NEW ZEALAND CENTRE FOR PUBLIC LAW
Te Wānanga o ngā Kaupapa Ture ā Iwi o Aotearoa

New Zealand Journal of Public and International Law

VOLUME 17 ▪ NUMBER 1 ▪ NOVEMBER 2019

SPECIAL CONFERENCE ISSUE: 26TH ANNUAL ANZSIL CONFERENCE
FROM THE LOCAL TO THE GLOBAL
SPECIAL ISSUE EDITOR: ALBERTO COSTI

THIS ISSUE INCLUDES CONTRIBUTIONS BY

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The Law Foundation NEW ZEALAND SUPPORTING INDEPENDENT LEGAL THINKING

Australian and New Zealand Society of International Law

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA UNIVERSITY OF WELLINGTON

NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

November 2019

The mode of citation of this journal is: (2019) 17 NZJPIL (page)

The previous issue of this journal was volume 16 number 1, November 2018

ISSN 1176-3930

Printed by City Print Communications, Wellington

Cover photo: Robert Cross, VUW ITS Image Services

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The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship. It is available in hard copy by subscription and is also available on the HeinOnline, Westlaw, Informit and EBSCO electronic databases.

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NEW ZEALAND JOURNAL OF PUBLIC AND INTERNATIONAL LAW

The New Zealand Centre for Public Law was established in 1996 by the Victoria University of Wellington Council with the funding assistance of the VUW Foundation. Its aims are to stimulate awareness of and interest in public law issues, to provide a forum for discussion of these issues and to foster and promote research in public law. To these ends, the Centre organises a year-round programme of conferences, public seminars and lectures, workshops, distinguished visitors and research projects. It also publishes a series of occasional papers.

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PUBLIC AND PRIVATE SPACES: DISPUTE RESOLUTION IN INTERNATIONAL TRADE AND COMMERCE

Robert French AC*

The following is the text of the Sir Kenneth Keith Lecture, delivered on 6 July 2018 in Wellington, in conjunction with the 26th Annual Conference of the Australian and New Zealand Society of International Law.

I INTRODUCTION

Sir Kenneth Keith stands high in the pantheon of great New Zealanders as scholar, teacher, public intellectual, advisor, advocate, law reformer and judge. He is a serial achiever and his achievements are too numerous and too well-known to this audience to bear detailed repetition. In his judicial capacities, he has served as a judge of the Court of Appeal of New Zealand, the Supreme Court of New Zealand and was the first New Zealander to be elected to the International Court of Justice. He also served as a sessional member of the Supreme Court of Fiji and it was my privilege as an Australian sessional member to sit with him in that role.

From time to time I have been asked to deliver lectures in Australia named for people who are alive and well and considerably younger than me. It is a pleasure to celebrate someone this evening who is alive and well and a little older than me, and maintaining a role as an energetic and enthusiastic public intellectual. It is also a delight to see that we are joined by Lady Jocelyn Keith at this event.

I first saw Sir Kenneth presenting at a conference organised by the Legal Research Foundation at the University of Auckland in August 1993. The proceedings were published under the title *Courts and Policy: Checking the Balance*.[1] At the time, he was President of the Law Commission of New

* Chief Justice of Australia, 2008–2017. The author acknowledges the assistance of Research Assistant Rachel Chan in the preparation of this lecture. The participation of Robert French AC was funded by the New Zealand Law Foundation.

1 BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995).

Zealand. I remember being struck then by his engaging personality and the way in which he communicated at that event.

He declared at the commencement of his paper that his canvas was vast. He spoke of the mutually supportive character of moral and religious principle, sound practice, theoretical writing, judicial decision, treaty text and national legislation. The sources of law, real and formal, did not have to be seen as antagonistic as had been suggested in some of the great debates about codification in the 19th century.

He pointed to continuing questions about the means by which the moral energies of nations and the world community were to be translated into law and legal processes.[2] Implicit in his remarks was a view of the various species of the international legal order and national legal orders as connected, a connection which, if anything, has become deeper and more complex in the 25 years which have passed since that paper was presented in Auckland.

That conference took place just over a year after the High Court of Australia's decision in *Mabo v Queensland (No 2)*.[3] In the leading judgment of Justice Brennan, with whom Chief Justice Mason and Justice McHugh agreed, his Honour said, rejecting the long-standing refusal of the common law to recognise Indigenous legal orders existing when Australia was colonised:[4]

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights … brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.

The recognition of native title across the country, its protection by the Racial Discrimination Act 1975 (Cth) which gave effect to the Convention for the Elimination of All Forms of Racial Discrimination,[5] and the registration of 1,200 Indigenous Land Use Agreements, are consequences of

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2 Kenneth Keith "Policy and Law: Politicians and Judges (and Poets)" in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brooker's, Wellington, 1995) 117 at 127.

3 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

4 At [42] (footnote omitted).

5 International Convention on the Elimination of all Forms of Racial Discrimination 660 UNTS 195 (opened for signature 7 March 1966, entered into force 4 January 1969).

the interconnectedness of which Sir Kenneth spoke in 1993 and which was recognised in the High Court's judgment.

In this lecture, which I present from the perspective of a non-specialist in the field of international law, I want to make some observations about the interconnectedness manifested in what appears to be an international legal ecosystem – an ecosystem in which different species of legal rule, "soft law" norms, domestic law and day-to-day practice, interact. Perhaps its longest lived species is international law, itself an evolving concept. The relationship between public and private international law illustrates its organic untidiness. The areas of international trade law and dispute resolution, particularly in the field of international investment agreements, seem to be at the leading edge of its evolutionary process. The process does not have a smooth trajectory as recent events involving the rise of economic nationalism suggest. There is, however, enough of a general trend to warrant the metaphor of an ecosystem. An advantage of the metaphor is that it helps us to avoid the kind of fine taxonomic distinctions which can inflame useless passions in the Academy and beyond. That said, I propose first to refer to the taxonomy of international law and the usefully inclusive concept of transnational law.

