

Joint Colloquium on International Arbitration
“Advancing Innovation in International Arbitration”

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- Meg Kinnear, Secretary General of ICSID
- India Johnson, President and CEO of ICDR-AAA
- Alexis Mourre, President of ICC International Court of Arbitration
- Distinguished colleagues

It is a privilege to join you for the 35th Annual Joint Colloquium on International Arbitration and to address such a notable group of professionals who are contributing to shape the course of international arbitration.

Today, I will address arbitration from a policy-maker’s angle, on two main aspects. First, I want to share with you what I consider are key factors that governments take into account when designing public policy around foreign direct investment. Second, I will share some questions that I think will contribute to the discussion around the new design of ISDS.

My message to you comes at challenging times for policy-making and not so long ago, the world faced similar conditions.

In December of 1991 the dissolution of the Soviet Union, which marked the end of the Cold War, thrust States into a “new world order” and thus began a period characterized by dramatic changes in the political climate and a readjustment of economic and political power. To make sense of the unfamiliar, experts described the world after the Cold War with the term “VUCA”: volatile, uncertain, complex and ambiguous. The term has regained meaning and accurately depicts humanity’s present trial. I will not delve into the elements that create this VUCA environment, as they are surely familiar to this audience, but the fact is that it is difficult to foresee how political, economic or commercial incidents in different countries, far and near, will impact our own countries, people and even businesses.

At the same time, citizens and consumers have become more demanding, to a large extent thanks to technological breakthroughs. This has pushed companies to conduct themselves under different rules. Indeed, for companies to brave new challenges, the business community coined the term *quantum company*, that is, a business that will thrive in this new paradigm and despite VUCA. It is accepted that if companies adhere to values such as coherence, integrity, transparency, and responsibility they will be more successful in today's markets. Conducts such as the sharing of information, empowerment of workers, simplification of rules, speedier interactions, rethinking hierarchical relations, and increasing collaborative spaces provide companies with the required gear to make decisions at a rapid pace and satisfy consumer demands.

In this context, a question that arises is, Is there such a thing as a *quantum State*? What is required for States to build strong foundations that can resist the VUCA context and at the same time cater to the also growing demands of their citizens? The degree to which governments are able to adopt values such as coherence, integrity, transparency, and responsibility will likely affect their legitimacy and at the same time the actual functioning of the State in the increasingly complex scenario that is the global economy.

Let us take the example of FDI attraction policies in my country, Costa Rica. Flows are at a historic turning point and seemingly moving away from greenfield to other modes with less social impact, also apparently returning from emerging countries to the more developed world. Together with transformations stemming from the digital economy, robotics and automatization, AI and other related technological megatrends, the VUCA context requires that States design and implement the right mix of policies to turn challenges into renewed growth opportunities. Indeed, States are competing against one another for FDI flows and need to be sure that they increase their participation in the global value chains.

So what should a small country such as Costa Rica do under the circumstances?

1. First, in order to build a competitive value proposition to attract investment, we know what our competitive advantages are and we know that we need to invest in them. Surely size is not one of them. Human talent, reputation and stability are among the most salient, so our budget

needs to reflect these priorities. Also, we have defined the target type and quality of investments the country wishes to attract in accordance with our identity, which means that respect for the environment and labor laws will be at the core of those policies. In addition, we must tackle inequality of investment flows within our own territory. We are working on ways to identify new and more productive agriculture activities that will be successful in the international markets. Finally, we must the modernization of administrative barriers for trade facilitation.

2. Secondly, precisely because of our characteristics, we must carry on with the country's open trade policy. Costa Rica has successfully negotiated 14 free trade agreements with 50 trading partners that represent two thirds of global GDP and 2.5 billion potential consumers around the world. This provides companies with a robust platform for export and import. We take pride on how we have been able to take advantage of free trade, converting it into one of the key drivers of our social and economic development. Indeed, we are increasingly diversifying our export mix, which is currently almost 50/50 goods and services. Surely we need to do more, to make sure that we become an even more diversified economy, so that we leverage risks arising from the VUCA context.
3. This takes me to the third and final foundation, which relates to the defense of international law. As a small economy, Costa Rica believes that international law is key to levelling the playing field among the different actors in international trade. We advocate multilateralism and the use of the dispute settlement mechanisms at hand to resolve emerging differences, as an honest broker that knows that the system works.

Dear colleagues, if I have translated the values of coherence, integrity, transparency, and responsibility from *quantum companies* to *quantum States*, how could we build *quantum arbitration*? That is, what do we need to do to design an international arbitration system that can adapt to the changing needs of the different stakeholders and at the same time offer the required predictability and credibility?

Discussions around this question have gone on for some time now, and some policy-makers are submitting proposals of wide range to modify ISDS. A possible scenario is that we will find ourselves with two regimes of ISDS, where

some treaties provide for the establishment of a permanent body and others will carry on with the current system. This will allow us to contrast and compare which of the regimes offers better responses to the concerns of inconsistency in the decisions, lack of transparency and accountability, and high amounts of awards and costs of the proceedings.

But I wonder, will either of these systems be a *quantum* arbitration system? In order to answer this, I offer some questions that I submit must be considered in the debate. Many if not most have been present for some time of course.

Who should participate in the design of the renewed system? Are businesses having a voice in this debate issues? Or is this only of the concern of States? If inconsistency and accountability are major preoccupations, do not they affect companies' decisions as to where to invest?

Do we need an appellate body? Would not this provide coherence? If so, who should integrate such a court? Who should design it and define the applicable rules? Would cases take too long?

If these solutions, such as an appellate body or permanent courts, prove too burdensome, will this drive investors to local courts instead? Local judiciaries have already become more modern as they implement technological solutions, will they compete among one another? Is this a trend that has begun already?

Other issues must be considered as well; for example, must we cap orders on damages? Or do we need to certify arbitrators? If so, which institution is best placed to offer certification? Finally, should we proscribe double-hatting?

After laying these queries, I commend ICSID, the ICC And ICDR for designing a program, not around those questions but rather around issues such as ethical conduct of counsel, handling of strategic communications, the manner in which cross examination is conducted, and enforceability of the award. These matters also lie at the core of legitimacy and credibility of international arbitration. After all, is it not through higher standards and better decisions that we will really improve ISDS?

Thank you.