PANEL 3: MULTI-PARTY ARBITRATION ISSUES IN INTERNATIONAL PROJECT FINANCE ARBITRATION

MODERATOR: Franco Ferrari
PANELISTS: Matthieu de Boisséson, Dr. Inka Hanefeld, Mark Kantor, Ryan Reetz, Laurence Shore

MR. JONATHAN CARDENAS: Our next panel, titled "Multi-Party Arbitration Issues in International Project Finance Arbitration," will be led by Professor Franco Ferrari, Professor of Law and Director of the Center for Transnational Litigation and Commercial Law. Professor Ferrari received his J.D. from Bologna University in Italy and his LL.M. from Augsburg University in Germany. He joined the NYU Law School faculty on a full-time basis in September 2010. Professor Ferrari was chaired Professor of Comparative Law at Tilburg University in the Netherlands, and also at Bologna University in Italy. After serving as a member of the Italian Delegation to various sessions of the United Nations Commission on International Trade Law from 1995 to 2000, he served as Legal Officer in the International Trade Law Branch of the UN Office of Legal Affairs from 2000 to 2002. Professor Ferrari has published over 240 law review articles in various languages, and 15 books on international commercial law, as well as conflict of laws, comparative law, and international commercial arbitration. Professor Ferrari also acts as an arbitrator in both international commercial arbitration and investment arbitration, and it's a pleasure to have him all the way from Europe as a full-time faculty member here in our school. Please join me in welcoming Professor Ferrari and our panel.

PROFESSOR FRANCO FERRARI: Now the fun starts. What we had until now was just a warm up.

We will deal with one of the questions posed by Professor Davis earlier today when he asked: do these deals go wrong? We have five of the most distinguished counsel and arbitrators here today. They will talk about various aspects of project finance and arbitration. Some of the issues to be dealt with, for example, by our colleague Matthieu de Boisséson, are issues that are arbitration issues as such, and that arise in a project

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finance context as well. We will then also have some talks on more project finance–specific issues as the afternoon proceeds.

Mr. Matthieu de Boisséson is a graduate of Paris University Sorbonne in law, but he also holds a Ph.D. in literature, and I'm sure he's the only one on the panel. He sat as an arbitrator in more than 140 cases, whether it's under ICC rules, under LCIA rules, ICSID, and so forth. He is also the co-author of one of the most influential books in French on the French law of arbitration, both domestic and international, a new edition of which we are expecting in 2014. I give him the floor right away. He will deal with two of the issues I mentioned, meaning arbitration issues in the context of project finance, namely multi-party arbitration, and the extension of the arbitration agreement to non-signatories.

MR. MATTHIEU DE BOISSÉSON: Thank you very much. First of all, I would like to express my thanks for this kind invitation. I'm extremely pleased to be here at NYU with you. And I would like also to thank particularly Professor Ferrari and all of our friends for having organized this session.

As you know, the growth of very complex projects and complex contracts has led to, and has also increased, the number of complex arbitration cases. The ICC, in particular, has been faced with an enormous increase of complex arbitrations over the last few years. In 1998, for instance, only 10% of the arbitrations administered by the ICC Court were related to multi-party arbitration and today it's more than 30% of the cases received by the ICC Court, which are cases extending beyond the classic bipolar model of arbitration. This is the reason why the ICC Court of Arbitration has felt the need to improve its rules, and by keeping, of course, the very flexible frame which is the traditional structure of the ICC Rules; but also to render these rules more efficient in order to adapt those rules to these cases of multi-party arbitration, complex cases, and multi-contract arbitration cases as well.

The new rules came into force on the first of January, 2012, and I would like to describe briefly the main articles which deal with complex arbitration. I use the term complex arbitration because now it is kind of a generic expression, a generic wording of these cases including three main hypotheses.

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The first issue involves multi-party arbitration where a single contract has been concluded by many parties. A second issue is especially apparent when project financing occurs where there are underlying documents, and also banking or financing documents, and a series of contracts between the investors and the banks (for the loans, etc.), and then between the contractors and subcontractors, etc. So the second issue is a group of contracts or contracts that are interrelated between themselves; and the third main issue is related to a group of contracts which involve parties which have not necessarily signed these agreements.

These are the three main issues which are at stake in our conversation, and which were of course at stake in the willingness of the ICC Court of Arbitration when she decided to improve the ICC Rules.

The first article, which is telling and is worth mentioning in the new ICC Rules of 2012, is Article 7. Article 7 enables the joinder of additional parties. Before 2012, it was possible for a claimant, for instance, to identify not only the respondent but other respondents. For instance, respondents which were not signatories, or respondents which were signatories, but who had difficulty in identifying other parties against which they had possible claims. So now it is open to any party to make a joinder to submit to the ICC Court before the signature of the times of reference, including requests for joiner of additional parties. This is provided for by Article 7.

Article 8 is related to claims between multiple parties. Other articles such as Article 1.1, which states that any party to the arbitration, whether a claimant, respondent, or an additional party (an additional party under Article 7 which I just mentioned), is entitled to make a claim against any other existing parties, which means, for instance, that between the respondents, a respondent #1, maybe is entitled within the framework of the ICC Rules now, which was not the case before, to submit a claim against respondent #2—not only a counterclaim against a claimant, but also a claim against respondent #2 or respondent #3, or a counterclaim against claimant number #2. And claimant #1 may possibly make a claim against claimant #2, which is of course something which is far more flexible than before.

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Article 9 deals with multi-contract arbitration, and it states, I quote, "Claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one, or more than one, arbitration agreement(s) under the Rules." In order to proceed with a sole arbitration proceeding based on various agreements, which is the hypothesis of several agreements, a claim may be presented on the basis of multiple contracts and multiple arbitration agreements. Of course there will be a checking made by the Secretariat of the ICC Court, and there are two main hypotheses in that: (1) if all the parties are participating and there are no objections, the Secretariat will transmit the case file to the arbitral tribunal without requesting a prior decision from the Court, and (2) if one or more of the parties is not participating in the arbitration and object to the claims being heard together in a single arbitration, the matter will be referred to the Court by the Secretariat.

