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TRIBUTE TO EMMANUEL GAILLARD (1952-2021)

by Phillippe Pinsolle & Yas Banifatemi

I. JOSEPH NEUHAUS

Thank you very much. Let's move to the program. First, we will start with a tribute to one of the giants of our community, that we lost this year: Emmanuel Gaillard.

We have asked two of Emmanuel's longtime colleagues and friends to speak briefly about him. Philippe Pinsolle, a partner at Quinn Emanuel Urquhart & Sullivan LLP in Geneva, and Yas Banifatemi, a partner at a brand-new law firm that she and Emmanuel had just launched.

II. PHILLIPPE PINSOLLE

Thank you, Joseph. What I am going to do is not easy, even with the passage of time. I will do my best. The death of Emmanuel reminded us that genius is no guarantee for eternity. Actually, if you look at history, it is probably the opposite. I need not remind you of his contribution to the theory of arbitration. Emmanuel was not discussing cooking recipes. He was not discussing whether you need one or two post-hearing briefs. He was not even discussing the kitchen or the restaurant. He was planning the city within the world. He was the architect of arbitration as a system as we know it. Yet, his contribution was immense, and it will be here for decades. I need not remind you either, that he was a genial litigator. The kind of which could smell blood from a distance. The kind of which could go to the jugular and kill you in a matter of minutes, real smart.

But I would like to insist on another aspect of his personality. Emmanuel was a human being, profoundly human. He was simple. He was approachable. And he was funny more than anything else. He was impertinent in a novel sense of that word. A quality which may be lost today.

Working with Emmanuel was a privilege. Being in arbitration with him was immensely funny. I will just tell you an anecdote and then you can think about it. We were in this case where three very famous arbitrators, a bit sleepy, were listening to us. And he looks at them and the secretary of the tribunal and, during the break,

he went to the opposing counsel and told them: "look, you see the secretary of this tribunal? He is not the fourth arbitrator. He is the sole arbitrator". And he was right, in that particular case. That is the kind of thing we would enjoy when working with Emmanuel.

That is something which I enjoyed for almost 20 years, and I am immensely grateful for that. And everything that I have done in the business derives, one way or another, from what I learned, from what he taught me. With this, I would like to give the floor to my former partner and friend. Yas will give you another view of Emmanuel and please remember him. Thank you for your time.

III. YAS BANIFATEMI

Thank you, Phillipe. Good day everyone. What I have to say is very similar to what Phillipe just said. In fact, because we have the same experience and the same approach to Emmanuel.

I will start by saying what Emmanuel liked to say: "a good theory is always practical." He was an incredibly powerful and visionary theorist with a fertile thinking spreading over a period of 40 years, starting with his PhD dissertation on the concept of power in private law, to a seminal legal theory on international arbitration based on his 2007 course at the Hague Academy,1 to his last articles calling for arbitrators to exercise courage in their assessment of corruption.2 At his very last webinar, which gathered over 1,000 persons, and during which he provided a masterful analysis of seven dirty tricks,3 he left us with what I considered to be a very small part of his testament to the international arbitration world: that the arbitral system is able to deal appropriately with party obstruction that are at the margins, but in order to avoid that abusive conduct from spreading and infecting the entire system, we need to develop substantive rules of international arbitration.

[1] The Hague Academy of International Law, 2007 Summer course.

[2] *See*, *e.g.*, Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35(1) ARB. INT'L 1, 19 (2019); Emmanuel Gaillard, *La Corruption Saisie par les Arbitres Du Commerce International*, 2017(3) Revue de l'arbitrage, 805, 838 (2017).

[3] American University Washington College of Law, *2020 Annual Lecture on International Commercial Arbitration: "Seven Dirty Tricks to Disrupt Arbitral Proceedings and the Responses of International Arbitration Law"*, held virtually on Sept. 24, 2020, https://www.youtube.com/watch?v= l8RF9Xq_MQY.

Emmanuel was also a magnificent practitioner, as Phillipe just mentioned. A lot has been said on his charisma and strong courtroom presence. I personally have vivid memories of historic cross-examinations and oral arguments over the 24 years of working with him, and his clients' admiration and devotion to him showed how much they counted on him to save the day.

As his co-teacher over the past few years, I cannot emphasize enough his footprints with the students. One of our former Yale students, an American Yale student, told me that what gave him reassurance was "the cultivation of generations of inspired lawyers and students, and perhaps the fact that his legacy will live on."

Above all, Emmanuel was an extraordinary human being, colleague, mentor, and friend. Hundreds of tributes were received from around the world at Gaillard Banifatemi Shelbaya Disputes, the firm which we established only six weeks before his unexpected passing. That gave him the excitement and delight of an institution created overnight in the body of a young start-up, which is what he liked to say. These tributes have unanimously saluted Emmanuel's kindness, generosity, and simplicity, despite his remarkable stature.

We miss him tremendously every single day. We miss his laughter, his mischievousness, and his extraordinary energy and youth. We will continue to be guided by his light and our intent to pursue his work and legacy. Thank you very much.

PHILIPPE PINSOLLE is a Partner, Quinn Emanuel Urquhart & Sullivan LLP. He is the head of international arbitration for continental Europe and is based in the firm's Geneva office. He has over twenty-five years of experience as a counsel, expert, and arbitrator in international arbitration. He has acted as counsel in more than 300 international arbitrations, with a particular focus on Investor-State arbitrations and commercial disputes involving the energy, power, oil & gas, construction, and defense industries. He has been involved in arbitrations under the auspices of virtually all major arbitration institutions including the ICC, the LCIA, the ICSID, the SCC, the AAA, the ICDR, the Swiss Chambers of Commerce, the AFA, the ADCCAC, as well as in ad hoc cases under the UNCITRAL rules or otherwise. Philippe Pinsolle has also served as an arbitrator in more than 60 cases, as well as an expert witness on arbitration and French law issues. Philippe holds an M.B.A from ESSEC in addition to his dual legal

qualification as a French avocat a la cour as well as an English barrister. He is recognized universally as one of the arbitration lawyers (acting as arbitrator or counsel) that best understands quantum issues. Philippe is currently senior co-chair of the IBA arbitration committee. He is a member of the Court of Arbitration of Singapore International Arbitration Center (SIAC) and an Advisor of the International Advisory Board (IAB) of the Thailand Arbitration Center (THAC).

DR. YAS BANIFATEMI is a founding partner of Gaillard Banifatemi Shelbaya Disputes and is widely recognized as one of the most prominent international arbitration and public international law specialists worldwide. Prior to founding Gaillard Banifatemi Shelbaya Disputes, she served as Shearman & Sterling's Global International Arbitration Practice Group Leader, Public International Law Team Leader and Lead Industry Coordinator for Energy. She advises and represents States, State-owned entities and companies on both public international law and international arbitration issues. Dr. Banifatemi has secured many landmark victories for her clients, including a USD 50 billion award for the majority shareholders of the former Yukos Oil Company, the largest investment award in history. She acts as both counsel and arbitrator in arbitrations conducted pursuant to the ICSID, UNCITRAL, ICC, LCIA, SCC, SIAC, HKIAC, CRCICA, DIS and the Swiss Arbitration Rules, with particular focus on investment protection, oil & gas and general commercial matters. Dr. Banifatemi is a member of the SIAC Court of Arbitration and the GIAC Arbitration Council. She is a former Vice-President of the ICC International Court of Arbitration as well as former member of LCIA Court. She is listed on a number of arbitrator panels, including the ICSID Panel of Arbitrators, appointed by the Chairman of ICSID's Administrative Council. She is the President of the International Arbitration Institute (IAI).

IN MEMORY OF MARTIN J. HUNTER (1937-2021)

by Alexandre Vagenheim

Professor J. Martin Hunter was a singularly important figure in international arbitration. Through his scholarship, practice, adjudication, and mentorship he helped shape many aspects of international arbitration. Martin's passing on October 9, 2021 has left behind generations of students, lawyers, arbitrators, and many friends around the world that are, like me, indebted to him. I had the privilege of knowing the many faces of Martin and it all started in Vienna.

The Willem C. Vis International Commercial Arbitration Moot was the most important date on Martin's calendar. He would never accept any conflicting commitment, including hearings, during the Vienna Vis Moot week in April each year. I met Martin as a young student of the Paris 1 Panthéon-Sorbonne University team attending the Vis. He was chairing the first round of our performance in 2006. After a lively session, I approached him for career advice in international arbitration. Even though he had never met me before, he took the time to engage with me and told me that as someone with a civil law background I should get a degree from a common law jurisdiction to foster my understanding of different legal systems in order to become a truly international arbitration practitioner. Martin's vision of international arbitration was pragmatic and visionary: finding common grounds to connect people and cultures through dispute resolution to promote world peace.

Martin repeatedly emphasized that international arbitration was a different "animal" than domestic arbitration. He was one of the first in the world to take the view that international arbitration should be practiced and taught as a specialist practice area. A pioneer in the field, together with Alan Redfern he built the first international arbitration practice at Freshfields in London in the 1980s and expanded it to Paris with Jan Paulsson.

At the time, I knew Martin mainly as one of the two authors of *Redfern and Hunter*[1]

[1] Nigel Blackaby & Constantine Partasides with Alan Redfern and Martin Hunter, Redfern & Hunter on International Arbitration (6th ed. 2015).

(which we quoted heavily in our moot submissions). Even after the authorship was passed to Nigel Blackaby and Constantine Partasides, Martin retained responsibility for the chapter on the conduct of the proceedings for which I later carried research for the fifth edition. The book, as *per* Martin's practice-oriented vision, follows the chronology of arbitration proceedings and remains today a seminal work for students and practitioners alike.[2] Martin's writing style was simple and sharp. His most important message to aspiring authors was that the object of a text is to inform the reader, not to demonstrate the cleverness of its author.

A year after that first encounter, I joined the LL.M. program at King's College London. There, I met Martin, the Professor. He became chair of International Dispute Resolution at Nottingham Trent University where he was appointed Emeritus Professor in 2010 and a Visiting Professor at King's College, where he taught international arbitration to post-graduate students from around the world. Martin's teaching style was also practice-oriented with a great emphasis on advocacy skills through a "learning by doing" approach. Like thousands of students around the world, I learned the fundamentals of international arbitration proceedings through his famous case studies: the *Abukarabia* and the *Kaspenistan* cases.

After completing my LL.M., Martin offered me a position of research-assistant and I became a part of the "M's." Martin's research assistants were all designated with an "M" and assigned numbers in the chronological order of their joining. I am "M-XIII."[3] As his research assistant, I witnessed Martin, as he is known by the arbitration community, in his capacity as a leading arbitrator. I saw the firm hand he had on procedure; always mindful of giving sufficient opportunities for the parties to present their case while never allowing excessive disruption. Well-known investment

[2] See the OUP presentation of the fifth edition of Redfern & Hunter, Redfern and Hunter on International Arbitration, Part I, Feb. 6, 2013, https://www.youtube.com/watch?v=_-TDtbaVlMs.

[3] For the anecdote of why we were called the "M's" our joint tribute to commemorate Martin "the friend," see Simon Weber, To Our Friend Martin (MI), KLUWER ARBITRATION BLOG, Oct. 18, 2021, http://arbitrationblog.kluwerarbitration.com/2021/10/18/to-our-friend-martin-mi/.

arbitration cases he was part of include *Mexico v. USA*,[4] *S.D. Myers, Inc. v. Canada*,[5] and *William Nagel v. Czech Republic*.[6] As secretary, I assisted the Court of Arbitration for Sport (CAS) tribunal Martin chaired regarding South African double amputee athlete Oscar Pistorius against the International Association of Athletics Federation as to whether his prosthetic legs gave him an unfair advantage over able-bodied athletes.[7] The proceedings were particularly tense because of the media attention and tight schedules as the decision would impact whether Pistorius was able to compete. Martin and his co-arbitrators upheld the appeal on the basis of lack of scientific evidence of the alleged advantages. As we know, Pistorius became the first amputee to win a medal for competing in non-disabled athletic competitions. Before becoming a leading arbitrator, Martin was a respected counsel in the *Aminoil* case,[8] which propelled him as counsel, and Freshfields into the position of a top-tier law firm at the time.

Recent testimonies have emphasized Martin's long-time dedication to the promotion and defense of international arbitration. He devoted a substantial part of his time to lead and support arbitral organizations and many institutions are indebted to his long-time support.[9] Martin was a member of many scientific councils, organization and institutions across the globe, including the Council of ICCA, and has participated in the work of a number of organizations including the AAA, the IBA, the ICC Court, the LCIA Court and UNCITRAL. He was chairman of the Board of Trustees of the Dubai International Arbitration Centre, and deputy-chairman of the UK Government's committee on arbitration law reform, which advised the UK on the

[4] *See* Mexico v. USA (In the matter of cross-border trucking services), NAFTA, Final Report of the Panel (Feb. 6, 2001).

[5] *See* S.D. Myers, Inc. v. Canada, NAFTA/UNCITRAL, Partial Award (Nov. 13, 2000).

[6] *See* William Nagel v. The Czech Republic, SCC Case No. 049/2002, Final Award (Sept. 9, 2003).

[7] *See* Oscar Pistorius v. IAAF, CAS 2008/A/1480, Award (May 16, 2008).

[8] *See* The American Independent Oil Co. (Aminoil) v. Kuwait, Final Award (Mar. 24, 1982).

[9] *See* Professor J. Martin Hunter (1937-2021), ICCA, Oct. 20, 2021, https://www.arbitration-icca.org/professor-martin-hunter-1937-2021; ICC pays tribute to Prof. J. Martin Hunter (1937-2021), ICC, Oct. 13, 2021, https://iccwbo.org/media-wall/news-speeches/icc-pays-tribute-to-prof-j-martin-hunter-1937-2021/.

English Arbitration Act 1996,[10] which celebrates its 25th anniversary this year.

I witnessed Martin's determination in the defense of international arbitration at the 48th session of the UNCITRAL Working Group II in New York in 2008 on the revision of the UNCITRAL Arbitration Rules where Martin represented the Milan Club of Arbitrators. These were the early discussions on transparency in investment arbitration, which came with heated debates between proponents of confidentiality and advocates for transparency. Martin managed to have these issues debated among the members of the Milan Club resulting in a Statement of the Milan Club of Arbitrators (that those issue should be best dealt with in separate instruments) that was included in this working group session's report.[11] The rest is now history. UNCITRAL took the directions proposed by Martin, the Milan Club of Arbitrators and others and addressed the issues raised in the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the Mauritius Convention.

Martin was not only militating for international arbitration; he was a great advocate for peace through disputes resolution. Martin strongly believed that the practice of international arbitration could bring peace not only through the process itself but also thanks to the individual connections it creates. In the last ten years, he advocated relentlessly for better education for students from countries such as Brazil, Russia, India, China, and South Africa (BRICS countries). At the inauguration of the law school of the Kalinga Institute of Industrial Technology (KITT) that is affiliated with the Kalinga Institute for Social Studies (KISS), a tribal school with now more than 27,000 children, Martin gathered a group of well-known practitioners and us from the younger generation to help setting up the law school and teach for a couple of weeks. Martin greatly contributed to this project in order to give a maximum exposure to the lifetime achievement of philanthropist Dr. Achutya Samanta, whose mission to provide those children with free education deeply impacted and inspired Martin. This project was followed by Martin's involvement in

[10] Martin Hunter and Toby Landau, The English Arbitration Act 1996: Text and Notes (1998).

[11] UN Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the work of its forty-eighth session (New York, 4-8 February 2008), U.N. Doc. A/CN.9/646, https://undocs.org/en/ A/CN.9/646.

the Global Institute for Peace and Conflict Resolution where he was appointed as Vice President for Europe.[12] Martin was an educator and visionary who believed in the collaboration between individuals of different nations.

More than anything, Martin was a mentor. He did so through the Young ICCA mentorship program, the Vis Moot, his various teaching appointments around the world and through his "M's". He did this naturally and effortlessly. With his generosity he gave us the self-belief that we, too, could succeed. He always encouraged his students, after completing studies in the UK, to go back to their countries and help develop international arbitration. It is for us to continue this legacy with the younger generation through mentorship, guidance and kindness.

Martin was a true "*bon vivant*". His joviality coupled with a mischievous and subversive side and a keen and dry sense of humor made it a delight to be around him and his wife, Linda, to whom I express my most sincere condolences. Martin offered more than mere career advice and together with Linda, they offered me and many others guidance as well as hospitality of their home in Walton-on-Thames, trips around the south coast of England on his Boat or a round of golf in their house of Boca-Raton. Linda's invaluable support to Martin and to his extended family of young friends around the world made it personally a privilege to be for some years his friend and his mentee.

Professor J. Martin Hunter leaves behind an exceptional legacy in international arbitration and will remain an emblematic and inspirational figure for generations of arbitration lawyers around the globe.[13]

[12] See the online tribute by the GLIP (Universidade de São Paulo, Centro de Estudo da Paz e Resolução de Conflitos), A Ceremony to Honor Prof. J Martin Hunter, dated Oct. 16, 2021, https://www.youtube.com/watch? v=eY9EIwQYrhc.

[13] For more on Professor J. Martin Hunter's life, see the well-documented eulogy of Alisson Ross, Martin Hunter 1937-2021, GLOBAL ARBITRATION REVIEW, Oct. 22, 2021, https://globalarbitrationreview.com/martin-hunter-1937-2021.

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¿PUEDE EJECUTARSE UN LAUDO CON UNA REPARACIÓN NO PECUNIARIA BAJO EL CONVENIO CIADI Y/O BAJO LA CONVENCIÓN DE NUEVA YORK?

por Alonso Bedoya Denegri

I. INTRODUCCIÓN

Cuando se suscita una controversia entre un inversionista y un Estado, sabemos que entre las distintas opciones que se tienen para la solución de las diferencias, una de las más atractivas es la de recurrir a un órgano de justicia imparcial y que otorga seguridad jurídica, un órgano como el Centro Internacional de Arreglo de Diferencias relativas a Inversiones ("CIADI").

La principal ventaja del arbitraje del CIADI es su eficiencia procesal, al evitar la incertidumbre que genera la interferencia judicial local que muchas veces termina por politizar la disputa. El sistema autónomo con el que cuenta el CIADI, que hará que el laudo final se ejecute como consecuencia del mismo, es el principal motivo por las cuales las partes prefieren recurrir a dicho mecanismo por sobre otros foros de arbitrajes de inversión como lo son la CCI, SIAC, ad hoc bajo reglamentó UNCITRAL, etc. Dicho de otra manera, en el CIADI no es necesario seguir un procedimiento de reconocimiento y ejecución de laudo para que tenga efectos.

No es poco frecuente que los Estados se muestran reacios a pagar un laudo indemnizatorio a un inversionista, sobre todo cuando el monto de la indemnización otorgado es elevado. Los laudos del CIADI están sujetos al reconocimiento automático de las partes contratantes y por ser parte de un tratado obtienen el valor de una sentencia firme de un Tribunal de cualquier Estado contratante del Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados ("Convenio CIADI"). Por lo tanto, un inversionista que posea una copia certificada de un laudo del CIADI tiene derecho a ejecutar ese laudo indemnizatorio en cualquier Estado contratante.

Sin embargo, han pasado más de 50 años desde que se redactó el Convenio del CIADI y, sin embargo, todavía no existe una opinión pacífica en la comunidad de arbitraje internacional sobre si los laudos del CIADI pueden o no hacer cumplir las reparaciones no pecuniarias. La tendencia generalmente favorece la posición de que

los tribunales del CIADI no pueden hacer cumplir las medidas de reparación no pecuniarias; no obstante, muchos autores disienten con una interpretación restrictiva del artículo 54 del Convenio del CIADI.

El primer párrafo del artículo 54 del Convenio del CIADI establece: "(1) Todo Estado Contratante reconocerá al laudo dictado conforme a este Convenio carácter obligatorio y hará ejecutar dentro de sus territorios las obligaciones pecuniarias impuestas por el laudo como si se tratare de una sentencia firme dictada por un tribunal existente en dicho Estado."[1]

En mi opinión, uno de los mayores vacíos de la convención es la falta de poder expreso otorgado a los tribunales arbitrales para hacer cumplir las reparaciones no pecuniarias en virtud del Convenio del CIADI, tal como refleja la redacción del citado artículo 54 del Convenio. En ese sentido, la pregunta cae de madura: ¿pueden los tribunales arbitrales del CIADI dictar medidas no pecuniarias en sus laudos?

Por reparación no pecuniaria debe entenderse de manera enunciativa y no limitativa, todo tipo de reparación o compensación no monetaria, como, por ejemplo, medidas cautelares, poder restringir los procedimientos de arbitraje paralelos, congelación de activos del estado demandado, exenciones provisionales como gravámenes, obligaciones de no hacer, etc.

El objetivo principal de este trabajo es: 1) analizar si el arbitraje del CIADI puede o no hacer cumplir reparaciones no pecuniarias, utilizando la opinión de varios autores; 2) repasar jurisprudencia relevante del CIADI y del derecho internacional relativa al poder de sus tribunales para hacer cumplir reparaciones no pecuniarias; 3) analizar si la Convención sobre el reconocimiento y la ejecución de las sentencias arbitrales extranjeras ("Convención de Nueva York)[2] (cuyo objetivo principal es hacer cumplir los laudos comerciales extranjeros) puede aplicarse supletoriamente para ejecutar las reparaciones no pecuniarias del CIADI; y 4) desarrollar el argumento de la soberanía de los estados como supuesta limitación para la ejecución de laudos no

[1] Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados art. 54, 18 de marzo de 1965, 575 U.N.T.S. 159 (énfasis agregado) [en adelante Convenio CIADI].

