2024
Volume 6, Issue 3

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 6 2024 NO. 3

TABLE OF CONTENTS

ITA IN REVIEW

BOARD OF EDITORS

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

ADDRESSING FEARS AND PET PEEVES OF INVESTMENT TREATY ARBITRATION

by Margarita Rosa Arango

I. INTRODUCTION

A. *Thesis*

The U.N. General Assembly's Resolution A/78/168 (the "Resolution") addresses several concerns about investor-state arbitration and its effects on environmental protection and human rights. The Resolution suggests that states are consistently vulnerable to Investor-State Dispute Settlement (ISDS) claims when implementing policies to mitigate climate change and protect human rights, posing a danger to their sovereignty.[1]

A primary concern stated in the Resolution is that foreign investors use investor-state disputes as a weapon to win millions (or even billions) of dollars from the host state.[2] Additionally, the Resolution indicates that International Investment Agreements (IIAs) prioritize the interests of foreign investors over the state and its internal actors, such as domestic investors and local communities.[3] Consequently, IIAs represent a risk for the state's policy agenda and its protection of human rights and the environment.[4]

It is critical to note that although investor-state arbitration is a dispute mechanism activated by foreign investors, it is established by sovereign states through treaties.[5] Therefore, states' representatives have power to negotiate these

---

[1] David R. Boyd, *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights*, A/78/168, 13 July 2023, G.A. Res A/78/168, ¶ 2 (July 13, 2023).

[2] *Id.* ¶ 1.

[3] *Id.* ¶ 12.

[4] *Id.* ¶ 14.

[5] C. L. LIM et al., INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 25, 64 (2d ed. 2021).

instruments, stating the terms and conditions for the protection of foreign investment and taking into consideration the socio-economic needs of their nations.

The underlying purpose of IIAs is to encourage foreign investment in a host state, providing the investors with stability to carry out their economic activities and protections to their private foreign investment.[6] These investment protections are intended to act as a counterbalance to the plenary power of the state. Thus, even though it is important to acknowledge the concerns raised in the Resolution about the ISDS and certain flaws the system might have, it is equally important to recognize the role that IIAs play in promoting investments, including investments that are critical to combating climate change and encouraging human rights such as the use of alternative energies.

For a state to comply with environmental obligations, it must have economic support, some of which comes from foreign investment. A strong IIA seeks to provide investors with the assurance needed to undertake substantial investments in a foreign nation.[7]

B. *Objective*

This paper addresses the main concerns about the ISDS system raised in the Resolution and critically analyzes the Special Rapporteur's arguments therein, particularly the ones related to "foreign investors using investor-state dispute settlement to seek exorbitant compensation from states that strengthen environmental protection,"[8] resulting in a "regulatory chill,"[9] to determine whether his allegations about the "catastrophic"[10] consequences of ISDS for climate and

[6] *Id.*

[7] *See* UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, at 16 (2009), https://unctad.org/system/files/official-document/diaeia20095_en.pdf; G.A. Res. 78/168, *supra* note 1, ¶ 2.

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.* ¶ 1.

environment action and human rights are sustained. Additionally, it will explain the role of the ISDS system in stimulating foreign investment and how IIAs can in fact assist states in meeting environmental and human rights obligations.

C. *Context*

The ISDS system is a conflict resolution mechanism to settle controversies arising from the alleged breach of IIAs.[11] These agreements are bilateral or multilateral treaties, through which states commit to grant certain protections and standards of treatment to foreign investments. They usually provide that qualifying investors may have recourse to international arbitration to resolve disputes arising out of the agreement.[12] In addition to IIAs, investment contracts between an investor and the state may entitle the investor to seek remedies against the host state through international arbitration.[13] Thus, the foundation of ISDS lies in international public law and contract law intending to ensure protection and reparation from wrongful acts—breach of the investment treaty or contract—by states.[14]

Investment treaty arbitration is intended to provide an international unbiased forum where foreign investors and host states[15] can settle their differences outside of local courts.[16] Like all arbitration, it is a private method of conflict resolution based on consent and the will of the parties. The state's offer to go to arbitration is in the dispute settlement provision in the IIAs, and consent is perfected when the foreign investor accepts that offer, usually by submitting a notice of claim or request for

[11] LIM, *supra* note 5, at 2.

[12] COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, *A Primer on International Investment Treaties and Investor-State Dispute Settlement* (updated January 2022), https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement.

[13] LIM, *supra* note 5, at 2.

[14] *Id.* ¶ 3.

[15] Kaj Hobér, *Investment Treaty Arbitration, and Its Future—If Any*, 7 Y.B. ARB. & MEDIATION 58, 3-4 (2015).

[16] Wanli Ma & Michael Faure, *Is Investment Arbitration an Effective Alternative to Court Litigation? Towards a Smart Mix of Litigation and Arbitration in Resolving Investment Disputes*, 48 BROOK. J. INT'L L. 1, 3 (2022), https://brooklynworks.brooklaw.edu/bjil/vol48/iss1/1.

arbitration.[17]

Each IIA sets forth various jurisdictional requirements that an investor must meet to establish the arbitral tribunal's authority to decide the case. For instance, the investor must show it is a qualifying investor with a protected investment in accordance with the applicable law in each case. Additionally, investors may need to comply with certain conditions to qualify for arbitration, such as notice requirements and negotiation periods, for the claim to proceed.

Regarding the merits, the investor bears the burden of showing that the respondent state breached the investment treaty by enacting a measure that unlawfully harmed its investment. Furthermore, investors can claim expropriation or breach of standards such as fair and equitable treatment (FET), most favored nation (MFN), or full protection and security (FPS). But in all cases, the investor must establish a breach of an international obligation as a result of the state's action.[18] Beyond that, investors need to demonstrate causation between the alleged breach of the treaty and quantifiable damage to the investment, to recover damages or receive compensation.[19]

The respondent state may raise various defenses in response to an investor's claim. One of the state's strongest defenses is that it has the right to regulate the general welfare of its territory. Consequently, respondent states might raise their legitimate and sovereign right as a defense to enact policies aimed at complying with environmental obligations or protecting human rights. For example, in the recent ICSID award of *Eco Oro v. Colombia*, the arbitral tribunal held that the environmental measures taken by Colombia to protect the Santurban ecosystem were a rightful exercise of its police powers. Thus, it dismissed the investor's claim for indirect

[17] LIM, *supra* note 5, at 95.

[18] *Id.* ¶ 276.

[19] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, ¶ 779 (July 24, 2008).

expropriation.[20]

Moreover, if the investor obtains compensation, that does not mean that the state will be forced to change its policy. In fact, arbitral tribunals try not to interfere with the exercise of sovereign powers by the host state.[21]

II. ANALYSIS OF THE MAIN CONCERNS OF THE ISDS SYSTEM RAISED BY THE SPECIAL RAPPORTEUR IN THE U.N. GENERAL ASSEMBLY'S RESOLUTION A/78/168 ON ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

In light of climate change, governments have been implementing strategies to lower carbon emissions and meet international environmental commitments.[22] These commitments involve enacting laws and regulations to limit carbon dioxide emissions, designating certain regions as protected areas,[23] and banning the extraction of natural resources such as oil, gas, and metals.[24] As these measures could impact foreign investments, there is a potential risk that investors might resort to an applicable IIA to pursue compensation through ISDS.[25]

The Resolution focuses explicitly on the impact of ISDS on climate, environmental efforts, and human rights.[26] It highlights the vulnerability of states to the threat of ISDS claims when adopting legitimate climate and environmental policies, resulting in a "regulatory chill"[27] that impedes the state's sovereignty and inhibits it from complying with environmental and human rights obligations.[28]

---

[20] Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Award, ¶ 698-99 (July 15, 2024).

[21] Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon, ICSID Case No. ARB/07/12, Award, ¶ 233 (June 7, 2012).

[22] Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada, ICSID Case No. ARB/20/52, Respondent's Counter-Memorial on Jurisdiction and the Merits, ¶ 14 (Feb. 17, 2022).

[23] Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Award, ¶ 126 (July 15, 2024).

[24] Lone Pine Resources Inc. v. The Government of Canada, ICSID Case No. UNCT/15/2, Claimant's Memorial, ¶ 154 (April 10, 2015).

[25] G.A. Res. 78/168, *supra* note 1, ¶¶ 2-3 .

[26] *Id.* at 2.

[27] An effect that results from the state's response to the threat of investment treaty claims, forcing the government to withdraw or reverse regulatory measures intended to address climate change, comply with environmental obligations or protect human rights.

[28] *Id.* ¶¶ 10, 49.

The Resolution concludes that ISDS is incompatible with human rights law and environmental compliance.[29] Furthermore, it urges states to take action to address the environmental crisis and recommends withdrawing their consent to participate in the ISDS system. The Special Rapporteur called for "specific actions that States must take" to overcome ISDS and its threat to climate, environmental and human rights issues.[30]

A. *ISDS is One-Sided and Incompatible with International Human Rights*

One concern expressed in the Resolution is that the ISDS system is one-sided and incompatible with international human rights, since IIAs assign rights only to foreign investors and responsibilities only to the state.[31] Thus, it highlights that victims of human rights violations must exhaust local remedies before going to the international realm, while foreign investors do not face such a requirement, thus creating a "justice bubble for the privileged" (foreign investors).[32] It also blames the ISDS system for prioritizing the interests of the "elite" foreign investors over domestic investors, local communities, human rights, environmental compliance obligations, and even the host state's interests.[33]

The Resolution suggests that ISDS undermines democracy when legitimate state acts are subordinated to arbitral tribunals, collegial bodies that render decisions not bound by the domestic law of the state in question.[34] Hence, ISDS represents a threat to sovereignty and police powers of the host state since arbitral tribunals are not required to apply domestic law.

The Special Rapporteur is correct that IIAs create an asymmetrical framework in which the host state is burdened with responsibilities, while the foreign investor is

[29] *Id.* ¶ 11.

[30] *Id.* at 2, ¶ 75.

[31] *Id.* ¶ 12.

[32] *Id.*

[33] *Id.*

[34] *Id.* ¶ 16.

given specific rights to engage in economic activities in certain country. However, it is important to understand the reasoning: IIAs aim to counterbalance state power, providing the investor confidence necessary to foster large-scale investment and promoting sustainable development.[35] One way in which IIAs do this is by offering a neutral and impartial forum to solve controversies through investment treaty arbitration.[36] This mechanism allows investors to seek remedies in an international venue, which is perceived to be more independent of host state influence and inter-state politics than other options, such as local courts or the diplomatic protection process.[37]

As discussed above, IIAs generally set forth the state's consent to arbitration, whereas the investor's consent comes only later with a notice or request for arbitration. Consequently, states generally lack the ability to initiate arbitration under the applicable treaty.[38] However, in some cases, it is important to recognize that states have the right to file counterclaims against the investor once the proceeding has begun.[39] Counterclaims work as autonomous claims in which the state can exercise its right of action in investment treaty arbitration.[40] Additionally, they can be used to safeguard the exercise of a state's power in regulating human rights and environmental matters, to protect the state's interest, and as a strategy to enforce domestic law.[41] Nevertheless, specific procedural and substantive requirements must be satisfied for the tribunal to assert jurisdiction over a

---

[35] Canada-Colombia Free Trade Agreement, Nov. 21, 2008.

[36] Lauge N. Skovgaard Poulsen, The Politics of Investment Treaty Arbitration, in THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION ¶ 742 (Thomas Schultz & Federico Ortino eds., 2020), https://doi.org/10.1093/law/9780198796190.003.0031.

[37] *Id.* ¶ 743.

[38] LIM, *supra* note 5, at 95.

[39] Maxi Scherer et al., *Environmental Counterclaims in Investment Treaty Arbitration*, 36 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 413, 414 (2021), https://doi.org/10.1093/icsidreview/siab006.

[40] *Id.*

[41] *Id.*

counterclaim.[42]

In *Perenco v. Ecuador*, the State filed a counterclaim, arguing that the corporation breached Ecuadorian environmental regulations during its oil extraction activities, due to inadequate oil field and equipment maintenance.[43] The tribunal focused on the environmental concerns, warning the investors about the importance of due diligence and environmental protection during the life of their investment.[44] Furthermore, the tribunal ruled in favor of Ecuador on the counterclaim, respecting its right to adjust environmental policies according to the country's needs and exercise its policy powers and recognizing the importance of environmental protection.[45]

As for the concern stated by the Special Rapporteur on the issue of ISDS being a "justice bubble for the privileged,"[46] based on the assumption that victims of human rights violations must exhaust local remedies before going to the international realm, while foreign investors do not, it is important to acknowledge that investment law does impose conditions on investors seeking to access arbitration.[47] Since states have the capacity to negotiate the IIAs, they have the power to agree on the conditions to access arbitration that suits them best, conditioning investors to meet those terms before initiating the procedure; otherwise, investors risk rejection of the claim. For instance, in *Generation Ukraine, Inc. v. Ukraine*, the arbitral tribunal held that the American investor failed to exhaust local remedies under the U.S.-Ukraine BIT, since it did not take reasonable steps to seek redress in Ukrainian courts. Therefore, the

[42] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 46, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[43] Scherer, *supra* note 39, at 430.

[44] *Id.*

[45] Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador, ICSID Case No. ARB/08/6, Award, ¶ 1014 (Sept. 27, 2019).

[46] G.A. Res. 78/168, *supra* note 1, ¶ 12.

[47] Southern African Development Community Protocol on Finance and Investment, Aug. 18, 2006, art. 28, https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Finance__Investment2006.

tribunal declined its jurisdiction over the claim.[48]

Moreover, tribunals seek to respect domestic legislation, even if they are not bound by it, since they do not want to undermine democracy or threaten the legitimate exercise of policy powers.[49] A recent case that illustrates the above is *Red Eagle v. Colombia*, in which investors argued that Colombia breached the Canada-Colombia FTA by enacting environmental measures that banned mining in the Santurban Paramo ecosystem, allegedly depriving Red Eagle from performing its economic activities in that constitutionally protected area.[50]

The tribunal concluded that the environmental measures taken by Colombia to protect Santurban ecosystem were a rightful exercise of policy powers in defense of the environment and general welfare. Therefore, the case was decided in favor of the State, acknowledging the legitimate use of sovereignty and authority to regulate.[51] Similarly, *Eco Oro v. Colombia*, which upheld that the environmental measures to protect the Santurban ecosystem did not represent an indirect expropriation of the claimant's investment.[52] Thus, it can be said that both cases safeguarded the interest and regulatory power of the state.

B. *Massive Damages Awards and "Regulatory Chill": Effects of Pro-Investor Bias in the ISDS System*

The Resolution suggests that ISDS tribunals exhibit "pro-investor bias" in their decisions; awarding large damages that can burden states and lead to "regulatory chill" where governments hesitate to exercise its policy powers. According to the text, awards are likely to result favorably to investors, bearing the state with the

[48] Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003).

[49] *See* Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 59, 70 (2009), https://doi.org/10.1093/ejil/chp004.

[50] Red Eagle v. Colombia, ICSID Case No. ARB/18/12, Request for Arbitration (March 21, 2018).

[51] Red Eagle v. Colombia, ICSID Case No. ARB/18/12, Award, ¶¶ 399-400 (Feb. 28, 2024).

[52] Eco Oro v. Colombia, ICSID Case No. ARB/16/41, Colombia's Press Release on Final Award (July 16, 2024).

responsibility to pay compensation.[53] These decisions are said to have a special impact on countries with fragile economies, leading them to deviate funds from essential policies such as human rights and environmental compliance to ISDS debt.[54]

The Resolution asserts that ISDS claims are leading to a "regulatory chill" that results from the state's response to the threat of investment treaty claims, forcing the government to withdraw or reverse regulatory measures intended to comply with environmental and human rights obligations.[55] This regulatory chill poses a barrier to states' regulatory power since governments would rather change its behavior than face ISDS disputes.

To address the issues above, it is essential to understand the role of arbitrators and how the arbitral tribunal is composed. First, in arbitration proceedings with a sole arbitrator, the parties can agree on the identity of the person they would like to appoint. If there is no agreement between the parties, an arbitral institution will typically appoint the sole arbitrator or offer a list of names for the parties to choose from, and if an agreement is reached, that person is appointed.[56] Second, if the tribunal consists of three arbitrators, each party generally chooses one arbitrator and the third is appointed by agreement of the parties or the co-arbitrators. However, if the parties do not agree on the president of the tribunal, the institution will appoint one.[57]

This appointment process of arbitrators seeks to guarantee impartiality during the proceeding. The president of the tribunal is either chosen by mutual agreement of the parties or by the arbitration center precisely to ensure unbiased awards. For that reason, it is a mistake to infer that ISDS tribunals exhibit "pro-investor bias" in their decisions. These statements challenging the legitimacy and impartiality of the

[53] G.A. Res. 78/168, *supra* note 1, ¶¶ 8, 30.

[54] *Id.* ¶¶ 8, 18.

[55] *Id.* ¶ 49.

[56] Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2.

[57] ICSID Convention, *supra* note 42, at art. 37(2).

tribunal undermines the credibility of both the individual performing as such and the ISDS system. Hence, allegations should be avoided unless supported by evidence.[58]

Furthermore, the Resolution supposes that since tribunals display "pro-investor bias" awards are usually rendered against the states. The information given by arbitration institutions, such as the International Centre for Settlement of Investment Disputes (ICSID), show otherwise. According to ICSID's caseload statistics for the period fiscal year 2023, it was found that 52% of all concluded ICSID arbitration cases resulted in decisions in favor of states.[59] The tendency remained relatively stable in the next year; based on FY 2024 caseload statistics, 51% of all concluded ICSID arbitration proceedings resulted in decisions in favor of states.[60]

Nonetheless, the Rapporteur's concern about developing countries and transition economies being easily affected by paying compensation is not wrong. According to UNCTAD statistics, about 75% of ISDS claims were brought against developing countries such as Peru, Venezuela, and Croatia. Developed country investors brought 70% of the claims.[61] Although it is important to keep in mind that both emerging economies and developed countries benefit from foreign investment flows thus, being crucial to maintain IIAs that reinforce domestic and international legal frameworks.[62]

As for the "regulatory chill" effect alluded to in the Resolution, the concern seems

---

[58] Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 482 (2008).

[59] International Centre for Settlement of Investment Disputes, *The ICSID Caseload–Statistics*, Issue 2023-2, at 13, https://icsid.worldbank.org/sites/default/files/publications/2023.ENG_The_ICSID_Caseload_Statistics_Issue.2_ENG.pdf.

[60] International Centre for Settlement of Investment Disputes, *The ICSID Caseload–Statistics*, Issue 2024-2, at 13 https://icsid.worldbank.org/sites/default/files/publications/2024-2%20ENG%20-%20The%20ICSID%20Caseload%20Statistics%20%28Issue%202024-2%29.pdf.

[61] United Nations Conference on Trade & Dev., *Economic Development in Africa Report 2021: Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth*, at 2, U.N. Doc. UNCTAD/ALDC/AFRICA/2021, U.N. Sales No. E.21.II.D.7, (2021), *available at* https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf.

[62] Brower & Schill, *supra* note 58, at 474.

to assume that arbitral tribunals interfere with states' regulatory powers and hold a pro-investor bias. However, arbitral tribunals do not have the authority to order states to change its policies. Their role is to decide whether a treaty was breached and whether the investor has suffered damages.

In fact, considering Annex 2 of the Resolution, the list of examples of ISDS claims launched in response to climate actions, it must be emphasized that from the nineteen cases identified by the U.N., only one resulted in a monetary award in favor of the investors.[63] In *Rockhopper v. Italy*, the arbitral tribunal found that Italy breached the Energy Charter Treaty by unlawfully expropriating Rockhopper's investment after enacting an environmental measure banning oil and gas exploration and contemplating no compensation to those expropriated investments. Even though the case was decided against the State, the tribunal did not order Italy to withdraw its measure but focused on compensating the investor for the breach of the treaty.[64]

In several ICSID cases, investors alleged the breach of treaty due to environmental measures adopted by the host State have been decided in favor of the states, recognizing states' exercise of regulatory power. For example, in *Urbaser v. Argentina*, the State filed a counterclaim arguing that the investors failed to fulfill their obligations concerning the right to water and environmental protection. The tribunal recognized that companies could be liable for the breach of human rights and environmental protection under international law. It asserted jurisdiction over the counterclaim and confirmed that the "right to water" was a human right under international law.[65] Furthermore, the tribunal observed that investment treaties should not be interpreted in a way that undermines a states' obligation to comply

[63] G.A. Res. 78/168, *supra* note 1, at Annex 2 (examples of ISDS claims launched in response to climate actions).

[64] Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Award (Aug. 23, 2022).

[65] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

with environmental protection and the defense of human rights. Therefore, this case reaffirms a state's right to regulate in public interest and exercise policy powers without necessarily breaching its IIA obligations.[66]

The *Phillip Morris v. Uruguay* case is another example of how the "regulatory chill" is more a myth than a reality in the ISDS realm. The investors argued that Uruguay's strict tobacco regulations violated the Switzerland-Uruguay BIT, and in response, Uruguay argued that the measures were taken in the interest of public health and to raise awareness of the dangers of smoking. The tribunal held that the measures taken were a legitimate exercise of Uruguay's regulatory power. It highlighted that those regulations, adopted in good faith and aimed to protect public welfare, did not constitute expropriation even if they affected foreign investments, thus the case was decided in favor of the State and investors were ordered to pay Uruguay's legal costs and expenses.[67]

III. PROPOSALS ON HOW INTERNATIONAL ARBITRATION CAN ADDRESS ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS CONCERNS

Throughout this paper it has been stated that IIAs are international instruments which main purpose is to create favorable conditions to encourage foreign investment in a host state and how ISDS provides an international neutral platform to settle investment disputes. In addition, it is crucial to understand the benefits of foreign investment in the host state and how it can help to comply with environmental obligations and human rights. The International Monetary Fund (IMF) focuses on the positive impacts of foreign investment in developing countries such as: 1) promoting competition in the domestic market, 2) generating profits that contribute to corporate tax revenues, and 3) transferring new technologies. Foreign investment contributes to economic growth, facilitating the flow of capital between

[66] *Id.*

[67] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, ¶ 306 (July 8, 2016).

capital-importing and capital-exporting countries.[68] This economic dynamization is a tool for states to meet compliance obligations.[69]

Foreign investment plays a fundamental role in promoting new technologies for green growth and to address environmental issues. "FDI is important for environmental technology transfer, as multinationals are usually the first to bring new environmental technologies to a country."[70] It is also essential to promote renewable energy and green technologies, which often are not accessible by low-income countries without a boost from foreign investors. Even more, when public policies are shaped to reduce carbon dioxide emissions, they create an important framework for investors to pursue environmental innovation.[71]

The Organization for Economic Co-operation and Development (OECD) recognized that foreign investment is essential to achieve sustainable development goals and recommends that governments incentivize foreign investment because it drives projects that promote community welfare and environmental protection. Other benefits include additional revenue for the host state, enhanced innovation, job creation, development of human capital, etc.[72]

Even if there are concerns about the ISDS system, it is a crucial tool to promote foreign investment that states can use to comply with environmental and human rights obligations. Since the 1990s, the use of investor-state arbitration has been increasing; by the end of the year 2020 "more than 1,104 known cases had been referred to the treaty-based ISDS mechanism."[73] Instead of discarding it, let's reform

---

[68] Prakash Loungani, *How Beneficial Is Foreign Direct Investment for Developing Countries?*, IMF Finance & Development, June 2001, https://www.imf.org/external/pubs/ft/fandd/2001/06/loungani.htm.

