SINGAPORE INTERNATIONAL ARBITRATION FORUM 2015

AT CAPITOL THEATRE SINGAPORE

ASIA: LOOKING BEYOND THE HORIZON

30 SEPTEMBER 2015

The Attorney-General, Mr V K Rajah, SC; chairman of Maxwell Chambers, Mr Philip Jeyaretnam; distinguished guests, ladies and gentleman, a very good morning to all of you. On behalf of Maxwell Chambers, I would like to welcome you to the Singapore International Arbitration Forum 2015. Thank you for joining us today. We're glad to have so many of you travel to Singapore for this event and we hope that it will be an exciting and fruitful day for you. Without further ado, I would like to invite our guest of honour, the Attorney-General, Mr V K Rajah, SC, to deliver his welcome remarks. Mr Attorney-General, please.

WELCOME REMARKS:

MR V K RAJAH, SC: Good morning. It's still early for some of the participants, but we should -- I'm told we should soldier on. Mr Philip Jeyaretnam, Chairman, Maxwell Chambers; Ms Lucy Reed; distinguished speakers and panellists, ladies and

gentlemen. I'm pleased to welcome you to the fourth edition of the Singapore International Arbitration Forum. This year's forum has the theme: Asia, Looking Beyond the Horizon. In the next few hours, some of the most respected and influential arbitration practitioners will discuss topics relating to this theme with sessions focusing on the resolution of investor-state disputes, international commercial arbitration in Asia and mediation of international disputes.

Singapore, as most of you will agree, today has global prominence in international commercial arbitration. The esteem that international arbitration practitioners and users worldwide have for Singapore is perhaps reflected by the fact that Singapore is the preferred seat for international commercial arbitrations in Asia. That Singapore is the preferred seat in Asia is evidenced, one, by its having been the top Asian arbitration destination for cases administered by the International Chamber of Commerce's International Court of Arbitration since 2008. In addition, Singapore's premier arbitration institution, the Singapore International Arbitration Centre, has received in excess of 200

new cases each year since 2012, the vast majority of them being international in nature.

In 2014, the SIAC received 222 new cases, of which 81% were international. The new cases involved parties from 58 different jurisdictions. Case statistics aside, in the 2014 Berwin Leighton Paisner survey, Singapore was rated by respondents as one of the top six seats for arbitration worldwide. The other top seats that respondents identified were London, Paris, Stockholm, Vienna and Zurich. A number of years earlier in the 2010 White & Case case survey, Singapore together with Paris and Tokyo were found to be the next most preferred arbitration seats after London and Geneva. Singapore's success in achieving global prominence in international arbitration can be attributed to a number of factors. I shall highlight some of the most important, not in any particular order.

First, Singapore's accessibility to and from other major cities and it being regarded as a stable and neutral jurisdiction that strictly adheres to the rule of law. Second, a sound legal framework for arbitration. The New York Convention is part of Singapore law and Singapore's international arbitration statute is

based on the UNCITRAL Model Law. In addition, dialogues and consultations with stakeholders regularly take place to ensure that arbitration laws are continuously updated and refined to be aligned with best international practices. Third, a supportive judiciary. The Singapore judiciary has for many years supported the arbitral process and refrained from intervention unless necessary and then only under the internationally accepted norms.

Fourth, a legal practice regulatory regime that is conducive for arbitration. All lawyers, whether Singapore qualified or not, are free to represent parties in international arbitration under any governing law taking place in Singapore. Notable also is the fact that tax incentives have been introduced for arbitrators and arbitration work. Fifth, the existence of a world-class physical infrastructure. The most prominent would be Maxwell Chambers, the world's first integrated resolution centre which provides state of the art hearing facilities and related support services of the highest standards.

Sixth, the presence of a first rate arbitration institution in the SIAC, housing leading arbitration institutions and arbitration

practitioners, both local and non-local, of the highest quality.

Turning to investor-state dispute resolution, Singapore's aspiration is to be a leading jurisdiction. To be completely clear, not as a respondent-state in an investor-state disputes, but to be established as the preferred jurisdiction in the region for the resolution of investor-state disputes. The steps that have been taken in this respect are fairly recent, but they are signs that Singapore is moving in the right direction.

Last month at GAR Live Singapore, Bernard Hanotiau vouched for Singapore's growing importance in investor-state arbitration. And based on statistics, Singapore is, in fact, a preferred seat in this region for the resolution of investor-state disputes, having been the seat for more investor-state arbitrations than any other jurisdiction in Asia. An example of a prominent investor-state case Singapore is hosting would be ***Philip Morris Asia Limited v Australia***. In total, Singapore's Maxwell Chambers has had 24 investor-state arbitrations in the past 5 years, half being cases from the permanent Court of Arbitration and the other half being cases from

the International Centre for the Settlement of Investment Disputes. Most of these cases were commenced in the past 2 years. Also notable is the fact that the SIAC too became involved in investor-state arbitrations for the first time in 2014, in which it saw involvement in four cases.

In relation to mediation of international disputes, Singapore has been at the forefront of significant recent developments in this area. In November last year, Singapore launched two new mediation institutions: the Singapore International Mediation Centre, referred to as SIMC for short, and the Singapore International Mediation Institute, referred to as SIMI for short. Together with Singapore's initiatives in international arbitration and the Singapore International Commercial Court, the SIMC and SIMI are part of Singapore's overall strategy of becoming a legal services and dispute resolution hub for the region. These new mediation institutions were created following the recommendations of a working group that comprised both Singaporean and international experts in the field of mediation.

The SIMC's primary focus is on providing quality mediation services for cross-border

commercial disputes. Its services include an arbitration-mediation-arbitration service or Arb-Med-Arb that is jointly provided with the SIAC. It has a panel of mediators that comprises leading mediation practitioners from around the world and a panel of experts to assist mediators in addressing industry-specific technical issues that may arise in the mediation process. The SIMI plays a complimentary role, serving as the professional standards body for mediators. The response to the launch of the SIMC and the SIMI has been positive from both the local legal fraternity and the business community.

As of 31st August 2015, the SIMC has already received two requests for mediation involving parties from Singapore, Korea, Laos and Macau. One was a request for mediation that was made following an arbitration outside Singapore. If the experience of the SIAC, which also handled two cases in the first two months of its operation many years ago, is anything to go by, the SIMC can be expected to make its mark in the not-distant future.

The points in observations I've just made relate to topics that will be discussed at this forum. They pertain, however, to Singapore and

the present. This forum will not be focusing simply on Singapore and the present. It will be looking at Asia and beyond and considering what will be beyond the horizon.

And there are few better persons to start the substantive portion of the forum than Lucy Reed, who is regarded by many as being in the highest echelon of practitioners in international commercial and investor-state arbitration. Lucy, in the course of her stellar career, has represented both private and public sector clients in over a hundred complex international commercial and investor-state cases. She's currently the global co-head of the highly regarded international arbitration and public international law groups of Freshfields Bruckhaus Deringer. She presently also serves as a member of the ICC Court's governing body, the SIAC Court, the Court of the London Court of International Arbitration and the governing board of the International Council for Commercial Arbitration. She's the author of numerous articles and co-author for three books, one of which is the recently published book, A Guide to the SIAC Arbitration Rules.

Her move to Singapore in mid-2013 was a development that was regarded by members of the Singapore legal community as a testament to Singapore's growing prominence in the region and the world as an arbitration jurisdiction.

I don't want to take up any more of the time that Lucy is going to spend presenting her paper. I just want to point out before passing the floor to her that after your discussions on what the future might hold, this evening you might be able to get a glimpse of Singapore's arbitration past. The National Gallery that you'll be visiting is housed in the buildings that were the former Supreme Court of Singapore and the City Hall. The SIAC originally had its offices in the City Hall building on the third floor, directly above where my old Court used to be.

I'm not sure whether the guided tour will take you where the SIAC was located but if it does, those locals like Sylvia and Philip who are old enough to recall where the SIAC was located, I'm sure, will point it out.

It remains for me to thank the organising committee and the supporting organisations for their efforts in making this forum a success and

to conclude by wishing you all an enjoyable and fulfilling time of learning. Thank you very much.

MS TIFFANY: Thank you, Attorney-General. Ladies and gentlemen, please join me in welcoming our keynote speaker, Ms Lucy Reed, on stage to deliver her keynote address. Ms Reed, please.

OPENING KEYNOTE ADDRESS:

MS LUCY REED: Thank you very much, Mr Attorney-General, for the introduction and the kind remarks. In advance, I want to share your thanks to the organisers and Maxwell Chambers, in particular, Philip Jeyaretnam, the Chairman, and Ban Jiun Ean and Phyllis Loh who have been tireless. I want to thank you all for coming of course and express special appreciation for the venues. It’s quite something to be here in this theatre. It makes me make an admission, which is that I once was quite a good student of tap dancing. And it’s hard to restrain the instinct to tap, standing up here on this stage. But instead of inflicting tap dancing on you, I have taken some theatrical liberties with my slides today. They will provide a bit of entertainment along with the substance.

[SLIDE 1] This will be less a substantive keynote speech than an introduction, or a launching, of ideas and format for today. I think it's best if I relay a bit of background.

Late last year, I received the invitation from Maxwell Chambers to give the keynote for this fourth Forum. I share with Toby Landau - and these are Toby's words from the third forum - "an increasing allergy to arbitration conferences" and that is because there are too many and there is not enough new substance in them. But like Toby for the third Forum in 2013, I immediately accepted the invitation to work with this Forum because of the origins and the purpose of the forum.

[SLIDE 2] Back in 2001, now Chief Justice Sundaresh Menon wanted a conference (and I'm reading to you from my handwritten notes from the first meeting we had organising this conference in December of 2014) "presenting a bit more theoretical over-the horizon-topics, the future, with people coming to think together". That has been the case, remembering the "blank sheets of paper" that we discussed in 2013. So, it's an immense honour to be invited, but it has also brought with it the immense responsibility to

identify themes and sub-themes and speakers and to shepherd the content which we are going to be exposed to today. It required getting right to work, let's say that.

With Chief Justice Menon's original concept or inspiration in mind, I talked with many others about-and-around future-type topics, next steps in the region, what to expect in the region, watch out for Asia. Frankly, this has become a common theme and even a bit of a tired theme. But I couldn't get out of my mind the idea of "thinking over the horizon". So I have unapologetically expropriated CJ's concept to use today to look beyond the horizon.

[SLIDE 3] I need you to get this slide of the horizon out of your mind, this being the hazy view from my office window this week. [SLIDE 4] Instead, for inspiration in this theatre, I would like you to have this view of a horizon in your mind. (There was no reason not to take a bit of liberty, take on the challenge of being a bit theatrical in this venue as we come together to think.)

Let me say also now that this conference will be subject to the Chatham House Rule, with no

unpermitted attribution of comments or views to speakers by name.

Words aside, what does it mean to talk about beyond the horizon? I'm not talking about flying or boats on the horizon. I'm talking about what it means to be a genuine leader, which means looking beyond the horizon and making the best educated guesses of what is out there coming towards us, and preparing for it. It is not hard to do what you have learned to do and are doing successfully and increasingly easily. It's hard to go outside your comfort zone. First movers are very rarely accidental.

It's not an exaggeration to say that Singapore, as a society and an economy, is a living example of thinking beyond the horizon. [SLIDE 5] We've heard in the introductory remarks and in this 50th anniversary that Singapore excels at – and these adjectives are important – critically and unsentimentally assessing its assets and resources to determine what it can do uniquely and profitably and then doing it. Where there has been a wrong move, and that's inevitable when one is an innovator, then Singapore shows that it can reverse course quickly and resolutely.

Drilling down, again as you heard this morning, Singapore has surely played this leadership role in international dispute resolution. Philip wrote about this in the invitation to this Forum, noting the growth of international arbitration in Asia over the past decade and stressing that today Asia is on a cusp of leading and not merely following. [SLIDE 6]

[SLIDE 7] I would argue that Singapore and other parts of Asia are beyond the cusp in many ways. I have said publicly many times, and I mean it sincerely, that Singapore is second only to The Hague in purposely establishing itself as a home or a centre of international dispute resolution. Indeed modern Singapore has created a veritable industry of international dispute resolution, not by accident but by funding and creating the necessary legal infrastructure, the laws, the judiciary and the physical infrastructure, and with that foundation encouraging local practitioners and welcoming practitioners like me from abroad. Just consider the list that the Attorney-General went over: Maxwell Chambers, which is successful and much copied; the SIAC, being among the best in show for institutions; SIMC, now developing.

I want to give special mention to the Singapore International Commercial Court because this is an institution that Singapore sighted and delivered from beyond the horizon. It is early days of course. There is only one case and success will take some time. But I personally would put money on it, based on demand for such an institution from our clients. It is a good idea in its own right and it is potentially an attractive alternative for those dissatisfied with international arbitration.

The SICC, though, is unlike Maxwell Chambers or other innovations that others can copy in the region. It will be the Court, the international commercial court in Asia, complementary and supplementary to the London Commercial Court and to, in my home country, the US Southern District Court of New York, which is the leading commercial court of first instance.

I can give you other examples (that do not have so many initials and acronyms) of leadership in Singapore in international arbitration. One is the recent decision in ***Malini Venture v Knight Capital Pte Ltd***. In that case the High Court confirmed the competence of an arbitral tribunal to determine its own jurisdiction, including – and

this is important – when the existence of the separate arbitration agreement is challenged. I can tell you that this is a decision that English judges and English arbitral institutions will be taking note of.

A second is Singapore's prompt acceptance of the award against it in the high-profile high-stakes arbitration with Malaysia related to the Malaysian Railway land disputes. This case was submitted voluntarily by the two governments for arbitration administered by the PCA. And although Singapore no doubt was not content with the negative award and many pointed to flaws in that award, Singapore accepted it immediately. In my opinion, Singapore's compliance has not received the international coverage it deserves. This has reminded me of how governments behaved with regard to the awards of the early mixed claims tribunals - there was a fair fight, there were good losers, and there were good winners.

This is all fine, more than fine, in showing that Singapore can and does see beyond the horizon and take action in preparation. We who practise in this field see that and we get the benefits of that here in Singapore and Asia. But as always we have to ask what is next, not to stop with

accomplishments, but ask what is next beyond the horizon? It is a fact that one never actually reaches "beyond the horizon". When you get there by accomplishing something, that something is in the foreground and there is something else coming. As an aside, this reminds me of a conversation I had regularly with my daughter, putting her to bed when she was little and I would say, "Good night, I'll see you tomorrow." And then the next morning she would say, "Is it tomorrow now?" And I would say, "No, it's today now. Tomorrow is tomorrow. And when I told you I'll see you tomorrow, that was yesterday." This concept is hard to explain, like the cycle we have with "beyond the horizon". (By the way, my daughter has gone on to be a PhD candidate at New York University, so she did learn conceptual thinking.)

Without pre-empting our speakers or you, I want to flag a most interesting "newest" development in dispute resolution in Singapore. I think it may be weather forecast of what we can work for and expect.

On the 31st of August, the Singapore Ministry of Law executed a joint declaration with the International Tribunal for the Law of the Sea (ITLOS) under which Singapore has agreed to make

facilities available for proceedings for special chambers of the tribunal or the tribunal itself when ITLOS determines it appropriate to sit or exercise functions in Singapore.

This is an obvious and advantageous use of Singapore's arbitration infrastructure. After all, why should the maritime nations of South-east Asia have to go to Hamburg, Germany, where ITLOS is headquartered, to meet and resolve disputes? But more than that, more than that obvious point, this agreement reflects the willingness of Singapore to go beyond international commercial and investor-state arbitration and to host and facilitate more arbitrations or similar proceedings between states. [SLIDE 8] Let me quote Minister of Law Shanmugam, in his press release on the 1st of September, who in words more important than what I say here today, said that: "This joint declaration demonstrates Singapore's commitment to the international rule of law…in order to serve the needs of the states in the region with a view to promoting the peaceful settlement of disputes relating to the Law of the Sea."

This is a big theatre so you may not notice the elephant here. The elephant in the room is

the South China Sea, with disputes including the ITLOS case that the Philippines have commenced against China. I'm quick to say that Singapore has emphasized its neutrality, which puts it in an appropriate diplomatic position in every way. But perhaps Singapore will be willing and able to use its much admired diplomacy skills to help mediate or at least contain these and similar inter-state disputes. I think - and this is only me speaking - that given the innovative role Singapore already plays in other kinds of dispute resolution, it would be natural for Singapore, within the ASEAN matrix in particular, to play a much needed peace-making and peace-keeping role in major regional disputes, of which there no doubt will be more beyond the horizon. It does not matter if that role remains behind the scenes. In Asia, I don't see any other government better positioned to play that role quietly or more publicly.

To illustrate our theme, let me give you another really "beyond the horizon" example, which is not connected to the Straits or the South China Sea or anything geographic. It is not even connected to dispute resolution, I should warn you. But it is connected to ways that we international lawyers can and should be thinking

if we want to be leaders in the new digital and social media world. I noted with interest that it was reported in the FT Weekend on the 12th of September in a very short article that a small Palestinian start-up called "Suptel" is partnering with the American Bar Association, using international donor funds, to provide Syrian refugees with free legal advice by text message. Suptel only has 30 people working for it. It relies on former humanitarian workers from Oxfam and the US Agency for International Development who understand refugee issues, plus software engineers who can sort and tag and translate inquiries which are then sent to lawyers based in Turkey. In the first three weeks of operation, this little organisation gave advice to 10,000 Syrian refugees - advice on benefits, advice on education, advice on filling out paperwork. They are expanding, I read, beyond Syria to other groups of refugees.

In a similar IT (information technology) vein albeit not in the humanitarian law area, we in this group can think far more creatively and aggressively about using technology to improve the quality and lower the costs of international arbitration. I know you are thinking there is

still a generation gap in IT, and I agree. My son is a computer engineer (a programmer actually but I am to call him “computer engineer”) to whom I am an endless source of amusement in my inability to do things that come naturally to him. But the generation gap in our field, I think, is actually a good thing because it is an area where older and younger generations of lawyers and arbitration practitioners can - in fact, we must - work collaboratively to maximise impact.

Let me give you a modest concrete example. When arbitral institution executives ask me, as they sometimes do, “What can we do to get ahead of the competition?”, I usually answer, “Be the first to get the next generation of video conferencing equipment for hearings, deliberations and meetings”. This is because while we know that sitting face-to-face with people is important, is it necessary for a short preliminary conference with participants from two or three or four continents? Why have a witness travel for two days and sit for another two days in a breakout room for an hour of cross-examination? Why should we be spending so much carbon? In our profession, why do we think we are more important than others in a need for face-to-face meetings? In the

Eritrea-Ethiopia Claims Commission, where I sat as a commissioner, we successfully used a videocon to hear a witness who was a busy doctor, during a break outside his operating room.

This is an example of thinking just at the horizon. Thinking beyond the horizon would be for an arbitral institution to partner with a private equity fund to underwrite the research and development to create that next generation of almost-in-the-room-video-conferencing for legal proceedings, and get exclusive use of that technology.

My suggestion usually prompts replies of "cannot", "not enough funds", "it's impossible", "too busy" etcetera, to which I can only think, "Why not?" Why not at least think about it? [SLIDE 9] Some of you know my current favourite quote which comes from Lewis Carroll's Alice in Wonderland, and I'll put it up again just for the theatrical context. Alice says, "There's no use trying, one can't believe impossible things." And the Red Queen says, "I dare say you haven't had much practice. When I was your age, I…did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."

So today, I think, we should try for one or two before lunch, being more modest. And let's leave Wonderland (or almost) to get to the here-and-now. [SLIDE 10] We are here in this room now, as ambitiously promised in the programme: "To explore what the winds of international dispute resolution are bringing our way, and despite oft-repeated predictions, might well not be bringing our way…", and to "use both …intellect and experience to look beyond the standard conversations about investment treaty arbitration, 'Asian international' commercial arbitration, and mediation of cross-border disputes…"

[SLIDE 11] These are the three natural sub-themes of our Forum. You heard them from the Attorney-General. You've got terrific panels to wrestle with these three topics. For now, I'm just going to give you a brief road map through the programme to let you know where we are taking you today.

First is "Investor-State Arbitration" with the question, "Arriving in Asia or Not?" I have practised investor-state arbitration effectively since 1981, starting with the Iran-US Claims Tribunal long before -- long, long, long before --

the acronym of "ISDS" was dreamed up. I don't mind saying that it is a difficult and often discouraging field of arbitration. My unpopular observation, especially applicable in Asia right now, is this: everyone (and at least in Korea, his or her taxi driver) is talking about ISDS in Asia, which can only mean that few people are really informed or really listening to the debate. And even if one discounts the entire ISDS hysteria, which isn't just in Asia but in Europe as well, much of the debate remains in my view abstract and static. Fortunately, all members of our first panel chaired by Judith Gill are experienced, informed and good listeners and therefore worthwhile to listen to on this important topic.

They may agree or disagree with me, I hope some of both on this. Personally, I do not see a great swell of treaty arbitrations approaching from beyond the horizon in Asia. There are cases. There are an increasing number of cases. There will be more cases. But I predict that there will be comparatively fewer cases, and those will be more focussed and more responsible cases than we saw in the early BIT arbitration days of Latin America and Central Europe disputes. This is good thing. This is a good thing for the region, if

not necessarily for the myriad of lawyers who understandably want to practise in this area.

I'm on record many times predicting, perhaps overly optimistically, that Asia can and should and will take advantage of being a late mover - and thereby a new first mover - in a new iteration of ISDS by implementing in FTAs and, we hope, the TPP, the many lessons that we have learned in treaty arbitrations over the past 15 years. I always hesitate to use the word "jurisprudence" in international law, but if you compare what we know now to 2000, say, the outline is much clearer (if not sharp) on jurisdictional issues such as indirect shareholder investments and on substantive issues such as fair and equitable treatment, umbrella clause and indirect regulatory expropriation. And I credit this "jurisprudence" with the decline in the number of arbitrations, the faster termination of what are opportunistic cases, the evening-out of parties between developed and developing nations.

[SLIDE 12] This is a serious slide, to show you that UNCTAD in February reported the first drop in new cases in four years. There were 42 new cases in 2014, down from the all-time high of 59 in 2013. And there are more cases now against

developed countries though all but five claimants in the 42 new cases are from developed countries, which is not really surprising.

Thinking back to the Singapore International Commercial Court and the advantages of having a court for commercial disputes that might otherwise go to arbitration, let's jump to investor-state and think: "What is the prospect of standing public ISDS courts instead of the one-off tribunals that are called for in treaties?" This idea is by no means beyond the horizon, it has been, let's just say, washing in and out with the tide for many years. But I think it is time to watch this carefully because the Europeans may stop talking about it and actually try to implement it, depending on what happens with the TTIP negotiations. Just last week, the European Commission proposed a draft negotiating text which has such a public court rather than ad hoc tribunals. If this goes through, one of the biggest challenges will be appointing representative judges. Just look at the experience of the International Criminal Court. But it is likely coming, andtre://ftr/?label="SIAF"?datetime=&quo

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has to come.

Let me move now to the second panel on "International Commercial Arbitration" where the topic is: "Is Asia Part of 'International' or Is It Not?" This requires a bit of bluntness. As posed in the programme, just how established is international commercial arbitration in Asia? Is Asia part of the phrase "international" or not?

Here is a thought more blunt than I wanted to put in the programme. I have seen before I moved to Asia over 3 years ago, and since I've been here, there tend to be separate track conversations about international arbitration writ large and international arbitration in Asia or involving Asia. There aren't matching separate tracks like that in my experience in Europe or Latin America or North America. It is an exaggeration (which I'm good at) but it seems that there is "International Arbitration Asia" and "International Arbitration Rest of the World". And as for advocates and arbitrators, only a few pioneers regularly cross that border.

No doubt this separateness comes first for some very good reasons: case numbers, litigiousness, experience, geography, sometimes

just timing and coincidence. But as time goes on, there no doubt are some suspect reasons as well. I think this is worth talking about, and this is one of the reasons I wanted to do this Forum. And it's worth talking about - not within the straitjacket of political correctness - because so much else in international arbitration is harmonised across ever faster disappearing borders. With UNCITRAL, arbitration legislation and rules, with the IBA guidelines for best (or pretty good) practices, with public treaty arbitration awards, with even a growing body - and I use this term loosely, as I do jurisprudence - of customary substantive international arbitration law.

Let me step back and say, lest I be misunderstood here, I consider that this harmonisation of practice and procedure and even some law is enriched by our Western and Asian and other legal and cultural differences. We should not be aspiring to some kind of mush - or I probably should say congee - in international law where we are harmonised into nothingness.

In this context, I was struck at a conference in Mauritius last spring when I heard Lord Mance speak. As a sitting English Judge, he spoke

rather wistfully about the, and I quote, “splendid anarchy” of international commercial arbitration tribunals. Admittedly, his context was the anarchy -- the splendid anarchy - of not being restrained by *res judicata* or collateral estoppel. Here, I refer to the idea that there is some kind of anarchy or at least a lack of accountability in how arbitral tribunals are selected and operate. Of course, we contract for this anarchy. This is part of international commercial arbitration, our contracting for appointing arbitrators. I don’t think that’s an excuse for ignoring the role that party arbitrator selection can play in the division between Asia and rest of world.

Today, for this discussion, I’m prepared to submit that genuine and full diversity and integration of Asia and “rest of world” in international commercial arbitration remains stubbornly beyond the horizon, despite other harmonisation. My question for the second panel is whether this is right, whether this is acceptable? Is it just a matter of time and patience, and we should trust it will all come together? And if it is just a question of time, shouldn’t the wait be shortened with focused

education, training, accreditation and implementing standards, whether hard or soft?

So again, staying on my theme here, what if Singapore and Southeast Asian practitioners were to become recognised, by their practices, as leaders in living the procedural and structural reforms that we talk about so often at so many conferences? What if one started associating best practices, more than we are already, with arbitration in Singapore and the region? This is in process, it really is, with SIAC and HKIAC and voices like Michael Pryles' and Neil Kaplan's.

But we can do more. What about Singapore and Singaporean and Asian practitioners preparing themselves to be leaders in new categories of arbitrable disputes? Many of us anticipate an increasing number of arbitrations involving complex structured financial products, and we're starting to see them in our practice. Even newer, how about arbitrations based on damages from climate change? The first one has now been filed, we know that. We had a discussion yesterday about the haze and what legal actions one might consider or not.

So this is the kind of thinking we want to promote in the second panel. The format will be

innovative as well. The idea is TED-type talks in which each panelist has the floor alone for about 10 minutes to express his or her views, without the restraint or the safety net of script or podium or interruption. I want to thank for this idea Ambassador David Carden of Jones Day. I predict the format is going to be a big success or really awful. I'm chairing the panel, not for more time on the stage but because I couldn't impose the risk on anybody else.

Our third and final sub-theme is "Mediation of international disputes. Will Asia be the leader?" This is an area where Singapore is already starting to be a leader in international commercial disputes; and potentially investor-state and state-state disputes. The infrastructure is here - the legislation, the SIMC, the SIMI - and the timing is right. There is, as you've already heard today, a crying need for more and better mediation, evidenced by the increasingly loud and legitimate complaints about undue expense and delay and inertia in international arbitration. The progress here will require vision and patience and investment, because it is not easy for us to see beyond this fixed horizon of binding arbitration and

litigation and anticipate successful mediation of complex disputes. It's fine to have a good mediator, but you also have to have two willing parties and open-minded lawyers. Singapore has a head start with SIMC's Arb-Med-Arb. We are fortunate to have an experienced and visionary panel chaired by Lawrence Boo today.

