LONDON INTERNATIONAL ARBITRATION COLLOQUIUM 2023: STATE SOVEREIGNTY AND IMMUNITY IN COMMERCIAL ARBITRATION

SPECIAL RAPPORTEUR REPORT

KOLOKIUM TIMBANG TARA ANTARABANGSA LONDON 2023: KEDAULATAN DAN KEKEBALAN NEGARA DALAM TIMBANG TARA KOMERSIAL

LAPORAN KHAS RAPPORTEUR

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EXECUTIVE SUMMARY

The voyage of the International Arbitration Colloquium 2023 has reached its final terminus, now at the heart of the City of London, following the two successful series of colloquia at Kuala Lumpur and Sabah respectively. This London Colloquium resembled a meaningful partnership between the Asian International Arbitration Centre (AIAC), the SOAS Arbitration and Dispute Resolution Centre (SADRC), the International Dispute Resolution Centre (IDRC), and the Government of Malaysia. Professor Emilia Onyema (Director of the SADRC), in her Welcoming Remarks, applauded the successful orchestra of the London Colloquium especially following the formalisation of a Memorandum of Understanding (MoU) between the AIAC and the SADRC on 21 September 2023. The signing of the AIAC-SADRC MoU is envisioned to bridge the interests between both Institutions and serves as a fundamental stepping stone for future knowledge and research-based collaborations.

Speaking of the London Colloquium, The Honourable Dato' Sri Azalina Othman Said (Minister in the Prime Minister's Department (Law and Institutional Reform), Malaysia) underscored the importance of facilitating continuous intellectual dialogues with the legal experts to dissect and analyse the multitudinous legal and procedural issues arising from the Sulu case *vis-a-vis* the development of international arbitration. The peculiarity of the Malaysia-Sulu case has called upon an unceasing cycle of deliberation from the governments, international organisations, and the global arbitral community to uphold the sanctity of international arbitration whilst strengthening its effectiveness as a robust alternative dispute resolution mechanism. To that end, the London Colloquium emphasised an intellectual-based discourse rather than being made an avenue to propagate certain views or ideologies, as accentuated by The Honourable Dato' Seri Diraja Dr Zambry Abd Kadir (Minister of Foreign Affairs, Malaysia).

With that in mind, this London Colloquium was specifically tailored to pave the way for in-depth academic reviews of (a) the interplay between international arbitration and state sovereignty, (b) the regulatory regime for the third-party funding industry as well as (c) the impacts of investment claims on the relationships between States and investors. The first session of the day entitled "***International Arbitration and State Sovereignty***" featured an insightful dialogue, with an amalgamation of the historical and legal analysis, that centred around the doctrine of competence-competence, the jurisdiction of the arbitrator and its derivative authority from the judicial order for appointment, and the ethical obligations expected of the arbitral tribunal. Notably, the panel encouraged the arbitral fraternity to continuously explore new avenues to uphold the integrity of arbitration proceedings which, among others, includes streamlining the ethical protocols as a blueprint for the arbitral tribunal, counsel and the Parties throughout the proceedings.

The discourse on litigation finance entitled "***Regulating Third-Party Funding in International Arbitration and A Review of R (on the application of PACCAR Inc and others) (Appellants) v. Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28: Its Impacts and the Way Forward***" is rather thought-provoking, especially in light of the meteoric growth of this industry and the unprecedented UK Supreme Court ruling in the PACCAR case. Third-party litigation funding is notable for its innate potential to facilitate greater access to justice through the provision of funds by the funder company to the funded party to maintain the continuation of its legal claims or proceedings. The panel however acknowledged the widespread demand that not only calls for the implementation of the regulatory framework for the third-party funding industry but also a greater degree of transparency in its day-to-day practices. Notwithstanding the divergent views on the impact of the Supreme Court decision, the panel outlined some practical approaches to regulate the litigation funding industry which ranged from the typical court oversight mechanism, attorney regulations, statutory regulations to the non-governmental approach such as the publication of practice notes on third-party funding by the arbitral institutions.

The day's conversation sailed into peak, witnessing an eloquent academic discourse on the topic of "***Impact of Investment Claims on States and Investors***" to unfold the effectiveness of the investor-state dispute settlement (ISDS) mechanism in safeguarding the quad-relationship between the investment claims, the home and host States, the investors and the economic development of the States concerned. Though the discussions on this domain remain mostly inconclusive, the panel remarked on the States' ongoing initiatives to pull through certain reforms to the ISDS system instead of favouring a complete abandonment of investment treaties. Meanwhile, the session also featured an interesting exchange of views on the feasibility and the practical challenges ahead of the establishment of the investment advisory centre for developing States. As the panel cautioned, it is prudent for the UNCITRAL Working Group III to undertake certain pre-implementation deliberations should the said advisory centre be entrusted to a broader mandate, extending beyond mere capacity-building and technical support initiatives.

WELCOMING REMARKS BY PROFESSOR EMILIA ONYEMA

DIRECTOR, SOAS ARBITRATION AND DISPUTE RESOLUTION CENTRE (SADRC)

Professor Emilia Onyema led off the London International Arbitration Colloquium 2023 themed "*State Sovereignty and Immunity in Commercial Arbitration*" with an insightful and interesting Welcoming Remark. Professor Onyema first provided a glimpse of the SOAS Arbitration and Dispute Resolution Centre's (SADRC) background and elucidated the significant divergence between academic institutions and arbitral institutions. In contrast with arbitral institutions, SADRC proudly stands as a research and knowledge exchange centre focusing on promoting arbitration and other dispute resolution mechanisms, specifically in the regions of Asia, Africa and the Middle East. Research is thus the lifeblood of the Centre that fosters strong connections among the pool of academicians, practitioners, researchers, and students.

Speaking of the London Colloquium, Professor Onyema explained that SADRC's roles focused on examining and interrogating the plethora of issues that arose from the Sulu case. As she emphasised, an academic institution such as SADRC would, as much as possible, refrain from taking sides in this ongoing Sulu proceeding. Rather, it aimed to interrogate these issues from an academic perspective and the London Colloquium is certainly an ideal platform for such engagement to take place. In this respect, she applauded the receptiveness of the Government of Malaysia towards academic engagements and open forum discussions involving the Sulu case.

In her concluding remark, Professor Onyema delightfully described the formalisation of a Memorandum of Understanding (MoU) between the Asian International Arbitration Centre (AIAC) and the SADRC on 21 September 2023 as a remarkable and meaningful partnership. She envisioned this MoU signing as a fundamental stepping stone for both Institutions to explore the areas of mutual interest and engage in a spectrum of future partnerships. Knowledge sharing, exchange of research outcomes and capacity-building initiatives are some highly anticipated areas of collaboration between SADRC and AIAC in the coming years. To that end, she welcomed all forms of engagement and partnership with any institutions, organisations and firms both domestically and globally to contribute to the development in the domain of alternative dispute resolution.

KEYNOTE ADDRESS BY THE HONOURABLE DATO' SRI AZALINA OTHMAN SAID

MINISTER IN THE PRIME MINISTER'S DEPARTMENT (LAW AND INSTITUTIONAL REFORM), MALAYSIA

The London Colloquium welcomed the presence of The Honourable Dato' Sri Azalina Othman Said (Minister in the Prime Minister's Department (Law and Institutional Reform), Malaysia) to deliver the Keynote Address for the day.

The Honourable Minister, in her preliminary remarks, acknowledged the significant collaborative effort put forth by the Asian International Arbitration Centre (AIAC), the SOAS University of London Arbitration and Dispute Resolution Centre (SADRC), the International Dispute Resolution Centre (IDRC), and the Government of Malaysia in making this London Colloquium a resounding success. She further expressed her gratitude to the esteemed panel of speakers and moderators for graciously agreeing to participate and contribute their wisdom to this Colloquium.

As aptly explained by the Minister, the core purpose of the London Colloquium was to facilitate continuous intellectual dialogues, in specific, the corpus of legal issues that stemmed from the Sulu case with legal experts from around the world. The predicament and experience that Malaysia encountered in the Sulu case have, in one way or another, sparked the necessity to review the arbitral due process and practices as well as the professional conduct of arbitrators. While dissecting the multi-faceted issues surrounding the Sulu case, this congregation of legal minds concurrently strived to explore and examine the recent developments in international arbitration.

Speaking of the Sulu case, The Honourable Dato' Sri Azalina Othman accentuated that this manifests an attempt by the purported descendants of the Sulu Sultanate to extort pecuniary benefits from an independent sovereign State. Such situation is exacerbated especially with the involvement of a third-party litigation funder, Therium Capital Management Ltd which has been actively bankrolling the Sulu claims despite being conscious of the grave violation of Malaysia's sovereignty. Given the above, it warrants a relook of the regulatory framework on third-party litigation funding specifically with regard to transparency and disclosure obligations.

The London Colloquium would, at this juncture, stand as an ideal platform to discuss and analyse these intertwining legal topics, complemented by the practical experience drawn from the ongoing Sulu case.

The Honourable Minister underscored Malaysia's pro-arbitration stance and unwavering commitment to promote arbitration as the forefront mechanism for dispute resolution. The Asian International Arbitration Centre (AIAC), in this respect, remains steadfast in broadening its services and spearheading outreach both domestically and internationally. Taking this opportunity, she applauded the recent formalization of the Memorandum of Understanding (MoU)

between the AIAC and the SOAS Arbitration and Dispute Resolution Centre (SADRC) on 21 September 2023. The MoU signified a meaningful collaboration to foster teaching and research activities relating to alternative dispute resolution in alignment with international best practices.