So you see that this Article 9 is equally interesting. Article 5 is on consolidation of arbitration. The consolidation of arbitration is a merger between pending arbitrations, and before 2012, it was only possible when it was the pending arbitrations that were existing between the same parties. So now the Court may consolidate in three situations:

1. When there is an explicit agreement between all the parties in all of the arbitrations to be consolidated when there is an agreement. This is very simple.
2. Where all the claims in the different arbitrations are made under the same arbitration agreement, and in that case, the Court may consolidate arbitrations even if the parties to the arbitration are not the same, which is the main difference.
3. Where the claims of the arbitration arise under more than one arbitration agreement if (a) first, the arbitrations are between the same parties, (b) second, the disputes in the arbitrations arise in connection with the same legal relationship, and (c) third, the court finds the arbitration agreements to be compatible. We see that the new ICC Rules have expanded the scope of the possibility to consolidate, but at the same

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time, is doing its best to respect the will, the intent of the parties.

I would like to finish this brief description with the topic of the extension of the arbitration agreement to non-signatory parties. As you know, the word extension is extremely misleading because it's not a question of extent (the legal effect of an arbitration agreement). The question is to identify the parties to the arbitration agreement. This is the problem. Whether the parties are signatories—when they are signatories it is easy. When they are non-signatories, it is a little more difficult. There are certain hypotheses (transmission of the arbitration agreement, subrogation, novation, settlement, etc.), but there are also other cases. For instance, jurisprudence about the group of companies, which is prevailing in certain countries, especially in Europe, when a mother company, for instance, or a subsidiary, although not a signatory, has participated, has closely participated in the conclusion or the performance of the agreement, the arbitral tribunal may decide that this party, within the structure of the group of companies, either the mother company or subsidiary, should be considered as a party to the arbitration agreement, and consequently should proceed and should participate in the procedure, as seen in the famous Dow Chemical case and many other decisions which have been rendered, but certainly we will have an opportunity to revert to that. Thank you very much indeed.

PROFESSOR FERRARI: Thank you very much. Thank you very much for this account where one can see of course a conflict between keeping the role of party autonomy where it is today, and grouping either claims or disputes or parties. That requires obviously a rather careful drafting of the arbitration agreement, which is what in part our next speaker will talk about, Dr. Hanefeld. Dr. Hanefeld who has an incredible CV, as you can see, is a managing partner of her own law firm; her claim to fame is not only to have been an LL.M. student here at NYU, but she was a Fellow last year at the Center for Transnational Litigation and Commercial Law. She has worked for seven years in a major law firm in their Vienna offices, New York office, Frankfurt and Hamburg offices, but finally settled in her own place in Hamburg. Please.

DR. INKA HANEFELD: Thank you very much. Thank you Franco and the conference organizers who invited me to this Panel, and thank you very much, Matthieu, for your valuable

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overview on multiparty arbitration under the ICC Rules. I will continue to share with you some thoughts on choosing the right arbitral institution and drafting arbitration agreements in project finance settings. The question which guided my thoughts when I prepared for today is to what extent can arbitration agreements in project finance settings be inclusive, i.e., be valid for all disputes, for all contracts, for all questions among all parties to the project? And to what extent should arbitration agreements be exclusive, i.e., outsource some matters from the arbitral tribunal to external service providers such as valuation experts?

I think we can agree as a starting point on this panel or hopefully we agree that there has been a move towards the adoption of arbitration clauses—at least in international transactions—even if the financial world is sometimes still reluctant to include these clauses in its contracts. I think it would also be interesting to discuss in the course of this panel for which contracts exactly arbitration is really a suitable means of dispute resolution. But maybe we will come to this later.

I will now turn to the arbitration agreement, as Franco has promised, and so let's think what needs to be considered when drafting such an agreement. In project finance arbitration, as in common arbitral practice, you will need a valid arbitration agreement in order to establish a tribunal's jurisdiction. As concerns the arbitral institution which should ideally be determined in the arbitration agreement, there are prestigious arbitral institutions with a general mandate for dispute resolution such as the already mentioned ICC International Court of Arbitration.

However, recently, specialized institutions with an exclusive mandate for the settlement of financial disputes have been created. The most recent example is P.R.I.M.E. Finance, P.R.I.M.E. standing for "Panel of Recognized International Market Experts". This is a specialized institution with an exclusive mandate for the resolution of financial disputes. It was founded in 2012, has its seat in The Hague and its rules are a modified version of the UNCITRAL Arbitration Rules. It will be interesting to see whether the other panelists already have experience and are familiar with these rules. I only wish to flag out certain particular aspects of these rules. First of all and foremost, the selection of arbitrators under the P.R.I.M.E. Finance Rules is narrowed down to an approved list of arbitra-

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tors. So you don't have the free choice to appoint your arbitrator but only someone from the list. If many parties on claimants' or respondents' side are parties to the dispute, it gets even more difficult to appoint an arbitrator. The P.R.I.M.E. Finance Rules also allow for a joinder of third parties. However, this is only possible in very limited circumstances if the third party is a party to the arbitration agreement. A joinder is not possible if the tribunal finds that the joinder should not be permitted because of prejudice to any of those parties. A further interesting aspect is their somewhat limited scope of confidentiality. The rules support the idea of increased publication of arbitral awards. It is also worth noting that the rules foresee various forms of interim relief.

Are these rules now suitable for project finance transactions? I have no final view on this but I think it will certainly be very interesting to see whether the financial world and the project finance lawyers perceive the arbitrators listed by P.R.I.M.E. Finance to have the necessary project finance expertise. In addition, it will be very interesting to see how the caseload of this new institution will develop and what the views here in the audience on these rules are.

I will now turn to the drafting of the arbitration agreement, and this is certainly a very sophisticated task. I understand that many project finance lawyers delegate this task to the dispute resolution departments of their firms. I therefore just want to mention a couple of things. The model clauses of the arbitral institutions are certainly a very good starting point when drafting an arbitration agreement. One will have to think about the place of arbitration, the language of the proceedings, the number of arbitrators, confidentiality, and finally, very importantly, absent provisions in the rules like in the ICC Rules, the parties will have to anticipate multiparty and multi-contract scenarios which may arise in project finance arbitrations. In the latter case, parties should use compatible arbitration clauses and confer explicit powers of joinder and consolidation on the arbitrators if this is not already foreseen in the rules.

This sophistication of drafting certainly has no limits. In some complex projects you will also find multistep clauses foreseeing assisted negotiation, conciliation, mediation and the like. But it would go too far to go into the very details of this drafting technique.

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I'd rather proceed with the second part of my presentation and I note that I have only five minutes left or four. But I will manage to keep my time limit. I wish to turn to the part on the exclusion or outsourcing of certain tasks to external service providers. What do I mean by outsourcing? I mean carving out certain aspects from the arbitration agreement and the jurisdiction of the tribunal, in particular for the purpose of valuation. I know Mark Kantor is the true expert on this. I have read many of his excellent publications.

