

Tel Aviv Arbitration Day, 25 February 2019

Keynote Address: Lord (Peter) Goldsmith QC, PC

International Arbitration at the Crossroads

A. INTRODUCTION

1.
 - i. It is a pleasure and an honour for me to have been invited to speak at the inaugural Tel Aviv Arbitration Day. I am delighted to be present at the birth of this initiative. I am sure we all want to congratulate the parents—they should be proud of the new arrival because it is a great thing they have achieved—and to wish the newborn a strong and vigorous life ahead.
 - ii. But, as well as joy and congratulations, every new birth encourages reflection. Reflection on the qualities of the child. Who does he look like? Does he have his father's eyes? His mothers' sharp wit and intelligence?
 - iii. And also reflections on what the future holds for the new child. That requires looking rather wider afield. At the state of the world in which he is to live and how that looks like developing. Some prediction and some forecasting and some wishing is necessary.
2. So too this conference offers the opportunity for this reflection as well as celebration. And reading the programme, it is apparent that the organisers have assembled an excellent and knowledgeable group for this birthday reflection. Experts from all regions to enable a global look at arbitration region by region and industry by industry. There is a lot to consider here: such as the Belt and road initiative which could transform many aspects of

business in China and the Far East, as well as reflection by local experts on Israel's own reform programme. And discussion of important procedural developments in international arbitration. I am looking forward to hearing the fireside chat with Paula, Alexander and Gabrielle, experts from the LCIA, ICC and Swiss Chamber.

3. But in my view, this ought not to be just a celebration of how well the arbitration community is doing. Not just a complacent look patting ourselves on the back. There is more danger ahead than may be apparent. It has been in one sense a golden age for international arbitration; new institutions; revisions of rules; development of new rules; new legislation—I was in India for example last week a jurisdiction which has been very arbitration unfriendly looking at proposed amendments to a law only passed in the last two years. A radical look at some of the problems such as whether we should continue with a rather common law approach to disclosure and discovery or look more to the civil law approach—which has led to the much trumpeted launch of the Prague Rules which boast just that aim. And a thriving and active arbitration bar.
4. But the question I want to pose is whether we are at a crossroads. Although this has been a golden age for arbitration, history is full of examples of golden ages which then lead to decline and decay sometimes sharper than the preceding development. Is there an issue we should be concerned about here?
5. The events which cause me to raise this question are in the context of developments in the field of investment arbitration—which you will be discussing at the end of the day with an expert panel including the deputy AG for Israel Dr Roy Schondorf as well as experts from private practice.
6. To set the scene for my concerns, I need to say a little about the developments in Investor State Dispute Settlement (ISDS), although you will be hearing more later today.
7. As many here will know, investors, sovereigns and administering institutions, as well as the wider public, are presently revisiting the very foundations and assumptions of ISDS. Reform initiatives are currently underway in respect of

some of the major pillars of ISDS including the current system of bilateral investment treaty arbitration (in particular in the sphere of EU law, following the Court of Justice of the European Union's seminal decision in *Achmea*); the arbitration rules of the International Centre for the Settlement of Investment Disputes (ICSID); and the North American Free Trade Agreement (NAFTA).

8. Of particular interest to Israeli players may be the degree to which re-visiting the rules and systems of ISDS may permit smaller states to have a greater say in the shaping of the system than they previously had.
9. I can claim some experience in this field, having been a member of the British government at the beginning of this century as Attorney General. I continue to be a member of our Upper House and so am engaged in Parliament with some of these issues. Either side of that spell in government, I have been engaged in legal practice as counsel and arbitrator, a great deal of it focussed on international disputes in all their forms, and have seen first hand some of the trends and changes across that sector. It is from this vantage point that I will explore with you the current developments that are underway in the sphere of ISDS.