[69] INTERNATIONAL MONETARY FUND, *Global Trade Liberalization and the Developing Countries*, IMF Issues Brief, Nov. 2001, https://www.imf.org/external/np/exr/ib/2001/110801.htm.

[70] David Popp, *The Role of Technological Change in Green Growth*, NBER Working Paper No. 18506, at 19 (2012), https://www.nber.org/system/files/working_papers/w18506/w18506.pdf.

[71] *Id.* at 32.

[72] OECD, Recommendation of the Council on Foreign Direct Investment Qualities for Sustainable Development, OECD/LEGAL/0476, at 3 (2024), http://legalinstruments.oecd.org.

[73] *Id.* at 618.

it! UNCTAD has long promoted ISDS reforms, scholars and practitioners have been debating ways to improve IIAs, leading to proposals on how to address issues like environmental protection and human rights through dispute resolution.[74] The proposals to reform the system include different ideas such as 1) eliminating ISDS, 2) creating an ISDS tribunal, 3) establishing a court of appeals, and 4) reforming IIAs.[75]

IIAs are the core of ISDS and investment treaty arbitration; since the early 2000s, a new generation of IIAs have been signed and have been entered into force. This new generation of IIAs seeks to balance the state's regulatory powers and investor's rights, including sustainable development and human rights-oriented provisions.[76] For example, the Canada-Colombia FTA asserts in Article 815: "It is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment."[77] Consequently, the article recognizes the state's right to adopt, modify or maintain environmental measures, balancing investment protection, and regulatory power on environmental protection.

This new generation of treaties have been nourished by the debates raised by different actors of the international community and by encouraging their improvement to preserve ISDS. The Netherlands BIT was reformed in the wake of criticism over the ISDS system.[78] The draft encouraged clauses that protect and

---

[74] Herbert Smith Freehills, UNCTAD Proposes ISDS Reforms, Arbitration Notes (July 2013), https://www.herbertsmithfreehills.com/notes/arbitration/2013-07/unctad-proposes-isds-reforms.

[75] Qingjiang Kong & Kaiyuan Chen, *ISDS Reform in the Context of China's IIAs*, 36 ICSID REVIEW - FOREIGN INVESTMENT L. J. 617, 620 (2023).

[76] PETER MUCHLINSKI, NEGOTIATING NEW GENERATION INTERNATIONAL INVESTMENT AGREEMENTS: NEW SUSTAINABLE DEVELOPMENT ORIENTED INITIATIVES 42 (2016).

[77] Canada-Colombia FTA, *supra* note 35, at art. 815.

[78] Marike R. P. Paulsson, *The 2019 Dutch Model BIT: Its Remarkable Traits and the Impact on FDI*, KLUWER ARB. BLOG, May 18, 2020, https://arbitrationblog.kluwerarbitration.com/2020/05/18/the-2019-dutch-model-bit-its-remarkable-traits-and-the-impact-on-fdi/.

attract foreign investment, hence not losing sight of the main purpose of IIAs, but also promoted provisions strengthening environmental protection and human rights, such as regional and gender diversity: "the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development."[79]

Even though it has been identified the trend in which environmental protection and human rights have been incorporated into the new generation IIAs, other paths that can be explored to reform the ISDS system and enhance the protection of sustainability and human rights in investment treaties such as: 1) harmonizing the conditions to access arbitration with environmental protections and human rights, 2) redefining investment in the IIAs as to include elements of environmental sustainability and human rights, and 3) rethinking damages calculation methods.

A. *Harmonizing the Conditions to Access Arbitration with Environmental Protections and Human Rights*

Imposing constraints that must be met before going to arbitration is one potential strategy to limit investors' access to the ISDS system. As illustrated above, the most common ones are notice requirements, negotiation periods, and exhausting local remedies. What if IIAs require investors to show that their investment complies with the environmental regulations of the host state? Or that the economic activities performed in the host state contribute to sustainability and general welfare. These conditions would strengthen IIAs, promoting responsible and sustainable foreign investment.

B. *Redefining Investment in the IIAs as to Include Elements of Environmental Sustainability and Human Rights*

As previously discussed, for an arbitral tribunal to establish jurisdiction over a case, the investor must have a qualifying investment under the applicable law. Thus, the economic activity must meet the definition of "investment" given in the treaty.

[79] Netherlands Model Investment Agreement, Mar. 22, 2019, art. 6.

Therefore, states could encompass elements of social responsibility, compliance with environmental protection, and human rights in framing the definition of qualifying investment according to the IIA, compelling the tribunal to consider those elements before establishing jurisdiction over the case. Furthermore, they could require the investor to uphold the U.N. Guiding Principles on Business and Human Rights.[80]

On the other hand, framing the definition of investment to meet elements of environmental protection and human rights standards allows the state to argue the compliance of these elements as a defense, or potentially as counterclaim if the treaty enables it. Moreover, if the treaty embodies domestic law obligations, then the state may be able to raise an investor's noncompliance as defense. For instance, in *Burlington v. Ecuador*, the State prevailed on its counterclaim based on the investor's accountability for environmental damages under domestic law.[81]

C. *Rethinking Damages Calculation Methods*

Besides improving the provisions previously mentioned, states could also negotiate better methods of calculating damages. As expressed by the Rapporteur, the amount of compensation awarded by tribunals is concerning—this criticism allows governments the opportunity to address the compensated amount award when drafting their IIAs.[82] A possible course of action would be for states to include more straightforward guidance on calculating damages in their treaties. Similarly, states could agree on the maximum possible amount to be claimed through investment arbitration, considering whether the parties are countries with developed and stable economies or emerging economies. However, this would imply reviewing the international reparation system applied to international arbitration proceedings.

[80] Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04 (2011), *available at* https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[81] Scherer, *supra* note 39, at 429-30.

[82] G.A. Res. 78/168, *supra* note 1, at 2, ¶ 18.

IV. CONCLUSION

ISDS is an evolving system with room for improvement that benefits from well-informed discussions that take place within the international community and allows it to adapt to the different worldwide issues such as climate change. As expressed by the Rapporteur, it is an asymmetrical mechanism that was designed to protect primary investors and provide them with favorable conditions for foreign investment. However, states can benefit from foreign investment since it facilitates compliance obligations and dynamizes the economy of developed countries and emerging economies.

Case law demonstrates that investment treaty arbitration seeks to balance between investor protection and state regulatory power, particularly in measures for public welfare. Arbitral tribunals cannot compel states to withdraw the adopted measures in compliance with its obligations. Furthermore, ICSID statistics demonstrated that most ISDS cases are resolved in favor states. Thus, the Rapporteur's claims about the "catastrophic" impact of ISDS on climate action and human rights are unsubstantiated and lack sufficient context in investment law.

Finally, ISDS plays a crucial role in promoting foreign investments in host states; thus, rather than discarding it, the international community must work throughout constructive ideas and legal ground to strengthen and improve the system. Encouraging the reforms of IIAs is a helpful way to maintain this international forum and articulate it with present concerns such as environmental protection and human rights.

MARGARITA ROSA ARANGO is a Colombian lawyer specializing in international law and human rights, with significant professional experience in the Colombian public sector. She holds an LL.M. in International Arbitration and Business Law from American University Washington College of Law and is the co-host of the legal podcast "The Advocate Next Door," where she engages with various legal topics and fosters discussions within the legal community.

ARTIFICIAL INTELLIGENCE IN THE SELECTION OF ARBITRATORS: WHETHER TO TRUST THE MACHINE

by J. Brian Johns

I. INTRODUCTION

To the casual observer, arbitration might appear as a simple means of resolving a dispute. Two parties that are unable to resolve a disagreement ask an independent third-party to step in to find a solution for them. Viewed in this way, arbitration is not dissimilar to two friends asking a fellow patron at their local pub to settle a bet. Any international arbitration practitioner would undoubtedly dismiss such a reductive analogy as ignorant of the complexities that exist at every stage of the arbitral process. Commercial arbitration carries with it the challenges and intricacies of litigation before a court, compounded by the need for the parties to construct the metaphorical courthouse.

The ability of parties to tailor the arbitral process to the precise needs of their case is an attractive feature when placed against the one size fits all structure of domestic courts. Despite this benefit, the task of structuring an arbitration can be a daunting list of numerous significant decisions, including whether to utilize an arbitral institution, what procedural and substantive laws to apply, and where physical hearings, if needed, are to take place.

Arguably, the most important of these decisions to both the conduct and outcome of the arbitration is the selection of the arbitrator or arbitral panel.[1] As with all other decisions made during an arbitration, arbitrator selection requires parties to analyze relevant information and predict potential outcomes.[2] This process is often frustrated by a lack of available resources and data. Even when candidates are

[1] Douglas Pilawa, *Sifting through the Arbitrators for the Woman, the Minority, the Newcomer*, 51 CASE W. RES. J. INT'L L. 395, 405 (2019).

[2] Charlie Morgan, *Data Analytics in International Commercial Arbitration: Balancing Technology with the Human Touch*, 9 INSIDE ARB. 23, 23–24 (2020).

provided by an arbitral institution, specific information about how an individual has adjudicated prior cases or their arbitral practices, temperaments, and philosophies can be difficult to uncover. Regular practitioners have traditionally relied on word-of-mouth recommendations, instinct, and intuition. Less experienced practitioners, however, are often left with only the confidence that can be derived from an internet search or résumé review.

In recent years, many areas of law have benefited from technological innovations related to artificial intelligence ("AI").[3] This article will consider whether similar tools may be of value in the arbitrator selection process. It will first provide brief explanations of artificial intelligence (II) and arbitrator selection (III). The article will then consider both the benefits (IV) and areas of concern (V) related to the implementation of AI tools in identifying and selecting arbitrators. Finally, it will provide some final thoughts on how AI tools will be used by practitioners moving forward (VI).

II. WHAT IS ARTIFICIAL INTELLIGENCE?

Artificial intelligence is difficult to define, with academics and other experts offering various, often conflicting, definitions.[4] The European Commission High-Level Expert Group on Artificial Intelligence attempted to define AI as:

> systems that display intelligent behavior by analyzing their environment and taking actions—with some degree of autonomy—to achieve specific goals.
> AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots,

[3] *See* Jordan Bakst *et al.*, *Artificial Intelligence and Arbitration: A US Perspective*, 16 DISP. RESOL. INT'L 7, 12–15 (2022); Harry Surden, *Artificial Intelligence and Law: An Overview*, 35 GA. ST. U. L. REV. 1305, 1331–32 (2019); Kathleen Peisley & Edna Sussman, *Artificial Intelligence Challenges and Opportunities for International Arbitration*, 11 N.Y. DISP. RES. LAW. 35, 37 (2018).

[4] Bakst *et al.*, *supra* n. 3, at 8–10.

autonomous cars, drones or Internet of Things applications).[5]

Generally, AI encompasses technologies that automate tasks that are traditionally thought to involve cognitive ability when performed by humans.[6] At a foundational level, it is important to understand that modern AI does not actually use intelligence in the same manner as a living person, but, rather, performs complex tasks through pattern recognition and adaptation based on encoded knowledge, rules, and data.[7]

The field of AI is currently dominated by the subfield of machine-learning, which relates to the ability of a model to improve its performance automatically with time and the accumulation of greater amounts of data.[8] The ability of a machine-learning algorithm to automatically update each time it runs allows for the analytical accuracy of the model's outputs to increase as more data is analyzed.[9] Machine-learning tools often take the form of predictive models that generate predictions by recognizing patterns in large quantities of data.[10] The ability of these models is highly dependent on the quality and quantity of the data on which they are trained.[11]

III. SELECTING THE ARBITRATOR

A perceived benefit of arbitration over litigation before a court is the ability of parties to select the finder of fact and law.[12] As arbitration is a creature of contract, the method of selecting the arbitrator or arbitral panel that will ultimately decide a

---

[5] European Commission High-Level Expert Group on Artificial Intelligence, A *Definition of* AI: *Main Capabilities and Scientific Disciplines* at 1 (Dec. 2018), https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf.

[6] Surden, *supra* n. 3, at 1307–08.

[7] *Id.* at 1308; Ryan McCarl, *The Limits of Law and* AI, 90 U. CIN. L. REV. 923, 926 (2022).

[8] McCarl, *supra* n. 7, at 926, 928; Surden, *supra* n. 3, at 1311; Eliza Mik, *Caveat Lector: Large Language Models in Legal Practice*, 19 RUTGERS BUS. L. REV. 70, 77–78 (2024); *What is Machine Learning* (ML)?, UC BERKELEY SCHOOL OF INFORMATION (June 26, 2020), https://ischoolonline.berkeley.edu/blog/what-is-machine-learning/.

[9] UC BERKELEY SCHOOL OF INFORMATION, *supra* n. 8.

[10] McCarl, *supra* n. 7, at 928; Surden, *supra* n. 3, at 1311–12, 1314–15; Mik, *supra* n. 8, at 78; *Artificial Intelligence* (AI) *v. Machine Learning*, COLUMBIA ENGINEERING, https://ai.engineering.columbia.edu/ai-vs-machine-learning/.

[11] Mik, *supra* n. 8, at 78.

[12] Sarah R. Cole, *Arbitrator Diversity: Can it be Achieved?*, 98 WASH. U. L. REV. 965, 974 (2021).

dispute is dictated by the agreement of the parties. In an *ad* hoc proceeding, parties are left to their own devices to identify mutually agreeable candidates. Alternatively, parties may agree to allow an arbitral institution to administer their arbitration or to act as an appointing authority.

Arbitral institutions maintain rosters of arbitrator candidates and offer differing methods for arbitrator selection and appointment. For example, under the rules of the International Court of Arbitration of the International Chamber of Commerce (ICC), if the parties are unable to mutually agree upon an arbitrator or panel, the selection is made by the ICC.[13] In a contrasting approach, the American Arbitration Association (AAA) and International Centre for Dispute Resolution (ICDR), the international division of the AAA, use a list method for choosing an arbitrator or panel.[14] Based on party input, the institution prepares a list of potential candidates from members of its roster of arbitrators.[15] The parties are encouraged to agree on an arbitrator or arbitrators from the presented candidates.[16] If the parties cannot reach consensus, each side strikes the names of any candidates that it finds unacceptable and ranks the remaining candidates in order of preference.[17] To assist in this task, the institution provides a résumé of general information on each presented candidate. Upon receiving the parties' responses, the institution appoints arbitrators based on the party rankings in the order of mutual preference.[18]

Regardless of the method employed, arbitrator selection is among the most important steps in the arbitration process. Arbitrators bring individual and distinct

[13] ICC Arbitration Rules (2021), arts. 12–13.

[14] AAA Commercial Arbitration Rules and Mediation Procedures (2022), art. R-13; ICDR International Dispute Resolution Procedures (2021), art. 13.

[15] AAA Commercial Arbitration Rules and Mediation Procedures (2022), art. R-13(a); ICDR International Dispute Resolution Procedures (2021), art. 13(6).

[16] AAA Commercial Arbitration Rules and Mediation Procedures (2022), art. R-13(a); ICDR International Dispute Resolution Procedures (2021), art. 13(6).

[17] AAA Commercial Arbitration Rules and Mediation Procedures (2022), art. R-13(b); ICDR International Dispute Resolution Procedures (2021), art. 13(6).

[18] ICDR International Dispute Resolution Procedures (2021), art. 13(6).

philosophies, experiences, temperaments, and procedures that will have an impact on how the arbitration is managed and the resolution of the dispute. A practitioner must consider all the objective and subjective characteristics they wish to be reflected in the person or persons responsible for deciding their case, while simultaneously accounting for how the opposing party is performing the same task.[19] In doing so, the practitioner attempts to gain as much information as possible about potential candidates through reviewing professional backgrounds, surveying colleagues for their experiences and opinions, researching prior publicly available awards, reading relevant published articles and public speeches, identifying potential grounds for disqualification, and conducting interviews.[20] This process can be time consuming, expensive, and hindered by a lack of available information. Despite these obstacles, the significance of selecting the correct arbitrator for the case mandates that practitioners perform all due diligence and decide, informed by all available information.

IV. BENEFITS OF AI IN ARBITRATOR SELECTION

In recent years, legal practitioners have become increasingly familiar with AI tools in the context of case management and certain common activities, including document review, legal research, and case analysis.[21] For example, attorneys, litigation funders, and other interested parties use AI to predict outcomes and the likelihood of success in pursuing litigation.[22] In the courtroom, judges are utilizing predictive machine-learning algorithms trained on past crime data to assess criminal defendants' potential risk of recidivism, flight, and danger to the community to better inform bail and sentencing decisions.[23]

One could assume that similar tools might be adopted for the job of arbitrator

[19] Pilawa, *supra* n. 1, at 405–06.

[20] *Id.*

[21] Bakst, *supra* n. 3, at 12–15.

[22] Surden, *supra* n. 3, at 1331–32; Peisley & Sussman, *supra* n. 3, at 37.

[23] Surden, *supra* n. 3, at 1332–33.

selection because the task is heavily reliant on analyzing data to predict which individual or individuals will provide the best chance of success on a case. In fact, the AAA-ICDR recently announced the beta launch of AAAi Panelist Search, a generative AI-powered panelist selection tool, to assist the institution in preparing lists of arbitrators.[24] The AAA-ICDR boasts that the new tool will improve "its ability to conduct broader and deeper searches across the AAA-ICDR Roster for potential candidates."[25]

For the individual practitioner, the most enticing benefit from utilizing AI in the selection process is the promotion of efficiency and a reduction of cost. An AI model trained on arbitrator data, such as academic and professional backgrounds and prior awards and writings, would be capable of identifying potential candidates based on case specific information much faster than a human attorney. The model might also be able to eliminate candidates for potential conflicts that would not be obvious to a human sifting through arbitrator résumés and word-of-mouth recommendations. In doing so, practitioners could reach a well-informed, data-driven decision much more efficiently than through traditional means.

The use of AI tools in the selection of arbitrators might broaden the pool of candidates considered. In adopting an independent system trained on data from multiple sources, a practitioner is no longer limited to only those candidates with which he or she is familiar, that were provided by an institution, or that were recommended by a colleague. Reliance on the tool could eliminate, or reduce, the influence of bias, either conscious or unconscious, on the practitioner's valuation of candidates. The implementation of AI tools might also eliminate some barriers, such as differing languages, that might have otherwise impaired consideration of a potential arbitrator candidate.

---

[24] AAA-ICDR *Launches New AAAi Panelist Search to Enhance Panelist Selection with AI Technology* at 1, AAA-ICDR (Oct. 10, 2024), www.adr.org/sites/default/files/document_repository/Press-Release_AAA_Launches_AAAi%20Panelist_Search_AI_Technology.pdf.

[25] *Id.*

V. CONCERNS OF AI IN ARBITRATOR SELECTION

As with any nascent technology, the benefits of AI tools must be considered against their shortcomings. In the case of arbitrator selection, the use of AI tools presents two significant questions. First, in a field in which confidentiality is viewed as a major benefit, does the lack of available public information impair the reliability and accuracy of a predictive model? Second, whether the adoption of an AI model would undermine current efforts to address other problems with arbitrator selection, specifically efforts to broaden and diversify the pool of arbitrators.

Machine-learning models are reliant on the availability of training data. As more data is analyzed, the model returns more accurate and reliable results. The limited availability of data is a major hurdle to the use of AI in international commercial arbitration.[26] Unlike with international investor-state arbitration cases and disputes before international bodies employing arbitration-like dispute resolution methods, international commercial arbitration is traditionally a confidential process and awards and orders are rarely published or made available in an unredacted form, if at all.[27] Some efforts have been made to collect and curate data on arbitrator procedural practices and individual user experiences through initiatives such as *Arbitrator Intelligence*,[28] *Dispute Resolution Data*,[29] and Global Arbitration Review's *Arbitrator Research Tool*.[30] The value of the data offered by these services is somewhat limited because it largely relies on surveys completed by individual arbitrators and practitioners and information voluntarily released by arbitration providers. Data of this nature often lacks contextualization and is susceptible to reflecting the biases of those that provide the data.

---

[26] Peisley & Sussman, *supra* n. 3, at 37.

[27] *Id.*

[28] ARBITRATOR INTELLIGENCE, https://arbitratorintelligence.vercel.app/.

[29] DISPUTE RESOLUTION DATA, https://www.disputeresolutiondata.com/.

[30] *Arbitrator Research Tool*, GLOBAL ARBITRATION REVIEW, https://globalarbitrationreview.com/tools/arbitrator-research-tool.

Confidentiality of awards is the norm in international commercial arbitration and even when data is made publicly available, it is often incomplete. For example, the ICC publishes awards in partnership with the legal database Jus Mundi.[31] However, only information pre-approved by the parties is made available for publication and other information is redacted.[32]

It is not uncommon for arbitrators to issue unreasoned final awards, with the parties choosing to forego the cost of a full draft with discussion of the arbitrator's reasoning. In such instances, the ultimate outcome of an arbitration is known, but how the arbitrator weighed evidence and reached the result is left a mystery.

Arbitral panels also present a challenge because their awards are often the result of unseen compromise. This coupled with the relative rarity of dissenting opinions in international commercial arbitration[33] can make it difficult, if not impossible, to attribute a particular result or philosophy to a single member of the panel.

Another concern with the adoption of AI tools in arbitration is the potential to further perpetuate existing biases and to weaken efforts to expand the pool of appointed arbitrators. International arbitration has been criticized for its corps of commonly appointed arbitrators not adequately reflecting the ethnic, racial, and gender makeup of the community as a whole.[34] The multiple factors contributing to this problem are beyond the scope of this article, but relevant for the purposes of this discussion is the behavior of clients and counsel.[35] Practitioners that regularly practice in the area of international arbitration are prone to relying on personal experience and personal relationships in selecting candidates that might be

[31] *Publication of ICC Arbitral Awards with Jus Mundi*, ICC, https://iccwbo.org/dispute-resolution/resources/publication-of-icc-arbitral-awards-jus-mundi-not-icc-publication/.

