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ITA Chair's Valedictory Remarks

by Joseph E. Neuhaus, ITA Chair

I was chatting the other day with José Astigarraga about the end of our respective terms as Vice-Chair and Chair of the Institute for Transnational Arbitration ("ITA"). He said that it was so frustrating that the last year and a half has been so disrupted by the COVID-19 pandemic. So, I have been thinking about that, and I think, yes and no.

On the one hand, I deeply miss the in-person interaction; the chance meetings at lunches during the Workshops when sitting next to someone you have never met; the chats at coffee breaks, or while getting breakfast at the Friday Forum, not to mention the bar at the Galleria. I think we all will be glad to get back to that.

On the other hand, I reflect on how well we have done. COVID-19 hit us literally days before our ITA-ASIL conference in March 2020. We also had a fully planned Workshop teed up for June 2020, which we planned to hold for the first time in Austin, Texas. We had to cancel everything and come up with a way to keep ITA relevant and stay connected to our members.

I think we have been largely successful. Along with the rest of the world, we transitioned to the Zoom platform. We figured out how to condense our programs into the shorter attention span you can expect in that format and how to do Zoom networking events.

Our Program Chairs Julie Bedard and Tom Sikora, and the Workshop Co-Chairs—Ank Santens, Loukas Mistelis, Mimi Lee, and Dominique Brown-Berset—pulled together an entirely new program in no time. By June 2020, we were ready to go. We held our first virtual Workshop at the traditional time. It was well attended, with attendance similar to the in-person event. We pioneered virtual networking with rotating breakout rooms, and we found that it did facilitate, but in a different, quieter way, getting to know people you had never met.

A week later, ITA-ASIL presented an interview by Chiara Giorgetti, Academic Council Chair, and Corinne Montineri, Senior Legal Officer, of UNCITRAL.

But then we doubled down and ramped up. We proceeded to have about two events a month until today. To give a sample:

- We added four days of programming in September on an in-depth examination of the first draft of the UNCITRAL draft Code of Conduct for arbitrators;
- The *ITA Arbitration Report* Board of Reporters launched its first Reporters Roundtable in October;
- In December, we held our 14th Americas Workshop, teaming up with the Latin American Arbitration Association (ALARB) to examine arbitrator immunity, occasioned by the jailing of our colleague in Peru, Fernando Cantuarias Salaverry;
- In January, we held the annual joint conference on energy arbitration with the International Chamber of Commerce and the Institute for Energy Law;
- In March, a two-day ITA-ASIL conference;
- In April, the ITA Board of Reporters teamed up with the Academic Council to discuss the EU-UK Trade and Cooperation Agreement;[1] and,
- Young ITA regional chairs put on 15 programs since COVID-19 forced them online, while the Young ITA Mentorship Program began its online series, presenting four webinars to date.

After the murder of George Floyd, we, along with the rest of the country, took a harder look at ourselves. We established a Diversity & Inclusion Task Force, led by Jennifer Smith and Mimi Lee, who have quietly and capably led an examination of where we are doing well and where we can do better, for example, by ensuring that our panels and leadership reflect the entire community.

ITA in Review, the new online publication launched in 2018, has continued to publish twice a year under the leadership of Rafael Boza and Charles "Chip" Rosenberg.

[1] Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, Dec. 30, 2020, ST/5198/2021/INIT.

ITA continues to prepare a massive amount of content for KluwerArbitration.com and moderate the successful ITAFOR Spanish and Portuguese discussion forum.

Young ITA has continued to grow, now boasting more than 2,400 members, a very active Mentorship Program involving 84 mentors, mentees, and facilitators meeting in 12 small groups (including several of ITA's Executive Committee leaders and other prominent practitioners). Plus, there is the increasingly popular and competitive Young ITA Writing Competition and Award.

Many people contributed to this extraordinary record, and I truly cannot name them all. ITA's counsel, Cecilia Flores, and the editors of the ITA Arbitration Report, Roger Alford, Monique Sasson, and Crina Baltag, have made tremendous contributions. Of course, none of this would have been possible without David Winn, who has managed to orchestrate all of it, often working short-staffed.

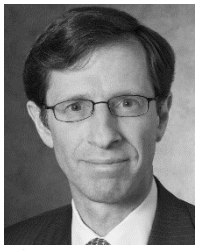
ITA is therefore doing fine. While none of us want to stay in this virtual mode, we have managed it very well.

That is also true, by and large, of the larger arbitration community. While shut-downs slowed down the court systems around the world, nearly all the major international institutions—the ICC, LCIA, SIAC, ICSID—reported increases in case filings in 2020. More significantly, hearings did not stop. ICSID reported that sessions or hearings held in ICSID cases in the nine months between March and December 2020 were almost exactly the same as in 2019: 150 versus 156.

Anecdotally, the same is true of commercial arbitration. By my extremely sensitive *brag meter*, I hear almost the same number of casual references to hearings that colleagues just came out of as before the pandemic. That may be just the fact that "Trouble Never Takes a Holiday." But it is also a reflection of the extraordinary resilience and creativity of our community.

Before I conclude these last remarks as ITA Chair, I would like to take a moment to express my appreciation for ITA and what it has done for me. Charles Brower got me involved in the Institute more than 20 years ago. Since then, I have very rarely missed a Workshop. I can remember one when my son graduated from college. In my time with the Institute, I have been asked to run a Workshop, chair Friday Forums,

co-chair Strategic Planning, examine the finances of the Institute, speak on panels, and travel to Houston, Dallas, Malibu, Singapore, and Washington, D.C. Incidentally, I have visited the San Jacinto Battlefield on the Houston Ship Canal, the grassy knoll where President Kennedy was shot, fancy clubs where oil barons meet, and roadhouses that I have only a vague drunken memory of. It has been an extremely rewarding involvement and the most significant extracurricular arbitration activity in my career. I am deeply appreciative of my work with ITA and urge you all to join us next year when we can get back to doing all this in person.



JOSEPH E. NEUHAUS a partner at Sullivan & Cromwell LLP. His practice is focused on international commercial litigation in both arbitral and court settings. He is the coordinator of Sullivan & Cromwell LLP's arbitration practice and has served as counsel and arbitrator in numerous arbitral proceedings, including ad hoc proceedings, arbitrations administered under the rules of most international arbitral institutions, and arbitrations involving sovereign entities. He also has served as counsel in a variety of arbitration-related disputes in court, as well as other commercial litigation and regulatory investigations.

CAIL'S AND ITA'S NEW LEADERS

I. INTRODUCING CAIL'S NEW PRESIDENT, MR. T.L. CUBBAGE

Thomas (T.L.) Cubbage became President of The Center for American and International Law, the parent of the ITA, in March 2021.

Before joining CAIL, T.L. served as Deputy Under Secretary for Science at the US Department of Energy (DOE). In that role, he oversaw a diverse portfolio of programs, including government investment in advanced energy technologies and protection of US innovations against illicit foreign misappropriation. Before serving at DOE, T.L. was a partner with Covington & Burling LLP in Washington, D.C. In recent years, his practice with Covington focused on international arbitration and other energy disputes. He played leading roles in hearings in North America and Europe before ICSID, ICC, and *ad hoc* tribunals with many highly esteemed arbitrators and represented clients in US litigation ancillary to international arbitrations.

Before becoming President, T.L. had served on CAIL's Board of Trustees and been a member of the advisory boards of CAIL's Institute for Transnational Arbitration and Institute for Energy Law.

T.L. received his B.A., magna cum laude, from Southern Methodist University in Dallas and his J.D., with high honors, from the University of Texas School of Law. He also served as law clerk to Fifth Circuit Judge Patrick Higginbotham.

II. INTRODUCING ITA'S NEW CHAIR, MR. TOMASZ J. SIKORA

Tomasz J. Sikora became Chair of the ITA's Advisory Board for 2021-2024. Tom is the 11th in a line of distinguished past Chairs of ITA since the Institute's founding in 1986.

Tom is Senior Counsel, International Disputes Group, at Exxon Mobil Corporation, where he manages international commercial and investment arbitration for the corporation. Prior to joining ExxonMobil, he spent ten years at El Paso Corporation managing the company's international arbitration and complex litigation. Tom initially practiced international arbitration of energy, construction and insurance disputes at Vinson & Elkins LLP in Houston, Texas.

Tom is a member of the Council (formerly Board of Directors) of the American Arbitration Association-AAA and the International Centre for Dispute Resolution-ICDR. He has been a member of the Executive Committee of the ITA for years, having served in a variety of leadership positions including Senior Vice Chair and Strategic Planning Committee Chair. Tom also serves as a Co-Chair of the Energy Arbitrators List. He is a former officer of the IBA Arbitration Committee and the ICC Commission on Arbitration.

Tom graduated from Harvard with an A.B. in History and Literature and from the University of Virginia School of Law with a J.D.

CENTER FOR AMERICAN AND INTERNATIONAL LAW
INSTITUTE FOR TRANSNATIONAL ARBITRATION
PRESENTS ITS
LIFETIME ACHIEVEMENT AWARD
TO
THE HONORABLE JUDGE CHARLES NELSON BROWER

ACCEPTANCE SPEECH
MAY 19, 2021

by The Honorable Judge Charles N. Brower

Chair of the Board of Trustees Harriet Miers; President T. L. Cubbage; Ambassador Jordan; other Trustees and Officers of the Center; and all of the magnificent Staff of the Center, not a single one of whom has ever disappointed me in the three decades and more that I have been active in this organization:

I choose to express the gratitude and humility with which I receive and accept this award in the elegant terms in which George Washington wrote to "The Hebrew Congregations in the Cities of Philadelphia, New York, Charleston, and Richmond" when replying to their letter of December 19, 1790, congratulating him on his election as President:

> [T]he repeated proofs which my follow-citizens have given of their attachment to me, and approbation of my doings, from the purest source of temporal felicity.
>
> The affectionate expressions of your address again excite my gratitude and receive my warmest acknowledgements.
>
> And as my exertions have hitherto been amply rewarded by the approbation of my follow-citizens, I shall endeavor to deserve a continuance of it by my future conduct."[1]

I would like to recite a few words that always have guided me to this moment and that I believe also must resonate with all of you. The March 15, 1832, issue of

[1] George Washington, *To the Hebrew Congregations of Philadelphia, New York, Charleston, and Richmond*, Dec. 13, 1790, https://founders.archives.gov/documents/Washington/05-07-02-0036.

Springfield, Illinois's "Sangamo Journal" carried a notice by a barely 23-year-old Abraham Lincoln announcing his candidacy for the State Legislature, in which he wrote the following:

> Every man is said to have his peculiar ambition. Whether it be true or not, I can say for one that I have no other so great as that of being truly esteemed of my fellow men, by rendering myself worth of their esteem.[2]

The final word I leave with you is this. On Valentine's Day in 2011, I attended the noon service in the Anglican Cathedral in Christchurch, New Zealand. When walking around inside the cathedral following the service, I spotted on an engraved plaque this verse from the Bible, the Book of Micah, Chapter 6, Verse 8, which summarizes why all of us in the law do what we do:

> And what does the Lord require of you but to do justice, and to love mercy, and walk humbly with your God?[3]

Amen and thank you again.

JUDGE CHARLES N. BROWER is judge *ad hoc* of the International Court of Justice (the World Court). First appointed in 2014 he sits in three active cases (two by appointment of the US and one by Colombia. Judge Brower has been a Judge of the Iran-US Claims Tribunal continuously since 1983, and from 1999 to 2002 also sat as Judge *ad hoc* of the Inter-American Court of Human Rights (by appointment of Bolivia). Earlier he served (1969-1973) in the US Department of State successively as Assistant Legal Adviser for European Affairs, Deputy Legal Adviser and Acting Legal Adviser on international law to the US Government. In 1987 he took leave from the Iran-US Claims Tribunal to serve in the White House as sub-Cabinet-rank Deputy Special Counselor to the President of the US.
Judge Brower practiced with the law firm White & Case LLP for 30 years, and since 1980 principally as counsel and arbitrator in international arbitrations. Since 2001 he has been an Arbitrator Member of London's Twenty Essex (barristers) Chambers. In 2013 The American Lawyer named him "the reigning king of international arbitrators."

[2] Abraham Lincoln, First Political Announcement, Sangamo J., March 9, 1832, http://www.abrahamlincolnonline.org/lincoln/speeches/1832.htm.

[3] *Micah* 6:8.

2020-2021 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" WINNER

ISSUES OF JURISDICTION AND ADMISSIBILITY IN THE "CRIMEAN" ARBITRAL PROCEEDINGS

by Martina Ercolanese

I. INTRODUCTION

Had David's victory over Goliath not prevented the giant's people to take over David's land, this biblical story would not have become the same metaphor for success. Disregarding this lesson, in the proceedings against Russia for the "Crimean" investments, each ruling of the arbitral tribunals awarding millions to the Ukrainian investors was celebrated and considered a success of the arbitral community,[1] as these were modern-day Davids. The proceedings were brought under the Russia-Ukraine Bilateral Investment Treaty (BIT)[2] for the alleged seizure of investments made

[1] Hughes Hubbard & Reed LLP, *Firm Wins Last Two Jurisdiction Decisions in Crimea Arbitrations*, July 20, 2017, https://www.hugheshubbard.com/news/firm-wins-last-two-jurisdiction-decisions-in-crimea-arbitrations; Lalive, *Landmark Decision by Swiss Federal Supreme Court Regarding Crimea Awards*, Oct. 24, 2018, https://www.lalive.law/news/landmark-decision-by-swiss-federal-supreme-court-regarding-crimea-awards/; Krzysztof Nieczypor, *For justice and compensation. Ukraine takes Russia to the international courts*, OSW COMMENTARY 271, June 11, 2018, http://aei.pitt.edu/94333/; Covington & Burling LLP, *Covington Secures Victory for Naftogaz in Crimea Arbitration Against Russia*, March 1, 2019, https://www.cov.com/en/news-and-insights/news/2019/03/covington-secures-victory-for-naftogaz-in-crimea-arbitration-against-russia/.

[2] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments, Nov. 27, 1998.

in the Crimean Peninsula[1] after Russia had gained control over the territory.

The elephant in the room, *i.e.*, the issue of sovereignty, was of such magnitude that it gave rise to a heavy doctrinal debate over whether the tribunals had jurisdiction to decide the claims. The primary issue raised by the existence of these proceedings lies in the fact that any decision on the merits is premised on the consideration that Crimea is to be considered as part of the territory of Russia. Indeed, it is the purpose of this paper to demonstrate that the jurisdiction of the tribunal would have required an investigation on the territorial scope and applicability of the BIT in question. With no other solution than to consider the changes to the territory of Crimea as unlawful and void, however, the tribunals should have declined to hear the case.

Furthermore, the peculiarity of these proceedings consists in the fact that the claimants were domestic investors at the time the investments were made in a part of Ukraine's territory. Therefore, these claims appeared to question the premise of investment arbitration and investment protection, which is that investment treaties have the purpose of protecting investments made *ab initio* in the territory of another party to the treaty.[2]

As creatures of international law and akin to all international instruments, investment treaties are bound by the requirements of territorial continuity or, in

[1] Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. Russia, Permanent Court of Arbitration,Case No. 2015-07; PJSC CB PrivatBank and Finance Company Finilon LLC v. Russia, Permanent Court of Arbitration, Case No. AA 568; PJSC Ukrnafta (Ukraine) v. Russia, Permanent Court of Arbitration, Case No. 2015-34; Stabil LLC et al., Permanent Court of Arbitration Case No. 2015-35; Everest Estate LLC et al. v. Russia, Permanent Court of Arbitration Case No. AA 577; LLC Lugzor et al. v. Russia, Permanent Court of Arbitration Case No 2015-29; Oschadbank v. Russia, Permanent Court of Arbitration Case No. 2016-14; NJSC Naftogaz of Ukraine et al. v. Russia, Permanent Court of Arbitration Case No. 2017-16; PJSC DTEK Krymenergo v. Russia, Permanent Court of Arbitration ; NEK Ukrenergo v. Russia,Permanent Court of Arbitration.

[2] Christoph Schreuer, *Diversity & Harmonization of Treaty Interpretation in Investment Arbitration*, *in* TREATY INTERPRETATION & THE VIENNA CONVENTION ON THE LAW OF TREATIES: 30 YEARS ON 129, 129 (Fitzmaurice et al. eds., 2010); Daniel Costelloe, *Treaty Succession in Annexed Territory* 65 INT'L & COMPARATIVE LAW QUARTERLY 343, 348 (2016); Carlo Brooks, *Arbitrability in Bilateral Investment Treaties: the Case that Applied International Law to Justify its Non-Application*, 23 SW. J. INT'L L. 303 (2017).

cases of changes to the structure of the territory, by the rules of state succession.[3] The ongoing dispute between Ukraine and Russia over the territory of Crimea, which has taken place in different *fora*[4] and that—to some extent—appeared to be decided before arbitral tribunals, once again gave rise to questions on the intersection between investment arbitration and international law.

Indeed, although it is accepted that Crimea does not legally belong to Russia and, contrary to Russia's claims, it is not part of its *de jure* territory, it is also undisputed that Russia is exercising *de facto* control over the area in breach of the territorial integrity of Ukraine.[5] While Russia had decided not to participate in the proceedings, Ukraine was allowed as *amicus curiae* in all proceedings and has argued in favour of the applicability of the BIT protection for its investors on grounds of the *de facto* control.[6] It appeared that the tribunals had agreed and had "sided" with the investors, accepting jurisdiction and deciding to hear the claims.[7]

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[3] Matthew Craven, *The Problem of State Succession and the Identity of States under International Law*, 9 EURO. J. INT'L L. 142 (1998); Claude Emanuelli, *State Succession, Then and Now, With Special Reference to the Louisiana Purchase* (1803) 63 LA. L. REV. 1277 (2003); Marko Milanovic, *The Tricky Question of State Succession to International Responsibility*, Feb. 16, 2009, https://www.ejiltalk.org/the-tricky-question-of-state-succession-to-international-responsibility/.

[4] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), I.C.J. (Application of Jan. 16, 2017); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation) Permanent Court of Arbitration, Case No. 2017-06; Ukraine .v Russia (re Crimea), Eur. Ct. H.R. (Application No. 20958/14).

[5] Michael Bothe, *The Current Status of Crimea: Russian Territory, Occupied Territory or What* 53 MIL. L. & L. WAR REV. 99, 100 (2014); Katharina Wende, *The Application of Bilateral Investment Treaties in Annexed Territories: Whose BITs are Applicable in Crimea after its Annexation*? Hague Y.B. Int'l L. 133, 137 (2018); President of Ukraine, *Extraordinary Message of the President of Ukraine to the Verkhovna Rada*, Aug. 29, 2019, https://www.president.gov.ua/en/news/pozachergove-poslannya-prezidenta-ukrayini-do-verhovnoyi-rad-56981.

[6] Luke Eric Peterson, *In Jurisdiction Ruling, Arbitrators Rule that Russia is Obliged Under BIT to Protect Ukrainian Investors in Crimea Following Annexation*, INV. ARB. REPORTER, Mar. 9, 2017, https://www.iareporter.com/articles/in-jurisdiction-ruling-arbitrators-rule-that-russia-is-obliged-under-bit-to-protect-ukrainian-investors-in-crimea-following-annexation/.

[7] Jarrod Hepburn, *Investigation: Full Jurisdictional Reasoning Comes to Light in Crimea-Related BIT Arbitration vs. Russia*, INV. ARB. REPORTER, Nov. 9, 2017,

Russia's change of strategy[8] to challenge the jurisdiction of the tribunals and the awards, along with the ensuing set aside proceedings and decisions of domestic courts, more specifically of the Swiss Tribunal Federal ("STF"),[9] has provided an effective and insightful vantage point to examine the reasoning of the arbitral tribunals in those cases for the first time. Although prior to those proceedings broad speculation ensued as to the basis of the tribunals' jurisdiction and whether it was appropriate for those claims to be heard by an arbitral tribunal, these decisions upholding the validity of the awards were not met with equal fervour. This paper will address these recent developments. In an attempt to reconcile the arguments that preceded them, it takes the view that the decisions to hear the claims were based on a misconstrued interpretation of the territorial applicability of the BIT and that the tribunals should have declined to hear the case.

In Section I, this paper briefly considers the historical context in which the Crimean proceedings ought to be framed and then examines the territorial scope of the BIT. In Section II, this paper submits that the tribunals should have declined to hear the disputes as they lacked jurisdiction *ratione materiae*. Finally, Section III argues that even if the tribunals were to find jurisdiction, they should have declared the claims inadmissible.

As new disputes are pending at the jurisdictional stage and new disputes might arise in the near future,[10] this paper aims to consider the issue systematically within

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https://www.iareporter.com/articles/full-jurisdictional-reasoning-comes-to-light-in-crimea-related-arbitration-everest-estate-v-russia/.

[8] Sebastian Perry, *Russia challenges Crimea awards and changes strategy*, GLOBAL ARB. REV., June 6, 2019, https://globalarbitrationreview.com/article/1193767/russia-challenges-crimea-awards-and-changes-strategy.

[9] Tribunal fédérale [STF], Oct. 16, 2018, 4A_396/2017, http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2?search=4A_396%2F2017; Tribunal fédérale [STF], Oct. 16, 2018, 4A_398/2017, http://www.swissarbitrationdecisions.com/atf-4a-398-2017?search=4A_398%2F2017; Tribunal fédérale [STF], Dec. 12, 2019,, 4A_244/2019, http://www.swissarbitrationdecisions.com/atf-4a-244-2019?search=4A_244%2F2019; Tribunal fédérale [STF], Dec. 12, 2019, 4A_246/2019, http://www.swissarbitrationdecisions.com/atf-4a-246-2019?search=4A_244%2F2019.

[10] Jarrod Hepburn, *Ukrainian Energy Firm Ukrenergo is Latest to File a Crimea-Related Arbitration Claim Against Russia*, INV. ARB. REPORTER, 2Aug. 29, 2019,

the international legal order by challenging the decisions that have already been reached and proposing the logical and coherent reasoning for the proceedings to come.

II. SECTION I

A. *The "Territorial" Issue*

Through a BIT, a state assumes the obligation to protect nationals of the other contracting party for investments made in its own territory.[11] The jurisdiction of a tribunal is therefore limited by the "territorial scope of consent" given by the parties.[12] Thus, whether Russia could be held responsible by an arbitral tribunal on the basis of the Russia-Ukraine BIT requires an analysis of the status of Crimea and the applicability of the BIT.

1. Factual Background

Following the revolution in Ukraine in February of 2014 and the formation of a new government which replaced a pro-Russia President, civil unrest continued in Crimea.[13] Shortly after the election, military personnel who were believed to be

https://www.iareporter.com/articles/ukrainian-energy-firm-ukrenergo-is-latest-to-file-a-crimea-related-arbitration-claim-against-russia/; Damien Charlotin et al., *Russia Round-Up: An Update on 19 Treaty-Based Arbitrations Against the State*, INV. ARB. REPORTER, May 17, 2020, https://www.iareporter.com/articles/russia-round-up-an-update-on-19-treaty-based-arbitrations-against-the-state/; Javier Echeverri, *Three are in Place to Hear Ukrenergo's Claims in Crimea-Related Dispute*, INV. ARB. REPORTER, Aug. 6, 2020, https://www.iareporter.com/articles/russia-round-up-an-update-on-19-treaty-based-arbitrations-against-the-state/.

[11] ANDREA BJORKLUND ET AL., INV. TREATY LAW, REMEDIES IN INT'L INV. LAW EMERGING JURISPRUDENCE OF INT'L LAW 313-14(2009); ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 284-327 (2009); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 174 (2nd ed., 2015); Odysseas G. Repousis, *Why Russian Investment Treaties Could Apply to Crimea and What Would This Mean for the Ongoing Russo-Ukrainian Territorial Conflict*, 32 ARB. INT'L 459, 462 (2016).

[12] CHIN L. LIM ET AL., INTERNATIONAL INVESTMENT LAW AND ARBITRATION: COMMENTARY, AWARDS AND OTHER MATERIALS 131 (2018).

[13] William Booth, *Ukraine's Parliament Votes to Oust President; Former Prime Minister is Freed from Prison*, Feb. 22, 2014, https://www.washingtonpost.com/world/ukrainian-parliament-after-ousting-president-tries-to-consolidate-power-frees-prisoners/2014/02/23/9246255c-9ca6-11e3-9080-5d1d87a6d793_story.html.

"Russian soldiers in disguise"[14] began to take control over Crimea.[15] On March 17, 2014, Crimea held a referendum and declared its independence,[16] which was recognized by Russia on the same day.[17] The next day, an agreement between Russia and Crimea was signed for the "accession" of Crimea to Russia.[18]

As a preliminary remark, it is necessary to properly frame the Crimean situation. First, because of the referendum, it would *prima facie* appear to be a case of secession. However, it is worth noting that unilateral secessions are generally not recognized[19] because "a state . . . is entitled to maintain its territorial integrity."[20] Furthermore, as the referendum took place with foreign armed troops already on the

[14] Bothe, *supra* note 7, at 102.

[15] BBC, *Russian parliament approves troop deployment in Ukraine*, Mar. 1, 2014: https://www.bbc.com/news/world-europe-26400035.

[16] State Council Republic of Crimea Res. 1745-6/14(Mar. 17, 2014); Steven Lee Myers & Ellen Barry, *Putin Reclaims Crimea for Russia and Bitterly Denounces the West*, Mar. 18, 2014, https://www.nytimes.com/2014/03/19/world/europe/ukraine.html.

[17] President of Russia Press Release, *Executive Order on Recognising Republic of Crimea*, Mar. 17, 2014, http://en.kremlin.ru/acts/news/20596.

[18] *Treaty between the Russian Federation and the Republic of Crimea on the Acceptance of the Republic of Crimea into the Russian Federation and on the Creation of New Federative Entities within the Russian Federation* (unofficial translation) Mar. 18, 2014, www.academia.edu/6481091/A_treaty_on_accession_of_the_Republic_of_Crimea_and_Sebastopol_to_the_Russian_Federation._Unofficial_English_translation_with_little_commentary; *Address by the President of the Russian Federation*, Mar. 18, 2014, http://en.kremlin.ru/ events/president/news/copy/20603; *Press Release on the Agreement on the Accession of the Republic of Crimea to the Russian Federation*, Mar. 18, 2014, http://en.kremlin.ru/events/ president/news/copy/20604; President of Russia, *Laws on Admitting Crimea and Sevastopol to the Russian Federation*, Mar. 21, 2014, http://eng.kremlin.ru/acts/6912.

[19] James Crawford, *State Practice and International Law in Relation to Unilateral Secession*, Report to Government of Canada Concerning Unilateral Secession by Quebec (Feb. 19, 1997), https://is.muni.cz/el/1422/jaro2006/MP803Z/um/1393966/INTERNATIONAL_LAW_AND_UNILATERAL_SECESSION.pdf; Pierre Emmanuel Dupont, *Foreign Investment and the Status of Kosovo in International Law*, 10 J. World Inv. & Trade 937, 941 (2009).

[20] Supreme Court of Canada [SCC], Reference re Secession of Quebec [1998] 2 S.C.R. 217, ¶ 154.

ground,[21] the prevailing view is that it is unlawful and invalid.[22] Secondly, it should be considered that the whole situation unfolded in less than two days. The incident being the "quickest" and "shortest" case of secession ever[23] alone should raise a few eyebrows. Ultimately, considering the claim that Ukraine brought against Russia before the European Court of Human Rights ("ECtHR"), alleging "cases of torture or other forms of ill-treatment and of arbitrary deprivation of liberty of civilians" and "unlawful automatic imposition of Russian citizenship,"[24] it appears that the correct framing is one of annexation. Annexation is indeed the gaining of effective control of a territory "through non-consensual and forcible means,"[25] joined to the claim of sovereignty over the territory.[26]

In response to this situation unfolding, the United Nations General Assembly (UNGA) issued Resolution 68/262 (2014) calling upon "all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the

[21] Anne Peters, *Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status under International Law*, Apr. 16, 2014, https://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/.

[22] President of the European Council, *Statement of G-7 Leaders on Ukraine*, Mar. 12, 2014, https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141460.pdf; President of the European Council, *Joint Statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso*, Mar. 16, 2014, https://www.consilium.europa.eu/uedocs/ cms_Data/docs/ pressdata/en/ec/141566.pdf.

[23] Patrick Dumberry, *Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian* [sic] *under the Ukraine-Russia BIT*, 9 J. INT'L DISP. SETTLEMENT 506, 511 (2018).

[24] European Court of Human Rights [ECHR], Registrar of the Court Press Release, *Grand Chamber hearing on inter-State case Ukraine v. Russia (re Crimea)* Sept. 11, 2019, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjR6sb3k4fsAhVVhlwKHQfsD9gQFjACegQIBhAB&url=https%3A%2F%2Fhudoc.echr.coe.int%2Fapp%2Fconversion%2Fpdf%2F%3Flibrary%3DECHR%26id%3D003-6498871-8572177%26filename%3DGrand%2520Chamber%2520hearing%2520Ukraine%2520v.%2520Russia%2520(re%2520Crimea).pdf&usg=AOvVaw0gLmqe015TadgRy3ioeC4v.

[25] Costelloe, *supra* note 4, at 353.

[26] *Id.* at 354.

[invalid] referendum."[27]

However, since 2015, a number of claims have been brought by Ukrainian investors against Russia for the expropriation of their investments in the Crimean Peninsula under the dispute resolution clause of Article 9 Russia-Ukraine BIT. Admittedly, much has remained unknown about the "Crimean" proceedings and the tribunals' reasoning in those proceedings until Russia challenged firstly, the interim awards on jurisdiction in the 2017 cases of *Stabil* and *Ukrnafta* and secondly, the final awards in 2019 before the Swiss Tribunal Federal.[28] Upholding the validity of the awards in both instances, the STF reported that the arbitral Tribunals had found that "[Russia] has acquired *de facto* control over the Crimean Peninsula and regards it as part of its territory."[29] On this premise, challenged in the following paragraph, the STF held that the BIT was applicable to Crimea.[30]

2. Territorial Applicability of the Bilateral Investment Treaty

BITs are fundamental instruments for the protection of foreign investments.[31] However, they are international treaties and, hence, are subject to the rules of treaty interpretation and application. Under Article 29 of the Vienna Convention on the Law of the Treaties (VCLT),[32] treaties are "binding upon each party in respect of its entire territory," which *a contrario* implies that they are only applicable to the territory of a state and not beyond it.

The applicability of the Russia-Ukraine BIT, for example, is limited pursuant to Article 12 "to all investments carried out by the investors of one Contracting Party on the territory of the other Contracting Party, as of January 1, 1992," with the term

[27] G.A. Res. A/RES/68/262, (Apr. 1, 2014).

[28] *Ukrnafta I*, *supra* note 11; *Stabil I*, *supra* note 11; *Ukrnafta II*, *supra* note 11; *Stabil II*, *supra* note 11.

[29] *Ukrnafta I*, *supra* note 11, ¶ 4.2; *Stabil I*, *supra* note 11, ¶ 4.2.

[30] *Ukrnafta I*, *supra* note 11, ¶ 4.3; *Stabil I*, *supra* note 11, ¶ 4.3.

[31] Christian J. Tams, *State Succession to Investment Treaties: Mapping the Issues*, 31 ICSID REV. 314, 305 (2016).

[32] Vienna Convention on the Law of Treaties, United Nations Treaty Series, vol. 1155, 331, art. 29 (May 23, 1969).

"territory" being defined as that of "the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law."[33] Whether Russia could be responsible under the BIT for the expropriation of the "Crimean investments" made by Ukrainians would have required its territory to have "expanded" to cover Crimea, therefore replacing Ukraine's sovereignty over the territory.[34] The changes in responsibility for a territory and the ability to represent it, even for the purposes of a treaty, are a matter of state succession and must be analysed in consonance with the relevant rules.[35]

(i) Obligation of Non-Recognition

As a preliminary consideration, it is important to note that the tribunals should have abstained from finding that Crimea is to be deemed as part of Russia's territory under the principle of *ex iniura ius non oritur*. This principle, enshrined in Article 41(2) of the Articles on Responsibility of States for International Wrongful Acts (ARSIWA),[36] prohibits the recognition of a situation created by a violation of *ius cogens*. This encompasses the obligation to not recognise an unlawful annexation and "not to render aid or assistance in maintaining the situation created by it."[37] Crimea's annexation should be considered as having "no legal validity,"[38] avoiding its validation through the recognition of ordinary legal consequences.[39] Being a rule of customary

[33] Russia-Ukraine BIT, *supra* note 2, at art. 1(4).

[34] Costelloe, *supra* note 4, at 246.

[35] Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm for International-Law?* 4 EURO. J. INT'L L. 447, 455 (1993); ROBERT JACKSON, SOVEREIGNTY: THE REVOLUTION OF AN IDEA (2007); RICHARD RAWLINGS ET AL., SOVEREIGNTY AND THE LAW: DOMESTIC, EUROPEAN AND INTERNATIONAL PERSPECTIVES 24 (2013); Tams, *supra* note 33, at 317; Richard Happ &Sebastian Wuschka, *Horror Vacui: Or Why Investment Treaties Should Apply to Illegally Annexed Territories* 33 J. INT'L ARB. 245, 253 (2016).

[36] International Law Commission (ILC), *Draft Article on Responsibility of States for Internationally Wrongful Acts*, Supp. No. 10 (A/56/10), ch. IV.E.1 (Nov. 2001).

[37] *Id.* at art. 41; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004I.C.J., 136, 159 (Advisory Opinion of July 9).

[38] Comm'n. of Human Rights Res. 2005/8, *Human Rights in the Occupied Syrian Golan*, at 5 (Apr. 14, 2005); S.C. Res. 662, at 2 (Aug. 9, 2004); Bothe, *supra* note 7, at 101.