B. ORIGINS OF INTERNATIONAL INVESTMENT LAW

10. Since modest beginnings in 1959, when Germany concluded the first known Bilateral Investment Treaty (BIT) with Pakistan, nearly 3,000 such treaties have been entered into.
11. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) was an enormously significant development in international arbitration. It has made arbitration awards a global currency by providing that arbitral awards rendered by a tribunal seated in one member state are enforceable in any other member state. 159 States are now contracting parties to the New York Convention meaning, for example, that, pursuant to a single treaty, an arbitration award rendered in Azerbaijan is enforceable in Fiji or 157 other member states. The popularity of arbitration as a dispute resolution mechanism must, in part, be attributed to

the success of the New York Convention measured by the number of adhering States and the general respect it is afforded by national courts.

12. The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was another landmark treaty that furthered the cause of international arbitration although, in this case, specifically with regard to investment treaty arbitration between investors and States. That Convention established ICSID, an independent international institution that forms part of the World Bank. Though the ICSID Convention itself does not establish consent to arbitration, by signing it, 162 signatory states have demonstrated their commitment to resolving investment disputes by arbitration within an autonomous legal framework.
13. The ICSID Convention marks the era of the investment treaty. By affording investors substantive protections (such as the right to fair and equitable treatment and protection from unlawful expropriation) that they can directly enforce through arbitration against the host state of their investment, investment treaties have radically transformed the arbitration landscape. In 1965, there were only a handful of investment treaties. Today, there are 2971 bilateral investment treaties, supplemented with a number of free-trade agreements and multilateral treaties with investment chapters providing for international arbitration.
14. Whilst mentioning ICSID I should mention two other important international developments. First the work of The United Nations Commission International Trade Law (UNCITRAL), established by the United Nations in 1966, with its general mandate to further the progressive harmonization and unification of the law of international trade, has also been a boon to international arbitration. The UNCITRAL Arbitration Rules (first drafted in 1976 and last updated in 2013) are often used for ad hoc arbitrations and are commonly referenced in arbitration clauses found in both commercial contracts and investment treaties. The 1985 UNCITRAL Model Law on International Commercial Arbitration (updated in 2006) has provided a “best practice” model, supportive of arbitration, and has been the genesis for much of the international harmonisation of States’ arbitration legislation.

15. These three pillars: the New York Convention, the ICSID Convention and the UNCITRAL Rules and Model Law, supported by a multiplicity of bilateral investment treaties, have formed the bedrock of ISDS as we know it for the last half century or so. Under these instruments (and others that have been established in their wake), there have been over 900 known investor-State arbitrations and nearly 400 awards issued by arbitral tribunals.

C. CATALYSTS OF CHANGE

16. So what has caused stakeholders to revisit the rules and systems of ISDS?
17. Stakeholders may feel the need to rationalize what already exists. That motivation is not unique to the current reform processes: rather, it is a common theme to periodic reform. The rules and systems we have at our disposal today have evolved considerably in sophistication and circulation since their origins. However, they have evolved in an ad hoc fashion—with the negotiation of treaties largely carried out on a bilateral basis. It is therefore logical that some harmonization is now required. We should also expect that further harmonization will be required in the future.
18. When it comes to rationalisation and harmonisation, the key aims are often the rebalancing of interests as between investors and states, procedural economy, and transparency.
19. But the changes are more dramatic than that and more fundamental than more rationalisation.
20. This has stemmed from sharp and vocal criticism of ISDS, especially in the sphere of investment arbitration.
21. Such criticism has particularly come from governments and civil society. ISDS is criticised for being an undemocratic secret court system which hides the activities of big business and prevents the proper, transparent regulation of industry. Focussing upon cases such as Phillip Morris' challenge to tobacco legislation in Australia and Vattenfall's challenge to regulation of the nuclear industry in Germany, critics also charge that ISDS and the bilateral investment treaty system in general improperly restrict the ability of governments to make

decisions and set policy in a way that is in the best interests of their citizens by giving large foreign investors the ability effectively to hold governments for ransom over any changes that would have an impact on those investors' businesses. Investors is of course another major factor animating the case for reform, and ISDS has had plenty of it.

