

Lord Goldsmith QC  
*A Brave New World – Can The BVI International Arbitration Centre  
Knock New York, London and Paris Off Their Perch?*  
Dr. J. S. Archibald QC Memorial Lecture  
BVI International Arbitration Centre  
20 May 2015

## **I. GREETINGS AND THANKS**

It is an honour and a pleasure to be invited to give this inaugural Dr. J. S. Archibald QC Memorial Lecture.

I have to start by saying that you have chosen an interesting time to start a new arbitration centre here in BVI. I use the word “interesting” of course in the sense of the Chinese curse: “May you live in interesting times”.

And the times are interesting for two reasons.

First – because there is a rise in regionalism in the arbitration field which means you are moving with the fashion to be starting here but which also adds a significant competitive pressure from other new centres.

Second, as I will explain, because there is a gathering storm on the arbitration horizon which threatens the practice of arbitration in a very fundamental way. To the extent that there are places - important places - where the word “arbitrator” is already becoming a dirty word.

What I will want to do this evening will be first to describe the opportunity which the new regionalism brings, then to describe the growing threat to arbitration into which the arbitration community is sleep walking and finally to ask the question whether BVI can make it in the new world and be at least one of those centres who are knocking the traditional centres of New York, Paris and London off their perch. In this last part, I will anticipate a new set of principles not due to be unveiled till an important centenary event in London later this year. You will be getting a foretaste of that. What I think is known in entertainment world as a “spoiler”.

But before that I must add my own short tribute to the man, the lawyer, the leader in whose memory this lecture series has been created.

It is fitting that this first lecture focuses on the very work that Dr. Archibald was so passionate about – the development of the BVI as an arbitration centre of global pre-eminence.

After being called to the bar in 1960, Dr. Archibald dedicated his life to the development and practice of the law and to public service.

As well as setting up and running his own law firm, Dr. Archibald served in important roles as Director of Public Prosecutions, and the Attorney General of St. Kitts, Crown Attorney for the BVI and President of the BVI's Bar Association. He was awarded Queen's Counsel in 1980.

In the latter part of his career, the Financial Services Commission appointed Dr. Archibald as the Chair of what became known as the International Arbitration Focus Group (IAFG). The IAFG was tasked with reviewing the BVI's arbitration regime with a view to modernising it and advising on how the BVI could be established as a centre for international arbitration. By all accounts Dr. Archibald threw himself at the task with the same passion he threw at all things he took on and I understand that he is the architect behind nearly all of the changes that the BVI has introduced in the last few years that will help ensure the success of the BVI Arbitration Centre.

Though I did not have the pleasure of knowing him I have learnt of his commitment and passion for the law from his wife, another dedicated public servant having served in many roles including as Deputy Governor General [and daughter] whom it was my pleasure to meet today. I thank Dawn Smith for making this happen. I know we will all want to make the events of today and tomorrow a fitting tribute to Dr. Archibald's memory.

Although I did not know Dr. Archibald I have had the pleasure of being here several times and in neighbouring countries. When I was Attorney General we would hold an annual conference of the Attorneys General of the Overseas Territories of the UK, most of which are here in the Caribbean which I would chair. In those days I was able to start my speeches by repeating the words which Ronald Reagan used to say were the most frightening words in the English language "I'm from the Government ... and I'm here to help". Since then (but without that introduction) I have been fortunate to appear in a number of jurisdictions here and nearby and still do. My colleagues in London and New York express envy that I can practice in such glorious surroundings but I try hard to tell them it is a terrible hardship having to put up with so much sunshine and blue sea.

## **II. A MOVE TOWARDS REGIONALISM IN ARBITRATION**

The BVI International Arbitration Centre is part of a growing trend towards regionalism in arbitration.

Arbitration, once open to the criticism that it was the preserve of western practitioners for western disputes has grown into a worldwide industry practised across the globe.

Ever-increasing globalisation, more cross-border deals and so more cross-border disputes have led to a blossoming of regional arbitration centres.

In 2014 alone Melbourne, Riyadh and Belgrade each opened their own arbitration centres. Three very different parts of the world.

And this year we have seen that Djibouti plans to launch an international arbitration centre. In so doing it joins the many other international arbitration centres already in Africa including in Algeria, Benin, Burkino Faso, Cameroon, the DRC, Egypt, Ghana, Morocco, Mozambique, Rwanda, Senegal, South Africa, Sudan and Tunisia.

