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HOST STATE RATIFICATION OF ILLEGAL CONDUCT

by Dan-Vlad Druta

I. INTRODUCTION

Objections to jurisdiction occupy an important place in the resolution of international investment disputes. As of June 30, 2019, 25% of the arbitration cases decided by arbitral tribunals under the ICSID Convention and the Additional Facility Rules ended with the arbitral tribunal declining jurisdiction.[1] One type of objection to the tribunal's jurisdiction or the admissibility of the claims is the illegality of the claimant's investment. When is such illegality relevant, and what factors should be considered in the analysis of the investor's conduct? Under what conditions, on the other hand, will such illegality not bar an investor's action based on a ratification of the investor's conduct by the host state?

The case law demonstrates that tribunals still grapple with finding the right answers to these questions. The recent awards in *Gavrilovic v. Croatia*,[2] *Karkey Karadeniz v. Pakistan*,[3] and *David Aven v. Costa Rica*[4] are indicative of these difficulties, despite the emergence of the new proportionality test in *Kim v.*

[1] *See* ICSID Secretariat, *The ICSID Caseload – Statistics*, *Issue* 2019-2, 4. Available at https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/The%20ICSID%20Caseload%20Statistics%20%282019-2%20Edition%29%20ENG.pdf.

[2] Gavrilovic v. Republic of Croatia, ICSID Case No. ARB/12/39, Award (July 26, 2018).

[3] Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017).

[4] David R. Aven et al. v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award (Sept. 18, 2018).

Uzbekistan.[5] Both *Gavrilovic* and *Karkey Karadeniz* raised the issue of the host state's involvement in the alleged illegality, and the tribunals found that there was no illegality considering the host state's own conduct.[6] However, the tribunals failed to offer a convincing rationale for this opinion. In addition, in *Karkey Karadeniz*, the tribunal found that the operation of estoppel precluded the host state from raising the illegality objection[7] without conducting a rigorous analysis of this concept. As regards the award in *David Aven*, the tribunal considered that the host state could not raise the objection due to its tacit acceptance of the illegal conduct of the investor.[8] Seemingly applying the concept of acquiescence, the tribunal did not analyze the conditions for the concept to apply, as established in general public international law.

This paper aims to further analyze and clarify the issues raised by these awards. In discussing the contours of the illegal conduct, this paper will, firstly, show that a distinction must be made between the normative sources of the legality requirement, as this has important effects on the interpretation and effects of the requirement. It will also demonstrate that the illegality cannot be successfully raised as an objection when the illegal conduct is exclusively attributable to the state. Grounded in interpretation rules based on the maxim *nemo auditur propriam turpitudem allegans*, this conclusion requires a case-by-case analysis when both the investor and the host state are involved in the illegal conduct, as was the case in *Gavrilovic*. Secondly, this paper argues that the host state's involvement in the illegality must be clearly distinguished from ratification. Thus, some of the factors identified by the tribunal in *Kim* are to be considered in the analysis of the ratification, and ratification of an illegal act cannot coexist, as a rule barring the objection, with the commission of the

[5] *See* Vladislav Kim et al. v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 413 (March 8, 2017) (arguing that, in the analysis of the illegality, the tribunal must balance the purpose of promoting investments with the consequences of admitting the objection, i.e., denying the protection).

[6] *See Gavrilovic*, *supra* note 2, ¶ 384 and *Karkey Karadeniz*, *supra* note 3, ¶ 624.

[7] *See Karkey Karadeniz*, *supra* note 3, ¶ 628.

[8] *See David Aven*, *supra* note 4, ¶ 324-25.

illegality exclusively by the host state. As regards the analysis of ratification, this paper will focus only on estoppel and acquiescence and will not consider waiver and recognition, which have a more limited applicability in the context of investment arbitration. It will show that a rigorous analysis of the conditions of estoppel and acquiescence, as understood in public international law, is required. Likewise, although the ILC Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are not applicable for purposes of estoppel and acquiescence, the paper shows that *ultra vires* acts can give rise to an estoppel.

Considering the backlash against the international investment arbitration system,[9] the author believes that these clarifications may contribute to the development of a framework that ensures a nuanced balancing between the need to protect investors and the need to protect and foster transnational public policy. The clarifications and observations made in this paper are not intended to be exhaustive, the purpose being to contribute to the existing debate by pointing out some of the problems that have not been thoroughly analyzed.

The paper is structured as follows. Part II of this paper analyzes the concept of investors' illegal conduct, summarizing its main characteristics and effects by distinguishing between the different normative sources of the legality requirement. Part III then discusses estoppel and acquiescence as legal manifestations of the ratification of the illegal conduct by the host state. It analyzes the understanding of these concepts under public international law in order to establish the requirements that need to be met for their application and then addresses their application in international investment arbitration as defenses to the respondent state's illegality objection. Part IV briefly summarizes the observations of the author regarding the ratification of illegal conduct.

[9] See generally Michael Waibel, Asha Kaushal et al., The Backlash Against Investment Arbitration: Perceptions and Reality in THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel, Asha Kaushal et al. eds., 2010).

II. THE CONCEPT OF ILLEGAL CONDUCT

A. *General Considerations.*

Similar to national legal systems, the parties' illegal conduct produces legal effects in international investment arbitration solely if a set of specific conditions is met. As a system designed primarily to promote and protect the rights of investors,[10] international investment law has developed standards against which the conduct of the host state is assessed by arbitral tribunals. However, given the structure of investment protection treaties–namely that these treaties mostly define standards of protection and obligations for host states–the nature and effects of the investors' illegal conduct is mostly the result of jurisprudential development. Thus, alongside legal scholarship, arbitral tribunals have drawn distinctions between the different situations that can occur in practice, with the purpose of discerning the different legal effects this conduct might have.

As to terminology, this paper construes as "conduct" all legal acts attributed to investors, be they active or passive. However, considering the lack of specific rules designed to impose obligations on the investors in investment treaties, providing a sharp contour of the notion of illegality in those treaties is a much more challenging task. This part briefly discusses the different sources under which illegality can give rise to an objection to the tribunal's jurisdiction or the admissibility of the claims (B), the contours of the notion of illegality (C) and its different effects (D).

B. *Sources.*

Illegality can be sanctioned based on two sources: treaties and general international law.[11] Considering the consensual nature of the international arbitration system, it is mostly based on the investment treaties at play that arbitral tribunals discuss illegality as an objection to jurisdiction or admissibility. The case law has also considered the investor's conduct through the prism of transnational public policy

[10] *See* Rudolph Dolzer & Cristoph Schreuer, Principles of International Investment Law 20-21 (2nd ed. 2012).

[11] For a brief discussion regarding the sources of international law, *see generally* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF INTERNATIONAL LAW 18-35 (9th ed. 2019) (ebook).

and the doctrine of *clean hands*.

1. Investment Treaties.

A number of investment treaties refer to the legality of the investment in what is called the "in accordance with the law" clause.[12] Two main types of such clauses are generally used:[13] clauses qualifying the definition of the investment that is protected under the treaty,[14] and clauses regarding the applicability of the treaty.[15] In this context, the only provisions relevant to a tribunal's jurisdiction or the admissibility of the claims are those relating to the protection of investments, as opposed to those

[12] See generally with respect to "in accordance with the law clauses", August Reinsich, How to Distinguish in Accordance with Host State Law Clauses from Similar International Investment Agreement Provisions, 7 INDIAN J. ARB. L. 70 (2018); Gabriel Bottini, Legality of Investments under ICSID Jurisprudence, in THE BACKLASH AGAINST INVESTMENT ARBITRATION 297 (Michael Waibel, Asha Kaushal et al. eds., 2010); Sam Lutrell, Fall of the Phoenix: A new Approach to Illegality Objections in Investment Treaty Arbitration, 44 U.W. AUSTL. L. REV. 120 (2019); Stephan W. Schill, Illegal Investments in Investment Treaty Arbitration, 11 LAW & PRAC. INT'L CTS. & TRIBUNALS 281 (2012); U. Kriebaum, Investment Arbitration - Illegal Investments in AUSTRIAN Y.B. INT'L ARB. 307 (Gerold Zeiler, Irene Welser et al. eds., 2010); Zachary Douglas, The Plea of Illegality in Investment Treaty Arbitration, 29 ICSID REV. 155 (2014); Jarrod Hepburn, In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration, J. INT'L DISPUT. SETTLEMENT 531 (2014); Rahim Moloo & Alex Khachaturian, The Compliance with the Law Requirement in International Investment Law, 34(6) FORDHAM INT'L L. J. 1473 (2011); Jean Engelmayer Kalicki, Mallory Silberman et al., What Are Appropriate Remedies for Findings of Illegality in Investment Arbitration? in INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 721 (Andrea Menaker ed., 19 ICCA Congress Series, 2017) (e-book).

[13] See Reinsich, supra note 12, at 72; Bottini, supra note 12, at 298; Lutrell, supra note 12, at 122; See also Schill, supra note 12, at 283 (referring to a mixed second type of clauses that refer both to admission and protection of the investments).

[14] See Agreement between the Government of the French Republic and the Government of the Republic of Moldova on the Reciprocal Promotion and Protection of Investments, Sept. 8, 1997, art. 1(1), cited in Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶ 361 (Apr. 8, 2013) ("it is understood that the mentioned assets must be or have been invested in accordance with the legislation of the Contracting Party, on the territory or maritime area of which the investment is made, before or after entry into force of the present Agreement.").

[15] See, Agreement on Reciprocal Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey, Mar. 27, 1986, art. 2(2), cited in Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 115 (July 14, 2010) ("the present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made.").

relating to the *admission* of investments.[16] While the former affect the protection offered to the investments–and, thus, whether such protection may be withdrawn in case of illegality–the latter are construed as imposing a limitation on the obligation of the host state to admit and accept foreign investments.[17] Both are designed to protect the host state, however, and thus re-establish the balance in its favor.

The contours of these clauses will be analyzed in Section C below, as they must be assessed comparatively with other notions deriving from general international law.

2. General International Law.

Tribunals have been asked to analyzed investors' illegal conduct from two different angles, when the investment treaty on the basis of which the arbitration has been initiated does not include a legality requirement. First, they have been asked to sanction illegality on the basis of public policy.[18]

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[16] *See* the Netherlands Model Bilateral Investment Treaty, art. 2 (Jan. 1, 2004), cited in Reinsich, *supra* note 12, at 75 ("either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments."). *See also* MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8), Award, ¶ 210 (May 4, 2016) ("Article 2 of the BIT reads as follows: "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of investors of the other Contracting Party. Subject to its right to exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments." The Tribunal observes that the first sentence in this article refers to the obligation of each State party to the BIT to promote investments and it is not addressed to the investors or the legality of the investments. Similarly, under the second sentence, each State undertakes to admit investments subject to the rights conferred by its laws and regulations.").

[17] See Reinsich, supra note 12, at 81. The admission clauses must, however, be distinguished from the type of clauses that include a requirement of such an approval/admission in the definition of investment, which raise the issue of the tribunal's jurisdiction. See Douglas, supra note 12, at 184-185 (mentioning the decision in Philippe Gruslin v. Malaysia, ICSID Case No. ARB/99/3, Award, ¶ 9 (Nov. 27, 2000), which analyzed article 1 of the Agreement between The Belgo-Luxembourg Economic Union and The Government of Malasya on Encouragement and Reciprocal Protection of Investments, stating that investment under the agreement included only assets that "are invested in a project classified as an "approved project" by the appropriate Ministry in Malaysia.").

[18] *See generally* Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 255 (Pieter Sanders ed., 3 ICCA Congress Series, 1987) (ebook); EMMANUEL GAILLARD & JOHN SAVAGE (EDS.), FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION

There are various approaches to this concept, including "international" or "transnational" public policy. The concept encompasses principles, "which are really essential and are supported by a widespread, if not universal consensus, or as possessing, owing to their importance, a particular force and a particular imperative nature."[19] Jan Paulson also remarked that this concept "requires the acknowledgement of a rare degree of global consensus."[20] Generally speaking, the threshold for finding a breach of public policy may be high, although questions of fraud and corruption should generally meet the required threshold, given that they are sanctioned in almost every legal system, thus being in breach of the public policy in national legal systems as much as international public policy.

Separately, tribunals have been asked to read an implied legality requirement in investment treaties, sometimes on the basis of the doctrine of *clean hands*.[21] However, to the extent the applicability of the *clean hands* doctrine as a general principle of international law is controversial,[22] as established by the tribunal in *Hulley*

860-64 (1999); Catherine Kessedjian, *Transnational Public Policy in* INTERNATIONAL ARBITRATION 2006: BACK TO BASICS 857 (Albert Jan Van den Berg ed., 13 ICCA Congress Series, 2007) (ebook); Jean-Michel Marcoux, *Transnational Public Policy as an International Practice in Investment Arbitration*, 10 J. INT'L DISP. SETTLEMENT 496 (2019); JAN PAULSON, THE IDEA OF ARBITRATION (2013) (ebook).

[19] Lalive, *supra* note 18, ¶ 109.

[20] Paulson, *supra* note 18, at 208.

[21] See generally for the discussion of the doctrine in international investment arbitration, Aloysius Llamzon & Anthony Charles Sinclair, Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 451, 508-517 (Albert Jan Van den Berg ed. 18 ICCA Congress Series 2015) (ebook); Patrick Dumberry, State of Confusion: The Doctrine of Clean Hands in Investment Arbitration after the Yukos Award, 17 J. WORLD INV. & TRADE 229 (2016); Mariano de Alba, Drawing the Line: addressing allegations of unclean hands in investment arbitration, 12 (1) BRAZ. J. INT'L L. 322 (2015); ROBERT KOLB, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC 568-574 (Graduate Institute Publications, Geneva, 2000).

[22] *See* Hulley Enterprises (Cyprus) Limited v. Russia, PCA Case No. AA 226, Final Award, ¶ 1358-1359 (July 18, 2014) ("The Tribunal is not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands'. General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law.").

Enterprises v. Russia, this paper will only briefly refer to the *clean hands* doctrine, to the extent it has been raised by respondent states.

C. *Contours of the legality requirement.*

1. "In accordance with the law" clauses.

Regarding the "in accordance with the law" provisions included in investment treaties, most of the tribunals[23] and scholars[24] consider that the illegal conduct of investors produces legal effects only if the illegality has a certain level of gravity. Thus, the clause covers, undoubtedly, corruption,[25] fraud and misrepresentation,[26] breaches of the host state's foreign investment law,[27] as well as breaches of fundamental rules of the host state;[28] as regards other types of host state law breaches, some tribunals have held that the clause does not cover minor or trivial breaches of the host state law,[29] while others have considered breaches of the applicable rules of host state law, for example the imposition of permits for purposes

[23] *See*, *e.g.*, Tokios Tokelės v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 85-86 (Apr. 29, 2004); *Saba Fakes*, *supra* note 15, ¶ 119-121; Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 483 (Mar. 30, 2015); Alpha Projektholding GmbH v. Ukraine, ICSID Case No. ARB/07/16, Award, ¶ 297 (Nov. 8, 2010); Desert Line Projects LLC v. The Republic of Yemen, ICSID Case No. ARB/05/17, Award, ¶ 104 (Feb. 6, 2008); Lesi SpA and Astaldi SpA v. People's Democratic Republic of Algeria, ICSID Case No. ARB/05/3, Decision on Jurisdiction, ¶ 83 (July 12, 2006); Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 319 (July 29, 2008); *Kim*, *supra* note 5, ¶ 395; Metalpar S.A. and Buen Aire S.A. v. the Argentine Republic, ICSID Case No. ARB/03/5, Decision on Jurisdiction, ¶ 72-85 (Apr. 27, 2006).

[24] *See* Schill, *supra* note 12, at 301; Kriebaum, *supra* note 12, at 319; Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 740; Llamzon, Sinclair, *supra* note 21, at 506; Bottini, *supra* note 12, at 299; Yas Banifatemi, *The Impact of Corruption on 'Gateway Issues' of Arbitrability, Jurisdiction, Admissibility and Procedural Issues*, *in* ADDRESSING ISSUES OF CORRUPTION IN COMMERCIAL AND INVESTMENT ARBITRATION ¶ 40 (D. Baizeau, R. Kreindler eds., 2015).

[25] *See*, *e.g.*, Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 389 (Oct. 4, 2013).

[26] *See*, *e.g.*, Inceysa Vallisoletana S.L. v. Republic of EI Salvador, ICSID Case No. ARB/03/26, Award, ¶ 239-46 (Aug. 2, 2006).

[27] *See*, *e.g.*, *Saba Fakes*, *supra* note 15, ¶ 120.

[28] See, e.g., Rumeli Telekom, supra note 23, ¶ 319.

[29] See, e.g., Tokios Tokelės, supra note 23, ¶ 85-86.

of construction,[30] both in relation to jurisdictional objections and the merits of the dispute.

When determining whether an illegality has taken place, such that the investor cannot prevail in its claim, a factor that has been taken into account in case law is the investor's good faith. Thus, some tribunals have taken the view that the existence of due diligence performed by the investor might be a factor indicating the existence of its good faith,[31] and, as a result, the inexistence of an illegality.

Looking at the conduct of the state, tribunals have been asked to assess the effect of the involvement of the host state in the illegal conduct. For example, in *Kardassopoulos v. Georgia*,[32] a case where the investment consisted of a joint venture agreement and a concession agreement concluded with state-owned companies, the Georgian state invoked the illegality of the investment on the grounds that the agreements were void, as they had not been signed by the competent authorities under the Georgian law. After stating that this illegality cannot be invoked by the Georgian state, being caused by the state itself,[33] the tribunal went on to say that the

[30] *Cf. Mamidoil*, *supra* note 23, ¶ 370 *et seq.* (even though the tribunal considered it had jurisdiction, it did give effect to host State law and the illegality on the merits.).

[31] *See* Alasdair Ross Anderson et al. v. Costa Rica, ICSID Case No. ARB (AF)/07/13, Award, ¶ 58 (May 19, 2010) ("[p]rudent investment practice requires that any investor exercise due diligence before committing funds to any particular investment proposal. An important element of such due diligence is for investors to assure themselves that their investments comply with the law. Such due diligence obligation is neither overly onerous nor unreasonable. Based on the evidence presented to the Tribunal, it is clear that the Claimants did not exercise the kind of due diligence that reasonable investors would have undertaken to assure themselves that their deposits with the Villalobos scheme were in accordance with the laws of Costa Rica."); *See also*, *Churchill Mining PLC and Planet Mining Pty Ltd. v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, ¶ 529 (February 24, 2014) ("The inadmissibility applies to all the claims raised in this arbitration, because the entire EKCP project is an illegal enterprise affected by multiple forgeries and all claims relate to the EKCP. This is further supported by the Claimants' lack of diligence in carrying out their investment.").

[32] Kardassopoulos v. The Republic of Georgia, ICSID Case No. ARB/05/18, Decision on Jurisdiction (July 6, 2007).

[33] *Id.* ¶ 183-184 ("Against this background, the Tribunal observes that Respondent does not allege that Claimant committed any act in violation of Georgian law. Quite the contrary, it is the Respondent which argues that its State-owned enterprises violated Georgian law by exceeding their authority, thus rendering void ab initio the JVA and the Concession. Accordingly, Article 12 of the BIT cannot be invoked by Respondent to exclude Claimant's

host state was estopped from raising the objection, given its approval of the investment.[34] A similar conclusion was reached by the tribunal in *Karkey Karadeniz*, a case where the host state argued that the investor had breached the provisions of its procurement laws.[35]

Although the legality clause under the treaties generally does not mention that the illegality must be committed by the investor, tribunals have been correct in concluding that, when the illegal conduct is attributable to the state, the investment is deemed to be legal. It should be noted, however, that the tribunals do not offer proper reasoning for this conclusion. In the author's view, the conclusion must rest on the rule of good faith interpretation provided by article 31 of the Vienna Convention on the Law of Treaties ("VCLT"). One of the manifestations of the principle of good faith is the maxim "*nemo auditor propriam turpitudem allegans*",[36] pursuant to which no one can benefit from her own fault. Thus, interpreting the

investment from protection under the BIT. It follows that notwithstanding the fact that the JVA and the Concession may be void ab initio under Georgian law, Claimant's investment nonetheless remains entitled to protection under the BIT and the Tribunal so finds.").

[34] *Id.* ¶ 194 ("[T]hus, even if the JVA and the Concession were entered into in breach of Georgian law, the fact remains that these two agreements were "cloaked with the mantle of Governmental authority". Claimant had every reason to believe that these agreements were in accordance with Georgian law, not only because they were entered into by Georgian State-owned entities, but also because their content was approved by Georgian Government officials without objection as to their legality on the part of Georgia for many years thereafter. Claimant therefore had a legitimate expectation that his investment in Georgia was in accordance with relevant local laws. Respondent is accordingly estopped from objecting to the Tribunal's jurisdiction *ratione materiae* under the ECT and the BIT on the basis that the JVA and the Concession could be void ab initio under Georgian law.").

[35] *See Karkey Karadeniz*, *supra* note 3, at ¶ 624, 628 (Aug. 22, 2017) ("[a] host State cannot avoid jurisdiction under the BIT by invoking its own failure to comply with domestic law. All the contractual modifications that Pakistan alleges were made in breach of its procurement laws were duly agreed by the contracting parties . . . Pakistan has consistently maintained that Karkey's investment was established in accordance with Pakistani laws, and it is now estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws.").

[36] *See* KOLB, *supra* note 21, at 488 (analyzing it as a particular manifestation of the principle of good faith, although Kolb rightly qualifies it as a maxim and not as a principle: "Toutefois il s'agit d'une maxime plus que d'un principe de droit au sens technique du terme. *Nemo auditur* est un *topos* de l'argumentation juridique plus qu'une norme d'application précisément circonscrite.").

legality clauses through the prism of this maxim, one may reach the conclusion that these clauses do not cover the case in which the illegal conduct is attributable to the state, as such a result would violate the principle of good faith interpretation included in article 31 of the VCLT.[37] This, in turn, leads to the question of how this rule applies when the investor is aware of, or takes part in, the illegal conduct of the host state.

This issue was analyzed in *Gavrilovic*, a case which involved the transfer of five companies to the investor as a method of awarding him for his services during the war with Serbia, when he smuggled money out of the country to Austria.[38] Even though the tribunal found that the investor was involved in smuggling and was at all times aware of the illegalities and their serious nature,[39] it considered that the involvement of the state in the illegality precluded it from raising it as a defense.[40] The tribunal seems to have desired to strike a balance between the need to protect investors and the need to protect the rule of law, and the award reflects its concern for safeguarding the protection afforded to investors by the international investment

[37] However, it should be noted that the maxim bears, in these cases, merely an interpretative role and is devoid of any normative force, as opposed to those cases where the maxim is applied as a general principle of international law. For a brief discussion about the analysis of the maxim as a principle of international law, *see infra*, sub-Section C of this Section.

[38] See Gavrilovic, supra note 2, at ¶ 325-29.

[39] *Id.* ¶ 383 ("[the] evidence points more strongly in the direction of the State's orchestrating the bankruptcy and thus the transfer of the Five Companies to Mr Gavrilović as a quid pro quo for his currency smuggling, as discussed above. In short, while this was plainly to the benefit of Mr Gavrilović and the Tribunal has no doubt that he understood exactly what was going on (particularly when his dealings with the Minister in early March 1992 and the visit to Mr Papeš are considered), the central plank of the Respondent's attack, namely, that he orchestrated it has not been proven and, for the reasons discussed above, seems to the Tribunal to be implausible."). *See also* ¶ 386 ("[Mr] Gavrilović knew how irregular it was for the Ministry of Finance to be financing the acquisition of assets in bankruptcy by a private party, but this fits within the larger picture of the Government's returning a favour during a period of wartime exigency.").

[40] *Id.* ¶ 384 ("it is not open to the State to plead the patent irregularities of a bankruptcy proceeding overseen and authorised at critical junctures by its own court or the making of an extraordinary loan approved by a senior government minister, which might or might not have been unlawful under Croatian law, in opposition to the BIT claim. Put another way, if this investment was not made in conformity with the legislation of Croatia, on the evidence before this Tribunal, this is due to the acts of organs of the State.").

treaty regime.[41] However, this concern cannot justify not applying established legal principles. As discussed above, the maxim of interpretation that underlies the conclusion in this type of cases is *nemo auditur propriam turpitudem allegans*. The applicability of this maxim is limited, however, in cases where the investor is also involved in the illegality. In such cases, the tribunal must analyze the gravity of each party's conduct and reach the conclusion that the investment is legal only if such a result would not lead to the protection of an illegal investment.[42]

In *Gavrilovic*, the tribunal attempted such an analysis, but in the author's opinion, it failed by overemphasizing the fact that the illegality was orchestrated by the authorities of the host state. A comparison with the classic example of bribery is useful in this context. In the case of bribery, a party commits an illegality (offering money or other benefits to an official) in exchange for an illegal act of an official. It is irrelevant who initiates the illegal exchange[43] and the entire purpose of the exchange

[41] See generally Kevin Lim, Upholding Corrupt Investors' Claims against Complicit or Compliant Host States—Where Angels should not Fear to Tread, 2011-2012 Y.B. ON INT'L INV. L & POL'Y 601, 620-622 (2013) (describing the arguments invoked against the implementation of an overly strict approach against corruption that would lead to the weakening of the investors' protections); See also Doak Bishop, Toward a more flexible approach to the international legal consequences of corruption, 25(1) ICSID Rev.—Foreign Invest. L. J. 63, 66 (2010) (cited by Lim and who considers that an important factor in deciding on issues of corruption is whether the investor or the state's officials had the initiative of the corruption acts). As regards the case law, see Metal-Tech, supra note 25, ¶ 389 ("[t]he Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act.").

[42] *See* KOLB, *supra* note 21, at 498 ("L'application de la maxime pourrait être écartée si la turpitude de l'autre partie est supérieure à celle du demandeur et si des lors son application pourrait mener à ce qu'une situation plus immorale encore ne soit entérinée.").

[43] *See* Constatine Partasides, *Remedies for Findings of Illegality in Investment Arbitration in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 740, 743 (Andrea Menaker ed. 19 ICCA Congress Series 2017) (ebook) ("The message sent out by Lord Mansfield's rule is unambiguous. Participate in an illegality and, amongst other things, you forfeit the protections of the law. While this unequivocal legal position is regrettably not always sufficient to counteract the temptation to succumb to a 'sweetheart deal', imagine for a second how much this legal disincentive would be undermined if it was qualified by

is for the official to ensure, often by devising a complex plan, that a benefit is obtained ultimately by the bribing party. In the case at hand, the same pattern occurred: the investor committed an illegality (i.e., smuggling money to Austria) in exchange for an illegal act of the officials (i.e., ensuring the transfer of the companies). The "orchestration" to which the tribunal refers represents, in fact, no more than the illegal acts committed by the officials in exchange for the benefits received from the investor. More generally, the very concepts of corruption and bribe are based, by definition, on an illegal act by an official person. If tribunals were to not sanction such illegality based on the official character of the function of the corrupted or bribed person, then grave types of illegality such as corruption or bribery would never be sanctioned.

Starting from this line of cases that grappled with the issue of finding appropriate limits to the broad meaning of the "in accordance with the law" provisions included in the treaties, some tribunals have recently tried to use a more systematic and flexible theory based on the principle of proportionality. According to this principle, the tribunal's task is to "balance the object of promoting economic relations by providing a stable investment framework with the harsh consequence of denying the application of the BIT in total when the investment is not made in compliance with legislation."[44] The theory was developed by the arbitral tribunal in *Kim*, the proportionality analysis comprising the following three steps: (1) assessing the significance of the obligation with which the investor is alleged to not comply; (2) assess[ing] the seriousness of the investor's conduct; and (3) evaluating whether the combination of the investor's conduct and the law involved results in a compromise of a significant interest of the host state to such an extent that the harshness of the sanction of placing the investment outside of the protections of the BIT is a

considerations such as: "who initiated the illegality?"; or "who benefitted more from the illegality?"; or "whose conduct was worse?" These are questions that have no place in a legal forum."). *See also* Bottini, *supra* note 12, at 309 (arguing that corruption is prohibited by international public policy and, thus, the state is not precluded from raising the illegality even it its officials were involved.). *Cf. Bishop*, *supra* note 41, at 66.

[44] *See Kim*, *supra* note 5, ¶ 413.

proportionate consequence for the violation examined.[45]

The same reasoning was applied in *Cortec Mining v. Kenya*.[46] Although not expressly mentioned, it seems to also having been applied by the tribunal in Anglo *Adriatic v. Albania*: "this loss of protection is all the more clear where there is a relevant public purpose, which justifies the proportionality between the breach and the sanction of depriving an investor from international protection."[47] The proportionality test has also been well received by legal scholars,[48] considering its case-by-case basis approach. The author agrees with this test, given the appropriate nature of a case-by-case analysis in this type of cases. For instance, the application of the proportionality test would have offered a much better framework for cases such as *Gavrilovic*, allowing the tribunal to consider comparatively the gravity of each of the parties' conduct. However, certain observations are needed with respect to some of the factors considered relevant to the proportionality analysis by the *Kim* tribunal.

The *Kim* tribunal considered that the "general non-enforcement of an obligation . . . the specific decision of the host State not to investigate or prosecute the particular alleged act of noncompliance . . . evidence of widespread noncompliance"[49] are factors that should be taken into account for establishing the significance of the obligation of the investor, while the "failure of the state to investigate or prosecute the alleged particular act of noncompliance"[50] is a factor to be considered in the assessment of the investor's conduct. While the author agrees that the general non-enforcement and the widespread non-compliance existent in the host state can be taken into account when interpreting the notion of illegality at the initial phase of the

[45] *Id.* ¶ 406-408.

[46] Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya, ICSID Case No. ARB/15/29, Award, ¶ 343-365 (Oct. 22, 2018).

[47] Anglo-Adriatic Group Limited v. Republic of Albania, ICSID Case No. ARB/17/6, Award, ¶ 288 (Feb. 7, 2019).

[48] *See* Lutrell, *supra* note 12, at 140-141.

[49] *Kim*, *supra* note 5, ¶ 406.

[50] *Id.* ¶ 407.

making of the investment, it may be more appropriate, under the interpretation rules of Article 31(3)(b) of the VCLT, to refer to the concepts of estoppel or acquiescence when looking at such practices during the lifetime of the investment. Furthermore, the failure to investigate the specific non-compliance of one particular investor cannot be considered as a factor showing the intention of host state for purposes of interpretation of the treaty, but should be analyzed as an acquiescence.[51]

2. Transnational Public Policy.

In addition to the legality clauses included in the treaties, the respondent states often invoke transnational public policy as a limit to the protection offered to the investor, irrespective of the treaty provisions. This concept has been used as a separate ground for respondent states when objecting to the legality of the investment, both when the treaty at play includes and when it does not include a legality provision.

The International Law Association considers that transnational public policy includes "fundamental rules of natural law, principles of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as 'civilized nations'."[52] Thus, it has been argued that this concept covers, without a doubt, slavery, torture,[53] corruption and bribery.[54]

Fraud has been considered to be a part of the concept of transnational or international public policy. For instance, in *Inceysa v. El Salvador*, a case where the investor obtained the investment through fraud, the tribunal considered that "not to exclude Inceysa's investment from the protection of the BIT would be a violation of international public policy, which this Tribunal cannot allow. Consequently, this Arbitral Tribunal decides that Inceysa's investment is not protected by the BIT

[51] *See infra* Part III, Section C (*Acquiescence*).

