**Institut de droit international** **Tokyo Session 2013**

**18th Commission**

# Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties

*Les aspects juridiques du recours à l'arbitrage par un investisseur contre les autorités de l'Etat hôte en vertu d'un traité interétatique*

Rapporteur : Andrea GIARDINA

Membership:

MM. ALEXANDROV, AUDIT, Mrs BASTID-BURDEAU, Lord COLLINS, MM. DOMINICÉ, EL-KOSHERI, FADLALLAH, LALIVE, LANKOSZ, LOWENFELD, MAYER, ORREGO VICUÑA, RANJEVA, REMIRO BROTONS, RESS, SCHWEBEL, SUBEDI, SUCHARITKUL, TREVES, VINUESA

LEGAL ASPECTS OF RECOURSE TO ARBITRATION BY AN INVESTOR AGAINST THE AUTHORITIES OF THE HOST STATE UNDER INTER-STATE TREATIES

**TRAVAUX PRÉPARATOIRES**

*(The Index and parts of the Report have been presented and shortly discussed at the Naples' [2009] and the Rhodes' [2011] Sessions of the Institute, Annuaire 2009 p. 543-568 and 2011, p. 485-550 The Deliberations of the Institute in 2009 and 2011 are hereby reproduced).*

**Deliberations of the Institute at the Naples Session**

**Onzième séance plénière** Jeudi 10 septembre 2009 (matin)

La séance est ouverte sous la présidence de M. Degan, troisième Vice-président.

The President proposed to resume the discussion on the topic of the 18th Commission.

The *Rapporteur* thanked the President, the Secretary General, and the Members of the *Institut*. He was honoured to present its preliminary report, especially in Naples where he had studied under the guidance of Professors Quadri, Capotorti, Conforti, and Ferrari Bravo. He recalled that the 18th Commission had been established in 2003 in Bruges; that a general outline had been proposed before the Krakow session; and that for the preliminary report three subjects had been selected; namely, the notion of investment, the notion of the investor, and the *régime* of regulatory measures. The first two aspects had traditionally been the focus of international investment law but they still raise important issues. The third aspect was selected because it highlighted a recent development in international investment law. The preliminary report dealt with these three topics separately, including a special session on the evaluation by the Commission of each topic, and examined a few more general issues that were suggested for further consideration. The main purpose of the report was to stimulate the discussion and receive comments from the Members.

First, the report addressed the question of the definition of investments. These were usually described in very detailed terms in bilateral investment treaties (BITs). However, these definitions could not be regarded as self-contained. On the contrary, they were rather open definitions. As an example, the Rapporteur referred to the UK Model BIT of the 1990s. The notion of investment was said to be problematic because its definition was usually circular and tautological. Therefore, the question revolved around the interpretation of the clauses providing the definition of investment. Since BITs had to be interpreted according to the general rules set out in the Vienna Convention on the Law of Treaties the Rapporteur focused on both the text of such clauses and the objective and purpose of BITs. Two elements were normally present in the preamble of BITs, namely, the intention to promote investments between contracting States, and the contribution of such investments to the economic development of the host State.

As recent developments in international practice, the Rapporteur took into account the USA Model, the Canadian Model, and the Central American Free Trade Agreement (CAFTA), all of 2004, the 2007 Draft prepared by Norway, and the 2009 German regulation on international economic co-operation. Thus, the uniform content of BITs could be said to be part of international customary law and could be used in the interpretation of BITs in case of *lacunae*. Therefore, the question of the relationship between BITs and international customary law was a particularly significant one.

As far as the Washington Convention was concerned, the Rapporteur pointed out that it raised a particular question in relation to the notion of investment. Since no such definition was provided under that Convention, its application had to rest on the investment agreement between the parties. Moreover, the practice of so-called *arbitration without privity* entailed the particular issue of investors relying on BITs to bring disputes before ICSID arbitrators, in the absence of an explicit consent of the State. Therefore, the question was whether a BIT could serve as the basis for arbitration. According to the Rapporteur, under such circumstances both the requirements under the Washington Convention and those provided under the BIT must be fulfilled. The Commission was hesitant in considering the definition of investment as the central topic of its mandate, due to its reduced practical impact. As to the elements of an investment under international law, the Commission agreed that a necessary pre-requisite was that an investment must have a fundamental international character, as held in the *Tokios-Tokelès* case.

Turning to the notion of investor, the Rapporteur explained that in the preliminary report he dealt with both natural and legal persons. The nationality of investors had to be determined on the basis of domestic law, and this gave rise to interesting cases in which the *effective link* requirement had been strictly applied. The Commission confirmed the importance of this topic and proposed to focus future analysis on the relationship between national and international law as far as nationality determination and, in particular, the effective link requirement were concerned.

As to the choice of regulatory measures being the field of specific study of the Commission, the Rapporteur explained that this subject raised particular problems and could stimulate the discussion among the Members of the *Institut*. The basic idea was to investigate whether regulatory measures could be considered indirect expropriations, and entail no obligation of compensation. Reference was made to the 2004 USA Model, Appendix B, which contained a vague definition of expropriation, leaving the question of regulatory measures open. While traditional case law was in favour of viewing regulatory measures as indirect expropriations, more recent cases had been cited in the preliminary report to show that a different solution could be envisaged.

Finally, the Rapporteur expressed the intention of the Commission to focus its future work on two main areas; namely, the contribution of investment law to the development of customary law and the interaction between international and national law in the field of international investments. He concluded expressing his gratitude to the Members of the Commission for their valuable contribution.

The *President* congratulated and thanked the Rapporteur. He opened the floor to debate.

Comments by M. Lalive
Comments by Mme Bastid-Burdeau
Comments by M. Bucher
Comments by Mr Tomuschat
Comments by M. Ranjeva
Comments by Mr Abi-Saab
Comments by Mr Orrego-Vicuña
Comments by Mr El-Kosheri
Comments by M. Mahiou
Comments by M. Fadlallah

M. *Lalive* félicite le Rapporteur de la qualité de son exposé. Il invite l'Institut à définir les orientations pour l'avenir face à un sujet aussi complexe. Il rappelle que lors d'une réunion avec quelques membres de

la Commission, l'accent avait été mis sur le fait que les travaux de l'Institut sur la question devraient être utiles à toutes les personnes (gouvernements, arbitres et conseils) qui s'interrogent sur les questions d'interprétation de la convention CIRDI et des traités bilatéraux d'investissement (BITs). Il observe que la pratique révèle les hésitations et les erreurs de nombreux praticiens. Il regrette également que les gouvernements soient souvent mal informés par des conseils qui n'ont aucune idée des rapports entre le droit international public et le droit international privé. Il lui semble que l'Institut doit dès lors se concentrer sur des questions d'interprétation. Il porte à l'attention des Membres qu'un congrès s'est tenu en 2009 à Genève avec pour thème "How to make ICSID awards more acceptable to States ?". Il estime que le choix de ce thème démontre qu'il existe des problèmes ainsi qu'en témoigne la décision de certains Etats latino-américains de dénoncer la convention CIRDI. Il lui semble que certains Etats seraient moins réticents vis-à-vis de la convention CIRDI si les arbitres tenaient compte de l'intérêt public ou de la position des gouvernements. Il cite l'opinion dissidente de Sir Frank Berman jointe à la sentence rendue dans l'affaire *Luchetti* et qui insiste sur le fait que lorsqu'il s'agit de décider de la juridiction du CIRDI, il y a un devoir particulier d'explication pour prévenir le risque de l'annulation pour défaut de motifs visée à l'article 52 de la convention. Il fait part de ses doutes sur la notion de *privity of arbitration* ou *arbitration without privity*. C'est une belle formule mais qui crée surtout de la confusion. Il explique qu'il ne saurait y avoir d'arbitrage sans un échange de consentement. Il y a toujours un lien contractuel qui fonde l'arbitrage et la pratique basée sur le traité sur la Charte de l'énergie le révèle.

Mme *Bastid-Burdeau* remercie le Rapporteur et souhaite faire une observation sur l'optique qu'il convient d'adopter. Elle indique qu'il y a une tendance à se référer au CIRDI et à sa jurisprudence. Or, selon les clauses d'arbitrage des traités bilatéraux d'investissement, les investisseurs se voient souvent offrir le choix entre un arbitrage CIRDI et d'autres types d'arbitrage (arbitrage *ad hoc*, arbitrage selon le règlement de la CNUDCI). Elle précise que la perspective des arbitres fluctue selon la procédure d'arbitrage en cause. Elle estime que la 18ème Commission doit décider de la question de savoir si elle envisage d'étudier tous les types d'arbitrage opposant un investisseur à un Etat ou si elle préfère se limiter à la convention CIRDI.

M. *Bucher* félicite le Rapporteur pour la qualité de son rapport et de son exposé. Il invite l'Institut à mettre l'accent sur ce qui est particulièrement délicat à l'heure actuelle en termes de politique législative.

Contrairement au Rapporteur, il ne trouve pas intéressant d'examiner par exemple les conditions de nationalité de l'investisseur. Il indique que la problématique du rôle de l'Etat est actuellement au cœur de l'arbitrage d'investissement. Il précise que s'il y a eu deux retraits de la convention CIRDI, c'est un signal inquiétant. Il suggère que la Commission dirige ses réflexions sur la question du risque politique dans les contrats d'investissement.

Mr *Tomuschat* congratulated the Rapporteur both on the style and the substance of his report. He indicated that the case-law was far from being homogeneous. He thought that an interesting question would be to study the need to have an appeal board such as the World Trade Organization (WTO)'s Appellate Body.

M. *Ranjeva* félicite et remercie le Rapporteur pour la clarté de son exposé ainsi que pour son dévouement. Il souhaite attirer l'attention des Membres sur le non-dit, c'est-à-dire les résistances politiques au recours à l'arbitrage d'investissement. Il indique que la réticence des Etats, notamment des Etats en développement, est liée à la crainte de ne jamais avoir gain de cause dans la mesure où les arbitres ne tiennent pas suffisamment compte de l'intérêt public et des intérêts légitimes des Etats. Il estime également que la réticence des Etats en développement est due au monopole quant aux services de conseil, de consultante et d'ajustement. Il invite l'Institut à réfléchir à une politique d'information et d'éducation en ce qui concerne le droit des investissements et la pratique en matière d'arbitrage d'investissement. Il invite également l'Institut à une démarche d'humilité en ce qui concerne les décisions rendues. Il lui semble que les décisions ne sont parfois pas de nature à recueillir l'adhésion des personnes et institutions concernées. Il estime que ces questions sont fondamentales.