22. But the criticisms go wider than that to challenge some of the fundamental architecture of international arbitration. Principal criticisms of ISDS thus tend to fall into broad categories:
 - a. Time and cost economy—stakeholders from all camps gripe about the time and cost of ISDS proceedings, which were originally mooted to be an economic alternative to national court processes.
 - b. Independence and impartiality of decision makers—party selection is one of ISDS's unique and, for some, most attractive features. But we are all aware of the “private members club” narrative as well as the criticisms regarding lack of diversity in arbitral panels.
 - c. Transparency—somewhat related to the previous point, but, in addition, the private nature of ISDS proceedings frequently comes under fire given the public interests at stake.
 - d. The balance of party interests—ISDS is criticized as being too investor friendly, thus (allegedly) stifling legitimate Sovereign conduct.
23. These concerns have not just been moans or isolated gripes. They have had a major impact on the development of the law and in international relations. So, ISDS provisions in the Transatlantic Trade and Investment Partnership (TTIP) (between the EU and the USA) proved to be a major sticking point. A number of European Citizen's Initiatives (a type of EU mechanism, introduced by the Lisbon Treaty, aimed at increasing direct democracy within the EU) opposed to the TTIP were formed and campaigned for the negotiations to be abandoned. One based in Berlin, called “Stop TTIP!”, started a petition calling for an end to TTIP which attracted over 3.2 million signatures in less

than a year, prompting various political leaders across Europe to voice their own concerns.

24. In the courts, too, we have seen concrete action. The Court of Justice of the European Union's much-debated decision in *Slovak Republic v. Achmea* has been viewed by some as a political decision representing a backlash against the state of intra-EU ISDS. The recent declarations by EU Member States that they will, among other commitments, terminate their intra-EU BITs by the end of this year (which I will go on to discuss) follow a similar trend.
25. Picking up on one of the main criticisms, the privacy or "secrecy" of arbitration, I would like to make one further point.
26. What the comparative secrecy of arbitration should not be allowed to do is to sanction behaviour which would not be countenanced in an open court; indeed would not even be attempted in an open court. Lawyers should not do things they would not do in a courtroom under the eyes of a watchful judge. Here is an area which needs more thought and development.
27. How do you sanction bad professional behaviour in an arbitration? It is not easy for the arbitrators themselves to sanction the lawyers—and it is not even clear they have the power to do so. Powers do exist in disparate locations in soft law, institutional rules and case law. For example, the 2013 IBA Guidelines on Party Representation in International Arbitration—available to parties on an opt-in basis—allow tribunals to admonish party representatives, to consider their misconduct when apportioning costs in a case or to take "any other appropriate measure". The LCIA incorporated these IBA Guidelines into its 2014 rules, an annex of which says that where a legal representative has knowingly made a false statement or concealed documentation, the tribunal may issue a written reprimand, caution or any other measure within its general powers.
28. That is all well and good to the extent that arbitrators actually make use of such uncodified powers. For what it is worth, my personal preference is for recognition that the rules of professional conduct which govern what we do in court should also apply to what we do in arbitration. To do that does also

require recognising and if need be amending rules of arbitration to allow that any confidentiality that applies in the arbitration should not apply to providing information to a regulator in respect of counsel's conduct. Or else any complaint could simply be stymied.

D. RE-VISITING ISDS—THE PRESENT STATE OF PLAY

E. Returning to the question of the criticisms and the reaction to them, there is now developing, I would suggest, a pretty clear outcome. And it is one which strikes at the heart of traditional investment arbitration

F. UNCITRAL ISDS Reform Process

29. In July 2017, at its 50th session (held in New York), the United Nations Commission on International Trade Law (UNCITRAL) considered notes by the Secretariat on: concurrent proceedings and ethics in international arbitration; possible ISDS reforms; and related comments and observations by States and international organisations.

30. Having duly considered these materials, UNCITRAL tasked its Working Group III with a broad mandate to work on possible ISDS reforms. Working Group III's mandate was three pronged: it would (i) first, identify and consider concerns regarding ISDS; (ii) second, consider whether reform was desirable in light of any identified concerns; and (iii) third, if the Working Group were to conclude that reform was desirable, develop any relevant solutions to be recommended to the Commission. Notwithstanding the scope for potential *substantive* reform, Working Group III's mandate is confined to matters of *procedure* in ISDS.