[2] Convención sobre el reconocimiento y la ejecución de las sentencias arbitrales extranjeras, 10 de junio de 1958, 330 U.N.T.S. 3 [en adelante Convención de Nueva York].

pecuniarios.

II. SOBRE LA POSIBILIDAD DE EJECUTAR UNA REPARACIÓN NO PECUNIARIA A LA LUZ DEL CONVENIO DEL CIADI

Como se mencionó anteriormente, existen dos corrientes de opinión entre la comunidad de árbitros de inversión, académicos y profesionales legales con respecto al contenido de la reparación en los laudos.

La primera se basa claramente en un alcance limitado en los poderes que tiene un tribunal arbitral.[3] Para ellos, un tribunal arbitral no cuenta con facultades otorgadas por el Convenio del CIADI para hacer cumplir las reparaciones no pecuniarias, por lo tanto, solo pueden limitarse a recomendar ciertas reparaciones no pecuniarias, pero no imponer tales obligaciones. El argumento principal que sustenta esta posición se basa en la forma en que se redactó el artículo 54 de la Convención. Si se da una interpretación restrictiva del texto, tendría que interpretarse que la Convención solo puede hacer cumplir las obligaciones pecuniarias impuestas en los laudos:

> (1) Todo Estado Contratante reconocerá al laudo dictado conforme a este Convenio carácter obligatorio y hará ejecutar dentro de sus territorios las *obligaciones pecuniarias* impuestas por el laudo como si se tratare de una sentencia firme dictada por un tribunal existente en dicho Estado.[4]

En este sentido, es más común en arbitrajes de inversión que el remedio típico se encuentre en la forma de una compensación o reparación en forma de daños. Las medidas no pecuniarias, como el cese de una actividad, el cumplimiento específico o una sanción declarativa, no son comunes.[5] Esto responde principalmente a la forma

[3] La doctrina Rosatti que surgió en Argentina como reacción ante un creciente número de casos en el CIADI, es un claro ejemplo de intento de restricción de poderes del tribunal arbitral, pues señala la posibilidad de ejercer un control de constitucionalidad posterior sobre los laudos emitidos por la corte del CIADI al momento de su ejecución en los casos desfavorables a Argentina. *Ver en general* Horacio D. Rosatti, *Los tratados bilaterales de inversión, el arbitraje internacional obligatorio y el sistema constitucional argentina*, 2003-F LA LAY 1283 (2003). Pero esa doctrina no ha sido acogida por la comunidad internacional. *Ver*, *e.g.*, Aníbal Sabater, *The Weakness of the "Rosatti Doctrine": Ten Reasons Why ICSID's Standing Provisions Do Not Discriminate Against Local Investors*, 15 AM. REV. INT'L ARB. 465 (2004).

[4] Convenio CIADI art. 54 (énfasis agregado).

[5] *Ver en general* CAMPBELL MCLACHLAN, LAURENCE SHORE, & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES § 9(G) (2d ed. 2017); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION ¶¶ 8-09-20 (2004); Martin Endicott, *Remedies in Investor-State Arbitration: Restitution, Specific Performance and Declaratory Awards*, *in* PHILIPPE KAHN & THOMAS WÄLDE, NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 517 (2007).

en que se redacta el reclamo del inversor, quien probablemente no estará a la expectativa de que el estado anfitrión devuelva un pedazo de tierra expropiado o a que el estado que dejó de hacerlo otorgue un trato justo y equitativo. Esto se debe a que el inversor no se sentiría cómodo operando en un país que no respeta sus acuerdos. Por tanto, el inversionista siempre se sentirá más seguro al reclamar daños por el incumplimiento del tratado y de ese modo poder amortizar la inversión realizada y acto seguido dejar de operar en ese estado, puesto que seguir operando en un país que no respeta sus obligaciones sería exponerse a otro incumplimiento futuro.

Otra razón importante por la cual las reparaciones no pecuniarias no se ven a menudo en los arbitrajes del CIADI, es que los inversores extranjeros prefieren la solución más práctica: reclamar daños es mucho más fácil que, por ejemplo, obtener la restitución de propiedad o un derecho de inversionista otorgado por un tratado de inversión bilateral que ya ha sido liquidado o dañado.[6] A los inversores no les importa mucho el hecho de ganar un caso contra un Estado. No tiene relevancia práctica ni financiera para ellos, ya que el curso de acción más lógico es reclamar daños y recuperar el dinero invertido o al menos la mayor parte de este. Así no se gasta tiempo y recursos en un procedimiento de arbitraje más exhaustivo que puede incluso no ser acatado por los tribunales nacionales del estado infractor; asimismo, el inversor se evita una larga y laboriosa búsqueda de activos del estado infractor (fuera de dicho estado) que puedan ser pasibles de incautación y liquidación.

Por otro lado, existe otra posición en el ámbito del arbitraje de inversiones que argumenta que los tribunales arbitrales del CIADI pueden ordenar perfectamente medidas variadas; desde reparaciones monetarias hasta todo tipo de restituciones.7

[6] Brooks E. Allen, *The Use of Non-pecuniary Remedies in WTO Dispute Settlement: Lessons for Arbitral Practitioners*, *in* Michael E. Schneider & Joachim Knoww (eds.), PERFORMANCE AS A REMEDY: NON-MONETARY RELIEF IN INTERNATIONAL ARBITRATION 283, 288 (2011).

[7] Nigel Blackaby & Andrea Camargo, *Alternativas de reparación en el arbitraje internacional de inversiones –Un debate entre la teoría y la práctica*, 1 ANUARIO COLOMBIANO DE DERECHO INTERNACIONAL 160, 164 (2008) ("Una vez aclarado lo anterior, debe indicarse que el artículo 31 del borrador consagra que los Estados causantes de un daño estarán obligados a reparar de forma integral, lo cual conlleva que, de acuerdo con la jurisprudencia de la [Corte Permanente Internacional de Justicia], dicha reparación sea realizada en

Entre estas últimas se encuentran el cumplimiento específico o el cese de una actividad lesiva; siempre con el fin de restituir la situación jurídica del demandado al estado anterior a la lesión. Esta decisión debería ser vinculante para las partes y poseer los efectos de la cosa juzgada. Bajo esta óptica, la capacidad de ordenar reparaciones no pecuniarias es inherente a los tribunales arbitrales del CIADI y no tiene asidero el argumento de que la aplicabilidad de los laudos del CIADI está limitado por el ejercicio de la soberanía del estado infractor.[8]

Además, el Tratado de Libre Comercio de América del Norte (TLCAN) en su artículo 1135, así como en el artículo 26(8) del Tratado sobre la Carta de la Energía (TCE), declaran de manera similar que un tribunal puede pagar daños monetarios en lugar de restitución. Bajo esta premisa, si otra legislación internacional permite a los tribunales ordenar medidas diferentes a los daños monetarios, no hay razones para pensar que esta posibilidad le esté proscrita al CIADI.

III. JURISPRUDENCIA DEL CIADI SOBRE LA APLICACIÓN DE REPARACIONES NO PECUNIARIAS Y EL CRITERIO CHORZÓW

En la jurisprudencia del CIADI ha habido algunos casos en los que se ha establecido que los tribunales están facultados para emitir remedios no monetarios, uno de los casos que propone tal postura es *Bernhard von Pezold v. Zimbabwe*, en el cual, el Tribunal determinó lo siguiente: "it is beyond doubt that non-pecuniary remedies, including restitution, can be awarded in ICSID Convention arbitrations under investment treaties."[9]

Evidentemente tal caso no ha sido el único. En *Antoine Goetz v. Burundi*,[10] los inversores belgas poseían una empresa en Burundi a la que se le otorgó un certificado de zona franca con algunas exenciones fiscales y aduaneras; posteriormente, este fue

forma adecuada. Acto seguido, el artículo 34 del borrador contempla distintas formas de reparación, siendo estas: la restitución, la compensación y la satisfacción, ello de forma independiente o combinada.").

[8] Christoph Schreuer, *Non-Pecuniary Remedies in ICSID Arbitration*, 20(4) ARB. INT'L 325, 331 (2004) ("*The ability to order specific performance is a power that is inherent in a tribunal's jurisdiction. There is no merit to the argument that an ICSID tribunal would thereby impeded a state in the exercise of its soverign rights.*").

[9] Pezold v. Zimbabwe, Caso CIADI No. ARB/10/15, Sentencia, ¶ 700 (28 de julio de 2015).

[10] Goetz v. République du Burundi, Caso CIADI No. ARB/95/3, Sentencia (3 de febrero de 2000).

retirado por Burundi, lo que dio origen a un arbitraje CIADI. El reclamo principal fue la anulación de la decisión que retiró el certificado de zona franca.

Aunque hubo negociaciones de acuerdo entre las partes, el tribunal emitió una decisión provisional sobre responsabilidad. La decisión de retirar el certificado fue considerada equivalente a una expropiación a la luz del TBI firmado entre Bélgica y Burundi. Por tanto, el tribunal le dio a Burundi la opción de pagar una indemnización justa o revocar el retiro de los certificados. Esta última fue, sin duda, una forma de alivio no pecuniario:

> [I]t falls to the Republic of Burundi, in order to establish the conformity with international law of the disputed decision to withdraw the certificate, to give an adequate and effective indemnity to the claimants as envisaged in Article 4 of the Belgium-Burundi investment treaty, unless it prefers to return the benefit of the free zone regime to them. The choice lies within the sovereign discretion of the Burundian government. If one of these two measures are not taken within a reasonable period, the Republic of Burundi will have committed an act contrary to international law the consequences of which would be left to the Tribunal to ascertain.[11]

Hay aún más jurisprudencia que sostiene el poder de los tribunales CIADI para hacer cumplir las reparaciones no pecuniarias. En el caso *Enron v. Argentina*, este último argumentó que al tribunal no se le otorgó el poder de ordenar medidas cautelares. El Estado argentino sostuvo que, si el tribunal determina que hubo una expropiación, la única acción que podrían ordenar es determinar la compensación correspondiente y no ordenar determinaciones no pecuniarias. Sin embargo, el tribunal arbitral expresó la siguiente opinion: "An examination of the powers of international courts and tribunals to order measures concerning performance or injunction and of the ample practice that is available in this respect, leaves this Tribunal in no doubt about the fact that these powers are indeed available."[12]

En caso de duda sobre si los tribunales del CIADI pueden ordenar y hacer cumplir una reparación no pecuniaria—como se mencionó anteriormente—no debería hacerse una interpretación literal del artículo 54 de la Convención, ya que fue la intención de

[11] *Id.* ¶ 133.

[12] Enron Corp. v. Argentine Republic, Caso CIADI No. ARB/01/3, Decisión sobre Jurisdicción, ¶ 79 (14 de enero de 2004).

los redactores otorgar poderes a los tribunales del CIADI para hacer cumplir este tipo de alivio si es necesario.[13]

Es erróneo interpretar el artículo 54 del Convenio del CIADI de manera restrictiva. Sugerir que los tribunales de inversión del CIADI no tienen poderes suficientes para ordenar el cese de una actividad lesiva u ordenar un cumplimiento específico es obviar la naturaleza de la reparación integral, así como el criterio Chorzów, a partir del cual se estableció como un principio del derecho internacional la restitución integral, la que tiene como cometido reestablecer la situación jurídica de la víctima antes del daño. Según este criterio, las sanciones empleadas para alcanzar la situación jurídica del dañado serán reparaciones monetarias o restituciones según lo que exija las características del caso concreto:

> The essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals - is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it-such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[14]

Asimismo, de lo anterior se sigue que en el caso Chorzów se haya establecido la posibilidad para el dañado de optar por una restitución o por una reparación por daños: "The Party who has been dispossessed has a choice of remedies. He may claim restitution of the property taken. This is what is meant by restitutio in integrum. He may on the other hand abandon any claim to restitution of the actual property and claim damages instead."[15]

De otro lado, cabe resaltar la posibilidad de que un tribunal se vea impedido de

[13] Aunque estamos hablando de remedios no pecuniarios, no debe confundirse con una orden judicial contra la demanda. La principal diferencia es que esta última es una medida contra una parte que tiene o está a punto de iniciar un reclamo ante el tribunal de otro estado en violación del acuerdo de arbitraje, pero no contra el tribunal nacional o el estado.

[14] Factory at Chorzow (Germ. V. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (13 de septiembre), ¶ 125.

[15] *Id.* ¶ 207.

aplicar reparaciones no pecuniarias si es que el TBI aplicable así lo dispone. Un ejemplo de esta postura es el criterio adoptado por el tribunal en el caso *European Media Ventures S.A. v. Czech Republic*:

> The Tribunal does not have the power to issue declaratory relief of the sort claimed by the Claimant or at all. This is clear from the language in Article 8(1) [of the BIT] which states that arbitral jurisdiction is limited to disputes 'concerning compensation due'. To the extent that any other relief may be appropriate, even for breach of Article 3(1) [expropriation], it would seem no arbitral tribunal has jurisdiction to grant such relief.[16]

Y es que, en efecto, no hay buenas razones en el horizonte para pensar que un laudo del CIADI de contenido no pecuniario no pueda ejecutarse. En términos legislativos, la única razón aparente es la literalidad del artículo 54 de la Convención, la que es fácil de circunvalar con una adecuada interpretación que contemple el fin de la reparación integral y la casuística de los tribunales CIADI y del derecho internacional.

IV. APLICACIÓN SUPLETORIA DE LA CONVENCIÓN DE NUEVA YORK

Pese a las razones anteriores, si se estuviera ante el escenario de que los tribunales no tengan la autoridad para hacer cumplir las medidas inmateriales, existe otra alternativa en la que puede confiar la parte prevaleciente. La Convención de Nueva York es el último recurso en el que una parte puede confiar como plan de contingencia en caso los tribunales del CIADI requieran aplicar medidas no pecuniarias.

La Convención de Nueva York en su artículo III establece: "Cada uno de los Estados Contratantes reconocerá la autoridad de la sentencia arbitral y concederá su ejecución de conformidad con las normas de procedimiento vigentes en el territorio donde la sentencia sea invocada[.]"[17]

Este Convenio no contiene limitaciones ni hace distinciones sobre el tipo de obligaciones—pecuniarias o no pecuniarias—que debe contener un laudo para su ejecución; por tanto, se trata de un instrumento legal idóneo para la ejecución de

[16] European Media Ventures SA v. The Czech Republic, CNUDMI, Decisión sobre Jurisdicción, ¶ 82 (15 de mayo de 2007).

[17] Convención sobre el Reconocimiento y la Ejecución de las Sentencias Arbitrales Extranjeras, 10 de junio de 1958, art. III, 330 U.N.T.S. 38, 7 I.L.M. 1046 ["Convención de Nueva York"].

sanciones no pecuniarias que sirve de válvula de escape en caso se haya cerrado la posibilidad de ejecución mediante el Convenio CIADI u otros acuerdos.[18]

Por otro lado, la Convención de Nueva York en su artículo I(3) establece que todo estado "[p]odrá también declarar que sólo aplicará la Convención a los litigios surgidos de relaciones jurídicas, sean o no contractuales, consideradas comerciales por su derecho interno."[19] Este artículo recoge la reserva comercial, por medio de la cual, un inversor puede toparse con la sorpresa de que el tribunal competente para otorgarle el exequatur se lo deniegue. Entonces, la pregunta inevitable es si un arbitraje de inversión puede considerarse comercial y, así, superar la reserva comercial.

Sobre el particular, no hay una definición precisa para delinear el carácter de comercial en la Convención de Nueva York.[20] Lo normal es ver un acuerdo entre una corporación de inversionistas extranjeros y un estado mediante cláusulas internacionales típicas (*e.g.*, de la CCI o la LCIA); no obstante, ante una disputa, por lo general la empresa inversora extranjera dependerá de un TBI para iniciar un arbitraje

[18] *Ver* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3177 (3rd ed. 2021) ("[I]t is well-settled that an award, within the meaning of the New York Convention, includes instruments ordering non-monetary relief (*e.g.*, declaratory or injunctive relief) and monetary relief."); Ricardo Vásquez, *Cumplimiento y ejecución del laudo arbitral CIADI*, ESTADO DIARIO (2 de octubre de 2018), https://estadodiario.com/columnas/cumplimiento-y-ejecucion-del-laudo-arbitral-ciadi/ ("Una de las grandes fortalezas de la Convención del CIADI es que ella es aún más favorable que la Convención de Nueva York al reconocimiento y la ejecución de un laudo. La Convención no permite que se rechace la ejecución de un laudo. Es más, requiere a la corte local del Estado contratante que reconozca y declare el pago de los perjuicios monetarios otorgados en el laudo de forma inmediata, como si se tratase de una sentencia definitiva dictada por una corte local de ese Estado. El tribunal local no puede anular un laudo por tratarse de un laudo dictado internacionalmente bajo las reglas del CIADI, en vez del derecho local. Sin perjuicio de ello, debe precisarse que el artículo 54(1) del Convenio, sin embargo, distingue entre la ejecución de daños pecuniarios y no pecuniarios. En efecto, solo exige al Estado que reconozca el laudo con carácter obligatorio, pero hace ejecutables exclusivamente a los daños pecuniarios. Ello significa que aquellos daños no pecuniarios, por ejemplo, la restitución de una propiedad embargada o el término de una restricción a la transferencia de capitales por parte de ese Estado al inversionista deberá exigirse bajo la Convención de Nueva York.").

[19] Convención de Nueva York, *supra* nota 17, art. I(3).

[20] Bernardo Cremades, *Regulación Nacional de Arbitraje y la Convención de Nueva York*, 1 REVISTA PERUANA DE ARBITRAJE 179, 184 (2005) ("Ante la posibilidad de diferentes criterios de apreciación en la definición de disputa comercial, la Ley Modelo ofrece criterios armonizadores, otorgando una interpretación amplia del término comercial, con el fin de abarcar el mayor número de cuestiones que puedan plantearse en el ámbito de las relaciones de índole comercial, contractual o no.").

de inversión en un foro del CIADI.[21] Esto puede deberse a varias razones, como que el procedimiento de arbitraje del CIADI es menos costoso que un procedimiento de la CCI, el TBI brinda a la parte inversionista extranjera garantías adicionales como el trato más favorable, trato justo y equitativo, protección contra cláusulas de expropiación, etc., y, como se mencionó anteriormente, el CIADI tiene un sistema autónomo que hace a la ejecución del laudo más probable de cumplirse.[22]

En definitiva, y asumiendo que la reserva comercial no sea un impedimento, el Convenio de Nueva York es un soporte legal importante que permitiría la ejecución de un laudo no pecuniario en el supuesto de que esta se haya denegado en virtud del Convenio CIADI.

V. SOBRE LA SOBERANÍA DE LOS ESTADOS Y LOS LÍMITES EN LA EJECUCIÓN DE REPARACIONES NO PECUNIARIAS

Otra de las principales razones arrojadas para no aceptar la ejecución de reparaciones no pecuniarias es la soberanía de los estados.[23] Esto, aparentemente, constituye un freno en la ejecución de obligaciones impuestas al estado. Sin duda que la soberanía revindica a los estados, otorgándoles un poder importante.

Primero debemos diferenciar entre la soberanía como concepto constitucional y como concepto del derecho internacional. El primero se refiere al poder indelegable

[21] *Ver en general* Karl-Heinz Böckstiegel, *Commercial and Investment Arbitration: How Different are they Today?*, 28(4) ARB. INT'L 577 (2012).

[22] Marco Antonio Huamán Sialer, *Arbitraje comercial internacional en materia de inversiones: reconocimiento y ejecución de laudos arbitrales expedidos por el CIADI en el Estado Peruano*, 13(15) LEX – REVISTA DE LA FACULTAD DE DERECHO Y CIENCIA POLÍTICA 283, 293 (2015) ("La característica más sobresaliente que diferencia a los arbitrajes llevados a cabo en la sede del CIADI, conocida también por sus siglas en inglés como ICSID, con otros tipos de arbitraje comercial es la total autonomía e independencia del procedimiento, siendo que las reglas mediante las cuales se rige son de carácter internacional, debido a que se fundamentan en un tratado, el cual ha sido ratificado por 140 países."); Osvaldo Marzorati, *Algunas reflexiones sobre el alcance de la protección de las inversiones en el marco de los tratados firmados por Argentina*, 1 REVISTA PERUANA DE ARBITRAJE 71, 107 (2005) ("Las reglas del CIADI tienen carácter autónomo, en el sentido de que son independientes del Derecho Nacional (se respeta la sede del arbitraje o el Estado en cuyo territorio se pretenderá el reconocimiento de la sentencia), y no son objeto de control por parte de los tribunales nacionales.").

[23] Por ejemplo, en el caso *Benvenuti & Bonfanti v. Congo* el Tribunal de Primera Instancia de París determinó que no se podía ejecutar el laudo en contra de los activos del Congo ubicados en Francia sin antes no tener su autorización, porque esos activos podían estar protegidos por inmunidad soberana. *Ver* Nassib G. Ziadé, *Some Recent Decisions in ICSID Cases*, 6(2) ICSID REV. 514, 523 (1991). Similares decisiones pueden encontrarse en *SOABI v. Senegal* y *LETCO v. Liberia*. *Ver* Ziadé, *Some Recent Decisions* a 521-25.

que tiene cada estado para fabricar sus propias normas, mientras que, en la esfera internacional, la soberanía alude a la capacidad que tiene un estado, precisamente, para asumir compromisos internacionales.

