ICCA

INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION

Legitimacy: Myths, Realities, Challenges

ICCA Congress Series No. 18

GENERAL EDITOR
ALBERT JAN VAN DEN BERG

with the assistance of the
Permanent Court of Arbitration
Peace Palace, The Hague

Wolters Kluwer
Law & Business

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Preface

ICCA Congress Series no. 18 comprises the proceedings of the XXII ICCA Congress, organized by the ICCA Miami 2014 Host Committee in Miami, Florida, on 6-9 April 2014. We thank our hosts for their warm welcome, excellent organization and tireless efforts on behalf of ICCA and the Congress participants.

The theme of the Congress was Legitimacy: Myths, Realities, Challenges, and the innovative program was notable for its on-the-spot gathering of empirical data. The Opening Plenary began by identifying propositions relating to arbitral legitimacy and asked the question: Are these myths, reality or something else? The Congress sessions were divided into two streams which explored the twin pillars of arbitral legitimacy: (A) justice and (B) precision. The aim of each session was to identify specific propositions as myth or reality by exploring in depth the specific aspects contributing to both arbitral justice (A), in both procedure and outcome, and to precision (B) at every stage of the proceedings. A summary checklist of the Panels' conclusions is included as an Annex to the Report on the Opening Plenary Session (pp. 22-29).

I would like to extend my thanks to the Program Committee: Lucy Reed (Chair), John Barkett, Adriana Braghetta, Dushyant Dave, Meg Kinnear, Salim Moollan and Klaus Reichert SC. A futher word of thanks goes to the Session Chairs and Rapporteurs who provided invaluable assistance during all phases of the Congress. They are as follows:

Opening Plenary:
Lucy Reed and Meg Kinnear (chairs), James Freda and Tobias Lehmann (Rapporteurs)
Precision Stream
– A1: David Brynmor Thomas (Chair), Timothy L. Foden, (Rapporteur);
– A2: John Barkett (Chair), Natalie Reid, (Rapporteur);
– A3: Nathalie Voser (Chair), Nicholas Lingard, (Rapporteur);
– A4: Klaus Reichert SC (Chair), Elizabeth Karanja, (Rapporteur)
Justice Stream
– B1: Adriana Braghetta (Chair), Ricardo Dalmaso Marques, (Rapporteur);
– B2: Salim Moollan (Chair), Belinda McRae, (Rapporteur);
– B3: Anna Joubin-Bret (Chair), Neeti Sachdeva, (Rapporteur);
– B4: Dushyant Dave (Chair), Kathleen Claussen, (Rapporteur)
Plenary: Spotlight on International Arbitration in Miami and the United States
– John Barkett (Chair), Frank Cruz-Alvarez, (Rapporteur)
Breakout Sessions on Arbitral Legitimacy: The Users' and Judges' Perspectives
– José Astigarraga (Chair), Luis González García (Rapporteur);
– Melanie van Leeuwen (Chair), Amanda Lees (Rapporteur);
– Joseph Matthews (Chair), L Andrew S. Riccio (Rapporteur);
– Edna Sussman (Chair), Ruth Mosch (Rapporteur)
Lunch Seminar – Latin America: Hottest Issues, Country by Country
– R. Doak Bishop (Chair), Ricardo Dalmaso Marques (Rapporteur)
Lunch Seminar – Power of Arbitration to Fill Gaps in the Arbitration Agreement and Underlying Contract
– John H. Rooney, Jr. (Chair), Elodie Dulac (Rapporteur)

Closing Plenary
– Jan Paulsson and Albert Jan van den Berg (Chairs), James Freda and Tobias Lehmann (Rapporteurs).

The Miami Cogress was ICCA's largest Congress to date, with over 1,000 registered delegates. It was also the first Congress since ICCA opened its doors to general membership. Meetings by ICCA's newly formed interest and project groups complemented the formal progam.

Looking ahead, the next ICCA Congress will take place for the first time in Africa, on 8-11 May 2016 in Mauritius. Information on the Congress will be posted on the ICCA website <wwww.icca-arbitration.org> as it becomes available.

