ETHICS FOR COUNSEL AND ARBITRATORS IN COMPLEX DISPUTES

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In this paper Sir David discusses the nature and role of ethics in arbitration generally and particularly in the context of international arbitration of financial disputes. Argument is drawn from judicial practice to conclude that the requirements of arbitrators are the same as those of judges – an over-arching ethic of quality, prudence, courage, imagination, and a concern for justice.

L'analyse de Sir David porte sur les fonctions des principes d'éthique dans le processus arbitral et plus spécifiquement dans le domaine de l'arbitrage international portant sur des litiges financiers.

A l'issue de son raisonnement, l'auteur souligne en s'appuyant sur la pratique judiciaire, les similitudes qui existent entre les qualités traditionnellement requises des magistrats de l'ordre judiciaire avec celles que l'on attend des arbitres, à savoir: un sens affirmé de l'idée de justice, du travail bien fait empreint de prudence, de courage et d'imagination.

I INTRODUCTION

"Ethic" is a set of moral principles, especially ones relating to a particular form of conduct. "Ethics" are those moral principles. Procès équitable,[1] alias fair trial, is an essential condition in both civil law and Common Law, in the Pacific as elsewhere in the world, of effective and durable resolution of complex disputes.

The valuable procedure of arbitration, evolving over time and expanding in subject-matter and location, gives rise to increasingly difficult ethical issues. Arbitration has unlimited potential. Since it depends on consent of the parties it can

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1 Baragwanath "Procès equitable" in *Dictionnaire encyclopédique de la justice pénale internationale* (Berger-Levrault sous la direction de Olivier Beauvallet, 2017) at 803.

embrace choice both of arbitrators and of law, including such techniques as what Professor Loquin has termed the "non-law" of decisions made *ex equo et bono* or as *amiable compositeur*.[2] While my emphasis is on international arbitration of financial disputes, to see it in focus requires stepping back to consider the context. That concerns the need for means of peaceful resolution of the disputes inherent in humans' interaction over an ever-increasing range of activities. Of course negotiation, mediation and conciliation all have their place. But since and before the Prophet's acceptance of the role of arbitrator,[3] the use of an outside adjudicator has been recognised as a useful tie breaker.

Nowadays the options include domestic and international courts and tribunals as well as an ever-growing range of arbitral and other institutions.[4]

The topic of ethics, actual or perceived, is among the most disputed elements of debates about which of these options provides the best means of handling particular kinds of dispute. It is seen at its most intense in relation to those in relation to international trade.

There has been much debate over both the proposed and now defunct Transpacific Partnership Agreement of 4 February 2016 (TPP)[5] and also the contemplated

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2 *L'Amiable Composition en Droit Comparé et International: Contribution à l'étude du non-droit dans l'arbitrage commercial* Eric Loquin (Libraires Techniques, Paris, 1980) discussed in *A's Co Ltd v Dagger* HC Auckland M1482-SD00, 7 March 2003 at [145]: the parties' choice was said to "connote an application of principles of natural justice and fairness rather than some narrow legalistic approach that could reasonably be regarded as unfair." A more recent example is the 'compromis' between Croatia and Slovenia in the PCA-administered case between those two countries: PCA CASE NO. 2012-04 Final Award 29 June 2017. Article 4 of the Arbitration Agreement contained the following mandate for the tribunal: to apply (a) the rules and principles of international law and (b) (in respect of a particular aspect of the dispute) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances. For more detail: <https://pcacases.com/web/view/3>.

3 Abdel Hamid El-Ahdab and Jalal El_Ahdab *Arbitration with the Arab Countries* (3 ed, Wolters Kluwer, 2011) p 7.

4 The City of The Hague has recently announced:

> the construction of The Hague Hearing Centre commenced in December 2017.This is an important milestone in our mission to establish the best hearing centre in Western Europe and serve as a platform for international arbitration and mediation.
>
> There are others in Singapore, Hong Kong, Dubai, Abu Dhabi and Qatar. Both France and the Netherlands have both recently opened commercial courts to Anglophones; Lord Woolf has been appointed Chief Justice of such a court in Kazakhstan which with the development of China's $900 billion Silk Road project aspires to become the leading financial centre in Central Asia.

5 Of which after the United States withdrew its signature the terms were adopted by the other members in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), also known as TPP11.

Transatlantic Trade and Investment Partnership (TTIP) now on the backburner at best. For the former the parties agreed on the use of arbitration, the model used extensively in the familiar Bilateral Investment Treaties devised to protect and thus encourage investors from wealthy states to provide resources for projects in other, not least developing, states. By treaty between the two states, the one whose enterprises receive the investment (the host state) commits itself to the state of the investor not to alter materially certain of the conditions on the basis of which the investor has made its investment. If those conditions are altered to the detriment of the investor, as by hardening environmental laws or conduct tantamount to expropriation, the investor rather than its state may claim redress directly against the host state. In construing what have become relatively common form terms of the BIT, to reach the conclusions expressed in their award arbitrators have formulated and applied principles of international law,[6] a topic to which I return.

In most PCA-administered investment cases, the respondent is a public entity, if not the state itself, responsible for the injurious conduct. This applies both to BIT-cases and contract-based cases.

Such arbitration procedure allows the investor both to challenge the injurious conduct without having to sue in the courts of the respondent state, and to enforce its award against assets of that state.

To inject idiosyncratic ethics of counsel and arbitrators, in particular any a priori readiness or reluctance to have regard to the consequences of their award, can have dire social and economic consequences for the people of both states involved - either the investor or, especially, members of the host state.

