These [treaties] are signed without any knowledge of their implications", he said. "And only when you are hit by the first investor-state arbitration do you realize what these words mean"![23]

All of this helps to highlight another grave defect in the current investment treaty regime – the absence of a level playing field – if and when the investment sours; inevitably, there is (on the one side) an investor of the developed country (Home State) – generally a large corporate entity well-stocked with legal talent and expertise – and on the other side the developing country (Host State – where the investment is made) – not half-so-well-equipped: which leads to my second suggestion.

SUGGESTION-II – The absence of a level playing field dis-ables the developing Host-State from making an effective defence to an investors' claims in arbitration: Even if the BIT as signed ensures more protection to investors in the Host State without any (or hardly any) compensating safeguards for the latter, when a dispute arises, efforts must be made to establish Equality in Arbitration.

In an article by Eric Gottwald published in American University International Law Review (2007)[24] the author says:

> "In the last five years, there has been an explosion in the number of investment treaty arbitration claims filed against developing nations, challenging a wide array of sensitive government regulations and routinely seeking millions and even billions of dollars in damages. Mounting an effective defense to these claims is essential for a developing nation, as even a single successful investor claim could wreak havoc on its economy, weaken its capacity to regulate in the public interest, and damage its reputation as a desirable investment location."

The author cites the instance of an investment arbitration between a giant Corporation on the one hand and a small almost insignificant Host State on the other. It makes pathetic reading! These are the facts (as stated by Gottwald): an ICSID arbitration was commenced by the Commonwealth Development Corporation (CDC) – a large U.K. owned development finance company – against the Republic of Seychelles, a small Island State (having a population of only eighty thousand people); CDC was represented by a team of

lawyers from Allen & Overy, a major international law firm in London with a speciality practice in investor-state arbitration; On the other side, the Republic of Seychelles was represented by its Attorney-General Mr. Anthony Fernando. The Republic of Seychelles had never been sued by a foreign investor before, and Mr. Fernando had no prior experience litigating ICSID or other investor-state claims. His office had an unreliable internet connection, no access to Westlaw or Lexis-Nexis, and no treatises or books on ICSID or investment arbitration. Some international law-firms who had been approached to represent the Republic of Seychelles in the arbitration told Mr. Fernando that they would charge $600 per hour per lawyer; if they had been engaged, their fees would have emptied his office budget in a few weeks – and possibly exhausted the entire budget of the State in a few months! Ultimately poor Mr. Fernando – a civil lawyer whose daily work, involved criminal, constitutional and administrative law – bravely (but unsuccessfully) defended

the Republic in an international investment arbitration case "armed only with his wits and a copy of the ICSID Convention and Rules!" The (Sole) Arbitrator found that Seychelles had no valid defence to CDC's claims under UK Contract law; and awarded CDC, the total amount claimed with interest amounting to about £ 2.4 million along with £ 100,000 as costs. Seychelles filed an application for annulment of the ICSID Award under Article 52(1) of the Washington Convention, but the Annulment Committee rejected all three of the Republic's grounds for annulment as "lacking in merit"; and even though the Annulment Committee observed that it was "not insensitive to the fiscal circumstances of the Republic" (which it described as "impecunious"), it went on to say "that it felt *compelled* to require that CDC receive" (in addition to the amounts already awarded), a further sum of £ 83,345.61 for CDC's legal expenses and costs incurred in connection with the annulment proceeding! – Gottwald describes this as "an alarming

illustration of how smaller developing nations who cannot afford counsel may defend themselves without access to basic legal authority with potentially disastrous results". I think it also illustrates the lack of appreciation on the part of the Host-State of the weaknesses in its own case – with more competent legal assistance: and by possibly making an offer of settlement, the Government of Seychelles could have avoided what was certainly an expensive and ruinous arbitration!