Mr *Abi-Saab* congratulated the Rapporteur for an excellent written and oral report. He remarked that in the ICSID context, general international law had sometimes been misinterpreted. He considered that a bridge should be built between the ICSID and the outside world of public international lawyers. Stressing the qualities of the Rapporteur as both a private international lawyer and a public international lawyer, he encouraged the Rapporteur to bridge this gap. He also emphasized the concept of jurisprudence. He regretted that some arbitrators gave flimsy motives for their awards. Agreeing with Mr Lalive, he underlined that there was a duty on arbitrators to give the reasons for their awards.

Mr *Orrego-Vicuña* invited the *Institut* to look at how international law evolved in certain areas. For instance insofar as the nationality of investors was concerned, the *Nottebohm* case had been reaffirmed in

many awards. In other fields, such as the nationality of corporations, he said that there had been a great evolution. For example, the Barcelonan Traction case was clearly surpassed by investment awards. He suggested that it would useful to examine questions such as those relating to expropriation and fair and equitable treatment. He pointed to the NAFTA context where the question arose whether fair and equitable treatment was a customary international law standard or was a self-standing standard under current international law. He believed that there was a need to recognize the importance of freedom to resort to arbitration. He urged the Members not to put all arbitration procedures in a common box because there were not always common rules.

Mr *El Kosheri* congratulated the Rapporteur. He voiced his full agreement with most of what had been said by the Members. He drew Members' attention to the topic's complexity. He suggested analysing the question of treaty claims and contract claims and also indicated that a discussion on res judicata was necessary. He expressed doubts on the importance of having an appellate mechanism in investment arbitration.

Finally, Mr El Kosheri invited the Commission to draft a comprehensive report and prepare a draft Resolution for the *Institut*'s next session.

M. *Mahiou* félicite le Rapporteur. Il estime, comme M. Ranjeva, qu'il existe une certaine méfiance vis-à-vis de l'arbitrage d'investissement. Cette méfiance est due tout d'abord à des considérations d'ordre politique. Il lui semble que le monde de l'arbitrage apparaît dans les pays du Sud comme un monde clos dans lequel se dessinent des relations incestueuses entre les arbitres, les conseils et les personnes provenant du milieu des affaires. Il prône la démocratisation de l'arbitrage et pense que 1'Institut pourrait jouer un rôle à ce niveau. Il souligne que la réticence vis-à-vis de l'arbitrage d'investissement est également due à une considération d'ordre technique: la manque de qualité des arbitrages rendus dans certains cas. Comme M. Tomuschat, il se demande s'il ne faudrait pas instituer un double degré de juridiction semblable à celui de l'OMC dans le cadre du CIRDI et de la Chambre de Commerce Internationale (CCI).

M. *Fadlallah* félicite le Rapporteur pour son travail remarquable et souhaite que la Commission énumère les problèmes concrets soulevés par ce sujet et les traite selon les suggestions formulées par les membres. Une première remarque concerne la méfiance des Etats envers l'arbitrage, qui doit être attentivement évaluée. Il s'agit souvent d'une impression et il n'y a pas toujours de déséquilibre en faveur des investisseurs. La deuxième remarque concerne la distinction entre *treaty claims* et *contract claims*. Il rappelle que la compétence en matière

d'arbitrage est donné pour les litiges et ne concerne pas ses causes. Remplacer l'objet l'arbitrage par le motif sur lequel celui-ci se fonde est un glissement qu'il faut éviter. La dernière remarque concerne le double degré de juridiction qui entraîne des risques d'erreur semblables à ceux qui existent au niveau de la première instance. Le droit fondamental à préserver est l'accès à une bonne justice; il n'est pas sûr qu'une double juridiction l'assure davantage.

The *Rapporteur* thanked the Members for their suggestions and expressed his intention to make four remarks. First, he expressed his intention to focus on practical problems rather than theoretical aspects. Second, he was not convinced that arbitration necessarily entailed an advantage for investors, and that States could rely on balanced arbitrations that did not systematically disregard public policy interests. Third, the Rapporteur agreed that arbitrators on investment law could be more careful in the interpretation of general norms of international law, but considered that an appellate mechanism in investment arbitration would not solve all the problems of consistency between different decisions concerning similar or identical cases. Finally, he regarded the impact of investment law on general international law as a fundamental aspect to be taken into account by the Commission.

The *President* thanked Mr Giardina for his reply. La séance est levée à 12 h 00.

**Deliberations of the Institut at the Rhodos Session**

**Onzième séance plénière** Vendredi 9 septembre 2011 (après-midi)

La séance est ouverte à 17 h 45 sous la présidence de M. *Roucounas*.

Le *Président* invite le Rapporteur, M. *Giardina,* à présenter son rapport. Il regrette que le temps qui lui est accordé est malheureusement très limite et appelle le Rapporteur à être synthétique.

The *Rapporteur* was grateful to the President and the Secretary General for allowing him to present his Report to the plenary, however briefly. He recalled that the objective was to achieve a vote on a draft Resolution at the next session of the *Institut* and that many issues remained outstanding. Given the limited time afforded to him, however, he would focus on a series of major points, and was looking forward to hearing the comments of his *consœurs* and *confrères*.

The work of the Commission had originally focused on three issues: the notion of "investment", the notion of "investor" and the issue of “regulatory measures”. Following recommendations made by the

plenary at the Naples session, the Commission had then focused its work on another set of issues, as reflected in the Report that was posted on the website of the Institute in July 2011. The Report addressed: the distinction between treaty and contract claims; the issue of most favoured nation ("MFN") clauses; and the concept of fair and equitable treatment ("FET").

The Report provided a full review of the case law and doctrine in relation to MFN clauses, including on whether such clauses applied to substantive issues only or also to jurisdictional issues: The Report was equally comprehensive with respect to FET. It discussed, *inter aria,* whether the FET standard expressed in bilateral investment treaties differed from the minimum standard of customary international law, as referred. to in Article 1105 of the North American Free Trade Agreement. The Rapporteur hoped that the plenary could express its view on this topical issue.

The Report also highlighted the current status of discussions relating to the interactions between international investment law and the law of the European Union. The Rapporteur recalled that the Member States has transferred an exclusive competence to the Union in that respect by the Lisbon Treaty. He noted that the European Court of Justice had already condemned three States (Finland, Austria and Sweden) for maintaining preexisting bilateral investment treaties with third States, because such treaties ensured free capital transfers and thus infringed the competence of the Council of Ministers to enact restrictions on inbound and outbound capital flows. The Rapporteur also indicated that the European Union would soon enact legislation in relation to inward foreign investment. This showed that the EU was now an important new actor in the field of international investment law, although it was difficult so far to understand where the EU was heading. The overall goal of the Commission was always to preserve EU law; European institutions would thus always consider international investment law through the prism of potential violations of EU law, which may ultimately have a significant impact of that particular field of international law.

The Rapporteur concluded by noting that several members of the Commission were of the view that the scope of the Report was too wide and that the upcoming draft Resolution should focus on one of the issues mentioned above. Another potential topic could have been the protection of public interest in investor-State arbitration, as many arbitral tribunals tended to apply reasoning and arguments that were

more appropriate to commercial arbitrations than to investment arbitrations.

The Rapporteur concluded by apologizing for the brevity of his presentation and reiterated that he was looking forward to the input of the plenary on the work of his Commission.

The *President* thanked the Rapporteur for his report and opened the floor for a very brief debate.

Comments by Mr. Torres Bernardes:

Mr *Torres Bernardes* congratulated the Rapporteur for his report in the name of the plenary. He hoped that the increased involvement of European institutions and EU law would result in a heightened sensitivity to the public interest among investor-State arbitral tribunals. He expressed the concern of many members of the *Institut* when stating that some arbitrators had been regrettably careless when it came to the protection of that public interest.

*La séance est levée à 18 h 05.*

RAPPORTEUR : ANDREA GIARDINA

**The Preparatory Works for the Tokyo Session**
**The questionnaire of 5 April 2013, rev. 10 June 2013**

*(The References to case-law and doctrine, relating to the various Questions, previously included in the original version of the Questionnaire, are hereafter omitted being now substantially included in the corresponding sections of the Report)*

**Part I (General and Preliminary Issues)**:

*Question no. 1:*

BITs and customary international law

**a)** Have the extremely numerous bilateral treaties on the protection of foreign investments, given their substantially homogenous content, determined the creation of a body of international customary law apt to fill the possible gaps in the BITs and to oblige also third States and International Institutions?
**b)** Do previous decisions of other arbitration tribunals which have adopted constant solutions in similar cases, create a body of law to be applied by subsequent Tribunals?
**c)** What is the relationship between FET and "full protection and security" (FPS) standards with the customary international law minimum standard? Does the treatment in accordance with the international minimum standard include the FET and the FPS standards?
**d)** Do interstate arbitration concerning BITs, or interpretations given by interstate organs, constitute relevant precedent?

*Question no. 2:*

The BITs as *lex specialis*?

**a)** Does a BIT, or even a series of BITs, represent a body of rules which are autonomous, as *lex specialis,* from other rules of general international law, which could not be used for interpreting or filling the possible *lacunae* of the BITs' regulation?
**b)** A related point is whether the above autonomy would be maintained also in the presence of peremptory rules of international law (for instance, the procedural rule on the equality of arms, and the substantive rules protecting fundamental human rights and those protecting States' basic economic sovereign rights).

**c)** An additional related point is whether the autonomy of investment law can be maintained, and/or with what possible qualifications, in the case that the BITs or other international instruments make express reference to international rules.

*Question no. 3:*

The BITs and the selected arbitration mechanism

**a)** In the case that an applicable BIT allows the investors to choose between different mechanisms for the solution of their dispute, will the rules of the BIT remain the only applicable rules, or in any case the prevailing rules in case of conflict?
**b)** Or do the rules of the chosen mechanism also have to be respected? The question especially applies to the ICSID requirements in the case of a BIT based arbitration, with particular reference, for instance, to the definition of investment, and investor.