Some centres are fully fledged administrators of arbitration with their own rules (though usually very closely modelled on the UNCITRAL rules) and secretariat. Others, for example one opened two years ago in Seoul Korea are high-tech hearing centres catering for arbitrations administered by other centres in Asia or by the parties themselves.

The Caribbean has been slower to follow this trend. Trinidad and Tobago's Dispute Resolution Centre Serving the Caribbean, established by the Trinidad and Tobago Chamber of Industry and Commerce in 1996 is an exception. Its International Chamber of Commerce Caribbean Court of Arbitration, which administers arbitrations under the ICC Rules, aims to be the "provider of choice" for out of court dispute resolution services. In 2011, the Centre mediated and arbitrated 20 disputes and states that it has experience arbitrating both domestic and international disputes. BVI will help the Caribbean to catch up.

This rise in regionalism has, of course, been good for arbitration; promoting its increased use across the globe and for many types of disputes.

More than that, though, it is also good for the parties to disputes.

The bringing of arbitration "closer to home", means that parties no longer need to go to "old world" centres of arbitration for reliable non-court dispute resolution. This increased access to reliable and neutral dispute resolution for parties outside of London, Paris and New York is of real value to all those who participate in international trade.

As a result of dealing with disputes closer to "home" there are often resultant time and cost efficiencies. So, the costs of venue space and accommodation will often be cheaper in Singapore than they are in London, for example. The costs of lawyers may also be cheaper than in London and New York.

Finally, but crucially, local tribunal members and lawyers may well have a better understanding of issues and realities on the ground and can thus add insight that non-local practitioners just wouldn't be able to deliver.

### **III. WHERE DOES THE MOVE TOWARDS REGIONALISM LEAVE THE OLD WORLD ARBITRATION CENTRES?**

So, where has this move towards regionalism left the “old world” arbitration centres?

First, I’d note that Ancient Greece and Rome were the real “old world” of arbitration. It is there that the first forms of what we understand to be arbitration was first seen and practiced, as early as 500 B.C. While London, Paris and New York, may now be considered the “old world” of arbitration, they were once the new world themselves.

Yet, as a primarily commercially-driven enterprise, arbitration has always moved with the times, adapting to what was needed, and followed trade to whatever jurisdictions it was taking place in.

In short, it is becoming increasingly clear, that the likes of London, New York, and Paris, no longer have the monopoly over arbitration. Of course, they still (currently) remain the real powerhouses of practice, but the loss of their market share is notable.

### **IV. THE RISE OF THE NEW WORLD ARBITRATION CENTRES**

Notwithstanding their increasing loss of market share, it is fair to say that many, if not most, of the new centres have not yet given London, Paris or New York a run for their money. The globalisation of disputes such that arbitrations can now be run out of Senegal, for example, has not obviously resulted in a decline in arbitrations in London, Paris or New York.

But there are exceptions. Some in the “new world” have made a real impact. And, in doing so, they have re-shaped the perception of and access to arbitration globally.

I am thinking here of Singapore and Hong Kong especially. Both relatively recent entrants to the world of arbitration, with Singapore’s International Arbitration Centre (SIAC) established in 1991 and Hong Kong’s International Arbitration Centre (HKIAC) established in 1985, but both now firmly established as world leading arbitration centres equal in stature to the old world centres of London, Paris and New York.

Taking Singapore as an example, a 2010 survey by the School on International Arbitration at Queen Mary’s University in London revealed that 7 per cent of corporates chose their preferred seat of arbitration as Singapore.

That is equal to the number who chose Paris and just above the 6 per cent that chose New York. Notwithstanding that 30% of corporates chose London as their favoured seat, these statistics reveal an increasing not just acceptance, but inclination towards, Singapore as the place of arbitration. Singapore’s arbitral institution’s (SIAC) figures

have since 2008 been the fastest growing arbitral institution in the world. To illustrate, its new cases rose from 99 in 2008 to 259 new cases in 2013.