[32] *Id.*

[33] *See Dissenting Opinions and Why They Should be Tolerated*, ARBITRATION JOURNAL (Mar. 12, 2019), https://journal.arbitration.ru/analytics/dissenting-opinions-and-why-they-should-be-tolerated/.

[34] Cole, *supra* n. 12, at 969.

[35] *See* Pilawa, *supra* n. 1, at 430.

sympathetic to a particular argument or defense.[36] Practitioners and clients that are less accustomed to international arbitration practice often place considerable weight on arbitrator experience and show a preference for former judges, experienced litigators, and arbitrators with name recognition.[37] Because minorities are traditionally underrepresented among judges, senior lawyers at major law firms, and business executives, they are appointed to arbitrator roles comparatively less than older, white, western males.[38] The limited number of diverse appointments in the past impacts AI tools in the present. An AI model is limited by the quality of its data, and the majority of existing data on which AI models might be trained was generated by non-diverse arbitrators. This introduces the potential for AI models to develop biases toward white and male candidates.[39]

Further limiting the ability of AI models to consider diversity is that the data that does exist often lacks necessary identification information. Diverse representation can involve a wide range of characteristics, including, but not limited to, gender identity, race, ethnicity, age, religion, national origin, sexual orientation, language, disability, veteran status, and socioeconomic status. The use of these criteria in the selection of an arbitrator is only possible if the data is available for the AI model to analyze. Because professional résumés and biographies are often focused on education and professional accomplishments, an AI model would be unable to reliably account for other criteria that a party might consider relevant.

The lack of information is a major hinderance to the use of AI in arbitrator appointments. There is simply no central repository of information for AI models to draw upon, and the information that is available is often incomplete or self-serving to the individual or institution by which it was prepared. In the absence of large

---

[36] Peisley & Sussman, *supra* n. 3, at 37.

[37] Cole, *supra* n. 12, at 984–85.

[38] *Id.*; Deborah Rothman, *Gender Diversity in Arbitrator Selection*, DISP. RES. MAGAZINE 22, 25 (Spring 2022).

[39] *See* Hunter Cyran, *New Rules for New Era: Regulating Artificial Intelligence in the Legal Field*, 15 CASE W. RES. J. L., TECH, & INTERNET 1, 31–35 (2024); Amy Cyphert *et al.*, *AI Cannibalism and the Law*, 22 COLO. TECH. L. J. 301, 304–06 (2024).

quantities of quality data, the advantage that AI tools can provide over traditional arbitrator selection methods is minimal.

VI. CONCLUSION

As with other areas of law and life, AI tools will continue to become common place in the practice of international arbitration. Practitioners and arbitrators will undoubtedly use AI in conducting research, managing discovery, reviewing documents, and drafting submissions and awards. It remains to be seen whether AI will have a significant impact on the selection of arbitrators. At this time, the lack of publicly available data presents a major weakness to any machine-learning model designed to identify qualified candidates or predict outcomes. Modern models cannot replace the experience and insight of seasoned practitioners or correct for existing institutional deficiencies, but with technological improvements and the accumulation of greater quantities of available data on which to train predictive models, it is reasonable to expect that AI tools will be regularly utilized in the near future in the selection of arbitrators.

J. BRIAN JOHNS holds an LL.M. from American University Washington College of Law in International Legal Studies with specializations in International Arbitration, International Business Law, and International Organizations. He is currently serving as a senior law clerk for a United States federal judge.

GLOBAL RESOLUTION HUB FOR ENERGY DISPUTES: EDAC'S VISION OF LEADERSHIP AND FUTURE

by Süleyman BOŞÇA

The Energy Disputes Arbitration Center (EDAC),[1] established in 2020, has rapidly gained recognition as a global arbitration center dedicated to resolving disputes specific to the energy sector. Considering the complexity and dynamic nature of the energy industry, the EDAC serves as a tailored solution platform designed to address the unique needs of this field. Having taken significant steps toward its goal of leadership in energy arbitration within a short period, the EDAC aims not only to resolve disputes but also to shape the future of arbitration in the energy sector.

The EDAC's most distinguishing feature lies in its sector-specific approach to managing arbitration processes. The energy industry encompasses a wide range of activities, including international energy investment agreements, oil and gas projects, renewable energy initiatives, nuclear energy projects, infrastructure development, and energy trade. Disputes arising in these areas often require high-level technical knowledge and legal expertise. To address these demands, the EDAC has developed an arbitration model that encompasses not only legal aspects but also technical and commercial dimensions. This approach ensures the continuity of energy projects while contributing to the preservation of commercial relationships between parties.

The EDAC's uniqueness stems from its panel of arbitrators who possess expertise in energy law, international arbitration, and the technical intricacies of the energy sector. These arbitrators are equipped to handle complex cross-border disputes, delivering balanced decisions that account for diverse legal systems and commercial practices. The panel's in-depth knowledge of specific areas, including oil and gas projects, renewable energy initiatives, nuclear energy projects, infrastructure investments, and energy trade distinguishes the EDAC from other arbitration centers.

[1] EDAC, https://arbitrationcenter.org.

Additionally, the arbitrators' expertise in innovative topics, such as energy market regulations, carbon certificates, and energy storage technologies, enables the EDAC to provide swift and effective solutions to intricate disputes.

Shortly after its establishment, the EDAC began resolving significant disputes. Notably, two major cases were adjudicated before the EDAC, both stemming from international agreements. These cases have demonstrated the EDAC's capacity to manage complex cross-border disputes with neutrality and expertise. Both disputes were successfully resolved, further strengthening the EDAC's reputation as a reliable arbitration center.

The EDAC places great importance on international collaborations to bolster its role within the global arbitration community. Its cooperation agreements with international arbitration centers and energy organizations have expanded its global influence and reinforced its international presence. Furthermore, the EDAC fosters cooperation and knowledge exchange among stakeholders in the energy sector through seminars, workshops, and training programs.

The EDAC is committed not only resolving existing disputes but also to shaping the future of arbitration in the energy sector. To achieve this, it plans to develop specialized arbitration solutions for emerging fields, such as renewable energy, carbon markets, and energy storage, while adapting to the digital transformation of the energy world by integrating technology-driven solutions into arbitration processes. Innovative approaches, such as online hearings, AI-assisted dispute analysis, and digital evidence management, are part of the EDAC's vision to modernize arbitration procedures.

The EDAC is also committed to contributing to global sustainability goals within the energy sector. By organizing carbon-neutral events and supporting solutions aligned with ESG (Environmental, Social, and Governance) criteria, the EDAC aims to mitigate the environmental impact of energy projects. This sustainability-focused approach positions the EDAC not only as an arbitration center but also as an institution contributing to the sustainable development of the energy industry.

In a remarkably short time, the EDAC has made significant strides toward becoming a global leader in sector-specific arbitration, leveraging its expertise, impartiality, and innovation. Its successful resolution of international energy disputes, expanded international partnerships, and innovative solutions tailored to the energy industry highlight the EDAC's potential to be a key player in energy arbitration today and in the future. As the energy sector continues to evolve rapidly, the EDAC remains a driving force, guiding and shaping this transformation.

SÜLEYMAN BOŞÇA, the founder and managing partner of BOSCA Law Firm, graduated from Ankara University in 2001. Mr. Boşça, who completed his Master's Degree in Private Law, is also continuing his PhD in Energy Law. He completed the Energy Law Certificate Program organized by the Banking and Commercial Law Research Institute in 2005. Süleyman presented papers in many national and international meetings and symposiums in the field of energy law and also gave lectures in this field. He has taken an active role in the preparation, negotiation, and management of many contracts, from energy supply contracts to EPC contracts and dispute resolution process in the energy sector. He is currently Chairman of the Energy Law Research Institute, Chairman of the Energy Efficiency Association Ankara Branch, Africa Coordinator Vice President and Chairman of the Turkey-Seychelles Business Council of the Foreign Economic Relations Board (DEIK), member of the Turkish National Committee of the World Energy Council and Member of the African Energy Chamber. He has experience in the fields of energy law, commercial and corporate law, mergers and acquisitions, project finance, sports law, public procurement contracts and law, intellectual property law.

INSIGHTS ON REASONING OF ARBITRAL AWARDS AND THE RIGHT TO A FAIR HEARING
THE ITA REPORTERS ROUNDTABLE

by Csilla Andrea Mate

I. INTRODUCTION

On November 22, 2024, the *ITA Arbitration Report* unveiled its latest initiative, the *ITA Reporters Roundtable*, a virtual webinar series designed to foster dialogue on critical global developments in international arbitration. The panel was led by co-managing editors Monique Sasson, founder of DeliSasson and arbitrator with Arbitra International, who has particular expertise in international investment law, and Dr. Crina Baltag, a Professor of International Arbitration at Stockholm University, member of the Board of the SCC Arbitration Institute, chair of the ITA Academic Council and qualified attorney-at-law, who has over 20 years of extensive practice in various aspects on international dispute resolution, as well as private and public international law.

The session featured a distinguished panel of ITA Reporters, including Damian Sturzaker (Marque Lawyers), Maria Beatrice Deli (DeliSasson), and Nicholas Fletcher KC (4 New Square Chambers). Moderated by Monique Sasson and Crina Baltag, the discussion delved into several pivotal issues, including the right to a fair hearing in arbitration, the enforcement of arbitral awards, and the adequacy of reasoning in arbitral decisions. The panel also explored whether parties could waive their right to a reasoned award, a question which continues to provoke legal debate.

The *ITA Reporters Roundtable* also highlighted timely topics recently addressed by national courts decisions, including significant rulings by the Singapore High Court in cases such as *Federal Republic of Nigeria v. Process & Industrial Developments*

Limited ("*Nigeria v. P&ID*");[1] *A v. B and Others*;[2] and *Danieli & C. Officine Meccaniche S.p.A. and Danieli Malaysia Sdn. Bhd. v. Southern HRC Sdn. Bhd.*, ICC Case No. 22174/CYK/PTA ("*Danieli* case").[3] These decisions have underscored critical concerns about balancing procedural fairness, transparency, and the efficiency of arbitration proceedings.

This article provides key insights into the significant rulings and issues currently shaping international arbitration. It then further examines the consequences of an arbitrator's failure to provide reasons for their decisions and explores whether recent court cases offer any guidance on this matter.

II. RIGHT TO A FAIR HEARING AND REASONING OF THE AWARD

A. *Introduction: Ensuring the Right to a Fair Hearing in Arbitration*

The right to a fair hearing is a cornerstone of procedural justice in arbitration and is vital to ensuring both the legitimacy of the arbitral process and the enforceability of awards. As Gary Born, leading commentator has noted, this principle mandates that parties be treated equally and afforded a full opportunity to present their case, thus serving as a foundation for the integrity of the arbitral process.[4] Its consistent application safeguards against both bias and procedural irregularities.[5]

This right is embedded in several authoritative legal instruments. For example, Article 18 of the UNCITRAL Model Law guarantees equal treatment of parties and their right to be heard, described by Holtzmann and Neuhaus as "the cornerstone of due process protections in arbitration".[6] The New York Convention, through Article V(1)(b), similarly permits the refusal of enforcement of an arbitral award in instances

---

[1] Federal Republic of Nigeria v. Process & Industrial Developments Limited ("Nigeria v. P&ID") [2020] EWHC (Comm.) 237.

[2] A v. B and Others [2024] H.K.C.F.I. 751.

[3] Danieli Malaysia Sdn. Bhd. v. Southern HRC Sdn. Bhd., ICC Case No. 22174/CYK/PTA.

[4] *See* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2167 (2d ed. 2014).

[5] *Id.*

[6] HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 552 (1989).

where one of the parties was not able to present its case.[7]

Moreover, while primarily addressing judicial proceedings, Article 6(1) of the European Convention on Human Rights has influenced arbitral practices, particularly within Europe. Franz T. Schwarz and Christian W. Konrad highlight in their commentary, *The Vienna Rules*, on arbitration in Austria that this provision, which guarantees a fair trial, is increasingly referenced to align arbitration with principles of procedural fairness.[8]

Additionally, the International Bar Association's Rules on the Taking of Evidence in International Arbitration provide practical guidance to ensure fairness during the presentation of evidence. For example, Jeffrey Waincymer emphasizes that these rules act as a framework for balancing procedural rigor with flexibility in international disputes.[9]

These legal provisions reflect the importance of maintaining procedural fairness in arbitration, not only to secure the integrity of awards but also to reinforce the legitimacy of arbitration as a preferred method of dispute resolution. During the panel discussion certain cases, such as *Nigeria v. P&ID*, served to highlight the practical implications of these legal provisions, demonstrating the evolving standards of fairness in international arbitration.

B. *Case Summary: Nigeria v. P&ID – The Arbitration and English Court Challenge*

Regarding this matter, during the round table, the most relevant cases were debated, including *Nigeria v. P&ID*.[10]

In his remarks, Nicholas Fletcher KC emphasized that the right to a fair hearing is a cornerstone of international arbitration, which ensures that both parties have an

---

[7] *See See* Convention on the Recognition and Enforcement of Arbitral Awards ("New York Convention"), art. V(1)(b), Jun. 10, 1958, 330 U.N.T.S. 3.

[8] *See* FRANZ T. SCHWARZ & CHRISTIAN W. KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA 110 (2009).

[9] *See* JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 749 (2012).

[10] Federal Republic of Nigeria v. Process & Industrial Developments Ltd ("Nigeria v. P&ID") [2020] EWHC (Comm) 237 (Eng.).

equal opportunity to present their case and the tribunal gives due consideration to all arguments raised. Related to this right, in the *Nigeria v. P&ID* case, Nigeria alleged that it had been denied a fair hearing during the arbitral proceedings. The Nigerian government contended that the tribunal had failed to properly address several key defenses, particularly allegations of fraud in the formation of the underlying Gas Supply and Processing Agreement ("GSPA"). Nigeria further argued that the arbitral tribunal's failure to consider these claims violated its right to procedural fairness, a fundamental principle under both Article 18 of the UNCITRAL Model Law and Article V(1)(b) of the New York Convention.

Nigeria's challenge before the English courts was grounded in the lack of procedural fairness, particularly with respect to the tribunal's handling of the fraud allegations, which were central to Nigeria's defense. These allegations were centered on claims that P&ID had fraudulently induced the government to enter into the GSPA. Nigeria argued that this issue was not adequately addressed by the tribunal, thus depriving the Government of a fair opportunity to present its case.

Despite rejecting allegations of bribery against Nigeria's legal team, the judge criticized the arbitral process, citing delays, lack of legal engagement, and failure to address important legal questions during the arbitration. The judgment also raised broader questions about the fairness of arbitration proceedings, particularly in cases involving significant sums and state parties, emphasizing the need for more intervention from tribunals in such cases.

The case further prompted discussions about the role of tribunals in addressing evidentiary issues and ensuring competent submissions, as well as the implications of a tribunal raising legal arguments that were not initially presented by the parties. The case also highlighted the challenges faced by tribunals in cases involving complex issues, corruption, and large-scale financial stakes.

During the roundtable discussion on the case and its implications, several thought-provoking questions were raised by Nicholas Fletcher KC, prompting a deeper consideration of the complexity of the right to a fair hearing and the potential

consequences of its breach. Amongst the most significant questions posed were: How would a tribunal's active pursuit of arguments not raised by the parties or their counsel impact the fairness of the proceedings? And, if a tribunal initiates a question or issue of law, does this constitute a matter the tribunal has been asked to determine, or is it outside the scope of its mandate?

The issues raised above highlight the fundamental importance of fairness in arbitral proceedings. As Born rightly points out, "if the arbitral tribunal is not listening, then no opportunity to be heard really existed".[11] An essential element of the right to be heard under Article 34(2)(a)(ii) of the Model Law, as well in other contexts, is the opportunity to comment on evidence or arguments introduced in the arbitral proceedings by a counter-party or by the arbitral tribunal.[12] "Failure to permit a party the opportunity to provide such comments can in principle constitute grounds for the annulling or denying confirmation of the resulting award."[13]

III. THE TRIBUNAL'S ROLE IN RAISING ISSUES AND THE CONSEQUENCES OF FAILING TO PROVIDE REASONS FOR AN AWARD

The role of an arbitrator in identifying and addressing key issues during an arbitration is both a matter of procedural integrity and a legal obligation to ensure fairness. A tribunal must carefully balance its proactive involvement with respecting the autonomy of the parties, ensuring that its interventions are within the permissible bounds of the arbitration process.

A. *The Tribunal's Right and Obligation to Intervene*

An essential question in international arbitration that was also raised during the panel discussion by Damian Sturzaker is whether the tribunal has the right—or even the obligation—to intervene when it believes that a key point is not being adequately addressed by the parties. In responding to this question, during the panel, the well-known principle that an arbitrator's primary duty is to render an enforceable award

[11] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3515 (3d ed. 2021).

[12] *See id.*

[13] *See id.*

was highlighted. This inherently includes the obligation to provide reasons for the award.[14]

Damian Sturzaker explored the understanding of what constitutes adequate reasoning in arbitral awards. This issue is often addressed in arbitration literature by, such as Born, where it is discussed that the reasoning must reflect the tribunal's evaluation of the evidence and arguments presented, ensuring procedural fairness and clarity.[15] As such, there is a clear duty for arbitrators to ensure that the proceedings are fair, and this includes the possibility of actively guiding the parties to properly present their case. Other prominent scholars, such as Nigel Blackaby in Redfern and Hunter's treatise, have noted that arbitrators are responsible for managing the process and ensuring that it is not derailed by procedural or evidentiary failures. The tribunal is therefore expected to act with due diligence and to raise concerns about missing points at an early stage, whether through case management conferences or otherwise.[16]

However, while it is open to a tribunal to invite submissions on specific issues, the question arises whether it should also raise new lines of argument or address points that have not been put in issue by the parties. The *Nigeria v. P&ID* case serves as a key example in this regard. In that case, Nigeria argued that the arbitral award should be set aside due to a failure to address certain key points or to explain the rationale behind certain decisions.[17] The tribunal's intervention—or lack thereof—was a central issue in the court's review of the award, with the English High Court emphasizing that an award must be grounded in clear reasoning, and the outcome of this case may thus have implications for future proceedings.[18]

---

[14] *Id.* at 3656.

[15] *See* BORN, *supra* note 11, at 3632.

[16] *See* NIGEL BLACKABY KC ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 150 (6th ed. 2015).

[17] *See Nigeria v. P&ID* [2020] EWHC at 237.

[18] *See id.*

B. *The Limits of Tribunal Intervention*

The tribunal's role in questioning witnesses, experts, and counsel is also a critical area where the limits of intervention need to be considered. Tribunals have the right to ask questions and ensure that the evidence is properly presented, which may include requesting further clarification or documentation. However, the scope of such intervention should remain within the procedural framework set by the parties and the arbitral rules.[19] As noted by numerous scholars, while tribunals can request specific evidence or raise concerns about the sufficiency of the factual record, they should avoid introducing entirely new arguments or evidence that were not previously raised by the parties.[20] This is particularly true when such interventions could be perceived as altering the balance of the proceedings or introducing new lines of dispute without consent.

Conversely, a tribunal's failure to exercise its right to ask pertinent questions or to raise potential issues early in the process can also have significant consequences. As an illustrative example, in the context of the *Nigeria v. P&ID* case, Nigeria's arguments that certain issues were not adequately addressed by the tribunal highlighted the importance of proactive engagement from the outset. The tribunal's failure to raise critical issues led to concerns about due process, especially when it became evident that significant points were not part of the initial scope of the arbitration.[21] Taken together, the tribunal's right to intervene must be carefully balanced to avoid issues of due process through lack of intervention or the introduction of new arguments or evidence not put forth by the parties to the proceedings.

C. *The Role of Reasons in the Arbitration Award*

Another significant topic raised was whether parties can waive the requirement

[19] *See* BORN, *supra* note 11, at 3527–28.

[20] *See* BORN, *supra* note 11, at 3527–28.

[21] *See Nigeria v. PI&D*, [2020] EWHC 237.

for the arbitrator to provide reasons and thereby relieve the arbitrator of this burden. This issue is tied to the principle of party autonomy, which allows parties to define procedural aspects of arbitration, as recognized in Article 19 of the UNCITRAL Model Law. However, courts have often underscored that reasoned awards are critical for enforceability and judicial review, suggesting that waiver could be problematic in certain jurisdictions and have a direct impact on the enforceability of an arbitral award.

The provision of reasons in arbitral awards is essential for upholding principles of natural justice, was underlined by Damian Sturzaker during the panel. The requirement for arbitrators to provide reasons for their decisions is essential to maintaining fairness and transparency in the arbitral process. For instance, Born emphasizes that an award lacking sufficient reasoning risks being set aside under frameworks like the UNCITRAL Model Law.[22] Some courts have annulled awards where it appears from the text of the award that the arbitrators have not considered the parties' arguments, reasoning that this constitutes a denial of the parties' opportunity to be heard, even though a better approach would be to analyze awards of this character under the category of unreasoned awards, rather than seeking to infer a denial of an opportunity to be heard.[23]

Most national laws, such as the English Arbitration Act 1996, mandate that awards must contain reasons unless the parties agree otherwise.[24] Conversely, in the United States, arbitrators are generally not required to provide reasons unless explicitly stipulated in the arbitration agreement.[25] This highlights the variability in legal standards and the impact of party autonomy on this requirement across different jurisdictions.

---

[22] *See* BORN, *supra* note 11, at 2523.

[23] *See id.* at 2536.

[24] *See* English Arbitration Act 1996, c. 23, § 52(4) (Eng.).

[25] *See* U.S. Federal Arbitration Act. 9 U.S.C. § 201, et seq." as a primary source that U.S. law does not require a reasoned award in international arbitrations; United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598–99 (1960).

Institutional rules like those of the ICC[26], LCIA[27], and SCC[28] typically require reasoned awards. However, these rules allow parties to opt out if the parties agree. The obligation to provide reasons often flows from a combination of the arbitration agreement, institutional rules, and the national law governing the arbitration. This hierarchy underscores the interplay of party autonomy and institutional frameworks in determining procedural requirements.