II THE EMPIRE OF INTERNATIONAL LAW

Some have spoken dismissively of international law as an emergent property of the coincident self-interest of collections of States.[6] Hugo Grotius found "no lack of men who view this branch of law with contempt as having no reality outside of an empty name."[7] Hersch Lauterpacht, in 1961, described international law as "immature" in character, and imprecise and uncertain in its rules. He and HLA Hart, writing at about the same time, pointed to the absence of a legislature, an executive and a judiciary with compulsory jurisdiction. They were not alone.[8]

Those critiques may have reflected, to some extent, mindsets derived from municipal law. Professors Goldsmith and Levinson writing in the Harvard Law Review in 2009, referred to domestic law in Anglo-American legal thought as the paradigm of a working legal system:[9]

> Legal rules are promulgated and updated by a legislature or by common law courts subject to legislative revision. Courts authoritatively resolve ambiguities and uncertainties about the application of law in

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6 Jack L Goldsmith and Eric A Posner *The Limits of International Law* (Oxford University Press, New York, 2005) at 3.

7 Hugo Grotius "Prolegomena" in *The Law of War and Peace* (1625), cited in Paul Finn "Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law" (presented at the Bond University 20th Anniversary Symposium, Gold Coast, 26-27 June 2009) at 9.

8 Richard A Falk *The Status of Law in International Society* (Princeton University Press, Princeton, 1970) at 31.

9 Jack Goldsmith and Daryl Levinson "Law for States: International Law, Constitutional Law, Public Law" (2009) 122 Harv L Rev 1792.

> particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interests or are imposed without their consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force, stands ready to coerce compliance.

The international legal order is not so simply described. That said, the sources of law applied in the International Court of Justice are set out in its Statute, as they were in art 38 of the Statute of the Permanent Court of International Justice before it. In the nearly 60 years that have passed since Hart and Lauterpacht wrote, there has been a proliferation and strengthening of international institutions and tribunals to enunciate and develop the applicable principles.[10] Non-State actors have an increasing voice. And as Gillian Triggs has written, if international law were not working "[n]o mail would go from state to state, no currency or commercial transactions would take place".[11]

Stephen Neff of the University of Edinburgh School of Law, writing at the end of his substantial history of international law published in 2014, cautioned that the efficacy of international law cannot be taken for granted. It has always been dependent upon compliance by States. Nevertheless, as he said:[12]

> One of the more remarkable facts of world history … is how well this precarious mechanism of largely voluntary compliance actually works in practice.

What then do we mean by international law today and is it a term in need of renovation?

III THE SPECIES OF INTERNATIONAL LAW

The general understanding of the term "international law" has expanded considerably since Jeremy Bentham called it a collection of rules governing relations between States.[13] A more apt contemporary description calls it "the legal order which is meant to structure the interaction between entities participating in and shaping international relations."[14] That legal order embraces States and non-State actors.

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10 Gillian D Triggs *International Law: Contemporary Principles and Practices* (2nd ed, LexisNexis, Chatswood (NSW), 2011).

11 At 4, citing Thomas M Franck *The Power of Legitimacy Among Nations* (Oxford University Press, Oxford, 1990) at 20.

12 Stephen C Neff *Justice Among Nations* (Harvard University Press, Cambridge (MA), 2014) at 479.

13 See generally JH Burnes and HLA Hart (eds) *The Collected Works of Jeremy Bentham: An Introduction to the Principles of Morals and Legislation* (Oxford University Press, Oxford, 1970).

14 Rüdiger Wolfrum "International Law" Max Planck Encyclopedias of International Law <www.opil.ouplaw.com/home/mpil>, citing Samantha Besson "Theorising the Sources of International Law" in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 163.

The broadening understanding of "international law" suggests that the international legal ecosystem includes rules and principles derived from treaties, conventions, customary international law, statements of principle and model laws and the practice of States, and arguably extends to rules and principles including those of private international law which are applied by States as part of their domestic law.[15]

International commercial dispute resolution and the resolution of disputes between investors and States under international investment agreements, in particular, increasingly form part of the complex and diverse landscape of international law. The investment treaty regime today arguably informs the development of customary international law by countless interpretations and applications of such agreements and the emergence from that process of international investment rules.[16]

A risk said to flow from treaty-based development in international investment law, is that it may threaten the coherence of international law. But coherence is in the eye of the beholder and perhaps dependent upon out-dated understandings of what international law is. The International Law Commission has suggested that the risk of incoherence is mitigated if international law is seen as a legal system rather than as a set of self-contained sub-specialties.[17] If the reality of the international legal order is interactive diversity, then it may not be necessary to be too concerned about classification.

IV TRANSNATIONAL LAW

A term which may usefully accommodate diversity and buttress against incoherence is "transnational law", coined by Philip Jessup in 1966. He defined it as "all law which regulates actions or events that transcend national frontiers".[18] It covers public and private international law and other rules which cannot be fitted within standard categories. It seems to pick up the considerable body of

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15 The Peace Palace Library Research Guide refers to private international law as "embodied in treaties and conventions, model laws, legal guides, and other instruments that regulate transactions": Peace Palace Library Research Guide <thepeacepalacelibrary.nl>.

16 José E Alvarez "A Bit on Custom" (2009) 42 NYU J Int L and Pol 17, citing Andreas Lowenfeld "Investment Agreements and International Law" (2003) 42 Colum J Transnatl L 123; and Stephen M Schwebel "The Influence of Bilateral Investment Treaties on Customary International Law" (2004) 98 ASIL PROC 27.

17 Alvarez, above n 16, at 75, quoting International Law Commission *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* A/Cn.4/L.702 (2006) at 11–13.

