INVESTMENT ARBITRATION, LEGITIMACY AND NATIONAL LAW IN LATIN AMERICA: AN ARBITRATOR'S PERSPECTIVE

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I. Introduction

It is well known that the ICSID Convention and the network of approximately 3,000 bilateral investment treaties ("IIA(s)") have essentially replaced the bad old days when an expropriation or other alleged mistreatment of a foreign investor might result in cut-offs of assistance or even threats of military action. The system generally referred to as Investor-State Dispute Resolution ("ISDS") has continued to grow with the number of investment arbitration cases filed increasing each year.

At the same time there has been a consistent drum beat of criticism going back at least 25-years suggesting that, for a variety of reasons, this system and the awards made by arbitrators appointed in investor-State cases somehow lack legitimacy.

As an arbitrator I am very suspicious of these arguments. To be more direct, it seems to me that this criticism arises not from the nature of the investment arbitration system, but from the fact that international arbitrators appointed by the parties are applying international legal norms and the legitimacy of their role is based on treaty commitments freely entered into by sovereign governments. As a result, the arbitral awards often vary significantly from those that might result if the same cases had been decided in the courts of the particular nation involved.

This article takes the three cases from Latin America and uses them to explore this thesis. The first two, cases from Costa Rica and Peru are ICSID cases in which I served as presiding arbitrator of the tribunal. The third is a case from Argentina — a purely commercial case handled exclusively by the Argentine courts. In my opinion, what these cases stand for is the reality in most of Latin America (and many other countries in the world) that when a government acts in a way that is blatantly arbitrary and illegal there often exists no adequate remedy for the

aggrieved party under national law. If this is true, we are then faced with an anomaly: foreign investors who are subjected to arbitrary and illegal action have available investment arbitration as a way to protect their legal rights — while good citizens of the very same countries are not so protected. We will explore this thesis further.

II. The Three Cases

While the final published version of this paper contains a rather complete description of the facts and procedures in each case, they will be summarized only very briefly here.

A. Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica

This case was brought by two German nationals under the Costa Rica/Germany BIT. The Claimants alleged that the government of Costa Rica had both expropriated their property and unfairly denied them their right to develop certain of their properties as they alleged had been agreed in an agreement with the government. Several claims were brought by the Claimants but the Tribunal found in their favor on only one — the expropriation of a strip of ocean front property without compensation.

It was undisputed that Mrs. Unglaube had owned this strip of property outright when the government issued a Presidential Decree in 1991 announcing that the Las Baulas National Marine Park would be created on property which included the property owned by Mrs. Unglaube.

Then, in 1995, a law was enacted which officially announced the boundaries of the Park and authorized the expropriation of property within the designated boundaries.[1]

The Constitution of the Republic of Costa Rica provides that private property is inviolable and that no one may be deprived of their property without prior compensation in accordance with the law. In the event of war or internal conflict it is not indispensable that this compensation be paid before the property is taken. In such a case however the resulting payment must be made not more than two (2) years after the conclusion of the state of emergency.[2] Notwithstanding this clear statement in the document of the highest legal authority, and the fact that no war or significant internal conflict had occurred, no compensation was paid to Mrs. Unglaube. At the time of the arbitral award in May 2012 and despite the clear language of the Constitution, no compensation had been paid to Mrs. Unglaube for more than 10-years.[3] While the Constitutional Chamber of the Supreme Court of Costa Rica had chastised the government for delay and ordered it to move ahead promptly, the Court's Order essentially made little or no difference.

B. Tza Yap Shum v. The Republic of Peru

In this case an investor of Chinese nationality residing in Hong Kong had created a fish flour company in Peru. The company known as TSG, had access to significant cash during a

[1] This law contained significantly problematic language which took time to resolve (see *Unglaube Final Award* at para. 157), but there could have been little ground for doubt regarding either the government's intention to create the Park or regarding the boundaries of the area within which it intended the Park to be established.

[2] Constitution of the Republic of Costa Rica Article 45.

[3] This is not the first instance but rather the second in which Costa Rica has failed to comply with a provision of its Constitution which has been in existence since 1949. *Compañia de Desarrollo Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award Feb. 17, 2000 (Fortier, Lauterpacht, Weil); *Marion and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/01 and ARB/09/20, May 16, 2012 (Berman, Cremades, Kessler).

period when Peru was suffering something of a liquidity crisis. TSG knew about the demand for fish flour in Asia where it is used principally for animal feed. The company was able to advance funds to fishermen to catch the appropriate fish known as *anchoveta*, to have the fish delivered to the plant of a processor with which TSG had contracted and to which it had advanced some funds. The processor would then process the fish and prepare it for shipment in 40 kilo bags. TSG would then take possession of the bags and export them receiving payment from their Asian customers. Making use of this approach, TSG was very successful and within about 4-years became the 3rd or 4th largest exporter of fish meal in Peru.

At that point TSG was visited by a tax auditor from the National Tax Authority, known as SUNAT. Among the many regulations of SUNAT, one provided that if a company that is engaged in selling a manufactured product does not conduct all the steps to produce the product within its own plant or facilities, then SUNAT officials "may" decline to rely on the accounting reports of the taxpayer and "may" choose to reconstruct and reconfigure the accounts as appropriate to accurately determine the tax obligations of a taxpayer. One can readily acknowledge the need for such a regulation but also appreciate the need for care and reasonableness in applying the rule. In this instance, it appeared that the mode of operation of TSG and the relative simplicity of the transactions involved should have made it rather simple to verify the costs and profits of the business. The tax auditor, however, thought otherwise. Her reconfiguration of TSG's books resulted in a tax debt owing of US $4 million dollars. The company appealed to the Peruvian Tax Tribunal. While the case was pending on appeal — so that no final legal obligation had yet been created — the tax auditor asked the supervisor of collections for SUNAT to put in place precautionary attachment measures against TSG. Because

such precautionary attachments can cause a serious financial crisis for the taxpayer company, the SUNAT regulations establish a series of pre-conditions their use. The tribunal found that SUNAT officials had ignored the agency's rules in this case. The result was that a notice was sent out to all the banks in Peru ordering that the next US $4 million dollars received by any of the banks as payable to TSG should be turned over instead to SUNAT. When this occurred the management of TSG sought bankruptcy reorganization and also filed a request for arbitration with ICSID. The award of the arbitral tribunal dated 11 July 2011 found that the request for precautionary attachment had been made in direct contravention of SUNAT's regulations, that the directive to all Peruvian banks to take possession of the next US $4 million dollars of TSG's assets had been arbitrary and that the company was therefore entitled to compensation for the loss incurred together with interest from the date of the taking. In order to reach this conclusion the tribunal was also required to determine whether, under the national law of Peru there existed an adequate legal remedy which could have been made use of by the company. The tribunal concluded that no such legal remedy existed.

