



## Thirty Fifth ITF Public Conference Evidence in Investor-State Arbitration

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Keynote Address

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### **Introductory remarks and framing the subject**

Thank you very much, Yarik, for that kind introduction, and for the invitation to speak today. It is a pleasure to be joining you all for what promises to be a very interesting conference. There is a lot of meat in the four panels to follow. I very much look forward to enjoying the discussion to come.

Given my various arbitral appointments, I have tended not to speak publicly on investor-State arbitration – and, when I saw the participants’ list, I was reminded why, with a good number of party representatives and counsel in pending cases before me participating in the meeting, as well as fellow arbitrators with whom I am sitting, or have sat, and of course a very welcome wider group of participants. I was particularly delighted to see such a large contingent from the Geneva Law School and the Graduate Institute.

Given the participation, it will not surprise you to hear that I do not propose to address current, or even past, cases – or, indeed, even to set out a concluded view on particular issues.

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With all the protein on offer in the panels to follow, I am the *hors d'oeuvre* – a small savoury dish offered as an appetizer! I propose to skip lightly over the surface of a number of largely procedural issues associated with questions of evidence. Following some framing observations, my remarks will touch, *seriatim*, on points that are usually in the shadows, lurking unseen, but which are nonetheless likely to be in the minds of informed and experienced arbitrators and counsel, without prejudice to how such issues might be addressed and resolved in the circumstances of particular cases.

Let me frame my remarks, though, with some truisms which are often overlooked when we think about evidential issues in investor-State arbitration.

While the ISDS arbitration community has a commonality of purpose, it is not a homogenous community. It is not simply that we are drawn from different national, cultural and linguistic backgrounds, and from common law, civil law and wider legal traditions – all of which will be influential, in some way or another, to our approach to evidence. It is also that it is frequently the case—both for members of a tribunal and for party representatives and counsel appearing before them—that we come with often materially different professional expertise. I am a public international lawyer by specialism, trained at the English Bar. My intuitive approach to evidential issues is unavoidably informed by this background. I have, however, over the years, learned to be not simply open to the approaches that come from other experiences but also to embrace them, when this seems appropriate in the circumstances. This is part of the job description. I have never sat with a tribunal all the members of which come with the same professional background. More often than not, apart from the common law, civil law mix, public international lawyers are sitting alongside private international lawyers, contract and commercial lawyers, other subject-area specialists, on occasion even with non-legal technical experts, and others. And the approach to evidence by each is likely to be very different.

When it comes to overseeing and regulating the preparation and presentation of evidence by the parties, for example, should the tribunal be an umpire or an inquisitor, or should it play more of a balancing role between the parties, but one which acknowledges the importance of the tribunal being fully informed on evidential issues, perhaps beyond the material that a party proposes to put before it. While there are useful guidelines that may assist in such an exercise, this will be a matter of appreciation by each tribunal member, and ultimately by the tribunal as a whole.

On the issue of guidelines, and perhaps even in some circumstances controlling regulatory principles, while there are a number of sources of such assistance, of varying weight and application—ranging from the relevant applicable law and procedural orders of the tribunal in a particular case, to rules such as those in the now revised and updated *IBA Rules on the Taking of Evidence in International Arbitration*, and even to relevant national Bar association

regulations—these rules or guidelines will seldom cover all the ground and, indeed, may expose legal-cultural differences that exist in the shadows of ISDS proceedings.

Let me illustrate this point with one small and seemingly innocuous example of an element relevant to witness evidence on which counsel may be subject, by their respective regulatory authority rules, to markedly different approaches.

Rule C9.4 of the England & Wales Bar Standards Board Code of Conduct, which regulates English barristers, but in doing so does not set out special rules applicable to international proceedings, provides that a barrister “must not rehearse, practise with or coach a witness in respect of their evidence”. So, for an English barrister, what is often described simply as witness prep is not permitted.

In contrast, the New York Bar—and other U.S. State Bar associations—adopts a markedly different and more flexible approach. Subject to the requirement of Rule DR 7-102, which precludes a lawyer from “participat[ing] in the creation or preservation of evidence when he knows or it is obvious that the evidence is false”, counsel subject to New York Bar regulation are permitted to confer with a witness about the substance of their proposed testimony and the best way of presenting their evidence.