18 Philip C Jessup "Transnational Law" in Christian Tietje, Alan Barouder and Karsten Nowrot (eds) *Philip C Jessup's Transnational Law Revisited: On the Occasion of the 50th Anniversary of its Publication* (Institute for Economic Law, Transnational Economic Law Research Centre, Faculty of Law, Martin-Luther-University Halle-Wittenberg, 2006) 45 at 45.

so called "soft law" relevant to transnational dealings. That body includes model laws,[19] principles,[20] guidelines and standard form transactional documents. Model laws and principles may be adopted and applied by domestic legal systems. Model transactional documents may be adopted by contracting parties with consequential legal effects on their rights and obligations. Transnational law so understood encompasses a variety of legal regimes and texts some of which are developed by the actions of private entities and individuals.

The difficulty of defining a clear speciation of the international legal order demonstrates the interconnectedness of its different aspects. That interconnectedness is not a new issue, although the pace of its development in recent times is probably unprecedented. Debate about the relationship between public and private international law is a case in point.

V PUBLIC INTERNATIONAL LAW AND PRIVATE INTERNATIONAL LAW

That debate has a long history.[21] The continental theorists of the 19th century saw private international law as subsumed in public international law – Savigny posited an international common law of nations operating to produce the same decisions with respect to the same legal relations regardless of forum.[22] Dicey, however, characterised private international law as, as much "[a] part of the law of England as the Statute of Frauds".[23] His view of its nature was generally accepted in the Anglo-American world.

An interesting paper, by the distinguished American international lawyer John Reese Stevenson, published in the Columbia Law Review in 1952, pointed to a tendency on the part of international tribunals from the early 20th century to treat private international law norms as emanations of public international law.[24] Examples given were decisions of the Permanent Court of International Justice in

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19 For example, UNCITRAL Model Law on Cross Border Insolvency (1997).

20 For example, ALI/UNIDROIT Principles of Transnational Civil Procedure (2006); and "Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases" (American Law Institute and the International Insolvency Institute, 2012).

21 The history is reviewed by John Reese Stevenson in "The Relationship of Private International Law to Public International Law" (1952) 52 Colum L Rev 561. See also GW Bartholomew "Dicey and the Development of English Private International Law" (1959) 1 Tas Uni L Rev 240.

22 William Guthrie (translator) Frederick Carl Von Savigny *Private International Law: A Treatise on The Conflict of Laws* (2nd ed, T & T Clark, London, 1860) at 348, as cited by Stevenson, above n 21, at 565. See also Antoine Pillet *Traité Pratique de Droit International Privé* (Sirey, Paris, 1923), cited by Stevenson, above n 21, at 18–21 (Translation: *Practical Treatise of Private International Law).*

23 AV Dicey *Conflict of Laws* (2nd ed, Stevens, London, 1908) at 3, cited by Stevenson, above n 21, at 565.

24 Stevenson, above n 21.

the *Serbian and Brazilian Loans Case*[25] in 1929, the American-Mexican Claims Commission in the *Illinois Central Railway Case*[26] in 1927, and the practice of mixed arbitral tribunals established under the Treaty of Versailles after World War 1.[27] The unsurprising suggestion derived from those early decisions is that choice of law rules applied by international tribunals may be treated as norms of public international law. The connection of public and private international law norms was more complex in municipal courts.

In a very recent paper in a collection published in 2018, Alex Mills, a reader in public and private international law at University College London, identifies various connections between the two areas of law:[28]

(1) Commonality of principles reflected in the central role played by the doctrine of comity in private international law.
(2) Historical links between the two subjects.
(3) Functional commonality – national rules of private international law operate within limits defined by public international law.
(4) The incorporation of policy – the rules of the private international law incorporate a public policy doctrine which may be invoked against the recognition and enforcement of a foreign judgment or as an exception to the application of foreign law.
(5) Shared objectives – both determine the allocation of regulatory authority between States generally relying on territorial or personal connections to justify the allocation.
(6) Methodology – private international law presents a methodology or technique capable of adoption and adaptation to other contexts.

Mills concludes that there are deep historical connections in the development of each area of the law as part of the law of nations. He says:[29]

> This is a dynamic and difficult terrain to explore, but it is important that private international lawyers are not blind to the global regulatory effects and potential of private international law, and that public international lawyers are not blind to the significance of private international regulation.

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25 *Payment of Various Serbian Loans Issued in France* (*France v Kingdom of the Serbs, Croats and Slovenes) (Judgment)* (1929) PCIJ (series A) No 20/21.

26 *Illinois Central Railroad Company (USA) v United Mexican States* (1927) IV RIAA 21.

27 Stevenson, above n 21, at 573.

28 See Alex Mills "Connecting Public and Private International Law" in Veronica Ruiz Abou-Nigm, Kasey McCall-Smith and Duncan French (eds) *Linkages and Boundaries in Private and Public International Law* (Hart Publishing, Oxford, 2018) 13.

29 At 31.

The case of public and private international law illustrates the difficulty of siloing elements of the international legal order which are embraced by the general rubric of transnational law. And when it comes to transnational commercial dispute resolution generally, naming species of law within the genus of transnational law is, in practical terms, of limited utility. Against that background it is time to turn to the place, in our ecosystem, of international investment agreements – comprising free trade agreements and bilateral investment treaties (BITs). Here there is a history of growth, controversy and, in recent times, scepticism about and rejection of the power of ad hoc arbitral tribunals to determine important questions about State conduct, including regulatory action and judicial decisions.