C. Sociedad Rural Argentina ("SRA")

The Sociedad Rural Argentina ("SRA") is a non-profit organization which was formed in 1886 by large landowners and other individuals and companies associated with the Argentine livestock industry. In 1875 SRA began to present an annual agriculture industry and livestock exposition for the public. Beginning in 1878 these fairs were held at the Predio Ferial Palermo ("the PFP Property"), which was located in an attractive area of the city of Buenos Aries. The land had originally been owned by a private individual who then ceded the property to the government of Argentina. For many years several governments allowed SRA to use the property

for these public fairs essentially rent free, with SRA undertaking responsibility for managing and maintaining the property at its own cost.

In 1991 an Emergency Economic Law No. 23.697, directed the government of Argentina to dispose of "any real property of which the government held absolute ownership and which was not necessary to carry out the government's work."[4] As a result of this new law the government made arrangements for the sale of a number of properties, including the PFP property. Pursuant to procedures set forth in the law, SRA offered to buy the property for US $30 million dollars. This offer was evaluated and accepted by the government. SRA made an initial US $10 million dollars payment and signed a series of notes payable over a period of years to cover the balance. A proper commercial deed of sale was prepared and duly signed and approved by the Chief Notary of the National Government on May 27, 1992. SRA continued to make payments on the notes as required. There was no default on the payments.

Twenty years later, in December 2012, then President Christina Fernandez signed a decree declaring that the sale of the property to SRA in 1992 was null and void on the ground that the price agreed in 1992 had been grossly inadequate. The evidence offered to prove this was tax assessments of the PFP property in 2012. The decree directed the Agency for the Administration of the Assets of the Government to take immediate steps to require SRA to hand over the property to the government in 30 calendar days.

[4] As described in Decree No. 2552/2012. (Emphasis added.) In Spanish "un inmueble del dominio privado del Estado Nacional innecesario para su gestión."

SRA attempted twice in the Courts of First Instance to make use of emergency protective orders (*medidas cautelares*) to force a suspension of the Presidential Decree pending a full legal review. Twice the judges of First Instance rejected this request. However the National Court of Appeals for federal, civil and commercial matters reversed these decisions and the Supreme Court of Argentina forcefully agreed with Court of Appeals and rejected the position of the government.

Notwithstanding these forceful decisions of the highest courts of the land, the Argentine Procurador General, in early 2015, filed a further action against SRA again seeking to take back the property on essentially the same legal grounds. Since the recent presidential elections, there is now a new administration in Argentina which is unlikely to pursue this legal action, but from 2012 until the present there has been no effective and final legal remedy for what appears to have been a blatantly illegal effort by the government to take the property of an Argentine citizen. Had the PFP property been owned by a foreign investor, it seems certain that a request for arbitration under the ICSID rules would long since have been filed and appropriate compensation would have been ordered.

III. Institutional Weakness and Lack of Judicial Independence

Again summarizing in a very compressed way, the paper then explores whether existing judicial or administrative institutions are designed to or are capable of being used, in practice, to control illegality on the part of the Executive Branch. In short, it appears that in most countries the *recurso de amparo*, which theoretically could serve as an effective mechanism for controlling actions of the Executive Branch, is subject to so many preconditions and qualifications that in

most of the hemisphere it simply does not provide an adequate or timely legal remedy. In two countries, however, Chile and Colombia more effective remedies do appear to exist. The *recurso de tutela*, (Colombia) and the *recurso de protección* (Chile) do provide mechanisms for requiring the government to cease its action immediately until a more thorough legal review can take place. There is also evidence that in other countries including Costa Rica and Peru such legal procedures have also been modified in the direction of providing for more adequate control of Executive Branch actions. But in much of the hemisphere, the historical adoption of French concepts of administrative law, without being accompanied by effective institutional supports for that law such as those which have been installed in France — has led to a reality in which legal recourse to combat abusive action of the Executive Branch remains a doubtful and ineffective tactic.

In Argentina — and this is demonstrated by the SRA case — the situation is more complicated. The paper documents that, as demonstrated by Hector Mairal, a brilliant and accomplished Argentine lawyer, it appears that the Supreme Court of Argentina had on a number of prior occasions established firm boundaries on the constitutional powers of the government to curtail property rights. Among these limitations were included the following:

1. Governmental measures may not affect the substance of the right but can only delay or limit in its exercise;

2. The measures may not be discriminatory; and

3. The measures may not exceed the time of the emergency.[5]

Notwithstanding these precedents and the availability of procedural remedies sufficient to call attention to them, very few cases were brought before the Argentine courts during the 2001-2002 crisis. Some of the businesses most directly affected were electric utilities yet, according to Mairal, no decision of an Argentine court awarding damages or invalidating government measures that hurt the utilities has been recorded.[6] So the bottom line in Argentina appears to be that while existing substantive law may appear on paper to be adequate to effectively control the Executive Branch, in practical terms, these remedies can and often do remain theoretical and meaningless. The result seems to be that if a particular president is sufficiently committed to a particular agenda and is strongly inclined to stretch or ignore legal boundaries, he or she remains free for most practical purposes to do as they wish.[7]

In short the absence of legal remedies or the obstacles to using them in practice seem, according to Mairal, to imply, in practice, a denial of justice. While this was once a matter principally of concern for local nationals, the implications have now grown in importance in our more interconnected world.