Most jurisdictions and institutional rules also permit parties to waive the requirement for a reasoned award. While waiving this requirement can enhance efficiency and reduce costs, it limits the ability to challenge the award for procedural defects. As noted by scholars, where statutory language allows, arbitration legislation should be interpreted to permit parties to agree to unreasoned arbitral award.[29] Furthermore, where parties have so agreed, an unreasoned foreign award should be recognized, even if local law in the judicial enforcement forum typically requires reasoned arbitral awards in domestically-seated arbitrations.[30]

D. *Failure to Provide Adequate Reasons in Arbitral Awards – The Case of* A v. B *in Hong Kong*

The Hong Kong Court of First Instance, in A *v.* B [2024] H.K.C.F.I. 751, refused to enforce an arbitral award, citing inadequate reasoning as grounds for setting it aside.[31] The case involved a franchise dispute where the respondents argued that the sole arbitrator failed to substantiate key conclusions on the governing law, termination date and enforceability of a non-compete covenant. Justice Chan by carefully considering the award stated that it "would be contrary to public policy to enforce

[26] *See* ICC Rules of Arbitration (2021), art. 32(2).

[27] *See* LCIA Arbitration Rules (2020), art. 26.2.

[28] *See* SCC Arbitration Rules (2021), art. 42(1).

[29] *See* BORN, *supra* note 11, at 3296.

[30] *Id.*

[31] *See* A *v.* B, [2024] HKCFI 751. Readers of the award, namely the parties themselves, should understand how and why the tribunal reached its conclusion on a particular issue, in the context of how relevant issues had been argued before the tribunal.

and recognize the Award when those important issues, which the parties were entitled to expect to be addressed in the Award, were not in fact addressed or explained."[32]

The judgment aligns with established Hong Kong jurisprudence, where "as found in *A v B HCCT* 40/2014, 15 June 2015, it is fundamental to concepts of fairness, due process and justice, as recognized in Hong Kong, that key and material issues raised for determination, either by a court or the arbitral tribunal, should be considered and dealt with fairly,"[33] which mandates that arbitrators adequately address core issues raised during the proceedings while allowing flexibility in the depth of the reasoning provided. Justice Chan clarified that failing to state reasons is distinct from failing to address every argument raised, a critical distinction recognized in international arbitration practices.[34]

The principle highlighted in this context mirrors findings in ICSID annulments, where failure to state the reasons is the second most frequently invoked ground (i.e. where a party sought to annul an award in at least 115 proceedings relying on this ground[35]), which as the roundtable noted was upheld in 11 cases. As noted in the *ICSID Annual Review of Annulments* 2023, the high threshold for annulment based on reasoning failures demonstrates the general deference to arbitral awards in international practice.[36]

This decision underscores the shared responsibility of arbitrators, counsel, and arbitral institutions to uphold procedural integrity and ensure transparent reasoning. It also highlights the rare but impactful role of inadequate reasoning as a ground for

[32] A *v.* B, [2024] HKCFI 751 at ¶ 34.

[33] *Id.*

[34] *See* A *v.* B, [2024] HKCFI 751 at. ¶ 35.

[35] ICSID ANNUAL REVIEW OF ANNULMENTS (2023), at 95, *available at* https://icsid.worldbank.org/sites/default/files/publications/Background_Paper_on_Annulment.pdf.

[36] *See id.* at. 90–95.

annulment or non-enforcement under frameworks like the UNCITRAL Model Law[37] and the New York Convention.[38] Particularly, we can conclude that in cases involving public interest or state entities, robust reasoning is crucial for maintaining the legitimacy and enforceability of awards.

IV. PROCEDURAL MISSTEPS AND PUBLIC POLICY VIOLATIONS. LEGAL PERSPECTIVES IN *DANIELI* CASE

The *Danieli v. Southern HRC* case,[39] highlights critical issues in international arbitration, particularly regarding procedural fairness, the protection of due process rights and the strict observance of arbitral mandates. This judgment reflects the ongoing judicial scrutiny over how arbitration processes align with fundamental principles of justice and the expectations of parties in high-stakes disputes. The underlying arbitration was conducted under ICC rules and the award was reviewed by the Italian Court of Appeal in Trieste, and underscores the impact of a tribunal's deviation from the agreed terms of reference on the validity and enforceability of arbitral awards. During the ITA Roundtable, Maria Beatrice emphasized the tribunal's failure to consult the parties regarding a critical remedy—the restitution of a steel plant—and how this omission raised issues of due process and public policy.

A. *Breach of Due Process and Equal Treatment*

The tribunal's decision in *Danieli* to order the return of the steel plant, without consulting the parties or including it in the terms of reference, deprived the parties of their right to present defenses, thus violating due process under UNCITRAL Model Law which provides that "each party shall be given a full opportunity of presenting his case."[40] Under Italian law, namely in the Code of Civil Procedure,[41] this failure to

---

[37] *See* UNCITRAL, Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (2008) ("UNCITRAL Model Law"), art. 34(2)(a)(ii).

[38] *See* New York Convention, art. V(1)(e).

[39] *Danieli & C. Officine Meccaniche S.p.A. and Danieli Malaysia Sdn. Bhd. v. Southern HRC Sdn. Bhd.*, ICC Case No. 22174/CYK/PTA.

[40] UNCITRAL Model Law, art. 18.

[41] *See* Italian Code of Civil Procedure (2023), Art. 840 para. 3 "(2) the party against whom the award is invoked was not informed of the appointment of the arbitrator, of the arbitration proceedings or was

respect procedural fairness provides grounds for refusing recognition or enforcement of the award, aligning with Article V of the New York Convention. This generally covers cases where the arbitral tribunal has improperly decided issues not submitted to it by the parties, or the tribunal grants remedies that no party had requested. This principle later was affirmed in the *Danieli* case by the Trieste Court of Appeal,[42] which emphasized that procedural fairness is integral to public policy.

B. *Tribunal Acting Ultra Petita*

In the *Danieli* case, the tribunal exceeded its mandate by addressing issues not submitted by the parties, contravening the principle of *ultra petita*. While broad "catch-all" clauses in the terms of reference allow tribunals discretion, it is essential that such clauses must still respect party autonomy and procedural fairness. The tribunal's decision in the *Danieli* case to mandate restitution of the plant, absent any prior discussion, violated these principles. This aligns with the interpretation of the New York Convention (Article V(1)(c)) and has been explored in cases such as *Hebei Import & Export Corp. v. Polytek Engineering Co.* [1999] H.K.C.F.A. 40, in which tribunals have exceeded their mandate by ruling on claims not raised by the parties.[43]

C. *Violation of Public Policy*

The tribunal's failure to notify the parties about the potential remedy of restitution also breached public policy under Article 840 para.3 (5) of the Italian Code of Civil Procedure, "the award has not yet become binding on the parties or has been annulled or suspended by a competent authority of the State in which, or under the law of which, it was rendered,"[44] which protects the right to due process. Public policy violations, including procedural irregularities, have been grounds for refusal of

otherwise unable to present its case during the proceedings; (3) the award decided upon a dispute that was not contemplated in the compromise or the arbitration clause, or fell outside the limits of the compromise or the arbitration clause."

[42] *See* Danieli & C. Officine Meccaniche S.p.A. and Danieli Malaysia Sdn. Bhd. v. Southern HRC Sdn. Bhd., ICC Case No. 22174/CYK/PTA, Trieste Corte di Appello (App.), 4 agosto (2023) (It.).

[43] *See* Hebei Import & Export Corp. v. Polytek Engineering Co., [1999] H.K.C.F.A. 40.

[44] Italian Code of Civil Procedure (2023), art. 840 para. 3 (5).

enforcement in Italian case law. As an illustrative example, in *Danieli*, the tribunal's failure to consult the parties and its lack of clarity on logistical and financial responsibilities for the plant's return contributed to the unenforceability of the award.

D. *Procedural Oversight and Institutional Scrutiny*

Arbitral awards must also comply with the form requirements set forth in the parties' arbitration agreement.[45] Additionally, in certain jurisdictions, national arbitration legislation imposes mandatory form requirements that override the less demanding form requirements set forth in institutional arbitration rules.[46] Some institutions have amended their rules to reflect additional procedural safeguards and institutional scrutiny of awards. For example, the most recent version of the ICC rules mandates that terms of reference and draft awards undergo a scrutiny to ensure procedural compliance.[47]

Noncompliance with the form requirements set forth in institutional rules may expose the arbitral award to annulment or non-recognition on the grounds that the parties' agreed arbitral procedures were not complied with.[48] However, it is only in an exceptional case where even material noncompliance with a form requirement has a sufficiently serious effect on the arbitral process which will warrant either annulment or non-recognition of an award.[49] In instances where there is no additional scrutiny by an institution, such as in the *Danieli* case, the failure of institutional oversight allowed procedural lapses to undermine the award's validity.[50] Enhanced review by arbitral institutions may have avoided such a result and could

[45] *See* BORN, *supra* note 11, at 3288.

[46] *Id.*

[47] ICC Rules of Arbitration (2021), arts. 23 and 33.

[48] *See* BORN, *supra* note 11, at 3288.

[49] *See id.*

[50] *See* Danieli & C. Officine Meccaniche S.p.A. and Danieli Malaysia Sdn. Bhd. v. Southern HRC Sdn. Bhd., ICC Case No. 22174/CYK/PTA ¶ 38–39.

bolster the validity of future arbitral awards by identifying and addressing the tribunal's failure to consult the parties.

Taken together, the *Danieli* case underscores the vital importance of procedural fairness and the integrity of arbitral proceedings. Arbitrators must act within their mandate, respecting the agreed terms of reference, while arbitral institutions must rigorously oversee adherence to these principles. Institutional scrutiny of arbitral awards further reduces the risk of noncompliance with such form requirements.[51]

V. CONCLUSION

The tribunal's role in raising and addressing key issues is crucial to the integrity and fairness of the arbitral process. While arbitrators have the discretion to invite submissions and raise concerns about unaddressed issues or gaps in the parties' submissions, their interventions must remain within the procedural framework agreed upon by the parties. Failure to adequately intervene and to provide reasons for decisions can have significant legal consequences, as demonstrated by the *Nigeria v. P&ID* case. The requirement for reasoned awards is not merely a procedural formality but a safeguard for transparency, accountability and the enforceability of arbitral awards. As the arbitration community continues to evolve, the need for arbitrators to engage early, manage the process proactively, and provide clear reasons for their decisions remains a cornerstone of fair and effective dispute resolution.

CSILLA ANDREA MATE is an accomplished legal professional with an international academic background and extensive practical experience. She is currently pursuing an LLM in International Commercial Arbitration Law at Stockholm University, while serving as a Research Assistant for Wolters Kluwer and the Institute for Transnational Arbitration. Additionally, Andrea is a Young ITA Regional Contributor for Central and Eastern Europe. Andrea is a qualified lawyer and a member of both the Bucharest Bar in Romania and the Swedish Bar Association as an EU Lawyer in Sweden. Her professional journey includes significant roles, such as Junior Lawyer at KPMG Legal Romania, where she specialized in mergers and acquisitions, corporate

[51] *See* BORN, *supra* note 11, at 3289.

law, and regulatory compliance. In this capacity, she managed complex legal processes, including due diligence, contract negotiations, and client representation before courts and public authorities. Andrea also served as Legal Counsel in Transfer Pricing Services at KPMG Romania. Her academic credentials include a Master's Degree in International and Comparative Business Law, a Bachelor's Degree in Law, and a Bachelor's Degree in the Economy of Commerce, Tourism and Services, all obtained from Babeș-Bolyai University in Romania.

ROCKS AND HARD PLACES: THE PREDICAMENT OF ARBITRATORS IN INVESTOR-STATE DISPUTE SETTLEMENT IN TIMES OF CLIMATE CHANGE

by Danielle Attwood

I. INTRODUCTION

The threat posed by climate change is significantly disrupting the international investment landscape. No field synthesizes this tension quite like investor-state dispute settlement ("ISDS"). Few facets of ISDS are currently, or are likely to remain, untouched by climate change. It impacts ISDS from the types of disputes arbitrators hear to the way investment arbitration itself is practiced. There has been significant academic focus on assessing the suitability and appropriateness of utilizing ISDS to handle the challenges posed by climate change.[1] This article, however, emphasizes the extent to which investment arbitrators are responding to the heightened legitimacy crisis brought on by climate change. The perception of regulatory chill is at the core of the tension, as the awareness that the ISDS system has undue power over public policy matters grows (section II). Although investment arbitration has always been a "field of tension, oscillating between conflicts and cooperation,"[2] the challenges posed by climate change are altering the interplay between the needs of states and foreign investors (section III). Against the backdrop of intensifying climate change, some investment arbitrators have sensed the urgency for self-correction by taking steps to address the system's legitimacy crisis (section IV). Ultimately, while the world's ability to combat climate change hangs on public policy

[1] *See, generally,* KYLA TIENHAARA, THE EXPROPRIATION OF ENVIRONMENTAL GOVERNANCE: PROTECTING FOREIGN INVESTORS AT THE EXPENSE OF PUBLIC POLICY (2009); Gauthier Vannieuwenhuyse, *Exploring the Suitability of Arbitration for Settling ESG and Human Rights Disputes*, 40 J. INT'L ARB. 1 (2023); Yulia Levashova, *Role of Sustainable Development in Bilateral Investment Treaties: Recent Trends and Developments*, 1 J. SUSTAIN. FIN. & INV. 222 (2011).

[2] Emmanuel Gaillard, *Sociology of International Arbitration*, 31 ARB. INT'L 1, 17 (2015) (quoting Narasimhan Anand & Mary R. Watson, *Tournament Rituals in the Evolution of Fields: The Case of the Grammy Awards*, 47 ACAD. MGMT. J. 59, 61 (2004)).

and business interests,[3] investment arbitrators must recognize their role in ensuring that international law adapts to climate commitments.

II. LEGITIMACY CRISIS & REGULATORY CHILL

Initiatives such as UNCITRAL's Working Group III recognize that ISDS is not above criticism and, from some perspectives, is in the midst of a legitimacy crisis.[4] The historical context of ISDS is at the root of this legitimacy crisis.

Comprised of a network of over 3,300 international investment agreements ("IIAs"), including bilateral investment treaties ("BITs") and free trade agreements ("FTAs"), ISDS creates a system of decentralized arbitration between host states and foreign investors.[5] The bulk of IIAs provide for arbitration according to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention"),[6] with others heard under the umbrella of institutions like the Permanent Court of Arbitration (PCA) and the International Chamber of Commerce (ICC).[7]

ISDS was originally intended to foster "democratic accountability and participation . . . and the protection of rights and other deserving interests."[8] It was a product of international cooperation developed in a post-WWII effort to move

---

[3] *See* Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals*, 48 VAND. J. TRANSNAT'L L. 1285, 1289 (2015).

[4] *See generally* UNCITRAL Working Grp. III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)*, U.N. Doc. A/CN.9/935 (May 14, 2018), https://documents.un.org/doc/undoc/gen/v18/029/59/pdf/v1802959.pdf.

[5] Tarald Laudal Berge & Axel Berger, *Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity*, 12 J. INT'L DISP. SETTLEMENT 1, 4 (2021).

[6] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[7] *See* Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 REV. LITIG. 267, 282 (2012) (referencing *About ICSID*, ICSID, https://icsid.worldbank.org/About/ICSID).

[8] Benedict Kingsbury & Stephan Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest—the Concept of Proportionality*, 75 INT'L INV. L. & COMP. PUB. L. 97, 75 (2010).

away from "gunboat" diplomacy and create an independent, depoliticized dispute resolution mechanism between capital-importing states and foreign investors.[9] These arrangements were considered mutually beneficial. Foreign investors gained rights that they could assert directly against host states to protect their investments. These IIAs took investment disputes out of the domestic court system, avoiding the perception of the inherent judicial bias favoring states. In theory, host states receive an uptick in foreign direct investment and reap the rewards of economic development and globalization in return for granting foreign investors these IIA rights.[10]

These agreements were relatively uncontroversial between the 1960s and 1990s. Harsher commentators have cast ISDS as a replacement for dysfunctional national courts in countries perceived to have a weaker rule of law.[11] However, there was a shift in the late 1990s, as investors began to use ISDS mechanisms against industrialized countries rather than less developed countries.[12] This transition loosely correlates with the boom in ISDS claims which began towards the end of the last millennium.[13]

This boom has resulted in the ISDS system undergoing a "delayed but acute teenager's crisis,"[14] and has heightened awareness of the impact of ISDS over states' public policies—particularly climate policies—via a concept called "regulatory chill". The phenomenon refers to when a state defers regulating in a certain area to avoid

---

[9] Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, *in* 3 THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 211, 316 (Shaheeza Lalani & Rodrigo Polanzo Lazo eds., 2015).

[10] *See* Kyle Dylan Dickson-Smith & Bryan Mercurio, *Australia's Position on Investor-State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?*, 40(2) SYDNEY L. REV. 213, 218 (2018).

[11] *See* Thomas Schultz & Cédric Dupont, *Investment Arbitration: Promoting the Rule of Law or over-Empowering Investors? A Quantitative Empirical Study*, 25 EUR. J. INT'L L. 1147, 1149 (2014).

[12] *Id.*

[13] Malcolm Langford, Daniel Behn, & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 307–08 (2017).

[14] Katselas, *supra* note 9, at 369.

an investment tribunal later finding them in breach of their IIA commitments and, crucially, liable to foreign investors for damages. The phenomenon is thought to have pervasive consequences on state policies.[15] Emblematically, the development of investment arbitration has been compared to a "freight train barreling down a steep and treacherous hill,"[16] which states have been accused of jumping on board without fully appreciating the speed, or obligations, they have accrued.[17]

Research has attempted to answer the question of whether regulatory chill exists. For instance, Tarald Laudal Berge and Axel Berger found that regulatory chill exists, but the extent to which it impacts a state is not a one-size-fits-all problem.[18] They found that the regulatory response to ISDS can occur at varying stages of the arbitration process. The chill might be anticipatory (pre-arbitration), responsive (based on a threat or initiation of arbitration), or precedential (post-arbitration).[19] Moreover, they found that there is a stronger tendency of regulatory chill when the state has a higher bureaucratic capacity, as these states are likely to develop vetting processes to account for potential ISDS risks.[20] According to Berge and Berger, "uncertainty over having to pay monetary awards under pending ISDS claims may influence respondent states' regulatory behaviour," especially when states have well-developed bureaucratic processes capable of identifying risks to regulation and communicating those risks across relevant government branches.[21]

Seemingly in response to the growing apprehension of regulatory chill, some

---

[15] Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat*, 3 W.J. LEGAL STUD. 1, 1 (2013).

[16] Katselas, *supra* note 9, at 315.

[17] Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551, 551 (2018).

[18] Berge & Berger, *supra* note 5, at 3.

[19] *Id.* at 7-8.

[20] *Id.* at 1; *see also* Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENV'T L. 229, 234 (2018).

[21] Berge & Berger, *supra* note 5, at 3.

states have slammed the breaks on the runaway ISDS train. States such as India, Indonesia, South Africa, Bolivia, Ecuador, Venezuela, and recently Honduras have denounced the ISDS system.[22] Other states have slowed their entrance into such agreements. In 2012, fewer BITs were entered into than in any of the previous 25 years.[23] While partly explained by oversaturation and the development of more regional trade and investment agreements, this also implies a growing recognition that BITs may be less beneficial to states than initially anticipated. States have also drafted modern investment agreements to incorporate greater regulatory considerations.[24] How these newer IIAs are interpreted depends on the disposition of investment arbitrators. Finally, other states have excluded ISDS from their investment agreements altogether.[25]

These legitimacy concerns have been growing against the backdrop of escalating climate tensions, with some hypothesizing that climate change-related regulations may become the poster child for chilled policy areas.[26] According to the Intergovernmental Panel on Climate Change (IPCC), investment arbitration leads to "countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels."[27] Illustratively, according to Elizabeth Meager, New Zealand has

---

[22] *See* Sarah Z. Vasani & Nathalie Allen, *No Green without More Green: The Importance of Protecting FDI through International Investment Law to Meet the Climate Change Challenge*, 5 EUR. INV. L. & ARB. REV. 1, 7 (2020); Pia Acconci, *The Integration of Non-Investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?*, *in* GENERAL INTERESTS OF HOST STATES IN INTERNATIONAL INVESTMENT LAW 165, 174 (Giorgio Sacerdoti ed., 2014); *Honduras Denounces the ICSID Convention*, ICSID (Feb. 29, 2024), https://icsid.worldbank.org/news-and-events/communiques/honduras-denounces-icsid-convention.

[23] Katselas, *supra* note 9, at 316.

[24] *See* Crina Baltag, Riddhi Joshi, & Kabir Duggal, *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 38(2) ICSID REV. 381, 398 (2023) (referencing Netherlands Model Investment Agreement, art. 7 (2019)).

[25] *See* Luke Nottage, *Australia's Ambivalence Again Around Investor-State Arbitration: Comparisons with Europe and Implications for Asia*, 39 ICSID REV. 320, 321 (2024) (stating that Australia has taken to avoiding ISDS mechanisms in more recent treaty negotiations).

[26] TIENHAARA, *supra* note 1, at 17.

[27] *Climate Change 2022: Mitigation of Climate Change* at 1499, Working Group III Contribution to the Sixth Assessment report of the Intergovernmental Panel on Climate Change (2022),

moderated its approach to phasing-out fossil fuel production due to the potential threat of ISDS claims.[28] This highlights the perceived effect of regulatory chill stemming from governments accounting for the risk of environment-related ISDS claims in their law-making.[29] In this way, ISDS avoidance may become embedded or institutionalized into state decision processes. There is also the case of cross-border regulatory chill, which may occur when investors strategically launch ISDS claims in jurisdictions where states have adopted progressive public interest policies (such as the environment) in a thinly veiled attempt to delay other states from implementing similar regulations.[30] The ISDS claims by Philip Morris against Australia and Uruguay for tobacco packaging regulation have been cited as examples of foreign investors attempting to stimulate cross-border chill.[31] New Zealand's postponement of similar plain packaging laws for tobacco products until the ISDS claims were finalized demonstrates the effectiveness of the technique.[32] As well as environmental regulatory chill, historical anecdotal evidence indicates that states hesitate to regulate issues of corporate social responsibility and health to avoid costly investment arbitration awards.[33] Both areas are intertwined with climate change action.

The diffusion of this tension corresponds with the increase in disputes with

---

https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf (emphasis added) (internal citation omitted).

