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From the Selected Works of Karl P. Sauvant

May, 2011

Learning from Experience: An Interview with Three Experts

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Available at: https://works.bepress.com/karl_sauvant/72/

Volume VII, Issue 1
May 2011

political risk insurance newsletter

robert wray PLLC 1150 connecticut avenue, nw | suite 350 | washington, dc 20036

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Learning from Experience: An Interview with Three Experts

Reports of Overseas Private Investment Corporation Determinations, is a forthcoming publication of Oxford University Press (www.oup.com/us/law), edited by three distinguished international legal experts: international arbitrator **Mark Kantor**; **Michael Nolan**, a partner at Milbank Tweed, Hadley & McCloy LLP and adjunct professor at Georgetown University Law Center; and **Karl P. Sauvant**, Executive Director of the Vale Columbia Center on Sustainable International Investment. Our interview with the editors, conducted by Mariano Gomezperalta and Felton (Mac) Johnston, explored the implications of this major work and other areas germane to international investment and political risk insurance.

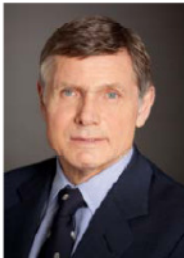
Mac Johnston: *OPIC's claims determinations are a rich store of information about political risk*

insurance (PRI) claims and losses and OPIC's policy interpretations, but your book obviously had a purpose beyond just putting these things together. Tell us a little bit about what makes the book particularly helpful and to whom and why.

Mark Kantor: In the collection we have about 260 claims determinations and about 15 arbitration awards. OPIC does not put on their website the entirety of what they have done. In addition to providing the full set of claims determinations and the full set of publicly available arbitration awards, Michael's team has done a lot more than that. If you look at a determination in the collection, you will not only get the full text of the determination, but you'll get a headnote that will cross-reference by identity

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Arbitrator Comportment and Foreign Investment Claims



William W. Park is a Professor of Law at Boston University, President of the London Court of International Arbitration and General Editor of Arbitration International. This article is adapted from *Arbitrator Integrity*, 46 SAN DIEGO LAW REV. 629 (2009).

The Evolving Context: A Paradigm Shift to Treaty-Based Arbitration

Arbitration of investor-state disputes provides an external adjudicatory discipline to a country's treatment of foreign investment, thereby enhancing rule of law for cross-border economic cooperation. In its early days, such arbitration was largely a matter of contract, with concession agreements serving as the foundation for arbitral authority to hear complaints about *de jure* or *de facto* expropriation. During the past few decades, however, investors have come to rely on bilateral and multilateral treaties to exercise a direct right of action against the host state, exercisable as the occasion arises for claims related not only to asset confiscation, but also to discrimination and other forms of inequitable treatment.

The paradigm shift from private contract to public treaty has meant heightened attention to arbitrator impartiality and independence. Some authors have characterized investor-state arbitration as "The Businessman's Court," with the suggestion that systemic incentives

for reappointment push arbitrators to favor claimants. Neither evidence nor logic, however, supports the existence of pro-investor bias.

Indeed, the very notion of such bias remains counterintuitive. Reputations tarnished by deviation from duty do not bring reappointment when both host state and investor have a role in the process, which has always been the case. Rumors of prejudice decrease rather than enhance the credibility of professional decision-makers. Although teenage boys may hope to attract adolescent girls by showing themselves dangerous and daring, no similar rule works for judges or arbitrators. Any arbitrator incentives that may in fact operate for large international cases work principally to promote the exercise of honest and independent judgment.

Nevertheless, all stakeholders in the arbitral process have an interest in monitoring and refining standards for acceptable arbitrator behavior. Integrity is to arbitration what location is to the price of real estate: without it, other things do not matter all that much.

As in other areas of law, the devil remains in the detail. Concrete standards rather than diffuse rhetoric must be applied to establish guidelines for arbitrator comportment. In this context one might turn to the basic treaty provisions creating the framework for challenging arbitrators deciding investor-state disputes.

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Arbitrator Comportment and Foreign Investment Claims (cont'd.)

