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**CHIEF JUSTICE OF NEW SOUTH WALES**  
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**EVOLUTION AND ADAPTATION: THE FUTURE OF INTERNATIONAL  
ARBITRATION**

**WEDNESDAY 18 APRIL 2018\***

**Introduction**

1. I would like to begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their elders past, present and emerging.
2. It is a pleasure to have the opportunity to speak at the closing of this 24<sup>th</sup> ICCA Congress in Sydney. I have had the immense privilege of attending many of the sessions over the past three days – and of course enjoyed the social functions that attend these gatherings. It is also my great pleasure that the conference this year has been held in my hometown of Sydney, and I hope that alongside all the learning and networking, you have had an opportunity to get outside and enjoy the weather, the beaches and the views.
3. Of course, of more importance than social functions and excursions, was the rigorous academic program that we have been exposed to. A significant amount of work has gone into each of the speakers' presentations and I thank them for devoting their time and expertise to the big issues that are facing international arbitration. Too often these events descend into an orgy of self-congratulations with little constructive being said. To the contrary, in this conference we have been privileged to hear from over 50 speakers, all renowned experts on international arbitration, expressing what could only be described as a cosmopolitan view of the issues which will confront international arbitration in the

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\* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

coming years and the best means to deal with them. Now in the face of the quality of the presentations I will not try to compete with them but rather focus this morning on some of the key themes emerging from the past few days.

4. These themes are ultimately what you all, the players in this field, have determined are “The Future of International Arbitration”. They seem to me to be, firstly, the internal challenge of legitimacy and associated with that issues of institutional design, costs, delays and transparency and secondly, the external challenges and opportunities that the coming years will bring in terms of technology. It is these two topics to which I will now turn.

### **Legitimacy**

5. Thomas Schultz on Monday helped frame this issue of legitimacy in practical terms – why do we care about legitimacy in international arbitration? He made the point that a regime that is not legitimate to the actors who can change it is likely to be unstable – that is, it is likely to change — and those who operate in that regime need to anticipate such changes.<sup>1</sup> One way we can think about legitimacy, therefore, is from the perspective of each actor who has change-making power. It is entirely sensible when one considers that any effort to define values that mean arbitration is “legitimate” needs to balance the myriad interests of its many players.
6. I think in the context of international arbitration and treating it as a process as distinct from a series of cases governed by particular rules of proceedings, legitimacy involves the concept of a process which is acceptable to the parties directly or indirectly affected by it. Legitimacy of commercial arbitration in that sense is vital. Quite apart from ISD disputes it is the most common way of resolving international commercial disputes, its importance being enshrined in the New York Convention and the UNCITRAL Model Law. It is thus a contributor to the rule of law and international commerce and order. This conference can only be congratulated for paying such close attention to this issue. Confidence in the

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<sup>1</sup> Thomas Schultz, ‘Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead’ (Panel Discussion at the 24<sup>th</sup> ICCA Congress, Sydney, 16 April 2018).

process or institution, whichever you prefer to call it, is critical in those circumstances.

7. One of the problems facing this community is a prevailing public perception that arbitration is not a legitimate means of resolving disputes that affect them. Of course the “legitimacy-elephant” in the room is Investor State Dispute Settlement. This issue, as we heard on Monday from Chief Justice Allsop,<sup>2</sup> caused significant public concern in this country around ratification of the TPP – or the new TPP-11 – because of the Australian experience with the Philip Morris plain packaging tobacco dispute.
8. Unfortunately we are operating in an era where mistrust in public institutions is rife. It seems this sentiment is only amplified in relation to international institutions. The expropriation obligation has collided with notions of the public interest and states’ rights.<sup>3</sup> When considering expropriation disputes, tribunals take into account whether measures taken are “proportional to the public interest presumably protected”.<sup>4</sup> I think it is trite to say that questions of proportionality inevitably involve value judgments. The legitimacy of tribunals making these judgments, when they operate outside accountable domestic governments is in sharp focus. This is particularly so in countries such as Australia and perhaps other common law countries where the concept of proportionality as a legal tool is not perhaps as well understood and accepted as in civil law jurisdictions.
9. We are already seeing pushback from this uncomfortable intersection — one example being the Court of Justice of the EU ruling last month in *Slovak Republic v Achmea*<sup>5</sup> – that the investor-state dispute arbitration clause in the Netherlands-

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<sup>2</sup> Chief Justice James Allsop AO, ‘Keynote address’ (Speech delivered at the 24<sup>th</sup> ICCA Congress, Sydney, 16 April 2018).