Guastini define a la soberanía como sigue: "La soberanía de los estados, en tanto presupuesto de la aplicabilidad de normas internacionales, es precisamente la condicio sine qua non de la existencia de obligaciones internacionales, y entonces de limitaciones jurídicas, para los estados. Es decir, la soberanía internacional no excluye, sino implica limitaciones jurídicas."[24]

Es decir, que es la soberanía la que permite imponerle obligaciones a un estado en primer lugar, de modo que la imposición de obligaciones o sanciones no comporta automáticamente quitarles soberanía a los estados. Se suele entender el problema de la soberanía como una injerencia en la jurisdicción del estado; no obstante, la resolución de una disputa mediante la vía arbitral no significa quitarle jurisdicción a un estado, esta sigue intacta, es solo que dicha jurisdicción en estos casos simplemente no la tiene el estado.

Preguntémonos, ¿en qué medida, por ejemplo, obligar a un estado a devolver un pedazo de tierra es una injerencia en su soberanía? Nótese que se ha usado el ejemplo más notorio posible de injerencia (la entrega de terreno). En la medida que se trate de un terreno ilegítimamente expropiado al inversor, de ninguna manera se infringe la soberanía del estado; primero, porque el estado no es el que ha fallado sobre el destino del terreno (sino un tribunal privado o internacional) y segundo, porque el derecho de propiedad en el caso concreto le pertenece al inversor, por tanto, no se le está quitando nada al estado.

En suma, el argumento de la injerencia en la soberanía de los estados nace de un miedo infundado, pero una mirada de cerca al problema debería poder despejar el miedo, con lo cual, las reparaciones no pecuniarias son perfectamente compatibles con la soberanía de los estados.

VI. CONCLUSIONES

[24]Riccardo Guastini, *Ernesto Garzón Valdés sobre la soberanía: Un comentario*, 30 DOXA, CUADERNOS DE FILOSOFÍA DEL DERECHO 117, 121 (2007).

La primera parte de este artículo analizó si los tribunales del CIADI podían hacer cumplir las reparaciones no pecuniarias. Al respecto, nos encontramos con dos corrientes de opinión.

La primera establece que los tribunales del CIADI no están facultados por el Convenio del CIADI para hacer cumplir las reparaciones no pecuniarias y que todo lo que pueden hacer es otorgar una reparación pecuniaria en forma de daños. A lo mucho, estos tribunales arbitrales pueden exhortar al estado soberano para que cese la acción u omisión cuyo resultado está causando daños al inversionista.

Por otro lado, existe la opinión de que los tribunales del CIADI pueden hacer cumplir las reparaciones inmateriales y que los árbitros no deben hacer una interpretación limitada y literal del artículo 54 del Convenio del CIADI, por tanto, deben interpretar dicho artículo con el artículo 53 (que establece el cumplimiento obligatorio de los laudos). Como resultado, si el inversionista extranjero reclama una reparación no pecuniaria contra un estado, entonces el panel del CIADI tendría que poder dar cumplimiento a esa decisión si los méritos del caso lo permiten.

Otra razón convincente por la cual los tribunales del CIADI tienen las atribuciones para otorgar reparaciones no monetarias, nace del hecho de que otras legislaciones sobre inversión permiten que los paneles arbitrales apliquen reparaciones no monetarias (como el TLCAN y el TCE), entonces, ¿por qué los tribunales del CIADI no pueden aplicar medidas similares?

Sin lugar a duda, existe una amplia gama de posibilidades de obligaciones inmateriales que se pueden imponer, como la restitución de bienes incautados, la devolución de una licencia o la no recaudación de impuestos irrazonables, así como la concesión de un permiso para transferir divisas y la interrupción del hostigamiento hacia el personal del inversor. Es decir, sí existen las formas de reparaciones no pecuniarias como herramientas útiles y listas para usarse. Solo falta la habilitación normativa.

Distinto es que los tribunales del CIADI usualmente impongan obligaciones pecuniarias en sus laudos; esto responde a una mecánica diferente, más no a la incapacidad de hacer cumplir las reparaciones no pecuniarias. Esto se hace

principalmente porque los inversionistas extranjeros prefieren estructurar sus reclamos en términos monetarios, principalmente, porque es mucho más práctico (tiene mayor sentido financiero) que reclamar reparaciones no pecuniarias. No obstante, eso no significa que los tribunales del CIADI carezcan del poder para imponer reparaciones no monetarias.

Por lo demás, existe jurisprudencia sobre la materia que privilegia la posición mediante la cual se le da alternativas al dañado para que, según las características del caso, elija entre una reparación, una restitución o una mezcla de ambas. Lo contrario limitaría el Convenio del CIADI y al arbitraje de inversión como institución, a una mera organización cuyo único objetivo es otorgar una compensación a un inversor cuyos derechos han sido violados. Esto soslaya que, en el derecho internacional, el fin último de la resolución de una disputa es hacer prevalecer la situación jurídica del dañado previa a la lesión y que, según el caso, esta podrá alcanzarse con una reparación monetaria o con una restitución (o incluso una mezcla de ambas), ya que en el fondo ambas son medios para reestablecer la situación jurídica previa al daño.

Sin perjuicio de lo anterior, existe una forma alternativa de hacer cumplir las reparaciones no pecuniarias del tribunal CIADI es a través de la Convención de Nueva York. Aunque el alcance de la Convención de Nueva York se limita a las diferencias comerciales, es seguro afirmar que las actividades de inversión de un inversor extranjero en otro estado deben considerarse comerciales, por lo que no debería haber ningún problema en ese sentido. Naturalmente, debemos tener en cuenta que tanto el inversionista extranjero como el estado anfitrión deben ser miembros de la Convención de Nueva York, de lo contrario, esta forma alternativa no podría usarse como un medio para hacer cumplir las reparaciones no pecuniarias.

Finalmente, el argumento de que las reparaciones no pecuniarias atentan contra la soberanía de los estados, se trata en realidad, de una preocupación infundada. Un acercamiento al problema revela que al ejecutarse estas reparaciones no se pone en riesgo la soberanía de los estados y que, más bien, es precisamente la soberanía (entendida como la capacidad de contraer obligaciones internacionales) la que permite la ejecución de obligaciones no pecuniarias.

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A CRITICAL ANALYSIS OF LEGITIMATE EXPECTATION VIS-À-VIS EU BLOCKING REGULATIONS

by Niyati Ahuja & Naimeh Masumy

I. INTRODUCTION

Blocking regulations are a national legislation creation designed to hinder the extraterritorial application of law created by a foreign jurisdiction.[1] The EU Blocking Regulation of 1996 (Regulation (EC) 2271/96) was first introduced on November 22, 1996 for the protection of EU businesses against the effects of the extraterritorial application of legislation adopted by any third country.[2]

On June 6, 2018, the EU updated the annexure to its Blocking Regulation to include the US extraterritorial sanctions regime.[3] This was done with the aim of mitigating the extraterritorial impact of US sanctions on EU entities engaged in trade with Iran and preserving their interests.[4] The uncertainty to cross-border investments caused by the interplay of US and EU laws is unprecedented. Notably, it raises speculations regarding their role in investment-related disputes. To date, it remains unsettled whether blocking regulations are an effective measure to protect the interests of foreign investors and their underlying investments. It is therefore imperative to understand how blocking regulations operate within the scope of investment arbitration and their impact on investors seeking to invest in the EU. In light of this, our article analyzes whether blocking regulations invoke legitimate expectations through the lens of investment arbitration.

The first part of this article sets out a brief overview of the genesis of the doctrine of legitimate expectations. It examines the normative underpinnings of the concept

[1] Giesela Ruehl, *The Renaissance of the Blocking Statute*, CONFLICTOFLAWS.NET (Dec. 12, 2018), https://conflictoflaws.net/2018/the-renaissance-of-the-blocking-statute/.

[2] CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 18 (2008).

[3] Council *Regulation* (EC) No 2271/96 of 22 November 1996, https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf.

[4] M. Andreeva, *Updated Blocking Statute in Support of Iran Nuclear Deal enters into Force*, European Commission-Press Release (Aug. 6, 2018), https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4805.

of legitimate expectations, exploring its evolution and the ways in which it has been applied within the context of investment arbitration. It then proceeds to elaborate why the invocation of legitimate expectations has been largely grounded on precedent, that is, awards citing to precedent to establish a violation of this principle. It contends that a coherent international law basis of legitimate expectations is necessary for the uniform application of this principle. The article then examines the use of the EU Blocking Regulation to determine its appropriateness within the context of investment arbitration. Finally, this article delves into the viability of this Regulation in generating legitimate expectations.

II. LEGITIMATE EXPECTATIONS

The doctrine of legitimate expectations refers to the justifiable and reasonable expectations of investors invoked by the consistent conduct of a host state.[5] In principle, these expectations provide investors with a recourse in circumstances where the conduct of a government or an administrative entity conveys an understanding that the investor will reap or continue to reap substantive and procedural benefits, and then acts inconsistently with its prior conduct.[6] Generally, these expectations can be engendered either by specific commitments addressed to particular investors or by a set of rules, assurances, policies, or presentations aimed at promoting and enhancing foreign investments.[7] If an investor relies on the promises and conduct of a host state but suffers damages because of the failure of the host state to honor such expectations, it amounts to a violation of the principle of legitimate expectations.[8]

Despite the widespread use of the principle of legitimate expectations in

[5] *See* MCLACHLAN ET AL., *supra* note 2.

[6] PAUL CRAIG, ADMINISTRATIVE LAW 677 (7th ed. 2012); Farrah Ahmed & Adam Perry, *The Coherence of the Doctrine of Legitimate Expectations*, 73 CAMBRIDGE L.J. 61, 67 (2014).

[7] Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under* NAFTA *Article* 1105, 31 J. OF INT'L ARB. 47 (2014); *see also* Charanne Construction v. Spain, SCC Case No. 062/2012, Award. ¶ 494 (Jan. 21, 2016); Metalclad Corp. v. Mexico, ICSID No. ARB(AF)/97/1, Award, ¶ 89 (Aug. 30, 2000).

[8] FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 69, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005).

investment arbitration, as evidenced by the large number of arbitral awards, tribunals have not identified a generally applicable definition of this principle, instead basing its application on the particular facts of each case.[9] This is due to various factors: firstly, the contour of this principle is not precisely explained because of the imprecise nature of the legal basis of the concept of legitimate expectations. It remains unclear whether the principle of legitimate expectations is only a constituent component of the Fair and Equitable Treatment ("FET") standard or if it has evolved into a stand-alone doctrine.[10] Secondly, the principle of legitimate expectations is neither absolute[11] nor binding[12] (unless codified or memorialized into an agreement) and may be interpreted inconsistently across the board, making it susceptible to diverging interpretations.

The following section provides a brief description of the origin of legitimate expectations by scrutinizing domestic legal systems and the EU legal framework with an intent to identify the salient features of this principle. It then proceeds to investigate the criteria considered by arbitral tribunals when examining the alleged violation of this principle. Finally, this section examines if there is a concrete benchmark to evaluate this principle.

A. *Genesis of the Legitimate Expectations Principle*

The concept of legitimate expectations was first introduced in the context of private law.[13] It then developed into a central principle of administrative law in the

[9] *See e.g.*, ADF Group Inc. v. United States, ICSID No. ARB (AF)/00/1, Award, (Jan. 9, 2003); Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada, ICSID No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012); Glamis Gold, Ltd. v. United States, UNCITRAL, Award (June 8, 2009); ADF Group Inc. v. United States, ICSID No. ARB (AF)/00/1, Award (Jan. 9, 2003); Grand River Enterprises Six Nations, Ltd. v. United States, UNCITRAL, Award, (Jan. 12, 2011).

[10] Patrick Dumberry, The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105 (Wolters Kluwer, 2013); E. Snodgrass, *Protecting Investors' Legitimate Expectations and Recognizing and Delimiting a General Principle*, 21 ICSID REV. 53 (2006); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVEST. & TRADE 363–366, 365, 385 (2005); *see also* International Thunderbird Gaming Corp. v. Mexico, Separate Opinion of Thomas Wälde, ¶ 30 (Dec. 2005); Mobil, *supra* note 9, ¶ 153.

[11] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007).

[12] Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 151, 156-157 (2010).

[13] Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, 11(4) EUR. PUB. L. 583, 586 (2005).

UK and European law in the judicial review sphere.[14] Initially, only procedural protections (such as the ability to participate in hearings) were granted to the party whose legitimate expectations were infringed.[15] Gradually, a number of legal systems started extending substantive protections as an additional component of protection under this principle.[16]

Although the concept of legitimate expectations has transformed from the mere expectation of procedural safeguards to including a substantive element,[17] this evolution has not yet been fully recognized by all jurisdictions.[18] For example, Latin American states serve as prime examples where legitimate expectations are limited to the revocation of formal administrative decisions that created rights to the benefit of a private party.[19] Similarly, English courts exhibit reluctance to intervene when investors' expectations are frustrated by general changes of policy.[20] States like Canada and Australia have adopted a fairly restrictive approach in extending judicial protection in cases where substantive expectations have been frustrated. These states have taken the view that the expectation stemming from the exercise of administrative power may only give rise to procedural rights.[21]

This indicates that despite the existence of this principle in many domestic legal systems, its scope of protection is not uniformly applicable. The inconsistent application of the principle of legitimate expectations also impacts its operation

[14] MATTHEW GROVES & GREG WEEKS, LEGITIMATE EXPECTATIONS IN THE COMMON LAW WORLD 23 (2017).

[15] Parkerings, *supra* note 11, at 584; *see also* C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMBRIDGE L.J. 238 (1988); N. Teggi, *Legitimate Expectations in Investment Arbitration: At the end of its life-cycle*, 5 (1) INDIAN J. OF ARB. L., 64–80 (2016).

[16] P. Craig, *Grounds for Judicial Review: Substantive Control over Discretion*, ENG. PUB. L. 831, 843–866 (2004).

[17] PETER LEYLAND & GORDON ANTHONY, TEXTBOOK ON ADMINISTRATIVE LAW 363 (8th ed. 2016).

[18] *See, e.g.*, Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REV. 88-122 (2013); *see also* Paul Craig, *Substantive Legitimate Expectations, Domestic and Community Law*, 55(2) CAMBRIDGE L.J. 289, 290 (1996).

[19] Hector A. Mairal, *Legitimate Expectations and Informal Administrative Representations*, *in* INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW, 413, 416-417 (2010).

[20] *R (Niazi) v. Secretary of State for the Home Department* [2008] EWCA (Civ) 755, ¶ 43.

[21] Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49(1) ALTA. L. REV., 203, 214-15 (2011).

within the broader realm of investment arbitration.

In recent years, the concept of legitimate expectations has gained a strong foothold as the basis for a claim in investment arbitration.[22] Tribunals have regarded the doctrine of legitimate expectations as a dominant component of the FET standard.[23] In this context, legitimate expectations are perceived as an incentive by investors to seek particular host states based on their attractive legal structure and representations made by the host state.[24] In addition, while this concept has been largely regarded as a core constituent of the FET standard, some scholars believe that this concept has evolved into a stand-alone doctrine, analogous to that of a general principle of international law.[25]

B. *Legitimate Expectations vis-à-vis International Law*

International law standards play a significant role in international investment arbitration by reinforcing roles and expectations and by distributing power and authority amongst decision makers.[26] When we draw upon methods employed by arbitrators to situate the investor within the legal framework of state responsibility, most legal authorities do not provide substantive norms for the principle of legitimate expectations. Despite the lack of an anchor, various scholars contend that the concept of legitimate expectations has evolved into a stand-alone doctrine, or possibly a distinct principle of law, entailing substantive norms.[27] They hold the view that the basis for the legitimate expectations principle is no longer anchored in the FET standard.

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[22] International Thunderbird, *supra* note 10, ¶ 37.

[23] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 298 (Sept. 28, 2007).

[24] C. Sschreuer & U. Kriebaum, *At What Time Must Legitimate Expectations Exist*, *in* A LIBER AMICORUM THOMAS WÄLDE, CMP Publishing 273 (2009).

[25] Emmanuel T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 1–24 (2020).

[26] Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20(3) AM. U. INT'L L. REV. 465, 467 (2005).

[27] *See, e.g.*, Yenkong Nganjo-Hodu & Collins C. Ajibo, *Legitimate Expectation in Investor-State Arbitration: Recontextualising a Controversial Concept from a Developing Country Perspective*, 15 MANCHESTER J. OF INT'L ECON. L. 45,48, 57 (2018); *see also* Julien Chaisse & Sum-yu (Ruby) Ng, *The Doctrine of Legitimate Expectations: Comparing International Law and Common Law in Hong Kong*, 48(1) H.K. L.J. 79, 81 (2018).

The EU iteration of the legitimate expectations principle also supports its convergence with general principles of international law.[28] The Court of Justice of the European Union (CJEU) has recognized the principle of legitimate expectations as a general principle of EU law in numerous cases where EU administrative acts or decisions were challenged.[29] In furtherance of the direct link between investor interests and legal certainty, the doctrine of legitimate expectations has been classified as a fundamental principle of the European legal system.[30]

The doctrine of legitimate expectations was addressed by the European Court of Human Rights (ECtHR) in *Sunday Times v. United Kingdom*. In this case, the ECHR summarized two requirements that flow from the expression "prescribed by law." First, that the law must be adequately accessible to the citizens. Second, a norm shall be regarded as a "law" if it is formulated with sufficient precision to enable the citizen to regulate his conduct, such that he can foresee, to a reasonable degree, the consequences of an action. Additionally, the law must not be too rigid, and must keep pace with changing circumstances.[31] The court considered that the principle of legitimate expectations often arises when new legislation is introduced, especially if the new rules have retroactive effect or if they interfere with a behavior which had been specifically encouraged by the state.[32]

In addition to this, cognizance must be taken of the fact that the EU regulatory framework poses certain complications for international investments. This is because in a claim for a violation of this standard, one carries the burden to question the regulatory competency of the EU or the international agreement concluded by

[28] Moreiro González, Carlos J., *The Convergence of Recent International Investment Awards and Case Law on the Principle of Legitimate Expectations: Towards Common Criteria Regarding Fair and Equitable Treatment*? 42 EUR. L. REV. 402–419 (2017).

[29] *See, e.g.*, Case 120/86, Mulder v Minister van Landbouw en Visserij ECR 2321 (1988) Case 111/63, Lemmerz-Werke v High Authority of the ECSC ECR 677 (1965); Case C-563/12, BDV Hung. Trading Kft v. Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága, ECLI:EU:C:2013:854 (Dec. 19, 2013); s*ee also* Jürgen Schwarze, European Administrative Law, Sweet & Maxwell 941, 942 (2006).

[30] Case C-81/10 P, Fr. Télécom SA v. Eur. Comm'n, Opinion of Advocate General Jaaskinen, ECLI:EU:C:2011:554, ¶ 159 (Sept. 8, 2011).

[31] The Sunday Times v. The United Kingdom, App. No. 6538/74, Eur. Ct. H.R., Merits, ¶ 49 (Apr. 26, 1979).

[32] Scoppola v. Italy (No. 2), App. No. 50550/06, Eur. Ct. H.R, ¶¶ 137-138 (Sept. 17, 2009).

its member states. Proving such competence is not straightforward, as some of the matters captured in international investment treaties fall within the exclusive jurisdiction of the EU. On the other hand, there are several other objectives enshrined in the Treaty on the Functioning of the European Union (TFEU) that are considered to fall within the common competence of both the EU and the member states. Some arbitral awards in recent years raise issues pertaining to the recognition of an investment arbitration tribunal's authority and execution over intra-EU disputes.[33]

The inducement of legitimate expectations implies that such expectations are generated or conferred upon a party only when that party has been given precise, unconditional, and consistent assurances by authorized representatives of the host state in accordance with its applicable laws. To that end, some tribunals have established that legitimate expectations arise when a state makes a representation, *i.e.*, a promise to do or not to do something to an investor, and the investor subsequently invests on that basis.[34]

Contrary to the views held by the ECHR and the CJEU, the International Court of Justice (ICJ) adopted a different stance in *Bolivia v. Chile* in 2018.[35] The ICJ distinguished between the obligations arising out of treaties and those arising out of international law.[36] The court held that while such obligations may arise from treaty clauses (or bilateral investment treaties where the principle of legitimate expectations is often encompassed within the FET standard), international law does

[33] *Micula. v. Gov't of Romania*, 15-3109-cv (2nd Circuit 2015), Amicus Curiae by the Commission of the European Union in support of Defendant Appellant; *see also* Case C-284/16 *Slovak Republic v. Achmea* BV [2018], ECLI:EU:C:2018:158. The analyses viewing intra-EU BITs incompatible with EU law and therefore inapplicable include *e.g.*: Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, 39 LEGAL ISSUES OF ECON. INTEGRATION 179 (2012); Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law*, 48 COMMON MKT. L. REV. 63 (2011).

[34] Nitish Monebhurrun, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 32(5) J. INT'L ARB. 551, 552-553 (2015). For case examples, *see* Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014); Parkerings, *supra* note 11.

[35] Obligation to negotiate access to the Pacific Ocean, *Bolivia v. Chile*, Judgment on Merits (Oct. 1, 2015).