The Basic Texts: ICSID and UNCITRAL

Challenges to arbitrators in investor-state disputes would normally be brought under either the ICSID or the UNCITRAL régimes, the two principal avenues for arbitration established through bilateral investment treaties and free trade agreements. Under the former, arbitration is administered by a World Bank affiliate, the International Centre for Settlement of Investment Disputes, and conducted pursuant to the Convention on Settlement of Investment Disputes between States and Nationals of Other States. The latter involves ad hoc proceedings under rules adopted by the United Nations Commission on International Trade Law.

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Although these systems share some common elements, their treatment of challenges diverges with respect to two key elements: the person who decides whether the challenge is justified, and the possibility of judicial review. On both matters UNCITRAL arbitration falls toward the commercial arbitration model, whereas ICSID arbitration follows an ad hoc internal control mechanism.

For ICSID arbitration, the touchstone is Article 14 of the ICSID Convention, which speaks of the individual's ability to "exercise independent judgment." This requirement is supplemented by a certification of independence made by the arbitrator at the beginning of the proceedings. A party to the arbitration may propose disqualification of an arbitrator on account of any fact indicating a "manifest" inability to meet that standard.

When a dissatisfied litigant contests an arbitrator's fitness in an ICSID proceeding, the remaining arbitrators normally determine whether the individual lacks the capacity to exercise independent judgment. Any review of the resulting award would be made by an ICSID-appointed panel on limited treaty-based grounds, set forth in Article 52, rather than national judges who might conduct their own review of independence and impartiality. By contrast, outside ICSID, challenges to arbitrators in commercial arbitrations would initially be heard by the relevant supervisory institution and then again come before whatever national court is charged with considering motions to review awards.

Challenge under the UNCITRAL Rules differs in procedural mechanics, notwithstanding a basic similarity in the standards themselves. Article 10 provides for challenge if circumstances give rise to "justifiable doubts" about the arbitrator's impartiality or independence. Unless the other side agrees or the arbitrator withdraws voluntarily, the challenge decision will be made by the appropriate "appointing authority" that constituted (or would otherwise have constituted) the tribunal itself. In UNCITRAL arbitration, as in ordi-

nary commercial cases, the ultimate validity of any appointing authority decision will be subject to review by national courts under the appropriate arbitration statute and/or within the framework of the New York Convention.

In some cases challenge of an arbitrator may take place under a hybrid process applying the ICSID Additional Facility Rules, available either when the host state is not a party to the ICSID Convention or when an investor is not a national of a party to that Convention. In such instances, the arbitration will be supervised by ICSID, under procedures similar to those of regular ICSID cases, but *outside* the framework of the ICSID Convention. The rule for challenge remains the ability to "exercise independent judgment", and the decision will normally be made by the challenged arbitrator's remaining colleagues. However, in vacating an award national courts might also have their say on the matter pursuant to their own standards of arbitrator fitness.

Filling the Gaps: Soft Law Standards

Evaluating arbitrator comportment would be a very difficult job indeed if investor-state cases were isolated from lessons learned in other varieties of arbitration. Notions such as independent judgment, or justifiable doubts as to impartiality, must be given meaning in the context of specific fact patterns shared with analogous cases resolved under commercial and financial arbitration regimes.

In any such comparisons, care must be taken in identifying distinctions as well as common ground. For example, the International Chamber of Commerce arbitration rules speak of arbitrator independence, but not impartiality. By contrast, impartiality as well as independence has been explicitly addressed in the Code of Ethics promulgated jointly by the American Arbitration Association and American Bar Association (AAA/ABA), as well as in the Guidelines on Conflicts of Interest drafted by the International Bar Association (IBA Guidelines) and the arbitration rules of the London Court of International Arbitration (LCIA). Some national legal systems speak directly about arbitrator bias and partiality as a ground for award annulment, while others subsume prejudice under the general rubric of "public policy" violation. Certain rules provide for challenge on the basis of actual bias, while other systems sanction the appearance of impropriety. Most standards require disclosure of circumstances that may cause doubts as to an arbitrator's ability to serve impartially and independently during a proceeding, whether by reference to "justifiable" doubts or circumstances which would cause doubt "in the eyes of the parties."

