

2023
Volume 5, Issue 2



Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration





ITA IN REVIEW

VOL. 5

2023

No. 2

TABLE OF CONTENTS

ARTICLES

YOUNG ITA WRITING COMPETITION WINNER. GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF ARBITRATION AFTER ZF AUTOMOTIVE	<i>Michael Arada Greenop & Augusto García Sanjur</i>	1
YOUNG ITA WRITING COMPETITION FINALIST. THE NEW YORK CONVENTION ON THE ENFORCEMENT OF DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES	<i>David Molina Coello</i>	44
NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES	<i>The Hon. Bernardo Sepúlveda-Amor</i>	85
ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS IMPACT ON INTERNATIONAL ARBITRATION IN INDIA	<i>Sushant Mahajan</i>	90
BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY	<i>Iván Larenas Lolas</i>	95
THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT?	<i>Dr. Üzeyir Karabiyik & Charles B. Rosenberg</i>	107

INTERVIEWS

PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS	<i>Rafael T. Boza & The Hon. Charles Brower</i>	112
---	---	-----

BOOK REVIEWS

GUÍA DE ARBITRAJE DE INVERSIÓN CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES	<i>Pilar Álvarez</i>	130
--	----------------------	-----

YOUNG ITA

#YOUNGITATALKS MEXICO AND CENTRAL AMERICA: HABILIDADES Y ESTRATEGIAS EN EL ARBITRAJE: CÓMO PRESENTAR MEJOR EL CASO	<i>Liliana Pérez Rodríguez</i>	139
---	------------------------------------	-----



ITA IN REVIEW

BOARD OF EDITORS

EDITORS-IN-CHIEF

Rafael T. Boza
Pillsbury Winthrop Shaw Pittman LLP,
Houston

Charles (Chip) B. Rosenberg
Squire, Patton, Boggs
Washington, D.C.

BOARD OF EDITORS

MEDIA EDITOR

Kelby Ballena
Allen & Overy LLP, Washington, D.C.

EXECUTIVE EDITOR

Albina Gasanbekova
Mitchell Silberberg & Knupp LLP,
New York

EXECUTIVE EDITOR

J. Brian Johns
United States Federal Judiciary,
Savannah

EXECUTIVE EDITOR

Raquel Sloan
White & Case LLP, New York

CONTENT EDITORS

Thomas W. Davis
Dentons, Frankfurt

Menalco Solis
White & Case LLP, Paris

ASSISTANT EDITORS

TJ Auner
Jones Day, Los Angeles

Matthew Brown
Houthoff, New York

Emma Bohman-Bryant
Quinn Emanuel Urquhart & Sullivan,
London

Julie Bloch
B. Cremades & Asociados, Madrid

Raúl Pereira Fleury
Ferrere Abogados, Paraguay

Katie Connolly
Norton Rose Fulbright, San Francisco

Rinat Gareev
ILF PC, Dubai & New York

Jose Angelo (Anjo) David
Attorney at Law, Washington, D.C.

Anna Isernia Dahlgren
United States Federal Judiciary, Fort
Collins

Naimeh Masumy
Energy Arbitration Review, Tehran

Jessica Sblendorio
Clifford Chance, Frankfurt

Julia Sherman
Three Crowns, Washington, D.C.

Paula Juliana Tellez
Brigard Urrutia, Bogota

Pem Tshering
Sidley Austin, Singapore

ITA in Review is

a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

© 2023 - All Rights Reserved.

BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY

by Iván Larenas Lolas

In March 2023, the Institute for Transnational Arbitration (“ITA”) held its third session in a series of conferences focusing on ESG in practice. These virtual conferences are part of the first online program series of the Americas Initiative Dialogues. The third session’s panel was composed of Vanessa Silveyra de la Garza (Director of Sustainability and Customer Service at ALEATICA) and Isabel Barba Menchen (Quality and Environmental Manager at SACYR), with Christian Conejero (Partner at Cuatrecasas, Santiago) acting as moderator. The panelists discussed Environmental, Social and Governance (ESG) factors and risks in the context of the infrastructure and construction sector. The Panel focused on how ALEATICA and SACYR have adapted their respective business strategy to sustainability practices. The Panel shared their insights and the challenges and opportunities they face in their industries, which could enlighten practitioners when ESG disputes arise on how to mitigate risks and de-escalate them.