[28] Elizabeth Meager, *Cop26 Targets Pushed Back under Threat of Being Sued*, CAPITAL MONITOR (Jan. 14, 2022), https://capitalmonitor.ai/institution/government/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/ ('The climate ministers of Denmark and New Zealand have admitted to *Capital Monitor* that the threat of investor-state lawsuits has prevented their governments from being more ambitious in their climate policies."); *see also* Kyla Tienhaara et al., *Investor-State Dispute Settlement: Obstructing a Just Energy Transition*, 23 CLIMATE POL'Y 1197, 1212 (2023).

[29] *See* Tienhaara, *supra* note 20, at 233; Jess Hill, *ISDS: The Devil in the Trade Deal*, ABC (July 25, 2015), https://www.abc.net.au/radionational/programs/backgroundbriefing/isds-the-devil-in-the-trade-deal/6634538 (discussing the concern over ISDS in Australia).

[30] Tienhaara, *supra* note 20, at 238.

[31] *Id.*

[32] *Id.*

[33] Baltag, Joshi, & Duggal, *supra note* 24, at 17-18.

environmental considerations being submitted to investment arbitration. From 2011 to 2020, over 150 disputes of this nature have been submitted to investment arbitration, up from 30 cases between 1970 and 2011.[34] Clearly, investment arbitrators increasingly face environmental issues.[35]

III. TENSIONS: PULL & PUSH OF INVESTORS

With the rise of environment-related ISDS claims, the system has seen changes in the behavior of states and foreign investors, which impact the nature of disputes brought before investment arbitrators. Briefly, investors are bringing claims based on environmental policies that they argue violate standards of investment protection,[36] such as phasing out nuclear energy,[37] revoking mining licenses[38] or withdrawing investment incentives for developing renewable energies.[39] Foreign investors may claim that a state has failed to uphold its climate change obligations according to international or domestic requirements.[40] As for states, there has been a rise in environmental counterclaims against foreign investors.[41] These are discussed below.

A. *States*

As noted in section II above, states have taken notice of regulatory chill, and two significant responses have been to initiate environmental counterclaims against foreign investors and employ new treaty drafting techniques.

---

[34] Laurent Gouiffès & Melissa Ordonez, *Climate Change in International Arbitration, the next Big Thing?* 40 J. ENERGY & NAT. RES. L. 203, 216 (2022).

[35] Katselas, *supra* note 9, at 316.

[36] Gouiffès & Ordonez, *supra* note 34, at 219.

[37] *See*, *e.g.*, Vattenfall AB v. Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, ¶ 8 (Aug. 31, 2018).

[38] *See*, *e.g.*, Lone Pine Res. Inc. v. Canada, ICSID Case No. UNCT/15/2, Final Award, ¶ 2 (Nov. 21, 2022).

[39] *See*, *e.g.*, Infrastructure Servs. Luxembourg Sà.r.l v. Spain, ICSID Case No. ARB/13/31, Award, ¶ 5 (June 15, 2018).

[40] Gouiffès & Ordonez, *supra* note 34, at 217.

[41] *Id.* at 218.

1. Counterclaims

States have initiated environmental counterclaims against foreign investors, reversing the typical one-directional flow of obligations from the states to foreign investors. In doing so, states are using ISDS as a sword rather than merely a shield.[42] Commentators note that this offensive action by states may act as a deterrent against foreign investors bringing claims.[43] Alternatively, counterclaims provide an opportunity for investment arbitrators to reduce the quantum of damages by setting off the initial claim with the cost of environmental harm.[44] Ecuador's counterclaims in *Perenco Ecuador Ltd. v. Ecuador*[45] and *Burlington Resources Inc. v. Ecuador*[46] are prime examples of how states may use ISDS to address climate change-related issues.[47] In these disputes, the foreign investors were held responsible for environmental damages to the Ecuadorian Amazon to the tune of over $50 million combined, offsetting some of the damages they were awarded.[48] Counterclaims in ISDS are a relatively novel phenomenon, but, when successful, they demonstrate an increasing willingness by investment arbitrators to consider the environmental effects of foreign investments.[49]

2. Treaty Drafting

Where new IIAs have entered into force or existing agreements are modified,

---

[42] Gian Maria Farnelli, *Investors as Environmental Guardians? On Climate Change Policy Objectives and Compliance with Investment Agreements*, 23 J. WORLD INV. & TRADE 887, 888 (2022).

[43] Diego Mejía-Lemos, *The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility*, 32 REV. EUR., COMP. & INT'L ENV. L. 334, 336 ¶ 6 (2022).

[44] *Id.* at 336.

[45] Perenco Ecuador Ltd. v Ecuador, ICSID Case No. ARB/08/6, Award (Sept. 27, 2019).

[46] Burlington Res. Inc. v. Ecuador ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).

[47] *See* Mejía-Lemos, *supra* note 43, at 336.

[48] Lucy Greenwood, *The Canary Is Dead: Arbitration and Climate Change*, 38 J. INT'L ARB. 309, 317 (2021).

[49] *See* Aven v. Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶¶ 738-47 (Sept. 18, 2018) (while the counterclaim was dismissed, largely due to deficiencies in its formulation, the tribunal found there was "no substantive reasons to exempt foreign investor of the scope of claims for breaching obligations under Article 10 Section A DR-CAFTA, particularly in the field of environmental law").

states have taken innovative approaches to treaty language to protect their regulatory autonomy while still attempting to attract foreign investors.[50] In particular, significant efforts have been expended to enshrine a "right to regulate,"[51] including specifically the environment.

Traditionally, states have attempted to preserve the right to regulate in preamble clauses. Preambles can be helpful because they indicate the intention of the states at the time of contracting. As per article 31 of the Vienna Convention on the Law of Treaties,[52] preambles form part of the overarching context for interpreting a treaty and may be deemed part of a treaty's non-binding objects.[53] For example, in its preamble, the Finland-Zambia BIT (2005) references the States' environmental policies in agreeing that "objectives can be achieved without relaxing health, safety and environmental measures of general application[.]"[54] A more recent example is the preamble of the Singapore-Myanmar BIT (2019) in which the parties reaffirmed their "right to regulate and to introduce new measures, such as health, safety, and environmental measures relating to investments in their territories in order to meet legitimate public policy objectives[.]"[55] While using preambles as an interpretative guide is a well-established practice, some tribunals however have found that the object and purpose of a treaty can derogate from its preambular intentions.[56] Such

---

[50] Christina L. Beharry & Melinda E. Kuritzky, *Going Green: Managing the Environment through International Investment Arbitration*, 30 AM. U. INT'L L. REV. 383, 389 (2015).

[51] Baltag, Joshi, & Duggal, *supra* note 33, at 3.

[52] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[53] *See* J. ROMESH WEERAMANTRY, TREATY INTERPRETATION IN INVESTMENT ARBITRATION 3.91-92 (2012).

[54] Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey* at 29, OECD Working Papers on International Investment 2011/01 (2011), https://www.oecd-ilibrary.org/finance-and-investment/environmental-concerns-in-international-investment-agreements_5kg9mq7scrjh-en.

[55] Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments preamble (2019), *available at* https://edit.wti.org/document/show/0edd9101-bae7-4cbe-8a43-f05351bd51a5.

[56] Baltag, Joshi, & Duggal, *supra* note 33, at 15.

a conclusion was reached in *Phillip Morris Brands Sàrl v. Uruguay*[57] where the preamble of the Switzerland-Uruguay BIT, which mentions the "important . . . role of foreign investment in the economic development process,"[58] was deemed too general to "materially advance analysis."[59] Some commentators hypothesize that an arbitrator's tendency to downplay the importance of a treaty's preamble may be attributed to their legal tradition, with a distinction between civil and common law approaches.[60]

Regulatory language may also be used in the body of the IIA to the effect that the states will not breach an IIA obligation merely by exercising their regulatory power for a legitimate public policy objective. This may be referred to as a "non-precluded measure" clause or "affirmation" clause and may incorporate exceptions, exclusions, or carve-outs.[61] Such language was used in the EU-Singapore BIT, stating that "the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of . . . environment[.]"[62] Such affirmation clauses essentially act as reservations in a treaty whereby states earmark certain regulatory matters as being unaffected by their treaty obligations.[63] Further,

---

[57] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No ARB/10/7, Decision on Jurisdiction (July 2, 2013).

[58] Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments preamble (1988).

[59] *Phillip Morris v. Uruguay* ¶ 201; *but cf.* Philip Morris Brands Sàrl v. Uruguay, ICSID Case No ARB/10/7, Award, ¶ [287] (July 8, 2016) (finding that the State validly used its police powers, defeating the expropriation claim).

[60] Beharry & Kuritzky, *supra* note 50, at 390 (arguing that the "differing legal cultures from which arbitrators are drawn" may impact the importance they place on a preamble, as "for example, an adjudicator hailing from a civil law culture may be more likely to view the treaty text, including the preamble, holistically").

[61] Baltag, Joshi, & Duggal, *supra* note 33, at 20.

[62] Investment Protection Agreement between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part, art. 2.2 (2018), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5714/download.

[63] Gordon & Pohl, *supra* note 54, at 14.

affirmation clauses may function as a bar to compensation for claims based on environmental regulatory action.[64] Uncertain interpretation of affirmation clauses persist despite being commonplace in IIAs.[65] As a general rule, however, these clauses are read narrowly by investment arbitrators. This is especially likely when the wording of the clause limits its application to regulations "otherwise consistent with this agreement," requiring the level of protection conveyed by the clause to be compatible with the state's treaty obligations.[66] Only a small (but growing) number of treaties contain specific reservation clauses on the environment. For example, the Hungary-Cabo Verde BIT provides that:

> Non-discriminatory measures that the Contracting Parties take for reason of public purpose including for reasons of public health, safety, and environmental protection, which are taken in good faith, which are not arbitrary, and which are not disproportionate in light of their purpose, shall not constitute indirect expropriation.67

The thinking behind such clauses is that the specific allowance for states to legislate on environmental matters is sufficient to defeat any claim in relation to such matters.[68] Recent tribunal decisions however have revealed differing views regarding how such clauses should be interpreted, as there are significant variances between facts, treaties, and arbitrators.[69] Unpredictability flows from this

---

[64] Beharry & Kuritzky, *supra* note 50, at 392.

[65] Gordon & Pohl, *supra* note 54, at 11.

[66] Beharry & Kuritzky, *supra* note 50, at 392.

[67] Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments, art. 6.4(c) (2019), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5916/download.

[68] Baltag, Joshi, & Duggal, *supra* note 33, at 390.

[69] *See* Roopa Mathews & Dilber Devitre, *New Generation Investment Treaties and Environmental Exceptions: A Case Study of Treaty Interpretation in Eco Oro Minerals Corp. v. Colombia*, KLUWER ARB. BLOG (Apr. 11, 2022), https://arbitrationblog.kluwerarbitration.com/2022/04/11/new-generation-investment-treaties-and-environmental-exceptions-a-case-study-of-treaty-interpretation-in-eco-oro-minerals-corp-v-colombia/ (discussing Eco Oro Minerals Corp v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability & Directions on Quantum (Sept. 9, 2021)).

divergence.

Lastly, states have also employed language that places them under a continuing obligation to maintain environmental standards, such as the Japan-Korea BIT.[70] These clauses act as a regulatory floor according to which states commit to not lower their environmental regulations. While criticized as aspirational in nature, such wording aims to "avoid a regulatory race to the bottom by [s]tates"[71] by encouraging countries to maintain higher regulatory standards than may otherwise be the case. As such, they function as a regulatory safeguard between states—often with consultation mechanisms attached—rather than as a sword for foreign investors to use against host states.[72] These consultation mechanisms do not appear to have been used for resolving environmental matters, but they have proven useful in other contexts[73] and may prove useful in the future.

Clearly, states have employed different drafting and interpretative techniques in an attempt to protect their right to regulate the environment, given the increased references made to the environment in relevant agreements. As a result, no consistent approach to dealing with environmental references in IIAs has so far emerged, in part due to the varied, idiosyncratic language used to implement them.[74] Regardless, these emerging references to the environment in IIAs signal an attempt by states to give investment tribunals interpretative scope to assess the relevance of environmental concerns when deciding IIA disputes. These provisions are sowing the seeds for more expansive assessments by tribunals, nudging them in a more

---

[70] Gordon & Pohl, *supra* note 54, at 29 (citing the Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment, Mar. 22, 2002).

[71] Beharry & Kuritzky, *supra* note 50, at 394.

[72] *See*, *e.g.*, Agreement Between the Government of Canada and the Government of the Republic of Latvia for the Promotion and Protection of Investments clause 5 (2009).

[73] *Id.* at 395 (*e.g.*, free trade negotiations).

[74] Gordon & Pohl, *supra* note 54, at 8.

climate-conscious direction.[75] Whether such attempts are effective at protecting state regulatory action that would otherwise be an IIA breach, ultimately depends on the construction that tribunals give to such clauses. As an addendum, some commentators have encouraged states to go further in their treaty drafting by using stronger language or adding new requirements for investment arbitrations with an environmental element.[76]

B. *Foreign Investors*

This section looks at the repositioning of corporate drivers that may signal an evolving relationship between foreign investors and their attitudes towards ISDS. It then looks more closely at the distinctions between investment arbitrations that have foreign fossil fuel investors as claimants compared to disputes with "green" investor claimants.

1. Investment Landscape

Stepping back, it is important to note that the investor landscape itself is changing significantly in response to the climate crisis. Investors are being called on to rapidly shift their investment priorities as the risk of climate liability intensifies,[77] often in the face of mounting shareholder pressure. Shifting incentives have the capacity to alter how they engage with investment arbitration.

Tracing this movement back through time reveals a few key lessons. Firstly, joint action by states catalyzed this crusade with a landmark United Nations (UN) report pithily titled *Who Cares Wins*,[78] which was intended to encourage the world's largest

[75] Baltag, Joshi, & Duggal, *supra* note 33, at 29.

[76] *See* Megan Wells Sheffer, *Bilateral Investment Treaties: A Friend or Foe to Human Rights 2009–2010 Leonard V.B. Sutton Awards: First Place*, 39 DENV. J. INT'L L. & POL'Y 483, 505 (2010).

[77] Kristin Casper, *Climate Justice: Holding Governments and Business Accountable for the Climate Crisis*, 113 PROC. ASIL ANNU. MEETING 197, 200 (2019).

[78] United Nations (UN) Global Compact Office, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2004), http://www.unglobalcompact.org/docs/news_events/8.1/WhoCaresWins.pdf.

investors to uphold responsible, ethical, and sustainable investing principles.[79] The report, published in 2005, minted the term "environmental, social and governance,"[80] now more commonly referred to as "ESG". The development of the Principles for Responsible Investment (PRI)[81] in 2006, also encouraged the active adoption of ESG measures and promoted investment transparency.[82] From 100 inaugural signatories, the principles have now been adopted by over 4000 institutions.[83] These commitments are a product of the growing pressure corporations are under to demonstrate ethical behavior in relation to natural resources, emissions, labor, and their internal controls. Sustainable business practices are increasingly a priority for investors and their stakeholders. Now, the development of metrics, such as Bloomberg's ESG scorecard,[84] quantify corporate compliance with ESG obligations and can be used by investors to make investment decisions.[85] BlackRock, one of the world's largest investment managers,[86] cited sustainability as a core goal for its investments and promised to consider "ESG risk with the same rigor that it analyzes traditional measures such as credit and liquidity risk."[87] Seismic shifts such as these embody the morphing objectives of corporations

---

[79] Nelson Goh, *ESG and Investment Arbitration: A Future with Cleaner Foreign Investment?*, 15 J. WORLD ENERGY L. & BUS. 485, 486 (2022).

[80] UN Global Compact Office, *supra* note 78, at ii.

[81] *What are the Principles for Responsible Investment?*, PRI, https://www.unpri.org/about-us/what-are-the-principles-for-responsible-investment.

[82] World Bank, *Future Proof? Embedding Environmental, Social and Governance Issues in Investment Markets: Outcomes of the Who Cares Wins Initiative* 2004–2008 at 8 (2009), https://documents1.worldbank.org/curated/en/476811468158704493/pdf/476600WP0Futur10Box338858B01PUBLIC1.pdf.

[83] Goh, *supra* note 79, at 486.

[84] *Bloomberg Launches Proprietary ESG Scores*, BLOOMBERG (Aug 11, 2020), *https://www.bloomberg.com/company/press/bloomberg-launches-proprietary-esg-scores/#:~:text=Bloomberg%20today%20announced%20the%20launch,4%2C300%20companies%20across%20multiple%20industries.*

[85] Goh, *supra* note 79, at 487.

[86] *Who We Are*, BLACKROCK, https://www.blackrock.com/uk/about-us/who-we-are.

[87] *Sustainability as BlackRock's New Standard for Investing*, BLACKROCK (2020),

to embrace a desire to "protect the environment by embracing sustainable practices[.]"[88] Clearly, ESG measures have entered the mainstream zeitgeist and now plays a crucial role in corporate strategy, as PRI signatories endeavor to "incorporate ESG considerations into investment analysis and decision-making processes."[89]

Law firms have also caught on to this green trend, setting their own sustainability targets and lowering their carbon footprints.[90] For example, the firm Herbert Smith Freehills LLP recently pledged to reach net zero emissions by 2030.[91] Moreover, in 2020, the firm began offering their clients the option to utilize "greener" case management in arbitrations to align with their client's internal environmental targets.[92] This voluntary shift towards greener policies indicates the attractiveness of such practices to clients who are under a social obligation to consider the environment in their business operations. This may trickle into how firms conduct their dispute resolution practices.[93]

It may also be emblematic of emerging legal theories on environmental duties. In the short term, it is conceivable that foreign investors may find themselves under an "ethical or legally binding obligation to go green,"[94] according to the national laws of their corporations. The likelihood of such an obligation increases as the rules and

---

https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter.

[88] *Our Commitment*, BUSINESS ROUNDTABLE, https://opportunity.businessroundtable.org/ourcommitment.

[89] Goh, *supra* note 79, at 486.

[90] Stephan Wilske & Zelda Bank, *Is There an (Emerging) Ethical Rule in International Arbitration to Strive for More Climate Friendly Proceedings?*, 14 CONTEMP. ASIA ARB. J. 155, 166 (2021).

[91] Alison Eyre, *Inside Arbitration: Towards Greener Arbitrations Achieving Greater Environmental Sustainability in the Way We Conduct Arbitrations: An Update*, HERBERT SMITH FREEHILLS (Feb. 25, 2021), https://www.herbertsmithfreehills.com/insights/2021-02/inside-arbitration-towards-greener-arbitrations-achieving-greater-environmental-0.

[92] *Id.* (citing arbitrator Lucy Greenwood's Green Pledge); *cf.* Lucy Greenwood, *Viewing Our World Through a Different Lens: Environmental and Social Considerations in International Arbitration*, 3 GLOB. ENERGY L. & SUSTAIN. 159, 169 (2022).

[93] Wilske & Bank, *supra* note 90, at 168.

[94] *Id.* at 161.

regulations around fiduciary duties and ESG requirements tighten globally. The adoption of an implied or express fiduciary duty to incorporate climate change considerations into corporate decision-making has been evaluated by prominent members of the judiciary and the arbitral network.[95] Further, such a duty has been explored in Australia, England, and Germany, for instance.[96] In this vein, France developed the *pacte statute*,[97] which requires corporations to consider ESG in their business activities.[98] France has also implemented a duty of vigilance, requiring French companies to address their environmental risks and impacts via a public monitoring plan.[99] If foreign investors were under such a duty, the potential exists for the duty to be transferred to their lawyers and, in this context, arbitrators.[100] Even if the duty itself does not transfer, pressure from clients will continue to stimulate environmentally friendly ISDS processes.

2. Distinguishing Claimants: Comparing Fossil Fuel & Green Investors

It is no secret that claims by foreign fossil fuel investors against host states comprise a historically significant use of the ISDS system.[101] However, the claimants

---

[95] *See*, *e.g.*, Felicia Cheng & Dominique Yong, *Hong Kong Arbitration Week Recap: Is Arbitration Sustainable?*, HKIAC (2019), https://www.hkiac.org/content/arbitration-sustainable; Lord Sales, *Directors' Duties and Climate Change: Keeping Pace with Environmental Challenges*, Speech at the Anglo-Australasian Law Society (Aug. 27, 2019), *available at* https://www.supremecourt.uk/docs/speech-190827.pdf.

[96] Wilske & Bank, *supra* note 90, at 168.

[97] *Cf.* CODE CIVIL art. 1833 (Fr.) ("*La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité.*").

[98] Christopher May, *Investor State Dispute Settlement: Challenging Private Governance*, *in* HANDBOOK OF BUSINESS AND PUBLIC POLICY 57, 69 (Aynsley et al. eds., 2021); Jean-Philippe Robé, Bertrand Delaunay, & Benoit Fleury, *French Legislation on Corporate Purpose*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2019), https://corpgov.law.harvard.edu/2019/06/08/french-legislation-on-corporate-purpose/.

[99] Gouiffès & Ordonez, *supra* note 34, at 205 (citing *Law no. 2017-399 of 27 March 2017 on the Duty of Vigilance of Parent Companies and Ordering Companies* (providing for a principle of precaution with respect to the environment)).

[100] *See* Wilske & Bank, *supra* note 90, at 167.

[101] *See* Lea Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry: IISD Report* at iii (2021), https://www.iisd.org/system/files/2022-01/investor%E2%80%93state-disputes-fossil-fuel-industry.pdf.

utilizing ISDS are increasingly diverse, especially as disputes between states and green investors emerge. Both types of claimants will be canvassed here to demonstrate the tightrope that investment tribunals navigate depending on the dispute before them. Markedly, the public interest considerations vary significantly. Although the claims are still generally based on alleged breaches of the investment standards relating to unlawful expropriation, fair and equal treatment, or full protection and security,[102] claims of green investors tend to focus directly or indirectly on the state's failure to uphold its climate obligations[103] or redirection in climate policy.[104]

(i) Fossil Fuel Investors

While not all foreign investors should be painted with the same brush, it is important to canvas the primary group that environmental regulatory chill benefits. The spread of regulatory chill, or its perception, has roughly corresponded with a rise in the strategic use of ISDS as a central feature of foreign investors' dispute settlement toolkit. No example better conveys this than the concentrated use of ISDS by "big tobacco," particularly with regard to Phillip Morris' claims against Australia and Uruguay, as mentioned earlier.[105] The *Phillip Morris* cases are examples of the extreme lengths big tobacco went to preserve market share in the face of the threat of being "regulated out of existence."[106] These efforts included

---

[102] Gouiffès & Ordonez, *supra* note 34, at 217.