To encourage such investment requires a dispute resolution process that is and is seen to be efficient and protective of the private interest of investors - to have effective recourse if the conditions existing and contemplated at the time of investment are unfairly worsened as result of conduct of the host state. In terms of

6 *Asian Agricultural Products Limited v Sri Lanka* ICSID Case No ARB/87/3, Final Award 27 June 1990; Meg Kinnear and Francisco Grob "*Asian Agricultural Products Limited v Sri Lanka*": Twenty-Five Years later" in Ulf Franke & ors *Arbitrating for Peace: How Arbitration Made a Difference* (Wolters Kluwer, 2016) pp 203-4.

public policy this process may be seen as win-win.[7] Any predilection to tilt the scales in favour of either host states or investors would be counter-productive, deterring investors or host states from future investments on such terms.

And appearances matter. In circumstances later developed, the TTIP (Atlantic) negotiations have seen a deep-seated difference between the US, which to date has sought use of arbitration to resolve disputes, and European interests which favour a set panel of judges. I am advised that this preference is the result of a de facto blockage in EU member states' parliaments of Fair Trade Agreements containing an arbitration clause. The EU did not enter the TTIP negotiations with this preference. It was the result of public outcry over an FTA with the US. This is believed to have had more to do with the issue of regulatory harmonisation (determining what food is good enough to enter the European market) than with arbitration proper. But that is water under the bridge.

Perceptions of ethical difference have loomed large in the debate.

These two techniques can be compatible. In domestic disputes the options for adjudication are increasingly seen as not as in competition but complementary. Where there are alternatives the search can be for *forum conveniens*, which may be either litigation or arbitration - or both.[8] A judge may leave the court to visit an arbitration to make orders to freeze assets; a court may not only enforce a forum clause requiring arbitration but may even propose reference of certain issues to the determination of arbitrators or an expert. In *Credit Suisse International v Stichting Vestia Groep*[9] Smith J, having allowed Credit Suisse's liability claim under the ISDA Master Agreement, turned to quantum:

> 346 … The amount that they recover will depend upon the determination of the issues between the parties about the calculation of the Early Termination Amount. I ask that the parties consider how those issues can best be resolved (and no doubt they will consider whether they are more efficiently and satisfactorily determined by an

7 The point is underlined by the intolerable conditions currently resulting in an ever-growing increase of internal and external refugees – in just over a decade from some 20 million to 65 million. The effects on them are often disastrous; for political decision-makers they are daunting both now and in prospect. Among the causes are poverty and hunger and the disputes to which they give rise. Both the EU and the USA are under ever-increasing pressure to accept large numbers of refugees. While neither is itself a significant source of refugees, each is a major standard setter for the world and an exemplar of what more extensive international investment can contribute to the vexed challenge of attacking the causes.

8 Campbell McLachlan *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, 2009)

9 [2014] EWHC 3103 (Comm), [2015] Bus LR D5.

arbitrator or an expert rather than a court hearing). I ask counsel to seek to agree upon the terms of an order to give effect to this judgment.

Indeed leading arbitrators are invited to serve as judges. And until a recent change of policy judges of the International Court of Justice have sat in major arbitrations.[10]

In each forum there is need for a generic ethic for counsel and the decision-maker – arbitrator or judge – which overarches the detail of specific kinds of ethical obligations, such as the rules of natural justice – absence of bias and giving fair opportunity to meet adverse argument – that are beyond the scope of this address.

Of their nature, forums differ – whether court or arbitral tribunal. Putting aside those beyond the pale of this discussion, as being affected by judicial corruption, different legal systems possess different practices and traditions. These include such practices as whether a unanimous decision is required, as was long the case in some Common Law courts including the Privy Council, perhaps influenced by the practical consequences of a death penalty, and with a view to certainty is retained by the Court of Justice of the European Communities. Usages as to formulation of the decision differ, from the formal expression of some civil law courts to the directness of other courts which emphasise candid expression of the judge's thinking. And judges may have deep-seated and inconsistent personal views. Where judges differ there may be elaborate courtesy or terse disagreement. Differences may arise from legal or habitual representation of different communities. With arbitrations a common composition is via appointment of one arbitrator or more by each opposing party and the selection of the presiding member either by such arbitrators or an authority such as the Secretary-General of the Permanent Court of Arbitration. Some appointees conceive their role as including assurance that the case of their appointor has been properly appreciated; others see the source of their appointment as irrelevant.

What matters for each is absence of bias: to ensure that the evidence and the case of each party are understood, the law is properly applied in the light of the values of the relevant community rather than those of the judge; to depersonalise by asking "what would a decent and informed member of this community see as appropriate?" Members of the court or tribunal may or may not enjoy others' company; but that is

10 The *Chagos Islands* case, involving Mauritius and the United Kingdom, has been before a divided UK House of Lords *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453, the subject of an arbitral award where Sir Christopher Greenwood, then a judge of the International Court of Justice, was the party appointed arbitrator for the UK - *Republic of Mauritius v The United Kingdom* Award 18 March 2015 <www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf>, and is currently awaiting an advisory opinion from the International Court of Justice.

not critical. Their task in every case is to reach an honest and carefully considered objective conclusion, which is the obligation they owe to all parties. They will however achieve a result giving greater satisfaction if camaraderie and collegial debate lead to improved judicial thinking.