<sup>3</sup> As discussed by Melida Hodgson, ‘Arbitration Challenged I: Reforming Substantive Obligations in Investment Treaties and Conditions of Access to Investment Arbitration’ (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>4</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability (3 October 2006) [195] citing *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/02 Award ¶ 154 (29 May 2003) [122].

<sup>5</sup> *Slowakische Republik v Achmea BV* (Case C-284/16).

Slovakia bilateral investment treaty is not compatible with EU law. In the CJEU's view, this arbitration clause removes disputes involving the interpretation of EU law from judicial review as provided for by the EU legal framework.<sup>6</sup>

10. A second issue is the provision in the "TPP-11" last month, for a senior level Commission with authority to issue interpretations of the agreement that are binding on tribunals considering it.<sup>7</sup> That Commission comprises government representatives of each party at the level of Ministers or senior officials.<sup>8</sup> Thus at least to a limited extent any arbitral tribunal's power to interpret the treaty potentially is limited.<sup>9</sup> Of course that has all been thrown up in the air just last week, but of course I am making no comment about that ...

11. In this context of increasing involvement of public bodies in international arbitration, Chief Justice Menon posed the following question to consider: "Under what conditions is the exercise of power [over persons] ... which is mediated through the laws of international arbitration, rightful? And to what extent is it appropriate for certain actors to have a role in shaping the rules by which such power is acquired and exercised?"<sup>10</sup>

12. So at the same time we are questioning the legitimacy of private arbitration resolving disputes of a public nature, there is also a real question to be asked about the legitimacy of the involvement of public bodies in arbitration, as against the arbitration precepts of party autonomy and minimal curial intervention.

13. This involvement is problematic, firstly, because of state sovereignty and the effect of changing national attitudes towards arbitration, when domestic policies

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<sup>6</sup> Ibid [56].

<sup>7</sup> Comprehensive and Progressive Agreement for Trans-Pacific Partnership, article 9.25(3) <<http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/official-documents/Pages/official-documents.aspx>>.

<sup>8</sup> Ibid chapter 27.

<sup>9</sup> Discussed by Professor Lucy Reed, 'Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead' (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>10</sup> Chief Justice Sundaresh Menon, 'Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead' (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

can “profoundly affect the global complexion of arbitration”.<sup>11</sup> The second concern is accountability, where public actors make decisions as to arbitration with no accountability to the affected private parties. Thirdly, is legislative and judicial overreach to the extent that party autonomy and other interests of arbitration users are trampled in pursuit of public policy concerns. Fourthly is the inconsistency that results when different jurisdictions produce conflicting rules and norms as they seek, for example, to fill the gaps in the *lex arbitri*. This is affected by the fifth concern, being that of legal precision.<sup>12</sup>

14. The challenge for the future, in line with what Professor Schill contended at the conference two years ago,<sup>13</sup> is to develop a “constitutional legal mindset in thinking about the functioning and legitimacy of international arbitration”.<sup>14</sup> As Chief Justice Menon has suggested, what this requires is a concerted effort from all stakeholders to develop a set of core principles to articulate and guide the proper relationship between public actors and international arbitration.<sup>15</sup>

15. This is part of a broader need for arbitration to develop a certain level of “self-regulation” in order to maintain its autonomy.<sup>16</sup> Alexis Mourre made the point, and I believe it was well made, that the “development of procedural soft law is a fundamental condition for the establishment of trust in arbitration.”<sup>17</sup>

16. But these sets of rules – such as guidelines on conflicts, best practices guides and the like – in turn require legitimacy. This requires that the process of rule-making is representative, transparent and consultative. An arbitral body engaged in a rule-making exercise should draft under the auspices of a representative task

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Stephan W Schill, ‘Developing a Framework for the Legitimacy of International Arbitration’ (ICCA Congress Series No 18, *Legitimacy: Myths, Realities, Challenges*).

<sup>14</sup> Ibid 826.

<sup>15</sup> Menon, above n 10.

<sup>16</sup> Alexis Mourre, ‘Law-Making in International Arbitration: What Legitimacy Challenges Lie Ahead’ (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>17</sup> Ibid.

force, submit the draft for consultation with persons likely to participate in the process and engage in periodic review.<sup>18</sup> The harmonisation of arbitration rules depends on consensus in this community, which is possible if you perceive yourselves as part of a global group sharing the same vision of arbitration as an “autonomous global system of justice”.<sup>19</sup> Conferences such as these go a long way to helping establish this common mindset.

