Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do?

delivered by Andreas F. Lowenfeld

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McGill University
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Andreas F. Lowenfeld
This second John E.C. Brierley Memorial Lecture was organised in collaboration with the Canadian Bar Association (Québec Branch) and with the support of the law firm Woods.

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Cette deuxième Conférence commémorative John E.C. Brierley fut organisée en collaboration avec l’Association du barreau canadien (Division Québec) et avec l’appui du cabinet Woods.

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**A Word on John E.C. Brierley**

Professor John E.C. Brierley held a B.A. from Bishop’s University, a B.C.L. from McGill University, and a doctorate in law from the Université de Paris. He was appointed teaching fellow at the McGill University Faculty of Law in 1960. He later became assistant professor (1964), associate professor (1968) and full professor (1973). He taught Canadian and Quebec private law, focusing on civil law property, comparative law, and foundations of Canadian law. He also served as dean of the Faculty of Law from 1974 until 1984 and as the acting director of the Institute of Comparative Law, McGill University, in 1994. He was named the Sir William Macdonald Professor of Law in 1979 and was the Wainwright Professor of Civil Law from 1994 until 1999.

Professor Brierley was frequently invited as a speaker or a visiting professor to other law faculties, including the Université de Montréal, University of Toronto, Dalhousie University, and the Institut de droit comparé of the Université de Paris II. Following his retirement from McGill University in 2000, he was named Emeritus Wainwright Professor of Civil Law. He passed away in 2001.


Professor Brierley received many awards for his accomplishments. In 1965, he obtained the Prix Robert Dennery from the Faculté de droit, Université de Paris, and one of his articles won first prize in the Concours de la Revue du Notariat in 1992. He was named trustee for the Fondation Jean-Charles Bonenfant by the Quebec National Assembly (1981-1988). He was also elected for a number of positions, namely as a member of the Board of Editors for the American Journal of Comparative Law (1989), associate member of the International Academy of Comparative Law (1991), member of the International Academy of Estates and Trusts Law, San Francisco (1992), and later member of its executive committee (1994-1999). He was elected a Fellow of the Royal Society of Canada (Academy I) in 1995.

This public lecture on international arbitration has been established to commemorate his life and work.
Un mot sur John E.C. Brierley


Le professeur Brierley a souvent été invité à prononcer des conférences et à visiter des facultés comme professeur invité, notamment l’Université de Montréal, la University of Toronto, la Dalhousie University, et l’Institut de droit comparé de l’Université Paris II. Suite à sa retraite de l’Université McGill en 2000, il fut nommé titulaire émérite de la chaire Wainwright en droit civil. Il est décédé en 2001.


Cette prestigieuse conférence sur l’arbitrage international fut instaurée pour commémorer sa vie et son œuvre.
This second John E.C. Brierley Memorial Lecture, entitled “Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do?”, was delivered at the Faculty of Law of McGill University on March 30, 2005 by Professor Andreas F. Lowenfeld.

One of the world’s most highly respected authorities in both public and private international law, Andreas F. Lowenfeld is the Herbert and Rose Rubin Professor of International Law at New York University School of Law. His books cover aviation law, public international law, international economic law, conflict of laws, arbitration, and international litigation. He has appeared before the United States Supreme Court and the World Court in several important controversies concerning international law, arbitration, and jurisdiction. Professor Lowenfeld frequently acts as arbitrator in international disputes, both public and private.

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Note introductive

Cette deuxième Conférence commémorative John E.C. Brierley, intitulée « Public Policy and Private Arbitrators: Who Elected Us and What Are We Supposed to Do? », fut prononcée à la Faculté de droit de l'Université McGill le 30 mars 2005 par le professeur Andreas F. Lowenfeld.

Sommité mondiale du droit international privé et public, Andreas F. Lowenfeld est le titulaire de la chaire Herbert and Rose Rubin en droit international à la New York University School of Law. Ses ouvrages portent notamment sur le droit aérien, le droit international public, le droit international économique, les conflits de lois, l’arbitrage et les litiges internationaux. Il a plaidé plusieurs affaires importantes devant la Cour suprême des États-Unis et la Cour internationale de justice sur des questions de droit international, d’arbitrage et de compétence juridictionnelle. Le professeur Lowenfeld agit comme arbitre dans plusieurs affaires internationales, tant publiques que privées.
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Introduction

I am very pleased the John E.C. Brierley Memorial Lecture is dedicated to international arbitration. Not only because it provided me with an invitation to a city and a university I like very much, but also because I believe that international arbitration is, for international lawyers at present, where the action is. You may think this a bizarre statement at a time when the world is focused on sovereignty, invasion, occupation, security walls, and genocide. True enough, and sad enough. But it turns out that on these topics law and lawyers are influential—I almost said relevant—only at the margin. In the field of arbitration, law and lawyers make a real difference—in some sense, the difference.