31. Working Group III was requested to ensure that its work would be “*Government-led with high-level input from all Governments, consensus-based and fully transparent*”. The involvement of UNCITRAL and Governments clearly raised the stakes for multilateral ISDS reform.

32. Working Group III began work on its mandate at its 34th session in Vienna, between November and December 2017, during which a number of key

themes for reform were discussed. These included: (i) the duration and costs of ISDS procedures; (ii) the allocation of costs in ISDS; and (iii) transparency in ISDS.

33. Primary concerns in relation to duration and costs included: (i) the disproportionate impact on smaller and developing States of limited financial means; and (ii) the need to increase case management and modern technology training for arbitrators.
34. Costs apportionment was also examined, with the mention of a potential future costs allocation system. Security for costs and third-party funding were also discussed in this context.
35. As ever, transparency was a prevalent concern, with better implementation and public understanding of transparency standards being mooted as areas for further development. The UNCITRAL Transparency Rules and the Mauritius Convention were noted as helpful instruments in this regard.
36. At its 35th Session, held in New York in April 2018, the Working Group went on to discuss concerns, inter alia, with the legitimacy and (lack of) diversity of arbitral appointments, independence and impartiality of arbitrators, costs of arbitration, third-party funding, counterclaims, and the consistency, predictability, and correctness of awards.
37. At its 36th session, again in Vienna, held between October and November 2018, Working Group III moved to the second prong of its mandate, considering whether reforms were desirable with regard to the concerns raised at the 34th and 35th sessions. “Desirability” was based on views expressed by individual States in accordance with their own respective criteria, which varied depending on their experience with ISDS.
38. The Working Group recognised that the previous sessions had highlighted three main areas of concern. The first of these pertained to the lack of consistency, coherence, predictability, and correctness of arbitral decisions by ISDS tribunals. Concerns here fell into three subcategories, namely: (i) divergent interpretations of substantive standards, jurisdiction and

admissibility, and procedural inconsistency; (ii) the lack of a framework to address multiple proceedings; and (iii) limitations in the current mechanisms to address inconsistency and incorrectness of arbitral decisions. The Working Group concluded that reform was desirable in respect of all three categories.

39. The second area of concern pertained to arbitrators and decision makers and more specifically: (i) lack or apparent lack of independence and impartiality; (ii) limitations in existing challenge mechanisms; (iii) lack of diversity of decision makers; and (iv) qualifications of decision makers. Again, the Working Group concluded that it was desirable to develop reforms in respect of each of these concerns.
40. The third main area of concern pertained to costs and duration of ISDS proceedings. Discussion fell into the following sub-categories: (i) the length and cost of ISDS proceedings and the lack of a mechanism to address frivolous or unmeritorious cases; (ii) allocation of costs in ISDS; and (iii) the availability of security for costs in ISDS proceedings. Reform was deemed to be desirable in each of these areas. The issue of third-party funding was also raised; however, consideration of the desirability of related reforms was deferred to the next session.
41. The Working Group encouraged governments to consult and submit written proposals for the development of work plans in time for the next session, which would move to consideration of implementation of potential reforms.
42. In response to the Working Group's invitation, on 18 January 2019, the EU and its member states submitted a paper to the UNCITRAL Working Group, outlining its proposal to **establish a permanent multilateral investment court** with an appeal mechanism and full-time adjudicators. The EU views this as the only reform option that can effectively respond to all the concerns identified in the Working Group Process process as it considers that it would:
 - a. enhance the predictability and consistency of decisions and ensure their correctness (due to the appeal mechanism);
 - b. eliminate the ethical concerns of the current system; and

- c. effectively address the problems of excessive costs and duration.
43. These proposals will be discussed at the next meeting, the 37th Session of the Working Group, from 1 to 5 April 2019 in New York.
44. While the EU has its own solution, which I will discuss in a moment, it is not shared by all participants in the process. For example, in comments submitted at the outset of Working Group III's mandate, though Israel welcomed UNCITRAL as an "appropriate global forum" for discussing tools in relation to a permanent investment court and an appeal mechanism, Israel noted that its support for the process did not imply support for the permanent investment court and appeal mechanism nor that Israel would necessarily join a convention on this issue. Israel considered further that UNCITRAL's involvement would support the involvement of smaller Member States in the discussions.
45. Nonetheless the momentum towards changing a system of party-appointed arbitrators to a system of full-time professional adjudicators—which is what the EU now says it wants—may be unstoppable. The EU is too big a trading group not to be able to call the shots with many, if not most, of its trading partners. So we may be seeing a move away from arbitration in this important field.

