

ISDS —Litigating the Judiciary
Chartered Institute of Arbitrators Centenary Conference
Chief Justice Robert French AC
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It is a pleasure to join in this centenary celebration of the Chartered Institute of Arbitrators. The membership of the Institute, its global reach and its vitality reflect the strength and international acceptance of arbitration as a leading mechanism of dispute resolution.

This address concerns Investor-State Dispute Settlement clauses ('ISDS') in international investment agreements and their interaction with domestic courts. The issues are of global concern and, whether by argument or calibration of the way ISDS works, at least in relation to developed court systems, they require ongoing active consideration.

ISDS is an acronym which, despite its want of euphony, is prominent in the public square of debate about global trade law and national sovereignty. It arouses passions which bring together strange political bedfellows and generate strong language. On 12 March 2015, leading Democrat Senator, Elizabeth Warren who had previously referred to ISDS panels as 'rigged pseudocourts' released a letter signed by 90 Law Professors concerned about a proposed ISDS provision in the Trans Pacific Partnership Agreement ('TPP') currently under negotiation between Australia, the United States and a number of other countries in our region. She said:

ISDS allows foreign companies to challenge American laws and potentially to pick up huge payouts from taxpayers without even setting foot in an American Court.¹

¹ Owen Boss, 'Law professors back Elizabeth Warren's fight against trade pact' Boston Herald (online), 12 March 2015
<www.bostonherald.com/news-opinion/local_coverage/2015/03/law_profesors_back_elizabeth_warren_s_fight_against_trade_pact>

The White House blog, answering criticisms by Senator Warren, argued that investment provisions under the TPP were designed to protect American investors abroad from discrimination and denial of justice. Moreover, there had only been 13 ISDS cases against the United States which had been brought to judgment in the three decades since the United States had been party to such agreements and it had not lost one of them. Rather disquietingly, the blog added:

Earlier in our history, the United States used gun boat diplomacy, sending our military to defend our economic interests abroad. The decision was made by our predecessors that it was better to rely on neutral arbitration instead.²

With enfilade fire from the right, the Libertarian Cato Institute argued that the win-lose record of investors and governments missed the point. The system was biased in the sense that foreign investors had access and others did not.³ Pithy support for the inclusion of an ISDS clause in the TPP came from Jeffrey Bleich, respected former US Ambassador to Australia who was reported in the *Wall Street Journal* of 2 March 2015 saying:

When you've got twelve economies at different stages it seems to make a lot more sense to create a level playing field for these types of claims.⁴

Going beyond the colour and movement of political contention in the United States, I propose in this address to direct attention briefly to the general and ongoing debate about ISDS clauses particularly in Australia and Europe. They are, of course, an aspect of

² Jeffery Zients, 'Investor-State Dispute Settlement, (SDS) Questions and Answers' on The White House Blog (26 February 2015) <<http://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isd-questions-and-answers>>.

³ Simon Lester, 'Responding to the White House Response on ISDS' on Cato Institute Online blog (27 February 2015) <<http://www.cato.org/blog/responding-white-house-defense-investor-state-dispute-settlement>>; see also Daniel Ikenson, 'Hyperbole Aside Elizabeth Warren is Right about the risk of Investor-State' on Cato Institute Online blog (26 February 2015) <<http://www.cato.org/blog/hyperbole-aside-Elizabeth-Warren-right-about-risk-investor-state>>.

⁴ William Mauldin, 'Dispute Resolution System Fuels Criticism of Pacific Trade Pact', *Wall Street Journal* (New York), 2 March 2015.

international trade law. That character affects the way in which the jurisdiction and powers of international arbitral panels differ in kind from those of national judiciaries. The issue of interest from the perspective of national judiciaries is the extent to which court decisions and processes may be called into question, directly or indirectly, by arbitral tribunals. That does not involve a critique of ISDS clauses generally. The debate on that topic is well joined by experts and policy makers around the world. However, their potential interaction with national judicial systems should be an important feature of any trade negotiations. That specific concern was reflected in a letter sent in November last year to the Commonwealth Attorney-General on behalf of the Council of Chief Justices of Australia.⁵ The Council considered it desirable that officers of the Commonwealth negotiating international investment agreements should have regard to the possibility that, absent suitable qualifications, arbitral processes might be invoked to call into question the decisions of domestic courts either by submissions that such decisions are breaches of an investment treaty or alternatively seeking findings based upon propositions inconsistent with such decisions. In so saying, the Council accepted that it was ultimately a matter for the Government to determine the scope of such provisions in agreements which it entered.

