THE RULE OF LAW : A PRE-REQUISITE FOR INVESTMENT

The Supreme Court has time and again asserted that the rule of law is an underlying principle of the constitution of Mauritius; one of its fundamental tenets[1]. The rule of law has even been described as the citadel, which guards the people against despotism, which guards the Government against anarchy[2].

It can be stated with confidence that where economic opportunities and political stability exist, a legal system that has high respect for the rule of law draws foreign investment and international business. The economic development of Mauritius exemplifies that statement. The attractiveness of Mauritius, as a top business destination for investment and locating major operations, is affirmed by various international surveys. The World Bank carries annually a world-wide survey on the ease and cost of doing business. The Doing Business 2012 annual report ranked Mauritius 23rd on the global scene as being, for the fourth year in a row, the easiest place in Sub-Saharan Africa for an entrepreneur to do business. High Performance of Global governance has been a key ingredient to enhance business activities. The MO Ibrahim Index 2012

[1] Vide *Mahboob v. Government of Mauritius* (1982) MR 135; *Noordally v. Attorney-General & ors* (1986) MR 204
[2] *Mahboob v. Government of Mauritius* (1982) MR 135

of African Governance ranked Mauritius first for the sixth time in row among the 53 countries rated by the Foundation. According to Mo Ibrahim Foundation, Mauritius' score with regards to global governance has improved between 2000 and 2011. The country recorded its highest score in the category Security and rule of law in the class participation and human rights category. Regarding the sub-categories, Mauritius is placed first for Personal Safety, Environment and Social Protection business. According to the 2010 Index of Economic Freedom of the U.S. based Heritage Foundation Wall Street Journal, Mauritius leads Sub-Saharan Africa in economic freedom and is ranked 12th worldwide. The report's ranking of 183 countries is based on measures of economic openness, regulatory efficiency, rule of law, and competitiveness. The World Economic Forum's 2010-2011 Global Competitiveness Report lauded Mauritius as "a country characterized by strong and transparent public institutions, with clear property rights, strong judicial independence, and an efficient government."

In the Words of Nobel Laureate Professor Douglass C North, "*long-term economic growth entails the development of the rule of law."* In his book on the rule of law Lord Bingham refers to Alan Greenspan, the former Chairman of the Federal Reserve Bank of the United States, who when asked what he considered the single most important contributor to

economic growth, gave as his considered answer "The Rule of Law". Mr. Francis Neate, the then president of International Bar Association, observed that the rule of law "*increasingly has a new and eminently powerful advocate in big business, which is realizing that in a country without it, doing deals can be very difficult indeed."*

What then are the characteristics of the rule of law or as some prefer the "just" rule of law?

The answer provided by our Supreme Court rests on two fundamental pillars which constitute its foundations. The submission of all to the law is the first underlying principle. "*Be you never so high, the law is above you*" has quoted Thomas Fuller. You will be prosecuted if you steal my watch and it will not matter if you are a commissioner of Police. There must be equality before the law. The second characteristic of the Rule of Law is, of course, the separation of powers. Judicial independence lies at the core of that doctrine. The doctrine of separation of powers in its modern form was articulated by Montesquieu but we owe it also to the jurist Blackstone who explained the importance of the separation of powers when he wrote in 1765: "*Nothing is to be more avoided in a free constitution than uniting the provinces of a judge and a minister of state."* No investor would feel confident to invest in a country whose legal system is neither impartial nor independent from the executive.

The rule of law is important to the market economy because it is the common basis on which parties can make agreements; it provides parties with confidence that disputes can be resolved efficiently and fairly. For this reason, the predictability and order that the rule of law promotes in substantive laws is viewed as the stabilizing force behind much

economic development. It is also about good governance and transparency.

In 2008, Mauritius introduced the International Arbitration Act, willing to develop as a regional hub for international arbitration and this aim "*is part and parcel of these efforts aimed at strengthening the rule of law, increasing the acceptance of international arbitration as a legitimate, universal and peaceful means for the resolution of commercial and investment disputes, and enhancing the attractiveness of Africa to inward capital flows*", as outlined during the Mauritius International Arbitration Conference in June 2012.

