ICCA Sydney: New Frontiers in International Arbitration II: Potential of Arbitration Involving New Stakeholders

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The morning session of the last day of the ICCA Sydney 2018 Conference on "Potential of Arbitration Involving New Stakeholders" was moderated by *Ndanga Kamau* and had the insightful contributions of *Dr. Campbell McLachlan QC, Prof. Makane Moïse Mbengue* and *Silvia Marchili*.

Ndanga Kamau opened the final plenary session by asking the following question: why do we need to evolve? The answer was rather simple: to ensure that the industry can survive. Ndanga Kamau warned delegates that we are still restrained by the myth that inclusiveness leads to the dilution of quality practitioners (counsel or arbitrators), and it is certainly not good enough to keep thinking about inclusiveness, rather than doing what is necessary to address it. Further, in regions where international arbitration is not developed, there is nothing inherent that stops interested parties from participating in the industry. It is important that we involve new stakeholders, even those with little or no understanding of international arbitration.

Ndanga Kamau invited each of the panellists to share their views on the topic.

Dr. Campbell McLachlan QC referred to the Abyei Arbitration and the Bangladesh Factory Accord as two examples where arbitration agreements were used in an innovative manner to protect the rights of all stakeholders affected by the subject matter of the dispute.

Dr. Campbell McLachlan QC offered five relevant themes and conclusions arising from these cases:

1. Access to new stakeholders – there is no inherent difficulty regarding access as it comes down to the will of the disputing parties as well as the arbitration community.

2. Role of arbitration in wider process of dispute settlement – arbitration is only part of a larger dispute resolution process, but it is a significant part.

3. Engagement of the international community – a reference was made to Chief Justice Sundaresh Menon's speech earlier in the conference. It was agreed that the success of the global system depends not only on party autonomy but more importantly active support from the international arbitration community.

4. Capacity of arbitral process to handle disputes – the arbitral process has the capacity to deal with

claims other than those where a contact or treaty is invoked.

5. Enlargement of facilitation – processes must be developed to promote facilitation, rather than to inhibit collective claims. This will ensure consistency, efficiency and most importantly access. Tribunals must actively promote the consolidation of claims.

Dr. Campbell McLachlan QC assured delegates that a strong understanding of these five key messages will ensure that arbitral tribunals are viewed as being highly independent, impartial, and international.

Silvia Marchili considered that evolution naturally brings about unintended consequences, and that we often fail to appreciate this as we are overly fixated on new initiatives. Silvia Marchili acknowledged the concerns regarding the legitimacy of ISDS, where some nations have denounced the ICSID Convention and where negotiations regarding regional agreements have often veered off course. Further, involving the local population in the process has a limited impact. Although NGOs and other community organisations may help 'demystify the secrecy aspect' of international arbitration, they alone are not capable of addressing broader concerns regarding the legitimacy of arbitration.

Silvia Marchili compared international arbitration to teenagers who believe they are capable of changing the world, questioning whether arbitration is in fact a suitable mechanism to solve human rights disputes. Silvia Marchili left the audience with two proposals which may assist with business and human rights (BHR) disputes: working groups and the need to amend BITs and other investment agreements to better reflect matters of consent, arbitrability, and enforceability.

The final part of the panel discussion involved a brief update on investment arbitration in Africa, and how new stakeholders are being considered in recent negotiations of agreements. *Prof. Makane Moïse Mbengue* noted that African countries have now become 'rule-makers', as opposed to 'rule-takers' as Africa is becoming more innovative, particularly with respect to new stakeholders in arbitration. Africa has also strived to strike a balance between rights and obligations in agreements, with the latter recently receiving significant attention. Many agreements also now include provisions regarding investor liability.

Prof. Makane Moïse Mbengue also highlighted that there is significant divergence regarding whether or not ISDS requires reform, and suggested that if it is to be reformed, the best avenue is by arguing that it must welcome (and be more accessible to) new stakeholders. Such an approach is ideal as it would also ease general concerns regarding ISDS reform in African countries.