As The Honourable Minister pointed out, Malaysia's journey in battling the Sulu fraud has never been easy. The Unity Government, having inherited this battle from the predecessor government, has devoted enormous time, effort and resources to defend its sovereignty and security across Europe, in particular, Spain, France, Luxembourg, and the Netherlands. To that end, she drew the audience's attention to the landmark victories anchored by the Unity Government, under the leadership of The Honourable 10th Prime Minister of Malaysia Dato' Sri Anwar Ibrahim, in Paris and the Hague to battle the Sulu case. Today, the Government of Malaysia is in the midst of procuring an annulment of the purported Final Award issued by Dr Gonzalo Stampa in the Paris Court of Appeal, to which if succeeded, would put a perpetual rest to this Sulu claim.

SESSION 1: INTERNATIONAL ARBITRATION AND STATE SOVEREIGNTY[1]

Moderator:

Dato' Firoz Hussein bin Ahmad Jamaluddin (Senior Partner, Messrs Firoz Julian and AIAC Advisory Board Member)

Panellists:

1. **Professor Catherine A. Rogers** (Department of Legal Studies, Bocconi University and the Co-chair of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration)
2. **Mr Gordon Nardell KC** (Barrister, Twenty Essex)
3. **Dr Brendan Plant** (Associate Professor at Downing College at the University of Cambridge, a Fellow of the Lauterpacht Centre for International Law at the University of Cambridge, and a Barrister at Twenty Essex)

Introduction

This session began with an introductory question posed by the moderator, Dato' Firoz to Dr Plant on how would the participation of a State party in arbitration proceedings affect the arbitral process, its supervision and subsequently the enforcement of the arbitral award.

At the outset, Dr Plant remarked that the Sulu arbitration proceedings are unusual, fascinating, and concurrently provocative. Speaking of this, he noted that this case has warranted the necessity to re-examine the suitability and limitations of arbitration to resolve certain categories of dispute. With that in mind, he intended to explore two elements which are of considerable complexity in the Sulu proceedings namely, sovereignty and history in the course of his discussion.

Before delving into the central discussion, Dr Plant canvassed an overview of the procedural history of the Sulu case bearing in mind that it involved a series of proceedings across different jurisdictions. As Dr Plant explained, the Sulu arbitration proceedings emanated from the claims submitted by the purported heirs of the Sultanate of Sulu pursuant to the Spanish Arbitration Act. Consequently, a sole arbitrator was appointed and a Partial Award on jurisdiction and admissibility of the disputes (also known as the "Preliminary Award") was rendered by the said arbitrator, Dr Gonzalo Stampa.

[1] Rapporteurs in session: AIAC Case Counsel, Ooi Wei Qian and Raagini a/p Sama Sundaram (Reviewed by AIAC Case Counsel, Kho Yii Ting).

That said, it is imperative to note that the appointment of Dr Stampa was later invalidated by the Superior Court of Justice of Madrid on 29 June 2021. Further to the annulment of his appointment, Dr Stampa was instructed to close the proceedings. Having that said, the arbitrator decided to relocate the seat of arbitration from Spain to France in defiance of the Annulment Order issued by the Spanish court in January 2022. Later, on 28 February 2022, Dr Stampa delivered a Final Award worth USD 14.9 billion, estimated over 16% of Malaysia's annual budget, against the Government of Malaysia.

Having in mind the invalidity of Dr Stampa's appointment and the arbitrary change in the seat of arbitration, the Government of Malaysia completely rejects the Final Award and does not recognise its legitimacy.

As elucidated by Dr Plant, the Government of Malaysia has initiated multiple proceedings across Europe i.e., Spain, France, Luxembourg and the Hague, ranging from the applications to invalidate the conduct of the sole arbitrator, stay the effects of the awards, set aside the purported Final Award, and initiate criminal proceedings against Dr Stampa in Spain.

Following that, the Government of Malaysia successfully secured two decisions against the Claimants from the Paris and the Hague Court of Appeal respectively in June 2023. Specifically, the Paris Court of Appeal upheld Malaysia's challenge against the Partial Award and ruled that the arbitrator is devoid of jurisdiction to preside in the proceeding. Similarly, the Hague Court of Appeal, on 27 June 2023, denied the Claimants' request to enforce the purported Final Award given the absence of a valid arbitration clause. Notably, the Hague Court ruled that no Final Award could have been lawfully rendered following the annulment of Dr Stampa's appointment by the Spanish court.

On that note, Dr Plant ventured further to dissect the elements of sovereignty and history, both of which are considerably crucial in the Sulu case:

1) *The Element of State Sovereignty*

Dr Plant, at the outset, accentuated the importance of categorisation and characterisation of the present Sulu disputes given its domino effect on other factors, *inter alia*, the arbitrability of the disputes, the suitability of dispute resolution through arbitration, the admissibility of the disputes in the context of arbitration and the jurisdiction of the arbitrator.

In the Sulu case, the Claimant asserted that the 1878 Agreement is a lease agreement based on the translation of the said Agreement from Jawi to English - a contentious point in the arbitration proceedings.[2] Relying on that ground, the Claimants claimed that this dispute ought to be categorised as a commercial transaction, thereby capable of being resolved by way of arbitration.

[2] Gary J. Shaw and Rafael T. Boza. (2022). *The Sultan of Sulu Award: Is it Enforceable in the US under the New York Convention.* ITA In Review, Volume 4, Issue 1, p. 32.

Nonetheless, Dr Plant pointed out that the 1878 Agreement involved a perpetual transfer of rights and sovereign powers from the then-Sulu Sultanate insofar as the nature of the agreement was concerned. On that basis, Dr Plant was of the view that mere semantic interpretation of the 1878 Agreement would not resolve the issue of categorisation or justify the categorisation of this dispute as a commercial matter. He further explained that a contract of such nature should be viewed and interpreted in a broader context especially when it involves the disposition of sovereign power.

To that end, Dr Plant underscored one key factor that differentiates the Sulu case from other arbitration proceedings as the former proceeding involves a sovereign State. In this respect, he explained that sovereign entities often may not find themselves completely subject to arbitration proceedings bearing in mind the elements of express consent to be bound by arbitration and the defence of state immunity.

Insofar as modern-day arbitration is concerned, a sovereign State is required to express its consent to refer any disputes to arbitration for settlement. Consent of such nature would be regarded as a waiver by a State to invoke its immunity against the legal proceedings at a later stage. In addition, the entitlement of the sovereign State to raise the defence of state immunity will affect the validity of the legal proceeding as well as the enforceability of its outcome.[3] In view of the above, as Dr Plaint emphasised, effective categorisation of the dispute at hand is therefore indispensable.

2) The Element of History

Along with that, Dr Plant spotlighted the importance of appreciating the Sulu case from the historical standpoint i.e., at the time when the 1878 Agreement was executed. From his perspective, various legal concepts and doctrines have undergone considerable evolution since that time. Among others, the doctrine of absolute immunity, which was once predominantly accepted in most jurisdictions, has now faded and seemingly substituted by the doctrine of restrictive immunity. Under the doctrine of absolute immunity, a foreign state enjoys complete immunity from being sued or having its assets seized or enforced by a foreign court[4]. However, given the sheer growth of transnational commerce, States are now precluded from invoking their immunity as soon as they transcend into the commercial arena.

Given the above, Dr Plant opined that the application of modern arbitration frameworks to an historically grounded dispute, such as that involving the 1878 Agreement, may be problematic. He echoed the decisions of the Paris and the Hague Courts in that no sufficiently cogent legal basis has been adduced to evidence the Parties' submission to arbitration.

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[3] Tai-Heng Cheng and Ivo Entchev. (2014). *State Incapacity and Sovereign Immunity in International Arbitration*. Singapore Academy of Law Journal, Volume 26, p. 943.

[4] Baker McKenzie. (n.d.). *Sovereign Investors – The State of State Immunity*. Available at https://www.bakermckenzie.com/en/-/media/files/insight/topics/sovereigns/baker-mckenzie-state-of-immunity.pdf [Accessed on 5 October 2023].

On that note, Mr Gordon Nardell KC was invited to shed light on how to deal with sovereign claims that arose from historical events, especially in the absence of a modern-day worded arbitration agreement.

Defunct Dispute Resolution Clause

At the outset, Mr Nardell pointed out that the most intriguing point to be addressed is how to deal with defunct dispute resolution clauses in colonial agreements which mostly involve the disposition of sovereign power.

Mr Nardell explained that the present Sulu claims were initiated when the Sulu heirs first approached the UK Foreign and Commonwealth Office (FCO) in 2017, requesting the appointment of a sole arbitrator. Notably, as he pointed out, the Claimants were cognisant of the defunct dispute resolution clause i.e., the non-existence of "*Her Britannic Majesty's Consul-General for Borneo*" in the 1878 Agreement when they approached FCO[5]. Such request was however denied by the FCO.

Nonetheless, Mr Nardell raised a thought-provoking counter fact, how would the UK Court deal with a defunct dispute resolution clause in the event that the Sulu Claimants sought judicial review of the FCO's rejection. In his words, it is interesting to observe whether the court will allow different avenues for Parties to vindicate their rights in situations where the dispute resolution clause is found defective.