Achmea

46. uImpetus is added to this direction by last year's decision of the Court of Justice of the EU in *Slovak Republic v. Achmea*. I will provide some brief background.
47. In 2016, the German Federal Court of Justice asked the CJEU to determine whether Article 8 of the Netherlands-Slovak Republic BIT is compatible with EU law. This was the dispute resolution clause at issue in *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13. In March 2018, the CJEU held that a clause "such as" Article 8 was not compatible. The court based its decision on the supposed threat posed by the clause to the constitutional structure and autonomy of the legal system of the EU as well as

its incompatibility with the principles of mutual trust and sincere cooperation enshrined in EU law.

48. On 31 October 2018, on the basis of the *Achmea* Judgment, the German Federal Court of Justice (the “Bundesgerichtshof”) set aside the 2012 final arbitral award in the *Achmea* case
49. In June 2018, the Svea Court of Appeal stayed the enforcement of a different intra-EU BIT award against *Poland in PL Holdings v. Poland* (SCC Case No. 2014-163). Following Poland’s objections based on the *Achmea* Judgment, the Svea Court found that there was “sufficient reason” to order the stay but did not set out further grounds for its decision.
50. The scope of the *Achmea* Judgment, and its implications for similar clauses in other treaties providing for international arbitration, has been the subject of much debate, including before national courts and international tribunals. The consequences for the arbitrations of the International Centre for Settlement of Investment Disputes (ICSID) have been particularly contentious, as those arbitrations operate within a self-contained system governed by a multilateral treaty whose parties include many EU and non-EU Member States. The implications of the *Achmea* Judgment on investor-state arbitration under the ECT—a multilateral treaty to which EU Member States, non-EU Member States, and the EU itself are parties—have also been a point of controversy. Spain has asked the Svea Court of Appeal, in the context of proceedings to set aside the award in *Novenergia v Spain* (SCC Case No. 2015/063), to seek a preliminary ruling from the CJEU on the compatibility of the ECT with EU law.
51. Importantly, according to publicly available information, in the 10 months since the *Achmea* Judgment, there have been no decisions by intra-EU investment tribunals finding that either the *Achmea* Judgment or the principles underlying the decision deprive these tribunals of jurisdiction. This is particularly true of ICSID tribunals, as reflected in seven publicly available or reported decisions since the *Achmea* Judgment, in which those tribunals have rejected requests to reopen proceedings on the basis of the *Achmea* Judgment

or found that their jurisdiction is unaffected. For example, the tribunal in *UP and C.D. v. Hungary* (ICSID Case No. ARB/13/35) held that “[t]he *Achmea* decision contains no reference to the ICSID Convention or to ICSID arbitration ... and ... cannot be understood or interpreted as creating or supporting an argument that, by its accession to the EU, Hungary is no longer bound by the ICSID Convention”.

52. To date, every investment tribunal to consider the question has come to the same conclusion—refusing to reopen proceedings or declaring that the *Achmea* Judgment does not undermine its jurisdiction. (Examples include: *Antin v. Spain*; *Masdar v. Spain*; *Novenergia v. Spain*; *Antaris v. Czech Republic*; *Vattenfall v. Germany*; and *Greentech v. Spain*.)
53. In the wake of *Achmea*, On 15 and 16 January 2019, just before the EU submitted its proposals on a multilateral investment Court to Working Group III, the 28 Member States of the European Union (including, for the moment, the United Kingdom) issued declarations undertaking to terminate bilateral investment treaties concluded between them (“intra-EU BITs”) by 6 December this year.
54. Here is the crux. Whatever the fine points of the jurisprudence, the political will of the EU members states is against determining investment disputes between themselves by traditional investment arbitration.
55. 22 of the 28 Member States have also signaled their view that the *Achmea* Judgment applies equally to intra-EU investor-State arbitration under the Energy Charter Treaty (ECT) and have undertaken to discuss with the European Commission any steps necessary to ensure its uniform application in this context. The remaining member states—Finland, Luxembourg, Malta, Slovenia, Sweden, and Hungary—concluded that the *Achmea* Judgment is silent on the question of intra-EU investor-State arbitration under the ECT. These States considered it inappropriate to opine on the issue, with the first five expressly noting that the question is currently contested before the Svea Court of Appeal in Sweden.