[52] Marcoux, *supra* note 18, at 498 (quoting the International Law Association, Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards 6-7 (2000)).

[53] *See* Douglas, *supra* note 12, at 181.

[54] *See* Llamzon & Sinclair, *supra* note 21, at 519.

because it is contrary to international public policy."[55] Also, in *Plama v. Bulgaria*, in the context of an Energy Charter Treaty claim, the tribunal decided that "granting the ECT's protections to Claimant's investment would be contrary to the principle *nemo auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal."[56] The awards have been strongly criticized by Zachary Douglas who considers that they have "pushed the concept of international public policy too far."[57] Although the author shares the same opinion regarding the restrictive interpretation of the transnational public policy concept, the idea of fraud being a part of transnational public policy should not be disregarded completely.[58]

The problem raised by these awards is not so much the alleged extension of the concept of transnational public policy, but the lack of any rigorous analysis which would establish that fraud is actually included in transnational public policy. In order to establish the existence of a subject/matter included in transnational public policy, one should find that the subject is widely considered by the international community as being of fundamental importance. However, in these cases, the tribunals did not analyze if such a consensus exists and assumed that fraud, as corruption, must be part of the transnational public policy. The conclusion of the two above-mentioned tribunals seems to have been facilitated by the fact that both found that offering protection to the investor would be contrary to the *nemo auditur propriam turpitudinem allegans* principle.[59] Thus, these decisions might be explained rather by the tribunals' belief that international public policy is equivalent to the *clean hands*

[55] *Inceysa*, *supra* note 26, ¶ 252.

[56] Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, ¶ 143 (Aug. 27, 2008).

[57] *See* Douglas, *supra* note 12, at 181.

[58] The argument raised by Douglas (*supra*, note 57), according to which the option of the respondent to confirm the contract represents an indication that fraud is not part of the transnational public policy cannot be accepted, as the internal law of the host state is not the determining factor when ascertaining the content of transnational public policy.

[59] *See Inceysa*, *supra* note 26, ¶ 240.

doctrine.[60] To the extent that would be correct, however, different thresholds apply. If the doctrine of *clean hands* includes, in principle, a conduct which is illegal according to the laws of the host state, without being necessary to analyze it from the perspective of the international community, this does not suffice for transnational public policy, as shown above. In other words, while transnational public policy includes the illegalities covered by the *clean hands* doctrine, the reverse is not true.

In light of the above, it should be concluded that transnational public policy requires a higher threshold than the "in accordance with the law" clauses and, therefore, is to be applied cautiously by the tribunals. Thus, the failure to obtain a permit, for instance, or to comply with some other local, non-fundamental requirements of the host state would not constitute breaches of the transnational public policy, although it may result in the investment not being protected, depending on the circumstances of the case.

D. *Effects of the Investor's Illegal Conduct.*

In order to determine the legal effects of the illegal conduct of the investor, tribunals have distinguished between illegalities committed during the making of the investment and the illegalities committed during the lifetime of the investment. Thus, if the illegal conduct occurs at the initial phase of the making of the investment, it is generally considered to affect the jurisdiction of the tribunal or the admissibility of the claim, while if it occurs after the investment was made, during the lifetime of the investment, it qualifies as a merits issue.[61]

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[60] The *clean hands* doctrine is based on a similar maxim, namely the common law maxim "he who comes into equity must come with clean hands." Pursuant to this doctrine, as developed in municipal laws, the claimant cannot proceed with her action when, *inter alia*, the transaction at stake is fraudulent or illegal (*see* Llamzon & Sinclair, *supra* note 21, at 509). Thus, considering that fraud is encompassed, generally, by this doctrine, it might be reasonable to assume that the reasoning started from this doctrine.

[61] *See*, *e.g.*, Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID Case No. ARB/03/25, Award, ¶ 344 (Aug. 16, 2007) ("[th]e effective operation of the BIT regime would appear to require that jurisdictional compliance be limited to the initiation of the investment. If, at the time of the initiation of the investment, there has been compliance with the law of the host state, allegations by the host state of violations of its law in the course of the investment, as a justification for state action with respect to the investment, might be a defense to claimed substantive violations of the BIT, but could not deprive a tribunal acting under the authority of the BIT of its jurisdiction."); Gustav F W Hamester GmbH & Co KG v.

This distinction is based on the usual wording included in the investment treaties, namely an investment made "in accordance with the law" or "assets invested in accordance with the law."[62] However, this distinction should also apply in the case in which no such provisions are included in the treaty, and the illegal conduct is analyzed as a violation of transnational public policy.

This conclusion results from applying the rule pursuant to which a state cannot invoke its own law in order to escape its international obligations.[63] Regarding the conduct of the investor occurring during the life of the investment, and possibly after the dispute has arisen, this might be analyzed as an abuse of rights and can, depending on the circumstances of the case, determine the denial of the tribunal's

Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 127 (June 18, 2010) ("The Tribunal considers that a distinction has to be drawn between (1) legality as at the initiation of the investment ('made') and (2) legality during the performance of the investment. Article 10 legislates for the scope of application of the BIT, but conditions this only by reference to legality at the initiation of the investment. Hence, only this issue bears upon this Tribunal's jurisdiction. Legality in the subsequent life or performance of the investment is not addressed in Article 10. It follows that this does not bear upon the scope of application of the BIT (and hence this Tribunal's jurisdiction) – albeit that it may well be relevant in the context of the substantive merits of a claim brought under the BIT. Thus, on the wording of this BIT, the legality of the creation of the investment is a jurisdictional issue; the legality of the investor's conduct during the life of the investment is a merits issue. In the Tribunal's view, the broader principle of international law identified in paragraphs 123-124 above does not change this analysis of Article 10, and in particular its distinction between legality at different stages of the investment."). *See also* Schill, *supra* note 12, at 307-309; Llamzon & Sinclair, *supra* note 21, at 500-501; Moloo & Khachaturian, *supra* note 12, at 1482.

[62] *See* Llamzon, *supra* note 21, at 501 ("Tribunals have concluded from the plain meaning of such terms and the past tense in which they are cast that the intention behind such treaty provisions is that the legality of the creation of the investment should be a jurisdictional issue, but subsequent illegality is not.").

[63] *See Hulley Enterprises (Cyprus) Limited*, *supra* note 22, ¶ 1354-1355 (July 18, 2014) ("[T]ribunal does need to address Respondent's contention that the right to invoke the ECT must be denied to an investor not only in the case of illegality in the making of the investment but also in its performance. The Tribunal finds Respondent's contention unpersuasive. There is no compelling reason to deny altogether the right to invoke the ECT to any investor who has breached the law of the host State in the course of its investment. If the investor acts illegally, the host state can request it to correct its behavior and impose upon it sanctions available under domestic law . . . It would undermine the purpose and object of the ECT to deny the investor the right to make its case before an arbitral tribunal based on the same alleged violations the existence of which the investor seeks to dispute on the merits.").

jurisdiction.[64]

Considering that this paper analyzes solely objections to jurisdiction and the admissibility of the claims, only the illegal conduct committed during the making of the investment is taken into consideration. When is illegal conduct a matter of jurisdiction, and when is it a matter of admissibility?

As remarked by August Reinsich, "a broad consensus has formed that, while jurisdiction goes to the power of an investment tribunal to decide a case, admissibility relates to the claims put forward in investment arbitration proceeding."[65] Given the limited scope of this analysis, the paper refers only to the general conditions included in the investment treaties, noting that other conditions could be imposed by other instruments chosen by the parties to regulate the dispute.[66] Thus, if the objection relates to the conditions or scope of the consent (ratione personae, ratione materiae, and ratione temporis), it affects the jurisdiction of the tribunal; on the other hand, the issue of admissibility arises only in relation to the claim itself and whether certain conditions are met for it to be brought.[67] Thus, prescription and mootness are generally considered as admissibility issues;[68] the denial of benefits clause has also

[64] See generally Emmanuel Gaillard, Abuse of process in International Arbitration, 32(1) ICSID REV. 17 (2017).

[65] August Reinsich, *Jurisdiction and Admissibility in International Investment Law*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 21, 23 (Andrea Gattini, Attila Tanzi et al. eds. 2018) (e-book).

[66] *See*, *e.g.*, Dolzer & Schreuer, *supra* note 10, at 65-76 (discussing the requirement of an investment under the ICSID Convention, which is a separate condition than that included in the bilateral treaty).

[67] For a detailed analysis of the jurisdiction and admissibility in public international law and investment arbitration, see *generally* Yas Banifatemi & Emmanuel Jacomy, *Compétence et Recevabilité dans le droit de l'arbitrage en matière d'investissements in* Droit International des Investissements et de L'arbitrage Transnational 773, 774 (Charles Leben ed. 2015), in particular at 778-780. *See also* Andrew Newcombe, *Investor misconduct: jurisdiction, admissibility or merits? in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187, 192-193 (Chester Brown & Kate Miles eds. 2011). These have to be, however, distinguished from simple conditions relating to the exercise of the consent (*See* Banifatemi & Jacomy, *supra* note 67, at 794-810).

[68] *See Newcombe*, *supra* note 67, at 196; *See also* Jan Paulson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 601, 616 (Gerald Aksen et al. eds., 2005).

been discussed as involving a condition of admissibility.[69]

Based on these distinctions, the defense of the host state regarding the illegality of the investment normally goes to the tribunal's jurisdiction when it is based on the "in accordance with the law" clauses, given that it affects the scope of the consent to arbitrate,[70] whereas it can be characterized as an issue of admissibility when no such provisions exist in the agreement, and the objection may then rest on transnational public policy or the *clean hands* doctrine.[71]

III. RATIFICATION BY THE HOST STATE OF ILLEGAL CONDUCT

A. *General considerations.*

Faced with objections to jurisdiction and admissibility raised by the host state, the investors' easiest defense is, of course, to argue that the illegality is not significant or that it was committed by the host state. These defenses relate to both the interpretation of legality clauses included in investment treaties or, as the case may be, the determination of the scope of transnational policy. Once the tribunal establishes that there was, indeed, an illegal conduct on the part of the investor,

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[69] *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 468-472 (2009). *See also*, *Plama*, *supra* note 56, ¶ 148; *Hulley*, *supra* note 23, ¶ 440.

[70] *See*, *e.g.*, Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶ 320 (Nov. 30, 2017) ("The Tribunal agrees with Claimant that under international law, the Tribunal may not import a requirement that limits its jurisdiction when such a limit is not specified by the parties. Indeed, the above considerations distinguish the FTA from the treaties applicable in Flughafen Zurich, Hamester, Inceysa, and Phoenix Action, which expressly required compliance with the host State's law. In fact, the wording of the FTA provides further clarity, because not only does it not mention such a limit, but, by the wording cited above, provides that such a limit is considered a formality which would have to be expressly included to be effective. Here, no such formality was expressly included."); Vanessa Ventures Ltd. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)04/6, Award, ¶ 113 (Jan. 16, 2013) ("The majority accepts that good faith has an important role in the analysis but considers that, in the absence of a treaty provision ascribing some different effect to the principle of good faith, it is only in circumstances where the application of good faith as a principle of national law invalidates the acquisition of the investment that a lack of good faith means that there is no "investment" for jurisdictional purposes. In other circumstances, the question of good faith does not go to jurisdiction but is a matter to be considered by the Tribunal when exercising its jurisdiction and to be applied in the context of admissibility and/or the application of the substantive protections of the Treaty at the merits phase.").

[71] *See* Reinsich, *supra* note 65, at 38-40; Moloo & Khachaturian, *supra* note 12, at 1499–1501; Schill, *supra* note 12, at 288-291.

either based on treaty or general international law, can the investor invoke any other defenses?

The likely "candidate" that springs to mind is the ratification of the illegality by the host state, on the basis of the doctrine of unilateral acts developed in international law. Specifically, the notions of waiver, recognition, and acquiescence could all be applied as principles of international law deriving from the principle of good faith. In addition, related to the doctrine of unilateral acts, estoppel is the fourth concept that could be applied in this context. Given that the application of waiver and recognition require the fulfilment of stringent conditions,[72] resulting in a lower probability of being successfully invoked, this paper is limited to the analysis of estoppel and acquiescence, as means of ratifying the illegal conduct of the investor.

Before turning to the analysis of these concepts, it should be borne in mind that illegal conduct which is found to be contrary to transnational public policy cannot be ratified.[73] The rule is justified by the fact that transnational public policy does not protect the interests of the host state only, but those of the international community.

B. *Estoppel.*

1. Public International Law.

Estoppel is usually analyzed as a general principle of international law[74] whose

[72] As the acquiescence is understood either as tacit recognition or a tacit waiver (See *infra* Part III, Section C), only express waiver and recognition would qualify for a separate analysis. For a discussion regarding waiver and recognition, *see generally* Isabel Feichtner, *Waiver*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 3 (online edition [https://opil.ouplaw.com/home/mpil] 2006) (discussing the effect of waiver, namely the "express renunciation of rights or claims") and Jochen A Frowein, *Recognition in* Max Planck Encyclopedia of Public International Law ¶ 1 (2010), *available at* https://opil.ouplaw.com/home/mpil (mentioning that recognition in a broader sense represents the "act by which a State confirms that a specific legal situation or consequence, which may have been in dispute, will not be put into question."). *But see* Lim, *supra* note 41, at 658-60 (discussing recognition in the context of investments tainted by corruption).

[73] *See generally* Douglas, *supra* note 12, at 180-181; *see also* Llamzon & Sinclair, *supra* note 21, at 523 ("Transnational public policy can also conceivably play a role in the absence of an "in accordance with host State law" provision, or when arbitral decision-makers deal with corruption in situations in which a particular State's formal law demonstrates tolerance or even condones such practices."). *Cf.* Lim, *supra* note 41, 670-77 (in the context of discussing *clean hands* doctrine which is broadly understood by the author).

[74] See CRAWFORD, *supra* note 11, at 407 (indicating also relevant case law); D.W. Bowett, *Estoppel*

effect is to preclude a party from making a statement or adopting conduct that contradicts one of its previous statements or conduct, when certain conditions are met.[75] Even though its terminology is imported from the common law systems,[76] the principle has acquired a particular meaning in the international system based on the notion of estoppel by representation used in the common law systems.[77] Two

before international tribunals and its relation to acquiescence, 33 BRIT. Y.B. INT'L L. 176, 176 (1957); KOLB, *supra* note 21, at 378-379; Emmanuel Gaillard, *L'Interdiction de se Contredire au Détriment d'Autrui comme Principe Général du Droit du Commerce International*, REV.D.ARB. 241, 255 (1985); Jack Wass, *Jurisdiction by estoppel and acquiescence in international courts and tribunals*, 86 BRIT. Y.B. INT'L L. 155, 159 (2015); I.C. MacGibbon, *Estoppel in International Law*, 7 (3) INT'L COMP. L. Q. 468, 470 (June 1958); Megan L. Wagner, *Jurisdiction by Estoppel in the International Court of Justice*, 74 CAL. REV. 1777, 1778 (1986) (these authors agreeing that this is a general principle of international law, representing a concretization of the principle of good faith). As regards the case law, *see* Delimitation of the Maritime Boundary in Gulf of Maine Area (Can./U.S.), 1984 I.C.J. 246 (Oct. 12); Chagos Marine Protected Area (Mauritius/U.K.), 2015 I.C.J., Award, ¶ 435 (March 18). *But Cf.* ANTOINE MARTIN, L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC 240-46 (1979) (arguing that estoppel is a custom).

[75] Hans Das, *L'estoppel et l'acquiescement: assimilations pragmatiques et divergences conceptuelles*, 30 REVUE BELGE DE DROIT INTERNATIONAL 607, 608 (1997); CRAWFORD, *supra* note 11, at 406; Bowett, *supra* note 74, at 176; KOLB, *supra* note 21, at 357; MacGibbon, *supra* note 74, at 512; A. Martin, *supra* note 74, at 260; I. Sinclair, *Estoppel and Acquiescence*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 104, 105 (V. Lowe and M Fitzmaurice ed. 1996); S. Allen, *The Operation of Estoppel in International Law and the Function of the Lancaster House Undertakings in the Chagos Arbitration Award*, *in* 4 FIFTY YEARS OF THE BRITISH INDIAN OCEAN TERRITORY 231, 252 (S. Allen and Ch. Monaghan eds. 2018) (e-book).

[76] *See, e.g.*, A. Martin, *supra* note 74, at 9-62 (describing the application of the principle in the common law system). It suffices to say here that three initial forms of estoppel were used in the past as procedural concepts related to evidence, namely estoppel by record, estoppel by deed and estoppel by matter in paiis. In the modern times, the main usages of the concepts are estoppel by representation and estoppel by *res judicata*, only the former being implemented in international law.

[77] Although a similar principle is known in other continental systems, such as Switzerland or Germany (i.e., the *non concedit venire contra factum proprium* principle) (*see* Gaillard, *supra* note 74, at 248-50), the operation of the principle in international law follows closely the conditions required for its operation in the common law systems. As described by Gaillard, *supra* note 74, at 246, based on the award of the tribunal in *Amco v. Indonesia*, estoppel by representation "[d]ésigne un mécanisme de blocage qui fonctionne à la manière d'une fin de non- recevoir. C'est l'interdiction faite à la personne qui, par ses déclarations, ses actes ou son attitude, c'est-à-dire par la « représentation » qu'elle a pu donner d'une situation donnée, a conduit une autre personne à modifier sa position à son détriment ou au bénéfice de la première, d'établir en justice un fait contraire à cette « représentation » initiale". However, as opposed to estoppel by representation, which traditionally only had a procedural role, as an evidentiary rule, in international law, estoppel is generally considered as having a substantive effect, determining the extinguishment of the state's right. For this opinion, *see* KOLB, *supra*

competing views were advanced as to the conditions required for its operation.[78]

According to the restrictive or strict approach, estoppel produces legal effects only in the following conditions:

a) The statement of fact must be clear and unambiguous;

b) The statement of fact must be made voluntarily, unconditionally, and must be authorized; and,

c) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.[79]

If in Bowett's view estoppel could only operate in the case of a statement of fact, this view has been abandoned by the modern proponents of the restrictive approach, who admit that estoppel applies also in cases of statement of law.[80] In addition, it should be observed that although the above definition refers only to statements, this is understood broadly as including also acts, actions and conduct of the state, including its silence.[81] On the other hand, according to the broader, opposing view, the third condition mentioned above is not necessary for estoppel to produce legal effects:

> What appears to be the common denominator of the various aspects of estoppel which have been discussed, is the

note 21, at 384 and Thomas Cottier & Jörg Paul Muller, *Estoppel*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 5 (2007), available at https://opil.ouplaw.com/home/mpil. *Cf.* A. Martin, *supra* note 74, at 271 and 316-20 (arguing that estoppel has an evidentiary role).

[78] See Das, supra note 75, at 611-12; A. Martin, supra note 74, at 71-72; Andreas Kulick, About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals, 27 EUR. J. INT'L L. 107, 109-12 (2016) (briefly describing these views).

[79] Bowett, *supra* note 74, at 202.

[80] *See* KOLB, *supra* note 21, at 362-63; *See also* Was, *supra* note 74, at 184-85 (arguing that jurisdiction can be based on estoppel and accepting, therefore, the premise of such an analysis, namely the possibility to have representations of law). *Cf.* Kulick, *supra* note 78, at 127 and Wagner, *supra* note 74, at 1799-1804. The extensive view, according to which statements of law are to be taken into account was embraced by international courts and tribunals as well. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar./U.S.), 1984 I.C.J. 392, at 413-415 (Nov. 26); See also, *Chagos*, *supra* note 74, ¶ 437.

[81] *See* Das, *supra* note 75, at 613; KOLB, *supra* note 21, at 360-61; A. Martin, *supra* note 74, at 274; Lim, *supra* note 41, at 645.

> requirement that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest, estoppel in international law reflect the possible variations, in circumstances and effects, of the under- lying principle of consistency which may be summed up in the maxim *allegans contraria non audiendus est*.[82]

The case law indicates that the international courts and tribunals have adopted the restrictive approach over the past decades.[83] Thus, all three conditions mentioned by Bowett have to be fulfilled in order for the principle to operate, with the caveat that the statements of law are also considered, as mentioned above.

The fulfilment of the first condition, as has been rightly remarked by Kolb,[84] is essential, as a prerequisite, for establishing that the addressee could have reasonably relied on the statement.[85] Without a clear and unambiguous statement the other party cannot be considered to have placed reliance on the statement. This explains, in turn, the lack of formalism regarding the form of the statement which includes, as mentioned above, also silence. The meaning of the conduct should be interpreted in context, by considering all the external circumstances.[86]

As regards the second condition, the state must act freely, meaning that a statement made under duress or caused by fraud[87] is not considered for the application of estoppel. In addition, the statement must not depend upon certain conditions,[88] as this would not entitle the addressee to rely on the statement. If the first prongs of the condition formulated by Bowett did not raise any particular issues,

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[82] MacGibbon, *supra* note 74, at 512.

[83] *See*, *e.g.*, *Chagos*, *supra* note 74, at 438; North Sea Continental Shelf, (Ger./Den.; Germ./Neth.) 1969 I.C.J. 3, at 26 (Feb. 20); Island and Maritime Frontier Dispute (El Sal./Hond., Nicar. intervening), 1990 I.C.J. 92, at 118 (Sept. 13); *Gulf of Maine*, *supra* note 74, at 305. *See also* Das, *supra* note 75, at 612 n.21; Kulick, *supra* note 78, at 112 n.28 (referring to other cases as well).

[84] KOLB, *supra* note 21, at 360.

[85] *See* A. Sinclair, *supra* note 75, at 107-108.

[86] *See* Bowett, *supra* note 74, at 189.

[87] *Id.* at 190.

[88] *See* KOLB, *supra* note 21, at 373; Bowett, *supra* note 74, at 191.

the second prong related to the authority of persons making the statement raises important issues in the practice of international investment arbitration tribunals, as will be discussed below. It is worth mentioning briefly that following the rule provided by article 7 of the VCLT, there is a unanimous view that statements made by heads of state, heads of government, foreign ministers and heads of diplomatic missions are capable of binding the state, while the statements of other officials can be binding only if they are expressly authorized to represent the state internationally.[89] It is, however, arguable if and under what conditions a state is bound by lower-ranked officials. For instance, in *Gulf of Maine*, the ICJ considered that a letter sent by a certain Hoffman ("Hoffman letter"), a lower-ranked official in the Bureau of Land Management, could not bind the state under international law.[90]

The third condition is indispensable, protecting the necessary predictability of state-to-state relations.[91] As stated by Wagner:

> The reliance requirement may derive from the municipal law idea of detrimental reliance, but it performs an independent function in international law. Without it, international estoppel would severely limit the development of international policies by individual nations. States would feel bound to maintain outdated policies regardless of whether any other

[89] *See* Nuclear Tests Case (Austl./Fr.), 1974 I.C.J. 253, at 269 (Dec. 20). *See also* KOLB, *supra* note 21, at 374; A. Martin, *supra* note 74, at 277; Das, *supra* note 75, at 614 ("il convient toutefois de ne pas exagérer l'importance de la position constitutionnelle de l'organe.").

[90] *See Gulf of Maine*, *supra* note 74, at 307 ("The Chamber considers that the terms of the "Hoffman letter" cannot be invoked against the United States Government. It is true that Mr. Hoffman's reservation, that he was not authorized to commit the United States, only concerned the location of a median line; the use of a median line as a method of delimitation did not seem to be in issue, but there is nothing to show that that method had been adopted at government level. Mr. Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities and did not seem aware that the question of principle which the subject of the correspondence might imply had not been settled, and that the technical arrangements he was to make with his Canadian correspondents should not prejudge his country's position in subsequent negotiations between governments.").

[91] *See* Cottier & Muller, *supra* note 77, ¶ 3 ("[c]lear and unequivocal representation, prejudice, or detriment are not simply addenda; they trigger the very justification for specific protection of legitimate and settled expectations. A rule or principle which would easily prohibit any modification of conduct, statement, or representation vastly overestimates the potentials of law. This is neither suitable nor desirable in effectively promoting protection of good faith, reliance, and confidence in international relations between sovereign nations.").

> state had relied on the existence of those policies.[92]

Thus, the party invoking the operation of estoppel must prove firstly the materiality of the statement,[93] i.e., its capacity to be reasonably understood as intended to be relied upon. In the words of the *Chagos* tribunal, such reliance must be "legitimate."[94] It should be noted that this does not require an analysis of the real intention of the party making the statement.[95] The condition is fulfilled if the party relying on the statement shows that, objectively, such a statement might have been understood as intended to be relied upon. Secondly, the party invoking estoppel must prove that it relied on that statement and that this caused a change in the position of the parties, either by creating a benefit for the issuing party or a prejudice to the addressee.[96] This is not limited to material prejudice, but includes detriment in a variety of forms.[97] For instance, in the *Temple of Preah Vihear*, a stable frontier was considered sufficient,[98] while in the *Military and Paramilitary Activities in and Against Nicaragua*, the lack of jurisdiction was taken into account.[99] Also, in *Chagos*, the tribunal considered that foregone opportunities amounted to a prejudice that could

[92] Wagner, *supra* note 74, at 1780.

[93] *See* Das, *supra* note 75, at 615; A. Martin, *supra* note 74, at 288; KOLB, *supra* note 21, at 364.

[94] *Chagos*, *supra* note 74, ¶ 445 ("A State that elects to rely to its detriment upon an expressly non-binding agreement does not, by so doing, achieve a binding commitment by way of estoppel. Such reliance is not legitimate. Nor does a State that relies upon an expressly revocable commitment render that commitment irrevocable.").

[95] *See* Temple of Preah Vihear (Cambodia/Thai.), 1962 I.C.J. 52, at 62 (June 15) (separate opinion by Sir Gerald Fitzmaurice) ("The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is where it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound.").

[96] *See* A. Martin, *supra* note 74, at 292-93; Das, *supra* note75, at 617-18; KOLB, *supra* note 21, at 365-71; Cottier & Muller, *supra* note 77, ¶ 3.

[97] *See* KOLB, *supra* note 15, at 367; A. Martin, *supra* note 69, at 299 n.198 (arguing that a moral prejudice suffices). *See also* Was, *supra* note 69, at 165 (arguing that the time wasted with pursuing litigation qualifies as detriment). *Cf.* Das, *supra* note 70, at 618.

[98] See Temple of Preah Vihear, supra note 95, at 32.

[99] See Military and Paramilitary Activities in and Against Nicaragua, supra note 80, at 413-5.

be taken into consideration.[100]

2. International Investment Arbitration.

Estoppel has been discussed and applied in a fair number of cases at both the jurisdiction and merits phases in international investment arbitration.[101] As opposed to the constant trend of cases that apply the restrictive theory of estoppel in international law, investment tribunals seem to oscillate between the restrictive and broad views.[102] Kulick has noted that 15 out of the 53 cases identified used the

[100] *See Chagos*, *supra* note 74, ¶ 440.

[101] *See* Kulick, *supra* note 78, at 112 – 15 (identifying, in a quantitative analysis, 53 cases where the terms "estoppel" or "estopped" were used both in the jurisdiction and merits phases).

[102] For the restrictive view, *see*, *e.g.*, *Mamidoil*, *supra* note 23, ¶ 469 ("The Tribunal shares the opinion that the principle of estoppel is embedded in international law. It is a principle where for reasons of material justice a person is hindered from exercising an existing right. It is apparent that such a consequence must be restricted to exceptional circumstances. Estoppel may be found when a party demonstrates by its conduct that it will not exercise a right and a counter-party legitimately relies on this conduct. Mere inactivity, as opposed to an act, is not enough and is addressed by norms on statute of limitation"); Pan American Energy LLC, and BP Argentina Exploration Company v. the Argentine Republic, ICSID Case No. ARB/03/13 and BP America Production Company et al. v. the Argentine Republic, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶ 159 (July 27, 2006) ("Estoppel is a recognized general principle of law that has been applied by many international tribunals. Of the essence to the principle of estoppel is detrimental reliance by one party on statements of another party, so that reversal of the position previously taken by the second party would cause serious injustice to the first party. None of that has been shown by Argentina in this case."); Cambodia Power v. Kingdom of Cambodia and Electricité du Cambodge, ICSID Case No. ARB/09/18, Decision on Jurisdiction, ¶ 266 (Mar. 22, 2011) ("With regard to the detriment requirement, the Tribunal finds that Claimant produced no evidence of detriment. Whatever was the situation, the Claimant always had recourse to arbitration under ICC Rules in the absence of ratification of the Convention by KOC, and therefore it is hard to see what detriment could have been suffered."); UAB E ENERGIJA (LITHUANIA) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award, ¶ 533 (Dec. 22, 2017) ("The Respondent has failed to discharge its burden of proof with respect to the first factual requirement of an estoppel defense. The Respondent has also failed to show its reliance on the Claimant's alleged conduct or statement that the investment claims would not be pursued beyond negotiations. The Tribunal therefore finds that no issue of estoppel arises on the facts of this case."). For the extensive view, *see*, *e.g.*, *Fraport*, *supra* note 61, ¶ 346 ("There is, however, the question of estoppel. Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."); *Rumeli*, *supra* note 23, ¶ 335 ("[it] is also well established in international law that a State may not take away accrued rights of a foreign investor by domestic legislation abrogating the law granting these rights. This is an application of the principles of good faith, estoppel and venire factum proprium."). *See also* Kulick, *supra* note 78, at 115-19 (discussing other cases as well).

restrictive view, while 13 seemed to apply the broad view and in the other cases it was either unclear or the tribunals misused the concept. [103] More interestingly, Kulick's analysis found that estoppel was found not to be applicable in all the 15 cases in which a restrictive view was taken.[104]

Although this might be an indicator that the test is too strict, the author agrees with Kulick that this should not lead to the conclusion that a broad view is preferable in international investment law.[105] The justification for the restrictive approach of estoppel in international law, namely the prevention of a "chilling effect" on the activities of states, is even more present in the context of investment law. As discussed below, estoppel is based in most of the cases on purely internal conduct or acts of a state's officials and the application of the broad view would drastically limit the exercise by the state of its sovereignty.[106] On the other hand, it is worth mentioning that even in the cases where the restrictive approach was applied, the solution to reject the estoppel claim was not always based on the third condition, but rather on the other two conditions which were analyzed rigorously.[107] In fact, the issue with the broad view applied in investment disputes is not only that the third condition is not taken into account, but, more importantly, the fact that the first two conditions are only summarily analyzed and estoppel seems to be used as a supporting argument.[108]

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[103] Kulick, *supra* note 78, at 114.

[104] Id.

[105] *Id.* at 124–28.

[106] This is justified by the fundamental difference between estoppel and consensual undertakings of the state. As discussed above, estoppel operates precisely in cases where there is an ambiguity with respect to the true intention of the state. Therefore, reliance performs a safeguarding function.

[107] *See*, *e.g.*, *Mamidoil*, *supra* note 23, ¶ 409, 417 (finding that the first condition of estoppel (i.e., clear and unequivocal statements) was not met); *UAB E ENERGIJA*, *supra* note 102, ¶ 533 (finding that neither the first condition, nor the reliance requirement were met; *Cambodia Power*, *supra* note 102, ¶ 264 (finding that the first condition was not met).

[108] *See* Kulick, *supra* note 78, at 120-121 ("most decisions rejecting estoppel under the strict view let the claim fail on the requirements that a broad view avoids discussing (clear and unequivocal representation, detrimental reliance on the representation).").