Speaking of this, Dr Plant drew the audience's attention to the distinctions between the international arbitration perspective and the public international law perspective in dealing with defunct dispute resolution clauses. Insofar as public international law is concerned, the defective dispute resolution clause would simply connote the absence of consent and submission to the prescribed dispute resolution mechanism. On the contrary, from the international arbitration perspective, the rights of the Parties are mostly protected in instances where they are faced with a defunct dispute resolution clause.

Following the discussion above, Dato' Firoz invited Professor Catherine Rogers to illuminate whether courts or arbitral tribunals in third countries should assume jurisdiction to deal with historical claims which may impact the sovereign rights of another nation.

[5] Supra 2, p. 29.

Jurisdiction

Professor Rogers, in her preliminary remarks, stressed that the concern of whether an arbitrator should assume such jurisdiction is certainly not a static question. Rather, it is one that evolves continuously through time. As she flagged, the concept of sovereignty and the power of arbitrators are among those which have developed progressively over the recent decades. Further, the outcome predominantly hinges upon the perspective this question is approached from.

Specifically, Professor Rogers highlighted that the powers of arbitrators have expanded tremendously over time, recounting the emergence of the jurisprudential doctrine of kompetenz-kompetenz in the Federal Constitutional Court of Germany.[6] Today, it is notable that the doctrine of competence-competence has been adopted and embodied in Article 16(1) of the UNCITRAL Model Law on International Commercial Arbitration. Article 16(1) of the UNCITRAL Model Law provides,

> *(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*

This doctrine, in essence, empowers the arbitral tribunal to rule on its own competence and jurisdiction should this question be brought forward as a preliminary challenge before the tribunal. That said, the forum court still reserves the jurisdiction to decide otherwise based on its own assessment.

Notwithstanding the above, it is important to note the duo-facet of the doctrine of competence-competence. This, however, depends largely on how the said doctrine is implemented. On the bright side, it confers power to the arbitral tribunal to decide on any jurisdictional objection raised by the Parties. Putting it in another way, it provides the arbitral tribunal the first-hand opportunity to determine its jurisdiction and the validity of the arbitration agreement in question[7]. On the flip side, this doctrine may however hinder the judiciary from determining the tribunal's jurisdiction at least until the award is rendered in the arbitration proceeding, albeit the former possesses supervisory jurisdiction over the proceedings[8].

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[6] Ana Clara Viola Ladeira. (2014). *Conflito de Competência em Matéria de Arbitragem. Revista Brasileira de Arbitragem*, Volume 11(41), p. 42-67.
[7] Kayode Filani. (2021). *The Doctrines of Competence-Competence and Separability in International Arbitration*. Available at https://www.kayodefilani.com/the-doctrines-of-competence-competence-and-separability-in-international-arbitration/ [Accessed on 5 October 2023].
[8] *Ibid.*

Maintaining the conversation on the national court's intervention in arbitration proceedings, Dato' Firoz invited Mr Nardell to deliberate on the question of whether the national court's rescission of its defective decision to appoint the arbitrator amounts to an act of upholding justice or an illegitimate interference with the arbitral process.

Rescission of Defective Decision by the National Court

Mr Nardell, in picking up from the public international law conversation with Dr Plant, underscored the complex and intriguing interactions between public international law and dispute resolution, in particular, arbitration proceedings. In this respect, Mr Nardell recalled the general expectation that one ought to adhere to the special procedures under national law i.e., through diplomatic channels, insofar as the service or communication of court processes to a sovereign State is concerned. It must be noted that in most jurisdictions, the service procedures on sovereign States are comparably more tedious and onerous than the service procedures on private parties.[9] Citing examples in the Sulu case, he remarked on the repercussions flowing from the failure of the Claimants to communicate the appointment documents, in accordance with Spanish law, to the Government of Malaysia.

He explained that in situations wherein the agreement contains a defunct dispute resolution clause, the appointment of the arbitrator could only be undertaken by an order of the national court. Given that the 1878 Agreement envisaged a now-defunct dispute resolution clause, the Claimants could only seek the appointment of the sole arbitrator by a national court, through which Dr Stampa was officially appointed by the Superior Court of Justice of Madrid in 2019.

Having acknowledged the failure of the Claimants to serve a proper notice for the claims in accordance with international law, the Spanish court then ordered the annulment of Dr Stampa's appointment and the nullification of all subsequent proceedings arising from his appointment on 29 June 2021. In other words, the Spanish Court rescinded its earlier decision pertaining to the appointment of Dr Stampa as the sole arbitrator.

Unfortunately, as Mr Nardell pointed out, the arbitrator perceived the order for annulment of his appointment as an illegitimate interference with the arbitration proceedings by the Spanish court. This is evident through Procedural Order No. 42 wherein Dr Stampa treated such judicial intervention as improper whilst declaring his competence to preside over the proceeding and thereafter relocated the seat of arbitration to France.

[9] Hazel Fox, QC and Philippa Webb. (2015). *The Law of State Immunity* (3rd ed.). Oxford Public International Law, p.1.

Mr Nardell, in affirmation of the conclusions arrived by the Hague Court of Appeal in June 2023, accentuated that the Spanish Court's decision which rescinded the authority granted to Dr Stampa through his earlier appointment, has cast an end to the proceedings. Given the annulment of his appointment, the authority of Dr Stampa which was initially clothed by the Spanish Court has now been terminated. As a result, Dr Stampa could not be said to have maintained the initial authority to continue this Sulu proceeding and to issue the purported Final Award.

One interesting question to be addressed, at this juncture, is whether the approach undertaken by the Spanish court *viz*, the intervention in the arbitration proceedings compromised the doctrine of competence-competence. It is Mr Nardell's view that such intervention does not compromise the competency of the arbitral tribunal. From his standpoint, it is crucial to draw distinctions between (a) the substantive jurisdiction of the arbitrator to determine the existence of a valid arbitration agreement, and (b) the authority of an ordinary person to exercise the jurisdiction of the arbitral tribunal. The doctrine of competence-competence however only relates to the substantive jurisdiction of the arbitrators.

Speaking of this, he opined that the Hague Court of Appeal was right in not pursuing beyond the question of the appropriateness of the intervention by the Spanish Court. In his view, such intervention was merely to undo the defects on good reason and to ensure proper observation of the national law and public international law. The existence of both a defective dispute resolution clause and the Spanish Court's order rescinding the appointment of the arbitrator had therefore nullified the authority of Dr Stampa to continue to act in the Sulu proceedings. In view of the above, the intervention by the Spanish Court ought to be regarded as a rectification of a nullity rather than an illegitimate intervention in the proceedings, at least from the public international law perspective.

Be that as it may, the above discussion is intertwined with the fundamental question on the source of the arbitrator's authority in instances where there is an absence of explicit mechanism (procedures) governing the appointment and removal of the arbitrator. Under such circumstances, Mr Nardell stressed that the source of the arbitrator's authority and competence could only be derived from an order of the national court. Thus, any defects in the order of the court and the subsequent annulment order, if any, would simply denote the end of the tribunal's authority to act further in the proceedings. Specifically, in the Sulu case, the Hague Court has rightfully rejected the Claimants' request to recognise and enforce the arbitral award which was, in substance, not a valid arbitral award.

With the analysis above, Mr Nardell concluded that the Spanish Court's intervention in the arbitration proceeding is not illegitimate. He emphasised the importance of drawing a distinction between the Spanish Court's decision in rescinding its earlier appointment order and an application by either Party to remove the arbitrator in court.

Professor Rogers also supplemented the dialogues with her views that the decision of the supervisory court to annul the source of the arbitrator's power may not automatically eliminate the doctrine of competence-competence or authority of the arbitrator. In a situation where an imposter arbitrator is initially appointed by the national court, a party may apply an anti-suit injunction from the national court to restrain further proceedings. On the other hand, there may be situations where an arbitrator is legitimately appointed but the court later found that the appointment was erroneous on the grounds of corruption or error. Under such circumstances, Professor Rogers opined that the arbitrator continues to maintain his competency yet it does not impede the court from exercising its authority to issue an anti-suit injunction.

Before ending the session, Dato' Firoz invited Professor Rogers to provide general remarks on the ethical role of arbitrators including the primary ethical obligations as well as other ethical considerations.

Ethical Role of the Arbitrators

In light of the above, Professor Rogers emphasised that arbitrators are not and ought not to be regarded as service providers per se. Rather, he/she is entrusted with the responsibility to continuously uphold the obligation of impartiality and the obligation to apply laws in arbitration proceedings.

The obligation of impartiality, in particular, sets forth a general expectation on the arbitrators to preserve fairness and uphold integrity throughout the proceedings. That said, fairness in the present context must not be equated to treating Parties in the arbitration proceedings identically. In situations where a State party is involved, the arbitrator should be conscious of the need to deal with the proceedings differently given the inherent complexity of the dispute, as opposed to the ordinary private party proceedings. As Professor Rogers highlighted, this is certainly not an act of imbalance but rather an effort to create fairness in the proceedings.

In adjacent to the above, she explained that arbitrators are entrusted with the onerous obligation to apply laws in the proceedings. Given the complex interactions between public international law and international arbitration, it thus falls within the arbitrator's discretion to decide and apply appropriate laws throughout the proceedings. Nonetheless, when it boils down to the matter of discretion, arbitrators ought to exercise such discretion in cognisant of his/her own sense of legitimacy and to achieve a greater sense of justice.