I. INTRODUCTION

Almost two decades have passed since the seminal “Who Cares Wins” Conference¹ and sustainability, as well as ESG factors, have indeed become a strategic imperative for companies.² As a matter of fact, in today’s world, it is not enough for a product or service to just be “good.”³ Regulators and other stakeholders now demand that the product or service meet certain ESG standards.⁴

¹ The term ESG was first coined in the Who Cares Wins 2005 Conference Report entitled *Investing for Long-Term Value Integrating Environmental, Social and Governance Value Drivers in Asset Management and Financial Research*. Who Cares Wins Conference, *Investing for Long-Term Value: Integrating Environmental, Social and Governance Value Drivers in Asset Management and Financial Research* (Oct. 26, 2005).

² *EY Sustainability and ESG Leaders Share Insights on how Organizations can Embed Sustainable Business Practices into their Operations*, EY, https://www.ey.com/en_us/sustainability/esg-evolution.

³ Ari D. Mackinnon & Martin Vainstein, *The Rise of ESG Disputes and the Role of Arbitration in Resolving them*, *FINANCIER WORLDWIDE*, Dec. 2022, at 91, 92, available at https://docs.financierworldwide.com/magazine/FWDEC22_yjb748jso763_digital/#page=94.

⁴ *Id.*



Investors, as one of these stakeholders, are increasingly paying more attention to ESG standards when investing.⁵ The so-called “socially responsible investing” (“SRI”) or “sustainable investing” is indeed growing and is estimated at over \$20 trillion in AUM or around a quarter of all professionally managed assets around the world.⁶ As such, ESG standards have become vital for business success, compelling corporations to encompass non-financial interests in their operations,⁷ which nonetheless have financial relevance.⁸ Given that ESG standards are vital for business success, they require effective governance to mitigate external business risk.⁹

As both panelists acknowledge, the mitigation of these external risks through compliance with ESG policies is deeply important for the infrastructure industry. The infrastructure industry is the backbone of economic development as it sits at the very center of development pathways and is closely linked to economic growth, environmental outcomes and well-being.¹⁰ But it is no secret that it can also have a considerable impact on the environment and local communities.¹¹ Work in the infrastructure or construction sector often involves the use of natural resources, such as land and water,¹² and can result in the displacement of communities and

⁵ Jane Courtneil, *ESG Reporting Preparation Guide: What is ESG Reporting?*, GREEN BUS. BUREAU, June 2, 2022, <https://greenbusinessbureau.com/business-function/finance-accounting/esg-reporting-what-is-esg-reporting/>.

⁶ Georg Kell, *The Remarkable Rise of ESG*, FORBES, July 11, 2018, <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/>.

⁷ Barnali Choudhury, *Serving Two Masters: Incorporating Social Responsibility into the Corporate Paradigm*, 11 U. PA. J. BUS. L. 631, 652 (2009).

⁸ Kell, *supra* note 6.

⁹ Courtneil, *supra* note 5.

¹⁰ OECD, *OECD Reference Note on Environmental and Social Considerations in Quality Infrastructure* (June 2019), available at <https://www.oecd.org/g20/summits/osaka/OECD-Reference-Note-on-Environmental-and-Social-Considerations.pdf>.

¹¹ A study titled *Infrastructure for Climate Action*, published by UNOPS, UNEP and the University of Oxford, highlights that the infrastructure industry is responsible for 79% of all greenhouse gas emissions and 88% of all climate adaptation costs. UNOPS et al., *Infrastructure for Climate Action* (2021), available at https://content.unops.org/publications/Infrastructure-for-climate-action_EN.pdf?mtime=20211008124956&focal=none.