## **Institutional design**

17. It may be that some of legitimacy challenges stem from a perception of investor-state regimes being a “bad deal”. Won Kidane suggested on Monday that this may be because of the impression that the expropriation obligation confers all the benefits on investors, with no commensurate benefit on the individuals those investors affect.<sup>20</sup> Concern over this imbalance has led to the imposition of some substantive obligations on investors under some contemporary treaties, such as through counter-claim provisions, but by and large it remains a one-way street. From an access point of view we were challenged as to whether it is necessary to rethink this aspect of structural design to temper the pivot away from its use.

18. The other big legitimacy discussion that has been had is over the issue of party appointment. Alfonso Gomez-Acebo expressed the view on Monday afternoon that there is a problem with party appointments if it is thought the appointing party has a role to play in ensuring “their” party’s position is understood by the tribunal.<sup>21</sup> This is because such a notion is hard to reconcile with precepts of impartiality and independence. There may be a role for soft-law producers, like the Chartered Institute of Arbitrators to eliminate any such ambiguity.

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Won Kidane, ‘Arbitration Challenged I: Reforming Substantive Obligations in Investment Treaties and Conditions of Access to Investment Arbitration’ (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>21</sup> Alfonso Gomez-Acebo, ‘Arbitration Challenged II: Party Autonomy in Choosing Decision-Makers: Advantages and Drawbacks – Should it be Revisited’ (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

19. There is however the converse side, that party appointment of arbitrators offers disputing parties confidence in the process. This is an important part of considering legitimacy from the perspective of party self-interest.<sup>22</sup> An important factor to remember, and one that is easily forgotten, is the reputation element for arbitrators – it is difficult to build up yet easily destroyed – and this can work against any incentive to taint a decision in favour of a party to secure future appointments.<sup>23</sup>

20. For commercial parties, the ability to select an arbitrator engenders a sense of control and proximity to the proceedings. It always has been an integral part of party autonomy in arbitration. Taking it away may diminish corporate users' preference for arbitration in the first instance.<sup>24</sup> The other issue is whether corporate users have faith in institutions to make appointments for them. In this context I think the point was well-made by Chief Justice Allsop on Monday, that it would be unwise to transmogrify concerns about ISDS into concerns about international commercial arbitration, as each needs to be understood from its own perspective.<sup>25</sup> The degrees of concern attending each field are different, and the solutions may need to be different too.

### **Costs and delays**

21. Perhaps it is trite to say it at this point, but a point of continued concern throughout this conference has been the need to address costs, delays and transparency. 2015 surveys confirm this – respondents perceived the worst characteristic of international arbitration to be “cost”.<sup>26</sup> Corporate decision makers historically selected international arbitration as their contractual dispute

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<sup>22</sup> Natalie Y. Morris-Sharma, 'Arbitration Challenged II: Party Autonomy in Choosing Decision-Makers: Advantages and Drawbacks – Should it be Revisited' (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>23</sup> Ibid.

<sup>24</sup> Ruth Stackpool-Moore, 'Arbitration Challenged II: Party Autonomy in Choosing Decision-Makers: Advantages and Drawbacks – Should it be Revisited' (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

<sup>25</sup> Allsop, above n 2.

<sup>26</sup> Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 7.

mechanism because it was a faster, more effective way of deciding disputes. Its continued popularity is dependent on maintaining this competitive advantage.

22. It has been instructive at this conference to hear perspectives from a variety of jurisdictions, offering ideas that I personally had never considered. It can serve as a timely reminder that what we might consider “arbitration orthodoxy” may represent only a fraction of what is possible. The organisation of arbitration proceedings was, by and large, developed by practitioners from a narrow group of countries, who historically dominated its practice.

23. For example, the contribution of the Deputy General of the Beijing Arbitration Commission, Dr Fuyong Chen, offered insight into the manner in which that Commission relieves the concerns of users on efficiency and cost — by imposing a limitation on caseloads, requiring prompt delivery of awards and using technology to enable mobile access, notification, electronic signing and distance filing.<sup>27</sup>

24. Patricia Bergin, the former Chief Judge in Equity of the NSW Supreme Court, also raised the possibility that the arbitral process can learn from initiatives implemented in domestic courts, which face many common challenges. As she said, the current issues with the Redfern Schedule bear some analogy to the challenges faced with the formal discovery process in the NSW Supreme Court. In an attempt to control the burgeoning cost of the process a Practice Note was issued, requiring service of evidence prior to discovery except in exceptional circumstances, and limiting discovery to the issues in dispute as revealed by that evidence.<sup>28</sup>