In my practice as arbitrator and counsel, I have witnessed so far two alternative methods of outsourcing the valuation of project finance assets to external service providers. The first is the appointment of an expert by the arbitral tribunal. The second is the conduct of valuation proceedings exclusively by party-appointed experts.

I consider the first method, pursuant to which the arbitral tribunal appoints an expert once a dispute has arisen, as the traditional method in project finance. This method applies in situations where parties have not agreed on an expert but where the arbitral tribunal sees the need for the outsourcing of valuation. And in project finance this very often comes into play because you have for example to quantify damages and assess the prospective revenues and capital flows of the project.

It seems to me that the second method, i.e., the conduct of valuation proceedings exclusively by party-appointed experts, is increasingly becoming a trend in recent practice. Let me give you an example of a valuation clause in an infrastructure project finance arbitration in which I act as counsel. This clause stipulates that the fair market value is to be certified in writing by an independent expert having regard to normal valuation factors which are considered relevant in his absolute discretion. The clause continues by stipulating that the following rules shall apply with respect to the appointment of the expert. One side shall propose an independent expert whom the other side may accept at its sole discretion. If the other side accepts the independent expert, the valuation shall be established in a certain period of time in an expert report and shall be binding and conclusive. In the event the other party does not accept the expert, it will also present an expert report. Both sides would share the results of the valuation and then the following thing will happen. In the event the difference between the valuations established by the two experts is

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less than 10%, then the arithmetic mean will govern. If the difference is larger than the 10%, then the two independent experts shall appoint a third independent expert and this third independent expert will make a final variation which shall fall between the valuations established by the two independent experts.

And now comes the most interesting part. The decision of the independent expert appointed pursuant to the rules set out herein shall be final without appeal and binding upon the parties who shall conform to it. This is an interesting scenario, and I like it as counsel and as arbitrator because I think that valuation in such complex projects is too complex to drag it into the arbitration unless this is definitely required.

Particular care is again required in drafting the contractual arrangements. An initial problem often results from the fact that the parties are not clear as to whether the result of the expert determination shall be binding or not. The wording must be precise. Second, parties often fail to stipulate clearly for whom the outcome of the valuation shall be binding—thus, whether it shall be binding for all project participants or only for certain parties. And third, the parties sometimes fail to stipulate to what extent the valuation proceeding shall be binding. Just take the example of determining the valuation date. In some instances, this may predominantly be a task to be performed by the tribunal—for example if it presupposes a prior determination of an event of default or the like. This list of things to consider could be continued. But my time is over and adhering to the promise to honor my Ferrari speed time limit of ten minutes, it's my pleasure to hand over to Mark Kantor.

PROFESSOR FERRARI: Thank you very much. Obviously even this issue of multiparty arbitration somehow depends on the drafting. We will also, as I said earlier, we will deal with various issues. There is obviously no seminar on project finance that can avoid talking about investment arbitration. We are lucky to have Mark Kantor here today. Mark Kantor, as all of you know, is an Adjunct Professor at Georgetown University Law Center. He was partner in the corporate and project finance groups of Milbank, Tweed, Hadley & McCloy for years. He is a Senior Research Fellow at an institute uptown, the Vale Center for Sustainable International Investment. Mr. Kantor is also very well known of course for him being the Editor-in-

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Chief of Transnational Dispute Management. He is the author of the book already evoked earlier, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence.* And he also has at this point 12 minutes.

PROFESSOR MARK KANTOR: Thank you Franco for that very gracious introduction, which I wrote. In addition to thanking you, I would also like to thank NYU and the *Journal of Law & Business* for inviting me here. And I must admit, particularly Jesse and Jonathan who have been really great to me over the last several weeks. I'd like to thank you personally in front of everybody. Special mention, before I do anything substantive, to Professor Andy Lowenfeld, who is not here, but of course is a longstanding fixture here at NYU. Andy was the professor for whom my wife worked when she was a law student here at NYU. She survived him, so I'm sure all of you can as well.

Given the now 11-1/2 minutes I have left, I will be brief.

Contrary to Dr. Hanefeld's suggestion, I'm not going to focus on valuation experts or damages, although we can return to that in the question and answer later, because I didn't prepare for that today. I, instead, will address two questions. Is investment arbitration like a guarantee? And is political risk insurance sufficient, so that investment arbitration is just not needed?

The answer to both questions is "no." The reason for asking those questions in a conference on project finance is that political risk insurance is a common feature in international project finance, both equity political risk insurance and debt political risk insurance. And investment arbitration is an increasing aspect of both counseling and dispute resolution for infrastructure projects that have gone wrong.

Now, nothing that I say about political risk insurance is candidly going to be a surprise to the project finance practitioners in the room. Certainly not to the people who are on the immediately preceding panel. And, nothing that I say about investment treaty arbitration will be a surprise to the investment treaty practitioners in this room—certainly not to the people on this panel. But, it may be a surprise to those who are reflexively anti-investment treaty voices in NGOs, in academia or in government. It may be a surprise to students who are just learning about these topics, and look to people

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who are practitioners and scholars to try to understand these issues better.

The first point I'd like to turn to is whether or not investment treaty arbitration is like a guarantee, because we see that phrase tossed around a lot in NGO critiques of investment arbitration. Well, if you had a contract that provided for the disputing parties to submit their disputes to the jurisdiction of the U.S. District Court for the Southern District of New York, or the commercial court in London, or the high court in New Delhi, no one would think that was a guarantee. That language is a selection of a forum to hear a dispute. If that contract further said, "This contract shall be governed by and construed in accordance with the law of" the State of New York or of England or of India, that would not be a guarantee either. That language just identifies the applicable rules to which we refer when we consider the conduct of the parties.

Well, an investment treaty dispute is not terribly dissimilar. You specify a forum—a type of international arbitration. And you specify a very limited set of rules—they're set out in the investment treaty itself. In general, those rules say "no expropriation without compensation"; "Thou shall not breach the international minimum standard, fair and equitable treatment, denial of justice, full protection and security"; "Thou shall not discriminate against a foreigner in favor of another foreigner" (most favoured nation treatment); "Thou shall not discriminate against a foreigner in favor of locals" (national treatment). Those are the core promises and the core legal rules in an investment treaty.

Some investment treaties also provide "Thou shall not break your promises," the so-called umbrella clause. The extent to which that clause picks up breach of contract claims is highly controversial. In general, though, if the government is acting in a commercial capacity, most arbitrators so far have concluded that there is no breach of contract claim available in investment treaty arbitration under an umbrella clause. That's a controversial issue.