In a famous essay published almost fifty years ago, two experts on conflict of laws wrote that appeals to public policy usually serve to avoid serious analysis.\(^1\) That was a persuasive point in addressing wholly private controversies—loans across state lines, liability for traffic accidents, promises to make wills, and so on. In the semi-private disputes my talk tonight addresses, that is, controversies with a private party on one side, and a state or state agency on the other, keeping public policy out of the discussion is an option not granted us. Saying this does not, of course, give any assurance that we know how to conduct the analysis. And it does not even explain what we mean by “we”.

I. Who Are the Arbitrators, and Why Were They Chosen?

I have thought about this question for some time, but it struck me particularly a couple of years ago, when I was appointed to two arbitral panels at almost the same time.

Case A arose out of a controversy submitted to the International Chamber of Commerce between a seller, an Italian manufacturer of a chemical compound used in making a certain type of electrical batteries, and a buyer, an American manufacturer of these batteries. Something went wrong in the manufacturing process, and the question was who was at fault. The American buyer asserted that the description of the compound and its properties was false, and claimed return of the purchase price paid thus far, as well as rescission and damages. The Italian seller asserted that the buyer had failed to follow the instructions for use of the compound, and demanded the outstanding portion of the purchase price and loss of profit on the remainder of the order.

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\(^1\) Monrad Paulsen and Michael Soenen, "Public Policy in the Conflict of Laws," 56 Colum. L. Rev. 969 at 1016 (1956)
Case B arose out of a joint venture, between an American insurance company and a group of Mexican investors, in a financial institution in Mexico. When the peso crisis of 1994-95 struck, the government of Mexico ordered a reorganization of numerous financial institutions, including the one in question. The American company claimed it had been treated unfairly by Mexico, in that as a result of several governmental decisions it was made to bear a greater share of the losses of the joint venture than the Mexican partners in the same institution. When negotiations failed, the American firm initiated arbitration under the now famous chapter eleven of the <i>North American Free Trade Agreement</i>.  

It is evident that the outcome in Case A will interest only the Italian seller and the American buyer. The arbitral decision will establish no significant legal principle. Clearly, the seller must meet contractual specifications, comply with an express warranty and probably an implied warranty of fitness, and will be held liable if it made false or misleading representations. Just as plainly, the buyer must pay for goods that comply with the specifications, and use them as intended in suitable facilities. The case will turn on the evidence, obtained in part from buyer and seller directly, but probably also from experts in industrial chemistry or another relevant subspecialty. The tribunal will have to decide early on whether to be satisfied with party-nominated experts, or try to find an expert on our own as well. When the case is over, no one but the two parties (and their counsel) will care about the outcome. It is likely the decision and submissions will remain confidential.

Case B, in contrast, concerns the actions of the Mexican government, its central bank, its Ministry of the Economy, possibly arrangements with the International Monetary Fund, the Bank for International Settlements or the U.S. government, all in the context of efforts to restore Mexico's fiscal and banking system to health and stability. Moreover, the award in Case B will involve interpretation of a major treaty: the NAFTA. It is likely to involve interpretation of such expressions as “measures tantamount to expropriation,” “treatment in accordance with international law,” “fair and equitable treatment,” and “treatment no less favorable than that ... [the host state] accords to its own investors.”

And the award will be published, and thus may well have effect as a precedent for future arbitration, or indeed as a deterrent of action being considered by Mexico, another NAFTA party, or other host states that have entered into Bilateral Investment Treaties (“BITs”) with provisions resembling those of the NAFTA.

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3 Ibid., arts. 1110, 1105, 1102.

4 Ibid., Annex 1137.4.
Well, what am I doing here, the same person, designated in two disparate international controversies? Procedurally, the cases look alike. Each side appoints an arbitrator; there is some inquiry into the nominees’ qualifications and independence; then a chairman is elected. Once the tribunal is constituted, there is usually a preliminary meeting, almost inevitably a continuing debate about discovery of documents, and eventually there will be arguments of counsel, witness statements, testimony, cross-examinations (which have become more and more common in recent years), and either pre-hearing or post-hearing briefs—perhaps both. Some cases will be bifurcated—say, first jurisdiction, then liability; or first liability, and later damages—and experienced arbitrators can introduce other variations to make the proceeding run smoothly.