[39] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South

international law, this obligation in investment arbitration should have been binding for the tribunals as their authority is limited by the principles of international law.[40]

In the cases of *Stabil* and *Ukrnafta*, the STF reasoned that, in order to accept jurisdiction over the disputes, the Tribunals "[were] not required to address the question of permissibility of the accession of Crimea into the Russian Federation or the lawfulness of the associated territorial claims."[41] However, it is submitted that it is not possible to separate the subject matter of the claims from the unlawful annexation, sidestepping the latter. In *Sanum*, one of the few investment proceedings which addressed the issue of state succession in investment treaties, the Singapore High Court held that it would not be able to consider the claims without first considering the territorial applicability of the BIT and the issue of state succession.[42] Similarly, in the case of *East Timor*, the International Court of Justice (ICJ) found that to consider the subject of the claim concerning a territory, it first had to predetermine the lawfulness of its acquisition.[43]

Thus, pursuant to the principles of *competence-competence* and *iura novit curia*,[44] the tribunals should have considered the fact that providing protection to the investors under the terms of the treaty would have meant recognising the legal consequences of the annexation. In abiding by their duty to respect international law, the tribunals should have declined to find that the BIT was applicable to the case, and they should have therefore dismissed the claims on this ground.

West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 149 (Advisory Opinion of June 21, Sep. Op. of Onyeama, J.); Stefan Talmon, *The Duty Not to "Recognize as Lawful" a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 125 (2005).

[40] Christoph Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 MCGILL J. DISP. RES. 1 (2014); Dumberry, *supra* note 25, at 527.

[41] *Ukrnafta I*, *supra* note 11, ¶ 4.2; *Stabil I*, *supra* note 11, ¶4.2.

[42] *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd* [2015] SGHC 111, ¶ 38.

[43] East Timor (Portugal v. Australia), 1995 I.C.J. 90 (Judgment of 30 June 1995).

[44] Repousis, *supra* note 13, at 480.

(ii) State Succession

The STF further reasoned that the term "territory" under Article 1(4) Russia-Ukraine BIT should "not be interpreted 'restrictively' with respect to the territorial scope to the agreement, such that it would be understood to mean only territories over which a given Contracting State lawfully has sovereignty under the principles of international law."[45] Relying on Article 29 VCLT, the STF held that treaty borders are "flexible" and would apply to the "entire territory" of a contracting state, even in cases of changes to it.[46] This consideration on the "flexibility" of borders, which refers to the so-called Moving Treaty Frontiers (MTF) rule set forth in Article 29 of the VCLT and Article 15 of the Vienna Convention on Succession of States in respect of Treaties (VCST),[47] implies acknowledgment that state succession had taken place with regard to the territory of Crimea.

However, the STF failed to consider that the rules on state succession only refer to the lawful changes to the territory. In the VCST, Article 6 specifically points towards an interpretation of Article 15 to only cover *de jure* territory.[48] Although Russia did not ratify the VCST Convention, it is recognised that such a principle is part of customary international law. [49] The VCLT contains no limitation similar to Article 6 VCST, however, the commentary to Article 29 appears to suggest that it is limited to *de jure* territory.[50] The definition of "territory" in Article 1 of the BIT, which ought to be determined "in conformity with international law,"[51] reiterates this

[45] *Ukrnafta I*, *supra* note 11, ¶ 4.3.2; *Stabil I*, *supra* note 11, ¶ 4.3.2.

[46] *Id.*

[47] Vienna Convention on Succession of States in Respect of Treaties, United Nations Treaty Series, vol. 1946, 3 (Aug. 23, 1978).

[48] Costelloe, *supra* note 4, at 347.

[49] Sanum Investments Ltd. v. Laos, UNCITRAL, Permanent Court of Arbitration, Award on Jurisdiction, ¶¶ 220-21 (Dec. 13, 2013); *Sanum*, *supra* note 44, ¶ 47; *Sanum Investments Ltd. v. Government of Lao People's Democratic Republic* [2016] SGCA 57, ¶ 75; Gerhard Hafner & Gregor Novak, *State Succession in Respect of Treaties*, in THE OXFORD GUIDE TO TREATIES 411 (Duncan Hollis ed., 2012).

[50] Costelloe, *supra* note 4, at 350; Kerstin Odendahl, *Commentary to Article 29* in THE VIENNA CONVENTION ON THE LAW OF TREATIES 498-500 (Oliver Dorr & Kristen Schmalenbach eds., 2012).

[51] Russia-Ukraine BIT, *supra* note 2, at art. 1(4).

concept as the qualifying definitions thereunder are limited to the lawful exercise of a state right over an area.[52]

Applying the MTF in the first round of the before-mentioned *Sanum* saga, the arbitral Tribunal had found that the Laos-China BIT is applicable to the territory of Macau, which had been returned by Portugal to China in 1999, although the BIT had been signed in 1993.[53] This was subsequently upheld by the Court of Appeal of Singapore.[54] However, the inherent difference between this case, as Macau was lawfully transferred, and the unlawful annexation of Crimea, should be noted. As the latter should have not been given any legal consequence, it is submitted that it could not be subjected to the same treatment.

Ultimately, it has been argued that Ukraine's intervention has influenced the decision of the tribunals.[55] In the *Everest* case, the Tribunal held that there had been an agreement between the parties for the continuation of the BIT because, as *amicus curiae*, Ukraine submitted that the *de facto* control was sufficient to establish jurisdiction.[56] On similar considerations, the arbitral Tribunal in *World Wide Minerals*[57] accepted a claim from a Canadian investor against Kazakhstan, which was part of the USSR prior to its dissolution, on the basis of the Canada-USSR BIT.[58] This decision was indeed founded on the behaviour of Kazakhstan, which had acted as a successor of the USSR, therefore implying a tacit agreement for the "extension" of

[52] Costelloe, *supra* note 4, at 365.

[53] *Sanum* (Award on Jurisdiction), *supra* note 51, ¶ 290.

[54] *Sanum* (SGCA), *supra* note 51, ¶ 75.

[55] Dumberry, *supra* note 25, at 508.

[56] Lisa Bohmer, *Law of The Sea Tribunal Accepts Jurisdiction Over a Limited Number of Ukrainian Claims Against Russia but Declines to Examine the Parties' Sovereignty Dispute over Crimea*, INV. ARB. REPORTER, Mar. 30, 2020, https://www.iareporter.com/articles/law-of-the-sea-tribunal-accepts-jurisdiction-over-a-limited-number-of-ukrainian-claims-against-russia-but-declines-to-examine-the-parties-sovereignty-dispute-over-crimea/.

[57] World Wide Minerals v. Kazakhstan, UNCITRAL (case reference unknown).

[58] Luke Eric Peterson, *In a Dramatic Holding, UNCITRAL Tribunal Finds that Kazakhstan is Bound by Terms of Former USSR BIT with Canada*, INV. ARB. REPORTER, JAN. 28, 2016, https://www.iareporter.com/articles/in-a-dramatic-holding-uncitral-tribunal-finds-that-kazakhstan-is-bound-by-terms-of-former-ussr-bit-with-canada/.

the BIT.[59] First, however, in the more recent cases *Gold Pool v. Kazakhstan* and *Oleg Deripaska v. Montenegro*, the Tribunals there conversely found that the Russia-Canada BIT and the Russia-Yugoslavia BIT could not be applicable to Kazakhstan and Montenegro, respectively, because there is no rule of automatic succession to BITs.[60] In any case, pursuant to the "critical date" doctrine, it is submitted that Ukraine's submissions in the proceedings should have not been given weight. After a dispute has crystallised, [61] which it is submitted should be the date the arbitral proceedings begin,[62] the factual behaviour of the those involved, especially that of a state not party to the proceedings, and their conduct cannot influence the decisions of the tribunal.

As state succession could not take place with regard to the territory of Crimea on the basis of the unlawful change of control, the tribunals should have found the BIT inapplicable and declined to have jurisdiction.

(iii) Extraterritorial Application

In the alternative, drawing from an analogy from human rights treaties, as argued by Costelloe and Wende,[63] the tribunals could have found the BIT to apply extraterritorially. Whether or not the change of control is lawful, human rights protection "devolves with the territory" as their application is based on the concept of jurisdiction.[64]

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[59] *Id.*

[60] Vladislav Djanic, *Kazakhstan Fends Off Claims by Canadian Gold Miner, as Tribunal Finds it is Not a Successor to USSR BIT*, INV. ARB. REPORTER, Aug. 4, 2020, https://www.iareporter.com/articles/kazakhstan-fends-off-claims-by-canadian-gold-miner-as-tribunal-finds-it-is-not-a-successor-to-ussr-bit/; Vladislav Djanic, Revealed: Reasons Surface for Tribunal's Decision that Montenegro was not Bound by the Russia-Yugoslavia BIT, INV. ARB. REPORTER, July 3, 2020, https://www.iareporter.com/articles/revealed-reasons-surface-for-tribunals-decision-that-montenegro-was-not-bound-by-the-russia-yugoslavia-bit/.

[61] John Shijian Mo, *The Dilemma of Applying Bilateral Investment Treaties of China to Hong Kong and Macao: Challenge Raised by Sanum Investments to China*, 33 ICSID REV. 125, 130 (2018).

[62] *Sanum* (Award on Jurisdiction), *supra* note 51, ¶ 67.

[63] Costelloe, *supra* note 4, at 346, 359; Wende, *supra* note 7, at 139.

[64] Tams, *supra* note 33, at 327; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5 (Nov. 4, 1950); Human Rights Committee, General Comment No 31: The Nature of the General

The jurisprudence of the ECtHR has confirmed that *de facto* control can amount to the exercise of jurisdiction within the scope of the European Convention of Human Rights.[65] As Russia is a Member State of the Council of Europe, the "Ukrainian investors" could have, therefore, claimed interference with the "the peaceful enjoyment of . . . possessions" under Article 1 of Protocol 1 to the Convention, which has been clarified to also encompass ownership of shares.[66]

However, the argument in favour of extraterritorial application fails to consider the striking difference between human rights protection and the BITs in question. The former is based on the idea that once protection of rights is given to individuals, that cannot simply be taken back.[67] The latter, however, never accorded protection to the Ukrainian investors in a part of Ukraine's territory.

Lastly, the fact that the BIT limits its applicability to the "territory of the Contracting States" must be read as excluding its extraterritorial application. Most Model BITs contain clauses expressly mentioning "jurisdiction" as the basis for their application.[68] Had that been the intention of the parties here, they could have simply made it explicit. The definition of "territory" contained in Article 1 of the BIT itself excluded this hypothesis.

Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); Inter-American Court of Human Rights, Advisory Opinion OC-23/17 (Nov. 15, 2017); MARKO MILANOVIC, THE EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES AND POLICY (2011).

[65] Loizidou v. Turkey, App. No. 15318/89, Eur. Ct. H.R. 10, ¶¶ 52, 62-64 (Mar. 23, 1995),; Cyprus v. Turkey, App. No. 25781/94, Eur. Ct. H.R. 331, ¶ 77 (May 10, 2001); Banković v. Belgium, Admissibility, App. No. 52207/99, Eur. Ct. H.R. ¶¶ 61, 67 (Dec. 12, 2001); Ilaşcu and Others v. Moldova and Russia, App. No. 48787/99, Eur. Ct. H.R., ¶¶ 312-13 (July 8, 2004); Issa and ors v. Turkey, Merits, App. No. 31821/96, Eur. Ct. H.R., ¶ 69 (Nov. 16, 2004); Al-Skeini and Others v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R., ¶ 138 (July 7, 2011); Sargysian v. Azerbaijan, App. No. 40167/06, Eur. Ct. H.R., ¶¶ 117-19 (Dec. 14, 2011); Chiragov and Others v. Armenia, App. No. 13216/05, Eur. Ct. H.R., ¶ 119 (June 16, 2015).

[66] Sovtransavto Holding v. Ukraine, App. No. 48553/99, Eur. Ct. H.R., ¶¶ 91-92 (July 25, 2002); Marini v. Albania, App. No. 3738/02, Eur. Ct. H.R., ¶ 64 (Dec. 18, 2007); Maria Fanou & Vassilis P Tzevelekos, *The Shared Territory of the ECHR and International Investment Law* in RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT (Yannick Radi ed., 2018).

[67] Tams, *supra* note 33, at 336.

[68] South Africa 1998 Model BIT; Germany 2008 Model Treaty; United States 2012 Model BIT; The Netherlands 2019 Model BIT.

In conclusion, it is submitted that the tribunals should have found that the Russia-Ukraine BIT was not applicable to the claims and, having no basis of jurisdiction, they should have declined to hear the cases. Any argument, in practice, would have implied recognising the legal consequences of the annexation in breach of the duty to not recognise violations of *ius cogens*.

III. SECTION II

A. *Jurisdiction: A Matter of Authority*

Alternatively, in case the tribunals were to find the BIT applicable to the territory of Crimea, they should have nonetheless declined to hear the case for lack of jurisdiction. In order for tribunals to assume jurisdiction, which is their authority to hear a case,[69] it must be established that the claimant is a covered investor within the scope of the BIT (*ratione personae*), that the subject matter of the dispute is a covered investment (*ratione materie*) and that the treaty was in force when the dispute arose (*ratione temporis*).[70]

As a preliminary remark, it should be noted that it is not the purpose of this paper to directly challenge the jurisdiction *ratione personae*. It is accepted that, at least theoretically, the claimants in the proceedings could be "legally capable, under the legislation of [their] respective Contracting Party, to carry out investments on the territory of the other Contracting Party."[71] It is also not challenged that the treaty would have been considered to be in force at the time of the breach, had the treaty been applicable to Crimea.

Conversely, it is argued that the tribunals did not have jurisdiction *ratione materiae* for two reasons. First, because the subject matter of the dispute was not merely over investments but required a predetermination over the *status* of Crimea. Second, because the Russia-Ukraine BIT would have required the investments to be

[69] Alex Mills, *Arbitral Jurisdiction* in OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 1 (Thomas Schultz and Federico Ortino eds., 2020).

[70] Filippo Fontanelli, *Reflections on the Indispensable Party Principle in the Wake of the Judgment on Preliminary Objections in the Norstar Case*, 1 Rivista di Diritto Internazionale 121 (2017).

[71] Russia-Ukraine BIT, *supra* note 2, at art. 1(2).

made *ab inito* in the territory of Russia.

1. Indispensable Issues

The protection of the Russia-Ukraine BIT is limited, in Article 1, to investments "which are put in by the investor of one Contracting Party on the territory of the other Contracting Party".[72] Deciding on whether the investments made by Ukrainian investors in Crimea could fit this definition would have required, as mentioned above, the recognition that Russia was responsible for the territory of Crimea. A predetermination on sovereignty over Crimea was therefore an "indispensable" and "necessary prerequisite"[73] to determine whether the investments were entitled to protection under the BIT. It should be noted that the jurisdiction of the arbitral tribunals invested with the "Crimean" proceedings is strictly limited, under the terms of the treaty, to "investment disputes."[74] The required ruling on sovereignty would have therefore been outside the scope of the tribunals' jurisdiction.

Pursuant to the doctrine of *indispensable issues*, any court or tribunal required to make a predetermination of the lawfulness of matters outside their direct jurisdiction, which are not simply a mere factual or an ancillary consideration, is bound to decline to have jurisdiction.[75] In *Chagos Marine*, the majority declined jurisdiction over Mauritius' claim against the United Kingdom because a decision on the dispute would have required an implicit decision on sovereignty over a contended territory.[76] As clarified in *The South China Sea Arbitration*, arbitral tribunals should decline to have jurisdiction if the subject matter of the dispute would require a decision, implicitly or explicitly, on sovereignty.[77] This was also confirmed by the

[72] *Id.* at art. 1(4).

[73] Peter Tzeng, *Investments on Disputed Territory: Indispensable Parties and Indispensable Issues*, 14 REVISTA DE DIREITO INTERNACIONAL 121, 131 (2017).

[74] Russia-Ukraine BIT, *supra* note 2, at art 9.

[75] Aegean Sea Continental Shelf (Greece v. Turkey), 1978 I.C.J. 3, ¶¶ 83-86 (Dec. 19); Application of the Interim Accord of 13 September 1995 (Macedonia v. Greece), 2011 I.C.J. GL No. 142, 2011 I.C.J. 644, ¶ 37 (Dec. 5); Tzeng, *supra* note 75, at 131.

[76] Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Permanent Court of Arbitration, Award (Mar. 18, 2015).

[77] The Republic of Philippines v. The People's Republic of China, Permanent Court of

Tribunal in the proceedings brought by Ukraine against Russia pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), which also concerned the dispute over Crimea. The Tribunal ruled that the matter of sovereignty was not a merely ancillary determination and it declined to hear claims "to the extent that a ruling of the Arbitral Tribunal on the merits of Ukraine's claims necessarily require it to decide, expressly or implicitly, on the sovereignty of either Party over Crimea."[78] It is worth mentioning that Ukraine in the UNCLOS case did not challenge that its claims are premised on a determination of the issue of sovereignty.[79]

It is further submitted that Ukraine's submissions as non-disputing party cannot be considered as "dispensing" the tribunals from the issue of sovereignty. Arbitral tribunals, pursuant to the *kompetenz-kompetenz* doctrine,[80] have the duty to investigate the extent of their jurisdiction and the lack thereof cannot be cured by the behaviour of the parties.[81] Once an issue vitiating jurisdiction exists, arbitral tribunals have no alternative but to dismiss the case.

2. "Foreign" Investment

Had the tribunals decided that the BIT is nonetheless applicable to the claims and that the issue of sovereignty did not impinge on their jurisdiction, it is submitted that they should have declined jurisdiction because the relevant investments could not be considered "protected investments." Indeed, these investments had originally been "domestic" as made by Ukrainians in a part of Ukraine's territory. As such, they were not entitled to protection under the BIT.

It is a well-established principle of investment protection that the investment

Arbitration, Award on Jurisdiction and Admissibility (Oct. 29, 2015).

[78] Bohmer, *supra* note 58.

[79] *Coastal State* Rights, *supra* note 6, Rejoinder of Ukraine on Jurisdiction, ¶¶ 10-11 (Mar. 28, 2019); Lawrence Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68 INT'L & COMP. L.Q. 779, 786 (2019).

[80] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 335 (5th ed. 2009); Fontanelli, *supra* note 72 at 111.

[81] August Reinisch, *Jurisdiction and Admissibility in International Investment*, in GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 130 (Adrea Gattini et al., eds., 2018).

shall be made on the territory of the host state,[82] as the purpose of any investment treaty is to reduce the risks associated with another state's enforcement jurisdiction in its territory.[83] Conversely, investments not made on the territory of the host state should not benefit from the BIT protection and would not be covered by it.[84]

In *Stabil* and *Ukrnafta*, upholding the reasoning of the arbitral Tribunals, the STF maintained that the investments were not required to be made in the "other contracting state from the outset."[85] This point is the core of the issue brought before the tribunals. That is, whether a change of control over a territory can be the source of a change of "nationality" of the investment, thereby turning a former "domestic investment" into a "foreign" one. According to STF, the wording of Article 1 which is "put in by the investor of one Contracting Party on the territory" diverges from the wording of Article 12, which is "carried out by the investors of one Contracting Party on the territory[.]"[86] By comparing these provisions in the original languages of the BIT, Russian and Ukrainian, the STF concluded that while the term "investment" and the verb form used in relation to it in Article 12 appears to have a temporal element, *i.e.*, covering investments "made in the territory", Article 1 appears to simply require the investments to be "present" in the territory of the other State to be considered "covered investments."[87]

In upholding this reasoning, however, both the arbitral Tribunals and the STF failed to consider the principle of international law under which terms of a treaty

[82] Fedax N.V. v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, ¶ 41 (July 11, 1997).

[83] Zachary Douglas et al., PROPERTY, INVESTMENT, AND THE SCOPE OF INVESTMENT PROTECTION OBLIGATIONS 383 (2014).

[84] SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, ¶ 99 (Jan. 29, 2004); The Canadian Cattlemen for Fair Trade v. United States of America (formerly Consolidated Canadian Claims v. United States of America), Award on Jurisdiction, ¶ 221 (Jan. 28, 2008).

[85] *Ukrnafta I*, *supra* note 11, ¶ 4.4.2; *Stabil I*, *supra* note 11, ¶ 4.4.2.

[86] *Id.*

[87] *Ukrnafta I*, *supra* note 11, ¶ 4.4.3; *Stabil I*, *supra* note 11, ¶ 4.4.3.

must be understood to have the same meaning throughout the instrument.[88] Moreover, considering that the purpose of translated texts is to aid interpretation,[89] it is submitted that the English version of the definition of investment as "being put" in the territory of the other state should have not been undermined.

Furthermore, the STF held that, pursuant to Article 31 VCLT, the scope of the Russia-Ukraine BIT, which is "to create and maintain favourable conditions for mutual investments [and] economic cooperation between the Contracting Parties"[90] would require the extension of the treaty protection to the "newfound" foreign investors.[91]

While these are again the reasons in *Stabil* and *Ukrnafta*, it can be presumed that similar considerations have been made in the other proceedings. It is submitted, however, that those reasons are not sufficiently convincing.

First, the purpose of BITs is to increase the desirability of a particular state for foreign investors by guaranteeing that foreign investments will be provided legal protection.[92] Second, the rationale of the limited application of investment treaties to a specific territory is that it ensures that the investments effectively made on the basis of the BIT can contribute to the development of the economy of the host state.[93] The purpose of the BITs, therefore, is to protect foreign investors and their investment[94] and the wording of the most prominent investment treaties appears to

[88] Vienna Convention on the Law of Treaties, *supra* note 34, at art. 33; Schreuer, *supra* note 4.

[89] Reports of the International Law Commission on the Second Part of its Seventeenth Session and on its Eighteenth Session, art. 29, [1966] 2 Y.B. Int'l L. Comm'n 224, art. 29, U.N. Doc. A/CN/4/SER.A/1966/Add.1.

[90] Russia-Ukraine BIT, *supra* note 2, at Preamble.

[91] *Ukrnafta I*, *supra* note 11, ¶ 4.4.3; *Stabil I*, *supra* note 11, ¶ 4.4.3.

[92] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 22 (2nd ed. 2012).

[93] Consortium Groupement L.E.S.I.- DIPENTA v. République algérienne démocratique et populaire, ICSID Case No. ARB/03/08, Award, ¶ 47 (Jan. 10, 2005); *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶ 374 (Aug. 4, 2011); Michael Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, University of Cambridge Faculty of Law Research Paper No. 9/2014), 1248-49, https://ssrn.com/abstract=2391789; Salacuse, *supra* note 13, at 188.

[94] Dumberry, *supra* note 25, at 518.

point to the fact that the investment should be "foreign" since the beginning.[95] To summarise, BITs were never intended to protect domestic investors.[96]

Furthermore, this argument is reiterated by the systematics of investment protection. In *Pugachev v. Russia*, the Tribunal declined jurisdiction holding that the investor must have a foreign nationality at the moment of the investment, not merely at the time of the breach.[97] Moreover, the prohibition of treaty shopping, which is defined as the "process of routing an investment as to gain access to a BIT where one did not previously exist,"[98] infers that in investment arbitration, it is required that investors do not seek protection they were not originally entitled to.[99]

At last, the functional interpretation of the treaty fails to consider that by extending the protection to Ukrainian investors, it is actually limiting the protection of the investment that fit the requirement of the BIT since the beginning. Recognising that Ukrainian investments in Crimea qualify as foreign means ruling that the Russian investments made in Crimea are not protected anymore. While admittedly Ukraine would not be responsible for their expropriation because it could claim non-

[95] North American Free Trade Agreement, Dec. 17, 1992, art. 1101(1), *reprinted in* 32 I.L.M. 289 (1993),; Energy Charter Treaty, Dec. 17, 1994, art. 26(1); Christina Knahr, *Investments "in the Territory" of the Host State*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 46 (Christina Binder et al. eds., 2009).

[96] Wende, *supra* note 7, at 156.

[97] Damien Charlotin, *Analysis: Pugachev v. Russia Tribunal Sees no Obstacle to BIT Claims by Dual National, but a Majority Declines Jurisdiction after Finding no Foreign Nationality at the Time of the Investment*, INV. ARB. REPORTER, June 23, 2020, https://www.iareporter.com/articles/analysis-pugachev-v-russia-tribunal-sees-no-obstacle-to-bit-claims-by-dual-national-but-a-majority-declines-jurisdiction-after-finding-no-foreign-nationality-at-the-time-of-the-investment/.

[98] Inna Uchkunova, *Drawing a Line: Corporate Restructuring and Treaty Shopping in ICSID Arbitration*, KLUWER ARB. BLOG, Mar. 6, 2013, http://arbitrationblog.kluwerarbitration.com/2013/03/06/drawing-a-line-corporate-restructuring-and-treaty-shopping-in-icsid-arbitration/.

[99] *Philip Morris Asia Limited v. The Commonwealth of Australia*, Permanent Court of Arbitration, Award on Jurisdiction and Admissibility (Dec. 17, 2015); Julien Chaisse, *The Treaty Shopping Practice: Corporate Structuring and Restructuring to Gain Access to Investment Treaties and Arbitration*, 11(2) HASTINGS BUS. L.J. 225 (2015); JORUM BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW (2016).

attribution,[100] it does indeed demonstrate the paradox of a strictly functional interpretation. As the Tribunal in *Plama Consortium Limited v. Republic of Bulgaria* maintained, one should not over-extend the method of looking at the object and purpose.[101]

(i) State-to-State Arbitration

In any case, as the issue is of interpretation of a clause of the BIT and how to reconcile the different provisions, it should be noted that the Russia-Ukraine BIT, like most BITs,[102] contains two dispute resolution clauses. Article 10 of the BIT, indeed, also provides for state-to-state arbitration for disputes concerning "the interpretation and application of the Agreement." State-to-state clauses are intended to solve either "purely" theoretical questions of interpretation[103] or to clarify issues of interpretation or application that arise in actual investor-State disputes.[104] These clauses are specifically aimed to allow states to be "involved in a particular

[100] Wende, *supra* note 7.

[101] ICSID Case No. ARB/03/24, Decision on Jurisdiction, ¶ 193 (Feb. 8, 2005).

[102] Anthea Roberts, *State-To-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1, 3 (2014).

[103] *Italian Republic v. Republic of Cuba, Ad Hoc* State-to-State Arbitration, Interim Award (Mar. 15, 2005); *Republic of Ecuador v. United States*, Permanent Court of Arbitration, Request for Arbitration, 1 (June 28, 2011); Luke Eric Peterson, *ICSID Tribunal Declines to Halt Investor Arbitration in Deference to State-to-State Arbitration*, INVEST-SD: INV. LAW & POLICY WEEKLY NEWS BULLETIN (2003), https://www.iisd.org/itn/wp-content/uploads/2010/10/investment_investsd_dec19_2003.pdf; Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential*? in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW (Nerina Boschiero ed., 2013) 755-756; David Gaukrodger, State-to-State Dispute Settlement and the Interpretation of Investment Treaties, 3 O.E.C.D. WORKING PAPERS ON INTERNATIONAL INVESTMENT (2016); Murilo De Melo, *Host States and State-State Investment Arbitration: Strategies and Challenges*, 14 REVISTA DE DIREITO INTERNACIONAL 80 (2017).

[104] Republic of Ecuador v. United States, *supra* note 105, Expert Opinion with Respect to Jurisdiction of Professor Michael W. Reisman, 17, 22-23 (Apr. 4, 2012); Dapo Akande, *Ecuador v. United States Inter-State Arbitration under a BIT: How to Interpret the Word "Interpretation"*?, EJIL:Talk! Blog, Aug. 31, 2012, https://www.ejiltalk.org/ecuador-v-united-states-inter-state-arbitration-under-a-bit-how-to-interpret-the-word-interpretation/%0ABy&#; Roberts, *supra* note 104; Andreas Kulick, *State-State Investment Arbitration as a Means of Reassertion of Control—From Antagonism to Dialogue*, *in* REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME 128, 128 (Andras Kulick ed., 2016), reprinted in 27 SSRN Electronic Journal 1, 1 (2017).

dispute,"[105] as they allow states to act in diplomatic protection on behalf of an investor's claim[106] prior to the commencement of investor-state proceedings.[107]

Considering the particular circumstances of the "Crimean" proceedings and the extent to which Ukraine appeared to intend to be involved, state-to-state arbitration seeking clarifications of the terms of the treaty would have been the much-needed logical route to understand the applicability of the BIT.

3. Consequences of the Tribunals' Jurisdictional Decisions

One of the implications of the tribunals' recognition that Crimea can be regarded as Russian for the purposes of the BIT is the fundamental question of what type of protection would be available to investors that hold nationalities of third states, *i.e.*, those who are neither Russian nor Ukrainian. It is questionable whether they could then commence arbitral proceedings against Russia on the basis of a BIT between Russia and their home state. First, not every state that has a BIT with Ukraine also has signed one with Russia. Above all, for exemplificatory purposes, the United States has a BIT with Ukraine but the one signed with Russia is currently not in force. Secondly, it is also submitted that those proceedings would be a breach of the duty of non-recognition, as they would be based on the recognition of the consequences of Crimea's annexation.

Perhaps another state could espouse the claim of one of its investors, commencing state-to-state arbitration against Ukraine to seek clarity on the meaning of "territory" in the relevant BIT. Alternatively, these "foreign investors" could be protected through recourse to diplomatic protection,[108] which remains a viable mean in cases "where treaty regimes do not exist or have proved inoperative."[109] As

[105] CHITTHARANJAN AMERASINGHE, DIPLOMATIC PROTECTION 341 (2008).

[106] Roberts, *supra* note 104, at 16-17.

[107] Amerasinghe, *supra* note 107, at 341.

[108] *Draft Articles on Diplomatic Protection*, 61 U.N. GAOR Supp. No. 49, at 505, U.N. Doc. A/RES/61/35, Supp. No. 10, U.N. Doc. A/61/10 (2006).

[109] Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), 2007 I.C.J. 582, 614, ¶ 88 (May 24); Colin Warbrick, Diplomatic Representations and Diplomatic Protection, 51(3) INT'L COMP. L.Q. 723, 731 (2002).

diplomatic protection is at the discretion of the relevant state,[110] predictions on its feasibility would require considerations on the interests that play a part in international relationships. That is, however, beyond the scope of this paper.

Although the awards in the "Crimean proceedings" would not be binding on any other arbitral tribunal,[111] it is important to note that the implications of the tribunals' findings on jurisdiction are multifaceted. They stand on the predetermination that Crimea belongs to Russia and, possibly, imply restrictions of the rights of all other investors. Once again, as the BIT was not applicable in the proceedings and, in any case, as the tribunals could not have jurisdiction *ratione materiae*, they should have declined to hear the cases.

IV. SECTION III

A. *Admissibility of the Claims: A Matter of Appropriateness*

Even if the tribunals in the "Crimean" proceedings were to deem that they had jurisdiction, arguably finding the BIT applicable to Crimea and the investments as "foreign," they should have then considered the issue of admissibility and dismissed the claims on this ground.[112]

Drawing a line between jurisdiction and admissibility is not always an easy task. Accepting Jan Paulsson's distinction, jurisdictional objections are aimed at the tribunal's authority while admissibility objections concern the propriety of the claim to be decided by an arbitral tribunal.[113] Although a tribunal might have established that all jurisdictional requirements are met, there are scenarios in which the tribunal

[110] Mavrommatis Palestine Concessions (Greece v. United Kingdom), Permanent Court of International Justice, 1924 P.C.I.J. (ser. A) No. 2, 12 (Aug. 30); Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), 1970 I.C.J. 3, ¶ 79 (Feb. 5); Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy), 1989 I.C.J. 15, ¶ 51 (July 20); Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs, [2002] EWCA Civ. 1598 [107-08]; Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), 2004 I.C.J. 12 (Mar. 31).

[111] Schreuer, *supra* note 4, at 11.

[112] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 667 (2012).

[113] Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 616-17 (Gerald Aksen & Robert Briner eds., 2005).

cannot exercise its authority because the merits of the claims are not "suitable" to be subject to the tribunal's adjudication.[114]

This paper submits that the claims should have been declared inadmissible because, first, they concerned the legal interests of a state not party to the proceedings, and second, because the subject matter of the claims is not arbitrable on the grounds of public policy considerations.

1. Indispensable Party Doctrine

While admissibility is generally understood to cover issues of "ripeness" of the claim, as in to cover the lack of exhaustion of domestic remedies or mootness of the dispute,[115] it also requires claims to be dismissed when they concern the legal interests of third-parties not involved in the proceedings.[116] The doctrine of indispensable parties, also known as "*Monetary Gold*" principle, requires courts or tribunals to decline to hear a case when its subject matter requires a determination of the rights and obligations of a third state.[117] The consensual nature of arbitral proceedings would require this third state to be joined as a "full party" to the proceedings when its legal interests are affected.[118]

Although normally it is the parties who challenge the admissibility of the claim,[119] this was predictably not to be expected in the "Crimean" proceedings. The investors, on one hand, were interested in ensuring that the proceedings would go ahead as to enjoy the protection of the BIT. On the other hand, Russia's initial lack of participation in the proceedings impinged on the opportunity to raise the claim.

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[114] ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 148 (2009); Paulsson, *supra* note 115, at 604; Martins Paparinskis, *Revisiting the Indispensable Third-Party Principle*, 1 RIVISTA DI DIRITTO INTERNAZIONALE 71 (2020).

[115] Gozie Ogbodo, *An Overview of the Challenges Facing the International Court of Justice in the 21st Century*, 18 ANN. SURV. INT'L & COMP. L. 93, 98 (2012).

[116] Crawford, *supra* note 114, at 672.

[117] Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America), 1954 I.C.J.19 (June 15); *East Timor*, *supra* note 45, ¶ 35; Paparinskis, *supra* note 116, at 49.

[118] Christine Chinkil, *East Timor Moves into the World*, 4 EURO. J. INT'L L. 206 (1993).

[119] Paparinskis, *supra* note 116, at 74.

Nonetheless, once again the principle of *iura novit curia* would have required the tribunals to address this point.[120] Indeed, arbitral tribunals should carefully consider the admissibility of the claims, in particular because decisions on jurisdiction will be reviewable, while decisions on admissibility are not.[121]

Although the necessary third-party doctrine is generally considered to force ruling bodies to refrain from deciding any dispute which implies a determination of the responsibility of a third state,[122] it is submitted that this is not the core of the principle. Admittedly, none of the "Crimean" proceedings neither concern the responsibility of Ukraine nor compose the subject matter of the dispute. To the contrary, it is submitted that the meaning of this doctrine lies in prohibiting a tribunal or court to "decide over a dispute" between a state party to the proceedings and a state that is not a full party to the proceedings.[123]

It is further submitted that the *Monetary Gold* principle should also apply to arbitral proceedings for the reason that tribunals in general "operate within the general confines of public international law."[124] In *Larsen v. Hawaiian Kingdom*, the Tribunal dismissed the claim because "the sovereign rights of a State not a party to the proceedings [were] clearly called in question," confirming that principles of international law must be considered in arbitral proceedings as well.[125]

In any case, as mentioned above, the arbitral tribunals in the Crimean proceedings were bound to consider the territorial applicability of the BIT. Any such analysis is however premised on the required determination on sovereignty over the territory of Crimea. As Ukraine, which maintains its legal sovereignty over Crimea despite the *de facto* control exercised by Russia, was not a full party in the proceedings where

[120] Repousis, *supra* note 13, at 480; Saar Pauker, *Admissibility of Claims in Investment Treaty Arbitration*, 34 ARB. INT'L 1, 4 (2018).

