

IPBA ARBITRATION DAY: MUMBAI

18th SEP 2025

10:30 AM To 11:30 AM IST

International Arbitration in a Conflict-Ridden World

MODERATOR

Naresh Thacker, Vice-Chair, IPBA DRAC, Mumbai

SPEAKERS

Lars Markert, Co-Chair, IPBA DRAC, Tokyo

Sitpah Selvaratnam, Independent Arbitrator, Petaling Jaya

Ashutosh Ray, Associate, Jenner & Block, London

Mariel Dimsey, Independent Arbitrator, Hong Kong

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1 **NARESH THACKER:** Hi, can we have everyone seated so that we can hopefully begin on
 2 time and end on time. Thank you so much. So, we kick-off with the first session of the day and
 3 the very thought from Benjamin Franklin and his despair, we shall begin from there. The first
 4 topic that we've picked for the day is International Arbitration in a conflict-ridden world.
 5 Obviously, while we were thinking of the topics, this is something which came up. In the
 6 current scenario, if you look around everywhere, it's either wars that we see, we see sanctions,
 7 we see tariffs. And all of this actually brought the thought along and we thought that instead
 8 of talking about the mundane things that we always talk about in Arbitration in India, which
 9 is whether it should be Judge led or it should be lawyer led, or we should have specialists, etc.
 10 We move away from that and we talk about something which is more relevant and more
 11 contemporary in current times. Obviously conflict does seem to be the world's fastest growing
 12 export at the moment. We are not here to resolve conflicts. In that sense, as what Lucy
 13 mentioned, that conflicts, we cannot resolve wars, but hopefully we will try and come to a
 14 conclusion and be very, very civil about it. In the process, if anyone does want to nominate for
 15 the noble peace prize, I'll be more than glad to accept that.

16 So, the first question of the day from me is... I'm sorry. Before I do that, I also need to do the
 17 introductions. Let me begin with Mariel. Mariel is an International Commercial Investment
 18 Arbitration specialist with nearly 20 years of private practice experience in Germany and Hong
 19 Kong and has recently set up as an Independent Arbitrator based in Hong Kong.
 20 Congratulations on that Mariel.

21 Next up is Ashutosh. He's an Attorney at Jenner & Block, a US based firm and is based in
 22 London. He focuses on cross-border international disputes, including commercial and
 23 investor state arbitrations and international litigations. Also, he was part of the Law
 24 Commission of India's expert committees that recommended changes to India's Arbitration
 25 statute and its model BIT. I don't know how much they heard you on it, Ashutosh.

26 Sitpah is an Independent Arbitrator with over three decades of experience in Maritime and
 27 Commercial law. She's been appointed as Arbitrator, and a majority of disputes involving
 28 admiralty, shipping and Maritime law, international trade and commodities, as well as
 29 commercial contracts, including shareholder disputes and property related matters. She also
 30 serves on the panels of major arbitral institutions and contributes extensively to Arbitration
 31 and admiralty scholarship.

32 Last, but never the least, Lars Markert here. He is a Partner in Nishimura and Asahi
 33 International Disputes Resolution Group. With two decades of experience in Tokyo, New York
 34 and Germany. He specializes in commercial and investment Arbitration, advising clients on

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1 complex cross-border disputes post M&A, construction and distribution matters across
2 industries such as life sciences, automotive and energy.

3 With that, we kick-off with the first question that I have for Mariel. Mariel, while we were
4 setting up all the questions, this is something that Mariel suggested, and I thought it was
5 maybe the right way to kick-off. So, what procedural aspects do you see that arise when it
6 involves an Arbitration between sanctioned Parties? And what role does the Arbitral Tribunal
7 play in addressing them?

8 **MARIEL DIMSEY:** Thank you, Naresh. I should start like all good lawyers do, with a couple
9 of caveats and also some context to frame what I'm about to say. So, the caveats first, I have
10 set up as independent in independent practice. I was into very recently at a law firm in Hong
11 Kong. I was also Secretary General of the HKIAC for a period of time. And I should emphasize
12 that because I will be drawing on those experiences. Anything I say here is purely my personal
13 view and cannot and should not be attributed to any of the organizations I used to work for.
14 And just to frame where I'm coming at, from this, as someone based in Hong Kong, we are
15 obviously seeing a lot of sanctions related issues coming through the courts, coming into
16 Arbitration in the centres that are based in Hong Kong. And as someone who has spent, and
17 still spends quite a bit of time in Germany. A lot of the cases that are coming through the news
18 at the moment are from that jurisdiction. And I was in Germany last week at the Berlin Dispute
19 Resolution Days, where a lot of these issues were also discussed. So, there are a lot of different
20 issues that come up in this area, and we could talk all day if we wanted to. So that's just to
21 frame what I'm about to say. In terms of procedural issues, I thought what I'd do in answer to
22 this question is to focus on things that really are germane to sanctioned process, cases
23 involving sanctioned Parties.

24 So, in terms of both Parties being sanctioned, I haven't actually seen that yet, but what we are
25 seeing increasingly, and I'm sure there are many more to come, is that there will be a non-
26 sanctioned Party bringing a case or the other way around against the sanctioned Party or a
27 Party who has sanctioned entities up the corporate chain. So just, this is essentially a laundry
28 list. And I'm not even professing to offer solutions because I don't think there are any right
29 now. As I discuss with someone just now in the break, but let me just start with what I think
30 are some of the issues that we are tackling and we'll need to tackle. First of all, is the other
31 Party even participating what I've seen in this respect. If you're looking at the case of a non-
32 sanctioned Claimant suing a sanctioned Respondent. Most cases, participation is not an issue.
33 They are participating, and my initial take on non-participation would be that you would
34 probably deal with it the way you would with any other non-participating Party in an
35 Arbitration process. Payment of arbitral fees is a real issue, particularly if you are going