The Attorney-General quite properly answered that the Government was conscious of the challenges entailed in including ISDS mechanisms in its agreements and that it considered whether to do so on a case-by-case basis. In such cases, Australia seeks appropriate safeguards to allow for the proper functioning of all branches of government. That includes, so the Attorney advised, clear substantive obligations and procedural safeguards in the ISDS mechanism. He pointed out that, for Australia, ISDS clauses can promote investor confidence by providing a further means for Australian investors to protect their interests. However, the Government was aware of the concerns raised by the Council of Chief Justices and when entering into the agreements would seek to appropriately balance promoting investment with protecting Australia's sovereign interests.⁶

Turning briefly to the general Australian policy debate, in 2010 the Productivity Commission in Australia issued a Report questioning the effectiveness of ISDS clauses in promoting trade and investment in Australia.⁷ The Commission suggested that they do not influence inward foreign investment flows and that there are considerable risks associated

⁵ Letter from Council of Chief Justices to Attorney-General, 6 November 2014.

⁶ Letter from Attorney-General to the Council of Chief Justices, 21 November 2014.

⁷ Productivity Commission, *Bilateral and Regional Trade Agreements Report*, Research Report (2010).

with them. The downside risks identified in the Report would be familiar to anybody conversant with recent debates. They include:

- The potential for regulatory chill whereby countries forego public policy action for fear that they will be subject to investor-State arbitration.
- The perception that foreign investors are given greater rights and opportunities than domestic investors in relation to disputes with the State.
- The perception of a pro-investor bias in ISDS processes and concerns relating to conflicts of interest where an arbitrator in one case acts as counsel in other cases involving the investor.
- Lack of consistency and clarity in the ISDS system.
- Lack of transparency.
- Cost.

The Commission recommended that Australia avoid ISDS provisions in trade agreements conferring rights on foreign investors over and above those provided by the Australian legal system.

Prior to 2011, Australia had become a party to a number of investment agreements with ISDS clauses with a view to providing additional protection for Australian investors operating in developing States where there were concerns about their particular domestic legal systems.⁸ In April 2011, Philip Morris (Asia) initiated an arbitral process under a HongKong-Australia investment treaty claiming breach of the Commonwealth's then proposed tobacco plain packaging laws. The Commonwealth Government subsequently

⁸ Jurgen Kurtz and Luke Nottage, 'Investment Treaty Arbitration "Down under": Policy and Politics in Australia' (2015) *ICSID Review* (Forthcoming) Sydney Law School Research Paper 15/06.

issued a Trade Policy Statement that it would discontinue the practice of including investor-State dispute resolution procedures in trade agreements with developing countries.⁹

The Productivity Commission's findings and the blanket preclusion of ISDS clauses were criticised by leading trade law academics, including Jurgen Kurtz and Luke Nottage who argued that the Commission had not properly assessed the benefits of ISDS to Australia and had over emphasised the disadvantages.¹⁰ Moreover, the Commission was said to have under-estimated behind-the-border regulatory interventions which, if discriminatory or arbitrary, could lessen or even extinguish the profitability of foreign investment in the receiving State. In the event, following the change of government in late 2013, the Trade Policy Statement was removed from the Commonwealth Government's website. An ISDS clause was included in the Australia-Korea Free Trade Agreement and, it would seem, is under discussion for the TPP.¹¹

Late last year a Senate Committee considered a Private Member's Bill which would have prohibited the Executive Government of the Commonwealth from agreeing to the inclusion of ISDS clauses in trade agreements at all. Interesting and thoughtful submissions were put by proponents and opponents of the Bill. The Committee recommended against the adoption of the Bill, which would have been something of a nuclear option response to particular concerns. The Committee concluded that it was more important for Australia to manage risks associated with ISDS provisions than to reverse its long-standing treaty practice and opt out of the system altogether. It has, however, embarked upon a new inquiry, on which it will report in June 2015, on the Commonwealth's treaty-making processes, particularly in light of the growing number of bilateral and multi-lateral agreements. A number of submissions to the Committee have continued to highlight concerns about the ISDS system and its potential incorporation into the TPP.