[121] Paulsson, *supra* note 115, at 601, 604; Paparinskis, *supra* note 116, at 74.

[122] Tzeng, *supra* note 75, at 125; Fontanelli, *supra* note 72, at 127.

[123] Crawford, *supra* note 114, at 672; Monetary Gold, *supra* note 119, at 17.

[124] Schreuer, *supra* note 42.

[125] Permanent Court of Arbitration, Award, ¶¶ 11.16-11.17 (May 15, 2014).

determinations concerning its sovereign rights were a requirement,[126] it is submitted that the tribunals should have declined to hear the case and declared the claims inadmissible.

2. Arbitrability and Public Policy

Arbitrability, broadly understood, refers to whether a claim is "capable of being settled by arbitration."[127] Although it has been sometimes unclear whether arbitrability should be treated as a jurisdictional or admissibility issue,[128] it is submitted that in investment arbitration it should rather be considered as an issue of admissibility, as it falls in the Paulsson's category of limitations to the subject matter. As such it will be treated for the purposes of this paper.

Certain claims cannot be submitted to arbitration and are therefore non-arbitrable when they are outside of the rights that are at the disposal of the parties, such as when they involve public policy concerns or powers reserved to courts.[129] Although public policy and arbitrability considerations are sometimes distinguished,

[126] President of Ukraine, *supra* note 7.

[127] Loukas Mistelis, *Is Arbitrability a National or an International Law Issue?*, *in* ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 13(Loukas Mistelis & Stavros Brekoulakis eds., 2009); Redfern & Hunter, *supra* note 82, ¶¶ 2.29-2.30; Paulsson, *supra* note 115, at 610 (citing PHILIPPE FAUCHARD, ET AL., TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL 326 (2005); Mills, *supra* note 71, at 15-16; ILIAS BANTEKAS, AN INTRODUCTION TO INTERNATIONAL ARBITRATION 29 (2015).

[128] ICC Case No. 1110, 10 ARB. LNT'L 3, ¶ 282 (1963); ABDHULAY SAYED, CORRUPTION IN INTERNATIONAL TRADE AND COMMERCIAL ARBITRATION 64 (2004); Luis Miguel Velarde Suffer & Jonathan Lim, *Judicial Review of Investor Arbitration Awards: Proposals to Navigate the Twilight Zone between Jurisdiction and Admissibility*, 8 DISP. RES. INT'L 85, 89 (2014); Yas Banifatemi, *The Impact of Corruption on "Gateway Issues" of Arbitrability, Jurisdiction, Admissibility and Procedural Issues*, *in* ADDRESSING ISSUES OF CORRUPTION LN COMMERCIAL AND LNVESTMENT ARBITRATION 17 (Domitille Baizeau & Richard Kreindler eds., 2015), https://lrus.wolterskluwer.com/store/product/addressing-issues-of-corruption-in-commercial-and-investment-arbitration/; Klára Drličková, *Arbitrability and Public Interest in International Commercial Arbitration*, 17 INT'L & COMP. L. REV. 55, 56 (2017).

[129] Elie Kleiman & Claire Pauly, *Arbitrability and Public Policy Challenges*, in GLOBAL ARBITRATION REVIEW: THE GUIDE TO CHALLENGING AND ENFORCING ARBITRAL AWARDS (1st ed. 2019), https://globalarbitrationreview.com/chapter/1178487/arbitrability-and-public-policy-challenges#footnote-057; Karl-Heinz Böckstiegel, *Public Policy as a Limit to Arbitration and its Enforcement*, IBA J. DISP. RES., Special Issue 2008, The New York Convention: 50 Years, 11th IBA International Arbitration Day and United Nations New York Convention Day, 4 (2008)4; Banifatemi, *supra* note 130.

it is widely acknowledged that the determination of arbitrability encompasses considering issues of public policy.[130] This is based on the recognition that states do not exist in a vacuum but rather belong to the broader framework of global governance and exist and work within the confines of international law and the principles on which it is based. [131] They therefore require due considerations in all *fora*[132] for "the system of values that must be complied with either the law that governs the dispute,"[133] which corresponds to the principles of universal justice and *ius cogens.*[134]

To summarise, arbitrability prevents certain matters from being decided in the private rooms of the arbitral proceedings and it aims at safeguarding the role of courts in protecting "the public interest" [135] or, better, the "larger interest of society."[136] As it is the *lex arbitri* which governs the matter of arbitrability,[137] each

[130] Karl-Heinz Bockstiegel, *Public Policy and Arbitrability*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 178 (Pieter Sanders ed., 1986); Fifi Junita, *Public Policy Exception in International Commercial Arbitration– Promoting Uniform Model Norms*, 5 CONTEMP. ASIA ARB. J. 45, 56-57 (2012).

[131] Kim Moloney & Diane Stone, *Beyond the State: Global Policy and Transnational Administration*, 1 INT'L REV. PUB. POL'Y 104, 105 (2019).

[132] World Duty Free Company v. Republic of Kenya, ICSID Case No. Arb/00/7, Award, ¶ 157 (Oct. 4, 2006).

[133] Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55, 106-07 (Separate Opinion of Moreno Quintana, J., of 28 Nov.); Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier RAKTA & Bank of America, 508 F.2d 969 (2nd Cir. 1974); Kleiman & Pauly, *supra* note 131.

[134] Michael Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 219-20 (1997); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under The U.N. Charter* 3 SANTA CLARA J. INT'L L. 72, 73 (2005); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 79-80 (2007); Deeksha Malik & Geetanjali Kamat, *Corruption in International Commercial Arbitration: Arbitrability, Admissibility and Adjudication*, 1 THE ARB. BRIEF 1, 7 (2018).

[135] Thomas Carbonneau & Francois Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT'L & COMP. L. 193, 194-95 (1994); Böckstiegel, *supra* note 132, at 126.

[136] Carbonneau & Janson, *supra* note 137, at 209-10.

[137] Loukas Mistelis, Arbitrability: International and Comparative Perspectives, *in Arbitrability: International and Comparative Perspective* 13 (Loukas Mistelis & Stravros Brekoulakis eds., 2009).

state has sovereignty to determine the rules that will limit arbitration within its jurisdiction.[138] By choosing to locate the proceedings in a given jurisdiction, the parties submit to the laws of that state as applied by its courts and accept that their autonomy only exists within the limits of the mandatory provisions of the law of the seat.[139]

The *lex arbitri* of all known seats in the "Crimean" proceedings, namely Switzerland, the Netherlands and France, mandate that the issue of arbitrability, and the public policy considerations that follow, must be examined by the tribunal.[140] As any award in the "Crimean" proceedings would imply the recognition of the unlawful annexation of Crimea in breach of *ius cogens*, contrary to international public policy, it is submitted that the claims were non-arbitrable.[141]

However, it appears that in the *Ukrnafta* and *Stabil* proceedings, both seated in Switzerland, the issues of arbitrability and public policy were not found to be relevant by the Tribunals. In fact, Russia challenged the arbitrability of the claims only during the setting aside proceedings of the final award. In a rather unsatisfactory manner, the STF held that no such concerns had arisen because "the subject matter of the arbitration was not the status of Crimea with regard to the 1998 BIT nor its status under international law," but was rather a "pecuniary claim."[142]

This reasoning—in light of the abovementioned discussion—entirely failed to consider the fact that the Tribunals were, nevertheless, deciding over the sovereignty of Crimea. That was a matter, however, the parties could not "freely dispose of." Whether explicitly or tacitly, no decision on jurisdiction could be made without finding that the annexation had given rise to state succession. In any case, the STF

[138] ANDREW TWEEDDALE & KEREN TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE ¶ 4.24 (2007).

[139] Redfern & Hunter, *supra* note 82, at 124; Mistelis, *supra* note 129, at 13; Drličková, *supra* note 130, at 68.

[140] Swiss Federal Statute on Private International Law (PILA) (1987) art. 177(1)-(2); Dutch Code of Civil Procedure (1986), art. 1020(3); French Civil Code (2016) arts. 2059-60.

[141] Dumberry, *supra* note 25, at 528.

[142] *Ukrnafta II*, *supra* note 11, ¶ 4.2; *Stabil II*, *supra* note 11, ¶ 4.2.

held that the "the territory of the Crimean Peninsula is to be considered part of [Russia]'s "territory" within the meaning of Art. 1(4) [BIT] 1998 and is included within the territorial scope of the agreement."[143] This appears to demonstrate that the Tribunal did make such analysis but failed to consider it a ground to dismiss the case as non-arbitrable.

However, it is argued that the STF's view on the matter should be better contextualised rather than being considered as a simple confirmation of the arbitrability of these claims. First, Swiss courts typically adopt a restrictive definition of public policy.[144] Accordingly, public policy would be violated only "when the recognition or the enforcement of a foreign award offends the Swiss concept of justice in an intolerable manner."[145] Secondly, it should also be considered in the light of the Swiss courts' stance on review of arbitral tribunals' decisions on jurisdiction. Indeed, although Article 190 PILA includes lack of (or refusal to assume) jurisdiction as a ground to challenge an award issued by a tribunal seated in Switzerland, the Swiss courts typically defer to such determinations. In *Recofi v. Vietnam*, the STF held that while it could "freely review" the decision on jurisdiction, it cannot be used as a court of appeals.[146] It further added that it had to adhere to the factual findings contained in the award which could not be rectified "even if the facts were established in a blatantly inaccurate manner or in violation of the law."[147] Third, as in *Ukrnafta* and *Stabil*, the arbitrability issue was only raised at the stage of the set aside proceedings after the final award; the STF—even if partially addressing the issue—did maintain the Tribunals' decision on jurisdiction because limited by issue estoppel.[148]

Considering these three points jointly, it becomes clear that the issue of arbitrability was to some extent severely undermined and not properly considered.

[143] *Ukrnafta* I, *supra* note 11, ¶ 4.3.2; *Stabil* I, *supra* note 11, ¶ 4.3.2.

[144] Tribunal fédérale [STF], July 28, 2010, 4A_233/2010, ¶ 3.

[145] *Id.*

[146] Tribunal fédérale [STF], Sept. 20, 2016, 4A_616/2015, ¶ 3.

[147] *Id.* ¶ 3.1.2.

[148] *Ukrnafta II*, *supra* note 11, ¶ 4.2; *Stabil II*, *supra* note 11, ¶ 4.2.

However, as the implications of any of those decisions go beyond what can be settled by arbitration, the tribunals could have also declined to hear the case on the grounds of arbitrability.

As Russia did take part in the more recent proceedings, with some of them not seated in Switzerland and with set aside proceedings currently pending,[149] the issue of arbitrability may have been raised in those proceedings in determining whether the tribunals should have exercised their jurisdiction. For example, French courts, being heirs of a different tradition, have continuously reiterated that arbitrators have the right to apply the rules of international public policy—the *competence sur la competence* principle—and the duty to ensure compliance with them to the point that they can impose sanctions to parties for failure to comply with public policy.[150] The decision of the other courts on the set aside proceeding are, therefore, long awaited to understand whether the tribunals ruled on the issue of arbitrability and on which ground they accepted to have jurisdiction.

(i) Enforcement

The unexplored and underestimated issue in these cases remains the one of enforcement. In investment arbitration, given the consent of contracting states to the BIT, it would be expected that these states comply with their obligations arising from awards on the basis of the *pacta sunt servanda* principle, having therefore waived their immunity.[151]

In cases of non-ICSID awards, such as those issued in the "Crimean" proceedings,

[149] Nicholas Peacock et al., *Inside Arbitration: Crimean Investment Treaty Arbitration Claims: Recent Developments*, Feb. 28, 2020, https://www.herbertsmithfreehills.com/latest-thinking/inside-arbitration-crimean-investment-treaty-arbitration-claims-recent-developments.

[150] Cour de Cassation, Commercial Division [Cass. com.], Nov. 29, 1950, Tissot v. Neff (Fr.); Judgment of Nov. 29, 1968, Colmar 2e, 1970 J.C.P. II, No. 16246 (Fr.); Cour d'appel de Paris [Paris Court of Appeal], May 19, 1993, Labinal v. Mors, REVUE DE L'ARBITRAGE 645 (1993) (Fr.).

[151] Susan Choi, *Judicial Enforcement of Arbitral Award under the ICSID and New York Convention*, 28 N.Y.U. J. INT'L L. & POL. 175, 175 (1995); Kamal Huseynli, Enforcement of Investment Arbitration Awards: Problems and Solutions, 3 BAKU ST. U. L. REV. 40, 41 (2017); Alan Alexandroff & lan Laird, *Compliance and Enforcement: Recognition, Enforcement, and Execution of Investment Arbitration Awards*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1174(Thomas Schultz & Federico Ortino eds., 2020).

the enforcement is governed by the New York Convention (NYC).[152] Article V of the NYC provides the grounds for refusal of enforcement, which includes both jurisdictional issues as well as arbitrability and public policy considerations.[153] There is, on these issues, a distinction to be made. With regard to jurisdiction, national courts adopt different standards of review which therefore means that some state courts at the stage of enforcement may defer to the tribunals' determination on jurisdiction.[154] Conversely, issues of arbitrability and public policy depend on the discretion of state courts which have the power to enforce, or refuse to enforce, the awards.[155] Admittedly, these latter approaches have not been widely adopted by national courts,[156] as it has been argued that such refusal should be interpreted narrowly and only applied if "the award contravenes principles which are considered in the host country as reflecting its fundamental convictions, or as having an absolute, universal value."[157]

It is worth repeating at this point that the obligation of non-recognition of an unlawful annexation is recognised to be *ius cogens* and, as such, is binding upon all states, which should therefore refuse the enforcement of the award.[158]

In any case, it should be noted that there is a line to be drawn between the enforcement of awards, which depends on the discretion of courts the investor turns to, and the execution of the award, which is, to put it bluntly, the payment of the sums owed.[159] The latter consists of, for example, attacking a state's assets, which have

[152] Huseynly, *supra* note 153, at 42, 45.

[153] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(2)(a)-(b), 21 U.S.T. 2517, 330 U.N.T.S. 38.

[154] Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108(4) AM. J. INT'L L. 150 (2014).

[155] New York Convention, *supra* note 155, at art. V; Huseynly, *supra* note 153, at 61.

[156] JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 721 (2003).

[157] FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 996 (Emmanuel Gaillard & John Savage eds., 1999).

[158] Articles on State Responsibility, *supra* note 38, at art. 41.

[159] Lim-Ho-Paparinskis, *supra* note 14, at 460; Jacob Kuipers, *Too Big to Nail: How Investor-State Arbitration Lacks an Appropriate Execution Mechanism for the Largest Awards*, 39 B.C.

been anyway described as falling under state immunity.[160] As Russia tends to refuse enforcement and payment on public policy grounds,[161] and considering that it challenged that the claims were not arbitrable, this does raise the question of whether these awards are simply going to become a rendition of *Yukos*.[162]

Predictably, the Crimean saga will end the same way it began: with empty-handed investors but passing through the recognition by both tribunals and national courts that the Crimean Peninsula is effectively Russian.

V. CONCLUSION

To safeguard the legitimacy of their decision and the stability of the system in the international legal order, arbitral tribunals should not go beyond the scope of their jurisdiction.[163] While this premise is widely recognised, the tribunals in the "Crimean" proceedings decided not to take this obligation into account, only to reach their decisions without considering and "avoiding" the preliminary issue concerning the *status* of Crimea. Conversely, it has been the purpose of this paper to demonstrate that the tribunals were bound to address the "territorial" question of the applicability of the BIT. The ruling that the BIT could provide protection to the "Ukrainian investors" was rooted in the predetermination that Crimea is to be deemed as Russian. Indeed, the sole logical way that could have led the tribunals to accept jurisdiction was for them to have considered the "legal" consequences of the unlawful annexation of Crimea, which would have been in breach of the tribunals' duty to abide by and respect the rules of international law. For these reasons, the tribunals in the "Crimean" proceedings should have declined to hear the disputes. Thus, it is submitted that any tribunal vested with claims concerning "Ukrainian" investments made in the territory of Crimea should decline to have jurisdiction on multiple

INT'L & COMP. L. REV. 417, 419 (2016).

[160] *Id.* at 419.

[161] FOUCHARD GAILLARD GOLDMAN, supra note 159.

[162] Yukos Universal Ltd. (Isle of Man) v. The Russian Federation, UNCITRAL, Final Award (July 18, 2014).

[163] Tzeng, *supra* note 75, at 135.

grounds, including (1) that the BIT was not applicable to the claims, (2) that the tribunal could not have jurisdiction *ratione materiae* and, (3) as a last resort, that the claims were not admissible.

It does not go unnoticed that the implication of this paper is the failure of the purpose of investment arbitration, which is to protect investors. Had the tribunals declined to hear the cases, the "Ukrainian" investors could have possibly been left empty-handed, with their investment having been expropriated by a foreign state but prevented from seeking compensation before an arbitral tribunal. Whether the awards can actually be considered a success for the investors and whether they will effectively be given the compensation that has been awarded is a completely different question that will, predictably, only be answered by further proceedings before national courts. The investors' quest to commence arbitral proceedings, and Ukraine's "intervention" in favour of its nationals, is nevertheless a failure to consider the other *fora* available to them, including recourse to the ECtHR, diplomatic protection, and state-to-state arbitration, the effectiveness of which is, however, beyond the scope of this paper.

Similarly, it is unclear what the future holds for investments made in Crimea by non-Ukrainians, especially whether they would be entitled to protection under investment treaties or whether they will have to turn to state courts.

In any case, the main issue originating from the "Crimean" proceedings is the disregard for the underlying recognition of Crimea as Russian, with the public's discussion on the issue fading over the years. Therefore, it is submitted that the interest of the international community should have superseded those of the investors.[164] While the more legally correct decision may have led to a more unjust result, it is submitted that that should still not prevent any ruling body from reaching the said decision.

Although almost all materials of the "Crimean" proceedings remain locked in the private rooms where they took place, it appears that the tribunals decided otherwise and, on the basis of the arguments that have been hereby challenged, they had found

[164] Dumberry, *supra* note 25, at 532; Carbonneau & Janson, *supra* note 137, at 211.

sufficient grounds to accept jurisdiction. The decisions of national courts on the set-aside and enforcement proceedings that are currently pending[165] are therefore necessary to effectively understand the tribunals' reasoning. However, it would be a mistake to ignore that the proceedings ought to be correctly framed by considering Russia's lack of participation in the proceedings until 2019. Whether politics might have played a part in the tribunals' findings—and in the awards—is the underlying question that, to this day, remains unanswered.

After all, the intricacies of the international community can hardly be compared to the throw of a stone to a giant's forehead but, remaining in the unexplored field of stone-throwing metaphors, what should be of concern is the ripple effect of the "Crimean awards."

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[165] Peacock et al., *supra* note 151.

2020-2021 YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION" FINALIST

COMPLIANCE WITH CLIMATE CHANGE STANDARDS AS A JUSTIFICATION TO VIOLATIONS OF INTERNATIONAL INVESTMENT TREATY OBLIGATIONS—AN ANALYSIS

by Marcus Liew

I. INTRODUCTION

Climate change has come to the fore as a genuine global concern worthy of serious attention. Given its global nature, international investment law cannot escape from this circumstance. The United Nations International Panel on Climate Change (IPCC), responsible for assessing climate change,[1] recently affirmed that evidence of the climate system[2] warming is unequivocal.[3] With the increase in global warming comes "severe, pervasive and irreversible impacts for people and ecosystems."[4] Suffice to say, climate change requires urgent consideration. Nevertheless, attitudes towards climate change have been lukewarm at best—the recent UN Emissions Gap Report 2019 findings paint a bleak picture in this regard: countries have collectively failed to stop the growth in global greenhouse gas emissions despite their political commitments, and the 1.5°C goal of the Paris

[1] The IPCC provides policymakers with regular assessments of the scientific basis of climate change, its impacts and future risks, and options for adaptation and mitigation. Intergovernmental Panel on Climate Change, IPCC Factsheet: What is the IPCC? (August 30, 2013), https://www.ipcc.ch/site/assets/uploads/2018/02/FS_ what_ ipcc.pdf.

[2] United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107, art (1)(3) (defining "climate system" as "the totality of the atmosphere, hydrosphere, biosphere and geosphere and their interactions") [hereinafter "UNFCCC"].

[3] IPCC, *Climate Change 2014: Synthesis Rep., Summary for Policymakers* (2014), at 2, 4-5, 10, https://www.ipcc.ch/site/assets/uploads/2018/02/AR5_SYR_FINAL_SPM.pdf [hereinafter "IPCC SPM"].

[4] *Id.* at 8.

Agreement is nearly slipping out of reach.[1] As Professor Tommy Koh states: "the majority are ignorant. The threat of climate change is like an invisible enemy. It is not like a meteorite heading towards earth. The earth is warming slowly but progressively. We are like the proverbial frog in a pot of boiling water."[2]

The international investment regime is no different. Historically, international investment agreements were promulgated without regard to the amorphous concepts of climate change. However, even with increasing recognition of climate change concerns as a global community interest, international investment law has been slow to respond to this shift. Many investors still prioritize economic output and turn a blind eye to climate action imperatives.

Hence, states and the international investment regime are critical in addressing the global issue of climate change. Providing states with climate change standards as a justification to violations of investment treaty obligations might provide the catalyst for change. While climate change and foreign direct investments are currently dealt with under separate fields of international law,[3] it is undeniable that both are inextricably linked—especially since states and Bilateral Investment Treaties (BITs) recognise the supremacy of international law in investment disputes.[4] But how can the interest of climate change be enforced in the international investment setting, as a justification to violations of international investment treaty obligations?

This paper proceeds as follows: Part II begins with presenting climate change as a global community interest. Part III reviews the status of climate change recognition in international investment jurisprudence. Part IV concludes by discussing the implication of the jurisprudence and potential avenues for climate change standards

[1] United Nations Environment Programme, *Emissions Gap Report 2019* (November 2019), Forward, https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?seq uence=1& isAllowed=y.

[2] Tommy Koh, *Foreword*, *in* CRUCIAL ISSUES IN CLIMATE CHANGE AND THE KYOTO PROTOCOL, ASIA AND THE WORLD (Kheng L. Koh et al. eds., 2009).

[3] Valentina Vadi, *Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals?*, 48 VAND. J. OF TRANSNAT'L L., 1285, 1343 (2015).

[4] Vienna Convention on the Law of Treaties, May 23, 1969, Arts. 27, 31, 1155 U.N.T.S. 331 [hereinafter "VCLT"].

to operate as justifications to violations of international investment treaty obligations.

II. DEFINING CLIMATE CHANGE AS A GLOBAL COMMUNITY INTEREST

B. *Climate Change and International Standards*

Adopting the United Nations Framework Convention on Climate Change's ("UNFCCC") definition, "climate change" means "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods."[5]

Standards for climate change[6] have been set forth in, *inter alia*, the UNFCCC, the Kyoto Protocol[7] and the Paris Agreement.[8] These instruments strive to achieve safe concentrations of atmospheric greenhouse gases via mitigation and to "make finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development."[9] Notably, the Paris Agreement obliges parties to engage in environmental adaptation planning and implementation, recognizing it as a "global challenge."[10]

C. *Defining the "Global Community Interest"*

By its very definition, an essential characteristic of the global community interest is that the interest transcends the interests of individual states and parallels the global needs and hopes of all humanity.[11] Furthermore, what sets global community interests apart from other interests are, first, the significance of the values at stake

[5] UNFCCC, *supra* note 2, at art. 1(2).

[6] Given the broad ambit of the definition of climate change standards, international environmental standards and obligations (which are referred to subsequently in this paper) necessarily fall within this ambit as well.

[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter "Kyoto Protocol"].

[8] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter "The Paris Agreement"].

[9] *Id.* at art. 2; UNFCCC, *supra* note 2; Kyoto Protocol, *supra* note 11, Preamble.

[10] The Paris Agreement, *supra* note 12, at art. 7(2).

[11] WOLFGANG BENEDEK, ET AL., THE COMMON INTEREST IN INTERNATIONAL LAW 17 (2014).

and, second, the need for collective action.[12] Particularly, concerning the need for collective action, global community interests require "collective action in response; no single state can resolve the problems they pose or receive all the benefits they provide."[13]

D. *Climate Change as a "Global Community Interest"*

Taking the definitions above, climate change falls squarely within the global community interest. Climate change and its ramifications (loss of biodiversity, increase in climate related calamities, etc.) do not only affect individual states, but also concern the global community. The climate, biodiversity, and in fact the entire world forms an interdependent ecological system which can only be protected at the global level.[14] This requires active cooperation and a joint effort among states to address climate change.

Climate change was first recognized as a global community interest in the 1972 Stockholm Declaration to the Human Environment—"to defend and improve *the human environment* for present and future generations has become an *imperative goal for mankind*."[15] Additionally, Principle 1 to the Stockholm Declaration emphasized that "man has the fundamental right to . . . adequate conditions of life, in an environment of quality."[16] Subsequently, climate change was expressly recognised as a "common concern of mankind" in the 1988 General Assembly Resolution 43/53[17] and has been continually recognized in other international instruments, including the

[12] CLAIRE BUGGENHOUDT, COMMON INTERESTS IN INTERNATIONAL LITIGATION, A CASE STUDY ON NATURAL RESOURCE EXPLOITATION DISPUTES 19 (2017); Dinah Shelton, *Common Concern of Humanity*, 1 IUSTUM AEQUUM SALUTARE 33, 33–35 (2009).

[13] BENEDEK, ET AL., *supra* note 15, at 17.

[14] *Id.* at 33–34.

[15] United Nations Conference on the Human Environment, *Stockholm Declaration*, ¶ 6, UN Doc. A/CONF.48/14/Rev. 1 (June 16, 1972) [hereinafter "*Stockholm Declaration*"]. This was also echoed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora dated March 3, 1973.

[16] *Id.* at Principle 1.

[17] G.A. Res. 43/53, Protection of Global Climate for Present and Future Generations of Mankind, ¶ 1 (Dec. 6, 1988).

UNFCCC,[18] the Convention on Biological Diversity and the 1992 Rio Declaration.[19] Furthermore, virtually all states acknowledge the global importance of climate change. This is evinced through the widespread acceptance and ratification of international treaties concerning climate change, for example, 197 parties joined the UNFCCC, 181 parties joined the Paris Agreement, and 192 parties joined the Kyoto Protocol. Hence, it is undisputed that climate change falls within the ambit of a global community interest.

Climate change as a global community interest is relevant in international investment law. International investment jurisprudence has supported the application of general community interests as potential justifications against investor rights and infringements.[20] This community interest cannot be confined to the domestic sphere, but must necessarily be that of global nature, encapsulating both the collective and individual interests of humans. Indeed, climate change considerations should precede investment protection as an important value of the international community in the hierarchy of international norms. Such community values ascribe precedence in international law as reflected by the notion of *jus cogens* in international law. Given the imperative and urgent necessities to humanity and the international community presented by climate change, this paper advances the notion that confronting climate change should take precedence over investment protection.

III. THE STATE OF CLIMATE CHANGE RECOGNITION IN INTERNATIONAL INVESTMENT JURISPRUDENCE: A REVIEW

The interaction between investment treaties and international environmental

[18] UNFCCC, *supra* note 2, at Preamble.

[19] United Nations Convention on Biological Diversity, June 5, 1992, Preamble, 1760 U.N.T.S. 79, 31 I.L.M. 818; United Nations Conference on Environment and Development, *Rio Declaration*, U.N. Doc. A/CONF.151/26 (Vol. 1) (Aug. 12, 1992).

[20] *See generally* JORGE E. VINUALES ET AL., THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 329 (2014); Methanex Corp. v. United States of America, UNCITRAL, Final Award (Aug. 2, 2005); Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); Marvin Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

instruments have been occasionally, but unsatisfactorily, examined in investment awards. Given that there is no explicit rule dealing with the interaction between different international instruments in international investment, this section scrutinizes relevant investment awards to examine how tribunals have dealt with global community interests pertaining to the environment. The underlying thread in the jurisprudence is an indication of a marked shift in emphasis from *Santa Elena v. Costa Rica*,[21] which gave precedence to investment protection, to more recent cases which have emphasized environmental protection.

A progressive change can be witnessed from the awards in *Santa Elena* and *Metalclad*, both decided in 2000. From an inflexible attitude of investment protection and general apprehension towards the application of international environmental instruments, concern towards the protection of the environment as a precedent interest began to emerge in successive cases. These cases are in line with the changing attitude of states in the development of investment treaties, which began to recognize sustainable development as the principal aim of investment treaties and providing for defenses based on the protection of environment and human rights.[22]

A. *Initial Hesitance towards Recognition of International Environmental Obligations*

In *Santa Elena*, the Claimant, CDSE, was formed for the purpose of purchasing Santa Elena to develop it as a tourist resort and residential community.[23] A majority of the CDSE shareholders were US citizens. Upon acquiring the property, CDSE proceeded to design a land development program and undertook various financial analyses of the property.[24] The Respondent, the Costa Rican Government, subsequently expropriated the property because of conservation objectives, *i.e.*,

[21] Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award (Feb. 17, 2000).

[22] MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 265–77 (4th ed. 2017).

[23] *Santa Elena*, Award, ¶ 16.

[24] *Id.*

conserving flora and fauna and protecting spawning grounds for sea turtles.[25] CDSE's property was required to meet this objective. While CDSE did not object to the expropriation, it disputed the amount of compensation to be rendered.[26]

What is pertinent is that the *Santa Elena* award addressed the conflict between the obligation to compensate in the event of expropriation and the international non-investment obligations which motivated this expropriation. In dealing with this question, the tribunal stated:[27]

> While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the property was taken for this reason does not affect either the nature or the measure of compensation to be paid for the taking. That is, *the purpose of protecting the environment for which the property was taken does not alter the legal character of the taking* for which adequate compensation must be paid. *The international source of the obligation to protect the environment makes no difference.*

The tribunal in *Santa Elena* found that the motivation behind the expropriation of property did not affect the expropriatory nature of the taking and compensation was still due. As such, the international non-investment obligation concerning the environment[28] was immaterial and the tribunal declined to analyse the international legal obligation to preserve the ecology of the Santa Elena site.[29] The tribunal further added that: "where property is expropriated, *even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.*"[30]

Hence, the *Santa Elena* tribunal deemed non-investment instruments and international non-investment obligations as *irrelevant* in determining if there had

[25] *Id.* ¶ 18.

[26] *Id.* ¶¶ 15–21.

[27] *Id.* ¶ 71 (emphasis added).

[28] Inferred to be the obligations under the Convention on Biological Diversity. *See* United Nations Convention on Biological Diversity, *supra* note 23.

[29] *Santa Elena*, ¶ 71 n.32.

[30] *Id.* ¶ 72 (emphasis added).

been a violation to treaty provisions. This categorical approach, however, might not be an accurate representation of the current state of international investment law, given the increasing recognition of the state's right to regulate.[31]

A similar attitude was adopted in *Metalclad v. Mexico*.[32] *Metalclad* concerned waste disposal and the operation of a waste landfill. In 1993, Metalclad, a US corporation, had purchased a Mexican company, COTERIN, together with its permits, in order to build and operate a site as a hazardous waste landfill.[33] Early in 1995, although the waste landfill raised some concerns, authorities concluded that the area was fit for a hazardous waste landfill.[34] However, after completing construction of the landfill, demonstrators blocked entry to the site, preventing Metalclad from opening the landfill. After months of negotiation, Metalclad and Mexico came to an agreement for the operation of the landfill.[35] Nevertheless, the municipal government denied Metalclad the operation permit and subsequently issued an Ecological Decree declaring a "Natural Area" to protect a rare cactus. This Natural Area included the area of the landfill.[36] Metalclad instituted arbitration alleging violations of NAFTA Arts. 1105 (Fair and Equitable Treatment) and 1110 (Expropriation).

Here, the tribunal did not even take into consideration the environmental and health consequences pointed out by the Respondent, much less contemplate the applicability of international climate change instruments. This was despite the Respondent referencing several instruments such as the North American Agreement on Environmental Cooperation which emphasizes environmental protection and the importance of public participation in conserving the environment.[37] In fact, given that *Metalclad* concerned the preservation of endemic species and a rare cactus, the

[31] United Nations Convention on Biological Diversity, *supra* note 23.

[32] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[33] *Id.* ¶ 30.

[34] *Id.* ¶ 44.

[35] *Id.* ¶ 47.

[36] *Id.* ¶ 59.

[37] *Metalclad*, Respondent's Counter Memorial (May 22, 1998).

tribunal could have addressed the relevance of the Convention on Biological Diversity. Unfortunately, the tribunal missed out on this opportunity to clarify the interaction between treaty obligations and international non-investment obligations.

In stark juxtaposition, the tribunal read in a (controversial) transparency element into NAFTA Art. 1105.[38] Transparency was only vaguely mentioned in NAFTA Art. 102(1), yet the tribunal willingly applied the transparency requirement without regard for the ecological and environmental concerns arising out of the site, eventually finding that Mexico had breached both the NAFTA FET and expropriation clauses.[39]

In summary, the findings in *Metalclad* are similar to the result in *Santa Elena*: international non-investment obligations concerning climate change were categorically not taken into consideration in the legal matrix. However, the tribunal was more than willing to consider pro-investor aspects such as transparency. This is perhaps symptomatic of the more conservative approach that tribunals adopt when applying other international instruments in investment disputes due to multiple reasons, *inter alia*, the difference between the two branches of international law (environmental law vs. investment law) resulting in general reluctance of arbitrators to enter the international environmental law sphere.