[36] *Id.* ¶ 162.

not enshrine any principle generating binding obligations purely arising from a state's legislative acts or policies.[37] In arriving at its decision, the court noted:

> [R]eferences to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.[38]

Effectively, the breach of an investor's expectation without an appropriate protection under the investment contract or treaty from the perspective of the taxonomy of different international legal regimes would not give rise to a binding obligation. In fact, the excessive reliance by some tribunals on the legitimate or reasonable expectations of investors led one annulment committee of *MTD. v. Chile* to note that "[t]he obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."[39] This position has been echoed in *Charanne v. Spain* where the tribunal observed that in the absence of a specific commitment towards stability, an investor cannot have a legitimate expectation that a regulatory framework will not be modified to adapt to the needs of the market.[40] *Impregilo v. Argentina* stands for the same proposition.[41] The ruling in this case suggests that the frustration of contractual expectations is not, without something further, protected under the fair and equitable standard.[42] This is consistent with the international law on state responsibility whereby a breach of contract with an alien is not, without more, considered a breach of international law.[43]

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[37] *Id.* ¶ 171.

[38] *Id.*

[39] MTD Equity Sdn Bhd. v. Republic of Chile, ICSID Case No. ARB/01/07, Decision on Annulment, ¶ 67 (Mar. 21, 2007).

[40] Charanne B.V. v. *Kingdom of* Spain, SCC Case No. V 062/2012, Award, ¶ 486 (Jan. 21, 2016).

[41] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Award, ¶ 292 (June 21, 2011).

[42] *Id.* ¶ 292.

[43] Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10, at art. 4, cmt. ¶ 6 (2001), *reprinted in* [2001] 2(2) Y.B. Int'l L. Comm'n 40, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

As a result, owing to the varying information available for evaluating legitimate expectations under international law, this principle may be susceptible to divergent interpretations and applications. Such varying interpretations stem from the analysis by arbitral tribunals into the meaning of the investment protections under either customary or international law.

The authors suggest that the lack of a uniform international law definition has been detrimental to the principle of legitimate expectations because it prevents tribunals from endorsing well-established authorities to justify their reliance on the principle. As such, this has led to the patchy, inconsistent application of the principle. A line of recent cases illustrates an inclination towards establishing the concrete existence of the doctrine by citing to prior decisions.[44]

This article argues that despite the distinct interpretations and applications by tribunals, there exists common criteria regarding the treatment of legitimate expectations by tribunals. At first glance, these criteria might come across as eclectic. However, a deeper analysis has led to identification of core standards recognized across the board. To this end, the authors have identified four main components connecting these awards: (i) regulatory guarantees and commitments under contracts; (ii) clarity and unambiguity regarding protection of expectations; (iii) intention behind promises and commitments made by the host state; and (iv) the reasonableness of the expectations so created.

1. Regulatory Guarantees and Commitments Made through Contracts

Arbitral tribunals generally draw a distinction between a contractual undertaking and the independent legislative framework adopted by governments to bolster their investment climate. Tribunals scrutinize the source of commitments giving rise to expectations. On the one hand, a state may make a commitment in the form of a law in favor of a class of investors providing a set of elements for ensuring the operation of promoted investments,[45] while on the other hand a state could execute a

[44] M. Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REVIEW 112 (2013).

[45] Deyan Draguiev, *Legitimate Expectations in Renewable Energy Treaty Arbitrations: The Lessons So Far*, KLUWER ARB. BLOG (Mar. 22, 2018).

contractual agreement with investors to stabilize its legislation or provide concessions under a contract (usually development agreements or concession agreements). The *Parkerings* tribunal held that "[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment."[46] In *Continental Casualty v. Argentina*, for instance, Argentina provided certain contractual commitments to foreign investors. The tribunal emphasized that "unilateral modification of contractual undertaking by governments . . . deserve clearly more scrutiny [as compared to political statements and general legislative assurances] in . . . light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance."[47] This line of reasoning was also echoed in Gustav v. Ghana where the tribunal underscored that "the existence of legitimate expectations and the existence of contractual rights are two separate issues."[48] This same proposition was in turn iterated by the tribunal in *Impregilo v. Argentina.*[49]

2. Clarity and Unambiguity regarding Protection of Expectations

Arbitral tribunals place significant weight on the language used by states when making promises and assurances to induce investment. Tribunals exercise caution and limit the protection of expectations to situations where the policies and regulatory guarantees embody explicit, clear, and unambiguous protections. For example, in *Total v. Argentina*, the ICSID tribunal highlighted that under domestic law "only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake."[50] In a similar vein, the tribunal in *Occidental v. Ecuador* referred to the preamble of the BIT to conclude that "stability of the legal and business framework is . . . an essential element of fair and

[46] Parkerings, *supra* note 11, at ¶ 331.

[47] *Id.* ¶ 261.

[48] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 335 (June 18, 2010).

[49] Impregilo, *supra* note 41.

[50] Total v. Argentina, ICSID Case No. ARB/04/01 Decision on Liability ¶ 129 (Dec. 27, 2010).

equitable treatment."[51] The *Enron v. Argentina* tribunal followed this position, holding that a "key element of fair and equitable treatment" is the requirement of a "stable framework for investment."[52]

3. Intention behind the Promises and Commitments made by the Host State

Another teleological element that tribunals often factor into their analysis is whether the representations made by states had the purpose of inducing investment. The tribunal in *Glamis Gold v. United States* took this stance and held that the host state may be held accountable for the objective expectations that it sets out to induce investment.[53] Further, in *Sempra Energy v. Argentina*, the tribunal noted that the requirement to protect legitimate expectations "becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations."[54] It is, therefore, established that the violation of the legitimate expectations standard requires something more than mere disappointments; it requires an active inducement of quasi-contractual expectations.[55] In addition, the reliance of investors on those promises is an equally resolute criteria that most tribunals take into account when holding states liable for the frustration of the principle. In PSEG. v. Turkey, the tribunal held that Turkey's policy to encourage and welcome investment was not a violation of legitimate expectations after noting that "[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed."[56]

4. Reasonableness in having Legitimate Expectations

Reasonableness is the hallmark of the principle of legitimate expectations. As explained above, various tribunals have held that the actions taken by the state ought to form a clear, unambiguous commitment that the regulatory framework will remain

[51] Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN 3467, Award, ¶ 183 (July 1, 2004).

[52] Enron Corp. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶ 260 (May 22, 2007).

[53] Glamis Gold, Ltd. v. United States, NAFTA/UNCITRAL, Award, ¶ 766 (June 8, 2009).

[54] Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 298 (Sept. 28, 2007).

[55] Glamis Gold, *supra* note 53, at ¶ 799.

[56] PSEG Glob. Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 241 (Jan. 19, 2007).

unchanged.[57] In addition to a specific commitment, it must be reasonable for the investor to have "expectations" that the promises and commitments will be honored by the host state. In the case of the fair and equitable treatment standard, the benchmark for "reasonableness" does not lie in the expectations of a reasonable person, but in those of a reasonable investor that has to take the laws and regulations of the host state as it finds them, providing that these laws and regulations conform to international law.[58] The reasonableness of an expectation also means that there must be a sufficient nexus between the nature of the state declaration or conduct and the content of the investor's expectation.[59]

Saluka is seminal in this regard. In *Saluka*, the tribunal held that a "foreign investor whose interests are protected under the [the Czech Republic-Netherlands BIT] is entitled to expect that the [host] State will not act in a way that is manifestly inconsistent, non-transparent, [and] unreasonable."[60] The tribunal observed:

> No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well . . . The determination of a breach of [FET] by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interest on the other.[61]

In general, tribunals thoroughly examine the "reasonable" justification behind a state's actions. This posture was memorialized by the ICSID tribunal in *Philip Morris* which excluded the arbitrariness of restrictions on cigarette packaging aimed at protecting health.[62] The tribunal held that the FET standard had not been breached,

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[57] JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 950 (2nd ed. 2006).

[58] Part II: The Content and Scope of the FET Standard, Chapter 6: The Content of the FET Standard, in Alexandra Diehl, The Core Standard of International Investment Protection, 26 International Arbitration Law Library, 311–537 (2012).

[59] Florian Dupuy and Pierre-Marie Dupuy, *What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the "Legitimate Expectations" Doctrine in International Investment Law*, *in* NASSIB G. ZIADÉ (ED), FESTSCHRIFT AHMED SADEK EL-KOSHERI, 273–298 (2015).

[60] Saluka Invs. B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶ 309 (Mar. 17, 2006).

[61] *Id.* ¶ 305.

[62] Philip Morris Brands SÀRL v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016).

noting that in the light of the "widely accepted articulations of international concern for the harmful effect of tobacco, the [legitimate] expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products,"[63] concluding that that non-arbitrariness entails reasonableness.[64]

The notion that investors should not expect that the regulatory framework of a state would remain unchanged for long periods of time has been enshrined in various arbitral decisions as detailed herein. This also points to the potential unreasonableness arising from harboring such expectations. The tribunal in *El Paso* stressed that "legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations" examined in the context of the circumstances that are present in the host state.[65] Any assessment regarding breach of legitimate expectations "should include 'the context of the evolution of the host state's economy', as well as the 'reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account."[66] The *Charrane* tribunal held that an investor can only claim protection under the notion of legitimate expectations in the situation where regulatory measures were not "reasonably foreseeable at the time of the investment."[67] The tribunal in Isolux made similar observations about an investor's legitimate expectations only being violated if the new regulatory changes were not foreseeable by "a prudent investor."[68]

Further, the tribunal in *Parkerings v. Lithuania* summarized the change to the legal framework for investors and observed that "any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power."[69] The

[63] *Id.* ¶ 430.

[64] *Id.* ¶ 391.

[65] *El Paso v. Argentina*, ICSID Case No. ARB/03/15 Award, ¶ 358 (Oct. 31, 2011).

[66] *Total*, *supra* note 50, at ¶ 123.

[67] *Charanne Construction v. Spain*, SCC Case No. 062/2012 Award, ¶ 505 (Jan. 21, 2016).

[68] *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153 Award, ¶ 781 (July 17, 2016).

[69] *Parkerings Companiet*, *supra* note 11, at ¶ 332.

tribunal in *Eiser v. Spain* accepted that the regulatory change introduced by the state was so radical and fundamental that it affected the financial fundament of the investments and "washed away"[70] the benefits envisioned at the time of investment, and this qualified as a breach.[71] *Duke Energy* also brought up the issue of reasonableness wherein the tribunal observed that "the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State."[72]

C. *Discretionary Powers of Arbitral Tribunals*

Arbitral tribunals have a wide discretion to interpret and apply the principle of legitimate expectations. A line of recent cases shows a more empathetic interpretation of the host state's obligations, signifying the expansive discretion tribunals enjoy. In other words, these arbitral tribunals recognize certain margins of discretion for host *states to amend their legislations and policies. The ICSID tribunal in Philip* Morris recognized that the legislature enjoys a "margin of appreciation"[73] to which international arbitrators should pay "great deference,"[74] and held that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State's rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances. Thus, tribunals intervene only if there is a very serious imbalance between a party's reasonable expectation and the wider public interest in a decision which will disappoint it.[75] Tribunals look into the corresponding regulatory framework, and the foresight that this may be modified or changed with regards to that existing at the time the

[70] *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Award, ¶¶ 389 (May 4, 2017).

[71] *Id.* ¶¶ 371, 379, 382.

[72] *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award ¶ 340 (Aug. 18, 2008).

[73] *Philip Morris*, *supra* note 60, at ¶ 388.

[74] *Id.* at ¶ 399.

[75] SØREN SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 112 (2000).

investment is made.[76]

In exercising their discretion, tribunals attribute great significance to the importance of commercial considerations. In *Genin v. Estonia*, the tribunal determined that Estonia's regulatory investigations against the Estonian Innovation Bank, controlled by US citizen Alex Genin, were non-discriminatory and "constituted entirely legitimate and fully proper exercises of the central bank's regulatory and supervisory responsibilities."[77] The tribunal noted "the particular context in which the dispute arose, namely, that of a renascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."[78] In *Duke Energy v. Ecuador*, the tribunal took a holistic approach to the evaluation of expectations by observing that the consideration for socio-economic circumstances helps shape the content of expectations. The tribunal noted that "the stability of the legal and business environment is directly linked to the investor's justified expectations"[79] and that "such expectations are an important element of fair and equitable treatment. At the same time, [the Tribunal] was mindful of their limitations." The Tribunal also observed that "in view of the contract history, the expectation could only have been deemed reasonable if it had been based on clear assurances from the Government."[80] This means that an investor ought to consider the legal and business environment as well as commitments made by the state in order to have "reasonable" and legitimate expectations. Thus, it can be argued that recent cases have moved towards a more expansive interpretation of the host state's obligation to protect investments where

[76] Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 2344 (1997).

[77] *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 353 (June 25, 2001).

[78] *Id.* ¶ 348.

[79] *Duke Energy*, *supra* note 72, at ¶ 340.

[80] *Id.* ¶ 351.

the holistic approach to socio-economic considerations is accounted for.[81]

It is therefore evident that host states ought to act coherently, unambiguously and with complete transparency so that foreign investors are aware of the regulatory landscape, objectives of public policy, and relevant administrative practices that will govern their investment at the time of making their investment. Further, host states should avoid arbitrary conduct that could change the regulatory framework.

In light of these considerations, the authors assess whether blocking regulations are capable of generating legitimate expectations and whether the nature, application, and structure of the regime meets the aforementioned.

D. *The EU Blocking Regulation and Legitimate Expectations*

This section examines the contour and purpose of the EU Blocking Regulation and endeavors to assess whether such a regulatory framework offers concrete commitments to invoke a breach of the legitimate expectations standard. A textual analysis of some provisions is conducted to establish if they are capable of espousing clear and unambiguous protections. Furthermore, this section inquiries into the discretion of competent authorities and the approach of courts towards this framework to determine whether this Regulation induces reliance from an investment standpoint. In doing so, it explores whether this instrument grants competent authorities the discretionary power to assess potential breaches of the standard of legitimate expectations. Finally, it examines whether this instrument can be deemed to generate legitimate expectations.

1. Background of EU Blocking Regulation: An Investment Protection Undertone

In May 2018, the EU amended its Blocking Regulation [82] to offset the extraterritorial effects of the re-imposed sanctions by the US. This Regulation was instituted to, inter alia, prohibit EU persons from complying with specified

[81] MARTINS PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 4–5, 171–180 (2013).

[82] Commission Delegated Regulation (EU) 2018/1100/ED on amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (Jun. 6, 2018) [O.J. LI 199/1].

extraterritorial sanctions.[83] This Regulation was adopted by Council Regulation (EC) No. 2271/96 of 22 November 1996.[84] It was brought into immediate effect on August 7, 2018. The purpose of the EU Blocking Regulation, as set out in Article 1, is to provide a "safeguard for European persons from the effects of the extra-territorial application of laws specified in the Annex, including regulation and legislative instruments and of actions based thereon or resulting therefrom adopted by a third country, where such application affects the interests of covered persons."[85]

Whilst this framework is not prima facie introduced to directly promote investment between EU and foreign investors, it is adopted in consonance with the Treaty Establishing the European Community, which hailed the promotion of investment and trade as the core principles of the EU.[86] In particular, Articles 73, 113, and 235 of this Treaty recognize objectives which encompass contributing to the harmonious development of world trade and the progressive abolition of restrictions on international trade and investment.[87] In addition, the EU Blocking Regulation was adopted having considered the opinion of the European Parliament regarding achieving the objective of free movement of capital by removing any restrictions on direct investments, including investments in real estate, financial services, or securities.[88] The overarching spirit of this regulatory framework is therefore to promote and foster the free movement of investment among EU member states and citizens of a third country.

The following sections seek to illustrate particular areas of the Regulation that undermine its viability as a purely investment-related instrument. Certain legal

[83] The annex to the Blocking Regulation as originally drafted referred to the following extraterritorial legislation: (i) National Defense Authorization Act for Fiscal Year 1993, Title XVII "Cuban Democracy Act 1992", sections 1704 and 1706; (ii) Cuban Liberty and Democratic Solidarity Act of 1996; and (iii) Iran Sanctions Act of 1996.

[84] Council *Regulation* (EC) No 2271/96, supra note 3, art. 1.

[85] *Id.*

[86] Treaty Establishing the European Community, Aug. 31, 1992, 6-79.

[87] *Id.* art. 73, 113, 235.

[88] Christian Schneinert, *Free Movement of Capital*, Fact Sheets on the European Union, Apr., 2021, at 3, https://www.europarl.europa.eu/factsheets/en/sheet/39/vrij-verkeer-van-kapitaal.

uncertainties have been identified with respect to contextual analysis, authorization, and the margin of discretion afforded to the competent authority. Prior to explaining these risks, it is important to first lay out the scope of the Regulation's application.

(i) Scope of Application of the Updated EU Blocking Regulation 2271/96

The EU Blocking Regulation 2271/96 applies to persons set out in Article 11, *i.e.*, Covered Persons. The Regulation is designed to protect EU operators engaged in lawful international trade, investment, and other related commercial activities, against the effects of the extraterritorial legislation. Article 11 lays out the scope of the Regulation's application. Under this Article, the provisions will apply to any natural person "being a resident in the community and a national or a member state and any natural or legal person."[89]

2. Textual Analysis of the Blocking Regulation

The interpretation of the Blocking Regulation is ultimately a matter reserved to the CJEU. However, in the absence of case law, it appears that domestic courts or international tribunals may have a role in interpreting its scope of application. But, it should be pointed out that the task of interpreting this legal framework is fraught with difficulties. This is largely due to the ambiguity surrounding some of the terms in the Regulation. This section asserts that these ambiguities may render the application of the Regulation arbitrary and devoid of a clear and definitive interpretation. The key provision of the EU Blocking Regulation 2271/96 is Article 5, which expressly prohibits persons covered by the Blocking Regulation under Article 11 ("Covered Persons") from complying whether directly or indirectly with any requirement or prohibition, including requests of foreign courts.[90] The apparent ambiguity of certain terms of the Blocking Regulation are discussed below.

(i) "Comply with"

The first notion that provokes confusion is the phrase "comply with" in Article 5. Article 5 is broadly structured and may be understood as including compliance with

[89] Council Regulation 2271/96 /EC, *supra* note 3, art. 11.

[90] Council Regulation 2271/96 /EC, *supra* note 3, art. 5.

requirements imposed by governmental bodies and commitments carried out by governmental bodies or third parties such as financing institutions.[91] The threshold of this standard has not been clearly identified.

The phrase "comply with" US secondary sanctions gives rise to difficulties with respect to clearly establishing what measures will amount to complying with US secondary sanctions. US secondary sanctions only outline potential consequences that might arise if a non-US person breach one of the provisions stipulated in the designated sanction regime.[92] Crucially, the US secondary sanctions do not provide clear, positive mandatory requirements.[93] More specifically, the existing archetype of US secondary sanctions does not postulate what prohibitive measures could fall within the purview of the sanction regime.[94] It is, therefore, not clear what action could constitute "compliance" or could trigger some of the provisions within the US secondary sanctions framework.[95] Generally, a decision to enter a commercial deal is made based upon a whole host of commercial and legal considerations. Oftentimes, it would be difficult to discern how much weight has been attributed to non-commercial considerations such as secondary sanctions. As a result, it is equally hard to establish if such avoidance may amount to compliance.[96] The difficulties within the contour of the notion of "compliance" is affirmed by the European Commission advisory opinion, whereby it stated that the decision to engage in business activities could be also driven from commercial considerations, thereby making it hard to determine if the decision was made as a direct result of US sanctions.[97] The recent English court case *Mamancochet Mining Ltd. v. Aegis Managing Agency Ltd.*

[91] Financial Markets Law Committee, June 2019, *U.S Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty* ¶ 2.13. http://fmlc.org/wp-content/uploads/2019/06/Report-U.S.-Sanctions-and-the-E.U.-Blocking-Regulation.pdf.

[92] *Id.* ¶ 3.17.

[93] *Id.*

[94] Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 (3) U. Pa. J. Int'l L. 906-910 (2014).

[95] Financial Markets Law Committee, *supra* note 91, at ¶¶ 3.17, 3.24, 70.

[96] *Id.* ¶ 3.85.

[97] Answer given by Vice-President Mogherini on behalf of the commission with regard to non-compliance with Regulation (EC) No 2271/96 (Apr. 1, 2015) [E-007804/2014].

underscores the inherent difficulty in ascertaining the compliance requirement.[98] The court noted that a party merely relying upon the terms of a sanctions clause to resist performing a contractual obligation cannot be construed as an act of "compliance" with a third country sanctions regime, and thereby would not breach the updated EU Blocking Regulation.[99]

In the absence of CJEU case law interpreting the Blocking Regulation, the interpretations adopted by the EU courts are followed by parties. Pending a definitive interpretation by the CJEU, the phrase "comply with" ought to be interpreted in good faith, in conformity with its ordinary meaning, in consideration of its context, and in light of the Regulation's object and purpose.[100] The main objective of the EU Blocking Regulation is to offset the effect of the US long arm legislation, by protecting EU individuals and companies that are directly and indirectly exposed to it.[101] Construing Article 5 in light of this, "compliance" occurs when the specified US sanctions would affect the interest of a "Covered Person" engaging in international trade or finance between the EU and third states.[102] Therefore, the updated EU Blocking Regulation would apply where the EU individuals and companies are directly and indirectly subject to negative effects from the designated sanction regime. In other words, it only applies to compliance or actions resulting from situations where these provisions apply extraterritorially. This understanding of the scope of application of the EU Blocking Regulation suggests that compliance by US person (even outside the US) with primary US sanctions would not be covered by the EU Blocking Regulations.[103] Therefore, this instrument does not *per se* eliminate obstacles in relation to foreign investments generally, instead focusing only on those investments affected by extraterritorial sanctions. To this end, its scope of protection is quite

[98] Mamancochet Mining Ltd. v. Aegis Managing Agency Ltd, [2018] EWHC (Comm) 2643.