Are these cases then the same from the arbitrator’s viewpoint? Can I call ‘em as I see ‘em, like an umpire calling balls and strikes one day in a Little League game, the next day in the World Series?

Let me turn the question around. Why me? In Case A, I was nominated by a lawyer who seems to have heard from a colleague at his law firm who had come before me and had reported that I appeared to have some sense of commercial transactions, came to hearings well prepared, and treated parties and counsel with respect. I do not think it is necessary to say whether I was nominated by seller or buyer. I was not chosen for being a “seller’s man” or a “buyer’s man.” Perhaps there is some of that in certain other types of commercial arbitration—some arbitrators are known to favour insurance companies or carriers or securities firms. But in disputes like Case A, the issue of bias (as contrasted with direct financial interest or personal relations with parties or counsel) does not arise. A belief that contracts should be honoured, that buyers should pay for accepted goods, that sellers should comply with specifications, and that merchants should behave in a commercially reasonable manner are assumed, and will not affect the selection of arbitrators. Nor, in my experience (which not everyone may agree with) will it make any difference that one party is Italian, the other American.

But why was I appointed by the investor in Case B? The reason may in part have been the same as in Case A—a reputation as an experienced arbitrator who does his homework. Or was there more to it? Was there some feeling that I was likely to favour investors over host governments, or that I was likely to focus on a strict view of contract terms rather than on the big picture of a nation in difficulty, or that I was impatient with arguments about public policy or force majeure?

I hasten to say that none of these perceptions would be accurate, at least so far as I can tell. (I suppose the definition of unconscious bias is that I could not tell). But my point is that litigators—and yes, counsel in arbitration are litigators—do look for predispositions, attitudes, and outlooks in arbitrators, as well as expertise and professional competence. Legitimacy of the arbitration demands a level playing
field, but each side wants the wind behind it. And while a little of this goes on in judicial proceedings, selecting one's arbitrator is a special kind of forum shopping—which both parties can engage in.

II. The Search for Neutral Principles

Can one, then, look for neutral principles to guide arbitrators? One can look, but it is important to be aware of the limitations of the search. Agreements seeking to limit or hold to account the actions of states are not governed by neutral principles such as those that govern the agreement between seller and buyer in Case A. At the risk of painting with too broad a brush, let me illustrate by recalling the history of the investment chapter of the NAFTA, which has generated much of the uneasiness about arbitration and arbitrators in the public arena. Many of you here know this story, but perhaps not everyone does, and I think it bears retelling as we explore what arbitrators do or should do.

The story begins in Canada in 1973 with the Liberals under Prime Minister Trudeau. Goaded by Herb Gray and Walter Gordon, who are dissatisfied with U.S.-based companies controlling, as they assert, too much of Canadian economy, Parliament adopts the Foreign Investment Review Act, as well as the National Energy Program hostile to American holdings in Canadian energy companies. FIRA creates a bureaucracy and a presumption (or at least an attitude) unfavourable to foreign direct investment and symbolized by the term “non-eligible person”, who is not really ineligible, but must prove to the Foreign Investment Review Agency that a proposed investment will be or is likely to be “of significant benefit to Canada.” The Agency did not actually reject many proposed investments, but it delayed and discouraged them, and after a decade, the perception grew in Canada that the FIRA had led less to independence from the United States than to Canada's falling behind on the frontiers of innovation and technology.

Then, Brian Mulroney and the Conservatives win a large majority in 1984, and set out to replace the FIRA by a new law, the Investment Canada Act. The new act is designed, as the minister in charge tells Parliament, to change Canada's reputation into that of a good place to invest, to stimulate trade and industrial development, and to “rekindle the entrepreneurial spirit in Canada.” Review of proposed foreign investment is retained, but only for acquisition of existing businesses, with a higher monetary threshold, and the presumption of benefit to Canada reversed. “Canada,”

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5 S.C. 1973, c. 46 [FIRA].
6 Ibid., arts. 8-10.
8 Statement by the Honourable Sinclair Stevens following the tabling of the Investment Canada Act (2 December 1984).
says Prime Minister Mulroney, in a speech in New York, "is open for business again." 9

But Mulroney has another concern. In the economic downturn of the early eighties, the U.S. Congress has once again been considering departures from free trade. If the United States were to become protectionist, Canada would want to be inside, not outside, the walls. And so, at the famous "Shamrock Summit" in Quebec on St. Patrick’s Day 1985, Mulroney proposes a Canada–United States free trade agreement. President Reagan accepts in principle, but in fact the proposal for a free trade area does not arouse much interest in the United States.