*Question no. 4:*

The reasons and effects of the different available choices

**a)** Do the different kinds of arbitration mechanisms provided for in the BITs determine different kinds of substantive and/or procedural solutions of the submitted disputes?
**b)** The related point is whether, and to which extent, the choice of the arbitration mechanism is determined by the differences between the prerequisites, procedural and substantive solutions offered, and the effects, particularly the enforceability, of the awards proper to the possible mechanisms.

*Question no. 5:*

Prior recourse to local courts and subsequent waiting periods

**a)** Is the requirement of prior recourse to local courts a substantive or a procedural provision?
**b)** Is a waiting period necessary for the investor prior to the filing of a claim before an international arbitration tribunal?

*Question no. 6:*

The interaction between international and domestic law in assessing certain arbitration prerequisites

**a)** Is the recourse to municipal law necessary to verify *in concreto* the existence of an investment? How can the applicable law be determined?

**b)** Is nationality to be assessed exclusively on the basis of the relevant domestic law?

**c)** Is the legality of the investment according to municipal law a

necessary prerequisite?

*Question no. 7:*

New actors and problems in investment arbitration

**a)** Transparency, amicus curiae, intervention of third parties, joinder of proceedings

**b)** What is the nature of collective mass claims (or class arbitration): "aggregate procedures" or "representative proceedings", as distinguished from "multi-party proceedings"? Do mass claims (or class arbitration) raise due process problems? Does the consent to arbitrate contained in a BIT cover also atypical arbitral proceedings such as mass claims (or class arbitration)?

**c)** Which foreseeable impact could Third Party Founding have on investment arbitration?

Could TPF increase conflicts of interest, in consideration of the control and participations in the TPF, and the role of the TPF in the management of the arbitration (appointment of counsel and arbitrators, strategy of the arbitration and possible settlements)?

Could TPF contribute to increase the number of cases involving high amounts in dispute, irrespective of the good foundation of the claim of the financed party, and possible settlements?

Should TPF be disclosed, and to which extent?

**d)** The Counterclaims in investors-State arbitration: problems of jurisdiction and admissibility.

Does the consent of the Parties to counterclaims represent an issue of jurisdiction for the investors-State arbitration Tribunals?

Do other considerations and argument play a role for affirming the jurisdiction of the Tribunal and/or the admissibility of counterclaims?

Does the ICSID annulment mechanism need some modifications and/or improvements?

Should the roles of Counsel, Arbitrators and Members of Ad Hoc Committees be kept separated? Does the ICSID annulment mechanism need some modifications and/or improvements?

Within the EU framework is the notion of public interest according to the EU larger than the traditional notion of public interest according to the law of the member States and/or international law? Considering that some States, by virtue of the accession to the EU, argue that intra-EU BITs are terminated, is there any consequence on the applicability of the MFN Clause? Which is the possible outcome to a conflict between BITs

and EU law and policy: a) before the EU Court of Justice, and b) before an investor-State arbitral tribunal or an Interstate Tribunal created according to a BIT?

WITH REFERENCE TO PART II (SOME RELEVANT ISSUES):

*Question no. 8:*

Treaty claims and contract claims

**a)** How broad is the extent of the protection provided by an UC? Can the UC be invoked against a State, when the investor claims the breach of a contractual obligation which has been entered into by a public entity and not by the State itself?
**b)** How can purely contractual aspects of a claim be identified? Does the jurisdictional clause inserted in a BIT refer to "any dispute", thus including also the contract issues and not only the treaty issues?

*Question no. 9:*

Most Favorite Nation Clause

**a)** Does the MFN clause interpreted in its broader sense include the provision on the settlement of disputes even when it is referred to as the "treatment"?
**b)** Can the MFN Clause be applied to the selection of an arbitration mechanism?
**c)** Are expropriation claims to be included in a MFN Clause when the Clause itself is generally referred to disputes between the Contracting Parties of a BIT?
**d)** Is the principle "expression *unius est exclusion alterius*" valid in interpreting the MFN Clause?

*Question no. 10:*

Fair and Equitable Treatment

**a)** Whenever the FET clause in a BIT is not expressly linked to the minimum standard of international law, is it possible to determine its meaning going beyond the limits of the minimum standard in similar cases?
**b)** Which are the elements of the FET treatment?
Due to the differences in interpreting the FET clause and the flexibility of various elements, it seems useful to distinguish few categories of standards:
- Due process and no denial of justice:
- No discrimination and arbitrariness:
- Legitimate expectations, transparency, consistent conduct:

**c)** How should the measure of compensation of investors be determined in case of violation of the FET standard?
Can a violation or multiple violations of the FET standard amount to indirect expropriation?
If not, how should compensation be determined?

*Question no. 11:*

Expropriations, indirect expropriations, regulatory measures

**a)** Are nationalizations to be distinguished from individual expropriations?

**b)** In which cases the behaviors and acts of the authorities of the Host State can be considered tantamount to expropriation?

**c)** Whether and how Regulatory Measures can be distinguished from indirect/or creeping expropriations?

**d)** Are the standards of compensation in case of nationalizations and regulatory measures different from those applicable in case of expropriations?

LEGAL ASPECTS OF RECOURSE TO ARBITRATION BY AN INVESTOR AGAINST THE AUTHORITIES OF THE HOST STATE UNDER INTER-STATE TREATIES

**The Answers received from the Members of the Committee and Issues Discussed and Directions adopted by the Participants to the Rome**

Meeting of 19-21 June 2013

**Preliminary Observations:**

It is to be preliminarily noted that in the course of the Rome Meeting of 19-21 June 2013, a general fear of fragmentation of the law of investments has been mentioned by the Participants, particularly with regards to a recent decision in a case between *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia* (award on Respondent's preliminary objections to jurisdiction and admissibility of claims) of 21 June 2012.

The settlement of disputes should therefore comply with the recognized rules of international law as accepted, including the general principles of law. The applicable law should respect the principles of international law and the award should be in conformity with these international standards. Unity and uniformity of international law should be emphasized.

**Question n°1:**
**BITs and customary international law**

**a) Have the extremely numerous bilateral treaties on the protection of foreign investments, given their substantially homogenous content, determined the creation of a body of international customary law apt to fill the possible gaps in the BITs and to oblige also third States and International Institutions?**

*PROFESSOR ALEXANDROV:*

The recent proliferation of BITs has helped to advance customary international law with respect to the minimum standard of treatment. As the ILC has explained, "An international convention admittedly establishes rules binding the contracting States only . . . but it must be remembered that these rules become generalized through the conclusion of other similar conventions containing identical or similar provisions."[1] According to Judge Schwebel, the development of customary international law through treaties "is a process of which more than 2,000

[1] Report of the International Law Commission covering the work of its twelfth session, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 145, UN Doc. A/4425 (1960) .

BITs are the contemporary exemplar."[2] However, as Judge Schwebel recognizes, the correlation between contemporary BIT practice and customary international law is not perfect. For example, given the role of consent in investor-state arbitration, it would be difficult to argue that the proliferation of investor-state arbitration provisions in BITs had created a customary rule of arbitration. Similarly, there remains little consensus regarding the status of the fair and equitable treatment standard under customary international law.

*JUDGE RANJEVA:*

La question n'est pas inédite en droit. La convergence des pratiques et jurisprudences amène à admettre *prima facie* l'idée d'un droit coutumier émergent. Pour ma part je considère qu'en la matière il y a lieu de faire montre de discernement: chaque cas d'espèce étant toujours unique, les conclusions s'inscrivent dès lors dans une contextualisation particulière et spécifique: l'analyse critique de cas est incontournable. Dans cette approche, il me paraît plus approprié sur le plan méthodologique de mesurer plus les degrés de résistance à l'extension de la norme coutumière que les facteurs d'extension. On peut se référer ainsi à l'interprétation de la déclaration de la souveraineté des Etats sur les ressources naturelles: les mêmes affirmations dans la déclaration de l'Assemblée générale des Nations unies et la Charte africaine des droits de l'homme et des peuples ont donné lieu à deux interprétations différentes: pour la CIJ, la Charte africaine a considéré le pillage des ressources naturelles comme une atteinte aux droits de l'homme.

Le manque d'uniformité ne doit pas être considéré comme un problème dans la mesure où dans le différend relatif aux investissements le problème affecte des ajustements réciproques de prétentions et d'intérêts avant toute chose.

*JUDGE SCHWEBEL:*

The very large number and concordance in the terms of BITs may be argued to tend towards the creation of a body of customary international law on certain core provisions of BITs, such as fair and equitable treatment and compensation for expropriation. Since BITs have been concluded by States world over, developed and developing, North, South, East and West, in the thousands, they constitute a decisive repudiation of controversial resolutions of the UN General Assembly, such as that embodying the Charter of Economic Rights and Duties of States. Whether these core provisions of BITs have attained the status of

[2] Stephen M. Schwebel, *The Influence of Bilateral Investment Treaties on Customary International Law*, in American Society of International Law Proceedings 2004, p. 29.

customary international law is open to debate, but the trend in that direction is compelling.

*PROFESSOR SUBEDI:*

I would say yes to the first half of the question, but am not sure about the second part of the question since some of the latest BITs/FTAs have started to show some variation especially with regard to regulatory expropriation.

*PROFESSOR TREVES:*

With respect to question 1a (but also 2a) concerning BITs as *lex specialis* or as elements of customary practice, I think it would be useful to introduce a reference to the *Diallo* (*Republic of Guinea v. Democratic Republic of Congo*) *ICJ Judgment on Preliminary objections* of 2007 (ICJ Reports 2007, p. 582), espec. at paras. 88-90, even though this judgment concerns the alleged impact of BITs and other treaties concerning investment on the customary law of diplomatic protection. The ICJ argues for the ambivalence of treaty practice, notably stating at para. 90: "The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary".