So now that I previewed for you the substantive agenda, a few words about format and process. You recall my words that we are here together to think a bit theoretically outside the box, and this makes a lot of lawyers, including me, uncomfortable. So it's important that we feel free to speak up here and go beyond the *status quo*, or why bother coming today? The Chatham House Rule will help somewhat for the external world. In addition here, in this room, it's critical that people feel able to express ideas that -- if not outright Alice-in-Wonderland-impossible -- are bound to elicit scepticism and disagreement. That is what starts transparent discussion and reform.

[SLIDE 13] You'll see some ideas shipwreck, no doubt about it. [SLIDE 14] Others will sail smoothly - we're back to a horizon picture without the haze.

Let me give you a minor, concrete example in my experience. Over the past decade, I and many others have spoken about the scandal of waiting for months or years for awards and directions from, fortunately, a minority of arbitrators who simply take on too many cases. I offered what I thought was a positive and harmless - innocuous - suggestion of arbitral institutions requiring hard data in the form of blackout calendars from arbitrator candidates, just like they ask for hard data on how many arbitrations have you chaired, how many have you done, etc.

This idea was met with some truly scornful charges of naiveté and excuses like “Oh, so many cases settle and dates change and you don’t know what’s going to happen in the future”. Some even said that to ask for calendar information would violate EU privacy law, as if the institution were going to ask for the personal reasons for unavailability, like for example psychiatrist appointments. My idea is nothing like that. It is just to get open dates, as of the time of the appointment of future availability or not. Day and weeks are to be blocked out – without detailed information -- for hearings, and for submissions for those of us who do counsel work, for holidays

that are sacrosanct. This debate went on for quite a while as many of you know and then, first ICSID, then the ICC, and now other institutions do require such calendar data. It's hard to remember that this was at one point controversial and innovative.

I am still lobbying, by the way, for institutions to require hard data from arbitrator candidates on the length of time between the close of the hearing or the last post-hearing submission and the issuance of an award. Yes, with a field to fill in why there seems to have been an unduly long period or even an unduly short period, with an explanation, because often there are good explanations - illness, postponements, suspension. This data would be more valuable to me as appointing counsel than any of the proposals on the table for arbitrator rating systems. This would be hard data. I think it could change behaviour in certain instances. I'm pretty unpopular to many for continuing to suggest this.

I'm not the only one, of course. There are many others who float ideas for improving international arbitration. Neil Kaplan, as you know, is using early opening statements, well in advance of the hearing, to guide the hearing.

Toby Landau is questioning the value of fact witnesses at all. My former partner, Jan Paulsson, has suggested that appointments should be made only by institutions to save time and expense, and appearances of bias.

Many of these ideas are unpopular and divisive, but - even if they end up shipwrecking – they prompt a valuable debate. For example, Jan's proposal, which set off a firestorm as far as I could tell, did prompt a re-examination of the party appointment process itself. Is there a right for a party to appoint an arbitrator? If so, where does it come from? Most people don't agree with the idea but we have re-examined this question of rights.

Now, believe it or not, my whole life is not international arbitration and I was reminded of the general importance of speaking up and speaking out when I was reading that same FT Weekend. (I do have other sources of information by the way, but I was thinking about preparing the keynote so I was alert to inspiration.) The reminder came in the form of two separate pieces, one weightier than the other. First, the less weighty one. Brooke Masters, who is the FT Companies Editor, had a very short column entitled "Sexism outcry

highlights the trials of female lawyers". Of course, I had to see what that was about. And in brief, a young woman London barrister invited a senior male Silk to connect on LinkedIn, the professional facebook service, which he did, with a self-admitted politically incorrect comment that her photograph was stunning. As the British say, for the avoidance of doubt, this photograph was just a headshot, her chambers photo. She then slammed him - I can't think of a better word - for misogynous behaviour, posted their whole exchange on Twitter, contacted his international law firm and demanded an apology. Personally, feminist though I am to my core, I found this an overreaction. [SLIDE 15] The editor Ms Masters did as well, but she added in her column this sentence put up on the slide, "Often, however, it takes a hardliner to start the conversation that sparks cultural change." That caught my attention with seriousness because that is true, including as to far more important dimensions of our law practice than LinkedIn.

I'm going to take you on a quick detour. Think of it as equal time. I just recounted a story about the personal appearance of a woman so I will give equal time to the personal appearance

of a man -- a man relevant, tangentially, to our Asian theme today. It comes from the same FT Weekend, in David Tang's advice column, the Agony Uncle column. [SLIDE 16] A reader posed this question to him, I'll put it up: "Your words that the Chinese, and basically Asian men in general, will never play James Bond rings sad but true. On the other hand, would you agree that Bond, even in his fictional prime, could never beat Bruce Lee?" And the answer was: "For the English, James Bond would win; for the Chinese, Bruce Lee! These are obvious natural prejudices."

[SLIDE 17] Well, I'm not so sure. I'm not so sure. So let's look. Really, I think I would pick Bruce Lee anytime. And by the way, I think that Daniel Craig looks too much like Vladimir Putin. So there you go. (I better not read this in GAR.)

More serious -- far more serious - is the longer piece, which comes from the long interview piece in the FT Weekend called Lunch with the FT. It was an interview of Judge Jed Rakoff of the US Southern District Court who has been known to take on the US Securities and Exchange Commission and our Department of Justice in relation to the 2008 financial crisis.

You need to know that Judge Rakoff is not a soft touch. He was the chief prosecutor in the Securities Fraud Unit in the Southern District US Attorney's Office for 7 years and a top leading white collar defence lawyer for another 15 years. The background here is that Judge Rakoff rejected a $300 million settlement between Citigroup and the SEC to resolve allegations that Citi misled investors in a $1 billion mortgage security. In his written opinion, Judge Rakoff objected to the SEC practice of letting corporate bank defendants settle by paying fines without admitting or denying charges. On appeal, our 2nd Circuit voided the decision. In 2014, Judge Rakoff had to approve the deal on order. He more than voiced his frustration in his opinion, writing quite colourfully that the Court of Appeals, and I quote, "has now fixed the menu leaving this trial Court with nothing but sour grapes".

[SLIDE 18] The FT correspondent wrote, again catching my attention, that: "Despite the decision" -- being -- "against his ruling, Rakoff has been credited with changing the terms of the debate" -- changing the terms of the debate -- "about financial accountability and has he's

prompted the SEC to get at least tougher on the banks."

It is a sign of a healthy justice system when judges can speak frankly, in specific in their opinions and in general publicly, about policy issues. I'm not making a direct connection but just a few weeks back, President Obama announced a new policy in the form of a memo going out to all federal prosecutors to prioritise the criminal prosecution of individual bank employees over the imposition of corporate fines, which are not hard to pay anyway.

To conclude, I hope my message - which I've tried to offer more by illustration than by lecture - is clear. You are all encouraged and safe here to say what you think is heading our way in international dispute resolution - or not, because that is just as important as saying what you think is coming. You are all encouraged to think beyond the horizon even if your ideas might sound farfetched or unpopular. And you are, of course, also invited to disagree vehemently – but also succinctly and civilly - with what others have to say.

We are busy and involved professionals, every single person sitting in this room. But since we

have come together here, I propose that, as we've done in the earlier Singapore Fora, we invest this day in exploring both possible and possibly impossible advances in our shared field of international dispute resolution, particularly advances that might be led here in Singapore and Asia, perhaps uniquely so.

There is no way we are going to run out of material. [SLIDE 19] As I said, the horizon -- there's our picture again -- is never actually reachable. Just when we accomplish something that we glimpsed or imagined beyond the horizon, if it's real, then it has come to the foreground and we have to keep looking. It can be discouraging and one can get worn out by that cycle - or one can get energised.

I conclude by saying that for today, and more than today, I vote for being energised. Thank you very much for your attention.

SESSION 1: INVESTOR-STATE ARBITRATION: ARRIVING IN ASIA OR NOT?

Welcome back, ladies and gentlemen, we will now begin the panel sessions. The first session is titled "Investor-State Arbitration: Arriving in Asia or Not?" and it will be chaired by Ms Judith

Gill QC, partner at Allen & Overy, together with panel speakers, Prof Hi-Taek Shin, Ms Loretta Malintoppi, Mr Romesh Weeramantry and Professor Chester Brown. I will now hand the time over to the chair, Ms Gill, please.

MS JUDITH GILL, QC: Good morning everyone. This is my first engagement as officially now resident in Singapore. It's a great honour and a great pleasure to be here amongst you as one of you, so thank you.

As you heard our session is looking at "Investor-State Arbitration: Arriving in Asia or Not?" and on one level, one might think that's a fairly straightforward question. There are undoubtedly a good number of Asia-related, investment treaty cases already afoot and we will no doubt reflect on some of those as we go along.

The approach we are going to take this morning is to look at the different types of provisions that one encounters, particularly in Asian BITs, and how these have evolved and will continue to evolve. We will also look specifically at the extent to which the dispute resolution provisions in BITs and free trade agreements are actually being used in practice in the Asian context. We will also consider

something that Lucy touched on earlier which is the backlash, if you will, against investor-state arbitration which we're seeing quite strongly in Europe and to some extent here in Asia as well. To what extent are there issues that we need to tackle and address and if so, how should we do that? Then, finally, we will address Lucy's favourite topic of the late-mover advantage which is probably, as she said, better seen as "first-mover advantage". To what extent can and should Asia learn from what has happened elsewhere e.g. the experiences in South America; and other geographical areas, both in terms of substance and in terms of procedure? What cross-pollination should there be with commercial arbitration? What mechanisms do we need to protect the process? What are the lessons to be learned?

We have an outstanding panel for you this morning to address these issues. They have been briefly introduced to you. Let me say a little more, you've got bios so I'm not going to go into these in any detail. But we will first of all hear from Prof Hi-Taek Shin who is a Professor of Law at Seoul National University, School of Law, and the director of the Centre for International Economic and Business Law. He has a fascinating

perspective and combines the academic side which he now pursues, but also was formerly a partner at Kim & Chang for 25 years, I believe, so brings that interesting combination of perspectives. He was also the co-chair of the commission to review the investor-state arbitration provisions in the Korean-US free trade agreement negotiation in 2006. So again, he has some coalface experience which I think will enrich our discussion today.

We will then hear from Chester Brown, who is Professor of International Law and International Arbitration at the University of Sydney. He is a barrister in Sydney, but also an overseas associate with chambers both in London and at Maxwell Chambers here. And he is widely published but notably in this context he is editor of the "Commentaries on Selected Model Investment Treaties" and also the "Evolution in Investment Treaty and Arbitration".

We'll then hear from two further speakers but I will come back and we will complete these introductions because otherwise I'm going to give you a long list and you will forget.

The format that we would like to have is an initial presentation by our speakers. We will then have what I hope will be an active, and

interactive discussion both amongst the panel and with you as members of the audience. As Lucy has indicated to us this is Chatham House Rules, so I would encourage you all to volunteer your thoughts, offer your perspectives and ideas for the future so that we really can look beyond the horizon. So with that, I will pass to our first speaker, Prof Shin.

PROF HI-TAEK SHIN: Thank you, Judith, for the very kind introduction. I am very pleased and honoured to be invited to speak at the Singapore International Arbitration Forum today. I would like to thank the organisers and Maxwell Chamber for the invitation. As a threshold issue to the question put to the first panel, I will first review the evolution of the ISDS provisions in Asia and BITs and regional FTAs and share my views with you as to whether this mirror says where and what we can expect in terms of future developments. The slide, please. Asian countries have played a very significant role in the International Investment Rule Making since the first modern BIT was entered into between Germany and Pakistan in 1959. This slide shows the high level of activities by some Asian countries in the investment-agreement making. For instance, China

has more than 100 BITs and 13 FTAs in force, most of them include ISDS clauses. Korea is next to China in terms of the number of BITs and FTAs with investment chapter. Out of 88 BITs in force, 84 of them have ISDS clauses. And 9 out of 11 FTAs in force have investment chapters which include very detailed ISDS clauses.

The investment chapter of Korea-Australia FTA concluded in 2014 includes ISDS clauses and this is the first Australian FTA that includes ISDS clauses after the recent Australian policy change. As we all know, Singapore is also very active in this regard, it has more than 40 BITs and 20 regional and bilateral FTAs. In recent years, Japan gets more engaged in the negotiation of investment agreement in the context of economic partnership agreement, the Japanese version of FTA. Next, please. As Asia encompasses a large number of countries from Middle-Eastern to Far-Eastern countries, and their practice in international investment agreement varies, my analysis in the following slides run the risk of over-simplication and generalisation with this caveat in mind. Let me quickly go over the evolution of Asian investment agreement regime and ISDS clauses.

In the early years from 1960s to mid-1990s, keen to attract foreign investment, many Asian countries concluded with BITs mostly with Western-European capital exporting countries. Majority of those BITs included rather simple ISDS clauses typically contained in a single article providing for consent to arbitration, or in some cases, mere agreement to give consent to arbitration. The first BIT which contained the ISDS clauses referring to an arbitration on the ICSID convention is known to the Dutch-Indonesian BIT of 1968. Next slide, please. This is the actual text of Dutch-Indonesian BIT which just include an agreement or to consent to ICSID or arbitration. Chinese BITs in this period limited the use of ISDS mechanism only to dispute involving the amount of compensation for expropriation. Next, please.

From the mid-1990s, Asian economies started to enter into BITs with diverse counter-parties including developing countries and transition economies. Some Asian countries such as Korea and China which witnessed growing outbound investment, recognised the need to protect their own investors and investment overseas, as well as the continuing need to offer protection to foreign investors and

investment. Most of the Asian BITs concluded in this period included ISDS clauses. As compared to all their version, the ISDS clauses tend to have more paragraph providing for some details relating to arbitration such as consultation requirement, conditions to consent arbitral institutions or rules, relationship with domestic remedies, governed law, et cetera. Next.

During the last 10 years, Asian countries have been very active in entering into regional investment agreements as well as free-trade agreements with major trading partners within or outside Asia. These investment agreements tend to address ISDS mechanism in more detailed manner in a number of articles. Some of the investment chapters of FTAs and the ISDS clauses contained therein, seems to have been substantially influenced with the investment chapter of NAFTA and US Model BIT. Why the -- all their BITs included concepts and principles embodied more than the BITs of European countries, those new Asian regional initiatives attempt to blend Asian perspectives with both the European and American elements. In a sense, we could say that Asia has become a maritime port where the rules and text developed by major European countries have been

blended with those developed in North America with the addition of certain Asian perspectives.

In this regard, the most notable development is the Asian comprehensive investment agreement concluded in 2009. And it is an investment agreement among members of ASEAN which include a number of nota -- innovative features. Furthermore, ASEAN as well as some individual member states of ASEAN entered into FTAs with China, Korea, Japan and Australia, some of which include very detailed investment chapters. Another noteworthy recent development was the conclusion of trilateral investment agreement among China, Japan and Korea in 2012. Why there exist BITs between each of them, the three countries concluded a trilateral investment treaty as a first step leading to tri-party free-trade agreement which is on the negotiation. The trilateral investment agreement co-exists with the three individual BITs, thereby adding additional layer of protection as well as complexity. In addition to this, Korea and China concluded the FTA in 2014 which has its own investment chapter.

So if this FTA becomes effective, Korean and Chinese investors would have three alternative ways to brings claims against China or Korea, one

on the easiest in BIT of 2007, another on the trilateral investment agreement, and again third, under the investment chapter of FTA. In this region – Asian region, two very ambitious regional agreements on the negotiation at the moment, TPP, Trans-Pacific Partnership, and RCEP which refers to Regional Comprehensive Economic Partnership. TPP involves 12 Asian and Pacific Rim states while RCEP involves 16 states comprised of 10 ASEAN-member states and 6 ASEAN FTA partners. Both TPP and RCEP are very comprehensive but the details of ISDS mechanism of these agreements are not officially public -- officially known yet. Next, please.

More recently, some Asian countries have negotiated or concluded investment rules with the United States, EU and Canada, which incorporated some new elements, mirroring the recent concerns raised by this traditional capital exporting countries. For instance, Korea concluded FTA with United States and Canada which have very detailed ISDS clauses. And Singapore recently initialled an FTA with EU which includes an investment chapter which -- that will replace BITs with individual EU-member states when it becomes effective. It has certain feature which are very

new, which reflect new elements. China's investment agreement with Canada is now in force and the details of the -- but Canada's investment agreement with China is quite different from the investment chapter of Korea-Canada FTA. This really means that there are these trading partners try to tailor their investment agreement and especially ISDS clauses to address their particular concerns.

All of these investment agreements we've lead certain shift to focus on policy of the United States, EU and Canada on certain important substantive and procedural aspect. First of all, with respect to the substantive contents of investment chapters, attempts have been made to rebalance the protection of invest and -- investment and the state's right to regulate and strengthen -- to regulate and also to strengthen the state control on the interpretation of treaty terms and conditions as well as the arbitration procedure is served. A force has also been made to include provisions to avoid or minimise abuses of treaty protections. These new investment agreements substantially strengthen the transparency in the procedure and also provide details on various aspects of arbitration, thereby

attempting to eliminate or reduce the discretion of tribunals and thereby the uncertainty in the outcome of the arbitration.

Let me briefly go over some of the new features relating to ISDS mechanism in this new type of agreement. Next, please. And while denial of benefits are not entirely new concept, but the -- quite a number of Asian countries take this issue very serious in order to avoid the kind of situation -- unhappy situation where home-country investors are allowed to sue the home-country through overseas subsidiary. And it has become quite a controversial issue in the Korea-US FTA negotiation. And since Korea-US FTA, Korea has included this denial of benefit clause in standalone BITs. And China and Canada F -- investment agreement even allows denial or benefits at any time included after institution of arbitration proceedings. And Asian comprehensive investment agreement has similar -- the similar concept in denial of benefits clause. Next.

And this is the clause from Canada-China investment agreement. It deals with the consent to arbitration. And:

"Failure to meet any of the conditions precedent provided for in Article 21 shall nullify that consent"

I think the intent of inserting this clause is very apparent to avoid the kind of situation we see in ***BG v Argentina***. And, next, some Asian countries also put some emphasis on local remedies and encourages the investor to resort to local remedies before it resorts to arbitration. And the language comes from China – Japan – Korea trilateral investment agreement. There is 4 month requirement to resort to administrative remedy procedures. And similar concept appears in Indian model BIT text.

Next, please. And the state's control on the interpretation of treaty terms and conditions seems to be kind of prevailing practice in international investment law. In ASEAN comprehensive agreement, there is a concept of governing law that the tribunal shall, on its own account or at the request of disputing party, request a joint interpretation of any provision of this agreement that is in issue in dispute. And there is similar concept in China - Canada at FIPA investment agreement as well as in Korea – US FTA. The idea is interpretation of treaty terms are in

the hands of treaty parties, and not rest with the tribunal.

Next, please. And also, some of the treaties, include the -- some give certain status or right of non-disputing contracting party in terms of participation in the proceeding or access to document. And this is also the languages from Korea – Canada free trade agreement and ASEAN comprehensive investment agreement, and also recent China - Canada investment agreement.

Next, please. The -- also recent trend is the investment treaties provide very well enhanced transparency related provisions. And typically, it is in the form of making publicly available awards and other documents submitted in the arbitration. And primary example is ASEAN comprehensive investment agreement. But it is quite noteworthy that ASEAN investment agreement has, paragraph 5, which includes a certain features protecting the confidential government information. So, ASEAN agreement try to cover out from some exception of governmental especially cabinet related documents from this transparency obligation. And in the case of China - Canada investment agreement, it has an explicit language that domestic law on public access to information

shall prevail over the tribunal's confidentiality order.

Next, please. And some agreements include loser pay rules as an obligation of the tribunal.

Next, please. And appellate mechanism and Korea - US FTA has a clear provision about the possibility of appellate mechanism. And Singapore - EU FTA also has anticipated that kind of possibility and review procedure.

Next, please. Then what will be the future direction? And except for a few states where apparent backlash against ISDS has emerged, like Indonesia, in my opinion, in most Asian countries cautious but positive posture on ISDS mechanism based upon the current arbitration module will continue for a foreseeable future. Under this scenario, more sophisticated and nuanced approach to ISDS is expected in future negotiation of international investment agreements to address probably concerns over ISDS system. But such patch work would serve particular probably so objectives, but it will complicate it -- the whole picture. And also in investment chapters of FTAs, lessons from trade dispute resolution might be imported or blended. I think that's what we see from the recent European commission TTIP text

having some reason belongs to WTO dispute settlement body. And then efforts to modernise or upgrade earlier BITs will continue. And under this scenario, host governments will need to carefully review potential implications under investment agreements when formulating domestic policies which might affect foreign investors. And in the meantime, I -- that Asian investors are expected to resort to ISDS provisions on a gradually increasing basis.

Next, please. And factors affecting the policy direction. As we all appreciate outcome of TTIP, impact of ultimate EU position as reflected in the TTIP. And outcome of TPP. And outcome of some of the major pending investment-state arbitration cases. Sometimes negative outcome might put the government on the tremendous pressure from the public and civil society to revisit their current policy.

I will stop here. Thank you.

MS JUDITH GILL, QC: Professor, thank you for an excellent presentation. I think that has given us all a terrific perspective and overview of the agreements and the treaties that are out there. And I think on one level that clearly answers the question of whether or not investor-state

arbitration is arriving in Asia. With that level of activity, I think it will be hard to conclude otherwise.

But let me start the discussion with -- perhaps a slightly provocative suggestion. One of the things that is really striking about what you have described is that we are dealing here with global issues. The issues in Asian BITs being addressed in the free trade agreements, and the other mechanisms, are similar issues to those that are being addressed elsewhere. And there's clearly a cross-fertilisation amongst them. But stepping back for a moment, is this iterative process really the best way to deal with it? You mentioned for example that between Korea and China, an investor has three different alternative routes for pursuing their investment dispute. At least three, possibly more. Each of those mechanisms will be drafted perhaps slightly differently, and have slightly different features. So it becomes a question arguably of treaty shopping. Do we think that's really the right and sensible way to approach this? Or should we actually be looking for a different, more coherent way of recognising and addressing in a consistent

way these global issues? Do you have some views, Chester?

PROF CHESTER BROWN: I think the answer is that there has been -- there have been a lot of assets to generate or produce a multilateral agreement on an investment, going back decades, going back to the Abs-Shawcross Draft in 1959 which is supposed to service a template after that kind of agreement. We didn't had the OECD I think in the 1960s - in 1962 and 1968. The OECD draft convention on the protection of foreign property. And more recently the late 1990s, there was the separate OECD effort to create a multilateral agreement on investment. And all of those efforts have found it, and that's not to mention, the original intention at the time. The general agreement on tariffs and trade was agreed in 1947 to having an international trade organisation set up under the Havana Charter which would also that deal with investment issues. So and the failure of those multilateral efforts have led to this bilateral -- this approach where states have sort agree -- to reach agreement on investment issues on a bilateral basis, whereas the multilateral track has worked for trade issues under the efforts of the WTO. That now -- that's not to say that a multilateral effort it will

always be doomed to fail. And that as you say it would perhaps give rise to fewer divergence as in jurisprudence, less confusion, less possibility of treaty shopping and investors face with two or three possibilities at asserting a claim under investment treaty. But I think a lot will depend on what happens with the TPP and what happens with TTIP. I think those two are going to be two very influential mega regional treaties. And if there is some element of consistency in the way that the provisions are drafted, I think that could lead to the multilateral agreement which we've tried to get a number of times but we've so far failed to achieve.

MS JUDITH GILL, QC: I suspect it depends to some extent how ambitious you are in terms of what you are trying to agree. The prospect of success may be influenced by how ambitious your agreement is. To the extent that you are trying to address what are recognised issues which are faced the world over, one would think you have rather more prospects of success than if what you are trying to do is incorporate these dispute resolution issues within a much broader, global agreement. Any other views?

MS LORETTA MALINTOPPI: I think there is a movement towards regionalism nor multilateralism, and it's a fact. I think it's there and it's probably there to stay. So I think we have to do with it at the moment. And I don't know whether the times are right before another attempt at the multilateral investment agreement that was before the OECD many years ago. Incidentally, I remember that at the time the acronym in Italian for the multilateral investment agreement was *mai*, which means "never". So sometimes, you know, what's in a name? But the question is whether the times have changed. And now we are more ready for that sort of thing. And we'll see, as Chester was mentioning, what happens in other quarters in that regard. But what I think is positive is this cross-fertilisation not only amongst different Courts and tribunals, but also, you know, within different states and different regions, the ways that people talk to each other at different levels. Recently, at the CIArb conference, Chris Thomas said that the action in Asia is at the treaty table, you know, where negotiations are taking place for treaties. And that's definitely a very exciting part of what's happening in Asia in any event. But another comment that came to my

mind when you mentioned the trilateral agreement, the possibility for investors to bring cases under that agreement is that will also require greater sophistication on the part of counsel that represent those parties. And particularly for local law firms out here who will require to keep up with more and more complex types of disputes and ways to resolves those disputes.

MS JUDITH GILL, QC: Thank you. Yes, please.

MR ROMESH WEERAMANTRY: I just want to say that the issue that you raised, you have three different options for one dispute. Is this the type of issue that will also feed the backlash? You know, you've got uncertainty involved. You've got an investor's option -- three different options. If he fell with one, can he pursue the next one or the next one? So all of this decentralisation creates uncertainty which also creates criticism. So the times are starting to turn, I think, in terms of a new view on how to centralise the process. And it's failed before, but we didn't have that sort of the public criticism which I sincerely believe that there is now: a new dimension out there now that's almost a game changer.

MS JUDITH GILL, QC: Looking at some of the specific provisions that have been considered and looking at the horizon, where else do we want to go? Is it the sorts of things that you discussed, the consent to arbitration, encouraging local remedies, transparency, joint interpretations from the contracting states? These are issues which we see in various parts of the world being discussed. Where do we think some of the other issues are going to come from? And, again, the inference of the TTIP negotiations may be a lead here. But to what extent, for example, do we think that something like the “loser pays” rule is going to become the norm in investor-state arbitration, which it isn’t at the moment? And to what extent is that then going to lead on to other provisions? Such as the source of funding needing to be disclosed, which is one of the things that the European Commission have put out there. Where do we think some of these provisions will go? Or is it actually just going to be necessarily reactive to situations which are uncomfortable? We’ve seen this over the last 15, 20 years: reacting to tribunal’s interpretations, not just in relation to procedural but also substantive measures, then leading on to further clarification in treaties.

Where do we think it's going to go? Do we have any thoughts on that?