As Professor Rogers pointed out, the global recognition and enforceability of an arbitral award under the New York Convention 1958 evinces a potent indication that arbitral awards are accorded with a comparable degree of dignity as judicial judgements.

Alongside that, it is interesting to note that arbitrators are afforded immunity from civil suits, albeit different jurisdictions may impose certain categories of exclusion. The grant of civil immunity would, in one way or the other, strengthen the proposition that arbitrators are not mere service providers. Such immunity, however, does not extend to shield arbitrators from criminal prosecutions. As evident in the Sulu case, the sole arbitrator, Dr Stampa is presently charged with "*unqualified professional practice*" in Spain for his defiance of the annulment order issued by the Spanish Court.

In a nutshell, the growing expectations on the arbitrators to secure the rule of law and to act with integrity should not, in any instance, undermine the overall confidence towards the efficiency of arbitration as an alternative dispute resolution mechanism. The arbitral fraternity should continuously explore new avenues or solutions to strengthen the spirit of integrity in arbitration proceedings and this includes, among others, streamlining the ethical protocols for all Parties involved i.e., the arbitral tribunal, counsel and the Parties.

SESSION 2: REGULATING THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND A REVIEW OF *R (ON THE APPLICATION OF PACCAR INC AND OTHERS) (APPELLANTS) V. COMPETITION APPEAL TRIBUNAL AND OTHERS (RESPONDENTS)* [2023] UKSC 28: ITS IMPACTS AND THE WAY FORWARD[10]

Moderator:

Mr. Hussein Haeri (Partners, Withersworldwide LLP and Member of SOAS Arbitration and Dispute Resolution Centre (SADRC))

Panellists:

1. **Professor Victoria Shannon Sahani** (Professor of Law, Boston University School of Law and Member of the ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration)
2. **Mr. Stephen Fietta KC** (Fietta LLP)
3. **Ms. Camilla Godman** (Investment Manager, Senior Legal Counsel, FCIArb, Omni Bridgeway)

Introduction

This session aimed to explore the intricate landscape of third-party funding in international arbitration, with a particular focus on the recent Supreme Court ruling in the *PACCAR Inc v. Competition Appeal Tribunal ("PACCAR")* decision and its far-reaching implications[11].

Objectives

The session's primary objectives are as follows:

1. **Exploring Complexity:** The panel delved into the multifaceted issues surrounding third-party funding in international arbitration. This exploration encompassed a wide range of topics, including the duty of disclosure, which is crucial to preserve transparency and fairness in arbitration proceedings. The panel emphasized that the scope of disclosure generally includes the existence of the third-party funding agreement, the identity of funders, and the reasons for disclosure. Such disclosure is imperative to enable arbitrators to conduct effective conflict checks and assess the application for security for cost, if any.

2. **Advancing Justice:** The panel also evaluated how access to third-party funding can be optimally harnessed to promote the cause of justice within the framework of international arbitration. Third-party funding plays a pivotal role in ensuring that Parties have the

[10] Rapporteurs in session: AIAC Case Counsel, Prissilla Ann John and Ezra Ravin Ponnudurai (Reviewed by AIAC Case Counsel, Kho Yii Ting).
[11] *R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents)* [2023] UKSC 28.

financial means to pursue legitimate claims, thus levelling the playing field and access to justice.

3. **Effective Regulation:** The panel scrutinized the possible effective means to regulate third-party funders, emphasizing transparency and ethical obligations within the industry. Effective regulation is essential to maintain the integrity of the arbitration process and protect the interests of all Parties involved.

4. **Global Impact Analysis:** A substantial portion of the discussion revolved around the UK Supreme Court ruling of the *PACCAR* case which, in effect, has triggered a global review of third-party funding regulatory framework and practices. Given its broader legal significance, this case may catalyse reforms in the third-party funding industry.

Overview of Third-Party Funding and Its Development

Professor Victoria Shannon Sahani began the session by explaining the working definition of third-party funding, albeit recognising the prevailing challenge to demarcate a concise definition for the same. She emphasized that third-party funding, by concept, involves an entity that is neither a party nor the legal counsel, which has agreed to provide financial support to enable the funded party to proceed with the dispute at hand. Although most third-party funding arrangements are profit-orientated, Professor Sahani pointed out that it may not always be the case. Rather, some fundings are undertaken based on the funder's expectations of the outcome or in some instances, for political reasons.

Professor Sahani then elaborated on the growing demand for disclosure of the third-party funding arrangements. Speaking of this, she explained that disclosure typically involves revealing the existence of funding and the identity of the funder. Transparency in disclosure is vital (a) for the arbitrators to conduct effective conflict checks and (b) to enable comprehensive assessment of the quantum of the security costs, if such an application is submitted. Given the above, the importance of disclosure cannot be overstated as it preserves fairness, transparency and integrity throughout the arbitration process.

During the discussion, Professor Sahani also highlighted the objectives and purposes of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration. This task force served as a crucial platform to address the key issues within the third-party funding industry. Among others, it played a fundamental role in analysing the necessity to develop guidelines and best practices for third-party funding in international arbitration, thereby contributing to the evolution of this practice.

In this respect, Mr. Hussein Haeri highlighted some of the emerging trends in treaty practices, particularly the new generations of treaties that called for the disclosure of third-party funding arrangement. An illustrative example was the Netherlands Model Investment Treaty[12]. This trend indicates a growing recognition of the importance of transparency in third-party funding practices in the context of international investment treaties.

Overview of the Framework for Third-Party Funding

Ms. Camilla Godman shared valuable insights on the framework and practical processes involved in third-party funding arrangement from a litigation funder's perspective. At the outset, she emphasized the significance of undertaking due diligence to evaluate any request for potential investments (funding). Having been briefed on the merits of the case, the funder company will then conduct internal due diligence to assess the merits, the realistic quantum involved and any potential risks associated with such funding. This due diligence process will generally involve, among others, the review of documents, evaluation of the strength of the case and the legal issues involved as well as the assessment of the potential quantum of damages. It is a tedious process, requiring meticulous review of the documentation to ensure that the investors are able to make informed decisions and allocate their limited resources wisely.

Ms. Godman then elaborated on the possible consequences that the third-party funders would encounter in the event that the outcomes of the funded-case are unsuccessful. Given that third-party funding is undertaken on a non-recourse basis, it is typically for the funder to assume full responsibility for covering the legal fees and costs incurred throughout the proceedings. The inability to recover costs in unsuccessful cases would, to a certain extent, adversely affect both the capital flow of the funder company as well as the growth of the third-party funding market. With that in mind, she reiterated the importance of ensuring thorough due diligence is undertaken prior to formalising any funding agreements.

On the bright side, if the outcome is successful, the funder would be able to claim its entitlements accordingly. One notable development is that the Claimants may now apply to the arbitral tribunals to recover the costs of funding, through which if successful, the Respondent will be held liable for the funding costs, in addition to the costs of arbitration. This however depends on the upfront disclosure of the existence of third-party funding agreements to ensure that the opposing party is made aware of such arrangements beforehand. In view of the above, the possibility and avenue made available for the recovery of funding costs signifies a positive development in the landscape of third-party funding.

Ms. Godman further outlined the typical internal procedures involved when the funder receives a request for litigation funding. As alluded to above, this process generally encompasses the review of documents, the assessment of the merits as well as the analysis of the potential or foreseeable

[12] Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download

damages. She pointed out that at this stage, the funders would usually work closely with the legal representatives and/or the funded party to gauge the likelihood of success in pursuing the legal strategy. Often, the funders would expect a minimum of 65% probability of success, objectively assessed, ahead of agreeing to the litigation funding request. As a matter of practice, the funder will draft the terms sheet for the case in the early stages, outlining the pricing structures for the client's perusal and negotiation (if necessary), before proceeding with the due diligence stage. If all goes well, the funder will then present the terms sheet to the internal investment committees for review and approval. In a nutshell, this well-structured process ensures that investors could undertake informed decisions and align their interests with those of their clients.

A Review of the *PACCAR* Decision and Its Impact

Mr Stephen Fietta KC, in his preliminary remarks, explained that the English law historically prohibited any agreements that allowed the sharing of the client's damages-recovery by the legal representatives and/or the funders. Such prohibition was rooted in public policy grounds and the common law doctrine of champerty, which formed the basis for the prohibition of litigation funding agreements within the common law jurisdictions.

Insofar as the third-party funding industry is concerned, significant evolutions and developments, departing from the common law position, have taken place over the recent years. He further alluded that such evolvement was observed in *Arkin v. Borchard Lines Ltd* wherein the funding agreements were ruled to be enforceable so long as the claimant retained full control of the litigation[13]. In ensuring the enforceability of such funding arrangements, the funders are expected to maintain a passive role throughout the legal proceedings, despite the financial support provided. This marked a significant departure from the earlier legal stance which, in effect, paved the way for the growth of third-party funding in England.

The significance of the review by Jackson LJ, which led to the regulation of damages-based agreements (DBAs) and claims management services by third parties, was also discussed. He explained that the said review introduced key definitions, including but not limited to those relating to the claims management services. Thus, any legislative framework sought to strike a balance between facilitating access to justice, ensuring transparency and upholding professional ethics within the third-party funding industry.