In considering what the generic ethic is and should be, since an arbitrator is a judge, although of a very special kind, I start with the judicial paradigm which in general terms applies to all judges; move to the related national and international dimensions of important arbitrations; and conclude with the financial dimension.

II THE JUDICIAL PARADIGM

That ethic has been variously described. Classic formulations have been offered:

- in France

In truth, we can deliver justice only with trembling hands[11]

- in The Netherlands

The qualities required of a judge are prudence and courage,[12] each illustrated in a case later discussed.

Of particular importance are the judicial oaths, often borrowing from the UK Promissory Oaths Act 1868:[13]

> I promise [1] to do right to all manner of people [2] after the laws and usages of the realm [3] without fear or favour, affection or illwill. (numbers in parentheses added)

The ethic of stability ([2]) is of course crucial to any society. The evolving demand for ever more sophisticated financial techniques keeps [1] and [2] in constant tension. And it may also be noted that they, and their priority, parallel Einstein's insight:[14]

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11 G Canivet *Audience solennelle du 6 janvier 2006 – Discours de Guy Canivet, Premier président de la Cour de cassation* (Paris, 8 January 2006) <www.courdecassation.fr/IMG/File/pdf_2006/audience_solennelle_2006_discours_pp.pdf>. Il est vrai que nous ne rendons justice que les mains tremblantes.

12 Gert Corstens 31 October 2014 on retiring as Chief Justice "La prudence et l'audace".

13 1868 (UK) adopted or adapted widely within states of the Common Law.

14 26 October 1929 *The Saturday Evening Post* "What Life Means to Einstein: An Interview by George Sylvester Viereck" Start Page 17, Quote Page 117, Column 1, Saturday Evening Post Society, Indianapolis, Indiana.

> Imagination is more important than knowledge. For knowledge is limited to all we now know and understand, while imagination embraces the entire world, and all there ever will be to know and understand.

That thought has been captured in a recent address "The Human Dimension of International Law" by President Abdulqawi Yusuf of the International Court of Justice. Starting with the Roman law precept:[15]

> *Hominum causa omne jus constitutum est*, all law is created for the benefit of human beings.

he explained:[16]

> Happily, ... there are some international lawyers who … recognise the ephemeral nature of legal rules. They recognise that the rules exist only because and for the benefit of the society that they serve. They recognise that rules evolve, grow, fall into desuetude because of the changing needs of society. Most importantly, they recognise that it is their job to identify, propose, and effect these changes in practice. … theory and practice are to a certain extent indissoluble: they are simply two manifestations of our personality.

III THE JUDICIAL ETHIC

There are extensive discussions of particular ethics of international judges,[17] arbitrators[18] and counsel.[19] A contributor to *The Backlash against Investment Arbitration: Perceptions and Reality*[20] writes of a "trend toward cross-pollination of ethical standards in international arbitration".[21]

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15 Used by President Antonio Cassese ICTY Appeals Chamber, *Prosecutor v Tadic, Decision on the Defence Motions for Interlocutory Appeal on Jurisdiction*, para 97.

16 Address in honour of Antonio Cassese, Florence 2017. It is paralleled in respect of procedure by Jeffrey Golden's "Call for Innovation" in Jeffrey Golden and Carolyn Lamm (eds) *International Financial Disputes: Arbitration and Mediation* (Oxford, 2015) 365.

17 See for example Andrew L Kaufman "Judicial Ethics: The Less-Often Asked Questions" (1989) 64 Wash L Rev 851.

18 Anjaa Seibert-Fohr "International Judicial Ethics" in Cesare PR Romano & ors (eds) *The Oxford Handbook of International Arbitration* (2014) p 757.

19 Gary B Born *International Commercial Arbitration* Volume II (Wolters Kluwer, 2009) 2304 "Professional Conduct of Legal Representatives in International Commercial Arbitration"; Gary B Born *International Arbitration: Law and Practice* (Wolters Kluwer, 2012) 265; Robert W Wacher "Ethical Standards in International Arbitration: Considering Solutions to Level the Playing Field" 24 Geo J Legal ethics 1143 (2011); Margaret L Moses "Ethics in International Arbitration: Traps for the Unwary" (2012) 10 Loy U Chi Int'l L Rev 73.

20 Michael Walbel & ors (eds) (Wolters Kluwer, 2010).

21 Above n 20, 210.

But attempts to improve on the Victorian oath by creating codes of ethics for permanent domestic and international judges have met with mixed success and there is a variety of proposals for such codes for arbitrators.[22] Despite the mass of literature concerning both domestic and international arbitrators, in the case of financial arbitration their ethics are, in my experience, fortunately much the same as judges'.

In a text *Arbitrating for Peace*[23] introduced by Kofi Annan and Judge Stephen Schwebel, the distinguished arbitrator Jan Paulsson has offered the encouraging advice that commercial disputes are suitable for arbitration, since:[24]

> the paramount interest is to promote the international exchanges that are necessary to sustain the world's growing population: to encourage trade in the framework of the rule of law, and thus to avoid the debilitating transaction costs that arise in an environment of legal insecurity.

He contrasts State to State disputes, in particular the famous case of *The Alabama Claims Arbitration* where, at a time before the Kellogg-Briand Treaty of 1928 and the Charter of the United Nations overrode the Grotian principle that a State may legitimately resort to war to give effect to its policies,[25] to avoid war between the USA and Great Britain[26] the arbitral process was:[27]

> manipulated by the protagonists to suit their purposes.