¹² Sustainable Infrastructure Tool Navigator, *Resource Efficiency: How to Reduce the Footprint of Infrastructure*, <https://sustainable-infrastructure-tools.org/resource-efficiency/>.



entire ecosystems.¹³ Therefore, and as both panelists agree, it is crucial to incorporate ESG standards in the industry since ESG policies are seen as a necessary investment to mitigate external risks.

II. INFRASTRUCTURE, ESG AND THE “LICENSES TO OPERATE”

The infrastructure industry, like other industries, is dependent on various stakeholders.¹⁴ These stakeholders form part of what Neil Gunningham referred to as the different “licenses to operate.”¹⁵ This concept encapsulates the idea that business is dependent upon and has relationships with different stakeholders that form part of the different licenses to operate.¹⁶ Therefore, to better understand corporate social responsibility (“CSR”) and ESG policies, a starting point is to stress that ESG can largely be explained by how corporations interpret and react to risks, external pressures and drivers.¹⁷

These licenses to operate are profoundly intertwined in the sense that they interact with each other. They sometimes pull in different directions, which is usually the case with the economic license,¹⁸ but they often gain strength through their interaction.¹⁹ A few examples may illustrate this point.

There is an obvious interaction between the social license, composed of social stakeholders, such as communities, consumers and activists, and the corporation’s economic license to operate. This is discussed by the panelists, as they recognize that it is crucial for their corporations to have the social license in order to properly

¹³ Korinna Horta, *Paying the Price for Development*, D+C, Aug. 20, 2020, <https://www.dandc.eu/en/article/when-people-are-displaced-make-room-large-scale-development-projects-trauma-and>.

¹⁴ Neil Gunningham, *Corporate Environmental Responsibility: Law and the Limits of Voluntarism*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 476, 480 (Doreen McBarnet et al. eds., 2007).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Neil Gunningham, *Environmental Law, Regulation and Governance: Shifting Architectures*, 21 J. ENV’T L. 179, 195 (2009).

¹⁸ Lisa Benjamin, *The Responsibilities of Carbon Major Companies: Are they (and is the Law) Doing Enough?*, 5 TRANSNAT’L ENV’T L. 353, 359 (2016).

¹⁹ Gunningham, *supra* note 14, at 482.



operate.²⁰ But if companies fail to respond adequately to the social license, aside from the economic impact such failure entails, these companies also risk a tightening of their regulatory license, as frustrated community activists usually turn to politicians and regulators for help, calling for stricter legislation and sanctions.²¹ In turn, the legal license can expand the social license by imposing mandatory ESG reporting as opposed to voluntary, market-based ESG reporting.²² This not only compels companies to adopt a more positive approach to ESG, it also allows the disclosed standards to become more consistent and comparable.²³ The disclosed standards provide social actors and other stakeholders, such as investors, banks and credit institutions, with the legal framework and appropriate standards to access information on ESG compliance.²⁴ This information is in turn used by these stakeholders not only in their decision to invest but also to grant preferential rates and better financing conditions. This is extremely important for infrastructure projects because they require considerable investment efforts and financing, thus affecting the economic license.

The aforementioned are just some examples of the interplay of the different licenses to operate. These examples help to provide context for the discussion that follows on how these companies operate in practice.

²⁰ *Id.*

²¹ *Id.* at 485.

