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The Contribution of Investment Arbitration to the Rule of Law

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I Boundaries in Flux

"No man is an island, entire of itself"; thus begins the famous poem of the Englishman John Donne, a meditation on social isolation, first published in 1624. It was at the same time that a Dutch expedition breached the geographical isolation of this enchanting island, naming it Mauritius, after Prince Maurits of Nassau. The island is a befitting metaphor to consider whether and how investment arbitration contributes to the rule of law. On the one hand, it may be characterized as a specialized regime of self-contained awards produced by élite lawyers; an island unto itself. On the other hand, it is surrounded by the vast ocean of globalization; of international law, political reality, and historical socio-economic context; a complex ocean that shapes the island's ever-changing boundaries. Its western shore is washed by the gentle tide of procedural flexibility, while the eastern shore is battered by the waves of normative fragmentation; and its northern shore is graced by the steady current of legal formalism, while the southern shore braces for the coming storm of substantive fairness. Flexibility and fragmentation, formalism and fairness; the contribution of investment arbitration to the rule of law depends on striking the right balance between these elements.

II Flexibility V. Fragmentation

Procedural flexibility is at the core of investment arbitration. Its institutional design is based on party autonomy in the constitution of tribunals, the absence of a judicial hierarchy, and simplified and efficient procedures; though the industrialization of arbitral proceedings with inordinately aggressive litigation has undermined this latter purpose. There is yet a further layer, of normative flexibility, because this alternating multiplicity of arbitrators applies an alternating multiplicity of bilateral investment treaties. Multilateral treaties such as the
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Energy Charter Treaty or NAFTA are very much the exception ● rather than the norm. This decentralized, pragmatic, contextualized, case-specific approach to dispute settlement is viewed as an appealing characteristic. But the promise of flexibility is accompanied by the perils of fragmentation. There is a competing need for – what the majority in *Burlington Resources v. Ecuador* famously described as – "a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law". (1) This is a rather elementary requirement of jurisprudence; in the words of Hans Kelsen, the rule of law "is not ... a rule. It is a set of rules having the kind of unity we understand by a system." (2) Without harmonization – or "systemic integration" – "[f]ragmentation puts into question the coherence of international law" and undermines "predictability and legal security". (3) This quest for coherence is further complicated by the fact that investment law is constituted both by special rules and general principles of international law. Thus, the jurisprudence must be both internally coherent within the specialized regime and externally coherent with wider principles of general international law.

A useful illustration of fragmentation is the State responsibility principle of reparations for injuries, as applied to compound interest. In the year 2000, the tribunal in *CSDE v. Costa Rica* awarded compound interest based on what it characterized as "considerations of fairness which form part of the law" while recognizing in fact that "[n]o uniform rule of law has emerged" on the question. (4) In 2001 however, the UN International Law Commission made a contrary conclusion that "[t]he general view of courts and tribunals has been against the award of compound interest ... ". (5) Over the decade that followed, several tribunals invoked the *CSDE* award as legal authority to award compound interest. But others, such as the tribunal in *Rosinvestco v. The Russian Federation*, held to the contrary that "it is not bound to award compound interest" because the practice of investment arbitrations "is by no means unanimous". (6)

Another example of fragmentation is the minimum standard of treatment under customary law. In the well-known *Elettronica Sicula (ELSI)* case, decided in 1989, the International Court of Justice defined arbitrariness as "a wilful disregard of due process of law". (7) In the years that followed however, the *ELSI* standard became subject to competing interpretations. In *Genin v.*
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Estonia, decided in 2001, it was interpreted as a ● procedural irregularity "amount[ing] to bad faith, a wilful disregard of due process of law or an extreme insufficiency of action". (8) The following year, in 2002, *Pope & Talbot* held that the *ELSI* standard does not require "egregious" conduct. (9) *Azurix Corp. v. Argentina*, decided in 2006, further held that *Genin* erred in requiring "bad faith" because the *ELSI* standard "emphasizes the element of wilful disregard of the law". (10) This jurisprudential muddle demonstrates the need for harmonization within the

investment arbitration regime.

There is however an additional, wider dimension to systemic integration. It is expressed by Art. 31(3)(c) of the *Vienna Convention on the Law of Treaties* as the interpretive obligation to "take into account, together with the context" of a treaty, "[a]ny relevant rule of international law applicable in the relations between the parties". Thus, beyond coherence in the application of specialized investment law, tribunals must also ensure coherence with general principles of international law. Specialized lawyers often cringe at the prospect of applying broader norms, for instance, those regarding human rights, public health, environmental protection, sustainable development, and anti-corruption measures. It would of course be best if such principles were specifically incorporated into relevant investment treaties to avoid ambiguity as to the applicable law. Nonetheless, other international courts and tribunals have seen fit to apply Art. 31(3)(c) in interpreting treaties in diverse contexts. For example, in *Al-Adsani v. United Kingdom*, the European Court of Human Rights held that despite its "special character", the European Convention on Human Rights "cannot be interpreted in a vacuum" and "should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the grant of State immunity" (11) which was at issue in that case. It is noteworthy that this interpretive method was invoked to limit rather than expand the human right to a fair trial. Why should investment treaties be any different? They too cannot be interpreted in a vacuum. Art. 31(3)(c) is not a Pandora's Box. It simply requires that, where necessary and appropriate, investment treaties must be harmonized with wider principles of international law. Tribunals must rise to the occasion.