[103] *See*, *e.g.*, Allard v. Barbados, PCA Case No. 2012-06, Award, ¶ 3 (June 27, 2016) (claim related to Barbados alleged failure "to take reasonable and necessary environmental protection measures and, through its organs and agents, has directly contributed to the contamination of the Claimant's eco-tourism site, thereby destroying the value of his investment").

[104] *See* Vadi, *supra* note 3, at 1317; *and see*, *e.g.*, Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14, Final Award, ¶ 6 (Aug. 23, 2022) (regarding the production at the applicant's oil and gas field that did not commence because Italy passed a law in late 2015 that banned offshore production near the Italian shoreline).

[105] *See supra* note 31 and accompanying text.

[106] Tienhaara, *supra* note 20, at 240.

treaty shopping and corporate restructuring.[107] These cases were broadly brought by big tobacco to contest the legitimacy of the regulatory safeguards that states implemented to increase public awareness of the poor health impacts of tobacco.[108] It has been theorized that the claimant's underlying objective in pursuing these cases was to stimulate cross-border regulatory chill to dissuade other states from adopting similar policies or at least to stall progress until the claim was decided.[109]

This comparison is extremely relevant given the parallels between big tobacco and fossil fuel investors, likewise referred to as "big oil". Both industries are fighting for survival in the face of escalating regulation to counter the negative effects of their products or industries.[110] Both have a vested interest in preserving their industries for as long as possible. And both have become repeat players in the ISDS system. Parallels have been drawn between the strategic use of ISDS by the tobacco industry and fossil fuel corporations, with the view growing that the fossil fuel industry is improving the tobacco playbook to delay unfavorable regulatory action.[111] The ability to resolve disputes via ISDS is crucial to the continuation of the fossil fuel industry. This is well understood by executives as demonstrated by their efforts to maintain the status quo.[112] ISDS is a fixed part of their risk management strategies. For this reason, investment tribunals are likely to be increasingly confronted by disputes of this nature, as global climate policies shift away from favoring fossil fuels.

(ii) Green Investors

Turning the focus to green investors, ISDS may be used by foreign investors to

---

[107] *Id* at 240-41.

[108] *See* World Health Organization, *Plain Packaging of Tobacco Products: Evidence, Design and Implementation*, (2016), at 47, *available at* https://iris.who.int/bitstream/handle/10665/207478/9789241565226_eng.pdf?sequence=1.

[109] Tienhaara, *supra* note 20, at 238.

[110] *Id.* at 239.

[111] SMOKE & FUMES, https://www.smokeandfumes.org/.

[112] Tienhaara, *supra* note 20, at 241.

advance environmentally friendly foreign direct investment (FDI).[113] Green investors are essential to ensuring the smooth transition to low-carbon and renewable energy.[114] Many states are in desperate need of green FDI to meet their Paris Agreement[115] commitments, as signatories agreed to make "finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development."[116] Conceptually, Anatole Boute suggests that investment arbitration may reduce the instability that currently comes with enacting climate mitigation policies and thus reign in the risk premium of such investments.[117] However, investors require credible commitments on the stability of climate policies. The potential for regulatory changes creates significant uncertainty for investors and can undermine the profitability of their projects. In essence, environmental claims or arguments by claimants may encourage states to uphold their climate obligations, positively reinforcing their climate policies.[118] Renewable energy investors have had some success with such claims, as seen in the slew of energy cases against Spain.[119]

IV. ILLUSTRATIVE EXAMPLES

There are signs that these tensions are being recognized throughout the ISDS network. The following section contemplates how arbitrators and the broader arbitration community are navigating these changing tides, through the lens of specific disputes and procedural changes.

---

[113] Farnelli, *supra* note 42, at 889.

[114] Fernando Dias Simoes, *When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking*, 45 DENV. J. INT'L L. & POL'Y. 251, 251–52 (2016).

[115] Paris Agreement, Dec. 12, 2015, 3156 U.N.T.S. 79.

[116] *Id.* art. 2(1)(c).

[117] *See generally* Anatole Boute, *Combating Climate Change through Investment Arbitration*, 35 FORDHAM INT'L L.J. 613 (2011).

[118] Farnelli, *supra* note 42, at 891, 913-14.

[119] Vasani & Allen, *supra* note 22, at 8; *see also*, *e.g.*, Cube Infrastructure Fund SICAV v. Spain, ICSID Case No. ARB/15/20, Award, ¶ 48 (15 July 2019) (in which the claimants successfully argued that Spain's regulatory changes vitiated their legitimate expectations about their renewable energy investments).

A. *Specific Disputes*

In recent years, some arbitrators have expressed discontent about the parameters under which they render environment-related decisions. How arbitrators have chosen to walk this line is an interesting illustration of this tension, particularly when an arbitrator has dissented from the majority view or offered an individual opinion. Two such examples will be discussed here, specifically *Eco Oro Minerals Corp. v. Colombia*[120] and *Rockhopper Italia S.p.A. v. Italy*.[121] This section also discusses *Aven v. Costa Rica*,[122] which involves the interpretation of environmental carve-out clauses as well as the use of counterclaims by a state. These cases demonstrate the divergence in how tribunals approach climate change issues.[123]

1. Eco Oro v. Colombia

As background, in 2012, Colombia enacted protection measures for the Santurbán Páramo region, considered one of its "environmental jewels".[124] These protection measures included suspending mining rights in the region where Eco Oro, a Canadian mining company, had held mining rights since 1994. Initially, Eco Oro was exempt from these suspensions. However, in 2016, its mining permits were withdrawn by the National Mining Agency after the Colombian Constitutional Court struck down the exception. The company brought an arbitration claim under the Canada-Colombia FTA due to the ongoing projects it had in the area in which the claimant had invested over $250 million.[125] Eco Oro claimed breach of the minimum standard of treatment requirement and expropriation. The claim was successful on

[120] Eco Oro Minerals Corp v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability & Directions on Quantum (Sept. 9, 2021).

[121] Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14, Final Award (Aug. 23, 2022).

[122] Aven v. Costa Rica, ICSID Case No. UNCT/15/3, Final Award (Sept. 18, 2018).

[123] Greenwood, *supra* note 92, at 164.

[124] *Eco Oro* ¶ 86.

[125] Canada-Colombia Free Trade Agreement, art. 805 (2008), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2569/download [hereinafter Canada-Colombia FTA].

the former claim but not the latter, as the "measures were adopted as a part of Colombia's valid and legitimate exercise of its police powers[.]"[126]

The breach of the minimum standard of treatment was made out despite the environmental carveout clause found in article 2201(3) of the Canada-Colombia FTA,[127] itself modeled after article XX of the General Agreement on Tariffs and Trade 1994 (GATT),[128] which provides:

> For the purposes of Chapter Eight (Investment), subject to the requirement that such measures are not applied in a manner that constitute arbitrary or unjustifiable discrimination between investment or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:
> (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health.[129]

According to the majority of the tribunal, the claimant was entitled to compensation because Colombia failed to treat it according to the minimum standard of treatment, which incorporated the fair and equitable treatment standard, as required under article 805 of the Canada-Colombia FTA.[130] According to the tribunal's interpretation, which relied on article 31(1) of the Vienna Convention on the Law of Treaties, the environmental carveout at article 2201(3) did not preclude a finding of liability for the minimum standard of treatment because the provision did not provide an exemption from liability. The tribunal viewed the lack of a liability exemption as standing in contrast to the exemption in annex 811(2)(b) of the FTA, which was explicit in stating that environmental measures

---

[126] *Eco Oro* ¶ 698.

[127] *Id.* ¶ 361 (quoting Canada-Colombia FTA art. 2201(3)).

[128] General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

[129] *Id.* art. XX.

[130] *Eco Oro* ¶ 821.

"would not give rise to any right to seek compensation," in expropriation cases.[131] In essence, the tribunal applied an e*xpressio unius est exclusio alterius* type logic—as the treaty specifically barred compensation for one kind of breach, but failed to exempt another type of breach, this suggested the states must have intended such an outcome. Otherwise, they would have broadened the compensation exemption beyond expropriation. The tribunal reached this decision despite Canada entering a non-disputing party submission to the effect that it was its intention when signing the FTA that no liability should flow if the conditions in article 2201(3) were met.[132] The tribunal's interpretation is controversial because it does not align with the generally accepted interpretation of article XX of the GATT, under which liability does not flow from an act that falls within the environmental exception.[133]

In contrast to the majority's decision, arbitrator Philippe Sands did not agree that Colombia breached the treaty, arguing that "[t]he approach taken by the majority fails to respect the text agreed by the drafters of the FTA, and is likely to undermine the protection of the environment."[134] This partial dissent emphasizes the environmental significance of the Santurbán Páramo and the right of the community to implement legitimate conservation measures.[135] Substantial credence was given to the preservation of the environment by both Canada and Colombia, as stated in the plain language of the FTA, which the tribunal's decision seemingly "undercuts."[136] The dissent also calls for international law (and the arbitrators who apply it) to account for the "state of transition" that society is gripping with in the "age of climate change and significant loss of biological

[131] *Id.* ¶ 829.

[132] *Id.* ¶ 836.

[133] Mathews & Devitre, *supra* note 69, at 9.

[134] *Eco Oro* ¶ 4 (Sands partially dissenting).

[135] *Id.* ¶¶ 1-2 (Sands partially dissenting).

[136] *Id.* ¶ 36 (Sands partially dissenting).

diversity[.]"[137] Sands comments that the "Respondent has not acted perfectly in its management of the páramo, but the [minimum standard of treatment] standard does not require it to have done so," particularly in light of the precautionary principle.[138] This comment may be interpreted as a rebuke for tribunals that hold states to an unduly high standard, ignoring the importance of implementing environmental regulation and the bureaucracy that often surrounds such decisions, such as in the case below.

2. Rockhopper v. Italy

The *Rockhopper* decision sparked significant criticism for hindering efforts to tackle climate change and the quantum used to determine substantial damages,[139] amounting to nearly 190 million euros.[140] The former point will be the focus here but the latter point goes ways to revealing the sheer scale of some investment arbitration awards, even when the dispute orbits around a public policy decision.

The dispute related to the claimant's project in the Ombrina Mare oil and gas field off the Italian coast.[141] The project sparked significant local and national outrage due to environmental concerns. In late 2015, public campaigning resulted in a legislative change that banned offshore production. Subsequently, Rockhopper's formal application for a mining concession was denied, after which it launched a claim against Italy under the Energy Charter Treaty.[142] The Tribunal found that this amounted to unlawful expropriation of the investment because the Claimant had a procedural right to the mining concession that accrued before Italy

---

[137] *Id.* ¶ 33 (Sands partially dissenting).

[138] *Id.* ¶ 34 (Sands partially dissenting).

[139] *See* Toni Marzal, *Polluter Doesn't Pay: The Rockhopper v Italy Award*, EJIL:TALK! (Jan. 19, 2023), https://www.ejiltalk.org/polluter-doesnt-pay-the-rockhopper-v-italy-award/; Paolo Mazzotti, *Rockhopper v. Italy and the Tension between ISDS and Climate Policy: A Missed Moment of Truth?*, VÖLKERRECHTSBLOG (Dec. 21, 2022), https://voelkerrechtsblog.org/de/rockhopper-v-italy-and-the-tension-between-isds-and-climate-policy/; Mazzotti, *supra* note 139, at [6]-[9].

[140] Rockhopper Italia S.p.A. v. Italy, ICSID Case No. ARB/17/14, Final Award, ¶ 335 (Aug. 23, 2022).

[141] *Id.* ¶ 5.

[142] Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100.

banned offshore production.[143]

Due to this finding, the majority did not address the claimed breaches of fair and equitable treatment or impairment.[144] Strangely, however, the majority's decision begins with an acknowledgement of environmental issues at play and claimed that the finding for the claimant "passes no judgment whatsoever on the legitimacy or validity of those views."[145] As such, "the material factual circumstances which have led to the final result . . . are . . . discrete from the environmental considerations[.]"[146] This does not align with earlier discussion on regulatory chill, especially given the scope of the award. The tribunal's almost apologetic attempts to downplay the underlying public interest in the dispute highlights that some investment arbitrators feel they are stuck between a rock and a (hopping) hard place when deciding cases that involve the regulation of environmental protections, as they do not feel that the public interest in environmental matters are on "equal footing with international investment law."[147]

Furthermore, the majority did not fully consider the police powers doctrine in light of the precautionary principle because they found that the legislative change was not motivated by environmental concerns but was more likely due to political and community engagement.[148] This logic defies the reality that the political tension escalated from the public's environmental concerns.[149]

Pierre-Marie Dupuy, who issued an individual opinion despite substantively agreeing with his co-arbitrators, went to further pains to note a few key points. According to Dupuy, it was to the claimant's advantage that the tribunal's finding of

---

[143] *Rockhopper* ¶ 6.

[144] *Id.* ¶ 203.

[145] *Id.* ¶ 10.

[146] *Id.*

[147] Jorge E. Viñuales, *Green Investment After Rio* 2012, 16 INT'L CMTY. L. REV. 153, 174 (2014).

[148] *Rockhopper* ¶ 198.

[149] Mazzotti, *supra note* 139, at 3.

unlawful expropriation obviated consideration of the fair and equitable treatment claim, as "it would have been almost impossible to conclude . . . that Rockhopper could reasonably and legitimately expect a positive response from the Italian authorities to its application for an operating permit."[150]

3. Aven v. Costa Rica

In this dispute, the claimants alleged that the respondent breached its investment obligations under the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR)[151] by shutting down the Las Olas Project due to the alleged discovery of wetlands and forest grounds within the project site, despite previously granting all of the required documentation, including environmental viability approvals.[152] The State responded with a counterclaim that the claimants were liable for the environmental damage to the Las Olas Ecosystem and therefore were responsible for restoring it.[153]

The tribunal denied the claimants' claims under CAFTA-DR largely based on its interpretation of article 10.11, which reads:

> Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

According to the tribunal, this environmental carve-out "essentially subordinate[s] the rights to investors under Chapter Ten to the right of Costa Rica to ensure that the investments are carried out 'in a matter sensitive to

[150] *Rockhopper* ¶ 2 (Dupuy concurring).

[151] Central America-Dominican Republic-United States Free Trade Agreement, Aug. 5, 2004, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/7004/download.

[152] Aven v. Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 6 (Sept. 18, 2018).

[153] *Id.* ¶ 689.

environmental concerns[.]'"[154] However, the tribunal found that the State's ability to assert this right by implementing environmental laws and policies is not absolute. Rather, this right must be exercised in a "fair, non-discriminatory fashion, applying said laws to protect the environment, following principles of due process, not only for its adoption but also for its enforcement."[155] The tribunal did not find that the State had breached this standard.

In affirming its jurisdiction over the counterclaim, the tribunal held that counterclaims were within the ambit of the ISDS provisions.[156] Accordingly, the foreign investor was under an obligation to abide by the State's environmental protection measures, given that there were "no substantive reasons to exempt foreign investors from the scope of claims for breaching obligations under Article 10 Section A DR-CAFTA, particularly in the field of environmental law."[157] In respect of the counterclaim itself, the tribunal rejected it on procedural grounds.[158] Notwithstanding the rejection, admitting the counterclaim builds on the previous attempts at state counterclaims in *Urbaser S.A. v. Argentina*[159] and *Burlington Resources Inc. v. Ecuador*[160] to a lesser degree (as the tribunal's jurisdiction to hear the counterclaim was not in dispute).[161] Notably, the *Aven* tribunal agreed with *Urbaser* in that "it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law," particularly "when it

---

[154] *Id.* ¶ 412.

[155] *Id.* ¶ 413.

[156] *Id.* ¶ 740.

[157] *Id.* ¶ 739.

[158] *Id.* ¶ 747 (citing UNCITRAL Arbitration Rules arts. 20-21 (2010)).

[159] Urbaser S.A. v. Argentina, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016).

[160] Burlington Resources Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims (Feb. 7, 2017).

[161] *See Urbaser* ¶ 1195 ("it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law"); *Burlington* ¶ 60 (noting that jurisdiction over Ecuador's counterclaims was not challenged).

comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment."[162]

4. Red Eagle v. Colombia

Red Eagle Exploration Ltd. v. Colombia[163] is another arbitration centered on Colombia's Páramo region and follows a similar fact pattern as *Eco Oro*, involving many of the same players. It also involves a Canadian-incorporated mining company, Red Eagle Exploration, operating in Colombia, that was adversely affected by Colombia's decision to restrict mining in the region by cancelling mining licenses. Canada similarly entered a non-disputing party submission.[164]

Notably, arbitrator Phillipe Sands was also present on this tribunal and he backed up his dissenting opinion in *Eco Oro*, by finding that article 805 of the Canada-Colombia FTA was not breached. In this matter, however, this was the majority view shared with arbitrator Rigo Sureda, while arbitrator José Martínez de Hoz dissented and found that the FTA was breached.[165]

With reference to clauses establishing most favored nations,[166] the majority considered that fair and equitable treatment was a component of the minimum standard treatment,[167] rather than a distinct standard to be applied.[168] The majority of the tribunal found that Colombia did not breach the minimum standard of treatment required of it under the FTA. Specifically, the tribunal found that the claimant failed to make out that Colombia's actions breached their legitimate expectations, lacked transparency, or engaged in arbitrary or unreasonable

---

[162] Aven v. Costa Rica, ICSID Case No. UNCT/15/3, Final Award, ¶ 738 (Sept. 18, 2018) (internal quotations omitted).

[163] Red Eagle Exploration Ltd. v. Colombia, ICSID Case No. ARB/18/12, Award (Feb. 28, 2024).

[164] *Id.* ¶ 39.

[165] *Id.* ¶ 2 (Martínez Hoz dissenting).

[166] Canada-Colombia FTA art. 804.

[167] *Id.* art. 805.

[168] *Red Eagle* ¶ 290.

conduct, lacked proportionality, or were disproportionate or discriminatory.[169]

In part, the tribunal found that the claimant's legitimate expectations could not have been breached because the mining ban was in place when the mining titles were acquired and the large-scale Vetas Project was never grandfathered in.[170] In forming this view, the tribunal endorsed the view of the minimum standard of treatment based on the existence of legitimate expectations expressed in *Glamis Gold v. United States*,[171] as opposed to that in *Tecmed v. Mexico*,[172] which does not.[173] The tribunal therefore held that the minimum standard of treatment may be breached where the claimant demonstrates the existence of "at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment," though the mere existence of a quasi-contractual relationship is not sufficient in itself to establish a breach.[174] The majority also noted that there was a lack of evidence that Colombia ever made any representations on which the claimant relied or that induced the claimant into making the investment.[175]

The dissenter, however, found that the claimant did indeed have legitimate expectations at the time it acquired its mining titles; that it would be entitled to engage in mining activities or, if it was deprived of its rights, it would be entitled to compensation; and that Colombia had a sufficiently predictable legal framework for investments.[176] He agreed with the *Eco Oro* tribunal that these expectations were breached when Colombia engaged in a "regulatory roller-coaster" due to the

---

[169] *Id.* ¶¶ 301, 305-06, 309, 312, 315 (unanimous with respect to legitimate purpose).

[170] *Id.* ¶ 297.

[171] Glamis Gold, Ltd. v. United States, UNCITRAL, Award (Jun. 8, 2009).

[172] Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. (AF)/00/2, Award (May 29, 2003).

[173] *Red Eagle* ¶ 295 (citing *Tecmed* ¶ 154).

[174] *Id.* ¶ 294 (citing *Glamis Gold* ¶ 766).

[175] *Id.* ¶¶ 299-300.

[176] *Id.* ¶ 131 (Martínez Hoz dissenting).

constant and contradictory decisions made during the process of delimiting the Páramo.[177]

The claimant's expropriation claims also failed.[178] The majority of the tribunal was not satisfied that the claimant had ever acquired a vested right to mine in the Páramo, under local law, which is a prerequisite for a finding of unlawful expropriation under article 811 of the FTA.[179] A party cannot be deprived of a right it never had. The tribunal found that the claimant's mining rights were conditional on being granted a licence, at Colombia's discretion. The majority also noted that, had such a right existed, the expropriation claim would likely still have failed because Colombia's conduct fell within the scope of its police powers, as the documentary evidence demonstrated that Colombia's "measures were plainly designed and applied to protect the public policy goal of environmental protection."[180] No rare circumstances arose in this instance such that the public policy measures fell outside the ambit of Colombia's police powers.[181]

The impact of the FTA's environmental carveout clause was also in dispute, but the tribunal declined to consider the scope or impact of the clause because it considered such an analysis unnecessary, as no primary obligation under the investment chapter was breached.[182] In doing so, the *Red Eagle* tribunal endorsed the view in *Eco Oro* that "Article 2201(3) is not an objection to the jurisdiction but rather a defense on the merits."[183]

---

[177] *Red Eagle* ¶ 137 (Martínez Hoz dissenting) (quoting Eco Oro Minerals Corp. v. Colombia, ICSID Case No. ARB/16/41, Decision on Jurisdiction, Liability, & Directions on Quantum, ¶ 718 (Sept. 9, 2021)).

[178] *Id.* ¶ 404.

[179] *Id.* ¶ 397-99.

[180] *Id.* ¶ 400.

[181] *Id.* ¶ 401.

[182] *Red Eagle* ¶ 428 (discussing Canada-Colombia FTA, art. 2201(3), chapter 8).

[183] *Id.* ¶ 175 (citing *Eco Oro* ¶¶ 379-80). The dissenter commented further on this provision and formed the view that Article 2201(3) did not exempt Colombia from liability if it breached article 805. *Id.* ¶ 152 (Martínez Hoz dissenting).

5. Comments of these Disputes

The ways in which these opinions are framed are as diverse as the legal principles and facts of the cases upon which they rest. Regardless, they share a common thread: a discernible unwillingness of most arbitrators to minimize the contentious environmental nature of the disputes before them. These statements demonstrate that investment arbitrators are conscious of the theoretical and traditional constraints on the ISDS system and the world in which they operate. However, investment arbitrators are increasingly sensitive to "the wider legitimacy crisis faced by international investment law, especially in cases concerning environmental issues."[184]

It is interesting to consider why investment arbitrators, like Sands and Dupuy, are deciding to rock the status quo by speaking out, especially given the conservatism of the profession and the constraints it operates under. Again, applying frameworks developed in other contexts may prove useful. Take Albert O. Hirschman's 1970s framework for explaining the limited responses at a consumer's disposal in the face of deteriorating product quality: *exit*, *voice*, *and loyalty*.[185] Previously, Katselas has applied this framework to international investment arbitration in order to understand the voluntary associations between states.[186] In the state context, exit refers to total, partial, or selective treaty termination and voice refers to political protest (*e.g.*, criticizing ISDS) or prescriptive action (*e.g.*, treaty replacement or amendment).[187] From the above, it is clear that states are dabbling with both approaches. It is conceivable that the voluntary association between states extends to arbitrators who voluntarily associate with ISDS by

---

[184] Freya Baetens, *Protecting Foreign Investment and Public Health through Arbitral Balancing and Treaty Design*, 71 INT'L & COMP. L.Q. 139, 154 (2022).