Hong Kong's case load is even higher with 293 new cases in 2012. It was the first Asian country to adopt the UNCITRAL model law. It has state of the art administered rules with an innovative costs structure, an emergency arbitration procedure, expedited procedures and the only centre to have a model clause for the choice of arbitral law – which is very welcome for all practitioners who have struggled to follow the puzzling series of decisions of the English courts on determination of the arbitral law in *CvD*, *Arsenovia* and *Sulamerica*.<sup>1</sup>

Hong Kong and Singapore have between them made a major inroad into the arbitral space. I am as likely to be hearing or arguing a case in Singapore as in London and more likely than doing it in, what was once the undisputed leader, Paris.

There has been a clear re-shaping of the market and, as Hong Kong and Singapore have shown, there is real room for some regional centres to become global players.

## V. BVI'S PLACE IN THE NEW WORLD

So what does all of this mean for the BVI's new arbitration centre?

It would be wrong to suggest it does not face challenges. Any new centre trying to find a place in the world of arbitration will have difficulties.

The rise of regionalism means a rise in competition. New arbitration centres have to fight harder than ever before to establish themselves.

There is an additional challenge I wanted especially to talk about comes from the current TTIP debate between the US and Europe.

If you have not been following this a few words of explanation may be helpful.

When concluded, the Transatlantic Trade and Investment Partnership (**TTIP**) will be one of the most influential and ambitious trade and investment treaties ever executed. Its aim is to promote closer trade and investment ties between the world's two largest economic blocs, the United States and the European Union, by pulling down barriers to trade such as customs duties and investment restrictions. The result is intended to be more business

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<sup>1</sup> XL Insurance Ltd v. Owens Corning [2001] 1 All ER (Comm) 530  
C v. D [2008] 1 All ER (Comm) 1001  
Abuja International Hotels Limited v Meridien SAS [2012] 1 Lloyd's Rep 461  
Sulamérica Cia Nacional de Seguros S.A. v. ENESA Engenharia S.A. [2012] 2 All ER (Comm) 795  
Arsanovia Ltd et al. v. Cruz City 1 Mauritius Holdings [2013] 2 All ER (Comm) 1

opportunities, more growth and more jobs – in real economic terms, it is anticipated that the TTIP could lead to a 0.5% increase in the EU's GDP.

All well and good – but the problem lies in the fact that one aspect of the proposed treaty is so called ISDS – Investor State Dispute Settlement. These are the procedures for settlement of investment disputes under multilateral or bilateral investment treaties, so called BITs. Since their inception, these investment agreements have encouraged and protected EU investments abroad, as well as foreign direct investment in the EU. For its part, ISDS has given investors the ability directly to enforce the investment protections given to them. Traditionally these are negotiated between States but in 2009, the Lisbon Treaty transferred competence for the protection of investments from EU Member States to the EU itself. This has given the EU a mandate and platform for the reform of traditional standards of international foreign investment protection. Those traditional standards are found in the 3,000 or so international investment agreements signed between the world's investment importing and exporting states. EU Member States are party to approximately 1,400 of those, and with its new-found competence for such matters, the EU has set about modernising investment protection standards through investment agreements such as the TTIP, the CETA, (for US-Canada relations) the EU-Singapore FTA and others.

The TTIP debate has however unleashed a storm of criticism - with NGOs and civil society vociferously in the lead, complaining that international arbitration for investment disputes is an undemocratic secret court system for preventing regulation of industry in the interests of citizens. It is partly driven by anti-big business ideology, fuelled by an anti-American feeling, thriving on examples of BIT cases alleged (but which are not yet decided) such as Philip Morris' challenge to plain packaging for cigarettes in Australia and Vattenfal's challenge to German regulation of the nuclear industry but also by much ignorance of how the system actually works. The scale of the challenge cannot be underestimated. When the European Commission ran a consultation it received a staggering 150,000 responses which on a technical subject like investment arbitration seems extraordinary.

The criticism of ISDS and of the TTIP's investment chapter have been widely circulated. Having started on the European left they have some high-profile disciples such as Senator Warren and apparently Senator Hilary Clinton in the USA, as well as distinguished European and American economic and legal academics.

Supporters of ISDS include President Obama, the ex and current EU Trade Commissioners, and the representatives of businesses large and small. However, the biggest failing in combating the criticisms of ISDS has been the failure of the business community to convey the importance to it of strong investment protections and effective ISDS mechanisms. The ISDS community has also been ineffective in addressing the substance of the criticisms clearly, succinctly and effectively. Arbitrations specialists

have been speaking to themselves through the trade journals and arbitration chat forums. Not an effective way of engaging with opponents.