What the Americans do care about is investment. The United States is not really worried about expropriations in Canada. Even the National Energy Program did not involve taking without compensation, though it certainly involved pressure on sometimes unwilling sellers. But if the United States is to eliminate tariffs for goods originating in Canada, it wants assurance that the regime of restrictions on transborder investment, sectors reserved for Canadians, and forced divestment will not return. To conclude the deal, Canada, for the first time in its history, agrees to give national treatment to investors from the United States. 10 Further, the two countries agree to prohibit requirements for local directors, compulsory divestment by reason of nationality, and performance requirements as a condition of investment. 11 And they also agree on a prohibition on expropriation, or measures tantamount to expropriation, except for a public purpose, in accordance with due process, on a non-discriminatory basis, and upon payment of "prompt, adequate and effective compensation"—the old Hull Formula. 12 There is a general provision for state-to-state arbitration, but no special provision for investor-state dispute settlement, because it is expected that the courts of the two countries can be relied on to protect individual investors who might complain of violations of the Agreement. 13

Next, Mexican president Salinas de Gortari declares to the United States that Mexico wants a free trade agreement as well. President Bush accepts, and Canada has little choice but to join what becomes a three-party negotiation. But if Mexican

9 Notes from a speech by Prime Minister Mulroney to the members of the Economics Club of New York (10 December 1984).
11 Ibid., art. 1603.
12 Ibid., art. 1605. The so-called Hull Formula originates in an exchange of Notes between the United States and Mexico between July and September 1938 (see Green Hackworth, Digest of International Law, vol. III (Washington: USPGO, 1942) at 655-61).
13 Canada-U.S. Free Trade Agreement, supra note 10, c.18.
goods are to come into the United States duty-free, there has to be massive American investment in productive facilities and financial institutions in Mexico. But Mexico, unlike Canada, has a history of expropriations, a former president who was a driving force for the United Nations’ General Assembly’s “New International Economic Order”\textsuperscript{14} in the 1970s, and its courts have a bad reputation. So while many of the substantive provisions of the \textit{Canada-U.S. Free Trade Agreement}, including the chapter on investment, could be kept unchanged in a trilateral accord, it would be essential for acceptance of the NAFTA in the United States to provide for an independent forum (\textit{ad hoc} arbitration), which investors would be able to turn to if they consider that the safeguards for investments were not being honoured. Thus the procedural guarantees, including investor-state arbitration, became not only instruments of investor protection, but essential elements in investment \textit{promotion}.

One significant provision relevant to our search for neutral principles was new in the NAFTA investment chapter. In the \textit{Canada-U.S. Free Trade Agreement}, the step forward in investment protection had been the promise of “national treatment”. For the first time, as I have mentioned, Americans were guaranteed in Canada the same treatment regarding investments as Canadians, and vice versa. That guarantee, of course, would be applied among all three countries in the trilateral accord. But what if the host country—read Mexico—treated foreign and domestic investors equally badly?

The drafters of the NAFTA, drawing on some recently concluded BITs, added article 1105(1) requiring that investors be accorded no less than a minimum standard of treatment “in accordance with international law, including fair and equitable treatment and full protection and security.”\textsuperscript{15} The concept of minimum treatment under international law was not new. Elihu Root, the leading American international lawyer in the first quarter of the twentieth century (as well as former Secretary of War and Secretary of State), wrote in 1910:

> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own citizens is that its system of law and administration shall conform to this general standard. If any country’s system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live


\textsuperscript{15} NAFTA, \textit{supra} note 2, art. 1105(1).
under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.\textsuperscript{16}

Did the words "fair and equitable treatment" in the NAFTA add anything to what Elihu Root told the American Society of International Law almost a century ago, before the world was turned upside down by two great wars? Did this phrase, to put it one way, serve to raise the standard of conduct expected of host states vis-à-vis aliens, including foreign investors? Or, to put it another way, did it serve to limit the freedom of sovereign states?