Many rules include a nationality requirement as a surrogate for impartiality. When litigants are of different nationalities, the LCIA Rules and the ICSID Convention generally provide that an arbitrator may not have the same nationality as either party. Conversely, the UNCITRAL Model Law provides that "no person shall be precluded by

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Arbitrator Comportment and Foreign Investment Claims (cont'd.)

reason of his nationality from acting as an arbitrator," unless the parties agree otherwise.

The vitality of nationality-based rules has recently been put into question by a June 2010 decision of the English Court of Appeal in the case of *Jivraj v. Hashwani*, on appeal as of the date of this writing. Finding that arbitrators were to be considered employees under the provisions of European anti-discrimination rules, the Court went on to invalidate an agreement between two businessmen, both members of the Ismaili branch of Islam, which called for an all-Ismaili arbitral tribunal. According to some observers, the logic of invalidating religious qualifications in arbitration, even when accepted by all parties, will ultimately extend to nationality-based standards.

Increasingly, conflicts of interest implicate non-governmental instruments such as the professional standards issued by the IBA or the AAA, supplemented by the writings of scholars and practitioners setting forth what might be termed the "lore" of international arbitral procedure. When properly applied, such standards fill lacunae left by national statutes and international treaties, thereby enhancing certainty. Professional guidelines provide an alternative to *ad hoc* rulemaking by scholars who with facile eloquence articulate general legal principles that constitute little more than a fig leaf to cover personal preferences. Crafted with intelligence, professional guidelines present a better guide to the parties' shared *ex ante* expectations than the unbridled discretion of clever arbitrators pursuing their own agendas.

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Most often, professional guidelines get pressed into service to fill the gaps left by overly vague institutional rules or lack of foresight by the parties' advisers. Perhaps the most oft-cited of these standards are the ones propounded by the IBA. Rightly or wrongly, the IBA Guideline's lists of permissible and impermissible relationships have entered the canon of sacred documents cited when an arbitrator's independence is contested.

The general standards contain both objective and subjective elements. According to the IBA Guidelines, arbitrators should decline appointment if they doubt about their ability to be impartial or independent or if justifiable doubts exist from a reasonable third person's perspective. With respect to disclosure, the Guidelines require communication of facts or circumstances that may "in the eyes of the parties" give rise to doubts about impartiality or independence. Any potential conflict must be evaluated according to a "justifiable doubts" standard. In turn, doubts will be justifiable if a reasonable

and informed third party would conclude that the arbitrator would likely be influenced by factors other than the merits of the case as presented by the parties.

One of the most useful (albeit controversial) features of the IBA Guidelines lies in its enumeration of illustrative elements that create varied levels of arbitrator disclosure. A "Red List" describes situations that give rise to justifiable doubts about an arbitrator's impartiality. Some are non-waivable (such as a financial interest in the outcome of the case), while others (such as a relationship with counsel) may be ignored by mutual consent. An "Orange List" covers scenarios (such as past service as counsel for a party) which the parties are deemed to have accepted if no objection is made after timely disclosure. Finally, a "Green List" enumerates cases (such as membership in the same professional organization) that require no disclosure.

Admittedly, the practice of looking to different sources of authority will not be satisfying to those who seek a hierarchy of clear authority such as that formed within a single legal jurisdiction. For better or for worse, however, no such unified judicial system governs the world of international economic relations. Accordingly, an approach taking into consideration relevant national and administrative practice will likely provide greater predictability and fairness than allowing each challenge decision to be fashioned from whole cloth.

The Heart of the Matter

In a world lacking global commercial courts of mandatory jurisdiction, arbitration provides one way to bolster confidence in cross-border economic cooperation. Without binding private dispute resolution, many business transactions would remain unconsummated from fear of the other side's hometown justice, or would be concluded at higher costs to reflect the greater risk due to the absence of adequate mechanisms to vindicate contract rights or investment expectations. Conflicts of interest thus take significance not only for the direct participants in cross-border trade and investment, but also for the wider global community whose welfare is directly affected by the arbitral process.