However, I endorse Gottwald's comment that the Seychelles case does call for some effective response – such as the establishment of a regional legal assistance centre in Asia, which, if set up would bolster the legitimacy of investment treaty arbitration by providing developing nations with an alternative low-cost option of getting expert assistance: It could then get better prepared when its Counsel would be able to make more cogent legal arguments, which would, in turn

produce an award that was better informed. "By ensuring that developing nations (in Asia and elsewhere) have affordable access to legal authorities and expertise, investment treaty arbitration will (then) more perfectly fulfil its mission of providing a truly neutral and just form of dispute settlement": (sic) – *at present however it does not*; which takes me to the next suggestion.

SUGGESTION-III: Exploding the myth about the infallibility of International Arbitral Tribunals; Is it at all possible to ensure that arbitral awards in international investment arbitration are just and fair?

In most professions, the possibility of occasional error is frankly admitted and even guarded against – more so, in Court systems which prescribe, a succession of appeals. But International Commercial Arbitration (prevalent for many decades now) – and International Investment Arbitration (a

more recent phenomenon) – proceed on the questionable premise that although Courts may err (and frequently do), an International Arbitral Tribunal can never (or hardly ever) be wrong: which is reminiscent of that supreme sense of complacency exemplified in a remark of the then Chief Justice of England at a Lord Mayor's Banquet, way back in 1936. Lord Hewart had then said (somewhat pompously):

> "His Majesty's judges are supremely satisfied with the almost universal admiration in which they are held".

Substitute "International arbitrators" for "His Majesty's judges" and you will get the current view of Arbitrators on Arbitrators!

But don't let us stop there.

Here is what David Pannick says. Pannick has written a book (on "Judges")[25] which is controversial but entertaining. After quoting Hewart, he says that it is difficult to believe that "the universal admiration" reflected the true feelings of many of the

customers of Hewart's own Court. What then about the customers of Investment Arbitral Tribunals around the world? I suggest that if there is a study on this, the results may not be too flattering.

If judges are fallible, arbitrators are not less so. We all have our stories of 'bad judgments', and we keep unfolding them – but in charming cover-ups: Professor Goodhart was Editor of the Law Quarterly Review for fifty long years. On his retirement, Lord Diplock wrote a commemorative little piece. He said that he always thought that Professor Goodhart was on his side, because whenever his (Diplock's) judgment was commented on (by Goodhart) in the LQR the remarks were always prefaced with the words: "with greatest respect". Diplock thought: "Ah, this is great: it must be because we belonged to the same University". But then Goodhart had let it be known how he had learned the 'props', of-how-to-criticise-a

judgment-without-appearing-to-be-offensive – it was from Sir Fredrick Pollock. Pollock had said:

- If you are doubtful whether the judicial reasoning is wholly unassailable you preface your comment on the judgment with the words: "*with respect*";
- If the judgment is obviously, wrong you substitute "*with great respect*";
- But if it is one of those judgments that have to be seen to be believed, then the formula is "*but with the greatest respect*"!

I have known of arbitral awards that have to be seen to be believed. (Of course, such awards are never *mine*. They are never *yours* – they are always someone else's!) In 1983, at the celebration of the 60th Anniversary of the ICC Court of International Arbitration Professor Pierre Lalive described them as "lawless awards". Even if their number is not large, I

suggest that we should hear more about them, speak and write more about them – and much more frequently; if necessary – and only if necessary! – *with the greatest respect!*

Of course, as with international cricket umpires, life is getting more and more difficult for arbitrators in international investment arbitration: their decisions are not only in the public domain, they are published, talked about and criticised. The mistakes of cricket umpires are now exposed to the cruel gaze of millions of television viewers – with the help of an advanced digital computer-system known as Hawkeye: (a system based on technology used in brain surgery), a system which now claims, definitively and accurately, to answer the question:

> "Would the ball have hit the wickets if it had missed the batsman's pads?"

In the next decade or so, I fervently hope that we have some sort of technological benchmark with reference to which awards

in international investment arbitrations can be graded for their *rationality, fairness* and *justness*! *But what till then?*: which takes me to my next suggestion.