B. *The Beginning of a Shift in Perspective—S.D. Myers v. Canada*

A shift in perspective began to appear in *S.D. Myers v. Canada*, also a NAFTA award made in the year 2000.[40] The *S.D. Myers* award remains as the most important decision that addressed the applicability of international environmental instruments in investment disputes.

The Claimant, S.D. Myers, was a US company incorporated in Ohio[41] and specialized in PCB remediation.[42] Given its highly toxic nature and the difficulty of

[38] *Metalclad*, Award, ¶ 99.

[39] *Id.* ¶¶ 101, 112.

[40] S.D. Myers, Inc. v. Govt. of Canada, UNCITRAL, Partial Award (Nov. 13, 2000).

[41] S.D. Myers was located approximately 100 km south of the US/Canada border.

[42] *S.D. Myers*, Partial Award, ¶ 94 ("The term 'PCB' is an abbreviation for a synthetic chemical compound known as polychlorinated biphenyl. This compound consists of chlorine, carbon and hydrogen and has a combination of properties that provide an inert, fire-resistant and

properly disposing PCB, the US and Canada banned export and future production of PCBs following the 1973 OECD Council Decision to limit PCBs.[43] In 1986, Canada and the US entered into the Transboundary Agreement, which contemplated the possibility of cross-border activity recognizing the close trading relationship and the common border between the US and Canada engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility.[44]

In 1989, Canada acceded to the Basel Convention,[45] which gave rise to certain environmental obligations that parties had to undertake.[46] Canada subsequently made statements emphasizing that the "handling of PCBs should be *done in Canada by Canadians*."[47] In 1990, S.D. Myers began its efforts to obtain the necessary approvals to import equipment containing PCB wastes into the US from Canada. However, in 1996, a successful lobbying campaign by the Canadian PCB disposal industry saw Canadian authorities banning the export of PCB for waste disposal. The

insulating material. This makes the compound suitable for insulation. PCBs were used mainly in electrical equipment and to a lesser extent in other products. PCBs biodegrade slowly and remain in the environment for a long time. To eliminate them from the environment, PCBs must be disposed of through either a process of thermal destruction at high temperatures or by chemical processing. Landfilling is also used as a means of disposal, but this method merely contains the material in a relatively safe manner and does not result in the removal of the substance from the environment.").

[43] *Id.* ¶ 99.

[44] *Id.* ¶ 103.

[45] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, March 22, 1989.

[46] *S.D. Myers*, Partial Award ¶¶ 106–07 ("State parties to the Basel Convention accept the obligation to ensure that hazardous wastes are managed in an environmentally sound manner. The Basel Convention establishes rules and procedures to govern the transboundary movement of hazardous wastes and their disposal. Amongst other things, it prohibits the export and import of hazardous wastes from and to states that are not party to the Basel Convention (Article 4(5)), unless such movement is subject to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent that those of the Basel Convention (Article 11). The Basel Convention also requires appropriate measures to ensure the availability of adequate disposal facilities for the environmentally sound management of hazardous wastes that are located within it (Article 4(2)(b)). It also requires that the transboundary movement of hazardous wastes be reduced to the minimum consistent with the environmentally sound and efficient management of such wastes and be conducted in a manner that will protect human health and the environment (Article 4(2)(d)).").

[47] *Id.* ¶ 116.

common border with the US for cross-border movement of PCBs was shut for 16 months.[48]

S.D. Myers commenced arbitration alleging Canada violated its NAFTA Chapter 11 obligations. In response, Canada argued that its obligations under separate international instruments, namely the Basel Convention and the Transboundary Agreement, justified its conduct and these international obligations prevailed over Chapter 11 obligations.[49] Canada highlighted that such international agreements expressed the common intention of parties, and the fact that the NAFTA parties included Art. 104(c) was an indication that parties intended to comply with their obligations under the Basel Convention.[50]

Although the tribunal eventually concluded that there was no legitimate environmental reason for introducing the ban,[51] what is prominent in this case was that the tribunal addressed the applicability of international environmental instruments within the NAFTA framework and found these instruments to be applicable.

Referencing NAFTA Arts. 102(2) and 1131(1), the tribunal proceeded to apply the "applicable rules of international law"—in this regard, the first port of call is the Vienna Convention on the Law of Treaties ("VCLT").[52] Accordingly, the tribunal found international instruments were *relevant* to the analysis and addressed the Basel Convention and its potential inconsistencies with NAFTA Chapter 11. The tribunal noted that NAFTA Art. 104[53] dealt specifically with reconciling inconsistencies, and in

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[48] *Id.* ¶¶ 118–27.

[49] *Id.* ¶ 150.

[50] *S.D. Myers*, Respondent Counter-Memorial (Oct. 5, 1999).

[51] *S.D. Myers*, Partial Award, ¶ 195. The complete PCB export ban was unnecessary to fulfil its obligations under the Basel Convention and that Canada had been discriminatory.

[52] *Id.* ¶¶ 197–200.

[53] North American Free Trade Agreement, Jan. 1, 1994, art. 104 provides in relevant part:

Article 104: Relation to Environmental and Conservation Agreements

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

(a) the Convention on International Trade in Endangered Species. . .

the case of inconsistencies between Chapter 11 and the Basel Convention, a party *can* rely on its obligations under the Basel Convention as a justification for violations of international investment obligations.[54] In recognizing this, the tribunal implicitly recognized the importance of environmental protection as a public interest.

Understandably, the obligations under an international instrument[55] do not provide an absolute blanket justification to violate investment obligations under NAFTA. Certain requirements must be fulfilled: where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, it is obliged to adopt the alternative that is most consistent with open trade.[56] On the facts of this case, Canada did not meet this standard because the complete PCB ban was unnecessary and inconsistent with open trade.

S.D. Myers marks a shift in perspective concerning the applicability of international environmental agreements in investment disputes. Notwithstanding the fact that the State was unable to make out its justification, the tribunal acknowledged the importance of environmental concerns and affirmed that the NAFTA regime provided that international environmental agreements could be a justification to exculpate states of their obligation under Chapter 11 of NAFTA. Notably, these justifications are not absolute, but if the requirements are met, a host state can claim compliance with international environmental instruments as a defense to violations of investment obligations.

Admittedly, the tribunal only reached such a conclusion because of the specificities of NAFTA, which contains express provisions dealing with the interaction between international environmental treaties and NAFTA. However, this recognition

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(b) the Montreal Protocol on Substances that Deplete the Ozone Layer. . .

(c) the Basel Convention on the Control of Transboundary Movements of

Hazardous Wastes and Their Disposal. . .

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

[54] S.D. *Myers*, Partial Award, ¶ 214.

[55] In this case, the Basel Convention.

[56] *Id.* ¶ 221.

could influence other investment tribunals—even outside of NAFTA—in the future.

C. *The Change from Inflexible Investment Protection to Increased Recognition of Environmental Interests*

Following the awards issued in 2000, *Methanex v. United States of America* (2004) rediscovered the rule that a regulatory expropriation is non-compensable.[57] Since then, the exploration of the extent of the police powers of a state has become significant both in awards as well as the literature on the subject.[58] Though it is acknowledged that drawing a definite line between a compensable and non-compensable regulatory taking is difficult, environmental concerns have become a matter of such public interest, as evinced in the rapid developments in international law (as the effects of climate change came to be felt),[59] that it has come to be reflected in international investment law as well. This recognition of climate change as a community interest was reflected in the emergence of the so-called "balanced" treaties which sought to accommodate within investment treaty objectives not merely investment protection, but goals of sustainable development and the preservation of regulatory space for the state to act in the public interest.[60] Consequently, it has become increasingly difficult for tribunals to exclude environmental issues, or other matters relating to the public interest. Climate change goes beyond the community interest of a single state. It implicates the interest of the whole of humanity.

It is against this backdrop that there have been several cases between 2004 and 2017 in which there was an articulation of environmental concerns. In *Chemtura Corporation v. Canada* (2010),[61] the prevention of the use of dangerous pesticides was

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[57] *Methanex*, Final Award, ¶ 15.

[58] *See* Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, 20 ICSID REV. F.I.L.J. 26 (2005); KATIA YANNACA-SMALL, *Indirect Expropriation and the Right to Regulate: How to Draw the Line?*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES (Katia Yannaca-Small ed., 1st ed. 2010).

[59] *See, e.g.*, KOH KHENG-LIAN ET AL., CRUCIAL ISSUES IN CLIMATE CHANGE AND THE KYOTO PROTOCOL, ASIA AND THE WORLD (2010).

[60] Sornarajah, *supra* note 26, at 265-77.

[61] Chemtura Corp. v. Govt. of Canada, UNCITRAL/NAFTA, Award (Aug. 2, 2010).

held to be a regulatory measure that needed no compensation.[62] In *Philip Morris v. Australia* (2012),[63] the argument was that a slew of WHO materials indicated that the ban on cigarette advertising promoted the community interest of health.[64] These awards prepare a foundational base for the acceptance of obligations contained in treaties on environmental protection and parallels the significance that arbitral tribunals increasingly exhibit willingness to take into account the existence of multilateral treaties which a state may be party to (especially if it concerns a community interest) in order to give precedence to the specific community interest.[65] It culminates into the recent award of *Burlington v. Ecuador* (2017).[66]

In *Burlington*, Burlington Resources, a US corporation, obtained licenses from Ecuador to explore and exploit hydrocarbons in the Ecuadorian Amazon. These licenses included choice-of-law provisions in favor of Ecuadorian law.[67] Following an increase in oil prices, Ecuador, wanting to benefit from this increase, invited Burlington to renegotiate. Following a breakdown in renegotiations, Ecuador amended the oil and gas laws to increase the tax obtained from exploitation of hydrocarbons. This tax was increased to 99% in 2006.[68] Burlington commenced arbitration contending that the increased tax and subsequent termination of the licenses were expropriatory.

The tribunal found that Ecuador's measures substantially deprived Burlington of its investment and hence were expropriatory. However, it is crucial to note that the tribunal *also* found Burlington liable for environmental harm under Ecuador's

[62] *Id.* ¶ 266.

[63] Philip Morris Asia Ltd. v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12, Australia's Response to the Notice of Arbitration (Dec. 21, 2011).

[64] *Id.* ¶ 5.

[65] *See* S.D. *Myers*, Partial Award; Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012); 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).

[66] *Burlington Resources*, Decision on Ecuador's Counterclaims (Feb. 7, 2017).

[67] *Burlington Resources*, Decision on Liability, ¶ 20.

[68] *Id.* ¶ 37.

counterclaim. The tribunal stated that Ecuador, in its 2008 Amendments, had extensively incorporated international environmental norms into its domestic legal order.[69] The tribunal observed that Ecuadorian law was brought in line with international norms to ensure that Ecuador could fulfil its obligations concerning hydrocarbon exploitation.[70] Notably, the Ecuadorian legal framework recognized climate change as a global community interest—Art. 250 of Ecuador's constitution insists on the conservation of the ecosystem as it is "*necessary for the planet's environmental equilibrium.*"[71] Chapter II expressly highlights "*mitigation of climate change*" and "biodiversity conservation" as fundamental international environmental principles, which are relevant to the public interest.[72] Ultimately, the incorporation of international environmental norms into Ecuador's domestic legal order represented a broader effort to ensure compliance with Ecuador's international treaty obligations.[73]

Although the tribunal stopped short of expressly pronouncing that Burlington was subject to international climate change standards, the tribunal found Burlington liable for the environmental harm under Ecuador's domestic laws. The tribunal held that this environmental harm was "defined by reference to the regulatory criteria" of the domestic regime and Ecuador's regulatory framework encapsulated international environmental standards.[74] This decision is remarkable because the tribunal was willing to sustain the State's counterclaim in recognition of the State's prerogative to enforce environmental obligations against an investor to ensure compliance with the State's own obligations under international environmental instruments. This is a

[69] *Id.* ¶ 195. Notably, Ecuador had ratified the UNFCCC in 1993 and ratified the Kyoto Protocol in Jan, 2000 prior to the dispute.

[70] *Id.* ¶¶ 195–216; Anagha Sundararajan, *Environmental Counterclaims, Enforcing International Environmental Law Through Investor-State Arbitration* 24, SALZBURG GLOBAL SEMINAR, https://www.salzburgglobal.org/fileadmin/user_upload/Documents/Anagha_Sundararajan__Environmental_Counterclaims.pdf.

[71] *Burlington*, Decision on Liability, ¶ 202.

[72] *Id.* ¶¶ 206–15.

[73] Sundararajan, *supra* note 74, at 25.

[74] *Burlington*, Decision on Liability, ¶ 291.

marked shift towards recognizing the applicability of international environmental norms or climate change standards as justifications for violations of investment obligations.

Another case worthy of mentioning is *Cortec Mining v Kenya* (2018).[75] In a similar vein, the tribunal in *Cortec Mining* analyzed the definition of a protected "investment" under the Kenya-United Kingdom BIT and decisively read in the requirement that a protected investment required compliance with domestic environmental legislation.[76] In adopting this approach, the tribunal undertook a thorough examination of the environmental regulations that the Claimants defaulted on and found that these imposed obligations of fundamental importance for environmental protection in the area in question (*i.e.*, Mrima Hill).[77] Mrima Hill was gazetted and protected as a forest and nature reserve and an environmental impact assessment approval (which the Claimants failed to procure) was mandated under Kenya's environmental legislation.[78] The tribunal expressly recognized that environmental protection was a significant interest of the State, and concluded that the Claimants' failure to comply with Kenya's environmental legislation warranted the proportionate response of a denial of treaty protection under the BIT.[79]

D. *Recognition of International Human Right Instruments in International Investment Jurisprudence*

The recognition of other international human rights instruments serve to bolster the applicability of climate change standards within the international investment framework for two main reasons: (1) not only are the principles behind the applicability of international human right instruments transposable onto the issue of whether an international environmental instrument is applicable; (2) more importantly, these human rights standards have relevance to climate change being

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

[76] *Id.* ¶ 365.

[77] *Id.* ¶¶ 345-46.

[78] *Id.* ¶ 345.

[79] *Id.* ¶¶ 352, 365.

destructive of human life and other essential needs of human life, like water and air, and implicate human rights values. As such, the findings in the recent 2016 *Urbaser v. Argentina* award[80] are significant.

Urbaser is an important case where international human right obligations were acknowledged as, in principle, capable of binding an investor. *Urbaser* concerned a concession which had been granted to the Claimant for water and sewage services to be provided in Greater Buenos Aires in early 2000.[81] When the 2001 Argentina economic crisis struck, Argentina's emergency measures resulted in economic losses to the Claimant's concession, cumulating into the termination of the concession in 2006. The Claimant commenced arbitration alleging violations of the Spain-Argentina BIT.[82] Argentina counterclaimed, alleging that the Claimant had failed to provide necessary investment into the concession, thus violating its obligations under international law based on the human right to water.[83]

In a positive step towards recognizing international non-investment standards as justifications, the tribunal held that investors *could be bound by obligations under international law instruments* and general international law.[84] The tribunal rejected the Claimant's contention that guaranteeing the human right to water is a duty that may be borne solely by states, and never by private companies.[85] Instead, it found that the law had moved past the position that only states could be subjected to international law. The modern conception was that investors could be subject to international law obligations as a corollary to the acceptance of investors being able to invoke rights under international law, for example, under BITs.[86]

[80] *Urbaser*, Award.

[81] *Id.* ¶ 34.

[82] *Id.*

[83] *Id.* ¶ 36.

[84] *Id.* ¶ 1195.

[85] *Id.* ¶ 1193.

[86] *Id.* ¶¶ 1194–95.

The tribunal went on to refer to the 1948 Universal Declaration of Human Rights[87] and the 1966 International Covenant on Economic, Social and Cultural Rights[88] as potential international human right obligations that investors owed concerning the right to water.[89] The tribunal rightly referred to VCLT Art. 31(3)(c) which indicates that "any relevant rules of international law applicable to the relations between the parties" is to be taken into account.[90] The BIT cannot be interpreted and applied in a vacuum. The tribunal must certainly be mindful of the BIT's special purpose as a treaty promoting foreign investments, but it cannot do so without considering the relevant rules of international law. The BIT must be construed in harmony with other rules of international law of which it forms a part, including those relating to human rights.[91] Appositely, it stated that the global community interest, such as the human right to water, is an obligation "on *all* parts, public and private parties, not to engage in activity aimed at destroying such rights."[92]

The *Urbaser* case opens the possibility for states to subject investors to obligations arising from international environmental treaties via the same principles. While this approach is promising, this route might be hampered by the fact that most international environmental treaties do not confer legal obligations enforceable upon private actors. Often, international environmental treaties require states to operationalize these principles in their domestic legal framework in the form of legislation. Hence, it is difficult to enforce a right in these international environmental instruments on investors as it is unlikely that they give rise to any obligations on the investors' part.[93]

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[87] G.A. Res. 217 (III) A, Universal Declaration on Human Rights (Dec. 12, 1948).

[88] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 6 I.L.M. 360, 993 U.N.T.S. 3.

[89] *Urbaser*, Award, ¶ 1196–97; Edward Guntrip, *Urbaser v. Argentina: The Origins of a Host State Human Rights Counterclaim in ICSID Arbitration?*, EUR. J. OF INT. L. (2017).

[90] *Urbaser*, Award, ¶ 1200.

[91] *Id.*

[92] *Id.* ¶ 1199 (emphasis added).

[93] Kate Parlett & Sara Ewad, Protection of the environment in investment arbitration–A Double Edged Sword, KLUWER ARB. BLOG, Aug. 22, 2017, http://arbitrationblog.kluwerarbitration.com

IV. THE WAY FORWARD? AN ANALYSIS OF THE CASES AND POTENTIAL AVENUES FOR CLIMATE CHANGE STANDARDS TO OPERATE AS JUSTIFICATIONS

Preliminarily, a large majority of international investment tribunals still do not refer to international climate instruments, which demonstrates skepticism towards referring to international non-investment treaties or obligations within the international investment framework.[94] However, such a view is changing because of dramatic changes taking place in the field. The argument that is advanced in this paper is that climate change is a global phenomenon—given that a state can take regulatory action with respect to a domestic situation concerning environmental protection, *a fortiori*, even greater heed must be given to the prevention of climate change as it implicates global interests.

Newer awards show a definite shift towards recognizing the applicability of international environmental obligations and climate change standards when tribunals are faced with such arguments. Previously, tribunals declined to address the potential relevance of international environmental treaties even when the opportunity was presented for them to do so. As seen in *Santa Elena* and *Metalclad*, the tribunals considered the international environmental treaties and obligations irrelevant to the legal analysis of whether the investment treaty had been violated even though the Convention on Biological Diversity could have been applicable. However, with *S.D. Myers* and the advent of the recent awards in *Burlington*, *Cortec Mining*, and *Urbaser*, the tribunals did not hesitate to consider the applicability and effect of the international non-investment obligation. In light of the shifting attitude towards recognizing climate change obligations within the international investment framework, this paper enunciates several avenues in which international environmental obligations and even more so, climate change standards, could operate as independent investment treaty violations.

This view is advanced first on the ethical consideration that climate change presents such a human catastrophe that it must be given greater prominence than

/2017/08/22/protection-environment-investment-arbitration-double-edged-sword/.

[94] ANDREAS KULICK, GLOBAL PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW 259 (2012).

investment protection which serves only the immediate interests of foreign investors. As a corollary, it is also on ethical grounds that climate change needs to be given greater prominence than environmental protection within a state as such environmental disasters within a state also implicate climate change.

Second, the existence of legal arguments as enunciated in cases such as *Burlington* and *Urbaser* substantiates these ethical considerations. It is but a small step to take that the reasoning in these awards should be extended to cover issues of climate change. However, more needs to be done to establish climate change as preceding investment protection by, at its highest, making it an independent factor that must be elevated in the hierarchy of precedence of norms to the highest position displacing investment protection as a value by far.

A. *Climate Change as an Independent Justification against Investment Treaty Violations*

1. Express Treaty Provisions

The most direct way for climate change standards to operate as justifications would be for states to (a) expressly provide for treaty provisions concerning climate change, or (b) draft treaty provisions which explicitly set out the relationship between the investment treaty and other international environmental instruments. Given that text of the treaty is the first port of call when interpreting a treaty provision, express provisions would empower tribunals to apply climate change standards as justifications and would encourage states to raise such arguments in favor of the global community interest.

(i) Treaties with Express Provisions Concerning Climate Change

Currently, the way in which treaties address climate change is patently inadequate for it to form an independent justification for violating treaty provisions.[95] In most treaties that contemplate climate change, it is often expressed only in the preamble of the treaty. For example, the Canadian Model

Foreign Investment Promotion and Protection Agreement ("FIPA") emphasizes the

[95] Markus W. Gehring & Avidan Kent, *International Investment Agreements and the Emerging Green Economy: Rising to the Challenge*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONALIST PERSPECTIVES (Freya Baetens ed., 2013).

"promotion of sustainable development"[96] and the 2009 Japan-Switzerland Free Trade Agreement (FTA) encourages the promotion of objectives dealing with climate change.

Certain treaties such as the 2004 US Model BIT do not address climate change, but state that parties are "desiring to achieve these objectives in a manner consistent with the protection of . . . the environment."[97] The Energy Charter Treaty addresses climate change explicitly, but only as "recalling the [UNFCCC], the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international agreements with energy-related aspects."[98] However, these, at best, provide context in interpreting the provisions of the treaty, but do not carve out a justification or defense for the state.

Nevertheless, as the practice of "balanced" investment treaties evolve, stronger statements on environmental protection, human rights and climate change could be expected, as evinced by the following examples.

First, the new 2018 Netherlands Draft Model BIT refers to sustainable development not only in its Preamble but has a whole article devoted to it.[99] Furthermore, Art. 7 refers to international standards on corporate responsibility. These standards also require a foreign investor to act in conformity with conventions that contain references to environmental protection.[100]

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[96] Canada 2004 Model Foreign Investment Promotion and Protection Agreement, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index .aspx.

[97] Gehring & Kent, *supra* note 99, at 203.

[98] Energy Charter Treaty, Dec. 17, 1994, Preamble.

[99] 2018 Netherlands Draft Model BIT, art. 6(5) ("Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.").

[100] *Id.* at art. 7 ("The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily *incorporate into their internal policies those internationally recognized standards*, guidelines and principles of corporate social responsibility that have been endorsed or are supported by

Second, the Singapore-Indonesia BIT,[101] which came into force in 2021, affirms the parties' right to regulate environmental concerns.[102] Art. 11(2) also expressly confirms that regulating through the modification of laws, even if it negatively affects the investment, would not amount to a breach of the BIT.[103]

Third, the draft Pan-African Investment Code provides an entire article (Art. 37) on the environment and discourages member states from relaxing or waiving compliance with domestic environmental legislation for investments. Art. 37 also mandates investors to comply with environmental legislation, and to "perform their activities, protect the environment and where such activities cause damages to the environment, take reasonable steps to restore it as far as possible".[104]

Finally, the Morocco-Nigeria BIT,[105] signed in 2016, acknowledges the applicability of domestic environmental law, policies and multilateral environmental agreements (which includes climate change agreements) in the state's right to regulate.[106] Investors are also obliged to adhere to environmental legislation, which would include environmental assessment screenings and assessment processes.[107] Art. 4(4) also establishes a Joint Committee to monitor the implementation and execution of the BIT, which would operate to ensure that investors comply with their environmental and climate change obligations under the BIT.

In any event, to effectively operationalize climate change in an express provision,

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that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.").

[101] Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Indonesia for the Promotion and Protection of Investments, Nov. 10, 2018 (entered into force on March 9, 2021).

[102] *Id.* at art. 11(1).

[103] *Id.* at art. 11(2).

[104] African Union Commission, *Draft Pan-African Investment Code*, AU/STC/FMEPI/EXP/18(II) (26 March 2016).

[105] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, Dec. 3, 2016.

[106] *Id.* at art. 13.

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

climate change would have to appear as an exception in an international agreement. Perhaps it could be incorporated within the general exception provision which is modelled after Art. XX of the General Agreements on Tariffs and Trade (GATT), which would place climate change as an exception to the IIA's expropriation or treatment standard provisions. A modern example of this is reflected in Art. 32 of the 2018 Indian Model BIT,[108] which provides for protecting and conserving the environment as an exception.[109]

Another method would be to include climate change within non-precluded measures ("NPMs"). NPMs are designed to exclude certain areas from the ambit of treaty obligations. With reference to the Germany-Bangladesh BIT, an NPM with climate change would look something like: "measures that must be taken for reasons of climate change, public health or morality shall not be deemed expropriatory within the meaning of Article X."[110]

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[108] The general exception provision in the Indian Model Treaty is as follows:

> Art. 32 General Exceptions:
>
> 32.1 Nothing in this Treaty shall be construed to prevent the adoption or enforcement by a Party of measures of general applicability applied on a non- discriminatory basis that are necessary to:
>
> (i) protect public morals or maintaining public order;
>
> (ii) protect human, animal or plant life or health;
>
> (iii) ensure compliance with law and regulations that are not inconsistent with the provisions of this Agreement;
>
> (iv) protect and conserve the environment, including all living and non-living natural resources;
>
> (v) protect national treasures or monuments of artistic, cultural, historic or archaeological value.

[109] For examples and detailed discussion, see Andrew Newcombe, *General Exceptions in International Investment Agreements*, *in* SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 358 (Cordonier Segger et al. eds., 2010); *see also* The Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Mar. 8, 2018.

[110] *See*, *e.g.*, Agreement between the Federal Republic of Germany and the People's Republic of Bangladesh concerning the Promotion and Reciprocal Protection of Investments, May 6, 1981, art. 2; Treaty Between the United States of America and the Republic of Panama Concerning the Treatment and Protection of Investments, Oct. 27, 1982, art. X.

(ii) Treaty Provisions Which Explicitly Set Out the Relationship between the Investment Treaty and Other International Environmental Instruments

Another method for climate change to feature in investment treaties is for there to be explicit rules and provisions on the relationship between the investment treaty and other relevant international environmental instruments, and an apt example of this would be NAFTA Arts. 103 and 104 as seen in *S.D. Myers*.[111] Indeed, this rule is encapsulated under VCLT Art. 30 which provides that if two treaties address similar subject-matters, and the parties have expressed their preference that one treaty is subject to the other, VCLT Art. 30(2)[112] provides that the normative order as specified by the contracting parties is to be adhered to.[113] NAFTA Art. 104 evinces the parties' intention concerning the relationship between the NAFTA treaty and other international environmental agreements:

> Article 104: Relation to Environmental and Conservation Agreements
>
> 1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
>
> a) The Convention on International Trade in Endangered Species of Wild Fauna and Flora . . .
>
> b) the Montreal Protocol on Substances that Deplete the Ozone Layer . . .
>
> c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. . . .
>
> Such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

Such an explicit detailing of the relationship between the investment treaty and

[111] *See* above III.B.

[112] VCLT, *supra* note 8, at art. 30(2) ("When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.").

[113] Moshe Hirsch, *Interactions between Investment and Non-Investment Obligations*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 5 (Peter Muchlinski et al. eds., 2008).

international environmental treaties (which encompass climate change standards) would leave little doubt as to when certain obligations would prevail over others.

2. Climate Change as *Jus Cogen* Norms Which Trump Investment Treaty Provisions

Preliminarily, it would be appropriate to address the public international law principles on dealing with conflicting international rules. At the outset, not all international investment obligations and international climate change obligations are contradictory–they could in fact complement each other,[114] and the discussion below will examine how climate change standards can be interpreted under investment treaty obligations.[115] However, when obligations are contradictory, and there are no provisions governing the hierarchy in the IIA, public international law has developed a body of rules that regulate inconsistencies among international legal rules.[116] Two such rules are relevant in this analysis which could potentially be invoked by parties in future investment disputes to bring in climate change standards.

(i) *Jus Cogen* Norms Prevail over Other Rules of International Law

It is a trite rule that *jus cogen* norms prevail over all other rules of international law if inconsistent.[117] VCLT Art. 53 codifies this rule,[118] which has been confirmed by

[114] *Id.* at 1–22 ("Hirsch points out that legal rules deriving from investment and non-investment international fields can reinforce each other. International tribunals may in some cases interpret international investment treaties' obligations in the light of non-investment treaties. In Hirsch's view, even where investment and non-investment rules are clearly inconsistent, this conflict may lead not only to a normative determination of which rule prevails, but additional legal consequences of such incompatibility can be reflected in the remedies determination or the burden of proof"); M. Feigerlova and A. L. Maltais, *Obligations Undertaken by States under International Conventions for the Protection of Cultural Rights and the Environment, to What Extent they Constitute a Limitation to Investor's Rights under Bilateral or Multilateral Investment Treaties and Investment Contracts?*, TRADE AND INVESTMENT LAW CLINIC, THE GRADUATE INSTITUTE CENTRE FOR TRADE AND ECONOMIC INTEGRATION (2012).

[115] *See* below Section IV.B.

[116] Hirsch, *supra* note 117, at 3; Feigerlova & Maltais, *supra* note 118, at 23.

[117] VCLT, *supra* note 8, at art. 53; OPPENHEIM'S INTERNATIONAL LAW 8 (Robert Jennings & Arthur Watts eds., 1996).

[118] VCLT, *supra* note 8, at art. 53 ("TREATIES CONFLICTING WITH A PEREMPTORY NORM OF GENERAL INTERNATIONAL LAW ('JUS COGENS') . . . A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no

multiple international courts and tribunals.[119] However, beyond the minimum accepted core[120] there is no clear consensus on which norms qualify as *jus cogens*.[121] As posited by Dr. Uhlmann, a *jus cogen* norm must have the following four characteristics:[122]

> [F]irst, the object and purpose of the norm must be the protection of a state community interest. Second, the norm must have a foundation in morality. Third, the norm must be of an absolute nature. Fourth, the vast majority of states must agree to the peremptory nature of the international norm.

International environmental protection was first mentioned as potentially *jus cogens* in the Advisory Opinion of the ICJ on the legality of nuclear weapons.[123] Judge Weeramantry (in his dissenting opinion) stated that state obligations concerning the environment "may range from obligations *erga omnes*, through obligations which are in the nature of *jus cogens*, all the way up to the level of international crime."[124] This view has been echoed by several other academics.[125] Climate change compliance (as

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derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

[119] *See*, *e.g.*, Case T-253/02, Ayadi v. Council of the European Union, 2006 E.C.R. II-02139, ¶¶ 116, 146; Case T-315/01, Kadi v. Council of European Union, 2005 E.C.R. II-03649, ¶¶ 226, 230 (". . . jus cogens, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. . . . International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community.").

[120] The minimum accepted core includes prohibitions of genocide, aggression, and slavery.

[121] SIOBHAN MCINERNEY-LANKFORD ET AL., HUMAN RIGHTS AND CLIMATE CHANGE, A REVIEW OF THE INTERNATIONAL LEGAL DIMENSIONS 23 (2011).

[122] Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEO. INT'L ENVTL. L. REV. 101, 104 (1998).

[123] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) (Weeramantry, J., dissenting).

[124] *Id.* at 78.

[125] Jutta Brunnee, *Common Interest—Echoes From an Empty Shell?, Some Thoughts on Common Interest and International Environmental Law*, 49 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 791 (1989); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (1988); Uhlmann, *supra*

characterized by Dr. Uhlmann as the "general prohibition of causing or not preventing environmental damage that threatens the international community")[126] ticks all the four characteristics of a *jus cogen* norm.

First, as enunciated above, climate change is undoubtedly a global community interest.

Second, climate change compliance is necessary for "the permanent preservation of a sound environment for future generations which has a foundation in morality."[127]

Third, the most convincing indication that the general norm of prohibiting environmental damage that implicates the international community is of an absolute character is encapsulated in the ILC Draft Articles on State Responsibility.[128] The Commission categorized "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere" as an international crime.[129] Despite the unclear relationship between international crimes and *jus cogens*, it is widely recognized that "an obligation whose breach is considered an international crime will usually be of a peremptory character."[130] Furthermore, climate change and the preservation of biological diversity has been declared as common concerns of mankind.

Fourth, consent is difficult to derive from state practice but can be evinced through the widespread ratification of the UNFCCC, Kyoto Protocol and Paris Agreement.[131] Hence, it is arguable that the general prohibition of causing or not preventing environmental damage that threatens the international community

note 126, at 115.

[126] Uhlmann, *supra* note 126, at 122.

[127] *Id.* at 118.

[128] Report of the International Law Commission, chapter IV.E.1, U.N. Doc. A/56/10 (November 2001), Supplement No. 10 (A/56/10).

[129] *Id.* at 113 n.651.

[130] Uhlmann, *supra* note 126, at 123.

[131] As highlighted above, 197 parties joined the UNFCCC, 181 parties joined the Paris Agreement and 192 parties joined the Kyoto Protocol.

(which necessitates compliance with climate change standards), is a *jus cogen* norm and should prevail over investment treaty provisions.

(ii) In the Absence of *Jus Cogen* Norms, the UN Charter Prevails

In the absence of *jus cogen* norms, the UN Charter's provisions prevail over inconsistencies in other treaties. Given that the UN Charter provides for certain human rights, compliance with climate change can be subsumed under a fundamental human right, that of the right to life. The right to life is protected under every international human rights convention. It guarantees not only the right for one to not be arbitrarily deprived of life, but also requires states to provide a fundamental level of environmental protection.[132]

3. Direct Application of Climate Change Standards in International Investment Disputes

International environmental instruments and the relevant climate change standards can be directly applicable in investment disputes in three ways. First, they are within the parties' choice of law.[133] Choice of law clauses often include applicable rules or norms of international law or host state law, and climate change standards could thus form part of these laws. Second, even without parties providing for a choice of law clause, Art. 42(1) of the ICSID Convention provides as a default that the tribunal "shall apply . . . such rules of international law as may be applicable."[134] Third, it has been argued by Professor Dupuy that even without a reference to international law, an arbitrator can refer to the obligations the state owes under international law through principles of transnational public policy.[135]

Although no known tribunal has directly applied international climate change obligations, with the advent of cases such as *Urbaser* and *Burlington*, it can be argued

[132] Uhlmann, *supra* note 126, at 135.

[133] Feigerlova & Maltais, *supra* note 118, at 22.

[134] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, art. 42(1), 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159.

[135] Pierre-Marie Dupuy, *Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, *in* HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 25 (Pierre-Marie Dupuy et al. eds., 2009).

that on principle, investors could be subject to the obligations under international environmental treaties which the state is party to.