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

As to Question 1 a), one should refer to the basic elements on which customary rules of international law are established, which means practice and *opinio iuris*. In investment law there is no reason to adopt ways of creating customary rules which would be different than those existing in general international law, which means that there must be practice of the tribunals. Of course, BITs could evidence such practice, especially when they belong to a special category. BITs are the expression of definite case-law but they are not creating customary rules.

Concerning the interpretation of BITs, the general rules of interpretation of treaties have to be applied. This means that relevant instruments could be invoked if the plain language of the treaty is not sufficient. The plain meaning of the terms should however be first examined.

In case of doubts as to the interpretation, customary international law could give some precise notions to abide by, like when denial of justice is invoked, where the arbitral tribunal would have to see what this means

under general international law. Furthermore, categories can be created within the field of BITs, whereby different models could be foreseen, like the French model, the German model and so on. So within a category, the terms of the treaty should be more enlightened by what happens in other BITs between the same State and other countries. There, it may be useful to refer to the practice of the States. This is also a means of interpretation which is referred to in the Vienna Convention.

Reference was also made to the *Diallo* case (cf. *Republic of Guinea v. Democratic Republic of Congo*, ICJ Judgment on Preliminary objections of 24 May 2007) and to the finding by the ICJ that treaties, even consistent treaties, are ambiguous as far as the question of whether they are evidence of customary law and they have to be interpreted in a broader context in order to know whether a particular provision, and not BITs in general, goes in the direction of derogating from customary law or from developing customary law. The necessary reference to the ICJ 2007 judgment in the *Diallo* case is generally shared among the Participants.

**b) Do previous decisions of other arbitration tribunals which have adopted constant solutions in similar cases, create a body of law to be applied by subsequent Tribunals?**

*PROFESSOR ALEXANDROV:*

The FET standard is broader than the customary international law minimum standard. The ordinary meaning of the term "fair and equitable treatment" is often interpreted to include, for example, the protection of investors' legitimate expectations, the guarantee of a stable and predictable legal framework, good faith, and the absence of arbitrariness. FET also encompasses the concepts of non-discrimination and denial of justice. The fact that the NAFTA Free Trade Commission adopted a note of interpretation in 2001 to limit that treaty's FET provision to the minimum standard indicates that the FET standard is generally interpreted as providing greater protection than the minimum standard. Nonetheless, as stated by the *Mondev* tribunal (Judge Schwebel, Prof. Crawford, and Sir Ninian Stephen), the minimum standard itself has continued to evolve, and it "cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920s" (para. 123 of award).

*JUDGE SCHWEBEL:*

It is incontestable that, certainly in the pre-BIT era, there was no agreement in the international community as to whether a minimum standard in the treatment of foreign investors and investments even

existed in customary international law (the Communist States denied its existence and acted accordingly and that position had the support of many developing States, as UNGA resolutions such as that just cited demonstrates). Today the content of the minimum standard in customary international law is unsettled, though there is room for the view that its essentials have been set out in the core provisions of the thousands of concordant BITs. Whether the content of FET is determined by customary international law is questionable, not least because of the traditional divide in the international community over the existence and the content of customary international law in this sphere. The United States Government, together with Canada and Mexico, has taken the lead in maintaining that FET affords nothing more than the minimum standard. That position, in my view historically inaccurate and currently ill advised, is proving influential and has been followed by some other States, not, I suspect, because of its merits but because of the standing of those countries. The United States appears to have changed its position as of 2004 because it found itself the object of international claims in NAFTA. (See my article, "The United States 2004 Model Bilateral Investment Treaty: an Exercise in the Regressive Development of International Law, in Aksen et al., *Global Reflections on International Law,Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (Paris, ICC, 2005), reprinted in Schwebel, *Justice in International Law Further Selected Writings* (Cambridge University Press, 2011).

Clearly stare decisis does not govern. Nevertheless counsel will typically extensively plead pertinent prior decisions. The tribunal is free to weigh, apply, distinguish or differ from prior decisions. Where prior decisions exhibit consistent content, the tribunal will be the more inclined to give them weight. Where the precedents divide, the tribunal will feel the more free to give precedence to its own analysis.

*PROFESSOR SUBEDI:*

I am not sure about it as the practice seems to vary a great deal. It also seems to depend on the background of arbitrators. Many of the ad hoc tribunals have continued to pick and choose rather than demonstrate a consistent pattern.

*PROFESSOR TREVES:*

As concerns question 1b about the precedential value of previous arbitral decisions, I would like to draw your attention to *Burlington Resources Inc. v. Ecuador* (ICSID case No. ARB/08/5), Decision on Liability, 12 December 2012, para. 187 repeats the passage of the Decision on

Jurisdiction you quote. It is interesting to note that the dissent by Francisco Orrego Vicuña at para 4, while concurring in principle with the statement of the majority, on the specific case is close to the restrictive view held by arbitrator Brigitte Stern and mentioned in the majority opinion at para 187. So the existence of a real majority on the point seems questionable.

For further statements similar to those in Burlington, see, among others, *Austrian Airlines v. Slovak Republic*, (UNCITAL Ad hoc arbitration), Final Award (Redacted), 20 October 2009, para. 84; *Saipem v. Bangladesh* (ICSID Case No. ARB/05/07), Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67: *Bayadir Izaat Turizm Ticarret Ve Sanayi AS v. Pakistan* (ICSID case Nr. ARB/99/2) Award of 27 August 2009, para 145, quoted with approval in *Bosh International Ltd and B & P Ltd Foreign Investiment Enterprises v. Ukraine* (ICSID case Nr. ARB/08/11) Award of 25 October 2012, para 211.

More restrictive statements, among others, in *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay* (ICSID Case No. ARB/07/9), para. 58 and in *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Award, 8 May 2008, para. 119.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

In view of the importance of consistency, predictability and unity in the case-law, with particular reference to ICJ precedents, it was agreed that ICJ case-law should be taken into account by tribunals whenever the Court has taken a position on otherwise unsettled issues or in areas where there are lacunae. This would be a way of taking into account a solution which is not addressed at all in the BITs, for instance for compulsory measures in interim awards or with regards to the conditions under which provisional measures are taken. This would help harmonize the solutions.

**c) What is the relationship between FET and "full protection and security" (FPS) standards with the customary international law minimum standard? Does the treatment in accordance with the international minimum standard include the FET and the FPS standards?**

*JUDGE SCHWEBEL:*

The customary International minimum standard -- on whose existence, still less content -- the international community was sharply divided as recently as the 1970's, today, arguably, may be said to be generally accepted virtually worldwide, at any rate among those States which are parties to BITs (which include the Russian Federation, China, Cuba, and,

for the time being, Argentina, Venezuela. Ecuador? Nicaragua? The Democratic Republic of Korea?) To that important extent, the concordant substantive principles of BITs have made a fundamental contribution to the development of the governing content of international law.

Some States, notably the NAFTA Parties, maintain that FET and FPS equates with the minimum standard. The United States and Canada have been inclined to define the minimum standard to mean no more than the Neer arbitral award of 1926 (see the award in Glamis Gold to this effect), a position not shared by some other States, tribunals and commentators (see, e.g, Mondev, Merrill & Ring and my article last year in Arbitration International: "Is Neer Far from Fair and Equitable?).

In my view, the minimum standard includes FET and FPS but is not limited to them. Moreover, FET and FPS import a more substantial measure of protection of the investor and the investment than does the minimum standard, a measure that has been developed in a number of awards.

*PROFESSOR SUBEDI:*

In my view the international minimum standard would include the FET standards. With regard to inclusion of “full protection and security” it would depend on how the term is interpreted.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

These issues have been discussed together by Participants due to the similarity of the questions involved.

A general agreement was expressed on the fact that there is no real difference between public international law and investment law as far as FPS is concerned, but FPS includes the physical integrity of the investment and of the investor and his personnel and close related persons, and it excludes any kind of undue influence or unjustified threat of a law-suit against the investor.

It was also considered that FPS is broader than FET, which is a more objective and settled principle.

Regarding the more general question of the existence of a customary international law minimum standard (which would thus also apply in the absence of a BIT), it was agreed that there is a minimum standard concerning the investor, but not the investment. So this issue of minimum standard should be taken only from the point of view of the investor. However, even if the main focus is on the investor, the protection guaranteed to the investor might imply the protection of the investment.

As to the meaning and content of this minimum standard, reference was made to the *bona fide* principle, the concepts of non-unjustified discrimination and non-arbitrariness, the absence of denial of justice, the protection of legitimate expectations of the investor, the right to property as it is understood under international human rights law, the fact of giving the investor a chance to perform his obligations in a correct way, without imposing any additional burden on him, and the idea of no deprivation but for public interest. The Participants suggested that this is a non-exhaustive list.

A general reference to the human rights conventions was suggested and in particular to the case-law of the European Court of Human Rights (and to article 1 of the 1st Protocol), which makes always a balance between public interests and the protection of property and it justifies the States' measures only to the extent that the sacrifice of the individual's rights is justified by the common interest, which is perceived according to this balancing of public and private interests. Reasonableness and proportionality are the 2 words used by the European Court.

The general idea is that the minimum standard is "minimum" and that the FET can be a more broader and protective concept.

Regarding the content of FET, reference has been made to treatment under law, which means non-arbitrary treatment. Reference was also made to the obligations imposed to the State of predictability, transparency, as well as the obligation to indemnify the investor in case of violation of the FET.

This issue should be addressed having regard to the "legitimate" expectations of the investor.

The expectations are normally that treaties should be complied with, independently from radical changes of policies, with certain leave-way for the States, like necessity, or the clause reserving special essential security interests. At treaty level, international law would prohibit the change of law unless there are special reasons, like necessity or special clauses for security interests. It follows that the situation for the investor is more difficult under the contract than under the treaty.

There is general agreement of Participants towards a proposal of a Model of the Resolution which would take into account the minimum standard of treatment due to the investor and which should refer to the fundamental rights recognized by international law. However, because there are two opposite interests in a BIT, the tribunals should apply the FET standard clause without giving a preference to the investor, but simply taking into consideration the interests of the host State and of the

investor in a balanced appreciation of the legitimate character of measures taken and in the avoidance of non-legitimate measures.