While I am not aware that this divergence of approach has ever been a major stumbling block in international arbitral proceedings, I do know that it is often a point of discussion in counsel teams which include English barristers, about the appropriate way in which to proceed to engage with witnesses. It’s a small point, but it illustrates the array of potentially different rules to which counsel will be subject depending on the regulatory system from which they hail.

Beyond the rules and guidelines, such as those prepared by the IBA, there is of course an ever growing repository of jurisprudence and commentary, and every tribunal, in its day-to-day case management, contributes to the growing body of settled practice on a wide range of procedural matters regarding evidence. The subject has come a very long way since the 1939 publication, by Durward Sandifer, of his seminal work on *Evidence Before International Tribunals*.

That book, Sandifer’s *Evidence*, in its 1975 revised edition, opens with the following observation:

“The course taken by the rules of evidence in their development can be better understood if the function of evidence in the judicial process is first clearly perceived. Ideally considered, its function is the same in municipal and international tribunals; that is, to enable the tribunal to discover the truth concerning the conflicting claims of the

parties before it. As Witenberg puts it, ‘the basic rules themselves require of the international judge the search for truth ..., for the truth – whatever it may be – is the supreme reason for the existence of the international judge.’

However, this ideal function has been somewhat modified in municipal judicial proceedings by the character they have generally assumed. They have become, especially in Anglo-American law, judicially regulated contests in which the parties are combatants, the judge acting as a disinterested and nonparticipating umpire whose principal function is to see that the combat proceeds according to the rules.

[...]

The truth that is sought and attained in municipal tribunals is, therefore, distinctly relative. ... The law of evidence in international tribunals[, however,] gives much wider scope for the ascertainment of truth in the absolute sense.’<sup>2</sup>

Sandifer was principally addressing what he described as the “distinctive character” of international judicial proceedings derived “from the fact that the parties are sovereign states”. As I say, the world has moved on a long way since 1975, let alone since 1939. But my sense nonetheless is that the approach to evidence today, including in ISDS proceedings, is still infused at some level with a subliminal appreciation on the part of party representatives, counsel and tribunal members about where the balance is appropriately struck on a given issue between the search for truth, on the one hand, and questions of evidential process that arise in the context of the contest between the parties, on the other.

I, of course, am not going to attempt to address this question, which will also be influenced by the parallel discussion of systemic considerations that arise on the continuum from, at one end, truly *ad hoc* international tribunals, in every sense of the word, to original instance tribunals that operate within a framework that includes an appellate tribunal as part of some overarching adjudicatory mechanism. It will be very interesting, for example, to see what emerges over time from the Appellate Tribunal established under Chapter Eight of the Canada–EU Comprehensive Economic and Trade Agreement (CETA). This rests on a carefully prescribed appellate review function—set out in CETA Article 8.28—but also on an appreciation, addressed in a CETA Joint Committee Decision, that what are described as “serious questions affecting the interpretation or application of Chapter Eight” may warrant an *en banc* approach, no doubt for purposes of ensuring institutional and procedural certainty.<sup>3</sup>

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<sup>2</sup> Sandifer, D.V., *Evidence Before International Tribunals* (Revised Edition, 1975), at 1–3.

<sup>3</sup> Article 2(7), CETA Joint Committee Decision on administrative and organisational matters regarding the function of the Appellate Tribunal.

The scope—entirely unsurprising—of the competence of the CETA Appellate Tribunal, shines a light on another issue potentially relevant to questions of evidence.

Appreciations of fact, typically rooted in evidence of fact, are usually a matter for the original instance tribunal, even in circumstances in which there is scope for appeal, annulment or challenge. But, manifest errors in the appreciation of the facts, or a failure by a tribunal to engage with the evidence before it, may be grounds for appeal, for a request for annulment, or for a challenge of some other kind.

I don't highlight this for purposes of a discussion on issues of the treatment of evidence on appeal, annulment or challenge, although there are undoubtedly interesting questions here. I do so, rather, to highlight the converse, namely, that the scope for post-award challenges remains quite limited, even in circumstances in which there is an available avenue, and such challenges will usually not extend an evidential review that may, even if only in exceptional circumstances, supplant the competence of the original tribunal. This consideration does and should properly weigh heavily on a tribunal vested with the primary competence to determine the facts. And this weight may be an important factor when a tribunal comes to addressing questions of the admissibility of evidence outside of the tramlines of the normal pleading process.