The award in *Karkey Karadeniz*[109] represents, in this respect, an indicative example of this approach in international arbitration. The case involved claims of an investor arising from the breach of a contract concluded with a Pakistani state-owned company following a public procurement process. The respondent objected that the tribunal lacked jurisdiction on the basis of an "in accordance with the law" clause, because the investment was obtained through alleged corruption and fraud and the contract was contrary to the Pakistani public procurement laws as found by the Pakistan Supreme Court.[110] As mentioned above,[111] the tribunal not only found that the breach of procurement laws was due to the state of Pakistan, but also that the respondent state was estopped from raising the defense. Although the respondent referred in its counter-memorial to the restrictive view of estoppel,[112] the tribunal did not make any reference to the requirement of reliance, nor did it proceed to a detailed analysis of the other two conditions of estoppel. If the conditions regarding the clear and unambiguous representation and the reliance of the investor seem to have been met in that case,[113] and, thus, the tribunal might have considered them self-explanatory, the fulfilment of the second condition raised an important question regarding the attribution of the representations to the state of Pakistan that required an in-depth analysis. In fact, the tribunal seemed to invoke estoppel only as a supporting, secondary argument in favor of its conclusion that there was no illegality, considering that it was committed by the host state.[114]

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[109] Karkey Karadeniz, supra note 3.

[110] *Id.* ¶ 75-160 (for the factual background of the case) and ¶ 277-335 (for Pakistan's contentions regarding the lack of jurisdiction based on the "in accordance with the law" clause).

[111] *Supra* note 36.

[112] *Id.* ¶ 336 ("Pakistan submits that the concept of estoppel prevents a party from exercising a valid legal right in circumstances where it has clearly and unequivocally stated that it would not exercise that right, and its counterparty has – in good faith – relied on this statement to its detriment.").

[113] *Id.* ¶ 627 (the contract concluded by the investor with the Pakistani company included a representation that the contract is valid and binding). As regards the reliance, *see* ¶ 75-160 (the factual background of the case evidencing the provision of electricity by the claimant and the presence of its vessels in Pakistan).

[114] For a similar reasoning, where estoppel was seemingly used only as a secondary argument, *see also Kardassopoulos*, *supra* note 32. This approach might be also explained by a

The conclusion of the tribunal raises two main issues. First, what is the relationship between estoppel and the commission of the illegality by the host state? Second, can the international law rules of attribution be used when analyzing estoppel, and if yes, which? This paper will try to answer these questions in the following sub-sections.

(i) Commission of the Illegality by the Host State.

As discussed above, when the illegality is committed by the respondent state, the dismissal of its objection to jurisdiction should be grounded on the interpretation of the applicable treaty in light of the maxim *nemo auditur propriam turpitudinem allegans*. Specifically, in such a case, there is no illegal conduct covered by the "in accordance with the law" clause included in the treaty, considering that it covers solely the illegal conduct of the investor. Since there is no illegality committed by the investor, is there a role for estoppel in this scenario?

In order to answer this question, a distinction between the theories regarding the effect of estoppel is necessary. If one applies the theory according to which estoppel only has a procedural effect that operates in matters of administration of evidence,[115] the operation of estoppel has to be considered before analyzing the existence of the illegality. This is because estoppel's effect would be precisely to preempt the opposing party from bringing any other evidence with respect to that particular matter. Thus, in such a case, the conclusion that the respondent is estopped would resolve the issue without being necessary to analyze the illegality itself.

On the other hand, if one regards estoppel as having a substantive effect,[116] extinguishing the right of the party to assert a certain fact, estoppel cannot play any role in this scenario. If there is no illegal conduct on the part of the investor, the right to be extinguished does not exist and, as a result, estoppel cannot operate. Therefore, irrespective of the theory embraced, it is not accurate to reject the defense of the

terminological confusion. As noted by Martin (*see* A. Martin, *supra* note 74, at 212), there was an inclination in practice to consider *nemo auditor propriam turpitudinem allegans* as an application of estoppel.

[115] *See supra* note 77.

[116] *Id.*

host state on the grounds of both estoppel and illegality committed exclusively by the host state.[117]

(ii) Rules of Attribution of Conduct under International Law.

The question relating to the attribution of the conduct of the state's officials might seem a non-issue at first glance. Indeed, most of the tribunals dealing with this question did not consider that it raised any particular issues,[118] as exemplified by *Karkey Karadeniz*. Although only some of the tribunals expressly referred to the ILC Articles,[119] it seems that other tribunals also based their decision on the rules included in the ILC Articles even without mentioning them.[120]

A notable exception is the award in Duke Energy v. Peru.[121] The tribunal in that case questioned the applicability of the ILC Articles and, in an extensive obiter, distinguished the attribution rules applicable to estoppel from those relating to international wrongful acts:

> The decisive element for estoppel is the reasonable appearance that the representation binds the State. In this regard, the competence, or rather, the manifest lack of competence, of a State organ is relevant, given that no one can reasonably have confidence in representations or statements coming from an organ which manifestly lacks the competence to make them . . . [for] purposes of estoppel, the Tribunal does not find helpful the principles on State attribution in the ILC's

[117] *Cf.* Kulick, *supra* note 78, at 113, 121 (arguing that in cases such as *Kardassopoulos or Arif* estoppel is used as an "argumentative *topos*", the issue being actually the "compliance of the investment with the domestic law").

[118] *See*, *e.g.*, *Kardassopoulos*, *supra* note 32, ¶ 194; Bernhard von Pezold et. al v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, ¶ 411 (July 28, 2015); *See also Fraport*, *supra* note 61, ¶ 346-347 and *Rumeli Telekom*, *supra* note 23, ¶ 335.

[119] *See*, *e.g.*, *Kardassopoulos*, *supra* note 32, ¶ 190 ("It is also immaterial whether or not SakNavtobi and Transneft were authorized to grant the rights contemplated by the JVA and the Concession or whether or not they otherwise acted beyond their authority under Georgian law. Article 7 of the Articles on State Responsibility provides that even in cases where an entity empowered to exercise governmental authority acts ultra vires of it, the conduct in question is nevertheless attributable to the State.").

[120] *See*, *e.g.*, *Karkey Karadeniz*, *supra* note 3, ¶ 564-582 (the tribunal applying the test under the ILC Articles).

[121] Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Award (Aug. 18, 2008) (the tribunal applied the principle of *actos propios* under Peruvian law in the merits phase, but it considered that this is the equivalent of estoppel under international law).

> Articles on State Responsibility. Rather, the Tribunal draws inspiration, by analogy, from the test that applies in international law to determine whether a treaty is binding even though it was signed in violation of a country's internal law.[122]

The same opinion was expressed by Lim who considers that the ILC Articles do not apply in cases of estoppel, acquiescence or recognition, as their application is restricted to the domain of international wrongful acts.[123] However, while the tribunal in Duke refers to the application by analogy of the VCLT, Lim proposes the application of the rules under the framework of the Guiding Principles on Unilateral Declarations of States ("ILC Guiding Principles"). In the end, the difference is only apparent, as Lim concedes that in cases of *ultra vires* acts, article 46 of the VCLT would be applicable to unilateral acts under the ILC Guiding Principles as well.[124]

The question relating to the applicability of the ILC Articles in this context might seem surprising, considering the unambiguous provisions included in the commentary of the ILC Articles that circumscribe, on one hand, its general field of application[125] and, on the other hand, the rules on attribution.[126] Despite these provisions, in the context of construing the umbrella clauses included in the BITs, it has been argued that the ILC Articles have a general application to matters of attribution and are not limited to internationally wrongful acts.[127] In addition, the

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[122] *Id.* ¶ 244, 248.

[123] *See* Lim, *supra* note 41, at 616-17.

[124] *Id.* at 644.

[125] *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, general commentary ¶ 4 (c) ("the articles deal only with the responsibility for conduct which is internationally wrongful.").

[126] *Id.* commentary of Chapter 2, ¶ 5 ("the question of attribution of conduct to the State for the purposes of responsibility is to be distinguished from other international law processes by which particular organs are authorized to enter into commitments on behalf of the State."). *See also* Lim, *supra* note 41, at 617-18; *Duke*, *supra* note 121, ¶ 250.

[127] As regards the umbrella clause, a classic example of such a clause is art. II(2)(c) of the US-Romanian bilateral investment treaty that was the basis of the dispute in Noble Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2015) ("Each Party shall observe any obligation it may have entered into with regard to investments."). The question that arises is whether the umbrella clause covers agreements entered into by other entities than the state (e.g., private companies where the state is a shareholder), given the reference in the clause to

applicability of the ILC Articles has been extended to the representations giving rise to reasonable expectations, in the context of analyzing breaches of the fair and equitable treatment standard.[128]

While the author understands the inequitable consequences these solutions try to prevent, the nature of the ILC Articles cannot be changed. The ILC Articles represent a *lex specialis* which is applicable only to the narrow field of international responsibility and "it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation."[129] In fact, the issues raised by the umbrella clause and the fair and equitable treatment are not even related to attribution, but rather to the methods of interpretation of such treaty provisions. Therefore, the ILC Articles might be taken into consideration by applying article 31(3)(c) of the VCLT, in the context of interpreting the provisions of the treaty, but cannot be applied directly, considering that they are not of general application.

Having concluded that the ILC Articles apply only in the limited domain of state responsibility for internationally wrongful acts, the decision of the tribunal in Duke and the assertion of Lim are correct. Estoppel is not related to a breach of an

"it". *See* ANDREW NEWCOMBE & LLUIS PARADELL, THE LAW AND PRACTICE OF INVESTMENT TREATIES. STANDARDS OF TREATMENT 461 note 133 (2009) (who consider that the ILC Articles have a general applicability and would cover this issue as well). *But see* Michael Feit, *Attribution and the Umbrella Clause – Is there a way out of deadlock?*, 21 MINN. J. INT'L LAW 21, 29-38 (2012) (describing the position of Newcombe and Paradell and arguing that this issue can be solved by applying flexible rules regarding the representation of the state). *See also* Shotaro Hamamoto, *Parties to the "Obligations" in the Obligations Observance ("Umbrella") Clause*, 30(2) ICSID REV. 449, 462 (2015) (who considers that the ILC Articles are not applicable in this case, and the issue should be solved by applying representation rules). For a contrary position, according to which this is a matter to be solved under the law governing the contract, *see* James Crawford & Paul Mertenskötter, *The Use of the ILC's Attribution Rules in Investment Arbitration*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 27, 34-35 (Meg Kinnear, Geraldine R. Fischer et al. eds., 2015) (e-book).

[128] *See* Georgios Petrochilos, *Attribution in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 293, ¶ 14.72 (Katia Yannaca-Small ed., 2010) (ebook) (arguing that the application of the attribution rules in this case "[m]ay rest on the basis that the non-wrongful conduct is a necessary part of the wrong complained of: the wrongfulness lies in the frustration of a prior representation.").

[129] *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts, *General Commentary* ¶ 4(a).

international obligation, nor does it apply on the basis of a treaty provision that needs to be interpreted. As to the framework that should be used for establishing the competent organs to bind the state through estoppel, the author believes that a flexible, case-by-case approach should be taken, in light of the good faith principle that guides its operation.

While the ILC Guiding Principles represent a good starting point, they do not dispose of the issue, given the express reference that they do not apply to conduct amounting to estoppel.[130] In addition, the alternative of applying article 7 of VCLT leads to a restrictive approach that contravenes to the rationale of estoppel which is firmly grounded in good faith. However, principle 4 of the ILC Guiding Principles[131] should be taken into consideration as a reflection of a general rule of international law allowing the representation of the states by other officials than the heads of states, heads of governments and foreign ministers, such as lower-ranked officials.[132] Thus, even though, conceptually, the ILC Guiding Principles do not apply per se, the general rule reflected in principle 4 should be considered when discussing the issue of estoppel.

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[130] The preamble of the ILC Guiding Principles that were finally adopted is clear in this respect (they "[r]elate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law."). *But see* Lim, *supra* note 41, at 636 (referring to the special rapporteur's comments included in his 9th report (Cedeño's Ninth Report A/CN.4/569/Add. 1) according to which the ILC Guiding Principles would apply *mutatis mutandis* to conduct of the states not envisaged by the Principles).

[131] Principle 4 of the ILC Guiding Principles on Unilateral Declarations of States ("A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs have the capacity to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence.").

[132] *See* Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo/Rwanda), 2006 I.C.J. Rep. 6, ¶ 47 (Feb. 3, 2006) ("with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials."). This paragraph from the award is expressly mentioned in the commentary of principle 4 of the ILC Guiding Principles.

When determining the officials that are authorized to represent the state in its relations with foreign investors, a broad approach should be taken. As opposed to classical state-to-state relations, the interactions between foreign investors and host states are more informal, given the presence of the investments in the territory of the host state and their regulation by the municipal law. Thus, if a host state does not have a special framework requiring foreign investors to only deal with special authorities and accepts the direct interaction between these investors and its national authorities, the latter are to be considered as having been authorized to represent the state, in their area of competence, under the general international rule reflected in principle 4 of the ILC Guiding Principles.[133] The contrast with the state-to-state relations is explained by the fact that the formalism of the latter rests on the restrictions imposed internally on the competence of officials representing the state internationally. As a consequence, if a lower-ranked official, respecting her competence, makes a statement, this is a valid statement for the operation of estoppel.

The rule that naturally follows from this conclusion is that *ultra vires* acts cannot be attributed to the host state.[134] As regards the applicability by analogy of article 46

[133] *See* ALEXIS MARIE, LE SILENCE DE L'ETAT COMME MANIFESTATION DE SA VOLONTE 288-292 (2018) (who considers that this solution rests on the function of the *renvoi* to the municipal law operated by international law, and, thus, there is no difference between lower-ranked officials and other officials if the municipal law recognizes the lower-ranked officials power to represent the state). As stated by Marie at 292: "Qu'on pense aux actes de délimitation, de naturalisation ou encore d'immatriculation, et l'on admettra qu'il est suffisant qu'ils soient édictés par l'autorité interne en ayant le pouvoir, qu'il s'agisse d'un Parlement ou d'un fonctionnaire subalterne, pour être imputables en tant que volonté internationale de l'Etat. Les organes et autres agents peuvent reconnaître, protester ou encore engager l'Etat dès lors que leur fonction le permet et cela quel que soit leur rang hiérarchique. C'est par exemple précisément parce que telles autorités peuvent refuser une extradition ou que telles autres peuvent respectivement s'engager au nom de l'Etat à ne pas extrader ou à ne pas exécuter la décision de condamnation."

[134] *Id.* at 293; *But cf.* Lim, *supra* note 41, at 653 ("So long as a state official acts within the scope of his official duties in making a declaration on the state's behalf (take for instance a foreign minister who, naturally, is in charge of making foreign policy-related decisions, and can thus make binding declarations of foreign policy on the state's behalf), even if he does not have competence under domestic law to make that particular declaration (the foreign minister may not be conferred the power under his state's constitution to recognize the sovereignty of another state over a foreign territory, even though such is a foreign policy matter), such

of the VCLT in such a case, this article is not applicable, considering that, under the framework envisaged by the VCLT, this case would fall under the provisions of article 8 of the VCLT and not article 7.[135] If estoppel would be a classic case of application of the rules regarding the manifestation of will, the analysis would stop at this point. However, as discussed above, estoppel applies especially in those cases where there is a doubt regarding the manifestation of a state's consent and the addressee relies in good faith on that statement. Referring to the importance of reliance in analyzing the *ultra vires* acts of the state making the statement, Thirlway observed that:

> Whereby what matters is the effect produced on the Respondent State, the constitutional niceties of the position of a given official are less important than the impression produced ab extra as to his competence to speak for the State. Yet there must be some degree of authority to speak vested in the person concerned.[136]

Therefore, if in such a case the authority of the organ can be implied under the circumstances and it is reasonable, in accordance with the principle of good faith, to consider that the investor could have relied on such a statement, estoppel can operate.[137]

The tribunal in Duke followed closely this approach, despite referring to article 46 of the VCLT. The respondent argued that the representations regarding the tax treatment of the merger to which claimant was referring were not made by the tax authorities, and, thus, could not be considered for the operation of estoppel. It was

declaration is still attributable to, and therefore capable of binding, the state."). While the author agrees that this reasoning applies to head of states, head of governments and foreign ministers, it does not apply to other lower-ranked officials given that principle 4 does operate a *renvoi* with respect to the latter.

[135] *Cf.* Frank Hoffmeister, *Article 8 in* VIENNA CONVENTION ON THE LAW OF TREATIES 148 (Oliver Dörr & Kirsten Schmalenbach eds., 2018).

[136] *See* Das, *supra* note 75, at 614 (quoting Thirlway, *The Law and Procedure of the International Court of Justice*, BRIT. Y. B. INT'L L. 45 (1989)).

[137] *See* KOLB, *supra* note 21, at 376 and Bowett, *supra* note 74, at 192 (arguing that the theory of apparent authority, concretization of the principle of good faith, applies in such a case). Kolb refers also to the possibility of an acquiescence or estoppel deriving from the subsequent conduct of the superiors of the official acting *ultra vires*. However, there is no need to refer to the statements of the official acting *ultra vires* once one establishes the existence of a subsequent acquiescence or estoppel, as these would produce the effects by themselves.

true that the representations were made by other organs, namely the representative of a company in which the state was a shareholder, but this did not deter the tribunal from attributing the conduct to the state. Taking into consideration, inter alia, the fact that the representative of the company said to have made the representations was also an official of the government's agency dealing with privatizations and the fact that the by-laws of the company were amended before the merger, stating expressly that the purpose was to give "the shares belonging to the State certain control powers through qualified majorities",[138] the tribunal held that the private company was representing the state.[139]

Returning to *Karkey Karadeniz*, the same conclusion could be reached with respect to the attribution of the representations included in the agreement concluded by the claimant with the Pakistani company, given the appearance that the government approved the conduct of the company and the reasonable reliance of the investor on these representations. Although the tribunal analyzed this relation under the framework of the ILC Articles for establishing whether the breaches of the treaty are attributable to the state, its factual findings are relevant in this context as well. The tribunal found that the bidding process was conducted by the government, through its specialized agencies that selected the private company as a counterparty for the winner of the tender[140] and the clauses included in the agreement clearly

[138] *Duke*, *supra* note 121, ¶ 397.

[139] *Id.* ¶ 410, 413 ("Everything that Electroperú did within the context of the privatization of Egenor was at the direction and on behalf of the Government. Indeed, Egenor's by-laws, the Privatization Agreement, and the Privatization Law all clearly indicate that Electroperú was one of the Government's agents in the privatization of Egenor . . . the Tribunal finds that it was reasonable for Dominion (and later Duke) to interpret the support for the merger from Electroperú's representatives as coming from the State itself."). *But see Duke*, *supra* note 121 (separate opinion Dr. Pedro Nikken ¶ 10) ("The relationship between a State and an investor, however, is not identical to the relationship between two States. An investor must know the legal order of the State within whose jurisdiction he has invested, at least in respect of the fundamental issues connected with his economic activity . . . If an agent of the State that is manifestly incompetent in tax matters has approved a taxable act, every investor must know that the tax authority remains entitled to object to it within the prescribed period.").

[140] *Karkey Karadeniz*, *supra* note 3, ¶ 573-75 ("It stems from the evidence on the record that Lakhra did not enter the Contract with Karkey out of its own free will and self-interest. It was Pakistan, through its organs and agents, which selected Lakhra to be the Buyer under the Contract . . . The Tribunal notes that Pakistan, and not Lakhra, solicited the RPPs and invited

showed that the state of Pakistan was the real party to the agreement.[141] These facts, as in Duke, show that it was reasonable for the claimant to rely on the representations as coming from the state itself.

In order to determine if there is apparent authority and the investor could have reasonably relied on it, certain factors should be considered, the *Kim* test being appropriate as a source of inspiration. Thus, one should, firstly, assess the importance of the rule/norm breached. If the obligation is of fundamental importance, the threshold is higher and the investor must clearly demonstrate that she relied on other statements coming from the lower-ranked official's superiors. Secondly, if, for instance, the breach was egregious, and not merely based on a negligence, showing a total disrespect of the host state's rules, it is reasonable to assume that the state would ratify the illegality only in limited circumstances. Other factors, such as the limitation period, as mentioned in the Nikken's dissent in Duke,[142] or the general attitude of the host state towards that particular matter could be relevant.

B. *Acquiescence.*

1. Public International Law.

Acquiescence is a tacit consent,[143] arising from the silence or passive conduct of

the RPPs to invest . . . Pakistan also determined the bulk of Lakhra's eventual obligations under the Contract (by way of the Pro Forma RSC attached to the RFP).").

[141] *Id.* ¶ 576 ("The Tribunal notes that the following provisions were set forth in the Pro Forma RSC, and were also incorporated in the 2008 RSC and 2009 RSC: [Clause 11 – BUYER Obligations] BUYER hereby covenants and agrees that throughout the duration of this Contract: (a) no direct or indirect expropriation, confiscation, compulsory acquisition, or seizure of all or any part of the SELLER's assets, business or operations shall be done by a Governmental Entity and/or state entity or private person or entity, any act, action, delay or omission of the Governmental Entity and/ or state entity.").

[142] *See supra* note 139.

[143] *See* Nuno Sérgio Marques Antunes, *Acquiescence in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (2006), *available at* https://opil.ouplaw.com/home/mpil; I. C. MacGibbon, *The Scope of Acquiescence in International Law*, 31 BRIT. Y.B. INT'L L. 143, 182 (1954).

a state, having the effect of either an implied waiver[144] or a tacit recognition.[145] As a manifestation of the state's consent,[146] it has legal effects only if strict conditions are met.[147] This is justified by the natural uncertainty regarding the effects that silence may have depending on the circumstances:

> Le silence peut, en effet, signifier qu'une offre, une violation ou une menace laisse le destinataire totalement indiffèrent (qui tace negue negat neque utique fatetur). Il peut aussi exprimer l'opposition (qui tacet negat). Mais, dans la plupart des cas, le silence équivaut à l'acceptation tacite par le destinataire d'une offre ou traduit sa résignation devant une violation ou une menace à l'encontre de ses droits.[148]

The first element required to establish the existence of acquiescence is the legal relevance ("pertinence légale")[149] of the silence, meaning that, in the given circumstances, the state has an obligation to act (obligation de réagir), as a response

[144] Was, *supra* note 74, at 159 (citing Tams, *Waiver, Acquiescence and Extinctive Prescription in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1036 (James Crawford et al. eds. 2010).

[145] CRAWFORD, *supra* note 11, at 405; Das, *supra* note 75, at 618; Kulick, *supra* note 78, at 108; Lim, *supra* note 41, at 643.

[146] *See* A. Marie, *supra* note 133 (the main thesis of the book being that silence is a manifestation of state's consent). *Cf.* KOLB, *supra* note 21, at 352 (in his opinion, acquiescence does not represent a manifestation of consent). Acquiescence in a broader sense can be used also as an interpretative tool when, for instance, one of the parties to a treaty maintains its silence with respect to the interpretation of the treaty by the other party. For this latter sense, *see* MacGibbon, *supra* note 143, at 146-47 and Das, *supra* note 75, at 618.

[147] *See* Das, *supra* note 75, at 619.

[148] ERIC SUY, LES ACTES JURIDIQUES UNILATÉRAUX EN DROIT INTERNATIONAL PUBLIC 61 (1962); *See also* Sophia Kopela, *The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals*, 29 AUST. YBIL 87, 90 (2010).

[149] A. Marie, *supra* note 133, at 47-48 and 54-55. The author rightly links this requirement to the rationale of the acquiescence, namely the protection of legal certainty ("Sans préjuger de la question de savoir si les effets en cause peuvent être attribues a une manifestation de la volonté, c'est en définitive la protection de la sécurité juridique qui justifie l'existence de règles écrites, ou non-écrites, qui attribuent des effets au silence étatique . . . [u]ne situation d'insécurité juridique peut résulte d'une difficulté des Etats a projeter un rapport de droit dans le future – elle consiste alors en un doute sur son existence et sa consistance futures – aussi bien qu'en un doute sur l'existence et la consistance actuelles d'un rapport de droit . . . [L]a pertinence légale du silence est en cela largement fonctionnelle. Elles se justifie précisément afin d'anticiper une indétermination future ou de remédier à une indétermination actuelle des rapports des droits.").

to the actions of another entity.[150] Even though the interest of the state to react is sometimes analyzed as a separate condition,[151] this is, in fact, a factor to be considered when establishing the pertinence légale of the silence.[152] As illustrated by the Fisheries case, such an obligation can arise even out of the internal acts of a state, which can be taken into account as a manifestation of the state's consent internationally.[153]

The second condition is that the acquiescing party is aware of the circumstances giving rise to its obligation to react. This condition is justified by acquiescence's nature of manifestation of consent[154] and raises the issue of attribution, as illustrated by the Hoffman letter in *Gulf of Maine*.[155] This issue is analyzed in a separate sub-section below, considering its importance in the context of international investment arbitration.

It has been argued that other conditions for the operation of acquiescence are "the notoriety of the facts and claims, their prolonged tolerance by the state(s) whose interests are specially affected, and general toleration."[156] While the toleration of the

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[150] *Id.* at 57-408 (for a detailed discussion regarding different cases where international law recognizes this obligation). International law recognizes that silence has legal significance (*pertinence légale*), in different hypotheses, ranging from state responsibility to treaty validity, but the prevalent field of application is the territorial disputes between states. *See*, *e.g.*, *Gulf of Maine*, *supra* note 74, at 307 and *Fisheries Case* (U.K./ Nor.), Judgement, 1951 ICJ Rep. 116 (December 18) (discussing acquiescence in the context of territorial disputes). *See also* Kolb, *supra* note 21, at 348 (arguing that such an obligation to react might also derive from the principle of good faith).

[151] *See* Das, *supra* note 75, at 623-25.

[152] *See Kopela*, *supra* note 148, at 105 (discussing the interest of the state in the context of the obligation to react).

[153] *See Fisher*ies case, *supra* note 150, at 132 ("The delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessary a unilateral act, because only the coastal State is competent to undertake it, the validity of the delimitation with regard to other States depends upon international law.").

[154] *See* Lim, *supra* note 41, at 643. *See also* Das, *supra* note 75, at 620 ("Si l'acquiescement est l'équivalent d'un consentement ou d'un acceptation, il est essentiel que l'Etat ait connaissance des prétentions de l'autre Etat.").

[155] *See supra* note 90.

[156] *See* Crawford, *supra* note 11, at 406.

state, as a response to its obligation to react, represents the third essential requirement of acquiescence, the notoriety and the duration of the toleration are not separate conditions. The latter are only criteria[157] that can be used for ascertaining, on the one hand, the knowledge of the facts by the acquiescing state, and, on the other hand, the existence of a consistent toleration, as a manifestation of will. Having said that, these criteria play a crucial role in establishing the existence of acquiescence, as shown by the ICJ. Thus, in the *Fisheries* case, the court rejected Great Britain's claim that it had not known about Norway's internal acts, considering that, in light of the circumstances, this was a notorious fact[158] and, given its failure to protest, decided as follow: "The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."[159]

As regards the duration of the toleration, two cases of the ICJ are worth mentioning: *Gulf of Maine* and the *Arbitral Award of the King of Spain*. In *Gulf of Maine*, Canada's contention of United States' acquiescence was based on the following facts: Canada issued permits for the exploitation of hydrocarbons in the area in dispute, a fact that was made known to the United States, as acknowledged by the Hoffman letter;[160] and this was then discussed using the diplomatic channels.[161] The United States replied only after more than three years, which meant, in Canada's

[157] See A. Marie, *supra* note 133, at 427; *See also* Sinclair, *supra* note 75, at 110 (who refers to the duration of the silence only as an important factor to be considered in the analysis of acquiescence).

[158] *See Fisheries* case, *supra* note 150, at 139 ("As a coastal State on the North Sea, greatly interested in the fisheries in this area, as a maritime Power traditionally concerned with the law of the sea and concerned particularly to defend the freedom of the seas, the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanations by the French Government. Nor, knowing of it, could it have been under any misapprehension as to the significance of its terms, which clearly described it as constituting the application of a system.").

[159] *Id.*

[160] *See supra* note 90.

[161] *See Gulf of Maine*, *supra* note 74, at 305-307.

opinion, that it has acquiesced to its pretentions. The court did not accept Canada's arguments, holding that Hoffman, a mid-level official, could not bind the state internationally, as discussed above, but also that:

> While it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.[162]

Even if the Court refers to estoppel in the last part of the paragraph, given that it has analyzed together the conditions of both concepts, the paragraph is indicative of the manner in which the duration of the silence is taken into account.

In the Arbitral Award of the King of Spain case,[163] a dispute between Honduras and Nicaragua, the ICJ considered the effects of an arbitral award rendered by the King of Spain in 1906, in a territorial dispute between the parties. Following Nicaragua's contentions that the award was invalid and did not produce any legal effects, Honduras brought a claim against it, with the purpose of obliging it to abide by the award.[164] The court considered that Nicaragua has acquiesced in the validity of the award, given that between 1906 and 1912, not only did Nicaragua not raise any objections to the award, but there were also affirmative acts recognizing the validity of the award.[165] Therefore, the Court concluded that:

> Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the

[162] *Id.* at 308.

[163] Case concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18).

[164] For a detailed discussion of the case, *see* Lim, *supra* note 41, at 643-44.

[165] *See Arbitral Award of the King of* Spain, *supra* note 163, at 211-12 (the court refers to a note addressed by Nicaragua's foreign minister to Spain's chargé d'affaires in Central America in which he stated Nicaragua's appreciation regarding the award, as well as to an address of the Nicaraguan president to the National Legislative Assembly and to the publication of the award in the Official Gazette of Nicaragua).

> conclusion at which the Court has arrived.[166]

The fact that a period of three years was considered insufficient in *Gulf of Maine*, but a period of six years was deemed sufficient in *Arbitral Award of the King of Spain* should not lead to the conclusion that the sole difference between the cases was the duration. Rather, the cases show that while duration is certainly an important factor, it must be analyzed in light of all the other circumstances. Thus, there is no certainty that the conclusion would have been different in *Gulf of Maine* had the United States' inaction lasted for six years.

Taking into consideration the conditions mentioned above, one is not surprised to notice that the concept might easily be confused with estoppel. However, even though they are similar, acquiescence must be distinguished from estoppel. While acquiescence is a unilateral act, based on a clear manifestation of the state's will, estoppel, as discussed above, applies precisely in the cases where there is no certainty regarding the state's will, the most important element in the analysis of estoppel being the reliance of the addressee.[167] This difference was stated in the following terms by ICJ in *Gulf of Maine*:

> The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion.[168]

2. International Investment Arbitration.

Just as estoppel, acquiescence has been applied in international investment arbitration as the investor's defense to the illegality objection raised by the

[166] *Id.* at 213.

[167] *See generally* Das, *supra* note 75, at 625-27; Bowett, *supra* note 74, at 197-201. However, this does not mean that silence cannot be considered for the purposes of estoppel. As discussed above, the conduct giving rise to estoppel might be a passive conduct, but, as opposed to acquiescence, proof of reliance and change in the relative position of the parties is needed.

[168] *Gulf of Maine*, *supra* note 74, at 305.

respondent state;[169] however, as opposed to the case law regarding the operation of estoppel, there are fewer cases that have expressly analyzed the conduct of the host state as acquiescence.[170] Still, similarly to the estoppel cases, tribunals do not usually conduct a step by step analysis by closely considering the fulfilment of all the conditions of acquiescence, but rather use it pragmatically. *Arif v. Moldova* and *David Aven*, two cases in which the investor's defense prevailed, illustrate this practice.