With the battle lines now well drawn, we find ourselves at a key crossroads in the debate. On 28 May 2015, the International Trade Committee of the European Union will vote on the constraints that should be imposed on the EU negotiators of the TTIP. Between 8 and 11 June 2015, the EU Parliament will do the same in plenary session. Unless the pro-ISDS camp can make its voice heard and effectively counter the anti-ISDS arguments, the investment protection aspirations of the TTIP may well lie lifeless on the cutting room floor come mid-June.

To highlight how delicate the situation is at present, I would like briefly to describe three salient and recent developments in the battle for hearts and minds:

First, on 6 May 2015, EU Trade Commissioner Malmstrom published a “concept paper” in which she described the form of ISDS that she feels addresses the main criticisms of ISDS – those criticisms being a perceived lack of transparency in international investment arbitration; under-qualification of arbitrators; bias of arbitral tribunals in favour of investors; and a lack of consistency in treaty interpretation, owing partly to the absence of an appeal mechanism.

For the anti-ISDS camp, these reforms still do not go far enough. For the pro-ISDS camp these reforms do not, in many ways, guarantee improvements in efficiency, fairness or consistency. In many ways, therefore, they are a step backwards, not forwards.

Ms Malmstrom’s proposals will not, in my view, result in a form of ISDS that gives all investors, large or small, an equal ability to enforce their rights. Nor will it be a cost or time efficient process.

For example, the ability of the US and EU to agree binding interpretations of the TTIP to bind Tribunals mid-consideration of an investor’s claim is far more likely to impact a small investor. A small investor, unlike a corporate behemoth, will lack the status and influence to persuade its home state not to issue a joint interpretation that would prejudice its claim.

As for cost and time efficiency, the proposal that any appeal mechanism should entitle an appeal for a manifest factual error by the arbitral tribunal will mean that the appeal will be a *de novo* hearing of the claim on the merits. Presently, investment arbitration costs investors and host states tens of millions of dollars per claim, and it can take 10 years to reach a final outcome. Those figures are likely to increase rather than decrease if current proposals are implemented.

It is perhaps unsurprising that the pro-ISDS camp is currently losing the battle when it cannot give voice to the concerns of the business community, cannot point to evidence

that ISDS promotes greater investment, and when the form of ISDS proposed does not look like it will work efficiently or effectively for anyone.

The second recent development is that in the same concept paper and in her blog post on 5 May 2015, Ms Malmstrom called for an international investment Court to replace ISDS in the medium term. Ms Malmstrom envisages a WTO-style permanent court with tenured judges, set up to deal with claims under any and all international investment treaties. The objective would be to set up the court as a self-standing international body or as part of an existing multilateral organization.

This is a bold idea that warrants careful consideration, but it is fraught with challenges and difficulties, and there is no reason at present to think that investment protection fit for the 21st century will be better served by a permanent court than by ad hoc international tribunals. For the time being it seems to me that there is more headway to be made in arguing compellingly that the criticisms of ISDS are unfair and misguided, and that ISDS is crucial to achieving the full potential of the TTIP.

To make that case, we need more empirical evidence. This brings me to the third recent development that I wanted to highlight.

Two recent studies have just become publicly available providing much-needed empirical support for the oft-repeated claim that investment protection and ISDS increases investment flows. A recent Hogan Lovells survey discussed at the Investment Treaty Forum at the British Institute of International and Comparative Law in London on 8 May 2015 shows that of 301 senior corporate decision makers surveyed, 20% said that they would not invest overseas without the protection of an investment treaty, and 60% said that such treaties were “very important”. These voices were absent during the EU Commission’s TTIP public consultation process, and yet, extrapolating from the survey results, the business community seems to be saying that proper investment protection enforceable through ISDS could account for an 80% swing in the number of potential corporate investors.

Last weekend, a study by the Netherlands Bureau for Economic Policy issued a paper showing that “*ratified BITs increase on average bilateral FDI stocks by 35% compared to those of country pairs without a treaty.*” The study also recognised that the impacts were most marked where the treaties were between low, lower middle and upper middle income countries, which would include approximately half of EU Member State countries.