Against the background of these framing remarks, let me turn to address my small series of points that lurk largely in the shadows but which are nonetheless of potential importance. As I said in opening, I don't propose to offer concluded views on these issues but simply to raise them.

I propose to organise my remarks to come under the following headings:

- *first*, the preparation and presentation of evidence by counsel;
- *second*, organisational and administrative arrangements by a tribunal for the fair, efficient and effective conduct of the proceedings;
- *third*, the document disclosure process;
- *fourth*, the admission of evidence;
- *fifth*, the issue of independent research and a tribunal's *proprio motu* powers; and
- *sixth*, the evaluation of evidence and the treatment of evidence in decisions and awards.

In laying out this list, let me stress that each of these topics is sizeable in its own right. I am not proposing a systematic examination of any – simply the noting of a series of points conveniently organised under these headings. I look forward to seeing, in a time to come, a more systemic examination of the issues suggested by these headings by the Geneva University and Graduate Institute students who are participating in these conference.

## The preparation and presentation of evidence by counsel

Turning, first, to the preparation and presentation of evidence by counsel, there are a number of issues which start life under this head, insofar as they are matters to which counsel ought to pay attention, but flow subsequently to be considered in the context of organisational and administrative arrangements, the admission of evidence and the evaluation of evidence.

We need a frame of reference to circumscribe the universe about which we are speaking. To this end, let me begin with four bright line propositions that many are likely to regard as uncontroversial – although, even here, there will be room for nuance, debate and controversy. But, we must start somewhere. The propositions are the following:

- *first*, argument is not evidence;
- *second*, submissions on international law are not evidence;
- *third*, unreasoned opinion is not evidence, even by an expert witness; and
- *fourth*, everything else turns on evidence.

Underlying these propositions is that the task of a tribunal is to reach a reasoned decision which is fairly based on the evidence put before it. I am less captured by Sandifer's and Witenberg's search for truth, which seems to me to be utopian in its presumption that there is a truth to be discovered, and more focused on fairness based on reasons.

The argument of counsel is to assist the tribunal in understanding the facts and the law for purposes of a fair and reasoned decision. Argument is not evidence. It is intended to be partial, even as it is required to be honest. It marshals the best case of the party in whose name it is presented.

What about submissions on international law? Here, there is frequently a divergence of views, which often turns on an interplay between the expertise of counsel and the perceived expertise of the members of the tribunal before whom the submissions are made.

I have grown up, as a lawyer, with the principle in mind that the applicable law of the tribunal is law, to be addressed in argument, and that foreign law is fact, to be addressed in evidence. Before an English court, for example, English law is law, and so is international law. An English court has competence to determine questions of international law. International law is accordingly addressed in argument.

This approach is in keeping with the principle, which is the subject of much academic debate, of *iura novit curia*, the court knows the law, i.e., that the court knows the law independently of the submissions of the parties.

While this principle has been invoked to suggest, controversially to some, that a tribunal may reach a finding on the law that has not been addressed in argument by the parties, it also forms the crux of the proposition that the interpretation and application of the relevant applicable law are matters to be addressed by way of submissions, not by way of expert evidence.

The question of what is the applicable law in a given ISDS case will depend on the terms, usually, of the treaty under which the tribunal is constituted, as well as any other manifestations of the consent of the parties. Usually, though, at least in the kinds of cases that we have in mind today, the applicable law will include international law. If so, it would seem to follow that international law should be addressed by way of submissions by counsel, not by way of expert evidence.

And this is very often the case. It is not unusual, however, to see copious expert opinions on questions of international law appended as annexes to a party's pleadings, with the pleadings themselves then going on, very largely, to simply adopt and repeat what is said in the expert opinion.

Counsel would not submit an expert opinion on international law to the International Court of Justice. Should they do so to an international arbitral tribunal constituted under a treaty? There is a view that says that they should not—that international law should be addressed in argument, from the bar, rather than as evidence, through the mouth of a witness.