Thoughtful dialogue on ethical standards will seek to articulate principles which avoid either of two paths by which arbitration may come into disrepute. The first implicates lax canons of behavior, allowing arbitrator prejudgment and hidden links to parties. The second imposes unrealistic rules that facilitate abusive arbitrator challenge designed to disrupt the arbitral process.

Public and private interests each possess very real stakes in the systemic integrity of arbitration. All stakeholders in the process bear an obligation to work toward implementing standards calibrated to achieve an optimum balance between fairness and efficiency. Those who break faith with this duty make the world a poorer place.

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Learning from Experience: An Interview with Three Experts (cont'd.)

of company, identity of host state, the claims that are presented, a summary of the factual background, the issues addressed, and a summary of the results. So if you are a law firm or a political risk insurer, or a prospective insured who wants to try to get its arms around this jurisprudence, you can use these tools to get the entirety of the history, not just a select few determinations and awards. That's a big difference.

Karl Suvant: And as to why anybody ought to be interested in looking at these determinations, we really see a renaissance of the issue of political risk in general. Increasingly, multinationals making locational decisions are concerned about changing legislation, repudiated contracts, restrictions on the repatriation of earnings and other adverse changes like these. In other words, political risk has



[W]hat organizations like OPIC have done in terms of determining what constitutes political risk and in which cases actually payment should be made becomes extremely important.—*Karl Suvant*

re-emerged as a key issue. This is taking place in the context of a change in attitude towards foreign direct investment (FDI) in general, a change that involves a more skeptical attitude on the part of some countries, at least concerning some types of FDI, especially mergers and acquisitions. Hence, what organizations like OPIC have done in terms of determining what constitutes political risk and in which cases actually payment should be made becomes extremely important.

FMJ: *Were there any great discoveries or surprises that came out of producing the book?*

Michael Nolan: It turned out to be a real learning experience. One of the aspects that was interesting and important was the extent to which a truly cohesive manner of understanding the policy obligations and the broader issues behind the policy obligations has emerged over time. For example, if you look at some of the early determinations by OPIC, there's an awful lot of pragmatism in terms of, for example, local currency needs by U.S. embassies in a particular jurisdiction that will be expressly discussed in connection with the way in which a claim is determined. But you also see, going forward in time, how there really is a much more rigorous, consistent, thoughtful understanding of the policy wording and the broader considerations that are present in this area that increasingly inform the decisions. I think this has resulted now in a much more cohesive way of understanding how OPIC works and how OPIC thinks about the matters that its policies extend to. Also, it's interesting to see how much history really does repeat itself. For example if you look at the Chilean expropriations under the Allende regime, you see

discussed the allegations of various participants in the process, and you see discussions of steps that were taken allegedly to coerce the sale of investments by investors—the types of conduct that are also now associated with a great many investor-state claims under bilateral investment treaties (BITs) and the like.

FMJ: *It strikes me that, in that respect, this makes good reading for a lot of different people involved in this arena. Underwriters and buyers and brokers could do very well to absorb a lot of this background. But how precedential or predictive of OPIC's future determinations is this history, given that the cases may involve very specific situations and that the policy language isn't always boilerplate, and that even boilerplate wordings evolve over time?*

MN: While it's true that you're going to have unique factual circumstances and particular issues that are obviously going to be important, you do see over time an increasingly cohesive approach to the sorts of issues that the policies address. It's useful to see how particular language is dealt with by OPIC because, as you say, although there can be an evolution of even consistent language over time and there can be unique aspects of policies, there are language and formulations that run through many different policies and, even more broadly, in instances where the language itself might not be exactly the same, the way in which issues are considered under these policies has become more comprehensive. Prior to looking at these decisions together, it really wasn't very easy to see how much effort, thinking, and meaningful wrestling with the policy language and broader issues has gone into these determinations. They could be quite important going forward with respect to new claims.

MK: Let me add that even though claims determinations are not binding precedent, they are persuasive documents. The people that write them seek to explain their reasons for honoring a claim or dishonoring a claim on an item by item basis, whether it's the substance of what is meant by an expropriation or what is meant by an exception or an exclusion in the policy. And, because they serve a persuasive function, that means that they are also persuasive within OPIC itself and persuasive with respect to covered insureds and other parties that provide similar products. The persuasiveness of these documents is far more significant than any notion that they may be binding precedent.