A contrasting outstanding and influential example of the classic use of arbitration according to the highest rule of law standards is the pioneer Bilateral Investment Treaty claim *Asian Agricultural Products Limited v Sri Lanka* (1990).[28] It is described by Meg Kinnear and Francisco Grob in the same book[29] as a:

> 'path-breaking dispute', giving rise to a 'silent revolution' that continues today. … this award demonstrates how the ICSID institutional framework can contribute to

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22 See Catherine A Rogers *Ethics in International Arbitration* (Oxford, 2014).

23 Ulf Franke & ors (eds) (Wolters Kluwer, 2016).

24 "The *Alabama* Claims Arbitration" ibid 21.

25 See Oona A Hathaway and Scott J Shapiro *The Internationalists and their Plan to Outlaw War* (Allen Lane, London, 2017).

26 Mark Mazower *Governing the World – The History of an Idea* (The Penguin Press, USA, 2012) 86.

27 Above n 22.

28 ICSID Case No ARB/87/3, Final Award 27 June 1990.

29 "*Asian Agricultural Products Limited v Sri Lanka*: Twenty-Five Years later" n 29 at p 191-2.

interstate peace through the resolution of investment disputes, even in complex geopolitical contexts.

A British company holding shares in a Sri Lankan prawn company claimed against Sri Lanka for destruction of the prawn farm while Government forces were in occupation. The innovative application of international law to treaty claims exemplifies President Yusuf's approach to development of the law.

I will return to the "too hard cases" such as *Alabama*, where Jan Paulsson identified departure from modern ethical standards. Generally speaking in my view more useful than any of the attempts to codify judicial ethics have been the standards and usually unarticulated ethos of a new judge's peers and predecessors before whom she or he has (usually) appeared as counsel, with or against colleagues who have learned from their peers and predecessors, together with adequate working conditions, remuneration and (as a result of the foregoing) community status.

I have noted that the same people may serve both functions. The absence of tenure and guaranteed flow of work for most arbitrators is something judges had previously experienced at the Bar. Those appointing arbitrators in significant cases tend to be no less wise and are often more experienced than those who appoint judges; both incline to see merit in track record, ability, and freedom from conduct suggesting risk of disqualification.

Since appointors are able to handpick arbitrators appropriate to the particular case, and may employ them for issues transcending the jurisdiction of any court - and indeed where the parties would have no confidence in other forms of adjudication - the ablest arbitrators are given such tasks. An essay by the Hon Charles Brower and Sadie Blanchard has powerfully argued the case for international investment agreements with arbitration clauses.[30]

So why the European resistance to this process for the Atlantic Trade Treaty (TTIP)?

Certainly history shows some fluctuation between enthusiasm for arbitration and preference for courts. The former was adopted in the 1899 Convention for the Pacific Settlement of International Disputes that created the Permanent Court of Arbitration, which contributed to the Nobel Prize of the Dutch jurist Tobias Asser. Preference for the latter followed disillusionment about arbitration resulting from its failure to prevent the first Great War, and led in 1922 to the Permanent Court of International Justice, succeeded in 1945 by the International Court of Justice. In recent times the

30 "What's in a meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States" 52 Columbia Journal of Transnational Law 689.

PCA and other arbitral forums have enjoyed a renaissance. That has been facilitated by its adoption in 1976 of the UNCITRAL Rules and the ever-increasing international confidence in the PCA which Judge Crawford of the International Court of Justice has described as "scrupulously fair".

There is however a substantial democratic expectation that a host state be free to exercise sovereignty to make such changes to its laws and institutions as it considers are necessary or desirable to protect the private interests of its people.

It is difficult to think of a more controversial topic than public health. Two particular sources of concern have been a set of disputes between Governments seeking to introduce plain packaging for cigarettes and the tobacco companies who opposed it, and the arbitral claim by a Swedish company Vattenfall AB against Germany for €4.7 billion as compensation for losses allegedly suffered as a result of Germany's decision to shut down all nuclear energy production.

The former topic received public attention from an *Economist* essay of 11 October 2014:[31]

> If you wanted to convince the public that international trade agreements are a way to let the multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade treaties over the past half century have done, through a process known as "investor-state dispute settlement", or "ISDS".[32]

The temperature had been raised by a dissenting judgment in the High Court of Australia in the Tobacco Plain Packaging case *JT International SA v Commonwealth of Australia* (2012)[33] which contended:

> 242 … there should have been an order declaring that the Tobacco Plain Packaging Act 2011 (Cth) is invalid

and was followed by an attempt by tobacco interests[34] to persuade BIT arbitrators to reverse the majority judicial opinion and override the Australian statute. Some of the

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31 Which proved influential in Europe.

32 P 74 cited by Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration at the Carnegie Seminar of 27 January 2016.

33 250 CLR 1.

34 *Philip Morris v Australia* UNCITRAL, PCA Case No 2012-12.

heat was removed by three decisions. The first was by the arbitrators' dismissal of the claim because:[35]

> the commencement of treaty based investor-State arbitration constitutes an abuse of right (or abuse of process) when an investor has changed its corporate structure to gain the protection of an investment treaty at a point in time where a dispute was foreseeable.

The second was dismissal by an ICSID tribunal of all claims in *Philip Morris Products SA and Abal Hermann SA v Oriental Republic of Uruguay* (2016)[36] arising from Uruguay's enactment, as a party to the 2003 Framework Convention on Tobacco Control of the World Health Organisation, and domestic measures of tobacco control including graphic and textual anti-smoking warnings to be printed on the lower half of cigarette packs.