**d) Do interstate arbitration concerning BITs, or interpretations given by interstate organs, constitute relevant precedent?**

*JUDGE SCHWEBEL:*

Awards in interstate arbitrations may be relevant precedent. The NAFTA Note of Interpretation of 31 July 2001 has force for NAFTA and tribunals constituted in pursuance of it. It need not have broader application, not least because of its questionable thrust.

*PROFESSOR SUBEDI:*

I do not know on what basis we can make such a clear distinction between the two. It would partly depend on the manner in which the legal issues have been dealt with in a given case.

*PROFESSOR TREVES:*

As regards question 1d, on interstate arbitration concerning BITS as relevant precedents, reference could be added to the *arbitral proceedings instituted by Ecuador against the US* on the basis of the clause on State to State arbitration in the US-Ecuador BIT, concerning the interpretation and application of article II(7) of the US-Ecuador BIT. (materials available on the PCA website). This might be seen as an attempt by Ecuador, in light of the interpretation given to a provision of the US-Ecuador BIT in the *Chevron* case, to obtain something similar to an "authentic" interpretation with the purpose of influencing (or binding) future investor-state arbitration tribunals. The fact that the award rendered has not been made public seems to show the reluctance of one party at least to have the award serve the purpose of influencing investor-State arbitration tribunals. One point of interest emerging in the published written pleadings and expert opinions concerns the possibility of submitting to arbitration pure questions of "interpretation" where no problem of "application" in a concrete case exists, and whether in such case there is a "dispute".

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

A general agreement was reached by Participants on the fact that, in the absence of a special provision in the BIT, interstate arbitrations concerning BITs or interpretation given by interstate organs should constitute relevant precedent.

However, the question was raised as to the case when the States parties to a BIT decide that a non-final decision rendered by an arbitral tribunal has interpreted the BIT in a way that is not consistent or not correct. It is to

know whether the arbitral tribunal is bound by the interpretation given by the two States or not and whether this interpretation has an influence on the coming award. The same question might arise when two tribunals are seized at the same time by two different investors, and having one of these arbitral tribunals taken its position, the States claim that the interpretation given is not correct. It is to know whether the interpretation given by the States bind the second tribunal which has not yet given its decision.

**Question n° 2:**
**The BITs as *lex specialis*?**

**a) Does a BIT, or even a series of BITs, represent a body of rules which are autonomous, as *lex specialis,* from other rules of general international law, which could not be used for interpreting or filling the possible *lacunae* of the BITs' regulation?**

*PROFESSOR ALEXANDROV:*

A BIT contains rules that are *lex specialis*, and that must be interpreted by themselves, according to Articles 31 and 32 of the Vienna Convention. However, the customary rules of treaty interpretation are an example of secondary rules of international law that remain relevant to the interpretation of the BIT's provisions.

*JUDGE SCHWEBEL:*

BITs are not "autonomous". They are treaties subject the law of treaties.

BITs are a *lex specialis* for the particular Parties to a particular BIT. But the rules that they contain are not autonomous and unrelated to the principles of international law. BITs are treaties, to be interpreted in accordance with the law of treaties and general international law.

*PROFESSOR SUBEDI:*

I am not sure about it. My own view is that the body of rules based on BITs should not be interpreted completely independently of the rules of general international law since international investment law is part of the family of general international law.

*PROFESSOR TREVES:*

With respect to question 2 a (but also 1a) concerning BITs as lex specialis or as elements of customary practice, I think it would be useful to introduce a reference to the *Diallo* (*Republic of Guinea v. Democratic Republic of Congo*) *ICJ Judgment on Preliminary objections* of 2007 (ICJ Reports 2007, p. 582), espec. at paras. 88-90, even though this

judgment concerns the alleged impact of BITs and other treaties concerning investment on the customary law of diplomatic protection. The ICJ argues for the ambivalence of treaty practice, notably stating at para. 90: "The fact invoked by Guinea that various international agreements, such as agreements for the promotion and protection of foreign investments and the Washington Convention, have established special legal regimes governing investment protection, or that provisions in this regard are commonly included in contracts entered into directly between States and foreign investors, is not sufficient to show that there has been a change in the customary rules of diplomatic protection; it could equally show the contrary".

**b) A related point is whether the above autonomy would be maintained also in the presence of peremptory rules of international law (for instance, the procedural rule on the equality of arms, and the substantive rules protecting fundamental human rights and those protecting States' basic economic sovereign rights).**

*PROFESSOR ALEXANDROV:*

As *lex specialis*, the BIT's provisions supersede rules of international law with which they are in conflict, with the possible exception of *jus cogens*. However, it is questionable whether *jus cogens* would ever apply in the context of a BIT dispute.

*JUDGE SCHWEBEL:*

In any event, the relevance of peremptory rules of international law is questionable.

The application of peremptory rules of international law to BITs is dubious. Equality of arms is a basic principle of national and international adjudication and arbitration, but is it really *jus cogens* together with the prohibitions of genocide and slavery? Recall the inability of the international community to agree on the content of *jus cogens* beyond such core principles. To inject fundamental human rights and protection of basic sovereign rights into the equation is no less questionable than the casual accusations of genocide found in contemporary political discourse. *Jus cogens* should be put aside in the BIT context.

*PROFESSOR SUBEDI:*

No, I do not think so.

**c) An additional related point is whether the autonomy of investment law can be maintained, and/or with what possible**

**qualifications, in the case that the BITs or other international instruments make express reference to international rules.**

*PROFESSOR ALEXANDROV:*

If the BIT makes express reference to other international rules, then those will also apply.

*JUDGE SCHWEBEL:*

Whether or not BITs make reference to international rules, they are to be interpreted in the light of them but above all to give effect to their particular provisions.

**Question n°3:**
**The BITs and the selected arbitration mechanism**

**a) In the case that an applicable BIT allows the investors to choose between different mechanisms for the solution of their dispute, will the rules of the BIT remain the only applicable rules, or in any case the prevailing rules in case of conflict?**

*PROFESSOR ALEXANDROV:*

No. For example, if the BIT allows the investor to refer the dispute to ICSID, then the ICSID Convention will also apply.

*JUDGE RANJEVA:*

Le consentement des parties au règlement arbitral ne peut être remis en cause sauf à dénaturer l'institution. Les mécanismes d'expression du consentement sont divers. Il faut s'assurer de la réalité effective du consentement quitte à faire montre de souplesse s'agissant de son mode d'expression.

L'arbitrage national de l'Etat hôte peut être considéré comme le plus pratique. Mais pour des raisons de stratégie procédurale on peut comprendre la réticence à saisir ces instances. Le principe à rappeler en matière de règlement de différents reste à mon avis le droit des plaignants à accéder à la justice arbitrale.

Je ne pense pas qu'il soit pertinent de raisonner en termes d'exclusion pour créer de faux cas de conflits de lois. Il appartient à l'arbitre de faire montre de créativité en termes de solution compte tenu des circonstances de fait qui déterminent en définitive les véritables enjeux. En matière d'investissement , les enjeux sont plus aisés à identifier dans la mesure où ce sont de valeurs chiffrées et non abstraites qui sont en cause.

*JUDGE SCHWEBEL:*

The rules of the BIT, and the rules of the chosen mechanism, will govern.

Where the BIT allows the investor to choose between set of rules or institutions, that choice should be respected.

*PROFESSOR SUBEDI:*

I do not think so.

**b) Or do the rules of the chosen mechanism also have to be respected? The question especially applies to the ICSID requirements in the case of a BIT based arbitration, with particular reference, for instance, to the definition of investment, and investor.**

*PROFESSOR ALEXANDROV:*

Yes. The ICSID Convention and Rules apply to all ICSID arbitrations, including those brought under a BIT.

*JUDGE SCHWEBEL:*

It is recognized that the Washington Convention does not define the investment. Typically the BIT itself defines the investment, in very broad terms, and defines the investor. (May I draw your attention to my article, "Does the consent of the Contracting Parties govern the requirement of an 'investment' as specified in Article 25 of the ICSID Convention?" *IAI Series on International Arbitration No. 8, ed. Y. Banifatemi,* Jurisdiction in Investment Treaty Arbitration, 2011.)

*PROFESSOR SUBEDI:*

I would think so.

**Question n° 4:**
**The reasons and effects of the different available choices**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

It was mentioned that while different mechanisms bring with them different procedures, there should be no difference in the substance of the solutions. In other words, the procedure may be different but the solutions should be the same.

**a) Do the different kinds of arbitration mechanisms provided for in the BITs determine different kinds of substantive and/or procedural solutions of the submitted disputes?**

*PROFESSOR ALEXANDROV:*

Where a BIT provides for different kinds of arbitration mechanisms, the procedural rules may differ according to the procedural mechanism, but the substantive protections of the BIT will not differ.

*PROFESSOR SUBEDI:*

I would think so.

**b) The related point is whether, and to which extent, the choice of the arbitration mechanism is determined by the differences between the prerequisites, procedural and substantive solutions offered, and the effects, particularly the enforceability, of the awards proper to the possible mechanisms.**

*PROFESSOR ALEXANDROV:*

To the extent the investor chooses one of the dispute settlement mechanisms, it is bound by the rules under that mechanism. However, regardless of the dispute settlement mechanism, the substantive protections are contained in the BIT.

**Question n° 5:**
**Prior recourse to local courts and subsequent waiting periods**

**a) Is the requirement of prior recourse to local courts a substantive or a procedural provision?**

*PROFESSOR ALEXANDROV:*

It depends on the specific requirement. There are exhaustion requirements and there are requirements that the dispute be submitted to domestic courts without however requiring the exhaustion of the domestic remedies. Either way, the requirement only applies when the BIT requires such prior recourse.

*JUDGE SCHWEBEL:*

International arbitral awards are divided on both the requirement of prior recourse and waiting periods. In the light of those persisting divisions, it is difficult to contend that one solution or the other governs. A tribunal should decide a particular case weighing not only the conflicting precedents but above all the particular provisions of the BIT at bar.

*PROFESSOR SUBEDI:*

I would say it is procedural.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

There is general agreement among the Participants that the requirement of prior recourse to local courts is a procedural provision.

It was also commented that the question of exhaustion of local remedies is almost never mentioned in the treaties, although it exists in customary law.