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1 through an institution. And if you are involved in an Arbitration involving the sanctioned
2 Party, whether as Council or as Arbitrator, you probably will be put on notice by the institution
3 that at some point, depending on whose perspective you're taking, you will either have to make
4 arrangements to pay the Arbitrator directly or the Arbitrator will need to make arrangements
5 directly with the Party, if, for whatever reason, the banks that the institution works with start
6 taking a funny view towards payments from a particular Party. Now, the difficulty with this in
7 practice is that the banks will not give you a clear answer. They will react when they see
8 something odd. And in worst case, that reaction can be freezing the accounts, which obviously
9 the institutions like to avoid. So there is a very careful, at least in East Asia, there's very careful
10 navigation going on right now about which banks are going to process those payments and
11 which banks are not. And it's very much by trial and error, so you will see these kinds of
12 warnings coming up. Just a very brief logistical point that has come up at other conferences
13 where this topic has been discussed recently. Things like if you do want to have an in person
14 hearing and if all Parties agree that that's desirable. Where are you going to have it? Can people
15 travel? Are people allowed to enter certain jurisdictions? Is it safe to do so? So these kind of
16 things will also come up in the context of physical hearings. To end on this point very briefly,
17 one thing that I think is inherently procedural and which is coming up everywhere is the issue
18 of parallel proceedings in other jurisdictions. And the example that I'm thinking about right
19 now is obviously what's going on in the Russian courts. There was a recent case a couple of
20 years ago in... Well, there are several cases involving these Parties. But there's the "Linda vs
21 Ruscan" cases, and one of those made it to the Hong Kong court. Essentially, proceedings were
22 started in Russia in reliance on the now infamous Article 2481 of the Russian Arbitral
23 Procedural code. An HKIAC Arbitration was commenced in Hong Kong. The Claimant in the
24 HKIAC Arbitration got an anti-suit injunction from the Hong Kong courts about the Russian
25 proceedings. The Russian Party came and tried to get it lifted. So, essentially, very briefly, what
26 the Hong Kong court said was, and this was all about the European sanctions. It was a German
27 Party with a Russian counterparty. German Party had stopped performance of the Contract in
28 reliance on the sanctions and the Russian Party had terminated for wrongful non-
29 performance. So, that was the sort of scenario. And essentially the Hong Kong court said that
30 Article 2481 wasn't even invoked because in a Hong Kong seated Arbitration, the EU sanctions
31 had no effect and as an alternative, and the wording wasn't entirely clear, but even if it was
32 invoked, the Hong Kong court considered very established case law that even if you have an
33 Arbitration Agreement that's valid under your own law, even the fact that jurisdiction may be
34 invoked in another forum is not a case for refusing to grant an anti-suit injunction.

35 I'll end very briefly on another example. As I said, this is essentially a laundry list. One thing
36 that I think is going to cause a huge problem, procedurally and otherwise, is the latest trend. I

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1 hope it's not a trend. I won't call it that. The latest incident of the fines being issued by the
2 Russian Federation against Parties to arbitrations. And the case I'm talking about specifically
3 is the German company Vintage Hull against Russia where the Arbitrators, the lawyers
4 representing the client, the client itself, and the PCA have essentially been deemed to have
5 breached provisions of Russian law and have all been hit with a €7.5 billion fine. Now that is
6 within the Russian system itself. But I think it's obvious to everyone in the room, the chilling
7 effect that that is going to have on everyone involved in the Arbitration process. And that goes
8 far beyond a mere procedural issue. And on that note, I'll stop and leave others to interject.

9 **NARESH THACKER:** But Mariel, can I just ask you a follow up question? A very quick
10 question on this. You spoke about non-participation of Parties in case of a sanctioned Party,
11 we very often have this in Arbitration. It's not necessary that the other side would appear. And
12 we know that due process is required to be followed. But would you say that in a situation of
13 this kind, where you have a sanctioned party, due process has to be given a bit more primacy.
14 Are you seeing, would you think that due process then becomes that much more important?
15 And how does it all play out in the mind of the Tribunal?

16 **MARIEL DIMSEY:** I am coming from where I'm seated and because of previous issues with
17 enforcement in China, I think we've got a very high bar with due process there anyway, because
18 you're essentially doing every courier delivery as if it's going to be in an annex to an award
19 that's before a Chinese court. I would say that the same approach, but probably not any
20 different or any higher would be taken for a sanctioned Party. So, you're making an effort to
21 allow them to participate. Multiple notices, multiple extensions of time, which may slow down
22 the process slightly, but in the grand scheme of things, you're aiming for an enforceable award,
23 which we'll talk about later.

24 **NARESH THACKER:** Thank you so much. Lars, in the current landscape as what we see,
25 do you think that this current landscape, the geopolitical tensions, the conflicts, have they
26 reshaped international Arbitration in any way?

27 **LARS MARKERT:** Thanks. Very difficult question. To me, I think things normally don't
28 reshape Arbitration specifically, but normally Arbitration reshapes around things that happen
29 in the world and, of course, when you now look whether there has been a cause and effect
30 between all of this. I do predict that with all those conflicts and all these problems there will
31 be at least a rise in International Arbitrations. That's quite often, once you have large
32 occurrences in the world and that's also interesting, normally with quite a bit of delay you see
33 Arbitration cases coming out of that. And just to give you an example, when COVID happened,
34 I was actually rubbing my hands and said, oh, this is great, I'm now going to write a lot of

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1 newsletters about *force majeure* and get a lot of cases, and then nothing happened for four
 2 years. And now, suddenly, the last two years, I have these cases on my desk. So, I would expect
 3 that what's happening now, the geopolitical tensions and conflicts, that's going to come up
 4 later and it's going to increase cases. I also think we're seeing it to some extent already, where
 5 you have just a big instability, which actually affects commercial relationships. And you can
 6 already see now. You have more supply chain disputes. You have a lot of disputes about long
 7 term contracts where the pricing doesn't work, and even if there's a pricing mechanism, Parties
 8 say, like, even with that, that's not attractive for me anymore. I think we're seeing this already
 9 now. And I do suspect with tariffs that will come, I again, I haven't had anything on my desk
 10 so far, but I suspect that over time we will see some of those disputes. Because, again, when
 11 you think about it in the commercial relationship between the Parties, the tariffs are going to
 12 affect the pricing balance and the risk, who is going to bear the risk of those tariffs and that's
 13 going to play out in Arbitration. I suspect in Arbitration, because normally these are cross-
 14 border Contracts that are affected, and they normally are subject to Arbitration Clauses.

