Supreme Court of Mauritius-World Jurist Association Conference on 'International Arbitration and Alternative Dispute Resolution (ADR) – Impact on the Rule of Law'

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The Rule of Law as a Key Guarantee for Investors

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 Government against anarchy.[2]

It can be stated with confidence that where economic opportunities and political stability exist, a legal system that has a 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. In 2011 Doing Business Report, which has recently been issued, Mauritius is ranked globally 20th.

U.S Secretary of State, Hilary Clinton, when she launched the Bilateral Investment treaty with Mauritius in August 2009, made the following remarks concerning our country: "*Mauritius has taken steps in recent years to attract investment by enacting reforms that protect investors and promote business. They've made it easier to launch*

[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.

start-ups, to access credit, and to register property. They've demonstrated a commitment to transparency, accountability, and good governance. Mauritius has attracted more investment in the last three years than it did in the preceding twenty years."

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 Supreme Court has already provided the answer to this question. It rests on two fundamental pillars which constitute its foundations. First is the submission of all to the law. …"**Be you never so high, the law is above you**". You will be prosecuted if you steal my watch and it will not matter if you are the 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 English jurist Blackstone who explained the importance of the separation of powers when he wrote in 1765 : "*Nothing is more to be 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.

More recently, in their official Declaration, G8 Foreign Ministers, stated that the rule of law is characterized by the principles of supremacy of the law, equality before the law, accountability to the law, legal certainty, procedural and legal transparency, equal and open access to justice for all, irrespective of gender, race, religion, age, class, creed or other status, avoidance of arbitrary application of the law and eradication of corruption.

Closer to us, in its 2010 Annual Report on its Activities, the Law Reform Commission which had examined the law and practice of international arbitration, stressed that the Rule of Law [and up-to-date arbitration legislation and rules] is an essential ingredient for successfully building and continuingly developing the landscape of arbitration in a jurisdiction for international and regional users.

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.

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 the users of the Act.

❖ The Need for Greater Transparency in State-Investor Processes

Today we are witnessing more and more agreements in the form 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. Mauritius has signed no less than thirty four of these Bilateral Investment Treaties.

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. Generally, these bilateral agreements have, by and large, standard elements and 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 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. In recent years, the number of investor-state disputes under these agreements has skyrocketed, as foreign investors have discovered that these agreements are an effective instrument for challenging legal or policy developments. 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

[3] The United Nations Conference on Trade and Development (UNCTAD) estimates that of the approximately 73 governments involved in the defence 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.

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 foreign economic activity within domestic borders.

A vigorous debate has taken place in recent years as to the extent to which these treaties provide for adequate safeguards for legitimate government functions, such as taxation, regulation and application of human rights standards.

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 the 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 governments alike.

Second, many investment treaties fail to provide adequate safeguards for the ability of developing countries to take certain measures 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 lawsuits 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 different need for transparency than purely commercial arbitrations. They differ in that investor-State arbitrations involve the 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 and 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 law 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 in international investment treaties.

In 2006, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) reformed its arbitration rules to incorporate greater transparency and opportunity for public participation in investor-State arbitrations. In accordance with this trend, the UN Commission on International Trade Law, at its 43rd session (New York, June 21–July 9, 2010), entrusted Working Group II with "the task of preparing a legal standard on the topic of transparency in treaty-based arbitration."

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 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 precepts of good governance."*

Satyajit Boolell, SC
Director of Public Prosecutions

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