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Does investor-state arbitration have a future? Keynote speech by Sir Christopher Greenwood

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The 8th edition of the Herbert Smith Freehills – SMU Asian Arbitration Lecture, jointly organised with the Centre for Cross-border Commercial Law at the Singapore Management University, took place on 18 October 2018. The distinguished event, graced by Chief Justice Sundaresh Menon, hosted a panel comprising: Sir Christopher Greenwood, DAG Lionel Yee, Judith Gill QC and Alastair Henderson (moderator). This post takes a closer look at the keynote speech delivered by Sir Christopher Greenwood.

The event was set against the sombre backdrop of increasing criticisms about investor-state arbitration ("ISA"). This was reflected in recent trends such as **withdrawal of Bolivia, Ecuador and Venezuela from the ICSID Convention**, and Australia's aversion to ISA clauses in its Free Trade Agreements. Further, the famous ***Achmea decision*** by the EU Court of Justice earlier this year lent support to opponents of ISA (see Kluwer Articles **here**, **here, here** and **here**). Indeed, in Sir Greenwood's words, "the storm clouds have been gathering" (for further analysis, see Kluwer Articles **here**, **here** and **here**).

But does ISA have a future, and should it? In addressing these questions, Sir Greenwood helpfully outlined the four major criticisms against ISA and provided suggestions for reform. While acknowledging that the future of ISA is "much more open to question", he expressed hopes for its continued relevance.

Intrusion into state sovereignty

Sir Greenwood first observed that the entire system of ISA has been negatively viewed as an intrusion on the sovereignty of states. This has emerged in recent years as part of a wider backlash against globalisation, evidenced by Brexit and "America First" campaign under President Trump.

As Sir Greenwood noted, this criticism is perhaps unsurprising, for ISA tribunals are increasingly being involved in states' domestic regulatory policies, possibly overriding a democratically-elected government's view of what is in its best interest. A primary example of this is seen in the case of ***Philip Morris Asia Limited***, where the Permanent Court of Arbitration ("PCA") was made to decide on a matter relating to Australia's plain packaging legislation for cigarettes.

In response to this, however, he suggested that the matter is perhaps "more complicated than it seems". A bilateral investment treaties ("BIT") involves, at all levels, two sovereignties. A state's act of concluding of a BIT *itself* is a sovereign act – where each state party agrees to limit the exercise of its sovereign regulatory powers. This is further evidenced in the nature of bilateral investments, as the investment in a recipient state by another's sovereign wealth fund necessarily involves the sovereignty of both. Even if the investment is by a private company, it would have to have been permitted to commit a portion of the sovereign wealth to overseas investment by its state's domestic legislation. ISA thus involves sovereignty of *both* jurisdictions.

Vagueness of applicable standards

Sir Greenwood then shared his thoughts on the perception that concepts – such as indirect expropriation, and fair and equitable treatment – are too vague to be applied with certainty by tribunals. He disagreed with the view that parties would shy away from ISA because these terms led to unpredictability in arbitral awards. Ultimately, if it were truly the case that such terms are so vague to be unworkable, then it is "extraordinary" the terms in BITs concluded over the past 50 years have remained significantly unchanged. Any "bad

reputation" should, in Sir Greenwood's view, be attributed to the quality of claims raised and not the awards themselves.

Notwithstanding the admonition against extravagant claims, he cautioned arbitrators against examining these terms in the abstract. Treaty interpretation is an exercise distinct from interpreting domestic statutes or contracts. There is thus a need to assess what parties meant in the treaty, with reference to treaty definitions and practices of the states in applying the treaty after concluding it. For instance, if a treaty provides that the interpretations of the Free Trade Commission are binding, the tribunal should give effect to the treaty's provisions even if the Commission's interpretation is objectionable.

On this note, Sir Greenwood acknowledged that the very nature of ISA, in resolving disputes that are closely intertwined with administrative law and other public law issues, concerns fundamental issues of policy. Arbitrators involved in the proceedings must, in his words, "face up to the magnitude of the task of investor-state arbitration" and take caution in their assessment of disputes.