25. I agree with the comments of Patricia at this conference that this procedure has resulted in “the enhancement of the Court’s capacity to control the process of document disclosure, the speedier resolution of commercial cases and the

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<sup>27</sup> Dr Fuyong Chen, ‘Building Better Arbitration Proceedings: Practical Suggestions, Part 1, Revising Conventional Wisdom in the Organization of Arbitral Proceedings’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>28</sup> Supreme Court of NSW, Practice Note SC Eq 11, *Disclosure in the Equity Division* <[http://www.lawlink.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/pages/574](http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/574)>.



reduction of costs”.<sup>29</sup> I appreciate that the Practice Note is not unique and that steps similar to that required by it have been adopted in many arbitrations. However it does demonstrate that proactive steps either by use of the rules, or by case management in individual proceedings, can significantly limit both costs and delay. I also appreciate concerns about due process but I do not think that due process requires more than giving parties a fair opportunity to present their respective cases. It does not include permitting the parties to chase every conceivable rabbit down every conceivable burrow, or giving them unlimited time to undertake that fruitless task.

## Transparency

26. Finally, there is transparency. I think there is probably consensus that increasing transparency in investor state disputes is a laudable goal, in response to the sledges in recent years that it is, apparently, secretive, skewed in favour of corporations, and excludes the public whose funds and interests are at stake.<sup>30</sup>

27. So far each of the major transparency initiatives in recent years has been accompanied by a clear recognition of the difference between ISDS and contract arbitration — where confidentiality is assumed to be an essential feature.

28. However, it may be that certain disputes are of such a “public” nature that the distinction is not tenable. One example we heard was the *Microsoft Mobile v Sony Europe*<sup>31</sup> case, involving a tortious claim brought by Microsoft in England for alleged anti-competitive cartel conduct. The claim was ordered to be heard by an arbitral panel rather than the English courts pursuant to an agreement between the parties. The issue resulting is that third parties who may also have

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<sup>29</sup> Patricia A Bergin, ‘Building Better Arbitration Proceedings: Practical Suggestions, Part 2, Efficiency and the Lessons to be Learned from Other Dispute Resolution Frameworks’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>30</sup> Stanimir A Alexandrov, ‘Arbitrations Involving Public Bodies and Public Interests: Salient Issues, Part 2, Confidentiality, Transparency and Public Participation: Too Far or Not Far Enough?’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>31</sup> [2017] EWHC 374 (Cth), as discussed by Constantine Partasides QC, ‘Arbitrations Involving Public Bodies and Public Interests: Salient Issues, Part 2, Confidentiality, Transparency and Public Participation: Too Far or Not Far Enough?’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

been the victim of unlawful conduct will have access to little or no information about it, and the public is kept in the dark about conduct that could have had an impact on consumer prices. One interesting issue which could have arisen out of the Microsoft Mobile case is whether production of material tendered in the arbitration and the arbitrator's award, could be compelled in either regulatory proceedings or proceedings in which the plaintiff was not bound by an arbitration agreement. The privacy protection might not be as absolute as originally perceived.

29. Part of the issue stems from what I think most of us here would be quite happy about — the exponential growth in the use of international arbitration. But it also means that arbitration can no longer claim some exotic status — it is not litigation for the “hip” — it is purely mainstream.<sup>32</sup> I hope this doesn't disappoint you too much. What we were challenged to rethink this week is whether this new reality means the idea that party autonomy prevails over all else will still hold true in 10, 20 or 30 years' time — and what this means for the place of privacy and confidentiality.

30. A pessimistic scenario is that the absence of transparency will start to mean misinformation — alternative facts, “post-truth” opinions and “fake news” abound. Constantine Partasides QC posed the following question, and I will simply quote it: “In an age in which an absence of information is often replaced by an abundance of misinformation, is it acceptable — or even wise — for a process that now accounts for such a significant proportion of commercial dispute resolution around the world to be automatically confidential?”<sup>33</sup>

31. What is interesting to note is that transparency was also a complaint we heard this year from corporate users. Laura Abrahamson posited that from a corporate user's perspective, there is significant demand for the publication of awards, whether in full, redacted or summary form — and also for greater data around arbitrators to guide selection decisions.<sup>34</sup> It might be premature to presume that

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<sup>32</sup> Partasides, above n 31.