Debate about ISDS has also occurred and continues in Europe. On 13 January this year the European Commission published a report of the results of a public consultation on investment protection and ISDS clauses in the proposed Trans-Atlantic Trade and Investment

⁹ Department of Foreign Affairs and Trade, Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, April 2011, 14.

¹⁰ Kurtz and Nottage, above n 8; Jurgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Review* 65; Leon Trackman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo', (2012) 35(3) *University of New South Wales Law Journal* 981.

¹¹ Selection of Bills Committee Report No 2 of 2014, 6 March 2014, Appendix 13.

Partnership Agreement ('TTIP').¹² The Commission set out proposed EU approaches to encourage investors to pursue claims in domestic courts or to use mediation rather than to resort first to ISDS. One measure would extend time limits for resort to arbitration so that an investor would not be deterred from using State courts or mediation. Another would prevent investors and affiliated companies from bringing concurrent claims in domestic courts and arbitral tribunals. Respondents were asked to provide their views on those approaches.

A large group of collective submissions, evidently by way of an online write-in, were received from about 70,000 people. The large majority of those respondents considered that only domestic courts should be used to determine disputes between States and foreign investors. They were joined in that proposition by almost half of the organisations which made individual submissions. Those organisations were largely NGOs, trade unions, some companies, and some governmental organisations.¹³ A number of them expressed concern about the 'democratic deficit' of ISDS processes in contrast with the determination of disputes by domestic courts applying laws enacted by democratically elected legislatures. On the other hand, most of the large companies and business associations which responded and the national committees of the International Chamber of Commerce argued for the availability of ISDS as well as access to the courts of the States and that ISDS should not be a last resort mechanism.¹⁴ Some causes could not be dealt with in national courts and for those international arbitration was a necessity. Some host States enjoyed immunity in local courts when it came to public acts. Most of those respondents were opposed to a requirement that investors exhaust domestic remedies before resort to ISDS. That requirement, it was argued, would add an additional layer of costs which would make ISDS inaccessible for SME investors.

The Commission is further consulting with European Union member States and the European Parliament on a number of topics including the relationship between domestic judicial systems and ISDS.¹⁵

¹² European Commission *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, Commission Staff Working Document (2015).

¹³ Ibid 14–16.

¹⁴ Ibid 15–16.

¹⁵ See also Doak Bishop, 'Investor-State Dispute Settlement under the Transatlantic Trade and Investment Partnership: Have the Negotiations Run Aground?' (2015) 30 *ICSID Review* 1.

That whistle stop tour of current contention about ISDS does not expose all the issues which arise in this complex and rather technical area. It does indicate however that there is an ongoing and serious public policy debate informed by conflicting perspectives about the interactions between national sovereignty, domestic legal systems, international law and international tribunals. It is not a debate which can be met with retrospective consequentialist arguments along the lines that nothing really bad has happened so far. Nor can it be met by worst case scenarios which are fanciful. However, the significance of the ISDS process is not diminishing and any rational consideration of it requires reflection about its potential ramifications.

A dramatic example of conflict between arbitral and judicial processes, so complicated that determining its rights and wrongs is a rather futile exercise, is the epic litigation between Chevron and the Republic of Ecuador. It is of such duration, with so many twists and turns, claims and counterclaims involving the parties, their lawyers, and litigation funders, that it could readily be fictionalised as a block-buster John Grisham novel perhaps with a Russian co-author, entitled '*Jarndyce v Jarndyce Goes Global*'. An Ecuadorian provincial court awarded a judgment of US\$18.2 billion against Texaco Petroleum in connection with an environmental tort claim, which had been commenced in 2003. The judgment was later reduced to US\$9 billion. Texaco Petroleum, at some stage, was acquired by Chevron. Chevron filed for arbitration against Ecuador under a bilateral investment treaty made between the United States and Ecuador in 1997. It asserted denial of justice by Ecuador. A spokesman for the company was quoted as saying:

We will fight until hell freezes over and then fight it out on the ice.

They did, and they are.