<u>SUGGESTION-IV</u>:– Since an Award rendered by an international investment arbitral tribunal is final and binding, and since recourse against it (on merits) is not presently available in Courts of law (either under the New York Convention or UNCITRAL or ICSID), there is a felt need for provision being made in the Treaty (BIT) itself for an agreed internal mechanism: to enable the arbitral tribunal to review its own award – at the instance of a party aggrieved – for the correction of obvious and patent errors.

After observing that "arbitration-without-privity is a delicate mechanism", Arbitrator-Emeritus Jan Paulsson warned that:

> "A *single incident* of an adventurist arbitrator going beyond the proper scope of his jurisdiction in a sensitive case may be sufficient to generate a backlash."[26]

One such "backlash" occurred in India in 2011 with the making of an Award (of 30th November 2011) by an Arbitral Tribunal appointed under the Australia-India Bilateral Investment Treaty dated (of 26-02-1999). It was as a direct consequence of this award (against the Government of India) that India was compelled to make payment of 4.08 million Australian Dollars to a corporate investor from Australia (*White Industries Ltd., Australia*) – along with a further sum of 4.25 million Australian Dollars by way of interest – under international law – for "*undue delays in dealing with White Industries' jurisdictional claim for over nine years, and India's Supreme Court's inability to hear White Industries jurisdictional appeal for over five years*" (sic) – even though the BIT of 26th February, 1999 had acknowledged that "effective means of asserting claims and enforcing rights" and "ensuring to investors the right of access to its Courts of justice" would be in accordance with the applicable laws of the Host-State, and that investments of

investors (of the Home-State) "*would be made within the framework of laws*" of the Host-State). The laws of the Host-State (India) did not and do not enable litigants (Indian or foreign) to claim damages for inordinate delays in the hearing / disposal of their cases in Courts. The only remedy under Indian law (for unreasonable or inordinate delays of cases in Courts) is the Court's power to award interest *pendente lite* on the principal sum awarded, when finally decreed.[27]

It was also as a result of this award (of 30-11-2011) that the Government of India decided to suspend entering into fresh Bilateral Investment Treaties with other States.

Now BITs are international-law-instruments governed by the Vienna Convention on the Law of Treaties: which provides that treaties between States are governed by international law and are to be interpreted in the light of any relevant rules of

international law applicable (Article 2(i)(a) and Article 31(iii)(c)). But this does not mean that international law trumps national law – whatever be the terms of the treaty (BIT); to treat international law as a self-sufficient legal order in the sphere of foreign investment is plainly untenable.[28] With the internationalisation of investment relations there is no denationalisation of legal relations established by foreign investments; the national law of the host-state is neither irrelevant nor inapplicable; hence, international arbitrators have an obligation to consider national laws of the host-state *where the Treaty so provides*: subject only to the host-state not being permitted to rely on its internal laws to derogate from or modify its Treaty obligations.[29] The question of whether a state (host-state) has acted in a manner inconsistent with its obligation under the Treaty cannot be decided without an investigation into the national law of the state. What happened in the *White Industries Arbitration* was that the arbitral tribunal

in its operative decision (final award dated 30th November 2011) – and without any investigation into the national law of the Host-State (India) – ordered and declared that the Republic of India had breached its obligation (*under international law*) to provide "*effective means of asserting claims and enforcing rights*" with respect to White Industries Australia Ltd's investment, "pursuant to Article 4(2) of the India-Australia BIT incorporating Article 4(5) of the India Kuwait BIT", and proceeded to award damages to *White Industries* in the sums already mentioned.

Now Article 4 (2) of the BIT (dated February 26, 1999) between the Government of Australia and the Republic of India has set out *the most-favoured-nation clause*; it reads:

> "4(2) A Contracting Party (India) shall at all times treat investments in its own territory on a basis no less favourable than that accorded to investments of investors of any third country."

And Article 4 (5) of the India-Kuwait BIT (dated 27-11-2001) – (rightly) relied upon by the Tribunal as having been incorporated in the India-Australia Treaty – read:

> "4(5) Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall *in accordance with its applicable laws and regulations* provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State, the right of access to its courts of justice, administrative tribunals and agencies, and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect of their investments."