<sup>33</sup> Ibid.

<sup>34</sup> Laura Abrahamson, ‘Arbitration Challenged I: Reforming Commercial Arbitration in Response to Legitimacy Concerns’ (Panel Discussion at the 24th ICCA Congress, Sydney, 16 April 2018).

the interests of the public and the interests of corporations in this area will always conflict.

32. However, at the risk of offending some of my fellow judges, lack of transparency or for that matter the reference of a body of international disputes to arbitration, has not in my view, inhibited the development of the common law at least in this country. Commercial arbitration has been around for decades, if not centuries, and the common law seems to have muddled along. In that context it must be remembered that a huge majority of cases in the courts don't involve any point of principle, but rather the application of established principle to the facts. It is the curse of an appellate judge these days to be bombarded by first instance decisions raising no point of principle and merely having the effect of raising the judge's blood pressure as he or she has to wade through them. I regret that the same could probably be said of a great number of awards

33. However, I should say, that in the case of arbitrations that do raise a point of principle, courts would benefit from access to the reasoning of the arbitrators. If that could be achieved it would be desirable. However I would not subscribe to the view that it is a serious policy matter, at least in this country, at the present time.

## **Technology**

34. Now we can't be at a conference with the word "future" in the name without some mention of how robots are going to be doing all our jobs soon. I would be lying if I said it doesn't keep me up some nights. When one googles "what makes a good judge", the first attribute that comes up is "legal ability". Anyone who has seen the youtube video "paralegal vs robot" should have no doubt that robots are far better at law than humans. And while some lawyers no doubt seem like robots in terms of their lack of apparent need for sleep or sustenance — I'm not sure how they will compete with the real deal. It seems every day there is a new headline to the effect of "Are we ready for robot judges" ... "AI to replace lawyers". It is enough to make the best of us nervous. I imagine the sessions yesterday exploring how much more effective artificial intelligence will be than humans as arbitrators has

had much the same effect on you.<sup>35</sup> Although, I suspect these things worry the younger “digital natives” among us far less than the “digital immigrants” such as myself.

35. The future of technology both in arbitration and litigation is at once both an opportunity and a challenge. It offers solutions to the challenges like unconscious bias and managing voluminous documents. This conference has shown us first-hand how the use of different technologies will revolutionise arbitration – such as the use of augmented reality in a proceeding.<sup>36</sup> I was grateful for an explanation of what this means at the time, so I will pass on the favour – it refers to the superimposition of images on the world as you see it – like Pokémon Go, for those who have also been confronted with robotic-like children chasing imaginary creatures in their suburbs.

36. In line with the academic rigour that has attended this entire conference, it was not all fun and games and cross-examination of Darth Vader. There were also the difficult questions of how we can ensure tech is used in a way that does not impinge on due process, and how we can ensure there is equality of access to these programs. The other point made, that I would repeat, is that technology is not only relevant to the process of arbitration, but also the content of future disputes. It will change your clients’ worlds well before it changes yours. If for nothing than pure economic benefit, it is incumbent on us to understand and embrace it.

## **New Voices**

37. Finally, I would like to make mention of the young practitioners who spoke yesterday afternoon — on topics as varied as arbitration in conflict zones,<sup>37</sup>

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<sup>35</sup> Carsten van de Sande, ‘Technology as Disruption’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>36</sup> Paul H Cohen, Hugh Carlson, Rashda Rana SC and Gabrielle Nater-Bass, ‘Technology as Facilitation’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>37</sup> Samantha Lord Hill, ‘New Voices’ (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

Sovereign Wealth Funds in investor-state dispute settlement,<sup>38</sup> the principles limiting compensation in arbitration<sup>39</sup> and their views on the state of the system.<sup>40</sup> These young practitioners come to the table, it is evident, with a genuine devotion to the practice of arbitration, and a desire to see it flourish. I think in a congress dedicated to thinking about the future of international arbitration, these young voices are the ones that deserve particular attention, and I commend them for their contributions.

38. The past few days have offered an unparalleled opportunity to engage in thoughtful introspection about the future of this industry. I hope you have each found it as useful as I have. I thank the organising committee for the opportunity to speak, and I look forward to meeting again at the next ICCA Congress.

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<sup>38</sup> Solomon Ebere, 'New Voices' (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>39</sup> Jawad Ahmad, 'New Voices' (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).

<sup>40</sup> Lucas Bastin, 'New Voices' (Panel Discussion at the 24th ICCA Congress, Sydney, 17 April 2018).