In February 2011, the Arbitral Tribunal made an interim order directing the Republic of Ecuador to take all measures at its disposal to suspend the enforcement or recognition within and without Ecuador of any judgment in the case. In June 2011, it made a preliminary award in the same terms and in February 2012 again ordered the Republic, whether by its judicial, legislative or executive branches, to take all measures necessary to suspend the

enforcement of the judgment and its certification as final. The Ecuadorian judiciary nevertheless certified the judgment as final in August 2012 and the plaintiffs sought enforcement action in Canada, Brazil and Argentina. In February 2013, the Tribunal declared the Republic to be in violation of its interim awards and ordered it to show cause why it should not compensate Chevron for any harm caused by the finalisation of the judgment.¹⁶ The saga continues. The Chevron example is not unique, except perhaps in its complexity. There have been a number of cases in which ICSID investment panels have issued provisional measures to suspend domestic court proceedings and a number of cases in which such relief has been sought and denied.¹⁷

Potential for interaction and conflict between arbitral and judicial processes may be thought to increase as the number of international investment agreements and their coverage increases. Their growth is a global phenomenon. The United Nations Conference on Trade and Development (UNCTAD) Yearly Review of International Investment Agreements and Investor-State Arbitration, released on 19 February 2015, discloses among other things that:

- There were 27 International Investment Agreements concluded in 2014 bringing the total number of such agreements to 3,268 worldwide.
- Forty per cent of the 42 known new cases invoking ISDS clauses in 2014 were initiated against developed countries. This was significantly more than the historical average of 28%.
- ICSID is still the most utilised institution with 33 of the 42 new known disputes filed with ICSID.
- ISDS Tribunals rendered at least 42 decisions in 2014. This included an award of US\$50 billion in three related cases. 356 cases have concluded, with 37% decided in favour of the State; 25% in favour of the investor and 28% of cases settling before the final award.

¹⁶ This aspect of the history of the proceedings is taken from the account in Michael Goldhaber, 'The Rise of Arbitral Power over Domestic Courts' (2013) 1(2) *Stanford Journal of Complex Litigation* 373, 374–75 and 380–83.

¹⁷ Ibid 378 citing Rodrigo Gill, 'ICSID Provisional Measures to Enjoin Parallel Domestic Litigation' (2009) 3 *World Arbitration and Mediation Review* 535, 553–64. See also Goldhaber at 379.

- There were important developments geared towards increased transparency in ISDS including the UNCITRAL Rules on Transparency and the adoption of the Mauritius Convention on Transparency in Treaty-based investor–State arbitration.
- Concerns about international investment agreements and ISDS have promoted a debate about their challenges and opportunities in multiple forums. There is the beginning of a broad consensus emerging that international investment agreements and the ISDS system need to be reformed to make ISDS more effective for sustainable development.¹⁸

The public interest dimensions of arbitral decisions arising out of those agreements, particularly where they involve State regulatory action or a judicial decision, means that the public policy debate will continue and continue to focus upon questions of national sovereignty, the privileging of foreign investors and the democratic legitimacy of the arbitral process. As pointed out earlier however, this address is concerned with the specific question of the interaction between ISDS provisions and the decisions and processes of domestic judiciaries.

The field of discourse about ISDS is international trade law, which covers trading relations between States under multi-lateral and bilateral agreements and mechanisms including arbitral tribunals for the resolution of disputes between States, between non-State entities and between States and non-State entities.

The capacity of international treaties to confer rights on non-State actors has long been accepted. But such rights are not enforceable under the domestic law of dualist States, unless those States are constitutionally empowered to give effect to them and have done so. Of course a domestic court may be called upon to interpret provisions of a trade agreement where they may affect rights and duties under domestic law.¹⁹ Domestic courts may be authorised to enforce arbitral awards arising out of investor-State disputes. They may also have jurisdiction to hear and determine causes of action under domestic law which arise out

¹⁸ United Nations Conference on Trade and Development, 11A Issues Note (February 2015) 1

¹⁹ See eg *Republic of Ecuador v Occidental Exploration and Production Co* [2006] QB 432, in which the Court of Appeal interpreted a bilateral agreement between Ecuador and the United States, the subject of UNCITRAL arbitration in London in order to determine the parties' rights under s 67 of the *Arbitration Act 1996* (UK).

of an investor-State dispute. The scope of the jurisdiction and the remedies will depend upon domestic law and not necessarily be congruent with the jurisdiction and remedies available under ISDS provisions.