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[5] Hector Mairal, 'The Silence of the Argentine Courts,' presented at the International Institute for Law and Justice, Buenos Aires Workshop, October 16-17, 2009, 6-7. *Peralta v. Estado Nacional* [1990] CSJN, 313 Fallos 1513; *Cassin, Jorge v. Provincia de Santa Cruz* CSJN 317 Fallos 1462 (1994); *Cacace, Josefa v. Municipalidad de Buenos Aires*[1995] CSJN L.L. 1996-B 19; CSJN *Compañía de Tranvias Anglo Argentina v. Nación Argentina* [1965] 262 Fallos 555, 569 ; *Maruba v. Estado Nacional*, [1998] 321 Fallos 1784, 1789.

[6] *Mairal*, op. cit. at p.3. In addition to the importance of this Supreme Court jurisprudence, it should be noted that in *National Grid* and many other cases, which focused on the government's response to the crisis, the government had specifically and formally agreed to mechanisms to protect the investors from the eventualities of inflationary policies and the devaluations resulting therefrom. *See also*, Jan Paulsson "The power of states to make meaningful promises to foreigners", (1(2) J. Int. Disp. S. 2010), 341-352.

[7] Obviously, self-restraint and prudence have guided some administrations more than others, but for those governments inclined to abuse or to act contrary to the law, existing Argentine legal institutions appear unlikely to halt such abuse in a timely fashion.

IV. An Attempt to Draw Strands Together and to Suggest Implications for the Latin American Region and Beyond

A. Common Fundamental Principles

Many years ago, a great law professor, Henry M. Hart, Jr., convinced me of the benefit of reminding ourselves, periodically, of certain underlying legal principles on which particular areas of law are constructed.

For example, one of the unspoken assumptions of the investment arbitration system -- indeed of international law generally — is that though lawyers may have been trained in different nations, cultures and legal systems, there are certain legal principles on which we all agree when we speak of "the rule of law." Among these we would expect broad agreement on the need to avoid arbitrary and discriminatory treatment, as well as denial of justice.[8] On the more positive side we would expect broad agreement that for every legal right there should exist a remedy. Further, we would expect that rights clearly expressed in a Constitution or laws will have legal force; that acquired rights will be respected; and that legal certainty is understood to be a crucial building block in the establishment of the rule of law. Stated in another form, fundamental characteristics of a functioning legal system should include: (1) that words have meaning and are capable of being interpreted in a reasonable and consistent fashion, (2) that "law" signifies not just words on a printed page, but an expression which forms part of an effective legal system — a system which gives those words practical force and implementation and (3) that there are certain acts of individuals and governments which lawyers, everywhere,

[8] The agreement on these broad principles limits does not eliminate differences of opinion on their application in specific circumstances. For an interesting discussion of some of the possible ranges of interpretation, *see Martins Paparinskis*, The International Minimum Standard and Fair and Equitable Treatment (Oxford Univ. Press, 2013), 241.

recognize to be blatantly contrary to law, or to be arbitrary or discriminatory and which, therefore, should not be allowed to stand.[9]

We must also recognize, that the terms "arbitrary," "unreasonable," and "capricious" have particular connotations that may become clear only in reference to the facts of a particular case.[10] But for present purposes, the terms "arbitrary" or "arbitrariness" are used to signify acts or rules which are based not on justice, reason or the laws, but rather handed down only by will or whim;[11] or are based on prejudice or preference rather than on reason or fact.[12]

Professor Schreur's expert testimony, accepted by the Tribunal in *EDF v. Romania* (Award October 2009), identified as arbitrary:

> a. a measure which inflicts damage on the investor without serving any apparent legitimate purpose;
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> b. a measure that is not based on legal standards but on discretion, prejudice or personal preference;
>
> c. a measure taken for reasons that are different from those put forward by the decision maker;
>
> d. a measure taken in wilful disregard of due process and proper procedure.

[9] For a valuable discussion (in a very different context) of what the term "prescribed by law" is understood to mean, *see The Sunday Times v. The United Kingdom* (Judgment) [1979] European Court of Human Rights (Strasbourg)
[10] Elettronica Sicula S.p.A. (*United States of American v. Italy*) [1989] ICJ Rep. 15 [hereinafter "ELSI"], 128
[11] Dictionary of the Spanish Royal Academy, 23rd Ed. (*Academia Real Española*: Madrid, 2014)
[12] *Lauder v. The Czech Republic* [2001] UNCITRAL, Final Award ¶221 (Citing Black's Law Dictionary 100 (7th ed. 1999)).

B. How Do These Principles and the Cases Described Above Relate to the Enterprise of Investment Arbitration?

1. What Are the Applicable Standards

I have presented the three cases above as each involving blatant governmental illegality, arbitrariness or other abuse. We have then considered — though admittedly in a summary fashion — the extent to which the respective national legal systems did or did not provide an "adequate legal remedy" for the aggrieved party. If it is correct, for the reasons indicated, that legal protections against such abusive acts, are either weak or non-existent (or may exist "on paper" but are not applied in practice), it is not surprising that the region has generated a large number of cases involving allegations that governments have violated established international investment law standards to which they had agreed in investment treaties. Even if the acts complained of were considered "legal" under domestic law, their domestic legality would not, of course, exclude the possibility of international wrongfulness.[13]

Notwithstanding the above, critics of investment arbitration have continued to question whether the legal protections for foreign investors are not overly broad, or whether they are being applied in an improper manner. Specifically, it has been alleged that arbitrators (generally "older" men and women from capital exporting countries in the global north) have, by means of their awards, created a structure of Global Administrative Law and have utilized this construct, *inter alia*, to impose large awards on less wealthy nations, some of which could not — even

[13] Paparinskis, *op. cit*, 193.

before such awards — provide for the basic needs of food, housing, healthcare, etc. of their citizens.[14]

To the extent that questions of this sort are in the air, there is nothing like a seemingly gratuitous and overbroad pronouncement from an arbitral tribunal to set off alarm bells and create a wave of reform proposals. For example, in his highly regarded study,[15] Santiago Montt points to the following, by now infamous, language from the English language version of the TECMED Award:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. . . (Emphasis added.) [16]

This language certainly makes it sound as if arbitral tribunals have almost limitless discretion to impose requirements on respondent governments; requirements that it is doubtful any government in the world could fully satisfy. It also may make a reader wonder whether arbitrators are called upon simply to gaze deeply into the night sky and to decide, what is "fair and equitable," a decision limited only by their own imaginations and consciences. Could arbitrators possibly be empowered to create from their own utopian thoughts standards of efficiency and transparency which no government could realistically satisfy?