Lack of institutional framework and accountability

Sir Greenwood observed that yet another criticism levelled against ISA pertained more to the nature of arbitration as a dispute resolution mechanism. Several characteristics of arbitration were discussed. First, he noted that as compared to courts where judges are appointed according to established mechanisms, arbitral tribunals have been criticised for not having to go through any stringent selection and formation process. In response, he questioned the basis for this conception that courts have more legitimacy than arbitral tribunals. Ultimately, a BIT-formed arbitral tribunal derives its legitimacy from a treaty, no different from the International Court of Justice, International Criminal Court, or European Court of Human Rights. Yet, the same criticism about the lack of legitimacy does not apply in the same vein to these international courts.

Secondly, he was also critical of the argument that tribunals are neither subject to a general set of ethical standards nor held accountable through elaborate appellate mechanisms. Such arguments on accountability could, in his opinion, also be raised against national systems worldwide where the provision of judicial tenure makes policing of accountability difficult. In any case, even if we look to national courts that are often impartial and efficient, they are primarily governed by domestic legislations and unable to give effect to a treaty standard.

Thirdly, Sir Greenwood touched upon the **recent debates** over the level of transparency expected of arbitral tribunals. He observed anecdotally, that the state was often the party that strove to ensure confidentiality of proceedings, pleadings and even awards. He also pointed out that the default rule in UNCITRAL remains one of confidentiality, as most treaties that are still being heard were completed before the 2013 Rules of Transparency came into effect. In his opinion, awards should minimally be published with reduction, for anything less would "abandon any concept of courts and tribunals as we know them today". Further, tax payers should not be expected to fork out so much money with no understanding of the grounds which the state has lost the case.

As a last note on transparency, Sir Greenwood stressed that there is a "need to be candid about who writes the arbitration award"; referring to the need for appointed arbitrators to perform their jobs, instead of relying on their secretaries or other unknown individuals.

No longer cheap or fast

The final criticism raised is related to the view that ISA no longer provides a quick resolution process, is expensive, and does not uphold confidentiality as before. While acknowledging these issues, Sir Greenwood suggested that these partly results from attempts to tackle other existing criticisms. For instance, in response to the calls for greater transparency, awards must provide a more detailed account of pleadings, effectively requiring more time. This is enshrined within Article 52(1)(e) of the ICSID Convention, which provides for the failure to state reasons as one of the grounds for annulment. Additionally, disputing parties played a role in causing delays and high costs, particularly through submissions that are unnecessarily long and overloaded with arguments in hopes that one might stick.

Sir Greenwood advocated calibrating the award on costs to reflect the quality of arguments and the corollary delayed caused, as was **done in the *Philip Morris* case.** He acknowledged, however, that this suggestion may prove impractical where costs are issued alongside the merits of an award.

Concluding thoughts

In summary, in Sir Greenwood's words, when viewed with a sense of proportion, the ISA "edifice is not crumbling". Despite the withdrawals from the ICSID Convention, 154 states have ratified it. While the number of cases have slowed down, ICSID alone has over 50 new cases in 2017–2018 – almost half of all cases including those before the PCA and the International Chamber of Commerce. Concurrently, Australia has relaxed its hostility while the UK remains as big a proponent of ISA.

Sir Greenwood also underscored that given the lack of viable alternatives, the abolition of ISA would cause a return to a "Wild West World" – one of snatch and grab expropriation, with abuse of regulatory power under the guise of protectionism. ISA obviates the need to rely completely on states discretion to bring claims against another, and avoids risking diplomatic relationships in every dispute.

On a final note, Sir Greenwood pointed out that the recent criticisms of ISA have arisen precisely because ISA has been evolving to address the problems of the past. In our opinion, its relevance is aptly seen in Singapore, which has been involved in the ***Sanum v. Laos*** and ***Lesotho v. Swissborough*** cases, despite being neither the investing nor receiving state. While reforms are undoubtedly needed in specific areas, there is hope that ISA will move into a better age.