In Australia, laws giving effect to international investment agreements entered into by the Executive Government can be enacted under the external affairs power conferred by s 51(xxix) of the Constitution if they don't fall under some other head of power. The enforcement of rights and obligations, including arbitral awards which might arise under such laws, can be entrusted to State and Federal courts by a grant of jurisdiction under s 77 of the Constitution. Part IV of the *International Arbitration Act 1974* (Cth) provides that Chapters II to VII inclusive of the ICSID Convention have the force of law in Australia.²⁰ It also provides that an award is binding on a party to the investment dispute to which the award relates and is not subject to any appeal or any other remedy, otherwise than in accordance with ICSID.²¹ An award may be enforced in the Supreme Court of a State or Territory or in the Federal Court of Australia with the leave of the Court as if the award were a judgment or order of that Court.²²

Part IV has not been the subject of judicial exegesis in the High Court. The Court, in 2013, rejected an argument challenging the constitutional validity of the enforcement provisions of Pt III of the Act, which relate to international commercial arbitration awards and give effect to the UNCITRAL model law. The plurality judgment of four of the Justices observed that parties are free to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party whether a person or a body. Where parties do so agree the decision-maker does not exercise judicial power but a power of private arbitration.²³

Action by an investor in a domestic court of a host State arising out of conduct said to constitute a breach of an investment treaty may be based upon rights and obligations derived not from the treaty but from domestic law. The ways in which domestic law may be invoked are various. If legislative action is complained of, it may be alleged that the legislation is beyond the power of the relevant parliament. Tobacco companies which challenged the plain

²⁰ *International Arbitration Act 1974* (Cth) s 32.

²¹ *International Arbitration Act 1974* (Cth) s 33.

²² *International Arbitration Act 1974* (Cth) s 35.

²³ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 566 [75] (Hayne, Crennan, Kiefel and Bell JJ).

packaging tobacco legislation before the High Court in Australia sought to characterise the laws as an acquisition of their intellectual property rights other than on the just terms mandated for laws of the Commonwealth by s 51(xxxi) of the Constitution. If the action complained of is delegated regulatory action made pursuant to a statutory power, then a party affected may argue that it was beyond that power. It may be assisted in some cases by a rule which would favour construction of legislation consistently with the host State's international obligations where a complying interpretation is open. If the investor complains of executive action, then it may be argued that the executive action exceeds the power conferred by law upon the relevant official. Again, the limits of the power may, according to the circumstances, be informed by reference to the host State's international obligations. The alleged breach may arise out of circumstances which also constitute a breach of a contract between the investor and the host State or an instrumentality of the host State. That kind of breach may be the subject of action in a domestic court or in private arbitration pursuant to the contract where the award is enforceable in the domestic court. The disadvantage of actions based on domestic law is that they are contingent upon the scope of the particular jurisdiction and remedies able to be awarded by the domestic courts. Those will not necessarily be as wide as the jurisdiction which can be exercised by an arbitral tribunal or the remedies which it can award. On the other hand, the remedies are generally immediately enforceable in the host State jurisdiction subject to questions of State immunity. Unlike arbitral awards they do not have to go through a distinct judicial enforcement mechanism to be legally effective.

One possible approach to increasing the attractiveness of resort to appropriately qualified domestic courts is for the host State to enact legislation conferring jurisdiction upon those courts to hear and determine disputes arising under investment agreements. If an international investment agreement contains an ISDS clause such a law in a State party, coupled with an exhaustion of remedies or perhaps a fork in the road clause, might provide an incentive to resort to the domestic jurisdiction. The strength of the incentive will no doubt depend upon the perceived independence, impartiality and competence of the domestic court. Such a provision, if coupled with a fork in the road clause, would leave it to the market to determine the choice of forum. There may be domestic political costs associated with legislation appearing to privilege foreign over local investors. That, as has been pointed out, is a complaint already made about ISDS clauses.

The scope of the protection for investments in a host State is often established through definitions of 'investor' and 'investment'.²⁴ The concept of investment generally includes moveable and immovable property, shares and other interests in companies, monetary claims and contractual rights, intellectual property and public law rights and has been held to include rights accrued under arbitral awards in commercial arbitrations which may arise between non-State entities or non-State entities and States.²⁵

Parties to investment treaties generally receive protection against 'unfair and inequitable treatment'. Investors are also generally protected from expropriation without prompt adequate and effective compensation.²⁶ Investment agreements which include Most Favoured Nation clauses will require a host State to treat foreign investors and their investments no less favourably than an investment made by one of its nationals and no less favourably than investments coming from any other countries. The standard can obviously overlap with the requirement for fair and equitable treatment. It is these standards, along with the high threshold criterion of 'denial of justice' that may be invoked to call into question judicial decisions of a host State.