56. The declarations have intensified the uncertainty for all investors that are considering or are pursuing proceedings under intra-EU BITs as well as investors with awards subject to set-aside or enforcement proceedings. It is unclear how tribunals will react to being “informed” that there is no valid consent to arbitrate, especially given the reactions of tribunals to the *Achmea* Judgment to date and the individual rights of investors.
57. It is not yet clear whether this adverse climate extends outside the EU. Since investment tribunals have, so far, concluded that the *Achmea* Judgment does not deprive them of jurisdiction or provide a basis to reopen proceedings, investors may seek to enforce the resulting awards in jurisdictions outside the EU where the respondent Member State has assets. Courts in those jurisdictions could decide to enforce the award under the New York Convention, or refuse to enforce on public policy grounds in light of the EU Member States’ declarations.
58. The commitment not to challenge settlements and awards that have been complied with or can no longer be annulled likewise lacks specificity: “Member States will discuss, in the context of the plurilateral Treaty or in the context of bilateral terminations, practical arrangements, in conformity with Union law, for such arbitral awards and settlements”. It is therefore unclear what impact the declarations will have on the EC’s position on recent awards by intra-EU BIT or ECT investment arbitration tribunals, particularly those which it considers to be in violation of EU law. For example, in October 2014, the European Commission had commenced infringement proceedings against Romania in respect of part payment of an award to the Micula brothers in *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*.
59. The future legal landscape of the UK remains uncertain as Brexit negotiations continue. Or not so much negotiations as PM May’s hurtling dash towards the abyss of a no-deal Brexit in the hope that either the EU or Parliament will blink before the crash occurs. In any event, the impact of these declarations on BITs between the UK and current or future EU Member States in the event that the UK exits the EU is therefore an open question.

60. Some Member States had already begun terminating their intra-EU BITs even before the *Achmea* Judgment. For example, the Czech Republic, Denmark, Ireland, Italy, Poland, and Romania had all terminated, or begun to terminate, their intra-EU BITs before March 2018. However, the recent declarations indicate a commitment to terminate all intra-EU BITs, with a question mark over the fate of investor-State arbitration under the ECT as it applies between Member States. Developments over the course of this year may shed greater light on how, and the extent to which, this commitment will be implemented. In particular, these developments may clarify whether EU investors will need to resort to national courts to challenge State measures affecting investments.
61. The impact on cases brought under the ECT will also be the subject of further discussion, especially in light of the reactions of the six Member States that have distinguished the applicability of the *Achmea* Judgment to the ECT.
62. But the writing is on the wall.

ICSID Rules

63. This is not to say that there are no pro arbitration developments. So for example ICSID is in the process of amending its rules for the fourth time. ICSID launched the current amendment process in October 2016 and invited Member States and (later) members of the public to suggest topics for potential amendment. My law firm and many delegates present at this conference were active participants in the public consultation process.
64. ICSID has three principal stated objectives for this phase of amendments to its rules. First, the changes are intended to modernize the rules based on ICSID's case experience. Given its administration of more than 650 cases, ICISD believes a number of lessons can be learned and should be incorporated into the rules from time to time. Second, ICSID hopes that the amendments will make the process increasingly time and cost effective, while maintaining due process and a balance between investors and States. Third, ICSID hopes that the rule amendments will make the procedure less paper intensive, with greater use of technology for transmission of documents and case procedures.