[99] Financial Markets Law Committee, *supra* note 91, at ¶ 3.39.

[100] Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), art. 31 (2), 1155 U.N.T.S. 331.

[101] European Commission, Guidance Note- Question and Answers: adoption of update of Blocking Statute (July, 8. 2018) [O. J. C2771] at 4-10.

[102] Financial Markets Law Committee, *supra* note 91, at ¶¶ 3.6, 3.7.

[103] *Id.* ¶ 3.15.

limited and does not provide an impetus for third parties to freely engage in investment-related activities without the risk of having its investment being exposed to secondary sanctions.

(ii) Extraterritoriality

Activities that are impacted by extraterritorial application of the specified US sanctions are covered under the EU Blocking Regulation. It is not entirely clear whether compliance triggered by primary sanctions of the US regime rather than by secondary sanctions is also prohibited by the Regulation.

Moreover, the Annex expressly notes that the summaries of the instruments are "only for informational purposes."[104] Since there is no further guidance as to how this concept is to be realized and applied, it runs the risk of rendering this instrument vague and generic which will diminish its chances of generating legitimate expectations.

(iii) Economic Interest

Another concept within Article 5 giving rise to uncertainty is the phrase "economic and/or financial interest." This phrase can be interpreted very broadly. As Article 2 obliges the affected person to notify the EC, one could imply that Covered Persons may also be required to report any future or anticipated effects of the laws specified in the Annex or perhaps any loss of opportunities arising from the wide-reaching impacts of the sanctions. Additionally, the Article does not purport what evidence is required for reporting and what is the appropriate threshold for the precise state of knowledge. Moreover, the Article fails to clearly identify what transactions could qualify as an investment.

The ambiguity surrounding this phrase gives rise to further complications as to what degree a Covered Person bears the burden of demonstrating a disturbance to its interest, or to what degree a person bears the burden of demonstrating economic

[104] Commission Delegated Regulation (EU) 2018/1100/ED on amending the Annex to Council Regulation on protecting against the effects of extra-territorial application (Jun. 6, 2018) [O.J. LI 199/1]. *See Annex Note*: "The main provisions of the instruments contained in this Annex are summarized only for information purposes. The full overview of provisions and their exact content can be found in the relevant instruments."

loss. This argument has significant implications for investment arbitration where the investor's conduct is given enormous consideration. The onus is on the claimant to prove the existence of conduct by the administration that supposedly created legitimate expectations, which can be particularly difficult if the complaint also alleges abuse of power and arbitrariness.[105]

An investor is responsible for practicing extreme diligence when the intention is to ground its expectations in a highly regulated state. This due diligence requires undertaking a comprehensive analysis of the legal framework before making an investment. Along with this, the investor bears the burden of proving the arbitrary or irrational nature of the controversial measures within the framework of arbitration proceedings.[106]

(iv) Requirement to Inform the Commission

The EU Blocking Regulation introduces a requirement for "notification" under Article 2 without clearly setting out its scope of application. The provision fails to specifically set out a minimum (or maximum) threshold to inform the EC, which makes this Regulation prone to arbitrary or capricious application.[107] As explained above, a claimant's alleged expectations must arise from unequivocal and precise assurances that are consistent with the applicable rules. The current text of Article 2 does not clearly indicate whether an additional factor is required to trigger the Article 2 notification requirements.[108]

The generic use of terms may prevent this Regulation from establishing a robust rule of law. According to Raz, a distinguished scholar, the rule of law is rooted in the autonomy of the law.[109] The law should operate prospectively only, be open and clear, and be relatively stable. Individuals should be able to discern the law and organize their lives according to it, and the law should not be promulgated or applied in an

[105] Case C-566/14 P, Marchiani v. Eur. Parliament, ECLI:EU:C: 437, ¶¶ 75–80 (2016).

[106] *Charanne* B.V. *v*. Kingdom of *Spain*, SCC Case No. V 062/2012, Award, ¶¶ 507, 536 (Jan. 21, 2016).

[107] Financial Markets Law Committee, *supra* note 91 ¶ 3.24.

[108] *Id.* ¶ 3.25.

[109] JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214, 219–220 (1979).

arbitrary manner.[110] In order to avoid unintended arbitrary application, more guidance or elaboration of terms stipulated in the Blocking Regulation is required.

(v) Authorization to Comply "Fully or Partially"

Under Article 5 of the EU Blocking Regulation, a Covered Person is allowed to apply for an authorization to "comply fully or partially" with the laws specified in the Annex to the "extent that noncompliance would seriously damage [that person's] interests or those of the community."[111] This authorization will be subject to the EU examination procedures. Article 5 does not clearly define the scope of an authorization. It is not clear as to whether an exemption can be sought from the EU Blocking Regulation in its entirety or just for specific transactions.[112] Additionally, it does not stipulate who can seek exemptions and on what basis, for example on the basis that it is a subsidiary of a US company. The Guidance Note of the EU Blocking Regulation did not provide much clarity regarding the ways in which the exemptions will be sought. Due to the limited guidance on what situations would potentially qualify for an authorization, it would be difficult to assess when applications for exemption will be granted.[113] This authorization process poses a great risk whereby the Blocking Regulation may be amended or disregarded at the EC's discretion.

(vi) Redressal Mechanism for Breach

Article 2(1) stipulates that any violation of Article 5 of the Blocking Regulation constitutes a criminal offence punishable by a fine.[114] The appropriate remedy is "to be determined by Member States" (Article 9); to this end, the Regulation has instructed the Member States to devise "effective, proportionate and persuasive" remedies.[115] In addition, under this Article, EU member states are required to inform the EC if they are affected by US sanctions. Since the Blocking Regulation came into force in 1996, EU member states have implemented respective laws.

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[110] *Id.* at 220.

[111] Council Regulation 2271/96 /EC, *supra* note 3, art. 5.

[112] Financial Markets Law Committee, *supra* note 91 ¶ 3.66.

[113] *Id.* ¶ 3.67.

[114] Council Regulation 2271/96 /EC, *supra* note 3, art. 2.

[115] Council Regulation 2271/96 /EC, *supra* note 3, art. 9.

For instance, under Swedish law, a breach of Article 2 or the first paragraph of Article 5 carries a potentially unlimited criminal fine and maximum sentence of 6 months.[116] Similarly, an Austrian law implemented such penalties of up to EUR 70,000.[117] Under German law, breach of the EU Blocking Regulation may constitute an administrative offence and can result in a fine up to EUR 500.[118]

III. AUTONOMY TO INTERPRET THE BLOCKING REGULATION

Courts and other dispute resolution authorities enjoy ample autonomy to interpret and apply the provisions in the Blocking Regulation. As the following analyses illustrate, the existing case law in relation to the scope of application of the EU Blocking Regulation is devoid of uniform outcome. An Italian case, which has remained unpublished, held that if a company faced a real threat of going insolvent due to the re-imposition of sanctions, then the termination of the contract without notice would be permitted.[119] This approach reflects the growing tendency of the courts to attribute significant weight to commercial considerations when establishing if the breach has occurred. In a notable German case, the court dismissed the claim of sanctions and granted interim measures, noting that the complications imposed by sanctions were not adequately explained and the breaching party failed to sufficiently demonstrate that the sanctions imposed significant commercial impediments, rendering the performance unfeasible.[120] Similarly, a Dutch case followed the same reasoning, noting that mere exposure to the risk of US sanctions is not an adequate ground for terminating a contract.[121] It

[116] Lag om EG:s förordning om skydd mot extraterritoriell lagstiftning som antas av ett tredje land (Svensk författningssamling [SFS] (1997:825) (Swed.).

[117] Federal Law Gazette for the Republic of Austria I No. 117/1997, https://www.ris.bka.gv.at/Dokumente/BgblPdf/1997_117_1/1997_117_1.pdf.

[118] Außenwirtschaftsverordnung vom, Aug. 2, 2013 (BGBl. I S. 2865), zuletzt geändert durch Artikel 32 des Gesetzes vom 23 Juni 2021 (BGBl. I S. 1858).

[119] Maya Lester QC, *Italian Judgment on the EU Blocking Regulation*, *European Sanctions: Law, Practice and Guidance*, European Sanctions, Oct. 2, 2019, https://www.europeansanctions.com/2019/10/italian-judgments-on-the-eu-blocking-regulation/.

[120] Landgericht Hamburg [LG] Hamburg [Hamburg District Court], Nov. 28, 2018, 319 O 265/18. Nennung der Zeigniederlassung als Antragstellerin, Vorliegen eines wichtigen Grundes für ein fristlose Kündigung.

[121] ECLI: NL: RBDHA: 2019:6301, Rechtbank Den Haag, C-09-573240-KG ZA 19-430.

also added that the position would be different if the contract became practically unfeasible because of the US sanctions.[122]

The reasoning of these cases denotes that courts are firmly in favor of applying this instrument without diminishing its role and purpose; they have also simultaneously considered many commercial considerations which potentially limit the scope of protection afforded by the regulation. The above cases demonstrate the significant freedom given to judges and other competent authorities to adequately determine the scope of blocking regulations. In essence, the judges engage in a close examination of the effect of sanctions with extraterritorial reach and decide how detrimental their impact is, and in doing so they place significant importance on the commercial aspects of each case.

In another German case, which provides welcome clarify on what extent the EU Blocking Regulation operates, the court took the view that the risk of the threat of sanctions should have an immediate impact on the operation of entity.[123] In this case, the court held that while the EU Blocking Regulation prohibits persons from complying with extraterritorial sanctions, it does not mean that it compels EU business to continue trading with Iranian entities.

These cases demonstrate that the EU Blocking Regulation do not oblige European entities to continue trade and business with Iranian counterparts. Their purpose is rather to ensure that EU businesses have the freedom to continue with Iranian transactions rather than protecting ongoing or future investments. Therefore, they do not always create "expectations" for the investors or oblige the states to abide by them. Until a uniform interpretation develops, the impact of blocking regulations on legitimate expectations remains speculative.

IV. CONCLUSION

This article focuses on the important elements that contribute to the invocation of legitimate expectations in international investment law. It contends that clarity,

[122] *Id.*

[123] Oberlandesgericht, Landgericht Hamburg [LG] [Hamburg District Court] Oct. 15, 2018, 318 O 330/18, (Case no. 11 U 116/19) Wirksamkeit der Kündigung des Girokontovertrages durch die Bank.

unambiguity, non-arbitrariness, and the intent to make policies and commitments are characteristics delineating the principle of legitimate expectations, and at the same time, guide the analysis relating to the breach of legitimate expectations.

The article examines the blocking regulation regime through the lens of legitimate expectations in investment arbitration by identifying some commonalities in arbitral jurisprudence. For instance, the *Micula* tribunal held that there must be a promise, assurance, or representation attributable to a competent organ and representative of the state to give rise to "legitimate expectations" on the part of the investor.[124] Such attribution has not been clearly spelled out in the provision stipulated in the blocking statute. The *Novenergia* tribunal took the view that assurance needs to be attributed explicitly and implicitly to a competent authority which is not clearly asserted in the regulations.[125] Such an assurance would obviate the possibility of the misapplication of the regulations by adjudicators in resolving disputes. Drawing on the conceptualization of legitimate expectations, this article argues that legitimate expectations would only arise when there are specific assurances made to investors by very clear and unambiguous conduct. However, the authorization to comply fully or partially has created such unspecific assurances and undertaking from European states, rendering it difficult for prospective investors to rely on these provisions.

Further, the article recognizes reasonableness as a yardstick for reviewing the breach of legitimate expectations, thereby placing a large latitude of discretion onto arbitral tribunals to examine if state practice circumvents or generates legitimate expectations. However, it also acknowledges that reasonableness is not a standalone element and tribunals adopt a holistic approach to determine a violation of legitimate expectations.

Finally, the article conducts a textual analysis of blocking regulations, and provides that the language of blocking regulations - in particular the lack of proper remedial mechanism, the absence of clear recourse, the ambiguous provisions

[124] *Ioan Micula Viorel Micula & Others v. Romania*, ICSID Case No. ARB/05/20, Award, ¶ 178 (Dec. 11, 2013).

[125] *Novenergia II-Energy & Environment* (SCA), *SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Award, ¶¶ 545, 546, 547 (Feb. 15, 2018).

regarding the interpretation, the vagueness surrounding the notion of economic interest and the usage of the phrases "comply with" and "extra" confirm that this regulatory framework is not capable of inducing expectations in foreign investors. The article has established that the language of blocking regulations generally gives rise to its inconsistent interpretation and failure to emanate unambiguous and transparent commitments by host states to provide substantive and procedural safeguards for foreign investors.

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LOOKING TO THE PAST FOR THE FUTURE: INTERNATIONAL INVESTMENT LAW AS A FRAMEWORK TO PROTECT PRIVATE ACTORS IN OUTER SPACE

by Vivasvat "Viva" Dadwal & Charles "Chip" Rosenberg

I. INTRODUCTION

In November 2021, Russia's anti-satellite missile test drew global condemnation when the resulting debris from the destruction of its Cosmos 1408 satellite threatened to collide with other objects in Earth's orbit, including the International Space Station and SpaceX's Starlink satellites.[1] Anti-satellite tests—which also have been conducted by China, India, and the US—are just one example of actions that have the potential to cause significant injury to persons and damage to spacecraft and satellites. As the space industry evolves and more States and private actors become involved, the needs and expectations of its players will change. This article discusses the current legal protections available to private actors in outer space and recommends that the international community look to international investment law as a framework to protect private interests in space.

II. STATUS QUO

The existing regime of international space law, like many traditional forms of international law, does not govern private actors. Instead, the 1967 Outer Space Treaty assigns States with the ultimate responsibility of supervising "national activities" in outer space, whether such activities are performed by "governmental agencies or by non-governmental entities."[2] The 1972 Liability Convention, which has been ratified by nearly 100 States including the United States and most space-faring nations, expands on the liability regime for damage caused by space objects.[3] It

[1] Tereza Pultarova, *Space debris from Russian anti-satellite test will be a safety threat for years*, SPACE.COM, Nov. 16, 2021, https://www.space.com/russia-anti-satellite-test-space-debris-threat-for-years.

[2] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. VI, 18 U.S.T. 2410; 610 U.N.T.S. 205; 6 I.L.M. 386 (1967).

[3] Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 861 U.N.T.S. 187, 10 I.L.M. 965 (1972) [hereinafter "Liability Convention"].

contains rules and procedures for apportioning responsibility and ensuring "prompt payment" of compensation to victims.[4] International rights and remedies for such "national activities" in space are overwhelmingly state-centric.

For example, a "launching State" has absolute liability for damage caused by its space object "on the surface of the earth or to aircraft in flight," and fault-based liability for damages that are caused "elsewhere than on the surface of the earth"—*i.e.*, in space.[5] However, the Liability Convention provides no guidance for what constitutes "fault" in the context of outer space. Likewise, only States may present claims for monetary compensation, which must be done through diplomatic channels. Failing settlement through negotiations, a three-person "Claims Commission" may be established, which has the power to issue a "final and binding" "decision" (but only if the parties agree) or a "recommendatory award" (if the parties do not wish to be bound by the Commission's decision).[6]

III. CHALLENGES

The existing regime of international space law runs the serious risk of leaving private actors out of luck. States are often reluctant to advance claims against other States, and even those who advance such claims may find unclear the standards under international space law. The Liability Convention has only been used once, and that dispute was settled. In 1977, radioactive debris from a Soviet surveillance satellite Cosmos 954 landed in Canada. Concerns about possible nuclear contamination led the Canadian Government to locate and recover parts of the Soviet satellite. Approximately one year after the incident, Canada presented a claim against the Soviet Union for CAD$6 million based primarily on the Liability Convention, but also on general principles of international law.[7] In 1981, following negotiations, the two States signed a protocol under which the Soviet Union agreed to pay Canada CAD$3

[4] *Id.*

[5] *Id.* art. IV.

[6] *Id.* arts. XIV, XIX.

[7] Canada: Claim Against the Union of Soviet Socialist Republics for Damage Caused by Soviet Cosmos 954, Feb. 8, 1978, 18 I.L.M. 899, 905.

million.[8] The protocol contains no indication of the basis of the settlement, and the majority of the provisions of the Liability Convention were left untested.

A private investor who suffers harm as a result of a space maneuver (such as an anti-satellite missile test) could bring its claim before the courts of the launching State or seek assistance from another State (most likely its home State) to bring a claim under international law. Under the first avenue, the investor would rely on domestic laws of compensation (assuming they exist) for damage caused by the State without regard to where the damage occurred (in space). Under the second avenue, the investor would have to rely on the discretion of a State to espouse its claim under international law. If the harm occurred in outer space, this would involve proving that the launching State was at "fault" for the harm caused, which may be challenging since the Liability Convention does little to establish a fault standard or a standard of care relevant to activities in outer space. In the event the launching State were to decline negotiations, a Claims Commission would have to be established to adjudicate the dispute, but its decision would be final and binding only if the disputing States agreed.

IV. A WAY FORWARD?

We begin from the premise that private investment in space is to be expected, and that a clear and consistent legal regime for private actors is required to promote responsible, peaceful, and sustainable use of outer space. But what obligations, rights, and remedies should private actors have against States in outer space? In our opinion, international investment treaties (such as bilateral investment treaties) may provide a framework for a stable, rules-based regime that encourages and sustains private investment flows in outer space.

Not long ago, a private actor who wished to assert a claim against a foreign State for breach of customary international law was required to petition its home State to espouse its claim. The shortcomings of "gunboat diplomacy" and the political

[8] Protocol Between the Government of Canada and the Government of the Union of Soviet Socialist Republics, Apr. 2, 1981, https://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/bi-multi-lateral-agreements/can_ussr_001.html.

considerations inherent in diplomatic protection led States to conclude modern investment treaties. Today, there exist thousands of investment treaties offering private investors substantive protections and a right to direct recourse against the host State. In many cases, foreign investors are not even required to exhaust local remedies before initiating an investment treaty claim. This uniquely structured regulatory framework has become a common method for resolving international investment disputes.

The space industry is no stranger to international arbitration. For example, in 2010, the Permanent Court of Arbitration adopted optional rules for resolving outer space disputes.[9] As we have written previously, the PCA Rules offer space actors the same tailored procedural rules that parties commonly use in international arbitration.[10] However, we believe that international investment law has much more to offer the space industry. Specifically, the investment treaty regime provides examples of substantive protections and forum design choices from which we can draw two conclusions. First, States generally agree on providing foreign investors and their investments certain internationally accepted protections in their own territory. These include the right to full protection and security, protection against arbitrary or unreasonable treatment, and the right to be treated fairly and equitably. These standards may serve as the starting point for a discussion about private actors' minimum legal protections *vis-à-vis* States' own "national activities" in outer space. Second, even when dealing with private actors, States consistently prefer confidential, neutral, and binding forms of dispute resolution. As on Earth, such dispute mechanisms have the potential to promote the rule of law and market-oriented space policies by treating private interests in outer space in a transparent and predictable manner. The evolving regime of international space law would do well to integrate private actors both as the subjects of protection and as direct

[9] Permanent Court of Arbitration, Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (2010) [hereinafter "PCA Rules"].

[10] Charles Rosenberg & Vivasvat Dadwal, *The 10 Year Anniversary of the PCA Outer Space Rules: A Failed Mission or The Next Generation?*, KLUWER ARB. BLOG, Feb. 16, 2021, http://arbitrationblog.kluwerarbitration.com/2021/02/16/the-10-year-anniversary-of-the-pca-outer-space-rules-a-failed-mission-or-the-next-generation/.

participants in dispute resolution.

V. CONCLUSION

International investment has spurred prosperity and economic development around the world. Legal protections that are responsive to the needs of private actors in space have the potential to do the same. These developments are particularly timely as an increasing number of States, like the United States, are contemplating ways in which to strengthen global governance of space activities and "uphold and strengthen a rules-based international order for space."[11]

In our view, the time has come for the international community to more seriously consider new international legal instruments that are aimed at promoting and protecting private investment in outer space. International investment law offers a compelling framework to protect private interests in space.

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[11] The White House, *United States Space Priorities Framework*, Dec. 1, 2021, https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Space-Priorities-Framework-_-December-1-2021.pdf.

REPROGRAMING GEOPOLITICAL FIREWALLS: TECHNOLOGICAL NON-PROLIFERATION AND THE FUTURE OF INVESTOR-STATE DISPUTE SETTLEMENT

by Jason Czerwiec

I. INTRODUCTION

"Moore's Law" is a popular euphemism for Dr. Gordon Moore's 1965 hypothesis regarding the advancement of integrated circuit technology.[1] Dr. Moore, then Director of R&D Laboratories at Fairchild Semiconductor, correctly predicted that every two years the number of components that could be fitted into an integrated circuit would double, that the cost of circuits would halve, and that electronic devices would enter into nearly every facet of modern life as a result. Moore's hypothesis would go on to drive the research and development ("R&D") model of the microchip industry for over 50 years, and he would go on to co-found and grow Intel Corporation ("Intel") into one of the US' largest, most successful semiconductor companies.[2]

Semiconductors are considered a foundational technology, advances in which lay the groundwork for the development, commercialization, and manufacture of a whole host of other electronics-dependent "high technologies."[3] Since at least the 1980s,

[1] Dr. Gordon E. Moore, 38 ELEC. MAG. 8 (April 19, 1965).