There was a view at one time that governments should not be held accountable for the conduct of their judiciaries on the basis that governments cannot, in principle, dictate the conduct of national judges.²⁷ However the renowned jurist Judge Arechaga confirmed the development of international public law to include the actions of the judiciary when he wrote in 1978:

In the present Century State responsibility for judicial acts came to be recognized. Although independent of government, the judiciary is not independent of the State: the judgment given by judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.²⁸

²⁴ Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging under Uncertainty* (Cambridge University Press, 2012) 56.

²⁵ Peter Turner, Mark Mangan and Alex Baykitch, 'Investment Treaty Arbitration—An Australian Perspective' (2007) 24 *Journal of International Arbitration* 103, 109.

²⁶ Ibid.

²⁷ See Jan Paulsson, *Denial of Justice* (Cambridge University Press, 2006) 38.

²⁸ Ibid 39 citing Arechaga, 'International Law in the Past Third of a Century' (Sijthaff, 1978) 159 *Recueil Des Cours*, vol 1, 278.

The International Law Commission definition of 'State conduct' reflects that view.²⁹

Investor State arbitration may call into question judicial decisions of a host State in a variety of ways. The claim of denial of justice is often closely associated with a claim that the investor was not afforded fair and equitable treatment by the host State. This may be attributed to systemic problems with the State's judicial system. Investors may argue that the actions of the judiciary constituted an expropriation of their investment by inhibiting their rights to their property in the host State. Arguments have also been put before international arbitral tribunals that the actions or inaction of a State judiciary can constitute a breach of a MFN clause.

The claim of denial of justice is generally not invoked to protect the substantive rights of foreign investors.³⁰ The dismissal of a claim of right under national law by a properly constituted national authority, whether correct or incorrect as a matter of national law, traditionally does not give rise to any international remedy unless there has been a violation of due process.³¹ The requirement for a violation of due process suggests that for a claim of denial of justice to succeed an investor must have exhausted local remedies.³² It seems that if a decision can be challenged through a judicial process it cannot amount to a denial of justice.³³

Denial of justice and related claims have been invoked in a number of arbitral cases. The ground appears to encompass refusal to entertain a claim, undue delay, seriously inadequate administration of justice and clear and malicious misapplication of the law.³⁴ Complaints about judicial decisions or processes may also characterise the relevant conduct as expropriation or unfair treatment or a failure to provide an effective means of redress.³⁵

²⁹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UNDOC A/56/10 (2001) Art 4(1).

³⁰ Christopher Dugan, Don Wallace Jr, Noah Rubins, Borzu Sabahi, *Investor-State Arbitration* (Oxford University Press, 2008) 526–27.

³¹ *Ibid.*

³² Paulsson, above n 27, 100.

³³ International Law Commission (Crawford), Second Report on State Responsibility, UN Doc A/CN.4/498 (1999) [75].

³⁴ Goldhaber, above n 16, 383.

³⁵ *Ibid* 384.

The celebrated case of *Loewen v United States*³⁶ involved a complaint about a judgment against a Canadian company in a Mississippi court which had awarded US\$500 million damages against the company, including US\$400 million punitive damages and US\$75 million for emotional distress in connection with a transaction valued at a tiny fraction of those amounts. Appeal rights were conditioned upon the payment of a bond worth 125 per cent of the award. The arbitral panel which heard Loewen's claims under an ISDS provision in the North American Free Trade Agreement denied the claim for want of exhaustion of local remedies. In the course of its reasons the Tribunal was scathing about the Mississippi court decision but said:

Too great a readiness to step from outside into the domestic arena, attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.³⁷

This cautionary approach was perhaps not surprising given the members of the panel which comprised Sir Anthony Mason, Lord Mustill and Judge Abner Mikva.