On that note, Mr. Fietta delved further into the *PACCAR* case, first explaining its background, brief procedural history and the legal issues that were raised. Notably, the UK Supreme Court has decided to treat litigation funding agreements as damages-based agreements (DBAs), thereby requiring such DBA arrangements to be concluded in compliance with the existing regulatory regimes. In particular, those funding agreements which the remunerations are calculated based on a percentage of damages to be recovered in litigation would fall within the ambit of DBAs. Any

[13] *Arkin v. Borchard Lines Ltd* [2005] EWCA Civ 655, English Court of Appeal.

non-compliant DBA agreements are thus rendered unenforceable and consequently, the funders will be deprived of the legal avenue to ventilate their claims. This case, in essence, has brought significant implications to the existing third-party funding agreements concluded in England and Wales, and accordingly necessitated a reassessment and renegotiation of these agreements.

When asked about the consequences of the *PACCAR* decision, Mr. Fietta pointed out that a majority of the English law-governed third-party funding agreements are at the risk of being ruled as unenforceable. Notably, speaking of the repercussions of this decision, he referred to the words of Susan Dunn (Association of Litigation Funder) who opined that "*...It (that is, the Supreme Court decision) would bring to an abrupt end to hundreds of funded claims with potentially catastrophic financial consequences for all involved in the case...*"

Ms. Godman later supplemented the conversation with her perspectives on the implications of the *PACCAR* decision. At the outset, she emphasised that the Supreme Court ruling should not be perceived as a criticism of the litigation funding industry. Instead, she perceived it as a situation where unintended consequences arose due to "*the incorporation of incorrect definitions from one statute into another*". In this respect, Ms. Godman stressed that the decision's most significant impact is likely to be felt in competition claims presented before the Competition Appeal Tribunal. She expressed optimism that remedial legislative actions are expected in due course to address the fallouts from this ruling.

In this respect, Ms. Godman highlighted several practical takeaways:

a) **Pre-*PACCAR* Commission Structure:** Prior to the *PACCAR* decision, the commission structure in litigation funding agreements is typically based on either (i) a multiplicand of the funded costs or (ii) a percentage of the resolution sum.

b) **Post-*PACCAR* Commission Structure:** In light of the *PACCAR* decision, litigation funders may need to revise the existing percentage-based litigation funding agreements (or DBA funding arrangement) to wholly multiplicand-based, thereby making them valid and enforceable.

c) **Structural Adjustments:** Alternatively, the funders may explore the more intricate approach which involves the restructuring of the litigation funding agreements to conform with the DBA regulations and the necessary compliance standards.

d) **Severability Clause:** Most funding agreements have incorporated severability clauses to ensure that any invalid and unenforceable clauses could be severed from the main contract, thus preserving the enforceability of the latter. However, the prevailing concern is that a non-compliant DBA provision is likely to invalidate the entire funding agreement from its root. Under such circumstances, she cautioned that it may be challenging if the funders are exploring the possibility of relying on such a clause to maintain the validity of the underlying funding agreement.

e) **Change in the Governing Law:** Another potential avenue to mitigate the impact of the *PACCAR* decision is the change of the governing law. By altering the applicable legal framework, Parties may be able to circumvent the DBA regulations. That said, Ms. Godman acknowledged that this approach may not be feasible in cases where the factual circumstances exhibit a strong nexus to the English law, and nothing further.

These practical considerations reflect the adaptability and strategic thinking required in response to the evolving legal landscape in the third-party funding industry.

Regulations of Third-Party Funding

Following an engaging discussion on the *PACCAR* case, the panel embarked on an interesting discourse on the regulatory framework of third-party funding. Mr. Haeri remarked that reviews were habitually conducted on the necessary regulation of third-party funding in the United Kingdom and at the European Union level, notably, the publication of the Voss Report. Speaking of this, he observed that several jurisdictions such as Singapore and Hong Kong, among others, have undertaken legislative efforts to legalize and facilitate the growth of third-party funding, at least for international arbitration.

Having considered this dynamic regulatory regime, he invited Professor Sahani to shed light on the foreseeable development of third-party funding in the space of regulation.

Professor Sahani first highlighted the continuously evolving and rapidly changing regulatory landscape of third-party funding globally and the need to constantly keep ourselves abreast with these developments. Following that, Professor Sahani outlined seven possible approaches for the regulation of third-party funding pursuant to her research and observation.

a) *Court Oversight Mechanism*

The oldest and most common form to regulate third-party funding is the court oversight mechanism. This is largely attributed to the fact that courts are often at the frontline to dissect questions on how such litigation funding arrangements should be regulated based on domestic laws. Cases of note such as *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* which, notably, led to the legalization of third-party funding in Australia[14]. While, in the United States of America, third-party funding is regulated at the State level. In the UK, *Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd* broke new ground wherein the funded party is allowed to recover the costs of funding from the opposing party, albeit unusual[15]. In this case, the Court opined that the losing party had created such an inevitable situation wherein the funded party had little option but to resort to funding in pursuing its claims.

[14] *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; 229 CLR 386; 80 ALJR 1441; 229 ALR 58.
[15] *Essar Oilfields Services Limited v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm).

b) *Funder Self Governance*

A good example of such an option is The Association of Litigation Funders in the UK, The International Legal Finance Association in Washington as well as The American Legal Finance Association. As Professor Sahani remarked, some funders have implemented internal codes of conduct, thereby demonstrating their commitment towards self-governance within the industry.

c) *Attorney Regulations*

In the context of litigation funding, Professor Sahani reiterated that the funders must not be the legal representative or attorney of the funded party and share no relationship with the proceedings. The codes of ethics and regulations of the attorney's professional conduct are among the common features across most jurisdictions. Although the binding effects are limited to attorneys, she explained that such regulations may also impact the third-party funding industry.

Given the sanctity of the attorney-client relationship, the attorneys are expected, at all times, to diligently maintain professional independence from the funder and be cautious of any potential intervention or manipulation of the proceedings by the funder. This demonstrates the classic notion of arm's length separation between the funders and the legal proceedings wherein funders are barred from meddling with the legal proceedings and instructing the attorney to act in their interests.

d) *Financial Services Industry*

Third-party litigation funding in certain jurisdictions such as the United States of America is considered a form of "financial service". For instance, the 2022 Study conducted by the US Government Accountability Office (GAO) provided some insights on the required regulations for the funding industry through which it revealed, among others, that "*...the government issued regulations in 2012 that exempted funders from certain requirements focused on conduct and disclosure in relation to financial services and products. This included the requirement to hold a financial services license, among other things...*"[16]. Professor Sahani further explained that a similar form of regulation is observed in Australia in which the funders are also required to obtain the requisite financial services license.

[16] United States Government Accountability Office. (2022). Third-Party Litigation Financing – Market Characteristics, Data, and Trend. *Report to Congressional Requesters.*
Available at https://www.gao.gov/assets/gao-23-105210.pdf

e) *Statutory Regulations*

Hong Kong and Singapore are amongst the few countries which have embraced the legalisation of third-party funding through statutory regime. In Singapore specifically, the Civil Law Act was amended in 2017 to abolish the common law doctrines of maintenance and champerty which have been the overriding factor that impede the legalisation of third-party funding. In the European Union context, the circulation of the Voss Report, on the other hand, signified a positive move towards introducing a proper regulatory framework for the third-party funding industry. Professor Sahani however pointed out that the so-called "Model Law" to regulate the practice of third-party has, to date, yet to emerge.

f) *Non-Governmental and Multinational Approach*

The non-governmental institutions played a meaningful role in shaping the regulatory framework for third-party funding. The publication of the ICCA-QMUL Task Force Report on Third-Party Funding in International Arbitration in 2018 has indeed provided greater insight and clarity into the fundamental elements and prevailing issues relating to the third-party funding industry[17].

In the same vein, the SIAC Practice Note on the Arbitrator Conduct in Cases involving External Funding, which supplemented the SIAC Arbitration Rules, similarly streamlined the obligations of the arbitrators in dealing with external funders in arbitration proceedings[18]. Likewise, the International Chamber of Commerce (ICC) has also issued the "*Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration*", which outlined the scope and duty of disclosure of the third-party funding arrangement[19]. Along with this, it is noteworthy that the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) is also established and tasked to evaluate the necessity for reform and regulation of third-party funding.

g) *Funder-Client Contract*

The third-party funding agreement formalised between the funder and the funded party is of considerable importance as it sets out the scope of the funding arrangement as well as the obligations of the respective Parties. Given the unequivocal stipulation of the Parties' obligations in the contract, it would, to a certain extent, serve as an in-built mechanism to

[17] Available at https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf
[18] Available at https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-%E2%80%93-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf
[19] Available at https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf

ensure Parties constantly observe and adhere to their responsibilities under the funding arrangement. For instance, the provisions that stipulate the funder's permissible conduct would be beneficial in assisting the funded party to ascertain any breach of obligation by the funder.

h) *No specific regulatory regime*

Notwithstanding the above, Professor Sahani explained that there may be situations wherein no specific regulatory framework has been introduced partly due to (a) the limited development or use of third-party funding in certain jurisdictions, and (b) the prevailing circumstances have yet to warrant the necessity to regulate the funding industry.

To complement the above discussion, Mr. Haeri remarked that countries such as China and India have begun to lean towards the legalisation of third-party funding, at least from their recent judicial approaches and decisions.