The words "fair and equitable treatment" are not self-defining, and different observers—and different arbitrators—may well interpret them differently. If faced with assertions of violation of fair and equitable treatment, say denial or revocation of a construction permit, or passage of a law that impairs an investment made before the law was enacted, some arbitrators might say, "It is up to me (and my fellow arbitrators) to decide what is fair." Other arbitrators would start out asking, "Why would a country have accepted such interference with its sovereign decisions?"—implying that the phrase should be given a reading that does not reach the challenged conduct.

In the case of the NAFTA, we know why the treaty partners accepted article 1105: Mexico wanted to attract investment, and the investment protection provisions, including the guarantee of "fair and equitable treatment," were the price to be paid to open the American market and let Mexico aspire to become a full member of the international economy—including the World Trade Organization ("WTO") and the Organization for Economic Co-operation and Development; Canada had on the one hand little choice, on the other hand little to fear, as it thought; and the United States perceived the investment provisions as protection for its companies investing abroad, and so far as I can tell gave little thought to becoming a defendant. Thus an arbitral tribunal might (I am not saying should) contemplate that if the treaty partners granted foreign investors broadly-formulated rights, perhaps greater than those given to nationals, they did so deliberately to foster transborder investment, and should not be allowed to retreat from that bargain.

In retrospect, we know that all three countries found themselves in the role of defendants, and came to fear that they could not trust arbitrators to interpret "fair and equitable treatment" and related terms favourably to their positions. And so in July 2001 the NAFTA Free Trade Commission, composed of the trade ministers of the three countries, issued a "Note of Interpretation" designed quite clearly to avert expansive decisions by arbitral tribunals on what is fair, what is equitable, and whether international law evolves with the times or remains static:

\textsuperscript{16} Elihu Root, "The Basis of Protection to Citizens Residing Abroad" (1910) 4 Am.J. Int'l L. 517 at 521-22.
Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1). Clearly, the trade ministers sought to put “fair and equitable treatment” back in the bottle by defining the minimum standard of treatment as no more than what Elihu Root referred to as a “standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.” And to ensure a restrictive reading, the ministers added the word “customary” before “international law” lest, one supposes, someone might refer to the BITs as creating a different standard by treaty.

Much has been written about whether the Note was indeed an interpretation, or really an amendment of the NAFTA, and whether it would be applicable to pending cases. More important for my purpose is that the Note, while displaying more unity among the governments of the three countries than might have been expected, reflects distrust of arbitrators, and when it comes to fundamental issues, a reluctance to let them carry on the search for neutral principles. It may be acceptable to let arbitrators hear evidence, entertain arguments, estimate the value of an investment that has been lost or damaged, or judge whether a particular official was merely negligent or acted with intent to harm or to discriminate. But if the questions are what is fair; what the parameters of international law within which states may act are; when an environmental regulation or an allocation of export or import quotas is “tantamount to expropriation”, and so on, governments are nervous. Neutral principles, in other words, and arbitrators “calling ’em as they see ’em” may not be compatible with public policy.

17 Free Trade Commission, “Notes of Interpretation of Certain Chapter 11 Provisions”, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca> [Note]. According to NAFTA art. 1131, the Free Trade Commission’s interpretations of NAFTA provisions are binding on arbitral tribunals (supra note 2). Not all tribunals, however, have agreed.
III. Arbitrators in an Uncertain World

a. Built-in Safeguards

I think the distrust of arbitrators disclosed in the episode of the Free Trade Commission's Note may be more widespread than we—the international arbitration community—want to admit. There are, of course, safeguards:

1. The almost universal employment of three arbitrators

2. The strong urge to achieve unanimous results

3. The professionalism of most members of the community of arbitrators, who expect to see each other again in future cases

4. The tradition in international arbitration (and, in most systems, the requirement) to prepare carefully reasoned awards

5. The role of precedent. Notwithstanding the efforts of the drafters of the Statute of the International Court of Justice, the NAFTA, and other sets of rules to provide that a decision is binding only on the parties and in respect of the particular case, in fact counsel in an international arbitration cite every precedent they can find, and arbitrators do try to follow precedents or explain why they are inapt or unpersuasive.