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[14] Several major capital exporting countries have, in the recent past, also protested on issues related to potential infringement of their regulatory powers. This matter will be addressed briefly, below.

[15] Santiago Montt, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION (Hart Publishing, Oxford 2009).

[16] *TECMED* Award, note 32, *supra*, ¶154; Montt, op. cit. note 33, 322.

The answer to these questions is a resounding "No!" That is not at all what arbitrators in investment cases are charged to do. They are charged to apply in a careful and principled way, established international legal standards on expropriation, fair and equitable treatment, etc. — with respect to claims arising from the actions of government officials. Far from being free to invent their own notions of ideal performance of government officials, they must apply the law as it has been set forth in authoritative form by numerous arbitral tribunals, judges, scholars and practitioners.[17] And while arbitral tribunals are not strictly bound by "precedent," tribunals are required either to apply this established jurisprudence — or to explain, persuasively and in detail, why such rules may not be applicable in a particular case.

In so doing, when investment tribunals are asked to examine the actions of governments, whether regulatory or otherwise, their examination must begin by recognizing that the exercise of administrative and regulatory powers by a sovereign government carries with it a strong presumption of legitimacy. This is especially true where the State is acting in pursuit of an important public purpose — such as the protection of public order, economic stability, health or public morality (generally referred to as "police powers" of the State).[18] Similarly, the seizure of property for failure to pay taxes is widely recognized as a legitimate tool of public administration; provided, of course, that these actions have been taken pursuant to due process of law.

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[17] For summaries *see*, for example Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice* 6 J.W.I.T. 3 *et. seq*. (2005); Andrew Newcombe *The Boundaries of Regulatory Expropriation in International Law,* ICSID Review, *Foreign Investment Law Journal*. Paparinskis, op. cit. note 32. With regard to fair and equitable treatment *see* Oil Platforms (*Iran v. U.S.*) [1966] 1CJ Rep. 803,858 (Higgins, Separate Opinion).

[18] Andrew Newcombe & Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment 338* (2009) [hereinafter "Newcombe & Paradell"]; Louis B. Sohn & Richard Baxter, 'Draft Convention on the International Responsibility of States for Injuries to the Economic Interests of Aliens (1961) 55 AM. J. INT'L L. 545, 552 [hereinafter "Draft Articles"]; *see also* Restatement (Third) of Foreign Relations Law section 712, cmt. g (1987) [hereinafter "Third Restatement"].

In my experience, arbitral tribunals do in fact, feel a great burden of responsibility to respect the prerogatives of sovereign governments that appear before them. They are most reluctant to conclude that the actions of such governments contravene international legal standards. But there are limits. Tribunals must begin by examining, with great care, whether such actions were generally carried out for the purposes stated, pursuant to reasonable legal procedures or whether such actions were confiscatory, arbitrary, abusive or discriminatory. These last four words carry with them a heavy weight of international case law and commentary. [19] To find against a government on one or more of such grounds requires a deep study of the facts and circumstances of each case as well as a credible explanation of why such evidence demonstrates that a violation of international legal standards has occurred. As indicated earlier, a finding that an action was arbitrary requires a tribunal to find that the decision was not merely wrong, or harmful, but that it had its basis not in law, public policy, or reason, but rather resulted from willful unlawfulness, whim or caprice.[20] In the words of the Third Restatement, such action might be found to be unfair and unreasonable, because, *inter alia*, it failed utterly to consider reasonable alternatives or the consequences of its action.[21]

But even if a tribunal were to conclude, for example, that a governmental action or decision had overstepped these very demanding limits —a government may still not be held responsible under international investment law if there was available to the investor an "adequate legal remedy" under local law. In case the reader is concerned that the emphasized language indicates some sort of effort to reinstitute a precondition of exhaustion of local remedies, my

[19] Newcombe & Paradell, *supra* note 34, at 246-252; Santiago Montt, op. cit. note 33, *supra*, 281-88; ¶177.
[20] *See* notes 89 and 90, *supra* and accompanying text.
[21] Restatement (Third) of Foreign Relations Law ¶712 and Reporter's Note 11.

intention is nothing of the sort. With respect to ICSID cases, this issue was foreclosed by Article 26 of the ICSID Convention which provides:

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

While it still remains possible for a host State to require exhaustion of local remedies in a BIT or other investment agreement, such provisions are increasingly rare and appear, generally, in some of the earliest BIT's[22]. Similarly in NAFTA cases, Article 1121 requires — as a condition of jurisdiction — that the Claimant submit a written waiver of any right to proceed or continue any action before domestic courts with regard to any measures taken by the Respondent that are alleged to be in violation of the NAFTA.[23]

But beyond these particular arbitral venues, the International Minimum Standard — which is drawn, *inter alia*, from the principles of justice recognized by the principal legal systems of the world — requires that a "taking," will be considered internationally wrongful, if it involves:

(a) clear and discriminatory violation of the law of the State concerned;

(b) a violation of any provision of Article 6 to 8 of the Convention [denial of justice];

(c) an unreasonable departure from the principles of justice recognized by the principal legal systems of the world; or

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[22] Christoph Schreuer, 'Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration'(2005)_ The Law and Practice of International Courts and Tribunals 1.

[23] *Ibid*., at 12. *See also*, *Yaung Chi Oo v. Myanmar*, Award, 31 March 2003, para. 40, 42 ILM 540, 547/48 (2003).