MS LORETTA MALINTOPPI: One of the areas -- I mean, I don't want to steal my own thunder because I'll talk about it in a bit, but one of the areas where I think there's been a lot criticism and where treaties have tried to intervene and reflect on the debate is the question of the qualities of the arbitrators, the composition of arbitral tribunals. How are tribunals constituted? And the issue of conflicts of interest, independence and impartiality of arbitrators, which is rather unique in investor-state disputes. It has some elements that are not common to commercial arbitration. There are some things that concern challenges in commercial disputes as well but the issue conflicts that we see in investor-state disputes are not present as such in commercial arbitration because they do not share the same elements of publicity. And also the fact that the same legal issues are repeated, particularly during the jurisdictional phase. A number of us act as arbitrators and counsel as well, so they can be seen as acting on both sides of that divide in cases that are pending at the same time, where the parties may not be the same but the legal

issues are the same. People write and those articles may come back to haunt them. Treaties are now dealing with those issues and I'll talk about some examples later. The other thing that you mentioned is, of course, the possibility of having a permanent court of investment which has been aired in European quarters. Is that really a solution? Is that really the best solution? Who would be those judges who would sit on that permanent court? It's hard enough to find arbitrators as it is. And, of course, people talk about domestic judges in different jurisdiction in Europe and that some of us cringe a little at that prospect. But, you know, there are a number of ways in which I think BITs can intervene in very concrete terms.

MS JUDITH GILL, QC: Thank you. Let me open this discussion up to the floor for any comments or contributions that people want to make? On either of the issues. Should we be looking at trying to achieve a more uniform and structured process? And where do we think it's going in the future? I suspect many of the issues that we are discussing in this context, like transparency, the conflict that you have in treaty arbitration between individuals acting both as counsel and as

arbitrator, those sorts of issues, will probably come up as we progress through the session. So let's -- I think if there's no burning questions from the floor, Chester, shall we proceed with our next topic?

PROF CHESTER BROWN: Thank you very much, Judith, and thank you for the kind participation to participating this panel. Thanks also to Maxwell Chambers and the other organisers of the -- of SIAF. Now, if we could just move to the next slide, I'll give you an outline of the questions that I'm going to address. This is really going to the question of whether investment -- investor-state arbitration in Asia is a reality or is a mirage or is something that we're still waiting for.

The issue is whether these mechanisms are actually being used in practice. And what sort of cases have been brought using Asian BITs. And does -- do these cases indicate future areas of vulnerability for Asian states? And are any lessons being learnt?

Now, in looking at the raw data, I've been heavily reliant, I should disclose at the outset, on UNCTAD's excellent database of investor-state disputes settlement and also Andrew Newcombe's

excellent website, ITA Law. However, my past experience tells me that there is no substitute for gossip in the margins of a conference about whether claims have been brought or additional claims have been brought that aren't yet publicly disclosed. So if any of you have any further information, tell me over a cup of coffee later on.

Now, at the outset, we also -- we all -- there is this perception that we all know that Asia has been kind of playing catch up on investment treaty arbitration. There were the big boom days of the mid-2000s and all the claims were being launched against Argentina arising out of that country's financial crisis, there have been many claims against Venezuela, a number of other Latin American countries. And also, the volleys of claims against countries in Eastern and Central Europe. But there's all -- there's been this kind of perception that Asia was a sort of a desert with very few oases that were few and far between, for those interested or engaged in the practice of investment treaty arbitration. But this is, in some respects, a misconception. Because Asia is, as everybody in this room will know, but birthplace of investor-state arbitration. The

very first claim was that brought under a BIT was brought by a Hong Kong-registered company against Sri Lanka, of course, the ***Asian Agricultural Products*** case.

Now, the fact that that claim was brought under a BIT between the United Kingdom and Sri Lanka was just an accident of the fact that, at the time, Hong Kong was still one of the United Kingdom's overseas territories and the UK, Sri Lanka BIT had to be extended to that hot -- to that country. But it all started here, for those out there. And I'm not saying there's anybody in this room who would like to say that Asia is still a place that's for investor-state arbitration is comparatively unknown.

We could go to the next slide. There's a question that we have to address at the outset as well, which is a definitional question: What is Asia? Are we just talking about Eastern Asia, ASEAN, plus a few countries in this part of the world? Or are we talking about everything that's east of the Euros, east of the Suez Canal until we get to the Pacific Ocean? As quickly speaking, geographically, that does include -- that is the definition of Asia, includes all the former Soviet Republics as well in Central Asia. And so if we

look at it in this light, there have in fact been a significant number of claims against Asian states. And again, just going back to the previous slide, sorry, yes, we're still on the previous slide, there have been 115 claims against Asian states. So, there we have the league table, as it were, where nobody wants to be in top slot. Whilst India's face 16 claims, and Kazakhstan and the Kyrgyz Republic, quite a few claims as well. And then, of course, there's a few of the Central Asian Republics that have faced claims. And coming down to Indonesia. Jordan, including the Middle East. Mongolia and the Philippines. And there are others, of course. The list goes on.

So Asian states have been sued 115 times out of the 608 known claims, they are the known claims reported from the ISDS -- UNCTAD-ISDS database. So that's just a shade under 20% of all the investment treaty claims that we know about, have been brought against states who fit within the broad definition of Asia, which includes the Middle East and which includes the Central Asian republics as well.

If we take a slightly narrower definition of Asia and we exclude the Middle East and we exclude the Central Asian former Soviet Republics, then

there -- it's only -- the number comes down to 61. So about 10% of the claims that we know about have been brought against Asian states.

We go to the next slide now. Of course, we also need to factor in the claims that have been brought by Asian investors and in order to work out at how much these BITs are being used. Now, there will be some degree of overlap between claims brought Asian investors and claims brought by -- and brought against Asian states. But if we look at claims by Asian claimants, again, broadly understood, it's about under -- just under 10% of the 608 claims that we know about. Again, most of them -- well, again, in the top spot on that ladder is Turkish investors, who have brought 18 claims under BIT between Turkey and other countries. But then there's a very quick drop off to the next country, Kuwait, Jordan, both have 5, and then Middle Eastern countries, so you'd exclude those on your narrower understanding of what Asia is. And then Kazakhstan and the UAE would also fall away. So we come then to Malaysia and China. And I'm slightly cheatingly including Australia in this list as a definition of Asia, although that's probably contentious and I might agree there's a point to be made there. But you

can see that there have not been that many claims brought by Asian claimants if we understand Asia as the narrower entity excluding the Middle East and Central Asia. It's down to less than 3%. And if we look in contrast at the home state of nationality, which is used -- which is those then litigious nationalities, you see United States, 128, making up practically more than a fifth of the claims that we know about. And plenty by Dutch investors, British investors, German investors and French investors as well.

And the most frequently invoked treaties are the Energy Charter Treaty, NAFTA, and of course the US-Argentina BIT, which has been used 20 times. The Energy Charter Treaty does involve some claims against Asian states but we can see that few of the Asian BITs *per se* have been used.

Now, this is a natural development, I suppose, that Asian treaties are beginning to be used more. But there's certainly some catch up there to do, if we want to play catch up at all. And that's a -- certainly a different question. But we might recall also in this regard, and I was sort of inspired by one of Lucy's comments in her keynote presentation earlier today, that claims Crawford wrote in his foreword to Zachary Douglas'

excellent book on ***The International Law of Investment Claims*** **-** and this was in 2009, and so 6 or 7 years' ago - that investment treaty arbitration had reached the end of its first half life. That was again 6 or 7 years' ago. If we -- so if we factor in the time from the first investment treaty claim, the ***AAPL*** claim in 1987, to 2009, if that's the first half life, then it -- there may be, if we follow that logic, a decline in number of investment treaty claims that are being brought -- that will brought in the future. The boom days of the Argentine financial crisis may be behind us. States are getting wiser, as we have seen in some of Prof Shim's slides, and as the new provisions' sort of being negotiated and investment treaty claims may be fewer in future. And I think that would be something that we should expect to happen.

If we move to the next slide and look at investment treaty negotiation activity by Asian states. Now, if we look at who has the most BITs, there is only one Asian country in the top 5 or 6. China, with 130, and a 108 of those in force. Germany, of course, world champion in world cup football, also in terms of BITs having been negotiated in BITs also entered into force. The

other countries are the usual suspects one expects to see is the capital exporting states of Western Europe.

If we move to the slide -- the next slide which gives us our top-ranked Asian countries, China comes in first, of course, second in the world in terms of BITs but first in Asia. But then there are some serious heavy hitters there as well. We have Republic of Korea with 90 BITs. And there, I noticed from Prof Shin's slides earlier, that the UNCTAD database and Prof Shin's numbers had some variation so I will defer to Prof Shin. Certainly on Korea's number of BITs. There were 1 or 2 different. But we also have Kuwait, 75 BITs. That's an awful lot. Malaysia. Indonesia has a reasonable amount as well. And Vietnam has 60. And then some of the Central Asian republics have a lot of BITs. And if we put those figures into perspective, all of those countries in Asia have more BITs than the US, which has less than 50. Mexico, which has only 29. Canada only has 40. And Norway only has 15. So, moving to ASEAN, to the specific region we're on now, we'll see - which is on the next slide, if that can be brought up on the screen - three or four of those countries, Indonesia, so with 64

BITs, Malaysia with 69 and Vietnam with 60. There are some countries in this part of the world that have been very active in negotiating BITs. Some countries like Brunei, only eight. But is -- I think it's a reasonable respectable number of BITs that these countries have been negotiating.

Just to look at the broader definition of Asia and all of Asian countries' BITs, there's an interesting honourable mentions to note from UNCTAD's database and that is -- one is the occupied Palestinian territory has managed to negotiate free BITs with Egypt, Germany and Jordan. And also Taiwan has negotiated 23 BITs with a range of countries, which is a significant number for a country whose status is –- there are issues of that. But one would have to note with respect to Taiwan that the BITs are referred to in most of them that are between –- for instance, the India-Taipei Association in Taipei and the Taipei Economic and Cultural Centre in Delhi, so they're not expressed as being entered into by states, but by the cultural-economic exchange agencies that are located in each country and so -– but still, these instruments are being entered into.

Okay, now, we also can't forget the role of ASEAN and Prof Shin has already mentioned that, so

we go on to the next slide and we go on to the next slide and we look at the ASEAN specific agreements. Of course, there is the comprehensive investment agreement that was developed in –- from the ASEAN agreement on investment, promotion and protection from the late 1980s and the treaty from the nineteen -- late 1990s. But then a host of FTAs that ASEAN has entered into, all of which with, I think with the exception Japan, the investment treaty protection –- investment protection provisions, the ASEAN-Japan FTA has a provision in Article 51 that says that the two blocks will work towards reaching agreement on investment chapter. And, of course, we've got the TPP to come and the Regional Comprehensive Economic Partnership agreement which is a very exciting potential development.

The TPP, just to put into context, that would, if it comes fruition, result in a trading area with a GDP of US$28 billion and a population of 805 million people but if RCEP, as it's known, comes to fruition, which is ASEAN, plus of all of ASEAN's FTA -- existing FTA partners are –- includes India and China, that would have a -– an area with a GDP of US$21.3 trillion and a population of 3.5 billion people, so practically

half of the world's population, if not –- half of the world's population. So that is a very exciting potential development for this part of the world. So looking back as I -- stepping back from all of these practice, the number of times of Asian states were being sued, the number of times that Asian investors have sought to bring claims, the number of treaties that have been entered into by Asian states, we can say that Asian states have –- are not really in the top 10 states that have been sued the most times.

Those places are being reserved for the –- some of the Latin American countries and the Czech Republic and Slovakia, even Canada, so that's probably, you know, not such a bad thing that Asian countries haven't been bearing the brunt of these -- the many claims that have been going on. And Asian investors are also not the most litigious and that -- there may be a number of reasons for that: Cultural reasons, social reasons, the educational reasons as to the existence of BITs. But Asian BITs are certainly being used. And, of course, all the figures I've been going through don't take account of many times that, no doubt, BITs are thought to be invoked or at least threatened, but no claim ever

eventuates, perhaps because some settlement is reached. The government adopts a different approach to the measure it was threatening to take or the commercial parties of the investor is able to reach a commercial settlement with the host state.

Now, just looking quickly at a number of claims that have been brought and this will be familiar to a number of you in the room, so I don't want or to dwell on this. But the types of claims that are being brought against Asian states, of course, we have –- there're claims against states all around the world that result typically from the termination of some kind of investment contract or concession agreement or the revocation of the licences that's necessary for the investor to carry on business and to make use of its investments. So, for instance, the ***Churchill Mining and Planet Mining v Indonesia*** concerns the revocation of mining licences by the Indonesian government or the provincial -– relevant provincial government and then a number of other claims against Indonesia that have been brought by two individuals, ***Mr Al Warraq***, ***Mr Rizvi*** were -– arose out of the bail out by the

Indonesian government of a bank and the subsequent prosecution of those claimants.

As the claim against –- well-known claim against Korea, the ***Lone Star Funds*** claim which is being –- which Prof Shin no doubt may be able to add more too, but that of course concerns the forced sale by that entity of its shares in the Korean Exchange Bank. Claim against Malaysia by ***Malaysian Historical Salvors***. There have been two or three others that are brought by investor in portfolio investor, Philip Crosland(?). But this one related to dispute arising out of salvage contract between a British investor and Malaysia for the salvage of a shipwreck. The -- I went down in the Straits of Malacca.

And then many claims have been brought against India. We had India at the head of the lead table, course. One by Australian investor, concerning the failure of the Indian judiciary to provide -- or India, to provide effective means for the enforcement of a commercial arbitration award. And then a number of claims arising out of the cancellation of telecoms licences by ***Axiata, Sistema, Telenor***, perhaps others. Other claims brought also -- brought by telecoms companies that are arising out of the imposition of a tax. And

then going back about 10 or 11 years, we had the debt haul claims brought by the project construction company, ***GE & Bechtel***. They were constructing a power station in India and many -- the financial institutions, the lenders, also joined in those bilateral investment treaty claims and they were being settled.

Turning now to what lessons have been learnt, if any. We can move to the next slide. Now, of course, some –- Prof Hi has probably already touched on a few of this, but we're getting – and this is not an Asian-specific development, of course. We can see this in the US' revised model BIT, Canada's model BIT and the various FTAs being entered into by countries other than Asian countries, but we're certainly seeing Asian countries learning the lessons of others and including this language in their investment chapters and free-trade agreements which are being negotiated.

So one example is this provision on fair and equitable treatment or the international minimum standard of treatment in the EU-Singapore FTA, which is -– which is not in force, but was concluded and negotiated before it concluded last year. So here we have, I think, the most

detailed, articulated of what FET means of any FTA or BAT that I've seen. And if we look at the type of conduct which is required by the host state, as set out in paragraph 2 of Article 9.4 of that FTA. We see what is essentially a treaty articulation of the ***Waste Management*** standard from paragraph 98 of the ***Waste Management v Mexico*** award, which is an interesting treaty formulisation of that standard that many has come to accept as being the best articulation of the -- what the FET standard that it actually requires.

Looking to the next slide, we have another example of the minimum standard of treatment in Australia's FTA with Korea and this is –- reflects the language that we know from the US model BIT, simply to confirm that FET and FPS are both tied to the customary standard of treatment under international law and that it doesn't require any treatment over and above what's stated and already require to do under international law. So that lessens being put into action by Australia and Korea.

Moving to the next one, next slide, we have the annex expropriation that ASEAN has included in its FTA with Australia, New Zealand and other ASEAN FTAs as well. That articulates an indirect

expropriation will not result from a non-discriminatory measure taken by party, which is designed and applied to achieve legitimate public welfare objective such as protection of public health, safety and environment that will not constitute an indirect expropriation. And there we have really to have see Methanex statement, which is a reflection of customary international laws understood by the tre://ftr/?label="SIAF"?datetime="20150930113855"?Data="fcacd7e6"Methanex Tribunal, confirmed in treaty language in its annex on expropriation, which we see across a range of the new FTAs, almost to becoming standard practice now.

Turning to another issue that Loretta raised earlier and that's on the next slide, which is an Australia-China FTA. The investment chapter is something that you can read very quickly because it really only has an MFN obligation in it with a provision saying that there's a program of future work for Australia and China. That Australia and China will work to develop and then reach agreement on other substantive protections and, of course, there's issue that Australia and China had a BIT that's still enforced and there's going to

be an effort made to try and align the BIT into -- with the FTA to reduce overlap.

But there is a very detailed code of conduct for persons acting as arbitrators, which runs on for a number of pages, which is another development that I think states are beginning to learn this is something that you don't want to leave perhaps to chance that the arbitrators will, of course, and the parties will have reference to a non-binding guide such as the IBA guidelines, but there's something actually written into the treaties and obligations that arbitrators have the duties independence impartiality and, of course, disclosure of any potential conflicts of interest.

We'll finish with the next slide which is a picture that some of you may know, if any of you are from King Spalding, you may be familiar with this gentleman. His name is Reverend Billy and he, in the –- at the height of the protests against the TTIP and the TPP earlier this year, instead of April and May, where this was all coming to a head at the European parliament where the EU was trying to reach a decision on whether it would accept ISDS and the -- and there was a lot of –- there were demonstrations in the streets around the world: The United States, in Canada,

in Australia, in Europe, in London. This gentleman, Reverend Billy, led an exorcism against corporate greed outside the offices of King Spalding in London. He -– well, this protest was organised by an NGO called Global Justice Now. They have a website; you can read all about this.

And one felt quite sorry for the -– had some sympathy for the lawyers at King Spaulding and one of the reasons why that firm was targeted was allegedly because of the many claims that they had been involved in against states but, of course, anybody else would know that King’s Balding acts for states in defending those claims probably almost as much as King Spaulding is acting for investors. So, if we can hope to see Asian states and other states around the world agreeing on investment treaty arbitration text that reflects the balance that Prof Hi talked about earlier at the balance and obligations on states and obligations also in rights and conduct of investors, Reverend Billy might not have quite so much to talk about in the future, but that’s obviously something for further discussion. Thank you very much.

MS JUDITH GILL, QC: Thank you, Chester. Some helpful points that are also playing into the discussion

earlier, about how states learn and then implement through their specific treaty provisions. I would just like to go back to a point that you raised, and I ask this as a general enquiry from someone who has spent quite some time in the region, but now expects to spend a good deal more. I would like to try and understand the dynamics of the relationships and the extent to which, if at all, that is a driver of what we see from the statistics that you looked at in terms of the number of actual claims and the percentages relative to other parts of the world. They indicate to me at least that despite the very substantial number of treaties being negotiated, the actual number of claims materialising is at a slower rate than in other parts of the world.

I think that's fairly clear and so, inevitably, one asks the question, "Why is that?" And one of the things you touched on is the fact that parties and investors in this part of the world are less litigious. They are more likely to try to resolve issues through other means. That's one half of the equation and I'd be interested to have the views of other panel members as to whether or not that is what is driving these numbers or whether there's some other factors.

But what about the other side of the equation? The respondent states. Are there particular Asian perspectives - I think Prof Shin described it as “Asian perspective” - which actually make claims in this part of the world a rather less attractive proposition than perhaps elsewhere? Are some of the states that we’ve talked about perhaps a bit less sanguine about being the subject of a treaty claim than others where it is perhaps more of a norm? I don’t know whether places like India would fall into that category, so can we have any views on that? Yes, Romesh.

MR ROMESH WEERAMANTRY: In terms of the rate of claims being brought, I’m speaking from a Chinese perspective here. Very minimal at the moment, but I see the numbers rising. One of the reasons is specially SOEs. They tend to talk to each other and I have discussed this with some of them and they said, “Oh, you know, this other SOE, they are thinking of bringing a claim. So what about us?” And it -- and on the grape vine, they are starting to know what everyone else is doing. That’s one factor. And the second factor is that they are also being unbound by the old shackles they used to have of being accountable from above. Now they

are getting a bit more independent and they are starting to exercise that independence by saying, "Oh, we could contemplate a claim."

PROF HI-TAEK SHIN: Maybe from a Korean perspective, the first investment treaty arbitration filed by Korean investor is a Korean construction company which has suffered tremendous loss during the -- some civil order in one of the North African country and it was filed under UNCITRAL Rules. So not much is -- has been known publicly. But at that time, Korean company and their counsel felt that there is no other meaningful option or to file claim for their damages. So they filed it and then the -- it was known to other construction industries that investor state arbitration could be a really meaningful option of solution for them. So it followed others at the -- quite a medium sized construction company made a decision to file a claim on the ICSID convention against China. And what I heard is that before they filed an arbitration, really nobody take their claim seriously from China's central government of the provisional government. But whilst they filed claim, then they get contacts, all requests, invitation for meetings. So this kind of information is shared by especially construction

industries and third claim was recently instituted by another Korean construction company belonging to Samsung Group. It's now big companies, filed the claim against Oman. So I think it's all sharing of knowledge and also information and some of them overcome initial reluctance to resort to legal strategy or even the investment treaty arbitration.

So I think now those kind of sharing will continue and if there is some positive outcome, it will have -- it will encourage others.

MS JUDITH GILL, QC: Yes. So it sees it as a real forum. Yes, Jonathan?

MR JONATHAN: (Inaudible) the export crediting (inaudible) Export crediting is mainly known by (inaudible). Most of all, not only on a government to government basis so that those (inaudible)

MS JUDITH GILL, QC: Thank you. I'm conscious that we didn't have a microphone and that some of you may have missed that. I will give a very brief summary of Jonathan's comment. He was essentially drawing your attention to the role of the export credit agencies particularly noting that in the context of the concerns about the cost of investment treaty arbitration, they may have a role to play as bearing the costs of pursuing the

claim if they already paid out. There also of course will then often be a question of government to government claims which can avoid some of the difficulties where you have private parties as claimants in investor state arbitration and also may encourage resolution at a diplomatic level. Therefore this may be a good mechanism. Have I captured the essence of that, Jonathan? I apologise for there not being a greater amplification.

I think at this point we should move on to our next speaker. I said I would come back so that they are fresh in your minds and introduce our second pair of speakers. We will first hear from Romesh Weeramantry who is a foreign legal consultant with Clifford Chance in Hong Kong. His publications include Treaty Interpretation in Investment Arbitration and he's also on the ICSID Review editorial board as I understand it.

And then finally we will hear from Loretta Malintoppi who is a counsel with Eversheds here in Singapore. She's dual qualified at the Paris and Rome bars. She's on the board of trustees of the Dubai International Arbitration Chamber and she's also a vice-president of the ICC International

Court of Arbitration. So with these brief introductions, let me hand over to you, Romesh.

MR ROMESH WEERAMANTRY: Thank you, Judith. And thanks also to the organisers for inviting me. I like to try to change the picture a bit and I'm going to make a presentation that is not the most usual, if I could be diplomatic.

I like to take you to the town of Vilnius and Vilnius is a place that you would pass -- it's in Lithuania -- you would pass Vilnius if you needed to invade Russia from Paris which Napoleon did in 1812. So if I could have the first slide.

In Vilnius, there's a monument and essentially, there's a plaque on that monument that says, "Napoleon Bonaparte passed this way in 1812 with 400,000 men." Just keep that figure in mind. So this is Napoleon marching off.

Next slide, please. This is Napoleon marching off into Russia. He's got 400,000 troops behind him. He's got confidence. He's got an all-conquering army. Nothing is going to stop him. He is going to go and invade Russia. So that's Napoleon's setting out and -- so he set out from Vilnius but now if we come back to the monument, if you look at that monument from the other side, you can see a very, very different

story. You have your back towards Moscow and there are few words there which paint a graphic picture. The plaque says, “Napoleon Bonaparte passed this way in 1812 with 9,000 men.” Remember the 400,000 men that he walked past that point with, the other way.

Well, you know, although -- more than 300,000 men perished during this campaign. It’s one of the most disastrous military campaigns in history. It was a complete disaster and you will see here a very different picture. Napoleon returning without the confidence, in total devastation: His army is in tatters and completely defeated. This is the picture that you see from the return of Napoleon.

Now somebody may say that I’m in the wrong conference. So I will try to bring it back now and to our question. I’m going to pose the question about investment treaties.

We have 3,000 investment treaties at the moment, approximately that much. Now they are passing this point in 2005 and the question I would like to pose is: Then what happens in 10 years or even maybe 20 years? How many investment treaties are going to come back? And what they are going to do at the moment they are going out?

This is the question I'm trying to raise here. They are going out and essentially there is a battle going on here. It's a battle against the backlash. How are these treaties going to survive? How is this field going to survive against the backlash?

Now what is the backlash? Everyone is aware of the criticisms. The investment dispute resolution process is undemocratic. We have secret tribunals behind closed doors dealing with public issues. There's a -- there are serious, serious environmental issues, serious health issues, all of these government issues that have been decided behind closed doors. So and there are very good reasons why the civil society is concerned with this. And so the backlash is being driven by a lot of civil society. There's a lot of politicians who are very vocal and this is the sort of -- the battle that investment treaties have to face.

I'll give you two examples of this battle. One is from Australia, one's from India. The first example from Australia is: A senator, Senator Whish-Wilson brought a private member's bill before the Australian Parliament that said, "All future Australian treaties will not contain

arbitration provisions." That was the -- that was his attempt to stifle investment treaties. The matter went to a Senate committee inquiry and at that Senate inquiry committee, there were numerous, like hundreds of submissions made to the senate committee. Most of them were by non-lawyers. They were doc -- sorry, there were dentists, there were nurses, there were religious groups. There were organic gardening enthusiasts writing one paragraph saying how bad investment treaties are, how bad investment arbitration is. There were not many lawyers writing in, giving another picture about what the advantages of investment treaty are and investment treaty arbitration give. In the end, the committee actually decided, "No, no, we -- you know, we cannot have a policy where we have a blanket prohibition on investment dispute resolution provisions in future treaties." But what was lacking there was the voice of lawyers who participate in this area.

Sam Luttrell and myself made one submission and we were quoted in that -- in the senate committee report at the end but I do note that there were many others that the committee could have used to make their findings but that was

lacking. So that's something that is an issue in my view, the lack of participation by lawyers in this field in the war against the backlash, rather it's war with the backlash basically. I'm not saying the backlash is wrong in total. There are many good points that are raised there but what I'm saying is the people or many who articulate the backlash views, they articulate it in a sense that it's -- we as lawyers are not -- we don't address what's being said out there in a proper way. And lawyers need to actually start realising that these organic gardeners, I mean, organic gardening enthusiasts, the nurses, the dentists, they are influencing politicians and that needs to be addressed.

But the second story from India. India has passed a model BIT and again India had a process where on the internet, you could actually make comments on the model BIT. Again hundreds, hundreds of comments by civil society, hardly any by lawyers; and one of the only groups that made a comment there in -- saying, "Well, maybe you have to have a look at this BIT from the perspective of an investor." There was one substantive comment made and it was by a group of four Indian law students. There were no lawyers actually writing

in saying, “Well, hold on, take a look at the advantages.” So again, that’s another instance of what’s happening out there. So, and I know that more and more, there has been a movement towards getting the legal position out there and having a proper legal debate about it. But I think that needs to be done much more.

So in terms of what’s happening again in Asia, you have Indonesia, you have a very well-known attempt -- Indonesia to say, “We’re going to actually now terminate our Dutch BIT and look at other BITs.” So again, in Asia, there could be that side of the backlash being expressed. But from the other side, you have, say for example, we’ve talked about the ASEAN comprehensive agreement. There hasn’t been a good deal of backlash against that. And ASEAN is going out and negotiating more and more treaties like this.