In *Arif*, the tribunal did not expressly refer to acquiescence,[171] but its reasoning indicates that it relied on this concept. The dispute arose from the termination of the agreements concluded by the claimant's local company with the Custom Service of Moldova and the state-owned company operating the Chisinau International Airport for the operation of duty-free stores, following their invalidation in the Moldovan courts. The contracts were concluded in 2008 after the claimant won the tender organized by the Moldovan government, but in 2009 one of the other bidders filed complaints, seeking the cancelation of the tender and the agreements, which were, in the end, invalidated by the Moldovan courts.[172] Taking these decisions into consideration and the "in accordance with the law" clause included in the BIT, the respondent argued that the tribunal lacked jurisdiction. The tribunal rejected respondent's objection, holding that:

> There are temporal limitations on a jurisdictional argument based on the illegality of an investment, where the legality of the investment has been accepted and acted upon in good

[169] *See*, *e.g.*, *David Aven*, *supra* note 4, ¶ 324; *Arif*, *supra* note 14, ¶ 374-76.

[170] *See*, *e.g.*, Mr. Franz Sedelmayer v. the Russian Federation, Ad Hoc Arbitration, Arbitration Award, at 66 (July 7, 1998); Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, ¶ 116 (Dec. 8, 2000) (cases where even though acquiescence was not mentioned expressly, the tribunals seem to apply it); *See also* Salini Impregilo S.p.a. v. the Argentine Republic, ICSID Case No. ARB/15/39, Decision on Jurisdiction and Admissibility, ¶ 91 (Feb. 23, 2018) and UAB E ENERGIJA, *supra* note 102 (where acquiescence was invoked by the host state against the claimant).

[171] Considering that the tribunal did not expressly mention the concept of acquiescence, the award might be also understood as an application of estoppel. *See* Hepburn, *supra* note 12, at 555-57 and Kulick, *supra* note 78 at 121 (analyzing *Arif* as a case of estoppel). However, in the author's opinion, tribunal's references to "acceptance" and the "passage of time" indicate that it rather applied acquiescence.

[172] *See Arif*, *supra* note 14, ¶ 41-124 (for the factual background).

> faith by both parties over a period of time . . . the passage of time and the actions of the parties on the mutual assumption of legality cannot be ignored in the determination of jurisdiction. The 'normative power of facticity' requires illegality in a case like the present one to be treated as an issue of liability and not jurisdiction.[173]

In *David Aven*, the dispute concerned the development of a touristic project in Costa Rica, which was partly based on a concession agreement concluded with a local municipality. The respondent objected to the jurisdiction of the tribunal, based on, inter alia, the breach of the Maritime Terrestrial Law (the "MTZ Law"), pursuant to which the majority of the shares in the companies having such a concession must have been held by Costa Rican nationals, and the failure to pay local taxes.[174] Relying, among other evidence, on the statement of the attorney general of Costa Rica, who was examined by the tribunal, according to which the practice of having Costa Rican nationals holding the majority of the shares on behalf of foreign investors was common and no proceedings were started against such practices, the tribunal concluded that the respondent tacitly accepted the illegality:

> Costa Rica was aware of the situation in La Canícula, and it never challenged the Concession on the ground of Articles 47 and 53 of the MTZ Law. The Tribunal believes that, insofar as the Respondent has knowledge of these structures, and according to the testimony of Dr. Jurado, the Attorney General's office has even discussed the issue with the municipalities which have the authority to issue the MTZ concessions, but the government of Costa Rica has elected to tolerate said structures, and not take any action against any of the existing concessions that may be similar in nature, implies their tacit acceptance . . . [th]e challenge argued by Respondent based on the fact that Claimants had failed to pay municipal taxes for several years should be dismissed because neither the Municipality nor Respondent took any action prior to the filing by Claimants of the Notice of Arbitration to remedy such failure, whether by fining the concession holder or initiating a procedure to revoke the Concession.[175]

It is noticeable that neither of the tribunals mentions the word "acquiescence",

[173] *Id.* ¶ 376.

[174] *See David Aven*, *supra* note 4, ¶ 308-311.

[175] *Id.* ¶ 324-25.

nor do they mention the conditions that need to be fulfilled in order to apply it. Both tribunals seem to assume, however, the existence of a duty to react in such cases and refer to the duration of the silence, seemingly as an indicator of toleration by the host state. In addition, the tribunal in *David Aven* expressly refers to the knowledge of the government, implicitly recognizing that this is a necessary requirement, and expressly uses the term "tacit acceptance". Thus, it is safe to assume that acquiescence was the concept taken into account by the tribunal.

However, were the three conditions discussed above fulfilled? The first condition was fulfilled in both cases, considering that it is reasonable to expect a reaction from a state faced with an illegal conduct on its territory. The contrary conclusion would represent a significant weakening of legal certainty.[176] Therefore, in the particular context envisaged here, namely the acquiescence in case of an illegal conduct, it can be concluded that, generally, the first condition of acquiescence is fulfilled.

As *regards* the second and the third conditions, the answer is not straightforward, considering the difference between investor-state and state-to-state relations. As opposed to the latter, the relations between the host state and the investors are complicated by the myriad of municipal laws and regulations that are at issue in the analysis of illegal conduct. In particular, the analysis of the two conditions must take into account the issue of the authorities that are competent to ascertain the existence of the illegal conduct and the conditions that need to be fulfilled under the municipal law for taking an action against the investor. Thus, in *Arif* it is doubtful that there was an inaction of the host state, while in *David Aven* it seems that the competent authorities were not fully aware of the illegalities. These aspects are discussed in the following sub-sections in order to determine the factors that have to be considered when analyzing the fulfilment of the two conditions in the context of illegal conduct.

(i) Rules of Attribution of Conduct under International Law.

The knowledge of the host state regarding the illegal conduct is often dependent on the *knowledge* of its lower-ranked officials and local authorities, as shown by the

[176] *See supra* note 149.

David Aven case above. As discussed, the knowledge of a lower-ranked official was not deemed sufficient in *Gulf of Maine*. Is the case of investment law different? What rules should guide the tribunals when discussing attribution?

Taking into consideration that this is not a matter related to the breach of the international obligations of the host state, the ILC Articles are not applicable in this case. As emphasized above, the ILC Articles do not have general applicability,[177] and thus cannot be applied to other matters. However, considering that acquiescence is a manifestation of consent, the rule reflected by principle 4 of the ILC Guiding Principles is relevant. Therefore, the analysis conducted above in relation to estoppel applies *mutatis mutandis* with respect to knowledge of the officials, acting within their powers under the municipal law of the host state.

However, there is an important difference in terms of attribution of *ultra vires* acts. As discussed above, the consequence that follows from applying the rule reflected in principle 4 of the ILC Guiding Principles is that the *ultra vires* acts of lower-ranked officials cannot be attributed to the state. This is applicable even when there is a reasonable appearance that other state officials are involved, considering that, as opposed to estoppel, the investor's reliance does not play a role in this case. As a result, the failure of an official lacking the competence to act in a certain situation cannot be attributed to the state for the purposes of applying acquiescence.[178]

As regards the cases discussed above, in *David Aven*, the tribunal referred specifically to the knowledge of the municipal officials,[179] but did not mention the competences of these officers that allowed them to apply the MTZ Law, nor did it refer to the organs which had the authority to sanction the failure to pay the taxes, as it appears that only the municipal authorities knew of these irregularities. Even though they might have had the authority to investigate and apply sanctions for the

[177] *See supra* Part III, sub-section B.2 (ii).

[178] *See supra* note 134.

[179] *See David Aven*, *supra* note 4, ¶ 319 ("Finally, as to control over the Concession Site, Claimants argued that Municipal officials at Parrita were well aware that the U.S. investors exercised control over the Concession at all relevant times.").

breaches, it seems likely that other authorities had these powers as well, given that the MTZ Law was of general applicability. Thus, in such cases, the tribunals should carefully analyze the shared competences of the national authorities, as the knowledge of the authority that has only limited power with respect to the breach (e.g., apply a fine) might not be sufficient for the operation of acquiescence, if other circumstantial factors are not in place.

Notwithstanding the above, the facts that justify the existence of a reasonable appearance of involvement of the officials in cases of estoppel might, in certain cases, indicate the notoriety of the illegal conduct, meaning that the knowledge of the state can be implied from the circumstances. In contrast to estoppel, however, the threshold should be higher, considering that notoriety is difficult to be proven by referring solely to the acts of a particular official. The theory of notoriety might, in fact, explain the decision in *David Aven*, even though the tribunal did not analyze the facts from this perspective. As mentioned above, the tribunal considered that the practice to use a national as a nominee shareholder in order to comply with the national legislation was widespread, meaning that it was known to the government. In other words, it was notorious. This might explain its decision to apply acquiescence, despite the fact that the claimant based its defense mainly on the knowledge of the municipality.

(ii) Toleration of Illegal Conduct.

In the context of illegal conduct, the consistent toleration of the host state is usually manifested through a limited number of inactions: failure to investigate, prosecute, or fine the investor, failure to revoke a certain permit or to annul a certain contract, etc.[180] Undoubtedly, such inactions must be taken into account, but under what circumstances? This is a factual inquiry that is highly dependent on the specific

[180] *See* Lim, *supra* note 41, at 665-66 (discussing the *Wena Hotels* case, the author considers that the host state has the obligation to react where it is aware of corruption); *see also* Nassib Ziade, *Curing the illness without killing the patient: prescribing appropriate remedies for findings of illegality in investment arbitration in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY 746, 755 (Andrea Menaker ed. 19 ICCA Congress Series 2017) (ebook) (considering also that in cases of corruption the state has an obligation to react).

circumstances of each case, but certain general distinctions can be made.[181]

First, it is beyond doubt that such a failure amounts to a consistent toleration if the limitation period for undertaking the specific action (i.e., investigation, revocation, etc.), under the relevant statute of limitation, lapses and the host state takes no action during this period. Second, where the host state acts by starting an investigation, but then it closes it, finding that no illegality has been committed by the investor,[182] there should be a strong presumption, absent new circumstances, in favor of the existence of a consistent toleration. Such a presumption could be rebutted if, for example, there is an ongoing appeal against the decision to close the investigation, which is filed by another authority or a third-party, in which case it can be argued that no final decision has been taken. Another situation would be if new elements of fact are uncovered after domestic investigations or legal action were started and closed, without wrongdoing having been found on that basis. Third, there should be also a strong presumption in favor of the toleration where, as in the *David Aven* case discussed above, there is solid evidence that inaction is a common practice and can be considered a state policy, even if none of the circumstances discussed under the first two hypotheses is present. In order to benefit from such a presumption, the investor must demonstrate that the failure is not specific to her particular situation by showing that this practice was present in other cases regarding other investors as well. Of course, this is not required where the investor can demonstrate that there is a specially designed state policy that regards only her investment, but this would be quite an extraordinary circumstance.

On the other hand, if none of the circumstances presented above is present, it is much more difficult for an investor to demonstrate that the host state has tacitly

[181] As mentioned above (*see supra* Part II, Section C.1), some of the factors mentioned by the tribunal in *Kim* are related to acquiescence, so that those factors should be taken into account.

[182] The closing of an investigation due to some procedural objections, such as the filing of the complaint by a non-competent person, that do not imply that the investment is legal and do not bar the opening of another investigation, without any other external factors, should not be considered a toleration. For a similar opinion, *see* Lim, *supra* note 41, at 666 (considering that there is no acquiescence where the host state conducts an investigation but closes it due to insufficient evidence).

accepted the illegality. The prolonged inaction is one of the main indicators in such a case and it should also be analyzed by taking into consideration the limitation periods under the statutes of limitation. For instance, if the limitation period under the relevant statutes for a certain criminal offence alleged to have been committed by the investor is 10 years, a toleration of two years beginning from the moment the host state knows of the illegality, might not be sufficient. In such cases, the tribunal should compare the case at hand with other cases in the host state as well. If there is evidence that in similar cases the authorities start investigations only right before the limitation period lapses, due to constrains related to their workload or insufficient funding, for example, then, a longer period is needed in order to find acquiescence.[183] This is not to say, however, that the limitation period included in the municipal law represents more than a simple criterion. If the host state's statutes of limitation provide for unreasonable limitation periods or even for no limitation periods, the tribunal should disregard this criterion and focus on other relevant circumstances, such as the general practice of the state in that particular area.

Regarding the cases discussed above, the consistent toleration is the main issue raised by the application of acquiescence in *Arif*. The competitor of the claimant filed the complaints approximately one year after the tender and the tribunals rendered the first annulment decision within another year.[184] Thus, in order to find a consistent toleration in this case, one should consider either the silence of the authorities during that year or the "silence" of the tribunal after the filing of the complaint as acquiescence. There is no evidence that the authorities were aware of the illegality before the filings,[185] and had they been aware, it would have been reasonable to conclude that the duration was too short to consider it a manifestation of will (given the lack of other relevant factual circumstances). On the other hand, the tribunal rendered a decision within a reasonable time, and thus, its inaction cannot be

[183] For a similar opinion, pursuant to which the resources of the authorities are a factor that should be considered, *see Kim*, *supra* note 5, ¶ 406.

[184] *See Arif*, *supra* note 14, ¶ 59, 68.

[185] Even though the authorities organized the tender that was invalidated, there is no irrefutable presumption that they knew of the illegality starting from that moment.

considered as an acquiescence of the respondent. It is worth noting that acquiescence based on the silence of the tribunals should be very strictly interpreted, by taking into account, on the one hand, the independence of the judiciary system in the host state and, on the other hand, the usual duration of a litigation in the host state.

IV. CONCLUSION

States have a legitimate power to offer legal protection solely to investments that are made in compliance with their own laws. The interest of the host states to protect their legal order is doubled by the interest of the international community which, in certain circumstances, requires the sanctioning of the investors for their illegal conduct even if no such requirement is imposed by the host state. The comparative analysis of these two types of illegal conduct reflects, however, important differences. Firstly, the threshold for finding an illegality based on transnational public policy is much higher. Thus, while a treaty-based legality requirement can be analyzed by using the proportionality test developed in *Kim*, the finding that a conduct is contrary to transnational public policy cannot rest solely on the analysis of the host state's regulations, the tribunal having to consider the illegality from a transnational perspective. Secondly, while a treaty-based legality requirement affects the jurisdiction of the tribunal, a situation of illegality recognized on the basis of transnational public policy renders the claims inadmissible. Thirdly, while the host state can ratify a treaty-based illegal conduct by way of unilateral acts and estoppel, any such ratification of conduct that contravenes the requirements of transnational public policy would have no effect, given the general interests of the international community.

In light of the above, it is proposed here that the ratification of illegal conduct apply conceptually only to treaty-based legality requirements and, if one accepts the existence of the doctrine as a separate principle of international law, to illegalities covered by the *clean hands* doctrine. The first step of any discussion regarding the ratification of illegal conduct is the determination of the illegal conduct. This paper has shown that the commission of the illegality exclusively by the host state does not

render the investment "illegal" for purposes of determining a tribunal's jurisdiction and must be distinguished from the concept of ratification. In addition, this paper has shown that even though the *Kim* test represents an important progress in the analysis of the legality requirement, factors such as the failure of the state to investigate the illegality and the general non-compliance in the host state with the provisions that were breached by the investor should be analyzed as manifestations of the state's will through silence, and not as factors relating to the existence of the illegality. The second step is the identification of the conditions that need to be met for the operation of the ratification. This paper has identified four concepts that can be used for the ratification of an illegal conduct, namely recognition, waiver, acquiescence and estoppel.

While the stringent conditions of an express manifestation of will, and, as a result, the reduced likelihood of their use as defenses by investors, are the reasons for which express recognition and waiver have not been analyzed in this paper, the analysis is different as regards estoppel and acquiescence: this paper has shown that a rigorous analysis of all the conditions of these concepts, as developed in public international law, is required before applying them to the facts of each case. One of the most problematic conditions of both estoppel and acquiescence in international investment law is the attribution of specific conduct to the respondent state. This paper has shown that the ILC Articles do not apply in this situation, and that a case-by-case analysis is required. While in the case of estoppel the *ultra vires* acts of the host state's officials can be considered, in the case of acquiescence, which is a manifestation of state's consent, such acts cannot be attributed to the state. However, these acts might, in certain circumstances, be construed as evidencing a notoriety of the illegal conduct and, thus, the constructive acknowledgement of the state.

The author concludes with the belief that these observations could be useful in the development by the tribunals of a framework capable of allowing them to strike a right balance between the need to protect investments and the need to protect the rule of law in the host state and the transnational public policy.

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ON THE PATH TO JUSTICE: EXPLORING THE PROMISE AND PITFALLS OF THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION

by Iris Ng Li Shan

I. INTRODUCTION

Around the world, transnational corporations are being called upon to bear responsibility for human rights violations. Realization is dawning that it is both appropriate and effective to target such corporations, because they are often the ones who profit from exploiting human rights and who possess the power to make a concrete difference by changing their practices.[1] In the past two years alone, a class action lawsuit has been filed in Thailand against Asia's largest sugar producer, Mitr Phol, by 3,000 Cambodian plaintiffs demanding compensation for alleged land grabs;[2] Eritrean refugees have attempted to sue British Columbia-based mining company Nevsun Resources in Canada for alleged complicity in forced labor, slavery and torture of workers at a precious metals mine;[3] and Google, Apple, Microsoft, Tesla and Dell are alleged to have aided, abetted and profited from child labor in a class action lawsuit in the US filed on behalf of families of Congolese children killed or

[1] Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 844-45 (2018) [hereinafter Ganguly].

[2] Rina Chandran, *Cambodian Farmers Battle in Landmark Lawsuit Against Thai Sugar Firm*, Reuters (June 11, 2019, 7:13 PM), https://www.reuters.com/article/us-cambodia-landrights-court/cambodian-farmers-battle-in-landmark-lawsuit-against-thai-sugar-firm-idUSKCN1TD00P.

[3] Kathleen Harris, *Top Court Weighs Precedent-setting Case of Human Rights Breaches at Canadian Mine in Eritrea*, CBC News (Jan. 23, 2019, 5:28 PM), https://www.cbc.ca/news/politics/supreme-court-nevsun-eritrea-mine-human-rights-1.4990064.

injured while working in cobalt mines in the Democratic Republic of Congo.[1] Yet, for many alleged victims of human rights violations by transnational corporations, the road to vindicating their rights before national courts is a long and winding one. They may face legal impediments in the form of jurisdictional hurdles, forum non conveniens arguments, and separate legal entity issues, as well as practical obstacles such as backlog in, or corruption or politicization of, the courts, just to name a few. Considering these downsides, international commercial arbitration has been held out as a promising model for resolving business and human rights ("BHR") disputes.[2] In this vein, the final text of the Hague Rules on Business and Human Rights Arbitration ("BHR Rules") was unveiled on December 12, 2019. First conceptualized in 2013 by the Working Group of the Business and Human Rights Arbitration project, the BHR Rules then went through multiple rounds of consultation and stakeholder engagement before being distilled into their final form. The BHR Rules are the first set of arbitration rules tailored for use in arbitrating BHR disputes.

In this article, I argue that BHR arbitration has great potential for resolving BHR disputes. Part I provides an overview of the key features of the BHR Rules. Part II discusses and offers solutions to four potential challenges to the widespread adoption of the BHR Rules—getting parties to arbitrate, identifying the content of corporations' human rights obligations, enforcing BHR awards, and overcoming the trust deficit. Finally, Part III sketches a vision for BHR arbitration to truly come into its own as a democratic institution alongside court-based dispute resolution, as a means of strengthening human rights protection through upholding the rule of law.

II. RAISON D'ÊTRE AND KEY FEATURES OF THE BHR RULES

Because BHR disputes often occur in regions where national courts are

[1] Annie Kelly, *Apple and Google Named in US Lawsuit over Congolese Child Cobalt Mining Deaths*, The Guardian (Dec. 16, 2019, 5:28 AM), https://www.theguardian.com/global-development/2019/dec/16/apple-and-google-named-in-us-lawsuit-over-congolese-child-cobalt-mining-deaths.

[2] Geetanjali Ganguly et al., *If at First You Don't Succeed: Suing Corporations for Climate Change*, 38 Oxford J. Legal Stud. 841, 844-45 (2018) [hereinafter Ganguly].

"dysfunctional, corrupt, politically influenced or simply unqualified," parties need a private mode of dispute resolution to ensure timely and fair access to justice.[3] Even where an acceptable court system is available, arbitration may be preferred because of factors such as procedural and substantive flexibility, possibility of selecting arbitrators who have expertise, and reaching parent companies that might otherwise be insulated from liability for their subsidiaries' actions due to jurisdictional or legal doctrinal obstacles.

To facilitate the use of international arbitration in BHR disputes, the BHR Rules were created based on the UNCITRAL Arbitration Rules, with modifications to address issues that are likely to arise in BHR disputes. [4] The key features of the BHR rules are as follows:

(a) Expert arbitration panels. Recognizing that the legitimacy of the arbitral proceeding is closely tied to the selection of suitable arbitrators,[5] the BHR Rules provide that the PCA will serve as appointing authority unless parties agree otherwise.[6] The drafters noted that in view of the need for access to arbitrators with expertise in BHR, including expertise in the cultural context in which the violations occurred, "it may be necessary for professional arbitrators who seek to serve on BHR Arbitration Panels to augment their skill sets, for new specialists to be trained and for parties to be able to appoint qualified arbitrators to a BHR Arbitration Panel who are not on the formal roster of an involved arbitration institution."

(b) Extensive transparency provisions. Section IV of the BHR Rules is dedicated to transparency provisions that parallel the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration ("UNCITRAL Transparency Rules"). Information regarding the name of the disputing parties, the economic sector involved and the legal instrument under which the claim is brought is to be made

[3] *Id.*

[4] CILC The Hague Rules on Business and Human Rights Arbitration, Introductory Note 3 [hereinafter "BHR Rules"], https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

[5] *Id.* at Art. 6, Commentary ¶ 1.

[6] *Id.* at Art. 6(1).

available to the public by default.[7] The same applies to documents such as the notice of arbitration and response, the statements of claim and defense, and table of exhibits.[8] Hearings will generally be public.[9] The transparency provisions are subject to exceptions for confidential or protected information[10] and safety considerations,[11] amongst others.

(c) Witness protection. The BHR Rules account for the possible need for the tribunal to create special mechanisms for the gathering of evidence and protection of witnesses.[12] The tribunal may adopt specific measures such as non-disclosure of witness identity or location, giving of testimony through image- or voice- altering device, and pseudonymization.[13]

(d) Correcting inequality of arms. The tribunal is exhorted to "ensure that [each] party is given an effective opportunity to present its case in fair and efficient proceeding," such as by adopting more "proactive and inquisitorial" (as opposed to adversarial) procedures to ensure that an unrepresented party can present its case in a fair and efficient way.[14]

Like the UNCITRAL Arbitration Rules, the scope of the BHR Rules is "not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the [BHR Rules]". Parties potentially include "business entities, individuals, labor unions and organizations, states, state entities, international organizations and civil society organizations, as well as any other parties of any kind."[15] That said, it is envisioned that in practice the BHR Rules will likely

[7] *Id.* at Art. 39.

[8] *Id.* at Art. 40.

[9] *Id.* at Art. 41.

[10] *Id.* at Art. 42.

[11] *Id.* at, Art. 38.

[12] *Id.*, Preamble ¶ 6(f).

[13] *Id.* at Art. 33(3), Commentary ¶ 3.

[14] *Id.* at Art. 5(2), Commentary ¶ 1.

[15] BHR Rules, *supra* note 7, Introductory Note 3.

involve claims by human rights violations claimants against businesses, or proceedings between business partners.[16]

III. FOUR CHALLENGES

A. *Challenge One: Getting Parties to Arbitrate.*

Looking at the BHR Rules, one cannot help but feel a certain sense of déjà vu. Nearly two decades ago, the arbitration world was introduced to the PCA Optional Rules for Arbitration of Disputes Relating To Natural Resources and/or the Environment ("PCA Rules"). Adopted in 2001, the PCA rules were drafted by a working group and committee of experts in environmental law and arbitration to address the principal gaps in environmental dispute resolution.[17] Like the BHR Rules, the PCA Rules are also based on the UNCITRAL Arbitration Rules, and allow for arbitration between any combination of states, intergovernmental organizations, non-governmental organizations, multinational corporations, and individuals.[18] Unfortunately, reception to the PCA Rules was lukewarm. These rules have been "scarcely employed," with only six cases commenced under the PCA Rules as of 2016.[19] The lack of compulsory jurisdiction has been identified as a significant problem.[20] The BHR Rules, like all arbitration rules, potentially face the same issue due to the

[16] Bruno Simma et al., International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process, Ctr. for Int'l Legal Cooperation (Nov., 2018), at 8-9 [hereinafter Elements Paper], https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf.

[17] *Environmental Dispute Resolution*, PERMANENT CT. ARBITRATION, https://pca-cpa.org/en/services/ arbitration-services/environmental-dispute-resolution/.

[18] Article 1(1) refers to any agreements, contracts, conventions, treaties or constituent instruments of an international organisation or agency). See Charles Qiong Wu, A Unified Forum? The New Arbitration Rules for Environmental Disputes Under the Permanent Court of Arbitration, 3 CHI. J. INT'L L. 263, 263-264 (2002) [hereinafter Wu].

[19] In half the cases, both parties were private entities, while the other three cases involved a public limited company, a public-owned private company, or a government agency as respondent. Tamar Meshel, The Permanent Court of Arbitration and the Peaceful Resolution of Transboundary Freshwater Disputes, ESIL REFLECTIONS, Jan. 15, 2016) at 1, 2, https://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2721249.

[20] Wu, *supra* note 21, at 266.

consensual nature of arbitration. Therefore, one critical issue is: How can parties be persuaded to arbitrate under the BHR Rules in the first place?

The BHR Rules do not prescribe how and when the prospective parties may consent. There are two main permutations, intra-supply chain disputes versus disputes brought by claimants of human rights violations, each of which raises different challenges.

1. Intra-supply Chain Disputes.

The paradigm fact pattern for intra-supply chain disputes is where there is a supply chain agreement between a company and its manufacturer, and the latter allegedly violates human rights obligations to its employees or other third parties in breach of the supply agreement.[21] The company can sue the manufacturer based on an arbitration clause in the contract that both are parties to. This scenario has existed long before the BHR Rules were promulgated,[22] and does not pose a particular legal challenge in obtaining consent. Rather, the problem appears to involve more of practical willingness to arbitrate.[23] One commentator has argued:

> While the BHR Arbitration proposal envisions that the BHR Arbitration Rules could be used in international or multilateral agreements, it is largely assumed that MNEs will simply incorporate BHR arbitration clauses into supply-chain contractual agreements. There are, however, normative and

[21] *Business and Human Rights Arbitration project report: Draft Team Meeting*, CTR. FOR INT'L LEGAL COOPERATION (Jan. 26, 2018), at 3 [hereinafter Draft Team Meeting], https://www.cilc.nl/cms/wp-content/uploads/2018/03/BHR-Arbitration.-Report-Drafting-Team-Meeting-25-26-January-2018.pdf.

[22] *See, e.g.*, the example of the ICC arbitration cited in Julianne Huges-Jennett & Alison Berthet, *Arbitrating Business and Human Rights Disputes: Uncharted Territory*, PRACTICAL LAW ARBITRATION BLOG (Aug. 30, 2018) http://arbitrationblog.practicallaw.com/arbitrating-business-and-human-rights-disputes-uncharted-territory/ (Providing as example an ICC arbitration where the buyer had terminated a contract for the manufacture of branded products because the seller had sourced certain items via a subcontractor which used prison labour, in breach of the agreement's incorporated code of conduct. The tribunal upheld the termination as lawful.).

[23] Rumbidzai Maweni, Arbitrating Human Rights Disputes: The Proposal for Business and Human Rights Arbitration Rules and Lessons Learned from the Bangladesh Accord Arbitrations, COLUM. CTR. ON SUSTAINABLE INV. (July 10, 2018), http://ccsi.columbia.edu/2019/07/10/arbitrating-human-rights-disputes-the-proposal-for-business-and-human-rights-arbitration-rules-and-lessons-learned-from-the-bangladesh-accord-arbitrations/.

> practical difficulties to this application of BHR norms. First, whether and in what circumstances an inter-corporate dispute, likely also based in contractual obligations, would raise sufficient human rights issues that it should be arbitrated under rules designed for this purpose. Second, global brands often do not even know the extent of their own supply chain as supply chains are often not fully traceable.[24]

I suggest that these problems are not true impediments to the use of the BHR Rules in intra-supply chain dispute. The first problem—the "normative" difficulty with the circumstances when an inter-corporate dispute may be arbitrated—needs some unpacking.

If what this means is that it is unclear when a BHR tribunal will have jurisdiction given the nebulous scope of what constitutes human rights, this problem is actually averted by the language of Art 1(1) of the BHR rules, which provides that "[t]he characterization of the dispute as relating to business and human rights is not necessary for jurisdiction where all the parties to the arbitration have agreed to settle a dispute under these Rules." This gels perfectly with the common formulation in arbitration clauses to include all disputes rising "out of or in connection with" a contract, such that there is no need to separate particular parts of the dispute as concerning exclusively BHR issues before they may be decided before a tribunal constituted under the BHR Rules.

On the other hand, if the first problem is understood as querying when an intra-supply chain dispute warrants recourse to arbitration, whether to commence arbitration in any given case involves balancing various pragmatic considerations. If a supplier violates human rights norms, a company's options include terminating the contract, litigating the dispute, working with a supplier, or even mediating.[25] Arbitration is not always the best solution, and it is beyond the remit of any set of arbitration rules to deal with this issue.

Turning then to the second problem of global brands not knowing the extent of their own supply chains, this is increasingly being mitigated by technological

[24] *Id.*

[25] Draft Team Meeting, *supra* note 24, at 3.

advances that make possible real-time monitoring and tracking. Besides the employment of standard communications technology, one notable development is the use of blockchain paired with smartphone applications or the Internet of Things (this being the extension of Internet connectivity to electronic devices so they may "communicate" with each other), for tracking and verification purposes. Blockchain is a type of distributed ledger technology that comprises a virtual database of records shared across a network of devices, which apply the same ground rules to maintain an accurate and updated ledger. Blockchain records are known for being relatively immutable and hence tamper-proof. This technology is already been applied to revamp the logistics and shipping sectors.[26] Once the arrival of goods at customs is logged into the smart contract, approval is automatically generated for quicker customs clearance.[27] In the same way, blockchain has potential for use by transnational corporations to track where exactly their supply chains lead. Of course, this is not a perfect solution. The technology alone will not tell you when or whether a human rights violation is occurring. I raise this example only to illustrate how technological advances are now giving corporations the capability to monitor the extent of the supply chain, undermining the invidious argument of escaping liability by disclaiming knowledge.

2. Disputes Brought by Claimants of Human Rights Violations.

Turning then to the trickier issue of obtaining consent to arbitrate in disputes brought by alleged victims, generally speaking, consent may be established pre-dispute (such as through contractual clauses), or post-dispute (by way of a submission agreement). I consider these in turn.