Under international law unreasonable delays in civil proceedings in Courts in which the foreigner is endeavouring to vindicate a right may amount to a denial of justice necessitating the award of damages to the claimant as an appropriate remedy.[30] Invoking this principle, the Arbitral Tribunal in the *White Industries case* granted relief for the inordinate delay in the disposal of White Industries' jurisdictional application and

appeal in Indian Courts (including in the Supreme Court of India) – but overlooked or ignored (and did not even explain why it overlooked or ignored) the italicised portion in Article 4(5) of the India-Kuwait BIT (quoted above): which mandated the Tribunal to apply Indian law; under India's legal system established under India's written Constitution there is no right or cause of action for any litigant to claim damages for delays in the hearing of cases in Courts.

There is another and a yet more startling error in the arbitral award dated 30th November, 2011. The award in the White-Industries- Arbitration had referred to and relied on an earlier award (dated 30th March, 2010) rendered by *another* arbitral Tribunal under *another* treaty (the USA-Ecuador BIT) – between *Chevron Corporation (USA) & Texaco Petroleum Company (USA) and the Republic of Ecuador* – in which it had been held that excessive delays in disposing of proceedings (in

Ecuador's national Courts) amounted to a denial of justice under international law, and so proceeded to award damages to *Chevron*. In the *White Industries Arbitration*, the Arbitral Tribunal relied on this finding (made in the Chevron award) as a *precedent* stating that the Article II(7) of the Treaty between the United States of America and the Republic of Ecuador "employs *almost identical wording* to that found in Article 4(5) of the India-Kuwait BIT": *another most egregious mistake*. Article II(7) of the Treaty between the USA and the Republic of Ecuador is not at all "identically" worded as Article 4(5) of the India-Kuwait BIT. It read as follows:

> "II(7) Each party shall provide effective means of asserting claims and enforcing rights with respect to investment, investment agreements, and investment authorisations."

The words in "*accordance with its (i.e. Ecuador's) applicable laws and regulations*" are absent. And yet the award dated 30-11-2011 assumed that Clause 4(5) of the India-Kuwait BIT was

identically worded as in the Treaty between the USA and Ecuador! Was this inadvertently stated, or was it deliberate (for some good but undisclosed reason!)? We shall never know. An international investment arbitral award once made is beyond recall by the arbitral tribunal that made it. It is imperative that a provision be made in the BIT itself, that a party aggrieved is entitled to bring to the notice of the arbitrators (or the arbitral tribunal) – within a stated period of time after the award is made – a patent or apparent error to enable the arbitral tribunal to correct the same, or to explain why there is no apparent or patent error. It is the lack of such a provision in the Australia-India BIT that led to the disastrous consequence of India having had to opt out of the international-investment-arbitration regime.

SUGGESTION-V – There is need for far greater accountability in the Investor-State arbitration system:

The most critical factor in investment arbitration is the integrity of the arbitrator. As to how Arbitrators or the Chairman of an Arbitral Tribunal should be chosen is crucial – but (as the hackneyed phrase goes) *the jury is still out*, as to how this can be ensured. Egalitarian trends are the order of the day! And the trend today is for an increasing number of arbitrators from different countries around the world to be appointed (as Arbitrator or as Chairman-of-Tribunal), which it is hoped would help build Third World confidence in International Investment Arbitration! But the persons so appointed (whether from the First World or the Third World or partly from one and partly from the other) must be extremely proficient, knowledgeable and competent – apart from possessing the highest integrity. My esteemed friend Jan Paulsson – once spoke on *Ethics and Elitism in Arbitration*. He said to his audience that it was a mistake to think that it was a good thing for the international arbitral process if the greatest number of persons possible had

the opportunity to act as Arbitrators; and he ventured to suggest that given the high stakes and great sensitivities involved in all types of international arbitration, there was a good case for supporting the emergence and recognition of an *elite corps of international arbitrators*. Individual reputation, in this field (Paulsson went on to explain) grows by slow accretion of evidence of independence and fair mindedness in numerous instances, and the building of reputation is a lengthy process, which offers no assurance of success, but it does create a depth of confidence which can never be achieved by self-serving arbitral declarations of independence and impartiality. But alas, the speech was not at all at all well-received! When sending me the text of his speech, Jan Paulsson wrote in the margin: "Fali – have you ever been jeered at the end of a speech? I have – and if you read the following pages you will see why"!)