A Participant also raised the question of the special BIT provisions, like the one in the Argentinean BITs about the 18-month time in which local courts must be consulted. In this regard it was said by some arbitrators that if the 18-months period is set out in the treaty, it should be respected, whilst there is also the view that this should not be respected, the 18 months period being too short. Regarding this question, it was suggested that if there is this fixed period in the treaty, it can probably be read as a conventional exclusion of the previous exhaustion of local remedies.

Doubts were expressed towards the application of the rule of local remedies in general.

**b) Is a waiting period necessary for the investor prior to the filing of a claim before an international arbitration tribunal?**

*PROFESSOR ALEXANDROV:*

Modern BITs generally do not require the exhaustion of local remedies. Some modern BITs have limited domestic litigation requirements (e.g., litigation for 18 months in local courts). However, if a BIT does require the exhaustion of local remedies, then a subsequent waiting period is not necessary.

*JUDGE SCHWEBEL:*

International arbitral awards are divided on both the requirement of prior recourse and waiting periods. In the light of those persisting divisions, it is difficult to contend that one solution or the other governs. A tribunal should decide a particular case weighing not only the conflicting precedents but above all the particular provisions of the BIT at bar.

*PROFESSOR SUBEDI:*

No, I do not think so.

RAPPORTEUR : ANDREA GIARDINA

**Question n° 6:**
**The interaction between international and domestic law in assessing certain arbitration prerequisites**

**a) Is the recourse to municipal law necessary to verify *in concreto* the existence of an investment? How can the applicable law be determined?**

*PROFESSOR ALEXANDROV:*

The existence of an investment must be determined on a case by case basis, in accordance with the terms of the BIT.

*JUDGE RANJEVA:*

Ce point qui implique une approche multilatérale des différents aspects reste la question clé tant pour les investisseurs que pour les Etats hôtes. Les pétitions de principe ou l'approche purement financière ne suffisent plus. Il est urgent de raisonner en termes de service international dans le partenariat mais non plus d'assistance caritative ou de subsidiarité.

Il convient d'adopter une double approche de cette notion aussi bien en termes de protection que de mobilisation des investisseurs potentiels. Pour les pays du sud, en effet face aux restrictions des APD, il est important de mobiliser les ressources des émigrés pour leur recyclage dans les pays de départ. A cette fin la protection des investissements passe par la dénationalisation des investisseurs et le traitement des investissements indépendamment des nationalités.

*JUDGE SCHWEBEL:*

Whether there is an investment would depend on the terms of the BIT and also on the law of the host State.

*PROFESSOR SUBEDI:*

Not necessarily and especially if the BIT/FTA has included a clear provision to this effect.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

The recourse to municipal law is necessary to verify *in concreto* the existence of an investment. The assessment must be made at the time of the investment.

If a State accepts that an investment is made, it cannot afterwards claim that it is not acceptable under municipal law.

However, the Participants agree that the definition of investment has to be assessed in compliance with the applicable BIT and / or Multilateral Convention.

**b) Is nationality to be assessed exclusively on the basis of the relevant domestic law?**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

There is general agreement on the statement that the issue of nationality is a matter attributed to the sovereignty of States. Therefore nationality is to be assessed depending on municipal law, but international law plays a role as to the moment nationality has to be established (at the time of filing his claim until the moment the award is rendered), as to the verification that there is no fraud in acquiring it and also as to the case of plurality of nationalities, which is disposed of under conventional rules (ICSID) but not under general law. A new question arises (and could be mentioned in the Resolution) concerning the possibility to extend the nationality rule provided for by ICSID to other arbitration systems.

*PROFESSOR ALEXANDROV:*

Nationality must be determined on a case by case basis, in accordance with the terms of the BIT.

*JUDGE SCHWEBEL:*

Nationality is a question to be determined in the light of international as well as national law (*Nottebohm*). While in *Soufraki* the investor pleaded official Italian papers in his support, he failed to show that Italian officials were informed of his adoption of a foreign nationality when those officials affirmed his Italian nationality.

*PROFESSOR SUBEDI:*

Yes, I would think so.

**c) Is the legality of the investment according to municipal law a necessary prerequisite?**

*PROFESSOR ALEXANDROV:*

The legality of the investment must be determined on a case by case basis, in accordance with the terms of the BIT.

*JUDGE SCHWEBEL:*

Generally legality of an investment according to municipal law is a necessary prerequisite. But other principles, such as estoppel, may supervene. If the State certifies an investment as in conformance with its law, it cannot be heard to maintain that its certification was erroneous or voided by subsequent statute, change of government and the like.

*PROFESSOR SUBEDI:*

No, not necessarily. It may also depend on the provisions of relevant

BITs/FTAs.

*PROFESSOR TREVES:*

As regards Question 6c (on legality of the investment under municipal law) two recant awards could be referred to in addition to *Inceysa Vallisoltetana SL v. El Salvador* (ICSID case No ARB/03/26), Award, 2 August 2000, paras. 187, 206-207. One is *Saba Fakes v. Republic of Turkey* (ICSID case No ARB/06/5), Award, 14 July 2010, paras. 112-114 stating *inter alia* that while the ICSID Convention remained neutral on the issue of legality "bilateral investment treaties were at liberty to condition their application and the whole protection they afford , including consent to arbitration, to a legality requirement in one form or another". The other is *Phoenix Action Ltd v. the Czech Republic* (ICSID case No ARB/06/5) Award, 15 April 2009, paras. 100-101, stating that: "The purpose of the international mechanism of protection of investment through ICSID arbitration cannot be to protect investments made in violation of the laws of the host state or investments not made in good faith, obtained for example through misrepresentations, concealments or corruption, or amounting to an abuse of the international ICSID arbitration system. In other words, the purpose of the international protection is to protect legal and *bona fide* investments…This condition, the conformity of the establishment of the investment with national laws – is implicit even when not expressly stated in the relevant BIT".

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

The Participants observe that the issue of legality of the investment according to municipal law is of minor interest, being its assessment limited to the time of the investment and to the prior verification of the investment legality by the State before accepting it.

## Question n°7:
## New actors and problems in investment arbitration

### a) Transparency, *amicus curiae*, intervention of third parties, joinder of proceedings

*PROFESSOR ALEXANDROV:*

The *Abaclat and others v. Argentina* case, for example, involves some 180,000 claimants. Similarly, the tribunal in *Ambiente Ufficio and others v. Argentina* decided that it could hear the claims of a bloc of some 90 Italian nationals. In *Anderson and others v. Costa Rica*, over 100 Canadian nationals brought claims in a single proceeding, although the tribunal found that it had no jurisdiction for other reasons. Such so-called "mass claims" are not class actions; each individual investor is a claimant

in its own right, but consolidation allows for the efficient adjudication of similar claims. (In fact, it is questionable whether even the term "mass claims" is appropriate, because each claimant is named and stands in a similar position as the other claimants.) If consolidation is feasible it should be done because it helps to ensure an effective remedy in protection of investors' rights. BITs do not contain quotas of how many investors may invoke their protections.

*JUDGE RANJEVA:*

La nature consensuelle de l'arbitrage en matière d'investissement exclut prima facie l'intervention de tiers à un titre quelconque. Ce principe n'interdit pas aux parties litigantes d'apporter des aménagements à la règle de la relativité des relations consensuelles, mais cette inflexion ne peut être présumée.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

Regarding transparency (which is addressed in the final part of the Resolution) Participants agree that the issue of transparency moves from the commercial origin of investment arbitration towards a more public international framework, as demonstrated by international statements and documents. Transparency could be affirmed as the default rule, leaving the parties free to choose confidentiality. As to the publication of awards it is mentioned that in recent ICSID cases parties have to agree to a number of preliminary issues, among which there is also the issue of the award publication.

Regarding *amicus curiae*, in cases where there is no rule in the convention (ICC, ICSID and UNCITRAL generally allow the intervention, but only NAFTA contains a specific provision thereon), the agreement of the parties is necessary. So either the arbitral tribunal decide for the *amicus curiae* intervention, having obtained the consent of the parties or the parties agree on that, under the supervision of the tribunal.

Regarding the intervention of third parties, there are different opinions and it is suggested, to refer to the Report of UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session (New York, 4-8 February 2013), doc. n. A/CN.9/765*, which addresses the issue, allowing the tribunal to accept the observations of the non-disputing parties.

Regarding the question of joinder of proceedings, this issue - if its relevance for the Resolution is confirmed – is important in order to avoid contradictory decisions and it was proposed that parties in dispute should be encouraged to deal together cases that involve the same questions, choosing the same arbitrators. A general wish was expressed for the

parties to join whenever the claims are "similar". In order to have consolidation of proceedings, the three required elements are parties, substance and cause of action, which should be the same.

**b) Mass (or class) arbitration: "aggregate procedures" or "representative proceedings", as distinguished from "multi-party proceedings"? Do mass (or class) claims raise due process problems? Does the consent to arbitrate contained in a BIT cover also atypical arbitral proceedings such as mass (or class) claims?**

*PROFESSOR ALEXANDROV:*

A tribunal under a BIT applies the BIT, unless the BIT is terminated on its own terms or the terms of the BIT provide explicit reference to EU law.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

A general view was expressed that investment arbitration has not been shaped for mass-claims under ICSID (reference is made to the *Abaclat* case). Therefore new procedures and rules should be elaborated. A possibility is to provide for a regulation to be developed under the PCA (which is a better forum rather than ICSID) or a new body to be created by IMF.

**c) Which foreseeable impact could Third Party Founding have on investment arbitration?**

**Could TPF increase conflicts of interest, in consideration of the control and participations in the TPF, and the role of the TPF in the management of the arbitration (appointment of counsel and arbitrators, strategy of the arbitration and possible settlements)?**

**Could TPF contribute to increase the number of cases involving high amounts in dispute, irrespective of the good foundation of the claim of the financed party, and possible settlements?**

**Should TPF be disclosed, and to which extent?**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

The issue has implications on professional ethics and honesty of parties. General discontent on the occurrence of third party-founding and agreement on the fact that transparency should have an impact on this and parties could be invited (not obliged) to disclose that costs are covered by a third party.