15 I think in terms of reshaping what will be also different and where Arbitration has to again
 16 adjust to the circumstances that talking now about Commercial Arbitration. Normally it's
 17 quite simple for a Tribunal. They have to look at the Contract and interpret it and listen to the
 18 Parties, what they say about it, but when you have these geopolitical tensions playing in. I
 19 think, Tribunals now, even in commercial relationships have to deal much more with state
 20 interventions and what states do. And then the big question is, is that something that can be
 21 resolved by just looking at commercial aspects? Is that something where suddenly public
 22 international law plays into the commercial relationship? And I think that's going to be quite
 23 tricky questions. So, I think some of the cases will become quite difficult. Maybe final point,
 24 as we're seeing kind of a certain politicisation around these disputes or playing into these
 25 disputes, I do foresee more Arbitrator challenges where Parties get much more sensitive as to
 26 who are the Arbitrators sitting in their cases. I think I'll come to that later. But we're already
 27 seeing it now, that Parties say, oh, this Arbitrator is NATO affiliated, so how can he judge fairly
 28 about any Russian disputes, and so as things become more sensitive, I see more Arbitrator
 29 challenges.

30 **NARESH THACKER:** So, I think the point that you made about tariff, and you're right, I
 31 have been thinking about it in the construction law, if I can give that as an example. Obviously,
 32 a lot of, and from an India point of view, we import a lot of stuff from across the world, and
 33 the tariffs are to change because obviously, when you're balancing, when Parties are balancing
 34 out, there their own risks and liabilities, people take into account, tax as one of the
 35 components. So, if the tariffs go up obviously there will be a change of law clause, but will that
 36 apply in a situation of this kind would this be... And again even under a *force majeure* clause.

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1 How are you going to consider it? Will it fall within political, non-political? Will it fall within
2 a conflict war situation, etc? All of those issues are likely to play out, as I see it. Sitpah, can I
3 ask you a question on this, in a politically charged atmosphere and obviously it happens, and
4 in the kind of disputes that we now see, not necessarily wars, even the trade wars, if you were
5 to take, everything is politically charged. As an Arbitrator, are there any safeguards that you
6 need to observe, are there anything on account of bias or political interference that an
7 Arbitrator faces and needs to guard against?

8 **SITPAH SELVARATNAM:** Thank you, Naresh. So, I probably will focus more on the
9 sanctions because we've seen more of that unfold rather than the tariffs and trades, but it's
10 very testing times. I mean, that's to state the obvious, but I'll highlight a few events and
11 incidents. So that what I'm going to say about what safeguards we could take is seen in true
12 context, perhaps, and a few incidents, I mark out maybe four. And which is the German court,
13 and many of them happened this year. The German court refused an enforcement of a Russian
14 award as it would breach sanctions and it was set to violate fundamental legal and political
15 values. So, this is a Russian award. The German courts refused to enforce that. And so, as
16 Arbitration practitioners and Arbitrators, first thing would come to mind is New York
17 convention and obligations. So that's one incident. Then you have the Russian court blocking
18 enforcement of a Dutch award because the Arbitrators were from unfriendly countries,
19 unfriendly being from Netherlands and Singapore. And interestingly, the Arbitrator said to be
20 from Singapore, has Russian origins. And yet that was one of the reasons apparently given, or
21 at least reportedly given. The third, Uniquet, an entity have procured, actually, an anti-suit
22 injunction from the English courts and they were pressured to lift it voluntarily, go to court
23 and lift their very own anti-suit injunction because of the pain of penalty that the Russian court
24 had imposed on them in turn. And 4th is one that Mariel referred to, the Wintershall. So, it
25 Wintershall, its Counsel and the Arbitrators and the PCA were all restrained by injunction
26 from proceeding with an Arbitration seated in the DIFC on paying off payment of 7.5 billion
27 euros. And this was on the basis that the Russian law permitted the Russian court to assert
28 exclusive jurisdiction over commercial disputes involving Russian entities that were subject to
29 sanctions. Why? Because the sanctions created obstacles to the access of justice.

30 So, from these four, at least very quickly. There are many, many more instances of different
31 shades. The measures and the countermeasures that we're seeing in this Arbitration space to
32 me, stems from the lack of the appearance or assertion of the lack of access to justice and the
33 absence of a neutral forum. And what then drives that is the fact that it's alleged that the PCA
34 was not neutral because top officials had publicly condemned actions by Russia. The
35 Arbitrators were said to be agents of the western sanctions, making exclusive anti-Russian
36 rulings. One of the arbitrations in the Wintershall matter have a UK link and therefore it was

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said that they couldn't possibly maintain obligations of confidentiality because she had to make reporting, so communication to the authorities that were in England in respect of any contact with Russians, and another Arbitrator had made again had made TV statements that showed prejudice towards Russia, Russia and Russians. So, against this backdrop what would be the safeguards, Naresh, I would say that it becomes absolutely critical that neutrality is observed, not just observed, but seen to be exercised. So, if we are offering or affording impartial and neutral independent dispute resolution services. And it's vital because it is really Arbitration, that in a sense needs to instil the rule of that, the rule of law can be and should be maintained then we must maintain that neutrality and have it seen to be maintained. And how do we do that? The safeguard that I might suggest, I'm sure the collective wisdom here would add on or have something else to say, but I would suggest the very first and obvious is that public statements have to be curtailed. Very circumspect in what we are saying. We are offering ourselves as neutrals. We must be neutral. And I'll come to perhaps the best time. How we do that in our own space, in our minds, a little later. So, our social media postings has to be also gutted. Now, the White & Case survey of 2025 is very interesting in terms of the reaction to geopolitics. It comes back by saying 30% of the Respondents have chosen to shift seats to either Hong Kong, Singapore, Dubai. 27% have payment challenges. Look, this is a huge proportion, actually, 25% to 30%, quarter to one third, 25 % have difficulties finding Counsel. Mariel had mentioned that, about trying to get payment through with banks. So it is, I think, one of the things that the safeguard that the institutions can take, perhaps, and I know the LCIA has done it before in 2022. And I think now England has got a general exemption, a general license for all institutions, all arbitrations, to be able to make payments to Arbitrators to institutions and so on. So, I think that's a safeguard that can be taken so there is actual, true access to justice. How can you not afford that if you want to say that everyone can have a right to Arbitration if payment becomes so difficult? And I also believe because neutrality is central that we need institutions and Arbitrators need to seek and make very stringent disclosures based on affinity and ideology bias because we really need to grab the bull by its horns and says, actually, where is my inclination? Am I truly neutral to accept disappointment? And maybe we can develop that a little bit more and institutions should actually publish that we are giving access to justice. These are the things we are taking. We're making exemptions for payments. We've done this with the banks, the arrangements. We have our filter systems for neutrality... So, those, Naresh, are some of my suggestions to safeguard Arbitrators and institutions