[2] Comparing the first microprocessor, Intel's 4004 released in 1971, to the smallest processor commercially available in 2014 (containing 14 nanometer width transistors), performance had improved 3,500 times, energy efficiency 90,000 times, and cost per transistor had fallen 60,000 times. If automotive technology had progressed at the same rate since 1971, cars would travel at speeds of 30,000 mph, traverse over two-million miles per gallon, and cost $0.04 on average. Moore's Law 50 Years Later, Intel, https://www.intel.com/content/www/us/en/silicon-innovations/moores-law-technology.html. Today's smallest functional chips are imprinted on four-nanometer-thick silicon wafers. For scale, a human hair is between 60 and 120 nanometers wide. Nanometer Laboratory Safety, Stanford National Accelerator Lab, https://www-ssrl.slac.stanford.edu/content/sites/default/files/documents/nano-lab-safety.pdf. No commercial product has come close to this level of technological advancement in the past half-century. Although Moore's "law" of circuit shrinkage has slowed in recent years, the exponential growth of the semiconductor industry has fundamentally changed society and the global economy in the 55 years since Gordon Moore first published his seminal article. David Rotman, *We're not prepared for the end of Moore's Law*, MIT TECH. REV. (Feb. 24, 2020).

[3] The term "semiconductor" refers to a class of materials that have a conductivity performance, which mediates between electrical conduction and electrical insulation. The semiconductor industry today

semiconductor manufacture has also been considered by the US government to be a foundational component of national security.[4] As such, the loss of domestic manufacturing capacity is deemed a potential "threat", and so the tools of governance adapt accordingly.

In addition to guarding its manufacturing base for *foundational* technologies, the US national security establishment has grown increasingly concerned about the economic and military implications of innovative *emerging* technologies.[5] Technological innovation is fundamentally tied to continued economic growth and geostrategic advantage, what Kennedy and Lim describe as the "innovation imperative" for developing states.[6] With this phenomenon in mind, the US security community has turned a keen eye toward China. They have documented a pattern of behavior by which Chinese firms with government assistance identify technological concepts with dual-use military implications, procure them through licit and illicit

largely traces its origins to the point-contact and junction transistors, pioneered by physicist William Shockley in 1947 and 1951, respectively. The move from geranium-based to silicon-diffused transistors was pioneered by eight of Shockley's acolytes (including Gordon Moore) at Fairchild Semiconductor in Mountain View, California in 1957, with the integrated circuit, and the birth of America's 'Silicon Valley' following shortly thereafter. Daniel Holbrook et al., *The Nature, Sources, and Consequences of Firm Differences in the Early History of the Semiconductor Industry*, *in* THE SMS BLACKWELL HANDBOOK OF ORGANIZATIONAL CAPABILITIES 47-49, 55-59 (Constance E. Helfat ed., 2003). Transistors were the foundational technology for integrated circuits, which were foundational for microprocessors, permutations, and evolutions of which enable the incredible expanse of computational technology that powers the global economy of today.

[4] *See* William C. Rempel & Donna KH Walters, *The Fairchild Deal: Trade War: When Chips Were Down*, LA TIMES (Nov. 30, 1987).

[5] These two categories, "foundational" and "emerging" technologies, are terms of art under the new US dual-use tech export control regime created by the ECRA. *See*, US Department of Defense (DoD), SUMMARY OF THE 2018 US NATIONAL DEFENSE STRATEGY 3, https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf. The following language clarifies the DoD's priorities with regard to technology and security:

The drive to develop new technologies is relentless, expanding to more actors with lower barriers of entry, and moving at accelerating speed. New technologies include advanced computing, "big data" analytics, artificial intelligence, autonomy, robotics, directed energy, hypersonics, and biotechnology–the very technologies that ensure we will be able to fight and win the wars of the future. The fact that many technological developments will come from the commercial sector means that state competitors and non-state actors will also have access to them, a fact that risks eroding the conventional overmatch to which our nation has grown accustomed. Maintaining the department's technological advantage will require changes to industry culture, investment sources, and protection across the National Security Innovation Base. *Id.*, at 3.

[6] Andrew B. Kennedy and Darren J. Lim, *The Innovation Imperative: Technology and US-China Rivalry in the Twenty-first Century*, 94(3) INT. AFF. 553, 556 (2018).

means, and commercialize them at a speed and cost beyond the capabilities of their western counterparts.[7] This merger of economics and security thinking has manifest as one strain of an ascendant "geoeconomic" policy worldview, with manifold impacts on global trade and investment.[8]

In response to China's competitive threat, the US government has engaged in a concerted effort to decouple the US' tech industry and its public infrastructure from Chinese government interests and Chinese nationals' capital.[9] In 2018, the US Congress put forward dual amendments to the Defense Production Act ("DPA"), each aimed at curbing Chinese technology acquisition. The first amendment, the Export Control Reform Act ("ECRA"), updated the power of the Commerce Department to place export controls, in the form of licensing requirements, on "emerging" and "foundational" dual-use technologies.[10] The second, the Foreign Investment Risk Review Modernization Act ("FIRRMA"), expanded CFIUS' jurisdiction to review and to block non-controlling but non-passive capital investments in US companies that produce, design, test, manufacture, fabricate, or develop one or more "critical technologies" and/or maintain or collect sensitive personal data of US citizens.[11] FIRRMA also provided CFIUS no less than US$80 million in appropriations over a four-

[7] Michael Brown & Pavneet Singh, *China's Technology Transfer Strategy: How Chinese Investments in Emerging Technology Enable A Strategic Competitor to Access the Crown Jewels of U.S. Innovation*, Defense Innovation Unit Experimental (DIUx) (Jan. 2018) at 2, n.2 ("The rapidity at which dual-use technologies are developed in the commercial sector has significant impact on the nature of warfare; mastering them ahead of competitors will "ensure that we will be able to win the wars of the future").

[8] *See* Anthea Roberts et al., *Geoeconomics: the U.S. Strategy of Technological Protection and Economic Security*, LAWFARE BLOG (Dec. 11, 2018); Paulo Triolo & Kevin Allison, *The Geopolitics of Semiconductors*, EURASIA GROUP (Sept. 2020).

[9] *See* Keith Johnson & Robbie Gramer, *The Great Decoupling*, FOREIGN POLICY (May 14, 2020).

[10] *See* Export Control Reform Act ("ECRA"), 50 U.S.C. § 4817.

[11] *See* Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), 50 U.S.C. § 4565. Although the precise definition of 'critical technology' will be developed with specificity over time and through an inter-agency process, the policy community generally considers technology with national security implications to broadly include advances in: artificial intelligence ("AI"), quantum computing, 5G, autonomous vehicles, unmanned systems and robotics, internet of things applications ("IoT"), space-based remote sensing, additive manufacturing and 3D printing, synthetic biology, genetic engineering, biocomputing, nanomaterials, hypersonics, batteries, and next-generation microelectronics. *Twin Pillars: Upholding National Security and National Innovation in Emerging Technology Governance*, CSIS Global Security Forum Report (Jan. 2020).

year period.[12] This is the first direct, non-discretionary funding for the Committee in its 45-year history.

These laws have been followed by a global wave of proposals to strengthen domestic laws and regulations scrutinizing foreign investment on national security grounds.[13] A policy race to erect regulatory firewalls is now taking shape.[14] The contours of a transnational Technological Non-Proliferation ("TNP") policy are now relatively visible. The application of this policy is likely to have serious implications for multinational companies ("MNCs") and other foreign investors operating across the global economy and financial markets: from semiconductors and micro processing to seed and venture capital, robotics and data analytics to growth equity and distressed debt, and from artificial intelligence to mergers and acquisitions.

There is a corpus of international and transnational designed to protect foreign investors and their property against arbitrary and discriminatory conduct of states targeting their investments.[15] In practice, it is not difficult to see how TNP mechanisms might discriminate against otherwise benign Chinese investments,[16] or

[12] 50 U.S.C. § 4565(p)(1).

[13] *See* Joachim Pohl & Nicolas Rosselot, *Acquisition- and ownership-related policies to safeguard essential security interests Current and emerging trends, observed designs, and policy practice in 62 economies*, OECD RESEARCH NOTE (May 2020), http://oe.cd/natsec; see also, *e.g.*, Nicole Kar et al., *CFIUK? UK introduces National Security and Investment Bill*, LINKLATERS PUBLICATIONS (Nov. 11, 2020) (discussing the newly introduced National Security and Investment Bill (NSIB) that creates first ever standalone foreign investment regime in UK); National Security and Investment Bill, 2020 (Bill 210, 58/1), https://publications.parliament.uk/pa/bills/cbill/58-01/0210/20210.pdf.

[14] *See generally* Tomoko Ishikawa, *Investment Screening on National Security Grounds and International Law: The Case of Japan*, 7 J. INT'L & COMP. L. 71 (2020) (describing FIRRMA-like upgrades to Japanese, UK, German, French, and EU-wide investment screening regimes) [hereinafter "Ishikawa"]; *see also* Tomoko Ishikawa, *Global Trend of Tightening FDI Screening: A Race to Build Walls?*, KLUWER ARBITRATION BLOG (Aug. 27, 2020).

[15] *See generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2d ed. 2012).

[16] *See* 50 U.S.C. § 4565(f)(i) (presenting CFIUS with the imperative to consider as its first factor in analyzing national security risk, "[w]hether a transaction involves a country of special concern that has strategic goal of acquiring tech that would affect US tech leadership in that area"). Further, President Trump made public his desire to utilize CFIUS to block Chinese investment and to unwind transactions of Chinese investors. *See* David Lawder & Diona Chiacu, *Trump to use US security review panel to curb China tech investment*, REUTERS, June 27, 2018. It remains to be seen if the Biden Administration will maintain this approach. US Trade Representative, Ambassador Katherine Tai previously commented that bi-partisan political consensus may necessitate a continued "aggressive" trade and investment

seem arbitrary and heavy-handed to multi-national firms who wish to continue their business relationships in China.[17] The problem of targeted discrimination is especially acute with the TNP strategy, because of the non-distributed nature of market share in many emerging technologies.[18]

However, the vital sovereignty concerns implicated in these measures,[19] along with the technical specificity with which they are shaped and deployed, militate in favor of a presumption of their validity and legitimacy *vis-à-vis* the broader investment liberalization commitments of particular capital-importing states.[20] Indeed, this should be the presumption of the law as well,[21] even with regard to general TNP policy actions that impact already established foreign investments.[22] But a TNP-adjacent policy applied specifically to a particular industry, technology, or

strategy *vis-à-vis* China, even in a more progressive administration. Simon Lester, *Katherine Tai on Various Trade Policy Issues: China, Supply Chains, A Biden Administration Trade Agenda*, USMCA, WTO, ISDS, INTERNATIONAL ECONOMIC LAW AND POLICY BLOG (Nov. 29, 2020 8:14 AM), https://ielp.worldtradelaw.net/2020/11/katherine-tai-on-various-trade-policy-issues.html.

[17] *See*, *e.g.*, *TSMC head warns of industry risks from US, China trade spat*, REUTERS FRANCE, June 5, 2018.

[18] Take the case of ASML, a Dutch company which has a market capitalization of almost US $180 billion and is the sole manufacturer of US$120 million machines which use Extreme Ultraviolet Lithography to etch transistors into the smallest commercially available microchips. Because of its dominance in a key supply chain segment for this literal 'cutting edge' technology, it has become the clear target of an otherwise facially neutral US export control policy program. *See* ASML, *From one of Many to Market Leader*, Medium, Dec. 16, 2016; *Dutch Firm Caught in US-China Row*, TECH XPLORE, Jan. 17, 2020.

[19] For a discussion of sovereignty in international investment law, *see* J. E. Vifluales, *Sovereignty in Foreign Investment Law*, *in* THE FOUNDATIONS OF FOREIGN INVESTMENT LAW (Zachary Douglas et al. eds., 2014).

[20] Investment liberalization commitments refer to obligations undertaken to refrain from erecting barriers to establishment of investments, differing from investment protection obligations, which offer post-establishment protections. See UNCTAD, Investment Liberalization and Promotion Feature Prominently in New Investment Policies, Press Release (2016). Key public international law instruments in this sphere almost uniformly provide exceptions to soft law prescriptions and general rules where state actions that contravene these rules relate to public order or essential security interests. *OECD Code of Liberalisation of Capital Movements* (2020), art. 3; *see also infra* Section II.B.2 for more on the BIS critical tech classification system.

[21] *See* Ishikawa, *supra* note 14 (calling for the use of deference strategies, akin to the Precautionary Principle in international environmental law, to shift evidentiary burdens of proof away from the State invoking its essential security interests as a defense to liability for internationally wrongful acts).

[22] Investment protection commitments are the traditional ambit of bilateral investment treaties ("BITs"). They establish obligations to refrain from abuse of foreign investment or investors after an investment is established, generally as evidenced by deduction of: a sufficient duration of time, the contribution of capital or other forms of economic value within the territory of the host state, and risk to the foreign investor. *See* generally Salini Costruttori SpA v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction ¶¶ 52-58 (July 23, 2001); Alcoa Minerals of Jamaica, Inc. v. Jamaica, ICSID Case No. ARB/74/2, Decision on Jurisdiction and Competence (July 6, 1975), *in* 4 Y.B. COM. ARB. 206 (1979) (excerpts).

foreign firm might violate a state's obligations to protect foreign investors and investments if it is applied arbitrarily or discriminatorily.[23] Once an understanding of the shape and scope of the policy and laws governing foreign technology investments is achieved, it becomes easier to identify anomalous or politically motivated state action. TNP thus can be read simultaneously as a blueprint for the state's security objectives and as a disclaimer for all related future state actions. It is the legal effect of this "disclaimer", in the marginal instances of *abus du droit* (abuse of right), which this paper seeks to analyze.

As it stands, the proliferation of TNP policies across the globe threaten to create an untenable multiplication of political risk for MNCs, which rely on investment outside of their home jurisdiction for critical segments of both their supply chains and downstream sales.[24] States have already begun more frequently to deploy national security prerogatives as a means to supersede their international commitments in the realm of economic law.[25] This troubling trend, overlaid with the indefinite legal boundaries of long dormant security exceptions clauses in international economic treaties, presents an enigma for future legal practitioners to decode.

Commentators such as J. Benton Heath have expressed the need to harmonize international standards on the meaning of "national security" and "essential security" in order to bring coherence to these concepts within the larger corpus of

[23] TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT 453 (2013) ("Customary international law permits unequal and/or discriminatory results from measures of general application, but it does not permit what might be characterized as arbitrary or discriminatory exercises of administrative, regulatory or judicial discretion"); *see also* Alec Stone-Sweet et al., *Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration*, 8(4) J. INT'L DISPUTE SETTLEMENT 579 (2017) (finding that, "in most disputes, investors do not challenge general state measures", and that they are far more likely to prevail when they contest acts specifically targeting their investments).

[24] Joachim Pohl, *Is International Investment Threatening or Under Threat?*, COLUMBIA FDI PERSPECTIVES, No. 246 (Feb. 25, 2019) ("A principle problem in this new world is the overlap of jurisdiction and the potential for asymmetries between the review processes of different States. One could easily imagine a single acquisition by a multinational enterprise triggering reviews in each of the jurisdictions which it has operations, which would likely be an untenable situation from a political risk and operational standpoint.").

[25] *See*, J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020 (2020) [hereinafter "Heath"].

international trade and investment law.[26] Within the "order" of security anxieties identified by Heath, concern about relative national advancements in computational and electronic technologies forms its own particular "genus". And each particular technology brings with it a separate "species" of unique concerns.[27]

Given the political weight and diffuse nature of these issues, reaching such a semantic consensus on "security" presents a long-term challenge. In the interim, foreign investors are left out in the cold. But a risk mitigation tool for this constituency already exists. This paper argues that ISDS can help address the growing legal market for political risk mitigation brought on by the advance of TNP—so long as its stakeholders promote its use and are cognizant and respectful of the political anxieties informing TNP.

In this way, ISDS can serve at once to ease political risk concerns for multinational firms,[28] and to prevent politicized economic disputes from escalating ad infinitum. This presents an opportunity for what Janet Koven Levit describes as a "bottom up" approach to lawmaking in the face of the prevailing top-down and state-centric narrative.[29] Indeed, as experience has demonstrated, consent-based international

[26] *Id.* Heath's analysis of the multiple vectors of threats to the prevailing economic order is excellent, but in labeling this challenge "new" it suffers from an ahistoricism that is prevalent in most calls to defend the prevailing liberal world order. *See* Timothy Stanley & Alexander Lee, *It's Still Not the End of History*, THE ATLANTIC (Sept. 1, 2014). Benton Heath himself recognizes this dynamic in another recent article in which he critiques the conceptual linkage between industrial planning and national security as a "return of the past". J. Benton Heath, *Trade and Security Among the Ruins*, 30 DUKE J. COMP. & INT.'L L. 223, 229-234 (2020).

[27] For example, in the realm of cross-border data transfer, *see* Andrew D. Mitchell & Jarrod Hepburn, *Don't Fence Me In: Reforming Trade and Investment Law to Better Facilitate Cross-border Data Transfer*, 19 YALE J. OF L. & TECH. 183, 216-229 (2018) (analyzing conceptual and practical difficulties in using ISDS to contest potential state restrictions on data transfer as violative of IIA commitments). Regarding the role of international investment law in protecting digital assets from cybercrime, *see* Julian Chaisse & Cristen Bauer, *Cybersecurity and the Protection of Digital Assets: Assessing the Role of International Investment Law and Arbitration*, 21(3) VAND. J. ENT. & TECH. L. 549 (2019).

[28] *See* Srividya Jandhyala, *The Politics of Investor-State Dispute Settlement: How Strategic Firms Evaluate Investment Arbitration*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 647 (J. Chaisse et al. eds., Aug. 2021) (describing the depoliticization benefits of ISDS as well as the often-underappreciated benefits of ISDS to private multinational firms).

[29] *See* Janet Koven Levit, *A Bottom-up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 126 (2005):

Bottom-up lawmaking tales do not feature state policymakers but rather the very practitioners-both public and private-who must roll up their sleeves and grapple with the day-to-day technicalities of their

dispute resolution is both possible in times of political hostility and preferable to strong-arm political bartering.[30] The access of foreign investors, in particular, to arbitration of their disputes with host states gives meaning to international investment commitments and performs a crucial role in "stabilizing and enabling economic exchange in the investment context".[31]

It should be disclosed at the outset that the theory and ideas promoted by this paper rest on the assumption that fair and free trade, based on Ricardian principles of mutual advantage, are prerequisite for lasting international peace and security.[32] Furthermore, the author subscribes to the view, much evolved since the time of Kant, that international law is "law" in both a moral and practical sense.[33] In this regard,

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trade. On the basis of their experiences on the ground, these practitioners create, interpret, and enforce their rules. Over time, these initially informal rules blossom into law that is just as real and just as effective, if not more effective, as the treaties that initiate the top-down processes.

[30] Perhaps the best example in modern times is the relative success of the Iran-US Claims Tribunal in de-escalating an incredibly tense political conflict and rapid financial decoupling between the US and Iran following the 1979 Iranian Revolution. Abner Katzman, *Despite Diplomatic Freeze, U.S. and Iran Keep Talking at Tribunal*, AP, Mar. 20, 1996. Iran continues to provide an apt case study for the functionality of private international law in times of economic hostility. *See* Farshad Ghodoosi, *Combatting Economic Sanctions: Investment Disputes in Times of Political Hostility, a Case Study of Iran*, 37 FORDHAM INT'L L.J. 1731 (2014) (narrating Iran's historical role in the development of the law governing foreign investment and scrutinizing the clash between sanctions compliance and investment law using Iran as a case study).

[31] Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9(2) CHI. J. INT'L L. 471, 477 (2009).

[32] *See generally*, IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795), https://www.mtholyoke.edu/acad/intrel/kant/kant1.htm; *see also* ZACHARY CARTER, THE PRICE OF PEACE: MONEY, DEMOCRACY, AND THE LIFE OF JOHN MAYNARD KEYNES (2020); Dwight D. Eisenhower, *Special Message to the Congress on Foreign Economic Policy* (Mar. 30, 1954),

> Great mutual advantages to buyer and seller, to producer and consumer, to investor and to the community where investment is made, accrue from high levels of trade and investment [...] [T]he American economy has evolved from such a system of mutual advantage. In the press of other problems and in the haste to meet emergencies, this nation—and many other nations of the free world—have all too often lost sight of this central fact.

(as quoted in preamble to FIRRMA legislation, *supra* note 11); *but see*, Barry Buzan, *Economic Structure and International Security: The Limits of the Liberal Case*, 38 INT'L ORG. 597 (1984).

[33] *See* Oona Hathaway & Scott Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 255-258 (2012) [hereinafter "Hathaway & Shapiro"]. The authors rebut Realist and legal positivist critics of international law, arguing that international law effectively utilizes externalized enforcement and outcasting such that it has meaningful, empirical impact on states' behavior. This, despite a lack of enforcement mechanisms utilizing the "threat and exercise of physical force". Using this frame of reference, ISDS can be understood as a particularly effective form of externalized enforcement, which states have voluntarily internalized, by waiving elements of sovereign immunity through treaty practice and domestic arbitration laws, in an effort to avoid economic outcasting. *Id.* at 327-329.

bridging the yawning divide between advocates of free trade and the national security establishment is a fundamental concern. As technological, capital, informational, and political diffusion continue to accelerate the post-modern trends etching away at the edifice of state power and redefining the concept of state sovereignty,[34] the emergence of novel and multifaceted "threats" to the vitality of the nation-state model will continue to widen this divide.[35]

With this in mind, a significant problem that this paper intends to address is the atomization of the international law and national security thought communities.[36] On the question of national security exceptions to international law commitments, an emphasis on legal theory over factual analysis has led the discussion into deep abstraction. For their part, the national security community is often distrustful, disinterested, or dismissive of the basic assumptions behind global investment and

[34] *See* Louis Henkin, *That S Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1 (1999); Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 STAN. J INT'L L. 283 (2004) (describing a "networked" world order in which sovereignty is gradually delegated by states to the international networks in which they participate); Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States and the International Trading System: Representations of a Relationship*, 15 EUR. J. INT'L L. 651, 653-55 (2004) (describing sovereignty as an "essentially contested concept", which is continually subject to semantic revision based on the prevailing political, social, and economic conditions of the time); Morad Eghbal & K. C. O'Rourke, *Post-Brexit: A Continuum for State Sovereignty U.K.'s Challenge to Balance Legitimacy, Capital Development and Human Needs*, 23 ILSA J. INT'L & COMP. L. 1 (2016); Sean Watts & Theodore Richard, *Baseline Territorial Sovereignty and Cyberspace*, 22 LEWIS & CLARK L. REV. 771 (2018).