The issue is not resolved, and, as I say, is likely to turn on the expertise of counsel and the perceived expertise of the members of the tribunal. As an international lawyer, my starting inclination is that an ISDS tribunal is a tribunal of international law, and that its competence extends to reaching determinations of the meaning and the application of international law, not simply, as is sometimes unavoidably the case, reaching a decision on the basis of the most compelling expert evidence presented by the parties.

What then about the approach to municipal law? On occasion, the municipal law of a given State will be part of the applicable law. The challenges here, though, when it comes to the interpretation and application of municipal law, are considerably greater for a tribunal that is not ultimately authoritative on such questions. In my experience, municipal law is usually, almost invariably, treated as a matter on which evidence is required. The question for counsel is how best to marshal and present that expert evidence.

What about the case in which a party (usually the respondent) is absent, or where it fails to present evidence of municipal law? A tribunal is likely to have special responsibilities in this regard, as also will the party that is present, to ensure that, mindful of its duty to the tribunal, the issues of law are fully and fairly presented. Counsel appearing in the proceedings in such circumstances will usually face an added burden.

There are a host of other possibly small but nonetheless interesting issues—away from the mainstream issues that will be aired in the sessions that follow—that are often overlooked, or minimised, by counsel when it comes to the preparation and presentation of evidence. Three that often catch my attention, because they require engaged consideration by a tribunal, are the following:

- *first*, how to approach the submission of evidence in a language other than the language of the proceedings;
- *second*, the expectation that a tribunal should take judicial notice of some fact or event; and
- *third*, the use of publicly sourced materials, including press reports, that address an issue from a third-person perspective—the journalist, the investigator, the hearsay witness, etc.

Let me say the briefest of words about each of these.

On the issue of evidence presented by way of translation, while this most frequently works smoothly, even if behind the scenes this is a hugely time and cost-intensive exercise, there are occasions on which this presents challenges. The material disagreement of the parties, for example, on the translation of a pivotal text—such as the treaty pursuant to which the arbitration is proceeding—may prove to be a persisting source of difficulty. The same is true when a key foreign language text is translated in apparently partial extract only, and then become the subject of dispute in the course of the hearing. From everyone’s perspective, it is worth spending the time, cost and energy in getting this right from the outset.

The interpretation of witness evidence, while usually working smoothly, can also derail a proceeding, when it goes wrong. Difficulties may arise because of the quality of the interpretation, because of technical problems, or simply because of the cadence of working across more than one language. Again, insofar as these issues can be anticipated and addressed in advance, it would be sensible to do so. Interestingly, at least in my experience, remote witness examination through Zoom, over the last 15 months, has worked pretty well, notwithstanding the very proper misgivings that everyone has had about this.

On the question of judicial notice, by and large, this is not a big issue. But, taken together with the use of publicly sourced-materials that address a matter from a third-person perspective, there is often an inclination on the part of counsel to throw everything they can find against the wall, regardless of the provenance, reliability and weight of the evidence, in the hope that the tribunal will be persuaded by the momentum, volume and patchwork of the materials to adopt the position advanced. While this “everything into the air” approach—an approach that afflicts both evidence and argument—is perhaps understandable, it is less than ideal, and, I add, it is less than persuasive, as poor evidence and argument has the unnerving capacity to infect good evidence and argument. With all the challenges that this presents, if party representatives and their counsel are able to be more discerning in what they present to a tribunal, it would make for more efficient and effective proceedings.

Staying with this point, the issue of what may be described as hearsay evidence on contested facts, i.e., evidence of a person who repeats what he or she has heard from someone else, is largely a common law foible, with many tending to address such evidence through the more flexible prisms of reliability and weight. It does, however, on occasion, give rise to issues, particularly in circumstances in which, for one reason or another, relevant documentary evidence is excluded or is unavailable, including rebuttal evidence. An attentive tribunal will be alert to this issue, as should counsel, especially having regard to the invaluable currency of counsel’s credibility.

### **Organisational and administrative arrangements by a tribunal for the fair, efficient and effective conduct of the proceedings**

I turn to my second topic, organisational and administrative arrangements by a tribunal for the fair, efficient and effective conduct of the proceedings. This, of course, is much of what is addressed in a tribunal’s bespoke rules of procedure or a first procedural order, quite apart from any applicable procedural rules. Such provisions are generally reasonably straightforward, even if there is some back-and-forth between the parties, and with the tribunal, ultimately requiring a decision by the tribunal to crystalise the relevant rules.