However, this could prove challenging given that most international environmental treaties do not provide for obligations directly imposed on non-state actors. Rather, international environmental treaties oblige states to establish a domestic regulatory framework to operationalize such climate change standards.[136] Take for example, the UNFCCC, which encapsulates a state's environmental and climate change obligations. The UNFCCC states that parties "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects" and to "formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change."[137] Given that the obligations are only placed on the states, it is difficult to directly implicate the investor in relation to compliance with climate change standards.

B. *Climate Change Standards as a Justification within the Interpretation of International Investment Treaty Provisions*

International environmental instruments and climate change standards could be considered within the investment legal framework by interpreting the IIA provisions (which the investor's claims are based on) in light of international climate change instruments and obligations. This systemic integration[138] of climate change standards is justified under VCLT Art. 31(3)(c), which mandates that "*any relevant rules of international law applicable in the relations between the parties*" shall be taken into account when interpreting a treaty provision. As such, the investment treaty is not a self-contained regime, but must be integrated with the international law framework.[139] For climate change standards to qualify under Art. 31(3)(c), two elements must be fulfilled: (1) it must be a relevant rule, and (2) the rule must be

[136] Parlett & Ewad, *supra* note 97.

[137] UNFCCC, *supra* note 2, at arts. 3(3) and 4(1)(b).

[138] UNFCCC, *supra* note 2, at art. 4.

[139] Feigerlova & Maltais, *supra* note 118, at 30.

applicable in the relations between the parties.

Element (1) is relatively uncontentious, the UNFCCC, Kyoto Protocol and Paris Agreement are treaties which form "rules of international law" and their widespread ratification emphasizes their relevance. Concerning element (2), in the context of investment disputes, the scenario is slightly complex given that parties to the external treaty will be different than the parties in the dispute because one party will always be a non-state actor. Hence, concerning BITs, state parties to the underlying BIT are to be taken as the parties in the determination of whether a rule is applicable between the parties under VCLT Art. 31(3)(c).[140] As such, climate change standards must be factored into the interpretation of treaty provisions if both states to the BIT are parties to the relevant international environment treaty.

If, however, one state is a party to the external treaty, while the other state is not, it is submitted that the fact that the duty to comply with climate change standards is an *erga omnes* obligation[141] would make the obligation to comply with climate change standards applicable to all states regardless of a treaty.

Hence, the next question is: what weight should be accorded to the compliance with climate change standards in the interpretive process of IIA provisions? The following sections examine possible avenues that climate change standards can feature to protect both the climate as well as investors.

1. Expropriation

Expropriation of an investor's property is not permitted under international law. An expropriation is only lawful if it is (1) made for a public purpose, (2) in accordance with due process, (3) in a non-arbitrary and non-discriminatory manner and (4) on payment of prompt, adequate and effective compensation.[142] It is not unimaginable

[140] Bruno Simma & Theodore Kill, *Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 990 (Christina Binder et al. eds., 2009); Feigerlova & Maltais, *supra* note 118, at 30.

[141] *See* IV.A.1.b above for *jus cogens* analysis; *see also* MCINERNEY-LANKFORD ET AL., *supra* note 125, at 255.

[142] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 90 (2012).

that measures implemented by the state to comply with climate change obligations could result in potentially expropriatory effects to the investor. For example, in the *Santa Elena* and *Metalclad* cases, the revocation and denial of permits were viewed as expropriatory as it substantially deprived investors of their investment. Nevertheless, there are three possible avenues in which climate change instruments may have an impact on the expropriation analysis.

First, highlighting an obligation to comply with international climate change treaties before tribunals would legitimize a state's measures. If the motivation behind a measure taken by the state was for the global community interest concerning climate change, it would confirm that the measure was made for a public purpose, fulfilling the first requirement for a lawful expropriation. Indeed, in *Southern Pacific Properties v. Egypt*, the exercise of the State's right in compliance with its obligations under the UNESCO Convention was found to be "exercised for a public purpose, namely, the preservation and protection of antiquities in the area."[143]

Second, international environmental and climate change obligations could aid the tribunal in finding that the state's measure was a legitimate, non-compensable regulatory measure under the police powers doctrine. The police powers doctrine operates as an exception to expropriation under customary international law—the host state is absolved from its obligation to compensate where economic injury results from a legitimate regulatory measure which is not discriminatory, in accordance with due process, and proportionate.[144] The *Methanex* award[145] is apposite in that the tribunal found that the environmental measures were bona fide regulatory measures that did not require compensation.[146] The presence of

[143] Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶ 158 (May 20, 1992).

[144] Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award, ¶ 262 (Mar. 17, 2006); JORGE E. VINUALES ET AL., THE FOUNDATIONS OF INTERNATIONAL INVESTMENT LAW: BRINGING THEORY INTO PRACTICE 329 (2014).

[145] Methanex v. United States, UNCITRAL, Final Award on Jurisdiction and the Merits, ¶ 15 (Aug. 3, 2005).

[146] *Id.* ("For reasons elaborated here and earlier in this Award, the tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex's central claim under Article 1110(1) of expropriation under

international climate change obligations, and the fact that it is a global community interest may ultimately swing the tribunal in finding that it was a legitimate non-compensable regulatory measure and not a compensable expropriation.

Third, concerning the requirement of non-discrimination, climate change obligations may be employed by the state to show why two investors were not in "like circumstances." Generally, a measure is discriminatory if two investors in "like circumstances" are treated in inequivalent manners—the purpose of the measure is important in determining if the investors were in "like circumstances."[147] Hence, if the purpose of the measure was for environmental or climate change reasons, an investor would not be in like circumstances with another investor that did not engage such climate change concerns. In *Parkerings v. Lithuania*,[148] the tribunal rejected the Claimant's allegation that it had been discriminated against because the comparative circumstances were different. Instead, the tribunal concluded that the State had "legitimate grounds to distinguish between the projects" due to "historical and archaeological preservation and environmental protection."[149] Hence, the fact that the site was protected for environmental reasons was decisive in finding that there had been no discrimination.

2. Fair and Equitable Treatment

The fair and equitable treatment standard has not been exhaustively defined, but international investment jurisprudence has generally recognized that it comprises that of legitimate expectations of the investor.[150] The fact that a state is party to an

one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.").

[147] Dr. A F.M. Maniruzzaman, *Expropriation of Alien Property and the Principle of Non-Discrimination in International Law or Foreign Investment: An Overview*, J. OF TRANSNAT'L L. & POL'Y 59 (1998).

[148] Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award (Sept. 11, 2007).

[149] *Id.* ¶ 396.

[150] *See, e.g.*, Saluka v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006); El Paso v. Argentina, ICSID Case No. ARB/03/15, Award (Oct. 31, 2011); Occidental v. Ecuador 2011, UNCITRAL, Award (July 1, 2004); Bilcon of Delaware et al v. Govt. of Canada, PCA Case No. 2009-04, Award (Jan. 10, 2019).

international environmental treaty or has enacted domestic laws in accordance with its international obligations would play a pivotal role in determining the investor's legitimate expectations.

Taking the UNFCCC as an example, if a state is party to the UNFCCC, an investor should not expect climate change measures to remain stagnant in the state. After all, parties to the UNFCCC are obliged to "anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."[151] Conversely, the investor should expect regulations and restrictions to be adopted in compliance with the state's commitment pursuant to the UNFCCC. For example, in *Methanex*, the tribunal found that environmental regulations had been foreseeable by the investor.[152] Hence, it is submitted that the investor, being aware of the possibility of the state taking action to reduce harmful environmental impacts and enforcing measures necessary to protect the climate, cannot allege that it had legitimate expectations that the state would not interfere in such a way with its investment. Rather, the regulatory measures by the state would come as no surprise to the claimant and as a result, no legitimate expectations can arise.

3. Counterclaims

Notwithstanding the debate as to whether counterclaims are possible under BITs (which is outside the purview of this paper), counterclaims may operate as a mechanism for states to enforce its international environmental obligations on investors. While not a justification to treaty violations *per se*, the fact that states have the opportunity to counterclaim acts to alleviate the compensation due to the investor and the practical effect of counterclaiming might be similar to justifying a treaty violation, *i.e.*, that on balance the state does not suffer monetary loss.

Given the advent of *Burlington* and *Urbaser*, tribunals seem more willing to find that investors are obligated to adhere to certain norms or standards at international law or encapsulated in the domestic framework. Both tribunals stated that the investors were liable for environmental harm under the domestic framework

[151] UNFCCC, *supra* note 2, arts. 3(1) & (3).

[152] *Methanex*, Award.

designed to fulfil a state's obligation to comply with its international treaty obligations.[153] Essentially, both tribunals found the investors liable for their failure to comply with international standards, even though it was not explicitly stated.

In the same vein, if tribunals express willingness to award states compensation, it could provide the impetus to encourage investors to comply with international climate change standards. If investors are cognizant that they could potentially be liable for environmental harm, they are more likely to prioritize environmental protection in their investments. Minimally, investors would be incentivized to adhere to domestic climate change regulations which would allow states to implement regulations in compliance with their international environmental obligations.[154]

4. Specific Scenario: Investment Contracts

Generally, the presence of an investment contract between the state and the investor does not preclude the infringement of the investor's rights when made on legitimate grounds such as compliance with climate change (as this paper argues). Indeed, this seems to be the case in *Southern Pacific Properties*, where the tribunal found that the same analysis was applicable regardless of the presence or absence of a contract: measures taken by the state to safeguard cultural heritage are still legitimate in the presence of an investor contract that is breached by the state, provided that such measures are proportionate and non-discriminatory.[155]

However, it is important to note that if a stabilization clause is present, this might prevent a state from raising its obligations to comply with climate change standards as a potential justification to infringements on investor rights. A stabilization clause usually freezes the law applicable to the contract as that when the investor invested in the state—this would exempt investors from regulatory change including the undertaking of new international obligations such as compliance with climate change standards.[156] However, compliance with climate change might still operate despite

[153] *See* above at Section III.C.

[154] Sundararajan, *supra* note 74.

[155] *Southern Pacific Properties*, Award; Feigerlova & Maltais, *supra* note 118, at 32.

[156] Katja Gehne & Romulo Brillo, *Stabilization Clauses in International Investment Law: Beyond*

the presence of a stabilization clause—movements against the position that a stabilization clause freezes the law are visible in the literature generated during the discussions on the Ruggie Report on Business Ethics where contrary ideas were floated.[157]

V. CONCLUSION

While recognition of compliance with climate change standards as a justification is still in its formative stages, recent investment jurisprudence, culminating into *Burlington* and *Urbaser* has evinced a definite shift towards giving greater weight to global community interests as encapsulated within international non-investment instruments. The changing attitude in both tribunals and states hint towards a positive trend towards recognizing the prominence that climate change should be accorded over investment protection. This could not be timelier, given the potentially catastrophic outcomes if climate change is ignored, which would implicate all of humanity.

As this paper has explored, several promising avenues are present for states and tribunals to recognize climate change standards as justifications to investment treaty violations. To recapitulate, these avenues include:

1. Express provision of treaty provisions concerning climate change or to draft treaty provisions which explicitly set out the relationship between the investment treaty and other international climate change standards.
2. Climate change as *jus cogen* norms which trump investment treaty provisions and hence is a justification to investment treaty violations.
3. The direct application of climate change standards in international investment disputes by parties and the tribunal.
4. Climate change as a justification to expropriation: (a) an obligation to comply with international climate change treaties would legitimize a state's

Balancing and FET, INST. OF ECON. L., TRANSNAT'L ECON. L. RES. CTR. GER., March 2017, at 7.

[157] *See generally* ANDREA SHEMBERG, STABILIZATION CLAUSES AND HUMAN RIGHTS (2008), https://www.ifc.org/wps/wcm/connect/0883d81a-e00a-4551-b2b9-46641e5a9bba/Stabilization %2BPaper.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-0883d81a-e00a-4551-b2b9-46641e5 a9bba-jqeww2e.

expropriatory measure; (b) climate change obligations could aid the tribunal in finding that the state's measure was a legitimate, non-compensable regulatory measure under the police powers doctrine and; (c) climate change obligations may be employed by the state to show why two investors are not in "like circumstances."

5. Climate change obligations provide reason that regulatory measures by a state would be expected by the claimant and hence no legitimate expectations can arise under the fair and equitable treatment standard.
6. Counterclaims may operate as a mechanism for states to enforce their international environmental obligations against investors.

Expectantly, these avenues would shed more light on climate change in the international investment regime and provide greater improvements to *both* the legal and environmental climate in the years to come.

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BOOK REVIEW:
INTERNATIONAL ARBITRATION IN LATIN AMERICA: ENERGY AND NATURAL RESOURCES DISPUTES
EDITED BY GLORIA ALVAREZ, MELANIE RIOFRIO PICHÉ, AND FELIPE SPERANDIO

Reviewed by Prof. Julián Cárdenas

I. INTRODUCTION

International Arbitration in Latin America: Energy and Natural Resources Disputes, is a remarkable effort in compiling experts' views over the last two decades of transnational energy-related arbitration cases and regulation throughout Latin America.

The decision to focus on Latin America was not a coincidence. Latin America's economic growth still relies mostly on the development of its massive natural resource reserves, many of them used for the generation of different types of energies produced from hydrocarbons, mining, and renewables. To improve investment conditions and attract foreign investment for the development of these resources, Latin American nations have integrated the transnational law system that governs transnational dispute resolution, including substantive rules such as investment treaties and the major international arbitration conventions such as the New York Convention of 1958, the ICSID Convention of 1965, and the Panama Convention of 1975.

This law, a bit dormant until the end of the last century, has not been without use in the last 20 years. According to ICSID's caseload report of 2010, which covers only investor-state arbitrations, at the end of the first decade of the 21st century, Latin America led the number of known arbitrations with approximately 30% of cases.[1] This was particularly boosted by cases arising from economic crisis and the resource

[1] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, THE ICSID CASE LOAD–STATISTICS (ISSUE 2010-2) 12 (2010), https://icsid.worldbank.org/sites/default/files/publications/Caseload%20Statistics/en/ICSID%20Statistics%202010-2%20English%20Final .pdf.

nationalism of Argentina, Ecuador, and Venezuela. Today, the region is second to only Eastern Europe & Central Asia with approximately 22% of the ISDS market.[2] Notably, energy-related disputes comprise 46% of ICSID's cases.[3]

Likewise, according to the 2020 ICC arbitration case report, Latin America is second with approximately 15% of commercial cases, mainly led by the frequent use of arbitration by Brazilian and Mexican parties.[4] This reflects the parties' preferences in the region for resolving disputes via arbitration in lieu of national legal systems. Also, the trend repeats and the highest demand for arbitration services at the ICC arose from the construction and energy sectors, comprising 38% of all cases.[5]

The high number of Latin American cases contributes to arbitration jurisprudence that will be widely used by arbitrators, and practitioners representing individuals, corporations, and governments. This is at the core of the contribution that the book provides.

II. ROADMAP

The book is presented in seven parts, with 21 chapters by 39 contributors. It analyzes substantive and procedural arbitration issues, and in particular, standard clauses and practices involving cases related to energy generation from different sources, including hydrocarbons and renewables. It further references the more recent trends on climate change, corruption, and environmental protection. The authors succeeded in documenting current trends starting from the more general topics to the more particular and specific cases providing lessons for the transnational dispute resolution community.

Parts I, II, and III analyze issues on the integration of Latin America to the transnational arbitration system (including commercial and investment arbitration law), issues on the arbitrability and admissibility of disputes, and the problems arising

[2] *Id.* at 11.

[3] *Id.* at 12. Energy-related disputes refer to Oil, Gas and Mining sectors (26%), as well as Electric Power & Other Energy (13%), and Construction (7%).

[4] INTERNATIONAL CHAMBER OF COMMERCE, ICC DISPUTE RESOLUTION 2020 STATISTICS 10 (2020), https://iccwbo.org/ publication/icc-dispute-resolution-statistics-2020/.

[5] *Id.*

from enforcing arbitration awards dealing with issues of public policy. Although chapter 2 highlights an arbitrator's risk in rendering decisions based on sound commercial judgments that could create conflicts with national court systems,[6] it is also true that depending on the facts of the case, the New York Convention and the Washington Convention offer a multi-jurisdictional enforcement system. This concept can be found in the post-award enforcement actions in the case *Pemex v. Commisa*, which the book addresses.[7]

Part II of the book provides studies from different energy sectors, showing their similarities and specificities. As the standardization of petroleum contracts and the transnationalization of disputes are consolidated, the concept of a *lex petrolea* appears to overcome past criticism and confirm the common transnational legal practice in the oil industry in the 21st Century. This same approach is applicable to the gas, power, and renewable energy sectors, which also follow specific standard clauses and industry practices adapted to commercial and investment transactions. The approach taken by the editors and authors is useful for those who specialize in any of these sectors.

Part III expands on corruption cases and concerns affecting international arbitration. As the sector evolves, targeting corruption is crucial because the system relies on the parties' belief, including corporations and governments, that the system does not contribute to or legitimize sophisticated corruption practices. Therefore, chapter 8 refers to relevant questions faced by tribunals when deciding the legitimacy of transactions in the energy sector when corruption allegations are present.

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[6] An arbitrator's power to decide cases based on trade usages is one of the common standards of applicable law that the transitional community recognizes arbitrators as having and is codified in Article 21.2 of the ICC Arbitration Rules, Article 35.3 of the UNCITRAL Arbitration rules, and any other modern set of rules that has incorporated this time-honored rule. Also on this issue, see Charles Jarrosson, *L'acceptabilité de la sentence*, 4 REV. ARB. 793, 804 (2012) ("En définitive, rendre une sentence acceptable est plus qu'une mission juridique, c'est tout un art qui requiert de l'arbitre non seulement des connaissances et un bon raisonnement juridiques, mais aussi de la psychologie, un sens des réalités pratiques, une bonne anticipation de l'effet concret de sa décision au moment où elle sera reçue et devra être exécutée: la somme de tous ces éléments pourrait bien s'appeler expérience.").

[7] *See Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016).

On a different issue, damages also create concerns in the arbitration community given that it is the most common remedy provided by arbitral tribunals in energy-related disputes.[8] The material differences among methodologies and parameters make clear that we are far from standardizing the awarding of compensation in the energy sector. These sophisticated practices continue to evolve as more detailed and specialized cases reach final decisions and a new generation of practitioners contribute with solutions. In the end, the acceptability of the arbitration award and the perception of fairness should remain at the core of these calculations to meet the legitimate expectations of both states and investors towards the certainty of the rule of law.

Finally, chapter 10 illustrates the multi-jurisdictional enforcement regulations provided by the New York Convention, the Washington Convention, and the Panama Convention, and the challenges that can be exercised against an arbitration award. The chapter also highlights the risks faced by governments deciding to ignore compliance with arbitral awards. Such risks include deterring new investment and inhibiting access to international funding. The chapter further explores the litigation saga countries can face, for instance, in the case of an Argentinean warship ARA Libertad detained in Ghana,[9] or the Crystallex case against Venezuela.[10]

Parts IV, V, VI, and VII focus on specific cases, starting with a chapter discussing the Brazilian experience with energy arbitration disputes and regulation (Chapters 11 to 13). Part IV provides specific references on the electricity market and gas supply contracts in Brazil. Part V analyzes social justice issues in natural resources disputes, stabilization clauses in the context of human rights, local communities' participation in investment projects and the disputes that can arise from their intervention over extractive industry projects, and the expansion of sustainable development clauses

[8] Given the impossibility of the challenges to award remedies based on *restitutio in integrum*.

[9] Sam Jones & Jude Webber, *Argentine navy ship seized in asset fight*, FINANCIAL TIMES (Oct. 3, 2021), https://www.ft.com/content/edb12a4e-0d92-11e2-97a1-00144feabdc0.

[10] Caroline Simson, *Crystallex Pushes to Keep Citgo Sale Moving Ahead*, LAW360 (March 1, 2021), https://www.law360.com/articles/1359975/crystallex-pushes-to-keep-citgo-sale-moving-ahead.

included in transnational investment law regulation, particularly in bilateral and multilateral investment treaties.

This section also includes chapter 14, which focuses on relevant issues arising from ISDS litigation against Venezuela. These issues include the admissibility of claims by dual nationals and the effects of the denunciation of the Washington Convention for investment disputes. This chapter also discusses recent challenges related to the Venezuelan government's representation given the dispute between competing state representation before arbitral tribunals, and how ICSID and ICSID tribunals have dealt with this question.

The relevance of energy transition and climate change developments are explored in Part VI, highlighting future trends in transnational litigation and arbitration practice in the energy sector.

The final chapter is on mediation in the energy sector. Mediation could reduce the number of claims that reach arbitration. As such, it would serve as a filter to the best interest of the parties and the arbitration community.

III. CONCLUSION

International Arbitration in Latin America: Energy and Natural Resources Disputes is a useful and practical resource that provides readers an overview of transnational arbitration practice in Latin America. Moreover, the importance of all major case studies highlighted by the authors rely on the fact that those cases can contribute to create arbitration practices or become arbitration precedent which can be argued or applied by practitioners and arbitrators in other regions of the world, particularly dealing, but not limited, to energy-related arbitration cases. Based on the major investment required by upstream and downstream energy projects, and the importance of the commercialization of its products, energy-related cases will continue to provide the lessons over complex disputes and transactions, that will contribute with the construction of the law that governs transnational investment projects and commercial transactions. Undoubtedly, this book provides a contribution towards that aim.

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Professor Cardenas is a researcher affiliated with the Environment, Energy and Natural Resources Center of UH and coordinator of the program "Inter-American Hydrocarbon Regulators Dialogue," an initiative that seeks to create a forum for research and knowledge between oil companies, regulatory agencies, and academia. He works with companies and government agencies in various areas of regulation and public policies in the hydrocarbons sector including offshore oil and gas regulation in Colombia, oil and gas arbitration in Mexico, and led a UH team that provided technical assistance to the 2019 Gabon Hydrocarbons Code. He has been a speaker in more than 15 countries on issues related to energy law and is frequently interviewed by media outlets on Latin American affairs and energy industry matters. Since June 2019 he serves as a member of the Ad Hoc Administrative Board of Petróleos de Venezuela. Before joining the University of Houston he practiced international arbitration in France and was a career diplomat at the Ministry of Foreign Affairs of Venezuela.

BOOK REVIEW:
THE UNRULY NOTION OF ABUSE OF RIGHTS BY JAN PAULSSON

Reviewed by Sylvia Tonova

I. INTRODUCTION

Jan Paulsson's book *The Unruly Notion of Abuse of Rights*[1] demystifies a seemingly universal concept, *viz.* abuse of rights. The book takes a clear view that the notion of abuse of rights cannot be deemed a general principle of law or an acceptable rule of decision on the international plane. It is uncontroversial that any legal right may, in some circumstances, be refused recognition on the ground that it has been abused. However, the theory of abuse of rights fails to identify the "circumstances" in question. Therefore, the theory is so nebulous that it invites arbitrariness and unpredictability, neither of which are the hallmarks of sound judicial decision-making.

Paulsson examines abuse of rights by reference to, *inter alia*, Bin Cheng's seminal treatise *General Principles of Law as Applied by International Courts and Tribunals*; the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles); the Statute of the International Court of Justice (ICJ); a comparative law perspective; and the *Himpurna v. Indonesia* arbitration, in which he sat as an arbitrator. While this exercise spans numerous doctrinal considerations, it also successfully transposes them into everyday practice.

II. THE BOOK

The Unruly Notion of Abuse of Rights comprises eight chapters which elaborate on Paulsson's thesis that "the notion of abuse of right . . . cannot be the foundation for a general principle of law or an acceptable rule of decision on the international plane."[2] The book starts with a helpful introduction to the nuanced distinctions between "concepts," "principles," and "rules" (*Chapter 1 Matters of Nomenclature*). This is

[1] JAN PAULSSON, THE UNRULY NOTION OF ABUSE OF RIGHTS (2020).

[2] *Id.*

followed by a proper examination of Bin Cheng's familiar 1953 study *General Principles of Law* and the author's conclusion that Cheng's study cannot legitimize the notion of abuse of rights as a general principle of law (*Chapter 2 An Idealistic but Troublesome Impulse*). Chapter 3 (A *Cacophony of Criteria*) lists no less than 34 criteria that underpin the notion of abuse of rights across the civil codes of different countries, international and domestic case law, and the UNIDROIT Principles.

After setting the scene, Paulsson considers the topic under French and Louisiana law (*Chapter 4 A 'Principle' with No Rules?*) as well as by reference to Article 38(1) of the ICJ Statute (*Chapter 5 The Challenge of Establishing Universal Principles*). He notes that abuse of rights is not defined in the French Civil Code or recognized under the law of the State of Louisiana and has no firm foundation in the ICJ Statute. In Chapter 6 (*The Politis/Lauterpacht Quest to Elevate the Concept*), Paulsson examines the attempt by Nicolas Politis and Hersch Lauterpacht to make abuse of rights a part of international law in the wake of the horrors of World War I. The impetus for this attempt was idealistic: they wanted to use the concept "as a tool to overcome the refusal of states to yield sovereignty."[3] However, this attempt to elevate abuse of rights to the status of an internationally recognized principle of law failed to garner the consensus needed (*Chapter 7 Rejection and Retrenchment*). Finally, the author alerts adjudicators to the dangers of basing their decisions on "abstractions dressed up as 'principles' with the pretence that they are rules of decision,"[4] which would cause adjudicators to cross the line into arbitrariness (*Chapter 8 The Vanishing Prospect*).

While Paulsson deals with one main theme in each chapter, five key points are salient.

First, the author rightfully posits that the notion of abuse of rights cannot be used as an accepted rule of decision both as an analytical matter and as a matter of policy. As an analytical matter, the conclusion that there has been an abuse of right is either redundant because the claim is "invalid" under other rules of decision, or depends on

[3] *Id.* at 79.

[4] *Id.* at 133.

the "personal proclivities" of the decision-maker due to the "irremediable indeterminateness" of the notion of abuse of rights, which would favour "open-ended discretion and unpredictability."[5] As a matter of policy, "decisions that result in individual case-by-case rule-making by adjudicatory bodies often weaken general adherence to the law."[6]

Second, the prohibition of abuse of rights cannot be seen as a corollary of the principle of good faith. The affirmative obligation of good faith performance of obligations is more "determinate" than that of the prohibition against what is "to be established as an abuse of right."[7] Further, while good faith in the context of contractual performance manifests itself on the basis of a consensual relationship of trust and reliance between the parties, the "assertion" of abuse of rights is "unilateral" and thus of a different "genus."[8]

Third, to be elevated to the status of a "general principle of law," the notion of abuse of rights must first have "solid foundations in major national legal systems of law."[9] Absent these foundations in domestic law, abuse of rights cannot "be deemed of general applicability in the international community."[10] However, one of the difficulties in gaining the recognition of a general principle lies in the fact that abuse of rights is a concept foreign to common law legal systems.[11]

Fourth, Paulsson provides a helpful framework for elevating abuse of rights to a rule of decision. "An adequate rule can be generated only be a *lex specialis* that defines the abuse of the rights it creates by reference to circumstances established by law, whether a statute or a treaty, or explicitly accords adjudicatory discretion in a particular respect where it seems appropriate."[12] Arguably, the same effect can be

[5] *Id.* at 2.

[6] *Id.* at 95.

[7] *Id.* at 34.

[8] *Id.* at 35.

[9] *Id.* at 21.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 95.

achieved by establishing a *jurisprudence constante* over a significant period of time, but this seems unlikely to occur at the international level and the diverging positions on abuse of rights in individual domestic legal systems do not provide much promise either.[13]

Fifth, Paulsson re-evaluates his conclusion as an arbitrator in *Himpurna v. Indonesia* that "the principle of abuse of right is universal."[14] While this statement formed the basis of the majority's decision to limit the recovery of lost profits in that case, Paulsson re-evaluates "[w]hat did this statement mean" and "was it correct"?[15] Paulsson explains that the only cited authority for the proposition that "the principle of abuse of right is universal" is Bin Cheng's book.[16] Bin Cheng, however, clearly distinguished between the "principle" of good faith and the "theory" of abuse of right and did not condone the universality of the abuse of right concept.[17] Therefore, the claim to universality is "untenable."[18] Having said this, the outcome in *Himpurna* is correct as it is rooted in the contractual stipulation that "the Tribunal need not be bound by strict rules of law" and the fact that the arbitrators were authorized to exercise their judgment as to the "correct and just enforcement of th[e] agreement."[19] Consistent with the main thesis of Paulsson's book, the *Himpurna* tribunal's reliance on abuse of rights can be justified by reference to the *lex specialis* and the powers it conferred to the tribunal.

III. CONCLUSION

The Unruly Notion of Abuse of Rights offers a fascinating and intricate analysis of the abuse of rights notion, its evolution as well as implications for the wider international dispute settlement system. The distilled nuances of the abuse of right notion will undoubtedly prove helpful to international arbitration practitioners and

[13] *Id.*

[14] *Id.* at 61.

[15] *Id.* at 62.

[16] *Id.* at 64.

[17] *Id.*

[18] *Id.* at 65.

[19] *Id.* at 63, 67.

academics alike. With this in mind, the publication of this incredibly helpful book may be complemented by an equally thorough guidance to legislators, including negotiators of bilateral and multilateral investment treaties, who wish to elevate abuse of rights to a rule of decision through a *lex specialis*.

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KEYNOTE REMARKS:
HOW THE BIDEN ADMINISTRATION WILL IMPACT THE ENERGY MARKETS

by Kenneth B. Medlock III

Keynote address delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 20, 2021.

I. INTRODUCTION

Today we discuss what the Biden administration can do to the energy market domestically and what it will mean internationally. It is important to highlight this world because the US is a major player on both the supply and demand fronts. This is where the Biden administration holds some strong and bold ambitions. I believe you will see several measures implemented on the foreign policy front that will set the stage for the US to capture a leadership role in climate conversations across the world.

The next slide offers us an understanding of how to frame a conversation about the energy market. This slide is a classic Earth at night photograph, a composite of the earth on a clear night around the world. When we put this composite together, we can identify where we consume the most energy because that is where the lights are on. This image was originally made famous by National Geographic in the mid-1990s. It was on the cover of one of its magazines. In fact, there are many iterations of this image that display different things; however, this one, in particular, shows you where the lights are on.

Now, I would like to draw your attention to a few regions first to highlight how difficult the task ahead will be. As you can see in the picture, in North America, the lights are very bright, particularly in the eastern part that is densely populated. From this image, you can also see Western Europe, which is incredibly well-lit. You can also see Japan and South Korea, where people live, and Australia, New Zealand, and Latin America.

I am going to pause there for a reason. Collectively, these countries are known as the Organizations of Economic Cooperation and Development ("OECD"). These

countries and regions are the brightest or the well-lit regions in the world. This matters when you have a conversation about energy and how energy policy in any one area might impact developments in the rest of the world.

II. THE GROWING DISPARITY IN GLOBAL ENERGY CONSUMPTION

In this part, we will examine how this domestic work can exert a major influence on the international energy market. This will hopefully culminate in suggestions about what can be done domestically to improve the inequality experienced within the global international market. To better illustrate the existing inequality, I should point out that the most well-lit places on the planet represent roughly 1.2 billion people. There are about 7.7 billion people on the planet, so the well-lit regions of the earth are home to a relatively small fraction of the population.

Interestingly, the OECD is not just home to the wealthiest nations in the world who also have the biggest energy footprints on a *per capita* basis; these are nations in which industrialization has long since been the norm. In addition, these countries have driven most of the political and geopolitical discourse about international commerce as well as the framing of international law. Effectively, these countries have set the stage for the rest of the world. That said, we should bear in mind that these countries are only home to 1.2 billion people.

Next, I want to draw your attention to India, Southeast Asia (or the ASEAN region), and China. Here you can see that the lights are on, but they are not quite as bright. However, if you do a time-lapse on this, you will see that those regions of the world are growing brighter. In fact, their growth has become the hallmark of what has been happening in the energy market for the last couple of decades. How can that be? Geographically, these regions are not quite as large and are still not quite as bright, but there is a very important point to bring to the fore here. Collectively, India, China, and the ASEAN region account for about 3.4 billion people. That is almost three times the number of what we have in the OECD in relatively smaller regions. This is remarkable. The population growth in these regions is still positive, as opposed to OECD nations, in which the population growth is relatively flat and is projected to remain so for the next 30 years. In fact, in a lot of OECD nations, you see aging

population. This has interesting implications for the socio-economic trends in these countries. However, in developing Asian economies, this is not the case.

A. *The Increased Influence of Asia in the Energy Landscape.*

When you look at what is likely to come over the next thirty years and what has transpired in the last 30 years, you will see that the world of energy has shifted to one that is driven by what is happening in Asia. China, of course, dramatically emerged onto the global energy scene in the mid-1990s with its massive rate of economic growth that has remained constant through the last two decades. As a result, it has forever transformed the way we think about energy production, energy demand, energy trade, and even conversations on the environment. In particular, the supply chain for some of the greener technologies is being proposed for distribution in OECD nations. We can certainly revisit this topic, if desired, however, it will suffice to say that, over the last twenty years, Asia, in general, and China, in particular, have had a transformative effect on the world of energy. They will likely continue to do so.

Now, it is important to note that I have not even commented on the remaining three billion people on the planet. They live in the Middle East, Central Asia, Latin America, and sub-Saharan Africa. This is where things get really interesting because if you look at sub-Saharan Africa at night, you see a continent that is relatively dark. Thus, it begs a very simple question: is it dark at night because there are no people in these regions? Of course, not. In fact, there are just over a billion people in this part of the world who lack access to modern energy services, a condition that is typically referred to as energy poverty. It is also a region that has launched an initiative to improve energy access conditions. The initiative is called "Energy Access for all by 2030". This initiative is regarded as ambitious as the "Net Zero" energy initiative which we hear about in OECD countries. These significant chunks of the global population without access to modern energy services account for nearly three billion people. This is not acceptable. Therefore, this invokes an urgent need to expand energy access by investing in energy infrastructure and developing new resources. However, what those resources are, remains to be seen. Generally, when countries begin to develop, they use local (*i.e.*, domestic) resources. This is called

leveraging their own competitive advantage. It allows them to support economic growth and development.