**d) The Counterclaims in investors-State arbitration: problems of jurisdiction and admissibility.**

**Does the consent of the Parties to counterclaims represent an issue of jurisdiction for the investors-State arbitration Tribunals?**

**Do other considerations and argument play a role for affirming the jurisdiction of the Tribunal and/or the admissibility of counterclaims?**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

In investment arbitration it is the investor - who has no obligations under the treaty – who starts the procedure against the State. Still it is possible to envisage that the State can submit a counterclaim against the investor, based on the fact that the latter failed to comply with some obligations of public international law, like the obligation to act in good faith, or avoid corruption, or minimize the costs of an investment in bad shape, or not to present himself in a false manner. Therefore counterclaims are not in principle excluded (cf. *Roussalis v. Romania* case), and they have to rely on the breach of a compulsory obligation. Such counterclaims should be encompassed in the jurisdiction of the tribunal, within the scope of the consent of the parties.

**e) Does the ICSID annulment mechanism need some modifications and / or improvements?**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

The annulment procedure is experiencing a crisis. It seems that it has been transformed in a sort of appellate jurisdiction.

**f) Should the roles of Counsel, Arbitrators and Members of Ad Hoc Committees be kept separated? Does the ICSID annulment mechanism need some modifications and / or improvements?**

**g) Within the EU framework is the notion of public interest according to the EU larger than the traditional notion of public interest according to the law of the member States and/or international law? Considering that some States, by virtue of the accession to the EU, argue that intra-EU BITs are terminated, is there any consequence on the applicability of the MFN Clause? Which is the possible outcome to a conflict between BITs and EU law and policy: *a)* before the EU Court of Justice, and *b)* before an investor-State arbitral tribunal or an Interstate Tribunal created according to a BIT?**

*JUDGE RANJEVA:*

L'union européenne a un mécanisme d'intégration unique à un point tel qu'il ne s'agit que d'un droit de relations spécifiques.

## Question n° 8:
## Treaty claims and contract claims

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

There is general agreement towards a strict interpretation of the UCs. A possible interpretation could be that this refers to "any breach" of "any obligations" which relate to the maintenance or the existence of the investment, whereby the clause is interpreted in such a way as to maintain the investment.

It was also said that not every single breach of the contract amounts to a breach of the treaty, but only these breaches that are paramount clear and correspond to the international standards of treatment of investments. This mechanism of suggesting tribunals to fully respect the choice made by the parties could reach a more reasonable solution.

In cases where a public entity (either a federal state or a public enterprise) is granted means of public power, it could be acting as an element of the State and the obligation under the treaty would be the same as for the State, so that there would be the obligation to act in integrity with the contract. In such cases the UC could justify that the public entity could go to treaty arbitration. In other words, in a case where a public entity has been granted prerogative powers, the investor could have a recourse to treaty arbitration if this entity has used public powers in a way that compromises the integrity of the investment.

**a) How broad is the extent of the protection provided by an UC? Can the UC be invoked against a State, when the investor claims the breach of a contractual obligation which has been entered into by a public entity and not by the State itself?**

*PROFESSOR ALEXANDROV:*

A State's contractual obligation is an undertaking. The State itself never enters into contracts – State organs, entities or instrumentalities do that on behalf of the State. Therefore, for the umbrella clause to have any meaning, it must include such State contracts with regard to investments.

*JUDGE SCHWEBEL:*

In my view, the umbrella clause should be given effect as set out in *Eureko v. Poland*.

*PROFESSOR SUBEDI:*

No, I do not think so.

*PROFESSOR TREVES:*

With respect to Question 8a (on the extent of the protection provided by the umbrella clauses), it would seem useful to add to the reference to the *ICSID EDF v. Romania* case *Bosh International Inc and B & P Ltd Foreign Investment Enterprise v. Ukraine* ICSID case No ARB/08/11, Award of 25 October 2012 paras 241-249 reaching conclusions similar to *EDF v. Romania*, although not quoting it. The Award accepts the view that a contract concluded by a public but autonomous University was not being attributable to the Ukrainian State, so that the umbrella clause could not be invoked to uphold claims against Ukraine. In para 248, twenty cases in which umbrella clauses were applied to contractual obligations undoubtedly assumed by States are usefully reviewed. *EDF* is distinguished in *Burlington Resources inc. v. Ecuador* ICSID case No. ARB/08/5 Decision on Liability 11 December 2012, paras 192-193.

**b) How can purely contractual aspects of a claim be identified? Does the jurisdictional clause inserted in a BIT refer to "any dispute", thus including also the contract issues and not only the treaty issues?**

*PROFESSOR ALEXANDROV:*

Contractual aspects of a claim can overlap with BIT claims. For example, contractual rights are often defined as a protected "investment" in BITs and a willful termination of a contract may result in an expropriation of those contractual rights. In addition, a State may consent in a BIT to international arbitration regarding "any dispute" – i.e., not only claims

arising from the BIT but also claims arising under contracts (or, for example, under customary international law).

*PROFESSOR SUBEDI:*

I would agree with the ruling in *Joy Mining v. Egypt* on this issue.

**Question n° 9:**
**Most Favorite Nation Clause**

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

A preference was expressed a for a more restrictive use of the MFN clause. There is general agreement as to the fact that the MFN clause refers to "treatment", but strong doubts as to whether the MFN clause also encompasses dispute settlement solutions (reference to the *Maffezini* and *Daimler* cases). If the treatment is deemed to include access to arbitration or the extension of an UC, it is necessary to stick to the provisions of the treaty, from which the obligations originate. Thus, an investor could not invoke an UC which is not provided for in a treaty.

In assessing the MFN status of treatment, a prior interpretation of the treaty should therefore be made in order to ascertain the intention of the States.

A new question is suggested as to whether an investor could invoke a MFN clause for a treaty which is not an investment treaty.

**a) Does the MFN clause interpreted in its broader sense include the provision on the settlement of disputes even when it is referred to as the "treatment"?**

*PROFESSOR ALEXANDROV:*

"Treatment" refers to both substantive and procedural treatment; BITs do not distinguish between forms of treatment (unless there is a specific exception from MFN with regard to dispute settlement). The purpose of MFN treatment is to prevent more favorable treatment of third State investors, which may include the choice of direct access to international arbitration (e.g., as compared to a domestic litigation requirement).

Under the *ejusdem generis* rule that governs the scope of MFN treatment, the MFN clause may only attract a provision relating to the same subject matter.

*JUDGE RANJEVA:*

La mondialisation se traduit par une course effrénée vers l'octroi de privilèges. Le même mécanisme a été connu au moment de la promulgation des codes d'investissements des années de l'Indépendance.

Avec la mondialisation institutionnelle, il est urgent qu'un mécanisme de veille institutionnelle, législative et règlementaire soit créé pour la mise en œuvre de procédures d'alerte. Les législations nationales en sont déjà dotées.

*JUDGE SCHWEBEL:*

The use of a MFN clause to avoid limitations on arbitral recourse, such waiting periods, is controversial. The precedents are deeply divided. Each of the conflicting positions has its force and its advocates. It is not possible in this circumstance to say what the law at large is. The tribunal should closely analyze the particular provisions of the BIT at bar, as did Judge Buergenthal in his recent award upholding MFN recourse against Argentina by a Spanish investor, *Teinver v. Argentina*.

*PROFESSOR SUBEDI:*

No, I do not think so.

**b) Can the MFN Clause be applied to the selection of an arbitration mechanism?**

*PROFESSOR ALEXANDROV:*

If the BIT guarantees an investor of the other Contracting Party MFN treatment, then that treatment will apply to all treatment (including expropriation) that is not excepted.

*PROFESSOR SUBEDI:*

No, I do not think so.

**c) Are expropriation claims to be included in a MFN Clause when the Clause itself is generally referred to disputes between the Contracting Parties of a BIT?**

*PROFESSOR ALEXANDROV:*

Yes. As the *National Grid* tribunal stated: "dispute resolution is not included among the exceptions to the application of the clause [in the BIT]. As a matter of interpretation, specific mention of an item excludes others: *expressio unius est exclusio alterius*" (para. 82 of the *National Grid* Decision on Jurisdiction). Similarly, the *Siemens* tribunal wrote: "[T]he term 'treatment' is so general that the Tribunal cannot limit its application except as specifically agreed by the parties. In fact, the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted" (para. 106 of the *Siemens* Decision on Jurisdiction).

*PROFESSOR SUBEDI:*

Yes, I would think so.

**d) Is the principle "expression *unius est exclusion alterius*" valid in interpreting the MFN Clause?**

*PROFESSOR SUBEDI:*

I would say yes here.

**Question n° 10:**
**Fair and Equitable Treatment**

**a) Whenever the FET clause in a BIT is not expressly linked to the minimum standard of international law, is it possible to determine its meaning going beyond the limits of the minimum standard in similar cases?**

*PROFESSOR ALEXANDROV:*

Yes. The FET clause should be interpreted according to its ordinary meaning, in its context, and in view of its object and purpose. Such interpretation does not allow FET to be equated with the minimum standard of treatment.

*JUDGE SCHWEBEL:*

I agree with the approach quoted from *Lemire v. Ukraine*. I do not think that *Merrill & Ring* is in accord with Glamis Gold (I spell this out in my piece on *Neer* in *Arbitration International*); in my view, *Merrill* is sound and *Glamis* unsound. I agree with the examples of FET cited, such as legitimate expectations.

*PROFESSOR SUBEDI:*

No, I do not think so.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

These issues have been discussed together by Participants due to the similarity of the questions involved.

A general agreement was expressed on the fact that there is no real difference between public international law and investment law as far as FPS is concerned, but FPS includes the physical integrity of the investment and of the investor and his personnel and close related persons, and it excludes any kind of undue influence or unjustified threat of a law-suit against the investor.

It was also considered that FPS is broader than FET, which is a more objective and settled principle.

Regarding the more general question of the existence of a customary international law minimum standard (which would thus also apply in the absence of a BIT), it was agreed that there is a minimum standard

concerning the investor, but not the investment. So this issue of minimum standard should be taken only from the point of view of the investor. However, even if the main focus is on the investor, the protection guaranteed to the investor might imply the protection of the investment.