China. China is now looking at its investors -- actually investors overseas -- and looking towards protecting their investors. So that sort of backlash is not really expressed by China.

So in Asia, I think, that there is a good deal of support for investment treaties and there are instances of comments adverse to investment treaties. But what I find in Asia and this is

very different to the world, is we don't -- we haven't and hope -- yet had an Argentine -- Argentina type of crisis or some regulatory decision that actually triggers masses of claims. We haven't had that. We've had tobacco, I suppose, from -- in Australia which has created this -- a lot of conversation about the issues involved. But we haven't had a trigger that creates multiple, multiple claims. Maybe that will happen, maybe it won't happen but that may influence it. And again with the debate especially in Asia, what will trigger the debate are claims, claims bring more -- like the ***Philip Morris*** case -- that will actually get more and more people talking about it. But as I said, before, it's very important that lawyers talk about this as well and make the debate a robust debate, not just people who are expressing their feelings -- and they are well-founded feelings -- but to express a more articulated legal debate about this issue.

Now in terms of the future, what I see is there is a -- what's going to happen? Chester was talking about what's been happening in Asia. I see a number of things happening. We've got TPP that may come in and Asia will be affected by that

significantly. We have these issues about transparency and this again is linked to the backlash. Investment treaties need -- and it's saying this -- they are being much more open. They are taking notes of what the backlash said and they are opening it up. You have the new UNCITRAL rules to permit transparency and you have the Mauritius Convention that states will be signing up to permit transparency in arbitrations.

The other topic, I think, that especially in Asia, that hasn't been debated - and Lucy mentioned it last night - conciliation and mediation. I mean, is that more fitting to an Asian perspective than pure arbitration? And that needs to be looked at a bit more. Whether it happens or not, that remains to be seen but that could be something for Asia as well.

The other point is -- it's addressing the backlash again -- when you talked about having an investment court. So you have an investment court to try to harmonize the decision-making, you have consistent decision-making, and the argument is you have more independent tribunal making these decisions. It will be open. It will be more transparent and democratic. So maybe that's another thing that Asia may look into. And you

know, what you -- we have the Washington Convention. We have the New York Convention. Well, maybe a Singapore Convention on an international investment court. But that, you know, that they are being expressed in treaties for governments to discuss this or maybe an Asian government could take this up and look at it in much more substantive way.

So if -- I just would like to round off by going to the next slide. So what I see here is when these investment treaties go often to battle with the backlash and come back, I don't see the confidence that Napoleon had when he marched off into Russian, right? It won't be like that but you still have, you won't have the losses. The next slide, you definitely won't have the losses that Napoleon incurred. So investment treaties will be there. They may be there in a different form but they still will be there. They are not going to disappear. So we'll need to sort of -- we'll be discussing this in 25 years. I'm certain of that. We'll be discussing investment treaties. But what I do see is probably a more cautious picture -- a more reflective picture. So you know, you have BITs but what they will do is they will be looking at what the backlash is. They

will be taking into account what's been happening, what issues there are and adapting to them. There won't be striding off with confidence saying, "Whatever we do, we'll fix everything." But they will be much more cautious, much more -- there will be more introspection and reflection. And I thought the World Investment Report, this section in the -- 2015 World Investment Report summed it up. It said, "This is an era of reorientation" -- it's an era of reorientation and that's what we are looking at. It's basically a reflective era in investment treaty practice. So I leave it at that to encourage some discussion.

MS JUDITH GILL, QC: Thank you. It's obviously a very topical subject at the moment, and is even referred to as the "backlash". We have to keep in mind that a lot of the issues, particularly the transparency issues, the concerns about investor-state dispute resolution being conducted by secret tribunals appointed without public input, without public accountability, these are not new concerns. I recall going to visit Antonio Parra at the ICSID offices in Washington in, I think, probably about the mid 1990s and he was quite excited because there had been a recent article published in the New York Times which had

given prominence to these sorts of views being expressed. I think it was initially on a public broadcasting service in the US but was then picked up by one of the most influential newspapers in the country. So the issues are not new. And many of the concerns being expressed are not new. But I think there can be no doubt there is a real momentum now behind the objections and the biggest concern is that it has become a debate which is being conducted by those who are not necessarily best informed, which is not to say they are wrong but they are perhaps not as well informed.

One point I'd like to pick up with you, Romesh, is that you gave the two examples of how, for whatever reason, lawyers are reluctant actually to engage in these debates. Isn't the bigger problem that the corporates, the investors, are not standing up to be counted? We as lawyers, can have this discussion, and belatedly, particularly in Europe, that has started happening. But the problem is we are seen as self-interested. Similarly, for the arbitrators involved in this type of work. But the people who I've always felt really should be standing up and being counted in defence of investor-state arbitration are the corporate investors, the

larger companies, the large conglomerates who want to be able to pursue business activities in parts of the world where actually the treaties may provide important protection. So the question, to my mind, is also, "Where are they in this debate?" Do we have a view? Am I misguided in this or are they missing from the table? And if so, why?

MR ROMESH WEERAMANTRY: I agree that that voice is missing from the debate. And part of that is also you hear the bad examples, you hear the tobacco claims or you hear, you know, claims by supporting nuclear power when the governments try to regulate it. But what you don't hear of are the bad war stories, the investor goes into a certain developed states --

MS JUDITH GILL, QC: Yes.

MR ROMESH WEERAMANTRY: -- and finds, you know, incredible situations that you wouldn't imagine.

MS JUDITH GILL, QC: Yes.

MR ROMESH WEERAMANTRY: And without investment treaties, there is no recourse and you don't see that. You don't hear that side of story and I -- you know, I do – and say but sometimes governments, you know, act very, very unfairly. Some governments act very fairly but there are

other governments that don't. But that side of the picture has not been painted.

MS JUDITH GILL, QC: And is that because that side of the picture doesn't capture the imagination of the public, or that element of the public who are engaging in the debate?

MR ROMESH WEERAMANTRY: And it is -- this is from my personal experience. In fact, if I didn't get involved in some of these cases and represent some of these clients, I would -- I won't believe what has happened in some of these cases. And so I can understand people who don't see that side of the story because they are not exposed to it. So I think, it's the investors who go through it and it's the investors who looked at BITs to protect their investments when they are structuring their investments. And it's the lawyers who represent them and see the bad stories that need to come out and get that view across.

MS JUDITH GILL, QC: Yes. I suspect this is a topic that we could discuss for a very long time. But I'm going to slightly accelerate things because I want to make sure that we don't run out of time for Loretta. I invite her to make her presentation now and then we can continue the discussion after that. Please.

MS LORETTA MALINTOPPI: Thank you, Judith. Thank you very much to the organisers for inviting me to participate in this very interesting debate. I'm going to reflect with you a bit on this notion of late mover for Asia and we've seen how at the same time at least couple of Asian countries were early comers to the scene of investor-state arbitration. It is a fact that Asia, in a larger sense of the word, seems to be somewhat lagging behind the rest of the world in sheer numbers of investor-state arbitrations. But what we see here, as Prof Shin noted earlier, is that there is no shortage of treaties and free trade agreements including regional agreements that have investment chapters involving Asian countries. And if we look at the most recent UNCTAD data, although there has been a decline in the new BITs concluded in the region overall, of the 11 new investment agreements signed in 2015 so far, more than half - seven - involved at least one Asian state with Japan alone entering into four such investment agreements. Given that the overwhelming majority of these treaties provide for some form of investor-state dispute settlement, including arbitration, it appears that, for the time being, the backlash against investor-state dispute settlement does not

seem to have reached Asia, or at least not to the same degree as elsewhere, and not for the time being. Instead, the most recent investment treaty practice in this part of the world shows that Asia has sought to find its own answers to some of the problems that have arisen in the practice of investor-state arbitration in other parts of the world.

It seems that more sophisticated and innovative ISDS provisions have been introduced in the majority of these treaties. I will not look at the substantive protections in this brief overview but just limit the attention to the procedural aspects. And just to give a very quick overview, there is a variety of arbitration rules that are foreseen as options for dispute resolution, not just ICSID arbitration rules. There are conditions precedent - consultations, limitation periods - to the submission of a claim to arbitration. There are waivers of the right to initiate or continue domestic litigation or other types of dispute resolution, the so-called “no U-turn” waiver provisions. There are detailed provisions on conflicts of interest of arbitrators including codes of conduct and other aspects which I will deal with in a minute. There are

provisions on the role of non-disputing states in the interpretation of the underlying treaties, and there are detailed provisions and entire sections on transparency which is an increasingly sought after aspect of the process, and as well as the possibility, which has been alluded to at the beginning of the panel, to resort to a bilateral appellate mechanism to review awards on questions of law.

With the limited time at my disposal, I will just focus on three of these developments, starting out with conflicts of interests, expertise and experience of arbitrators, codes of conduct and then moving on to the role in the non-disputing state in ISDS, including the possibility of *amicus curiae* submissions and finally I will say a few words on transparency.

The debate on independence and impartiality of arbitrators has taken a very different overtone in investment arbitration, and it appears to have important repercussions in treaty making and treaty drafting in Asia. First, because it has led to the introduction in certain of this investment agreement of lists of arbitrators that are pre-selected by the parties, and agreed by the parties. In particular, China and Australia have

agreed in the investment chapter of their FTA which was signed in 2015 to form a standing body of 20 arbitrators, of which five are appointed by each party and 10 of different nationalities are selected to be on standby as possible presiding arbitrators. All of these will be available to determine claims under the treaty. So, rather than having a permanent investment Court, the idea is to have standby panels of arbitrators.

But the really interesting aspect for me is the institution of codes of conduct which add to the already existing rules on independence and impartiality and conflicts of interest that have been adopted by arbitral institutions and also by professional associations, notably by the IBA, with the guidelines on conflicts of interest which were recently amended. For instance, if we look at the EU Singapore FTA as of May 2015, we find a novel way to provide for the duties of arbitrators who should not only be independent and impartial, but also “avoid creating an appearance of bias and impropriety”. Further, arbitrators shall not “be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing party or fear of criticism”. Also, arbitrators should not

directly or indirectly incur any obligation or accept any benefit that would in any way, interfere, or appear to interfere, with the proper performance of his or her duties.

The notion of avoiding creating the appearance of bias and impropriety" corresponds to the idea that justice should not just be done but be seen to be done. This is a concept that has become increasingly central when it comes to the duties of arbitrators in ISDS. At the same time, this notion is also puzzling because it is difficult to pin it down particularly in the absence of a reference to a particular standard. Should this be interpreted as objective impropriety in absolute terms, or should it be regarded as subjective? In other words, should this be impropriety in the eyes of the parties in a specific case or situation including a specific cultural or geographic reality? But it seems that the conditions or the standards for arbitrators to respect in this kind of situations have become more and more stringent than in existing codes, or guidelines such as the IBA guidelines on conflicts of interest. But in the code of conduct of the EU Singapore FTA, there are more duties for arbitrators, such as the fact that an arbitrator

cannot use his or her position to advance any personal private interest and must avoid actions that may create the impression that others are in a special position to influence him or her. Lastly, arbitrators must avoid entering into any relationship or acquiring any financial interest that is likely to affect his or her impartiality, or that might reasonably create an appearance of impropriety or bias.

From the perspective of somebody who appears as counsel in ISDS and also sits as an arbitrator, I think that it is becoming more and more difficult, and eventually even impossible, for people who act as both arbitrator and counsel to continue doing that. These duties are a very tall order for potential arbitrators since they are under the obligation to avoid a whole array of objectionable situations as well as the appearance of being involved in such situations. This is rendered all the more difficult by the fact that arbitrators have a continuing duty to disclose any objectionable situations, including the appearance of objectionable situations, throughout the duration of the proceedings. One of the issues that is not often addressed is the issue of conflict checks that have to take place within law

firms. These are obviously of great importance because the conflicts situation needs to be monitored throughout the duration of a case. Arbitrators have to be vigilant and report objectionable situations at any stage of the proceedings as soon as they become aware of them and are expected to make all reasonable efforts to become aware of these situations. The consequences may be quite serious.

The third development that I wanted to point out is that some Asian treaties provide that arbitrators have to have experience in public international law, international trade or international investment rules or the resolution of disputes arising under international trade or international investment agreements. This is the case of the investment chapter of the Canada-China FTA which is on the screen now. The relevant language is highlighted on the quote.

By contrast to this language, Article 14 of the ICSID Convention does not require a specific knowledge of public international law. Under the ICSID Convention, arbitrators should be people of high moral character and recognised competence in the fields of law, commerce, industry and finance. At first sight, if one looks at the provision

specifying that arbitrators should have public international law expertise, it may seem that it would unnecessarily limit the pool of individuals from which arbitrators can be drawn. However, the second part of this sentence allows also the possibility of having expertise in the resolution of disputes arising under international trade or international investment agreements. This in essence includes in the number of arbitrators, not just individuals who have that particular expertise in public international law, but also persons who sit as arbitrators in investor-state arbitrations, regardless of whether they have specific public international law training.

Next, I will address the question of binding joint interpretation and the intervention by non-disputing states, including the possible submission of *amicus curiae* briefs. Normally, the home state of the investor will not, by definition, be a party to an investor-state arbitration under the provision of investment treaties. Nevertheless, the home state of the investor has an important role to play and is by far not the odd man out in investment arbitration. You will recall the situation in the ***Sanum v Laos*** UNCITRAL case where the crucial jurisdictional

issue was whether the underlying BIT between China and Laos also extended to Macau, so as to vest the Tribunal with jurisdiction over the claims. The state of the investor, China, had not expressed its views on the interpretation of the BIT in question and there hadn't been any joint interpretation of the two states in the course of the arbitration. The tribunal ruled in favour of its jurisdiction and then Laos sought to set aside the award before the Singapore High Court and produced in support of its application as evidence an exchange of letters between the Lao Foreign Ministry and the Chinese Embassy in Laos, stating that the Laos-China BIT did not extend to Macau. So, the Judge of the High Court of Singapore had the benefit of the view of the two contracting states, something that was lacking in the case of the UNCITRAL tribunal. On that basis mainly, the Judge decided to set aside the arbitral award.

While a discussion of that case is outside of the scope of my remarks, it provides an interesting example of how the role of the non-disputing state may be very important in the interpretation of an underlying treaty and the role of the two contracting states may be a game changer in investor-state disputes.

If it is accepted that, in principle, the state of the investor or a non-disputing state party to an investment treaty may play a role in the interpretation of that treaty, then the question is: how can that be done? Some recent investment treaties in this part of the world provide answers to that question. There are, of course, already recent agreements that provide a methodology and foresee the possibility of interpretation of the contracting states through a joint committee. This is the case of the Free Trade Commission in the NAFTA, and which is comprised of cabinet level representatives of the state parties and can adopt interpretations of the agreement that are binding on arbitral tribunals. The 2004 US model BIT also contains a provision that is similar to the NAFTA mechanism. There are also examples of treaties, like the 2012 US model BIT, that provide that the contracting states themselves may issue a joint decision declaring their interpretation of a provision of a treaty which is binding on a tribunal.

In Asia, we have examples of both types of situations, with provisions that either allow both states parties to the relevant BIT or a joint body constituted by members from the state parties to

issue interpretations that are binding on the tribunal. An example of the first type of provisions in Article 10(26) of the investment chapter of the New Zealand-Malaysia FTA. Pursuant to the request of either the tribunal, the disputing investor or a state party, a binding joint interpretation of the state parties may be issued. A similar provision is contained in the ASEAN-India framework agreement.

Under the Australia-China FTA, the Tribunal can request a joint interpretation which must be submitted within 90 days of the request and then the parties act through a committee on investment. The establishment of this committee is a requirement under the FTA and the committee meets upon the request of either party. A decision of the state parties acting through the committee is binding on the tribunal and any decision or award issued by the tribunal must be consistent with such a joint decision. The Singapore EU FTA also envisages a similar type of body called the Trade Committee.

As you will appreciate, it appears that a number of Asian agreements have endorsed the position that interpretation of an investment treaty by the state parties, including the

non-disputing parties, the state of the investor could enhance clarity and provide predictability with respect to the interpretation of these treaty provisions. But joint interpretation, be it through a committee or the joint interpretation of the two states, is not the only way that a state can provide guidance on how a treaty should be interpreted. In circumstances where the two states cannot agree on a point of treaty interpretation, the question arises as to whether the non-disputing state can also submit a *amicus curiae* brief with respect to the interpretation of a treaty. Now, this question seems to have been answered in the affirmative, at least according to some treaty practice in Asia. Again, this is not unprecedented as the NAFTA contains a provision, article 1128, stipulating that a party to the Agreement that is not a disputing party to a given case may, after notifying the disputing parties in writing, make submissions to a tribunal on a question of interpretation of the Agreement. The UNCITRAL Transparency Rules also provide that a Tribunal, after consultation, may allow submissions on further matters within the scope of a dispute from a non-disputing party to the treaties.

But let's see some examples from Asian treaty practice. Under article 27(2) of the Canada-China FTA, the non-disputing state has the right to attend any hearing and, upon written notice to the disputing parties, may make submissions to the tribunal on a question of interpretation. Some of the ISDS provisions of the Asian BITs that I've looked at specify that the non-disputing state party, or an entity that is not a non-disputing party, may file an *amicus* brief if the tribunal considers that certain circumstances exists.

The provision on the screen, article 11(25) of the Australia-Korea FTA list three factors that the tribunal should consider in order to allow an *amicus* submission. If this provision sounds eerily familiar is because it's drafted in the same terms as ICSID Arbitration Rule 37(2)(c). But if you focus on the aspect of the "significant interest in the proceeding" which is highlighted on the slide, arguably, the home state of the investor will have a significant interest in the interpretation of the underlying BIT and should be able to satisfy, in fact, all the conditions that are listed in this provision. As in the case of this example, many other treaties in this part of the world also provide that submissions by a non-

disputing party should not disrupt the proceedings or unduly burden or unfairly prejudice any of the parties.

Although the theoretical possibility of a non-disputing state filing an *amicus* brief has always existed, in practice, states have not often availed themselves of that possibility. This may be changing as the European Commission in particular has been using the means of *amicus* briefs more actively in order to provide its views on the relationship between Intra-EU agreements and EU law. In addition, the United States has made at least a couple of *amicus* submissions under the US-Peru Trade Promotion Agreement in the ***Renco v Peru*** UNCITRAL arbitration.

So it would be I think particularly interesting for us here to watch the Asian space to see how these provisions may be applied in future cases involving Asian parties.

Lastly, I will address the matter of transparency. That's very much one of the topical issues in this field. Transparency naturally segues from the question of *amicus curiae* briefs. It is often said that Asian states prefer to keep their disputes confidential and avoid confrontation. Therefore, it's interesting to see

that in this part of the world, there seems to be no shortage of very detailed provisions concerning transparency, including provisions regarding the publicity of proceedings and the publicity of documents adopted by tribunals in arbitral proceedings.

That said, some Asian states, while supporting in principle the notion of transparency in investor-state arbitration, have still expressed some reluctance and maintained a number of reservations regarding the UNCITRAL Transparency Rules. In particular, during the discussion for those rules in the Sixth Committee, Singapore raised its concerns "over instituting processes which would facilitate interventions by non-governmental organisations in investor-state arbitration". Singapore's representative further warned that the application of the transparency rules to existing treaties would amount to a unilateral change of the investment environment after investments had been made and would, again I quote, "demolish the certainty of the rules applicable to these investments".

By contrast, China has adopted a policy of open support of the UNCITRAL Transparency Rules and the Convention. This may reflect a grown

acceptance of transparency by China as shown, in particular, by the investment agreement it signed with Canada in 2012. This BIT contains extensive provisions on transparency including the obligation to publish arbitral awards, subject to the redaction of confidential information, and the authority of Tribunals to accept non-disputing parties' submissions.

It is also interesting that hearings can be open to the public. Hearings can be open to the public if, after consulting with the investor, a disputing contracting party determines that it is in the public interest to do so. And again, there are provisions as to the protection of confidential information and the possibility to hold portions of the hearings incamera.

I've been told that I have a minute and that's all I need to conclude. I would just say that, although investor-state arbitration in Asia has not experienced the same level of growth encountered in other parts of the world, Asian states appear to have been actively reforming their BITs and investment agreement, particularly in developing more sophisticated and mature ISDS provisions. So, arguably, this is the late mover advantage that Asia has been able to profit from.

It is interesting that Asian treaty practice, rather than join in the backlash against ISDS, or promote the establishment of permanent courts or investment tribunals rather than arbitral panels, has tried to react constructively by reforming the process and providing its own answers to some of the most burning issues that have led to criticism of ISDS.

So, if we are looking beyond the horizon, as Lucy has invited us to do from this Asian advantage point, I think there may still be hope for the future of ISDS. And I still would like to hear from Romesh as to who Napoleon is in your analogy.

SESSION 2: INTERNATIONAL COMMERCIAL ARBITRATION: IS ASIA PART OF "INTERNATIONAL" OR IS IT NOT?

MS LUCY REED: We have set out in the conference outline the following introduction: “As foreign investment increases in Asia, there is much talk about how Asia needs increasing expertise in international commercial arbitration. The talk tends to ignore underlying questions, some of which are inconvenient.” We have set out four questions in the outline. The first one has to do

with Asian law societies and bars; the second, with the international arbitration community being open or not to Asian arbitrators and advocates; the third, a reciprocity point as to whether leading international arbitrators and practitioners overlook the growing reality that they need Asia as much as they think Asia needs them; and fourth, a general cultural sensitivity question.

The plan is for our panellists to address various permutations of these questions in the form of "TED Talks". For those of you unfamiliar with that format, "TED" stands not for a person but for technology-education-design. A TED Talk is a short talk given by an expert on a topic of his or her expertise, standing alone on stage for 20 to 30 minutes with a handheld microphone walking around.

Our version will be a little different. We are not talking about technology-education-design, at least directly, but rather about international dispute resolution. Each talk is 10 minutes, using hand mikes. But the challenge is the same – we have asked all the speakers to express frank, forward-looking, potentially controversial views on the basis of their personal expertise and

experience. We are dividing the panel before and after lunch in hopes that these questions will trigger discussion over your lunch tables.

We start with John Rhie. John is, in my book, a poster child of internationalism. He hails from Korea. He's now the managing partner of the Hong Kong office of the US litigation-arbitration boutique, Quinn Emanuel, formerly a partner with Kim & Chang in Seoul. So, John, I give you a mike - tell us what you think about all these issues.

MR JOHN RHIE: Okay, I'll try this. [USING SAMSUNG PHONE FOR BULLET NOTES] Thank you everybody and organisers for allowing us to be up here. It's a fantastic stage. I feel like a Shakespearean actor, a very bad Shakespearean actor. I want to sort of take away a little bit of my thank you away from Lucy for giving us this opportunity to be on stage, walk around, act like a very poor man's Steve Jobs, rest in peace. Unfortunately, I have no product to sell and I can show you what we can do with these snazzy products but, in lieu of that, I will -- and the irony is that our firm represents Samsung in the smartphone's war against Apple. And in that light, I will try and really do technology and try and use this as my notes.

Steve Jobs is probably rolling in his grave right now but I will use this and try and discuss a few points in a T-E-D or TED fashion as Lucy mentioned.

The discussion point that I'm going to do is the second question, and that's how and when will the international arbitration community be really open to Asian arbitrators and advocates for non-Asian disputes. You know those -- the terms used and various words used in that question are well beyond my intellect. For instance, in relation to Asia, I know Chester struggled with "What is Asia?" I have no idea; I don't even where it starts and stops - north, south, east, west. I think it's -- yes, there's 4 billion plus people in Asia speaking hundreds of different languages and that's only in China. And so it's very difficult to pinpoint and homogenise what is Asia in relation to this question. And I think the same thing for, for instance, international arbitration community, I don't know what it is, I hope I'm in it but I don't know how that's defines. And certainly the easiest thing that should be defined, which I find the hardest personally and that's Lucy defined me as an international person. Look in the mirror, I look

Asian, I'm pretty sure I'm Asian, but 30 years of my life has been outside of Asia in "western world". I have been educated outside of Asia. I work in a US firm; I'm married to a Korean person. I don't really know what I am. The more I think about it, it's more confusing. And I really struggle with this question because -- I don't know, how do you -- how do I deal with issues that are not defined, and I can't define them. And I think ultimately where I got to was -- actually the real answer in my view is the answer that leads me to not be able to define these words, which is that this is an issue way beyond arbitration. And this is a social-political issue in relation to the changes that are happening in our world where the "western powers", if that's the right words, are moving towards the east. The economic growth which leads to a bigger voice and at some stage will trickle down to our humble legal profession where we will have a bigger voice, and Asian, however that's defined, will also have a bigger voice. Now, I think that's the ultimate answer and so it will take time, and I think Lucy mentioned that where people from this region will have more voice and, therefore, will have more of a say and become more and more

involved in disputes which are not “Asian”. I suspect Lucy didn’t really invite me to answer that question that way. I suspect the question that she wants me to answer is the same one but I think intonated in a different way, which is how and when will the international arbitration community be really open to Asian arbitrators and advocates for non-Asian disputes, which obviously implies that it’s not really open. And I think in short, there’s some truth to that. I can’t define it, I don’t have statistics for it, but I think it’s not necessarily a defined prejudice or a limit in relation to a glass ceiling. But perhaps human nature, all other issues that relate to things that again I cannot define. That lead to maybe it’s not really open. At some stage will it be open, I think so. Will it be in my lifetime? I’m not sure. I think those are things that are beyond me and perhaps more broader philosophical and like I say social-economic questions. But I think what I can turn the question around is to say, “Why should it be open?” Why is there a presumption that it should be open? Like -- our firm like many firms, like Freshfields, we have international offices. If there’s a dispute between a European company and a European company,

I'm not really sure why I would be involved as a, quote, unquote, Asian, I wouldn't be involved. But if a partner of ours in D.C. had work that had related to a Chinese company or trading company, I know I will be involved because there's a nexus there. So then the question is, if there is no nexus why are we even implying that there should be some sort of a link with a specific region or specific people to bring those people into a dispute. I don't think there should be.

I'll try and think about arbitrations that I've done throughout my career where it may raise an eyebrow vis-à-vis this question. I can think of one very good example, and that was an arbitration I did a few years ago. We were acting for an international consortium for light rail. And it was against a Korean municipality, a Korean city, basically government. The arbitration was seated in Korea, the law was Korean. The language to be spoken was English and Korean, so basically, Korean. The arbitrators, I'm presuming race is an issue here, there were three Caucasians from Britain, Australia and France. So, I thought about this yesterday but, terrible memory, I can't remember exactly why this happened. Thinking about it now, the issue was specifically about

PPP, public private partnerships, and more specifically about light rail. And we got the best people for that, people who really understood PPP, who really understood light rail, and who really understood the issues that would arise from this arbitration -- the construction, the project site. Now, whether they were white, black, yellow, green, I really wouldn't care because I have a duty to the client to bring out the best person. Some of the takeaway points from that for me, for today's talk, were that if you are really good you will be involved. I do believe that. Because being in an American firm, you know, the bottom line is money. And if you can win, and if you can do a good job, then you will be chosen. In relation to the expertise, that's one takeaway point that I actually learnt whilst looking at this question. Be an expert in something, IP work for instance. There are not that many IP specialists in arbitration. So if I become the guru of IP and also have the arbitration experience, whether the dispute is in Latin America, whether the dispute is in Europe or the US, I'm confident that my fellow international arbitration community members, if I am one of the experts, I will be part of a panel or I will at

least be discussed as an appropriate person to be either the advocate or the arbitrator.