A corollary to the supremacy of the law therefore, is the requirement for the law to be as far as possible intelligible, clear and predictable. In order to perform his obligations, an investor must be able to know with certainty the provisions of the law which govern his rights and obligations. The successful conduct of trade and investment can only be possible if they are promoted by clear legal rules governing commercial rights and obligations.

The International Arbitration Act was drafted having those considerations in mind. Moreover, and in order to promote greater

transparency, Government made sure that the "*travaux preparatoires"* explaining the rationale behind each provision of the Act, was published and made accessible to all users of the Act. The IAA 2008 is based on the UNCITRAL model law for international commercial arbitration of 1985, as amended in 2006. The innovative feature of this law is the permanent office of the Permanent Court of Arbitration (PCA) in Mauritius. Moreover, implementation of the Act was enhanced through an agreement in July 2011 between the Mauritius International Arbitration Centre Ltd (MIAC) and the London Court of international arbitration (LCIA), for the establishment and the operation of a new arbitration center in Mauritius known as LCIA-MIAC arbitration center, as a result of which new rules for arbitration and mediation were adopted and came into effect on the 1st of October 2012.

The Mauritian legislation also ratified the "*Convention on the settlement of investment disputes between states and nationals of other States*" through the Investment Disputes Act of 1969. The legislation provides a legal framework for the establishment and organization of an International Centre for Settlement of Investment Disputes which is governed by rules of procedure, for conciliation and arbitration proceedings.

The Need for Greater Transparency in State-Investor Processes

Today we are witnessing more and more agreements in the form of bilateral investment treaties (BITs), in which the concepts of the rule of law are embedded. With a large number of law firms being active in this area, the number of investor-state arbitrations can only continue to increase. On the 15th of February 2011, 22 BITs have been signed and came into force and 15 BITs are awaiting confirmation.

Bilateral investment treaties were designed by western capital exporting governments to protect investors when they make investments abroad, typically in developing countries[3]. They were conceived as a supplement to domestic legal systems, so as to provide higher levels of protection against property interferences, including nationalization without compensation[4], guarantees for the free repatriation of capital, and prohibition of discrimination against foreign investors and investments. These bilateral agreements provide a legal basis for enforcing the rights of the investors in the countries involved. They give assurance to the investors that their foreign investments will be

[3] The United Nations Conference on Trade and Development (UNCTAD) estimates that of the approximately 73 governments involved in the defense of investment treaty claims, two thirds have been developing country governments.

[4] It seems that the nationalization of the Anglo-Persian Oil Company by Iranian Prime Minister Mossadegh in 1953 have taught some lessons.

guaranteed fair and equitable treatment, full and constant legal security and dispute resolution through international mechanism.

One of the more notable features of these investment treaties is that they permit foreign investors to sue their host governments under international law in the event of an alleged breach of the treaty obligations. While some of these emerging disputes revolve around classical interferences (e.g. nationalization of an investment), others have raised more difficult and sometimes worrying issues. One trend has been for foreign investors to challenge new public interest regulations (in areas of health, environment etc.) on the grounds that such regulations are tantamount to an "indirect" expropriation or nationalization of foreign investments. Doubts and uncertainty have emerged, as governments playing host to foreign investment are sometimes unclear as to how these international treaties limit their ability to regulate economic activity within domestic borders.

Concerns are emerging that these treaties provide foreign investors with broad and ambiguous rights, which may be asserted before international arbitration tribunals, whose operations are shrouded in confidentiality. In a number of countries, there has been criticism from the media or

NGOs as arbitration of important public policy issues is taking place behind closed doors, without adequate public oversight or scrutiny.

Several governments have acknowledged public concerns by moving to revise their investment treaties, so as to provide greater certainty that those treaties will not impinge upon domestic policy space of government officials and elected politicians. Both Canada and the United States have adopted new negotiating templates which are designed to strike a balance between foreign investor protection and the legitimate right of governments to regulate economic activity in the public interest. Other governments including Argentina, The Czech Republic and The Republic of South Africa have also embarked upon re-evaluation of these international treaties, after being hit with massive lawsuits from foreign investors, often in relation to sensitive matters such as the regulation of foreign investment in the media/broadcasting sector, treatment of foreign investors in the context of a national financial crisis, or the use of preferential treatment for historically disadvantaged persons in South Africa.