NARESH THACKER: So Sitpah, one thing and maybe either you or Mariel... Mariel, maybe I can get a secondary comment on this from you. But as what Sitpah mentioned as Arbitrators, one of the things that we need to do is to maybe be a lot circumspect in what we put out there

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1 in social media. If I may put, summarize what Sitpah just mentioned, but we've all had our
 2 past lives in so called peace times when there's no conflict, we've made statements in our
 3 student days, we would have said a lot of things which our ideological leanings would have
 4 been very different. And today, social media is all pervading unlike the days of the past, you
 5 would have said something and possibly gotten away with it. It would not be published to you.
 6 Maybe I was not as important at that point in time for anybody to pick up and put it out there
 7 in print media, but today life is very different. In these circumstances as an Arbitrator, when
 8 your past is dug up and you now want to sound neutral, is there really a conflict between your
 9 ideology and what you are going to put out there as an Arbitrator. How does that work?

10 **MARIEL DIMSEY:** You've gotten me very close to my pet peeve, which has Arbitrator
 11 disclosure. So everyone's warned. Let me just pick up on one thing you just said. You want to
 12 sound neutral, and I think this ties back to what Sitpah said. Are you neutral? Leaving
 13 LinkedIn aside and our passes out there. Someone's captured it, probably somewhere, and
 14 things that we won't even remember doing maybe thrown back at us in the Arbitrator selection
 15 process, and then it's on yourself and the rules that the institution have to decide whether or
 16 not that passes must or not. But in terms of actually being neutral, I think that's the way Sitpah
 17 put it, I couldn't agree more. It's a really valid question right now. You have to sit down and
 18 deal with yourself, I guess, about whether you can actually decide a dispute, for example,
 19 involving a sanctioned Party or an entity that has a sanctioned parent, etc. Am I going to be
 20 able to decide this neutrally? What am I leaning towards? Is my risk appetite there to do it,
 21 which is a slightly different point, but I think there is going to be, because of what's going on
 22 in the world right now, and it's not just Russia. It's different conflicts going on that were
 23 mentioned by Lucy at the outset. I think there's a very different standard that you have to apply
 24 to yourself between, do I sound neutral enough and am I actually able to do this neutrally?
 25 And then, if you answer the latter question in the negative, it's not a matter of disclosure, you
 26 just can't act. That would be my take on it.

27 **NARESH THACKER:** Ashutosh, if we can come to you now. What we possibly have been
 28 talking about is the primary sanctions, but there are secondary sanctions as well. And we
 29 understand how secondary sanctions work. In those situations, which are situations or
 30 secondary sanctions, do you see any impact on Tribunal members from different jurisdictions?
 31 And if there are any impact, how do you expect, as an Arbitrator, how would you react to it?
 32 How would you prepare for it?

33 **ASHUTOSH RAY:** First of all, very pleased to be here at company of some of the brilliant
 34 minds in the world of International Arbitration. So, thank you for having me. And to answer
 35 your question, Naresh, yes, it does. Secondary sanctions can significantly complicate and make

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1 things more complex in International Arbitration, both procedurally and substantively. And
 2 let me try and break this in the ways it affects the Arbitration jurisdiction and admissibility
 3 being the first point. When it comes to enforceability of Arbitration Agreements, if one party
 4 is subject to secondary sanctions, questions may arise as to whether entering into or
 5 performing the Arbitration Agreement itself violates sanctioning state laws. The state that has
 6 sanctioned the Arbitration or one other party. The other issue is access to Arbitral institutions.
 7 Something that Mariel does upon. Some institutions may hesitate to administer cases
 8 involving sanctioned entities because their staff could get in trouble. The banks they deal with
 9 could be hesitant in violating the sanctions and more importantly, even if a Tribunal member
 10 is from a different jurisdiction, we operate in a globalized world, an interconnected world, and
 11 if an entity is sanctioned by large and influential nation such as the US, it would definitely
 12 impact everyone operating in the space.

13 The second limb is, of course, the procedural challenges. The first being payment of advanced
 14 costs again, something that Sitpah, Mariel touched upon. Sanctioned Parties may struggle to
 15 transfer funds to Arbitral institutions or Arbitrators because banks may block those
 16 transactions. Even when Arbitration itself is not prohibited. The Parties may not be able to use
 17 certain currencies. So for, if for example, if your Arbitrator accepts payments in US dollars,
 18 the party is sanctioned by the US. You will have to find other ways. It is not that there are no
 19 solutions, but you have to be very careful that you don't take steps that can get you in trouble
 20 and when it comes to appointment of Arbitrators, Arbitrators themselves made a few
 21 appointments. If they fear exposure to liability under sanction regimes. No Arbitrator in a
 22 major jurisdiction would want to be affected by sanctions especially when the country involved
 23 is influential as influential such as the US. There can be various issues that can come when it
 24 comes to case management as well. Again, something that Mariel, Sitpah has touched upon,
 25 practical issues arise with hearings, travel restrictions, use of digital platforms that may be
 26 linked to jurisdictions imposing sanctions, by way of example, we had this experience when
 27 you have online meetings and you're using Zoom or Teams, and both are American companies.
 28 Can you use those platforms when you are dealing with an entity that is sanctioned by the US?
 29 So these are small little things that come up, and you have to pay attention to every single little
 30 detail and not just these procedural issues they can be substantive issues that are involved,
 31 such as validity of Contracts. Sanctions can render Contracts illegal or unenforceable if
 32 performance require violating the sanctions laws. Arbitrators may need to decide whether
 33 sanctions amount to *force majeure* or illegality then there are public policy considerations.
 34 Even if Arbitrators uphold claims, courts may refuse enforcement if the award conflicts with
 35 the sanctioning state's public policy.