²² Market-based reporting has been criticized for multiple reasons including: the influence of the four market-leading rating companies that compete among themselves to provide ESG metrics; the disparities of the components of ESG performance indicators; the multiplicity of ESG standard-setting initiatives, which cause “option overload” for companies; the quality of the information provided by companies; industry sector bias; and the overall failure to identify risks by the aforementioned methodologies, which can mislead investors and materially affect investment decisions. See Javier El-Hage, *Fixing ESG: Are Mandatory ESG Disclosures the Solution to Misleading ESG Ratings?*, 26 *FORDHAM J. CORP. & FIN. L.* 359 (2021). See also Timothy Doyle, *The Big Problem with “Environmental, Social and Governance” Investment Ratings? They’re Subjective*, *INVS. BUS. DAILY*, Aug. 9, 2018, <https://www.investors.com/politics/commentary/the-big-problem-with-environmental-social-and-governance-investment-ratings-theyre-subjective/>; Dennis T. Whalen, *It’s Time to Reassess ESG and Sustainability Reporting*, *NACD BOARDTALK*, Oct. 28, 2019, <https://blog.nacdonline.org/posts/reassess-sustainability-reporting>.

²³ See Cynthia A. Williams & Jill E. Fisch, *Petition for Rulemaking on Environmental, Social, and Governance (ESG) Disclosure* (Oct. 1, 2018), available at <https://www.sec.gov/files/rules/petitions/2018/petn4-730.pdf>.

²⁴ Gunningham, *supra* note 14, at 482.



III. INDUSTRY PRACTICE: HOW DOES THE INFRASTRUCTURE SECTOR INCORPORATE ESG STANDARDS?

As mentioned, understanding the inherent dynamics and interplay between the external pressures or drivers is key for comprehending how ESG initiatives are adopted. Considering the different stakeholders and including them in the discussion process is essential for determining which ESG policies to adopt.

Both panelists approach this issue through a materiality analysis. Materiality assessment is understood as “the process of identifying, refining, and assessing numerous potential environmental, social and governance issues that could affect a business, and/or its stakeholders, and condensing them into a short list of topics that inform the company strategy, targets, and reporting.”²⁵ This type of analysis enables the elaboration of effective ESG policies that incorporate and mitigate ESG risks while focusing their resources accordingly.

For Isabel Barba, the key issues identified after conducting SACYR’s materiality analysis were climate change; energy efficiency; corporate ethics; and good relations between analysts and stakeholders. Based on these three main issues, SACYR elaborated its sustainability plan to include environmental, social and governance measures. This plan includes measures such as diminishing CO2 emissions and neutralizing carbon footprint, circular economy,²⁶ increasing the number of women in leadership roles social action and investing in the development of its workers, who in turn usually prefer to work in ESG-committed companies. The plan likewise encourages all operations to abide by good corporate ethics, elaborating codes of conduct to that effect.

²⁵ KPMG, SUSTAINABLE INSIGHT: THE ESSENTIALS OF MATERIALITY ASSESSMENT (2014), available at <https://assets.kpmg.com/content/dam/kpmg/pdf/2014/10/materiality-assessment.pdf>.

²⁶ Circular economy is a model of production and consumption that involves sharing, leasing, reusing, repairing, refurbishing and recycling existing materials and products for as long as possible. This allows the life cycle of products to be extended. *Circular Economy: Definition, Importance and Benefits*, NEWS EUR. PARLIAMENT, May 24, 2023, <https://www.europarl.europa.eu/news/en/headlines/economy/20151201STO05603/circular-economy-definition-importance-and-benefits#:~:text=The%20circular%20economy%20is%20a,reducing%20waste%20to%20a%20minimum.>



Vanessa Silveyra, who describes her company as “agents of welfare,” states that ALEATICA also conducts a materiality analysis to flag key ESG issues and allocate resources and efforts accordingly. The process involves the participation of communities and other stakeholders to identify the issues that are truly relevant to those participants. As with SACYR, climate change, corporate governance and human rights surfaced as the most important matters. Ms. Silveyra stressed the importance of designing a global sustainability strategy tailored not only to the needs of the company as a whole, but also to the needs of its different business units in order to gain precision and better allocate resources to key issues. She also emphasized the importance of constructing resilient structures, adapted to climate change and severe weather phenomena which only serves to demonstrate how environmental issues such as climate change must be incorporated in the different aspects of an infrastructure company’s activities.