On that note, Mr. Stephen Fietta KC was then invited to share his thoughts on the regulation of third-party funding. While acknowledging the broad effort to formulate the appropriate regulatory framework for litigation funding, he remarked that none of them explored the possibility of outlawing third-party funding as a whole. Rather, what has been observed now is that States are actively formulating regulatory frameworks to strike a balance between facilitating access to justice and preserving the integrity of the overall justice system.

Historically, the soft law approach has been at the forefront of mechanisms to regulate third-party funding, a typical example of such includes the Code of Conduct for Litigation Funders in the UK[20]. In some jurisdictions, the debates predominantly revolved around the questions of whether hard law ought to be utilised on the basis of public policy consideration or whether this industry should be left to self-regulatory regime. In this respect, Mr. Fietta noted that established funders such as Omni Bridgeway are exploring stronger regulations within the industry to "*weed out the cowboy funders*". Speaking of this, Mr. Fietta recalled a case wherein the funder's inadequacy of funds in the mid-course of proceeding has unfortunately resulted in an inordinate delay to the proceeding and substantial additional expenses incurred by the funded party to scout for a replacement funder. Given the above, public policy consideration has certainly necessitated a relook on the regulation of third-party funding but the extent to which these hard laws should regulate this sector remains debatable.

[20] Association of Litigation Funders of England & Wales: Code of Conduct for Litigation Funders (2018). Available at https://associationoflitigationfunders.com/wp-content/uploads/2018/03/Code-Of-Conduct-for-Litigation-Funders-at-Jan-2018-FINAL.pdf

Rounding out his input, Mr. Fietta explored the European Union's stance and its moot of adopting a harmonised set of regulations across the Union through the Proposed Directive of the EU Parliament and of the Council on the regulation of private funding. As he elaborated, the Proposed Directive seemingly revealed the EU's strong preference towards hard law regulations, to which if successfully implemented, would bring significant development to the regulatory regime on third-party funding. Registration and the eligibility of funders, capital adequacy requirements (to ensure funders are financially capable of sustaining the mounting costs of the proceedings), the fiduciary relationship between the funder and funded party, the disclosure obligation, the capped fees for funders, and conflict of interests are among the aspects addressed in the EU Voss Report.

Following that, Ms. Godman commented on the current regulatory landscape of third-party funding *vis-a-vis* the Voss Report, from Omni Bridgeway's standpoint. She highlighted the prevailing predicament wherein non-professional funders seek to cash in on the blossoming sector without first having a clear understanding of the practice and the requisite capital means to maintain a continuous flow of funds throughout the proceedings. To remedy this situation, a strong recommendation is to include the examination of the funders' capital adequacy as well as their track records in litigation funding.

Specifically, with respect to the Voss Report, she remarked that certain recommendations are welcomed by Omni Bridgeway whilst acknowledging the written response issued by the International Legal Finance Association (ILFA), to which Omni is also a member, to the European Commission. She however noted that objections were raised by ILFA in the written response given that certain recommendations in the Voss Report revealed a misunderstanding of the working mechanism within the funding industry. In furtherance, the fact that no consultation was held with the stakeholders in the funding industry, prior to the publication of the Voss Report, has led to multiple issues and conflicting opinions. As she explained, the mandated disclosure would, in certain circumstances, lead to unnecessary security for cost applications. That said, Ms. Godman stressed that, in all arbitration proceedings, Omni Bridgeway practices an "early disclosure policy" to eliminate any potential conflict of interest between the arbitrators and the case at hand. This stands as a practical example of the self-regulatory mechanism which was elaborated in-depth by Professor Victoria in her earlier discussion.

Off the back of the latest amendments to the Arbitration Act 1996, it is notable that the Law Reform Commission in the UK has recently expressed its intention of not intervening in the decision-making of whether the litigation funding industry in the UK should be statutorily regulated. Rather, the Commission opined that the relevant stakeholders and industry players are in a better position to deliberate and decide in the industry's best interests.

At this juncture, Ms. Godman glossed over the dichotomy of third-party funding in the common law and civil law jurisdictions. Third-party funding in the common law jurisdiction has developed over the passage of time, initially in Australia and later in the UK. In civil law jurisdictions, third-party funding arrangements are made largely based on the principle of freedom of contract. Under such circumstances, the imposition of restrictions on third-party funding, which is underpinned by the notion of freedom of contract, has to be undertaken with extra care. On that note, Ms. Godman cautioned against the feasibility of the one-size-fits-all approach insofar as the regulatory regime for third-party funding is concerned.

Future of Third-Party Funding

The Panel adventured a stimulating discussion, looking into the future and the potential that third-party funding has in the legal industry as a whole. Ms. Godman began the discussion by highlighting the innovative evolutions the industry is presently undergoing which include, among others, funding of both defences and portfolio claims, instead of focusing on the funding of claims per se[21]. As she observed, funders have been actively exploring creative ways to fund defences and one possible way is through the funding of portfolio claims, which essentially allows the concurrent funding of claims and defences.

Yet another recent development in the industry is the evolving definition of "success" in the eyes of the funders which may differ across cases. The common instances include a mere securing a positive outcome of the case would suffice even though the funders agreed to be reimbursed at a lower percentage. Likewise, the enforcement of an award in a particular jurisdiction could also be deemed a success despite the funded party agreeing to pay the funder in a different manner[22]. Accordingly, it is highly anticipated that there will be a wider array of creative funding products to emerge in this industry. Funding of intellectual property cases is one of those which has gained traction and increasing popularity in recent years.

She further remarked that there is a greater certainty to the arbitral tribunal on the recovery of the costs of funding as the industry develops. Separately, she observed that non-professional funders are likely to be driven out of the market not just by the regulations but also by the growing pool of established funders and their inability to sustain adequate funds throughout the proceedings.

Ms. Godman rounded off her insight stating that there is also a growing shift towards the practice of risk-sharing among the funders (commonly known as the "secondary market") especially in cases that are anticipated to span over a prolonged duration, for example, the investment-treaty cases.

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[21] See further Law Reform Commission 2023. *Consultation Paper Third-Party Litigation Funding*. Available at https://www.lawreform.ie/_fileupload/consultation%20papers/Third-Party%20Funding%20and%20Assigning%20Causes%20of%20Action%20Consultation%20Paper%2018072023.pdf

[22] Emily Samra. (2016). The Business of Defense: Defense-Side Litigation Financing. *The University of Chicago Law Review*, 83(4) 2299. Available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5980&context=uclrev

Mr. Fietta, agreeing with Ms. Godman, believed that there will be greater transparency in the funding industry as the market changes and regulatory evolution take place. As he pointed out, international arbitration and arbitral institutional rules now called for relatively limited transparency with a minimal degree of disclosure which, among others, includes the key details of the funding agreement, the identity of the funders, and the extent to which such funding arrangement covers the award of adverse costs. Apart from that, as the industry becomes more transparent, one would expect greater diligence and higher thresholds set forth by the funders in evaluating and agreeing to fund the prospective claims. As a result of the dynamic evolution of the funding industry in its current trajectory, one may observe a declination of the less-scrupulous funders and frivolous claims (such as the ongoing Sulu fraud) due to the tightening of regulations.

Professor Sahani echoed the sentiments of the panel highlighting the untapped market of respondent-sided funding. Further, given that the practice of risk-sharing is now at a nascent stage, its potential remains an area requiring further observation and deliberation. Interestingly, she foresees an upward growth of the not-for-profit funding arrangement in the coming years, citing examples of state-to-state funding, crowdfunding, as well as instances where the funders assumed the role of Claimant in continuing the legal pursuits. Not-for-profit funding, in this context, simply means those funding arrangements which are not profit-orientated but rather based on the funders' expectations over the outcome sought. Last but not least, Professor Sahani explained that the publication of the award, albeit redacted, would undoubtedly contribute to the development of the third-party funding regulation as well as bring clarity to the arbitration practices.

Conclusion

Third-party funding has undoubtedly brought about a cascading effect of change to the way funded cases are approached in the legal industry. To that end, the Panel not only succinctly navigated the decision in *PACCAR*, but also canvassed an in-depth analysis of the current landscape of third-party funding. Rounding off a fruitful discussion, the esteemed panellists offered their insights into what the future holds for this growing industry and the ingenious methods employed by funders in customising funding schemes that cater to the evolving needs and expectations of their clients.

SESSION 3: IMPACT OF INVESTMENT CLAIMS ON STATES AND INVESTORS[23]

Moderator:

Professor Martin W. Lau (Professor of South Asian Law at SOAS University London, Member of SOAS Arbitration and Dispute Resolution Centre (SADRC) and Essex Court Chambers)

Panellists:

1. **Mr. Baiju Vasani** (Barrister and Arbitrator, Twenty Essex and Member of SOAS Arbitration and Dispute Resolution Centre (SADRC))
2. **Professor Steven P. Finizio** (Partner, WilmerHale London and Deputy Director of SOAS Arbitration and Dispute Resolution Centre (SADRC))
3. **Ms. Angeline Welsh KC** (Barrister, Essex Court Chambers)

Introduction

The third and last session of the day focused on the complexities of investor-state dispute settlement (ISDS) and its effects on the modern-day economy involving States and investors. Stirred by the skillful moderation of Professor Martin Lau, the session was structured as a discussion with a subsequent Q&A from the audience.

Impact of Investment Claims on the Relationship Between the Investor and the State and Its Impact on the Economic Development of the States

The first topic addressed by the panelists was the exploration of the impact of investment claims on the relationship between the investor and the State, and its impact on the economic development of States as well as the commercial viability of foreign investors.