VI FREE TRADE AGREEMENTS AND BILATERAL INVESTMENT TREATIES

Free trade agreements with investment chapters and investment treaties, collectively referred to as international investment agreements, create rights and obligations at international law, although their enforcement generally requires the support of domestic law. They typically include provisions protective of investments made in one State party by an investor from another State party. The protections include:

- protection against expropriation other than expropriation which is non-discriminatory, made for a public purpose, in accordance with due process and on payment of prompt, adequate and effective compensation;[30]
- investments and returns of investors of each State party shall be accorded fair and equitable treatment in the territory of the other State party;[31]
- each State party shall, subject to its laws, regulations and investment policies, grant to investments made in its territory by investors of the other party treatment no less favourable than that which it accords to investments of its own investors;[32]
- neither State party shall subject investments and activities associated with such investments by the investors of the other State party to treatment less favourable than that accorded to the investments and associated activities by the investors of any third State.[33]

Many such treaties and agreements include investor-State dispute settlement provisions under which foreign investors, who claim that host State obligations under the treaty or agreement have been breached, may seek compensation and other remedies through an arbitral process (investor-to-state dispute settlement (ISDS) clauses).

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30 Baxter Roberts, Michael Feutrill and Kanaga Dharmananda *A Practical Guide to Investment Treaties – Asia Pacific* (LexisNexis Butterworths, Chatswood (NSW), 2015) at [3.9].

31 At [4.4].

32 At [6.5].

33 At [7.4].

An interesting area of interconnectedness within the international legal ecosystem is found in the relationship between international investment agreements and customary international law.

Generally speaking, the impact of customary international law on the international investment agreement regime is not controversial. When an investor-State relationship is governed by an international investment agreement, gaps can be filled by customary international law. By way of example, in the case of *ADC Affiliates Ltd v Republic of Hungary*, the Arbitral Tribunal said:[34]

> Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case.

And, of course, under the Vienna Convention on the Law of Treaties, international investment agreements must, like all treaties, be interpreted by reference to "any relevant rules of international law", including "customary international law".[35]

Some arbitral tribunals seem to have accepted standard protections in BITs as having codified customary international law. For example, in 2003 in *Generation Ukraine Inc v Ukraine*, the Tribunal stated:[36]

> It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law.

The late Andreas Lowenfeld and Stephen Schwebel argued that BITs had "moved beyond *lex specialis* … to the level of customary law effective even for non-signatories".[37] That is to say that common substantive provisions now apply to investor-State disputes even where the investor's home State and the host State are not parties to a treaty. Not surprisingly, that view is hotly contested. Opponents argue that BITs lack the consistency required to establish state practice.[38] In relation to *opinio juris*, they argue that States sign bilateral investment treaties for economic reasons – not because they believe there is a legal obligation to do so.[39] The view that BITs have informed the

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34 *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary* ICSID ARB/03/16, 2 October 2006 at [483].

35 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31(3)(c).

36 *Generation Ukraine Inc v Ukraine* ICSID ARB/00/9, 16 September 2003 at [11.3].

37 Lowenfeld, above n 16, at 129. See also Schwebel, above n 16.

38 Patrick Dumberry "Are BITs Representing the New Customary International Law in International Investment Law?" (2010) 28 Penn State International Law Review 675 at 685.

39 See for example Andrew Guzman "Why DLCs Sign Treaties that Hurt them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 88 Va J Intl L 639 at 685–687.

development of customary international law in investor-State relations has attracted different responses from arbitral tribunals.[40]

Professor Lowenfeld conceded that his thesis might not accord with the requirements of state practice and *opinio juris*.[41] He suggested, however, that "the undertaking of legal obligations by a large group of states, even from a mixture of motives" is sufficient in this context.[42] In other words, "perhaps the traditional definition of customary international law is wrong, or at least in this area, incomplete".[43] Whatever the merits of that argument, changing well-established requirements of State practice and *opinio juris* is "a big ask". For now, therefore, the part played by international investment agreements in developing customary international law remains the subject of interesting, but evidently unresolved debate.

VII INTERNATIONAL INVESTMENT AGREEMENTS – THE REFORMING TREND

The growth of international investment agreements is a global phenomenon, but their growth has not followed a smooth trajectory. There have been terminations and serious calls for significant reform, particularly in the area of investment protection and dispute resolution. The United Nations Conference on Trade and Development (UNCTAD) published an Issues Note in May 2018 which recorded both growth and change:

- In 2017, 18 new international investment agreements were made – nine were BITs and nine were other treaties with investment provisions (TIPs). This brought the total number of such agreements world-wide to 3,322; comprising 2,946 BITs and 376 TIPs, of which 2,638 were in force at the end of 2017.
- Of the 18 new international investment agreements concluded in 2017, three were regional agreements – The Association of Southeast Asian Nations (ASEAN)-Hong Kong, China Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol and the Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement between Australia, New Zealand and 12 Pacific Island States.

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40 *Mondev International Ltd v United States of America* ICSID ARB(AF)/99/2, 11 October 2002 at [117] (footnote omitted). Opining that concord with practice of States in the protection of foreign investments has influenced the content of rules governing their treatment in current international law. Contrast *United Parcel Service of American Inc v Government of Canada (Jurisdiction)* ICSID UNCT/02/1, 22 November 2002 at [97]. Holding that in terms of *opinio juris* there is no indication that obligations included in bilateral treaties reflect a general sense of obligation.

41 Lowenfeld, above n 16, at 129–130.

42 At 130.

43 At 130.

- There were also terminations of existing treaties. India terminated 17 treaties. Ecuador sent 16 notices of termination in 2017. Two terminations took effect in 2017 among intra-European Union BITs.
- For the first time, the number of effectively terminated international investment agreements exceeded the number of newly concluded treaties and the number of new treaties entering into force.

The terminations seem to reflect a degree of State concern with the resort by non-State actors – in particular foreign investors – against State parties to international investment agreements. Institutional responses to those concerns have begun to emerge.

The UNCTAD Issues Note observes that the reform oriented treaty-making today contrasts strikingly with treaty-making at the turn of the millennium. Reform oriented clauses are becoming more common. They include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of investment dispute settlement. Investment treaty-making has reached a turning point. Countries are modernising their existing stock of old generation treaties. There have been multilateral reform discussions, including discussions relating to investor-State dispute settlement, and countries are beginning to issue interpretations of existing treaties or replacing old generation agreements.