This inevitably leads to the conclusion that organizations can get the most benefit from their materiality analysis by using it as an opportunity to apply a sustainability lens to business risk, opportunity, trendspotting and enterprise risk management processes.²⁷ The better view, as both panelists agree, appears to be that ESG planning should be an integral part of the business, rather than a separate, isolated process.

IV. ESG-RELATED DISPUTES: WHAT TO EXPECT?

Given that the expertise of both panelists falls outside the scope of dispute resolution, arbitration and other forms of dispute resolution was barely touched upon by the panel. Nonetheless, the panelists agreed that it is in their respective company’s best interest to avoid ESG-related disputes altogether. This is not only because of the legal consequences such disputes entail, but also because nowadays, more than ever, the risk of reputational harm is tremendous. As ESG is increasingly important for different stakeholders, the importance of preventing these disputes by actively engaging in ESG practices is fundamental. Similarly, it is important for companies to responsibly report their ESG frameworks and standards in order to avoid the

²⁷ *Id.*



reputational harm that a mismatch or false information of ESG performance could cause.

Despite the fact that the panelists do not focus much on dispute resolution mechanisms, they nevertheless conclude that as the importance of ESG in corporate policies and investment decisions increases, so too will the number of disputes arising out of ESG-related issues.²⁸

Prior to briefly discussing this issue, a distinction should first be drawn between commercial arbitration and investment arbitration.

A. *Commercial Contract Claims*

One can foresee that the inclusion of ESG standards and commitments in concession bids and infrastructure contracts, especially after the pandemic, will certainly influence the number of ESG-related disputes. In this context, the panelists confirm this tendency, as they see an increasing trend in concession bids that incorporate ESG policies. For example, and as mentioned by Isabel Barba, bids today increasingly require the companies to calculate and inform the irruption of their carbon footprint, which entails not only the carbon footprint of their activities but also of the materials used in the project and the whole supply chain, including transportation. This elevates the responsibility of construction companies who now must scrutinize and consider all parts of the construction cycle.

On the other hand, companies such as SACYR and ALEATICA incorporate ESG standards in their supplier contracts, enhancing their due diligence commitments to ESG standards throughout the entire supply chain.

But contracts are not the only source of ESG commitments; legislation is also moving towards the mandatory inclusion of ESG policies. An example is the German Supply Chain Due Diligence Act, recently in force, which imposes heavy diligence obligations on companies regarding ESG standards in the supply chain.²⁹

²⁸ Holly Stebbing & India Furse, *ESG Disputes in International Arbitration*, LEXOLOGY, Dec. 1, 2022, <https://www.lexology.com/commentary/arbitration-adr/international/norton-rose-fulbright/esg-disputes-in-international-arbitration>.

²⁹ *The New German Supply Chain Due Diligence Act (LkSG) – What Needs to be Done*, RÖDL & PARTNER, Jan. 2, 2023, <https://www.roedl.com/insights/supply-chain-act-due-diligence-obligations>.



The aforementioned will certainly lead to disputes concerning novel issues of interpretation, enforceability and measurement of compliance with ESG-related provisions. It will also impact disputes relating to breaches of contract claims for non-performance of ESG-related obligations or overstated ESG-related representations or warranties.³⁰

In terms of overstated ESG representations and warranties, the issue of greenwashing³¹ is mentioned by the panelists as an attempt of some companies to capitalize on the growing demand for environmentally sound products.³² This will certainly give rise, as it already has, to disputes as well as sanctions for companies that incur in misleading statements and inaccurate reporting of their ESG policies.³³ Greenwashing can be perceived as another reason to impose mandatory ESG reporting obligations. This is because mandatory ESG reporting can further a more uniform methodology, which could overcome some of the market-based reporting shortcomings, such as the enabling of greenwashing practices.³⁴

Given the international component of most of these disputes, and as many companies now include ESG-related provisions in their contracts to operate globally, international arbitration could become the natural forum choice for the resolution of disputes with ESG components.³⁵ The fact that the parties can select arbitrators with

³⁰ Stebbing & Furse, *supra* note 28.