Ms. Angeline Welsh KC led the presentation on the above-mentioned topic by highlighting how it has been largely discussed with inconclusive and no straightforward answers. She reflected on the current context of ISDS and mentioned how it does not point towards the complete abandonment of the system, but rather its reform, and the importance of understanding the reasons behind this shift.

a) *Relationship Between Investment Claims and Economic Development*

Ms. Welsh further dived into the fact that there has been an increase in the signing of investment treaties which has reflected an increase of cross-border capital flows.

[23] Rapporteurs in session: AIAC Case Counsel, Sapienza Jazmin Alejandra and Balqis binti Azhar (Reviewed by AIAC Case Counsel, Kho Yii Ting).

Unsurprisingly, there has also been an increase in investment treaty claims[24].

In terms of economic development, Ms. Welsh mentioned that another factor to bear in mind is that by 2018, two-thirds of the respondent States to investment treaty claims were developing countries. In 2019, investors from developed countries brought most of the 55 known cases against developing countries and transition economies[25].

This goes hand in hand with another factor posed by Ms. Welsh - the Regulatory Chill. The concept of regulatory chill refers to the reluctance of the State to implement policy changes for fear of an increase in investment claims[26]. In other words, it indicates a State may abstain from altering its policies due to the fear of arbitration. Though empirically difficult to demonstrate, the regulatory chill has come up as a repeated concern[27].

Ms. Welsh viewed that these factors should direct us to reflect on the development of investment treaty infrastructure. She pointed out how some States have withdrawn from their investment treaties or moved away from ISDS but most pointedly, we are witnessing a reform rather than a complete abandonment of investment treaties.

b) *ISDS Reform*

Ms. Welsh provided the audience with three examples of how States have used investment treaties as a tool to achieve a balance between economic development and providing assurance to foreign investors that investments in the host States will be properly dealt with.

1. Cooperation and Dispute Prevention

The first example being the Brazil Cooperation and Facilitation Investment Agreement[28]. Although Brazil has previously signed traditional investment treaties, they have never been approved by Congress. Instead of completely stepping away from the ISDS system, Brazil used the investment treaties as a tool for cooperation, facilitation and investment agreement in promoting foreign direct investments (FDIs). Through those creative objectives, it enables Brazil to effectively create a cooperation mechanism between the State parties. Arising from the said cooperation mechanism, Parties are also obligated to

[24] United Nations Human Rights Office of the High Commissioner. (2018). Reforming International Investment Agreements. Available at https://www.ohchr.org/sites/default/files/documents/issues/development/resources/2022-08-04/Reforming-International-Investment-Agreements.pdf (Accessed on 1 October 2023).
[25] *Ibid.*
[26] Toby Thomas Landau. (2018). *Arbitration in a Changing World*. In Romesh Weeramantry. John Choong (Ed.), *Asian Dispute Review* (Vol. 20, Issue 4, pp. 154-159). Hong Kong: Hong Kong International Arbitration Centre (HKIAC).
[27] *Ibid.*
[28] Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil And. Available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download (Accessed on 3 October 2023).

create a centralized mechanism and appointment of Ombudsman, which serves as a platform specifically to deal with investors' queries and demands for investments made in Brazil[29].

There is also a provision for Joint State cooperation committees and dispute prevention[30]. Thus, it is observed that the current model focuses on dispute prevention rather than resolution, thereby eliminating any involvement of ISDS.

This model does not have much in common with the traditional Bilateral Investment Treaties (BITs). Given its origins from the private sector to protect outward investment, the model agreement focuses on the promotion and facilitation of investment, rather than on the investors' protection[31]. This indicates a movement away from investment treaty claims as such, but it also points towards the desire to continue to have these agreements and cooperation recognizing its role in FDIs.

2. Adoption of Language to Create Regulatory Expectations

A review of the investment agreements signed between 2018 and 2020, which was 36 in total, showed that some of the most common features dealing with the creation of regulatory space in investment treaties were to include language in the preamble of the treaty itself to preserve the right of the host state to regulate exemptions. This applies in the context of indirect expropriation and exemptions, and non-precluded measures.

Thus, recognizing situations where it would be permitted for States to impose measures that may impair investor rights, the new treaties which were entered into balance the regulatory space in order to achieve economic development while protecting investors' rights.

3. Sustainable and Investment Provisions in Investment Agreements

The last example brought forward by Ms. Welsh was the introduction of potential sustainable development obligations into treaties. She mentioned how in the future such provisions may play a role in counterbalancing the rights of host States and investors. This may require the imposition of certain obligations to ensure the sustainability of the investments such as due diligence and the reporting requirements[32].

[29] *Ibid*, Article 18.
[30] *Ibid*, Article 17.
[31] Nathalie M-P Potin, & Camila Brito de Urquiza. (2021). The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected? *Kluwer Arbitration Blog*. Available at https://arbitrationblog.kluwerarbitration.com/2021/12/29/the-brazilian-cooperation-and-facilitation-investment-agreement-are-foreign-investors-protected/ (Accessed on 4 October 2023).
[32] Organization for Economic Co-operation and Development (OECD). (2021). The Future of Investment Treaties - Background Note on Potential Avenues for Future Policies - 6th Annual Conference on Investment Treaties. Available at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf (Accessed 3rd October 2023).

Broader references to the sustainable development objectives of the States parties are found in the preambles of some newer texts and (less frequently) in some operative provisions. The draft Pan-African Investment Code contains references to sustainable development and the Sustainable Development Goals (SDGs) in its preamble, and the Code's stated objective is "*...to promote, facilitate and protect investments that foster the sustainable development of each Member State, and in particular, the Member State where the investment is located...*"[33].This points towards potentially ensuring that treaties are fit for their purposes, but not at the expense of the individual development of the State.

The session concluded with remarks from the panel praising the noticeable increase of awareness of ISDS in the legal sector, while the commercial sector is also catching up. This discussion provided participants with a comprehensive outlook on the future of ISDS reform and treaty protection.

Impact of Investment Claims on the Relationship Between the Home and Host States

The second topic addressed by the learned panel was the exploration of the wider impact of investment claims on the relationship between the home and host States.

Mr. Vasani led the discussion by establishing that if ISDS is working properly, the impact should be minimal or non-existent due to its initial purpose to depoliticize disputes. To this effect, it is imperative to remark on Article 27 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), which precludes home States from granting investors diplomatic protection should the investors and host States agreed to arbitrate their disputes[34].

This follows from the historical background which resulted in the ISDS system[35]. Mr. Vasani remarked that treaties are by nature equal and balanced. They are intended to benefit home and host States equally. However, the adoption of a model treaty may come as a result of a more powerful State exercising its influence.

He also referred to the practice of "gunboat diplomacy" to force host States to allegedly comply with international law. Gunboat diplomacy, in this respect, refers to a situation where the home State is advocating the investor's case through force or the threat thereof[36].

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[33] Article 1 Draft Pan-African Investment Code. Available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf (Accessed 4th October 2023).

[34] ICSID Convention, Regulations and Rules. Available at https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf (Accessed on 4th October 2023).

[35] Weghmann, V., & Hall, D. (2021). The Unsustainable Political Economy of Investor–State Dispute Settlement Mechanisms. *International Review of Administrative Sciences*, 87(3), pp. 480-496. Available at https://doi.org/10.1177/00208523211007898 (Accessed 3rd October 2023).

[36] Ladan Mehranvar, & Lise Johnson. (2022). Missing Masters: Causes, Consequences and Corrections for States' Disengagement from the Investment Treaty System. In Thomas Schultz (Ed.), *Journal of International Dispute Settlement* (Vol. 13, Issue 2, pp. 264 – 308). United Kingdom: Oxford University Press. Available at https://www.kluwerarbitration.com/document/kli-ka-jids-2022-02-005?q=gunboat+diplomacy

Another interesting aspect raised by Mr. Vasani was that of dispute settlement. In this sense, Mr. Vasani mentioned how a powerful State can raise issues during certain official or diplomatic settings. This carries the advantage of a potential dispute being settled at the government-to-government level. However, it does counteract the main objective of the ISDS system, which is to avoid such political entanglements[37].

Mr. Vasani pointed out that, once the arbitration proceeding commences, the home State would normally participate with an amicus submission. In usual circumstances, Mr. Vasani noted the perception arises is that the investor would be at the advantage end, as opposed to the host State, given the involvement of the home State. However, in reality, that may not be the case. Such is, Mr. Vasani observed, due to the home States' endeavour to take a narrow and consistent interpretation of international law.

Mr. Vasani also added that where there are criminal investigations instituted against the investors concerned, exchanges of such information between the States *viz*, the pseudo-discovery process would gravely undermine the integrity of the proceedings.

Mr. Vasani also provided an example of the impact of investment claims in times of conflict. Such is the case between Ukraine and Russia, wherein the BIT is invoked to assist its investors in suing Russia for the expropriation of investments made into Crimea, and it sees this as a form of war using the legal process[38]. The panel remarked on the use of the BIT, which in good times was meant to promote mutual prosperity, as a tool in times of war.

To conclude the discussion, Mr. Vasani highlighted that there are known cases where the ISDS system has been abused given the exorbitant worth of pecuniary claims at stake. The involvement of third-party funder may, to a certain extent, heighten the complexity of the matter. Speaking of this, he emphasized Malaysia's need to engage with other States to insist, in collective, that further abuse of the system must be put to an end. To that end, Mr. Vasani reminded everyone that more emphasis and cooperation between States are necessary as an alternative to some investment dispute settlement provisions.