The third was rejection by the courts in England of the 17 grounds of challenge by tobacco interests to regulations imposing plain packaging of tobacco: *The Queen on the Relation of British American Tobacco UK Limited and others v Secretary of State for Health*.[37]

The decision on 31 August 2018 of the distinguished arbitrators in *Vattenfall AB and others v Federal Republic of Germany* (ICSID Case No ARB/12/12) in rejecting a challenge to their jurisdiction is a reminder that the now pending substantive award might enliven the discussion. The claimants, producers of nuclear power plants, have argued that Germany has breached obligations owed to them under the Energy Charter Treaty following its decision to phase out its nuclear power plants by 2022. An account of the hearing[38] reports that Germany argued that the measures at issue were a reaction to the tragic events at Fukushima, were enacted in good faith and fell squarely within its right to regulate in order to protect the health of its people, as mandated by the German Constitution. According to Germany, its measures were conducted in such a way that they balanced the interests of all concerned parties and any financial loss suffered by the claimants was the result of their own business failure.

A similar if not identical issue had been the subject of a judgment of the First Senate of the Federal Constitutional Court of Germany. The Court's news release of

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35 Award 17 December 2015 para 585.

36 ICSID Case No ARB/10/7.

37 [2016] EWCA Civ 1182, [2018] QB 149.

38 <www.fiettalaw.com/pil_news/public-hearing-held-in-vattenfall-v-germany/>.

6 December 2016 described the statute amending the Atomic Energy Act of 31 July 2011 as:

> … largely contitut[ing] a determination of the protection of legitimate expectation and of the principle of equality … this is what the … Court held in its judgment today [the statute] does, however, violate the constitutionally guaranteed right to property …

in certain particular respects. A commentator[39] considered the decision:

> was very clear that the State enjoys broad regulatory powers when it comes to the protection of public goods such as health and environment. … Accordingly, the GCC Vattenfall judgment defies yet again the unfounded critique of anti-ISDS groups that judicial proceedings – be they national or international – would somehow limit the regulatory powers of the State.

He went on to add that:

> Despite the broad regulatory freedom of the State, the State must act within certain boundaries. One important element in this regard is the protection of legitimate expectations.

He cited the Court's statement:

> even the paramount public interest grounds for an accelerated nuclear phase-out cannot absolve the legislature of the consequences of those investments undertaken in the short period of validity of the 11th AtG Amendment [which extended the permissions] and in the legitimate expectation that the legislature itself had brought about with view of the prolongation of the operational lifetimes

and its conclusion:

> the GCC first of all made it clear that the protection of property can be limited for public purposes. Accordingly, the power plant owners had to accept a certain level of interferences with their property rights.
>
> However, based on the principle of proportionality the GCC found that the lack of any compensation for the complete reversal of its policy on nuclear power constitutes violation of the property rights of Vattenfall et al.

Those debating the issue of which forum should be preferred might perhaps consider whether selection of arbitrators for the substantive tobacco decision would

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39 Nikos Lavranos "The German Constituional Court judgement in the Vattenfall case: lessons for the ECT Vattenfall Arbitral Tribunal" Kluwer Arbitration Blog December 29 2016 <http://arbitrationblog.kluwerarbitration.com/2016/12/29/german-constitutional-court-judgment-vattenfall-case-lessons-ect-vattenfall-arbitral-tribunal/>.

have made any difference, or whether the German court in its *Vattenfall* should have reached a different conclusion.

Of course in the first case we will never know; in the second it remains to be seen how the substantive arbitral award will be reasoned and received.

An author of an essay in *The Backlash against Investment Arbitration: Perceptions and Reality*[40] fears that with arbitrators there may be "issue conflict" and "role confusion":[41] tendency to advocate an argument already adopted in an author's academic writings; or a position advocated (or to be adopted) in another case. Neither problem is peculiar to arbitration; in the former case a judicial decision was overturned for that very reason;[42] and any experienced judge will have from time to time to decide whether to endorse an argument he or she had run as counsel or judge. Then there is the suggestion that "arbitrators may have incentives to decide in favour or claimants in order to increase their prospects of reappointment", but that is then dismissed with the important comment:[43]

> … no evidence supports the proposition that the arbitral system as it now exists provides incentives to produce inaccurate decisions that favour either claimants or respondents or even that such incentives actually exist. Common sense tells us that the big losers would be none other than professional arbitrators themselves if the process did not inspire general confidence.

It may be thought that the (English and German) court decisions in both the tobacco and the nuclear cases were each fairly open to the respective tribunal**.** Focussing on tobacco, in a paper delivered in Paris on 5 February 2016[44] I offered the conclusion:

> I would have been surprised had Australia lost on the merits. Despite the dissent in the High Court of Australia on the constitutional issue, the law is well familiar with the defence originally labelled "iniquity" and now called "public interest".[45] Since we are looking at an international treaty the principle of good faith is engaged.[46] A facet of it

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40 Michael Waibel & ors (eds) (Wolters Kluwer, 2010).

41 Above n 40, 205.

42 *Locobail (UK) Ltd v Bayfield* [2000] QB 451.

43 P 207.

44 EFILA Second Annual Conference, Maison du Barreau, Paris, 5 February 2016.

The Rule of Law and Investment Arbitration: Promoting or Holding Back its Advancement?

45 See RG Toulson and CM Phipps *Confidentiality* (3rd ed, 2016) at 6-003ff and the "public policy" consideration in public international law later discussed.