VIII POLITICAL DEBATES ABOUT INVESTOR-STATE DISPUTE SETTLEMENT

A reforming response was necessary. Investor-State dispute settlement processes had begun to arouse passions uniting politicians from opposite ends of the ideological spectrum. By way of example, on 12 March 2015, in the United States of America, a leading Democrat, Senator Elizabeth Warren, who had previously referred to ISDS panels as "rigged pseudocourts", released a letter signed by 90 Law Professors concerned about a proposed ISDS provision in the Trans Pacific Partnership Agreement (TPP) which was, until the election of President Trump, under negotiation between Australia, the United States and a number of other countries in the region. She said in words which could have appeared in a Trumpian tweet:[44]

> ISDS allows foreign companies to challenge American laws and potentially to pick up huge payouts from taxpayers without even setting foot in an American Court.

The White House argued that investment provisions under the TPP were designed to protect American investors abroad from discrimination and denial of justice. Moreover, there had only been 13 ISDS cases against the United States in the three decades since the United States had been party to such agreements and it had not lost any of them. The libertarian Cato Institute argued against the

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44 Owen Boss "Law professors back Elizabeth Warren's fight against trade pact" *The Boston Herald* (online ed, Boston, 12 March 2015).

White House that the win-lose record of investors and governments missed the point. The system was biased in the sense that foreign investors had access and others did not.[45]

The debate which was raised in the United States over a number of years prior to the exchanges of 2015, did not lead to any radical change in approach by the United States administration which, in 2012, adopted a new Model Bilateral Investment Treaty retaining substantive investment protections and arbitral clauses.[46]

Turning briefly to the Australian policy debate, in 2010, the Productivity Commission in Australia issued a report questioning the effectiveness of ISDS clauses in promoting trade and investment in Australia.[47] The Commission suggested that they do not influence inward foreign investment flows and that there are considerable risks associated with them. The downside risks identified in the report would be familiar to anybody conversant with recent debates. They include:

- The potential for regulatory chill whereby countries forego public policy action with potential adverse effect on foreign investors for fear that they will be subject to investor-State arbitration.
- The perception that foreign investors are given greater rights and opportunities than domestic investors in relation to disputes with the State.
- The perception of a pro-investor bias in ISDS processes and concerns relating to conflicts of interest where an arbitrator in one case acts as counsel in other cases involving the investor.
- Lack of consistency and clarity in the ISDS system.
- Lack of transparency.
- Cost.

The Commission recommended that Australia avoid ISDS provisions in trade agreements conferring rights on foreign investors over and above those provided by the Australian legal system.

Prior to 2011, Australia had become a party to a number of investment agreements with ISDS clauses with a view to providing additional protection for Australian investors operating in developing States where there were concerns about their particular domestic legal systems.[48] In April 2011, Philip Morris (Asia) initiated an arbitral process under a Hong Kong-Australia investment treaty claiming

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45 Simon Lester "Responding to the White House Response on ISDS" (27 February 2015) Cato Institute Online blog <www.cato.org>. See also Daniel Ikenson "Hyperbole Aside Elizabeth Warren is Right about the risk of Investor-State" (26 February 2015) Cato Institute Online blog <www.cato.org>.

46 Paolo Di Rosa "The New 2012 US Model BIT: Staying the Course" (1 June 2012) Kluwer Arbitration Blog <arbitrationblog.kluwerarbitration.com>.

47 Productivity Commission *Bilateral and Regional Trade Agreements Report* (Australian Productivity Commission, Research Report, 2010).

48 Jurgen Kurtz and Luke Nottage "Investment Treaty Arbitration 'Down Under': Policy and Politics in Australia" (2015) 30 ICSID Review 465.

that the Commonwealth's proposed tobacco plain packaging laws were in breach of the treaty. The Commonwealth government subsequently issued a Trade Policy Statement that it would discontinue the practice of including investor-State dispute resolution procedures in trade agreements with developing countries.[49] There was considerable push-back from some trade law academics and practitioners. In 2013, following a change of government, the Commonwealth announced that it would consider ISDS clauses in international investment agreements on a case-by-case basis.

On 13 January 2015, the European Commission published a report of the results of a public consultation on investment protection and ISDS clauses in the proposed Trans-Atlantic Trade and Investment Partnership Agreement (TTIP).[50] The report indicated substantial public concern about such clauses. Those concerns highlighted the "democratic deficit" of ISDS processes, contrasting them with the determination of disputes by domestic courts applying laws enacted by democratically elected legislatures. On the other hand, there was support for the process from the business sector and from the National Committees of the International Chamber of Commerce. Some cases could not be dealt with in national courts and for those international arbitration was a necessity. Some host States enjoyed immunity in local courts when it came to public acts. Most of those respondents were opposed to a requirement that investors exhaust domestic remedies before resort to ISDS.

IX EUROPE MOVES TOWARDS AN INTERNATIONAL INVESTMENT COURT

The European Union (EU) has since moved decisively in favour of a permanent International Investment Court to hear and determine investor-State disputes arising out of free trade agreements or BITs.

In September 2015, the EU announced that it had approved a proposal to establish an "Investment Court System" to "replace the [ISDS] mechanism in all ongoing and future EU investment negotiations, including the EU-United States talks on a Transatlantic Trade and Investment Partnership (TTIP)".[51] The main elements of the reform were outlined as including:

- the setting up of a public Investment Court System composed of a first instance Tribunal and an Appeal Tribunal;

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49 Department of Foreign Affairs and Trade *Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity* (April 2011) at 14.

50 European Commission *Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (Commission Staff Working Document, 2015).

51 European Commission "Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations" (press release, 16 September 2015).

- the appointment to the Court of judges with high qualifications, comparable to those required for the members of permanent international courts such as the International Court of Justice and the World Trade Organization (WTO) Appellate Body;
- the Appeal Tribunal to operate on similar principles to the WTO Appellate Body;
- the ability of investors to take a case before the Tribunal would be precisely defined and limited to cases such as targeted discrimination on the base of gender, race or religion, or nationality, expropriation without compensation, or denial of justice;
- governments' right to regulate would be enshrined and guaranteed in the provisions of the trade and investment agreements.