Let me briefly touch upon two issues, one more common, the other less so, that may merit further reflection.

The first, not uncommon, although still not usual, is whether the submission of evidence on quantum should presumptively be bifurcated to a procedure that would follow any finding on liability. The general tendency is not to do so, as a claimant’s case on damages is usually at the centre of its claim. There is also the view that a consolidated procedure is more cost and time efficient than a bifurcated procedure.

The submission of quantum evidence in advance of a finding of liability, however, can pose real challenges for a tribunal as the quantum evidence presented invariably puts the party's case in maximalist terms and is necessarily unresponsive to the tribunal's finding on liability. In the event of a finding of liability, the effect of this is often to require the tribunal to deconstruct the quantum evidence in an attempt to salvage those elements that comport with the tribunal's liability finding. This is not always easily done, however, and we have seen a number of cases in recent years in which tribunals have gone back to the parties, after a liability finding, to require further, and more responsive, evidence on quantum. The question, given the issues to which this gives rise, is whether it would be sensible to determine, as a matter of routine, at the start of proceedings, that the quantum phase should be bifurcated.

This said, apart from appreciations of time and cost, there is at least one area where such an approach is unlikely to recommend itself. This is in cases in which there is an expropriation claim which turns on the adequacy, or otherwise, of the compensation that has been offered or paid. In such cases, the issue of quantum may be inextricably bound up with the issue of liability.

The second issue going to organisational and administrative arrangements is that of an absent party, almost always the respondent. How should the tribunal address issues of evidence in such cases? As regards jurisdiction, a tribunal has a *proprio motu* responsibility to address its jurisdiction, regardless of the non-appearance of a party. But both at that stage, and when it comes to the merits, what steps, if any, should a tribunal take to satisfy itself on the evidence in circumstances in which only one party, usually the claimant, is presenting evidence? Can a tribunal simply address the matter through the prism of burden of proof? At the other end of the spectrum, should a tribunal appoint its own experts in such circumstances? In proceedings before a municipal court, it is not so unusual to see a court-appointed amicus asked to present a case in opposition to the appearing party. Having participated in just such a hearing before the UK Supreme Court, as counsel for the sole appearing party, I can attest to the significant impact that a court-appointed amicus has on the conduct of the hearing. This said, there would be significant obstacles, both of principle and of practice, in adopting such an approach in ISDS proceedings. But the core issue remains. What steps should a tribunal adopt to assist its evaluation of the evidence in circumstances in which a party is not represented?

### **The document disclosure process**

My third heading is the document disclosure process. This process is a centrepiece of most ISDS cases and, apart from the grind of it, and the sometimes unavoidably impressionistic quality that it takes on, given that the tribunal does not see the documents being argued over, it is a process that seems, by-and-large, to work well. This said, there is often a sense that the document disclosure process is wielded by parties as an independent cudgel in their adversarial

engagement with each other, going well beyond what might reasonably be expected or be warranted. And, I emphasise that this is not a point that is directed at the practise of either claimants or respondents. It is a neutral observation about the shades of trench warfare that seem often to be present both in parties' disclosure requests and in their objections to the disclosure requests of the other side.

One upshot of this, I suspect, is to elevate in prominence the philosophy of the members of a tribunal, in practice largely of the presiding arbitrator, as regards documentary disclosure. Unsurprisingly, some arbitrators may be more inclined to an expansive approach to disclosure, while others may be more inclined to restrict it to what appears, from the parties' scheduled submissions, to be strictly necessary for purposes of the presentation of a party's case. Fishing metaphors and assertions of vagueness and burden abound. Although it is difficult to form a considered and fully informed view about this, given the nature of the disclosure process, my guess is that, while there are increasingly common principles and procedures that apply to document disclosure exercises, there will also be quite a large and varied spectrum of tribunal practice when it comes to the application of those principles and procedures.