[35] Risvas identifies a similar albeit more pronounced conflict between ideological camps during the period leading up to WWII. He writes:

For [US Secretary of State] Hull, "unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition with war." JOAN E. SPERO & JEFFREY A. HART, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 3 (7th ed. 2010). That is unsurprising because "[t]he foremost proponent and practitioner of discriminatory trade restrictions was Nazi Germany, which regarded the principle of the most-favoured-nation treatment as a particularly vicious offshoot of a discredited liberalismus. It utilized all kinds of trade controls to make the German economy self-sufficient and provide it with the implements for war." First Report on the Most-Favoured-Nation Clause, [1969] 2 Y.B. Int'l L. Comm'n 157, 163, U.N. Doc. A/CN.4/213.

Michail Risvas, *Non-Discrimination in International Law and Sovereign Equality of States: An Historical Perspective*, 39(1) HOUSTON J. INT'L L. 79, 106, n.121 (2018).

[36] A failure to analyze and communicate effectively across ideological boundaries is a common precursor to political atomization and conflict escalation. *See* E.H. CARR, THE TWENTY YEARS CRISIS: 1919-1939 (1940) (highlighting the divide between Utopian and Realist schools of IR theory during the inter-war period, precipitating WWII).

international law.[37] Fortunately, this disconnect is largely owing to a general dearth of national security challenges to the prevailing international economic order since the end of the Cold War. This state of affairs is already changing.[38] As free trade law and national security policy ellipse toward repeated future collisions, neither side can afford to ignore the trajectory of the other any longer.

Developing a comprehensive and effective system to manage the conflicts presented by these global trends is a task far beyond the scope of this paper. However, this paper serves two specific functions that are antecedent to this task. First, it serves the descriptive function of connecting the TNP strategy to its various manifestations and predicting the ways in which this strategy will impact global economic relations in the near future. Second, it serves the normative function of promoting international law generally and ISDS specifically as a means to mitigate the adverse impacts of technological non-proliferation on international private industry.

The paper proceeds in three parts. First, it examines technological non-proliferation as a geopolitical strategy. It uses US domestic law to describe the blueprint for a comprehensive and advanced TNP regime, *i.e.*, the kind that is now being adopted by many other advanced economies.[39] This section also reveals the means by which the US has incentivized other states to adapt their own domestic laws to adopt the TNP strategy, and it discusses the impacts TNP is already having on

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[37] *See* Tim Bakken, *Legal Takeovers of Nations: The Value and Risks of Foreign Direct Investment in a Global Marketplace*, 40 U. DAYTON L. REV. 259 (2016) (presenting skepticism regarding the popularly avowed "benefits" of inward FDI). The author is a professor of law at West Point. *See also* Stewart Baker, *Episode 313: Is the International law of cyberwar a thing?*, THE CYBERLAW PODCAST, Apr. 27, 2020, https://www.steptoe.com/feed-Cyberlaw.rss (questioning whether international law has any functional content or relevance to cybersecurity and accusing international law scholarship of posing "angels on the head of a pin" theories in this regard). The host is the former General Counsel of the National Security Agency (1992-94) and was the first Assistant Secretary of Homeland Security for Policy (2005-09). The genesis of this modern view may be found in Clausewitz. He trained a keen eye on the relationship between technology, military power, and international law. On the first page of his magnum opus, *Vom Krieg*, he remarked: "Force, to counter opposing force, equips itself with the inventions of art and science. Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it." CARL VON CLAUSEWITZ, ON WAR 75 (1832) (Ed. & Trans. by Michael Howard & Peter Paret, 1976).

[38] *See* Benton Heath, *supra* note 25 (2020); *accord* Georgios Dimitropoulos, *National Sovereignty and International Investment Law: Sovereignty Reassertion and Prospects of Reform*, 21(1) J. WORLD INV. & TRADE 71 (2020).

[39] Ishikawa, *supra* note 14.

global investment. Next, it considers the security taboo in domestic and international law; what has been described variously as a "vanishing point of law",[40] and as a regulatory "black hole", through which no law can pass.[41] This section: (1) looks at the ways in which international economic law instruments approach this taboo, (2) considers the policy foundations of TNP, and (3) questions whether the various novel and retrograde security rationales used to justify elements of the TNP strategy can all fit the paradigm of "essential security" exceptions.

Finally, the paper presents an argument in favor of utilizing ISDS to "reprogram" the political imbroglios at the core of many TNP-adjacent measures. It discusses the benefits of ISDS for foreign investors and for states, and argues that international investment law is a flexible, complex, and adaptive system that is well suited: (1) to mitigate the frictional costs of geopolitical competition on private industry, and (2) to depoliticize economic disputes and to set guidelines for international commerce involving state-owned and parastatal commercial entities. In order to provide a meaningful forum for TNP dispute resolution, practitioners must do the utmost to understand the species of concerns informing TNP, and to advocate to all relevant stakeholders the benefits of ISDS.

II. TECHNOLOGICAL NON-PROLIFERATION AS A GEOPOLITICAL STRATEGY

A. *The Levers of US Regulatory Power*

1. The Committee on Foreign Investment in the United States

The most important screening mechanism for foreign capital entering the US is the Committee on Foreign Investment in the United States (CFIUS). CFIUS is an interagency committee headed by the Treasury Department that is authorized to review certain transactions involving foreign investment in the US in order to determine the effect of such transactions on national security. CFIUS has its genesis in political controversy, and its powers have grown over the decades in moments of

[40] Nicolas Lamp, *At the Vanishing Point of Law: Rebalancing, Non-Violation Claims, and the Role of the Multilateral Trade Regime in the Trade Wars*, 22 J. OF INT'L ECON. L. 721 (2019) [hereinafter "Lamp"].

[41] Ji Li, *Investing near the National Security Black Hole*, 14 BERKLEY BUS. L.J. 1 (2017).

economic turmoil and in eras of heightened fear of foreign investors.[42] CFIUS was created to examine the potential for predatory investments from cash-rich OPEC countries in the aftermath of the 1973-1974 oil embargo.[43] It was established by Executive Order of President Ford in 1975 as a monitoring and advisory board for the President of the United States ("POTUS"), tasked with gauging the impact of foreign investment in the US.[44] CFIUS did not gain a mandate to block transactions involving foreign parties until the late 1980s when, in the midst of an overestimated Japanese challenge to US technological and economic supremacy, the Fujitsu conglomerate attempted an acquisition of the Fairchild Semiconductor Company.[45] Political pressure from the Reagan administration nixed the purchase attempt, and Congress passed an amendment to the DPA in following year.[46]

The 1988 Exon-Florio Amendment strengthened congressional oversight of transactions involving "strategic assets" and gave POTUS explicit authority to investigate foreign investments, to block certain transactions, and to set conditions on the approval of acquisitions involving foreign persons.[47] CFIUS was incorporated into this statutory framework by President Reagan shortly thereafter.[48] The Exon-Florio Amendment was an important step in the consolidation of government powers

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[42] *See* C.S. Eliot Kang, *U.S. Politics and Greater Regulation of Inward Foreign Direct Investment*, 51 INT'L ORG. 301, 315 (1997); Matthew J. Baltz, *Institutionalizing Neoliberalism: CFIUS and the Governance of Inward Foreign Direct Investment in the United States Since 1975*, 24 REV. INT'L POL. ECON. 859 (2017).

[43] *See* Memorandum from C. Fred Bergsten to Robert Carswell, *The Operations of Federal Agencies in Monitoring, Reporting on, and Analyzing Foreign Investments in the United States: Examination of the Committee on Foreign Investment in the United States, Federal Policy Toward Foreign Investment, and Federal Data Collection Efforts*, 96th Cong. 334-35 (1979).

[44] *See* Exec. Order No. 11858, 40 F.R. 20263 (May 7, 1975).

[45] Susan Chira, *International Report: Fujistu, A Match for I.B.M., Making Further Inroads in U.S.*, N.Y. TIMES, Nov. 3, 1986. It is worth noting that the importance of Fairchild at this point in time was largely symbolic. It had begun to lag its competitors in product output and market share by the late 1960s. Although it did maintain some of its original edge in the form of an innovative research department, Fairchild was sold to the French conglomerate Schlumberger in 1979. *See* Daniel Holbrook et. al., *supra* note 3, at 56.

[46] David E. Sanger, *Japanese Purchase of Chip Maker Cancelled After Objections in US*, N.Y. TIMES, Mar. 17, 1987.

[47] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1425 (1988) (amending the Defense Production Act of 1950 ("DPA")). *See* George S. Georgiev, The *Reformed CFIUS Regulatory Framework: Mediating Between Continued Openness to Foreign Investment and National Security*, 25 YALE J. ON REG. 125, 127 (2008).

[48] Exec. Order No. 12661, 54 Fed. Reg. 779 (Dec. 27, 1988).

to review and block foreign direct investments, but the fusion of legislative and executive powers was not completed until the passage of the Foreign Investment and National Security Act ("FINSA") in 2007, by which Congress finally incorporated CFIUS into the DPA in 50 U.S.C. §4565. This particular bill was inspired by the political fallout from the 2006 Dubai Ports World scandal, an incident that underscores the exposure of foreign investment to national-origin-based political headwinds.

Dubai Ports World, a majority state-owned entity of the UAE purchased a British company, Peninsular and Oriental Steam Navigation Co. ("P&O"), which held contracts to manage and operate six US ports. Though the transaction initially cleared the Bush Administration's CFIUS review, it provoked an intense backlash from members of Congress who vaguely pointed to the UAE as the home state of two of the hijackers involved in the September 11 attacks that had occurred only five years prior. Some criticized the clearance of the deal at the time as "politically tone deaf".[49] Dubai Ports World eventually agreed to divest the US assets which had formed a substantial basis for their initial transaction with P&O.[50] In addition to pulling CFIUS closer to the legislative branch, FINSA broadened the conceptual focus of its national security mandate to include: (a) a broad critical technology consideration; (b) the record of the investor's country of origin in cooperating with counterterrorism efforts; (c) the potential for transshipment or diversion of critical technology with dual use applications; and (d) long term energy-supply issues which may be implicated by the transaction.[51] The overwhelming focus of these updates was on counter-terrorism, not state-to-state competition. In hindsight, these statutory provisions clearly track the geopolitical priorities of the time. As such, they demonstrate the difficulty in legislating a universal standard for national security review that is uncolored by the anxieties and political tensions of the day.

Under the Trump Administration, CFIUS moved beyond its traditional merger

[49] *US lawmakers criticise ports deal*, BBC NEWS, Feb. 21, 2006 (quoting Sen. Lindsay Graham (R-SC)).

[50] Neil King Jr. & Greg Hitt, *Dubai Ports World Sells US Assets*, WSJ, Dec. 12, 2006.

[51] Foreign Investment and National Security Act of 2007 ("FINSA"), Pub. L. No. 110-49.

control role to review investments of smaller percentage stakes.[52] The passage of FIRRMA provided a statutory basis for this all-encompassing review. FIRRMA also markedly increases Congressional oversight and involvement in the CFIUS process.[53] In this sense, FIRRMA represents the apex of a troublesome trend in the development of CFIUS legislation.[54] As demonstrated by the Dubai Ports World controversy, Congressional involvement increases the risk of politicization of the process, because it brings diffuse legislative priorities into what was designed to be a somewhat rote administrative process.[55] The presence of a clear and negative bi-partisan public bias towards particular foreign governments amplifies this problem. In the wake of the COVID-19 pandemic, public bias toward China may have impacts under FIRRMA similar to those experienced by investors from the UAE under FINSA.[56]

CFIUS has also traditionally operated as a gap-filler, providing a basis for executive action in high-profile acquisitions of US companies only where no other provisions of law provide adequate and appropriate executive authority.[57] Increasingly, CFIUS has become the vanguard of the TNP strategy, and its most attentive sentinel.[58] It is now the regulatory body of first concern for most all

[52] Even before FIRRMA passed, CFIUS review contributed to the abandonment of Tencent's attempted purchase of a 10% stake in a Dutch Software company with a US presence. Reuters Staff, *Chinese investors buy stake in mapping firm HERE*, REUTERS, Dec. 27, 2016; Trade Practitioner, *CFIUS Filing Withdrawn, Deal Abandoned: NavInfo, Tencent, GIC Pte, and HERE International*, SQUIRE PATTON BOGGS, Oct. 3, 2017, https://www.tradepractitioner.com/2017/10/navinfo-tencent-gic-here/.

[53] *See* 50 U.S.C. § 4565(m) (detailing requirement of annual reports to Congress); 50 U.S.C. § 4565(g)(1) (detailing on-request briefing requirement to Congress with regard to specified transactions).

[54] *See* Brian J. Farrar, *To Legislate or to Arbitrate: An Analysis of U.S. Foreign Investment Policy after FINSA and the Benefits of International Arbitration*, 7 J. INT'L BUS. & L. 167 (2008).

[55] *See* Jonathan C. Stagg, *Scrutinizing Foreign Investment: How Much Congressional Involvement is Too Much?*, 93 IOWA L. REV. 325, 349 (2007).

[56] *See* Kat Devlin et al., *US Views of China Increasingly Negative Amid Coronavirus Outbreak*, PEW RESEARCH CENTER, Apr. 21, 2020.

[57] Brandt J.C. Pasco, *United States National Security Reviews of Foreign Direct Investment: From Classified Programmes to Critical Infrastructure, This Is What the Committee on Foreign Investment in the United States Cares About*, 29(2) ICSID REVIEW 350, 357 (2014).

[58] Theodore H. Moran, *CFIUS reforms must be reformed*, COLUMBIA FDI PERSPECTIVES No. 231 (July 30, 2018) [hereinafter "Moran"] (noting that FIRRMA expands CFIUS authority to review commercial sales, joint venture arrangements and normal business licensing of intellectual property by US companies to foreigners. "FIRRMA permits CFIUS to screen commercial practices even if the sales and licenses involved are not covered for national security reasons by the US export control regime").

commercial transactions involving foreign investors in Technology, Infrastructure, and Data ("TID") in US businesses.[59]

The CFIUS review process itself is straightforward on paper, even if it is opaque in practice.[60] However, the decision whether or how to begin this process is variable and complex.[61]

Furthermore, the mitigation measures demanded by CFIUS can be exacting, and can often undermine the central commercial purpose behind a given transaction.[62] Confusion surrounding the filing process is further compounded by justiciability gaps

[59] Department of the Treasury, *Final Rule: Provisions Pertaining to Certain Investments in the United States by Foreign Persons*, 31 C.F.R. 800 RIN 1505-AC68 (Sept. 15, 2020). The TID US business is defined by FIRRMA and Treasury regulations as any firm that (1) produces, designs, tests, manufactures, fabricates, or develops one or more "critical technologies" as defined by BIS regulations; (2) owns operates, manufactures, supplies or services any of 28 identified categories of critical infrastructure; or (3) maintains or collects sensitive data of US citizens, *i.e.* certain categories of "identifiable" data (*e.g.* financial, health, geolocation), and either tailors their services to US agencies with intelligence, national security, or homeland security responsibilities, or collects such data on more than one million individuals within a twelve-month period.

[60] Once CFIUS has jurisdiction over a "covered transaction", it can review that transaction with or without voluntary notification. There is statute of limitations restricting CFIUS from engaging in review after a set period of time. However, once review has determined the lack of a threat to national security, a "safe harbor" is received by the transacting parties. Because voluntary submissions begin a process by which CFIUS must conduct initial review within a period of 30 days and, if necessary, secondary review within 45 days, parties generally will make voluntary filings if they expect CFIUS to take an interest in their transaction. If mitigation measures fail, CFIUS may make a recommendation to the President that he suspend or prohibit a transaction that threatens to impair the national security of the US. Johnathan Wakely & Andrew Indorf, *Managing National Security Risk is an Open Economy: Reforming the Committee on Foreign Investment in the United States*, 9 HARV. NAT'L SEC. J. 1, 8-9 (2018).

[61] *See* REID WITTEN, THE CFIUS BOOK (2d ed., 2020). For visual representation of filing variability, *see* filing decision tree, *available at* https://cfiusbook.com/.

[62] CFIUS Annual Report to Congress for FY2019 26-29, Public / Unclassified Version (2020). Examples of mitigation measures demanded in FY2019 include: (1) prohibiting or limiting transfer or sharing of certain intellectual property, trade secrets or 'know-how'; (2) ensuring that only authorized persons have access to certain tech, certain USG, company, or customer info, and that no direct or remote access exists by foreign acquirer to systems that hold this info; (3) ensuring that only US citizens handle certain products and services, and that certain activities and products are located only in the US; (4) establishing a Corporate Security Committee and other mechanisms to ensure compliance with all required actions, including the appointment of a USG-approved security officer or member of the board of directors and requirements for security policies, annual reports, and independent audits; (5) notifying, for approval, security officers or relevant USG parties in advance of foreign national visits to the US business; (6) assurances of continuity of supply for defined periods, and notification and consultation prior to taking certain business decisions, with certain rights in the event that the company decides to exit a business line. Establishing meetings to discuss business plans that might affect USG supply or national security considerations; (7) exclusion of certain sensitive assets from the transaction; (8) ensuring that only authorized vendors supply certain products or services; (9) prior notification to and approval by relevant USG parties in connection with any increase in ownership or rights; and (10) divestiture of all or part of the US business.

within the CFIUS regime. Final determinations by the President are not subject to judicial review,[63] but evidence in the administrative record is at least nominally available, after opportunity for in-camera review.[64] CFIUS determinations that are rendered by the statutorily prescribed method have the combined weight of executive and legislative authority, meaning a court will likely grant them an extraordinary measure of deference.[65] Furthermore, there is a wealth of credible authority that suggests policy determinations made pursuant to the President's foreign affairs power should not (and even functionally *cannot*)[66] be challenged by judicial review in the administrative law context.[67] Still, in theory, a failure of CFIUS to follow the procedures mandated by the DPA may invite an aggrieved party to vitiate their rights on procedural grounds.

Indeed, this was the conclusion reached by the US Court of Appeals for the DC Circuit in *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*[68] The facts of the *Ralls Corp.* case involved Sany Group, China's largest producer of construction equipment. Sany

[63] 50 U.S.C. § 4565(e)(1).

[64] 50 U.S.C. § 4565 (e)(3).

[65] *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-44 (1952) (Jackson, J., concurring).

[66] *See, e.g.*, Richard A. Posner, *Reply: The Institutional Dimension of Statutory and Constitutional Interpretation*, 101 MICH. L. REV. 952, 957 (2003); *but see N.Y. Times Co. v. United States*, 403 U.S. 713,719 (1971) (Black, J., concurring) (opposing the use of a vague notion of security to defeat First Amendment rights in the context of the publication of the already leaked Pentagon Papers, detailing executive deliberations regarding security determinations during the Vietnam War). This line of doctrine may become relevant as WeChat and TikTok continue to lodge judicial challenges based in part upon the First Amendment rights of their users. *See WeChat Users Alliance v. Trump*, No. 3:20-CV-05910-LB (N.D. Cal. Sept. 19, 2020); *TikTok Inc. v. Trump*, No. 1:20-CV-02658-CJN (D.D.C. Sept. 27, 2020).

[67] *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1227-28 (2007); *but see* Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (advocating for the "normalization" of US foreign affairs law through the application of the US administrative law principles regarding delegation and deference). Claussen enters the fray in a recent article examining the separation of powers of issues inherent in US Trade Law, revealing a structural imbalance between established presidential powers: on the one hand to eliminate international trade barriers (requiring congressional approval), and on the other to erect them based on the needs of US economic security (generally taken to be exercised unilaterally). Kathleen Claussen, *Trade's Security Exceptionalism*, 72 STAN. L. REV. 1097, 1160-62 (2020) (describing the origins of the nondelegation doctrine and its use in 19th century tariff litigation). Claussen concludes that, "[T]rade's unique position at the intersections of domestic and international policy, commerce, and security means that finding the constitutionally and practically appropriate separation of powers will remain a work in progress".