B. *The Contrasting Landscape of OECD Countries vis-à-vis non-OECD Countries*

So, when we look at the world and we talk about energy, what is evident is that it is the world of haves and have nots. The OECD is certainty the world of "haves" yet this world does not even comprise half of the world's population. The fact is there are more people lacking access to modern energy services in any reliable way to promote economic growth, development, and well-fair improvement.

As we move forward, this set of data will be a very important motivator for international discourse. It is also equally important to recognize that, by UN population projections, if we project out to 2050, we will be looking at 9.6 billion people. By that time, OECD is projected to be roughly the same size, just south of 1.4 billion. This means that most of the population growth that is being projected will occur outside the developed world. To make things clearer, a massive fraction of that growth is expected to come from the world's most impoverished nations, from places like sub-Saharan Africa.

So, when we think about the energy transition problem, it is important to recognize that transitions essentially mean multiple things depending on where you are in the world. This picture is illuminating in many ways because you can begin to see that a transition in North America might mean moving from one resource to another, as new technologies are integrated into legacy infrastructures and grids get expanded. It is largely the story of moving from one fuel to another. Nevertheless, when you go to places like sub-Saharan Africa, it is less about fuel displacement and more about increasing energy demands. The question then becomes: how do we meet that challenge? It is a significant challenge, one that needs to be understood in the context of transitioning from energy poverty to energy access. Therefore, it is a very different kind of discussion.

The next slide presents a set of data that supports what I just laid out. The slide compares data from OECD and non-OECD countries. It also contains energy use from 1970 all the way through 2019. 2020 data is not yet completed. Once it is

completed, it will be added. We should expect a drop in demand, given the global shut down that we experienced. I will discuss this later in further detail, as it has significant bearing on the conversation concerning what we see in 2020.

III. THE ROLE OF LEGACY INFRASTRUCTURE IN SHAPING ENERGY MARKET

In the OECD spectrum, you can see primary energy use by fuel type. It contains oil, natural gas, and coal, which are still the dominant forms of energy use. In the non-OECD spectrum, the story is similar, except that there is even greater fossil dependence. When you see the non-OECD data the difference is quite striking. This is due to a significant growth in natural gas demand, as well as noticeable decline in coal consumption. These trends most definitely are going to continue, as they are directly connected with the age of infrastructure that is in place to use coal. Specifically, these trends pertain to the legacy conversation. I will explain this term in a minute. By contrast, when you look at the non-OECD trends, what stands out the most is the growing use of coal over the course of last twenty years. This signifies a striking difference from the OECD countries' trends. What that reveals is the popularity of legacy infrastructure that is in place in non-OECD countries. This infrastructure continues to be expanded due to the massive amount of coal-fired generation capacities which are still under construction in developing countries in Asia. Looking at these trends makes one thing clear; coal is going to be around for a while in these countries. This revelation gives rise to a vexing question about how these countries can manage to grapple with CO2 emissions and climate change.

In the US, the last major build-out of coal-fired generation was between 1978 - 1982. Most of that capacity was built with the design life of roughly forty years. A lot of it was supported by the policy. During 1980-1990, there were significant concerns in relation to energy security, the reliance on imports of oil, and the increased risk of running out of natural gas in the US. These factors drove movements towards domestic fuels. That is partly why the coal, in terms of resources endowment, has remained a dominant fuel. Although it is not a key fuel that is being consumed predominantly, the US is still home to 20% of the world recoverable coal, making it a massive resource base.

A. *The Shifting Paradigm of the Coal Production and Consumption in OECD Countries*

When fast forward to just a last few years, it can be seen that the production of coal experienced a noticeable drop in the OECD countries, as well as the US In fact, coal has actually been in decline since 2007. It is partly due to being out-competed by other resources. Additionally, the decline of the coal consumption can be largely attributed to the rapid approach to 40th birthday of the significant percentage of coal-fired generation capacity in the US. This leaves developers with the option of either retire or replace the existing infrastructure or upgrade them. With natural gas being so cheap, coupled with renewables getting cheaper by the day, it is a fairly easy, straightforward decision. The only sensible option would be to retire and replace. That is what prompted the energy transition landscape in the US, similar story is unfolding in Europe as well.

However, when you get outside of the more developed economy of the world that is not the case. The landscape there is incredibly different and that has significant bearing on how the energy transition will unfold in different parts of the world. With respect to energy demand, one thing that I wanted to highlight is that, in 2006, the Non-OECD demand exceeded OECD demand for the very first time. It has continued to grow ever since. Currently, we are at the point in which Asia collectively represents more energy use than the EU and North America combined. Thus, the things that are happening in Europe and North America, on the energy fronts, still matter. However, it is important to recognize that what is unfolding in Asia is really indicative of emerging new reality in the world of energy.

B. *The Implications of Co2 Emissions*

The next slides carry an implication for Co2 emissions. This is important because, at the end of the day, a lot of international climate negotiations are really aimed at reducing Co2 emissions. The efforts to reduce Co2 emissions has not really garnered any concrete momentum in recent history. The table shows a slight decline in Co2 emissions in 2009, which was largely due to the global financial crisis. It is expected to see a significant decline of Co2 emissions in 2020, which is clearly due to a significant calamity that effectively resulted in the shutdown of the world's

economies. But I raised this point that in 2020, we effectively shut down two third of the world. Yet, we look at what happened in global oil demand, on an annual basis, it is projected to fall out by between ten to twenty billion barrels per day. That is roughly ten percent of the global demand. When you look at Co2 emissions that is fallen substantially, but not nearly as much as what most people would have anticipated, especially if they were told that the economic activities would have collapsed the way it did as a result of a pandemic in 2020.

So, this really does highlight the fact that legacy infrastructure will continue to play a major role in facilitating what we see in terms of carbon emissions and fuel use. This means that de-carbonization is going to require significant action, but it is not going to be a one-size-fits-all sort of story, nor will it be a silver bullet. In other words, many different things will shape the future energy landscape. It is important that we expand the way we think about de-carbonization; we must recognize that we are not just talking about replacing hydrate carbon. In fact, there are three very important words that you must incorporate into any conversation about energy transitions. Those words are legacy, scale, and technology. If you cannot reconcile these three words with the events that are unfolding, you should be wary of being sold a bill of goods. These three words are integral to any discourse concerning the integration of new energy resources into the existing energy architecture.

One thing from this slide that I would like to highlight—a thing that speaks volumes about the immense challenge that global Co emissions represent—is the division between OECD and non-OECD. Since 2000, OECD emissions have not increased, nor have they remained constant—they have decreased. The growth of global C02 emissions has occurred outside of the OECD and is largely driven by a developing Asia. In fact, the growth has been so dramatic that if you took OECD emissions all the way down to zero tomorrow, global emissions would still be at 1995 levels. This is a remarkable fact. It speaks volumes about what must happen and where.

C. *The Effects of Coordination Failure on the Future of Energy Market*

There are a few things on this slide that I would like to point out. The energy system has always been in transition. The world of energy today is very different from

what it looked back in 1990. The world of energy in 1990 was very different from what it looked in 1960. In a similar vein, the world of energy in 1960 looked very different from what it did in 1930. By all accounts, the world of energy in 2050 will look significantly different from what it looks like today. So, it is important to recognize that the energy system constantly evolves. It is always subject to transition. New technologies are always being introduced, therefore, their integration with the existing eco-energy system gives rise to an important question. Oftentimes, there comes about a particular technology that makes something so much cheaper, but it never gets picked, never gets integrated. Why is this the case?

We have seen this story play out with electric vehicles multiple times. It is largely due to the theory called "coordination." This theory says that if I were to do something green that does not necessarily leverage the existing infrastructure, I would have to not only develop new technologies, but also the support technologies that is necessary for its operation. If one thing in that chain breaks down, you have what is called a "coordination failure" which results in the new technologies not being picked up for mass production.

So, for example, when you think about wind and solar, they have been relatively easy to integrate into developed economies' power grids because there is an existing grid. Also, there are legacy resources that can provide back-up generation capacity. They are referred to as de facto storage. For instance, natural gases have done a tremendous job in places such as the State of Texas regarding wind power. Therefore, wind and solar energy must leverage existing legacy infrastructures as they continue to evolve.

In contrast, technologies that cannot leverage existing infrastructures might prove to be problematic. This is where policies and regulations will play an incredibly important role. It is also where coordination failure can occur. Said failure is known to be one of several elements that contributes to what is known as the "valley of death." For those of you unfamiliar with this idea regarding new technologies, the "valley of death" describes a situation in which a promising new technology emerges every now and then and falls into the "valley of death," that is, it never gets adopted.

One of the main reasons that technologies fail to catch on is that they lack the necessary (and expensive) support infrastructure.

That is why it is important to recognize the importance of legacy. All these factors are important, however, the level of importance of any one factor can vary by region, country, etc. When we think about the principle of comparative advantage, that is really what everything is point to: the fact that energy transition(s) will look different everywhere. In certain regions, you have certain comparative advantages that do not exist in other regions. Therefore, these regions should leverage their advantages toward a movement (within the energy system) that can lead to a more sustainable future. However, because this movement will be specific to these regions, it cannot be used as model for the rest of the world. A prime example is Northwest Europe, throughout which massive wind resources exist, especially off the coast of Denmark and the Netherlands. Granted, it is still intermittent, but it is robust and being leveraged.

That gives rise to another important question: how do you deal with intermittency? One of the ways these countries are addressing this issue is through the development of transmission infrastructure. This helps them arbitrage periods when there is a lot of wind blowing and when there is not. One of the interesting things that I was privy to learn about is that, in Norway, there have been significant discussions about expanding long-distance transmissions between Norway, Denmark and the continent. Why is this significant? Norway enjoys massive hydro resources and hydro is the world's best battery. It can be used as a balancing item for a system with more renewables. This is beautiful because we are effectively talking about a system that could evolve to a zero-emission system in a relatively easy manner by developing a little bit of infrastructure. But again, we cannot superimpose this reality on other regions. This gives rise to the question: how will other regions evolve? They will evolve with a similar approach but with different means. The key here is: what is the end goal? Environmental sustainability. Of course, last year sent a shockwave through the system. This has many people wondering about Covid-19's impact on energy and other facets of society. I would argue that the effects of Covid-19 are not

yet fully understood. Nevertheless, these effects will be with us for a long time to come.

IV. THE IMPACT OF COVID-19 AND BIDEN'S ELECTION ON THE US ENERGY MARKET

The short-term impacts of the pandemic on the energy market as well as consumer preferences have been significant. There certainly has been a shift in consumer behavior; for example, shopping behavior has significantly shifted (*i.e.*, has significantly decreased, changed from in-store shopping to online shopping, etc.). However, it is likely that we will see a return to the way things were once the vaccine is widely distributed and Covid is behind us. Nevertheless, some industries (*e.g.*, the aircraft industry) have been decimated and it may be a while before they show signs of recovery. In the energy field, folks have been talking about the pandemic's impact on oil prices and the oil market in general.

The interesting thing about it is that you see a significant drop in reduction and demand and there was a force shut-in of capacity. However, if you compare this to other industries—airline, hotel, or restaurants businesses—you will see that, in the energy field, things are on a more significant scale. So, a lot of shaking out has to happen. Public transportation was the area that, both, local and federal governments, were grappling with for a while. Rider shifts dropped dramatically. This put a strain on cities, forcing them to support public transport infrastructure. So, it will be interesting to see how these areas shape up as we go forward. In essence, it is really an issue of consumer behavior and habit. For example, in a lot of places in the world, people have avoided using public transportation. Instead, they've chosen to use their own vehicle or simply decided to not go anywhere. How this situation unfolds in the next ten to twenty years is an open question, however, its implications for energy transition are quite important.

Recent vehicle sale statistics noted that, on a global scale, SUVs have accounted for just over 42% of all new car sales last year. This is remarkable. However, we ought to focus on whole data and not individual parts because electric vehicles are being sold too, however, they make up a relatively small fraction of total annual sales. So, this begs the question: how is this going to unfold as we go forward? What will new

efficiency and new regulations mean for these sales?

This data that you see here is known to many people, however, there a couple of points I want to focus on. The outcome of Georgia gave Democrats a narrow majority in the Senate. They also maintained their narrow majority in the House. The key word in both these statements is *narrow*. Basically, this means that we will see a real opportunity for good old-fashioned negotiations. It also means that we will see a strong use of executive orders. In today's America, the robust use of executive orders is, in many ways, the prime emblem of its political system. Nevertheless, one of the biggest criticisms of their use is that they cannot affect lasting change because they are not legislative actions. Also, they can effectively be undone by the next president.

One of the more interesting things about this year's elections is that 86 of the 99 chambers in state legislators held elections. If one looks carefully, one can see a shift away from Democrats (*i.e.*, republication). At present, it is a relatively minor shift, but it is still a shift. Why does that matter? There is a process occurring that is known as re-districting. This means that if you have republication controls in state legislators, it is likely that Democratic districts will learn towards the Rs. It should go without saying that this matters to Democrats because it will affect how they vote on various issues, *i.e.*, they will be less willing to vote for something that will harm their constituency. At best, they might push everything back towards the middle. This is where good old-fashioned negotiation will come into play. In any case, the age of uncertainty is upon us. Personally, I think it is going to be fun to see what the next four years have in store.

The last slide summarizes our discussion today. It is important to note that energy will not be at the top of the list, at least not from a legislative perspective. Nevertheless, it may still be affected through executive order. From a legislative perspective, there is going to be a lot more emphasis on getting through the pandemic, health care, and economic recovery. These are big ticket items which are not simple to address. However, no matter what is said, it is all going to be about one thing: recovery. This is where I believe a lot of negotiation will take place. Ultimately, these negotiations will lead to more moderate discussions on energy transition. Of

course, this does not mean that discussions will not be contentious–of course they will be–we are talking about people who have very strong feelings about this stuff. That said, there will be areas in which bipartisanship will prevail. Therefore, we should expect to see fast movement in these are areas. As far as de-carbonization, we must think deeper about things in a broader perspective. This means that we need to consider things from portfolio perspective, which means looking at nature-based solutions.

There is a bill called the "Growing Climate Solution Act". The bill was debated last June and has considerable support across the political spectrum. This is the type of thing I would expect to move forward without a hitch. Also, I think we are going to see a strong emphasis on carbon capture technologies and support for their deployment. This could reel in several republication, oil- and gas-producing states. In addition, it could garner support from Democrats, which is where their thin majority comes into play.

Over the last two weeks, I have read a multitude of articles about how an infrastructure package might be introduced in the next wave of the US government's two trillion-dollar investment opportunity. In fact, there is a myriad of examples there. I think that one of the most common issues these packages have is their particular focus on transmission structure. This is needed regardless of the energy technologies win out, so there are certain things that are inevitable, and certain things that are not. What this means is that we get pushed into things that are easier to make progress with at the expense of the more contentious issues which, ultimately, get tabled. This, in essence, opens a door for Biden to use foreign policy as a very strong and powerful tool. In rejoining the Paris Accord, the US assumed its leadership role in global climate discourse. Of course, leadership can be assumed without concrete actions from within. Nevertheless, I think we will see said actions, either through making or through various cabinet appointments. These actions will effectively establish the US as a country that is taking real action to address climate change.

V. CONCLUSION

I believe lots of interesting events will occur that will send strong signals internationally that the US is determined about climate action, in particular with respect to rule making action from within the executive branch. However, such robust desire to take serious actions to address climate change is not reflected as strongly from legislative perspectives. There have been discussions about banning fracking and what can be done on that front. There is an interesting juxtaposition that I would like present to you to leave you something to think about.

I did a briefing for the Ministry of Foreign Affairs in Korea a few weeks ago. An important issue that surfaced in that discussion was the concerns amongst people in the Ministry about what the administration might do to natural gas production and the prospect for it, as well as energy exports. They are quite concerned. Korea remains steadfast ally in the Asian Pacific, therefore, their views are important. Why are they worried? Because currently their power generation mix comprises roughly 40 % of coal. They have very strong and solid goals to drive coal out of their energy mix, but they also do not have a lot of renewable resources, which forces them to rely on gas. From the energy security perspective, one thing that they need to consider is whether the gas would be a viable alternative for them. That is where the US really can play a significant role. The US energy de-risks the gas market in the Pacific base. That is something the Korean government seeks to capitalize on. Therefore, if you envision the world where the LNG exports in the US are diminished because the gas production is compromised, it still carries significant implications for the carbon footprint of some of our allies in a developing Asian economy as well. So, this factor ultimately will shape this conversation, which is why, natural gas will likely remain an important fuel for any energy transition's discussion, largely due to what it means in other parts of the world.

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A REPORT ON THE "YEAR IN REVIEW—THE MAGNIFICENT SEVEN" PRESENTATION BY LAURENCE SHORE

by Munia El Harti Alonso

Delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 21, 2021.

This presentation considered both investor-state and contractual disputes in the energy sector. It cast an eye over the wide range of matters that have come before arbitral tribunals in 2020, and will attempt to identify the top seven rulings and industry trends that will have significant influence on energy arbitration in 2021 and beyond.

I. INTRODUCTION

Laurence Shore (Bonelli Erede, Vice Chair of the Executive Committee of the ITA) launched the second day of the Conference with an outlook on the top six rulings and one industry trend—the Magnificent 7—(the "Influencers") that ought to influence energy arbitration in 2021 and beyond. The presentation identified seven Influencers, with the first providing for a more nuanced approach to Fair and Equitable Treatment (FET) claims. The three following cases can be summarized as "words matter," providing for a cautionary recommendation to pay attention to textual approaches in the interpretation of legislation, contracts, and commitments with local communities. Influencers five and six regard mega-awards enforcement proceedings and the intricacies for states regarding sovereign immunity waivers and the provisional application of the Energy Charter Treaty (ECT). The last influencer is a technologic advancement, with the imminent commercialization of oceanic methane hydrates that might prompt a new dimension of hydrocarbon disputes.

II. INFLUENCER 1: *ESKOSOL* AND THE REASONABLE RETURN AS A NUANCED ASSESSMENT OF FET

Citing one of the ECT renewable photovoltaic disputes, Mr. Shore identified the recent *Eskosol* award[1] as a landmark case in the energy sector, whereby the tribunal determined that the Conto Energia IV and Romani Decree of 2011 general enactments apply to the whole PV production industry, and Italy made no specific commitments to the investor that the regulatory regime would not change.

In line with certain previous awards, the key issue was that the original plan was too successful and in 2011 it was apparent that the 2020 PV target would be met by 2013, so there was excessive energetic capacity. Thus, the tribunal crucially found that Italy's incentive program was nuanced from the start with a concern to manage consumers fair price and providing for a reasonable return for investors. The tribunal´s approach to understanding the consumer's interest (embedded in legislative incentives in the renewables field) will be an influencer for more nuanced FET assessments of FET claims.

III. INFLUENCER 2: *MCGIRT*, NEW GROUNDS OF AUTHORITY FOR NATIVE PEOPLE ON OIL AND GAS RESERVES

The Supreme Court of the United States' (SCOTUS) ruling in *McGirt v. Oklahoma*[2] is bound to have ramifications on the domestic statutory interpretation and rights of people on natural resources. The SCOTUS ruling attributes Indian authority on a Creek Nation tribal reservation that spans three million acres and includes most of the city of Tulsa, with four more such reservations encompassing the entire eastern half of the State—19 million acres. The rationale of the Court was that the grant of authority that was attributed by Congress to the Creek Nation remained intact. As pointed out by the dissenting opinion of Justice John Roberts, "[t]he decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental

[1] Eskosol S.p.A. in Liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, (Sep. 4, 2020).

[2] McGirt v. Oklahoma, 591 U.S. ___, 140 S. Ct. 2452 (2020).

law."[3]

Mr. Shore pointed out that the decision will entail challenges to operators of oil and gas wells, causing them to enter into new agreements, some of them including arbitration clauses.

IV. INFLUENCER 3: ROCKROSE, WORDS MATTER IN RECENT ENGLISH LAW INTERPRETATION OF JOINT OPERATING AGREEMENTS (JOA)

The *Rockrose* decision[4] of the English High Court concerned a long-term JOA for oil and gas blocks in the North Sea. Although agreements of this type typically contain an arbitration clause, this one did not. The nine participants decided to remove the operator pursuant to the JOA. The operator brought suit arguing that the operators had to act in good faith. The Court applied the contract verbatim, without reading into the contract's implied terms and dismissing the doctrine of good faith with sophisticated JOA parties. Systemically, in a *Lord Sumption v. Lord Hoffmann* tension,[5] this decision is likely to influence approaches to contract interpretation under English law in many energy arbitrations.

V. INFLUENCER 4: SINOHYDRO COSTA RICA, A SOVEREIGN CAUTIONARY CASE ON STATE-LOCAL COMMUNITY COMMITMENTS

The *Sinohydra Costa Rica* arbitration concerns a 400 Million USD contract for the construction of an electric dam in Mexico.[6] Claimants were the contractors consortium. One of the salient aspects regards labor union rights and blockades, and community demands for compensation promised by Mexico's Federal Electric

[3] *Id.* (Roberts J. dissenting).

[4] Taqa Bratani Ltd and Others v. RockRose UKCS8 LLC [2020] EWHC 58 (Comm).

[5] For a recount of the debate between the two former Supreme Court Justices on the extent to which judges should look behind parties' choice of words to determine their intended meaning *see* John Denis-Smith, *An Attack on the Past as a Guide to the Future? Lord Sumption's Latest Lecture*, THOMPSON REUTERS DISP. RES. BLOG, Jun. 30, 2017, http://disputeresolutionblog.practicallaw.com/an-attack-on-the-past-and-a-guide-to-the-future-lord-sumptions-latest-lecture/.

[6] Omega Construcciones Indus., S.A DE C.V., Sinohydro Costa Rica, S.A., Desarrollo y Construcciones Urbanas, S.A. DE C.V. and Caabsa Infraestructura, S.A. DE C.V. v. Comisión Federal de Electricidad, LCIA Case No. 163471, Award (Jun. 22, 2020) *available at* https://jusmundi.com/en/document/decision/en-omega-construcciones-industriales-s-a-de-c-v-mexico-sinohydro-costa-rica-s-a-costa-rica-desarrollo-y-construcciones-urbanas-s-a-de-c-v-mexico-and-caabsa-infraestructura-s-a-de-c-v-mexico-v-comision-federal-de-electricidad-mexico-final-award-monday-22nd-june-2020.

Commission ("The Commission"). The consortium decided to terminate the contract based on a radical change of conditions since the time of tender, contending that the Commission was aware of the issues with the community and failed to resolve them. The tribunal determined that the Commission failed to honor its commitments to compensate the community residents, which led to foreseeable blockades and shutdowns. This case is a likely influencer because of the state-local community conflict implications for massive energy projects where the contractor must rely on community relations.

The last two cases deserve inclusion in these highlights, as the underlying industries of these recent decisions are oil and gas, with significant billion-dollar dispute amounts. Both are under appeal, and thus might deserve to be included in the 2022 ITA Conference.

VI. INFLUENCER 5: *P&ID*, SOVEREIGN IMMUNITY MOTIONS AND THE FISA

P&ID v. Nigeria,[7] a dispute worth USD 10 billion, concerned a gas supply and processing agreement, whereby Nigeria would supply wet gas and PI&D would refine the gas to produce lean gas for Nigeria. The agreement could not secure the requisite amount of wet gas. PI&D initiated an arbitration seated in London and won the case for 6.6 billion. However, in the set-aside proceedings, an English Court found that Nigeria managed to prove a strong prima facie case that the contract was procured by bribery.[8] PI&D moved to confirm the award in the District Court of Columbia in 2018. The District Court heard the sovereign immunity motion, but the Court decided that Nigeria waived its immunity, declining the motion to dismiss as well as the stay.[9] The operation of the waiver of sovereign immunity under the 1976 Foreign Sovereign Immunity Act ("FISA") is a key finding of the P&ID case, pending its final resolution.

[7] Process and Indus. Dev. Ltd. v. The Ministry of Petroleum Res. of the Fed. Republic of Nigeria, *ad hoc*, Final Award (Jan. 31, 2017), *available at* https://jusmundi.com/en/document/decision/en-process-and-industrial-developments-ltd-v-the-ministry-of-petroleum-resources-of-the-federal-republic-of-nigeria-final-award-tuesday-31st-january-2017#decision_5289.

[8] Nigeria v. Process & Indus. Dev., Ltd., [2020] EWHC 2379 (Comm).

[9] Process and Indus. Dev., Ltd. v. Fed. Republic of Nigeria, 506 F.Supp.3d 1, 6–11 (D.D.C. 2020).

VII. INFLUENCER 6: YUKOS RELOADED, PROVISIONAL APPLICATION OF THE ECT BACK INTO THE DEBATE

The Hague Court of Appeal decision of February 2020[10] reinstating the Yukos awards[11] is of particular relevance. The Dutch Supreme Court hearing Russia's appeal decided to refuse the stay of the enforcement while its petition is being heard. With this ruling, the Court of Appeal is putting the construction of Article 45 of the ECT in circumstances in which provisional application would bind the Contracting State back into debate.

VIII. INFLUENCER 7: OCEANIC METHANE HYDRATES COMMERCIALIZATION, THE NEXT HYDROCARBON FRONTIER

A technology development that year after year will lead to arbitrations in the medium term: the soon to happen commercial production of oceanic methane hydrates. While it may not be as energy altering as the fracking of shale gas, its commercialization will be significant. It has long been a focus of government energy research programs, and recent projects have shown that the production of natural gas from oceanic methane hydrates is technically feasible, though with greenhouse gas emission consequences. The hydrates are in many countries Exclusive Economic Zone waters, particularly those of China, Japan, and South Korea. Territorial disputes are bound to arise, and the exploitation of these hydrates will lead to a new wave of arbitration clauses to deal with significant and expensive engineering challenges on the ocean floor.

IX. CONCLUSION

The dynamic presentation provided for a panorama of recent and most relevant disputes and developments in energy arbitration. The seven trends identified are indicative of the intrinsically evolutive nature of energy disputes, yet the lessons

[10] Rechtbank-Den Haag [District Court], , Apr. 20,l 2016 Case No. C/09/477160/HA ZA 15-1, *available at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2016:4230&showbutton=true&keyword=ECLI%3aNL%3aRBDHA%3a2016%3a4230 (English translation).

[11] Hulley Enterprises Ltd (Cyprus) v. Russian Fed., Permanent Court of Arbitration 2005-03/AA226, Final Award (Jul. 18, 2014); (ii) Yukos Universal Ltd (Isle of Man) v. Russian Fed., Permanent Court of Arbitration 2005-05/AA227, Final Award (Jul. 18, 2014); and (iii) Veteran Petroleum Ltd (Cyprus) v. Russian Fed., Permanent Court of Arbitration 2005-05/AA228, Final Award (Jul. 18, 2014).

learned provide for a systematic understanding of the current landscape in the field for the past year, and beyond.

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A REPORT ON THE "ENERGY DISPUTES: AN UPDATE FROM THE ARBITRATORS" PANEL PRESENTATION

by Lorena Guzmán-Díaz

Delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 21, 2021.

Energy disputes comprise a significant portion of commercial and investment arbitrations. This Panel will present observations on these disputes from the perspectives of the arbitrators who decide them, including trends in the matters that are coming before arbitral tribunals and learnings from energy arbitrations across different legal systems and geographic regions.

I. INTRODUCTION

In January 2021, the Institute for Transnational Arbitration ("ITA"), the Institute for Energy Law of the Center for American and International Law ("IEL"), and the ICC International Court of Arbitration ("ICC") held a virtual conference to discuss the latest advances in the energy sector and emerging trends in energy arbitration, focusing in particular on the impact the COVID-19 pandemic has had on the energy industry and energy disputes. The first panel discussion, titled *Energy Disputes: An Update from the Arbitrators*, presented recent observations on energy disputes from the perspectives of the arbitrators who decided them.

Moderated by Maria Chedid (Arnold & Porter, San Francisco), the panel discussion centered on four topics that have come up before arbitral tribunals in energy disputes: (1) the increasing reliance on force majeure provisions; (2) allegations of corruption; (3) the increasing presence of states and state-owned entities as parties in energy disputes; and (4) the role of expert witnesses in energy arbitrations. The participants also provided takeaways from energy arbitrations across different geographic regions and legal systems. The panelists were Mohamed S. Abdel Wahab (Zulficar & Partners, Egypt), Horacio Grigera Naón (Center on International

Commercial Arbitration at the American University Washington College of Law, Washington, DC), Matthew Secomb (White & Case, Singapore), and Maxi Scherer (WilmerHale, London).

II. TOPIC 1: FORCE MAJEURE CLAUSES

To start, the panelists noted an increasing trend in which parties to international energy agreements are invoking the force majeure clauses contained in energy contracts. A common contractual provision, force majeure clauses serve to relieve the parties from performing their contractual obligations when certain circumstances beyond their control arise and which make performance inadvisable, commercially impracticable, illegal, or impossible. In response to the COVID-19 pandemic and the unprecedented nature of the last year and a half, force majeure provisions have been increasingly invoked in the context of energy disputes, contributing to a heightened demand for force majeure determinations. Given the longevity of energy contracts, the pandemic has disrupted the contractual framework of these long-term energy contracts.

Scherer led the conversation regarding force majeure clauses in energy arbitrations. She noted that while she could not divulge specific issues in her cases without breaching confidentiality, she would try to infuse her experiences into a couple of remarks. First, Scherer touched upon statistics related to energy disputes during the COVID-19 pandemic. While dependent on the type of energy source at issue, global energy demand has declined in the EU and North America. In the first quarter of 2020, the overall global energy demand declined by about 4%, with coal dropping by 8%, oil demand by nearly 5%, and gas by approximately 2%. Unsurprisingly, the demand for energy from renewables remained high. By contrast, the second half of 2020 presented a mixed picture. In China, for example, demands were systematically up by 6% as compared to 2019 levels. This was not true for other parts of the world, particularly for Europe.

Scherer continued by identifying two notable cases related to the development of energy disputes and force majeure clauses. Her first selection involved a dispute related to the implementation of the force majeure provision contained in an

agreement between Electricité de France ("EDF") and Total Direct Energie ("TDE") in France. The substance of the dispute related to the suspension of obligations under a contract for the purchase of electricity at a regulated price due to the notable decrease in electricity consumption during the COVID-19 pandemic. The Paris Commercial Court found that the buyer could invoke the force majeure provision of the agreement because the conditions under the clause had been met. The Court found that the pandemic could not have reasonably been foreseen at the conclusion of the contract between EDF and TDE. Moreover, the Court found that the consequences of the pandemic were beyond the control of the parties and could not have been avoided. In this case, the force majeure clause broadened the scope of force majeure where performance of the contract would have been impossible under reasonable financial conditions. This is the first court decision recognizing the COVID-19 pandemic as a force majeure event.

Her second selection was the UK's Financial Conduct Authority's ("FCA") test case on business interruption insurance. In this case, the English High Court found that a number of representative business interruption insurance policies would cover financial losses caused by the pandemic. The Court refused the argument by the insurer, who claimed the indemnity was not due because economic loss would have been suffered regardless because of the economic downturn. Scherer noted she selected this case because it demonstrates important developments in the EU with respect to the impacts of the pandemic.

From an arbitrator's perspective, Scherer believes it all comes down to the wording of the force majeure clause. Throughout the pandemic, she has heard of clauses that were drafted before and after the pandemic started that did not include the word "pandemic." As such, it will become a matter of interpretation for arbitral tribunals. Grigera Naón commented on an energy dispute he presided over, which involved Chilean and Argentine parties. In the same vein as Scherer's remarks, Grigera Naón also recognized the importance of word choice in the force majeure provision. He recalled how in that case, the issue turned on the translation of the word "preventing." In the clause at issue, the translation contained the wording

equivalent of "impede" in English. Yet, "impede" does not imply "absolute impossibility." Nonetheless, the arbitral tribunal accepted the party's force majeure argument. Because of the wording in the provision, an event that would not have qualified as "impossibility" did qualify as such under the "impede" text of the contract.

Secomb concluded the discussion on force majeure clauses by touching upon the kinds of cases currently seen in Asia in this context. He identified two types: (1) cases in which a big project (*e.g.*, a large-scale infrastructure project) is being interfered with by a government action and where the dispute concerns the consequences of such action; and (2) cases in which there is a massively changed commercial outcome which leads parties to call upon force majeure.

III. TOPIC 2: CORRUPTION ALLEGATIONS IN ENERGY DISPUTES

To transition into a discussion regarding allegations of corruption in energy arbitrations, Chedid inquired about the impact these allegations have on arbitrators' perspectives and their evaluations of such allegations. Abdel Wahab led the discussion on this topic. He started by stating that corruption is one of the "most fascinating" topics in arbitration, both in the commercial and investor-state arbitration settings. In the realm of energy disputes, there have been increased allegations of corruption in many parts of the world. From an arbitrator's perspective, Abdel Wahab believes allegations of corruption color the arbitrators' discussions, deliberations, and views on the matter.

According to Abdel Wahab, several factors have led to an increase in allegations of corruption. Among these is a global growing focus on bona fide dealings between parties. In addition, references to bona fide dealings in the proliferations of texts and treaties make these types of dealings an indispensable requirement. He observed that arbitral awards routinely deal with issues of corruption. The involvement of states and state-owned entities, polarized practices mandated by cultural differences, as well as political and socio-economic changes and regional volatility have all impacted the increasing visibility of corruption allegations in arbitration, particularly in energy dealings.

Abdel Wahab listed four "magical words" to keep in mind when considering the

subject of corruption allegations in arbitral proceedings: (1) perception; (2) framing; (3) proof; and (4) impact.

An arbitrator's perception about what constitutes corruption and the importance of the allegation itself is informed by a variety of factors, such as past experiences, previous cases, perceptions based on the jurisdiction where the alleged action has taken place, and the jurisdiction where the arbitrator is from.

Framing refers to the way the parties in the dispute frame the allegation of corruption. This element is also impacted by an arbitrator's perceptions on the issues raised. Framing is an essential element in identifying and distilling issues of corruption. Abdel Wahab noted that whether an arbitrator is proactive and reactive regarding the corruption allegation depends on the different approaches taken by the parties and on the arbitrator's background.

As to proof, arbitrators must evaluate who bears the burden of proving the allegation of corruption. Abdel Wahab noted that, in practice, the weighing of evidence is very "interesting" when a state is involved. This is because there may be local court rulings related to corruption, and arbitrators must decide what weight (if any) to accord to such decisions. He questioned whether these decisions were something arbitrators should take as concrete evidence or whether they are challengeable by the parties to the dispute. From an arbitrator's perspective, Abdel Wahad emphasized the increasing use of expert evidence in allegations of corruption, particularly relating to the interpretation of local law and whether certain activities meet the threshold of corruption.