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1 And that brings me to the final point in this regard, which is refusal at enforcement stage. On
 2 the New York Convention, National courts may refuse to enforce awards that would breach
 3 sanctions. So, you have to be careful when you are planning to enforce the awards and
 4 Arbitrators don't like their awards being not enforced, so no matter from which jurisdiction
 5 you are, you will think twice whether this Arbitration that I'm taking up is going to cause
 6 issues, is going to be set aside or vacated in different jurisdictions again our Arbitrators will
 7 keep that in mind. Asset freezes. So even if an Arbitral Award is recognized, recovery may be
 8 blocked if Respondent's assets are frozen under sanctions. And then of course divergent
 9 enforcement landscapes, meaning some jurisdictions may resist a US secondary sanctions,
 10 well, let us give it more weight. So it's very fragmented. And when Arbitrator takes a case, they
 11 will have to think about a lot of consultations before they can actually confidently say that,
 12 okay, I'm able to take this case and do justice to it.

13 **NARESH THACKER:** So, you spoke about an Arbitrator who would think twice before
 14 accepting an arbitral appointment between a non-sanctioned and sanctioned Party. And lest
 15 the Arbitrator gets trumped by the US, by a country as influential as US. Now, this actually
 16 brings me to a very important question about Arbitrator selection. And Mariel, may I ask you
 17 this question if you take a step back, how important is an Arbitrator selection in an event of
 18 this kind, particularly keeping in mind the expertise that an Arbitrator may possess, are there
 19 any perceived biases that are in her favour or against her and given the volatile geopolitical
 20 scenario, how would this play out?

21 **MARIEL DIMSEY:** Thanks, Naresh. Let me spin that slightly, just because a lot of those
 22 points have been touched on, including the perceived bias point. Let me start with the role of
 23 an institution in the Arbitrator selection process because I'm proceeding on the assumption,
 24 which may be wrong, that most of these appointments are going to be done through an
 25 institution. If you're in *ad hoc*, excuse the formulation, but you can basically do whatever you
 26 want. But in the institutional setting, there will be a degree of institutional control which in
 27 the Arbitrator selection process involving a sanctioned Party is going to be particularly
 28 important. So, the institution's role is to remain neutral. I note very well the points made by
 29 my co-panellists about some institutions being hesitant. I know, in Hong Kong, when I was
 30 there, under the caveat that I said before we were very concerned that we were being perceived
 31 as neutral. There is a sanction statement on the HKIAC website, which I understand is still
 32 there. So, the role for the institution is to ensure that Arbitrators are appointed to the greatest
 33 extent possible that we'll be able to deliver an enforceable award. So, in terms of how that plays
 34 out, as an institution, you need not just to look at the individual arbitrators that are being
 35 nominated by the Parties, assuming it's three, but also how they would work together and I
 36 know when I was at the HKIAC, we had instances where we were worried about the

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1 nationalities of the various individuals being proposed were effectively not going to result in
2 an enforceable award. And I'll leave it at that. So you need to keep the institutional role in
3 mind and as a Party or as a Counsel representing a Party, be cognizant of the fact that the
4 institution will be having a very, very close look at who you're appointing, not as a way to
5 curtail your rights *per se*, but to ensure that the whole constitution of the Tribunal will actually
6 function with all the regimes that are going on. Leaving that to one side, and that's a big thing
7 to leave to one side, I think in terms of the subject matter, a lot of these disputes are arising,
8 as I said before, from non-performance of Contracts that were concluded before the sanctions
9 regimes came in, where one Party is relying on the sanctions to usually stop work, and there
10 are various iterations of what happens after that. In terms of expertise on that, I think you're
11 going to find the gender normal pool of experienced Arbitrators. The layer on top of that is
12 that you'll probably have to deal with the sanctions issues. My take on that expertise is that if
13 you're looking at US sanctions or European sanctions, it's all written out. Of course, there are
14 some Arbitrators with some nationalities who are getting a lot of experience in that area right
15 now. But from where I sit, it's not rocket science. If you're prepared to accept the appointment
16 and all the other caveats have worked out in your favour, I don't think that in itself is a hurdle
17 because it can be learned and it's ever evolving. And of course, the Parties in front of you,
18 assuming they're represented by competent Counsel, will be assisting you on the sort of subject
19 matter level. Just very quickly on the bias point, obviously, what's already been said. I won't
20 repeat but I think in addition to the bias as a Party, you need to be thinking about appointing
21 an Arbitrator with a very steady set of hands because, particularly involving the sanctioned
22 Parties and the sanctions issues that we're currently aware of. There's going to be a lot of
23 curveballs thrown at them, and we are seeing instances in addition to the €7.5 billion fines that
24 we both mentioned before, Sitpah and I, there are other instances of Arbitrators being
25 pressured to resign because it all is getting a bit too hot for them. Now, that's something you
26 probably can't avoid, but I think it's very much front of mind when you're appointing an
27 Arbitrator because this is going to be a contentious proceeding in every sense of the word. So
28 I think there's no solution as I said at the outset but they're the kinds of things that you need
29 to be thinking about.

30 And just to round it off very briefly because I know we'll get to this separately, the issue with
31 enforceability has come up by multiple people here. One big point that I see happening is the
32 paradox of all of this is that the Arbitration will be allowed to proceed to its natural conclusion.
33 But you may have issues with enforcement precisely because of the sanctions and because the
34 nature of the enforcement will evolve you, trying to get access to assets that under a sanctions
35 regime are probably not accessible right now, so that's also something to keep in mind at the
36 end of the day. I'm not trying to say it might be futile, but it's certainly a different level of risk

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1 appetite and there are various German courts that are dealing with this right now with entirely
2 contradictory outcomes, but I'll leave that for a later point, in the interest of time.

3 **NARESH THACKER:** Sitpah, can I come to you on a slightly different issue maybe now, and
4 we've spoken about secondary sanctions as well, given the increasing use of sanctions, whether
5 primary or secondary, how are Arbitrators and Parties adapting? How are you seeing Parties
6 or Arbitrators adapting to remain compliant and at the same time procedural fairness in
7 Arbitration where you have sanctioned Parties and a non-sanctioned Party?