FMJ: *There's another potential audience for this work and that's the sovereigns who have signed bilateral agreements with OPIC and with similar entities. If they read this volume carefully, what consequences do you think might flow from that?*

KS: Well, I certainly think that sovereigns should be consulting these volumes. After all, sovereigns want to attract FDI, and having a regulatory framework that is stable, predictable and transparent is one of the key investment determinants. They really should be

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keeping themselves abreast as to what kind of actions companies that make the investment decisions are concerned about and therefore affect the investment climate and the attractiveness of a particular country for FDI.

MK: The question you asked assumes that sovereigns look at issues through the lens of international law. That is certainly true. But PRI policies at bottom are contracts, and sovereigns and many other participants in the PRI world often focus much more on the scope of cover which derives from international law, at least with respect to expropriations, but not necessarily on the contract-based exclusions and exceptions. One thing that comes through very clearly in looking at all of these determinations is the importance of the exclusions and the exceptions in these policies. That, [and what that means from a regulatory perspective] is, I suspect, a bit of an eye-opener for many government officials.

FMJ: *To shift the subject, it would be interesting to have your views about traditional PRI (inconvertibility, expropriation, political violence) that have kind of fallen out of favor with investors for a number of reasons. Do you have any opinions about how PRI policies might be improved in a way that's consistent with prudent underwriting and that would make them a better inducement to investment?*

MK: Mac, I think the people at Robert Wray probably know the answer to that question, but I have an opinion or two on that. I heard a lot of backchannel comments about the lack of predictability of confiscation cover, particularly by disappointed insureds in connection with the Argentine crisis. It was clear that there was a disconnect between the provider of the coverage and the party who was covered regarding what those policies meant. That, I suspect, has had



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—Mark Kantor

a fairly significant negative consequence on the willingness of people to put money down in the way of premiums. I would therefore believe that a little more transparency about what the coverage is, and what the exclusions and exceptions mean, will help resolve that issue. It may end up producing altered coverages, exceptions, or exclusions if the current set of coverages, exceptions, and exclusions are not really attractive to the market. Or it may end up just eliminating some fears as to what those items mean—that in the end may be overstatements of fears. But I suspect the traditional approach of not providing specificity and keeping, for example, private insurance policy disputes entirely confidential is something that

has contributed to the level of uncertainty in that market, with the consequence that people are less likely to put their money down and actually purchase the product. In addition, I think there was a viewpoint 5-10 years ago that most countries had moved away from direct expropriations. With 20/20 hindsight, a lot of us have come to realize that that is not true. Direct expropriations, as well as indirect bite-by-bite regulatory conduct that an insured believes has the effect of an expropriation: both of those topics continue to play a role in international economic relations. Therefore, I think the events particularly of the last five years may have stirred the pot a bit and made traditional CEN cover a bit more attractive than it was five years ago.

MGC: *In the investment arbitration arena, I wanted to start by asking whether you think there is a positive relationship between BITs and FDI. There are thousands of BITs in place. They seem to be an important element of almost every country's trade and investment policies. Are they really that important for investors? Do they really have an effect in attracting foreign investment?*

KS: Maybe I can start replying to this question, having edited with a colleague a volume which deals with the impact of BITs, and for that matter taxation treaties, on FDI flows. The starting point has to be that any locational decision by an investor is determined by economic determinants: the nature of the infrastructure, the rate of economic growth, the size of the market, the availability of skills, and other economic factors like that. If these factors are not present, meaning that a company cannot make any profit, then of course no investment is likely to take place, regardless of whether or not an enabling framework at the national level is in place or, for that matter, whether or not the country in question has any BITs or not. That's the starting point. There has to be a good opportunity for making a profit. Once there is the opportunity to make a profit, however, the nature of the regulatory framework—both at the national and the international levels—becomes important. At the national level this is the case, because without an enabling regulatory framework an investor may not even be able to enter a particular industry or undertake certain activities. But the nature of the international regulatory framework is also important because it provides a much more stable framework for the relationships between a foreign investor and the host country government. And, as you pointed out, there are about 2,700 BITs in place, in addition to some 300 free trade agreements that have investment chapters. The result is a sophisticated and strong international investment law and policy system, enforced by the investors themselves through the investor-state dispute settlement mechanism. It is very difficult to determine, within that overall set of factors and determinants, the role of BITs in helping countries to attract foreign investment. But on the face of it, a BIT sends a signal that a country is prepared to subject itself to international investment disciplines—but how important that signal

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is ultimately in the decision-making process of firms is difficult to ascertain. Having said that, however, BITs certainly strengthen and complement the generally very favorable national frameworks for FDI.