In effect, what investment treaty arbitration does is it provides a forum and a limited set of rules. That is not a guarantee. In fact, it isn't even close to a guarantee, when we look at what actually happens. When we look at the outcome of investment treaty arbitrations, governments win more than half

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the time. High quality governance countries almost never lose. The United States has never lost an investment treaty arbitration. Britain, Germany, Belgium and the Netherlands have never lost. Canada has lost 2-1/2 arbitrations. Canada is the only good governance country that has ever lost an investment treaty arbitration. The countries that lose investment treaty arbitrations are usually countries that are transitional countries or they are countries that have poor records of governance.

When I say "win and lose," by the way, you should appreciate that, if the tribunal awards even a penny to the investor, that's a win the way I just calculated the numbers. Investors, in general in the last few years, when they win, which is less than half the time, they are awarded around 20% of what they have asked for. Then of course, they have to take that piece of paper, the award, and turn it into money unless the government voluntarily pays that award. If you happen to have watched what Argentina and Ecuador, among others, are doing, you will know that neither of those countries has paid any of their recent investment treaty awards. It is very hard to collect if the government is recalcitrant. So the one thing investment treaty arbitration is not, is a guarantee.

Now let me turn to the second topic. Does the existence of political risk insurance mean that I have only five minutes remaining? Yes, it does. In addition to that, does the existence of political risk insurance mean that we don't need investment treaty arbitration? Well, the answer to that is also "no."

Let me start off, first, by pointing out that political risk insurance is only purchased in somewhere between 10% and 15% of foreign direct investment transactions (according to MIGA, the Multilateral Investment Guarantee Agency, and other surveys of private and official political risk insurers). That means 85% to 90% of the foreign direct investment transactions in the world go forward without political risk insurance.

Why is that? Well, there are two core reasons. First, this stuff costs a lot. And, second, political risk insurance is not a guarantee either. It has a narrow scope of cover and it is subject to limits, conditions and qualifications.

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In the remaining few minutes I have, let me explain very quickly what I mean. Hypothetically, if you had a small-to-medium-sized international power project, you might see $100 million of equity invested and $300-400 million of debt invested. The cost of a power project of 140 megawatts is somewhere between four and five hundred million dollars—that is the example I use, by the way, in the class I teach at Georgetown.

So, let's take the $100 million equity and ignore completely the $300 to $400 million of debt. How much does it cost to purchase political risk insurance for $100 million of equity? Well, fortunately for us the U.S. agency OPIC (the Overseas Private Investment Corporation) publishes a set of rate schedules. If you take their rate schedules and just use the mid-range, because it obviously depends on how risky the country is, and you purchased expropriation cover, political violence cover, and inconvertibility cover (which are the three principle scopes of cover), the cost of that insurance for $100 million would be $1,070,000 per year, payable up front annually in advance.

What does that mean? Well, let's say we complete the project tomorrow, Franco. And, five years later, Ruritania expropriates the project. Five years worth of insurance, in that example, is $5,350,000. That's more money than I have in my bank account. That's for a power project—an oil and gas project is even more expensive. Same $100 million (good luck finding an oil project for only $100 million of equity, by the way). The cost of the political risk insurance over five years would be somewhere between $11 and $14 million for an oil and gas project. This is expensive stuff.

What do you get for it? That's the second point. I have already indicated the first issue. Political risk insurance does not cover all types of political risk. It covers expropriation, direct or indirect. It will cover political violence—war, insurrections, strife, terrorist attacks. It will cover transferability and inconvertibility restrictions—debt moratoriums. And, in some limited circumstances, it will cover breach of contract by a State party.

Okay—what doesn't it cover? Well the single most common successful claim in investment treaty arbitration is breach of "fair and equitable treatment." That claim is not covered

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under political risk insurance. Period. Just isn't—not unless it turns into an expropriation.

In addition, there are limits, dollar limits. OPIC, for example, like most official credit insurers, requires the investor to share 10% of its loss. OPIC pays 90%, the investor absorbs 10%. So, right there you've got 10% for the insured (the investor). But, there's also a ceiling. OPIC has a ceiling right now of 270% of the size of the equity. MIGA has a ceiling of $220 million. You remember that 140 megawatts power project I mentioned—that was $494 million of invested capital. Got a problem there, don't you?

In addition to those issues, when you calculate the sum that the insurance company pays, it's based on book value, not market value. As any accountant or financial valuation expert in this room will say, market value of an operating successful project is always higher than book value, which means that, if there's any excess of market value over book value, the insurance doesn't cover it.

And, then, in the one minute remaining, I will draw your attention to limitations and qualifications. Under these insurance policies, the insured investor has a duty to disclose events that may give rise to a loss. If you don't do that, the insurance goes away. Also, you have the possibility of multiple causes—if the preponderant cause of the loss is not a covered event, the whole policy might go away under some policies. You have situations where the investor is alleged to have engaged in provocative acts—there's an exclusion in most political risk insurance policies for provocative acts by the insurer.

And, finally, the last point I'd like to make is some people think that when an insurance company pays political risk insurance, that means the host government doesn't have to pay. That is wrong. In addition to the losses the investors retain and can seek from the host State—the 10% the investor still has, anything above the policy ceiling and anything that's market value in excess of book value—every penny the insurer pays to the investor, the insurer is subrogated to the claim of the investor and gets to pursue the host State to recover what they paid. By the way, that's what the MIGA Convention says. That's what bilateral agreements between MIGA and the host States say. That's what bilateral agreements between OPIC and the host States say.

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And, if you don't think the insurers really do that, you should pick up the phone and call the Government of India and ask them why the United States Government sued them in connection with the Dabhol project. Or, perhaps you could call the Government of Indonesia and ask them about what the U.S. Government's claims in the Patuha and Himpurna projects, after OPIC paid the insurance to the investors. Or, what the private insurers did in the Karaha Bodas project.

And, with my time now up, I'd like to thank you for your patience.

PROFESSOR FERRARI: Thank you very much Mark. And to the audience, I suggest really you read the account that the organizers have made available up front on international project finance and arbitration by Mark Kantor in the *Fordham International Law Journal* because it is a tale of, I quote, "bribes, kickbacks, and corruption; the collapse of entire economies, wholesale rejection of contracts; political crisis and coups; claim of human rights violations; injunctions against arbitration and, God forbid, awards in the hundreds of millions of U.S. dollars." It is made available.