Now, ultimately, I think -- the client's going to love this. The product placement here in relation to Samsung, I feel is actually a good microcosm of how we-- we Asians, I'll use "we" today -- can go into the international community more. Samsung did nothing. They did nothing and everything 20 years ago. They made clothes as well as electronic goods, basic electronic goods. But they decided to do a few things which I think we can learn from. One, they decided to focus on tech. So they became expert in a specific area. Two, they invested a lot of money in R&D and education. And again, I think Lucy mentioned in relation to education and providing training for up-and-coming lawyers or even lawyers in this region, they did that. They became great marketers. And the commercials that Samsung does, they were fantastic in the US. I think that's also a lesson that we need to learn from this region in order to market ourselves outside, and to show people how good we are vis-à-vis not just Asia but internationally. And I think, finally, they make damn good product now. I mean I wouldn't have bought this frankly if they were a

client a few years ago. But it's very good. And I think ultimately if you are very good, if you have expertise, if you put yourself outside there, I don't think that there is a glass ceiling or necessary prejudice to stop anybody from becoming as good or even better than their international counterpart. How is that? Thank you very much.

MS LUCY REED: I knew I made a good decision in asking John to go first.

There was a question about timing in what you said that reminded me of why I posed this question, namely that you don't expect to be involved if there is not a connection. Yet the core of people from whom we select arbitrators are the best, often regardless of objective connection to the parties. When we select an Albert Jan van den Berg or Gabrielle Kaufmann-Kohler, there does not have to be a connection to where they come from or their background. It is a question of their quality and experience. So, to some extent for Asia, it is a question of timing, growing a bigger local group where the "connection" is pure merit and experience.

Next, we go to Minn Naing Oo who is well-known here in Singapore. He's the former CEO and Registrar of SIAC, and now is a partner with Allen

& Gledhill in his home country of Myanmar. I have asked him to focus on the questions and also on a whole new area for us, which is international dispute resolution in Myanmar in the future.

MR MINN NAING: Thanks, thanks very much, Lucy. John is certainly a hard act to follow. Let me just start by saying thanks everyone for being here and thank you, Lucy, for having me on the panel.

Coming back to the topic at hand, I thought maybe I'll just start off by giving you an introduction on what's been going on in Myanmar in terms of arbitration, and the prospects for arbitration in Myanmar. It's of course in many ways a real market of interest, an investor's darling, right now, and companies are rushing in to provide goods and services. But – and of course I suppose that includes us as arbitration practitioners, what does it hold for arbitration practitioners and arbitrators? And I think the prospects are quite good -- I would say better than quite good for a couple of reasons. So just to set the landscape, the Myanmar Arbitration Act currently in force is from 1944, it's the Arbitration Act of 1944. From the title, you will guess that it is outdated, and it is. And it's also -- the world has moved on since then. And

what the government has done in the last year or so is to start the process of having a new Arbitration Act come into force.

So a draft was done, a couple of revisions were made to it. I was involved in the drafting of that law. And it was put into Parliament, it's based on the UNCITRAL Model Law, it's taken inspiration from the UK Arbitration Act and the Singapore Arbitration Act. And so it's a pretty modern piece of legislation and it would be bringing Myanmar into the realm of modern jurisdictions if the law would be passed. Unfortunately, as the law was crossing through Parliament, parliament ended a session about 2 weeks ago for campaigning to start for the elections in November. So it didn't make it in time this time around. I'm hoping that it will be considered again when the next Parliament comes in February next year.

Some of the features of that Act, what you might expect in a modern arbitration bill, you've got. It's got both international and domestic arbitrations being governed by the same Act. And there's a default, there's going to be a designated appointing authority for arbitrators under that Act, and it's expected to be the main

business chamber to be more efficient in the appointment process. The default number of arbitrators will be three. I had suggested one but I think the Myanmar business community and the government felt that it would be fairer to have Tribunals of three, even for default positions. So that's what it is. So we will have a modern piece of legislation in Myanmar hopefully early next year. And that lays, I think, the groundwork for arbitration prospects in Myanmar.

The second thing is, quite interestingly, arbitration is quite familiar to the Myanmar business community and to the government agencies. Most, if not all, of the government contracts in Myanmar that involve foreign parties, would have an arbitration clause -- maybe not all but many. Of course it now refers to the 1944 Act but in time to come the arbitration clauses would refer -- if it's passed – if an arbitration is seated in Myanmar, to the new Act. Increasingly, arbitration is becoming more popular. Arbitration outside of Myanmar is getting more popular as well with places like Hong Kong and Singapore being named in the clauses. So there is a general acceptance of arbitration as the means of dispute resolution in Myanmar right now. There is also a new investment

law which recognises arbitration. In fact, it has a grievance mechanism for disputes involving investors and the state.

To conclude on the prospects for arbitration in Myanmar, I think the prospects are bright, I think there will be greater use of arbitration. In fact, there are already a couple of cases. I think that one of the things that gives confidence is the recent highly-publicised ***F&N*** case where the Myanmar military government-owned company ***MEHL*** actually won the case against ***F&N***. And it was seen by a lot in the Myanmar community thatMyanmar parties can actually go to international arbitration and win. I think that gives confidence to people in the mechanism of arbitration.

Now, to come to the question that I have been asked to look at more directly, I see it as looking at three factors, the economics, the governing law of contracts and of course the expertise that needs to reside where it should reside. I think for the economics, it's quite clear that Asia is growing, Asia is where a lot of the action is, when other regions are slowing down. If you look at a place like Myanmar, people are rushing in to invest. So the economy seems to

dictate that arbitrators, whether they be from Asia or from elsewhere, should be looking at Asia. It is an important region and it's a huge region, huge population, huge resources, huge investments coming in. And intra-Asia trade as well should not be ignored because that's really a lot of the money being made and spent.

And so the economics seem to dictate that arbitrators should be looking at Asia, and you see that happening, right now. You see more and more of the arbitrators from Europe and America coming over to Asia, you've got law firms setting up here. I think the number of law firms that are basing their offices in Singapore for instance, show that Asia is becoming an important region driven by economics.

The second point that I think is significant is governing law. If you look around, in most of the contracts that I have now seen in transactions that I'm working on, if it's not the law of the host country where the investment is being made, the contracts will have either English law as governing law, as the most popular one, US -- New York law, and at least in this region coming third would be Singapore law. But English law by far dominates whichever nationality the parties happen

to be. And so once you have English law or New York law as the governing law, then I think it's obvious that it dictates to a large extent which law firms you're going to be using, which arbitrators you're going to be using, if disputes will arise.

I think that in that sense at least, so long as the contracts are going to have governing laws that are not necessarily from Asian jurisdictions, you will have arbitrators who will be needed with that legal expertise, who will be needed in Asia.

The third point that I would just discuss very briefly is expertise. There's no questioning that the pool of experts, the body of knowledge, has been longer established in Europe and in the West if you like in general, than in Asia. So expertise to a large extent will reside more outside of Asia. And in that sense, again I think that Asia probably still needs the arbitrators from outside of Asia a bit more than the arbitrators in Asia in that sense alone.

On balance, my view is that the economics will continue to drive the growth, and as the body of expertise grows in Asia -- and we are seeing it grow -- this will drive the growth of a body of arbitrators in Asia and who are Asian. The

governing law aspect, I think, is something that could go either way. There are more and more, like John says, Asians in US, UK firms who are practising English law, New York law, and a lot of the arbitrators I think will be from this region going forward.

Those are my observations on this and thank you once again for having me here.

MS LUCY REED: Thank you.

(Luncheon adjournment)

MS LUCY REED: Thank you. We are going to start again with Michael Hwang, SC, who is one of the Singaporean pioneers in international arbitration whom I mentioned this morning. Michael actually is the inspiration, though he didn't know it, for the topic for this panel.

MR MICHAEL HWANG, SC: "To be or not to be? That is the question." There are three reasons why I open with that remark. The first is, that the last time I was in this hall, I was sitting over there and watching a live performance of Hamlet. Second, as you know, all advocates are frustrated actors. And so this is my one chance. And the third, it actually has something to do with what I am about to say. Now, under question 1, I make 2 points. The first point is this: I think our

government is a little ambivalent on the attitude to the role of foreign practitioners, foreign arbitration practitioners, in the practice of international arbitration in Singapore. Now, when we reformed out Legal Profession Act, we in effect said that we are opening the door to full foreign participation in our arbitrations which are seated in Singapore. But there is a caveat or there is a qualification, which is that while foreign practitioners can practise arbitration in the sense of giving advice, handling the case, filing the papers, arguing the case before SIAC, they are still precluded from appearing in our local courts when there is a court application that arises from a Singapore seated arbitration. So, this is the part that I find a little anomalous. And the question really, I'm putting it the other way, not why should they be justified in going to our local courts but why not go the whole hog and say, "If you can do an arbitration in Singapore, then you can deal with that arbitration from beginning to end". Because what happens now is that, if a foreign firm is arguing a case in SIAC or ICC but seated in Singapore, and you need to go to court because you have an urgent application for provisional measures, you need a setting aside,

you need to remove an arbitrator, that -- the foreign firm will then have to hand over the case to a local firm who will then run that part of the case in the Singapore courts.

Now, historically, the reason why we have said that we don't want to -- we want to keep litigation the exclusive preserve of Singapore-qualified lawyers. And the position -- or the justification for that has been that it is because we want to keep the development of Singapore law in Singapore hands. That rationale doesn't really apply in the case of international arbitration. Because in international arbitration, when you go to court to enforce your rights one way or the other in the arbitration which requires a court order of some sort, the matters that are going to be canvassed before the court are not questions of substantive Singapore law, unless of course the governing law is Singaporean. But even when the governing law is Singaporean, what is typically argued before the courts are not questions of substantive domestic Singapore law but questions of Singapore arbitration law. And Singapore international arbitration law is taken from international models. We have our Model Law, we have the New

York Convention. And most of the arguments are going to be about issues that are raised under those international laws. And by definition, the foreign arbitration practitioners who are engaged in the practice of international arbitration in our arbitral tribunals in Singapore are going to be as experts as a Singaporean on those aspects.

Now, Singapore wants to make itself an international hub for international arbitration. And of course we want to promote the jurisprudence of our own courts because this will eventually, of course, be broadcast to the world. And as it is, we already have a very substantial body of case law on the Model Law which is contributing to international jurisprudence on that subject. So when you want to aim for those heights, why is it that we don't make available of the best resources that we have who -- available in Singapore? So that's the first point.

The second point I want to make is a different one. But it's still about, what is the position of foreign arbitration lawyers now when we have the SICC? Now, this is not clear from the words of the legislation. And I know that this was not seriously discussed in the working party that drafted the legislation and the rules

governing the SICC. But the way that the SICC is set up, foreign lawyers have a role to play in it. And the three criterions are: First, the case must be international and commercial. And that's not a problem for most of the commercial arbitration cases that I have heard in SIAC or other tribunals seated in Singapore. The third requirement for a foreign lawyer to be able to handle that case is that the case must be offshore. And offshore is defined as having no connection with Singapore at all, or if it has a connection with Singapore, that only connection is that the governing law of the dispute is Singapore law.

Now, if you fall within that definition, how do we look at applications to the court under the International Arbitration Act? Because that is an independent action of its own. And when you file that that can theoretically be filed by a foreign practitioner. First of all, he's got to get registered with the High Court as a foreign-registered lawyer for purposes of the SICC. Depending on his qualifications and experience as Counsel, he can be given either full rights of audience or partial rights of audience. Partial rights of audience is when he's allowed to

submit to the Court on certain specific points of foreign law on which he is expert. In other words, you have to get an Indian lawyer to argue an issue of Indian law. But the Indian lawyer cannot argue the whole case procedurally but only on the legal points.

Now whatever it is, how do you get an arbitration case into the SICC? There is no obvious gateway so you have to piece it together from what is in the legislation right now. One of the ways that you can do it is of course if both parties, if both counsel in the arbitration agree that they want to keep hold of the case and carry on the fight into the High Court and the Court of Appeal, then they can agree and they jointly file an application. And the application would be for that case to be declared an offshore case. And if it's declared an offshore case, then it would -- it should go into the SICC. Theoretically, the SICC or the High Court can decline but I don't see any reason why they should if both parties want the right to argue.

Now, more likely scenario is that one of the parties will want to carry on with the case, have control of the case and conduct of the case all the way through instead of bringing another

lawyer. The other lawyer, for whatever reason, does not agree. But even then, the lawyer -- the foreign lawyer who wants to take his case into the international -- into the High Court or the SICC, can theoretically achieve that objective by filing a declaration in Court that the case is an offshore case. Once he has made that declaration, he will be allowed to argue that application. And it -- of course if he is successful in the application, then he carries on with the case. At least theoretically, he qualifies. Now because the offshore case -- any cases going into the SICC go in as of right if both parties agree. But if one party doesn't agree, then it's left to the High Court to determine whether or not it fits all of the criteria that the High Court are looking for before they transfer a case to the SICC.

So this is a very quick summary of where we stand and I think some clarity could be welcomed. Let me now turn to question 2. Now in this connection, I asked SIAC to give me some statistics for 2014, and I asked them two questions. First question, "In how many cases where there was not a Singapore party involved in the arbitration was a Singaporean arbitrator appointed?" Answer, "Something like 51 per cent."

Second question, “In how many cases where there was no Singapore party involved did the parties choose a Singapore lawyer -- law firm, a Singapore-based law firm?” I didn’t distinguish between offshore and local firms, so I just asked them that question. And the answer came back, it’s something like 13.6 per cent where -- sorry, it’s something like 47 per cent where one of the parties appointed a Singapore-based firm. And when both of the parties, despite the case not having any connection with Singapore, chose a Singapore lawyer, it’s about 13.6 per cent.

Now, on the face of it, these figures are quite staggering. I mean, when we started the SIAC, we wanted to open it up to the whole world and one of the selling points is that you can bring your whole team with you, you can run the case just like you would run it in London or New York or Paris or Geneva. And yet we find that over the years, we have acquired such a reputation that now, people who don’t -- would not, in the first instance, think of engaging a Singapore lawyer even though it was a Singapore-based arbitration, are now doing so voluntarily. Of course a lot of these clients, I suspect, would be coming from places like -- well, basically from

countries which do not have lawyers experienced in international arbitration. And therefore, when they find that the case is going to be heard in Singapore, they start enquiring around.

Now that demonstrates to you one thing which I think we ought to pay attention to when we start to predict the future of our arbitration bar in Singapore and how we develop our reach beyond the shores. I am following what Chester said. In fact, he pre-empted my point. When you talk about going outside of Asia, let's decide what we are -- what -- exactly area we are talking about. And I suggest to you that realistically speaking, let's look at our backyard. And our backyard is essentially East Asia and South Asia, and no further. Middle East, CIS states, and now this fanciful name for all these Central and Eastern European states which can't make up their mind which -- what they are, may now call themselves "Eurasia". And so I think we're going to exclude all of that for the moment and just focus on, you know, what is our true hinterland.

And in that, I think the Singaporean law firms and I'm really now talking about the local firms because offshore firms actually are governed by different metrics because of their global

client pool and their global resources in termin -- in terms of manning, setting up teams for particular arbitrations. The Singaporeans have to rely just on their one source. Now, what is the future of the Singapore bar in going outside of Singapore itself to find cases for them to practise in? In other words, arguing cases before Tribunals outside of Singapore. And let's keep it within East and South Asia. Well, I think a couple of years ago for another talk, I polled the big four firms in Singapore and asked them, "Just tell me of your arbitrations, how many per cent are actually conducted outside of Singapore?" Again the answer to me was a bit surprising. The answers ranged from between 5 per cent to 10 per cent of their case load in arbitration, were actually argued outside of Singapore, beca -- places like UK, Hong Kong, China, Malaysia. I suppose these are the usual suspects.

So we already start with some kind of momentum which I think we can develop. And why do I say that? Well, just a couple of quick reasons. The first reason is this, if you think about it, in this region, this hinterland of ours, I think we, and arguably being challenged by Hong Kong, have the strongest arbitration bar. I mean, we

have cultivated the art of advocacy by developing the role of the senior counsel, and I think that has made a huge difference to the standard of advocacy and the capabilities of our advocates. Of course Hong Kong would say, well, they have a divided bar and they have barristers and they have quite able counsel, which may be true. But frankly, I have not seen Hong Kong firms outside of Hong Kong, you know, plying their wares in India or wherever.

So we have, you know, that advantage of a very strong bar compared to, let's say, the bars in the Philippines, Vietnam, Cambodia, even China. But -- and there are other competitors but the dynamics are a bit different. We just have to go out and try and find cases where we already have some relations with the clients, typically let's say in India because a lot of our firms here developing links with Indian firms. But let's compare our position with that of, let's say, Korea. Now, Korea is a big exception to my statement that Singapore has a more experienced arbitration bar than most Asian countries. Their bar is very strong, particularly their international arbitration bar. They are excellent lawyers, very well-qualified, many of them come

back from the US. John Rhie is, you know, excellent example, completely fluent in English. But John perhaps apart, most of the international arbitration bar are focusing on Korean clients, but then they have a huge advantage over Singapore because Korean construction companies are everywhere. And so, I think the -- what the Korean bar is trying to aim at is to say, “When you go abroad, don’t forget to take us along with you.”

Now unfortunately, our Singaporean firms are not of the same mind. I can imagine that our Singaporean firms get involved in arbitrations in places like Brazil where we have quite a lot of investment. And if they have an arbitration, I don’t hear any calls back to Singapore to, you know, “Send us a team.” So these are things that we have to gradually change the mindset and try and get more support from our own. I asked GIC for example -- sorry, not GIC, Temasek. I said, “When you go abroad and you -- do you try and write in SIAC arbitration?” And they say, “Well, you know, we can’t really because they see us as a government department and therefore they think that SIAC is connected with the Singapore government so we actually can’t get SIAC into our

clauses. And what is more, they are not actually taking our lawyers with them. I think this is a pity and -- but some of course of our commercial clients, purely commercial clients, are going out to countries like China and obviously Malaysia and that's where I think our law firms have been able to get some business in developing their overseas wings.

So all of this, I think, is auguring well but I think we at least ought to think about how we can emulate Korea's example in gathering nationalist loyalty which is of course based on confidence on the competence of their own lawyers. And the next interesting competitor to watch is going to be China. If Koreans are all over the place, the Chinese are already there and increasing in ever-greater numbers. And of course, they would very much like to bring their own lawyers out into the far reaches of this world where they are going to be negotiating for arbitration clauses. But historically, of course the Chinese bar has not had a great deal of experience in international arbitration, but that is changing fast. You know, I have been to China up to this year, once each year of the last 3 years. This year, I've gone four times. And on

each visit, I can see the standard of English in the local lawyers increasing rapidly. 3 years ago, you sit in a room like this, half of the people will have earphones for simultaneous translation. The next year, it was down to a quarter. The last visit I made to Shanghai, zero, nobody was using earphones. Of course it was a specialist audience but still, I mean, it does indicate a rapid change. And then don't forget the dynamics of the way that the Chinese firms are expanding themselves and of course -- highlighted of course by King & Wood Mallesons.

When King & Wood Mallesons merged, you know, first with Mallesons & Stephen Jacques, and then with SJ Berwin, they immediately acquired this huge English-speaking capability and as well as the arbitration experience. And now you will see in many cases where I see Chinese parties as parties to an arbitration, King & Wood will be appearing particularly if it is outside of China and Hong Kong. So we've come a long way but there's still a long way to go. I'd be very pleased actually to hear the experience of the people on the ground. Cavinder is around somewhere, let him tell us where we are heading and if he agrees with me. Thank you.

MS LUCY REED: Thank you, Michael. We will turn to Amanda Lees, our Australian colleague with Simmons & Simmons in Singapore and a fellow of the Chartered Institute of Arbitrators. And as Amanda comes up, I'll mention that unfortunately, we lost our panellists Utku Cosar, from Istanbul and Zia Mody from Mumbai to urgent business, and will surely miss viewpoints from those parts of Asia.

MS AMANDA LEES: I'm afraid I couldn't give up the notes totally so I've got one piece of paper here so I can hopefully keep on track. So as many of you know and those of you who don't would guess from my accent, I am Australian. And so as Chester's already alluded to, sometimes depending upon the Australian PM at the time (they keep changing) or depending upon the definition used, I'm in Asia or I'm in the rest of the world. So I think straddling that divide between Asia and the rest of the world and having now lived in Singapore nearly 4 years, hopefully you'll indulge me with a few observations as to the question that we've been posed: Is Asia part of international or not? And I'm going to look at it from the perspective of diversity. Now, as many other people have said in other conferences, diversity is important. Why is it important? Why is it

important to get away from, I think the joke goes: the pale, male and stale breed of arbitrators. No offense intended. Because a diversity of arbitrators and counsel leads to a diversity of thinking and a diversity of approaches. And so, at ICCA in 2014 there was a very long session about diversity, in which there were statistics given about how many arbitrators come from Western Europe, North America, I think it was over 70% for arbitrations conducted by the ICC, even though the disputes heard involved parties from a far more diverse range of countries and involve far less than 70% of disputes from Western Europe and North America.

And so, there was a call to have more arbitrators from Asia, more arbitrators from South America, more arbitrators from Africa to increase the diversity of the pool of arbitrators and counsel available globally. On the flip side, as Michael's already alluded to, in Singapore they recognise the importance of having diversity when they look to, "How can we make Singapore an international dispute hub for the region, if not internationally?" They recognised that they would need to increase the diversity of counsel and arbitrators involved here. They encouraged

international law firms to come in and as a consequence, there are increasingly numbers of prominent arbitrators, many of whom are in this room, who've come to the region and are now living in Singapore, which is terrific.

So we now have a real group of notable home-grown Singaporean arbitrators such as Michael, as well as imported prominent arbitrators. And that has increased the attractiveness of Singapore as a seat. So, personally, I think that Singapore and Hong Kong both have an opportunity to lead the world in becoming centres, arbitration centres where there's a true diversity of arbitrators and counsel. Now, why do we have that opportunity that perhaps there isn't in other places? Because we have a great locally trained bar, as well as having a lot of foreign lawyers, as well as having an increasing number of meaty disputes. And, hopefully, that combination will mean that an increasing number of arbitrators from this region will sit with arbitrators from other parts of the world and those people will see, "Look, hey, there's some great talent here. We should be appointing them elsewhere in the world."

I don't know, perhaps that may well be a bit of a pipe dream but in any event, we can make where we are the best that it can be. So how are we doing in terms of diversity? And this is where hopefully, the slides will now magically appear. Ah-ha, so first of all -- and they've even made it prettier. They've done very well. First of all, looking at how's the SIAC doing in terms of diversity. Looking at SIAC Tribunal appointments. The first thing you'll notice is that 32% come from Singapore. And now I've taken this -– ripped this off from the SIAC annual report. I love that annual report as it has more statistics than any other institution, and they're all freely available; you don't have to subscribe to a bulletin to get them - it's always an interesting read and I think these tables are interesting to look at.

So it's a big percentage from Singapore. Now, why might that be? Obviously, if you look elsewhere in the annual report, 49% of the new cases last year were governed by Singapore law, so there's a big reason for why you might appoint more Singaporeans. There are still a lot of cases, I think it's about 41% that are under a million Singapore dollars. So in small value

cases, you're going to want arbitrators who are actually at the seat in order to decrease the costs that the parties are going to have to pay. And there's also still a huge percentage of the parties involved who are Singaporeans, so I think it's 147 out of 222 of the new cases involve Singaporean parties. Then who else is getting lots of appointments? The British are doing very well with 22%. Australia surprisingly has 13%. Be interesting to see whether now America might go up and Australia might go down with the changes at SIAC, but Malaysia is doing quite well with 8% as well.

But one thing you'll note from this is that there are not many arbitrators appointed from other parts of Asia. China only represented 2% of the appointments and 2% is roughly two appointments. Yet, there are 22 panel members located in China, exactly the same number as there are located in Australia. So if we can turn to the second slide, now we look at party appointments and here it's even less diverse. 62% of the party appointments were Singaporean counsel. So, in fact, I think Singaporean arbitrators are actually doing pretty well. Interestingly, parties are less keen on British

than SIAC and more keen on Europeans. The Austrians have been doing quite a bit of marketing and it's obviously had an effect with 6% of the appointments to arbitrators from Austria and 3% to those from Switzerland. But it is roughly the same number for Malaysia. But again, a very low percentage from other Asian countries.

And in particular, what I wanted to note was the low percentage from other Asian countries, especially the civil law ones. Now, if we turn to the next slide, the SIAC panel. Now, for some reason, the SIAC panel is set out by geographic location, not by nationality. So, 114 members are based in Singapore, which is 28%, but not all of those are Singaporean. There are a number of British included. And, hopefully, some time there will be more Australians as well who are, you know, listed as being in Singapore but are obviously not Singaporean. But as you can see, quite a bit over half come from Asia, Australia or New Zealand, so are located in this very diverse and big region.

The 96, they're all the people from Europe, from the Middle East, from Africa, from South America. I couldn't be bothered to put in the numbers for each one of them because I had to make

up this graph. Unfortunately, they don't have one of these in the annual report. But what I thought the shame here and where Singapore -- where we -- I think we can do more to increase diversity is the little one down the bottom "Other ASEAN". And these are the ASEAN civil law countries of Indonesia, Philippines, Thailand and Vietnam. There are only 13 arbitrators on the panel that come from those countries. And yet, there are a lot of parties from those countries that use SIAC arbitration.

Singapore is already doing an excellent job in many ways in capacity building, particularly in the developing countries. I'm involved in the Chartered Institute of Arbitrators, as are a number of you, and CIArb, and SIArb I know as well, go out and run courses in Cambodia, the Maldives and at other places to try and increase the knowledge base about international arbitration. SIAC has gone out and run events. But we need to obviously to do more. NUS run the arbitration academy and get government employees from those countries to come along and learn about investor-state arbitration. But how are we going to increase the actual good commercial arbitrators who come from those jurisdictions? And I think

that is a challenge if we're really serious about making it Asia that we're talking about, not just Singapore or Hong Kong.

I think, if from big law firms, there's more we can do in terms of secondment of talented lawyers from those places, training them and then sending them back and giving them the opportunity to get arbitrator appointments. But, I'm sure many of you probably have better ideas than I do about how we might be able to do this. And, obviously, South Korea is a good example of a civil law Asian country that has been able to build up an arbitration bar, as Michael already mentioned. So there's no reason that just because it's a civil law country that we can't help to facilitate the same growth in a bar there.

Finally, turning to the next slide -- gender diversity. Now, this is a depressing and familiar story. There's absolutely no divide here between Europe and Asia. It's exactly the same story. So on the SIAC panel, we have 8%. If we turn to the next slide, on the HKIAC panel, just slightly worse at 7.5%. I'm sure that there are more than 33 talented women out there who can qualify to be on the panels in Asia because there's an awful lot of cross-over between the women on the SIAC panel

and the HKIAC panel. There must be more, but this is something where I don't think there has been much debate about this in Asia and particularly, in Singapore. We need, in terms of being part of the arbitration practitioners societies here, we need to make sure that there are women on our boards and that there are women speaking at events.