Claimants of human rights violations are not generally parties to pre-dispute arbitration clauses, since their claims arise due to the conduct of corporations, which happens after-the-fact. The drafters of the BHR Rules proposed an innovative

[26] Guido Perboli et al., Blockchain in Logistics and Supply Chain: A Lean Approach for Designing Real-World Use Cases, IEEE Access (Oct 16, 2018), https://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=8493157.

[27] How Blockchain Is Revolutionizing the World of Transportation and Logistics, WINNESOTA, https://www.winnesota.com/blockchain.

solution: A pre-dispute arbitration clause (which can exist in intra-supply chain contracts) can grant arbitration rights to third party beneficiaries, including claimants of human rights violations as a defined class.[28] The model clause to grant third party arbitration rights provides:

> Defined class of third party beneficiaries entitled to arbitrate:
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to the obligations undertaken by the parties under this[contract] [agreement] [treaty] [instrument] [rule] [decision] [relationship] for the benefit of:
> [insert defined class of third party beneficiaries]
> may be submitted by any such third person to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.
> Defined scope of third party claims entitled to be arbitrated:
> The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to:
> [insert defined subject matter, which may include:
> (a) selected national laws;
> (b) selected international instruments;
> (c) other industry or supply chain codes of conduct, statutory commitments or regulations from sports governing bodies, or any other relevant business and human rights norms or instruments]
> may be submitted by any third party beneficiary of such [law(s)] [instrument(s)] to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration.[29]

The above model clause is a significant innovation that was absent from the PCA Rules. It provides an elegant and relatively fuss-free way of opening the door to arbitration for alleged victims.

First, the structure of the BHR Rules averts a ubiquitous thorny problem with third party beneficiary clauses, which is that while third party beneficiaries may be granted the right to commence arbitration it is unclear in what circumstances they will also be obliged to do so.[30] This problem would not arise under the BHR Rules because the

[28] BHR Rules, *supra* note 7, Annex – Model Clauses at 106.

[29] *Id.*

[30] Some commentators have argued that if the third party has the right to invoke an arbitration clause, it is also under an obligation to do so. Andrea Meier & Anna Lea Setz, Arbitration Clauses in Third Party Beneficiary Contracts – Who May and Who Must Arbitrate?, 34 ASA BULL. 62, 77 (2016).

rules are not meant to be exclusive; alleged victims will still be able to go to court. Paragraph 3 of the Preamble to the BHR Rules provides that "[a]rbitration under the Rules is not meant as a general substitute for State-based judicial or non-judicial mechanisms." The Working Group Paper also affirms that unlike consumer arbitration, which extracts a waiver of all other legal rights except arbitration, arbitration before a BHR Arbitration Panel would be "consensual in principle and would leave open any options that alleged victims might have to go to court instead of to arbitration."[31]

Secondly, the model third party beneficiary clause encourages buy-in by corporations because it demonstrates how corporations can take control of the parameters of the dispute as a risk management strategy (at least in the first instance before interpretation of the clause by the tribunal). Corporations get to define not only the subject matter and scope of obligations, but also the class of beneficiary. The possibilities are legion, as the following two possible classes illustrate:

a) Employees. Would an "employee" class include employees of that corporation only, or also the employees of a subsidiary a sub-contractor? Should this group be limited to current employees, bearing in mind (i) the danger of corporations firing their employees to preclude claims, and (ii) the possibility of certain human rights violations (especially environmental claims) manifesting only over time?

b) Affected communities. Various ways of characterizing a community have been suggested, included geography, interaction, and identity.[32] The most appropriate way to define a "community" for purpose of an arbitration clause may well depend on the type of corporation involved. To illustrate, for corporations involved in the extractive industry a geographically bounded (spatially defined) community may be the most appropriate (such as for purposes of prosecuting the environmental consequences of its activities).

c) Claimant representatives. In view of the potential cost of mounting a claim, it

[31] Working Group Paper, *supra* note 5, at 27.

[32] Ciprian N Radovi, Community-Investor Environmental Conflicts: Should and Could They Be Arbitrated, 12 S.C. J. OF INT'L L. & BUS. 117,133 (2016).

is worth considering whether beneficiary classes should include non-governmental organizations, labor unions or even industry groups.[33]

There is cause for optimism that corporations will find it in their interest to draft decently-scoped BHR arbitration clauses, in view of the need to strike a balance between giving in to the corporation's self-preservation tendencies (to restrict the groups of beneficiaries as narrowly as possible, to avoid opening the floodgates of liability), and the truism that an extremely narrow clause will simply channel some cases to litigation or even draw public condemnation.

B. *Challenge Two: Populating the Content of Corporations' Human Rights Obligations.*

Article 46 of the BHR Rules provides that the tribunal shall apply "the law, rules of law or standards designated by the parties as applicable to the substance of the dispute," a formulation intended to grant maximal autonomy and flexibility to the parties, allowing recourse to provisions of different nature (hard law/soft law; public/private) and origin (international/national).[34] Failing party agreement, the tribunal shall apply the law or rules of law it determines to be appropriate. These may include international human rights obligations.[35] In all cases, the tribunal is required under Art 46(4) to take into account "any usage of trade applicable to the transaction, including any business and human rights standards or instruments that may have become usages of trade."

The operative question here essentially concerns the finding of an anchor for enforceable BHR obligations. What would the applicable sources of law, and the applicable norms, be?[36]

1. International "Soft Law" Instruments.

The first way is for parties to prescribe for the application of international human

[33] *See, e.g.*, Michael Hirsh, *How Private Lawsuits Could Save the Climate*, FOREIGN POL'Y (Nov. 21, 2018, 3:03 PM) (reporting commercial fishermen suing oil, gas and coal companies), https://foreignpolicy.com/2018/11/21/how-private-lawsuits-could-save-the-climate/.

[34] BHR Rules, *supra* note 7, Art. 46(1), Art. 46 Commentary ¶¶ 1-2.

[35] BHR Rules, *supra* note 7, Art. 46 Commentary ¶ 3.

[36] Alison Berthet, *Arbitration: New Forum for Business and Human Rights Disputes?*, PRACTICAL L. ARB. BLOG (Oct. 16, 2017), http://arbitrationblog.practicallaw.com/arbitration-a-new-forum-for-business-and-human-rights-disputes/.

rights "obligations" intended for businesses. These include the UN Guiding Principles on Business and Human Rights ("UNGPs"), and the OECD Guidelines for Multinational Enterprises ("OECD Guidelines"). This has been done in practice, albeit outside the arbitration context, by FIFA in deciding to make the UNGPs compulsory for its contractual partners and suppliers.[37]

The problem is that such instruments are "soft law", drafted in an open-ended manner and not designed to be enforced.[38] For instance, Principle 13 of the UNGPs provides that:

> The responsibility to respect human rights requires that business enterprises:
> (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

Principle 22 provides that "[w]here business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes." But what does it entail for businesses to "prevent or mitigate" adverse human rights impacts, or to "provide for or cooperate" in remediation? The vagueness of these principles makes it difficult to determine what compliance requires and whether there has been a breach. Moreover, the applicable domestic law may not recognize corporate liability for human rights violations in the first place.[39] One example is how in the US context, *Kiobel v. Shell* and *Jesner v. Arab Bank* hold that foreign corporations may not be sued under the Alien Tort Statute for violations of the law of nations.[40] In view of the

[37] Stéphane Brabant, Partner, Herbert Smith Freehills, Setting Human Rights Standards Through International Contracts, Address at the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) Trade Law Forum (May, 2016) *in* HERBERT SMITH FREEHILLS, June 24, 2016, https://www.herbertsmithfreehills.com/latest-thinking/setting-human-rights-standards-through-international-contracts.

[38] Berthet, *supra* note 39.

[39] Id.

[40] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013); Jesner v. Arab Bank, 138 S. Ct.

foregoing, applying international "soft law" instruments does not look promising.

2. Specific Rights and Obligations Under National Law.

The second option is for the tribunal to try to look to the law the parties have chosen to apply as the source of human rights norms. The applicable governing law can contain two main sources of norms: (a) constitutional law, or (b) particular human rights obligations imposed on businesses.

Basic rights such as the right to life and liberty, the prohibition of torture, and the right to a fair trial are often constitutionally guaranteed. Other human rights are also gaining traction (consider how 148 out of the 196 countries with constitutions have enshrined some form of environmental constitutionalism).[41] The problem, however, with relying on constitutions (and legislation like the UK Human Rights Act 1998) is that these deal fundamentally with vertical relationships between states and individuals, making it incongruous to try and apply these protections to the conduct of corporations.

Another way forward is to look at the human rights obligations imposed on businesses specifically. If French law is chosen to apply, one might invoke the 2017 "Duty of Vigilance" law that requires companies of a certain size to annually assess and address the risks of serious human rights and environmental violations resulting from their activities. The same goes for English law and the Modern Slavery Act 2015, section 54 which requires businesses that exceed a minimum turnover to report annually on steps taken to ensure that slavery and human trafficking are not taking place in their own business or in their supply chains. While these provisions undoubtedly impose obligations on businesses, given their "due diligence" nature, it is questionable how far they can be meaningful in BHR arbitration involving victims (as opposed to intra-supply chain disputes), in which the gravamen of the complaint is the violation of the right and not merely the policing of whether that right has been upheld. National law, therefore, does not provide a sufficient basis for grounding corporations' BHR obligations.

1386, 1407-1408 (2018).

[41] Ganguly, *supra* note 1, at 863.

3. Contractual Standards that Parties Choose to Incorporate.

The best solution to the problem of populating the content of corporations' BHR obligations may well be the most direct: Relying on contractual provisions that explicitly refer to human rights guarantees. Through their contractual provisions, corporations could require their business partners to observe particular human rights norms (e.g., the right to a safe workplace) by specifying the particular practices to implement or be avoided (e.g., provisions on working conditions, working hours or minimum age).[42]

To streamline the unwieldy process of inserting human rights norms into a contract, the American Bar Association, in its 2018 Report on Human Rights Protections for Workers in International Supply Chains, has attempted to provide model contract clauses for buyer companies to include in agreements with their suppliers.[43] The key component of the model clauses is a human rights appendix, the content of which the ABA does not prescribe, into which a buyer will insert all the proposed human rights obligations. This appendix is referred to as "Schedule P" ("P" stands for "Principles" or "Policies"). Schedule P is then given "teeth" by tying it to contractual provisions such as representations and warranties. For instance, model clause Article 1 provides that "Each shipment and delivery of Goods shall constitute a representation by Supplier and Representatives of compliance with Schedule P", and Article 2 goes on to say that "Buyer shall have the right to reject any Goods produced by or associated with Supplier … that Buyer has reason to believe has violated Schedule P … regardless of whether such Goods were produced under this or other contracts."

Proposals such as the ABA model clauses are a creative solution to the problem of making BHR obligations relevant to, and at home in, the business context. When considered in relation to BHR arbitration, however, it quickly becomes apparent that

[42] Working Group Paper, *supra* note 5, at 3.

[43] David V Snyder & Susan A Maslow, Human Rights Protections in International Supply Chains-Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts, ABA Business Law Section, 73 BUS. LAW. 1093 (2018) at 1096–1099.

the model clauses are more relevant to intra-supply chain disputes than disputes brought by human rights claimants.

The solution I propose is for Schedule P to be reimagined as a "charter of rights" of sorts for the class of third-party beneficiary referred to in the BHR Rules' model arbitration clause. This can be achieved by way of a clause like the one below:

> [Buyer] and [Seller] acknowledge that [Schedule P, or specific provisions of Schedule P] of this agreement was entered into for the benefit of [Buyer] and [each member of the class(es) of persons referred to in the clause granting arbitration rights to third parties], who are each entitled to bring a claim [for damages or other specified relief] for violation of the rights in [Schedule P].

Such clauses are likely to be upheld as they are unexceptional, being based loosely on similar provisions in the Contracts (Rights of Third Parties) Acts common to several jurisdictions. These generally provide that third party to a contract may in its own right enforce a term of the contract if the contract expressly provides that it may; or the term purports to confer a benefit on it. Considering the above, I suggest that there is a workable solution to the challenge of subjecting businesses to enforceable human rights obligations.

C. *Challenge Three: Obtaining Recognition and Enforcement of BHR Awards.*

The 2018 Queen Mary University of London (QMUL) International Arbitration Survey identified the enforceability of an award as the most attractive feature of arbitration.[44] Clearly then, BHR arbitration is unlikely to take off if the awards rendered pursuant to this procedure are not widely recognized and enforceable. The drafters of the BHR Rules were cognizant of this, and sought to better the chances of enforceability under the New York Convention ("NYC") by including Art 1(2). Under this provision, any dispute submitted for arbitration under the Rules is "deemed to have arisen out of a commercial relationship or transaction" for purposes of Art I of the NYC. This gets around the fact that nearly fifty states have made declarations

[44] Queen Mary Univ. of London & White & Case, 2018 *International Arbitration Survey: The Evolution of International Arbitration*, QUEEN MARY U. LONDON, at 7, http://www.arbitration.qmul. ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).pdf.

under Art I(3) of the NYC for the convention to apply "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial," and the restriction under many national arbitration statutes to "commercial" matters or "transactions involving commerce."[45] That said, there exists two further hurdles to enforceability under the NYC—the non-arbitrability ground for non-enforcement under Art V(2)(a), and the public policy ground in Art V(2)(b).

1. Non-arbitrability Under Art V(2)(a).

The issue here is whether BHR disputes are legally allowed to be settled by arbitration. There are three potential arguments for the non-arbitrability of BHR disputes—all of which I argue are unpersuasive.

First, it has been suggested that "issues regarding human rights and fundamental freedoms guaranteed by international agreements may not be subject to arbitration … due to divergent ideological underpinnings of commercial sphere and human rights' approach … [H]uman rights are based on human dignity as such, whereas trade-related relationship are [sic] construed for instrumentalist reasons."[46] This criticism misunderstands the nature of the non-arbitrability defense. The non-arbitrability doctrine "rests on the notion that some matters so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect."[47] Properly understood, non-arbitrability is determined not by reference to whether human right are compatible with commercial considerations, but rather, whether they involve "public" rights and concerns or the interests of third parties.

Secondly, it may be argued that BHR issues are non-arbitrable because they involve rights that are the courts' prerogative to resolve. While this argument might

[45] Elements Paper, *supra* note 19, at 19.

[46] Natalja Freimane, Arbitrability: Problematic Issues of the Legal Term 17 (2012) (unpublished Master's Thesis, Riga Graduate School of Law), *available at* https://sccinstitute.com/media/56097/ arbitrability-problematic-issues.pdf.

[47] Gary Born, International Commercial Arbitration 945 (Kluwer Law Int'l, 2d ed. 2014).

conceivably apply to constitutional rights, which are of a public law nature, it loses its force once it is recalled that the most likely sources for enforceable BHR obligations are contractual standards that the parties have chosen to incorporate. As argued above, human rights obligations that arise under constitutional law are unlikely to be the ones that are subject to BHR arbitration. Even if similar obligations are incorporated into a contract, the basis for their application would be the parties' agreement. The court arguably has no special claim to adjudicating this kind of dispute.

Thirdly, BHR disputes might be said to be non-arbitrable because the range of remedies in arbitration is more limited. Similar arguments were accepted in Young JA's dissenting opinion in Rinehart v Welker in respect of the non-arbitrability of trustee misconduct. This version of the non-arbitrability argument rests on a double fallacy. Non-arbitrability should not depend on the precise alignment of remedies, given that there are other remedies and enforcement mechanisms available to an arbitrator.[48] In any case, it is worth pointing out that under the BHR Rules a conscious move was made to steer clear of the approach in investor-state arbitration where damages are the predominant remedy. Art 45(2) of the BHR Rules provides that an award may order "monetary compensation and non-monetary relief, including restitution, rehabilitation, satisfaction, specific performance and the provision of guarantee of non-repetition." Accordingly, there are strong counterarguments to the non-arbitrability of BHR disputes.

2. Public Policy Under Art V(2)(b).

In the 2018 Elements Paper, the drafters of the BHR Rules observed that the "public policy" exception to the enforceability of awards might allay concerns that using international arbitration to resolve BHR disputes has the potential to result in awards that contradict internationally-recognized human rights norms, i.e., awards that are not "rights-compatible." In other words, an award might be refused

[48] Matthew Conaglen, *The Enforceability of Arbitration Clauses in Trusts*, 74 Cambridge L. J. 450, 456- 74 CAMBRIDGE L. J. 450, 456-57 (2015).

enforcement if the award is assessed by the court to violate human rights.[49]

But what, precisely, does it mean for an award to not be "rights-compatible"? Consider this hypothetical. A BHR tribunal determines that the respondent corporation did not violate the claimants' right to water due to its acts of pollution. The enforcement court, applying its own interpretation of the right to water, would have concluded that it did. Are there grounds for refusing recognition of the award for being contrary to public policy? On one hand, it could be argued that the tribunal merely made an error of law in concluding that there was no rights violation when the correct view is that there was. Errors of law per se do not necessarily engage the public policy of a jurisdiction; the situation is similar to, say, the tribunal making a mistake about what is the applicable law of the contract.[50] On the other, it might also be said that a wrong interpretation of a fundamental human right is so clearly injurious to the public good that recognition (or enforcement) should be refused. On balance, it is suggested that the better view should generally be the former one. While human rights are sacrosanct and their value incalculable, this is not a ground for saying that all human rights violations in all circumstances must serve as a trump card. Courts should adopt a fact-sensitive approach, to consider if the particular misinterpretation of human rights obligations is such an extensive violation of the most basic notions of morality and justice that recognition or enforcement would be repugnant. All things considered, the public policy ground ought not be an easy one to invoke, and BHR arbitration awards are likely to face no particular hurdles to recognition and enforcement.

D. *Challenge Four: Overcoming the Trust Deficit and "Guilt by Association" with Investor-State Arbitration.*

Investor-state dispute settlement by way of investor-state arbitration has

[49] BHR Rules, *supra* note 7, Art. 20 Commentary ¶ 3.

[50] See the Singapore approach in PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA [2007] 1 SLR(R) 597 (Sing.) at [56]–[57] (errors of fact or law made in an arbitral decision, per se, are final and binding on parties). Cf., Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629 (India) (award that was inconsistent with provisions of Indian statute was wrong in law, hence liable to be set aside on public policy grounds). See however Shri Lal Mahal Ltd v. Progetto Grano Spa (2014) 2 SCC 433 (India) (departing from the former view).

increasingly come under fire for being complicit in trampling on human rights. Bilateral investment treaties have been described as perpetrating environmental injustice and "undermin[ing] the right to a healthy environment."[51] Humanity has allegedly become "collateral damage."[52] In view of this perceived incompatibility between investor state arbitration and human rights, it might then be a hard sell to say that the way to resolve BHR disputes is yet more arbitration. To evaluate whether BHR arbitration is likely to be able to overcome "guilt by association" with investor state arbitration, I will consider two questions: (a) What is the root of the discontent with investor state arbitration as far as human rights are concerned? (b) Considering the similarities and differences between BHR arbitration and investor state arbitration, is the same fate likely to befall BHR arbitration?

1. The Human Rights Factor in the Backlash Against Investor-State Arbitration – Relevance, Roles, and Repercussions.

In investor state arbitration, human rights have been invoked at various junctures.

(a) As a "sword" by investors. In Hesham Talaat M Al-Warraq v Indonesia,[53] the tribunal found that Indonesia had breached the fair and equitable treatment obligation when that obligation was read in the light of the International Covenant on Civil and Political Rights ("ICCPR"), to which Indonesia was a party. The tribunal stated that "the rights enshrined within [the ICCPR] represent the basic minimum set of civil and political rights recognized by the world community" and held that "the Claimant did not receive fair and equitable treatment as enshrined in the ICCPR".

(b) As a "shield" by the host state to rebuff investors' claims. Host states have argued that human rights obligations afford a defense to breach of the investment treaty. For example, in Suez v Argentina, Argentina argued that the right to water

[51] Lisa Sachs et al., *Environmental Injustice: How Treaties Undermine the Right to a Healthy Environment*, KLUWER ARB. BLOG, Nov. 13, 2019, http://arbitrationblog.kluwerarbitration.com/2019/11/13/environmental-injustice-how-treaties-undermine-the-right-to-a-healthy-environment/.

[52] Henok Gabisa, The Fate of International Human Rights Norms in the Realm of Bilateral Investment Treaties (BITs): Has Humanity Become a Collateral Damage?, 48 INT'L LAW.153 (2014).

[53] Hesham Talaat M Al-Warraq v. Republic of Indon., UNCITRAL, Final Award, ¶ 559 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

supported its imposition of a price freeze and so any breaches of contractual obligations were necessary.[54]

(c) As a "counterattack" by the host state in bringing a counterclaim. More rarely, the host state may seek to counterclaim against the foreign investor for human rights violations if counterclaims are envisioned under the BIT. In Urbaser v Argentina, the tribunal interpreted Art 10(1) of the Spain-Argentina BIT "in good faith" to include state counterclaims and investors' obligations towards the state (though the counterclaim was eventually dismissed on the merits).[55]

On one level, the unhappiness with investor state arbitration is traceable to the perception of bias in favor of investors in deciding human rights disputes—the disillusionment of being stuck in a rigged system where you can never win, which seeps into each stage mentioned above. Tribunals have been criticized for adopting jurisprudence in favor of investors but, in the same breath, declining to apply the same approach to states. In *Azurix Corp v Argentine Republic*,[56] the tribunal considered a reference to an European Court of Human Rights judgment as "useful guidance for purposes of determining whether regulatory actions would be expropriatory and give rise to compensation." Yet this reliance on human rights jurisprudence was confined to interpreting the investor's property rights, and not extended to Argentina's defense of the human right to water.[57] Tribunals have sometimes also refused to engage with human rights arguments, preferring instead to sweep them under the carpet. In *EDF v Argentina*, the tribunal acknowledged that it "should be sensitive to international jus cogens norms, including basic principles of human rights." Yet, it cursorily dismissed Argentina's human rights arguments by

[54] *Suez, Sociedad General de Aguas de Barcelona, v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 252 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

[55] *Urbaser* SA,*v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, ¶ 1143-55 (Dec. 8, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.

[56] *Azurix v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶ 312 (July 14, 2006), https://www.italaw.com/ sites/default/files/case-documents/ita0061.pdf.

[57] Tamar Meshal, Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond, 6 J. Int'l Disp. Settlement 277, 289 (2015).

stating that Argentina's violation of the concession agreement was not "necessary to guarantee human rights."[58] Finally, the bringing of a counterclaim against an investor tends to be fraught with jurisdictional hurdles.[59] And even if jurisdiction is established, there is still difficulty populating the content of the norm allegedly breached by the foreign investor, since older-generation BITs tended to be "asymmetric" in imposing obligations on the state but rights on the investor.

Digging deeper, we might realize that the human rights debate is simply the canary in the coalmine for a deeper discontent with investor-state dispute settlement ("ISDS"): the perception of a pervasive loss of control, or the loss of maneuvering space, on the part of states which then feel they are being boxed in. In that sense the discontent surrounding human rights may only be symptomatic of a broader protest against the balance of power in ISDS, implicating concerns over whether ISDS is equitable or disproportionately impacts certain respondent states. The backlash against investor state arbitration is evident from a string of high-profile exits from the ICSID Convention (Bolivia in 2007, Venezuela in 2009, and Ecuador in 2012)[60] and the calls for a shift towards a multilateral investment court system.

2. Will BHR Arbitration be Different?

In view of the concerns underpinning the backlash against investor state arbitration, it is safe to say that the answer to the above is an emphatic "yes"—BHR arbitration will likely face a different reception from investor state arbitration. BHR arbitration would primarily involve private parties (corporations or claimants) as opposed to state actors. Correspondingly, the rulings arrived at are unlikely to have the far-reaching implications for states that have become such a major bugbear to ISDS. Even where the corporations involved in BHR arbitration are state-owned,

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[58] *EDF International SA v. Argentine Republic*, ICSID Case No ARB/03/23, Award, ¶ 914 (June 11, 2012), https://www.italaw .com/ sites/default/files/case-documents/ita1069.pdf.

[59] Maria Fanou, *Environmental Considerations in Investment Arbitration: A Report of a 'Topical Issues in ISDS' Seminar*, Kluwer Arb. Blog, May 22, 2019, http://arbitrationblog.kluwerarbitration.com /2019/05/22/environmental-considerations-in-investment-arbitration-a-report-of-a-topical-issues-in-isds-seminar/.

[60] Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?* 29 European J. Int'l L. 551, 556 (2018).

state-controlled or otherwise closely linked to a state (for which attribution arguments might be fruitful under international law), the legal framework and context of BHR arbitration ill support contentions that a state has attracted responsibility under international law because breaches of contract have been elevated to treaty breaches.[61]

Nevertheless, there is a cautionary tale for BHR arbitration to be derived from the investor state arbitration experience—the paramount importance of transparency. Significant disquiet came about due to the initially closed nature of ISDS. That sentiment is vividly captured in this quote:

> Their meetings are secret. Their members are generally unknown. The decisions they reach need not be fully disclosed. Yet the way a small number of international tribunals handles disputes between investors and foreign governments has led to national laws being revoked, justice systems questioned, and environmental regulations challenged.[62]

These sentiments eventually led to a sea change towards transparency, with the promulgation of instruments such as the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (better known as the Mauritius Convention) and the UNCITRAL Transparency Rules, as well as the reforms to the ICSID system (most notably, the move towards even further transparency in the August 2019 proposals). Considering this general sentiment, corporations would do well to adopt the transparency provisions in the BHR Rules as they are rather than

[61] In particular, consider the applicable law provisions. Article 46 of the BHR Rules empowers the tribunal to "apply the law, rules of law or standards designated by the parties as applicable to the substance of the dispute". BHR Rules, Art. 46(1). This conceivably includes direct importation of human rights standards under treaty law (though questions may arise over whether an *ad hoc* tribunal may adjudicate upon such standards, and whether the relevant treaty confers a cause of action upon the individual claimant(s)). But if the above analysis on sources of norms reflects the mainstream approach adopted by contracting parties, international law is unlikely to be the applicable law in BHR proceedings. Nor does BHR arbitration run the risk of claimants arguing that breaches of contract are transformed into treaty breaches under umbrella clauses. For an expansive approach towards umbrella clauses, see *SGS Société Générale de Surveillance S.A v. Republic of the Phil.*, ICSID Case No Arb/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), https://www.italaw.com/sites /default/files/case-documents/ita0782.pdf.

[62] Won Kindane, The China-Africa Factor in the Contemporary ICSID Legitimacy Debate, 35 U. Pa. J. Int'l L. 559, 564–65 (2014).

try to contract out too extensively; one simple way to overcome the trust deficit is to show that you have nothing to hide.

IV. REIMAGINING BHR ARBITRATION AS A DEMOCRATIC INSTITUTION

This final section deals with a question inextricably connected with the future of BHR arbitration, which is also perhaps the elephant in the room—the appropriateness of BHR arbitration as a means of resolving BHR disputes in the first place. The argument is that the very channeling of disputes away from the courts is undemocratic, because courts "promote public participation in the development and administration of the rule of law by allowing parties to bring actions to enforce legal rights, as well as by allowing, or requiring, the citizenry to administer the law through jury service."[63] The channeling of disputes to arbitration might then be perceived to be undemocratic, because this deprives a party of its day in court and also its opportunities for civic participation.

But this objection suffers from two fundamental mistaken assumption. First, that the disputes diverted to arbitration are necessarily those that would have been heard in court. As alluded to above, the greatest need for BHR arbitration is envisioned to arise precisely where there are deficits in the court system. In other words, in certain cases the appropriate comparator is not "better" justice in the courts, but no satisfactory recourse at all.

Second, the assumption that arbitration inevitably falls short when measured against the court system, which is perceived as the "baseline endowment for dispute resolution" that shapes obligations and expectations regarding the democratic character of other dispute resolution mechanisms.[64] Several core democratic values have been identified as criteria to assess the democratic character of a method of dispute resolution.[65] These include the political values of participation, accountability and transparency, and rationality; the legal values of due process and

[63] Richard C Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 293 (2004) [hereinafter Reuben].

[64] *Id.* at 293.

[65] *Id.* at 285–86.

equality; and the social capital values of public trust and social connection. Considering these in turn, BHR arbitration in the form proposed under the BHR Rules fares rather well, such that arbitration can properly be regarded as a democratic institution (alongside the courts) to enhance access to justice—both directly as a mode of dispute resolution, and indirectly by achieving efficiency gains for the public justice system when disputes are funneled away from over-taxed courts.

Participation. Participation values are said to sometimes be compromised in arbitration because there is a lack of a place for public participation. I leave aside the form of public participation that is jury trials because not every judicial system still maintains separate institutions of judge and jury. This criticism has much less force under the BHR Rules, which contain provisions that allow for third-party participation through written submissions. Under Art 28, third persons (such as state(s) of the parties' nationality or on whose territory the conduct that gave rise to the dispute occurred, amicus curiae, or relevant NGOs) may apply to the tribunal to make submissions and the tribunal can decide to allow the filing of written submissions pertaining to the dispute. The tribunal is to have regard to whether the third person has a significant interest in the arbitral proceedings, and the extent to which the submission would assist the tribunal in by bringing a perspective, particular knowledge or insight different from that of the parties.[66] It is significant that parties to the arbitration do not have a veto over third party participation—the tribunal is only obliged to "consult" with the parties and retains the final say, subject to it ensuring that any submission does not disrupt or unduly burden the proceedings or unfairly prejudice any party. While third parties are not entitled to make oral submissions that should not be considered a bar or disadvantage to participation, bearing in mind how arbitral tribunals generally have discretion to decide whether hearings are to be heard orally or by way of submissions only.

Accountability. There are ways around the "problem" of there being no oversight over the merits of an arbitral award. First, it is open to the parties to opt for an appellate arbitration clause. Such clauses permit the parties, if dissatisfied with the

[66] BHR Rules, Art. 28(3).

decision of a first arbitral tribunal, to appeal to another tribunal.[67] Appellate arbitration clauses can take various forms, such as two-tier arbitration clauses in which parties assemble their own preferred appeal mechanism,[68] or clauses that incorporate an institutional arbitration procedure with an appellate mechanism (e.g., that offered by the International Institute for Conflict Prevention and Resolution, JAMS appeal procedure, or American Arbitration Association Appellate Arbitration Rules). Secondly, the seat court retains oversight in the form of being entitled to annul an award if the award contravenes public policy.

Transparency. As discussed above, the BHR Rules reverse the default position of closed hearings and require the publication of information at the commencement of proceedings, of documents, and of awards—subject to exceptions or confidential or protected information. There is also the option of restraining or delaying the publication of information. I suggest that these provisions, while a good start, are not enough. Beyond the formal enshrining of transparency in institutional rules, the missing piece of the puzzle is publicity in practice that would raise public awareness. Several national courts routinely issue case summaries or media briefings on significant cases. Some (such as the UK Supreme Court) even provide for live-streamed court proceedings to the public. While arbitration should not be benchmarked against the foregoing, these nonetheless provide ideas for how improved outreach efforts can serve a key legitimating function. I propose that institutions charged with administering BHR arbitration come together to set up a unified channel for disseminating information about key BHR proceedings. This need not be complex—a new Twitter handle or Facebook page, for instance, under which

[67] Prachi Aggarwal, *Multi-tier Arbitration Clauses*, RMLNLU L. REV. BLOG (Oct. 25, 2017), https://rmlnlulawreview.com/2017/10/25/multi-tier-arbitration-clauses/.