8 **SITPAH SELVARATNAM:** Well, I can't speak for a big pool of Arbitrators, but I can
9 certainly talk about some aspects of the moral dilemma that we go through. I mean, finally,
10 these Arbitrators are human beings. So they have their minds, they have their emotions, and
11 they also have human values or value system that they anchor live on, and so it's natural,
12 therefore to be in a moral and ethical dilemma. Consciously or subconsciously, they might be
13 formulating in their minds, who is right and who is wrong based on their value judgment and
14 be therefore aligned to a particular faction based on behaviour. I think the most important
15 thing is to know that that's going to be natural but we have to acknowledge that that we have
16 this and that process is going on inside of us, as human beings and as Arbitrators. And then
17 be transparent about it when it comes to the appointment process. I think that's vital. And as
18 Mariel said then you can't accept appointment because you're simply not neutral, and that's it.
19 You can't have your cake and eat it, so to speak, because it does the whole system, Arbitral
20 system, a system of justice a serious disservice. And to just touch also on the enforceability and
21 that the thought that it might be set aside. So in the White & Case report that I mentioned, it
22 also spoke about Arbitrators' declining appointments because of a reputational risk. They just
23 don't want to engage into something where they will find their awards being set aside, and
24 that's a personal choice, and that's fine. It's your choice, it's our choice but once we've been
25 appointed and we've decided we're accepting the appointment, I thought to my mind, I think
26 seven things are very important and if this helps, I hope it helps is that to remember or remind
27 ourselves that every entity, every Party is deserving of access to justice.

28 And second, that every Party in person is deserving of a fair hearing and therefore should have
29 us walk into the Arbitration room with an open mind. And the third, perhaps, would be this,
30 that every human being and even corporations are run by human beings, view life through
31 lenses that have lenses of experiences that formulate what is right and wrong, which shapes
32 their perspective of what is fair and unfair. And so when we do listen, I think we should listen
33 with the intention of understanding. And of course, it will then play out. And what are the
34 facts? What are the law? You'll come to an outcome, and it's important. If the outcome is as
35 important or the process is as important as the outcome. And if we go through this process, I

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1 think it helps us sustain our position throughout the process without having internal conflict
 2 as we hear what's going on between the Parties. And I hear what Lucy said about conflict's
 3 different, we are just doing Arbitration, a dispute. But at this point in time, I might be
 4 idealistic, but I think Arbitration is not just a satellite of commerce. Every individual at this
 5 point in time in the planet has a place, a role to play in preserving a vibration of peace and
 6 especially Arbitrators, we actually should rise to the role of peacemaker and in doing so, we
 7 allow access to justice. We allow neutrality to flourish, and that goes a long way to my mind.
 8 Now, if I come back to enforceability. I know it's a bit paradoxical because the primary rule of
 9 an Arbitral to ensure you issue an award that's impossible, and here you cannot ensure that.
 10 But it's not through anything that we can do in this set of situations. So that takes to some
 11 backseat to some, it means a reputational risk.

12 **NARESH THACKER:** Lars, conflicts are not... This is not for the first time that humanity is
 13 either seeing conflicts or sanctions or tariffs, etc. History is littered with conflicts, histories
 14 littered with situations that we are undergoing currently. Now, is there a situation where
 15 things in times like these, do you see investor state disputes arising more? Are they being
 16 handled in the same manner as one would handle, let's say commercial disputes or do you
 17 think they are handled differently? They'll be handled with far more kid gloves than one would
 18 expect an Arbitrator when sitting in a commercial dispute handling them. So, are there any
 19 differences that you perceive and see in these situations?

20 **LARS MARKERT:** Sure. So when we talk about investment Arbitration, of course, you have
 21 a commercial Party on one side and the state on the other side, and I think some of the
 22 examples we already heard today, Russia, going against the Arbitrators and going against
 23 Counsel. These are examples actually arising out of investor state cases. So, I think it is quite
 24 normal that such international crisis often come with investor state claims in the aftermath.
 25 Now, we've seen that, for example, after the Arab Spring. So there were quite a number of cases
 26 where investors felt even though one can see positively what happened during the Arab Spring,
 27 but there was a lot of expropriations, there were a lot of unrest where states actually failed to
 28 protect foreign investments, and that came later and there were quite a number of instances
 29 in which, for example, Egypt or Libya were then asked to pay damages to the investors. Just
 30 the second example is not necessarily arising out of the current Russian invasion into the
 31 Ukraine, but the occupation of Crimea. In 2014. So there we already have quite a number of
 32 examples playing out in cases. And now, when you ask me how would Tribunals treat these
 33 issues differently, I think the Crimea cases are quite an interesting example because the
 34 Tribunals at the outset are faced with the issues. Do we even have jurisdiction over these
 35 disputes? Because that was originally Ukraine territory and now basically, the Ukraine
 36 investors are asking the Tribunal to say, well, now, please consider this for purposes of our