Once again, I wish to thank the Permanent Court of Arbitration and its Secretary-General, H.E. Hugo Hans Siblesz, for hosting the ICCA Editorial Staff at the headquarters of its International Bureau at the Peace Palace. The continued support of the entire administrative and technical staff of the PCA is much appreciated as well.

A final word of thanks to the Editorial Staff of ICCA Publications, in particular Ms. Alice Siegel, Assistant Managing Editor, for their invaluable assistance in preparing this volume for publication.

Albert Jan van den Berg
March 2015

23rd ICCA CONGRESS

8-11 May 2016

Mauritius

"International Arbitration and the Rule of Law:
Contribution and Conformity"

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http://http://www.iccamauritius2016.com

www.arbitration-icca.org

For the Young ICCA Event:

www.arbitration-icca.org/YoungICCA/Home.html

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Keynote Address: In Defence of Bilateral Investment Treaties

*Judge Stephen M. Schwebel**

It is a pleasure and privilege to join in welcoming this distinguished audience to the opening of ICCA Miami.

Some sixty-three years ago, the Government of Iran, led by Prime Minister Mossadegh, expropriated the concession rights and installations of the Anglo-Iranian Oil Company. Anglo-Iranian had found, extracted and exported Iranian oil for decades. Its concession agreement was a template for oil and other concessions the world over. It provided for international arbitration of disputes and the application of international legal principles in the determination of those disputes. The Government of Iran refused to arbitrate pursuant to the concession agreement. By blocking access to the agreed forum, Iran thereby committed the international delict of a denial of justice. The concession agreement provided for default arbitral appointment by the President of the Permanent Court of International Justice (PCIJ). The President (or Vice President acting in his stead) of the International Court of Justice (ICJ) declined to exercise a power of appointment entrusted to the PCIJ President. Exercising its right of diplomatic espousal on behalf of Anglo-Iranian, the Government of the United Kingdom then brought proceedings against Iran in the ICJ. It alleged multiple violations of international law, including Iran's refusal to arbitrate pursuant to the concession agreement. Iran successfully challenged the treaty bases of jurisdiction invoked by the United Kingdom, so the Court was not empowered to pass upon the merits of the dispute. Anglo-Iranian sought to interdict the sale of oil from the concession areas through "hot oil" suits, with a measure of success. The Mossadegh Government was eventually overthrown; the Shah, who had fled abroad, returned; and it is accepted that in the overthrow of Mossadegh, the intelligence services of the United States and the United Kingdom had a hand. Thereafter the Iranian Oil Consortium Agreement was negotiated, on the one part between Anglo-Iranian and a group of the major international oil companies, and on the other part the Iranian Government. The export of Iranian oil resumed unhindered. That regime flourished until the Iranian revolution of 1979. The Consortium Agreement was ruptured in its wake. But, as an element of the release of the American diplomats taken hostage by Iran, the claims of the American members of the Consortium were remitted to arbitration before the Iran-United States Claims Tribunal, a Tribunal that over the last thirty-four years has amassed a body of valuable jurisprudence. The claims of the successor to Anglo-Iranian, British Petroleum, went to *ad hoc* arbitration. The BP case was eventually settled, while claims of the American oil companies before the Tribunal were adjudicated and paid.

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* Former Judge and President, International Court of Justice. In preparing these remarks, the author has particularly benefitted from writings of Professors José Alvarez, Andrea K. Bjorklund and Susan D. Franck.

Why do I recall these events in these summary terms? I do so because they suggest that if, in 1951, the then Iranian Government had abided by its contractual, and international legal, obligation to arbitrate disputes arising under the Anglo-Iranian Concession, much that is deplorable that has taken place since very probably would not have happened. Foreign subversion would not have occurred. The position of secular and democratic elements of Iranian society, and Iran's national and international policies and relations, would be very different. For these and others reasons, the history of the Anglo-Iranian Oil Company expropriation is an object lesson demonstrating that the displacement of gunboat diplomacy by international arbitration is a very real achievement.

Today that achievement is under attack. That attack is not mounted by advocates of *realpolitik* but by those who profess to be progressives. My purpose in today's remarks is to examine whether the criticism directed at arbitration between investors and States is well founded.

But before I address these critical contentions, permit me to place international investment arbitration, and the treaties from which its jurisdiction and substantive legal principles largely derive, in historical context. The value of investment arbitration can only be understood in that context.