[68] See the sample clause in M/S Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd, Civil Appeal No 2562 of 2006 (Supreme Court of India) ("*Centrotrade*") at [3]: (Arbitration - All disputes or differences whatsoever arising between the parties … shall be settled by arbitration in India through the arbitration panel of the Indian Council of Arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration. If either party is in disagreement with the arbitration result in India, either party will have the right to appeal to a second arbitration in London, UK in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce . . . .).

updates to BHR proceedings can be posted. The key consideration is for this to serve as an easily available and consolidated entry point for both the media and the general public. This is necessary due to the disparate and "scattered" nature of BHR proceedings, which arise from how the BHR Rules are meant to be applicable under the auspices of any arbitral institution willing to administer these rules. Although public awareness does not guarantee public interest, this would bridge the critical last mile between BHR arbitration proceedings actually being transparent, and being perceived as "walking the talk" of transparency.

Rationality. The argument why arbitration does not embody rationality is that "arbitrators have substantial discretion to decide matters on grounds other than those that may be required by a rule of law, grounds that may appear arbitrary or capricious."[69] This argument may be strongly rebutted. Existing work on the use of precedent in arbitration suggests that while tribunals are not bound, as courts are, to take into account prior decisions as a matter of stare decisis, they do consider these precedents as a matter of fact.[70] Next, if the objection is with the possibility of the tribunal being empowered to decide as amiable compositeur or ex aequo et bono if the parties so decide (as is permissible under most institutional rules and also Art 46(3) of the BHR Rules), that objection erroneously equates rationality with a rules-based approach, when in truth rationality may also be achieved through grounding in reason and logic.

Equality and due process. Equality and due process rights are enshrined in Art 18(1) of the BHR Rules, which exhorts the tribunal to ensure that "parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case." It also bears emphasis that equality and due process are cherished values for arbitration in general—consider the NYC ground for setting aside due to a party's inability to present its case.

Public trust and social connection. Public trust in institutions that form part of the

[69] Reuben, *supra* note 66, at 302.

[70] See e.g., Richard C Chen, Precedent and Dialogue in Investment Treaty Arbitration, 60 HARV. INT'L L. J. 47 (2019).

social fabric, a sense of social connection, as well as a spirit of reciprocity are amongst the "intangibles that constitute the foundation upon which a democracy must rest if it is to be sustained, consolidated, and effective."[71] BHR arbitration under the BHR arbitration rules arguably contributes to this. Even whilst BHR arbitration is sought as an alternative to purportedly inept or corrupt national courts, it reaffirms the need for trust in a domestic court (especially the seat court) given that arbitration proceedings must ultimately be anchored in a national law; in alleviating the burden on national courts arbitration also provides breathing space and offers an ideal for reform. Further, BHR arbitration encourages the rehabilitation of corporations as corporate citizens, given that the very availability of this option is contingent on businesses actually formalizing and incorporating human rights obligations in their contracts (as argued above). Finally, BHR arbitration enhances civic participation by empowering disenfranchised parties, who might otherwise face a long and rocky road to justice. In light of the above, there are persuasive reasons why BHR arbitration can come into its own as a democratic institution to enhance access to justice.

V. CONCLUSION

The BHR Rules are not a panacea. A lot still depends on the implementation of "access to justice" measures such as funding options under national law, the fidelity to the original BHR Rules shown by the parties in their implementation of these rules, and the approach taken by BHR tribunals in adjudication. Nevertheless, BHR arbitration offers a promising alternative route to justice, and the BHR Rules amount to a good starting point for all parties involved to operationalize and institutionalize this method of dispute resolution. Nelson Mandela once said that to deny people their human rights is to challenge their very humanity. Sending just one more case on the way to justice would mean one less travesty.

[71] Reuben, *supra* note 66, at 293.

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The paper is written in the author's personal capacity, and the opinions expressed in the paper are entirely the author's own views.

A CRITICAL ANALYSIS ON INTERNATIONAL COMMERCIAL ARBITRATION, COURT INTERVENTION AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN BANGLADESH

by Al Amin Rahman & Tasmiah Nuhiya Ahmed

I. INTRODUCTION

International commercial arbitration is increasingly utilized as a dispute resolution mechanism throughout the world. The primary reasons for its increase in popularity is the globalization of business and its perceived ability to be more adaptable, speedier, and confidential than ordinary lawsuits in court.[1] The most essential aspects of arbitration is that arbitral awards are final and binding, and awards are easily enforceable globally in countries that are signatories to the New York Convention of 1958 ("New York Convention"), while preserving confidentiality and neutrality.[2]

Both Bangladesh and India are parties to the New York Convention. Previously, the law relating to arbitration for each country was governed by the Arbitration Act of 1940 (the "1940 Act").[3] Under the 1940 Act, local courts had wider power to intervene in arbitrations; meanwhile, enforcement proceedings were slow and cumbersome, requiring a previous order from a district court to be valid.[4] In addition, the 1940 Act only governed domestic matters, which posed a principal problem following the enactment of the New York Convention. Many provisions of the 1940

[1] Lucy Greenwood, *Sketch: The Rise, Fall and Rise of International Arbitration—A View from* 2030, 77 ARB. 4, 435-41 (2011).

[2] Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, 25 ARB. INT'L 515 (2009) (quoting V.V. Veeder QC as saying, "There are too few national courts as accommodating to foreigners as international commercial arbitration in a neutral forum", making arbitration "the only game in town").

[3] A.F.M. Maniruzzaman, *The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective*, 14 AM. REV. INT'L ARB. 139(2003) (hereinafter "Maniruzzaman").

[4] *See* Dr. Kamal Hossain and Associates, *Arbitration: Bangladesh Chapter*, SAARC *Arbitration Council*, *available at* http://sarco.org.pk/bangladesh.html.

Act were inconsistent with the modern laws and concepts of international arbitration.[1]

In light of common historical experience, India in 1996enacted the Arbitration Act (amended in 2015).[2] In 2001, Bangladesh also enacted its Arbitration Act, which is based on United Nations Commission on International Trade Law(UNCITRAL) Model Law (the "Arbitration Act 2001" or the "Act").[3] The Arbitration Act 2001 governs domestic and international proceedings, and it has repealed the Arbitration (Protocol and Convention) Act of 1937 as well as the 1940 Act.[4]

The enactment of the Arbitration Act 2001 has opened Bangladesh's doors to international commercial arbitration, modernizing arbitration law in Bangladesh and making it an attractive place for the international commerce and investment.[5] However, enforcement of foreign arbitral awards still faces some difficulties in the country due to unnecessary court interference. This difficulty is greater if a foreign party seeks enforcement against a local party.[6]

This article will discuss the Arbitration Act 2001 with reference to, where relevant to (1) the Model Law (as revised 2006 and 2010); (2) the Singapore International Arbitration Act of 1994 (as amended in 2012) ("Singapore International Arbitration Act 1994"); and (3) the Indian Arbitration Act of 1996 (as amended in 2015) ("Indian Arbitration Act 1996"). The purpose of this study is to examine the Arbitration Act 2001 with a special focus on court intervention and the enforcement of foreign arbitral awards in Bangladesh, along with its counterparts India and Singapore. It endeavors to serve as a possible source of inspiration to bring some changes to the Act to keep pace with the recent trends and modernization of international

[1] *See* Commentary on the website of SAARC Arbitration Council, Bangladesh, *available at* http://sarco-sec.org/bangladesh.

[2] Loukas Mistelis, *Seat of Arbitration and Indian Arbitration Law*, 4 INDIAN J. OF ARB. L. 2, 1 (2016).

[3] Maniruzzaman, *supra* note 4.

[4] *Id.*

[5] *Id.*

[6] Norton Rose Group, "Arbitration in Asia Pacific: Bangladesh", 7 (2010), *available at* http://www.idacindia.org/pdf/bangladesh-26261.pdf.

arbitration law.

II. ARBITRATION ACT 2001

The Arbitration Act 2001 provides flexibility in the following areas: the procedure for appointing[7] and challenging the appointment of an arbitrator;[8] the determination of the rules of procedure to be adopted in arbitral proceedings; the competence of an arbitral tribunal to rule on its jurisdiction;[9] and general provisions on the setting aside[10] and enforcement of arbitral awards.[11]

It further includes a mandatory stay of court proceedings[12] and empowers the court to grant interim measures[13] in various forms, and recognize and enforce foreign arbitral awards,[14] and supplies the grounds for refusing recognition or execution of such awards.[15]

A. *Scope.*

The Arbitration Act 2001 is applicable to both domestic and international

[7] Arbitration Act 2001, art. 12: "Appointment of arbitrators. (1) Subject to the provisions of this Act, the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. (2) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties."

[8] *Id.* at arts. 13-14.

[9] *Id.* at art. 17: "Competence of arbitration tribunal to rule on its own jurisdiction. Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own jurisdiction on any questions including the following issues, namely (a) whether there is existence of a valid arbitration agreement; (b) whether the Arbitral Tribunal is properly constituted; (c) whether the arbitration agreement is against the public policy; (d) whether the arbitration agreement is incapable of being performed; and (e) whether the matters have been submitted to arbitration in accordance with the arbitration agreement."

[10] *Id.* at arts. 42-43.

[11] *Id.* at art. 44.

[12] *Id.* at art. 10(2): "Thereupon, the Court shall, if it is satisfied that an arbitration agreement exists, refer the parties to arbitration and stay the proceedings, unless the Court finds that the arbitration agreement is void, inoperative or is incapable of determination by arbitration."

[13] *Id.* at art. 7A.

[14] *Id.* at art. 45.

[15] *Id.* at art. 46.

commercial arbitration.[16] However, Section 3(1)[17] limits its scope to instances in which the seat of the arbitration is in Bangladesh. On the other hand, several sections still apply even if the seat of the arbitration is outside of the country.[18] Bangladeshi courts sometime render controversial opinions regarding the scope of the Act. The controversy seems to have originated from the meaning and use of Section 3 of the Act. In 2012, the High Court Division rendered contradictory decisions in two famous cases. In *HRC Shipping Ltd v MV X-Press Manaslu and Others*,[19] the High Court of Bangladesh stayed a domestic suit in favour of an arbitration conducted outside of Bangladesh, while in *STX Corporation Ltd v Meghna Group of Industries Limited and Others*,[20] it refused to grant an interim remedy when the arbitration was seated abroad.[21]

By comparison, the Singapore International Arbitration Act 1994 was amended in 2012 to align it provisions related to this point with the revisions made to the Model Law in 2006[22] and 2010. At the same time, India also amended the Indiana Arbitration

[16] *Id.* at art. 2(c): "'International Commercial Arbitration' means an Arbitration relating to disputes arising out of legal 'relationships, whether contractual or not, considered as commercial under the law in force in Bangladesh and where at least one of the parties is: (i) 'an individual who is a national of or habitually resident in, any country other than Bangladesh; or (ii) a body corporate which is incorporated in any country other than Bangladesh; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than Bangladesh, or (iv) the Government of a foreign country[.]'"

[17] *Id.*, art. 3(1): "This Act shall apply where the place of Arbitration is in Bangladesh."

[18] *Id.*, art. 3(2): "Notwithstanding anything contained in sub-section (1) of this section, the provisions of sections 45, 46, and 47 shall also apply to the arbitration if the place of that arbitration is outside Bangladesh."

[19] This case has been recently reported in 1 LCLR [2012], Vol. 2, 207–22.

[20] Arbitration Application No. 16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol. 2, 159–78.

[21] Sameer Sattar, Asian Pacific Arbitration Review on Bangladesh, Country Chapter (2016), *available at* http://globalarbitrationreview.com/reviews/71/sections/238/chapters/2878/bangladesh/ (hereinafter *Sattar*).

[22] As part of the revisions, the original Article 17 of the Model Law was replaced by a new chapter on interim measures. This contains a new Article 17(J), which provides: "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings irrespective of whether their place is in the territory of the enacting State, as it has in relation

Act 1996 in 2015 based on the 2010 Model Law. However, these issues remain in Bangladesh as it is the sole responsibility of the Bangladeshi Parliament to amend the Arbitration Act 2001 to remove the ambiguity and confusion created by these court decisions, which has not been done yet.

B. *Court Intervention.*

Generally, the Arbitration Act 2001 dictates that courts shall take a minimal interference approach in favor of arbitration proceedings, which is clearly defined in Section 7. Article 5 of the 2006 Model Law sets out a similar principle.[23]

Section 7 of the Act restricts the role of the courts in instances where one of the parties involved in arbitration proceedings triggers court proceedings. In the case of *Bangladesh Jute Mills Corporation v Maico Jute and Bag Corporation & Others*,[24] the court held that it could not try the case, which was already pending before an arbitral tribunal. In addition, Section 7A of the Act empowers district courts to make interim orders in certain matters, such as, *inter alia*, interim injunctions to restrain the transfer of property which would likely frustrate enforcement of an arbitration award.

On the other hand, Section 10 of the Act complements Section 7, and is closely modelled from Article II(3) of the New York Convention. Section 10 ensures that no Bangladeshi court shall interfere with a matter that is subject to an arbitration agreement between contending parties. If a party to an arbitration agreement commences litigation in a Bangladeshi court and the other party objects before the filing of its statement of defense, then the Bangladeshi court shall,[25] unless convinced that the agreement is void, inoperative or incapable of determination by arbitration, stay the proceedings and refer the parties to arbitration.

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to proceedings in court."

[23] UNCITRAL Model Law, art. 5 ("In matters governed by this Law, no court shall intervene except where so provided in this Law.").

[24] 22 BLD (HCD) (2002) 320.

[25] It is important to note here that the use of the term "shall" implies that the local court is under a positive obligation to refer the parties to arbitration and not merely on exercise of its discretion, albeit to be exercised sparingly and for the reasons mentioned in the legislation.

Few decisions of the Bangladeshi courts guarantee that a local court will apply such principles strictly,[26] even though the Arbitration Act 2001 provides the limited areas where a court may intervene during an arbitration. *Saipem v. Bangladesh*[27] is the key example of interference by national courts in an international commercial arbitration, and which ultimately led to a successful claim of expropriation against Bangladesh. This ICSID award held the State responsible for expropriation based on local judicial interference in arbitration proceedings.[28]

C. *Interim Measures.*

The Act provides in more detail the power of the arbitral tribunal to order interim measures[29] than the Model Law[30] and Indian ArbitrationAct1996.[31] In fact, the Model Law and the Indian Arbitration Act 1996 contain identical provisions. No doubt, like the Indian Act 1996, the Bangladesh Arbitration Act 2001 adopts the Model Law's provision on the matter; however, it also includes some added features, such as the requirement to notify the other parties involved and apply to a court for the enforcement of an arbitral tribunal's interim orders.[32] In all the aforementioned frameworks, party autonomy is limited in the matter of interim measures, in that the parties can bypass the arbitral tribunal and have recourse directly to the court for interim measures. An arbitral tribunal has the power to issue an interim order,[33] but

[26] For example, in the case of *Civil Engineering Company v. Mahkuta Technology & Others*, 14 BLT (HCD) (2006) 103, it was held that the court shall not interfere with a matter covered by an arbitration agreement, and those who agree to settle their disputes through arbitration must be encouraged to follow that route. However, a limitation to this provision, as illustrated by *Seafarers Insurance Co v. Province of East Pakistan*, 20 DLR (SC) (1968) 225, 228, is that the party contending the suit must raise its objection with respect to the arbitration before the filing of the statement of defense.

[27] Saipem Saipem v. Bangladesh, ICSID Case No. ARB/05/7, Award (June 20, 2009).

[28] *See* Sameer Sattar, *National Courts and International Arbitration: A Double-edged Sword?*, 27(1) J. INT'L ARB. 51, 72 (2010).

[29] Arbitration Act 2001, art. 21.

[30] UNCITRAL Model Law, art. 17.

[31] The Indian Arbitration Act, art. 17.

[32] Arbitration Act 2001, art. 21(3)-(4).

[33] *Id.* at art. 21: "(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral

because it is not directly considered as a decree or court order,[34] the prevailing party should apply for the enforcement of that interim order.[35]

The Model Law and original version of the Indian Arbitration Act 1996 discuss the same procedure regarding the jurisdiction of the arbitral tribunal on interim measures. However, following the 2015 amendment of the Indian Arbitration Act 1996, any order passed by the arbitral tribunal under Section 17 will be deemed to be an order of the court for all purposes and be enforceable under the Code of Civil Procedure 1908 (CPC).

The question may arise, however, whether an arbitral tribunal sitting abroad may order an interim measure that is enforceable in Bangladeshi courts. Section 3(1) of the Arbitration Act 2001 applies where the place of arbitration is in Bangladesh.[36] Interim measures ordered by an arbitral tribunal are not applicable, however, if the place of arbitration happens to be outside of Bangladesh.[37] In India, the situation was the same, but following the 2015 amendment of the Indian Arbitration Act 1996, the scope was broadened and the national barrier distinction was removed. Bangladesh, on the other hand, is still struggling with the old regime. National courts seem to be very confused regarding the provisions of the Arbitration Act 2001.

The decision of the Bangladeshi High Court in *Egyptian Fertilizer Trading Limited v. East West Property Development (Private) Limited*[38] seems to follow the approach of STX *Corporation Ltd v. Meghna Group of Industries Limited* and others[39] in refusing to grant interim relief to an arbitration seated outside of Bangladesh. This reflects a tendency on the part of Bangladeshi courts to interpret Section 3 of the Arbitration

tribunal may consider necessary in respect of the subject matter of the dispute, and no appeal shall lie against this order."

[34] *See* Maniruzzaman, *supra* note 4.

[35] Bangladesh Arbitration Act 2001, Art. 21(2); UNCITRAL Model Law, art. 17.

[36] *Id.* at art. 3(1).

[37] *Id.* at art. 21.

[38] Arbitration Application No. 11 of 2010 [unreported].

[39] Arbitration Application No. 16 of 2009 [unreported]. This case has been recently reported in 1 LCLR [2012] Vol. 2, 159–178.

Act 2001 restrictively.

In relation to interim remedy issues, Bangladesh could take valuable lessons from a developed arbitral jurisdiction like Singapore. In *Multi-Code Electronics Industries v Toh Chun Toh and Others*,[40] the Singaporean High Court took a less restrictive approach on that issue, deciding that under its general statutory power, it could grant injunctions in support of foreign-seated arbitral proceedings.

D. *Time Limit for Arbitral Award and Fast Track Procedure.*

Fast track arbitration is a moderately recent invention in the continuous mission for quicker, less expensive and more productive dispute resolution mechanisms.[41] This is because the determination of disputes in arbitration using conventional litigation techniques may not work as efficiently as was hoped. However, fast track arbitration is not a distinct kind of arbitration.[42] Its implementation is to expedite arbitration procedures. The focal point of fast track arbitration is strict time limits. The parties are required to complete certain procedures, e.g., appointment of arbitrators, within an agreed timeframe. Following their appointment, the key boundary for arbitrators is a time limit to issue an award.[43]

However, there is no such kind of process in the Arbitration Act 2001. Only Section 37 specially authorizes the chair of an arbitral tribunal to render its decision.[44] Section 29 of the original version of the Indian Arbitration Act 1996 states the same provision regarding decision-making by a panel of arbitrators. However, the 2015

[40] [2009] 1 SLR 1000.

[41] Alan Redfern, *Stemming the Tide of Judicialization in International Arbitration*, 2(5) WORLD ARB. & MED. REV. 21 (2008).

[42] Irene Welser & Christian Klausegger, *Fast Track Arbitration: Just fast or something different?*, AUSTRIAN ARB. Y.B. 259, 260 (Klausegger et al. eds., 2009).

[43] Mirèze. Philippe, *Are Specific Fast-Track Arbitration Rules Necessary?*, PERMANENT COURT OF ARBITRATION/PEACE PALACE PAPERS, THE (HRSG.), *Arbitration in Air, Space and Telecommunications Law*, 253 (Den Haag, 2002).

[44] Arbitration Act 2001, at art. 37: "(1) Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. (2) Notwithstanding anything contained in sub-section (1), if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by the Chairman of the arbitral tribunal."

amendment to the Act included two new Sections at 29A and 29B.

Under Section 29A, the arbitral award shall be made within a period of 12 months from the date the arbitral tribunal enters upon reference; however, upon mutual consent of the parties, the time may be extended for a further period not exceeding six months. If the arbitral tribunal fails to render the award within the stipulated time, its mandate shall be terminated, unless there are good reasons for delay. If the tribunal fails to show sufficient grounds for delay, the arbitrators' fees will be deducted by an amount not exceeding five percent for each month of such delay.[45] Section 29B deals with fast track procedures where the parties at any stage of an arbitration may apply for fast track proceedings.[46] Under this approach, the tribunal shall decide the dispute only on the basis of written pleadings, documents and submissions. No oral hearing shall be conducted unless requested by both parties, and the award shall be made within a period of six months, which may be extended following the mutual consent of the parties and not exceeding for a further period of six months. If the arbitrators fail to provide an award within the required timeframe, however, the sanction procedures are the same as Section 29A.

E. *Enforcement of Foreign Arbitral Awards*

Section 45 of the Arbitration Act 2001 embodies Article III of the New York Convention in that it makes a foreign arbitral award binding for all purposes on parties to the arbitration agreement, and that such an award may be executed by the local court as if it were a decree of the local court. Section 45(b) provides that a foreign arbitral award shall be enforceable on the application by any party in accordance with the Code of Civil Procedure in the same manner as if it were a decree of the court. This approach was confirmed in the case of *Canada Shipping and Trading S v. TT Katikaayu and another*[47] (following Section 45(b)).[48]

Thus, there is no requirement to obtain separate permission from a local court for

[45] *Id.* at art. 29A.

[46] *Id.* at art. 29B.

[47] 30 CLC (HCD) (2001) (*Admiralty Jurisdiction*).

[48] Arbitration Act 2001, art 45(b).

enforcement. The court, however, may refuse to execute a foreign arbitral award for certain specified reasons. Foreign arbitral awards are defined as awards made pursuant to an arbitration agreement in the territory of any state other than Bangladesh, except those states that are specified by the Government of Bangladesh through a gazette notification.[49] Therefore, as the above provisions consider the territoriality of the arbitral award rather than the lex arbitri under which the award was rendered, the scope of the Arbitration Act 2001 is much narrower than either the Model Law or the New York Convention.[50]

Furthermore, the provision that the Government of Bangladesh will be able to specifically exclude foreign arbitral awards delivered in certain states means that courts will be able to disrupt the enforcement of such awards by finding that the arbitration has taken place within the territory of a specified state.[51] If a member state of the New York Convention is so specified, that will run contrary to the spirit of the Convention.[52]

However, under the Indian Arbitration Act 1996, foreign awards from signatory countries of the New York and Geneva Conventions will be enforced directly as if they were a court decree, while preserving the power of a court to refuse execution if an award contravenes the public policy of India.[53]

In 2015, however, India amended the Indian Arbitration Act 1996, introducing two identical explanations to Section 48(2)[54] and Section 57(1)[55] in an attempt to explain

[49] *Id.* at art. 47.

[50] Sattar, *supra* note 26.

[51] Article 47 of the Bangladesh Arbitration Act 2001 stays the power of the Government to declare a specified state. For the purposes of this Chapter, the Government may, by notification in the official Gazette, declare a state as a specified state.

[52] Sattar, *supra* note 26.

[53] *See* Indian Arbitration Act, arts. 48 and 57.

[54] *Id.*, Sub-section 2(b): "Enforcement of an arbitral award may also be refused if the court finds that … (b) the enforcement of the award would be contrary to the public policy of India."

[55] *Id.*, Sub-section 1(e): "the enforcement of the award is not contrary to the public policy or the law of India."

the meaning of "public policy of India."[56]

On the other hand, enforcement of international arbitral awards in Singapore are governed by the Singapore International Arbitration Act 1994, which was amended in 2012 in line with UNCITRAL Model Law on International Commercial Arbitration as revised in 2010 and gives effect to the New York Convention.

International arbitral awards—whether made in or outside Singapore—may, by leave of the High Court of Singapore, be enforced in the same manner as a High Court judgment or an order to the same effect.[57] However, the award will be refused if Section 31 of the Singapore International Arbitration Act 1994 is applicable. However, the Singapore International Arbitration Act 1994 does not define public policy as India has done in its law. At the same time, Singapore has recognized and incorporated[58] the UNCITRAL Model Law directly into the Singapore International Arbitration Act 1994, which certainly has a positive effect to enforce foreign arbitral awards without much hindrance by local courts.

On the other hand, the issue of enforcement of foreign awards in Bangladesh is a crucial problem. It needs to be addressed and resolved quickly by amending the Arbitration Act 2001 to mirror the Singapore International Arbitration Act 1994 (as amended in 2012), Indian Arbitration Act 1996 (as amended in 2015) and Model Law (as revised in 2010).

III. CONCLUSION

International business and investment in Bangladesh are increasing, and the

[56] The explanations seek to narrow the scope of the definition of "public policy" which, to date, has been interpreted so broadly by the judiciary that almost all awards are challenged based on a violation of the public policy of India. Explanation 1 clarifies that an award conflicts with the public policy of India only in the following circumstances: "(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice." Explanation 2 attempts to clarify that when determining whether there has been a contravention of public policy, the courts will not review the case on the merits of the dispute. While some attempt has been made to explain what public policy is, the explanations may not be helpful as they are loosely worded and open to interpretation.

[57] Singapore Arbitration Act 1994, as amended, art. 19.

[58] *Id.* at art. 3.

enactment of the Arbitration Act 2001 was a first initiative to encourage that growth. Now, however, it is high time to amend the Act to include some key provisions.

It was expected that the Act would bring about important changes in some areas of arbitration law in Bangladesh, e.g., scope, court interference, clear judicial interpretation, time limits of arbitral tribunals and fast track procedure, as well as enforcement of foreign arbitral awards as provided in the New York Convention (to which Bangladesh is a party).

To be clear, however, there is no point in ratifying the New York Convention unless the concerned State institutions at the highest level are willing to honor its international obligations and implement and follow the Convention's provisions appropriately. An important way to address this underlying issue is to address the related problems of advanced education and training. No doubt more frequent or regular engagement with these issues and law by the judiciary would be helpful. Moreover, it is important to remove ambiguity arising out of different interpretations of arbitration law, and ensure that this dispute resolution mechanism is dynamic, efficient and acceptable to stakeholders concerning choice of law and foreign arbitral awards.

It is imperative to amend the Arbitration Act 2001 to make these important changes and continue to modernize Bangladesh's arbitration law, which will be welcomed by parties who may be involved in foreign-seated international commercial arbitrations. Like India, Bangladesh should continue to encourage foreign investments and update its arbitration law to provide parties access to local courts for interim relief against local parties regarding assets located within the country and to directly approach the High Court for interim protection.

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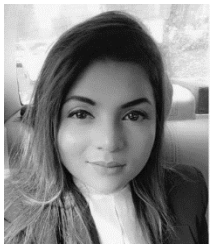

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BOOK REVIEW:
ARBITRATION OF M&A TRANSACTIONS: A PRACTICAL GLOBAL GUIDE EDITED BY EDWARD POULTON

Reviewed by Tim Samples & Atman Shukla

I. INTRODUCTION

While capital flows and investor-state arbitration have been facing headwinds in the current global environment even before the onset of the Covid-19 pandemic, the arbitration of cross-border M&A transactions is well placed to continue thriving. For various reasons—from customizability in drafting to the enforceability of awards—market participants rely heavily on arbitration for cross-border M&A deals and many other international transactions. In this book review, we provide feedback on a valuable book published recently regarding this topic, titled Arbitration of M&A Transactions: A Practical Global Guide, edited by Edward Poulton.[1]

The substantive part of the book is divided into four parts: national threshold issues (Part 1), the arbitration agreement (Part 2), common types of disputes in M&A (Part 3), and other issues arising from arbitration (Part 4). We offer thoughts on each part of the book below, in sequence.

II. THE BOOK

A. *Part 1: National Threshold Issues.*

Part 1 addresses national threshold issues with local counsel perspectives from seventeen jurisdiction-specific sections: Austria, China and Hong Kong, England and Wales, France, Germany, Italy, Japan, Mexico, the Netherlands, Peru, Poland, Russia, Singapore, Spain, Sweden, Turkey, and the US. These summaries are not limited to matters of arbitration; many of them contain general information about business entities and other matters of law. These perspectives—written by an impressive array of experienced lawyers in the M&A space—offer the reader a quick overview of key issues, such as arbitrability, choice of law, and enforceability.

[1] Arbitration of M&A Transactions: A Practical Global Guide (Edward Poulton ed., 2014).

This Part offers practical and efficient primers on the jurisdictions covered. Because this Part is essentially an edited compilation of perspectives from a variety of jurisdictions, there is some variability in scope and content, which is a common feature in multi-jurisdiction productions like this. We believe Part 1 would prove helpful for any student or practitioner seeking general familiarity with the arbitration landscape in a covered jurisdiction. As an organizational matter, because this Part serves primarily as a jurisdiction-specific reference guide, we wondered whether it would be better placed later in the book.

B. *Part 2: The Arbitration Agreement.*

Part 2 begins by explaining what makes a valid arbitration agreement, including an overview of relevant international conventions, requirements for validity, and matters of competence. A roadmap of arbitration agreements follows, explaining the essential anatomy of arbitration agreements. As the authors correctly note, arbitration clauses are customizable, and the parties are free to depart from "one-size-fits-all" models.[1] The typology of approaches to arbitration clauses—from carve-out and hybrid to fast-track and escalation—is thorough without being tedious. As a complement to this Part's content, the authors add insightful commentary on notable cases and market practices throughout the sections.

Experienced attorneys will likely find certain aspects of this Part useful, while early-career lawyers will find a solid and comprehensive introduction to arbitration agreements.

C. *Part 3: Common Types of Disputes in M&A Contracts.*

Part 3 offers eleven different perspectives on common disputes and headline issues relevant not only in M&A transactions but also in joint ventures and shareholders agreements.[2] These perspectives range from pre-signing and interim period disputes to indemnity claims, from purchase price adjustment issues to valuation perspectives. For several reasons, this segment of the book should help both practitioners and students.

[1] Poulton, *supra* note 1, at 263.

[2] *Id.* at 279.

Refreshingly, the perspectives are delivered not only by lawyers, but also by accountants, consultants, and insurance professionals–such a variety will help readers develop a fuller context for envisioning how a dispute might play out, and how to avoid and/or mitigate disputes in the first place. For example, having articles both on the fundamental notions of breaches of representations and warranties, on the one hand, and the calculation of related damages, on the other hand, provides the reader practical context for the assiduous analysis required for contract drafting and interpretation.

Further, while the perspectives in this Part are certainly offered through a general lens focused on arbitration, in many ways, they are useful as a collective primer for commercial transactions generally, not only for commercial lawyers seeking prefatory reference material, but also for law or business students hoping to learn more about the nuts and bolts of deal-making.

Of special note is the article on warranty and indemnity insurance written by professionals hailing from Aon UK LTD, a well-known insurance firm.[3] Despite using the term "arbitration"[4] only once, this article serves as a useful reminder of the sorts of M&A disputes that can arise, as well as a guide for implementing and negotiating insurance coverage for losses arising from a seller's breach of representations and warranties. Given the ever-increasing prevalence of this insurance product and the breakneck pace of change in available options for insurance terms, having this well-structured article within close reach will prove useful for all M&A lawyers.