This brings me to a point of some potential importance. It is what may be described as the fungibility of knowledge or information—when can a party be said to be informed about a matter or to have possession of a piece of information? And what must a party do by way of searches to satisfy its disclosure obligations? There is also the related issue of when a party may be deemed to know or have notice of some fact or other evidence, although my focus here is on the documents disclosure process rather than on the issue of deemed knowledge.

Let me describe the issue more concretely. In a case, for example, between a multinational claimant and a State, how far do the disclosure obligations extend across the breadth of the party in question? Is any item of evidence, no matter where in the far flung depths of a corporate or governmental empire it is located, fair game in the documentary disclosure process? When is a party on notice of something? When does it have a piece of evidence in its possession—when an email is received in some unattended and remote mail box in a far-away recess? I accentuate, of course, to illustrate the point, and some may say that such disclosure requests would be perfectly easily addressed through the prism of concepts such as unreasonably burdensome or procedural economy or proportionality, etc. And that may well be so in particular cases. But not always. Electronic searches of servers and databases, for example, may not appear to be so burdensome, but this is not always the case. And the issue of principle remains. And, again, I stress that this is not a claimant or respondent-specific point. It applies on both sides of the litigation aisle.

I do not have the answer, and don't propose to speculate on what one might be. I note, also, that this is a big, though little observed and remarked upon issue in the context of domestic

court proceedings against governments. My only purpose in raising the point is to shine a light, for the insight of counsel, on the appreciation that these kinds of issues will often engage the minds of arbitrators when they are charged with addressing document disclosure requests in the context of particular proceedings.

### **The admission of evidence**

I turn to the issue of the admission of evidence. This, usually, is a straightforward matter that unfolds in the normal pleading process, with the attachment of evidential exhibits to the written pleadings of the parties. There may be arguments here or there but these are usually easily resolved. The more challenging issues under this head usually arise in circumstances in which a party wishes to introduce evidence after the close of the written procedure, or even later, and indeed on occasion in circumstances in which the hearing has been concluded and the tribunal is deliberating. This may also be associated with late breaking developments in municipal proceedings in which issues closely associated with the ISDS proceedings are being litigated.

Sandifer and Witenberg’s search for truth suggests that the door to the admission of new evidence should always be open, until the tribunal has finalised its award. Good sense suggests that this can’t be, as a line must be drawn at some point.

While, however, this may indeed be appropriate in most, even virtually all, cases—with the debate being only about where that line should be drawn—the issue may not always be quite so straightforward. In an expropriation case, for example, where there is an on-going parallel domestic procedure for the determination of compensation, could a tribunal properly refuse to admit evidence, even up to the point at which it is finalising its award, if that evidence has a material bearing on its decision? What about a claim in which there is a live issue of exhaustion of local remedies, which is determined, one way or the other, after the hearing, while the tribunal is deliberating?

Sandifer’s observation, that I quoted in opening—about Anglo-American court proceedings being judicially regulated contests in which the parties are combatants and the function of the judge is to see that the combat proceeds according to the rules—[this approach] is a safe procedural refuge, and indeed, in its even-handedness and certainty, it may also be fair. On the other hand, good sense and a properly considered adjudicatory process may dictate that a different balance should be struck in particular circumstances. The critical consideration, in such cases, is that it is struck in manner that is procedurally fair.

### **The issue of independent research and a tribunal’s *proprio motu* powers**

I come to the issue of the issue of independent research and a tribunal’s *proprio motu* powers.

For those of you who are subscribers to OGEMID, you will have seen the discussion about the recent decision of the Frankfurt Court of Appeal rejecting a challenge to the enforceability of an ICC arbitral award on the ground that the arbitral tribunal had relied on its own online research into the facts, and that it did so without giving the parties an opportunity to comment. As I have not been able to read the judgment, which is in German only at this point, I am reliant on the summary provided by the OGEMID correspondents. That suggests that the decision was rooted in the ICC Rules and the German Code on Civil Procedure, which grants tribunals the discretion to investigate the facts, and that, for the Frankfurt court, ascertaining the truth was more important than the observance of procedural rules.