46 Vienna Convention on the Law of Treaties Preamble, arts 26, 31(1), 41(2).

is the intertemporality principle applied in the authoritative *Iron Rhine* Award of 24 May 2005,[47] construing an 1839 treaty on the basis that where issues of:[48]

human health and safety are at stake new norms have to be taken into consideration; and … new standards given proper weight.

Protecting the public from the horrific consequences of smoking, discovered and described by Professor Sir Richard Doll, might be thought to meet that standard.

IV COMMENT

The first point is that the treaty must be drawn competently by experts who are up to date. Much of the ISDS criticism is leveled against different outcomes from different tribunals on the basis of often similar or even identical treaty articles. This could and should be dealt with by tightening up the relevant treaty criteria, leaving less leeway to different interpretations. The second is the need for the adjudicator – judge or arbitrator – to interpret and give proper effect to the legal document under consideration. While the principles of contractual interpretation have received much attention[49] there can be unfortunate differences among judges construing similar documents.[50] So relevant expertise is important.

That can be possessed both by judges whose experience is suited to the case and by arbitrators who have been appointed by a skilled appointor.

So the third is to ensure suitable adjudicators. That requires:

- an appreciation of the kind of case expected
- a selection process that optimizes the choice.

Certainly with the help of counsel a good judge can pick up a reasonable competence in many classes of case. But in recondite areas there can be real benefit from specialist knowledge and experience of the adjudicators. If there is likely to be a significant proportion of such cases the advantages of *ad hoc* appointment of expert arbitrators are obvious.

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47 The tribunal consisted of Judge Rosalyn Higgins (President), Professor Guy Schrans, Judge Bruno Simma, Professor Alfred Soons and Judge Peter Tomka.

48 Reports of International Arbitral Awards (2005) Volume XXVII 35 at paras 58-9.

49 See for example *Iron Rhine* paras 45-60; compare in domestic law *Arnold v Britton* [2015] AC 1619 discussed by David McLauchlan in "Continuity, not Change in Contract Interpretation" (2017) 133 LQR 546.

50 See Jonathan Ross "The Case for Prime Finance: P.R.I.M.E. Finance Cases" Capital Markets Law Journal (7(3) (2012) 246 ff cited in Jeffrey Golden and Carolyn Lamm (eds) *International Financial Disputes* (Oxford, 2015): see paras 12.10-1.11.

There is often a valuable complementarity between judge and arbitrator. If the permanent court option were selected it could be empowered to refer the too hard cases to arbitration, by extended analogy with the special master provisions of Rule 53 of the US Federal Rules of Civil Procedure.

A fourth point is that in cross-border litigation a judge or arbitrator must use a metaphorical periscope to look above the fortuities of his or her own prior experience. Given the wide range of state jurisdictions and of the issues in prospect, any suggestion that judges of a particular state are to be preferred should be disregarded in favour of a simple standard of excellence.

So the choice between a permanent court and arbitrators should be made after examination of:

- what are the likely issues;
- can they be narrowed;
- can possible answers be refined;
- what forum will meet investors' concerns;
- what is needed to meet public concerns?

Options for response:

- work to abate investor concerns
- alternatively, when making appointment of permanent judges consider the interests of all three classes of persons potentially affected; also how does the advantage of an appellate tier weigh against the consequential delays;
- as part of treaty negotiation, carve out topics that the public would wish to avoid subjecting to arbitral decision, or provide for a more general balancing test such as those employed in human rights treaties to set "reasonable limits" on such rights – in practice, typically applied as a proportionality standard;
- empower States parties to give binding determinations on certain issues, including the interpretation of standards in any treaty.[51]

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51 Compare art 158 of the Basic Law of the Hong Kong Special Administrative Regime of the People's Republic of China:

> The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.
>
> The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.
>
> The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship

Further points are:

- the Secretary-General of the Permanent Court of Arbitration acts as Appointing Authority of arbitrators, mostly on the basis of the UNCITRAL Rules 1976/2010 including the authority to designate an Appointing Authority[52] and, in the event of failure by the party-appointed arbitrator to agree, of the presiding arbitrator;[53]
- The demands of a wide range of potential disputes can require selection of different adjudicators for different cases. The Secretary-General understands the maxim about horses for courses; he employs the Dutch variant of securing the exceptional "five legged sheep" needed to constitute the *forum conveniens* for especially recondite cases. For instance he has both his own lists of experts, as in the case of environmental disputes and, for complex financing transactions, access to the P.R.I.M.E. Finance panel of recognised market experts;
- ICSID also enjoys an excellent reputation as appointor of suitable arbitrators.

In the nuclear case, it may be that until renewable energy is made more readily available, in terms of President Higgins' "new norms" there could be set against the horrific consequences of misuse of nuclear energy the argument that its use might help resolve the crucial dilemma recently discussed at the London *Conference on Small States and the Environment*.[54] It is that, while inadequately controlled global warming by greenhouse gas emissions will be disastrous, unlike the devastation of the ozone layer by chlorofluorocarbons, greenhouse emissions cannot simply be stopped by international agreement: they are produced by the very conduct that allows developing countries to secure the benefits of which developed states demand continued enjoyment.

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between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

The Standing Committee of the National People's Congress shall consult its Committee for the Basic Law of the Hong Kong Special Administrative Region before giving an interpretation of this Law.

52 Article 8(1) Permanent Court of Arbitration Rules 2012.

53 Article 9(3).

54 Publication of book based on the proceedings - Petra Butler (ed) is pending.

So unlike tobacco and the chlorofluorocarbons now prohibited by international treaties, where judicial notice may be taken of an element of public policy, the position with nuclear issues is much less obvious.