³¹ “Greenwashing is the act of exaggerating the extent to which products or services take into account environmental and sustainability factors. Funds and advisers that engage in greenwashing may exaggerate or overstate the environmental and sustainability practices or factors considered in their investment products or services, while labeling and marketing themselves in a manner that makes it difficult for investors to distinguish them from funds and advisers that are truly using environmental and sustainability strategies.” *Greenwashing*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/glossary/greenwashing>.

³² Josie Moore, *What is Greenwashing and what can you do About it?*, WORKFORCLIMATE, https://www.workforclimate.org/post/what-is-greenwashing-and-what-can-you-do-about-it?gclid=Cj0KQCQjwi46iBhDyARIsAE3nVrYAwT6wKi54WRPbRTcU4nxX8vQQ2qQQ3jBG0598ASWqnGVd7CeGgtYaAqPvEALw_wcB.

³³ In the United States most of these claims are under SEC Section 10(b). See Sue Choi, *ESG Metrics: Safeguard Against Greenwashing or Safe Harbor for Greenwashing?*, 14 GEO. WASH. J. ENERGY & ENV'T L. 27 (2023).

³⁴ *Id.*

³⁵ Stebbing & Furse, *supra* note 28.



experience and competence in ESG-related issues, and the fact that arbitration can respond to urgent matters that require relief through injunctions, provisional measures or emergency arbitrations, only reinforces international arbitration as an appropriate mechanism to resolve ESG-related disputes.³⁶

B. *Investment Treaty Claims*

New international investment treaties and revised, existing treaties increasingly include human rights, due diligence and environmental obligations as well as other ESG-related substantive protections.³⁷ This could certainly give rise to novel claims and defenses in Investor-State Dispute Settlement (“ISDS”), with more claims being brought by, rather than against, states.³⁸ States being entitled to bring claims (or counterclaims) against investors for ESG failures, and the dilution of investor protection where that protection conflicts with a state’s ESG objectives, are just a few examples.³⁹ Latin America, in particular, could be a point of interest, given that it is home to half of the world’s biodiversity and has seen environmental issues rise in the context of investor-state disputes.⁴⁰

Issues involving corruption, which entails a company’s good governance, have long been a part of investor-state disputes. It is not uncommon for states and sometimes investors to resort to corruption defenses or claims in ISDS. As corruption is viewed as against public policy, the issue has been raised as an illegality of the investment, as affecting the arbitral tribunal’s jurisdiction, or as resulting in a denial on the merits of the claim, if the investment was procured or tainted by corruption.⁴¹ The recent Odebrecht scandal,⁴² which occurred precisely in the infrastructure

³⁶ Mackinnon & Veinstein, *supra* note 3, at 93.

³⁷ *Id.*

³⁸ Stebbing & Furse, *supra* note 28.

³⁹ *Id.*

⁴⁰ Jack Ballantyne, *GAR Live Miami: Has the ESG Era Already Begun?*, GLOB. ARB. REV., May 27, 2022, <https://globalarbitrationreview-com.proxygt-law.wrlc.org/article/gar-live-miami-has-the-esg-era-already-begun>.

⁴¹ See ALOYSIUS P. LLAMZON, *CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION* (2014).

⁴² Odebrecht is one of the companies caught in Operacao Lava Jato, Brazil’s corruption probe into the state oil giant Petrobras. Dozens of companies acknowledged paying bribes to politicians including former president Dilma Rousseff and Michel Temer and other officials in exchange for contracts with



industry, proves it is especially vulnerable to these practices. Notwithstanding, the increased attention to ESG issues by corporations and their adoption of anti-corruption programs could mean that in the future, allegations of corruption feature less frequently in investment arbitration.⁴³