Lucy does a fantastic job with all the events she is involved in at making sure there are women speakers and I've been a great beneficiary of that, so thank you to Lucy. But all of us have a responsibility. I was on the organising committee of the Chartered Institute of Arbitrators conference and this was one thing that came up and we said, "No, we've got to make sure that we've got a woman on each panel." And yet, I'm going to be critical here. The SIArb, unfortunately for the second year running, does not have a single woman chair for the signature event that they run, which is the SIArb symposium. It's a great event and a great deal of care is taken in choosing the chairs to ensure that there's diversity of views in terms of people coming from outside Singapore, but gender seems to have been a blind spot. And

I'm not sure that that would be acceptable elsewhere in the world.

So, you might say, "Well, why does it matter? Why does gender diversity matter at conferences?" Because conferences is where we debate ideas, it's where we talk about practical issues to do with arbitration and it's important to have diverse views and diverse thinking. To not have groupthink. So, I personally think it's very important and I think there's some way in Singapore for us to go in relation to that as well. All of us have the responsibility of encouraging young women to be arbitrators, to get involved, to seek appointments and to be mentors to them.

I don't know about you, but I got into this game because of diversity. I got into it because the parties involved were diverse, they came from different legal cultures, they are international. I got into it because there was the opportunity of being involved in an arbitration community that was global, that was more exciting. So, I hope that we can make Singapore a real example of somewhere where there is a vibrant open debate about arbitration ideas and issues and has a real diversity of arbitrators and counsel going into

the future, so that it is the sort of place that will attract people to want to come and be here and people who want to arbitrate their disputes here. Thank you.

MR CAVINDER BULL, SC: I'm just glad that Lucy did not say that I was going to deliver my 10-minute spiel in verse because I'm not that good. I thought I would share my ideas, my impressions on the first question: How and when will Asian law societies, bars and courts be really open to international expertise? Pretty much a loaded question, let's all agree about that. I don't know about all the Asian bar associations. I don't know about all the legislation from different countries. So I'll start with Singapore and I think Singapore is a pretty open jurisdiction, whether that's compared to other Asian countries or compared to non-Asian countries. As Michael has mentioned, in Singapore, anybody can do international arbitration, any international lawyer can do that. There are no regulatory hurdles, no qualifications needed. So arbitration, totally open.

The courts, now with the SICC, international lawyers can participate. There, all you need to do is fill out a form. There's a small

administrative fee. It's a very simple process to get registered. Yes, the number of cases in the SICC is modest. We're now in the first year but that's a division of our High Court and there's entry there. But the other divisions of the High Court as well as our Court of Appeal, international lawyers have had access to that, albeit through an admission process, you have to get ad hoc admission permission from the court to appear before the judges there.

The test for that used to be that the expertise that counsel had was not available in the local bar. That's, I think not a bad test. Look back at the question. When will Asian legal systems be really open to international expertise? But that's not the test anymore. In Singapore, admission for ad hoc admission for, let's say, somebody wanted to bring in Queen's counsel from London or senior counsel from Australia to argue a case, expertise not being available at the local bar, no longer a pre-requisite. There must be a reason and there is still a barrier but you just step back and think about that for a moment. All arbitration is open. There's access to the courts in some measure and the test has been made easier to satisfy over time. That, I think it's a pretty

open system. I don't think you get that in many mature jurisdictions.

Now having said that, I'm not saying that Singapore is totally open. I'm just saying that Singapore's quite an open legal system. It wasn't always like that and it's been a journey to get here.

Thirty years ago, any case of any substance when it came to a trial, Queen's counsel will be instructed from London. He will fly in or she would fly in and they would do the trial. And that meant the local bar had a more difficult time acquiring the skills that you need to get to the next level. That was 30 years ago but the test, the ability to bring in foreign counsel, was made more difficult. The test was changed, the legal test was changed and then it became very difficult and the local bar had to step up to that. And one of the reasons for doing that, the policy makers tell us, was to develop the local bar and there has been an entire generation of Singapore lawyers that have benefitted from being forced to learn the skills that we all enjoy practising.

All of you would have heard the Attorney-General, V K Rajah, people like him, the Chief -- our Chief Justice Sundaresh Menon, Justice Steven

Chong, Law Minister, Mr K Shanmugam, these people all in the same professional generation coming up at the time when clients, if they had a case in Singapore, they did not have the option of bringing in international lawyers to do their cases. Of course you have to have people like them who step up, take on the challenge and learn. But as time went on and as the Singapore bar became more confident of itself and acquired a certain critical mass of skill, the test has been lessened and we've gotten to a much more liberal standpoint which I have described just now.

I rehearse this history to make two points: The first is, looking again at the question, Asia's a big place and different countries are at different stages in their journey. Singapore is more open than some other countries and Asia is not one homogenous whole as far as this question goes.

The second point is about the journey. When we look at certain Asian legal systems and we may characterise them as more closed to international expertise, that may be because they are on their own journey. Yes, sometimes their journey takes them down the wrong road or so we think, but there is a development that needs to happen before this

is a realistic proposition to discuss in respect to some countries. But regardless of which stage of that journey an Asian legal system is in, I'd like to offer two suggestions about how international expertise might be more welcome.

The first one is this: Have expertise. There are lots of fakes in Asia. I'm not talking about the handbags or the watches. If you are honest with yourself, you will smile and think to yourself, "Yes, I have seen one or two of them." The one I like to reminisce about is there used to be a Queen's Counsel who used to come to Singapore to do advocacy training for a lot of law firms until it was found out that that person hadn't done more than two or three trials involving cross-examination -- and that's not really bringing expertise. But if you have expertise, if international lawyers really do have expertise, well, lawyers like to win, clients like to win. If you have expertise, if we have expertise, you are going to be welcome. Real expertise, not a poor proxy for it. Being from Freshfields, doesn't make you someone with international expertise. Lucy Reed isn't giving the keynote address to this conference because she's from

Freshfields. She gave the keynote address because she's Lucy Reed.

It isn't good enough for lawyers to come to another country and say, "I am for such and such a law firm. I'm from Sullivan and Cromwell or Freshfields or Drew & Napier." It isn't good enough. We have to be real.

The second suggestion I'll make is this: There has to be an appreciation of community. When we look again at the question of law societies, bars, these are professional organisations. They were created because these institutions help self-regulate. They help people come together to better themselves, to teach the younger members of the profession as well as to put restraint, natural communal restraint on behaviour that can get out of hand when in the middle of an argument, a debate, a submission before the court. And yet sometimes we see that international lawyers stand apart.

Now I'm not saying join the community, donate money to pro bono in Singapore or play tennis for the bench and bar games. All that's good and fine. I'm talking about putting one's professional reputation at stake in the place that you're at.

Judith, at the start of her panel number one said that this was her first professional engagement since moving to Singapore and she said she was looking forward to it because she was doing this now as one of us. She's placing, I think, her professional reputation here. But fairly often, we do see lawyers coming to another jurisdiction and they pull stunts in the courtroom or before arbitrators that they would never pull back home.

Now I have to tell another story. A few years ago there was a law firm, an international law firm, two partners of whom came to see us and they said, "Well, we are setting up in Singapore for the first time and we really like to be part of Singapore." And they didn't use the word "community". But they were talking about the same thing and I admired that sentiment. Of course they did it for professional reasons. They thought that that would advance their office in Singapore. Over the last three years, those two have been true to their intent and they have staked their reputation in Singapore as well, and I won't mention their names because it would not be right, but they are the sort of people that are easily welcomed. And I just think that if we have

a greater sense of commitment to the community we are coming into, the professional community we are coming into, staking our reputations alongside the people who practise in that jurisdiction, we would be that much more welcome. That's my two cents' worth.

MS LUCY REED: Thank you. By the way, I learned this morning from Joan Janssen of the MOJ that there are now two cases at the Singapore International Commercial Court. So double what there were during the keynote.

Let me introduce next Matt Skinner, a partner at Jones Day here in Singapore who divides his time between arbitration and mediation. English or Australian?

MR MATTHEW SKINNER: Australian

MS LUCY REED: Another Australian.

MR MATTHEW SKINNER: Well, I'll just clarify that. You can say I am English but I practised in Australia for about seven years and was fortunate enough to be granted citizenship. So dual citizenship there.

So I'm going to be talking today. I'm really addressing question four -- so that's in the context of cultural diversity and I'm very happy to say, and I think it's been reflected in some of

the things that people have said already, is that one of the great things about international arbitration is that it is culturally diverse. If we just look around this room today or look at the panel or if you think about the last matter that you acted on, the fact is that as international arbitration practitioners, we are often dealing with parties or with opposing counsel or with arbitrators who are of a different cultural background to ourselves and that, I think, is a very positive thing and it's probably one of the reasons a lot of us actually enjoy what we do. But that does give rise, I think, to a very significant question as to: "Well, what does that actually mean in practice and also how does it affect the way that we operate or how should it affect the way that we operate?" And in this respect, and when we are talking about cultural diversity, I'm not talking about whether a certain hand gesture is offensive or whether it's offensive for someone to show you the soles of their feet, if any arbitrator did that, I think everybody here would think that was extraordinary behaviour. What we are actually talking about is the conflict or the difference between legal cultural systems and how they come together and

how do we reconcile them. And the biggest problem is that we all obviously come from a particular legal system, we were trained in that legal system and that legal system has a set of norms associated with it which have arisen over a long period of time. Obviously the legal systems themselves, it might be civil law, it might be common law and it might be customary law or it might be Islamic law. Similarly, if we practise in certain industries, the construction industry has a particular approach to resolving legal issues. Some might say that they are more amenable to resolving matters by way of ADR. If we look at shipping law, for example, they have a whole language almost for themselves and they have particular *fora* that they like to utilise. And even Courts have their own types of cultural norms and cultural practices that will be observed. But it's a bit more complicated than that too because while these types of things tend to be written down, maybe in legislation, or in civil procedure rules, or in codes of conduct, there are also a number of unwritten rules that pervade our own legal backgrounds and cultures that we come from. And they may extend to matters such as how the law is to be interpreted and to be applied, what's

acceptable in terms of conduct, how you behave during the course of a hearing and expectations of how disputes should be resolved as well as to concepts of justice. If you all think back to your first time when you went to Court, you probably had spent a lot of time looking at the procedural rules and looking at the codes of conduct to making sure that you were going to behave in an appropriate manner or a manner in custom with those written rules. But I'm sure that when you actually got there, it probably turned out to be quite different. The Court operated in a very smooth manner in ways that were not written down anywhere. I personally remember when I was a young lawyer, which wasn't that long ago -- honestly -- and going to the commercial court on a Friday. And on the first few occasions, whenever I was addressing the Judge, I would say, "Good morning." And I was told, in no uncertain terms, that the Court did not care whether it was a good or a bad morning and that I should not be addressing them in that way. And another, when I practised in Australia, there was an English silk who had been brought over to appear for a party in a very big piece of litigation and it was of much amusement to the

profession generally when that particular esteemed silk kept referring to the Judge as "Your Lordship" as is customary in the English High Court, whereas in Australia, it's obviously "Your Honour". That's obviously a fairly trivial example but really, what it goes to is the fact that yes, with legal cultures, some of them are written down, some of them are unwritten. And the problem that we have in international arbitration is sometimes we are bringing or we're trying to bring these things together. And in that regard, it's obviously not reasonable for me to expect that people should just simply adopt the norms or should adopt my approach to how we resolve disputes because, let's face it, the person on the other side of the room probably thinks that their methods and the things that they learnt when they were growing up in their legal system are the most appropriate.

I think, in that respect and how we resolve these, we need to try and work out what we are really trying to achieve. And I think that our objective here, and one thing that we can't ever lose sight of, is that we are trying to create a process that really represents the best possible way of resolving disputes. And I accept that that

is a completely aspirational statement in some respects and it doesn't have a huge amount of substance. But we have to recognise that we're dealing with a "melting pot". And I think, that in some respects the best thing that arbitration has going for it in terms of resolving some of these issues is its ability to be flexible.

If I give an example again, I'm sure that most of you would be familiar with this. If we have a situation where we have two parties who are from, say, a common law background where they are used to there being discovery then the chances are that the tribunal will be inclined to order fairly wide ranging discovery. The tribunal has that ability. However, where the parties are not from that type of background or let's say, for example, one of them is from a jurisdiction where discovery is commonplace and the other is from a jurisdiction where it is not, then the tribunal has the flexibility and, in my experience, will often exercise its power to order a more limited version of document disclosure as between the parties. So it's got that flexibility and that's very positive. But I think that there are also risks in terms of trying to be flexible in international arbitration, particularly when it's

done under the guise of recognising or trying to be sensitive to cultural diversity and to cultural issues and what I mean by that is that what we don't want to do is to allow the introduction into the international arbitration arena of bad practices. And the problem is that we all have different views as to what they may be -- and the example I would give is that, in some legal systems and legal cultures, it is perfectly acceptable for the parties -- and in fact, it's an expectation -- that the party's nominated arbitrator will essentially act as an advocate for that party when negotiating with the chairman and when people are considering the outcome of the case. That is the expectation. That's the basis upon which you choose your arbitrator and that is obviously, I think, something that is quite controversial in international arbitration circles. For me, at least, it's not a type of practice that I want to encourage. But at the same time, I'm faced with an issue where I'm acting for a client, I know that's likely what's going to be going through the other party's mind. I know, if they instruct the right person, that's what is going to be happening so I need to guard against it. But that sort of belies another

problem that we have here in international arbitration is the level of scrutiny applied over arbitrators and over the process as a whole. And because the process ultimately is confidential, the only way that these types of issues come out is if practitioners are ultimately willing to voice our concerns and express our concerns and debate in an open forum, whether we think these practices, whatever they might be, are ultimately desirable and whether they should be incorporated or whether we need to guard against them in some way. And then we get into this other issue which is well, if I, for example, were to say that I think that a certain practice is not consistent with best behaviour or best conduct -- then that's when we start walking this tightrope of political correctness -- people are often nervous and anxious about raising issues for this reason. But again, I think that to some extent the arbitration community has gone a long way to try and address these things. If we look at the IBA, they've obviously had committees looking at issues around the production of evidence in international arbitrations. I think that's a hugely valuable forum. And I think that sort of open debate and open discussion really does need to be encouraged.

The other thing I wanted to say on this was that, and it goes back a little bit to my comment about showing the soles of your feet, but I think that when we're talking about cultural issues, it's very important that we don't speak in terms of generalisations because I think generalisations are, quite frankly, fairly hopeless in this type of arena. And the example I would give is around mediation. So I've been in Singapore now for over 5 years and in my time in Singapore, I have never ever had a case resolve itself by way of mediation once the arbitration process has commenced. That is completely contrary to my experience practising in the UK and in Australia. I haven't even really managed to get a mediation off the ground here. When I came up here, one of the things I was told is that, in Asia, people much prefer to resolve disputes rather than fight them. So I guess it goes to my point really which is that when we talk in generalisations, it's not terribly helpful and I think, in some respect, it's incorrect. On that mediation point, I'm unable to really comment on whether it's a cultural issue or whether it's a lack of familiarity with the process because certainly they are a lot of jurisdictions in Asia where mediation or formal mediation process is not

a very familiar concept. And, I think, some of the problems themselves, you can go back to not really having a recognised format of "without prejudice" privilege, for example. But even then, there are differences to how "without prejudice" privilege applies in different common law jurisdictions. So I think that potentially, there might be an issue there as well. But in that respect, we now have the SIMC here in Singapore and I personally hope that will go well. You can see already that they are embracing thought leadership for mediation in Asia. So it'll be interesting to see how that unfolds over the next few years. In five years' time, I might tell you that I haven't had an arbitration hearing and all of my matters have been resolved by way of mediation. That would be a good thing.

I think, in conclusion, as international practitioners we all have different cultural backgrounds, we all grow up in a different legal environments and legal frameworks which we bring, and we have to be aware that we bring our own, not prejudices, but we bring those to the table when we are engaged in international arbitration -- but we have to be aware that so does everybody else. I think, secondly, the arbitration process

is flexible enough to be able to address cultural diversity and, I think, it has been successful in doing so to-date. But it's incumbent upon practitioners as well as arbitrators to be strong and, I suppose, to recognise that we can't afford to let the bad issues or potentially bad practices leak into the system through or under the guise of seeking to be culturally sensitive.

Lastly, while we may not really want to be critical and at the same time we don't want political correctness to get in the way of open and honest debate on these things because quite frankly, if we do want to achieve a system which is international best practice for resolving disputes and for developing a forum which is different to the Courts and which is more acceptable and admirable than the Courts, then we need to have honest and open debate. So, thank you.

MS LUCY REED: Matt, your comments reminded me of when I was general counsel of an international organisation in New York dealing with North Korea, and one-third of the staff were Japanese, one-third were South Korean and one-third were a mix of other nationalities. We were given some cultural counselling. I remember so well that when our

"coach" sat down with the American employees, we were excited to learn, oh, what are Japanese like? what are South Koreans like? what are the traits? what do we need to know? And she said, "What you need to know is what you are like. What you need to know are your traits as Americans in order to be open to what you are bringing to the table and how others see you. You can learn the chopsticks later." This was valuable.

Our last speaker is Prof Mahdev Mohan, a professor at Singapore Management University teaching, among other things, investment law and public international law, and also a barrister and counsel with Providence Law Asia.

PROF MAHDEV MOHAN: I've been asked to look at the last question as well, just like Matthew. But as I'm the last speaker for this particular panel, I'd like to shake things up a little bit, before we take another break. And the question that I'm asking is: What does culture have to do with it? Why do arbitrators, counsel or scholar practitioners, anybody in the arbitration community, why should they think about the word "culture" in this context? I mean, we're not anthropologists; we're not people who study another race or tribe. Or are we?

I think of culture from two perspectives. The first one is descriptive. I think Matthew has done a great job of speaking about the descriptive elements of culture. So when we talk about American legal culture or French legal culture, or Singaporean legal culture, we have certain presumptions about how that descriptively can be spoken about. What are those aspects about national psyche that manifest in that legal culture? The biggest problem with that kind of 'speak' though, as Matthew mentioned is that we may fall prey to shorthand. We may assume that American lawyers, for example, are always akin to warriors or have a proclivity for aggressive argument and advocacy. That may not always be the case. We may assume that Singapore lawyers always wish to settle. I've never seen that to be the case. Just because we're Asian, we settle easily? That isn't the case.

So, if we were to move away from the descriptive aspects of culture, which are what we would normally think about, there is another aspect of culture with arbitration that I would like to mention. And that's a more introspective look at culture, and that's specifically to arbitration culture.

I've done one worse on Amanda's use of the data from the SIAC annual report. I have ripped off an actual slide from the SIAC because I think this is too good not to directly replicate here. When we begin by saying Asia has an arbitration culture, we've got to begin from the point that the Asia of today is not the Asia of 5 to 10 years ago. If we look at it as a geographical space in terms of inflows of foreign investment both to Asia and away, thinking of Asia as a capital exporting entity or region, you'll notice that the complexity of disputes and commerce and capital that will necessarily follow from Asia has been exponential.

If I could just stop for a moment, and tell you that as I'm standing in Capitol Theatre, my mind goes back to 3 decades ago when I first came to Capitol Theatre as a child and I must say nostalgia isn't what it used to be. Singapore too is not what it used to be 30 years ago, Asia has even much more radically changed, which means our presumptions from a descriptive perspective must be rethought. And we must see ourselves as an arbitration community. I wouldn't count myself within that community, as John mentioned, but if we are part of an arbitration community, we are

the subjects of its culture. And we are making it up as we go along, we are forming it through adherence to the model law, adherence to the New York convention, to every norm, practice and provision that is at the convergence of this arbitration community. So, if we look at ourselves then, not so much as a destination. Being 'Asians', we are people based in Asia or coming to Asia, we're not just a destination but we are a point of origin. The rules then change. If we are the point of origin for a culture to form, in that sense, there are different aspects that we need to think about to arbitrate in Asia.

And that is even before thinking of how Asian arbitrators, counsel or experts can contribute to arbitration all over the world. How can we be truly 'international'? Do we become international only by going to Zurich, by going to London, and not looking at disputes that have a connecting factor to Singapore? Only by looking at disputes which have nothing to do with Singapore, nothing to do with the region? Not anymore.

The question I'll ask first is this: Why would Asia arbitrators want to do that? And this is echoing what John said, when ASEAN seems to be a hot potato. If you've got a region which has

600 million people and 2.5 trillion dollars in GDP, which will only increase by 2030, - all of this is from the ADB - why would Asian arbitrators, counsels or experts or foreign lawyers who are based in Asia want to necessarily focus on a transatlantic approach? Surely, yes, we would be seen as neutral parties, if there was a dispute which is purely transatlantic, but I would say that the Asian arbitrators would be far too busy with their practices in Singapore or in KL or in Hong Kong to want to make that trip and to find that new client that is buried halfway across the world. But that brings us to another point. So we've established ourselves as a community.

If we are a community, there is one benefit and one drawback. The singular benefit of us being a community as an arbitration culture is that we become a network, a veritable, bona fide social network. And this is not just because Ed Saverin happens to live in Singapore or because Mark Zuckerberg is a high net-worth individual (and is a great client we all want to have), but because if we look at the social network as a paradigm, I'm reminded of a famous legal economist, Anthony Ogus. Anthony Ogus said if you

can come up with a product, a paradigm, which is your network, then you will win. In other words, his example was if you have a telephone, that reduces the cost for the entire community, and so everybody benefits. Everybody depends on you because you invented the telephone network. But it's too outmoded, nobody uses it anymore. We're all on iPhones now.

If we use, as a different example, the operating system - the OS, not originating summons -- as an example, think of how if you had a network, not just for conferences to share ideas as suggested earlier, but if there was a network, as it is now, where the most important cases, the most important issues are arbitrated and also litigated in this part of the world, there is a far reaching benefit for everyone involved. There is a culture of arbitration that benefits everyone who is part of that network. It seems great, right. The benefit of that is that those of us who are not plugged in directly to the network are in a race to catch up; are in a race to the top. You want to be better than you were before.

And we're seeing this, if I spoke for a moment from a boutique practice perspective.

So for arbitration now, I have the privilege with being associated with a firm which is in an arbitration at the moment where the client is an Asian party, against an Asian sovereign. So we've got an Asian government, you've got an Asian company on the other side. All of the counsel, and the sole arbitrator, involved are Singaporean, and the arbitration is seated in Singapore. This is the sort of arbitrations that I imagine will continue to come to Singapore in the long run. I'm not saying that Singapore arbitrators or counsel should not be involved in work outside Singapore or outside the region, but when there is such a magnetic force around the Asia Pacific, I ask why? It's not just Southeast Asia. I talked about how ASEAN itself can give you work for the next 50 years. But if we talk about the Asia Pacific generally, there is so much to do. So from a positive perspective, this arbitration culture of the social network is a huge benefit.

There is this one problem. And that problem is what happens if you happen to be the owner of the operating system? What if you are that Anglo-American firm which is the dominant player? You're Apple, you're Steve Jobs. What happens then? Two cultural problems. The first cultural

problem is you have no time for your competitors. You're too used to liking the Facebook page of your friends. So that may end up in a situation where you miss new opportunities that abound. You miss the greatest next case that could be taken on.

The second problem is a conflict of interest. If you are the dominant player - and I'm just using Anglo-American firms here as an example - if you are the dominant player, there is naturally going to be a conflict of interest. Loretta earlier mentioned the conflict of interest arising in investment-state arbitration cases, which is certainly going to be the case (or is already the case). Tonnes of cases where this occurs because you have the same coterie of people who sit in different capacities, because it's a small community: it's a club, not even a community. But commercial arbitration is not immune from the same allegation and that's because: where you've got very good people, but a small group of very good people, conflicts of interest are likely to arise, and the threshold for an appearance of bias or impartiality in commercial arbitration is, I suggest, even lower than what you would find with investment arbitration.

So in a region like Asia, there are likely going to be a higher number of challenges and opportunities to seek disqualification of arbitrators on this basis. And that is something that we've got to think about and keep in mind, from a cultural perspective.

What then could we do?

I propose two things. The first proposal is, let's work together. So if we have a magic circle firm operating in Hong Kong, South Korea, Singapore, wherever, share a bit of that pie. Pass it around because the benefits of having a domestic partner who knows a model law jurisdiction and also knows the domestic clients and the context will alleviate your concerns for cultural insensitivity but also boost your opportunity to widen your reach.

Second, I would say that because of confidentiality in commercial arbitration, and because there is an important need for clients not to expose or reveal everything that happens in an arbitration, perhaps there should be a neutral place where some data is gathered about arbitration. Someone you could look to tell the community and those outside the community what trends are being formed in commercial arbitration.

As an example, I'm looking at Queen Mary University of London's annual report. Every year, they put out a report on challenges and trends in arbitration. Their next report comes out next month. And this is based on surveys that they conduct and it's also based on, importantly, scholar practitioners' perspectives.

So, people who arbitrate on commercial matters or take part as counsel in commercial arbitrations give their insights on what is actually going on. I'm hoping that this may be something that Singapore can also participate in going forward. I could imagine people like Prof Hi-Taek Shin, who is involved in both commercial and investment arbitration and has been doing so for a long time in Korea as being one of those people. As a scholar-practitioner who can tell the arbitration community, from an insider's perspective, what ought to be changed. I also look at my own former professor, Lawrence Boo, as another example of a scholar-practitioner. And there are many other examples, including Michael Hwang (who is on this panel). People who participate and observe, but also have been arbitrating long enough to know the changes that are occurring along the way.

Finally, let me stress; because it's a small community, there is likelihood of conflict. The easiest way of thinking about the international arbitration community, unfortunately, so far, has been as a club. So you think of it as the Cricket Club or the Tanglin Club, if you're in Singapore, or the East India Club, if you come from London. Clubs are great, you know everybody who's there, everybody knows you. But at some point of time, new people are going to come and you're not going to be quite sure what to do with them. The best way to handle this sort of situation is to change our mind-set of a club altogether. And if we are meant to be a community from an arbitration perspective, think of the words of Oscar Schachter, the famous international lawyer. He once said that we are – or international lawyers, at least, are meant to be - an 'invisible college' of international lawyers. I would say let commercial arbitrators and lawyers be a very visible college of people who work and play together. Thank you.

MS LUCY REED: So that brings us to the end of the second panel. I just want to remind you that this morning I said that this TED format would be either a shipwreck or a success. I'm very

pleased, at least from my vantage point, to say it's been quite a success. I have been really impressed by the thoughtfulness and the creativity of each speaker. It is not easy to be asked to speak for 10 minutes or so with minimal notes about important topics. This requires both a distilling of thoughts and also a distancing from the issues in order to give one's personal reflections succinctly. I, at least, am taking away a large number of things to think about from each of the speakers.

Going forward, if anyone wants to copy this format, that's fine. In fact, that would be great. I recommend it. But let's not call it "TED Talks" anymore. We can call it -- and this will be an innovation unique for Asia, appropriate for Asia - Legal Karaoke.