Several potential problems have been identified with investment treaties. I shall refer to two. First it remains unclear how to draw the line between indirect or creeping forms of expropriation, where the State gradually

encroaches upon a foreign investment so as to confiscate or destroy it, and the exercise of legitimate government regulation, which might have some negative impact upon foreign (and domestic) business activity. Many foreign investors have argued for a generous interpretation of expropriation, so that many of the latter type of regulations would trigger the treaty requirement to compensate foreign investors. For the time being, arbitration tribunals have adopted diverging approaches to this important question of where to draw the line between expropriation and legitimate regulation, creating greater uncertainty on the part of investors and government alike.

Second, many investment treaties fail to provide adequate safeguards for the ability of developing countries to take certain measure's which would benefit domestic firms (such as subsidies for infant industries) or give preferential treatment to disadvantaged persons (such as indigenous persons who might require special or differential treatment). In particular, the Republic of South Africa has been buffeted by threats of international law suits as a result of its Black Economic Empowerment policies. These policies designed to remedy past discrimination and to provide preferential treatment to black employees, managers and business-owners, could run afoul of investment treaty strictures to provide "fair and equitable treatment" or "national treatment" to foreign

investors. Great uncertainty arises in this context, and important matters of public policy might be resolved before international arbitration tribunals which are charged with determining whether investment treaty obligations have been breached.

The rule of law would be void of meaning in relation to the protection of investors if transparency was not assured. Investor-State arbitrations have a need for transparency than purely commercial arbitrations. They differ in that investor-State arbitrations involve public interest in ways that commercial arbitrations do not. Several strong and somewhat overlapping public interest concerns exist. First, the mere presence of a State as a party to the arbitration raises a public interest because each investor-State case involves an allegation that the State acted wrongfully. Second, investor-State disputes often arise in relation to critical national economic sectors and social services, such as water, electricity, oil, gas, mining, waste, disposal, transport and telecommunications. Third, investor-State arbitrations can involve challenges to regulatory measures to protect public welfare, including environmental and public health measures, as well as multiple types of taxation measures. Fourth, investor-State arbitration has implications for the public purse, irrespective of the sector or regulatory measure involved. And finally, international investment is now an important part

of the international law on globalization, and tribunals interpreting the provisions of investment treaties have a pivotal role in how the law is developed.

All stakeholders in the investor-State process have an interest in greater transparency, including:

- States, so that they can make more informed decisions knowing how obligations similar to their own have been interpreted by tribunals;
- Members of the public, so that they are aware of disputes whose outcomes may potentially affect them and have the necessary information to hold their governments accountable for their actions;
- Investors, so that they can make better business decisions with more knowledge of what treaty protections mean for them;

- Lawyers, so that they can better advise their clients, whether host State or investor; and,
- Arbitrators, so that they are not making decisions either in a vacuum or attaching unmerited weight to a small number of precedents in the public domain

Moreover, it has been widely recognized that greater transparency will enhance the arbitration process overall, as well as its public legitimacy. It will promote the independence and impartiality of arbitrators, and improve the quality and credibility of tribunals' decisions. This, in turn, should increase the coherence of tribunals' interpretations of investment treaty provisions.

The need for transparency in investor-State processes is now widely recognized by the international community generally, and is reflected in an increasing number of arbitral decisions and awards as well as international investment treaties.