Supporters of ISDS need more such evidence and support for ISDS and investment protection and need small and medium sized enterprises with international investment aspirations to make themselves heard. After all, it is they who have the most to gain in this debate.

Until that happens, we can expect more of the criticism issued over the last week by Senator Warren, and by the 40 social democrat MEPs who registered their continuing public opposition to ISDS even in the form now proposed by Ms Malmstrom. What is important is to facilitate a fair hearing for the argument that foreign investment promotes prosperity for all, and that, in turn, effective and efficient ISDS promotes foreign investment and protection of the rule of law.

You may ask whether this matters to the new BVI centre which may not have investment arbitrations in its sights. It's important to recognise that this is not just another battle between different ideologies in the Old World that it is irrelevant except to those concerned with investment arbitration between EU and US. There is a problem for arbitration more generally. The attack on "secret courts" and "unaccountable judges" is just as toxic to the arbitration brand in other areas. As I said some European Parliamentarians don't even want to use the word arbitrator so toxic has it become.

This can have the effect to driving people away from arbitration even outside the investment field and into construction disputes, shareholders agreements, oil and gas contracts and so forth. This is a threat to the very substance of arbitration and could reverse the strong growth over recent years of arbitration as the preferred method of dispute settlement.

## **VI. THE GOOD NEWS. CAN BVI ARBITRATION SUCCEED?**

But it's not all doom and gloom. There are, I think, some very good reasons why I have every confidence that the BVI Arbitration centre can be a huge success.

First and foremost, the BVI has an excellent new arbitration act. Based squarely on the UNCITRAL model law (with some modifications), the new Arbitration Act 2013 came into force on 1 October 2014 and in so doing replaced the old act which had not been updated since 1976.

Adopting the UNCITRAL model law was important – people can now be confident that the BVI's arbitration laws are fair and efficient and designed with modern international arbitration in mind. The new Arbitration Act 2013 covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the tribunal, the extent and of court intervention to the recognition and enforcement of awards. The certainty and clarity of having a modern and well-known arbitration act cannot be underestimated.

Linked but separate to this is the fact that the new Arbitration Act gives the parties to arbitration the right to be represented by a legal practitioner of their choice. There are no limitations in the new act as to where legal counsel must be qualified or their nationality etc. (Section 61: "Every party is, unless otherwise provided in the arbitration agreement,

entitled to be represented in arbitral proceedings by a legal practitioner of his choice.”). Enshrining this right in legislation confirms that the BVI is committed to party choice – no entity wants to be told who it can and cannot engage to represent it in its disputes and it is good that the BVI recognizes where others have failed.

Similarly, the Arbitration Act 2013 also gives civil immunity to arbitrators for anything done in good faith in the exercise or performance of their capacity as arbitrator (the Act, section 101). Without this simple protection, the BVI would struggle to attract the best arbitrators to its jurisdiction.

Fourth, and crucially, enforcement of arbitration awards is now no longer a problem. Until 24 May 2014, the BVI was not a party to the New York Convention thus rendering any BVI arbitral awards all but unenforceable outside of the BVI. This all changed on 25 May 2014 when, following a request from the BVI government to the UK government, the BVI became a party to the New York Convention. As a result, those participating in BVI arbitrations can be confident that the resultant award will be enforceable in the over 150 contracting states that have acceded to the New York Convention.

Neither of these developments (the new Arbitration Act, and accession to the New York Convention) can be underestimated and they are evidence of the fifth factor that demonstrates the strength of the BVI’s offering – strong governmental support. It sounds trite but in fact the importance of government support is something that is often overlooked; it is often seen as the reason why Hong Kong and Singapore broke away from the plethora of other regional arbitration centres that have opened up over the years. Both have had exceptional support from the government – be it through developing a legislative framework that is conducive to arbitration or through focused and deliberate policy decisions that encourage arbitration including by spending commitments. It is clear that the BVI government is adopting a similarly hands on approach to work with partners in industry to ensure that the BVI’s offering is the best that it can be. This support must continue.

Sixth, and equally as importantly as those features that have gone before, the BVI has a sophisticated, learned, ethical and impartial judiciary. Arbitration cannot flourish where there is an overactive judiciary that fails to understand the need for minimal intervention in the arbitral process. One of the key traits of London, Paris, New York, Hong Kong, and Singapore, is a sophisticated supportive but non-interventionist judiciary who understands the need to support the arbitral process rather than impede through over activity.