Regarding impact, Abdel Wahab explained this element refers to the consequences and ramifications of an arbitral tribunal finding there has been corruption. He identified two parts to the impact element: causation and magnitude. By causation, he questioned whether it is necessary for there to be causation between the activity and harm suffered and the relief sought by a party. As to magnitude, he stated that assessing the magnitude or seriousness of an allegation of corruption can be demonstrative of the perceptions and backgrounds of arbitrators.

Abdel Wahab and Secomb both agreed that the increased visibility of corruption,

rather than an increased number of instances of corruption, is what may be causing the increased frequency of corruption claims in energy arbitration. Secomb highlighted that the legal community is looking at allegations of corruption "with a magnifying glass" because of anti-corruption legislation, internal investigations, and repeated reporting of allegations of corruption in the media. Both panelists noted that oftentimes a party will make an allegation of corruption or illegality in an attempt to undermine the credibility of the opposing party before the arbitral tribunal.

IV. TOPIC 3: STATES AND STATE-OWNED ENTITIES

In the third topic of the panel, Grigera Naón addressed whether the presence of a state or state-owned entity as a party to a dispute can potentially change an arbitrator's approach to management of the proceeding. In particular, he pondered the different considerations an arbitrator may consider when dealing with these types of parties. By way of example, Grigera Naón considered contracts for the construction of an refinery and a powerplant. He highlighted the different types of disputes that arise in energy arbitration. Given the complex and distinct nature of these disputes, each case and subject matter requires a different level of analysis and expertise on the part of the arbitrator.

Grigera Naón urged parties to be careful in how they draft their contracts. His warning is based on trends he has seen with respect to interpreting and construing the provisions of a contract, including the force majeure clause. Grigera Naón considered a scenario in which a contract for the construction of a refinery was drafted in accordance with common law guidelines in a case where the counsel for both sides were common law lawyers, but the contract was drafted under Venezuelan law and needed to be interpreted under Venezuelan law. In his view, these types of contracts should be interpreted in light of "custom and usage", both of which are relevant in energy disputes, particularly when a state is a party. These are some of the elements arbitrators may take into account when deciding cases. Grigera Naón stressed that these are the types of practical issues he has experienced in his energy arbitration practice.

Other issues Grigera Naón has dealt with in energy disputes involving a state or

state-owned entity include issues of applicable law, public international law (i.e., treaty interpretation), evidentiary and procedural matters, as well as concerns related to privilege. He also discussed interpreting issues of domestic law, which require an arbitrator to understand both the industry and legal issues raised in the dispute under national law. In this respect, he inquired about the kind of expertise and experience that should be required from arbitrators who are going to be sitting in these complex cases. These considerations are relevant in the context of disputes involving states or state-owned entities, specifically within the framework of bilateral investment treaties ("BITs"), which oftentimes refer to the laws of the country in which the investment is made. Before concluding the dialogue on the involvement of states and state-owned entities, Abdel Wahab commented on the broad range of disputes in the energy industry. From an arbitrator's perspective, he cautioned against having a bilingual contract, calling it a "deadly combination." Contracts should have one prevailing language. Additionally, he commented on the pressure some arbitrators feel when they are nationals of the state now involved in a dispute before them. This added dimension finds its way into a tribunal's deliberations and discussions.

V. TOPIC 4: EXPERT EVIDENCE IN ENERGY ARBITRATIONS

Lastly, the panel discussed another notable feature of energy arbitration: the dominance of expert opinions across a wide range of disciplines. Secomb took the lead in providing insight into the way arbitrators see experts. From an arbitrator's perspective, Secomb noted that experts do not always help arbitrators in their role as decision-makers, particularly in energy arbitrations. To support his point, Secomb divided experts in this field into the following three types: (1) data bundlers and "repackagers"; (2) quasi-lawyers; and (3) real experts.

As to the first type, experts in energy cases take very complicated data sets and re-package them in a way that lay lawyers sitting as arbitrators can digest and ultimately decide on. In some instances, delay experts will take data sets and package them in a way that allows for arbitrators to decide on two versions of events. Secomb considered whether this ability is really an indication of expertise or whether it is simply a tremendous skill these people possess.

As to quasi-lawyers, Secomb proposed that most of their expertise comes from being involved in disputes of a similar nature (for example, in the oil and gas fields), but not from being involved directly in the subject matter of the dispute. He considered gas pricing cases as the primary example. In that regard, he noted most of the experts in the field are not necessarily people who have worked for oil and gas companies. As such, they are not able to inform a tribunal about the way an executive or executive team negotiates gas prices. That being said, these quasi-lawyers play two roles: (a) data bundling and (b) giving their view on how gas price reviews should be resolved. It is important for arbitrators to remember that this kind of expert is advocating for a certain price. They can still be helpful to arbitrators, but arbitrators must decide the case based on the partisan role some of the experts are playing.

The third type of experts recognized by Secomb were "real experts." By this, Secomb explained he was referring to people who have spent their whole life studying a specific subject matter. In his view, this type of expert is the most helpful to a tribunal. Secomb touched upon a case before him in which there was an expert on coal blending. The case turned on the issue of how coal would react when it was blended on a molecular level. One of the parties had an expert who had spent his whole life "obsessed" with coal. As an arbitrator, Secomb gave this expert's testimony and views significant weight because the expert had experience with the subject matter at issue.

From an arbitrator's perspective, Secomb recognized experts are valuable but emphasized the importance of considering the expert's role and what they are purporting to bring to the table. In line with Secomb's remarks, Scherer addressed how experts can be most valuable to arbitrators. She expressed her preference for "expert conferencing" and discussed the importance of an expert testifying and being subject to a cross-examination. Scherer added that she has heard arbitrators suggest there should be a tribunal-appointed expert tasked with helping arbitrators digest the expert evidence presented by both sides. In her view, this scenario shows arbitrators are failing to understand the expert evidence presented to them and need someone to walk them through it.

Every panelist, except for Grigera Naón, indicated they prefer to have expert conferencing. Grigera Naón further expressed that while there may be different types of experts, not many of them are reliable, irrespective of their impressive credentials. In support of this view, Grigera Naón referenced a construction case he presided over in Texas, in which one of the parties had a distinguished expert from a leading construction jurisdiction in Europe. The expert gave an emphatic presentation, with one of the vital parts centering around a specific text. During the proceedings, the opposing party showed how the text emphasized so heavily by the expert had been taken verbatim from a fax in evidence, which came from the general counsel of the party who had instructed the expert. Clearly, the expert was not independent. Grigera Naón cautioned against being impressed by experts. Instead, he noted an arbitrator can really see a person's expertise by observing how the expert conducts himself in cross-examinations.

VI. CONCLUSION

Before her closing remarks, Chedid asked each panelist to leave the audience with a piece of advice from an arbitrator's perspective. Grigera Naón emphasized the importance of well-drafted briefs. Secomb cautioned parties against wasting an arbitrator's time. Scherer touched upon an arbitrator's ability to be proactive in case management. Lastly, Abdel Wahab urged arbitrators to consider every case on its facts and pleadings. He noted the danger in arbitrators being "too webbed" in their past experiences with energy arbitrations and thinking every case is "more or less" the same. In addition, Abdel Wahad stressed the importance of picking experts carefully.

In her closing remarks, Chedid noted the field of energy arbitration is destined to grow. Arbitrators will hear more and more of these types of disputes as the world transitions into new sources of energy.

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A REPORT ON THE "IN-HOUSE PERSPECTIVES: THE ENERGY INDUSTRY IN TRANSITION" PANEL PRESENTATION

by Patrick Aana

Delivered at the 9th ITA-IEL-ICC Joint Conference on International Energy Arbitration on January 21, 2021.

This roundtable conversation gave participants a view into the perspectives of in-house counsel from various energy companies in the wake of the COVID-19 pandemic, the recent oil price decline, and the immediate and critical challenges presenting the energy industry today during a period of transition. The speakers will offer their thoughts on how energy companies have managed the bumpy waters of 2020 and are positioning themselves for the future and what impacts they see or foresee in relation to ongoing disputes, business relationships and dispute resolution choices.

I. INTRODUCTION

From January 20 to January 22, 2021, the 9th Annual ITA-IEL-ICC Joint Conference on International Energy Arbitration was held virtually. On the second day of the conference, Marcela Berdion-Straub (Lead Counsel—Litigation, Total American Services) moderated a panel on In-House Perspectives: The Energy Industry in Transition. The panel featured three in-house attorneys: Chris Bellotti (Assistant General Counsel, Halliburton), James Cowan (Associate General Counsel, Litigation—Americas, Shell Oil Company), and Maxime Rabilloud (General Counsel, Total E&P).

These panelists, each working in disputes at their respective company for years, provided unique perspectives into the challenges and changes in the energy industry with the onset of the pandemic in 2020. With a depth of experience in disputes work and holding positions at major players and service providers in the industry (at a time when an initial drop in prices posed a near-existential threat to some actors), they provided several insights into the worlds of arbitration and energy during this critical time.

During the panel, Ms. Berdion-Straub asked the panelists questions, walking through the early days of the pandemic and into a look at the future. The questions and responses placed the effects of the pandemic into broader trends in dispute resolution and energy, hitting points on virtualization, diversity, and inclusion, and the energy transition.

II. CHRIS BELLOTTI

With respect to the early stages of the pandemic, Mr. Bellotti remarked the crowdsourcing of ideas with other teams in the company, that would not ordinarily be consulted in the course of business. And while it may not be desirable to require such collaboration in the long term, as he observed, it was certainly advantageous when dealing with the developing and breaking situation of the pandemic. The switch to virtual communication enabled this sort of collaboration across teams and across borders, but—as experienced by employers and employees in many industries around the world—it also brought with it a host of challenges.

Looking to the future, Mr. Bellotti acknowledged that some changes may be here to stay—short meetings, for example, likely won't require a transatlantic flight and will instead be conducted virtually. But Mr. Bellotti, on the same page as Mr. Rabilloud below, explained that virtual communication is not efficient for certain functions, like onboarding, where building relationships and exposure to company culture is especially important.

Commenting on the role of outside counsel during a breaking situation like the COVID-19 pandemic, Mr. Bellotti emphasized the importance of two things: first, having a well-developed plan, even if it isn't strictly adhered to, and second, having the ability to disagree. In these situations, advice is often being sought and received in real-time, and regulatory guidance—as many witnessed over the course of 2020—comes disparately, making candid dialogue and a trusted relationship with outside counsel even more valuable.

Mr. Bellotti envisions some permanent changes to dispute resolution practice, such as blended virtual and in-person arbitral proceedings, which he believes are not only here to stay, but will also likely bleed into court as well. And with it many

opportunities come for parties and counsel to save on costs, from travel expenses to the preparation of printed materials. Along these same lines, he also foresees a drop in telephonic hearings, in favor of virtual ones—where counsel will still have to dress up.

On the issue of diversity and inclusion, Mr. Bellotti stressed the significant role that in-house counsel have. He first mentioned the importance of casting a wide net. This means not just relying on one specific counsel, but on multiple, and really, any counsel from which you can get information. And second, he pointed out that in-house lawyers are in a position to push for greater opportunities for younger lawyers from their outside counsel, who tend to be more diverse and, as he explained, whose greater development would only benefit the company and the law firm. Mr. Rabilloud agreed, encouraging in-house counsel to look at diversity through the lens of value, as a wider net—covering more scope and territory in terms of gender, nationality, and cultural background—will increase the value that you can capture and the number of opportunities you'll have for finding the right panel.

III. JAMES COWAN

Mr. Cowan first discussed how in the early days of the COVID-19 pandemic, there was a shift in how legal advice was considered: it had to be filtered through a "safety lens." Not only was there an emphasis on keeping Shell's own employees safe, but also on considering how the company could contribute to societal efforts at large. And to this end—with the pandemic posing, of course, a global challenge—teams began to think much more internationally. As Mr. Cowan observed, litigation can be a very local operation, even in a global business, but the implementation of global guidance inevitably affected local advice.

On a broader level, the cross-border collaboration was intensified by the shift to working in a virtual environment, which often provided opportunities for lawyers to work on matters outside of their home jurisdiction. Such opportunities, enabled by virtualization, provided exciting development opportunities for members of the legal team. The legal team was able to streamline and get out of the business of "writing every letter," allowing it to focus on higher risk and higher value issues where the

expertise of the team was especially relevant.

On the topic of virtual dispute resolution, Mr. Cowan emphasized that "the medium matters"—and that we're only at the cusp of learning how to maximize the value of the virtual one. Looking toward the future, he envisions blended proceedings, acknowledging that there will of course be a place for in-person hearings, but that they will have changed because of our experience during the pandemic. He mentions several ways in which the collective experience with virtual hearings will affect how we think about their in-person counterparts, including the length of hearing days (shorter, as we've become more conscious of attention spans in the virtual environment) and the effect of time zones (which we've grown more sensitive to, with participants tuning in at various points of their day). He wonders whether this blended model may just be another acceleration of a more long-term trend, where we've already seen that the rules of evidence have been converging and more value is being placed in concise case presentations.

Mr. Cowan highlighted the value of arbitrators spending time together in-person as a key part of the dispute resolution process. It's a way for the arbitrators to build consensus and find common ground. That the current virtual reality does not allow arbitrators these opportunities—like a dinner together—to build trust, he warned, is a real danger. And it's a danger not just to the ability to resolve a given dispute, but likely also an obstacle to greater diversity in arbitrator selection. When arbitrators are not able to easily build relationships with their fellow tribunal members, they will be more reliant on existing relationships, meaning parties are less likely to take a risk on those who are not as well known or connected.

IV. MAXIME RABILLOUD

"We need to be useful," is the motto that Mr. Rabilloud says Total E&P lived by in the early days of the pandemic, observing the emphasis on safety. With Total E&P present in over 50 countries, it was necessary to listen to—and rely on—the people on the ground. The pandemic accelerated this kind of "integration," whereby employees in headquarters, faced with new constraints on travel, had to rely more on the employees in each country, and they had to get comfortable with such reliance. This

reliance was necessary not just to continue performing the operations of the company, but for the company to better understand how to support its employees around the world—which was, in turn, required for the operations to continue. And Mr. Rabilloud observed exactly that: the industry managed to continue producing throughout, while maintaining a very high standard for safety—an impressive feat for 2020.

Total E&P, as explained by Mr. Rabilloud, was effective in the transition to remote work, but he commented on short-term and long-term drawbacks. First, the legal team at the Paris headquarters of Total E&P is remarkably diverse, with 16 nationalities represented. The pandemic has made the movement of expats more difficult, posing a challenge to hiring for this sort of composition. And second, Mr. Rabilloud questions the long-term sustainability of the remote model: while employees who have had the benefit of working together in-person may effectively transition to working together remotely, it will likely be difficult to maintain that course over the years, especially with the onboarding of new employees. Mr. Cowan and Mr. Bellotti echoed those concerns, acknowledging that the transition has been effective on existing relationships, but questioning how much longer it can last without "refreshing" those in-person relationships.

With specific regard to the virtual transition in dispute resolution, Mr. Rabilloud commented that, while it has brought efficiency in terms of cost, the experience is materially different than with in-person proceedings. And on this point, he emphasizes reliance on outside counsel—it is expected that outside counsel will think deeply about how to adapt to virtual proceedings and leverage them strategically, as parties that will be better positioned to succeed.

V. CONCLUSION

The panel concluded with a discussion about the energy transition—a topic that has characterized the energy industry for the years leading up to the pandemic but was certainly underscored by the effects of the COVID-19 pandemic on the economy and on human life. As Mr. Rabilloud commented, "we are in a world that is fragile."

The pandemic will certainly be an accelerator on the energy transition itself and

societal scrutiny to that end. The panelists are generally on the same page: that the major players now will likely remain major players in the future, but as alluded to by Mr. Cowan, that the future will not necessarily look like the past. It is perhaps these major players—which, as discussed by Mr. Bellotti, have a proven ability to deliver on large, complex projects and invest in new spaces—that are best positioned to move the energy transition along, producing hydrocarbon-based energy while also bringing cleaner energy to the world.

PATRICK AANA is an international arbitration associate in the Houston office of Norton Rose Fulbright US LLP, where he represents parties in international and domestic arbitration and handles international litigation in US courts. Patrick holds a juris doctorate from the University of Texas School of Law.

A REPORT ON PROFESSOR ALVAREZ'S OPENING REMARKS "ISDS REFORM: THE LONG VIEW"

by Fabian Zetina

Delivered at the 18th ITA-ASIL Conference on March 23, 2021.

What are the long-term goals of those seeking to change how investment disputes are resolved? Should today's proposed reforms be best understood as seeking to advance lawyerly goals like 'rule of law' or 'sovereign equality'? Or are they about securing economic fairness or justice in the sense of political economy? Prof. José E. Alvarez will put the reforms being considered in places like UNCITRAL in historical context to consider where we might be going and why.

This piece is a Synopsis of what we can expect from the current reform efforts: is there a risk that if ISDS reformers succeed, shortfalls in capital flows (such as universal access to education, clean water, or internet) will not be filled or worse still, only get worse?

I. INTRODUCTION: THE TWO MONSTERS IN THE ISDS REFORM

This year, Prof. José E. Alvarez joined the 18th ITA-ASIL conference to deliver the initial remarks, with a thought-provoking presentation about the outcomes the international arbitration community can expect from the efforts leading the reform of the investor-state dispute resolution system ("ISDS"). To introduce the topic, Prof. Alvarez mentioned that the foreign investment regime has been under the shadow of—what he calls—"two hydra-headed monsters." The first and biggest monster is the set of existing international investment agreements ("IIAs"), which some have criticized as neocolonial exercises that are necessary to build capital. The second monster is what currently is being considered and discussed as part of the ISDS reform in settings such as ICSID, UNCTAD, and UNCITRAL. Such discussions focus on making ISDS more subject to the rule of law.

While many of the stakeholders in the foreign investment regime are more worried about the "big monster" (*i.e.*, the substantive provisions of IIAs), these are not the current discussions at the level of the ISDS reform.

II. THE LARGER MONSTER: NO NEED FOR IIAS OR ISDS

According to Prof. Alvarez, many political economists and scholars are re-thinking the fundamental premises of the investment regime. He discussed four of these original premises. First, foreign direct investment ("FDI") does not necessarily need special or supranational protection because the "obsolescing bargain model" is a myth. Second, IIAs do not attract foreign direct investment or attract the type of investment that contribute to economic development. Third, they sometimes violate "private law" concepts, such as national laws on corporations or intellectual property. Fourth, there is no proof that foreign investment really "de-politicizes" investment disputes. Whether we agree or not with these critics, the truth is that reformers are working under a broader legitimacy crisis, as the supposed benefits of these treaties have not materialized as clearly as the thousands of investors' claims that have resulted in substantial awards against many developing countries.

III. THE SMALLER MONSTER: THE RULE OF LAW CHALLENGES TO ISDS

Prof. Alvarez next turned to what he calls the "smaller monster" or the rule of law challenges to ISDS. To a great extent, this concern reflects the current efforts and agenda at UNCTAD, UNCITRAL, and ICSID regarding ISDS reform, including issues of the inconsistency or fragmentation of the resulting law, the problem of multiple proceedings, insufficient transparency, diversity of arbitrations, and costs, among others.

The UNCITRAL Working Group III's agenda focuses on fixing ISDS's perceived rule of law flaws. The group members agree that ISDS poses important legitimacy challenges but differ on the steps that need to be taken to achieve a real solution (*i.e.*, just reforming ISDS or taking more radical steps). According to Prof. Alvarez, they are split into two big groups: those for a multilateral investment court and those who retreat from binding international dispute settlement altogether. Another proposal that has been discussed is the creation of an assistance facility–inspired by the World Trade Organization's assistance facility model–to help smaller and developing countries participate more equitably in ISDS.

IV. ADDITIONAL OUTCOMES OF THE ISDS REFORM EFFORTS

In addition to the assistance facility model, Prof. Alvarez outlines five other different outcomes or alternatives that we can expect from the ISDS reform efforts.

First, the end of a supranational review model. This implies a return to a world where FDI host states rule on foreign investment claims applying domestic law. This model already exists between some developed states, such as the European Union-China Comprehensive Agreement on Investment, or in the Brazilian cooperation and facilitation agreements that anticipate non-binding conciliation with ultimate state-to-state dispute settlement.

Second, ISDS as a last resort. This effort retreats from ISDS by imposing restraints and restrictions on claims, which in some cases requires a long period for the exhaustion of remedies. An example of this is the United States-Mexico-Canada Agreement ("USMCA") and the India Model Bilateral Investment Treaty. According to Prof. Alvarez, this idea might not appeal to states that have already embraced ISDS and might wonder the point of entering into agreements with such restricted forms of ISDS.

Third, ISDS severely reformed as we know it. This effort suggests the creation of an appellate mechanism with the power to review awards. It also contemplates the idea of accepting respondent state counterclaims, limitation on certain damages, and imposing time limits on claims, among others. An example of this effort is the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") or the 2012 US Model Bilateral Investment Treaty, on which the CPTPP was modeled. Prof. Alvarez believes that it might still take some time for states to adopt what he calls a reformed ISDS, as in recent years several investment treaties have adopted the traditional ISDS as we know it.

Fourth, the creation of an international investment court. The creation of a single multilateral investment court as an alternative of ISDS, consisting of a standing panel of full-time judges serving 6-to-9-year terms and complemented with an appellate panel with a similar composition of judges. According to Prof. Alvarez, its proponents believe that only a court of such nature would solve all the rule of law problems

related to ISDS that would help to overcome the major issues, such as inconsistency and fragmentation, the problem of multiple proceedings, lack of arbitral independence, and insufficient transparency, among others. An example of this effort is the Canada-European Union Comprehensive and Economic Trade Agreement ("CETA").

Prof. Alvarez predicts that a single multilateral investment court would not displace ISDS over the next ten years. This is mainly because different questions arise, such as whether investors and states would be satisfied with a system that prevents them from selecting arbitrators or if the court would actually diversify the adjudicators, among others unresolved issues. Also, Prof. Alvarez is particularly skeptical that a single multilateral investment court would produce the harmonious investment law that is expected, as this court would not interpret a single set of investment treaties or multilateral agreement but rather different texts with different variations of standards (*e.g.*, different formulations of fair and equitable treatment standards).

Fifth, a plurilateral investment agreement. This option has as its favorite model the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration ("Mauritius Convention on Transparency") and includes, in general, all the previous efforts. This investment agreement would include different choices for states. For example, states would be able to keep as many investor rules as possible or varieties of standards, retain traditional ISDS for certain treaties or resort to non-binding conciliation or mediation in some instances.

V. CONCLUSION

Considering the outlined options, Prof. Alvarez's view is that it is unlikely that in the following ten years any of the previous options would fully displace ISDS as we know it today. In fact, he anticipates that it will look as it does today, as a "confusing spaghetti bowl" of different IIAs, with diverse substantive standards and different adjudicating mechanisms. It seems like the "spaghetti bowl" will become even more complex, with more substantive and procedural options and mechanisms—not less.

As an example of the above, between 2018 and 2020, Brazil signed seven treaties

with no ISDS, the E.U. signed two treaties with an investment court, other states signed treaties with some form of ISDS, and others ratified treaties with traditional ISDS. The interpretation of substantive standards and treaties by all these new adjudicators is not likely to produce the predictable, consistent, and stable interpretation of rules that the reformers seek. According to Prof. Alvarez, the reformers appear to let a good crisis go to waste and not necessarily to address or confront the most critical challenges ISDS faces.

FABIAN ZETINA is an Associate with GST LLP. He focuses his practice on investor-state and international commercial arbitration, serving both as assistant to the arbitral tribunal and counsel. Fabian holds an LLB from Universidad Francisco Marroquin, *cum laude*, and an LL.M. from Columbia Law School where he was a Cutler Fellow, Graduate Editor of the American Review of International Arbitration, and Cofounder of the International Arbitration Newsletter.

A REPORT ON THE "TALKING TO INSTITUTIONS LEADERS: WHAT DOES REFORM LOOK LIKE?" PANEL PRESENTATION

by Fransua Estrada

Delivered at the 18th ITA-ASIL Conference on March 23, 2021.

International commercial and investment arbitration is amid a substantial reform process. Several initiatives have been taken in various fora (such as the ICC, ICSID, and UNCITRAL) with the aim of improving the procedures at stake. This panel, while identifying some of the core features of these reform proposals, will discuss how arbitration may evolve as a result. The impact of the Covid-19 pandemic on arbitration will also be assessed. The reforms will be discussed from the perspective of their impact on approaches to international dispute settlement more broadly.

This year's ITA-ASIL conference featured a timely and important conversation with Secretary of UNCITRAL, Ms. Anna Joubin-Bret, Secretary-General of ICSID, Ms. Meg Kinnear, and Secretary-General of the ICC, Mr. Alexander G. Fessas, about the reforms within their respective institutions. The crux of this panel was to discuss what major reform initiatives would be implemented and, in general, why those changes are taking place. Throughout the discussion, the consensus, as Mr. Fessas put it, was that "time requires reform." In essence, this panel demonstrated the effectiveness of intra-institutional cooperation and collaboration and the importance of moving forward with the reforms.

Ms. Joubin-Bret kicked off the discussion by referring to the metaphor of remodeling a home to describe UNCITRAL's reform efforts and the considerations put forth by Working Group III, with a key point being the installation of an appellate mechanism to the ISDS system, establishing a "second-level" of substantive review of arbitral tribunals' decisions. Though it is uncertain whether this mechanism will involve a second-instance court or a standing appellate court, Ms. Joubin-Bret noted that UNCITRAL has been devising the essential features of this long-discussed topic collaborating with ICSID and more than 450 individuals involved in its Working Group III.

ICSID, as Ms. Kinnear expressed, is "a procedural mechanism through which dispute settlement can get accomplished," so it has focused its reform efforts on its protocols, with less emphasis on substantive reforms. Indeed, though the specific language may differ on paper, the proposals made to the ICSID Rules should be similar in practice to the recently amended ICC Rules. Both institutions strive to provide more transparency by requiring the disclosure of third-party funding to avoid conflicts of interest. Further, both the ICC and ICSID are materializing an expedited arbitration protocol, whereby, as Mr. Fessas noted, small and medium-sized businesses could "avail themselves of the benefits of international arbitration." The goal is to provide a system through which parties can resolve their disputes expeditiously.

Overall, the panel discussion covered the important points of what the future of international arbitration would look like within these institutions. The reforms discussed attempt to facilitate the dispute resolution mechanisms in the near future and should positively impact to the users of UNCITRAL, ICSID, and the ICC arbitration.

FRANSUA ESTRADA is a recent graduate from the American University Washington College of Law specializing in international law.

YOUNG ITA CHAIR'S REPORT
FALL/WINTER 2020 AND SPRING 2021

by Robert Reyes Landicho

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

I. ANNOUNCING OUR YOUNG ITA CHAIR AND YOUNG ITA VICE-CHAIR FOR THE 2021-2023 TERM

On June 17, 2021, the current two-year term for the current Young ITA leaders ended. Please join me in congratulating Catherine Bratic in her appointment as Young ITA Chair, and Karima Sauma in her appointment as Young ITA Vice Chair. Both will serve two-year terms, starting in June 2021.

Incoming Young ITA Chair Catherine Bratic is a Senior Associate at Hogan Lovells LLP in Houston, Texas, where she represents clients in the energy, construction, and media sectors, as well as states and state-owned entities. Catherine is dual-qualified in Texas and France, and earned law degrees from Columbia University and the Institut d'Etudes Politiques de Paris. Prior to joining Hogan Lovells's Houston office, Catherine clerked for the Hon. Lee H. Rosenthal, Chief Judge for the Southern District of Texas, served as a legal fellow at UNESCO in Paris, and previously practiced in Hogan Lovells's Paris office.

Incoming Young ITA Vice Chair Karima Sauma is the Executive Director of the International Center for Conciliation and Arbitration of the American Chamber of Commerce in Costa Rica, an adjunct professor at ULACIT University and LEAD University in San José, and of Counsel at DJ Arbitraje. Previously, she worked as an Advisor at the Costa Rican Ministry of Foreign Trade, and prior to that, she worked at

Freshfields Bruckhaus Deringer in Washington, DC. Karima received her J.D. with honors from the University of Costa Rica, and an LL.M from Columbia Law School, where she was a Harlan Fiske Stone Scholar. She is admitted to practice in Costa Rica and the State of New York.

II. YOUNG LAWYERS ROUNDTABLES

Young Lawyers Roundtables are presented annually during the ITA Workshop, the ITA-IEL-ICC Joint Conference on International Energy Arbitration, and the ITA-ALARB Americas Workshop. Below is a summary of the most recent Young Lawyers Roundtables at the ITA-ALARB Americas Workshop and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. Both events were held virtually.

A. *ITA-ALARB Americas Workshop Young Lawyers Roundtable*

The Young Lawyers Roundtable for the ITA-ALARB Americas Workshop was held on December 2, 2020, as a virtual conference.

Karima Sauma (Young ITA Mentorship Chair, and incoming Vice-Chair) and Juan Pablo Argentato (Counsel, ICC International Court of Arbitration, Paris) were the 2020 ITA-ALARB Workshop Young Lawyers Roundtable co-chairs.

1. Panel 1: "Fernando Canturias Salaverry's Paradigmatic Case"

This panel dealt with Mr. Salaverry's incarceration in Peru on charges relating to his service as an arbitrator. Alfredo Bullard (Bullard Falla Ezcurra +, Lima) and Mario Reggiardo (Payet, Rey, Cauvi, Pérez Abogados, Lima) shared their experiences with this controversy and the arbitral community's reaction. Estefania Ponce (Posse Herrera Ruiz, Bogota) moderated the discusión.

2. Panel 2: "Arbitrator Immunity and Liability Survey"

This panel offered a survey of immunity issues as they have arisen in different jurisdictions in Latin America and around the world and commented on the main outcomes resulting therefrom. María Angélica Burgos (Baker McKenzie, Colombia), Leonardo de Castro Coelho (Mattos Filho, Brazil), Michael Fernández (Winston & Strawn, New York), and María del Mar Herrera (EY, San José) served as panelists, and Karima Sauma served as moderator.

B. *ITA-IEL-ICC Joint Conference on International Energy Arbitration, January 22, 2021.*

The Young Lawyers Roundtable was held in conjunction with the 2021 ITA-IEL-ICC Joint Conference on International Energy Arbitration. The co-chairs for the Young Lawyers Roundtable were Crina Baltag (Young ITA Vice Chair, Senior Lecturer, Stockholm University, Stockholm), Katharine Menéndez de la Cuesta (ICC YAF Representative, Holland & Knight, Miami), and Quentin L. Smith (IEL YEP Representative, Vinson & Elkins LLP, Houston).

Crina Baltag (Young ITA Vice Chair, Stockholm University, Stockholm) and Lukas Stifter, (Chair, ECT Modernisation Group, Energy Charter Treaty, Federal Ministry for Digitization and Business Location, Vienna) provided opening remarks. Then, panelists Simon Batifort (Curtis, Mallet-Prevost, Colt & Mosle LLP, New York), Isabel San Martin (King & Spalding, Paris), Dalibor Valincic, (Wolf Theiss, Zagreb), and Agnieszka Zarowna (White & Case LLP, London) engaged in the debate, with James Hope (Vinge, Sweden) moderating and providing concluding remarks.

1. Roundtable Panel 1: "Recent Regional Developments in Energy Arbitration, What's the Latest?"

This panel focused on recent regional developments in the energy sector and their impact on international arbitrations. The panel discussed the shifting of state policy in South Asia, and how it has affected oil and gas related disputes; the late progress in the tensions between indigenous rights and energy investments in South America; and recent reforms in Africa that may give rise to disputes in the petroleum industry.

Javier Jaramillo-Troya (Pérez Bustamante & Ponce, Quito), E. Jin Lee (Three Crowns, Washington D.C.), and Charis Tan (Peter & Kim, Singapore) served as panelists, and Sarah Vasani (Addleshaw Goddard LLP, London) moderated the panel.

2. Roundtable Panel 2: "Debate on the Energy Charter Treaty Modernization"

The Energy Charter Treaty (ECT) came into force on 16 April 1998 and only in the past ten years has made the headlines, with over 130 arbitrations concerning its investment promotion and protection provisions. In November 2017, the discussions on the modernization of the ECT were launched and the list of topics to be considered

in the modernization process was put together and approved on 27 November 2018. This list includes, among others: the definition of the notions of 'investor' and 'investment', the fair and equitable treatment, most favoured nation treatment and expropriation standards, 'denial of benefits' clause, third-party funding, transparency, etc. To add to the ECT context, the 2018 Achmea decision of the Court of Justice of the European Union has triggered a forceful discussion as to the intra-EU applicability of the ECT.

This panel debated two relevant propositions:

1. This house believes that the definition of the notion of 'investor' in Article 1(7) ECT should include the requirement of 'substantive activity' in the home Contracting Party, to prevent treaty shopping.

2. This house believes that ECT is a multilateral treaty and any decisions as to the applicability of intra-EU BITs should not affect it.

III. #YOUNGITA EVENTS

#YoungITATalks is a series of local events presented around the world. The format of each of the talks vary, ranging from workshops, interviews, panel discussions, debates, or other presentation formats that cover a wide range of subjects relating to arbitration. The #YoungITATalks series is designed to educate, to promote conversation, and to share knowledge and experiences among young practitioners throughout the world. Young ITA has also hosted #YoungITA Mentorship Speaker Series events, which focused on issues of interest to the Young ITA mentorship program groups (but were open to all ITA and Young ITA members). All events were held virtually.

A. *November 26, 2020—#YoungITATalks América Central y Sudamérica—"Arbitraje de Inversiones en Chile, Colombia, México y Perú: ¿Dónde estamos y hacia dónde vamos?"*

Speakers included: Moderators Andrés Talavera (Young ITA Regional Chair, South America—Spanish-Speaking Jurisdictions), Sylvia Sámano Beristain (Young ITA Regional Chair, México and Central América); Panelists Mairée Uran Bidegain (Coordinadora—Programa de Defensa en Arbitrajes de Inversión Extranjera—Chile), María Paula Arenas Quijano (Directora—Inversión Extranjera y Servicios—Colombia),

Cindy Rayo Zapata (Directora General de Comercio Internacional de Servicios e Inversión–México), and Ricardo Ampuero Llerena (Presidente de la Comisión Especial que representa al Estado en Controversias Internacionales de Inversión–Perú).