In 2006, the World Bank's International Center for Settlement of Investment Disputes (ICSID) reformed its arbitration rules to incorporate greater transparency and opportunity for public participation in investor-State arbitrations. The ICSID ruled in March 2010 that "unless there is agreement of the parties on the issue of confidentiality and transparency on a case-by-case basis, instead of tending towards imposing a general rule in favor or against confidentiality." The decision expressly rejects the new Bank transparency policy, which includes a presumption of disclosure for documents. In accordance with

this trend, the UN Commission on International Trade Law, at its 43rd session (New-York, June 21st – July 9th, 2010) entrusted working Group 2 with "the task of preparing a legal standard on the topic of transparency in treaty-based arbitration." The new UNCITRAL rules which came into effect for contracts entered into after the 15th of August 2010, replacing the original 1976 version of the rules. The rules of the UNCITRAL together with the rules of Arbitration of the International Chamber of Commerce (ICC) constitute two prominent sets of international arbitration rules that have been revised in the past year. The critical distinction between ICC rules and UNCITRAL rules is that the latter are not administered by any particular arbitration institution, while ICC rules administers and supports arbitrations under ICC rules. The new ICC rules which took effect on the 1st January 2012 were principally intended to increase the efficiency and cost-effectiveness of ICC arbitration without disturbing provisions that substantially differentiate the ICC rules from other institutional arbitration rules. The ICC 2012 guidelines for international investment further provides that the government of the host-country should ensure the publication and transparency of all national laws, regulations, and administrative practices relating to foreign investment in a timely manner.

This move to ensure transparency is also consistent with the principles emerging across the UN system. As stated by the Un secretary General's Special representative on Business and Human Rights in his February statement 2008 statement to this Working Group : "*From the perspective of my mandate, adequate transparency where human rights and other state responsibilities are concerned is essential if publics are to be aware of proceedings that may affect the public interest. Indeed such transparency lies at the very foundation of what the United Nations and other authoritative entities have been promulgating as the percepts of good governance."*

Investment in IT sector: Cloud Computing and Data-park

Cloud computing describes the use of the Internet and centralized remote servers to maintain data and applications. Gmail, for instance, operates in the "cloud" – email is stored not on a local computer hard disk, but on a remote server managed by Google. Cloud computing is thus a style of computing in which dynamically scalable and often virtualized resources are provided as a service over the Internet according to the ICC Cloud policy statement 2012. The Computer Security Division of the NIST defines "cloud computing" as a model for enabling convenient, on-demand network access to a shared pool of

configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of four essential characteristics:

1. ***On-demand self-service*:** A user can unilaterally provision computing capabilities, such as server time and network storage, as needed automatically without requiring human interaction with each service's provider.
2. ***Broad network access**:* Capabilities are available over the network and accessed through standard mechanisms that promote use by heterogeneous thin or thick client platforms (e.g., mobile phones, laptops, and personal digital assistants).
3. ***Resource pooling**:* The provider's computing resources are pooled to serve multiple users using a multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to user demand.
4. ***Measured Service:*** cloud systems automatically control and optimize resource use by leveraging a metering capability appropriate to the type of service (e.g. storage, processing, bandwidth and active user accounts). Resource usage can be

monitored, controlled, and reported providing transparency for both the provider and consumer of the utilized service.

Cloud will broaden and accelerate the movement of data. Therefore, keeping data secure is of critical importance for all users - governments, organizations and individuals. Concerns about privacy and security are often used as key justifications for not migrating to cloud-based IT services. The main near-term focus should be on how to properly apply existing regulation to cloud environments which may have more jurisdictional complexity.

The 2012 ICC Cloud statement policy has identified four broad categories of particular importance to providers and consumers of cloud services:

1. ***Data privacy*:** these are regulatory obligations derived from the personal nature of the data customer places in the cloud. These types of regulations typically impose obligations, usually on owners or controllers of data, about keeping information secure, notifying individuals when their information is lost and requiring oversight of contractors who might get access to this information.

2. ***Confidentiality and secrecy obligations:*** these are regulatory or contractual obligations derived from relationships – such as that

between a banker, broker, auditor or lawyer with his client or a doctor with his patient. They prevent disclosure of the secrets or confidential information entrusted to a "secret bearer". Although perhaps not as developed as in relation to data privacy, professional practice guidelines regulatory guidance and market practice has evolved in order to deliver effective outsourced service models that respect these obligations appropriately, either by (i) obtaining appropriate consents from clients or patients; (ii) ensuring that access by suppliers to data is prevented such that no disclosure of the secret or confidential information takes place; or (iii) allowing access by suppliers to data in a controlled way, with measures in place to preserve its confidential nature. As with data privacy regimes, these rules tend to impose obligations on the owner or custodian of the client/patient relationship rather than their suppliers.