I submit that the present system of challenge (under applicable arbitral rules or ad hoc practice) to the *independence* or *impartiality* of an Arbitrator (or of the Chairman of an Arbitral Tribunal) – elitist or otherwise – is far too liberal. It favours the Arbitrator/Chairman whose appointment is sought to be challenged. It is just not possible to get rid of an appointed Arbitrator (or Chairman of the Arbitral Tribunal) because of some information in the possession of the challenging party – which (for want of proof) cannot be revealed! At present there has to be disclosed some 'good reason' that the person already appointed is not likely to be impartial – a herculean task!

It is heartening to find that challenges to appointed arbitrators under the ICSID regime in the last two years have been far more successful than in the past. In three very recently decided cases – decided by the Chairman of ICSID – in Blue Bank International & Trusts (Barbados) vs. Bolivarian Republic

of Venezuela[31] (‘*Blue Bank*’), Burlington Resources Inc. Vs. Republic of Ecuador[32] (‘*Burlington*’) and in Caratube International Oil C LLP vs. Republic of Kazakhstan[33] (‘*Caratube*’) – in each of these cases - challenges to the independence of the arbitrators succeeded by applying a lower standard than in the past – a standard of ‘reasonable doubt’ – not that of ‘high probability’. Dr. Sam Luttrell in his article in the 15th Anniversary Issue of the Asian Dispute Review (October 2014)[34] concludes that “it seems reasonable to surmise that the return to a lower standard (of ‘reasonable doubt’) as the threshold for disqualification is an institutional reaction to what are, at their core, calls for greater accountability in the Investor-State arbitration system.”

We definitely need more calls for greater accountability in the investor – state arbitration system!

What next for Asia?

First, some statistical information: the various countries in Asia that have entered into Bilateral Investment Treaties (together with their numbers) and a list of Asian countries that have filed Investment Treaty claims for adjudication (in Arbitration) together with their number, are enumerated and set out in the end note.[35].

Current *trends* in International Investment Arbitration (around the world) are somewhat confusing. UNCTAD World Investment Reports describe the years 2013 and 2014 as "***years of disengaging and upscaling***":

> - "**disengaging**" as instanced by the premature termination of several Bilateral Investment Treaties:
>
> - (*In Asia*), the Republic of India has suspended entering into fresh BITs from the year 2012: on account of an arbitral award (UNCITRAL) in the case of *White Industries Australia Ltd v. The Republic of India* which though honoured and paid up in full, suffered from an egregious error – viz. applying international law to an aspect which the treaty expressly provided had to be determined by the law of the Host-State (India).

- Indonesia has given notice of termination of its BITs with the Netherlands;

- (*In Australasia*) the Australian Government (prior to the 2014 elections) had announced the discontinuance of Investor State - dispute settlement with developing countries.

- *(In Africa) South Africa* has given notice of termination of its BITs with Germany, the Netherlands, Spain and Switzerland;

- (*In Europe*) *The* Parliament in the Netherlands has recently adopted a resolution criticising Investor – State Dispute Settlement;

- (*In South America*): the Republic of Ecuador has terminated 13 of its BITs in the year 2013, the Republic of Venezuela having done so a year earlier whilst simultaneously denouncing the ICSID Convention (!); Ecuador and Bolivia have also withdrawn from the ICSID Convention in the year 2007/2009;

- **upscaling**": by adding in the year 2013 - 44 new International Investment Agreements (30 BITs and 14 IIAs) to those already existing, bringing the aggregate total number of International Investment Agreement – including BITs – to 3236 by the end of December 2013.[36]