So it may well be that in *Vattenfall* there is no basis for any approach other than the conventional clinical professional assessment made by the German Constitional Court and the arbitrators in deciding the point of jurisdiction, and perhaps is be expected of any other judge considering nuclear issues in that context at this stage. But once alternatives to nuclear power are accepted as practical, in terms of the *Iron Rhine* Award, may the Precautionary Principle evolving in international law be seen as involving relevant issues of:[55]

> human health and safety so that new norms have to be taken into consideration; and … new standards given proper weight.

become ethical questions for the future?

V THE NATIONAL AND INTERNATIONAL DIMENSIONS

Sensitivity is also required, in both judicial and arbitral contexts, in relation to the treatment of international law.

In construing the ISDA Master Agreement for the purposes of a New York case Judge Friedman made use of international jurisprudence. In a recent address to the Duke-Leiden Institute in Global and Transnational Law in The Hague on "The Future of International Financial Disputes" I suggested:

> by promoting the Agreement P.R.I.M.E. Finance is contributing to the international development of important jurisprudence which is being achieved internationally.

As to the role of domestic courts and judges in this process, Lord Mance of the UK Supreme Court wrote last year:[56]

> 148 … The role of domestic courts in developing (or … even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States

55 Reports of International Arbitral Awards (2005) Volume XXVII 35 at paras 58-9.

56 In *Al-Waheed v Ministry of Defence* [2017] UKSC 2, [2017] 2 WLR327 drawing on Lauterpacht's earlier article "Decisions of Municipal Courts as a Source of International Law" 10 British Yearbook on International Law (1929) 65-95 and later writings, especially by Sir Michael Wood.

> may express their opinio juris regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

In such a case, like arbitrators and judges in Bilateral Investment Treaty cases, the court can be obliged, in order to adjudicate, to form its own opinion on an issue of public international law; and if its answer later commends itself to others, it can become part of international law via art 38(1)(4) of the Statute of the International Court of Justice:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> …
> (d) …judicial decisions and the teaching of the most highly qualified publicists of the various jurisdictions, as subsidiary means for the determination of rules of law.

In short,[57] both in domestic and international cases the courts, jealous and proud as we lawyers are of our own traditions, now appreciate the ever-extending globalisation of human relations and dealings and need to take them into account when determining cases. Arbitrators should do the same.

That entails a distinct change in ethic, the need for which has been brilliantly explained in the research and argument of Oxford's best-selling legal author in 2017-18. The Australian Anthea Roberts is qualified also in England and having taught at Columbia and Harvard Law Schools as well as the London School of Economics is a Reporter for the Restatement (Fourth) of the *Foreign Relations Law of the United States.* Her *Is International Law International?*[58] identifies the gross differences of approach among nation states, their systems of legal training and their judges and lawyers to the vital topic of what "international law" means.

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57 As Justice Breyer has emphasised in *The Court and the World: American Law and the New Global Realities* (Alfred A Knopf, New York, 2015).

58 Oxford, 2017.

VI THE FINANCIAL DIMENSION

In London the Financial List has been created with jurisdiction over major and difficult financial claims requiring particular expertise in the financial markets.[59]

A glance at its website <www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/financial-list/> reveals a dynamic process of law evolution requiring enhanced expertise of judges as to law – domestic, private international and even public international – as well.

The latter is illustrated by a judgment of the Judge in Charge of the Commercial Court, Blair J in *BancoSantander Torra SA v Companhia de Carris de Ferro de Lisboa SA*.[60] The issue was whether his court had jurisdiction in a Portuguese case where the contract stipulated it was to be construed in accordance with the law of England. The defence to the jurisdiction claim depended upon establishing that Portuguese law overrode the choice of English law. That turned on the interpretation and application of the 1980 Rome Convention on the Law Applicable to Contractual Obligations which includes in its Uniform Rules art 3 as to Freedom of Choice. Such freedom is excluded if, aside from the choice of law clause, "*all the other elements* relevant to the situation at the time of the choice are connected with one country only [in that case Portugal]."[61] Following a perceptive Portuguese decision, rejecting previous English authority, Blair J held:[62]

> 404 … For the purposes of Art. 3(3) of the Rome Convention**,** in determining whether … *all the other elements relevant to the situation are connected with one country only,* the enquiry is not limited to elements that are local to another country, but includes elements that point directly from a purely domestic to an international situation. In financial transactions, the use of ISDA or other standard documentation used

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59 It deals with any claim which:

(a) principally relates to loans, project finance, banking transactions, derivatives and complex financial products, financial benchmark, capital or currency controls, bank guarantees, bonds, debt securities, private equity deals, hedge fund disputes, sovereign debt, or clearing and settlement, and is for more than £50 million or equivalent;

(b) requires particular expertise in the financial markets; or

(c) raises issues of general importance to the financial markets.

(3) "Financial markets" for these purposes include the fixed income markets (covering repos, bonds, credit derivatives, debt securities and commercial paper generally), the equity markets, the derivatives markets, the loan markets, the foreign currency markets, and the commodities markets.

60 [2016] EWHC 465 (Comm); [2016] 4 WLR 49.

61 Emphasis added.

62 Emphasis added.

> internationally may be relevant, and the fact that the transactions are part of a back-to-back chain involving other countries may also be relevant.