In November 2015, the EU formally presented to the United States of America its proposal for the Investment Court System for the TTIP.[52] It is now history that that partnership is not proceeding, at least for the foreseeable future. Europe has, however, pursued the concept of standing tribunals in recent free trade agreements.

The Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, concluded in 2017, contains fairly standard provisions for the protection of Canadian investors in the EU and EU investors in Canada. Under CETA, the tribunal to determine investor-State disputes is to consist of 15 members, five of whom are Canadian, five nationals of the EU and five from other nations. The members are required to have specialised knowledge of, or experience in, public international law.

Chapter 3 of the EU-Singapore Investment Protection Agreement, which is linked to the EU-Singapore Trade Agreement, also provides for a standing body comprising six members, two nationals of the EU, two nominees of Singapore and two who shall not be members of any Member State of the EU or of Singapore. Appointees are required to have knowledge of, or experience in, public international law. They are to be appointed for eight-year terms subject to transitional provisions applicable to initial appointments. There is a six-person appeal tribunal with a similar split in its composition. Their qualifications are as for the tribunal.

The EU-Vietnam Free Trade Agreement provides for the establishment of a tribunal comprising nine members; three EU nationals, three Vietnamese nationals and three from a third country. An appellate tribunal is also established.

It is of interest that the members of the Standing Dispute Resolution Panels in these agreements are required to have knowledge of or experience in public international law.

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52 European Commission "Transatlantic Trade and investment Partnership: Trade in Services, Investment and E-Commerce" (Proposal for Investment Protection and Resolution of Investment Disputes, 12 November 2015).

These developments suggest a trend towards the establishment of regional investment courts and possibly even a global investment court which could be designated in international investment agreements as the forum for resolution of investor-State disputes. Such a development would place investor-State dispute adjudication firmly in the area defined by the connected elements of public and private international law and within transnational law generally.

Standing tribunals will, it is suggested, contribute more credibly and effectively to the continuing development of global principles of international investment law than the accumulated decisions of ad hoc tribunals, however experienced their personnel and however transparent their decisions. An alternative but not necessarily exclusive development would be the creation of jurisdictions in international commercial courts, such as the Singapore International Commercial Court, to hear and determine investor-State disputes with effect to be given to their determinations pursuant to the terms of particular investment agreements and the ICSID Convention[53] much as occurs today.

X INTERNATIONAL COMMERCIAL ARBITRATION

International commercial dispute resolution involves disputes between non-State actors which may have significant public policy implications. It may also involve disputes between States and non-State actors outside the framework of international investment agreements – for example where a dispute arises under a contract between a State or a State entity and a foreign contractor. There are two principal adjudicative mechanisms for the resolution of such disputes – arbitral and judicial. The arbitral processes are supported by the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration.[54] These can be seen as emanations of transnational law. However, given the confidentiality which attaches to private arbitral processes, their contribution to the development of international trade law is limited. It is most apparent when questions of arbitrability and enforceability arise in domestic courts applying commonly used international criteria. The criteria relate to the arbitrability of the dispute and public policy considerations against recognition and enforcement. They are embedded in the relevant conventions and domestic statutory schemes for the recognition and enforcement of awards.

Articles 34(2)(b) and 36(1)(b) of the UNCITRAL Model Law respectively set out the grounds for setting aside arbitral awards and for refusing recognition or enforcement of awards. The grounds are:

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

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53 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 575 UNTS 159 (opened for signature 18 March 1965, entered into force 14 October 1966) [ICSID Convention].

54 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959) [New York Convention]; and UNCITRAL Model Law on International Commercial Arbitrations (1985).

(ii) the award is in conflict with the public policy of this State.

Article 5 of the New York Convention sets out similar grounds for refusal to recognise and enforce an award.

In October 2015, the International Bar Association (IBA)'s Subcommittee on the Recognition and Enforcement of Arbitral Awards released a report on the public policy exception in art 5 of the New York Convention.[55] The IBA reporters concluded that in the vast majority of national jurisdictions a violation of public policy requires a violation of fundamental or basic principles. In many jurisdictions, it covers both procedural and substantive matters. The ground is differently expressed by courts and academic commentators in civil law and common law jurisdictions. Civil law jurisdictions refer to the basic principles or values upon which the foundations of society rest. Common law jurisdictions are said to invoke broad values such as justice, fairness or morality. The results nevertheless suggest a common acceptance that public policy criteria are to be applied with restraint consistently with the objectives of the New York Convention and the UNCITRAL Model Law.

Although judgments about what is arbitrable and what is not vary from jurisdiction to jurisdiction, there seems to be a significant degree of overlap on the application of that ground. This suggests that the general principles developed by the decisions of domestic courts can, in this area, contribute to the development of transnational law by reference to arts 34 and 36 of the UNCITRAL Model Law and art 5 of the New York Convention.

XI COMMERCIAL COURTS

Beyond the important field of arbitral dispute resolution lies judicial dispute resolution which, in so far as it concerns the interpretation and application of treaties, conventions, model laws, model transactional documents and general principles of trade and investment law, makes its own contribution to the growth of transnational law in those areas. There is an ongoing concern by commercial courts around the world that their ability to contribute to the development of the law through public decision-making processes should not be diminished by the tendency to resort to confidential commercial arbitration or, for that matter, ad hoc tribunals in investor-State arbitration which are not bound by any principles of comity or precedent.[56]

The former Lord Chief Justice of England and Wales, Lord Thomas, argued that the rule of law in international markets is supported where commercial courts learn from each other and develop the

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55 International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards *Report of the Public Policy Exception in the New York Convention* (October 2015).