C. *Mediation and Dispute Resolution Prevention*

Given the nature of ESG-related disputes, dispute resolution boards and mediation emerge as viable, cost-effective solutions to prevent and de-escalate such disputes. On the one hand, the high and long-term impact of infrastructure projects in local communities exposes the projects to constant tensions, not only with local communities but also with other social stakeholders such as Non-Governmental Organizations (NGOs) or other interest groups. These tensions could be dramatically reduced not only by the incorporation of ESG policies, as the panelists stress, but also through mediation mechanisms that incorporate the relevant actors and help balance the various interests in a sustainable and satisfactory manner.⁴⁴ On the other hand, as Christian Conejero points out, dispute boards can also serve to prevent and resolve ESG-related disputes at an early stage. Dispute boards have been quite relevant in the infrastructure and construction industry, as their natural function is to assist parties in resolving or avoiding disputes and, ideally, preventing such disputes from escalating.⁴⁵ After all, it makes perfect business sense to avoid conflict. As both

Petrobras. Corruption cases were not limited to Brazil but also expanded to other Latin American countries where Odebrecht did construction business, such as Peru. In Peru, an arrest warrant was issued against former President Alejandro Toledo who was recently extradited back to Peru. The case gained notoriety after 2015 when the group's chief executive, Marcelo Odebrecht, was arrested and sentenced to 19 years of prison. Since then, the group's officials have admitted to various acts of corruption all over Latin America. Odebrecht was penalized for more than US \$3.5 Billion dollars globally with a US \$1.78 Billion-dollar penalty imposed under the Foreign Corrupt Practices Act ("FCPA"). Odebrecht's corruption scandal was so big that it had to change its corporate name to Novonor. See Daniel Gallas, *Brazil's Odebrecht Corruption Scandal Explained*, BBC NEWS, Apr. 17, 2019, <https://www.bbc.com/news/business-39194395>.

⁴³ Alison Ross, *We Need to Talk About ESG*, GLOB. ARB. REV., Apr. 19, 2022, <https://globalarbitrationreview-com.proxygt-law.wrlc.org/we-need-talk-about-esg>.

⁴⁴ Dr. Victoria R. Nalule, *6th ICC Africa Conference on International Arbitration*, 3 ICC DISP. RESOL. BULL. 61 (2022), available at <https://jusmundi-com.proxygt-law.wrlc.org/en/document/publication/en-6th-icc-africa-conference-on-international-arbitration>.

⁴⁵ Aceris Law LLC, *Dispute Boards and International Construction Arbitration*, ACERIS L., June 7, 2020, <https://www.acerislaw.com/dispute-boards-and-international-construction-arbitration/>.



panelists emphasize, good relations with the different stakeholders are crucial for infrastructure projects.

V. CONCLUSION

ESG, much like CSR, implies “a shift in the focus of corporate responsibility from mere profit maximization for shareholders to a broader spectrum of stakeholders, including community concerns like the protection of the environment and accountability on ethical as well as legal obligations.”⁴⁶ In that vein, ESG standards have become vital for business success. As such, today they fall within the fiduciary duties of managers, overcoming old paradigms that traditionally excluded them.⁴⁷ Today, more and more corporations are compelled to encompass non-financial interests, which nonetheless have financial relevance.

The infrastructure industry is no exception. The dialogue initiated by ITA on ESG in the practice of arbitration sheds light on the importance of incorporating ESG standards in the infrastructure and construction industry. Given the infrastructure sector’s close link with economic development and its potentially high environmental and social impact, it requires effective governance and strategic planning to mitigate external business risks by incorporating ESG standards.

Overall, this dialogue provides insights and opportunities for practitioners to better understand how ESG policies are thought out and implemented in the infrastructure industry. It also offers a window into the future. As mentioned, there is a growing demand for ESG standards in concession contracts and bids, as well as an increasing inclusion of ESG standards in construction and infrastructure contracts and a progressive inclusion of ESG-related obligations in international treaties. This

⁴⁶ Doreen McBarnet, *Corporate Social Responsibility Beyond Law, Through Law, for Law: The New Corporate Accountability*, in *THE NEW CORPORATE ACCOUNTABILITY: CORPORATE SOCIAL RESPONSIBILITY AND THE LAW* 9, 9 (Doreen McBarnet et al. eds., 2007).