B. *December 9, 2020 - #YoungITATalks and CIArb YMG Joint Event (Chicago) – "The Arbitral Process from Start to Finish–Tips for a Successful Arbitration"*

Speakers included: Soledad O'Donnell (Young ITA Regional Chair, North America, Abbott Technologies, Chicago); Sarah Reynolds (Goldman Ismail Tomaselli Brennan & Baum LLP, Chicago); Ricardo Ugarte (Winston & Strawn, Chicago); Prof. Margaret Moses (Professor, Loyola University School of Law, Chicago); Javier Rubinstein (King & Spalding, Chicago); Lawrence Schaner (Arbitrator, Schaner Dispute Resolution LLC, Chicago); and Prof. Victoria Shannon Sahani, Associate Dean and Professor of Law, Sandra Day O'Connor College Of Law at Arizona State University, Phoenix).

C. *December 11, 2020 - #YoungITATalks UK and Continental Europe – "After Brexit – Arbitration in the Civil and Common Law Worlds at a Crossroads"*

Speakers included an introduction by Alexander G. Leventhal (Young ITA Regional Chair for Continental Europe, Quinn Emanuel) and Samuel Pape (Young ITA Regional Chair for the UK, Latham & Watkins, London); a keynote speech by Dr. Matthieu de Boisseson (Littleton Chambers, London, and Paris); and discussion with panelists Emilie Gonin (Doughty Street Chambers, United Kingdom) and Matthieu Grégoire (4 New Square, London).

D. *Other Notable Events*

Other notable events include:

1. May 20, 2021 - #YoungITATalks UK, Asia, and Oceania – "The Energy Transition and Arbitration – what's on the horizon?"

2. June 1, 2021 - #YoungITA Mentorship Program Speaker Series – "The (Sometimes Forgotten) Importance of the Arts and Psychology in Advocacy in International Arbitration"

3. June 10, 2021 - #YoungITATalks Asia – "Asia Pacific Roundtable: Regional Developments in International Arbitration"

4. June 17, 2021 – Young Lawyers Roundtable at the 33rd Annual ITA Workshop

IV. YOUNG ITA'S 2021 WINNER OF THE YOUNG ITA WRITING COMPETITION AWARD

Young ITA is pleased to announce the winner of the 2021 Young ITA Writing Award, Martina Ercolanese (Trainee Lawyer, Cleary Gottlieb Steen & Hamilton LLP, Rome). Martina's paper, "Issues of jurisdiction and admissibility in the "Crimean" arbitral proceedings," is being published in the ITA journal, ITA in Review.

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

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

YOUNG ITA LEADERSHIP ANNOUNCEMENT

Young ITA is delighted to announce twenty-six new appointments to its leadership team. Despite the global, Covid-19 pandemic, Young ITA has had a busy two year of events and seen an increase in membership to over 2000 individuals across over 100 countries, Young ITA has created several new roles to ensure that its members are continuously provided with the most useful and interesting events, articles, and workshops, across the widest range of regions.

We are excited to announce that our previous leadership positions have been expanded to include our first ever regional chairs for India, Oceania, Eastern Europe and Western Europe, alongside vice chairs to assist our Communications and Thought Leadership Chairs, as well as a number of our regional chairs. We would like to say a big thank you to our outgoing leadership team for their fantastic services for the past two years and congratulations to our new chairs and vice chairs, we look forward to another successful two years working with the ITA and continuing to expand on educational and leadership opportunities for young arbitrators.

The Young ITA Leadership Team

Catherine Bratic
Young ITA Chair
Hogan Lovells US LLP
Houston, TX

Young ITA Chair—**Catherine Bratic** is a Senior Associate at Hogan Lovells LLP in Houston, Texas, where she represents clients in the energy, construction, and media sectors, as well as states and state-owned entities. She regularly advises clients in complex, high-value disputes

before international arbitral tribunals and national courts. Catherine is dual-qualified in Texas and France and earned law degrees from Columbia University and the Institut d'Etudes Politiques de Paris. Prior to joining Hogan Lovells's Houston office, Catherine clerked for the Hon Lee H Rosenthal, Chief Judge for the Southern District of Texas, served as a legal fellow at UNESCO in Paris, and practiced in Hogan Lovells's Paris office for three years.

Karima Sauma
Young ITA Vice-Chair
International Center for Conciliation and Arbitration (AmCham Costa Rica)
San Jose, Costa Rica

Young ITA Vice-Chair—**Karima Sauma** is the Executive Director of the International Center for Conciliation and Arbitration of the Costa Rican-American Chamber of Commerce, an adjunct professor at ULACIT University and LEAD University in San José, and of Counsel at DJ Arbitraje.
Previously, she worked as an Advisor with the Dispute Settlement Team of the Costa Rican Ministry of Foreign Trade, where she was part of Costa Rica's defense team in claims filed under various treaties and free trade agreements. She was also a member of the negotiating team for treaties involving investment and dispute settlement provisions. Prior to joining the Ministry of Foreign Trade, she worked with the International Arbitration Group at Freshfields Bruckhaus Deringer in Washington, DC.
Karima received her JD with honors from the University of Costa Rica. She also holds an LLM from Columbia Law School, where she was a Harlan Fiske Stone Scholar. She is admitted to practice law in Costa Rica and the State of New York.

Ciara Ros
Young ITA Communications Chair
Vinson & Elkins LLP
London, UK

Young ITA Communications Chair–**Ciara Ros** reads Jurisprudence as an undergraduate at Oriel College, University of Oxford and is a senior associate in the International Dispute Resolution practice group of Vinson & Elkins RLLP. She spent six months in the Vinson & Elkins LLP Houston office as part of her training contract and worked in the Dubai office of Vinson & Elkins LLP for three years after qualification. Ciara returned to the London office of Vinson & Elkins RLLP in 2018. Her focus is on construction, energy and infrastructure disputes and international commercial arbitration, for both private companies and state clients. Ciara also advised clients on project finance and mergers and acquisitions, within the energy, infrastructure and telecoms sectors, during her tenure as a cross-practice associate in the Dubai office of Vinson & Elkins LLP. She is admitted to practice as a solicitor in England and Wales.

Jorge Arturo Gonzalez
Young ITA Communications Vice-Chair
Aguilar Castillo Love, SRL
San José, Costa Rica

Young ITA Communications Vice-Chair–**Jorge Arturo** is an Associate in Aguilar Castillo Love's Costa Rica office. He focuses on international arbitration and commercial litigation, and has experience in sectors including pharmaceuticals, tourism and hospitality, forestry, real estate, and finance. He earned his law degree from University of Costa Rica, and further completed studies in the Netherlands and the United States.

Tom Innes
Young ITA Mentorship Chair
Steptoe &Johnson LLP
London, UK

Young ITA Mentorship Chair –**Thomas Innes** is an Associate at Steptoe & Johnson in London. He advises and conducts advocacy on a wide range of international and commercial disputes. In particular, he acts as counsel in investment treaty disputes and international commercial arbitrations. Thomas is ranked as an Associate to Watch for International Arbitration in *Chambers UK* and as a Rising Star for Public International Law by *The Legal 500 UK*.

Sylvia Samano
Young ITA Mentorship Co-Chair
Mexican Arbitration Centre (CAM)
Mexico City, Mexico

Young ITA Mentorship Co-Chair–**Sylvia Samano** is the Secretary General at the Arbitration Center of Mexico. She holds an LLM in Arbitration and Dispute Resolution from Hong Kong University and a law degree specialized in commercial law from National Autonomous University of Mexico (UNAM). She has experience in civil, commercial, mining, natural resources, and energy law. In the academic field, she teaches arbitration at the postgraduate program at UNAM as well as in the bachelor program at Tecnológico de Monterrey. She has acted as counsel, arbitrator, and secretary of tribunal in commercial arbitrations, and has interned at the ICC Hong Kong office.

Enrique Jaramillo
Young ITA Thought Leadership Chair
HIS Markit
Houston, TX

Young ITA Thought Leadership Chair– **Enrique Jaramillo** is an Associate Director in IHS Markit in Houston, Texas, where he advises governments and international oil companies on issues of international and domestic energy and environmental law. Enrique's international practice has allowed him to work in different parts of the world including North America (United States and Canada), Europe and Latin America. He is familiar with the petroleum and environmental laws from a plethora of jurisdictions including almost every oil producing country in the Americas, as well as numerous European and African nations. Enrique is a dual-qualified attorney, licensed to practice law in the State of New York, and in the Republic of Ecuador. He holds a Juris Doctor (JD) degree from the University of Houston Law Center, two master's degrees in Law and Economics (LLM) from the Universität Hamburg (Germany) and the Università di Bologna (Italy), a postgraduate degree in Tax Law from the Universidad de Castilla-La Mancha (Spain), as well as a JD equivalent from the Universidad Católica Santiago de Guayaquil (Ecuador).

Derya Durlu Gürzumar
Young ITA Thought Leadership Vice-Chair
Bilkent, Universiteler Mahallesi
Ankara,Turkey

Young ITA Thought Leadership Vice-Chair– **Derya Durlu Gürzumar** is an Attorney-at-Law registered to the Istanbul Bar Association.
She holds LLB and LLM degrees from Bilkent University Faculty of Law, in Ankara,

Turkey, and a diploma in Advanced Studies in International Arbitration, awarded by the University of Lucerne and University of Neuchâtel. She also holds several international arbitration certificates, awarded by various academic and professional institutions, including the Chartered Institute of Arbitrators (CIArb), University of Düsseldorf, University of Cologne, and Humboldt University of Berlin. Mrs. Durlu Gürzumar is currently a PhD candidate at the University of Neuchâtel, in Switzerland.

Being an ardent "Vis-mootie" since 2007, Mrs. Durlu Gürzumar has been one of the few law students to receive two successive Honorable Mentions in the Martin Domke Best Oralist Award, namely in the 16th and 17th Willem C. Vis Moot competitions. She has been coaching her alma mater's moot teams since 2018 and has been arbitrating the written and oral phases of various international and domestic arbitration competitions, such as Vis Moot and Vis East Moot, Jessup, ICC Moot, FDI Moot, and ISTAC Moot, as well as a number of pre-moot competitions, since 2010.

She is the current chair of the International Bar Association's (IBA) Alternative and New Law Business Structures Committee, which works primarily on alternative legal practice models and the future of the legal profession. Mrs. Durlu Gürzumar's practice and research interests focuses on competition law, internet/IT law, AI/LegalTech, dispute resolution/arbitration, and white-collar irregularities.

She has co-authored a book on "Fundamental Concepts of Anglo-American Law," and has been publishing extensively in the foregoing fields.

Anne-Marie Dornenburg
Young ITA Asia Chair
Nishimura & Asahi
Tokyo, Japan

Young ITA Asia Chair—**Anne-Marie Dornenburg** is an Associate at Nishimura & Asahi in Tokyo specializing in international arbitration, public international law and cross-border dispute resolution. She represents clients in commercial and investment arbitrations under major arbitration rules, advising both corporations and governments. Anne-Marie is admitted in Germany (Rechtsanwalt) and England & Wales (Solicitor). Brought up in a trilingual environment and fluent in six languages, Anne-Marie is passionate about working with clients and colleagues from all over the world. Before moving to Japan, Anne-Marie was based in Washington, DC, Paris, Munich and London while working for Freshfields Bruckhaus Deringer LLP. As Young ITA's ambassador in Asia, Anne-Marie looks forward to organizing interesting projects and events that will encourage dialogue between young arbitration practitioners in both Asia and the West.

Philip Tan
Young ITA Asia Vice-Chair
White & Case
Singapore

Young ITA Asia Vice-Chair—**Philip Tan** is an Associate in White & Case's International Arbitration practice. Based in Singapore, Philip acts as counsel in commercial and investment treaty arbitrations, focusing on energy and construction disputes. He has represented clients in complex, cross-border arbitrations under various rules, including ICC, SIAC, UNCITRAL and ICSID. He also speaks and writes regularly on

developments in international arbitration, with an emphasis on the Asia-Pacific region. Philip received his JD from Columbia Law School, and is qualified in New York, District of Columbia, Singapore, and England & Wales.

Daniel Allman
Young ITA Oceania Chair
Norton Rose Fulbright
Sydney, Australia

Young ITA Oceania Chair—**Daniel Allman** is a Senior Associate at Norton Rose Fulbright in Sydney. Daniel specializes in cross-border dispute resolution and represents clients in international commercial and investment arbitration, as well as complex commercial litigation. He is dual-qualified in Australia and New York. Daniel was previously an associate at Covington & Burling in New York and has worked as a consultant to a UN agency on business and human rights in Southeast Asia and as a solicitor at another leading firm in Australia and on secondment in China. Daniel received his LLM from Columbia University and his LLB and BA from the University of Melbourne. He served as managing editor of Columbia FDI Perspectives and writes frequently on arbitration, investment, and trade.

Rodrigo Barradas Muñiz
Young ITA Mexico and Central America Chair
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Ciudad de México, México

Young ITA Mexico and Central America Chair— **Rodrigo Barradas Muñiz** is a Senior Associate in Von Wobeser y Sierra's dispute resolution team in Mexico City. Rodrigo acts as counsel in commercial arbitration cases under all major arbitral rules, and has

particular experience in the energy and public works sectors. He also represents clients in complex, high-value disputes before domestic courts. Rodrigo is dual-qualified in Mexico and New York, and holds a law degree (JD equivalent) from Escuela Libre de Derecho and a master's degree (LLM) from Harvard Law School. Prior to joining Von Wobeser y Sierra, Rodrigo worked for Paul, Weiss, Rifkind, Wharton & Garrison, LLP in New York. He is currently an Adjunct Professor of International Litigation and History of Law at Escuela Libre de Derecho and writes regularly on international commercial arbitration and dispute resolution.

Daniel Brantes
Young ITA Brazil Chair
Centro Brasileiro De Mediaçao E Arbitragem
Rio de Janeiro, Brazil

Young ITA Brazil Chair—**Daniel Brantes** earned his PhD in Constitutional Law at the Pontifical University of Rio de Janeiro in 2011 and was a visiting scholar at UB Law School (2009) researching Legal Realism under the guidance of UB Distinguished Professor John Henry Schlegel. Daniel was a Law Professor in the following Law Schools in Rio de Janeiro: Federal University of Rio de Janeiro (2008-2009), FGV-Rio (2010), and University Cândido Mendes (2012-Present). Daniel was the Dean of IBMEC Law School from 2014 until 2017. Currently, Daniel is a professor at University Cândido Mendes and Ambra University, teaching the course of arbitration for graduate and undergraduate students. He is also Vice President for Academic Affairs at the Brazilian Center of Arbitration and Mediation (CBMA), where he is also an arbitrator. Daniel is also Chief-Editor of the Brazilian Journal of Alternative Dispute

Resolution (RBADR). He is the Dean of Candido Mendes University master's in law and Fellow of the Chartered Institute of Arbitrators.

Guilherme Piccardi
Young ITA Brazil Vice-Chair
Pinheiro Neto
Sao Paulo, Brazil

Young ITA Brazil Vice-Chair—**Guilherme Piccardi** is a Brazilian attorney specialized in international dispute resolution, with focus on arbitration, mediation, commercial litigation, and corporate investigations. He is a Senior Associate at Pinheiro Neto Advogados' litigation practice in the city of São Paulo, Brazil. He worked as a foreign temporary associate at Davis Polk & Wardwell's New York office during the period of August 2019 to December 2020. Guilherme has received his Bachelor of Laws degree from the Law School of the Pontifical Catholic University of São Paulo, and is currently pursuing an LLM. degree at Northwestern Pritzker School of Law. He is a member of the Brazilian Bar Association, São Paulo Section, to which he was admitted in 2012.

Dr. Viktor Cserep
Young ITA Continental Eastern Europe
PROVARIS Varga & Partners
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Young ITA Continental Eastern Europe—**Dr. Viktor Cserep** is an Associate at PROVARIS in Budapest specializing in dispute resolution and a doctoral candidate at the University of Vienna (international arbitration). Viktor has regularly served as assistant to the presiding arbitrator in high-profile international arbitrations and counsel in arbitration, setting aside and complex cross-border commercial

litigation proceedings in multiple industry sectors, including several construction disputes (FIDIC Books). He holds a juris doctor degree (*summa cum laude*) from Eötvös Loránd University (Budapest, Hungary) and teaches private international law and contract law to international postgraduate students in the European and International Business Law LLM programme of the same Faculty. He frequently attends international conferences and moot courts as arbitrator (Vis, FDI) worldwide. Viktor works in English, German and Hungarian.

Karolina Czarnecka
Young ITA Continental Eastern Europe Vice-Chair
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Warsaw, Poland

Young ITA Continental Eastern Europe Vice-Chair—**Karolina Czarnecka** is an International Arbitration Associate at Queritius. She has represented clients in commercial and investment arbitration cases, under various institutional rules. She also has experience in M&A and banking law. Karolina acts as a Mentor in the Mentorship Programme at the Istanbul Arbitration Centre, a Mentee in the Young ICCA Mentoring Programme, and an Ambassador for Arbitrator Intelligence in the CEE region. She is also a member of the Arbitration Youth Forum (AFM below 40) at the Arbitration Court at the Polish Chamber of Commerce in Warsaw. She graduated from Sciences Po, Paris, where she completed a LLM degree in Transnational Arbitration and Dispute Settlement, and Kozminski University, Warsaw, with a master's in law degree. She is currently pursuing her PhD degree at University of Warsaw focusing her thesis on business and human rights arbitration.

Asha Rajan
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Teynier—Pic I Paris
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Young ITA Continental Western Europe Chair—**Asha Rajan** is an Associate at Teynier Pic in Paris, France. She represents clients in areas of international commercial and investment arbitration and international litigation. Asha has experience in the construction, telecommunications, industrial and spatial sectors. In addition to acting as counsel, she has also assisted arbitral tribunals in commercial arbitration proceedings. A dual-qualified lawyer, Asha is admitted to practice in India and France and has law degrees from the University of Pune, India and Institut d'Etudes Politiques de Paris. Asha writes regularly on international commercial arbitration, and arbitration developments in India.

Georgios Fasfalis
Young ITA Continental Western Europe Vice-Chair
Linklaters
Amsterdam, Netherlands

Young ITA Continental Western Europe Vice-Chair—**Georgios Fasfalis** is an associate in Linklaters' arbitration practice. He has previously worked for a renowned arbitration boutique and the legal department of a Dutch multinational. Georgios' arbitration experience includes involvement in commercial and investment treaty arbitrations conducted under, among others, the ICC, ICSID, LCIA, NAI, SIAC and UNCITRAL Rules. He has also been involved in arbitration-related litigation matters, such as setting aside and enforcement proceedings. Georgios' publications

include, inter alia, a chapter in S. Balthasar (ed) International Commercial Arbitration (Hart Publishing) (2021). He is admitted to the Thessaloniki Bar in Greece and holds degrees from the University of Amsterdam and the Aristotle University of Thessaloniki.

Juhi Gupta
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Shardul Amarchand Mangaldas & Co
New Delhi, India

Young ITA India Chair—**Juhi Gupta** is a Senior Associate at Shardul Amarchand Mangaldas & Co. She is based in New Delhi and is qualified in India. Juhi has diverse international commercial arbitration experience under various arbitral rules. Her arbitration experience also includes domestic arbitration and related court proceedings as well as acting as a tribunal secretary. Juhi is a graduate of National Law School of India University, Bangalore and a LLM graduate from Harvard Law School, and previously completed her training contract from Allen & Overy, London. She is also a certified mediator. Juhi regularly writes on different topics related to arbitration in India and dispute resolution. She will serve as Young ITA's first ambassador in India.

Lidia Rezende
Young ITA North America Chair
Chaffetz Lindsey LLP
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Young ITA North America Chair—**Lidia Rezende** is an Associate at Chaffetz Lindsey, LLP in New York, where she represents clients in international and domestic commercial arbitrations under the ICC, SCC, UNCITRAL, LCIA, and AAA rules, and in litigation before US courts. Lidia received an LLM degree from NYU Law in 2015 and

an LLB degree from *Universidade Federal de Minas Gerais* in 2010. She is admitted to practice both in New York and Brazil and is a native Portuguese speaker. Her cases focus on matters of construction, infrastructure, oil and gas, insurance and reinsurance, Foreign Sovereign Immunities Act (FSIA), complex contract disputes, and matters at the intersection of common and civil law. Prior to joining Chaffetz Lindsey, Lidia practiced for five years at a mixed law and engineering boutique firm in Brazil, working side by side with civil engineers in complex construction matters.

Michael Fernandez
Young ITA North America Vice-Chair
Winston & Strawn
New York, USA

Young ITA North America Vice-Chair– **Michael Fernandez's** practice is focused on complex commercial litigation, international arbitration and regulatory compliance issues. He frequently represents Spanish and Portuguese speaking clients. He has experience representing US, Latin America, and other foreign based companies and individuals involved in arbitrations, litigations, and with regulatory compliance issues in the US, as well as parties to international commercial and investment treaty arbitrations conducted under the major international rules (UNCITRAL, ICSID, ICDR, etc.).
He is a Fellow of the Chartered Institute of Arbitrators and is admitted to the arbitrator rosters of the Costa Rica Center of Conciliation and Arbitration (CICA), the Mexico Arbitration Center (CAM) and the Conflict Resolution Commission of the Chamber of Industry of Guatemala (CRECIG). He was named to Best Lawyers: Ones to Watch for Alternative Dispute Resolution and Commercial Litigation, 2021

and recognized by Super Lawyers as a "Rising Star" in the area of Civil Litigation: Defense, 2018-2021.

Maria Camila Rincon
Young ITA South America Chair (Spanish-Speaking Jurisdictions)
Zuleta Abogados
Bogotá DC, Colombia

Young ITA South America Chair (Spanish-Speaking Jurisdictions)—**Maria Camila Rincon,** is an associate at Zuleta Abogados Asociados, where she concentrates her practice in international investment law, public international law and international arbitration. Before joining the Zuleta Abogados team, María Camila was part of Colombia's National Legal Defense Agency and the Ministry of Trade, Industry and Tourism where she participated in Colombia's first international investment arbitrations, in the negotiation of investment treaties, and the design of public policies to attract and protect foreign investment in Colombia. María Camila has been a Professor of Public International Law and a Teacher Assistant of Theory of Public International Law at the Universidad del Rosario. She graduated from Universidad del Rosario and has studied in the Columbia Center for Sustainable Investment at Columbia University and in Private International Law at the Hague Academy of International Law.

Santiago Lucas Pena
Young ITA South America Vice-Chair (Spanish-Speaking Jurisdictions)
Bomchil
Buenos Aires, Argentina

Young ITA South America Vice-Chair (Spanish-Speaking Jurisdictions)—**Santiago Lucas Pena** is a Senior Associate in the international arbitration department at Bomchil, Buenos Aires. His practice focuses on complex litigations and arbitrations. He has acted in several arbitrations under the main international rules (ICC, ICDR and UNCITRAL, among others) and participated as attorney and secretary of arbitral tribunals. He graduated with honors from Universidad de Buenos Aires, and obtained a postgraduate diploma in arbitration as well as a master's degree in corporate law from Universidad Austral. He is an assistant professor on civil and commercial contracts at Universidad de Buenos Aires and at Universidad Torcuato Di Tella.

Katarina Limond
Young ITA UK Chair
Allen & Overy's
London, UK

Young ITA UK Chair—**Katarina Limond**, Limond is a London-based Senior Associate in Allen & Overy's International Arbitration and Public International Law team. She acts for a range of State and corporate clients in cross-border investment-treaty and commercial arbitrations under the ICSID, UNCITRAL, LCIA, ICC, CIArb and SIAC rules. She has also been involved in arbitration-related litigation matters, such as challenge and enforcement proceedings before English courts. Katrina also advises on public international law issues. Before joining Allen & Overy, she studied English Law at the University of Cambridge and

French Law at the Université Paris II (Panthéon-Assas). She also worked as a legal advisor for the Legal Affairs, Disarmament and Terrorism Committees at the Delegation of the European Union to the United Nations in New York.

Robert Bradshaw
Young ITA UK Vice-Chair
LALIVE
London, UK

Young ITA UK Vice-Chair—**Robert Bradshaw** is an Associate in LALIVE's London office, where his practice focuses on international commercial and investor-state arbitration. He has represented clients in diverse sectors including energy, mining, media, information technology, food processing, hospitality, and pharmaceuticals. In addition to the Young ITA, Robert is active in Young ICCA, ICC Young Arbitrators Forum, LCIA Young International Arbitration Group and CIArb Young Members Group and publishes regularly. Prior to joining LALIVE, he was an associate in the Paris office of Hogan Lovells. Robert is a graduate of the University of Birmingham, where he studied LLB Law with German, and BPP Law School, where he completed his LPC and LLM.

REPORT ON #YOUNGITATALKS AND CIARB YMG JOINT EVENT: THE ARBITRAL PROCESS FROM START TO FINISH—TIPS FOR A SUCCESSFUL ARBITRATION

by Elisabeth Zoe Everson

On December 9, 2020, #YoungITA and CIArb YMG hosted a live webinar debate on tips for a successful arbitration, moderated by Sarah Reynolds (Mayer Brown, Chicago/Palo Alto).

The event's unique format enabled the panelists to share their perspectives on different issues arising at various stages of arbitral proceedings. The discussion took place in the context of the following hypothetical scenario: a software company based in Chicago (US) is negotiating a cross-border professional services agreement with a company based in Dublin (Ireland) for the provision of after-hours tech support services.

I. THE PERSPECTIVE OF IN-HOUSE LAWYER

Javier Rubinstein (King & Spalding, Chicago), who acted as in-house lawyer for a US company, shared his thoughts on negotiating the contract. First, Mr. Rubinstein advised adopting an arbitration clause because arbitration (i) allows for enforcement abroad, (ii) is usually more acceptable than domestic litigation to parties from different countries, (iii) tends to be faster and less expensive, and (iv) ensures confidentiality. Second, Mr. Rubinstein suggested opting for institutional arbitration, which provides infrastructure and regularly updated state-of-the-art rules, and selecting a seat of arbitration whose courts have a healthy respect for arbitration. Additionally, he advised pushing for an all-encompassing arbitration clause because an unclear scope may result in litigation over the question of jurisdiction and lead to delays and increased costs. Lastly, Mr. Rubinstein advised that the negotiated contract encompasses a confidentiality clause.

For the purposes of the hypothetical, following the negotiations, the parties agree to an arbitration seated in New York and governed by the ICC rules. A dispute arises.

II. THE PERSPECTIVE OF THE OUTSIDE COUNSEL

Ricardo Ugarte (Winston & Strawn, Chicago), as the outside counsel representing a US entity, shared five key steps to consider at this stage: (i) assess the enforceability of the arbitration clause, (ii) analyze and follow any preconditions to arbitration, such as a written notice of the dispute or a meeting between the parties' executives, (iii) go over all of the elements negotiated at the time of the contract, such as the seat or the applicable law, and consider their practical implications, (iv) examine any potential jurisdictional issues, (v) start the selection of arbitrators early, and finally (vi) make use of the time control advantage as the claimant in the hypothetical, we now have a case filed with the ICC.

III. THE PERSPECTIVE OF THE INSTITUTION

Prof. Victoria Sahani (Arizona State University, Phoenix) explained the process within the institution. On top of sending the request for arbitration, the claimant must pay a non-refundable administrative fee,[1] following which the secretariat assigns a team and specific counsel to administer the case. At that time, the parties are usually required to advance the costs, following which the secretariat confirms the arbitral tribunal.[2]

The parties generally have the right to select their arbitrator, and the secretariat merely verifies that the selected candidate does not have any conflict of interest and is sufficiently available. Once confirmed, the file is transferred to the arbitral tribunal (see *infra* Section IV).[3] Fast forward to the very end of the proceedings, the ICC has a unique scrutiny procedure, through which it reviews the award.[4] For the purposes of the hypothetical, a sole arbitrator is now confirmed and has received the file.

IV. THE PERSPECTIVE OF THE ARBITRAL TRIBUNAL

Lawrence (Larry) Schaner (Schaner Dispute Resolution, Chicago) explained that he starts by organizing the proceedings and in this respect establishes: (i) the terms

[1] ICC Rules of Arbitration (2021), art. 4(4) and Appendix III, art. 1(1).

[2] *Id.* at art. 13.

[3] *Id.* at art. 16.

[4] *Id.* at art. 34.

of reference as required by the ICC, (ii) a procedural timetable, and (iii) specific procedural rules for the case, which will be incorporated into a procedural order.

The main phases in a typical international arbitration are: (i) pre-hearing memoranda, submitted simultaneously or consecutively; (ii) document exchange; and, (iii) hearing. Larry Schaner orders two rounds of pre-hearing submissions in the present case, with a document exchange phase in between. Then, before the hearing, he holds a pre-hearing conference to address any logistical questions. The hearing usually has the following components: (i) short opening statements and (ii) cross-examination of witnesses, as well as questions to the witnesses by the arbitrator. The hearing can be followed by either oral closing statements or written post-hearing briefs submitted after the hearing ends. Thereafter, the case is submitted to the sole arbitrator for a decision.

In the hypothetical case at hand, the sole arbitrator finds in favor of the claimant, awarding compensatory damages, pre-award interests, and lost profits. He also finds the claimant is entitled to its costs. Before issuing the award, the sole arbitrator submits the draft to the ICC secretariat for review and integrates any comments.

V. THE PERSPECTIVE OF THE JUDICIARY

Margaret Moses (Loyola University, Chicago) concluded the webinar by explaining the enforcement of the award. When the losing party does not voluntarily comply with the award, the judiciary may get involved in two instances: First, the losing party may vacate the award in court where the arbitration was sited. Because the present arbitration was sited in New York, US federal district court judge would analyze the situation under the Federal Arbitration Act ("FAA") and could only vacate the award on limited grounds, such as violations of due process or fairness.[5] Second, the winning party may bring a motion to enforce the award in the jurisdiction where the losing party's assets are located, usually under the New York Convention.[6] The grounds for non-enforcement are also limited and somewhat similar to those under

[5] FAA, 9 U.S.C. § 10.

[6] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046.

the FAA.

The event concluded with a short discussion about fee-shifting and misconceptions about the speed of the proceedings.

ELISABETH ZOE EVERSON joined LALIVE as a trainee in February 2020. She holds a Bachelor of Law (2017), a Certificate in Transnational Law (2017), a Master of Law (2019) and a Certificate of Advanced Studies in Legal Professions (2019) from the University of Geneva. Elisabeth Zoe Everson participated in the 25th edition of the Willem C. Vis International Commercial Arbitration Moot (2018), in which her team won the Pieter Sanders Award for the Best Memorandum for Claimant and received honorable mentions for the Memorandum for Respondent and the Oral Pleadings.

YOUNG ITA MENTORSHIP GROUPS IN ASIA HOST FIRESIDE CHAT WITH MS. LUCY REED

by Ishita Soni, Yvonne Mak

On 31 March 2021, two Young ITA Mentorship Groups based in Asia led by Ms. Chiann Bao and Ms. Mariel Dimsey, along with mentorship facilitators, Mr. Cameron Sim and Ms. Anne-Marie Doernenburg respectively, jointly held a virtual fireside chat with Ms. Lucy Reed. Ms. Reed, one of the top international arbitration specialists, independent arbitrator at Arbitration Chambers and President of the ICCA, shared valuable insights and advice with mentees on developing a successful career in international arbitration.

As a US pioneer in international arbitration, Ms. Reed provided insight into her career trajectory. She explained that, while at law school, there were no arbitration courses yet available. Her first main encounter with international arbitration was thus with the Iran-US Claims Tribunal, both in private practice and with the US State Department. Capitalizing on her experience there, puts Ms. Reed at the forefront of the practice of investment treaty arbitration as it developed. Since then, she built her practice with Freshfields in the New York, Hong Kong, and Singapore offices.

When asked what skills she considered essential to thrive in international arbitration, Ms. Reed advised young practitioners to build their substantive knowledge of the law, especially of their jurisdiction. This is because arbitration is a procedural skill, akin to litigation in the interpretation and application of law to facts. Furthermore, Ms. Reed emphasized the importance of working on one's written advocacy to be able to express arguments concisely and with absolute clarity. Equally, oral submissions should be streamlined and focused on helping the tribunal appreciate and understand one's case.

As for practitioners in jurisdictions where arbitration is less developed, Ms. Reed saw this as an opportunity for such practitioners to become arbitration pioneers. She

cited the example of lawyers from such jurisdictions who had gone abroad to work for international law firms for a number of years, before returning to their home jurisdictions to work on international matters as leading counsel through their unique combination of international experience and local legal knowledge. Ms. Reed also stressed the need to be flexible and sensitive to different cultural and legal backgrounds and approaches, when interacting with colleagues, approaching a case, or addressing a tribunal.

Ms. Reed concluded her thoughts with the following key takeaways: while luck does often play a role in one's career, one should train and be prepared to take advantage of opportunities by adopting a "Why Not?" attitude. In particular, young practitioners should hone their international arbitration practice skills while maintaining intellectual curiosity and keeping abreast of contemporary issues. Moreover, Ms. Reed advised to exercise discretion with personal branding; when deciding to write articles or speak at conferences, these should be significant and impactful. Finally, Ms. Reed underlined the importance of networking and helping peers, which she considers as keys to a successful career. She also emphasized the importance of being part of organizations such as the ITA which, in Ms. Reed's case, had connected her with the oil and gas sector and arbitration specialists in the United States.

Ms. Reed's parting advice was to be patient in waiting for arbitrator appointments, as a career covers a long time.

The Young ITA Mentorship Groups in Asia would like to extend their gratitude to Ms. Lucy Reed for taking the time to speak to our mentees.

ISHITA SONI, Student, Symbiosis Law School, Pune
YVONNE MAK, Associate, Withers KhattarWong LLP

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

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

A. *Mission.*

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

B. *Why Become a Member?*

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

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. *The Advisory Board.*

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

D. *Programs.*

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

E. *Publications.*

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary

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

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

Institute for Transnational Arbitration
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