Employed, with any necessary local modification, across state borders such agreements engage private international law. Within such broader contexts as the 1980 Rome Convention they have moved a long distance from the sphere of private law – domestic and international - towards that of public international law and the principle formulated by Judge Greenwood of the International Court of Justice - that international law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.[63] Indeed a respected colleague has suggested that (whether directly or by useful analogy) Article 31(3) of the Vienna Convention of the Law of Treaties might warrant attention:

> There shall be taken into account [in interpreting a treaty] … (c) any relevant rules of international law applicable in the relations between the parties.

Returning to *The Alabama* and the too hard cases, another notable decision by Sir William Blair illustrates that adjudicators still have to determine issues that may lead to war. In *The Law Debenture Trust Corporation P.L.C. v Ukraine* [2017] EWHC 655 (Comm), [2017] QB 1247 the claimant, bringing proceedings on the direction of the Russian Federation, sued the State of Ukraine for a sum alleged to be due in respect of Notes issued by Ukraine. Ukraine pleaded that the contractual arrangements were procured by duress and Ukraine's consent to them was vitiated by unlawful and illegitimate means and pressure; and that it was entitled to decline to make payment as a "countermeasure" under international law. Ukraine asserted it had intended to seek financial assistance from the European Union and was compelled to seek Russian insistence instead. Subsequently Russia invaded Crimea. Ukraine's case was that Russia had also fuelled and supported separatist elements in, interfered militarily in and succeeded in destabilising and causing huge destruction across eastern Ukraine. Blair J accepted that there was sufficient factual foundation for a decision whether the plaintiff's claim for summary judgment was justiciable. He found that Ukraine's case as to threats made was credible and had not been answered. But since the issue concerned threats of the use by Russia in Ukraine, he applied the principle that:[64]

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63 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* ICJ Judgment 19 June 2012, Declaration of Judge Greenwood para 8, cited by Sir Michael Wood Special Rapporteur *First Report on formation and evidence of customary international law* International Law Commission 17 May 2013 A/CN.4/663 at para 19.

64 Paragraph 308 (ix).

> Some matters are … better addressed at the international level, rather than in domestic courts. In civil as well as common law, it appears unsurprising under present conditions that domestic courts should treat acts of government consisting of an act of war or of alleged self-defence at the international level as no-justiciable and should refrain from adjudicating upon them.

He therefore dismissed the defence to the plaintiff's claim, which was allowed.

On 14 September 2018 the decision on the duress issue was reversed by the Court of Appeal, applying a "public policy" exception to the principle adopted by Blair J.[65] So that Court contemplated a trial in London of the conduct of the Russian Federation in relation to Ukraine. The reasons for decision include the fact that since Russia had directed the plaintiff to bring the proceedings, it must have accepted the risk that a duress defence might require consideration before it could satisfy the Court it was entitled to judgment.

It may be ventured that, sitting at first instance, Blair J was wise to adopt President Corstens' "prudence" option rather than apply what might be seen as the "audace" approach entailing the consequence of trial in England of Russia's conduct; and equally that the appellate court was the *forum conveniens* to consider any alternative approach.

Would an arbitrator have decided differently? It may be that, had Russia and Ukraine consented to arbitration as did the United States and Great Britain in *The Alabama*, the case would have been justiciable. There would have been waiver by each State of its claim to State immunity, just as there was in that case. But without consent there can be no arbitration.

VI CONCLUSION

Arbitrators are judges. Since their work overlaps and is complementary to that of full-time judges, often requiring specialist competence that may not be available from established courts, each now recognizes the need to work together to advance the rule of law. So not only may full-time judges visit an arbitration to bring the power of the State to protect arbitral process, but each adopts and applies the ethical principles required of them and the counsel appearing before them to meet the ever-increasing need for excellence in their work. In engineering, failure to meet ever-

65 [2018] EWCA Civ 2026.

increasing technical demands can risk an aviation disaster;[66] in the context of dispute resolution:[67]

> …a judicial mistake made when interpreting a standard term can 'infect' trillions of dollars of trading based on the same term.

While the international law-making role of BIT arbitrators has understandably assumed particular prominence, Lord Mance has shown that all judges – that must include arbitrators – may be called upon to perform that function. Like the US Supreme Court in *Carpenter v United States* on 22 June 2018[68] other members of the international legal community must grip the reality that it must deal justly with disputes arising in the rapidly changing contexts of the computer age.

What preparation that may need may be considered in the light of a review of Professor Roberts' book[69] stating:

> according to a survey I conducted in 2014, 100% of law schools in Russia require their students to study international law, while only 3% of British law schools do the same…

Professor Westlake concluded his essay on international arbitration, published in the International Journal of Ethics, in October 1896:[70]

> … international arbitration is in the air. When this happens to an idea, and as long as it continues to be the case, the power of the idea for good cause cannot be measured by logic, necessary as that is that we should do our best to understand the conditions in order to work with them. It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish.

Key to doing so, more evident since the lessons of the past century, is an over-arching ethic of quality, prudence, courage, imagination, and concern for justice on the part of all concerned with arbitration. The same are needed for arbitrators and judges.

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66 Simon Winchester *Exactly: How Precision Engineers Created the Modern World* (William Collins, 2018) 173-213.

67 Jeffrey Golden and Carolyn Lamm *International Financial Disputes Arbitration and Mediation* (Oxford, 2015) at p 14.

68 585 US _ (2018).

69 Associate Professor Ryan Scoville of Marquette University Law School "The Divisible College of International Lawyers" (30 October 2017) <https://lawfareblog.com/divisible-college-international-lawyers>.

70 1 at 20.