Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel*

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I. PERSONAL CONSIDERATIONS

The international law of foreign investment law is a subject of considerable personal interest. It is the matter addressed by my first academic position, back in 1984, working with Elihu Lauterpacht at the newly established Research Centre for International Law at Cambridge University. For four years we worked together on a project on investment treaty arbitration; much time, I recall, was spent trying to reconstitute what had happened in the old Delagoa Bay Railway arbitration,1 one of the very first cases to address now familiar issues. A foreign investment dispute was also the subject of the first set of instructions I ever received as a barrister, back in 1986: it was a ‘hand-me-down’ from Sir Ian Sinclair, the early ICSID case of Southern Pacific Properties v. Egypt;2 I recall spending about three days on some remote part of the case that most likely had no role in the outcome. Since then, investment disputes have been a regular feature of my workload, some more memorable than others. Few cases can beat Tradex Hellas v. Albania,3 not least for the way in which that case arrived. I recall sitting in my office at the School of Oriental and African Studies (SOAS) in Russell Square in London, in 1994, receiving a phone call from a former student, Stephen

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3 Tradex Hellas v. Albania (ICSID Case No. ARB/94/2, Award of 29 April 1999).
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Hodgson, to let me know that he was in the Legal Adviser’s Office in the Ministry of Agriculture in Tirana, Albania. He had come across a locked cupboard in the legal adviser’s office that he had gained access to, and found a number of unopened Federal Express packages sent by Ibrahim Shihata, the general counsel of the World Bank also responsible for ICSID. The letters notified Albania about pending proceedings. The Fedex packages seemed to have been ignored. A first procedural hearing had been set. Albania appeared to have taken no action. Was I in a position to help? James Crawford, Ruth Mackenzie and I took on the case, one in which Albania eventually prevailed on the merits. I believe that the total costs of counsel for the entire case—comprising a jurisdiction phase and a merits phase, several rounds of written pleadings and two hearings—came to less than £100,000. No case has been more memorable!

Since those days the world of investment disputes seems to have changed rather dramatically, not least in relation to costs. ICSID was little known, the Permanent Court of Arbitration was inactive; twenty-five years later the situation is transformed, with investment treaty arbitration being amongst the most vibrant and exciting areas of international law. You only need to look at the large number of awards to be able to appreciate the richness of the legal issues, and also to recognise the range of strongly held views about many of the key issues of the day: the meaning of expropriation and of fair and equitable treatment, the effect of a most-favoured nation (MFN) clause and the implications of an umbrella clause. These are issues that will be familiar to anyone involved in investment treaty arbitrations. Alongside these issues of substance are also some growing issues of legitimacy, as some States withdraw from the ICSID system against a background of concerns as to the adequacy of the system’s ability to balance the legitimate interests of investors, on the one hand, and of States, on the other. Over the long term, such balance will be indispensable to the well-being of the system. I have been privileged to observe these changes over the past two decades, having been involved as counsel in a number of cases, and—since 2008—sitting as arbitrator in several more.

II. THE GROWING IMPORTANCE OF IMPOSING LIMITS ON ARBITRATION ROLES

In this chapter I will address one aspect that touches on the legitimacy and effectiveness of the ICSID system, one that goes to heart of the subject of this volume: it concerns the question of the propriety of lawyers acting simultaneously as counsel and arbitrator—in different cases of course—in cases that largely raise the same or similar legal issues. In October 2009, I participated in a lively and well-reported session on this issue at the meeting of the International Bar