And so, it appears to me that *What's Next for Asia* is precisely what doctors used to prescribe (to all and Sundry) for a host of

petty illnesses way back in the nineteen-thirties and nineteen-forties: the prescription would read: MIXTURE AS BEFORE. For What's Next in Investment Treaty Arbitration in Asia – the answer is: MIXTURE AS BEFORE. The investment arbitral world will not come to a grinding halt merely because of defects and deficiencies in the investment treaty regime, neither in Asia nor in any other Continent. BITs will continue to be entered into - with or without mutually negotiated clauses. And BITs already signed may possibly at some future time get "unsigned": when the Host-State (that signed them) chooses to withdraw from the BIT regime.[37]

And this is how – ladies and gentlemen – this Lecture ends – "not with a bang but a whimper!"[38]

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[1] The World Investment Forum held its annual meeting in Geneva, just three weeks ago (14-16th October, 2014). One of the subjects discussed was "Reforming the Investment Agreement Regime:" the meeting took stock of 60 years of investment policy-making and means for improving International Investment Agreements (IIAs). Countries in Asia also participated (Bangladesh,

China, India and Mongolia); their representatives commented on the need for improvements (reported on the conference website).

[2] Comments by Elihu Root, Sen. Doc. 444, 60th Cong. 1st Sess. 10-11, 12; 1907, 1133, 1135.

[3] See "The Flame Rekindled" (New Hopes for International Arbitration) edited by Sam Muller and Wim Mijs published by Martinus Nijhoff Netherlands (1994) at page 134.

[4] 35 developing countries in Asia are: Afghanistan, Bangladesh, Bhutan, Cambodia, China, East Timor, India, Indonesia, Iran, Iraq, Jordan, Kazakhstan, North Korea, Kyrgyzstan, Laos, Lebanon, Malaysia, Maldives, Mangolia, Myanmar, Nepal, Oman, Pakistan, Philippines, Russia, SaudiArabia, Syria, Sri Lanka, Tajakistan, Thailand, Turkey, Turkmenistan, Uzbekistan, Vietnam, Yemen. 11 high-income countries in Asia are: Bahrain, Brunei, Hong Kong, Israel, Japan, South Korea, Kuwait, Qatar, Singapore, Taiwan and United Arab Emirates.

[5] See Anthea Roberts in an article and in Vol. 104 American Journal of International Law (April 2010) at page 182.

[6] For instance – Fraport AG Frankfurt Airport Services Worldwide vs. Republic of Philippines (ICSID Case No. ARB/03/25) – Award dated 16th August, 2007 para 402.

[7] This is in contrast to the provisions of the New York Convention on Enforcement of Arbitral Awards 1958 – which relies on national Courts to implement its provisions.

[8] "International Arbitration in the 21st century – Judicialisation and Uniformity?" (Co-edited Richard Lillich and Charles N. Brower – Transnational Publishers, 1994).

[9] Due to the complex history of evolving meanings and contexts there is no clear or agreed-upon definition of the Third World. The French anthropologist Sauvy, in an article in a French magazine in August 1952 had coined the term Third World preferring to countries that were not aligned with either the Communist Soviet block or the capitalist NATO block during the cold-war. Sauvy wrote: 'this third-world ignored, exploited, despised like the third-estate, also wants to be something". The term third-world is now used inter-changeably with least developed as well as developing countries.

[10] Concept of the First World originated during the Cold War involving countries that were aligned to the USA, UK and France.

[11] http://issuk.comembajadecuusa/docs/public_statement_final_dec_2013

[12] http://tpplegal.wordpress.com/open-letter

[13] Four original signatory' countries to the TPP are Singapore, New Zealand, Brunei and Chile. China and Korea have announced their interest in September 2013. The USA, Australia, Peru, Vietnam, Malaysia, Mexico, Canada and Japan are still negotiating.

[14] New Statesman and Nation (dated 15.07.1933).

[15] http://unctad.org/en/publicationslibrary/wir2013_en.pdf; http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=937

[16] "That closely imitates or mimics another"; "someone who copies the words or behavior of another".