It will be interesting to see the full judgment in due course, and the commentaries that are already promised on it. That a tribunal researches publicly available information on the matter before it is perhaps not so surprising. That the parties were not afforded an opportunity to comment on the findings of that independent research raises wider questions. My intent, though, in raising this issue is not to tread into the debate about either this particular judgment or the issue of independent research and the notice that should be given to parties to enable submissions to be made on a matter on which the tribunal's decision turns. It is rather to shine a light on to the undisputed *proprio motu* competence of ISDS tribunals to seek such evidence as they consider to be necessary for the fulfilment of their functions. This is expressly addressed in Rule 34(2) and (3) of the ICSID Arbitration Rules; in Article 27(3) of the UNCITRAL Arbitration Rules; and in Article 4(10) of the IBA Rules on the Taking of Evidence in International Arbitration.

The more interesting question is how, if at all, this competence is exercised. I expect, but this is again difficult to establish or quantify on the basis of reliable information, that this is a competence most often exercised *sotto voce* in the form of questions that a tribunal puts to the parties in the course of, or just after, a hearing, that invite the parties to address certain issues on which the tribunal feels insufficiently informed. There are also at least some cases in which tribunals are more directive regarding evidence that they would like to see. Whether this is appropriate or not will no doubt turn on the particular circumstances. Whatever the assessment, the exercise of such competence has the capacity to significantly alter the dynamic of the proceedings.

Although not an ISDS case, in an inter-State case in which I was involved recently as counsel, the PCA-administered tribunal, at a relatively late stage in the process, in the run up to the hearing, requested the participation of a number of named witnesses from each party, individuals who had not been offered by either party as witnesses in the proceedings. The hearing that took place subsequently was materially different from that which the parties had contemplated beforehand, and, away from the heat of the case, there are important issues that

warrant scholarly attention relating to the process. But, what was not in doubt was the tribunal's competence to proceed as it did.

### **The evaluation of evidence and the treatment of evidence in decisions and awards**

I come, finally, to my concluding topic—the evaluation of evidence and the treatment of evidence in decisions and awards. This, again, is a book-length subject and I do not propose to attempt to canvass the landscape. The only question that I would raise, to provoke discussion, is the extent to which ISDS tribunals are properly required to both form a view and to express a view on each item of evidence, or at least on what might be described as each parcel or bundle of evidence that is submitted to them, or whether a more nimble adjudicatory process is capable of emerging.

Although there are notable exceptions, many, if not most, ISDS awards have a tome-like quality, in pursuit of an impregnable decision that systematically works its way through all the slivers of evidence to express a reasoned decision on every bundle of issues put before the tribunal. The fact of an increasing propensity to challenge awards for a lack of a fully reasoned decision on every issue is an incentive to such an approach. It feels, though, at times, as if the rigour of the decision-making process has taken over the purpose of fair adjudication. Decisions and awards must of course be reasoned, and the disappointed party will always want to see all of its arguments reflected in the decision or award. The question remains nonetheless as to whether decisions and awards must visibly tick off every evidential issue and argument even in circumstances in which these may not be a necessary part of its determination.

There is, of course, the well-worn and much loved concept of judicial economy. But this notwithstanding, international arbitral tribunals, particularly in the ISDS field, are inclined to an approach that is readily contrasted with both standing adjudicatory bodies in the international space, such as the International Court of Justice and the International Tribunal for the Law of the Sea, and with municipal adjudicatory mechanisms.

I should add that there are many who lament what they see as the unduly broad brush with which the ICJ and others paint, and would wish for more step-by-step analytical rigour from such tribunals. I make no comment on this, and, in this forum, offer neither endorsement nor criticism of the evidential evaluation process and decision-making in ISDS decisions and awards. My purpose is simply to provoke discussion of this issue. A lyrically crafted arbitration award—and by this I do not mean written in verse, but rather crafted in lucidly reasoned prose—[a lyrically crafted arbitration award], including notably in its marshalling and evaluation of the evidence, that is accessible to the parties and other readers, that conveys with clarity the reasoned decision-making of its authors, is a pleasure to read. While the search for truth may reside in the footnotes, communicating reasoned fairness may not.

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Let me conclude with the thought that, just as procedural fairness is an essential component of fairness more broadly, the effective presentation and reasoned evaluation of evidence is fundamental to adjudicatory decision-making.

The subject-matter of this conference is important. I look forward to the stimulating discussions to come over these two days.

Yarik, thank you again for the invitation to speak today.

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