(d) an abuse of the powers specified in this paragraph for the purpose of depriving an alien of his property.[24]

As stated by the Tribunal in ADC Affiliate Limited v. Republic of Hungary:

> Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. [25]

Similarly, as noted by a leading treatise:

> "On balance, it seems that due process imports a requirement that an expropriation be in accordance with the law of the host State as well as an international minimum standard of due process, including notice, a fair hearing and non-arbitrariness." *26*

Or as stated in another authoritative work,

> "Classical law, human rights practice, and the leading authorities of modern law point in the same direction: international law defers to the legitimacy of the purpose and means chosen to pursue it as such (unless they are entirely indefensible), but scrutinizes the formal and procedural safeguards against abuse in their implementation (the absence of which permits a more critical engagement with the ends and means)." *27*

In the end, another wise commentator states:

> ". . .the promise of non-arbitrariness helps make acceptable the inevitable sacrifice of private interests in the pursuit of public ends."[28]

Viewed from this perspective, investment tribunals do not appear to pose a significant threat of unwarranted infringement of sovereignty; but should function, instead, as an important bulwark for the rule of law. One wonders, actually, whether it is even appropriate to describe the

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[24] Sohn and Baxter's Draft Articles, n 97,551. *See also*, Art 10.5, *ibid*. 554.

[25] *ADC Award*, note 31, *supra*, ¶*435*.

[26] ¶ 329; Newcombe & Paradell, *supra* note 34, at 339; generally *see also* CHRISTOPHE SCHREUER, *Fair and Equitable Treatment in Arbitral Practice*, (6 J.W.I.T. 3) June 2005; NEWCOMBE & PARADELL, op. cit., Ch. 6, p. 233 *et seq*., Martins Paparinskis, op. cit. note 32, 237-243; *see also*, *Railroad Development Corporation (RDC) v. Guatemala*, ICSID Case No. ARAB/07/23.

[27] Paparinskis, op. cit. note 32, 242.

[28] Jerry L. Mashaw, *Greed, Chaos and Governance: Using Public Choice to Improve Public Law* (New Haven; Yale University Press 1997) 52

efforts of investment tribunals as creating new "Global Administrative Law" rather than, more modestly, applying respected legal principles of longstanding in support of well-established and appropriate legal boundaries, recognized by the principal legal systems of the world — and which legitimate government action may not transgress.

In further support of this view, it may surprise the reader (as it did the author) to learn that the rather grandiose language quoted above from paragraph 154 of the TECMED award[29] is actually a very poor — even grossly distorted — translation of the original Spanish version of the award.[30] A much more accurate translation of the same portion of that award appears on the Institute for Transnational Arbitration website www.ITALaw.com. It reads as follows:

> The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation. (Emphasis added.)

This language is strikingly different from the English translation quoted earlier, in the text accompanying footnote 94, *supra*. It avoids, almost entirely, the unrealistic demands that a State act in ways which are "free of ambiguity" and "totally transparent(ly)." It does not require that an investor must know beforehand "any and all rules that would govern its investments, as well as the goals of the relevant policies and administrative practices or directives," thus to be able to plan its investment in full compliance with such regulations. As we all know, one reason that lawyers exist is that no matter how conscientious and careful lawyers may be, in the drafting

[29] *See* note 94, *supra*.
[30] I am indebted to Oscar Garibaldi for this important observation.

of laws and regulations, some ambiguities and requirements for interpretation will always remain. This is normal and probably unavoidable, but the task of elaborating the permitted range of ambiguity and appropriate limits of administrative discretion can only be worked out case-by-case, hopefully, by prudent and cautious tribunals.

Returning briefly to the TECMED Award, it is hard to understand how a translation so distorted and tendentious could have been prepared or how it gained such wide distribution.[31] It is a dangerously false rendering of the language of the original award, but it will take years to overcome the impression it has made.

2. The Scope of State Responsibility

As stated previously, my view is that each of the three cases discussed above illustrates either a taking of private property by the State in direct contravention of its national constitution and laws, on the one hand, and also (except for the SRA case) the terms of an applicable bilateral investment treaty on the other.[32] Although the reader may not fully share my reaction to the outcomes in these cases under each respective legal system, it is hoped that you will agree that the governmental actions in these cases, and the legal responses to them at the level of national judicial or administrative institutions, do not approach the kind of results which we would expect or find acceptable when we speak of the International Minimum Standard as including analogous

[31] A brief computer search of some of the key words in the version quoted at note 94 indicated that this highly inaccurate translation has been cited in Andrew Paul Newcombe, Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment (2009* – Law*)*, John Anthony VanDuzer, Penelope Simons, Graham Mayeda, *Integrating Sustainable Development Into International Investment* (Business and Economics, 2013), Martin Dixon, Robert McCorquodale, Sarah Williams, *Cases and Materials on International Law*, (Law – 2011), Peter Muchinski, Federico Ortino, Christoph Schreuer, *The Oxford Handbook of International Investment Law* (Law – 2008), to name just a few respected treatises and other generally authoritative sources.

[32] While this discussion is limited, for the sake of clarity to takings of property, the same line of analysis would seem to apply equally to the infringement of other treaty-protected rights as well.

principles of justice recognized by the principal legal systems of the world. Moreover, in both the Costa Rica and Peru cases, it seems clear that a local citizen, if subjected to similar treatment by the State, would have had no adequate legal recourse. We believe that this situation is due — not only to the lack of practically available judicial remedies (and the related issues referred to in Section IV, *supra*), — but also to another contributing factor — the practice of granting generalized and overbroad immunity both to elected and administrative officials — a common feature in much of the region.[33]

It is not a matter of controversy in the international legal community that a State should not escape responsibility for illegal and abusive acts of its agents and employees. But if public officials in Latin America (or elsewhere), in the course of their duties, are able, without adequate administrative or judicial discipline, to expropriate or otherwise do serious damage to the private property rights of foreign investors, then arbitrators who are charged with applying international law in investor-State cases should, and probably will continue, with some frequency, to find such States financially responsible.