Now from investment arbitration to what international commercial arbitration can do given the limitations of international investment treaty arbitration, it is Ryan Reetz who will tackle the topic. He is a partner in DLA Piper's international arbitration and litigation practice. His practice specifically ranges from investment disputes and sovereign immunity challenges to class actions, RICO Act claims, contract disputes, unfair trade practices, and so on. He taught for eight years transnational civil litigation and arbitration as an adjunct professor at the University of Miami, and is now a visiting professor at the University of Navarra School of Law. Please, Ryan.

MR. RYAN REETZ: Thank you Professor Ferrari for that very kind introduction, and thank you to the *Journal* for organizing this Symposium and for the invitation to be here. It's really wonderful. In thinking about the topics that we've been talking about today, I'm reminded of the story of a businessman who is interested in starting a greenfield project, and went up in a hot air balloon to get a better view of the terrain. And some wind came along, blew him off course, he was lost floating above the earth, looked down, saw someone standing in a field and said, "Hello, please, can you help me, can you tell me

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where I am?" And the man standing in the field said, "Yes, of course, you're in a hot air balloon, and you're about 45 feet above the earth." The man in the balloon said, "You must be a lawyer." "How did you know?" "Your answer was completely accurate, and completely useless."

And I think the subject of utility is very important when we talk about remedies and disputes that arise in the context of these projects. Mark sold me on never buying political risk insurance for anything and made a very eloquent case for the limited usefulness of investor state arbitration, investment treaty arbitration really. And that ties in with what Inka said about the BIT's not rendering commercial arbitration or an arbitration agreement obsolete. And I wanted to just take a few minutes to talk about the relative utilities of the two mechanisms, when one can be helpful and when another can be helpful. And to suggest that we need both of them really for many of these projects to make sense in terms of having available remedies.

What is one of the big problems with investor state arbitration? You have to have a claim that falls within its parameters which means that this isn't going to be a claim against anyone other than a state that's a party to one or two treaties that are necessary to select the venue, as Mark suggested, and to select the applicable law, to give rights. And you have to meet the jurisdictional requirements with respect to those claims. So you need, in addition to a claim against the contracting state and a treaty, the claimant needs to be a national of another contracting state. When you have a project ownership structure that maybe has a local entity as the ground level operating entity and then it's owned by foreign entities, you may run into issues about whether you have someone who can make a claim, someone that is a national of another contracting state. And this is an issue that may not be resolved until the time of arbitration. So there's uncertainty as to whether you may be able to make an investor state claim given a particular company structure.

Another ground of uncertainty is whether you have what's described as an investment. An investment is something necessary to have jurisdiction in the ICSID regime of investor state arbitration. But it's also something you have to have to claim under a bilateral investment treaty, regardless of whether you're going to use the ICSID scheme. And there are differing

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definitions of investments and until you have an arbitral tribunal that decides which one will be used, there's further uncertainty as to whether you really will have an investor-state remedy. The claim that you would assert would be a claim against the state for something it did, an expropriation, a violation of fair and equitable treatment or denial of national treatment or something like that. Many of the commercial complaints that you might have, even against a state entity, won't qualify, as Mark suggested. And the claims that arise in the context of investor-state arbitration are typically claims under international law, either treaty-based claims or perhaps claims under customary international law. But there's also uncertainty as to exactly how that will all play out in the context of an investor state arbitration. In part, because it's a regime that is not based on a comprehensive articulation of standards, as in a code-based regime, nor is it based on a developed system of precedent, so that arbitral tribunals really have a tremendous amount of freedom to decide each case according to their own understanding of their responsibilities.

Another potential limitation of the utility of investor state arbitration is the very lengthy pre-arbitration requirements, whether it's a cooling off period or a negotiation period that must be complied with before you can commence the arbitration. And there may be ways to dispense with these requirements, to argue that they're futile or that they're non-jurisdictional. But again you won't know whether that works, whether you can dispense with the requirement, until you have an arbitral tribunal and they rule on the issue.

So in general, there's a lot of uncertainty as to how an investor state claim will come out, which is why, as Mark suggested, only a small percentage of them are viewed as successful by the investors who bring them.

Other potential limits of investment treaty arbitration include the subject of multiple parties, something that Matthieu talked about, which works to some extent now in the commercial arbitration context in that there are ways of handling claims among multiple parties, but it's very difficult in investor state arbitration to bring in multiple parties. About the only thing that I've seen is a possibility under NAFTA of consolidating like claims under certain circumstances. But you cannot have the sort of complex multi-contract, multi-party arbitra-

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tion that you can allow for in the context of commercial arbitration.

Mark mentioned that the measure of damages is generally more conservative in an investor-state arbitration. And provisional measures are much more restricted in their being granted. Why do we see all these limitations? The whole idea behind the bilateral investment treaty regime was designed to encourage foreign investment by providing comfort to investors by trying to make investors feel secure, and yet we see that in application the rights conferred by the treaties and the procedures don't seem to provide all that much. One answer may be that when you provide these rights by treaty, you're using a very broad instrument. You're conferring rights on a very broad category of potential investors. And it may be that countries are more comfortable conferring rights on an individual basis, in the context of a particular contract or project that they may want, than committing very far in advance to all potential investors who may fit within the regime. So the limitations, I think, tell us that in terms of bargaining even with just the state, the host state, you may be able to accomplish much more in the context of commercial arbitration. But commercial arbitration has its own limits that render it inappropriate for some situations. You have the question of non-signatories or whether you have the right contracting party in your arbitration agreement. If the state action that has made the investment infeasible is not an action taken by a contracting party, then you may have no claim under your contracts and in the commercial context. There may be an issue, if you're contracting with a state party, of whether the state party really has the capacity to enter into an arbitration agreement as a matter of its own law, whether it can be held to that arbitration agreement. The applicable legal rules will be rules of contract law, which may not include the sort of international law claims that you would want to assert. And you may have state interference with the arbitration process itself.

There are also issues with enforcement under either regime, questions of sovereign immunity in connection with execution on assets, and the commercial arbitration award is potentially subject to greater interference by being set aside in the jurisdiction of the seat (as it's very difficult to get a state entity to agree to arbitrate with a seat outside of its own territory).

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I think in deciding between these two types of arbitration with respect to protecting your rights, you should also consider questions of public perception and publicity. The investor state arbitrations tend to have a higher degree of visibility even though in theory they're supposed to be confidential in many respects. This publicity in connection with the claim may pressure the state to consider a settlement more actively. On the other hand, as we heard in this afternoon's first panel, publicity about state concessions to private parties may create political pressure and may make it more difficult for the state political actors to resolve the dispute. So that's something that has to be considered.