[17] For examples of Awards containing inconsistent interpretations of standard clauses in BITs see – (i) Lauder vs. Czech Republic – UNCITRAL London Award 2001); CME vs. Czech Republic – Stockholm Award (2001); (ii) SGS vs. Islamic Republic of Pakistan (ICSID Case No.2003); SGS vs. Republic of Philippines (ICSID 2004); (iii) S.D. Myers Inc vs. Canada (UNCITRAL 2000): Metalclad Corporation vs. United Mexican States (ICSID 2000); (iv) Pope and Talbot Inv. Vs. Canada (UNCITRAL 2000); Suez Inter Aguas v. Argentina (ICSID 2006); (v) Suez-Vivendi v. Argentina (2006): Vladimir Berchader v. Russian Federation (2006).

[18] A Law for Greed or a Law for Need? The Current State of the International Law on Foreign Investment" (2006) 6 International Environmental Agreements pages 329 to 357 (Springer, 2006).

[19] UNCTAD International Investment Rule Making: stock taking Challenges and the Way Forward – UN Document UNCTAD/iit/2007/3/unsalesnumber.08.II.D.1(2008) – page 51.

[20] See 104 American Journal of International Law (2010) at page 186–f.n.

[21] Also mentioned in a very recent judgment of the US Supreme Court in B.G. Group PLC vs. Republic of Argentina 572 US 1 at p-7 (Judgment dated 5-3-2014).

[22] Expert testimony from Christoph Schreuer, quoted in the Award dated December 8, 2008 in Wintershall Aktiengesellschaft v. Argentine Republic ICSID Arbitration para 85.

[23] Investment Treaty News April 2009 pages 3 and 4.

[24] "Levelling the Playing Field: Is it Time for a Legal Assistance Centre for Developing Nations in Investment Treaty Arbitration!" American University International Law Review, (2007) Volume 22 Issue 2 Article 3.

[25] Oxford University Press 1988.

[26] See "Arbitration Without Privity", Jan Paulsson, ICSID Review, Foreign Investment Law Journal, Vol. 10, Number 2, Fall 1995 page 232 at page 257.

[27] White Industries Australia Ltd., had in its favour an ICC Award of the year 2002 (in an international commercial arbitration); *being a "foreign award*" under Indian law, it sought to enforce this award by an application made in the High Court of Delhi; the Respondent in the ICC Award was Coal India Ltd., an entity of the Government of India; However, Coal India Ltd., had already filed (a few days earlier) an application in the High Court of Calcutta to set aside this ICC Award of 2002; *White Industries* then filed an application in the High Court of Calcutta contending that no Court in India, including the High Court of Calcutta, had any jurisdiction to *set aside* a foreign award – such an award under Indian

Law could only be enforced or (on very limited grounds) not enforced; it could not be *set aside*. The Calcutta High Court dismissed the application of *White Industries* holding that on the basis of a decision of a Bench of three Judges of the Supreme Court of India (in Bhatia International – March 2002) the High Court Calcutta had undoubted jurisdiction to 'set aside' the ICC Award of 2002. *White Industries* then filed a jurisdictional Appeal in the Supreme Court of India (in July 2004) contending that *Bhatia International* was wrongly decided. The Appeal was admitted but not heard for several years since *Bhatia International* could only be reconsidered (and if found erroneous, overruled) by a larger Bench of 5 Judges. This did happen (i.e. overruling of *Bhatia International*), but only much later, when the crowded docket of Supreme Court permitted the setting up of a five judge bench: In Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service, Inc. & Others (6th September, 2012) – reported 2012 (9) SCC 552 – after a long hearing *Bhatia International* was overruled: but only prospectively w.e.f 6-9-2012. The net result was that White Industries' jurisdictional appeal in the Supreme Court of India would have had to be dismissed in view of the judgment of the Bench of five Judges in Bharat Aluminium (which by its terms operated only prospectively), and the Calcutta High Court would then have had to decide whether or not, and on what grounds the ICC Award of 2002, even though a foreign award could be or was liable to be *set aside* in Indian courts. However in July 2010 *White Industries* had already filed a Notice of Arbitration under the Australia-India BIT invoking principles of international law and contending that *the means of asserting claims or enforcing rights* (guaranteed under the Australia-India BIT), in order to be effective could not be subjected to indefinite or undue delays, since *in international law "undue delay in effect amounted to a denial of access to those means*". This claim and contention was upheld in the arbitral award dated 30th November, 2011.