65. The working paper is some 922 pages, including text in English, French and Spanish. Ahead of its publication, ICSID's secretary general, Meg Kinnear, highlighted a sample of the proposed rule changes:
- a. more simply worded rules that are better organised and sequential;
 - b. A recommendation for claimants to expand the information in requests for arbitration with further details of the facts, damages claimed, proposed method of appointing arbitrators and even their chosen arbitrator, which could be designated as the first memorial in the case to save time and would help expedite subsequent proceedings;
 - c. Provisions geared to decreasing the time of proceedings, including a general obligation on parties and arbitrators to address the time and costs consequences of their acts and specific requirements and time goals attached to various steps in the process;
 - d. a presumption that all filing is electronic to reduce time and costs;
 - e. a time frame of 90 days within which parties must appoint the tribunal, or either party can activate the default process of selection by the chairman of the ICSID Administrative Council;
 - f. a requirement that arbitrators file a more elaborate declaration addressing their relationship to parties, counsel, co-arbitrators, and funders and their availability for the case;
 - g. a specific time frame for seeking to disqualify an arbitrator and the removal of the automatic suspension of proceedings to avoid abuse of challenges;
 - h. a new provision on witnesses, including tribunal-appointed witnesses, that is more reflective of practice; and
 - i. a rule keeping costs in the discretion of the tribunal but with extra criteria that should be considered including the outcome of the proceeding and conduct of the parties.

66. I note that Israel's contributions to the amendment process have been very much in line with these main themes. [Interestingly, in relation to Arbitration Rules 20 and 65 (General Provisions regarding the Constitution of the Tribunal; Annulment: Appointment of Ad-hoc committee), Israel proposed a prohibition on the appointment of an arbitrator who is the national of a State which does not maintain diplomatic relations with the State party to the dispute, or with the State whose national is a party to the dispute, without agreement of the other party. Its justification was to avoid intertwining investment disputes with political ones.
67. Based on the ICSID rules, amendments require two-thirds of ICSID member-states to approve the amendments. The vote on amendments is expected in 2019 or 2020.
68. 34 states, as well as the African Union and European Union, have submitted comments to the proposed amendments.

E. Wider Implications

69. I have been discussing all this from the perspective of investment arbitration. It is clear that investment arbitration is at a crossroads very likely moving from the system we know so well of decision making by arbitrators chosen by the parties without effective appeal. There are special considerations here such as the impact on governmental policy choices I mentioned earlier: health care choices; nuclear energy choices and so on.
70. So, solutions which are eventually adopted to meet those concerns do not necessarily carry across to the world of commercial arbitration. And moreover, the actors are different; businesses and individuals in the private sector are not driven by the same concerns as governments.
71. But the applicability of the investment concerns to commercial arbitration cannot be dismissed so easily. If arbitrators cannot be trusted in the field of investment arbitration to be objective and dispassionate if they are chosen by the necessarily self-interested parties, why is it any different in commercial arbitration? If the need for consistency of decision making (and therefore

predictability of decision making) requires not just a permanent body of judges but also an appeal mechanism for investment cases, does the same not apply also to commercial disputes at least those on standard forms such as those prevalent in construction banking or engineering contracts?

72. My point, therefore, is this. The current revision of investment arbitration must put pressure too on the commercial arbitration system. Is it not also at a crossroads? We saw some of that when the European Parliament first debated the proposed US/EU TIPP. Arbitrators were discussed in very uncomplimentary terms. Will it give way to that pressure? Will we see similar initiatives for commercial arbitration as the permanent investment court? It would fit in with other thinking such as that of Jan Paulson in his Miami lecture advocating a move away from party-appointed arbitrators to appointment from an institutional list.
73. We cannot be sure of the answer to that question. But it is one that needs to be answered. And it could mean a radical and far-reaching change to what we are presently doing. That is why I asked if international arbitration is at a crossroads.
74. I am not suggesting there will be no international arbitration. The rationale for it and the reason for having it in some cases are too strong to be ignored. But, we could be seeing the start of a completely different system. Alarmist? Perhaps. Without any substance? Certainly not.
75. These then are my reflections on the birth of this new event. And with this uncertainty about the future, it is appropriate to say to this audience from the arbitration community a Hebrew phrase well known to all but which has a double meaning; Mazel Tov. Congratulations. But also, Good luck
76. Thank you.