And timing is also very important, something about which I suspect I will get my own note in a minute. The perception is that investor state claims can take a very long time to resolve compared to commercial claims. One statistic I read last night is that, as of a few years ago, ICSID claims were taking about 3-1/2 years to resolve, which seemed even short to me based on some of the ICSID cases that I'd read about.

Another consideration is whether it's possible to reserve some claims for litigation, playing a little bit on Inka's point. If you're dealing with a foreign sovereign, that's generally not going to be a good idea. But for the commercial relationships involved in a complex project, there may be claims that are better dealt with in litigation because they need things that only national courts can do. For example, remedies involving title to land may be something that is more easily dealt with by national courts in some systems.

So what I'd like to suggest is there are really three types of dispute resolution that need to be considered. They work together. In an ideal world, you would seek to protect your contract rights through commercial arbitration remedies. Maybe even, in a complex project, having a master arbitration agreement to which all of the contract parties subscribed through their individual contracts, whether it's an inter-creditor agreement, a financing agreement, et cetera. Everyone buys into a common system of arbitration, so that an arbitral tribunal can manage the claims effectively. In addition to seeking to protect contract rights through commercial arbitration, you seek to protect your international law rights, such as they are (recognizing that they're very limited), through investor state arbitration and making sure that you have structured the investment

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as best you can to position yourself to take advantage of the bilateral investment treaties even though they're not a perfect remedy. And I thank you very much.

PROFESSOR FERRARI: Thank you. I did not even have to flag times. That's amazing. So we have one more speaker this afternoon. Laurence Shore is a partner with Gibson, Dunn, & Crutcher here in New York. He is co-chair of the firm's international arbitration practice group. He has been the lead advocate in a large number of cases under all kind of rules, UNCITRAL, ICC, Society of Maritime Arbitrators, LCIA, and Cairo Regional Center, but he does not only act as counsel, he also acts as arbitrator under all of those rules. He is the co-author of International Investment Arbitration and he is also the co-editor of the World Arbitration Report.

MR. LAURENCE SHORE: Thank you Professor Ferrari. I have just a few remarks about dealing with expert witnesses in project finance arbitrations. And I'll try to do so from a dual perspective as counsel trying to present an effective case, and as arbitrator trying to get to a sound decision.

Now, as counsel, whether cross-examining an economist or forensic accountant on valuation of losses or a business executive on marketing prospects of a product, or project manager or engineer on plant production or defects, where I work, we tell ourselves focus on assumption, otherwise you'll get killed, because you'll get into the technical expertise sweet spot of the expert. And here there's a lot of technical expertise about project finance. And I don't want to get killed either. So I'm going to stick with an underlying assumption about the role of an expert witness that many international arbitrators, particularly those trained in non-U.S. legal jurisdictions, seem to have, which is this. It's a shame that the parties could not agree on a tribunal-appointed expert because the party-appointed experts are partisan. And there's an accompanying assumption, which is experts really should agree. If they're genuinely engaged in the search for truth in a technical empirical scientific area in the same practice community, they should agree. Of course, except they don't agree. Because unless results can be presented to the tribunal without interpretation, the experts have room to diverge about the truth of the situation wholly apart from who is paying them.

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And in particular, and I'm sure Professor Kantor will have some observations about this, particularly when they're economists forecasting the future, as they are when they do any sort of DCF [discounted cash flow] calculation. And that's inevitably going to have a speculative element and in doing so, whatever their opinion is in a particular case, if they change it in another case, that's not necessarily because they're bad people. It's because their opinion in one case and in another case is not violating either their training or their settled views on something fundamental. There's just enough room for that opinion to change. And that should come as no surprise to arbitrators because truth arises in an adversarial context in international arbitration. And the adversarial context does not assume that each side's presentation represents the truth and in fact in virtually all rules it is provided that each party shall have a reasonable opportunity of putting its case and no one believes that that case is the truth or that the expert retained is stating one unalterable truth.

The issues in project finance arbitration don't lend themselves in particular to the programmatic application of a discernible state of knowledge. But the arbitration community would like it to be that way. So whether it's the IBA Rules on the Taking of Evidence, Article 5 of the Chartered Institute of Arbitrator's Protocol on the Use of Party-Appointed Expert Witnesses, they strive to make experts neutral. And they have a provision that the experts should put in his or her report my overriding duty is to the tribunal; I'm giving you my complete opinion taking into account all matters that might adversely affect it and I'm going to meet and confer or arbitrators require that the experts meet and confer to narrow their differences.

The final point is one of interest I'll come back to in the five minutes I have remaining. But the rest is boilerplate. And in non-U.S. jurisdictions, it may be a belief that experts coming from those jurisdictions are more neutral. Some people here can speak to it. I've seen absolutely no evidence of it. Certainly, however, there are some experts in North American jurisdictions who are getting the point. I had one recently who, after being cross-examined, instead of going to the table with us, he went to the back of the room and I asked him afterwards and he said, you know, to give the impression of neutrality. I said I'm sure those three guys sitting up there who don't

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realize that you've been working with us for two years and that very strident view that you gave was not affected at all by the side whose table you were not sitting on.

Partisanship is inherent and therefore my suggestion in the remaining minutes is that the bad fact of partisanship should be embraced. And, in fact, when arbitrators and counsel are doing it right, they do embrace it because it's put in the context of what the tribunal is trying to get from the quantum expert or the project manager and that is a technical method or trade knowledge applied to assist to understand a fact or matter that is at issue in the case. And then the question is for the tribunal and what counsel should be assisting on, is who and what are you going to rely on? And I'll just say one word about the investment treaty context. I believe you've heard a slightly partial view. I would recommend, as I always do, the late Professor Brownley's separate opinion in *CME v. Czech Republic,* where he very painstakingly goes through a DCF analysis, shows that the speculative aspects should maybe not be accepted in a treaty context where, after all, the respondent is a sovereign state, not a commercial entity; the sovereign state is not accepting the risk of national economic disaster, and indeed the statistics that you've heard overlook the fact that the sovereign state doesn't know from the beginning that it's got a 50% chance or whether good governance has been applied or not, all it knows is that there are some terrible awards out there, and if it gets hit, its own citizens' tax rate will rise, as happened to everyone in the Czech Republic after that US$335 million DCF analysis was accepted by two-thirds of the tribunal.