One way for governments to protect themselves from potential liability for the acts of their agents or employees, would be for them to recognize the potential consequences of accepted international legal norms, and to deal with that risk by conducting training programs for public officials at all levels — local, provincial and national — regarding the responsibilities which have been agreed to by their governments in BIT's. This could help to establish a sort of

[33] A thorough discussion of the scope of immunity is beyond the scope of this paper, but has long been the focus of concern for respected scholars. *See, e.g.* A. Gordillo, op. cit., Vol. 2 (4th Ed.) Ch. XX; *see also* L. Hammergren, Envisioning Reform: Conceptual and Practical Obstacles to Improving Judicial Performance in Latin America (Penn State University Press: 2007). at 178.

early-warning system regarding issues which might, without awareness and corrective actions give rise to a claim under a treaty. We are aware of at least one effort, by the government of Colombia, to undertake such a training effort.[34] Also, if they have not already done so, governments might simply create and maintain a register of foreign investments covered by BIT's — and assure that this register is distributed to relevant national, provincial and local officials, again to provide an early alert regarding the possible legal consequences of their actions.

3. The Protection of Local Nationals From Arbitrary, Discriminatory or Other Illegal or Abusive Action of State Officials

Even more desirable than taking steps to head-off legal responsibility for actions involving foreign investors, of course, would be a governmental decision to curb the discretion of its officials in order to better protect the rights of its own nationals and residents. Staying with the theme of the right to property, as a relatively straightforward example, virtually every constitution in the hemisphere gives prominent recognition to the right of private property and restricts the taking of such property except under certain specific legal preconditions. But the reality is that, in much of the region, abuse of administrative discretion — both intentional and unintentional — occurs often, and can easily result in *de facto* taking of a citizen's property or a violation of other legal rights established in the constitution for which — at least in practical terms — no adequate legal remedy exists.

Prof. Gordillo calls for a veritable revolution in legal thinking in which reasonableness is acknowledged as the core *desideratum* of a properly functioning system of administrative law.

[34] This program, which began in late 2013, resulted from an initiative of Mariano Gomezperalta, a Mexican lawyer and former senior official of the Mexican Ministry of Economy.

In so doing, he makes reference to "The Irrational Rationality of the Bureaucracy."[35] In this discussion, he describes, in a very amusing way, the tendency of some public officials — whether due to lack of judgment or fear of criticism — to apply regulations in the most strict, wooden and nonsensical manner — utterly without any consideration of fairness or efficiency. This kind of behavior on the part of some percentage of public officials is, of course, a universal phenomenon, — not at all unique to Latin America. The crucial question, however, is whether or not such absurdities can be brought to light either before they take effect, or can be reversed or modified in a timely fashion — before they have potentially disastrous consequences. The situation of the tax auditor in the Peru case might serve as a concrete example. There, the key regulation stated only that the auditor had discretion to reconstruct the accounting records of any manufacturers that had contracted-out some portion of their production process. It did not say that the auditor was required to do so — especially in a situation where the accounting records of the taxpayer were, apparently, reasonably complete and sufficient.[36] In other instances public officials have also insisted on the most strict compliance with a written norm even though it is "clearly unjust, inefficient, arbitrary, disproportionate. . . etc. without so much as attempting to find a way to interpret it so as to overcome such obstacles to its validity under the constitution or other supra — constitutional sources. . ." [37] Obviously, it will take much time and effort to rein in or redirect bureaucratic decision-making so that it pays more attention to due process and to the major jurisdictional principles and purposes of the constitution and the laws (rather than a

[35] Gordillo, op. cit., note 58 *supra*. This is also the title of a chapter in a book by Bernardo Kliksberg, entitled "CUESTIONANDO EN ADMINISTRACIÓN, (Buenos Aires, 1973), 158.
[36] The actions of the Supervisor of Collections were, of course, even more egregious
[37] Gordillo, op. cit. at p. VI-36.

nonsensically narrow or self-serving interpretation of laws and regulations). To return to the words of Prof. García de Enterría:

> "We must leave behind the exaggerated proceduralism and legal sophistry — the typical mode of escape from responsibility of every bureaucracy — which characterizes 'the degradation of Justice in bureaucracy'".[38]

As this area of the law attracts more attention, the standards for determining the legality of such actions will hopefully continue to evolve away from excessive discretion in the executive branch, and in the direction of making reasonableness the necessary keystone of legitimate administrative decisions or actions.[39] This will call for further clarification of the requirements of both substantive and procedural due process, principles which are recognized, *inter alia*, in the American Convention on Human Rights as well as other regional human rights conventions. [40] In this regard, decisions of the European Court of Human Rights in the *Azorian* and *Sporrong* cases, have continued to refine the concepts of a deferential approach to regulatory or administrative actions, while also examining in detail the legitimacy of purpose, appropriateness, necessity and proportionality of the measures taken.[41] Controversy will certainly continue regarding exactly where to draw the line between administrative abuse on the one hand and legitimate actions of public officials on the other. But the task of strengthening effective limits on the discretion of public officials seems clearly to be an urgent and worthy objective.

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[38] Reflexiones sobre la Ley y los principios generals de Derecho, (Madrid, Civitas, 1984) 110. (Translated by author.)

[39] As stated by Gordillo, to pass muster under the standard of reasonableness and constitutional legitimacy, a regulation or administrative action must demonstrate, at a minimum: (1) a sufficient basis of fact, motive, etc.; (2) that the objective being pursued bears a sufficient relationship to the facts which support it; and (3) that the means chosen are congruent with and proportional to both the objective being pursued and the facts established to support it. Gordillo, op. cit., Vol. I, Ch. 6, "Fuentes Supranacionales del Derecho Administrativo, *passim*, and especially p. VI-33.

[40] *Ibid*, VI-33-36.

[41] *See* Paparinskis, op. cit. note 32, 240 and Chapter 9 (*passim*) on the International Minimum Standard and the Protection of Property; B. Kingsbury and S. Schill, 'investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2006) IILJ Working Paper 2009/6 24-30.