[28] The Hybrid Foundations of Investment Treaty Arbitration by Zachary Douglas, *British Yearbook of International Law* (2003) Vol. 74 (1) 151 at page 155.

[29] Antoine Goetz et al. Vs. The Republic of Burundi (ICSID Award dated 10th February, 1999) – reported in ICCA Yearbook 2001 Vol. XXVI page 24 at page 31.

[30] "The International Responsibility of States for Denial of Justice" by Alwyn Freeman, Longman Green & Co., (1938) pages 257 to 262; and "Jan Paulsson Denial of Justice in International Law" (2005) Cambridge University Press, pages 177-178

[31] ICSID Case No. ARB/12/20 – Decision on the Parties Proposals to Disqualify a Majority of the Tribunal (12th November 2013).

[32] ICSID Case No. ARB/08/5, Decision on the Proposal for Disqualification of Professor Francisco Orrego Vicuna (13th December 2013).

[33] ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of Mr. Bruno Boeshch (20th March, 2014).

[34] See – "Beware of Blue Bank: the Implications of a Lower Threshold for ICSID Arbitrator Disqualification for International Arbitration in Asia" by Dr. Sam Luttrell, 15th Anniversary issue of the Asian Dispute Review (Arbitration & ADR in Asia) October 2014 pages 172 to 178.

[35] What's Happening in Asia is as follows:

(1) Bangladesh has so far entered into 28 Bilateral Investment Treaties; and has filed one Investment Treaty Claim; (2) Cambodia has so far entered into 21 Bilateral Investment Treaties; and has filed one Investment Treaty claim; (3) China has so far entered into 131 Bilateral Investment Treaties; and has filed one Investment Treaty claim; (4) Hong Kong has so far entered into 16 Bilateral Investment Treaties; (5) Indonesia has so far entered into 64 Bilateral Investment Treaties; and has filed 5 Investment Treaty claims; (6) India has so far entered into 84 Bilateral Investment Treaties; and has filed 14 investment Treaty claims; (7) Laos has so far entered into 24 Bilateral Investment Treaties; and has filed 2 Investment Treaty claims; (8) Malaysia has so far entered into 68 Bilateral Investment Treaties; and has filed 2 Investment Treaty claims; (9) Mongolia has so far entered into 44 Bilateral Investment Treaties; and has filed four Investment Treaty claims; (10) Pakistan has so far entered into 47 Bilateral Investment Treaties; and has filed 8 investment Treaty claims; (11) Philippines has so far entered into 37 Bilateral Investment Treaties and has filed 4 investment Treaty claims; (12) Republic of Korea has so far entered into 91 Bilateral Investment Treaties and has filed one investment Treaty claim; (13) Japan has so far entered into 22 Bilateral Investment Treaties; (14) Singapore has so far entered into 41 Bilateral Investment Treaties; (15) Sri Lanka has so far entered into 28 Bilateral Investment Treaties and has filed three Investment Treaty Claims; (16) Thailand has so far entered into 39 Bilateral Investment Treaties and has filed one Investment Treaty claim; (17) Vietnam has so far entered into 60 Bilateral Investment Treaties and has filed 4 Investment Treaty claims.

[36] In 2013- 30 BITs were signed and 14 IIAs signed bringing the total number of agreements to 3,236 by December 2013.

[37] Several BITs were terminated for instance by South Africa, and Indonesia. Bolivia, Ecuador, Venezuela has withdrawn from the ICSID Convention in 2007, 2009 and 2011 respectively.

[38] From T.S. Eliot's poem: "The Hollow Men":

> "This is the way the world ends
> not with a bang, but a whimper".