So what do you want to do as counsel and as arbitrator? One, I think maybe not so much from a U.S. perspective, but you want to look at the qualifications of the expert. Is there someone in front of you or someone you're presenting who really does have expertise as an economist, who really does have the right expertise as a project manager in the particular case? You want to get away from the idea that the expert is not engaged with the treaty or the contract. Of course, the expert's job is not to interpret the treaty or the contract. But of course, every single one of them must do so in order to come up with something that is plausible for the tribunal, assisted by counsel or not. And finally, and this is the point that I raised before about meet and confer, both as counsel and surely as

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tribunal, meet and confer is a good thing. It has the international presumption that reasonable experts should narrow their differences, but of course what happens in that process is usually one expert who wasn't so reasonable moves $300 million and another expert moves something much smaller, on a much smaller issue. And the tribunal is just very pleased because there's been a narrowing of differences. But they still have to rely principally on one of those experts and they should be cognizant and as counsel, I think we should all be cognizant of who moved and who didn't. And that's because it's all in the adversarial context. So I'll stop there. Thank you very much.

PROFESSOR FERRARI: So thank you very much. Actually apart from everything else, he's an expert timekeeper. So that was really quick. We have 20 more minutes to take questions. However, I have rules even for the questions. Questions are not monologues. Questions are questions. I would also like you to address them to one of the colleagues. That makes it possible to answer more questions. That said, the rules said, you can ask questions.

AUDIENCE MEMBER: I have a question to Mark Kantor that relates to both investor state arbitration and political risk insurance. Now, it would appear that in practice these two are linked. That is to say you have an arbitration clause and the investor agreement and you also possibly, in addition, have political risk insurance. Given the limitation language that you talked about with respect to political risk insurance, it would appear that these kinds of insurance contracts are dispute prone or conflict prone. So what is the dispute resolution mechanism that is in place with respect to disputes arising out of political risk insurance? And the second part of the question, how does that dispute resolution mechanism relate to the dispute resolution mechanism under the investor state agreement, because it would appear that there might be a conflict between the dispute resolution systems that are operating in practice and can these be linked somehow in practice?

PROFESSOR KANTOR: First, it is market practice in political risk insurance policies and guarantees to provide the disputes between the insurer and the insured are resolved through arbitration.

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And that arbitration must be confidential, unlike US treaties that provide now for transparent investor state arbitration, by the way. Okay. And, you will find that the decisions made by an insurance company (a claims determination), with one exception, are confidential. The arbitration awards, if there is a dispute about that claims determination, are also confidential, with one exception. The exception is the U.S. government agency OPIC, which makes publically available all of its claims determinations and all of the arbitration awards in any dispute in which it is involved. No other political risk insurer does that.

The rules that are used in those arbitrations, for OPIC (I say this now as a member of the board of directors of the American Arbitration Association)—OPIC wisely chooses the international rules of the American Arbitration Association. MIGA, the arm of the World Bank that issues political risk insurance, wrote their own rules many years ago. They're publically available and you can find them, but they're idiosyncratic to MIGA. I do not know the rules that most other insurers use—I'd have to go and check on them. However, they almost never get involved in claims disputes, or so they say.

There is one instance (and I'd be curious if anybody knows of any others) where there was a political risk insurance determination and then there was also an investment treaty arbitration. That is the Ponderosa-Enron matter involving Argentina. OPIC paid a claim by Ponderosa under expropriation cover. Enron is the—the Ponderosa claim was an Enron claim. Enron asserted the same claim against Argentina in investment treaty arbitration and that claim was later pursued by Enron's liquidation committee in bankruptcy.

The investment treaty arbitrators expressly said, we do not look to the OPIC determination of expropriation because, of course, that was a national decision. So, they just simply ignored the decision by OPIC that the conduct was expropriation. And, in fact, I think they concluded in Ponderosa it was not an expropriation, although it was a breach of fair and equitable treatment—that is, I believe what every single Argentina award has held (no expropriation but a number of them have concluded there is fair and equitable treatment breach). That goes back to my point that fair and equitable treatment is not within the scope of cover, on a standalone basis, for political risk insurance.

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Could you do something to integrate the two dispute resolution mechanisms? Possibly, but, given the very atomized nature of investor-state arbitration (about 3,000 individual treaties plus investment chapters and free trade agreements), it would be very hard to stitch things together without an overriding multilateral investment agreement. And that, candidly, does not seem in the cards politically.

PROFESSOR FERRARI: Great. Do we have some more questions?

PROFESSOR KANTOR: Let me ask a question. Larry, you said you're skeptical that party-appointed experts can ever be truly neutral. So, my question to you is, when you sit as an arbitrator, which you do of course, how do you deal with party-appointed experts? What's your tool or tools for trying to get a useful answer out of experts who are insisting they are impartial and independent, with their primary duty to the tribunal, but in fact always seem to propose a number that benefits the party who hired them?

PROFESSOR FERRARI: Nicely said.

MR. SHORE: I think part of it is to rely on counsel to expose exactly those assumptions that the expert has made in giving his or her report and to encourage counsel to explore that. But where they don't, which is partially what happened, I think, in CME simply because Professor Brownley came in so late, that the arbitrator himself or herself has to do exactly that examination and hopefully to have the expert there and to have the experts—both experts from both sides, not in a meet and confer without a prejudice situation where they're all going to report back to counsel so they can change their opinions after they've given them up in part, but to have them discuss it in front of the tribunal. But I certainly would probe it deeply and to try to understand it and spend a lot of time on it other than just accept it.

PROFESSOR KANTOR: There's a career development point for every student in this room in what you just said—which is that you don't delegate to the expert the question of expertise when you are counsel. Instead, as a lawyer, you have to learn the subject matter on which someone is testifying just as well, and possibly better, than they know it. Those young lawyers who identify an area of expertise, for example valuation, and learn it well when other lawyers don't know it well are highly

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sought after commodities, because there aren't a lot of them who do that.

So, if you want to develop a reputation early on as a young lawyer in your law firm in the litigation area working for Larry, for example, understand the subject matter on which the expert is going to testify as well as the expert does—because that's how you challenge assumptions and that's how you engage in vigorous and illuminating cross-examination.

PROFESSOR FERRARI: You should take his word for it. He wrote the book *Valuation for Arbitration*. But there's a comment by Dr. Hanefeld.

DR. HANEFELD: I think Lawrence made a very good point. And I also think that expert conferencing can be a good solution. But in the end the outcome of a case may depend on whether you did your homework and, as Mark suggested, whether you truly understand the questions which are determinative for the outcome of the case. I think this sometimes is quite helpful to try to get to the truth.

PROFESSOR FERRARI: We have a question from the audience.