All these elements combine to reduce the likelihood of outcomes that could be regarded as challenging the bounds of legitimacy.

b. Conflicts of Interest, Real or Potential

I do want to say a few words about conflicts of interest, though much has already been written about this topic. Plainly, one should not serve as an arbitrator if one has a financial tie to a party or counsel in a particular proceeding, and one ought to disclose when in doubt, for instance when one has been retained by a firm in the past but has no continuing relationship with the firm. Generally, disclosure leads to disqualification (or a milder suggestion that perhaps the arbitrator in question should rethink accepting the nomination). If one cannot conclude that there is a real conflict, the cliché for disclosure is "appearance of conflict", or reasonable doubt, or something about Caesar's wife.

18 See e.g. Statute of the International Court of Justice, art.59, being Annex to Charter of the United Nations, 26 June 1945, Can. T.S. 1946 No.; NAFTA, supra note 2, art.1136(1).
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But what about arbitrators who are also counsel in disputes raising similar issues? If the disputes are like Case A with which I started, I think there is no problem, assuming the parties or the transactions in question are not in some way connected. A person can argue as counsel in one case that the seller delivered defective merchandise, and sit as arbitrator in another case in which the issue is whether or not the merchandise was defective. Suppose, however, the issue arises in arbitration under a BIT whether an investor, having litigated in the Xandian courts under Xandian law, is now barred from bringing an international arbitration arising out of the same controversy—the famous "fork in the road" problem. Xandia says, "Never mind the forum, you, foreign investor, litigated in our courts, and you are now precluded from litigating the same controversy in arbitration. The object of the fork-in-the-road doctrine is to prevent inconsistent results." The claimant in the arbitration says, "There is a critical difference between litigating under the law of Xandia and arbitrating a treaty claim under international law in an international forum. Thus there can be no bar, and the arbitral tribunal should uphold its jurisdiction." May a lawyer who represented either side in this controversy serve as arbitrator in a subsequent case that might raise the same issue? What about the reverse situation where an arbitrator who sat on the panel that decided this controversy is approached in another case to serve as counsel for a party that seeks a similar outcome?

If the answer to each of these questions is that one may not serve as arbitrator if one has served as counsel, and vice versa, then the pool of experienced, knowledgeable arbitrators may diminish, which I know has been a problem for the International Center for Settlement of Investment Disputes ("ICSID") and other arbitral institutions. If the answer is that one may serve as both counsel and arbitrator, then is a doubt cast on the legitimacy of the process? Or are the two questions different, so that it is acceptable to be retained as counsel after one has been an arbitrator, because there are no restrictions on lawyers, provided one did not obtain the employment while still arbitrating, but it is not acceptable to be an arbitrator after one has been counsel?

What about the in-between position, which I confess in the interest of disclosure, may apply to me? I have twice given expert reports in arbitrations raising the fork-in-the-road issue. My two reports are not inconsistent with each other, though different in detail. If a third such case should come up in which I was asked to give an expert report, I would not, of course, take a position contrary to what I have written and testified to previously. But if the fork-in-the-road issue arises in arbitration, am I disqualified from serving as arbitrator? What if the issue arises in the course of arbitration, but is not evident at the outset? Remember that arbitrators are appointed well before the claim, let alone the defence, is laid out in detail. It is awkward to step out in the middle of a case, but perhaps worse to stay on and have
counsel argue whether some prior opinion of an arbitrator is or not applicable to the actual case.

Should I then, if I want to continue being asked to serve as arbitrator in what for want of a better term I will call "public policy cases", decline to give expert reports in such cases? Or vice versa? Must I, in other words, decide on a fork in the road myself? I bring this up not to seek career guidance, but to point out that the expert witness occupies a position different from both arbitrator and counsel, but with some attributes of each.

I was glad to see that the recent ICSID Discussion Paper on possible improvements in its arbitration rules raised the topic of issue conflicts, and indeed pointed out that the problem may arise not only at the outset, but in the course of arbitration.\(^{19}\) For the time being all I can add is heightened consciousness, plus the suggestion that ICSID and similar institutions find a way to ask these questions routinely, so that they do not cause embarrassment to either the potential (or actual) arbitrators or to the institution.

c. Back to Public Policy

I want to come back to the question of public policy and how arbitrators should address it. Rather than discussing it in the abstract, I want to take an example that arises in many presently pending arbitral disputes—the case of Argentina.

In the early nineties, Argentina under President Menem embarked on an aggressive program of privatization of state-owned enterprises, particularly in the electricity and gas sectors. The privatization was to be based in major part on foreign direct investment, and to that end Argentina entered into over thirty BITs. Further, Argentina adopted a new peso, equal by statute to the U.S. dollar and fully convertable.