Expropriation claims have been made arising out of the failure of domestic courts to enforce international commercial arbitral awards. *Saipem SpA v The People's Republic of Bangladesh* is a leading example.³⁸ Saipem was the beneficiary of an ICC award pursuant to an arbitration arising out of an agreement between Saipem and a Bangladeshi company, Petrobangla. The Supreme Court of Bangladesh refused an application of Petrobangla to set aside the award, but did so on the basis, not particularly helpful to Saipem, that there was no valid award. The Court had earlier revoked the authority of the ICC Arbitral Tribunal to proceed with the arbitration and had issued an injunction restraining it from doing so. The

³⁶ *Loewen Group Inc and Raymond L Loewen v United States of America (Award)* (2005) 7 ICSID Rep 421.

³⁷ *Ibid* 490–91 [242].

³⁸ *Saipem SpA v The People's Republic of Bangladesh (Decision on Jurisdiction and Recommendation of Provisional Measures)*, (ICSID Arbitral Tribunal, Case No ARB/05/7, 21 March 2007).

ICC award was thus 'a nullity in the eye of the law'. Saipem then took arbitral proceedings against Bangladesh pursuant to the bilateral investment treaty between Italy and Bangladesh. The Tribunal concluded that Saipem had made an investment within the meaning of Art 25 of the ICSID Convention and appeared to bring the ICC arbitration within the scope of that investment. It relied upon observations in the European Court of Human Rights that court decisions can amount to an expropriation. At the jurisdictional stage, there was no indication that the courts of Bangladesh could manifestly not qualify as State organs. The Tribunal said that Saipem's contention that the courts of Bangladesh had expropriated its investment and that the available remedies were futile met the jurisdictional test of conduct which might constitute a breach of the treaty.³⁹ There was considerable academic debate about the merits of the decision and the distinction made between the denial of justice and expropriation.⁴⁰

Difficulties in enforcing an international commercial arbitral award between non-State parties led to White Industries Australia Ltd invoking ISDS processes against the Republic of India. White Industries was the beneficiary of a final award of \$4.08 million from an ICC Tribunal in 2002. The respondent, Coal India, applied to the High Court in Calcutta to have the award set aside. White Industries applied to the High Court in New Delhi to have the award enforced. By 2009 the matter had still not been resolved. White Industries then commenced arbitration proceedings against India claiming that by the actions of the Indian courts and Coal India, India had breached the bilateral investment treaty between itself and Australia. The ICSID Tribunal rendered its award on 30 November 2011 finding that India had breached the obligation to provide 'effective means of asserting claims and enforcing rights'.

The cases mentioned so far involved claims that a domestic judicial system had simply failed the investors seeking to invoke it. The desire for redress against such failure is understandable. The difficulty is that the principles developed out of those hard cases may become 'bad law' in a metaphorical sense capable of invocation, with all the associated transactional costs, against developed court systems. Denial of justice may be a high

³⁹ Ibid 42 [153].

⁴⁰ See eg Mavluda Sattorova, 'Judicial Expropriation or Denial of Justice? – A Note on *Saipem v Bangladesh*' (2010) 13(2) *International Arbitration Law Review* 35, 41.

threshold complaint, but as one writer has observed, like the River Nile, it has many tributaries.⁴¹

The interaction between ISDS and domestic court processes becomes more acute where a complaint is based upon the domestic court's interpretation of substantive domestic law. Eli Lilly has a pending arbitration claim against Canada under the North American Free Trade Agreement relating to the interpretation of a 'promise utility doctrine' in relation to patents by the Canadian Supreme and Federal Courts. The application of the doctrine has led to invalidation of Eli Lilly's patents. The decisions were said to constitute an uncompensated expropriation breaching NAFTA and violating Canada's obligations to afford 'fair and equitable' treatment to foreign investments. Eli Lilly seeks damages of not less than \$500 million Canadian and 'to have the Government of Canada rectify the situation of non-compliance, resulting from the judge-made law on utility and disclosure, and to remedy the violations of the investment obligations owed to Eli Lilly.'⁴² Canada has submitted that the Court did no more than fulfil its statutory role and that, in any event, Canada had met the customary international law minimum standard of treatment of aliens given that there was no denial of justice to Eli Lilly. Canada has submitted that the only basis for an international tribunal to interfere with the decision of a domestic court on domestic law is where there has been a denial of justice. Canada submitted that the high threshold of the standard had not been reached.⁴³ The case is presently scheduled for hearing in May and June 2016.