SESSION 3: MEDIATION OF INTERNATIONAL DISPUTE: WILL ASIA BE THE LEADER?

Welcome back to the final session of the forum, titled "Mediation of International Dispute: Will Asia Be the Leader?" Today we have heard from leading arbitrators, practitioners and academics on the topics of investor-state arbitrations in Asia and international commercial arbitration.

Now, let us heard from Prof Lawrence Boo, Head of Chambers, The Arbitration Chambers. Joining him we have Ms Eunice Chua, Prof Nadja Alexander, Dr Shahla Ali. I will now hand the time over to the chair, Prof Boo, please.

PROF LAWRENCE BOO: Thank you. Thank you for coming back after a long day and you'll notice I have the privilege of chairing this session. You have a very exciting time earlier talking about arbitration and let me say that we will be going on to something even more exciting. I said so because I'm very encouraged by what Matt said earlier. He said that he hoped maybe in 5 years when he asked -- people ask him how many cases of arbitration do you have and he said none, they are all in mediation. So, that's the exciting field I'm moving into and I hope his prophecy or his dream or vision will come through, yes. In this session, therefore, we ask ourselves, if and when mediation takes off will Asia be the leader. So this is something in the back of our mind when we have this session. And before I go on any further, I'm sure many of you who are sitting there will be very envious of me sitting with three very beautiful, charming, intelligent ladies. And I heard also earlier, I think it was

Amanda, I think, who complained that there are not enough ladies in arbitration. We don't have that problem currently in mediation. So come, those of who want to be involved in mediation. There are a lot of opportunities for you, both men and women, okay. So I have really with me, Ms Eunice Chua, she is the –- on my left, she is the deputy CEO of the Singapore International Mediation Centre. Of course, she is a brilliant scholar, she graduated with First Class from NUS, became a Justice Law Clerk and Assistant Registrar and then now she is serving as the deputy CEO of SIMC. On the left is, of course, Prof Nadja Alexander. She holds appointment with -- teaching appointment at -- as professor of Hamline University as well as University of Queensland. And she is the editor of a journal called *tan pan*. So those of you who knows Mandarin, you know what it means, *tan pan*. Okay. She's, of course, also on the board of SIMI, Singapore International Mediation Institute. On my extreme left is Prof Shahla Ali. She comes from -- she serves as a associate professor in Hong Kong University and she had headhunted by them all over the world and finally landed in Hong Kong. And she's a -- she practise as a attorney before she went into academia. She was with Baker

& Mackenzie in San Francisco. Her research is -- interest is in the area of cross-border dispute resolution, particularly in East Asia. And let me tell you, she speaks Mandarin well. So those of you who wants to ask questions later in Mandarin, please do so and she will answer all the questions that you may have in relation to Chinese mediation or arbitration.

So what we plan to do this afternoon is to -- I'll -- I have told them, they have prepared a lot of papers to read for us. But I've told them you got to summarise them in 10 minutes. So each of them will be given 10 minutes to talk about mediation and the different aspects of mediation. We'll be talking about mediation settlement agreements, we'll be also talking about the state -- investor-state mediation. And then finally we'll -- we will then, after their 10-minute presentation, we will -- I will be conducting interview of each of them. Yes? Or maybe as a panel, we'll be throwing some questions for them and hopefully we will provoke some answers that will be exciting for all of us. They have actually threatened to dance because the guys earlier were marching up and them. We say, "No, no, no, that's not good." They want to dance.

Except that there's this drop here, so it's not possible. So forgive us, and I think they have to just hold themselves, just continue sitting on this table.

So, to start off, I ask Eunice.

Eunice, please.

MS EUNICE CHUA: Thank you, Prof Boo. I'd like to start off by drawing the link between arbitration and mediation. So why are we talking about mediation in this conference which is called the Singapore International Arbitration Forum? I'd like to start by sharing some statistics and studies that point to the growing use of mediation globally as a complement to arbitration.

So the first statistic I'd like to share, at the next slide, comes from a 2013 survey published in the Harvard Negotiation Law Review. This survey asked Fortune 1000 companies what forms of ADR they had used in the prior 3 years. The survey was done once in 1997, and that is represented by the dark blue bars. And then again in 2011, and that is represented by the light blue bars. So many people are surprised when they look at this survey finding because mediation emerges as by far the most preferred way of resolving disputes for Fortune 1000 companies. In fact, in

2011, 98% or virtually all of the Fortune 1000 company respondents indicated that they had used mediation in the prior 3 years. Compared with arbitration, which is the next most preferred, arbitration comes in at 83%. So this really paints an interesting picture for us, particularly in Asia, because I think most of us would have the experience that Asian companies don't really follow this pattern that seems to have emerged from the study of Fortune 1000 companies. And perhaps later on in our discussions, we will pick up on this a little bit more.

The other very interesting thing about this survey is the growing use of combining mediation and arbitration. So if you look at the third set of bars from the left, mediation-arbitration, so this grew from 40% in 1997 to 51% in 2011. Which is one of the more, you know, larger growth figures. The other growth figures come from the use of early neutral evaluation as well as early case assessment. I think this sends a message to us that users are trying to find more ways to address their disputes at an early stage, try to get a better sense of what could be appropriate and what will be the most cost effective way. So in order to do so, they are using more and more

different types of ADR methods as early as possible. And also resorting to mediation as a first choice and then combining it with arbitration as well.

The next set of figures on the next slide focuses on mediation. So the next slide shows figures that were published by the Who's Who legal report research team in 2013 as well. So this team looked at commercial mediations specifically. And they found that there was a steady increase in the popularity of mediation around the world. And I think this is our experience in Asia as well. Mediation is really growing all over Asia. I recently came back from India where court-annexed mediation has really taken off. And there are more and more domestic mediation providers that are setting up a commercial mediation service independently from the courts. There is an Asian Mediation Association that was founded in 2007 that now has more than 12 members from 10 countries, including India and China. And China is chairing the Asian Mediation Association this year.

So this really speaks to a trend in the growing use of mediation in Asia. There is also increase in cross-border mediations which probably

explains why the Asian countries are paying more attention to mediation. Mediation is becoming more complex and specialised, meaning that it is used not only for simple, commercial, low-value disputes, but also for very technical, complex cases. And Nadja, who is actually a mediator on the SIMC panel, will be sharing with you some stories later on about how mediation can be used in the most complex of cases.

The figures represented in the Venn diagrams show the respondents who are lawyers indicating which areas of dispute resolution they practise in. So they go from 2011, 2012 to 2013. I think you would see that litigation and arbitration, the figures are roughly stable. But there is a growth in mediation from 168, 2011 to 253 in 2013. That is very significant. There is also growth in the overlapping area. Mediation where it overlaps with arbitration, as well as mediation where it overlaps with litigation.

So, an explanation for these trends, I think, can be seen in another study that I have put on next, in the next slide. And this is a study done by the International Mediation Institute on corporate users. They asked the users this question: Whether they agreed or disagreed with

the proposition that parties to an arbitration proceeding should be actively encouraged by the arbitration provider to use mediation to settle their disputes. And you would see that the vast majority, 74%, agreed with this. There were some neutral, 22%. But only 4% actually disagreed with the proposition. So I think we are getting quite a strong signal from users that mediation is something that they see as very valuable, as a way of resolving a dispute effectively, quickly. And I think this was alluded to a little bit in the earlier sessions today as well, about arbitration going beyond being a process of adjudication but also helping users to find the most efficient way to resolve their disputes as quickly as possible. And I would suggest that arbitration, combined with mediation, can offer this.

I'm from the SIMC, the Singapore International Mediation Centre. And for those who may not already be familiar, I'd like to introduce this service and put it out there for your comments and your feedback. This is the "SIAC-SIMC Arb-Med-Arb" service. So named because it starts with arbitration, goes into mediation, and then ends off with arbitration again. It is different from the usual med-arb models which

probably go along a tiered system where if you don't succeed in mediation, then you go along to arbitration. And the real reason for starting with arbitration is in order to obtain an enforceable consent arbitral award at the end of the day if the mediation succeeds and ends with a settlement. So, if you go by the traditional med-arb route where you commence mediation before arbitration, once your mediation settles, you may have a problem with enforceability if your -- do obtain an arbitral award, because when you started your arbitration, there is no more dispute in existence. It has already been settled during the mediation. So this model that the SIAC and SIMC have designed tries to allow parties to start arbitration, so they have that certainty that the -- some litigation process has been started. If there is any issue of limitation, this is taken care of because arbitration is formally commenced. But before costs are incurred to too high a degree, parties will stay the arbitration and then go into mediation to try to resolve their disputes. If they succeed, they can take this back to the arbitral tribunal who can then record it as a consent award. And if they do not succeed in resolving their issues, they can very quickly

transit back into the existing arbitration proceeding, and it is very likely that the arbitrator would have already given some directions when referring the case to mediation as to how the proceedings should be conducted if they should come back to arbitration. This is quite a new area, and if I'm speaking to arbitrators here, I would also urge you to explore this in your own practice. It may not be under the SIAC-SIMC framework, but the idea is that where there is an appropriate dispute, it may be a good thing to suggest to parties that they could take some time to try mediation before continuing with the arbitration again.

At the next slide, I summarise some of the key features of the SIAC-SIMC Arb-Med-Arb service and why combining arbitration and mediation has some unique benefits. The first is that it focuses the mind of the negotiating parties. In some of you -- and some of you have had the experience where, at an early stage, your clients don't want to mediate. They hate each other. They are already in a situation where it's very acrimonious and their first thought is to go to court, go to arbitration, start their proceedings. It sometimes can take, you know, the commencement

of formal proceedings before a dispute crystallises and parties are prepared to come to the negotiating table. So combining arbitration and mediation could focus the mind of negotiating parties and lend some discipline to the framework of dispute resolution.

Yet it gives you the benefit of enforceability because especially for international relationships and international disputes, this is of concern. In mediation, the reality is there's a very high rate of voluntary compliance because of the way a mediated settlement is arrived at. But for international contracts, I think there is some caution and I can understand why, whether the mediation agreement is enforceable in the jurisdiction where perhaps the assets are located. And so combining mediation with arbitration gives the benefit of arbitration, of enforceability in all the New York Convention countries, to a mediated settlement agreement. Even if no settlement is reached, because parties have had the opportunity to go through the mediation process with the aid of a mediator, identify the real issues at stake, go through extensive discussions, it is very likely that the

arbitration can be concluded more quickly in a more streamlined manner.

With this SIAC-SIMC model, the arbitrator and the mediator would be different persons generally because SIAC would appoint the arbitrator independently, and SIMC would appoint the mediator independently. Of course parties have freedom of choice, so if they insist on the arbitrator and the mediator being the same person, it is possible. But as a general rule, I think the centres would recommend, you know, having different persons so as to maximise the benefit of your mediation process where you might go into private sessions with the mediator. And if you knew your mediator would become an arbitrator later, this might pose problems and create obstacles to the extent that parties may be more careful with what they share with the mediator, even in private sessions.

So the SIAC-SIMC protocol, we have designed it that it provides a period for mediation to be concluded. The maximum time period that is stated is 8 weeks. And if parties need an extension, they apply for it to the registrar of the SIAC. We have designed it this way to put some control to the proceedings and to make sure that it’s not

used to delay a proceedings or as a way of a strategy or a tactic. However, we'll be happy to hear, you know, any suggestions from the audience or any feedback your -- as to your views on whether this is necessary and whether this period is sufficient.

We have a model clause that SIAC and SIMC have designed to make this service easily available. Really, it's quite a simple clause. It just modifies the existing SIAC model clause by inserting a second paragraph which would provide for parties to agree to attend mediation in good faith after the commencement of arbitration. Importantly, there is reference to the SIAC-SIMC protocol so that there is certainty in this clause.

And finally, it provides for the settlement reached in the course of mediation to be referred to the tribunal and made a consent award on agreed terms. This could be very important because, in mediation, you might include in your settlement agreement matters that technically go outside the contract from which the original dispute arose and which contains the arbitration agreement. So a clause like this would be important to make sure that there is a properly enforceable arbitral

award at the end of the day. So, this is the model that SIAC and SIMC have suggested to try to combine the best of the both worlds of arbitration and mediation, and we put it out there for your use and for your comments. So, I don't want to exceed my time. And I hand the time to Prof Boo.

PROF LAWRENCE BOO: Thank you. Thank you, Eunice. Nadja, coming up next, on the same -- following up from what she just shared. Please carry on.

PROF NADJA ALEXANDER: Good afternoon. I woke up far too early this morning. And so, instead of getting out of bed, I picked up a book that I wanted to read, and flipped through it. And I read this quote: "A father and his son are in a car accident. The father dies and the son badly injured is rushed to hospital. In the operating room, the surgeon looks at the boy and says, 'I can't operate on this boy. He is my son.'" When I read this, I was thinking how can -- how is that? Are you thinking the same thing? All right. If you are not, you don't have an implicit bias. If you do, if you are confused when you first read it, you have implicit bias associating surgeon with male being male because the surgeon is the mum. Okay? So, what does that got to do with arbitration and mediation? Well, a lot.

Because I invite you in this session to notice your implicit biases, if one can notice a bias that is implicit. But as you hear voices of concern or scepticism, just open your mind because this is about the future of dispute resolution.

The next slide is a piece of architecture by Italian architect, Carlo Stampa. And he was very famous for his gaps. All right. Not wanting to have to regulate everything. Not wanting to have everything closed. It's important -- we are all insiders here today. Insiders in the dispute resolution field. It's important to be able to look outside when we are busy doing our stuff inside. And not only to look outside, between right the outside in. And that the inside out sometimes. And that's a little bit what we are about this afternoon.

If international arbitration was a house, the next slide would show you, that is a house with very solid foundations. Very strong walls, and it would have had quite a lot of extensions because of its rapid and successful growth since early last century. If international mediation was a house, well, we would still be working on the foundations. But there's been an interesting development in the dev -- in international

mediation, and that is the emergence of mediation windows in the arbitration house. And Eunice spoke about one of those types of mediation windows and that's the arb -- med-arb process that the Singapore International Mediation Centre and the Arbitration Centre are offering in an institutionalised form. But there are variations of these windows.

Next slide, please. And here are just some. And some of us are familiar with med-arb, arb-med, arbitration withholding the decision allowing the parties to mediate, and then the absence of settlement issuing an award. Arb-med-arb, Eunice has explained. Co-arb-med-arb, where you have a panel of arbitrators and the same panel conducts the mediation. But for the private sessions, that's only conducted by one mediator so that can the panel can continue with the arbitration. And the French version of mediation and arbitration simultaneously, where you have two processes going on at the same time and you have counsel checking in on a regular basis about how each process is doing for them at any particular time, in order to make strategic decisions about how it continue and which process is looking more promising. So, there is a lot happening in this field, in this

mediation windows. But what about the foundations of the mediation house itself?

As the next slide shows, mediation is still in its nascent stage. And there are various factors which need to develop and can't develop overnight in order to encourage behavioural change. Right. Behaviour change of users and behaviour change of a legal counsel as well. One is the international framework. So there is a model law on international commercial conciliation as there is on international commercial arbitration. But we have fewer than 20 countries who have adopted it. And most of them are still focusing on the domestic house. There are quite a few very strong mediation domestic houses. All right. So that's where the focus has been and it's now starting to shift. But you know the saying, get your own house in order first before you start looking elsewhere.

In particular, there are issues around the enforceability of mediated outcomes. And there are some concerns around that. Some people say mediation is not binding and I think that's a very -- mediation outcome aren't binding. I think that's an interesting statement because the -- one of the attractive things about mediation is the

creativity in relation to outcomes. Hence the growth of mediation windows in a cross-border setting. But as we speak, once the trial is working on the development of something like a New York convention for mediation, the equivalent of the New York convention for arbitration. So, there is work being done in that field. And in Europe of course, there is a Brussels regulation and a number of other frameworks which help with issues of enforceability of cross-border mediated settlement agreements. But then of course there's also the issue of mediation law. There's tons of arbitration law. But what about mediation law? You would, you know, some people some then say, "Well, actually isn't mediation supposed to be not about law?" Well, not at all. The law is always there and the law is always important. All right? And when you need a question clarified in relation to the enforceability of a mediated settlement agreement or in a relation to some issue about confidentiality in the process, what you want is stable law. Right? I have a legislation or case law. And that is still emerging. And so, that also is a concern because some uncertainty particularly in common law jurisdictions, where there isn't a national piece of mediation

legislation. A lot of the common law developments are very piece ***Miller*** and the legislation. And exception is Hong Kong, which recently couple of years ago enacted a jurisdictionally wide piece of mediation legislation. And I think Singapore is also in the process of developing a national mediation law. The British don't want anything to do with mediation legislation. And Australia has -- and the US have just like hundreds -- in the US thousands of pieces of mediation legislation which doesn't really help certainty and consistency in relation to people's rights and obligations in the process. So that's something that we're working on. So but as Bob Dylan says, "The times they are a changing" and they are -- although he says "a changing". But -- and they are. They really are. And it makes me wonder when I talk to lawyers, sometimes I'm surprised about how little is known about cross-border mediation settings, and what makes a good mediation jurisdiction. Right. If you are being asked by a client to insert a dispute resolution clause, and as happened just a couple of weeks ago, a solicitor rings me and says, "My client in the telecommunication industry has requested mediation in the clause. What do I do?" We are going to have a tiered clause. I beg

he want arbitrat -- a mediation is a -- is an independent process with in that. What's a good jurisdiction? What law should we apply? What do you look for? Well, for those of you who like food, you may have been to a Michelin star restaurant. So I thought, because I like food, what if we had a mediation star system? Where we could rank countries jurisdictions according to how mediation robust they were or mediation friendly they were. And if we did that, what would some of the factors be that we would look for? Well, here's my top 10.

We have to look at to what extent or cross-border and domestic mediation, to what extent are these -- both these processes regulated within the same legal framework. Because increasingly more and more is cross-border. And sometimes it's not always easy to distinguish cross-border and domestic or you have both BITs in the same dispute, where they are regulated in the same way that's attractive. To what extent a mediation laws and that's, you know, mediations are field where everywhere in the world if there's an incredible use of, not just legislation but also soft regulation code of conduct, practice directions, industry standards, that may end up

being the subject of Court interpretation. So to what extent are these laws transparent and clear? To what extent that can the disputants access mediation information and service? So, think of Airbnb. Think of Uber. Now, I was talking to John Rhie last night. And he was saying to me, "Well, look, it's not that Airbnb, you know, where you can go and stay in someone's private apartment, it's not that that's a new idea." Or Uber, where you can hire a private car instead of a taxi just -- it's not is it -- that was around before. But what did these business do that was different? They made it so accessible. Right. With the press of a button on your smartphone. Right. So what about the not just a transparency, but the accessibility.

To what extent are Courts likely to enforce mediation clauses and multi-tiered dispute resolution clauses in your jurisdiction? How good are the laws on confidentiality, and what does "good" mean? Do want them to be really tight? Do you need some exceptions? Right? Because sometimes you do need to get to a Court, and you might need the Court to look into what happened in the mediation. And if so, what sort of exceptions? To what extent is there real choice

about the legal form of your mediated settlement or your mediated outcome? All right. You can -- the mediated settlement agreement may become -- be transformed into an arbitral award. And some jurisdictions even with cross-border disputes. It's a Court order something you are after. Right? What choices are there? A number of jurisdictions now have mediation deeds, particularly in civil law jurisdictions which are immediately enforceable.

To what extent do the Court support mediation in terms of a clear line of decision making in cases about enforceability of mediated settlement agreements, however drafted in whatever legal form they take? I'm on to number 8 now. To what extent are there incentives for legal advisers to recommend, advice on and support mediation processes?

And number 9, to what extent does the law efficiently and effectively suspend litigation, limitation period? So that the cause of action doesn't run out.

And my number 10 is to what extent is mediation in fact more effective, reliable and trustworthy? Or any of the above, than other

dispute, resolution, options in that jurisdiction. And I'm sure you can think of a lot more.

So, my message today is let mediation into your arbitration house. Support the construction of a strong mediation house alongside it and recognise the fact is that will contribute to its strength.

PROF LAWRENCE BOO: Thank you. Thank you, Nadja. Thank you, Eunice. Let me just change the format a little bit. Instead of asking Shahla to speak, I thought at this time, I'll just throw some questions to two or all three of you, and see whether we can get the discussion on commercial arbitration going. Let me just ask. Eunice have given some information on data, on the -- showing us that based on the interview of cases, of Fortune 1000, right, companies, the preference has been to use mediation as supposed to arbitration. In other words, more people are using mediation rather than arbitration. Is that what you said earlier? Did I get it wrong? If that is the case, let me ask both of you or three of you, is that also your experience? That there are more people opting for mediation in international disputes rather than going for arbitration. Has

that been your experience? And also, from the floor. Anyone can just speak up, okay?

MS EUNICE CHUA: I would just start by saying I think from what I have come across, the answer is no. This hasn't translated in Asia. I think if you look at the composition of Fortune 1000 companies here, they are largely based in the US, the UK, Australia, Europe. There some Asian countries in the Fortune 1000 but few. So that is something that we have to consider, whether mediation is really that well used in the Asian context. And I think that there is some way to go before we reach that level.

PROF LAWRENCE BOO: Okay. Nadja?

PROF NADJA ALEXANDER: I think there's two answers. In my world, there's no lack of customers for international mediation, cross-border mediation. At the same time, the statistics are really clear, across the world in terms of international dispute resolution, arbitration is still the preferred process of choice. I think some data also shows that a lot of, depending on jurisdiction, that a lot of settlement or mediation is -- or more settlement, mediation is happening within arbitration processes.

PROF LAWRENCE BOO: So your experience has been very positive as well?

PROF NADJA ALEXANDER: Yes, my sense is a steady increase in my world.

PROF LAWRENCE BOO: In your world, yes.

PROF NADJA ALEXANDER: But I'm not in the arbitration house, I just live next door.

PROF LAWRENCE BOO: Okay. What about the audience? Anyone share the view that it's reflective of what the survey of Fortune 1000 companies are like? Just an indication. No? No one share the experience? Yes, would you like to say something? Yes, microphone, please. Would someone pass him a microphone? I'm sorry, I changed the format a little bit, yes?

MR LESTER SCHIEFELBEIN: Lester Schiefelbein and I'm from San Francisco. I agree in part that on a domestic basis, mediation is the preferred tool for dispute resolution. Internationally, and one of the speakers hit it, mediation is not the preferred tool but most international companies have at least a three-step process before you get to either arbitration or litigation. And that is, the first step is an attempt to resolve the problem of the dispute with executives in the respective companies. And the second step is

actually mediation. And if mediation fails, then you might move on to arbitration or litigation. I don't think, at least in my view, that mediation lives in a separate household from arbitration when you're at step 2. I think when they get to separate households is who in fact is the mediator for this second step. And this is, I think, where the process could be more robust. There is not an international cadre of mediators much there is for arbitrators when companies get to step 2, the mediation stage. They generally go to -- it's a consensus choice but they generally go to someone who is very popular in one of the countries of one of the parties. They're just as not a recognised international panel. And to the second speaker who brought this up, I'd kind of like your feedback on this as to whether my assessment is in the middle, accurate or wanting based on knowledge.

PROF LAWRENCE BOO: Nadja?

PROF NADJA ALEXANDER: Oh, I'm sure your assessment is perfectly legitimate. We all see things from -- with different glasses. But what -- just a couple of comments on your comments. I watched a movie once, many years ago, about Frida Kahlo, an artist. And she and her husband had this great

deal where they lived in different houses next door and they built a bridge, literally a bridge, so they could sort of come over, but they had their independence. And I actually think mediation needs to be a separate house for the integrity of the process and I think that's what you were suggesting as well. It's in the arbitration house, and the windows need to be there, and, yes, a bridge would be great as well. But the separate houses are important for the robustness, particularly of the mediation process because it's still developing on an international scene. In terms of a international pool of recognised mediators, that's something that is, when I say lacking, it's there. SIMC, for example, has a great pool of mediators in all -- from all over the world. But people don't know about it yet. I'd think people do go for who they like or who they know and often it may or may not be someone who's -- it's very hard, I think, to be really brilliant in arbitration and mediation, particularly in the same dispute. It's my biased view.

MR LESTER SCHIEFELBEIN: My second point I'd like to bring in, and see your feedback, is that a number of international companies use mediation, not

necessarily to solve the problem or resolve the dispute, because once negotiation with the executives has failed, there is an awful steep curve to get into arbitration or litigation. What they do use it for is to better understand their case, and more particularly, to understand the case of the other party.

PROF NADJA ALEXANDER: Agree.

PROF LAWRENCE BOO: Yes. Okay. Let me just suggest to you that, maybe we don't have to look at arbitration and mediation as separate houses or same house. They can be the same family living in separate houses. They're relatives, brothers and sisters. Yes? And that brings me to the question of, do we in the legal profession, see mediation, well, at least international mediation, as a poor cousin of international arbitration?

MS EUNICE CHUA: I think from my experience in, you know, sharing about SIMC internationally and trying to promote the use of mediation for international commercial disputes, we have found the large majority of the reactions tend to be, "We are quite comfortable with arbitration. Arbitration is backed by the New York Convention. We are comfortable with arbitration laws in the various countries. And we don't think that when

there's a dispute, we don't trust the other side enough that, if we have a mediation and we don't go to an arbitration, that they would comply with the mediated settlement agreement." So I think this was one of the reasons that SIAC and SIMC are offering the Arb-Med-Arb service. But of course, if you don't look at it from that cynical perspective and you see mediation as really a completely different kind of dispute resolution process, I mean, in reality, in arbitration, one party loses, the other party wins. In mediation, you have the choice, when you are in the process, to step out of it, to continue with it, you have completely -- you have complete control over the terms of the settlement agreement. And it's something that you agreed to. It's not something that someone has imposed on you. So, if you look at mediation from that angle, I actually think that mediation is something very suitable for even international commercial disputes as a standalone process. But to meet the concerns of, I think, largely lawyers who are supporting the -- their clients and making sure that their interests are protected, sometimes enforceability is a big concern. And in that respect, mediation, you know, receives much less favour than arbitration

because of the international frameworks that exist around arbitration.

PROF LAWRENCE BOO: Especially from lawyers, right?

MS EUNICE CHUA: Yes.

PROF LAWRENCE BOO: Yes? So maybe I pose one provocative question. How many of us will be prepared or bold enough to have in your agreement a mediation clause and nothing else? How many of us will do that? Nadja, would you suggest that?

PROF NADJA ALEXANDER: For cross-border?

PROF LAWRENCE BOO: Yes.

PROF NADJA ALEXANDER: I would generally suggest a tailored clause, a tailored multi-step clause -and that will really depend on, you know, on the needs of the client and (inaudible).

PROF LAWRENCE BOO: I think the day will come. It will take a long time before we do that, isn't it? To have no arbitration clause, no dispute resolution clause, just simply a mediation clause?

PROF NADJA ALEXANDER: Oh, we just need the New York Convention for mediation.

PROF LAWRENCE BOO: Well, yes. Yes, your suggestion of a "NYC4M" is exciting one. Let's see how far we can develop that. Yes? And that is premised on the need or understanding there is a need to enforce a mediated settlement agreement. Why is

there a need? Why is there a need? If parties go into mediation, they resolve their dispute, they agree to go and perform whatever obligations they have, that is the purest form of mediation. Why is there a need for enforcement of the award -- of the decision -- of the settlement agreement?