The program was successful for several years, as investment flowed in from the United States and Europe, and Argentina's standard of living improved. But by the end of the decade, for a variety of reasons, the parity of the peso and the dollar did not hold, and Argentina's credit ran out. When the International Monetary Fund, which had helped out a number of times, declined to extend further credits, Argentina was forced to default on its debt, riots and strikes broke out, and the President of the Republic (as well as several short-term successors) resigned.

In response, the government took a series of drastic steps by emergency law and decree. Among other measures, the law establishing the parity of the dollar and the peso was repealed; the peso was first devalued, then permitted to float (or rather sink) freely; dollar balances were required to be deposited with the central bank; transfers abroad of foreign exchange (including dividends) were forbidden; and loans from foreign investors were permitted to be paid down in depreciated pesos. The services supplied by foreign-owned privatized enterprises were required to be maintained at rates previously calculated in dollars but now payable in pesos worth less than half. ... And so on.

As one might expect, the investors sought compensation, and many of them initiated arbitration under ICSID, relying on the relevant BITs and the ICSID Convention. Eventually, almost fifty such cases were filed against Argentina.

Putting aside differences in the respective investment agreements and the applicable BITs, the cases raise two underlying, related questions. First, whether measures of general application such as devaluation of the currency or imposition of exchange controls are to be regarded as breaches of individual investment agreements compensable under a BIT; second, whether a real emergency such as hit Argentina at the end of 2001 and the beginning of 2002 constitutes force majeure of a kind that overrides even commitments enshrined in solemn international treaties.

These are hard questions, on which reasonable, thoughtful persons can differ. I know that the ICSID secretariat is concerned that different panels may come up with different answers to these questions, without the kinds of errors that would justify annulment under the ICSID Convention. While strong advocates will try to adduce applicable precedents and develop persuasive analogies, in the end a conscientious arbitrator will be troubled that the burden of answering falls on him or her or on the three of us. And outsiders will also be troubled, especially if some awards go one way, and some the other, with no higher authority to appeal to.

Should there be, then, an appellate tribunal for investor-state or similar arbitration, along the lines of the Appellate Body established pursuant to the Dispute Settlement Understanding of the WTO? There is a lot to be said for this suggestion, though as the ICSID secretariat pointed out in its Discussion Paper...

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21 See ibid., art.52.
released last fall, it would be difficult to accommodate the 140 parties to the ICSID Convention and all the parties to the world-wide web of BITs.\[^{23}\] Perhaps a voluntary facility, offered by ICSID, and made available to parties when they conclude an agreement to arbitrate or when arbitration is initiated, would be a start, provided the members of the appellate tribunal were in place. For a closed system, such as the three-member NAFTA, creating a standing appellate tribunal would be easier, though my impression is that no one is anxious to open up the NAFTA to amendment, for reasons having nothing to do with arbitration.

Evidently, this is not the place to discuss the proposal for an appellate tribunal in detail. Permit me to just make a few remarks in closing, to relate the proposal to the preceding discussion.

First, the effort to establish a relatively consistent jurisprudence in the context of disputes about public policy is likely to have the side effect, as has happened in the WTO, of giving the appellate judges a greater role in shaping the agreements than perhaps the member states have in mind.

Second, jurisdiction of appellate tribunals of all kinds is generally limited to issues of law, as in the WTO, or “clear errors of law,” as in the ICSID Discussion Paper.\[^{24}\] But challenges to arbitral awards on the issues that I have raised here—“fair and equitable treatment,” the “fork in the road,” and the impact of general emergency measures on particular contracts—may not quite fit in that category. We may, in other words, have to look for a new definition of the scope of review, still tied to law, but perhaps not to “clear error”.

For my part, I have mixed feelings about the proposal for an appellate tribunal.

As an arbitrator, I would like to be able, with my co-arbitrators, to decide the controversy before us, without finding out a year later that what we had carefully worked out in crafting our award was overturned by a higher instance that almost certainly did not give as much attention to the case as my fellow arbitrators and I had.

As a classroom teacher and editor of casebooks, I do not mind conflicting decisions to put before the students.

As the author of a treatise, I’d like to know what to say.

But in the end, I am stuck with the question that the organizers of this talk posed to me: Who elected me? Who elected us? Who elected them?

\[^{23}\] Supra note 19, Annex.

\[^{24}\] DSU, supra note 22, art.17(6); Discussion Paper, supra note 19, Annex at para. 7.