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1 claim as Russian territory because we need an investment in the post state. So, Russia and now
 2 what do you do as an Arbitrator? You don't want to say in your world, yes, we have jurisdiction
 3 because this is undoubtedly Russian territory. Now, that might be a controversial view but at
 4 the same time, you need to find an approach where you say, yes, we do have jurisdiction over
 5 this issue that is where you have to put on the kid gloves and need to argue very carefully and
 6 where you then, as an Arbitral Tribunal, say, well, at least the Respondent Russia considers as
 7 Russian territory. It basically holds control over Crimea. And so, for purposes only of our
 8 jurisdictional finding without expressing ourselves of who's got the sovereign right over
 9 Crimea, we can assume jurisdiction. So when you're faced with these international geopolitical
 10 issues, I think Arbitrators do indeed need to be extremely helpful in how they argue the issues
 11 and how they assess the issues, that's maybe one aspect. And of course, you have the second
 12 issue that at least what we see now, states tend to get quite aggressive in defending their
 13 positions to go again with the example of Russia, we've heard that Russia now takes several
 14 avenues, which are, in my view, quite novel to basically say we're going to find Council, we're
 15 going to find the Tribunal but actually, when you think of it and that's, I think, as a European
 16 way, I always say we shouldn't be too hypocritical when we look at these issues maybe you are
 17 aware that, for example, under the Energy Charter Treaty or other VRTs, states are allowed to
 18 deny benefits to investments and so there's the Article 17 of the Energy Charter Treaty that
 19 basically allows states to deny benefits and basically say, well, if your investment is basically
 20 just a mailbox company, or if it's made in a state with which we have no diplomatic relations
 21 and it's structured through a chain of companies, and then we won't accept this as an
 22 investment for purpose of the Energy Charter Treaty. So what the EU did, it went ahead. And
 23 basically notified the Energy Charter Secretariat that all investments by all Russians from now
 24 on are basically not accepted as proper investments under the ECT, and I felt that was very far
 25 reaching that wasn't really targeted as some other sanctions packages are. So, I was quite
 26 surprised, and I felt this was quite sweeping and actually might lead to claims. I always think
 27 we need to be a bit careful. The second aspect, where I feel sometimes especially you, is a bit
 28 hypercritical when they say, well, you cannot use your own domestic laws to declare something
 29 illegal. This is exactly what the EU is doing in the Intra EU, VRTs fear where they say, well, we
 30 just declared that EU law is the highest law of everything above Public International Law. And
 31 so anything that touches the interest Intra EU, you cannot be subject to investment disputes,
 32 so I think we need to be careful how we assess the issues.

33 **NARESH THACKER:** The example that you gave about Russia and Crimea and the fact that
 34 an Arbitrator was to assume jurisdiction, trying to keep the sovereign rights aside. Good luck
 35 to you if you were appointed as an Arbitrator in a matter of this kind.

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1 **LARS MARKERT:** Yes, good luck to me. Fortunately, I am male, pale and stale but not stale
 2 enough yet to be appointed. But I think, really, that's where you... As Mariel put it, you need a
 3 steady pair of hands. You need to have people who are extremely experienced and who are able
 4 to walk this very fine line. We do need to give access to justice to actually both sides, and we
 5 need to come up with a just solution on the basis of Public International Law, but Arbitrators
 6 need to be very careful because it's not just about Public International Law. It is about politics
 7 and so that's where the big issue lies.

8 **NARESH THACKER:** All of this brings me to a question. We've heard about what sanctions
 9 can do, what tariffs can do and how arbitrations, how you proceed with arbitrations. Now one
 10 question, maybe Ashutosh before... or maybe we can take a couple of other questions. We have
 11 almost 10 minutes with us and then we'll put the floor open for the audience. But are
 12 arbitrations in these situations, even an effective mechanism to resolve disputes or are we
 13 seeing a trend towards fragmentation in these cases? You yet believe that Arbitration is the
 14 way to go and can we resolve the despair of Benjamin Franklin?

15 **ASHUTOSH RAY:** The question has been answered by both Mariel and Sitpah, and they
 16 said steady pair of hands and moral compass. I think no matter the forum is, you need to be
 17 guided by your moral compass and make sure that the Parties involved are delivered justice.
 18 So, having said that, Arbitration can do that and amongst all the options that we have, I think
 19 perhaps it can do the best. So, I think it remains a very viable option but there is no straight
 20 answer to it. If you know the sanctioned entity, especially in secondary sanctions where
 21 entities can be sanctioned individually. If you know that an entity has been sanctioned in
 22 advance, you can curate your dispute resolution process accordingly and consider Arbitration
 23 as a method. But what if you are already in an Arbitration and the Parties involved or one of
 24 the Parties involved is sanctioned. What do you do then? So there are complications at every
 25 step and that can sort of put you online, that is where the moral compass comes in. And
 26 Arbitrators who are seasoned then, who know how to deal with these sensitive issues proceed
 27 with caution. So, I would say Arbitration is still a very valid and viable option given other
 28 options that we have.

29 **NARESH THACKER:** Mariel, can I ask you this question that there is definitely going to be
 30 a risk of mistrust in Arbitration as a neutral forum when you have sanctioned and non-
 31 sanctioned Parties. So, do you see and to what extent of risks do you see? What kind of risks
 32 do you see, are there only geographic or cultural diversity risks? And I think that was
 33 something the diversity bit is something that Lucy had touched upon, but in the current kind
 34 of situation, are there risks of mistrust in the entire process of Arbitration and as being a
 35 neutral forum for dispute resolution?

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1 **MARIEL DIMSEY:** There's a lot of layers to that question. I'm going to give a very loyal
 2 answer, but I will explain it. It depends. And what you're seeing in this evolving area of law, if
 3 you want to call it that is that it very, very much depends on what you're talking about in a case
 4 by case instance. Talking from the Hong Kong perspective, I think despite a lot of the cases
 5 that have happened in Hong Kong have been alluded to or specifically mentioned today. I think
 6 in Hong Kong's case there is still trust in the Arbitration process, and the question then arises,
 7 trust from which side? I think as a Party, who's not sanctioned who has a potential claim or
 8 thinks they have a claim against the sanctioned entity, your biggest question is probably, do I
 9 have a viable alternative? And I think the answer is no. From the perspective of the sanctioned
 10 entity and just to give a bit more support to what Sitpah said before, there are sanctioned
 11 entities bringing claims right now as well who are genuinely still trying to or sanctioned up the
 12 chain who are still genuinely trying to get Arbitration through as their, excuse me, agreed
 13 method of dispute resolution. But the problem is it's difficult to get those arbitrations off the
 14 ground. So from Hong Kong's perspective, I think we are not affected by sanctions there. There
 15 will be ongoing parallel proceedings in the Hong Kong courts, in the Russian courts, HKIAC
 16 arbitrations, other institutional arbitrations, I think, don't quote me on that. But I think from
 17 that perspective you have a robust system that will offer alternatives. And there are several
 18 seats around the world that do similar things.