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[37] Organisation for Economic Co-operation and Development Investment Division, Directorate for Financial and Enterprise Affairs Paris, France (OECD). (2012). Government Perspectives on Investor-State Dispute Settlement: A Progress Report - Freedom of Investment Roundtable, p. 8. Available at https://www.oecd.org/daf/inv/investment-policy/ISDSprogressreport.pdf (Accessed 4 October 2023).

[38] Mariana Antonovych. (2023). 2022 in Review: Investment Arbitration Amidst War in Ukraine. *Kluwer Arbitration Blog*. Available at https://arbitrationblog.kluwerarbitration.com/2023/02/17/2022-in-review-investment-arbitration-amidst-war-in-ukraine/ (Accessed 4th October 2023);
See also Luke Eric Peterson. (2017). In Jurisdiction Ruling, Arbitrators Rule That Russia Is Obliged Under Bit To Protect Ukrainian Investors In Crimea Following Annexation. *Investment Arbitration Reporter*. Available at https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0209.pdf (Accessed 4th October 2023).

Smaller Investors or Investors with Small Claims

The panel speakers also observed that there is a great reluctance in prioritizing the investor to the home State, thus causing a lack of engagement among the investors, specifically micro, small and medium-sized enterprises ("MSMEs"). The panel speakers agreed that ideally, a treaty should facilitate a healthy relationship between the two Parties, including the MSMEs. However, it may be difficult to objectively analyse and set criteria of who and what constitutes the MSMEs, as noted in the UNCITRAL report[39].

How Investment Claims Can Be Better Managed and Exploring A Regional Advisory Centre for the Developing States

The moderator, Professor Lau also skillfully navigated the panel discussion, by exploring the possible ways investment claims could be better managed through the prospective establishment of the investment advisory centre for developing States.

To address this, Professor Steven P. Finizio underscored the ongoing effort towards realizing reforms of the ISDS system[40], having regard to the broad mandate entrusted on the Working Group III to oversee and facilitate such reform since 2017[41].

Professor Finizio noted previous accounts of efforts undertaken across the South America and Asia regions to put together an advisory regional centre but were to no avail. To circumvent this, the Working Group III proposed for the forthcoming advisory centre to be moulded based on the World Trade Organization (WTO) model through which, in Professor Finizio's words, hopefully could enhance the chance of success and sustainability of such initiative. He emphasized that advisory centres of such nature should embody the primary objective of helping low-income and developing States.

Speaking of the structure and function of the advisory centre, Professor Finizio explained that its fundamental purpose is to provide two-pronged assistance to developing States namely, (a) technical assistance and capacity-building activities, and (b) legal support and assistance in ISDS-related proceedings. That said, it should be mindful that the scope of activities of the advisory centre is confined to the sphere of international investment law and investor-state dispute settlement (ISDS).

[39] United Nations Commission on International Trade Law. (2020). *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019).* New York: United Nations General Assembly, p. 30. Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/104/76/PDF/V1910476.pdf?OpenElement
[40] Available at https://uncitral.un.org/en/working_groups/3/investor-state
[41] *Ibid.*

Technical assistance and capacity-building initiatives, in this respect, generally encompass (a) advice on issues pertaining to dispute prevention and conflict management, (b) provide training on the possible means to resolve investment-related disputes, and (c) facilitates knowledge sharing and exchange of best practices among its member States.

In adjacent to this, the advisory centre may, subject to its available resources, offer legal support and assistance with regard to ISDS proceedings upon request of a member State. It is interesting to note that the legal assistance offered by the centre may range from providing a preliminary assessment of the case and representation services, advising the selection of mediators/arbitrators/adjudicators/experts, supporting the preparation of statements, pleadings and evidence to engaging with external legal counsel (if any). This would greatly assist developing States to better prepare for their ISDS proceedings as well as undertake an informed decision.

Though it appears to be a relatively comprehensive working plan, Professor Finizio cautioned on the necessity to properly address and deal with the practical issues should the advisory centre extend its roles beyond capacity-building and technical support. The panellists were aware of the broader challenges in realizing the establishment of such advisory centre. As the panel spotlighted, the legal representation services may raise several uncertainties, among others, the independence of the centre, the obligation of confidentiality and information-sharing, and its ability to act in the best interest of each State in the respective case. Further, the potential centralization of legal counsel within the advisory centre, or perhaps the institutionalization of legal representation, and its consequential impact on the development of investment law are some areas requiring pre-implementation deliberations by the Working Group III.

Conclusion

Topic relating to the impact of investment treaties on economic development was revisited during the Q&A session. In particular, the panellists exchanged thoughts on whether bilateral investment treaties (BITs) could facilitate the inflow of foreign direct investments, thereby contributing to the economic development of a nation. To address this, Mr Vasani remarked on the prevailing challenge to pin a direct correlation between the existence of investment treaties and economic growth, having acknowledged the reality that investment decisions are mostly made based on capital returns consideration. That said, he noted the growing awareness of bilateral investment treaties and treaty protections over the recent decades especially among the pool of sophisticated investors. Echoing Mr. Vasani's position, Ms. Welsh explained that BITs are commonly factored into the decision-making process but they may not necessarily stand as the decisive factor underpinning investment decisions. Other considerations such as regulatory regime and the risks of investment are taken into account in reaching a better-informed decision.

CLOSING REMARKS BY THE HONOURABLE DATO' SERI DIRAJA DR. ZAMBRY ABD KADIR

MINISTER OF FOREIGN AFFAIRS, MALAYSIA

Having been enlightened by the wisdom of the esteemed panel, the London Colloquium is drawn to an end with the Closing Remarks delivered by The Honourable Dato' Seri Diraja Dr Zambry Abd Kadir (Minister of Foreign Affairs, Malaysia). In his preliminary address, The Honourable Minister extended his profound gratitude to the Minister of Law and Institutional Reform, the strategic collaborating partners, eloquent moderators and speakers for their spectacular effort in pulling through and contributing to this Colloquium. He alluded that the previous series of the Colloquium in the home country had cruised through the intricate discourse on the historical, legal and diplomatic aspects, including but not limited to the issues of sovereignty and territorial integrity in the Sulu case.

Today, the London Colloquium has gathered the foremost voices not just in the legal fraternity but also the SADRC academicians to exchange views on the fundamentals in international arbitration, third-party funding and investor-state dispute settlement. The first session of the day featured a comprehensive discussion on the developments in the world of international arbitration and the obligation of the arbitrators while making close reference to the Sulu case. Jumping on the bandwagon of third-party funding, the panel has eloquently talked through the various dimensions of the central topic and how the recent UK Supreme Court ruling altered the regulatory landscape in the litigation funding industry. The final session addressed the untapped discussion on the impacts of investment claims on the relationship between the investors and both the home and host States. Interestingly, the panel also exchanged views on the prospects as well as the feasibility of the investment advisory centre for developing States.

With that in mind, The Honourable Minister circled back the day's discussions to the core objectives of the London Colloquium - the ongoing Malaysia-Sulu fiasco, which has attracted tremendous attention from the global alternative dispute resolution (ADR) community. As The Honourable Minister described, the Sulu claims depicted an abuse of the international arbitral processes which not only undermined Malaysia's sovereignty and territorial integrity but also jeopardised the established norms and values of international arbitration. Speaking of this, he drew the audience's attention to the fact that the principle of territorial integrity constitutes an integral part of the international legal order, as envisaged in the United Nations Charter. Its importance could not be stressed further having considered its broad protections, encompassing the notion of self-determination, the inviolability of State territory and the effective control and possession of a State.

As for the Sulu case, he underscored the recognition by the United Nations as well as the international community that Sabah constitutes part and parcel of Malaysia with effect on 16 September 1963. Under such circumstances and without transforming this Colloquium into a

platform to propagate, The Honourable Minister reiterated the unfounded claims pursued by the Claimants and the invalid issuance of the Final Award by the sole arbitrator, both of which have hauled Malaysia into a corpus of unprecedented legal battles across multiple jurisdictions. As he accentuated, these legal actions are unfortunately undertaken at the expense of the valuable resources and funds which could have, at least, been allocated to support the socio-economic development in Malaysia.

Echoing the words of The Honourable Tan Sri Anifah Aman, he stressed that Malaysia still believes in the sanctity of arbitration as a means to uphold the fundamental principles of statehood namely, sovereignty, territorial integrity and the rule of law. Arbitration is often praised for its innate values of ensuring fairness and efficiency in amicable dispute settlement. For decades, Malaysia has been a proud host to the Asian International Arbitration Centre (AIAC), home to alternative dispute resolution within the ASEAN region. The exploitation of arbitral processes in the Sulu case necessitates a review of the arbitration framework to preserve its resilience against any future attempts to manipulate the system. In The Honourable Minister's words, it is only with continued deliberation from the governments, international organisations and the global arbitral community that arbitration can maintain its legitimacy and effectiveness as a robust mechanism for resolving transnational disputes.

Along with this, he mentioned that the Government of Malaysia is tailoring a state immunity legislation, with the inclusion of a clause on the reciprocity treatment, to codify the customary international law on the same as part of our commitment towards safeguarding the sovereignty of all States and promoting friendly relations with other States.

[End of Report]