[185] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 25 (1970).

[186] Katselas, *supra* note 9, at 323 (citing HIRSCHMAN, *supra* note 185).

[187] *Id.* at 335, 348.

accepting tribunal appointments and, in doing so, assume or maintain their role in the investment arbitration club. When applied to arbitrators, on the extreme end of the spectrum, exit may refer to their unwillingness to engage in investment arbitration with environmental elements. Importantly, the frequency of arbitrators exiting ISDS for such reasons are unknown. In contrast, voice connotes an arbitrator's willingness to engage with climate change concerns in the investment arbitration appointments they accept and within the system more broadly. The illustrations in this chapter have attempted to demonstrate the increasing steps taken by arbitrators to exercise their voice in relation to investment arbitration's legitimacy crisis. A snowballing use of voice by arbitrators indicates their loyalty to the concept and institution of investment arbitration is strong in this respect.[188] They would prefer ISDS to evolve and redefine its mission rather than become defunct. As Katselas noted, "a balance between politics and law is both possible and necessary to attain if the club is to survive."[189]

It may be extrapolated that they comment on such matters as an implicit signal to the international community of their dissatisfaction with the constraints placed upon them by IIAs, which prevent the arbitrators from fully accounting for the public interest. It may be viewed as an appeal to the international community (states, investors, and the public) to address the issues exposed by the dispute.[190] This demonstrates a bildungsroman-type acknowledgement from arbitrators that their opinions and decisions contribute to the development of investment arbitration and may be relied upon as persuasive precedent by future tribunals.[191] Arguably, a movement away from the mere acknowledgement of non-investment concerns, such as social and environmental factors, to the integration of these

---

[188] *Id.* at 319.

[189] *Id.*

[190] Ruth Breeze, *Dissenting and Concurring Opinions in International Investment Arbitration: How the Arbitrators Frame Their Need to Differ*, 25 INT'L J. SEMIOTICS L. 393, 409, 412 (2012).

[191] *Id.* at 412.

concerns into ISDS frameworks via innovative treaties and applicable rules interpreted broadly is a necessary step to ameliorate the field's legitimacy crisis.[192]

B. *Initiatives*

A tangible sign that the investment arbitration community is paying attention to the change in stakeholder attitudes stems from the initiatives gaining traction. There appears to be no shortage of ideas regarding how to improve investment arbitration's relationship with climate change issues. However, there is a lack of consensus as to the best course of action. A few promising initiatives and ideas will be briefly discussed, with the *caveat* that some of the actions have been suggested in the context of international arbitration broadly. However, some of these ideas may equally be applied to investment arbitration. The purpose of this discussion is to demonstrate that these self-led shifts symbolize a wider recognition by the industry that a black-letter, case-by-case approach to tackling climate change is inefficient and dangerous for all parties.[193] Furthermore, these varied approaches to dealing with the crisis are an endorsement of the agency approach and a recognition of professional responsibility. Overall, these efforts have the potential to morph into soft law, which may further point to the emergence of the ethical duty discussed earlier. Soft laws are important as they can fill the gaps to "address issues that are considered in the 'grey zone' or where the appropriate approach to the issue is still hotly debated."[194] Soft laws are therefore indicative that the traditional norms are in the midst of a transitional stage and they attempt to anticipate the laws of tomorrow without binding the present.[195] Crucially, soft laws may act as the climate change guidance that arbitrators are crying out for.

While ICSID is of particular relevance to this discussion given the Convention's

---

[192] Acconci, *supra* note 22, at 176.

[193] *Id.* at 183.

[194] Wilske & Bank, *supra* note 90, at 172.

[195] *Id.* at 171.

dominance in ISDS, other arbitral institutions are taking action on climate change. For instance, the ICC has recognized its role in this space via its guide, *Resolving Climate Change Related Disputes through Arbitration and* ADR.[196] To the extent that investor-state disputes are heard under the aegis of the ICC, the guide provides that where the relevant treaty references the Paris Agreement, arbitral tribunals are "obliged to give greater consideration to international climate change obligations bearing on states, and specifically the Paris Agreement."[197] Irrespective of such a reference, the ICC also proposes that international obligations tend to be interpreted on a progressive basis and may inform how tribunals determine an investing party's legitimate expectations, particularly concerning fair and equitable treatment.[198]

V. CONCLUSION

Investment arbitration outcomes have far-reaching effects beyond the consenting parties, with the potential for particularly adverse ramifications with respect to environmental matters. An environmental reckoning is on the horizon for international investment arbitration due to a culmination of forces pushing the field to become more climate conscious. The burden of climate change mitigation does not rest solely on the shoulders of investment arbitrators. The challenges require commitment from all parties involved, particularly states, and continuous pressure from the public. It cannot be ignored, however, that ISDS has substantial power to help or hinder this recalibration. Investment arbitrators must recognize and embrace the role they can play in addressing climate change concerns.

Further, foreign investors hold contradictory roles in relation to environmental

---

[196] International Chamber of Commerce (ICC), *Resolving Climate Change Related Disputes through Arbitration and* ADR (2019), https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.

[197] *Id.* ¶ 5.63 (citing, *e.g.*, 2018 Netherlands Model Bilateral Investment Treaty art. 6.6).

[198] *Id.*

issues. As it stands, they fund the greatest emitters of greenhouse gases and have a significant monetary interest in maintaining their plum position. On the other side of the spectrum, foreign investors are capable of assisting in greening economies by investing in renewable energy projects. This paradox gives rise to mixed messages in relation to investment arbitration and highlights the exceptionally fine balance that tribunals are expected to strike between state regulatory power and the starkly different motivations of foreign investors. Arbitrators will need to show a commensurate commitment to global governance to the extent it fulfills the needs of the international business community, in recognition of the core reality that "[i]nternational arbitration exists to serve the needs of international business."[199] Fortunately, international cooperation is the bedrock of ISDS.

DANIELLE ATTWOOD has a LLM from King's College London, where she received the Dickson Poon School of Law Prize for the best dissertation in the field of international dispute resolution. Danielle was afforded the opportunity to study in London after receiving the Nicholas Auden International Scholarship from Monash University, allowing her to complete her LLB (Honors) and BCom overseas. Danielle is currently an associate at the Supreme Court of Victoria.

[199] Joshua Karton, *International Arbitration Culture and Global Governance*, *in* INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE 74, 168 (Walter Mattli & Thomas Dietz eds., 2014) (quoting Fabien Gélinas, *Arbitration and the Challenge of Globalization*, 17(4) J. INT'L ARB. 117, 117 (2000)).

COMENTARIOS SOBRE "THE ITA ARBITRATION INSTITUTIONS SERIES: CENTRO DE CONCILIACIÓN Y ARBITRAJE DE PANAMÁ (CECAP)" Y EL REGLAMENTO DE ARBITRAJE DEL CECAP

por Fransua Estrada

I. INTRODUCCIÓN

El 22 de octubre de 2024 se llevó a cabo una jornada referente al Centro de Conciliación y Arbitraje de Panamá ("CeCAP", o el "Centro"), en el marco de la "ITA Arbitration Institutions Series" del Instituto de Arbitraje Transnacional (Institute for Transnational Arbitration o "ITA"). Entre los diferentes paneles de la jornada, se desarrolló una entrevista con la Directora del Centro, Liliana Sánchez, haciendo especial énfasis en el Reglamento de Arbitraje del CeCAP y sus diferencias y semejanzas con los de otras instituciones internacionales.

En efecto, tal como busca la serie, resulta interesante generar conocimiento del procedimiento arbitral del CeCAP. Lo anterior aun cuando el Centro también ofrece servicios de conciliación y mediación que tienen su propio reglamento.

II. ACERCA DEL CECAP

El Centro fue fundado en 1994, aunque la ley de arbitraje de Panamá, aplicable tanto a los arbitrajes nacionales como internacionales con sede en Panamá, entró en vigor solo en el año 2013.[1] El Centro aprobó las normas para el Reglamento de Arbitraje en abril de 2015.[2] Por consiguiente, el CeCAP provee servicios de conciliación, arbitraje y mediación en aras de promover estos mecanismos como otras formas de resolución de controversias empresariales en el ámbito nacional de Panamá, y en el internacional.

De hecho, a pesar de ser una de las instituciones más reciente en fundarse, el Reglamento de Arbitraje del CeCAP presenta similitudes a los de otras instituciones arbitrales internacionales, incluyendo la Cámara de Comercio Internacional (ICC), el

[1] Ley No. 131 de 2013.

[2] CeCAP, Reglamento de Arbitraje, Presentación (2015).

Centro Internacional de Arreglo de Diferencias Relativas a Inversiones (CIADI), el Centro Internacional de Conciliación y Arbitraje de Costa Rica (CICA), la Corte de Arbitraje Internacional de Londres (LCIA) y el Centro de Arbitraje Internacional de Hong Kong (HKIAC).

Es de resaltar que la ubicación estratégica del CeCAP en la República de Panamá, puede ser vista como una ventaja, debido a su localización estratégica como puerto de entrada a Suramérica y, en particular, debido a que el Canal de Panamá ha permitido que el país sea reconocido como un centro influyente del comercio mundial.[3]

Durante la entrevista con ITA, Sánchez hizo énfasis en los beneficios de utilizar el Centro como institución administradora. Resaltó especialmente la dolarización de Panamá, el dinámico sector de servicios y la ya mencionada localización estratégica de Panamá. Sanchez reveló que, hoy en día, el Centro administra arbitrajes en varias industrias, con el gran porcentaje de ellos centrados en construcción, inmobiliario y servicios, mientras que un menor porcentaje de los arbitrajes se enfocan en temas de energía y contratos de consumo.

Además, como otras instituciones que buscan aplicar las mejores prácticas internacionales vigentes, el Centro continúa actualizando sus reglamentos. Así, en la entrevista Sánchez anunció que, en el mediano plazo, el Centro buscará reformar su Reglamento de Arbitraje para seguir el paso a las tendencias contemporáneas del arbitraje a nivel global, como lo será incluir en sus servicios el arbitraje de emergencia.

III. LAS PARTICULARIDADES DEL REGLAMENTO DEL CECAP

El CeCAP, al igual que otras instituciones arbitrales, aplica sus propios reglamentos al procedimiento arbitral. Sin embargo, aunque todas las instituciones, se puede presumir, comparten el objetivo común de resolver conflictos de manera alternativa al litigio, existen diferencias claves en sus ámbitos de aplicación y los

[3] José Carlos Cueto, Cuánto depende del Canal la economía de Panamá y qué otras industrias explican la riqueza del país que más creció en América Latina en las últimas décadas, BBC News Mundo, 30 de abril de 2024, https://www.bbc.com/mundo/articles/cnekk1984nzo.

procedimientos que ellas siguen.

La eficiencia de un procedimiento arbitral depende de varios factores como el tiempo que se demore componer el tribunal o el tiempo que se tome para dictar un laudo final. De hecho, es importante reconocer que los reglamentos de las instituciones solo proveen una estructura, o sea un guía, para el procedimiento; y que la forma en que se lleve a cabo el arbitraje estará determinada por el método específico del árbitro o árbitros y lo que las partes acuerden en los términos de referencia o la orden procesal.

Algunos temas de gran importancia que los participantes consideran al elegir el arbitraje internacional en vez de litigar ante las cortes judiciales son la eficiencia del procedimiento arbitral y la posibilidad de participar en la constitución del tribunal, dado que el arbitraje se promociona como una alternativa más eficaz que las cortes ordinarias de un país determinado.

A. *El laudo final.*

Para evitar un retraso excesivo con el laudo final, varias instituciones internacionales, como el CeCAP, incluyen un plazo fijo dentro del cual el tribunal arbitral debe emitir su laudo final. Por ejemplo, el CeCAP, conforme al Artículo 38 del Reglamento de Arbitraje, establece que el plazo máximo para dictar el laudo final, siempre y cuando las partes no hayan dispuesto de otra manera, será de 2 meses a partir de la presentación de los alegatos de conclusión por las partes.[4] De hecho, dependiendo la complejidad del tema u otras circunstancias, la Secretaria General de Arbitraje del Centro puede aprobar la prorrogación de dicho plazo por un mes adicional (Artículo 38).

En cuanto al plazo para dictar el laudo final, el CeCAP se distingue de la mayoría de otras instituciones al reglamentar este asunto. Por ejemplo, la CCI establece un plazo de 6 meses (Artículo 31) desde la fecha de la última firma, del tribunal arbitral o de las partes, en el Acta de Misión o a partir de la fecha en que la Secretaría notifique

[4] CeCAP, Reglamento de Arbitraje, Art. 38 (2015).

al tribunal la aprobación del Acta por la Corte.[5] La LCIA indica que el laudo se debe producir tan pronto sea razonablemente posible, pero que el tribunal arbitral procurará hacerlo en un plazo máximo de 3 meses después de la última presentación de las partes (Artículo 15.10)[6] El HKIAC dispone un plazo de 3 meses desde la fecha cuando el tribunal declare el procedimiento cerrado (Artículo 31.2).[7] Similarmente a CeCAP, el CICA (Artículo 44) provee un plazo de 60 días desde el cierre de las actuaciones y el tribunal arbitral posee la autoridad de ampliar el plazo por 30 días adicionales.[8] El CIADI (Artículo 58) establece que el tribunal arbitral dictará el laudo lo antes posible pero clarifica varias situaciones en cuales el plazo puede ser ampliado entre 60, 180, o 240 días.[9]

B. La composición numérica del tribunal.

Un tribunal involucra típicamente uno o tres árbitros, y la determinación entre un árbitro o tres puede causar retrasos si las partes no tienen un acuerdo de arbitraje explícito

En caso de que no haya un acuerdo, los reglamentos de las instituciones prevén un mecanismo por defecto y algunos incluso autorizan a la misma institución que escoja.[10] Por ejemplo, a través del Artículo 14 del Reglamento de Arbitraje, el CeCAP intenta evitar esa situación, disponiendo que, cuando las partes no hayan establecido el número de árbitros, se designará un solo árbitro cuando la cuantía del arbitraje no exceda de doscientos cincuenta mil dólares ($250,000.00), pero el tribunal se compondrá de tres árbitros cuando la controversia sea de una cuantía mayor, cuando una de las partes sea un Estado o una entidad estatal, o, cuando la controversia se trate de una cantidad indeterminada (Artículo 14).

[5] CCI, Reglamento de Arbitraje, Art. 31(1) (2021).

[6] LCIA, Reglamento de Arbitraje, Art. 15.10 (2020).

[7] HKIAC, Reglamento de Arbitraje Administrado, Art. 31.2 (2024).

[8] CICA, Reglamento de Arbitraje, Art. 44(5) (2020).

[9] CIADI, Reglas de Arbitraje, Regla 58(1) (2022).

[10] CeCAP, Art. 14; CCI, Art. 12; CICA, Art. 16; LCIA, Art. 5.8; HKIAC, Art. 6.1.

En comparación, varias instituciones no incluyen una cláusula tan precisa tal como la del Centro. En particular, el CCI (Artículo 12), la LCIA (Artículo 5.8), el HKIAC (Artículo 6.1) y el CICA (Artículo 16(3)) establecen que, en caso de que las partes no hayan escogido el número de árbitros, el tribunal estará compuesto, por defecto, de un árbitro, a menos que la institución encuentre que sea necesario tener tres. En contraste, el CIADI, conforme a las Reglas 15 y 16 de las Reglas de Arbitraje y el Artículo 37 del Convenio del CIADI, dispone que el tribunal estará compuesto de tres árbitros en el caso que los participantes no tengan un acuerdo. En contraste, el Reglamento del CeCAP establece específicamente en qué situaciones, cuando las partes no hayan llegado a un acuerdo, se designa un árbitro y en cuales se nombran tres.

IV. CONCLUSIÓN

Este evento ha permitido evidenciar, nuevamente, que la serie del ITA respecto de los centros de arbitraje resulta verdaderamente ilustrativo al resaltar los servicios de las distintas instituciones internacionales, con el fin de informar sobre las ventajas, desventajas y particularidades de cada una de ellas. Justamente, en este caso permitió evidenciar que, aun siendo una de las instituciones internacionales más recientes en fundarse, el CeCAP está equipado con reglamentos similares a otras instituciones internacionales más veteranas. Además, el Reglamento de Arbitraje CeCAP presenta pequeñas distinciones en contraste con otras instituciones más conocidas, indicando que el Centro está tomando pasos para mantenerse al frente de los cambios en el ámbito internacional y ofreciendo una alternativa útil para partes buscando nuevas opciones de sedes e instituciones arbitrales.

FRANSUA ESTRADA es asistente judicial en la Corte Superior de las Islas Vírgenes de EE.UU., y posee un amplio conocimiento sobre los mecanismos y procedimientos de la resolución de disputas internacionales. Fransua ha publicado escritos sobre distintos temas relacionados con el arbitraje internacional, como las tasas de interés en los laudos arbitrales, modificaciones de las reglas de instituciones arbitrales y reformas de las instituciones internacionales.

BOOK REVIEW:
THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: A CRITICAL APPRAISAL AND PRAGMATIC PROPOSAL BY MOHAMED F. SWEIFY

Reviewed by Nilufar Hossain

I. INTRODUCTION

Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal,[1] presents an insightful and well-crafted analysis of third-party funding that skillfully analyzes some of the industry's challenges. The book explores what Sweify views as fundamental flaws of third-party funding—the risk of claim control by the funder and his perceived shift of arbitration from a forum for justice to a forum for funders' profits. Beginning with a discussion of the historical grounding of third-party funding in access to justice, the author posits that the purported shift of control from a party to the funder is fundamentally at odds with arbitration as a forum of justice. Sweify is careful to underscore that his goal is not to call for the abandonment of third-party funding, but rather to reconceptualize it in a new framework in an effort to minimize claim control issues and protect the fundamental due process interests of funded parties. Sweify's work concludes with practical suggestions for such reform.

II. THE BOOK

This book presents its arguments across six chapters, which are reviewed in sequence below.

Chapter one, entitled *Mapping third party funding*, provides a broad overview of the various forms of sources of financing available for legal disputes. These options, summarized in detail by Sweify, include lawyers' contingency fees, insurance, loans, and assignments. The author also emphasizes that funding must not interfere with

1 MOHAMED SWEIFY, THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION: A CRITICAL APPRAISAL & PRAGMATIC PROPOSAL (2023).

fair procedural process or trample on the rights of the funded party who should be treated fairly and equitably.

In Chapter two, which is called *Abandoned promise*, the author contends that third-party arbitration funding in its current form is imperfect and ripe for reform. Sweify considers funding to be at odds with efficiency and fairness that are the hallmarks of arbitration. Notwithstanding the author's criticisms of funding, the chapter is well-balanced. It underscores that the solution to challenges with funding is grounded in reform and not a blanket ban of funding. In addition, Sweify compares arbitration funding to alternative forms of financing—attorney contingency, insurance, loans—and carefully illustrates why arbitration funding may be the superior choice depending on the circumstances.

Chapter three, *A Historical Framework*, examines the historical development of the premodern doctrines of maintenance and champerty through the lens of access to justice. Champerty and maintenance prohibited the involvement of third parties in litigation, including for purposes of providing funding, when those third parties had no connection to the dispute otherwise. Over time, various jurisdictions such as Australia, the United Kingdom, and the United States have relaxed prohibitions against champerty and maintenance which has allowed the third-party funding industry to flourish in those jurisdictions in particular. Sweify provides a well-researched overview of champerty and maintenance in these jurisdictions. He then proceeds to analyze the impact of these doctrines on arbitration in particular with respect to access to justice, efficiency and control of the arbitral proceedings, as well as challenges to the enforcement of awards.

Chapter four, *Asymmetric imbalances*, presents a detailed analysis of disclosure of third-party funding in arbitration. It then proceeds to assess how the disclosure of funding may impact the decision making of arbitrators at various stages of the arbitration—during the proceedings as well as before and after. For example, Sweify discusses how knowledge about the existence of funding might sway an arbitrator's views during the jurisdictional phase or when a party requests security for costs. His

analysis also includes a helpful review of how some courts have addressed funding when choosing to enforce (or not) an arbitral award.

Chapter five, *Regulation calculus*, examines regulatory arguments surrounding third-party funding. Sweify's analysis is comprehensive. First, he presents the arguments for a complete ban of third-party funding in arbitration. He then examines the arguments in favor of funding with existing regulations. Sweify then proceeds with a discussion of funding in the context of more comprehensive regulatory reform. His ultimate conclusion is a helpful one—that regulatory reform of third-party funding should be led by arbitral institutions who are best placed to provide consistency.

Finally, in Chapter six, *Nurturing the promise*, Sweify surveys different definitions of third-party funding. His purpose in doing so is to set the groundwork for proposing his new regulatory framework that is centered around the essential role of arbitral institutions within the third-party funding industry. Sweify acknowledges that his proposal for reform may not be immediately feasible, but stresses that the long-term goal is to arrive at a more "ideal arbitration funding paradigm."

III. CONCLUSION

Third Party Funding in International Arbitration: A Critical Appraisal and Pragmatic Proposal provides its readers with substantially more than an overview of third-party funding. Sweify's work is an invaluable contribution towards an understanding of the challenges that funding poses to the normative goals of arbitration—access to justice, due process, and party control.

The book's insights depend, however, on accepting the author's premise that the interests of an arbitral party and those of the funder are necessarily in tension, which in many instances is not the case. Indeed, third-party funding can only grow as an industry and as a more widespread tool for access to justice, if users of third-party funding experience it as helpful to advancing their interests in a particular arbitral dispute, rather than experiencing it as a zero-sum competition between the funded party and the funder. Sophisticated funders recognize the importance of alignment

of interests between the funded party, counsel, and the funder and strive to achieve that with their investments.

NILUFAR HOSSAIN leads Omni Bridgeway's international arbitration investments in the U.S. At Omni Bridgeway, one of the world's largest providers of legal finance, Nilufar works with corporate clients and attorneys globally to source and structure legal investments, conduct and oversee due diligence, and manage funded claims through to resolution, focusing on international arbitration and cross-border litigation and judgment enforcement matters. Nilufar began her legal career practicing with the New York offices of King & Spalding LLP and Freshfields Bruckhaus Deringer LLP. Nilufar received her J.D. from New York University School of Law, her M.A. from Middlebury College, and her B.A. from Harvard College, where she graduated *magna cum laude*.