The BVI has a well-respected commercial court in place that is bolstered by the Caribbean Court of Appeal, with a final right of appeal to the Privy Council in England. These courts are well used to dealing with complex international disputes. Arbitration practitioners need have no concerns as to the ability of these judges to weigh in on the many complex issues that their arbitrations may throw up.

Equally though, we can be confident that these same courts understand the importance of being seen to support rather than undermine arbitration. The BVI courts have a pro arbitration history and, even before the new arbitration act came into force, it has stayed court proceedings in favour of arbitration (*Applied Enterprises Limited v Interisle Holdings Limited*).

Just as I have described its judiciary as sophisticated, learned, ethical, so too would I described the lawyers of the BVI. This seventh feature is another essential ingredient to success. Successful arbitration centres need sophisticated and skilled practitioners to run and support the arbitrations taking place in the jurisdictions. .

And it isn't just the BVI's legal infrastructure that are the ingredients to its success. The eighth factor that I would throw into the mix is the BVI's reputation as a financial services centre. In 2012 it was suggested that the BVI was the world's biggest provider of offshore entities with more than 1 million companies incorporated at that time. The CIA World Factbook describes the BVI's economy as "one of the most stable and prosperous in the Caribbean". This matters.

Most obviously, the BVI is well placed to develop a healthy and sophisticated domestic arbitration practice to meet the needs of these companies.

But beyond this, the BVI is uniquely placed to leverage a domestic arbitration practice to win international arbitrations. For the majority of the BVI companies sit amidst truly international company structures. This can and should be leveraged to ensure it is not just BVI entities seeking to have their disputes heard confidentially in the BVI but it is also their many international affiliates.

Moreover, the use of arbitration to resolve financial disputes is on the rise. Again, the BVI's expertise in financial services means that it is exceptionally well placed to develop its reputation as a centre for financial dispute resolution – it has a ready pool of experts who can hear and argue the most complex of financial disputes.

Ninth, although still in its early stages it is important that the facilities that will be offered at the BVI International Arbitration Centre will meet the standards now expected in international arbitration. BVI IAC's remit, among other things, is to offer facilities for the conduct of arbitral proceedings. What the likes of Maxwell Place in Singapore or Arbitration Place in Toronto show us is that increasingly the parties to arbitrations, and the practitioners, are raising the standards of what they would like from their hearing centres and their arbitral instructions. Let's be clear. I am not saying that the BVI national Arbitration Centre should get to work on building a "cloud garden" (as proudly touted by Toronto's Arbitration Place) if it wants to become a global player but I am saying that it should offer the services and facilities that its clients have become used to – comfortable surroundings that are conducive to work, easy and quick internet access, easy access to refreshment and accommodation; transcription and translation facilities

adequate hearing rooms able to accommodate small hearings and large events with multiple attendees, good document management systems.

I am unclear also whether the intention is to offer administered arbitration or simply the facilities for hearings. The Queen Mary survey I referred to earlier found a clear preference by users for institutional arbitration over ad hoc: 86 to 14%. I wholly endorse that conclusion. Running institutional arbitration does require greater input from the centre but users like it – it takes a lot of the strain off them to maintain the standards of awards for example so they are enforceable.

Finally, and something that could well be overlooked, but the very nature of the BVI is an essential part of its success as an arbitration centre. It is politically stable, good accommodation and a good and modern infrastructure.

I have identified 10 factors here. Each of the key factors that I have touched on here fall within what will soon be known as The London Principles 2015 which we consider are the Principles necessary for an effective, efficient and “safe seat for the conduct of international commercial arbitration.” Which I told you before will be launched later this year in London.

## **VII. CONCLUSION**

I want to conclude by wishing much success to this new venture. The legislative changes have put BVI on the way to adding to its reputation as a financial and legal centre, a welcome arbitration capability. It has the chance to be the best thought out and thus most popular in the Caribbean but also serving other places. Arbitration need know no national boundaries.

I look forward to the conference tomorrow. And I look forward to coming back soon to participate in a new centre whether as arbitrator or counsel. And if it does happen, if it is a success following the idea of Archie Archibald whoever has made it happen – and it has to include government - will be able to say: We were from the government and we were here to help.