3. ***Litigation and investigatory access:*** the flexibility afforded to businesses by cloud solutions may result in data of a customer moving across borders, perhaps even residing in multiple jurisdictions at the same time. That movement of data across borders exposes data to different regimes for access both in civil

litigation and regulator backed investigations. Subsequent disclosure of that information, by a service provider either compelled to comply or voluntarily complying with a court or regulator request, may put customers in breach of rules prohibiting co-operation with foreign litigation or investigatory action.

4. ***Specific sectorial rules on outsourcing****:* these are rules focused on the controls necessary to manage the risks of any outsourcing, and are most prevalent in the financial services sector. For example, the Markets and Financial Instruments Directive requires any European financial services firm that outsources material functions to the cloud to have a range of contractual and practical protections in place, such as audit rights for customers and regulators and service continuity on termination.

In the criminal justice process, we have to turn our attention towards the gathering of cloud-based evidence. This is especially true as we are faced with the phenomenon of "cybercrime". Such crime is committed in the virtual, computer-based world. Cybercrime has been aptly described as "borderless", as it could be committed from anywhere in the world.

For prosecuting and law enforcement agencies, the "cloud" presents a series of challenges:

1. Classic search and seizure processes are rendered largely irrelevant: searching the physical computer used by a suspect will not turn up any evidence of cybercrime, since no relevant data is stored therein.

2. Consequently, jurisdictional issues arise. The territorial limitations of conventional investigative powers do not allow for the searching of remote servers located in other jurisdictions. It then becomes necessary to seek the assistance of foreign law enforcement counterparts to obtain "cloud" evidence located overseas, giving rise to a host of problems, not least the potentially slow pace of such requests.

3. Finally, even if foreign law enforcement is willing and able to provide assistance, the cooperation of the companies providing the "cloud" services in question may not be forthcoming, due to limitations in their contractual terms of service with their users, or other legal impediments such as privacy and data protection laws, which also differ greatly across jurisdictions.

Article 32(b) of the Budapest Convention has the most potential relevance to cloud computing. It permits trans-border access to data without mutual assistance requests, where there is consent of the "person who has the lawful authority to disclose the data."

With regards to the geographical instability of offences resulting from storage and migration of data, jurisdictional issues arising from evidence gathering and prosecuting needs to be treated on an international level through Conventions. In this context a need for a global convention on cybercrime was discussed during the 17th Annual Conference of the IAP held in Bangkok on October 2012.

In recent years, information and communication Technology (Business Process Outsourcing, call centers, software development) has emerged, attracting substantial investment from both local and foreign investors. The Mauritian legislation provides legal framework for the regulation of the Information and technology sector. The data protection act 2004 establishes rules regarding confidentiality, collection, use and security of personal data as well as rights of data subjects and exemptions, which are enforced by a well-established "Data Protection Office".

The information and communication technologies act 2001 and the computer misuse and cybercrime 2003 also contribute to the regulatory framework for the prosecution of offences in the respect of confidentiality and privacy.

These standards and safeguards must strike a balance between enabling effective investigations and preventing abuse, while also protecting the rights of both the provider and user to a reasonable extent.

Conclusion:

I have argued in this paper that the rule of law is a prerequisite for investment in a country. But for that to happen, investors want laws which are intelligible and certain, guaranteeing their rights to their investment whilst States are concerned that the legitimate rights of government to regulate economic activity should not be undermined. Cloud computing is a classic example where investors seek absolute guarantees from states in relation to data privacy. It gives rise to jurisdictional issues since the conventional approach to territorial limits has no application.

The world we live in is fast changing due to the frantic pace of technology. There is no doubt that we have to adapt to the new set of

international rules that will soon dictate the pace of economic activities around the world. Only those who adhere to the rule of law will be able to plus in.

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