At the time of the expropriation of the Anglo-Iranian Oil Company, the middle of the twentieth century, there was a longstanding legal as well as economic gulf between capital-importing and capital-exporting States. There was a great gulf on the substance of the governing international law – if any. There was a great gulf on international legal process – if any.

The depth of that gulf was certified by the Supreme Court of the United States in the *Sabbatino Case* when it observed in 1964 that: "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens."[1]

On one side of that divide, capital-exporting States expounded a minimum standard of customary international law for the treatment of foreigners and their property. They could not be denied justice; they were entitled not merely to national treatment but to a minimum standard of treatment that included observance of contracts and, in the event of a taking of their investments, to prompt, adequate and effective compensation.

On the other side of the divide, capital-importing States adhered to the Calvo doctrine of national treatment. The alien and his property were subject to national law and national courts and were entitled to no more than was afforded to nationals of the host State, however little that might be. Customary international law governing the treatment of alien property did not exist.

All this was well rehearsed by the Russian Revolution, where foreign property was impartially expropriated with the same compensation as that afforded to Russian nationals, that is, none; by the Mexican nationalization of oil; and, after the Second World War, by the takings in a number of instances of which the Anglo-Iranian expropriation was perhaps the most notable.

The divide early manifested itself in the United Nations under the banner of "permanent sovereignty over natural resources". In 1962, after a decade of preparation, a resolution of that title came up for negotiation and adoption. The result was a reaching

1. 376 U.S. 398, 428 (1964).

across the divide that achieved a constructive accommodation of positions. UN General Assembly Resolution 1803 (XVII) repeatedly affirmed the permanent sovereignty of a State over its natural resources. But these recitals were balanced by a recognition that "capital imported ... shall be governed by the terms thereof, by the national legislation in force, and by international law". Expropriation required "appropriate compensation" in accordance with national and international law. Moreover, Resolution 1803 (XVII) strikingly provided that "Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith" – thus requiring the observance of contracts with foreign investors. In all, this was a proportionate resolution which recognized that foreign investment was governed by international as well as national law.

But soon after, confrontation displaced accommodation. Subsequent General Assembly resolutions on "permanent sovereignty over natural resources" excluded the governance, even the relevance, of international law. With the oil crisis of 1973, and the pain engendered by the immense surge in the price of oil, especially felt in the developing world, the UN Group of seventy-seven developing countries was led by OPEC to maintain that international economic problems were all the fault of the West. What was needed was a "New International Economic Order". North/South dispute came to a head in 1974 with the General Assembly's adoption of the "Charter of Economic Rights and Duties of States".[2] That Charter excluded international law in the treatment and taking of foreign property and asserted the sole governance of the domestic law of the host State as interpreted and applied by its courts. Key industrialized democracies voted against the Charter. At that juncture, the outlook for universal or even broad agreement in this sphere on either legal process or principle seemed remote.

This informed audience is familiar with two initiatives that changed that outlook to a presence far more beneficent. The first – the creation of the International Centre for Settlement of Investment Disputes (ICSID) – was one of process. The second – bilateral investment treaties (BITs) – was built on the first and successfully surmounted the divide not only over process but principle as well.

The then General Counsel of the World Bank, Aron Broches, saw in the 1960s at the time of the UN debates on permanent sovereignty over natural resources the difficulties of reaching meaningful and sustainable universal agreement on the principles at stake. His ingenious contribution was to sidestep what seemed to be a sterile substantive confrontation with procedural creativity. The Bank would not take sides between the developed and developing worlds. Rather it would create a facility for the impartial arbitral settlement of inevitable international investment disputes. Broches and his colleagues prepared the ground carefully in a series of regional conferences in which States and their legal advisers were fully consulted. He brought the persuasiveness of his vivacious personality to bear both with the legal advisers of governments and the Executive Directors of the Bank to put his insight across. The result was the conclusion in 1965 of the Washington Convention on Settlement of Investment Disputes between States and Nationals of Other States.

That Convention was and remains a remarkable achievement. Professors Dolzer and Schreuer in their valuable book, *Principles of International Investment Law,* offer this appraisal:

2. General Assembly Resolution 3281 (XXIX).