D. *Part 4: Other Issues Arising from Arbitration.*

Part 4 includes four articles.[5] They address legal finance, antitrust issues, confidentiality and privacy, and procedural and tactical issues. In a way, we would have found some of the content in this Part to be better placed, and perhaps better

[3] Poulton, *supra* note 1, at 363.

[4] *Id.* at 363.

[5] James MacKinnon, *Using Legal Finance of M&A Arbitrations*, *in* Arbitration of M&A Transactions: A Practical Global Guide at 447 (Edward Poulton ed., 2014).; Gordon Blanke, *Antitrust Issues*, *in id.* at 461; Ioann Knoll-Tudor, *Confidentiality and Privacy in Post-M&A Arbitration Disputes*, *in id.* at 477; John Leadley, *Procedural and Tactical Issues*, *in id.* at 513.

appreciated, if organized as part of a more general segment addressing the administration of an arbitration.

With that said, the articles are useful additions to the book. For instance, the article on legal finance[6] is an interesting reminder for the options, and pitfalls, relating to the financing of legal costs and expenses by outside parties. The article on procedural and tactical issues[7] is also an important piece addressing some key arbitration issues such as interim relief, timing issues, selection of arbitrators, and formal requirements for abiding by contractual prescriptions.

III. CONCLUSION

Overall, *Arbitration of M&A Transactions: A Practical Global Guide* lives up to its title by offering a useful introduction to arbitration agreements, jurisdiction-specific guidance, and a deeper dive on a number of discrete topics particular to M&A and related commercial arrangements. Given the broad scope and a significant variety of authors and perspectives, this book is a useful, practical reference point for any practitioner for spotting issues and identifying topics requiring further research or diligence.

TIM SAMPLES is an Associate Professor of Legal Studies at the Terry College of Business. His research focuses on the interactions between markets and sovereign states, particularly in the areas of sovereign finance, investor-state disputes, and frameworks for foreign investment. Samples received a 2017-18 Core Fulbright grant to conduct research and teach in Argentina, where he taught courses on sovereign debt at the Facultad de Derecho (School of Law) at the Universidad de Buenos Aires. Samples has been quoted by media outlets such as the Wall Street Journal, Financial Times, Barron's, Bloomberg, Los Angeles Times, and BBC Mundo, and has also appeared on CNN en Español, BBC World Service, and National Public Radio.

[6] MacKinnon, *supra* note 6.

[7] Leadley, *supra* note 6.

ATMAN SHUKLA is an attorney in the Houston office of Sidley Austin LLP. His practice focuses on mergers and acquisitions and investment transactions (including joint ventures) for clients in the energy and infrastructure space, including renewables, upstream, oilfield services, midstream, and downstream, including power, refining and trading. Atman's practice has a particular focus on private equity clients, and also encompasses portfolio company management and corporate governance matters. Atman's practice also includes aviation matters, particularly in the regional airline space, and he has also advised start-ups and emerging ventures through Sidley's Emerging Enterprises Pro Bono Program. Atman holds a B.A. from the University of Pennsylvania, and a J.D., with honors, from The University of Texas School of Law.

BOOK REVIEW:
GAS AND LNG PRICE ARBITRATIONS: A PRACTICAL HANDBOOK (2D EDITION) BY JAMES FREEMAN AND MARK LEVY Q.C.

Reviewed by Thomas Voisin

I. INTRODUCTION

The second edition of "Gas and LNG Price Arbitrations," curated by consultant editors James Freeman and Mark Levy Q.C., is a practical handbook written by leading practitioners for practitioners. The fourteen chapters of the Handbook provide a comprehensive overview of gas price arbitration. They examine all stages of a price review and consider the main issues raised by arbitral proceedings involving LNG and gas prices from the perspective of all stakeholders: arbitrators, clients, counsel, and experts. Although commercial by nature, gas price review disputes are unique, and a book dedicated to this topic is certainly more than welcome and needed. To this end, the Handbook is an invaluable, must-have source since there is limited material available publicly for price review arbitrations

II. THE BOOK

The Handbook begins from first principles with an exploration into the art of drafting price review clauses and their essential elements. Indeed, the Handbook's Chapter 1 covers the drafting of the price review clause and includes considerations for key terms and concepts, such as "trigger events," "market economically," and "value." Chapter 1 further provides insight into the common problems that may arise from the drafting of price review clauses and continues on to present strategies for solving these issues. When applied, these solutions can assist the parties and arbitral tribunal to narrow the scope of the dispute in future arbitrations.

Moreover, the Handbook proceeds to cover how the price review clauses are implemented in practice both by the parties and–once a dispute arises–by the arbitral tribunal. This involves a comprehensive review of "trigger events" in price review arbitrations: their nature, timing, relevant criteria, and temporal scope. This

is then followed in Chapter 3 with the related discussion of whether the contractual concept of "changes of circumstances" can be used as a price modifier in gas price reviews. The discussion requires a close examination of the doctrine of "hardship" and, quite helpfully, this chapter provides a comparative overview of "hardship" doctrines having regard to common, civil, and sharia law requirements.

The Handbook next turns to procedural matters in gas price reviews. Chapter 4 includes procedural steps that arise before, during, and after the arbitration. Specifically, it encompasses issues such as contract drafting negotiations, the consolidation of arbitrations, written submission and evidence (including expert evidence), and the scope of the final award. Certainly, the evidence is a central issue in price reviews, and Chapter 5 addresses it at length. The chapter discusses the burden and standard of proof while also detailing the types of evidence used typically to support price review claims. Additionally, Chapter 5 explores the role of previous arbitral decisions and the extent to which they may affect subsequent arbitrations.

Furthermore, the Handbook tackles procedural issues relating to confidentiality. One critical element of gas price reviews is obtaining data that shows the price at which gas is sold in the relevant market. Indeed, enabling fair access to such data for the parties is a central point of contention in many price review arbitrations. This data is vital for the resolution of the dispute. Typically, this data includes sensitive commercial information relating to the quantities of gas consumed by customers and the price at which gas is sold, which the Buyer will (naturally) be reluctant to reveal. There is, therefore, an information asymmetry between the parties in accessing this data that must be bridged either by the parties themselves or with the guidance of the arbitral tribunal.

Once completing the discussion of procedural issues, the Handbook next turns to assessing the role of the key players (other than counsel) in the gas price review arbitration. This involves looking at the price review from the perspective of the arbitrator (Chapter 7), the client (Chapter 8), and the expert (Chapter 9). Critically, the general mandate of the arbitrator is discussed, and the manner in which the arbitrator must use the economic expert's evidence is considered. Furthermore, it

should be noted that the expert in gas price reviews plays a more significant role than in many other types of arbitrations. Indeed, as explained in this chapter, most price review arbitrations are conducted "around a core of expert analysis and evidence" where counsel's role is often limited to effectively communicating the expert's evidence to the arbitral tribunal.

Finally, the picture would not be complete without an overview of the lessons learned from the last wave of price review arbitrations. More precisely, these final chapters address the numerous issues raised in adopting hub indexation along with the consequences of its adoption. Moreover, these chapters explain that the wide-spread (but not unanimous) adoption of hub indexation eliminated notorious issues such as price reviews arising from discrepancies in the value of gas and oil products for many parties. However, the final chapters nonetheless continue on to explain that hub indexation will likely remain a potential source of dispute for parties and may emerge as such in the next wave of price reviews.

III. CONCLUSION

The Handbook concisely and effectively communicates to the reader the expertise and experience gained by practitioners from the last wave of price reviews. This wave emerged largely in Europe and shifted the paradigm: it reshaped the way gas is priced in long-term contracts and, most probably, the way how price reviews will be conducted in the future.

In summary, the Handbook is more than a practitioners' guide. The Handbook analyses the current and future trends for price reviews and attempts to provide solutions. It is important to note that the Handbook was published before the current energy crisis. There is no doubt that the COVID-19 pandemic will have (and has had) consequences for energy markets worldwide. These consequences will challenge long-term gas supply contracts and, in particular, their price review provisions. In these uncertain times, the second edition of "Gas and LNG Price Arbitrations" will serve as an invaluable and essential guide for practitioners involved in gas price reviews.

THOMAS VOISIN is the Managing Partner of Quinn Emanuel's Paris office. He has represented clients in a number of international arbitrations, both ad hoc (including under the UNCITRAL Rules) and under the rules of major arbitration centers (ICC, ICSID, LCIA, SCC, AFA, etc.), with particular focus on investment, energy, construction and commercial disputes. His experience includes international arbitrations in the oil & gas, power, transportation, mining, aviation and chemical sectors. Thomas is the Assistant Editor of the French International Arbitration Law Reports.

BOOK REVIEW:
ATTRIBUTION IN INTERNATIONAL LAW AND ARBITRATION BY CARLO DE STEFANO

by Augustin Barrier & Anita Subedi

I. INTRODUCTION

The attribution of acts to the State is at the core of the international law on State responsibility. Attribution requires determining, before any finding of liability, whether a person or entity's specific conduct can be attributed to the State. It is a key precondition. This concept often raises issues in the context of investment arbitration. Most international investment agreements (IIAs) do not contain specific rules on attribution. Attribution is therefore one of the instances where investment arbitration tribunals must look beyond the underlying treaty, to customary international law.

Carlo de Stefano's book, Attribution in International Law and Arbitration,[1] meritoriously explores the development of the concept of attribution from a pure public international law perspective. Further, it surveys the drafting and application of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). The book offers insightful comments and critiques by the author as well as an erudite account of judicial practice from a wide range of contexts such as: The World Trade Organization, the International Court of Justice (ICJ), the Iran-US Claims Tribunal, and investment arbitration.

II. THE BOOK

In his introduction, de Stefano recalls the tension within the rules of attribution. It is a fundamental tenet of international law that a state cannot be held responsible for the conduct of private individuals or entities. Yet, at the same time, it is necessary to ensure State accountability for "State" conduct. Determining whether an act is of the State therefore becomes a critical exercise.

[1] Carlo de Stefano, Attribution in International Law and Arbitration (2020).

The author sets his goal: to identify objective features of acts and omissions of States under the principle of attribution in order to improve consistency in what we may recognize the "State" to be, i.e., its organs, instrumentalities, and sometimes even private parties.

In the first chapter, de Stefano explains the essence of attribution, namely aligning State responsibility with the concept of the "State" as a non-physical entity acting through its "agents." The rules of attribution comprise various tests seeking to achieve this alignment with respect to specified conduct.

As specified by ARSIWA Article 2, "attribution is a requisite (or pre-requisite)" for the finding of a wrongful act under international law.[1] There must be both a breach of international law, and this breach must be attributable to the State. While considered the "subjective" element in the finding of a wrongful act, attribution does not engage typical legal principles that indicate responsibility, such as intention or causation. Further, the paradox with the rules of attribution is that while they are classified as subjective, they are based on objective elements (such as the institutional status of State organs, conferral of governmental authority, or the degree of control of a private entity by the State).[2] De Stefano suggests that this paradox gives the rules a "trans-substantive," or preliminary, character.[3] Additionally, he highlights that domestic law, one objective criterion among others to be taken into account in determining attribution, does not prevail over what is an otherwise "autonomous normative process."[4] The possibility of divergence between domestic laws and international law is therefore very real.

The process of determining attribution, embodied in particular by ARSIWA Articles 4, 5, 7 and 8, does not have the binding force of a treaty. It has, however, reached a customary status in public international law, as confirmed on multiple occasions by scholars and international tribunals. In any event, it is accepted that

[1] *Id.* at 6.

[2] *Id.* at 9.

[3] *Id.*

[4] *Id.* at 11.

ARSIWA codifies customary international law.

According to de Stefano, attribution is a question of merits; attributability, or lack thereof, does not affect an international court or tribunal's power to adjudicate a dispute. However, he acknowledges that States are nevertheless free to agree that attributability is a jurisdictional prerequisite.

De Stefano additionally compares and distinguishes the concepts of attribution and sovereign immunity. Though they share an initial purpose, which is to bridge the gap between State instrumentalities and the State, they lack synergy. The author highlights the potential for lacunae between the regimes of (domestic) immunity and (international) attribution and advocates for greater coordination between the domestic and international judiciary.

In Chapter 2, de Stefano explores the application of attribution rules in international law, as codified by ARSIWA. Among other points, he examines the categorization of de jure State organs and de facto State organs (ARSIWA Article 4), private entities conferred with governmental authority (ARSIWA Article 5), and individuals acting under the direction and control of the State (ARSIWA Article 8). De Stefano also examines the doctrines of *patientia* and *receptus*, as well as the rejection of the doctrine of *complicity*.

In particular, de Stefano explores the role of private State-controlled or State-owned enterprises (SOEs). Due to the general principle of separateness of corporate entities from the State, mere legal control by the State as a shareholder is insufficient to establish attribution. There must be a form of public interference, such as specific and formal instructions, or a level of direction or control, which renders the individuals or SOEs completely dependent. The author examines these points in light of international jurisprudence, dedicating several pages to an analysis of the International Criminal Tribunal for the former Yugoslavia's (ICTY) judgment in the *Tadić* case, and refuting the idea of its alleged conflict with ICJ case law.

In Chapter 3, de Stefano considers how the rules of attribution are applied in investment arbitration. Throughout the chapter, he focuses on the attributability of acts of SOEs, which is often discussed in investment disputes. As few IIAs contain

specific rules of attribution, most investment tribunals resort to customary international law, and particularly ARSIWA. The author criticizes the confusion under which certain tribunals apply attribution tests, notably ARSIWA Articles 4, 5, and 8. As these rules apply to radically different types of relationships between persons and the State, they must not be conflated.

De Stefano also analyzes the difficulties faced by tribunals with regard to umbrella clauses and determining whether the author of contractual violations was the State, specifically in the context of contracts with SOEs. He emphasizes that the rules of attribution are of no assistance when determining contractual responsibility.

De Stefano then turns to investment arbitration case law on attribution under ARSIWA Article 4, with specific emphasis on those organs exercising "any other functions"[5] and the doctrine of de facto State organs.[6] He likewise considers the application of the so-called functional test by tribunals applying ARSIWA Article 5. De Stefano provides a very user-friendly list of "symptoms" of governmental control, as identified by various investment tribunals.[7] More generally, with regard to SOEs, he states that the approach should be the so-called "private contractor" test,[8] i.e., whether a SOE would rationally have taken a specific action, like any other competitor in the market, without the benefit of State ownership. As for ARSIWA Article 8 (attribution based on instruction, direction, or control), the author shows that investment arbitration tribunals have applied a demanding test of effective control.

Attribution in International Law and Arbitration concludes with de Stefano's message to the legal community: an invitation to arbitrators, but also to domestic courts, to consider the fundamental specificity and independence of each rule of

[5] *Id.* at 178.

[6] These cases include, for example, *Alex Genin, Eastern Credit Limited, Inc and AS Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award, 25 June 2001 (para 327) and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007 (para 391), ICJ Reports 2007, 43, 201.

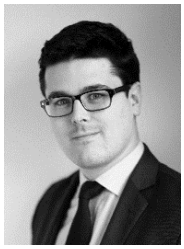
[7] *Id.* at 154-57.

[8] *Id.* at 178.

attribution. De Stefano advocates for the proper and consistent application of these rules, which would enable judicial bodies to better apprehend the intervention of the State in the economy and at all levels of society.

III. CONCLUSION

Attribution in International Law and Arbitration brings the necessary academic depth and clarity to the notion of attribution, which all too often lacks substance when wielded in the context of investment arbitration. Carlo de Stefano elects to speak directly to the investment arbitration community by conducting a thorough analysis of case law, flaws in application, and remedial advice. His book also serves as an important reminder of the role customary international law should play in investment arbitration. As such, it is a most welcome contribution.



AUGUSTIN BARRIER is an associate at LALIVE. His main area of practice is international arbitration, including commercial and investment treaty arbitration, in a wide array of business sectors, including the construction, energy, and mining industries, mainly in Europe and Africa. He has acted as counsel in numerous international arbitral proceedings under the aegis of various institutions, as well as *ad hoc* proceedings governed by a range of substantive and procedural laws, both common and civil law, and international law.
Before joining LALIVE, he practiced international arbitration at leading international firms in Paris, where he also practiced commercial litigation.

ANITA SUBEDI is an associate at LALIVE. Her main area of practice is international arbitration, specializing in commercial disputes in a range of business sectors, including construction, mining, and airlines, mainly in Europe, the Middle East and Asia. Before joining LALIVE, she completed her qualifying traineeship with a US firm in London where she gained experience advising on international commercial disputes.

YOUNG ITA CHAIR'S REPORT 2020

by Robert Reyes Landicho

I. INTRODUCTION

Young ITA is a group of like-minded young professionals (under 40) practicing international arbitration. Young ITA encourages its members to become more involved with the ITA and fosters a supportive and inclusive community of arbitration professionals through programs, publications, competitions, and other activities.

II. YOUNG LAWYERS ROUNDTABLES

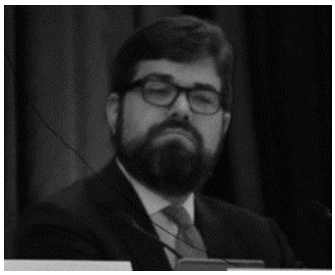
Young Lawyers Roundtables are presented annually during the ITA Workshop, the ITA-IEL-ICC Joint Conference on International Energy Arbitration, and the ITA-ALARB Americas Workshop. The past two 2020 Young Lawyers Roundtables are highlighted below, with the third roundtable scheduled for December 2, 2020 during the ITA-ALARB Americas Workshop.

A. *8th ITA-IEL-ICC Joint Conference on International Energy Arbitration.*

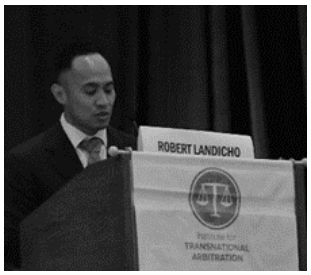
The Young Lawyers Roundtable for the 8th ITA-IEL-ICC Joint Conference on International Energy Arbitration took place on January 23-24, 2020 in Houston.

Rafael Boza (ICC Young Arbitrators Forum (YAF), Sarens USA), Christopher Hogan (IEL Young Energy Professionals (YEP), Hogan Thompson LLP), and Robert Reyes Landicho (Young ITA, Vinson & Elkins LLP) served as roundtable co-chairs.

Rafael Boza



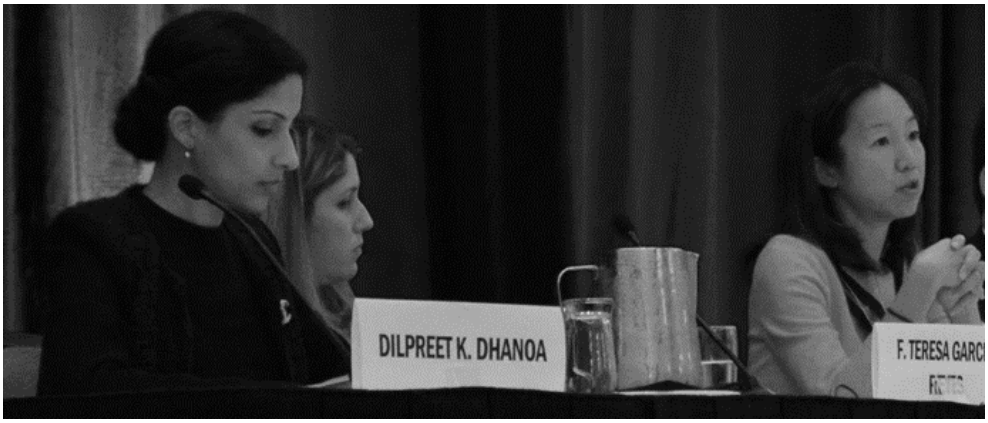
Christopher Hogan



Robert Reyes Landicho

Panel 1 addressed the topic "A Tour Around Our 'Troubled' World? Recent Geopolitical Developments and Their Impact on Energy Disputes," with the interventions of **Chiann Bao** (Independent Arbitrator; Former Secretary General of

HKIAC); **Dilpreet Dhanoa** (Squire Patton Boggs, Dubai and Abu Dhabi); and **Teresa Garcia-Reyes** (Senior Counsel, Litigation, Baker Hughes Company, Houston); moderated by Young ITA's Co-Chair, **Christopher Hogan**.



Later on, Panel 2 addressed the issue of "National Security, International Trade, and Sanctions Update—A Brave New World and How Disputes Lawyers can Cope," with the participation of **Damara Chambers** (Vinson & Elkins LLP, Washington, D.C.); **John E. Lash** (Control Risks, Washington, D.C.); and **Dr. Crina Baltag** (Young ITA Vice-Chair, Stockholm University, Stockholm); and it was moderated by **Rafael Boza** (ICC Young Arbitrators Forum (YAF), Sarens USA).

The Young Lawyers Roundtable concluded with a well-attended reception.

B. *32nd Annual ITA Workshop and Annual Meeting—"Ethical Challenges with Virtual Arbitral Proceedings".*

The Young Lawyers Roundtable held during the 2020 ITA Virtual Workshop comprised of one mock pre-hearing conference and one panel.

The Mock Pre-Hearing Conference issue was: "Due to travel and in-person hearing restrictions at the seat of arbitration [Paris, France], an arbitration hearing under the 2017 ICC Rules of Arbitration scheduled for July 1 through 14, 2020 cannot move forward in person."

Claimant argued that an online hearing must go forward in the interests of fairness and efficiency, citing financial pressures if an Award is not rendered expediently.

Respondent argued that there would be a grave breach of due process if the hearing moves forward, as this would deprive Respondent of the ability to meaningfully offer or present its witnesses in person (two of its four witnesses would testify in Arabic) and because two of the expert witnesses had recently suffered the loss of a close relative.

The Arbitral Tribunal then engaged in a mock deliberation and rendered a decision.

The participants of the Mock Pre-Hearing Conference were **Thomas Innes** (Counsel for Claimant, Steptoe & Johnson LLP, London, Young ITA Thought Leadership Chair); **Jawad Ahmad** (Counsel for Respondent, Mayer Brown LLP, London); **Stephanie Cohen** (Tribunal Chair, Independent Arbitrator, New York); **Anna-Maria Tamminen** (Co-Arbitrator, Hannes Snellman, Helsinki); and **Joseph Chedrawe** (Co-Arbitrator, Vinson & Elkins LLP, Dubai).


Thomas Innes


Jawad Ahmad


Stephanie Cohen


Anna-Maria Tamminen


Joseph Chedrawe

Later, the Roundtable Panel Discussion addressed the topic "A Tour Around the Arbitration World - Commonalities and Divergences in a Time of Disruption."

A group of practitioners presented recent developments in international arbitration in their respective jurisdictions, both before the COVID-19 pandemic and after, considering how different legal systems have reacted to the disruption.

The panel was moderated by **Marike R.P. Paulsson** (Senior Advisor, Albright Stonebridge Group, Bahrain), and the panelists were **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico, Mexico City - Young ITA Regional Chair for Mexico and Central America); **Alexander Leventhal** (Quinn Emmanuel, Paris, France – Young ITA Regional Chair for Continental Europe); **Vinicius Pereira** (Campos Mello Advogados in association with DLA Piper, Rio de Janeiro – Young ITA Chair for Brazil); and **Sue Hyun Lim** (Secretary General, Korean Commercial Arbitration Board, KCAB INTERNATIONAL, Seoul).


Marike Paulsson

Sylvia Samano Beristain


Alexander Leventhal


Vinicius Pereira


Sue Hyun Lim

III. #YOUNGITA EVENTS

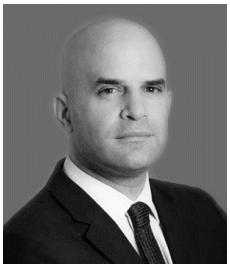
#YoungITATalks is a series of local events presented around the world. The format of each of the talks varies, ranging from workshops, interviews, panel discussions, debates, or other presentation formats that cover a wide range of

subjects relating to arbitration. The #YoungITATalks series is designed to educate, promote conversation, and share knowledge and experiences among young practitioners worldwide. This year, the Young ITA has also hosted #YoungITA Mentorship Speaker Series events, which focused on interest issues to the Young ITA mentorship program groups (but were open to all ITA and Young ITA members).

Thus far in 2020, Young ITA has hosted 15 events (listed below) and have—at least—three more planned for the remainder of 2020. Due to the COVID-19 pandemic, all Programs after March 6, 2020 were virtual programs.

A. *January 16, 2020—#YoungITATalks and CIArb YMG Paris.*

This event was held at Dechert LLP's office in Paris and the topic was "The Arbitral Process from Start to Finish—Tips for a Successful Arbitration" and speakers included: **Alexander Fessas** (ICC Secretary General, Paris); **José Manuel García Represa** (Dechert LLP); **Ana Gerdau de Borja** (Derains & Gharavi); **Ilija Mitrev Penusliski** (Shearman & Sterling); **Rocío Digon** (White & Case); **Sara Kileilat Aranjo** (Senior Associate, Al Tamimi & Co.); and **Alexander Leventhal** (Young ITA Regional Co-Chair for Continental Europe, Quinn Emanuel).


Alexander Fessas


J.M. García Represa


Ana Gerdau de Borja


Ilija Mitrev Penusliski

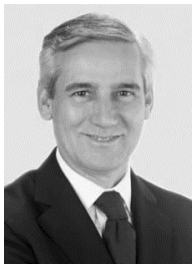

Rocío Digon


Sara Kileilat Aranjo


Alexander Leventhal

B. *February 6, 2020 – #YoungITATalks, Guatemala City.*

This event was held at Club Guatemala Centro Histórico, Guatemala City, Guatemala, and addressed the topic "A debate on the scope of the arbitration agreement in tort cases related to sports arbitration" (in Spanish). Speakers included: **Álvaro Castellanos Howell** (President, CRECIG); **Alejandro Cofiño** (QIL+4 Abogados); **Igancio Grazioso** (Director, CRECIG); and **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico, Young ITA Regional Chair for Mexico and Central America).



Álvaro Castellanos Howell

Sylvia Samano Beristain

Alejandro Cofiño

Igancio Grazioso

C. *February 20, 2020 – #YoungITATalks & YAAP Joint Conference, Vienna.*

Held at Hotel de France in Vienna, the topic was "The promise and peril of the publication of arbitral awards." Speakers included: **Andreas Schregenberger** (Gabriel Arbitration, Zurich); **Natascha Tunkel** (KNOETZL, Vienna); **Ryan Manton** (Three Crowns, Paris); **Anna Kozmenko** (Schellenberg Wittmer, Zurich); **Tamara Manasijevic** (Andreas Reiner & Partners, Vienna); **Klaudia Dobosz** (VIAC, Vienna); **Maria Gritsenko**

(VEON, Amsterdam); **Markus P. Beham** (University of Passau, Passau); and **Joseph Schwartz** (Wagner Arbitration, Berlin).

Andreas Schregenberger

Natascha Tunkel

Ryan Manton

Anna Kozmenko

Tamara Manasijevic

Klaudia Dobosz

Maria Gritsenko

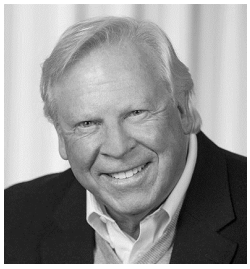
Markus P. Beham

Joseph Schwartz

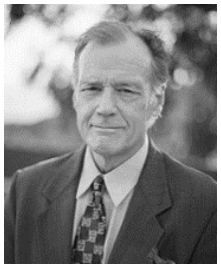
D. *February 27, 2020 – #YoungITATalks, Malibu.*

This event took place at Pepperdine Caruso School of Law in Malibu, California. The topic was "Decoding the Restatement on International Commercial Arbitration and Investor-State Arbitration and Latest Developments Under California Law." Speakers included: **Neil Popovic** (Sheppard Mullin; Professor, Berkeley Law); **Professor Robert E. Lutz** (Southwestern Law School, Los Angeles); **Professor Jack J. Coe, Jr.** (Pepperdine Caruso School of Law, Malibu); **Cecilia Flores Rueda** (Flores Rueda Abogados, Mexico City); **Sarah Reynolds** (Mayer Brown LLP, Palo Alto); and **Marcio Vasconcellos** (Musick Peeler, Los Angeles).

Neil Popovic



Prof. Robert E. Lutz



Prof. Jack J. Coe, Jr.

Cecilia Flores Rueda

Sarah Reynolds

Marcio Vasconcellos

E. *March 4, 2020 - Presented by Young ITA - Tel-Aviv Young Arbitration Practitioners' Symposium.*

Held at Meitar Law Firm, the topic was "Procedural trends in international arbitration and energy sector arbitration" and speakers included: **Dr. Claudia Annacker** (Dechert, Paris); **Baruch Baigel** (Asserson); **Gidon Even-Or** (AYR); **Ayelet Hochman** (White & Case); **Nir Kiedar** (Gornitzky & Co); **Alexander Leventhal** (Young ITA Regional Chair–Continental Europe, Quinn Emmanuel); **Ben Love** (ITA Communications Co-Chair, Reed Smith); **Andrea Manaker** (White & Case); **Asaf Niemoj** (Meitar Law Firm); **Kirtan Prasad** (RPC); and **Elad Shaul** (General Legal Counsel at M+W Israel Ltd.).

Dr. Claudia Annacker

Baruch Baigel

Gidon Even-Or

Ayelet Hochman

Nir Kiedar

Alexander Leventhal

Ben Love

Andrea Manaker

Asaf Niemoj

Kirtan Prasad

Elad Shaul

F. *March 5, 2020 – #YoungITATalks, Geneva.*

Co-hosted with ASA Below 40, the topic of this event was "The Future of Intelligence in International Arbitration—Artificial Intelligence & Arbitrator Intelligence." The Speakers included: **Niuscha Bassiri** (Hanotiau & van den Berg, Brussels); **Catherine Anne Kunz** (ASA Below 40 Co-Chair, Lalive); **Alexander Leventhal** (Young ITA Regional Co-Chair for Continental Europe, Quinn Emanuel); **Sara Nadeau-Seguin** (Teynier Pic, Paris); **Flavio Peter** (Wenger & Wieli, Zurich); **Philippe Pinsolle** (Quinn Emanuel, Geneva); **Nhu Hoang Tran Thang** (Peter and Kim, Geneva); and **Philip Wimalasena** (Schellenberg Wittmer, Zurich).


Niuscha Bassiri


Catherine Anne Kunz


Alexander Leventhal


Sara Nadeau-Seguin


Flavio Peter


Philippe Pinsolle


Nhu Hoang Tran Thang


Philip Wimalasena

G. *April 23, 2020 - #YoungITATalks, Central America.*

Due to the COVID-19 pandemic, this event (and the ones that follow) was held via Zoom. The topic was "Is arbitration a mechanism that favors trade relations and investment in the region?" (in Spanish) and speakers included: **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico; Young ITA Chair, Mexico and Central America); **Emilio Ruiz** (Central Law, Honduras); **Christian Betancourt** (Consortium Legal, Honduras); **David García Hellebuyck** (GH Abogados, El Salvador); **Francisco Zuluaga** (Arias Law, Guatemala); and **Sebastián Ayala** (ECIJA, Costa Rica).