MN: I can make one observation, really, from the perspective of a practitioner in the area who represents investors and states in arbitrations and acts as arbitrator. It does seem to me sometimes that the question as it's generally posed is too broad to be useful. If you simply ask whether there's a positive relationship between BITs and FDI, you get very broad data about FDI sometimes and the incidence of entry into BITs. But the question really might be appropriately more project-specific and more investment-specific than that. For example, if you have a situation where you have investment in exploration of an oil deposit or some other natural resource that might count on a currency basis for an enormous amount of FDI, you have a situation that's very different from an investment that's in, say, a manufacturing site or facility from some sort of clothing or good. A short way to put it is simply that there are some situations where investors have much more meaningful choices when they're trying to consider which countries to operate in and where to make investments. There are other situations where investors really don't, given the nature of their investment activities. I don't purport to have any truly broad or complete knowledge of the sort of data and work that's been done on this question, but when you look at a lot of these studies, they seem *not* to make those sorts of distinctions and they sometimes seem not to really zero in on those investment decisions with respect to which the legal environment and how it is affected by BITs could perhaps have the greatest bearing.

MK: Let me add just one extra point. If your library does not have the book that Karl and his colleague Lisa Sachs co-edited, you should buy it. And by purest chance, when I became aware of this question, I photocopied an article that Karl's co-editor, Lisa Sachs, wrote, just so I could make sure that I could give you the title of it so you could buy the book: *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows*, by Oxford University Press.

KS: A question that is sometimes asked about BITs is whether they discriminate in favor of foreign investors. I wouldn't formulate it as BITs or international investment agreements in general discriminating in favor of foreign investors, but rather that international investment agreements—in particular, BITs—were concluded and still are being concluded with the specific purpose of protecting investors and, at least for some countries like the U.S. and Canada, to liberalize the conditions under which investors can enter and operate in a particular country. So from that perspective and by design, BITs are focused on one issue only, even though most treaties say that they are treaties for the protection *and promotion* of investment flows. I think a broader question that has arisen is whether the focus of treaties on investment protection and perhaps liberalization leaves

enough policy space for host countries to pursue their own legitimate public policy objectives. To a certain extent, you see the answer to that question in the development of the model BIT of the United States between 1984 and 2004, in that the very strong emphasis on protecting investors in the 1984 model BIT has been tempered in the 2004 model in reference, for instance, to indirect expropriation, fair and equitable treatment (as not being more than the minimum standard) and the deletion of the umbrella clause. Beyond that, what is particularly worrisome is the inclusion of a self-judging essential security interests clause in the latest model BIT (and in actual treaties). All these are developments that other countries are likely to copy increasingly, as it limits the potential liability of host countries and makes international investment agreements more balanced in terms of the rights and responsibilities of both investors and host countries. At the same time, this development makes the international investment framework less predictable and transparent for foreign investors—or, to put it differently, this development increases political risk for international investors.