4. Implications for the Broader Critique of investor-State Arbitration

Since this paper began by referring to the longstanding discussion of the legitimacy of the investor-State arbitration regime, it seems appropriate to comment briefly on a relatively recent and quite different line of criticism regarding legitimacy. This line of thought appears to have its principal proponents in Europe and has, directly or indirectly, contributed to a recent official proposal, *inter alia*, to form a new EU investment court.[42]

At its core, this new critique of legitimacy builds on earlier scholarship suggesting that while the "consent" of a government, *e.g.* by signing and ratifying a Convention or a BIT, may be a necessary foundation for the legitimacy of investor-State arbitration, it may not, in itself, be sufficient.[43] It is argued that a more adequate conception of legitimacy for modern democratic governments would involve greater participation by NGO's and other interested parties — since, of course, some of the issues to be decided in investor-State cases may well involve important public health, safety, or environmental matters, and other regulatory matters capable of reaching down to and affecting individual local citizens. Given the nature of constitutional democracies, the critics raise questions, for example, as to whether a government is even authorized, according to its constitution, to delegate power to an *ad hoc* arbitral tribunal of three members — where none of the tribunal members is a permanent members of any court, either of that State or the EU

[42] *See*, European Commission Fact Sheet, (Press Release Brussels, 16 September 2015) Reading Guide on Draft Text on Investment Protection and Investment Court System in the Transatlantic Trade and INVESTMENT PARTNERSHIP (TTIP). It is unclear how this new court would relate to the existing investor-State arbitral regime including ratification of the ICSID Convention by EU member nations and the large number of BIT's which have been ratified by European parties. For present purposes, however, there is no need to get into that level of detail here.

[43] Thomas Franck, *Fairness in International Law and Institutions* (OUP, Oxford 1995), 29.

— and where at least one of the members has been appointed by a foreign party, without any input from the State, whatsoever.[44]

It is argued, further, that, such arbitral tribunals are vested with broad power to create and apply Global Administrative Law, and that such awards have had considerable potential to impinge seriously on State sovereignty.[45] In support of this thesis, such commentators, for example, point to cases in which Claimants have challenged:

- the administration of water concessions in Bolivia;
- affirmative action programs seeking to remedy apartheid injustices in South Africa;
- the ban of harmful substances in the U.S. and Canada;
- anti-tobacco legislation in Australia and Uruguay;
- the health-care insurance system in the Czech Republic; and
- most recently the arbitration initiated by the Swedish power producer, Vattenfall, challenging Germany's exit from nuclear power production, now an ICSID proceeding (Case No. ARB/09/06)).

Finally it is argued that investment arbitration cases, especially if they involve issues of such importance and sensitivity, should no longer be permitted to be heard in private proceedings, away from the public eye. Matters of such import should instead be subject to procedures which

[44] A State is, of course, empowered to challenge any arbitrator on grounds of conflict of interest, bias or other evidence that such arbitration should not be allowed to serve.

[45] Benedict Kingsbury and Stephan Schill, Stephan 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emergence of Global Administrative Law' (IILJ Working Paper 2009/6).

provide for maximum transparency, open hearings, the disclosure of all documents, and the participation of as many organized groups and interested parties as possible.

There has already been, and will continue to be, much discussion of these ideas. I do not intend to list or evaluate all of the arguments, pro and con, regarding these suggestions. Instead, this paper will comment only on the connection between this new legitimacy critique and the main topics discussed above. The author does, however, consider that one concise — and helpful document — especially regarding the alleged excessive secrecy and insulation from public scrutiny of investor-State proceedings — is the International Bar Association's Document "investor-State dispute settlement: the importance of informed fact-based debate."[46]

But, returning to the principal subject, the reader is undoubtedly aware, that the origins of the Washington Convention and the other treaties and agreements which gave rise to a dramatic increase in international investment arbitration are found in the same post-war efforts which gave rise to the World Bank, the UNDP, the regional development banks and numerous bilateral assistance programs. By the 1960's, however, foreign assistance levels had stagnated and the prospects for major improvements to the lot of developing nations seemed limited at best. It was hoped that private foreign investment might come to the rescue and might dramatically expand the resources available for development. It was also observed that developing nations were still attracting only a relatively small proportion of the world's investment flows.

This situation was understood to result, in significant part, from the perception in the world business community, that something drastic needed to be done to protect against, or at

[46] IBA 20/04/15 — which may be accessed in any browser searching "IBA issues fact-correcting statement on ISDS."

least to mitigate, political or non-commercial risks in developing nations, where legal systems were perceived to be weak and unreliable. While expropriation risk was most often highlighted, businesses had similar concerns about the potential of other less easily described government measures with potential to impair the rights or assets of foreign investors.[47]

And so began what seems in retrospect, (especially in this present era of complaints about government dysfunction) a remarkable effort of world leaders to create the Washington Convention, and an institution within the World Bank Group dedicated to administering a system for resolving international investment disputes, transparently, by legal means. It was also hoped that the new institution — (which we now refer to as "ICSID"), and its rules, might relieve the Bank of certain "extra-curricular burdens" with which it was periodically charged — namely, to take a forceful role in settling investment disputes with developing nations, often under considerable pressure from a wealthy contributing government which was backing the investor.[48]

In 1967, Aron Broches, then World Bank General Counsel and the unquestionable intellectual father of the Convention, urged countries to include ICSID arbitration in their BIT's. In 1969 ICSID also published model BIT clauses.[49] Soon after, the number of BIT's, which provided for ICSID (and/or UNCITRAL) arbitration for the resolution of investment disputes, began to grow exponentially, until today, the number of BIT's in force has grown to more than 3000.

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[47] Antonio R. Parra, *The History of ICSID*, (Oxford U. Press, 2012) 12. This book is a rich and authoritative source for information not easily available elsewhere.

[48] Parra, op. cit., 141.

[49] Parra, op. cit., 132.

In the current swirl of policy discussions, it is important, for purposes of perspective, to look back at these beginnings. At the moment, for example, Australia, Germany and the United States, among others, (all countries with sophisticated legal systems which include layers of procedural safeguards), seem to be placing very high on their priority lists the need to seek further protection of their sovereign privileges to regulate a variety of commercial activities within their borders as they see fit.[50] It is not that these concerns are unreasonable: governments are, of course, entitled to try to avoid what they see as unneceessary and burdensome litigation by clarifying certain concepts related to their freedom to regulate. Indeed, most of these efforts have been focused on clarifying existing international standards rather than rolling them back.[51] But these concerns are, nevertheless, very far removed from the concerns with which the investment arbitration regime began.