19 Just to quickly turn back to the German perspective, since it's very fresh in my mind from last
 20 week. I heard someone say at the conference last week, a system is not judged when it's
 21 performing well. It's judged when it's performing badly. And that was said in the context of
 22 how the EU system of sanctions is working as it plays out in practice and the issue I mentioned
 23 before about you get what you want at the end of the day, you've managed to conclude an
 24 Arbitration with a sanctioned entity, but you can't find a court in Germany that will actually
 25 enforce it for you. So, I think there will be a huge amount of distrust in the process and you
 26 add to that everything that Lars just said about the EU Investment Treaty, not crisis, I won't
 27 call it that. But the issues around Intra EU Investment Treaties, I do think there is a very severe
 28 wavering of trust in the process. So, it depends on where you are but as with the geopolitical
 29 crisis, as they always seem to pan out, there are opportunities and risks in different parts of
 30 the world, depending on which geopolitical approach your country or your place of location is
 31 taking.

32 **NARESH THACKER:** Sitpah, can I just ask you this one last question and maybe then we
 33 can open it for the floor? Are there any particular protocols or guidelines that are necessary
 34 for conducting Arbitration, especially in these crisis situations?

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1 **SITPAH SELVARATNAM:** Naresh, yes, thank you. The answer is absolutely, there's a need
 2 for one. And if I told, I just highlight again and remind ourselves where we are following
 3 through from what Mariel just said about the elements of mistrust. So, equal treatment of
 4 Parties is the cornerstone of Arbitration and natural justice. And yet sanctioned Parties are
 5 unable to appoint Counsel of their choice. They aren't able to affect payment without serious
 6 impediments. They're unable to get visas to enter venues for oral hearing. They are unsure of
 7 their independence and impartiality of their Tribunal. So principles of non-discrimination are
 8 seriously, significantly eroded. So yes, but necessity is the mother of invention, and I think we
 9 need to, the community, Arbitral community owes it to the users to come together to write the
 10 house. It's gone off a little bit, but we can always bring it back to where it should be. And if I
 11 may be so bold to suggest, it's not my place to, but I would suggest it anyway that we carve out
 12 Arbitration and Arbitration litigation from the reach of sanctions. We all believed at many
 13 stages in the evolution of mankind that the Rule of Law is so absolutely essential, and access
 14 to justice is a fundamental aspect of the Rule of Law, then it would follow that we need to carve
 15 it out. And therefore, payment of Arbitrators, the institution Counsel even should be equally
 16 removed from the realm of sanctions, then you have a true sense of access to justice. Specific
 17 questionnaires should be formulated to help people deal with their own emotional dilemmas
 18 for disclosure of interest specifically from ideology and affinity bias. I think we should let
 19 Tribunals decide the merits of the claim without giving motives to why that claim has been
 20 brought or otherwise. And there should be recognition and enforcement of awards. And that's
 21 what we all agreed to, 170 countries in 1958, and that should follow through. There should be
 22 immunity from... of Arbitrators restated again. And I suppose now creeping in, we should also
 23 provide for how, I don't know how, but we should provide for how. And anti-Arbitration
 24 injunctions against any person or entity except the Parties, meaning their Counsel, the
 25 institution, whatever else, whoever else should be treated. How is that to be treated? Those
 26 would be some things I could suggest. But we certainly, certainly need a protocol, and the
 27 institutions, all of us, should really work towards that and maybe IBPA, maybe the institutions.
 28 Thank you.

29 **NARESH THACKER:** Thank you so much, Sitpah. We have 25 seconds left, so any questions
 30 from the audience, please? Sanjay.

31 **SANJAY:** So, I have a question for a panel that in view of this geopolitical conflict and the
 32 polarized world, you still think that this traditional International Arbitration hubs like London
 33 and Paris, Dubai, they can still be treated as neutral. And whether India or Mauritius or Gift
 34 City can be the preferred destination for Arbitration?

35 **NARESH THACKER:** Anyone?

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1 **LARS MARKERT:** Yes, I can.

2 **NARESH THACKER:** Please start.

3 **LARS MARKERT:** Well, when I was preparing for the topic, the interesting thought I had is
4 that actually the whole issue around sanctions is a great chance for some of the Arbitration
5 hubs that are not affected so much and you see already disputes moving into these hubs where
6 actually you have a lot of Arbitrators, you have institutions that are not either affected or don't
7 care so much about sanctions. And of course, these are all very important disputes. So, you
8 might see a shift, a bit of where cases go. And if Parties then realize, this is actually a great way
9 to resolve our disputes, and this is a great hub, it might perpetuate, so we don't know. But that
10 might be the start of something where actually there's a shift and now, I think we've already
11 seen a bit of a shift, for example, towards Asia. I mean, we have here SIAC, HKIAC, they made
12 already inroads. Before, it was New York, London, Paris. I think now the top five, you have
13 already two Asian institutions, and there should be more.

14 **NARESH THACKER:** Sorry, from an India perspective, Sanjay, just to answer that, I think
15 you are inviting more tariffs on yourself if you want to. I mean, if that's the path you want to
16 go down. I'm sorry, but...

17 **MARIEL DIMSEY:** In all seriousness, and to someone who's, I'm in India for my very first
18 time but just to echo what I said about Hong Kong, this is the way the world is going right now.
19 Everything is kind of turned on its head and Hong Kong ten years ago was a hub for China
20 related dispute disputes, and no one was even thinking that it would become a hub for Russian
21 disputes. And fast forward that a period of time, and this is one of the biggest growing areas of
22 interest and business in the Hong Kong Arbitration community right now. And without
23 knowing much about the Indian community, I can only echo what Lars has said, this is an
24 opportunity because of what's going on in Europe, because of what's going on in the US, I think
25 for lesser-known hubs that have the infrastructure, have the pool of qualified Arbitrators, all
26 these things that make a good Arbitral seat. I do think that will result in a shift because there
27 is nowhere else to go. And as Sitpah said, opportunity breeds invention, and I do think it's a
28 very ripe time for lesser-known hubs to be to be putting their hand up and seeing the
29 opportunities there.

30 **NARESH THACKER:** With that, thank you so much to all of you for being such a lovely
31 audience. I'm so sorry we can't take any more questions. But we are all around and we will
32 certainly be able to answer anything over tea or coffee. Can we have a round of applause for
33 my panellists? We've managed to keep all of you engaged with a very heavy topic. You have

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- 1 the next topic, which is going to be very light. Trust me, it's Global South vs Global North ISDS.
- 2 How difficult can that be? Thank you so much.

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~~~END OF SESSION 1~~~

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