As to the meaning and content of this minimum standard, reference was made to the *bona fide* principle, the concepts of non-unjustified discrimination and non-arbitrariness, the absence of denial of justice, the protection of legitimate expectations of the investor, the right to property as it is understood under international human rights law, the fact of giving the investor a chance to perform his obligations in a correct way, without imposing any additional burden on him, and the idea of no deprivation but for public interest. The Participants suggested that this is a non-exhaustive list.

A general reference to the human rights conventions was suggested and in particular to the case-law of the European Court of Human Rights (and to article 1 of the 1st Protocol), which makes always a balance between public interests and the protection of property and it justifies the States' measures only to the extent that the sacrifice of the individual's rights is justified by the common interest, which is perceived according to this balancing of public and private interests. Reasonableness and proportionality are the 2 words used by the European Court.

The general idea is that the minimum standard is "minimum" and that the FET can be a more broader and protective concept.

Regarding the content of FET, reference has been made to treatment under law, which means non-arbitrary treatment. Reference was also made to the obligations imposed to the State of predictability, transparency, as well as the obligation to indemnify the investor in case of violation of the FET.

This issue should be addressed having regard to the "legitimate" expectations of the investor.

The expectations are normally that treaties should be complied with, independently from radical changes of policies, with certain leave-way for the States, like necessity, or the clause reserving special essential security interests. At treaty level, international law would prohibit the change of law unless there are special reasons, like necessity or special clauses for security interests. It follows that the situation for the investor is more difficult under the contract than under the treaty.

There is general agreement of Participants towards a proposal of a Model of the Resolution which would take into account the minimum standard of treatment due to the investor and which should refer to the

fundamental rights recognized by international law. However, because there are two opposite interests in a BIT, the tribunals should apply the FET standard clause without giving a preference to the investor, but simply taking into consideration the interests of the host State and of the investor in a balanced appreciation of the legitimate character of measures taken and in the avoidance of non-legitimate measures.

**b) Which are the elements of the FET treatment?**

*PROFESSOR ALEXANDROV:*

According to the basic principle of compensation articulated in 1928 by the Permanent Court of International Justice in the *Chorzów Factory* case, "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed" (p. 47 of the PCIJ's award on the merits).

*JUDGE RANJEVA:*

Il importe de tenir compte d'une critique commune des Etats d'accueil des investissements, souvent défendeurs dans les instances: l'interprétation du droit en faveur des intérêts des investisseurs. En effet, la notion de préjudice véritable ouvrant droit à réparation mérite des études: la perte d'une espérance de profit est-elle constitutive de préjudice?

*PROFESSOR SUBEDI:*

I would say yes to all of the above.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

These issues have been discussed together by Participants due to the similarity of the questions involved.

A general agreement was expressed on the fact that there is no real difference between public international law and investment law as far as FPS is concerned, but FPS includes the physical integrity of the investment and of the investor and his personnel and close related persons, and it excludes any kind of undue influence or unjustified threat of a law-suit against the investor.

It was also considered that FPS is broader than FET, which is a more objective and settled principle.

Regarding the more general question of the existence of a customary international law minimum standard (which would thus also apply in the absence of a BIT), it was agreed that there is a minimum standard concerning the investor, but not the investment. So this issue of minimum

standard should be taken only from the point of view of the investor. However, even if the main focus is on the investor, the protection guaranteed to the investor might imply the protection of the investment.

As to the meaning and content of this minimum standard, reference was made to the *bona fide* principle, the concepts of non-unjustified discrimination and non-arbitrariness, the absence of denial of justice, the protection of legitimate expectations of the investor, the right to property as it is understood under international human rights law, the fact of giving the investor a chance to perform his obligations in a correct way, without imposing any additional burden on him, and the idea of no deprivation but for public interest. The Participants suggested that this is a non-exhaustive list.

A general reference to the human rights conventions was suggested and in particular to the case-law of the European Court of Human Rights (and to article 1 of the 1st Protocol), which makes always a balance between public interests and the protection of property and it justifies the States' measures only to the extent that the sacrifice of the individual's rights is justified by the common interest, which is perceived according to this balancing of public and private interests. Reasonableness and proportionality are the 2 words used by the European Court.

The general idea is that the minimum standard is "minimum" and that the FET can be a more broader and protective concept.

Regarding the content of FET, reference has been made to treatment under law, which means non-arbitrary treatment. Reference was also made to the obligations imposed to the State of predictability, transparency, as well as the obligation to indemnify the investor in case of violation of the FET.

This issue should be addressed having regard to the "legitimate" expectations of the investor.

The expectations are normally that treaties should be complied with, independently from radical changes of policies, with certain leave-way for the States, like necessity, or the clause reserving special essential security interests. At treaty level, international law would prohibit the change of law unless there are special reasons, like necessity or special clauses for security interests. It follows that the situation for the investor is more difficult under the contract than under the treaty.

There is general agreement of Participants towards a proposal of a Model of the Resolution which would take into account the minimum standard of treatment due to the investor and which should refer to the fundamental rights recognized by international law. However, because

there are two opposite interests in a BIT, the tribunals should apply the FET standard clause without giving a preference to the investor, but simply taking into consideration the interests of the host State and of the investor in a balanced appreciation of the legitimate character of measures taken and in the avoidance of non-legitimate measures.

**c) How should the measure of compensation of investors be determined in case of violation of the FET standard?**
**Can a violation or multiple violations of the FET standard amount to indirect expropriation?**
**If not, how should compensation be determined?**

*PROFESSOR SUBEDI:*

I would say it would.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

Regarding compensation for the violation of the FET standard, it was stressed that in the few cases where the FET standard alone has been applied, compensation was given at the same level of expropriation, even if in this case the property remains in the hands of the investor who suffered from a bad treatment. Therefore, the investor should be compensated, but according to a different standard, the violation of the FET having to be distinguished from creeping expropriations.

Participants agreed that where the breach of FET amounts to an expropriation, then the tribunal has to apply the rules on expropriation, which are not the same as the rules on international responsibility.

Generally, compensation and the measure of it can be provided for in the BITs, which will have to be complied with, otherwise the general rules of international law and international responsibility apply.

As to the question of mitigation, Participants agreed that misbehaviour of the investor could have a consequence on the primary obligations of the State and it may make certain measures justifiable. In this case, the parties are free to choose the rules applicable to their relation, and if not, especially with BITs, the rules on State Responsibility by ILC can be applied, especially Part 1, Article 1 and Chapters 1 and 2 of Part 2.

**Question no. 11:**
**Expropriations, indirect expropriations, regulatory measures**

**a) Are nationalizations to be distinguished from individual expropriations?**

*PROFESSOR ALEXANDROV:*

No. As F. A. Mann wrote in 1981: "It is noteworthy that the conception of expropriation [in modern BITs] comprises 'nationalizations'. In the past it has often been suggested that far-reaching social changes such as nationalizations usually intend to achieve are on a different level and should not give rise to any right to compensation at all or should lead to compensation on a lower scale defined as 'reasonable', 'sufficient' or in some similar fashion . . . . The [investment] treaties now under discussion give the lie to any such theory: they require the payment of 'just compensation' for both expropriations and nationalizations and thus recognize a standard which is entirely in accordance with traditional thought." (*British Treaties for the Promotion and Protection of Investments*, 52 British Y.B. Int'l L. 241, 1981).

*JUDGE RANJEVA:*

Le principe d'une indemnisation calculée sur la base de la valeur vénale des valeurs ayant été indemnisées doit être revue à la lumière des actions, et de l'évaluation des actifs nationalisés.

*PROFESSOR SUBEDI:*

No, I do not think so especially if the ultimate outcome is the same or similar.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

A suggestion has been made by most participants not to differentiate anymore between the concepts of nationalization, expropriations and creeping expropriation, but to treat them as part of one category, identified as taking of property. The general rule of international responsibility should then apply to them.

Furthermore, reference to the 1992 Guidelines of the World Bank was suggested. In these Guidelines, nationalizations are mentioned with a different regime from expropriations. The expropriation is an individual measure, unlike nationalization, where there are special policy grounds that come into play. Therefore it was suggested by some participants that the differentiation be kept, but this did not find an unanimous consent as the majority of Participants did not find such differentiation useful.

Provided that there is an obligation to avoid imposing arbitrary measures or use of threats against the investor, it was also suggested that there should be an obligation to renegotiate in case of fundamental economic changes in the host State, especially for long-term contracts. The refusal

to renegotiate will constitute a breach of the contract, and penalties can be applied.

**b) In which cases the behaviors and acts of the authorities of the Host State can be considered tantamount to expropriation?**

*PROFESSOR ALEXANDROV:*

Modern BITs protect investors not only from "direct" expropriations – i.e., where the State formally takes title – but also from "indirect" or "*de facto*" expropriations in which the substantial deprivation of property is "tantamount" to a direct expropriation. The key determinant is not whether the expropriation is avowed or disavowed by the State, but rather whether the effect of the measure is a substantial deprivation of the value of the investment. Thus, for example, if a shoe factory is prohibited from manufacturing shoes, even though the investor maintains title of the factory, there is nonetheless an indirect expropriation. As explained by the *Metalclad* tribunal, expropriation "includes not only open, deliberate and acknowledged takings of property . . . but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State" (para. 103 of award).

*PROFESSOR SUBEDI:*

I would agree with the ruling in *Burlington* v *Ecuador*.

**c) Whether and how Regulatory Measures can be distinguished from indirect/or creeping expropriations?**

*PROFESSOR ALEXANDROV:*

Regulatory measures can also be expropriatory if they substantially deprive the investor of the value of its investment. As stated above, the central factor is whether the measure results in a substantial deprivation of the value of the investment.

*PROFESSOR SUBEDI:*

According to the object and purpose of the measure adopted.

ISSUES DISCUSSED AND DIRECTIONS ADOPTED AT THE ROME MEETING

A Participant expressed the desire to maintain the difference between expropriations and regulatory expropriations (reference to *Bulington* case). Regulatory expropriations, which are admitted by the BITs since 2004 and which are repeated in the most recent BITs, do not constitute expropriations. In case of protection of human health and human rights,

the measures adopted should be considered in themselves as justified without compensation for the investor.

**d) Are the standards of compensation in case of nationalizations and regulatory measures different from those applicable in case of expropriations?**