AUDIENCE MEMBER: My question concerns the ultimate enforceability of an arbitral award, and I was always interested in the case of CME that the Czech Government did not continue to resist but in fact taxes were raised 30% or more in the subsequent year because they simply did not have the money on hand to satisfy that arbitral award. And I know that countries are signatories to the Convention on the Enforcement of Arbitral Awards and so forth. But I'm wondering, in your experience, whether it becomes that easy to gain enforcement and satisfaction when a sovereign or an instrumentality of a sovereign is involved. And whether the odds change when the magnitude of the arbitral award is so much greater or whether there are particular strategies. I recall when I was in practice, one had to craft the arbitration provision extremely carefully to include central bank assets, for example, or aircraft. We tried a case—we were involved in a matter but in fact the aircraft of this particular government were all sale-leaseback craft and therefore they did not own title to any of those aircraft. So does enforceability create additional challenges or does one have to go through an additional proceeding, for example, in the jurisdiction where enforcement is sought?

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MR. REETZ: I guess I could speak to that a little bit. Picking up on Mark's point, you could almost say the world is divided into governments that are going to pay the awards and governments that aren't. And there's a reason for that, I mean, beyond the simplistic reduction. The whole idea of the regime of bilateral investment treaties and multilateral investment treaties is that the governments receive something in exchange for the assurances that they're giving, which is that they are hopefully attracting investment leading to economic development. And if a government becomes known as the government that won't pay its awards, there's at least a question as to how comfortable foreign investors will feel coming in and doing that. There are other penalties, I mean, in the case of Argentina, the U.S. government has gotten involved to try to put some additional pressure on them. But the specter of losing that additional investment supposedly pressures many governments to pay their awards. I'm kind of a little skeptical about that myself. I think that there is probably a five-year time period during which people forget what happens and they see the opportunity to make money and they think that nothing will ever go wrong again. And they're back into a market where people had problems before. But in theory, if you can find the assets that can be reached consistent with the sovereign immunity law of the country where the assets can be reached, then you can execute on these things although I haven't heard of anyone successfully doing much. I think there was a German claimant in Europe who was able to recover some assets but that's about all that I've heard of being, excuse me, done through force. I don't know if anyone has had a different experience.

PROFESSOR FERRARI: So any other questions?

AUDIENCE MEMBER: Hi, I'm in the L.L.M. Program here in International Legal Studies. I'm Brazilian so my question relates to Brazil, and I'm not directing the question to any of the speakers. As there is no Brazilian practitioner involved in the international investment dynamic since Brazil has not enforced any BIT yet, and is not planning on being part of the Washington Convention anytime soon, and since we still have some troubles with considering the idea of public and private arbitration, as the lecture on PPPs said before. So I just wanted to know how do you see the decision of the Brazilian govern-

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ment's decision to not take part in the international investment arena? Thank you.

MR. SHORE: I think it's brilliant. I think it's just fantastic. It was really smart because it doesn't harm Brazilian investors going out. They just restructure their investments through the Netherlands like everyone else. So they're protected. And everyone wants to go to Brazil anyway. So it's just—I just don't understand why more countries don't do it. I was astonished that we have now—is it third generation, fourth generation of Chinese BITs? I just thought that would be certainly one jurisdiction that would do the same as Brazil, but Brazil just seems to have gotten it right, I think. I don't see why they should change. I don't think it's harmed any of their foreign direct investment. Others may know better and certainly their investors are protected. They've broken the code on the treaty regime.

PROFESSOR KANTOR: Just so that everybody understands exactly how Brazilian companies doing business outside of Brazil remain protected, if you have a country that is only a capital importer, you don't care about that. But, if you have a country that is both a capital importer and a capital exporter (Brazil has grown into that situation, China has grown into that situation, India has grown into that situation), the tension is avoiding having to risk large awards against you from foreign investors while at the same time protecting your own investors when they go outside the country and are treated very badly. That's a technical legal rule; it's against international law to be treated badly.

The way Brazilian companies have done this, since the wave of expropriations in Venezuela, Bolivia, and Ecuador (in particular triggered in part by the Bolivia-Brazil pipeline project), is that they have restructured their investments so that there is an intermediary company located in a jurisdiction that does have investment treaties. And, they've tried to make sure that the intermediary company has enough real business that is not seen as just a shell corporation that you would look through. And, therefore, those companies then rely upon another country's investment treaty to get the protection they need for their outbound investment while Brazil avoids being sued for any alleged misconduct on its part for inbound investment.

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The reason why that is not pursued more often candidly is that Brazil is not yet a major exporter of capital. When you reach a stage in export of capital where you have so many companies going outside your boundaries and so many different transactions, far too many of them cannot be fit through these havens like the Netherlands Antilles. They, instead, are just made directly by companies that don't know to go through treaty havens or cannot structure their transaction to go through treaty havens on a commercially reasonable basis. And that's why the Brazilian approach works, but there will be more pressure on Brazil 10, 20 years from now as its economy continues to mature and more and more of its companies are engaged in globalized transactions where they invest outside the borders of Brazil.

PROFESSOR FERRARI: So we have time for a very short question.

AUDIENCE MEMBER: What is the dispute settlement body that's typically used for project finance? I'm a little bit surprised that we spoke so much about MIGA but we haven't mentioned the WTO's TRIMS agreements, which would cover that and I'm just curious to know how effective it's been at dispute settlement resolution.

PROFESSOR KANTOR: WTO is an entirely different conference of course. But that's a state-state dispute resolution process. It cannot be triggered by individual investors or private companies. So, it's not terribly helpful to an individual company that feels it's been mistreated in connection with a contract or a project.

There is no single one accepted dispute resolution forum in the world of project finance. Lenders typically don't use arbitration—at least international lenders do not. They submit to the New York courts or to the English courts (the London courts).

There may be an exception for derivatives transactions, where P.R.I.M.E. is becoming important, but that's because derivatives transactions are not one-sided arrangements. Loans are—the day before I lend you money, I've got the money, you've got nothing. The day after I lend you money, you've got the money, I've got a piece of paper. So, my piece of paper is going to be one-sided. We call that a "loan agreement."

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When you get past project finance loan documents to the underlying commercial contracts (the concession agreement, project agreement), in the case of developing countries it's typically arbitration. Which arbitration rules you choose, there's no special rule on that. Same for construction contracts, same for fuel supply contracts. Real estate, as Ryan said, typically is local courts, not arbitration. Letters of credit, standby letters of credit and commercial letter credits, are typically courts—again, usually New York or London.

PROFESSOR FERRARI: Thank you very much Mark. So I want to thank of course the members of the Panel for coming. I want to thank of course Jonathan Cardenas and Jesse Gero for putting this together, and I give the floor for closing remarks to Jonathan.

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