Not surprisingly the Eli Lilly case has given rise to concerns about the use of arbitral tribunals to review substantive decisions of domestic courts. It has been described as an attempt to subvert a core judicial function, namely the interpretation of a domestic law which is already infused with multilateral obligations. To subject that interpretation to the oversight of a private international tribunal, it has been argued, alters the contours of State power and responsibility for compliant domestic legislation and policy prescriptions.⁴⁴ The resolution of that case is a long way off but it puts into sharp relief the issues raised when an arbitral tribunal is asked to review the decision, on a matter of substantive law, of the court of a

⁴¹ Goldhaber, above n 16, 384.

⁴² *Eli Lilly v Canada*, Case No UNCT/14/2, Notice of Arbitration [85] and *Eli Lilly v Canada*, Case No UNCT/14/2, Notice of Intent to Submit Claim to Arbitration under NAFTA Chapter 11 [87].

⁴³ *Eli Lilly v Canada*, Case No UNCT/14/2, Counter Memorial [213].

⁴⁴ Ruth Okediji, 'Is Intellectual Property "Investment"? *Eli Lilly v Canada* and the International Intellectual Property System' (2014) 35(4) *University of Pennsylvania Journal of International Law* 1121. See also Cynthia M Ho, 'Sovereignty under Siege: Corporate Challenges to Domestic Intellectual Property Decisions' (2015) 30(1) *Berkeley Technology Law Journal* 27–29.

country with a developed legal system.⁴⁵ Whether a distinction can be drawn between a case in which the correctness of the domestic court decision is put in issue and a case in which its decision, whether or not correct, is to be treated as a breach of the relevant investment agreement may be a matter for debate and perhaps some casuistry.

There may also be cases in which although no claim is made based on a domestic court decision, the arbitral tribunal is asked to decide a claim against a State on a proposition of law contrary to that determined by a domestic court in the context of the same dispute or otherwise by a domestic court of final authority whose determination is binding as a matter of law on other courts and branches of government.

So long as judicial decisions can be attributed to host States the possibility of what amounts to arbitral review of judicial processes or decisions is open under current arrangements. Such review may involve purported arbitral restraint of judicial action, characterisation of judicial process or shortcomings (including delay) as a breach of an investment agreement by the host State, characterisation of decisions on substantive law as a breach, and the adoption of reasoning about domestic law inconsistent with judicial interpretation of domestic law.

Conclusion

The preceding discussion touches lightly upon an important area which is already the subject of a very considerable body of academic and practitioner writing. Debates about ISDS arbitral processes and the finality and authority of domestic courts cannot be resolved into bright battle lines. Clearly there are categories of case in which ISDS clauses may provide an incentive to investors which are concerned about risking investment in a country with an undeveloped judicial system or one which for social, economic or historical reasons, lacks the relevant expertise or resources to competently, expeditiously and impartially hear and determine disputes between the investor and the State or its instrumentalities. The question whether such protection is desirable and the scope of such protection in relation to

⁴⁵ See also the discussion of *Apotex Inc v The Government of the United States of America*, (UNCITRAL Award on Jurisdiction and Admissibility) (14 June 2013) discussed in Kotuby Jr and Egerton-Vernon in Case Comment (2015) 30 *ICSID Review* 21–29 concerning, inter alia, claims by Apotex under NAFTA against the US, complaining of US regulatory agency and judicial decisions pertaining to applications to the US Food and Drug Administration in relation to a generic drug.

decisions and processes of the domestic courts cannot be answered with global assertions that ISDS is a good thing or a bad thing. They are questions which must be answered on a case-by-case basis. The problem becomes acute if there is any possibility that an ad hoc arbitral panel can be established to hear and determine a claim in which it is asserted that the decisions of courts of a developed legal system constitute a breach of one or more of the obligations of the host State under an international investment agreement.

Domestic courts have an important part to play in the enforcement of arbitral awards made under ISDS processes. It is necessary, however, to maintain a proper and mutually respectful distance between their constitutional functions and those of arbitral tribunals. The general topic of the interaction of arbitral tribunals and judicial systems raises important issues of public policy, public interest, international law and constitutional and domestic law. It requires careful attention by those engaged in framing international investment agreements generally.