PROF NADJA ALEXANDER: Because we're all human. Yes? We all make mistakes. We all interpret things differently. We might be at mediation for different reasons. We're all human.

PROF LAWRENCE BOO: So I suppose that there are some areas in which we need to, "Oh, right, there's a contribution there" -- yes, Taj(?), is it?

MALE SPEAKER: Just a suggestion.

PROF LAWRENCE BOO: Shoot.

MALE SPEAKER: You could have a mediation clause on its own, standalone, and the reason it may work is if you go to mediation and have either a settlement agreement or a deed, that deed or the settlement agreement itself carries either (a) a dispute resolution clause or an enforcement provision. If it does, then perhaps that may allay the concern you have that it's not enforceable. Then you would probably alleviate the concern also of having a New York Convention for mediation. But just food for thought on that.

PROF LAWRENCE BOO: Okay.

PROF NADJA ALEXANDER: Yes, I think that it also depends on the jurisdictions involved and how well, you know, where enforceability need happen and how familiar you are with, you know, as a lawyer, with those jurisdictions because there's an enormous amount of variability. I think I mentioned earlier in many civil law countries are now -- legislation is introducing the notion of a mediation deed, which, well, you know, which has -- is as enforceable as an arbitral award. But of course, the -- you know, the various jurisdictions will -- would need to have something similar for those sort of concerns to be allayed.

PROF LAWRENCE BOO: Okay. Another thought up question and that is on -- you mentioned earlier, Nadja, about mediation laws, mediation infrastructure, right? Is -- do you think the current structure, whether hard physical infrastructure or soft infrastructure is sufficient to support international mediation. That, of course, brings into play what you mentioned earlier about Hong Kong law, Hong Kong having a mediation act or mediation law. Do you think we really need those laws? And will it promote mediation?

PROF NADJA ALEXANDER: So a couple of things. I don't think having laws necessarily motivates behavioural change. You know, I think regulation goes hand in hand with other forms, other incentives, to encourage behavioural change. So that's, I guess, one answer. And the other thing, it's not just regulating mediation. Usually when we say regulating mediation, we think of mediation as one thing, and we think of regulation as one thing. And we usually think of regulation as legislation. But in fact, it's much more nuanced. If we want mediation to remain a viable alternative to processes such as arbitration, we need to maintain its flexibility. At the same time, we need to make sure that people who go into mediation, the participants, understand and have certainty around their rights and obligations and their process. And if they reach an outcome, how that outcome will be enforced and/or protected. If we say the process is confidential, what does that mean? If somebody engages in misleading and deceptive conduct or commits fraud within the umbrella of a mediation, what can be done about that if the whole process is supposed to be confidential? So, I think you need to think about mediation in terms of what incentives are there to

encourage people to use mediation. And I think you need lots of different forms of regulation, soft and hard regulation, to sort of to encourage that. How is the internal process regulated? And generally that's done by agreements to mediate and/or industry codes. And that's important because it's got to be flexible. You actually don't want legislation regulating that. Then you've got, who gets to mediate? And because it's still such a new field, I think, best practice tends to be, let's not legislate that yet. Let's, again, use industry standards and uniform standards because we need certainty. But be responsive and develop that. But what does need clarity, and often legislation, is rights and obligations, when the internal mediation process meets the legal system. So there, we're talking about enforceability issues and mediated outcomes, enforceability of agreements to mediate. We're talking about confidentiality, admissibility or non-admissibility of mediation evidence. We're talking about how the mediation process affects legal limitation periods and factors like that. And there, you need clarity. So I think it's quite, you know, quite nuanced and it's not a matter of, you know, creating a mediation law and

everything will change overnight. And the New York Convention, I mean, I'm not necessarily a fan of this idea although I probably sound like it, because I don't think that's going to change everything overnight. And how that's handled needs to be very different from how arbitrations being handled.

PROF LAWRENCE BOO: Just to simplify things. Is there anyone of you can help me with a simple question is: What are the things that are need -- that we need to have to promote international mediation? And what are the things that are good to have for promoting international mediation? And we just distil that into a few suggestions. Law, I suppose, mediation law seems to be one of those things that is good to have, right? We don't need to have.

PROF NADJA ALEXANDER: Yes, but I think it's important to have law about some fundamental rights in mediation practice. I think that helps, particularly in cross-border.

PROF LAWRENCE BOO: Eunice?

MS EUNICE CHUA: I just wanted to -- I mean, from my perspective, I would say a domestic mediation law is a -- good to have, rather than a need to have. I say that because when you look at the

experiences of jurisdictions where mediation is very developed, there is no uniform mediation act in the US that is accepted generally by the states and with provisions for enforceability. But yet, mediation is growing there and it's well-used. In Hong Kong, I say this based on anecdotal evidence. The mediation ordinance has resulted in change in behaviour in that because mediation is so strongly encouraged and the Courts would actually refer and, indeed, cases go for mediation. People do go through that process, but whether or not it translates into a genuine process which people are committed to and attempt at good faith, that leaves some room for doubt.

So, I am in the camp of mediation laws are good to have. I think, particularly, confidentiality protection if this is given, made clear by the law, this gives people a lot of comfort. Currently without a law, your confidentiality protection, the status, is because you agreed to protect it says based on contract. So with a statutory protection, that would definitely give greater confidence to users. But yet, mediation has flourished without these laws and I think, really, it's a matter of culture, you

know? How people perceive the dispute arising and their reactions to that.

PROF LAWRENCE BOO: You take time to cultivate culture. What about incentives, accessibility that Nadja mentioned? Any suggestion as to what kind of incentives would encourage the use of international mediation? I like the word -- I like the example that you give, Nadja, about Uber accessibility.

PROF NADJA ALEXANDER: Yes.

PROF LAWRENCE BOO: How do we bring that into international mediation.

PROF NADJA ALEXANDER: I think we need to have many incentives and I think they need to be different, so that it doesn't have to be mandating mediation or referring by a Court or even a practice direction. We have those things as well but I think, you know, it's like corporations and the legal profession making something like a mediation pledge. Right, changing internal policy in big corporate organisations in the dispute management departments. You know, those sorts of triggers, inserting mediation clauses or multi-tiered clauses instead of straight arbitration clauses, for example into contracts. They are all triggers to mediation and they begin to change culture,

inserting into the code of conduct for lawyers' requirements to advise clients on a range of dispute management options which, you know, in –- which exist in numerous jurisdiction.

PROF LAWRENCE BOO: I think everyone loves incentives, yes. Lawyers love incentives too, so let's see whether we can come up with some ideas next time on incentives. I think I shouldn't keep Shahla waiting for too long. Shahla, can I invite you to make your presentation?

DR SHAHLA ALI: Thank you very much. It was very good to be here and I've enjoyed the previous panels and meeting various individuals during the breaks and having a chance to learn and also, so far this panel has been stimulating, so thank you very much, Prof Boo. So what I'm going to talk about now is early mediation of complex investor-state disputes. So, we don't hear about this often and we're going in the next few slides, we'll talk about why that is. Why don't we hear about this and where are these cases being handled?

So the next slide, please. So as I mentioned, I'll talk about investor-state mediation generally. What are the options? What are the sorts of structures, as Nadja mentioned? What are the sort of international structures that

are available to parties who would seek this process out? I'll look at one example of when this process was used in Asia and then look at some of the potential benefits and applications. So next slide, please. So as we all know, and I think we're all working in this field of arbitration and those who work in investor-state in particular, know particularly well that there has been a growth, a significant growth in investor-state disputes since the late 90s to the current period. So in the early to late 90s, there were a handful of cases, maybe three, five per year. Now we see over 50 to 60 or so.

And let's go to the next slide. We know that also the cost and the time involved in these disputes are significant, the average UNCTAD study finding that the average cost of an investor-state arbitration is about US8 million. The OECD did a similar study finding that the cost was between 5 and 10 million. Average length, 3.6 years or so. And this has raised questions within parliaments, within governments, as to efficiency, as to cost, as to tax spending. I know Elizabeth Warren, back in my home country of the US, has raised quite a storm. Her concerns were more about jurisdiction and protection of US companies. I think the US is

realising its not always on the winning end and it, you know, it's subject to the same rules it imposes elsewhere. So we at the same time understand that there is a need for distinct form; a specific form to resolve investor-state type disputes. There are no courts, no domestic settings in which these cases can be handled effectively and so there's no question that investor-state arbitration has a significant role to play in this field.

Now, what about investor-state mediation? How does this fit in? Where could this sit within the spectrum of available options? There was a recent conference in London last year. It was called the Convention on Shaping the Future of International Dispute Resolution. I wonder if any of you were at this conference. There were about 150 or so delegates from 20 countries and they took a poll at this conference and of those participants present about three-quarters believe there should be investor-state dispute resolution in all investment treaties. And three-quarters also believe mediation should be used as early as possible. This might not be the most representation sample, you know, for this type of survey, but it's interesting to show as I think

Eunice was mentioning in her slides that among some pockets, there is growing interest and also growing demand for this -- for at least enquiring into this option.

Next slide, please. So, we know at the global level there are some options, there are some rules that have been put into place. ICSID and now the IBA provides for investor-state mediation. The IBA adopted a set of rules in 2012, which is a model set of rules for investor-state mediation. I had the privilege of being on one of the working panels, panel B, looking at the mediator selection and also confidentiality issues. But the aim of this process was to look at how mediation within the investor-state context could help foster early exchange of information, clarify issues and facilitate meaningful negotiation. The scope and application of these rules was that they would be designed for mediation of investment-related disputes. And it would only apply when parties agree on those rules and authorise a mediator to apply those rules.

Next slide, please. So just to give you a little bit of a flavour of the content of these rules, the commencement to mediation would not be that dissimilar to arbitration. There would have

to be a written request to mediate, sent to the other party, and mediation though could take place alongside other processes. What's new in this set of rules is not a rule; it's that mediators would need to state their independence and their impartiality. So there would need to be a disclosure, essentially. Very much similar to what we see in arbitration. The mediator would have to disclose any potential conflicts, any issues that might give rise to justifiable doubts about their impartiality or their independence. So this is a new feature that was incorporated into this set of rules.

Next slide, please. The role of the mediator, similar to what we see in commercial context and also domestic context would be to be guided by certain principles which are generally agreed within the sort of realm of mediation fairness, objectivity, independence, impartiality. The considerations would be towards the parties' wishes, the circumstances of the case. The aim would be cost efficiency and timely settlement. In terms of conduct, the mediator is there to help assist parties to reach agreement on the basis of voluntary agreement. So the parties are, of course, in control of the final outcome. At the

same time, the mediator has a role and has a function of seeking expertise, relevant information, at times making recommendations, if appropriate, to help parties narrow down the facts and narrow down what relevant information would assist in the resolution of the case. Again, similar to commercial or domestic settings, there are confidentiality requirements for these sets of rules.

So let’s go to the next. So benefits, I think are very similar to what we’ve talked about so far. They assist parties to explore creative and innovative solutions outside of strict legal remedies, so often times investor-state disputes deal with political, they deal with long term issues, they deal with resource allocation and often times the structure of such agreements may require thinking and consideration of parameters that may move beyond the bounds of strict legal requirements. So advantages, the process is flexible, the forms of mediation are various. You can have more evaluative or more facilitative styles and then mediation finally is there to facilitate a process where parties agree to the ultimate outcome. So this advantage is also, as I’ve spoken to many individuals who work in this

area of investor-state dispute resolution, this potential advantage is also one of the very severe disadvantages from a political perspective.

I think most individuals involves in investor state disputes understand that delegates and party representatives, state representatives, don't want to be on the line of coming to an agreement voluntarily that may in any way reflect badly or poorly on their own host state, their nation state and being associated with a decision through an autonomous process presents a high degree of risk. And most individuals will prefer that that risk be passed to the arbitrator and that that decision be out of an individual's hands. So this is one of the greatest barriers and disincentives at this time.

Let's move to the next slide. So, in terms of the rules that exist and the structure that exists, the IBA rules have been reviewed by Kluwer and also Herbert Smith. They've talked about how they see these rules as potentially offering an innovative set of regulations. Relatively optimistic on the future application, Herbert Smith noted the statement of independence availability as being a unique feature that could potentially open new ground in this area.

Let's move to the next slide. Okay, so now we talk about examples. As I mentioned, there are very few. And, actually, I had the great pleasure at lunch to sit next to Geraldine Bourke and also Jonathan Wood of RPC and it was quite fortunate because I was mentioning that I had done extensive searching for any example because Prof Boo has asked, "Okay, give examples: What do you see in this realm? Is there -- is anyone using this or is this all theoretical pie in the sky?" So after a lot of search, there was one case that I was able to find, which is a ***MIGA*** case. ***MIGA*** is the Multilateral Investment Guarantee Agency of the World Bank.

Late 90s, 1999 case, that was over a power plant dispute in China. There were four power plants. And I'll go into the details of this case in a minute, but I mentioned this to my lunch mates and it's very, very interesting that Jonathan would himself, he works in insurance claims, and the reason we don't hear a lot about the settlement processes and the mediation processes that take place in investor-state context is because they're all highly confidential and often they do deal with insurance related issues that are in most cases settled but in all

cases as a condition of that settlement, there is non-disclosure. There is complete confidentiality associated with that. So we don't see public news, we don't see reports of these cases. So this particular case, because maybe as a public entity with records for public scrutiny, this one had some bare bone facts which I will be happy to share, so let me go into that. But I think just as a context, it's important to note that this case isn't one that exists in isolation. There are hundreds potentially of these such cases but they aren't advertised. They aren't recorded. They are written in books because they occur quietly and perhaps heroically through the efforts of individuals of direct negotiation and in some cases, mediators are called upon to assist in some of these claim settlements.

So in this case, there were four power plants in China that were operated jointly by a foreign investor and the local government. MIGA, which is the investment guarantee agency, guaranteed against risks of transfer and expropriation, of war, civil disturbance. So there was a violation of the agreement between the Government and the foreign investor where the local Government

unilaterally decided to reduce the prices it paid for the power. And so MIGA then stepped in.

We go to the next slide. So there are two stages in negotiation. The first stage resulted in a memorandum of understanding. There were complexities and difficulties in executing that MLU. So there was another round of negotiation and after that, a second round, an agreement was reached with some additional concessions by the investor to provide compensation. So this did result in a successful outcome. There was compensation that was provided to the party. There was some annual distributions being sent to the invested capital that was already put in place.

So recently last week because I knew Professor Bueisand he’s a very diligent scholar, I said I have to do my extra homework. This was all that I could find. So I wrote to some friends who worked at the World Bank and one referred me to a friend who works at MIGA and I asked her, “Do you know anything else about this case? Do you know who made it? How was it referred? Where was it -- where did it take place? And she said, “Most importantly the person who was involved in this case retired two years ago.” So she said

that this was the most information we could find at this point but maybe if those here have other information and hence feel free during our discussion to please add it.

Let's go to the next. So why would individuals seek out mediation for investor state disputes? There are a number of reasons. One is confidentiality. I think in commercial context, we are very much aware of the sensitivity of information that is often at stake. The same applies to investor state issues and so confidential process reputation, goodwill.

Secondly, to avoid the distraction, the expense of litigation or arbitration, one party is seeking more than an award of damages, party has desired creative solution or seek to avoid decisions of a potentially biased body or desire an opportunity to be heard. Let's move to the next.

So what does this mean in terms of what Asian nations can do? What we can do in this region in terms of promoting or seeing the future developments of investor state mediation.

One is to provide a pool of credible/capable mediators who familiar with this field and who can work in this field to enforce the mediated

settlements, I think Eunice offered a very interesting model which offers some promise in this respect. Does it need a lead agency at point of contact, one that would help to resolve issues in terms of appointments, in terms of sharing of information? And then establish explicit provisions on the use of ADR in investor state dispute settlement.

So whether that be adopting a particular set of existing rules or coming up with new rules, these are some areas to consider and to look into for further development.

Next slide. I think that comes to the end of what I have to share.

PROF LAWRENCE BOO: Thank you, Shahla.

DR SHAHLA ALI: So I look forward to further discussion.

PROF LAWRENCE BOO: That’s very interesting. And what you have shared, especially the case involving the MIGA and the Chinese power dispute. Can you -- is it a -- I notice you put there that MIGA stepped in. Yes. So it gives you the impression there’s an active third party stepping in to activate a mediation or to ensure that parties get into the mediation gear. Is that my understanding of what you have just found out?

DR SHAHLA ALI: That's exactly it. I think and from what I heard, you know, our discussion at lunch, I think this is very common practice that there be a stepping in, that there be a active settlement overtures, there will be direct discussions very quietly with other parties and as I was speaking with Mr Wood, you know, many of the cases he was mentioning these claims cases, therefore insurance against political risk and in many cases these are state parties. So this would include parties, state parties or entities that, because of some change of policy or regulation or what not, have a loss. And those loss amounts are not advertised for many reasons. I think those who work in insurance are familiar with the reasons but you don't want to sort of advertise the potential claim amount you can get to other parties and broadcast that very widely, you know, because then, you know, this could undermine future negotiations et cetera. So I would invite actually Ms Chua would like to add a supplement, any of this would be wonderful. But I think a lot of this does happen quite quietly and we don't see these things in the press. So MIGA, I think because of contractual obligation, it was its authority to step in because it was a guarantee.

PROF LAWRENCE BOO: Whereas in the normal, say, investor state dispute, yes, there will be no third party like MIGA stepping in to initiate or to pull the parties together and say, “Hey, guys, we can -- let’s initiate mediation for you, folks.” Yes?

DR SHAHLA ALI: Yes.

PROF LAWRENCE BOO: So is there something -- is this something, a value-add, something that can be introduced into investor state VIT disputes you think? And, if so, which would be the body that should initiate it or institution that should be initiated?

DR SHAHLA ALI: Yes.

PROF LAWRENCE BOO: Do you think it should be provided for?

DR SHAHLA ALI: Well, I think -- so the stepping in actually just to go back a little bit. The party, the investor did bring this up. So they have to affirmatively say, “Something has happened here that’s wrong and we’ve lost, you know. We have lost some rights. Some part of the agreement wasn’t honoured. So there has to be an affirmative request. Yes, mediators can’t just sort of parachute around in these issue that I don’t foresee that happening. I think that there

always has to be a, you know, jurisdiction that has to be acclaimed.

PROF LAWRENCE BOO: I mean just take ICSID arbitration for example, investor state arbitration. In this, an investor lodged a claim with ICSID. ICSID actually have their own conciliation rules. They could have initiated conciliation, mediation process for them. Yes. Perhaps it is something that is not done that actively and perhaps that is something that can be encouraged, to do something like what MIGA did in this case, step in and try to get the parties to work towards, go on the mediation path rather than the war path of arbitration. Yes. So in a non-ICSID cases even more difficult, isn't it? In non-ICSID cases, there is no one, no institution or even if there is institution, their institutions are probably quite happy to receive the case and not about to initiate mediation for them or suggest mediation for them. I mean this is just my personal view on things. Anything from both of you?

MS EUNICE CHUA: Actually I like to suggest that perhaps the investor could be the person who initiates the mediation.

PROF LAWRENCE BOO: Okay. Just stopping there. Why would an investor initiate mediation? Investor

has suffered losses and now making a claim against the state, the investor probably hope that you make as big splash as possible and to put pressure on the state to maximise his compensation? Would that not be the incentive for the investor to do a big bang on that? Why would the investor want to go and quietly say, "Let's negotiate?"

MS EUNICE CHUA: I think one reason could be that the investor is looking at the long-term relationship. This is not a one-off investment in that country. This investor wants to continue investing in that country and wants a solution that will enable the investor to be able to continue and not burn those bridges. Not too long ago, SIMC actually received the query about whether we could administer mediation under the IBA investor state mediation rules and this was a query, not a concrete case and we had agreed to do so and the investor was going to bring this back to the other party and discuss the options. So that was why I suggested that perhaps it could be the investor because in this particular example, that was one of the incentives for this investor to come to the Asia.

PROF LAWRENCE BOO: Good, good, thanks, thanks. What about lawyers? Will it be an incentive for

lawyers to do so? When I look at the cost that I think Shahla shared, that it costs about $8 million under the UNTAC survey and under OCB five to $10 million in cost. This is great news for lawyers. Is there not -- no, why should there be? -- a disincentive for lawyers who want to refer or to suggest mediation. Why would lawyers do that? Lawyers, anyone who want to speak in defence? Yes. Yes, please, starting from the rear. Microphone, please. All right.

MR SURESH JEGANATHAN: Hi, Suresh Jeganathan from Oon & Bazul in Singapore. I'm not speaking in defence of lawyers earning 8 million in fees as nice it would be. But actually on a related topic of when you would do the mediation. So, for example, take the Arb-Med-Arb Clause of the SIMC. My experience has been that and I think many lawyers share this: Many cases settled on the doorsteps of the court so to speak. In other words, the parties go through the process of dispute resolution, be it litigation or arbitration in quite some detail and they need to go through that process sometimes before they realised that their case is not as strong as they thought it was. Before they realised how expensive this process is, before the possibility of losing the case, the uncertainty of

the result gets to them and then that brings them closer to the table to negotiate or to mediate. So if you have just the Arb-Med-Arb process where mediation is very early, you might lose out on the situation where you can do mediation later and I say you lose out because I don't see parties doing two separate mediations. I personally haven't experienced that. If you didn't succeed in mediation, then you suggested to a party again subsequently in the process they say, "Well, we tried it. It didn't work, so I don't want to do it again." That has been my experience. And so if you move the mediation a little further down the process, in a sense everybody wins. The parties have a higher chance of settling. The lawyers get to earn a little bit more fees and everybody in the same family can be happy.

PROF LAWRENCE BOO: Just two more questions. Yes, please, microphone.

MS AMANDA LEE: Amanda Lee. Coming from Australia where mediation is common, I agree it often occurs at the end. It's when settlement can be reached but also there are other point which often is very successful right at the beginning. And that's where I say I guess they are made up protocols following now because waiting for the arbitrators

to be appointed can take you three or four months and by then the parties may well have lost that early impetus towards settlement. So personally I'm not -- well, I'm a huge fan of mediation but I'm not a great believer in having mediation clauses or multi-tier clauses because parties if they've got sensible counsel and sensible representation know that they can mediate and resolve at any time and they can do that. I can say the appeal of the MIGA made in terms of coming up with a consent award but I think they -- there are other approaches that perhaps might be less more informal but might also be able to achieve the same results and I think, we need to be careful to not over-bureau -- I can't say that word -- bureaucratize that the mediation process and leave it at some -- and that can be driven by the parties. The other point I want to make was, I think, that Shahla had made a very good point about people wanting someone else to make the decision. And I think, this from my sort of experience of working with some Asian clients, I think, this is a blockage towards mediation in Asia as well, is that if there is mediation then the parties themselves have to actually come to the decision. And I think, yes, a lot of sort of

middle-managers in some -- from some particular Asian jurisdictions do not want to put their neck on the block of having make the decision, they rather have someone else make up for them even if that means they lose.

PROF LAWRENCE BOO: They don't want to carry the blame.

PROF LAWRENCE BOO: Okay, last question. Yes?

MR CAMPBELL BRIDGE: Right. Campbell Bridge from 7 Wentworth Selborne in Sydney. One of the things that's happened in Australia and it was just picked out one month ago is that we've mediate virtually everything; and somebody mentioned a month ago and for mediations in one case. This is a statistical thing. The Supreme Court of New South Wales alone between 2010 and 2014 did 596 mediations. About 40 per cent is also ad hoc, and that's getting onto something I'll mention in a moment. One of the things I want to talk about regulation of mediation, the whole benefit of mediation is that it is flexible, it's a parties' process. And once you start regulating it, you run a risk of "throwing the baby out with the bath water". On the ad hoc question, good people who know what they're doing can do things easily. I did a mediation here in Singapore a few months ago now involving Indonesia, parties from Europe,

parties from the US, lawyers from Australia, lawyers from Singapore, lawyers from a large London firm. We organised to in about 20 emails and about two month -- about two weeks of planning at no administrative cost to anybody and it was a 40 million Euro dispute and we sorted out in three days. Now, on the question of accessibility: How can -- assuming there are people in there who know what they are doing, how do you then justify a fee which would have been $32,000 just on administration to SIMC when competent parties who know what they are doing can do it themselves easily. Now I should say this one worked, not another one here, I mediate with Chelva Rajah, same story. People who know what they are doing in the types of mediation in international disputes we are talking about involved people who know what they are doing. They can usually do it, let them do it and a good mediator will deal with complexities as the case unfolds. And parties generally have a pretty good idea of who is good and who is not, in my experience.

PROF LAWRENCE BOO: Thank you for your contribution. I think we are running out of time because I have not been able to control myself earlier and I do apologise for that. I want to leave you with some

questions. Why are we talking about arbitration mediation limited to economic disputes, money matters? Can we not move beyond especially for mediation? Can we not be moved beyond talking about damages, to non-economic disputes, for example tribal disputes, racial disputes, civil strife in our neighbouring country in Asia, why not? And thank you to my panelists who have contributed much to our discussion. Thank you.

CLOSING ADDRESS

MS LUCY REED: Thank you. I don't have a closing address. One of my favourite professors in university intuitively used to say that he considered many of the most involved students in the class to be silent because he could tell they were actively listening to everything that was going on and no one could hear the conversations that would be in their heads during the class or thereafter. I know the format and the timing has not allowed much interaction with the audience today but it's been a very attentive and engaged audience and for that, I wish to thank you. I want to mention that I was happy to see the substantial interchanges in the coffee breaks and at lunch. I also want to thank Maxwell Chambers, especially again Ban Jiun Ean and Phyllis Low.

And thank, of course, all the other people at Maxwell Chambers and here at the Capitol Theatre whose names we don't know, for supporting this conference and the speakers and the chairs.

I myself heard some innovative ideas.

I will recount one thing about each of our three topics, looking beyond the horizon

On treaties, I took this note: treaties are not going away. We will be discussing investment treaties in 25 years, although more cautiously, more reflectively, less Napoleonically -- because we are in an era of re-orientation in Asia as elsewhere.

On international commercial arbitration, I took down this note: we are not the Asia of 30 years ago or five years ago, nor is this the Asia of five or 30 years hence. Asia is huge beyond and there is a lot to do here without worrying excessively about what's happening "out there". Among the areas where Asia might lead is diversity, and I use that term in the sense we heard from my panellists that Singapore, by attracting so many international dispute resolution lawyers to come here as counsel, as arbitrators, as conference participants, exposes and displays its own practitioners and advocates.

Those who come from outside take the local names back and start recommending them. This is a type of network building that I think I had underestimated before today.

Finally, mediation: as we just heard, let's watch out for "NYC4M" as it was said.

To close, I am going to give two awards. One is for the best and bravest quote; and that goes to Cavinder Bull for saying, "There had been lots of fakes in Asia". And second, the best slide award goes to Romesh Weeramantry for "Napoleon coming and Napoleon going", images that will stay in our minds. Perhaps an honourable mention to Chester for "Reverend Billy".

With that, I finish my remarks and thank you again for your attention and your ideas.