La Evolución de la Jurisdicción Arbitral en Panamá y Mejores Prácticas: Conferencia 30 Años CeCAP

por Alejandro E. Chevalier

El pasado 18 y 19 de noviembre de 2024, se llevó a cabo en Panamá una conferencia en el marco del trigésimo aniversario del Centro de Conciliación y Arbitraje de Panamá (CeCAP).[1] En el primer día, se desarrollaron dos paneles donde se trataron, respectivamente, el impacto de la ley de arbitraje panameña en el desarrollo del arbitraje CeCAP y mejores prácticas en el manejo de casos. El primer panel estuvo moderado por Liliana Sánchez (Directora CeCAP) y contó con la participación de destacados panelistas panameños como Eric Britton (socio fundador de Britton & Iglesias), Mayte Sánchez (colíder de la práctica de arbitraje y socia de Morgan & Morgan), Jorge Federico Lee (socio fundador de Alemán, Cordero, Galindo & Lee) y Esteban López (socio fundador de Katz & López). El segundo panel fue moderado por Miriam Figueroa (socia fundadora de Figueroa-Broce Abogados) y contó con la participación de especialistas internacionales en materia de arbitraje como Karima Sauma (abogada en DJ Arbitraje y árbitro internacional), Álvaro Galindo (árbitro internacional y profesor de la facultad de derecho de la Universidad de Georgetown), Andrea Hulbert (árbitro internacional y socia fundadora de Hulbert Volio Abogados) y Roger Rubio (socio fundador de Rubio Arbitration Law).

I. La Ley de Arbitraje de Panamá y su Impacto en el Desarrollo del Arbitraje CeCAP (Panel 1)

El primer panel de la conferencia se caracterizó por desarrollar discusiones de temas en torno a la ley de arbitraje panameña y los elementos que hacen que esta, junto a otros avances en materia arbitral durante las últimas tres décadas, distinga a Panamá como un país pro-arbitraje. Eric Britton destacó cómo ambas jurisdicciones, ordinaria y arbitral, se han ido alineando con el tiempo. Mencionó que el

[1] Aunque la conferencia contó con tres paneles distribuidos en ambos días del evento, este artículo discutirá únicamente los dos primeros paneles que tomaron lugar, ambos, el 18 de noviembre de 2024.

reconocimiento a la jurisdicción arbitral se evidencia en el número reducido de amparos contra centros, árbitros y laudos. Además, subrayó la internacionalización del arbitraje, respetada por la Corte Suprema de Justicia de Panamá,[2] y la participación de árbitros y abogados internacionales que han incrementado el nivel de las disputas y la sofisticación de los escritos dentro de procedimientos arbitrales con sede en Panamá.

Por su parte, Mayte Sánchez confirmó la armonía existente entre las cortes y los tribunales arbitrales gracias a la Ley 131 de 2013, que, basándose en los principios que enmarcan a la Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI) sobre Arbitraje Comercial, hace posible que arbitrajes nacionales e internacionales se rijan bajo los mismos estándares.[3] Comentó que esta ley ha sido fundamental para garantizar que los procedimientos arbitrales en Panamá se realicen con el mismo rigor y profesionalismo que en otras jurisdicciones internacionales.

Esteban López abordó el tema de los terceros no signatarios, explicando diversas teorías relacionadas con el consentimiento, como la referencia a grupo de contratos y compañías, agencia, levantamiento del velo corporativo, *estoppel*, subrogación o cesión, y cesión tácita. López hizo referencia a jurisprudencia de la Corte Suprema de Justicia de Panamá sobre esta materia como el caso "*Don Lee*".[4] Eric Britton intervino añadiendo que estas teorías ya existen y deben ser aplicadas adecuadamente ante la secretaría aplicable y el tribunal arbitral. Subrayó la importancia de presentar estas teorías de manera apropiada para que sean consideradas por los tribunales arbitrales.

Pasando al tema de las medidas cautelares, Mayte Sánchez resaltó el enfoque

---

[2] *Ver*, *e.g.*, Corte Suprema de Justicia, 12 de abril de 2023 (Panamá). Esta sentencia desarrolla hitos históricos importantes de la evolución de la jurisdicción arbitral en Panamá, incluyendo la internacionalización del arbitraje.

[3] *Ver* Ley 131 de 31 de diciembre de 2013 art. 1, GACETA OFICIAL 27449-C, 8 de enero de 2014 (Panamá).

[4] Corte Suprema de Justicia, sala 4ª, 27 de Mayo de 2015 (Panamá) (Don Lee Int'l, S.A. v. Violeta S.A.).

internacional de la Ley 131 de 2013 y su aplicación por tribunales en arbitrajes nacionales e internacionales. Indicó que esta ley permite a los centros de arbitraje manejar mejor los expedientes y que las cortes ordinarias pueden auxiliar a tribunales arbitrales extranjeros. Como ejemplo, mencionó un caso reciente de un arbitraje con sede en Panamá donde una parte obtuvo una medida cautelar de una corte ordinaria mexicana para retener un buque en aguas mexicanas. Este caso generó debates sobre la posibilidad de obtener medidas cautelares de cortes ordinarias extranjeras después de constituirse el tribunal arbitral panameño, la aplicabilidad de los requisitos legales en base a ley panameña por parte de la corte ordinaria extranjera y sobre la debida notificación de dichas medidas. Explicó finalmente que, el tribunal arbitral con sede en Panamá, basándose en la Ley 131 de 2013, modificó la medida cautelar decretada por las cortes ordinarias mexicanas—fundamentalmente, revocando dicha medida—y ordenó las gestiones necesarias para que dichas cortes ejecutaran esta orden revocatoria. Quedó probado así que un tribunal arbitral panameño posee las herramientas para revocar medidas cautelares otorgadas por cortes ordinarias extranjeras.

Jorge Federico Lee abordó el desarrollo positivo de la jurisdicción arbitral en Panamá, expresando su confianza en las medidas cautelares otorgadas por el órgano judicial panameño y resaltando la jerarquía constitucional del arbitraje.[5] Asimismo, resaltó jurisprudencia reciente de 12 de abril de 2023 por medio de la cual la Corte Suprema de Justicia finalmente manifestó de forma ejemplar la exclusión de la acción de amparo de garantías constitucionales en contra de laudos arbitrales.[6] Con apoyo en esta sentencia Lee destacó la eficacia y rapidez de los procesos de nulidad de

[5] Constitución Política de la República de Panamá art. 202 ("El Órgano Judicial está constituido por la Corte Suprema de Justicia, los tribunales y los juzgados que la Ley establezca. La administración de justicia también podrá ser ejercida por la jurisdicción arbitral conforme lo determine la Ley. **Los tribunales arbitrales podrán conocer y decidir por sí mismos acerca de su propia competencia**.") (resaltado añadido).

[6] *Ver*, *en general*, Mayte Sánchez G. y Alejandro E. Chevalier, *Ante laudos arbitrales no procede amparo; el criterio de la Corte Suprema de Panamá*, LEXLATIN (13 de julio de 2023), https://lexlatin.com/opinion/laudos-arbitrales-amparo-criterio-corte-suprema-panama.

laudos arbitrales, y que el derecho a impugnar forma parte de una garantía de debido proceso y, por lo tanto, no es renunciable.

Todos los panelistas reconocieron el avance de Panamá como una jurisdicción favorable al arbitraje y la seguridad que brinda la Ley 131 de 2013. No obstante, Eric Britton mencionó tareas pendientes, como la definición expresa de materias arbitrables y la percepción de corrupción en el órgano judicial. Mayte Sánchez también destacó la incremental participación de mujeres en arbitrajes con sede en Panamá gracias a la internacionalización de la normativa panameña que hace posible que mujeres tanto panameñas como internacionales puedan ocupar la posición de árbitro en procedimientos celebrados en Panamá. Y, finalmente, Liliana Sánchez concluyó invitando a abogados e instituciones por igual a que se promueva a Panamá como sede de arbitrajes internacionales.

II. CASE MANAGEMENT EN EL PROCEDIMIENTO ARBITRAL (PANEL 2)

El segundo panel del primer día de la Conferencia discutió asuntos relacionados con el manejo eficiente del procedimiento, desarrollando consejos prácticos de árbitros internacionales tanto para árbitros como para abogados de parte que pueden ser aplicados en aras de promover procedimientos arbitrales de alta estima en Panamá y la región. Karima Sauma enfatizó la importancia de considerar las habilidades de *case management* en la selección de árbitros. Recomendó establecer un calendario procesal concreto, emitir directrices claras a las partes y tener reglas pormenorizadas sobre la producción de documentos. También mencionó la necesidad de recordar que los árbitros son seres humanos y utilizar herramientas persuasivas como tablas y cuadros, los cuales pueden ser de gran utilidad para los abogados de parte. Asimismo, enfatizó que las partes deben querer que el tribunal utilice sus argumentos, y sugirió como ejemplo evitar el uso excesivo de negritas y subrayados en los escritos, ya que pueden ser percibidos como agresivos.

Seguidamente, Álvaro Galindo pasó a discutir sobre la conveniencia de bifurcar el proceso arbitral en diferentes fases (*e.g.*, jurisdicción y méritos) para mayor eficiencia y recomendó invitar a abogados y partes a participar en el proceso en etapas

tempranas. Advirtió sobre lo que acuñó como "tácticas terroristas" o *guerrilla tactics*,[7] dirigidas a perjudicar el procedimiento arbitral y sugirió que el tribunal debe tomar un rol activo en la dirección del procedimiento desde etapas tempranas con la colaboración de las partes. Propuso que tribunales arbitrales son capaces de decidir sobre incidentes de forma eficiente, por ejemplo, tomando decisiones sobre costos y limitando la exhibición de documentos.

Andrea Hulbert sugirió invitar a las partes a tomar acuerdos sobre reglas procesales y puntos litigiosos, y destacó la obligación de buena fe y no abuso del derecho. Propuso que tribunales arbitrales pudiesen estar en posición de declarar a una parte en rebeldía si está debidamente notificada y no se presenta. En esta parte intervino Roger Rubio, quien, aparte de dar recomendaciones en materia de persuasión y argumentación jurídica, habló sobre la aplicación de las Reglas de la International Bar Association (IBA) sobre practica de prueba y técnicas como *hot tubbing* para que tribunales arbitrales puedan ejercer un mejor análisis sobre pruebas periciales presentadas.[8]

En resumen, este segundo panel subrayó la importancia de ser eficientes en el *case management* y la necesidad de seguir fortaleciendo la jurisdicción arbitral en Panamá y la región.

[7] *Ver, e.g.*, Günther J. Horvath & Amanda Neil, *Guerrilla Tactics in International Arbitration*, 19(3) ASIAN DISP. REV. 131, 132 (2017).

[8] En el contexto del arbitraje, "*hot tubbing*" se refiere a una técnica en la que los peritos de ambas partes presentan su testimonio simultáneamente ante el tribunal arbitral. Esta metodología permite que los peritos discutan directamente sus puntos de vista y respondan a las preguntas del tribunal y de las partes, facilitando una comparación directa de sus opiniones y conclusiones. Este enfoque puede mejorar la eficiencia del proceso arbitral y proporcionar una visión más clara y comprensible de las cuestiones técnicas en disputa.

ALEJANDRO E. CHEVALIER se especializa en materias relativas a la resolución de controversias internacionales, así como en litigios y arbitrajes contemplados, por un lado, bajo derecho panameño ante los diferentes centros de arbitraje y entidades judiciales de la República de Panamá, y, por otro lado, involucrando el derecho de múltiples jurisdicciones bajo reglamentos de arbitraje internacional como CIADI, CNUDMI y CCI. Es miembro del Colegio Nacional de Abogados de Panamá, Young ICCA, ICDR Young & International, ICC YAAF, la Asociación de Egresados de la Universidad de Nueva York, el Club Español de Arbitraje (CEA), y Panama Young Arbitrators (PANYARB). Posee una Licenciatura en Derecho y Ciencias Políticas (Summa Cum Laude) de la Facultad de Derecho de la Universidad Católica Santa María La Antigua en Panamá; un LL.M. de la Facultad de Derecho de la Universidad de Nueva York; un Certificado Profesional Avanzado en Derecho y Negocios (APCLB, en inglés) de la Escuela de Negocios Stern de la Universidad de Nueva York; y un LL.M. en Arbitraje Internacional de la Facultad de Derecho de la Universidad de Miami.

#YOUNGITATALKS CENTRAL AMERICA
THE NEW COSTA RICAN ARBITRATION LAW IN CORPORATE AND ARBITRATION PRACTICE

by Daniela García

On November 28, 2024, Young ITA (Institute for Transnational Arbitration) Costa Rica, in partnership with Aguilar Castillo Love, hosted a panel discussion addressing the upcoming Costa Rican Arbitration Law No. 10535, which is set to take effect on April 1, 2025 (the "New Arbitration Law").[1] Eduardo Méndez Zamora (Aguilar Castillo Love), co-chair of Young ITA Central America, delivered the opening remarks, emphasizing the law's potential to modernize dispute resolution in Costa Rica by offering faster and more flexible processes that could position the country as a regional arbitration hub. Its success, however, hinges on the effective implementation by all the users involved.

The first panel, titled "How Does the New Arbitration Law Affect My Corporate Client?," began with moderator Gabriel Chaves Corrales (Ministry of Foreign Trade, Costa Rica) outlining the significance of the New Arbitration Law. He described it as a substantial legislative advancement, with the panel focusing on the law's impact on business activity and how this new legislation will enhance Costa Rica's arbitration framework.

Esteban Agüero Guier (Aguilar Castillo Love) started the discussion by emphasizing the importance of tailoring arbitration clauses to the specifics of each contract and potential future disputes. Depending on the type of contract and the foreseeable issues, it might be advisable to recommend, for example, that the arbitration clause specify a seat outside of Costa Rica. This approach could ensure that the clause aligns with the client's needs and helps safeguard the integrity of the arbitration process.

[1] Ley 10535, LA GACETA 182, Oct. 1, 2024 (Costa Rica) [hereinafter "New Arbitration Law"].

Marcela Méndez Castro (The Coca-Cola Company) offered an in-house counsel perspective, emphasizing the importance of efficient and transparent tools for addressing disputes. She explained how the new law strengthens Costa Rica's credibility as a jurisdiction favorable to arbitration, particularly for multinational corporations operating in the region. One of the most significant advancements, she noted, is the flexibility for arbitration proceedings to be conducted in languages other than Spanish.[2] This reform eliminates language as a potential barrier, providing greater freedom for international businesses whose contracts are often negotiated and executed in English.

Agüero further highlighted how the removal of translation requirements in Costa Rica-seated arbitrations—a costly and time-consuming process, especially in cases with a high documentary load—enhances arbitration's efficiency. Together, these changes not only make the process more cost-effective but also align Costa Rica's arbitration framework with the expectations of global investors, making the country a more attractive venue for resolving cross-border disputes.

The panelists also discussed notable reforms, including the introduction of emergency arbitrators to resolve urgent issues[3] and the removal of procedural obstacles like the suspensive effect of jurisdictional challenges before the Supreme Court of Justice of Costa Rica (*Sala Primera*).[4] Previously, parties could challenge the arbitral tribunal's jurisdiction in the arbitration and later appeal this decision to the Supreme Court, which suspended the arbitration proceedings. Under the new reform, the arbitration can proceed even if the tribunal's jurisdiction is challenged

[2] The current arbitration law for domestic arbitration requires proceedings to be conducted in Spanish. Ley 7727 art. 41, Dec. 9, 1997 (Costa Rica), *available at* PROCURADURÍA GENERAL DE LA REPÚBLICA, http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=26393&nValor3=27926&strTipM=TCm [hereinafter Current Domestic Arbitration Law].

[3] New Arbitration Law art. 17(3).

[4] The Supreme Court (*Sala Primera*) has exclusive jurisdiction to resolve appeals concerning the jurisdiction of arbitral tribunals. New Arbitration Law art. 6; Current Domestic Arbitration Law art. 38.

before the Court.[5]

The inclusion of emergency arbitration under the New Arbitration Law recognizes the validity and enforceability of a critical mechanism to address urgent matters prior to the constitution of the arbitral tribunal. Emergency arbitrators are appointed swiftly to grant interim relief, such as for freezing assets or preserving evidence, in situations where immediate action is necessary to prevent irreparable harm to one of the parties. This mechanism aligns with the best international practices and enhances the efficiency of arbitration by reducing reliance on local courts for provisional measures. Currently, under the existing framework, arbitrators in Costa Rica are often reluctant to issue interim measures due to a lack of regulatory clarity.

The second panel, titled "The Evolution of Arbitration in Costa Rica: Leaving Behind Old Judicial Practices," was moderated by Ana Laura Alfaro Valverde (Aguilar Castillo Love). She began by emphasizing the positive outlook brought by the New Arbitration Law and invited panelists to reflect on the historical development of arbitration in Costa Rica.

Alberto Fernández López (BTA Legal) opened the discussion by recounting the country's journey with arbitration, beginning in 1999 when practitioners relied heavily on the Costa Rican Civil Procedure Code. He explained the initial challenges, including the clash between the principles of written litigation and the oral nature of arbitration. Over time, reforms to arbitration regulations and the incorporation of international standards in local practices have helped Costa Rica mature in this area. Despite these advances, Fernández cautioned against overapplying procedural norms from the Civil Procedure Code to arbitration, as doing so undermines arbitration's flexibility.

Karima Sauma Mekbel (DJ Arbitraje) shifted the focus to domestic arbitration, noting significant procedural changes introduced by the new law. One major improvement is the removal of the suspensive effect of judicial challenges regarding

[5] New Arbitration Law art. 16.

an arbitral tribunal's jurisdiction, as mentioned above, allowing arbitration tribunals to proceed with their awards even when such challenges are pending.[6]

The elimination of the suspensive effect of these jurisdictional challenges before the Supreme Court (*Sala Primera*) under the New Arbitration Law is particularly significant in light of the operational delays historically associated with the Court. The delays stem largely from the broad jurisdiction granted to the Supreme Court by Costa Rican law, which encompasses not only arbitration-related appeals but also a wide range of civil, commercial, and contentious administrative matters.[7] This jurisdictional breadth has resulted in a bottleneck, prolonging the resolution of disputes and diminishing the efficiency of the arbitration process. By removing the suspensive effect of judicial challenges, the New Arbitration Law addresses this structural issue, allowing arbitration tribunals to continue proceedings and issue final awards even when jurisdictional appeals are pending.

Sauma also highlighted cost reductions in domestic arbitration through a single arbitrator default rule instead of three,[8] as well as the importance of addressing legal gaps, such as the absence of specific rules for investment arbitration in Costa Rica.[9]

Felipe Volio Soley (White & Case LLP) discussed the harmonization of domestic and international arbitration frameworks under the New Arbitration Law. He praised the unification of a previously dual system and highlighted the law's emphasis on uniform application, good faith, and party autonomy.

Volio explained the hierarchy of norms in arbitration where mandatory provisions take precedence, followed by party agreements and tribunal discretion. He did so to

---

[6] *Id.*

[7] *See generally* Luis Guillermo Rivas Loáiciga, *Los tiempos en la Sala I*, DELFINO (Dec. 13, 2021), https://delfino.cr/2021/12/los-tiempos-en-la-sala-i.

[8] New Arbitration Law art. 10(2).

[9] *Cf.* Karima Sauma & Mauricio Paris, *What Does Costa Rica's New Arbitration Law Mean for Domestic and International Cases*, KLUWER ARBITRATION BLOG (Nov. 11, 2024), https://arbitrationblog.kluwerarbitration.com/2024/11/11/what-does-costa-ricas-new-arbitration-law-mean-for-domestic-and-international-cases/ (discussing that the current arbitration law establishes that it does not apply to investor-state disputes).

emphasize the importance of promoting uniformity in the application of the law, as outlined in article 2(a) of the New Arbitration Law.[10] This principle ensures that both domestic and international arbitration are interpreted according to shared guidelines, such as good faith and party autonomy, avoiding inconsistencies and regional idiosyncrasies.

Building on this framework of party autonomy and tribunal discretion, Volio emphasized that certain procedural aspects, such as timelines, can be varied or agreed upon by the parties to better suit the specific needs of a case.[11] He noted that the timelines provided by the law are not mandatory or binding, further allowing for this flexibility. In his opinion, these adjustments should reflect the complexity or monetary value of the dispute, ensuring that the arbitration process is tailored to the particularities of each case rather than rigidly tied to distinctions between domestic and international arbitration.

The panel concluded with reflections on arbitration as a collaborative and evolving practice. Fernández underscored the role of counsel in fostering dialogue between parties, while Sauma emphasized raising the professional standard of arbitration services in Costa Rica. Volio also expressed optimism about the potential establishment of a specialized arbitration court, citing its success in other jurisdictions as a model for Costa Rica to follow.

The discussion concluded with a shared optimism about the New Arbitration Law's potential to position Costa Rica as a leading arbitration hub. However, panelists emphasized that the law's success depends on its proper implementation, continuous training for legal professionals, and the readiness of arbitral institutions to adapt to the changes introduced by the law.

---

[10] New Arbitration Law art. 2A(1) ("*En la interpretación de la presente ley habrá de tenerse en cuenta su origen internacional y la necesidad de promover la uniformidad de su aplicación y la observancia de la buena fe. Este principio de interpretación será aplicable tanto a arbitraje internacional como al doméstico.*").

[11] *Id.* arts. 13, 16, 33 (regarding arbitrator challenges, jurisdictional challenges, and award correction and interpretation).

DANIELA GARCÍA is a Paralegal at Aguilar Castillo Love. Her practice focuses on Corporate Law and Litigation, with particular emphasis on civil, commercial, and contentious-administrative litigation. She completed her law studies at la Universidad de Costa Rica in 2023 and is currently finalizing her graduation thesis to incorporate as a lawyer. She worked as a teaching assistant for the International Contracting and International Trade courses, part of the Master's Program in Business Law at the Universidad para la Cooperación Internacional, in 2022 and 2024. She has contributed to the publication and drafting of academic articles, including: "Liberation of the 5G Spectrum in Costa Rica" (2023) and "The Implementation of the Electronic Apostille in Costa Rica" (2022).

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.

I. 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.

II. 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.

III. 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.

IV. 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.

V. 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 in Review*, ITA's law journal edited by ITA's Board of Editors and published in three 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.

Institute for Transnational Arbitration
ITA IN REVIEW

Table of Contents

Articles

and Much More. Visit us on www.itainreview.org

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