Sylvia Samano Beristain


Emilio Ruiz


Christian Betancourt


David García Hellebuyck

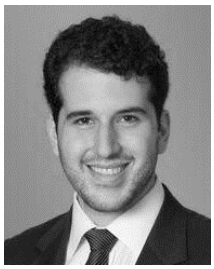

Francisco Zuluaga


Sebastián Ayala

H. *May 29, 2020 - #YoungITA Mentorship Program Speaker Series.*

The event addressed the issue of "The Elastic Corporate Form in Investment Arbitration" and speakers included: **Karima Sauma** (Young ITA Mentorship Chair, CICA-AmCham, Costa Rica); **Professor Julian Arato** (Brooklyn Law School, NY); and **Edi Grgeta** (Compass Lexecon, Chicago).


Karima Sauma


Julian Arato


Edi Grgeta

I. *June 25, 2020 - #YoungITATalks, Europe, Central and South America.*

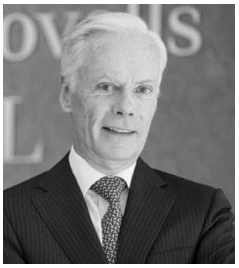
The topic for this panel was "Construction Arbitration–practical perspectives of the arbitrator, the litigant and the client" (in Spanish) and the speakers were: **Andrés Talavera** (Young ITA South America (Spanish-Speaking Countries) Chair); **Javier Íscar** (Asociación Europea de Arbitraje); **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico; Young ITA Chair, Mexico and Central America); **Alfredo Bullard** (Bullard, Falla & Ezcurra Abogados); **Eduardo Siqueiros** (Arb-Inter); **Victoria Viñes** (Maire Tecnimont SpA Milán); **Ximena Herrera** (Shearman & Sterling); and **Rocío Digon** (White & Case).

Andres Talavera

Javier Íscar

Sylvia Samano Beristain

Alfredo Bullard



Eduardo Siqueiros

Victoria Viñes

Ximena Herrera

Rocío Digon

J. *July 23, 2020 – #YoungITATalks, Portugal, Brazil, and Europe.*

This event's topic was "A Chat on the Brave New World of Arbitration" (in Portuguese) and the speakers included: **Vinicius Pereira** (Campos Mello Advogados, Young ITA Regional Chair, Brazil); **Pedro Batista Martins** (Batista Martins Advogados); **Alexander Leventhal** (Quinn Emanuel, Young ITA Regional Chair, Continental Europe); **Mariana Marra** (Leste Litigation Finance); **Sofia Ribeiro Mendes** (DLA Piper); **André Luis Monteiro** (Quinn Emanuel); **Ana Gerdau de Borja** (Derains & Gharavi); and **Ana Serra e Moura** (Deputy Secretary General, ICC).

Vinicius Pereira

Pedro Batista Martins

Alexander Leventhal

Mariana Marra


Sofia Ribeiro Mendes


André Luis Monteiro

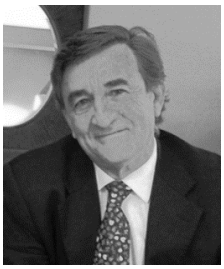

Ana Gerdau de Borja


Ana Serra e Moura

K. *August 10, 2020 - #YoungITA Mentorship Program Speaker Series.*

Addressing a current pressing issue, this panel's topic was "COVID-19 as an Excuse Not to Perform International Contracts." Speakers included: **Karima Sauma** (Young ITA Mentorship Program Chair, CICA-AmCham, Costa Rica); **Alejandro M. Garro** (Adjunct Professor of Law, Columbia University); and **Michael A. Fernández** (Winston & Strawn, New York).


Karima Sauma


Alejandro M. Garro


Michael A. Fernández

L. *August 31, 2020 - #YoungITATalks, Brazil—(in Portuguese).*

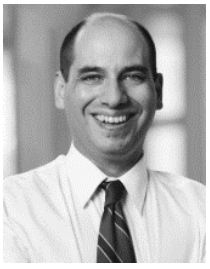
Hosted by Silveiro Advogados, the topic addressed the issue of the "Effects of Judicial Recovery on the Arbitration Agreement and Arbitral Proceedings." Speakers included: **Vinicius Pereira** (Campos Mello Advogados and Young ITA Regional Chair, Brazil); **Ricardo Ranzolin** (Silveiro Advogados); **Giovana Benetti** (Judith Martins-Costa Advogados); **Guilherme Queirolo Feijó** (Silveiro Advogados); and **Luis Renato Ferreira** (TozziniFreire Advogados).


Vinicius Pereira


Ricardo Ranzolin


Giovana Benetti


Guilherme Queirolo Feijó


Luis Renato Ferreira

M. *September 3, 2020 - #YoungITATalks, Global (Mentorship Program).*

This event was co-sponsored by Centro de Arbitraje de México and FloresRueda Abogados. The topic was "Tips for Home Office / Working from Home" and the panelists were **Karima Sauma** (Young ITA Mentorship Program Chair, CICA-AmCham, Costa Rica); **Cecilia Flores Rueda** (FloresRueda Abogados); **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico; Young ITA Chair, Mexico and Central America); **María Lilian Franco** (Aguilar Castillo Love, Guatemala City, Guatemala); **Rania Alnaber** (IB Law, Amman, Jordan); **José Abel Quezada** (Del Castillo y Castro Abogados, Monterrey, Mexico); **Mariana Rentería Díaz Barriga** (Wöss & Partners, Mexico City, Mexico) (not pictured); and **Inaê Siqueira de Oliveira** (Ernesto Tzirulnik Advocacia, Porto Alegre, Brazil) (not pictured).


Karima Sauma


Cecilia Flores Rueda

Sylvia Samano Beristain


María Lilian Franco

Rania Alnaber

José Abel Quezada

N. *September 15, 2020 - #YoungITATalks, Brazil.*

This event addressed the following topic: "International Arbitration: How to Choose Your Seat" (in Portuguese and English). Speakers included: **Vinicius Pereira** (Campos Mello Advogados and Young ITA Regional Chair, Brazil); **Bruno Baptista** (President of the Brazilian Bar Association - Pernambuco Section); **Mario Guimarães** (President of the Escola Superior da Advocacia - ESA / PE); **João Lessa** (Secretary General of the CIESP/FIESP Chamber); **Crina Baltag** (Senior Lecturer at Stockholm University, Young ITA Vice Chair); **João Ilhão Moreira** (Assistant Professor at the University of Macau); and **Clávio Valença** (Doctor from the University of São Paulo. Lawyer and arbitrator).

Vinicius Pereira

Bruno Baptista

Mario Guimarães

João Luiz Lessa Neto

Crina Baltag

João Ilhão Moreira

Clávio Valença Filho

0. *October 13, 2020 - #YoungITATalks, Africa, Mexico, and Central America.*

This event, co-organized by the Nigerian Institute of Chartered Arbitrators and

Arbitration Center of Mexico, addressed the topic "Challenges of Arbitration in the Developing World," and speakers included: **Demilade Elemo** (Young ITA Regional Chair for Africa); **Sylvia Samano Beristain** (Secretary General, Arbitration Center of Mexico; Young ITA Chair, Mexico and Central America); **Julieta Ovalle Piedra** (Ovalle Favela Abogados, México); **Vicente Bañuelos** (Garza Tello- Clyde & Co., México); **Mauricio París** (ECIJA-Costa Rica); **Alexander Aizenstatd** (Alexander Aizenstatd, Guatemala); **Fidéle Masengo** (General Secretary, Kigali International Arbitration Centre, Rwanda); **Madeline Kimei** (Founder, iReolve, Tanzania); **Tokunbo Davies** (Pinheiro LP, Nigeria); and **Folashade Alli** (FAA law, Nigeria).

Demilade Elemo

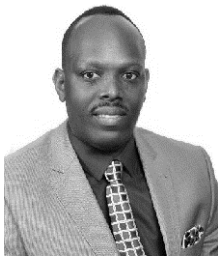
Sylvia Samano Beristain

Julieta Ovalle Piedra

Vicente Bañuelos

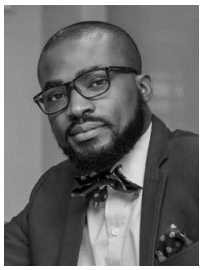
Mauricio París

Alexander Aizenstatd

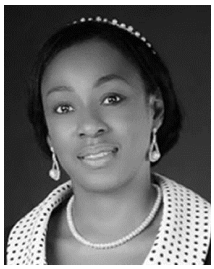


Fidéle Masengo

Madeline Kimei



Tokunbo Davies



Folashade Alli

IV. 2020 YOUNG ITA WRITING COMPETITION AWARD WINNER

Young ITA is pleased to announce the 2020 Young ITA Writing Award winner,

Dan-Vlad Druta (LLM, Harvard Law School).

Dan-Vlad's paper, "Host State Ratification of Illegal Conduct," is published in this issue of ITA journal *ITA in Review*.

The annual award, "*New Voices in International Arbitration*," recognizes research in the field of international arbitration by young practitioners, academics, and students.

ROBERT REYES LANDICHO is an attorney in Vinson & Elkins LLP's Houston office. He focuses in international commercial arbitration, investor-state arbitration, and U.S. commercial litigation. Rob has represented clients or assisted in investor-State disputes at ICSID and under the UNCITRAL rules, as well as in ICC, ICDR, AAA, DIFC, BCDR, LCIA, and ad hoc commercial arbitrations. Rob has particular experience in oil and gas, construction and infrastructure, banking, manufacturing, real estate, franchising, and intellectual property international disputes involving Middle Eastern, European, and North, Central, and South American parties.

HOW TO ACHIEVE A SUCCESSFUL HEARING

by Abel Quezada Garza & María Lilian Franco

I. INTRODUCTION

An arbitration hearing can be a crucial event in an arbitration and can have a great effect on the decision of a tribunal and the terms of an award. Indeed, all the major arbitration rules have provisions on hearings or "Oral Hearings" specifically. According to arbitrator Cecilia Flores Rueda, an arbitral hearing has the following objectives: (i) for the parties to present their case, and (ii) for the arbitral tribunal to obtain the necessary elements to issue the respective award.[1]

As Alexis Mourre has noted, "an arbitrator's learning curve is very different from that of a counsel."[2] There are some arbitrators who decide on the documentary evidence, but they also made their decision at the hearing. In this sense, an oral hearing could be determinative. Getting the tribunal's attention is not always an easy task. We have seen arbitrators who lost their attention during the hearings, i.e. yawning in the middle of a hearing, constantly checking their cellphones, or shifting their attention to other matters. Effectively conveying your arguments to the tribunal is essential.

This article will explain the basic provisions related to the importance and relevance of the hearing, as a procedural aspect of arbitration, and present a few suggestions on how to make the most out of an arbitral hearing.

II. IS A HEARING REALLY NEEDED

The tradition of settling disputes through oral hearings comes from ancient times. For example, the Bible recounts two women contending to be an infant's birth mother and how they presented their claims to possession of the baby to King Solomon, and

[1] *See* Cecilia Flores Rueda, *Audencia*, in DICCIONARIO ENCICLOPÉDICO DE ARBITRAJE COMERCIAL, (Cecilia Flores Rueda ed., 2010).

[2] Colin Ong Q.C., *Case Strategy and Preparation for Effective Advocacy*, *in* THE GUIDE TO ADVOCACY (Stephen Jagusch Q.C. and Philippe Pinsolle eds., 2018).

in Cicero Orations, Cicero defended Milo against an accusation of murder before a panel of Roman judges.[1] Over time, the concept of a hearing has developed, and in some systems oral debate has disappeared. Even now, in certain circumstances, an arbitration procedure may be conducted through the submission of documents only, on the grounds that the parties can property present their case in writing only, without a hearing, or that a matter can be properly decided exclusively on the law because the facts are not in dispute.

In this regard, arbitration provides flexibility and permits the parties to tailor the process to the specific dispute, and it is less formal than judicial process. One of the ways to increase efficiency and minimize the costs of arbitration is to not conduct an oral hearing if it is not necessary. It is common practice for a tribunal hold a hearing unless the parties have agreed that no hearing should be held, although increasingly tribunals are willing to decide disputes in the appropriate circumstances without a hearing upon the request of a party or through a summary disposition procedure. In fact, numerous arbitral institutions have recently introduced amendments to their rules to conduct fast-track processes to avoid an oral hearing or provide the parties with the ability to avoid an oral hearing. For example, the Rules of the International Chamber of Commerce (ICC) the Rules of the London Court of International Arbitration (LCIA), and the Rules of the World Intellectual Property Organization (WIPO) provide as follows:

> ICC Rules of Arbitration (2017), art. 25(6): The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.
>
> ICC Rules of Arbitration (2017), Appendix VI, art. 3(5): The arbitral tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents submitted by the Parties, with no hearing and no examination of witnesses or experts.
>
> LCIA Arbitration Rules (2014), art. 19.1: Any party which expresses a desire to that effect has the right to be heard orally before the Arbitral Tribunal on the merits of the dispute, unless the parties have agreed in writing on documents-only arbitration.

[1] *See* Jay Tidmarsh, *The Future of Oral Argument*, 48(2) LOY. U. CHI L. J. 475, 476 (2016).

> WIPO Arbitration Rules, art. 55(a): If either party so requests, the Tribunal shall hold a hearing for the presentation of evidence by witnesses, including expert witnesses, or for oral argument or for both. In the absence of a request, the Tribunal shall decide whether to hold such a hearing or hearings. If no hearings are held, the proceedings shall be conducted on the basis of documents and other materials alone.

However, international arbitration counsel should consider if avoiding an oral hearing is the most effective means to make the arbitration move quicker, and if it is the right procedure for their client's case on a case-by-case basis. One of the main points to consider is whether written submissions, pleadings, and evidence provided during the procedure provide the tribunal with enough information without the need for an additional input or argument to be provided at an oral hearing.

In addition, counsel should be aware that oral hearings might considerably increase the costs of arbitration, which a client may want to avoid. Hearings may require physical attendance of the arbitral tribunal, the parties, their legal representatives, and their factual or expert witnesses, and thus include travel costs and related time.

Aside from the cost benefits, parties' counsel should also consider whether parties could benefit from an arbitral hearing when a case involves "doubtful" legal issues with broad significance beyond the lawsuit that require a full accurate development. Also, parties should consider the complexity of issues or facts.

Moreover, a hearing serves as the opportunity to communicate the theory of your case. Arbitrators might benefit from an oral hearing, which provides them with information about the parties, facts and issues. In other words, the counsel can take the maximum advantage of the potential of its written submissions. Counsel can communicate the story of the dispute, so it is clear in the arbitrator's mind. In this way, the tribunal can identify points of doubt and concern. Also, the tribunal can potentially make more rapid progress in its preparation to write the award and counsel can identify the issues to address in their post-hearing briefs.[2]

[2] David J.A. Cairns, *Oral Advocacy and Time Control in International Arbitration*, in ARBITRATION ADVOCACY IN CHANGING TIMES 185 (Albert Van den Berg ed., 2011).

III. LOGISTICS FOR THE HEARING

An arbitral hearing requires a lot of preparation. It is common for the parties to have a conference call with the tribunal at least a few weeks before the date of the hearing. The conference call can help to ensure that all of the participants are informed of the matters to be addressed at the hearings and schedules. Arbitral Tribunals expect the parties' communication and cooperation to shape the arbitration process.

After the conference call, arbitrators should issue a comprehensive case management order, setting forth the schedule and procedures for the hearing. Logistical items to consider for the hearing are listed below:

A. *Dates and Location.*

The date of the hearing should be fixed early in the proceedings, so scheduling conflicts can be avoided. It is important to make an agreement to determine on what day the hearing is scheduled to start and end, and at what time sessions will begin and end every day. In the context of start date and hours to carry on the hearings, parties should consider travel time for arbitrators who come from a different country or continent to ensure arbitrators give their best attention during the hearing.

Regarding the location of the hearing, it is usually held in the seat of arbitration; however, the arbitral tribunal and the parties can select the place they consider most efficient. If an arbitral process is institutional, an institution may provide services to organize the hearing facilities and meetings. The use of video conferencing or telephone may be considered where appropriate.

B. *Participants.*

Arbitration is usually confidential, so the public is not allowed to access. In this respect, it is advisable to have a registry table out of the hearing room to verify who is attending to the hearing.

C. *Hearing Sequence.*

It is important to define the hearing sequence, such as whether arbitrators will make an opening statement or whether they want to address preliminary matters first. Then parties will make their respective opening statements, present evidence,

and each fact and expert witness will be examined, and the parties will deliver final arguments or closing statements. It is important to confirm schedules and time limits.

D. *Record of Hearings.*

Usually, a hearing is recorded. It is advisable to verify the noise at the facilities during the days that the arbitral hearings take place. If the hearings are going to take place outside of institution hearing space or arbitration centers (for example, at a hotel), it may be important to review if other events will be taking place at the same time to ensure that these events do not affect the audio recording.

Parties should make arrangements to hire audio and/or video recording services. The hearing can be also transcribed, but the digital recording will be the official record of the hearing. If agreed, the parties often make a stenographic record of the hearing.

The parties should refrain from making recording or transmissions of the proceedings and this should be made by a professional to guarantee the quality of the audio.

E. *Documents.*

Arbitrators do not have courtroom staff. Ideally, parties should provide the arbitrator with pre-marked exhibits and agree if there is going to be a set of key exhibits and how these will be shown to the arbitral tribunal and other hearing participants. At the hearing, each party should bring sufficient copies of their supporting documents, properly labeled, for the arbitral tribunal and opposing party. Likewise, tribunals may ask parties to prepare bundles of the core documents. Tribunals may request that parties prepare these bundles jointly or that each party prepare its own bundles.

In this respect, parties should consider the use electronic means, such as tablets, if participants intend to travel. If you choose hardcopy, organize exhibits into notebooks.

F. *Audiovisual Support.*

It is common that attorneys or experts use visual materials, such as power points,

tables, graphics, etc. In this respect, it is advisable to test the devices to be used in the hearing room prior to the hearing to make sure the display or the software is compatible. Also, parties should make sure high-speed Wi-Fi, photocopy and printer services are available to the arbitral tribunal or the secretary of the tribunal.

G. *Interpreters and Transcript.*

If necessary, an interpreter can be present at the hearing. Prior to the hearing, it is important to determine a simultaneous or consecutive interpretation. Sometimes, simultaneous interpreters can distract the attention so make sure they have a proper space in the room.

Also, if transcripts are to be produced, they may consider whether and how the parties will be given an opportunity to check the transcripts.

H. *Break-Out Rooms.*

If necessary, parties and arbitral tribunals can have a break-out room. These are used to set up hearing documents, any equipment, or discuss confidential matters during the breaks.

I. *Presentation of Expert Evidence.*

The tribunal may give party experts the opportunity to make a presentation, which gives experts the opportunity to explain in their own words their methodology, assumptions, and conclusions presented in their expert report. Usually, experts' presentations are lengthy, so parties should allocate enough time for their presentation and for tribunal's questions that it could have.

J. *Witness Testimony.*

It can be relevant for the tribunal to hear from the individuals directly involved in the case to understand it better and to get a feel for their concerns. Likewise, the parties may submit witness testimony in written form. A tribunal may also call a witness to testify. If a witness is unable to travel, he or she may be permitted to testify by videoconference. In this regard, parties should review the law of the seat to determine if a witness has to swear or may affirm the truthfulness of their testimony.

IV. OPENING / CLOSING STATEMENTS: KEEP IT SIMPLE

Hearings traditionally provide an opportunity for the parties to present their

opening and closing statements. The parties' decision of whether to have an opening or closing statement (or both) is a relevant point of strategy and cost analysis. Lengthy closing statements, for instance, could be deemed unnecessary if written closing pleadings are already contemplated in the procedure.

An opening statement is an opportunity to make a summary and synthesis of the case and can help focus the arbitral tribunal's attention on the key issues.[3] The specific strategy of an attorney presenting a case before a tribunal depends largely on the attorney's legal tradition, experience, and the merits of the case. The profile of the arbitrator(s) is also relevant for this strategy.

Attorney Sapna Jhangiani makes an excellent summary of suggestions for opening statements, regarding the attention span of the arbitrators, oral techniques, and general strategy.[4]

A. *Tribunals are Not Superhuman.*

Arbitrators, especially more experienced ones, have a busy agenda. They are often on several cases at the same time. Complex proceedings with thousands of documents, bundles, witness statements, and hefty submissions are deemed heavier to process for arbitrators than for counsel that filed such content. It is simply unrealistic to believe that a tribunal will be able to read and understand all the memorials and evidence prior to attending a hearing. Therefore, it is critical to present a complex case in the easiest way possible for the arbitrators to focus on the most relevant provisions and evidence of the case.

B. *Storytelling.*

Everyone loves a good story. Humans are inherently social creatures who dwell on good stories for behavior and social rules. Oxytocin, a "feel good" hormone released when hearing a story, boosts feelings like trust, compassion, and empathy. Stories are unique for building social connections, which are therefore strongly

[3] *Effective Management of Arbitration—A Guide for In-House Counsel and Other Party Representatives*, INT'L CHAMBER OF COM. (2018).

[4] Sapna Jhangiani, *Keep it Simple: Keep it Interesting*, KLUWER ARB. BLOG, Sept. 17, 2015, http://arbitrationblog.kluwerarbitration.com/2015/09/17/keep-it-simple-keep-it-interesting/?doing_wp_cron=1591243158.9364919662475585937500.

encouraged when presenting a case.

As Jonathan Gottschall aptly stated: "We are, as a species, addicted to story. Even when the body goes to sleep, the mind stays up all night, telling itself stories."[5] To persuade, attorneys must aim to bring out the "human aspect" of the story by presenting their narrative as a tale, rather than straightforward facts or boring legal provisions.

C. *Less is More*

Jörg Risse is quoted as saying, "Do you have a PowerPoint, or something to say?"[6] A lengthy Power Point presentation, with huge amounts of text will probably go unread by the Tribunal. A short, succinct presentation, explaining a complex legal problem in the simplest way, is more efficient to send a message to the Tribunal.

A long monologue, explaining your case might bore the arbitrators, too. Reading your audience by keeping eye contact and pausing from time to time can help to keep the desired attention.

V. DIRECT EXAMINATION, CROSS-EXAMINATION, WITNESS CONFERENCING

Direct examination provides a party with an opportunity to tell its story. Cross-examination is the opposing party's opportunity to show that the story is not accurate and not reliable.[7]

A direct examination is frequently substituted with written witness statements. In the case of written statements, the document itself is evidence. If the direct examination is to be conducted, the counsel should guide the witness to tell the relevant facts in an orderly chronological way, like telling a story. Usually, witnesses that provided a written testimony must only attend the hearing if the opposing counsel or the tribunal requests their presence for cross-examination or further

[5] *See* JONATHAN GOTTSCHALL, THE STORYTELLING ANIMAL: HOW STORIES MAKES US HUMAN (2012).

[6] Mentioned in Aina Hannisa's news publication at the Humboldt Universität zu Berlin website, *Workshops on oral advocacy with Prof Dr Jörg Risse*, https://www.rewi.hu-berlin.de/en/sp/angebote/master/idr/workshops-on-oral-advocacy-with-prof-dr-joerg-risse-ll-m-berkeley.

[7] *See* RAGNAR HARBST, A COUNSEL'S GUIDE TO EXAMINING AND PREPARING WITNESSES IN INTERNATIONAL ARBITRATION 97–152 (2015).

questioning from the tribunal.

Something important to bear in mind while preparing a cross examination is to be aware there are no "Wow Moments" in the cross examination, as it is depicted in American movies, such as A *Few Good Men*.[8] The purpose of a cross examination is to demonstrate the witness' testimony is not to be relied on for the purpose of the tribunal's analysis. How can this be achieved? By showing the witness' facts, as testified, are not credible or by showing incoherent statements and other factual elements that will smudge the witness' testimonies.

Also, counsel should ask questions of which he or she already knows the answer to. Asking questions to which one does not know the answer is almost never a good idea. This principle of Less is More is also relevant in the examination of witnesses.

Witness conferencing can be an alternative or addition to cross examination, which can save time and costs as it helps the tribunal to focus on and clarify certain evidential disagreements. This is especially relevant for expert witnesses, who often provide different theories on technical and evidential issues.

Witness conferencing can be suggested by the parties or the tribunal itself. Opting for witness conferencing depends on the complexity of the case and relevance of the statements.

VI. POST-HEARING BRIEFS—ASSIST THE TRIBUNAL, DON'T CONFUSE THEM

One of the primary roles of an attorney is to assist the tribunal in their decision making. Seeing your role as that of assisting the tribunal on post-hearing briefs is an effective way to get the tribunal's attention. Instead of repeating the same arguments used in previous submissions, counsel should try to summarize or remark relevant issues that occurred during the hearing.

Most arbitral rules prohibit the introduction of new claims or arguments in the post-hearing briefs. Arbitrators tend to dislike such attempts by the parties' counsel. While parties might be tempted to re-plead their strongest arguments or to sneak in new ones, the cost-benefit analysis will often speak against post-hearing

[8] Rob Reiner, A FEW GOOD MEN (1992) (Colonel Jessup (Jack Nicholson) "*You can't handle the truth*!").

submissions.[9]

VII. CONCLUSION

The need for a hearing should be considered in light of the parties' submissions, and parties and their counsel must make a cost-benefit analysis as to whether to hold an oral hearing. If a hearing does take place, it is imperative for the parties' counsel to present their case in the most effective way for the tribunal.

Parties should be prepared to support with logistics when preparing for the arbitral hearing, and they must cooperate to make the arrangements in advance. Parties have the responsibility to optimize a hearing, and this should be observed throughout the arbitral hearing in order to manage expectations, define objectives, allocate and arranging timing.

However, faster is not always better. There is no one-size-fits-all answer. The key is to ensure that the dispute resolution process is thoughtfully selected by the parties to meet their needs.

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[9] Victoria Pernt, *Efficient Arbitration – Part 3: Winning an Efficient Arbitration*, KLUWER ARB. BLOG, July 21, 2018, http://arbitrationblog.kluwerarbitration.com/2018/07/21/efficient-arbitration-part-3-winning-efficient-arbitration/?doing_wp_cron=1591244545.4975619316101074218750.

REPORT:
#YOUNGITATALKS & YAAP JOINT CONFERENCE—VIENNA
PUBLICATION OF AWARDS: PROMISING FUTURE STANDARD OR UNFORTUNATE TRANSPARENCY HYPE?

by Viktor Cserép

I. INTRODUCTION

The very first joint conference of Young ITA and the Young Austrian Arbitration Practitioners (YAAP), organized by Andreas Schregenberger, Alexander G. Leventhal, Lisa Beisteiner, and Christian Koller was held under the title: "*Publication of Awards: 'Promising Future Standard or Unfortunate Transparency Hype?'*" in Vienna on 20 February 2020, on the eve of the annual Vienna Arbitration Days.

Following introductory remarks by **Natscha Tunkel** (KNOETZL, Vienna), two panels consisting of lawyers with diverse backgrounds addressed potential advantages and concerns related to the publication of arbitral awards in commercial arbitration.

II. FIRST PANEL

The first panel, moderated by **Andreas Schregenberger** (GABRIEL Arbitration, Zurich), dealt with "*Chances and Risks*."

Ryan Manton (Three Crowns, Paris) examined some of the risks that may follow from the greater publication of awards, focusing on the preferences of users of arbitration. He noted that 73% of the respondents to Queen Mary University's 2018 International Arbitration Survey considered confidentiality to be either "very important" or "quite important", and he suggested that the greatest risk of pushing parties towards publishing more awards is that the views of those who choose, and therefore sustain, international commercial arbitration will be ignored. Dr. Manton acknowledged the possibility that users' preferences may change over time and observed that some institutions, such as the ICC following the introduction of its opt-out procedure for the publication of awards in its 2019 Note to Parties, appear to be seeking to nudge users in that direction. But he also raised the point that some of the

main arguments in favor of publishing awards raised difficult questions; for example, the argument that publishing awards would satisfy a public interest for greater transparency obscured difficult questions about who determines the public interest, especially in circumstances where some sovereign States and State-owned entities themselves appear to prefer maintaining the confidentiality of awards.

As to the *chances*, **Katia Rener** (Wenger & Vieli, Zurich) noted that publicizing awards might contribute not only to an increase in transparency in international commercial arbitration but also to a development of the law—especially with regard to specific (arbitration-related) procedural matters or the interpretation of international conventions or trade usages. Moreover, it might provide a certain degree of quality assurance by essentially holding arbitrators accountable for their decisions and subjecting them to an external "peer review". Finally, Dr Rener noted that publicizing awards might also serve an educational purpose by providing a database from which arbitrators could draw inspiration from.

III. SECOND PANEL

The second panel, moderated by **Tamara Manasijević** (ARP, Vienna) aimed to explore "*Different Perspectives on the Publication of Awards*."

From the academic perspective, **Markus P. Beham** (University of Passau) commented that a greater window into practice would be an invaluable asset, particularly in certain types of recurring factual constellations. According to Dr. Beham, the question of "representativeness" of the sample of published awards is less important than the reasoning of the individual award. He concluded by adding that, historically, it might be important to recognize that the core concerns in the development of this dispute resolution method were arbitrator selection and trust, not confidentiality.

According to **Joseph Schwartz** (WAGNER Arbitration, Berlin), *from a decision-making perspective*, the publication of commercial arbitral awards remains desirable despite the obvious challenges. While case law and legal interpretation of the respective substantive law will be available in many jurisdictions (in the form of national court decisions), the publication of commercial arbitral awards still seems

highly relevant for the development of the law with regard to the interpretation of arbitration laws and rules of procedure. Furthermore, arbitral awards would partake in the development of the substantive law, in particular in areas in which disputes are commonly resolved through arbitration. Dr. Schwartz added, however, that safeguarding a neutral and representative picture seems challenging in an environment where parties decide about the publication of awards themselves and the self-regulation through appeal proceedings does not occur.

Approaching the issue *from a client's perspective*, **Maria Gritsenko** (VEON, Amsterdam) commented that she does not see the advantages of systemic publication of arbitral awards, especially given the practical difficulties of suitably anonymizing an award. At the same time, she acknowledged that the international arbitral community (including its clients) would benefit from a wider publication of the (anonymized) decisions on issues proper to the arbitral process (such as arbitrator challenges, disclosure matters, security for costs). She added, however, that it is also important to preserve the right to disclose an award (in subsequent or connected proceedings, for example), subject to adequate control by a court.

Providing insights into *an institutional approach*, **Klaudia Dobosz** (Vienna International Arbitral Centre/VIAC, Vienna) pointed out that Article 41 of the Vienna Rules allows the Board and the Secretary General to publish anonymized summaries or extracts of awards—and other decisions of the arbitral tribunal—in journals or VIAC's own publications, unless a party has objected to publication within 30 days of service of the award. Based on this provision, VIAC was able to issue a book with a selection of 60 arbitral awards (out of 1,600 cases), detecting interesting abstracts containing (mainly) procedural as well as occasionally substantive issues that have arisen and evolved over the years 1975–2015 and which have been considered to be of great avail for the arbitration community. This publication was and is going to be—2nd edition is planned—a response to the increasing call on the part of parties, counsel and arbitrators alike for measures to ensure greater transparency in commercial arbitration proceedings in the form of enhanced accessibility of arbitral awards as well as their content and reasoning.

IV. CONCLUSION

Finally, in his closing remarks, **Christian Koller** (University of Innsbruck, YAAP co-chair) also referred to a potential competition to arbitration in the form of specialized courts and judges, which might increase in the future because of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. The publication of arbitral awards of a high standard might play a significant role in counter-balancing this competition.

VIKTOR CSERÉP (rapporteur for Young ITA/YAAP), a lawyer from Budapest, Hungary and PhD student at the University of Vienna.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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