⁴⁷ The traditional view, as advanced by Milton Friedman’s school of thought, compared the legal obligation of managers to stewardship for the owners of the company. Their obligation is to focus on profit maximization, constrained only by the need to comply with regulations imposing particular duties. Going beyond these particular duties would mean acting beyond their legal powers (*ultra vires*), in breach of their fiduciary duties and powers. See Milton Friedman, *A Friedman Doctrine - The Social Responsibility of Business is to Increase its Profits*, *N.Y. TIMES*, Sept. 13, 1970, <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.



certainly plants the seed for ESG-related disputes to be resolved by arbitration and other forms of alternative dispute resolution, which will grow and blossom, giving rise to novel issues. In the end, ESG in construction and infrastructure is really all about Who(ever) cares, Wins.



IVÁN LARENAS LOLÁS is a Chilean qualified lawyer, with an LL.M. in Energy Law at UCL and an LL.M. in International Legal Studies at Georgetown University Law Center. He has 10 years of experience in the field of litigation, arbitration, and dispute resolution, mainly in commercial, insurance and maritime disputes, and has worked at several prestigious Chilean law firms. He has also served as a pro-bono advisor on international law matters for various organizations. In 2023, during his LL.M. at Georgetown and as part of his training, he did an externship at King & Spalding's international disputes practice at their Washington, D.C. office. Moreover, he taught an Arbitration and ADR course as an adjunct professor at Universidad Mayor in Chile in 2020.

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

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a



free subscription to ITA's quarterly law journal, *World Arbitration and Mediation Review*, a free subscription to ITA's quarterly newsletter, *News and Notes*, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. PROGRAMS

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. PUBLICATIONS

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, *News and Notes*. All ITA members also receive a free subscription to ITA's *World Arbitration and Mediation Review*, a law journal edited by ITA's Board of Editors and published in four



issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.



TABLE OF CONTENTS

ARTICLES

- YOUNG ITA WRITING COMPETITION WINNER.
GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF
ARBITRATION AFTER ZF AUTOMOTIVE *Michael Arada Greenop &
Augusto García Sanjur*
- YOUNG ITA WRITING COMPETITION FINALIST.
THE NEW YORK CONVENTION ON THE ENFORCEMENT OF
DECENTRALIZED JUSTICE SYSTEMS' DECISIONS: A PERSPECTIVE
FROM THE EVOLUTIONARY INTERPRETATION OF TREATIES *David Molina Coello*
- NAFTA AND THE USMCA: THE SUBSTANTIAL DIFFERENCES *The Hon. Bernardo Sepúlveda-Amor*
- ENTRY TO FOREIGN LAWYERS & LAW FIRMS IN INDIA & ITS
IMPACT ON INTERNATIONAL ARBITRATION IN INDIA *Sushant Mahajan*
- BUILDING STANDARDS: ESG IN THE INFRASTRUCTURE INDUSTRY *Iván Larenas Lolas*
- THIRD-PARTY FUNDING: A TOOL TO DETER INVESTOR MISCONDUCT? *Dr. Üzeyir Karabiyik &
Charles B. Rosenberg*

INTERVIEWS

- PERSPECTIVES ON THE IRAN-US CLAIMS TRIBUNAL AFTER 40 YEARS *Rafael T. Boza &
The Hon. Charles Brower*

BOOK REVIEW

- GUÍA DE ARBITRAJE DE INVERSIÓN ARBANZA *Pilar Álvarez*
CO-EDITED BY YAEL RIBCO BORMAN AND SANDRO ESPINOZA QUIÑONES

AND MUCH MORE.

www.itainreview.org

The Institute for Transnational Arbitration
A Division of The Center for American and International Law

5201 Democracy Drive
Plano, Texas, 75024-3561
USA