56 As to emerging practices in this area, see Gabrielle Kaumann-Cohler "Arbitral Precedent: Dream, Necessity or Excuse" (2007) 23 Arb Intl 357.

law to take into account each other's decisions in a variety of jurisdictions.[57] He initiated the establishment of a Standing International Forum of Commercial Courts which was convened in London on 5 May 2017 and at which 16 jurisdictions were represented by their Chief Justices.[58] A media release following the meeting indicated that the Form would seek to:

(1) produce a multilateral memorandum explaining how, under current rules, judgments of one commercial court may most efficiently be enforced in the country of another;
(2) establish a working party to examine how best practice might be identified and litigation made more efficient – with a view to the production of a further multilateral document to be discussed at the next meeting of the Forum;
(3) establish a structure under which the judges of the commercial court of one country could spend short periods of time as observers in the commercial court of another; and
(4) consider issues such as practical arrangements for liaison with other bodies including arbitral bodies to identify and resolve areas of difficulty.

The Forum launched its website in March 2018. It scheduled a further meeting to be hosted by the judiciary of the Southern District of New York in September 2018. If effective, the Forum may facilitate convergence in commercial law and practice between participant courts and to that extent convergence in an important area of transnational law.

XII INTERNATIONAL COMMERCIAL COURTS

New institutions are emerging from a variety of domestic jurisdictions to provide specialised judicial dispute resolution of international commercial disputes. These are International Commercial Courts which have been established in Qatar, Dubai, Singapore and Abu Dhabi. A Netherlands Commercial Court is expected to be established this year. Central Asia's first commercial court has been established in Kazakhstan under the leadership of Lord Woolf. That Court will operate exclusively in the English language. The establishment of the Kazakhstan Court appears to have emerged from exchanges between Kazakhstan and the United Arab Emirates, followed by meetings in Dubai between the Dubai International Financial Centre (DIFC) Courts and the Supreme Court of Kazakhstan.

Recently, the Supreme Court of the People's Republic of China has raised a proposal for the establishment of Chinese International Commercial Courts to deal with commercial disputes arising between parties connected with Belt and Road Initiative States. The Chief Executive of Dispute

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57 Lord Chief Justice Thomas "Commercial Justice in the Global Village: The Role of Commercial Courts" (Speech delivered to the Dubai International Financial Centre, Academy of Law, 1 February 2016).

58 Jurisdictions represented included Abu Dhabi, Australia, Bahrain, Bermuda, Canada (Ontario), Cayman Islands, Delaware, Dubai, Eastern Caribbean, European courts, Hong Kong, Ireland, Kazakhstan, New English Language Netherlands Court, New York, New Zealand, Nigeria, Qatar, Rwanda, Sierra Leone, Singapore and Uganda.

Resolution Authority, Kazakhstan published an article in the *Astana Times* entitled "Belt and Road Initiative: One Vision of Justice" in which he said:[59]

> As goods and services travel across the world along the BRI [Belt and Road Initiative], they will seamlessly cross borders, so we need a seamless judicial platform that can do the same. The answer is to make sure that when the dispute comes into the "real world", the court system can understand that virtual supply chain and deliver a decision that can be executed around the world. The creation of a court that focusses on connectivity and the enforceability of its judgments will ensure the success of the BRI by facilitating the quick resolution of disputes in a neutral forum.

Other initiatives in this area include the establishment of the International Commercial Chamber within the Paris Court of Appeals on 7 February 2018. Litigants will have the opportunity to conduct proceedings in English and other foreign languages. A recent proposal for the establishment of chambers for international commercial disputes in Germany was unsuccessful, but will no doubt be revisited. In Belgium in October 2017, the Belgian Minister of Justice announced the government's intention to establish a specialised court to be called "The Brussels International Business Court".

I am an international judge of the Singapore International Commercial Court. It was established in January 2015. It is a division of the Singapore High Court created under the Supreme Court of Judicature Act of Singapore. Its jurisdiction is limited to claims "of an international and commercial nature". It comprises Singaporean Supreme Court judges from both the Court of Appeal and the High Court. It also has a number of international justices from the United Kingdom, Australia, France, Hong Kong and the United States of America. It has distinctive procedural rules and practice directions allowing for innovative procedures. Parties can be represented by foreign lawyers where the action is an "offshore case", that is, a case that has no substantial connection to Singapore. There is provision for confidentiality of proceedings and for the adoption of evidentiary rules other than Singaporean Rules of Evidence. Parties can have questions of foreign law determined on the basis of submissions rather than proof. The parties may also contract out of or limit their rights of appeal.

The Court is designed to offer an attractive alternative to arbitration by offering a combination of expertise, efficiency and procedural flexibility. As with most of the international commercial courts, it anticipates that cases will come to it as a result of its nomination as the forum in contractual dispute resolution clauses. In the meantime, the Court has taken a number of cases involving international commercial disputes which were instituted in the original jurisdiction of the High Court of Singapore. The first case arising out of a contractual nomination of the Court as a forum has been filed. The rise of international commercial courts, supported by domestic statutes and composed of judges from a number of jurisdictions, is a particular mechanism for advancing the judicial contribution to a transnational commercial law.

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59 Mark Beer "Belt and Road Initiative: One Vision of Justice" *The Astana Times* (online ed, Kazakhstan, 20 April 2018).

Interconnectedness with the international legal ecosystem is demonstrated by the intrusion into transnational commercial law of human rights norms derived from international conventions and customary international law.

XIII INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION AND HUMAN RIGHTS

International trade and investment and human rights do not, at first glance, seem to be natural bedfellows – which perhaps indicates that there may be a problem in their interaction. They are, however, increasingly interconnected areas of discourse.