MGC: *Do you think there are particular regions or countries that are doing better in terms of shaping the international standards? At the WTO level, you see the EU and the U.S. participating in almost every case and they put a lot of emphasis on trying to influence what the standards ought to be and how to interpret certain rules. It's always these countries and other developed countries participating in the rule-making process. With investor state disputes, it seems to be the other way around. Respondents are usually developing countries. Do you think states have a chance of shaping the rules in a similar way as in WTO?*

MK: Why don't I talk to the role in shaping the rules through treaty making and then perhaps Michael can pick up and talk about shaping the rules through the process of adjudication by foreign investment treaty tribunals. Treaty making—the impact of the United States here is candidly astonishing, starting with the changes in the treaty template for the United States. A little bit of boring history: in 2002, Congress passed the Trade Promotion Authority Act, the Act that authorizes the U.S. to negotiate new trade agreements. That Act set out some negotiating objectives for the United States. Those negotiating objectives were immediately translated into the investment chapters of the two free trade agreements (FTAs) that were finalized promptly after the Trade Promotion Authority Act was passed in 2002: the Chile-U.S. FTA and the Singapore-U.S. FTA. Dramatic differences—both in an effort to tie the interpretation of the fair and equitable treatment and minimum standards of treatment test, and the expropriation test, to customary international law—dramatically increasing transparency in investor-state arbitration and a variety of other changes. They showed up first in 2003 in the Chile and Singapore FTAs. They were then translated into DR-CAFTA and into the Model BIT in November of 2004. The impact of

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that change in the U.S. template outside of the United States has been extraordinary. I'd like to draw your attention in particular to Asian investment agreements and Asian FTAs with investment chapters. The reality to anybody engaged in the international business today is the future involves India. It involves China. It involves Southeast Asia. That's where economic growth is occurring. That's where the hyper-powers of the 21st century are located. And when one looks at, for example, the China-ASEAN Investment Agreement or looks at the New Zealand-China FTA or looks at the Indian investment agreements that have recently been concluded, what you see is the developments in the U.S. template are showing up in the Asian treaties, along with some additional changes. The U.S. has had an impact far beyond just the treaties it has signed.

MN: Model treaties in general have a very significant bearing on how the treaty framework of particular countries develops. There are some instances where a particular state devotes terrific attention to its policy objectives and designs and to the extent that they can be achieved or reflected consistently across treaties. But it is quite surprising sometimes, when acting in these matters, the extent to which BITs vary even in states that have quite ambitious BIT programs. It raises the question as to the degree of attention that is sometimes directed to the specific treaty language. As treaty practice develops, I think it becomes important for drafters to address in the agreements themselves, which is where states obviously can be most effective, the sorts of issues that are resolved. Some of the questions that are remarked upon very, very amply in the community of people interested and such matters are whether most-favored nations clauses are intended to extend consents to arbitration, if investment treaties are intended to operate as essentially



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jurisdictional mechanisms, as well as mechanisms that operate with respect to the sorts of substantive protections to which a state consents. Another important question is whether state-owned claimants are deemed to be investors. Another is whether and how particular treatment standards operate with respect to taxation or include taxation. Those are just some of the sorts of questions that are very current in investment treaty dispute resolution practice and could be addressed at the drafting stage and the conclusion stage in treaty making but frequently are not. It's also interesting to look at some recent NAFTA decisions—and two cases that have received a fair bit of comment, and I think really appropriately so, are Glamis Gold

and Merrill Ring—you see really radically different conceptions of what the international minimum standard means. So even when there is the mechanism that Mark posits, and even when that mechanism is used, the process of dispute resolution still does not necessarily result in a clarification or a consistency or a migration of the understanding of these standards in the way that the contracting states might intend and hope.

MGC: *Do you think customary international law is developing to establish a clearer framework for minimum standard of treatment? I think there is anxiety, at least with some governments, as to what exactly that standard means and how it applies: if it's still at the level that requires shocking and outrageous behavior like the Neer case or is it something else.*

MN: Well, customary international law certainly has to develop—there's no question—because state practice constantly evolves and develops and we move ahead. And it's remarked by many and is the view of many that a now very significant number of decisions that we have under BITs are themselves something that you could argue to be a source of customary international law, and therefore you have a sort of "artist painting a picture of an artist painting a picture of an artist painting a picture" phenomenon, whereby dealing with these questions itself can contribute to the process of state practice development and the process of development of customary international law. The difficulty, of course, is understanding exactly how state practice has developed and exactly how these standards sit at a particular time. As to whether the Neer standard of outrageousness really continues to exist as a feature of international law and what the U.S. perspective on that is, I don't want to comment on that directly, but I will say that people who are interested in that should read Glamis Gold, which is quite interesting in how it recites an understanding of the customary international law standard.