When Germany, for example, signed the very first BIT with Pakistan in 1959 it would have seemed strange indeed to express concern about the legitimacy of the process into which it was entering. A sovereign, democratically-elected government was, without question, authorized to enter into treaties which it believed would provide protections for its private investors, while also, more generally, assisting the flow of investment capital to poorer nations. In so doing, it was understood and agreed that it was entering into a binding commitment to honor such treaty-based obligations and commitments as part of its domestic law — even if such commitments might, to some extent, include standards and procedures different from or more demanding than those established in domestic law.

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[50] *See*, for example, Model U.S. BIT (2012).

[51] *See*, for example, K.L. Kizer and J.K. Sharpe, 'Reform of Investor — State Dispute Settlement: The U.S. Experience' in Kalicki and Joubin-Bret (2014) TDM 1, op. cit. (note 9) 172

It may be true, as Prof. Schill, and other distinguished scholars have suggested, that legitimacy, in a more idealistic and philosophical sense, should now be understood to require maximum transparency as well as procedures which allow for the participation of as many citizens or non-governmental organizations as possible. But international investment arbitration and the ICSID Convention were created to solve a different set of problems, problems which, then and now, seem to the author to be for more urgent. Maximum transparency, for example, may be considered highly desirable as a general rule, but when one is seeking the careful and dispassionate application of applicable legal rules to resolve a highly politically-charged investment dispute, maximum transparency may be the last thing that either of the parties involved would desire. And while the proceedings themselves, depending upon the wishes of the parties, may, typically, be closed to persons other than the tribunal, the parties, their witnesses and counsel, the text of the award itself — normally running to between 100 and 200 pages, including detailed reasoning of the arbitrators and extensive citations to authority — is almost always readily available to the public — especially if the government involved wishes it to be so.

With regard to the freedom of sovereigns to regulate in the public interest, ample protections already exist and are in the process of being refined even further. As indicated earlier, while it is difficult to compress international investment law into a few words, any government acting to regulate activities within its core functions (including, *inter alia*, the protection of public safety, health and the environment) may do so in virtually any way it chooses — *provided, however*, that the measures chosen do not violate international legal obligations by treating foreign investors in an "arbitrary" or "discriminatory" manner. These are limitations which, of course, (1) also serve to protect their own nationals doing business abroad,

and, most importantly, (2) should pose little or no burden on nations with highly developed legal systems.

Whether one is pleased or displeased with the performance of the international investment arbitration regime, generally, my own view is that it does actually function by requiring experienced, honest and conscientious arbitrators, chosen by the parties, to peer into another legal world and and to puzzle out, together, how that system actually works in practice. Where arbitral tribunals find, by careful and respectful application of the rules, that a government's actions have been arbitrary, discriminatory, confiscatory or plainly abusive (thus violating the International Minimum Standard, [including the standard of Fair and Equitable Treatment]) — and where the tribunal concludes, *post hoc*, that the aggrieved party did not have available "an adequate legal remedy under local law" — the reader may not be surprised to learn that some tribunal members experience a degree of gratification that they could come to the rescue of that particular aggrieved party. It is not that arbitrators have an emotional or philosophical preference for one side or the other; they must not. Instead, this reaction, in my experience, comes from having burrowed deeply into the law and the facts of the case, and having conscientiously done one's job. These same arbitrators, may then go on to think that it is unfortunate that while international investment law may enable a tribunal to provide a remedy for a foreign investor in such a situation, a citizen of that same nation — having received the identical maltreatment from his own government — would be legally helpless. While this is clearly a matter to be decided by each government, raising the level of protection for such citizens under national law would seem to be the best way to eliminate this disparate treatment.

Returning to investment cases, as indicated earlier, some Latin American governments (or particular administrations) are more cautious and restrained than others, and hence encounter fewer claims. Also, as indicated earlier, some governments have now put in place more immediately effective remedies which may be used, responsibly, to control abusive governmental actions. Elsewhere, judges — and especially constitutional courts may gradually show more backbone when faced with situations of executive branch abuse. Governments may also take action to set up early warning systems so that they are in a better position to appreciate how arbitrary decisions of national, provincial or local officials may contravene commitments made in investment treaties. Attention to such potential risks should lead to greater care, thought and consultation before steps are taken that may later have significant legal and financial consequences. It is to be hoped that this sort of preparation and forethought will eventually diminish certain categories of future cases, especially those in which a single country becomes the object of a large number of investor claims.

At the same time it is hoped that the maturation of the process will not be derailed by present initiatives of some governments reacting to perceived dangers to their sovereign prerogatives, especially in the area of indirect expropriation through regulatory action. In view of the legal protections already in place, these preoccupations appear exaggerated, to say the least. And to the extent that new objections regarding legitimacy play into these concerns, they beg the question: if the regime of investment arbitration, based on these arguments, is not considered sufficiently legitimate for European nations, is it not somewhat unseemly to suggest that it sufficiently legitimate for others? It is, of course, possible that further research will support the conclusion that there are serious legitimacy problems for one and all. However, it

should be clear, by now, that the author is skeptical of this line of thinking. In my view, it would be preferable to focus, instead, on the potential influence of the investment arbitration regime in the direction of reducing arbitrary and abusive governmental action generally, and of providing needed protection not only for foreign investors, but for ordinary citizens of the world as well.

Perhaps it is appropriate to close with the words from one of those investment tribunals suspected of having too much undisciplined power. The award in *Waste Management v. Mexico*[52] said the following:

> "Taken together, the S.D. Myers, Mondev, ADF and Loewen cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety — as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candor in an administrative process."

Such a statement might now also be found in recent human rights cases — which recognize that all such misconduct violates international obligations. We believe that the governments of the world — especially those with highly developed legal systems — have no need to fear these standards or the arbitrators that they choose to apply them. Instead, with some patience and courage, there is good reason to believe that these standards and the institutions of investment arbitration which have been developed to administer them will strengthen the bonds of international law and continue to advance the objectives of investment and development which gave rise to them.

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[52] *Waste Management, Inc. v. United Mexican States*, (II) ICSID Case No. ARB (AF)/00/3, Award, 2004, [98].