It is said that a judge is a law student that grades his own exam paper. But fragmentation has consequences. A notable example is the new policy of the European Commission to replace arbitration in investment treaties with an "Investment Court System". This system is composed of what is described as "fully qualified judges" deciding cases "on the basis of clear rules" in "transparent" proceedings, and "subject to review by a new Appeal Tribunal". Its purpose is to "protect the governments' right to regulate, and ensure that investment disputes will be adjudicated in full accordance with the rule ● of law". (12) Whether we like this shift in policy or not, it is a reality that cannot be ignored. What if the African Union or other regional organizations follow the same model?

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Perhaps investment arbitration is becoming a victim of its own success. From a handful of isolated cases to the proliferation of numerous significant awards, its transformation in recent years has made it both increasingly relevant and increasingly subject to scrutiny. Who could have imagined twenty years ago when the first ICSID cases emerged that one day even "the man on the street" would know what ISDS meant? Under such circumstances, how can investment arbitration adapt itself to make a better contribution to the rule of law? Will procedural flexibility inevitably result in normative fragmentation? Will adjudication increasingly substitute for arbitration in the future?

III Formalism v. Fairness

There is clearly room for greater coherence in jurisprudence. This can be achieved in part through greater methodological rigour. But the safe harbour of legal formalism alone will not solve the problem. In general, investment law does not consist of specific rules. It is a relatively indeterminate body of norms. For example, the tribunal in *Enron Corporation Ponderosa Assets v. Argentina* held that in "vague circumstances, the fair and equitable standard [in treaty law] may be more precise than its customary international law forefathers". (13) By contrast, the tribunal in *Saluka Investment v. The Czech Republic* made the candid admission that "the difference between the Treaty standard and the customary minimum standard ... may well be more apparent than real. ... different formulations of the relevant thresholds ... could be explained by the contextual and factual differences of the cases to which the standards have been applied". (14)

There is of course always an element of ambiguity in jurisprudence. As Ronald Dworkin famously observed, "[a]bsolute confidence or clarity is the privilege of fools and fanatics". (15) The question is how that ambiguity is resolved. Dworkin's theory of "law as integrity" held that the correct legal view must "follow from the principles of justice, fairness, and procedural due process ... ". (16) Thus, legal formalism must be combined with fairness, because for "a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so". (17) Perhaps this explains the contention of one arbitrator in *Burlington Resources v. Ecuador*, Professor Brigitte Stern, that contrary to the majority view on harmonization, her duty was "to ● decide each case on its own merits, independently of any apparent jurisprudential trend". (18)

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There may be good reason for subordinating rigid formalism to substantive justice. Fairness is not achieved by disguising judicial "diplomacy" (19) as the only correct legal view. In the words of Judge Rosalyn Higgins of the International Court of Justice, "[w]here there is ambiguity or uncertainty" an element of "policy-directed choice" should be made because in fact it is unavoidable. (20) Thus, "alongside coherence, pluralism should be understood as a constitutive value of the system". (21) This requires greater transparency in identifying policy choices rather than denying their influence. Fairness calls for resolving ambiguities through the conscious balancing of interests, not only between States and investors as the direct parties in proceedings, but where appropriate, also that of international organizations and civil society. It also calls for tribunals that properly reflect these diverse perspectives in their composition.

IV Beyond the Island

I have reflected on flexibility and fragmentation, formalism and fairness, as elements defining the contribution of investment arbitration to the rule of law. I have done so in light of the obvious fact that in contrast with the imperial domination and gunboat diplomacy of the past, the contemporary regime represents significant progress and historical evolution. Investor-State arbitration has clearly emerged as an indispensable instrument of global governance. But its coming of age also gives rise to new challenges. Moving forward, the investment arbitration regime must have a legitimacy that is commensurate with its unprecedented visibility and relevance; a legitimacy that is consistent with its high ideals of shared prosperity and progress.

In an earlier time when such a large gathering of international practitioners could scarcely have been imagined, Oscar Schacter famously spoke of the "invisible college of international lawyers". We have come very far since arbitration was the exclusive preserve of an aristocratic gentlemen's club, mirroring a world in which power and prosperity was the privilege of the select few. Today, we belong to a much broader though still self-regulating community of élite lawyers entrusted with the solemn responsibility of dispensing justice. Yet, in the name of progress, we must ensure that we also reflect the ideals of fairness and transparency, diversity and inclusivity, to ensure legitimacy in our own midst. The long-term survival of investment arbitration may well depend on it. In that regard, this historic ICCA Congress in Africa has hopefully opened a new chapter in the global self-conception of our community.

"No man is an island entire of itself; every man is a piece of the continent, a part of the main". I began with this seventeenth-century English poem, a meditation on the interdependence of humankind, written around the same time that Mauritius was first ● settled. In the spirit of multiculturalism that has brought us to this auspicious gathering, I will call to mind the Persian and Arab merchants, sailing the Swahili coast in the fourteenth century, that first discovered this enchanting island, naming it *Dina Arobi* or "*baie aux tortues*". In tribute to that tradition and culture, I will end with a poem by the renowned mystic Rumi, reminding us that the rule of law, beyond an abstraction, is above all, a recognition of our inextricable interdependence as a single human race: "You are not a drop in the ocean," Rumi wrote; "You are the entire ocean in a drop."

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References

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