On 16 June 2011, the Human Rights Council of the United Nations endorsed a Statement of Guiding Principles on Business and Human Rights. The Guiding Principles are directed to the duty of States to protect against human rights abuses within their territories by third parties, including business enterprises.[60] Operational principles affecting general regulatory and policy functions include the propositions that States should:[61]

- enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights;
- ensure that other laws and policies concerning the creation and ongoing operation of business enterprises such as corporate law, do not constrain but enable business respect for human rights.

The potential interaction between those operational principles and transnational convergence in commercial law is obvious enough. There is evidence of a substantial degree of support for the Guiding Principles in the international business community and considerable interest in their development and implementation in our region.

By way of example, in October 2014 the ASEAN Corporate Social Responsibility Network arranged an ASEAN Responsible Business Forum in Kuala Lumpur which brought together 250 representatives of government, companies, trade unions and civil society. The final component of the Forum was a Workshop on the Guiding Principles co-organised by the ASEAN Corporate Social Responsibility Network and the Singapore Management University with support from the Swedish government, the Asia-Europe Foundation, the EU and the British Institute of International and Comparative Law.

Human rights norms also inform the meaning of "public policy" for the purpose of the public policy ground for setting aside or refusing the enforcement of an arbitral award under domestic arbitration laws and the New York Convention. In *Allsop Automatic Inc v Tecnoski snc*, a case

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60 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* A/HRC/17/31 (21 March 2011) at 6.

61 At 8.

concerning the enforcement of an award under the New York Convention, the Milan Court of Appeal defined public policy as:[62]

> … a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.

Similarly, German Courts have set aside, on public policy grounds, awards that involve human rights violations.[63]

Both substantive and procedural human rights norms can influence the meaning of "public policy". As regards substantive norms, an award may be set aside if it concerned a transaction involving the exploitation of children or some form of discrimination, for example.[64] The application of substantive norms may raise factual issues about the required degree of connection between the transaction and the human rights violation for the public policy ground to apply.[65] If courts require only a low degree of connection between the transaction and the human rights violation, this could undermine the policy objectives of the New York Convention. That Convention has been very successful in providing commercial parties with certainty that awards will be enforced partly because courts will apply a high threshold before refusing to enforce on public policy grounds. On the other hand, human rights go to the heart of public policy for most, if not all, States.

Public policy may also have a procedural rights aspect. An example is derived from the European Convention on Human Rights (ECHR).[66] Article 6(1) states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established in law.

The courts of some European countries have referred to the ECHR in relation to international commercial arbitration, albeit not in the context of public policy. For example, in *Mousaka Inc v Golden Seagull Maritime Inc*, the applicant relied on art 6 ECHR (as incorporated by the Human

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62 *Allsop Automatic Inc v Tecnoski snc* (1992) 22 YB Com Arbn 725 (Court of Appeal of Milan) at 726.

63 Gary Born *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014) at 3324.

64 Bernardo Cremades and David Cairnes "The Brave New World of Global Arbitration" (2002) 3 Journal of World Investment 173 at 206–207; and Chang-fa Lo "Principles and Criteria for International and Transnational Public Policies in Commercial Arbitration" (2008) 1 CAAJ 67 at 82–83.

65 Cremades and Cairnes, above n 64, at 206–207.

66 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953).

Rights Act 1998 (UK)) to argue that a judge must give reasons for refusing to give a party permission to appeal from an arbitration award.[67] Justice Steel stated:[68]

> The tentacles of the Human Rights Act, 1998 reach into some unexpected places. The Commercial Court, even when exercising its supervisory role as regards arbitration is not immune.

On the other hand, a party's agreement to arbitration may constitute a waiver of at least some of the ECHR's human rights protections.[69] Specifically, parties to arbitration waive the right to public dispute resolution before a tribunal established by law; arbitration is not public and arbitral tribunals are not established by law.[70] However, agreeing to arbitration is not a waiver of all procedural guarantees.[71] Thus, as the Swiss Federal Supreme Court has stated, arbitral tribunals must still respect fundamental procedural rules.[72]

In an interesting development, the city of The Hague, supported by the Netherlands Foreign Ministry, is funding a project for the drafting of a set of rules applicable to the use of arbitration to resolve business and human rights disputes. The Kluwer Arbitration Blog in November 2017 reported that the drafting committee is chaired by Bruno Simma, a former judge of the International Court of Justice. The rules, once drafted, and following a process of stakeholder consultation, will be offered to the Permanent Court of Arbitration and other international arbitral institutions. They could also be applicable to ad hoc arbitrations.

Transnational businesses have strong reasons to ensure that human rights abuses do not occur in connection with their activities or in their supply chains. They accordingly have reasons for providing accessible mechanisms for victims of any such abuses to seek redress. Arbitral processes, using suitably qualified arbitrators with relevant experience in human rights adjudication and dispute resolution would be a feature of such arbitral processes. The interaction between international trade and commerce and human rights is a developing feature of the international legal ecology.

XIV CONCLUSION

Transnational commercial law generally, and dispute resolution in particular, is going through change at the present time. Some strands of that change point in the direction of an increasing interconnectedness in the international legal order in its various manifestations. Others, particularly

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67 *Mousaka Inc v Golden Seagull Maritime Inc* [2001] 2 Lloyd's Law Reports 657 (QB).

68 At 658.

69 Nigel Blackaby and others *Redfern and Hunter on International Arbitration* (6th ed, Oxford University Press, New York, 2015) at [10.58].

70 At [10.58].

71 At [10.59].

72 At [10.58].

the recent emergence of economic nationalism and protectionist tendencies in the United States of America and other countries, may point in different directions.

I tend to optimism. The world is now a very small place. Neither State nor people can simply bounce off each other like atoms in Brownian motion. There is an ecosystem which seems to be evolving.

As I said at the beginning of this lecture, Sir Kenneth Keith marked out his position as a believer in interconnectedness in the international legal ecosystem a long time ago. In his judicial and other roles, he has been a living example of it in action. I have no doubt that he has much left to contribute. It has been a privilege to honour his contribution by this lecture.