MK: A couple of additional comments there: first of all, as Michael well knows because he actually attended a presentation on this on Monday, there is a very strong critique of the notion that there is anything called customary international law in this area. Judge Stephen Schwebel, who was the president of the International Court of Justice, puts forward a very forceful argument that there's in fact no customary international law to be found in this area because of a lack of consensus amongst states as to what this means. Therefore, simply looking at these questions through the lens of customary international law maybe misplaced. Whether or not that is right, it's easier in a conversation like this to just talk about consistency of decisions rather than give it a label of customary international law, because then you implicate that entirely separate question. So just looking at this from the question of consistency of decisions and whether the arbitrators have a common understanding of what one means by the phrase "minimum standard of treatment" or the phrase "fair and equitable treatment" or the like, I just want to draw

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Learning from Experience: An Interview with Three Experts (cont'd.)

your attention to a little bit of parochial United States history. In the U.S. Supreme Court, a somewhat analogous debate played out for a very long period of time: what we in the U.S. call Substantive Due Process, the question of the extent to which that doctrine placed limits on the regulatory authority of states in the area of economic measures. Here in the United States, which is perhaps the most litigious country in the developed world (New Zealand competes with us, by the way), we had taken 40 years to come to some consensus about the proper standard for judicial review of economic regulatory measures from a due process perspective. It is therefore no surprise to me that we do not yet have consensus among arbitral tribunals on similar issues.

MGC: *There is this view that arbitration cases are very expensive and are only available for large enterprises with deep pockets. Do you think that investment arbitration will ever become accessible to smaller businesses?*

MN: I think that investment arbitration is becoming more accessible and is becoming more broadly utilized and I think that those trends are likely to continue. There's a sense in which obviously the biggest and most dramatic and highest dollar arbitrations are going to attract attention precisely because they're the biggest cases. That's true with respect to any sort of legal activity. But the mechanisms are obviously much more broadly available and the awareness of the investment treaty mechanism is something that's grown just spectacularly. At this point, it is really part of the thinking of all manner of businesses and enterprises that are involved in transnational activity. So you have an awareness of investment arbitration that is much greater and therefore obviously an interest in it in some cases that's much greater. Now, how can high costs of pursuing claims be addressed? I think that there has been real and meaningful development recently in that area and there is every indication that it is going to continue. One thing that we're seeing more and more of is third party financing becoming available and considered in the field of investment arbitration and this has the ability to make investment treaty arbitration much more broadly available. You also see already the development of mechanisms that allow smaller claims to

be pursued in the arbitration process. One example of this that I think is very significant and portends probably a great deal for the way in which the field is going to develop are the Argentine bondholder cases.

MK: It is worth addressing the cost to the respondent state of investment treaty arbitration, because it's not just investors who are troubled by how expensive this can be, but also states. That has occasioned a good deal of discussion. I would point to two developments there that are worth thinking about: first is Latin American countries who are trying to organize themselves either for common defense or to provide resource facilities for the purpose of having resources that help them support their thinking about defenses. That's designed not just to provide consistency, but also to try to control costs. Whether it will be successful, yet no one knows. And second, just as there are developments in third party funding of claimants, there are also commercial market developments in third party funding of respondent costs and expenses. In the London market, for example, you can purchase something called "ATE" ("after the event" insurance), which is designed from a respondent's perspective to provide protection against unexpected increases in the cost of defending the case—not against a liability award, but the out-of-pocket costs for attorneys, experts, and similar costs and expenses. These are all responses to the recognition that international arbitration—whether we're talking investment treaty arbitration or international commercial arbitration—is an increasingly expensive proposition. And then I will make one last point on this topic, which is if you think it's expensive today, you should take a look at the developments in the Chevron-Ecuador investment treaty dispute and the role here in the United States of so-called Section 1782 discovery requests by Chevron (of which there are, I think, 19) and by Ecuador (of which there are at least three). You should ask yourself: if U.S.-style discovery tools become more commonly utilized in the international investment arbitration, do you think costs are going to decrease or increase?

FMJ: *Well, thank you everybody. We appreciate it very much. ■*

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