[68] 758 F.3d 296, 312 (D.C. Cir. 2014).

purchased a wind farm operation in Oregon through a Delaware-incorporated subsidiary, Ralls Corp. According to the plaintiffs in *Ralls Corp.*, the intention of the investment was to utilize Sany wind turbines to demonstrate their quality and reliability to the US wind power industry.[69] After the acquisition was completed, CFIUS reviewed the transaction and found that the proximity of the turbines to a US Naval weapons testing site and the ability of the windmills to interfere with radar operations necessitated the acquisition be unwound. President Obama ordered as such, and Ralls filed a lawsuit in federal court challenging the order as a taking without due process of law.[70] Notably, a number of foreign investors of different nationalities running wind farms in the area were not asked to similarly divest.[71]

The District Court ruled against the plaintiff, pointing to its failure to file advance notice of the transaction with CFIUS and to the prescription against review of presidential determinations in the DPA.[72] On appeal, however, the DC Circuit held in favor of Ralls Corp.[73] It found, specifically, that foreign investors do have constitutionally protected property rights that vest after the close of a transaction, and that those rights could not be deprived without due process protections, such as a notice of deprivation, access to unclassified evidence, and the opportunity for rebuttal.[74] The substantive question of expropriation was not addressed, as Ralls Corp. eventually agreed to divest its ownership of the windfarm in a settlement agreement with the government.[75] Importantly, it was not the presidential determination that was held to be lacking, but the failure of CFIUS to involve Ralls Corp. whatsoever in its decision-making process leading up to its presidential recommendation. This Committee review procedure remains the only aspect of the

[69] *Id.* at 313.

[70] *Id.*

[71] *Id.*

[72] *Id.* at 314-15.

[73] *Id.* at 318.

[74] *Id.*

[75] Stephen Dockery, *Chinese Company Will Sell Wind Farm Assets in CFIUS Settlement*, WSJ, Nov. 4, 2015.

CFIUS process that is open to challenge.[76]

Yet even under this longshot approach, the US Treasury Department and other CFIUS member agencies are not held to the normal rigorous procedural standards prescribed by the Administrative Procedure Act (APA),[77] because administrative actions that are authorized under the Defense Production Act are not subject to the provisions of the APA.[78] Beyond the ability to obtain non-classified information, and perhaps an in-camera review of other information used in CFIUS determinations, there is likely little of substance to be won by an aggrieved foreign investor in US courts. Despite courts struggling for years with conflict between due process and national security in the War on Terror era, the submission of national security power to law arguably remains stochastic in the US legal system.[79]

To be sure, instances of abuse or of political "horse trading" represent a small minority of the hundreds of transactions reviewed by the Committee in a given year.[80] Still, *sans* concrete standards, *sans* even a consistent pattern of action for which the shape and direction of power is visible, the potential for abuse is apparent. If CFIUS' goal is to decouple US technology firms completely from Chinese investment, then its amorphism is its greatest asset. Indeed, FIRRMA and ECRA have already had an enormous chilling effect on Chinese investment in US electronics-reliant companies.[81] Much as with Bentham's ruthlessly efficient panopticon, the institutional design of CFIUS has a psychological impact far exceeding the practical

[76] FINSA's denial of judicial review of presidential determinations is repeated verbatim in 50 U.S.C. 4565(e)(1) as amended by FIRRMA. Therefore, the prescriptions for due process given in *Ralls* should apply with equal force to any future litigation on similar facts.

[77] *See* 5 U.S.C. §§ 551-559 (Administrative Procedure Act codified).

[78] 50 U.S.C. § 4559(a); *accord* Sitaraman & Wuerth, *supra* note 67.

[79] *See* Jack. L. Goldsmith & Neal Katyal, *The Terrorists Court*, N.Y. TIMES, July 11, 2007; *accord* Neal K. Katyal, *Stochastic Constraint*, 126 HARV. L. REV. 990 (2013); Jack L. Goldsmith, *A Reply to Professor Katyal*, 126 HARV. L. REV. F. 188 (Apr. 22, 2013).

[80] CFIUS Annual Report FY2019, *supra* note 62, at 37. According to the report, 231 written notices of transactions were filed with CFIUS in 2019 that CFIUS determined to be covered transactions. CFIUS conducted subsequent investigations with regard to 113 of these notices. Of these 113 notices, 28 were cleared after parties adopted mitigation measures pursuant to §721 to resolve national security concerns. Eight transactions fell apart after CFIUS and the parties failed to reach agreement on mitigation measures and four "fell apart for commercial reasons unrelated to CFIUS review".

[81] *See infra* Section II.C.

capabilities of the agencies staffing it.[82] Furthermore, statistics from CFIUS' most recent report to Congress make clear that it is not only Chinese funders and acquirers caught up in the process.[83] In theory, this investment screening mechanism could be turned against the firms and nationals of any state depending on the direction of prevailing political headwinds.[84]

2. Export Controls: Commerce, the ECRA, and BIS

If CFIUS is the face of the TNP strategy, then the ECRA is its backbone. At its core, the TNP strategy is about restricting trade in technology: both directly through product export controls, and indirectly through limiting foreign investment rights to control of and to information sharing in US businesses. Despite the prevalent risk of overregulation presented by new rules on dual-use "emerging" and "foundational" technologies, [85] this US export control regime still compares favorably to its counterpart in China in terms of its transparency and emphasis on producing

[82] *See Panopticon*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/technology/panopticon. Describing the panopticon as a prison architecture, "consist[ing] of a circular, glass-roofed, tanklike structure with cells along the external wall facing toward a central rotunda; guards stationed in the rotunda could keep all the inmates in the surrounding cells under constant surveillance"; *see also* Michel Foucault, *Panopticism*, *in* DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977):

> Hence the major effect of the Panopticon: to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action; that the perfection of power should tend to render its actual exercise unnecessary; that this architectural apparatus should be a machine for creating and sustaining a power relation independent of the person who exercises it [...]. In view of this, Bentham laid down the principle that power should be visible and unverifiable. Visible: the inmate will constantly have before his eyes the tall outline of the central tower from which he is spied upon. Unverifiable: the inmate must never know whether he is being looked at at any one moment; but he must be sure that he may always be so.

[83] CFIUS FY2019 Report, *supra* note 62. According to the report, Chinese firms filed 115 notices between 2017 and 2018, and only 25 of 231 written notices filed in 2019. Japan was the main country of origin for companies filing in 2019, with 46 filings, followed by: Canada with 23, France, Germany, and the UK with 13 each, and South Korea and Singapore with 10 each.

[84] Moran, *supra* note 58 ("[If] the rationale [of applying investment screening measures] to prevent the erosion of industrial or technological leadership becomes accepted as legitimate, could the effort be limited to foreign acquisitions involving only a few countries?").

[85] *See* Chad P. Brown, *Export Controls: America's Other National Security Threat*, 30 DUKE J. COMP. & INT'L L. 283, 286 (2020) [hereafter "Brown"].

effective and discernable controls.[86] Further, its emphasis on multilateralism as well as built-in incentives for global cooperation could see many of its features adopted by other capital-importing, technology-exporting states.[87] Still, there are many politically sensitive and problematic elements of the export control regime. Most prominent is the Entity List, by which the US Commerce Department maintains a list of foreign companies to which certain export licenses will be presumptively denied.[88] China has copied this tool in recent updates to its export control regime with the addition of an "unreliable entities" list targeting specific firms by name.[89]

The key for making sense of CFIUS' expanded jurisdiction for tech investors is also held within the Department of Commerce, by the Bureau of Industry and Security ("BIS").[90] This key is the ability to define "critical technology", the umbrella term for both foundational and emerging tech within the larger TNP regime. BIS has been reluctant to take on its expanded role on its own, but has been aided by robust input from both the policy establishment and the regulated community.[91] The ECRA provides detailed standards for considering what to define as "emerging" and "foundational" technology, and it establishes a public-private advisory board to assist

[86] *See* Feng Wang & Menghao Dai, *New Export Control Law: 5 Issues Remain to be Clarified*, King & Wood Mallesons, CHINA LAW INSIGHT BLOG, Nov. 5, 2020, https://www.chinalawinsight.com/2020/11/articles/export/new-export-control-law-5-issues-remains-to-be-clarified/#page=1 [hereinafter "Wang & Dai"].

[87] *Id.*

[88] Commerce has already blocked exports of critical components for major Chinese firms such as Huawei and SMIC and their affiliates using the entities list. *See*, BIS, Supplement No.4 to part 744 of the EAR ("Entity List"), https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list.

[89] Wang & Dai, *supra* note 86.

[90] The US Treasury Department promulgated a rule, effective October 15, 2020, that changes the source definition for "critical technologies" to harmonize it with export controls promulgated under BIS. *See*, 31 CFR Part 800, RIN 1505–AC68, *supra* note 59. *See* Export Control Reform Act, 50 U.S.C. §4817 (2018). Under this process, interagency consultation must take into account: (1) foreign availability of the tech; (2) potential impact on domestic research; and (3) the potential effectiveness of the controls imposed on limiting the proliferation of covered technologies. *Id.*

[91] Notice of Recruitment of Members, A Notice by the Industry and Security Bureau on 04/01/2019, 84 Fed. Reg. 12195 (recruiting policy professionals to join BIS' Technical Advisory Committee). BIS' first notice of proposed rulemaking relating to emerging tech under the ECRA received a staggering 250 public comments from the regulated community in a 3-month period. Review of Controls for Certain Emerging Technologies, A Proposed Rule by the Industry and Security Bureau on 11/19/2018, 83 Fed. Reg. 58201, 15 CFR Part 744, RIN 0694–AH61.

BIS in its mission.[92] BIS has come up with fourteen broad categories within which it will seek continuing input as to the existence of "emerging technologies" with dual use applications.[93]

The Commerce Department has shown that it intends to introduce new export controls under the ECRA on a rolling basis, rather than by issuing a single, comprehensive rule.[94] The ability to develop controls in this manner addresses the challenge inherent in regulating the ever-evolving cutting edge of technological innovation. But the importance of this procedure to determining CFIUS jurisdiction creates a host of concerns. Several of the Senators sponsoring FIRRMA have already expressed concern regarding the slow pace of the Commerce Department in developing a workable list of emerging and foundational technologies, and the impact of this dynamic on CFIUS' legal capacity.[95] On the other hand, a constant flux in the definition of "critical tech" creates the possibility of *ex post facto* regulatory intervention by CFIUS. How can a technology transaction ever truly be finalized when regulators might consider the technology at the center of the transaction "critical" to domestic security interests well after the fact?

In response to this apparent gap, the "Final Rule" promulgated by the US Treasury Department relating to "critical technology" CFIUS filing requirements clarifies that a covered transaction will be considered to involve "critical technology" as that

[92] *See* 50 U.S.C. § 1758(b)(4)(f).

[93] 83 Fed. Reg. 58201, *supra* note 91. These include broadly: biotechnology; AI & machine learning technology; position, navigation, and timing technology; microprocessor advancements; advanced computing technology; quantum information and sensing technology; logistics technology; additive manufacturing (*i.e.*, 3D printing); robotics; brain-computer interfaces; hypersonics; advanced materials; and advanced surveillance technologies.

[94] Department of Commerce, Advance Notice of Proposed Rulemaking (ANPRM): Review of Controls for Certain Emerging Technologies, 15 CFR 744, RIN 0694-AH61 (Nov. 19, 2019).

[95] Ian F. Fergusson & Karen M. Sutter, *U.S. Export Control Reforms and China: Issues for Congress*, CRS IN FOCUS, Aug. 21, 2020; Kirkland & Ellis, *CFIUS Goes Back to the Future by Tying Mandatory Filings Pertaining to Critical Technologies to U.S. Export Controls Assessments*, Kirkland Alert, Oct. 21, 2020, https://www.kirkland.com/publications/kirkland-alert/2020/10/cfius-critical-technologies#ref6. The experts authoring the report further state that Congress is likely to take a more active role policing BIS regarding the implementation of controls on "emerging" and "foundational" technologies, such that BIS may soon abandon its current multilateral approach.

definition stands at the time the transaction is consummated.[96] That means that investors who consummate transactions involving a technology that has not yet been added to the roster of BIS export controls effectively have assurances that their transaction will not become "covered" *ex post facto*. Under CFIUS' traditional structure, this sort of measure would be enough to protect investments from post-establishment meddling.

But FIRRMA, has vastly expanded the meaning of a "covered transaction", beyond that utilized in CFIUS' traditional focus on mergers and acquisitions. Any subsequent "transaction" involving a change in control or other material rights in an US TID company technically invites further review by CFIUS, even where general foreign control over the company is established prior to the underlying technology becoming "emerging or foundational" according to BIS. So, an investor purchasing a material interest in a technically non-TID company may find still themselves facing CFIUS review later on. In theory, should BIS decide to add that firm's technology to the list of emerging or foundational technologies, when the corporation makes another covered transaction CFIUS gets another bite at the apple. Under this regime, any foreign investor purchasing shares or an interest in a US TID business incident to a long-term investment strategy does so at significant political risk.

This dynamic, which likely will manifest in other investment screening regimes in the form of similarly vague jurisdictional rules, is worth monitoring as the basis for potential future disputes under IIAs that protect an investor's "legitimate expectations." A failure to accord due process of administrative law, inconsistencies between separate governmental agencies in implementing the law governing an investment, or a general lack of transparency in carrying out measures that cause harm to a protected investment, might each form the basis of a violation of the Fair and Equitable Treatment ("FET") standards found in many IIAs.[97]

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[96] *See* 31 CFR Part 800, RIN 1505–AC68, *supra* note 59.

[97] *See generally* Tecnicas Medioambientales Tecmed S.A. v. the United Mexican States, ICSID Case No. ARB(AF)/00/2, Award ¶ 154 (May 29, 2003); PSEG Global, Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award ¶¶ 173-74 (Jan. 19, 2007) (discussing the principle of transparency in international investment law); MTD Equity v. Republic of Chile, ICSID Case No. ARB/01/7, Award ¶ 163 (May 25, 2004)

Because of the broad mandate of BIS in formulating both International Traffic in Arms Regulations ("ITAR") and Export Administration Regulations ("EAR"), there will likely be general confusion about exactly what implications future BIS rules carry *vis-à-vis* commercial US TID business.[98] As with CFIUS, part of the uncertainty may be by design. In any event, export controls limiting the flow of products to critical markets can have indirect impacts that are just as destructive of protected foreign investment as the direct bans issued by CFIUS.[99] Given the diffuse nature of production and sales markets for many critical technologies and the need to issue regulation quickly to respond to a rapidly evolving technological landscape, haphazard export controls may well form the basis of several future investment treaty claims.

The hyper-concentrated nature of some markets for emerging technology also presents risks for discriminatory or arbitrary action *vis-à-vis* foreign firms. The case of Advanced Semiconductor Materials International ("ASML") with Extreme Ultraviolet-Lithography ("EUV") is a pronounced example.[100] In October of 2020, BIS

(highlighting the inconsistency between two arms of government in implementing the legal framework to regulate the foreign investment); Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award ¶ 164 (Oct. 27, 2006); Joseph C Lemire v. Ukraine, ICSID Case No ARB/06/18, Award ¶ 49 (Mar. 28, 2011) ("Previous notification of limiting laws and regulations is not simply a formality: it is a fundamental requirement in order to guarantee that investors enjoy legal certainty, and that States cannot invoke the exception ex post facto, surprising the investor's good faith").

[98] For example, in January of 2020, BIS published its first notice of an interim final rule that appeared to add "software specifically designed to automate the analysis of geospatial imagery" to the export control regime as an "emerging technology". *See*, Dep't of Commerce, Bureau of Industry & Security (BIS), *Notice of Interim Final Rule for the Addition of Software Specially Designed to Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series* (2020). Although this announcement generated a great deal of speculation about BIS enacting broad unilateral dual-use tech controls, as the former Assistant Secretary of Commerce for Export Administration Kevin Wolf noted, the use of the 0Y521 Series designation actually rendered it a *temporary* unilateral control, subject to public comment and clarification but not subject to the notice and comment requirements of the ECRA. Kevin Wolf et al., *A Look at New Limits on Geospatial Imagery Software Exports*, LAW360, Jan. 6, 2020. Despite the subject matter overlap, this designation addressed what BIS saw as a momentary gap in the export control regime, not the definition of "emerging technology" as it links to CFIUS jurisdiction or otherwise relates to the holistic TNP regime.

[99] Brown, *supra* note 85, at 293-94 (discussing the relationship between access to foreign markets and legitimate commercial expectations in the US semiconductor industry).

[100] Alexander Alper et al., *Trump Administration pressed Dutch hard to cancel China chip-equipment sale: sources*, REUTERS, Jan. 6, 2020.

published its first true "emerging technology" control list.[101] The list included six items that were established as critical dual-use technology by multilateral consultations under the Wassenaar Arrangement during its 2019 plenary.[102] In effect, this was the Bureau's first definitive list of "emerging technologies" under its ECRA mandate.

Notably, this October 2020 list includes software utilized in EUV-Lithography Semiconductor Manufacture Equipment (SME). There is one company, which dominates the market in these machines: the Dutch firm ASML.[103] After failing to block ASML directly from exporting its EUV machines in 2018, the US managed to persuade the Dutch government to suspend its license to export the US$120 million products to one of its largest customers in China.[104] But the suspension is not permanent, and China has applied equal pressure to allow release of the already purchase-ordered machines to its main chip foundry company SMIC.[105]

The inclusion in its export control regime of the software needed to program these gargantuan machines is a clever jurisdictional hook for the US TNP regime. Chip design software is the single area in the supply chain in which the US maintains a distinctive majority of global market share, and ASML utilizes a US-incorporated subsidiary in part for this purpose.[106] Whether or not the concern behind these

[101] Dep't of Commerce, Bureau of Industry & Security (BIS), *Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary*, Final Rule, 15 CFR 740, 772, 774 RIN 0694-AI03 (Oct. 5, 2020).

[102] *See* Statement Issued by the Plenary Chair on 2019 Outcomes of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Vienna (Dec. 5, 2019), https://www.wassenaar.org/app/uploads/2019/12/WA-DOC-19-PUB-001-Statement-issued-by-the-Plenary-Chair-on-2019-Outcomes.pdf. For more on Wassenaar, *see infra* Section II.B.1.

[103] *See* ASML, *supra* note 18.

[104] Yang Ge & He Shujing, *Chip Equipment Giant ASML Says Some Sales to China Don't Require US License*, CAIXIN, Oct. 15, 2020 (citing ASML's CEO as saying sales of Deep UV Lithography machines were not covered by existing licensing controls).

[105] Reuters Staff, *Chinese ambassador warns Dutch government against restricting* ASML *supplies*, REUTERS, Jan. 15, 2020.

[106] Asa Fitch & Luis Santiago, *Asia Captures Chip Production from US*, WSJ, Nov. 4, 2020. The authors demonstrate from market data provided by Gartner, the SIA, VLSI Research, SEMI, and company financials that the US maintains 85% of global market share in the chip design software supply-chain segment. This is compared to US control of only 12% of the global market share in overall chip manufacturing.

measures is grounded in a legitimate threat to national security, the potential for abuse and for harm to foreign firms is apparent.

B. *Multilateralization of the TNP Strategy*

1. By Cooperation within Established Multilateral Frameworks

When it comes to non-proliferation regimes, purely unilateral policies aimed at supply-side restrictions are doomed to fail. The ECRA includes instruction that export controls relating to emerging and foundation technology be multilateralized swiftly and comprehensively.[107] As one of the "Congressional Findings" in the preamble to the bill that became FIRRMA notes, POTUS is implored to spread the CFIUS investment screening technique among allied nations.[108] International partnerships, with allied states working in lockstep, are necessary to prevent sourcing of controlled products from reaching the targets of any non-proliferation regime.[109]

The TNP strategy leaves no stone unturned when it comes to expanding US influence over trade and investment with China.[110] And beyond technological non-proliferation, the US has made strides to create a united trade front against China.[111] But the cracks in the "club" model of global governance are beginning to show.[112] It may not be practicable to ostracize a state with the economic clout of China into

[107] Export Control Reform Act of 2018, Pub. L. No. 115-232, § 4811(6), 132 Stat. 2210 (2018) ("Export controls applied unilaterally to items widely available from foreign sources generally are less effective in preventing end-users from acquiring those items. Application of unilateral export controls should be limited for purposes of protecting specific United States national security and foreign policy interests."). In particular, the ECRA recommends that if the President fails in multilateralizing any particular export control within three years, the US should drop it. *See* 50 U.S.C. §1758(c).

[108] *See* Title XVII– Review of Foreign Investment and Export Controls, Subtitle A – Committee on Foreign Investment in the United States, Sec. 1702(7), HR 5515-538.

[109] Brown, *supra* note 85.

[110] For a particularly salient example, the United States Mexico Canada Free Trade Agreement ("USMCA"), which entered into force on 1 July 2020 contains a provision, buried in Chapter 32, that allows two of the parties to terminate the agreement with six-months' notice as to the third, should that party enter into a free trade agreement with a "non-market" country. *See* United States-Mexico-Canada Agreement, July 1, 2020 ["USMCA"], art. 32.10.

[111] *See* Bob Davis, *White House Weighs New Action Against Beijing*, WSJ, Nov. 23, 2020 (discussing Trump administration plan to create an informal alliance of Western nations to jointly retaliate and absorb economic impacts when China uses its trading clout to pressure other States politically).

[112] Nicolas Lamp, *The Club Approach to Multilateral Trade Lawmaking*, 49 VAND. J. TRANSNAT'L L. 107 (2016) (describing a 'club' approach to global economic rulemaking, which compartmentalizes multilateralization efforts but has normative influence on those inside and outside of the "club").

submission by threatening technological or full economic decoupling. The global mechanisms currently in place to deal with issues such as non-proliferation are not well equipped for such a task.

For example, though relatively obscure, international export control coordination systems aimed at dual-use TNP have existed since the beginning of the US-Soviet Cold War.[113] During this period, an informal agreement called the Coordinating Committee for Multilateral Export Controls (COCOM) was established between the US and members of the North Atlantic Treaty Organization (NATO), largely in secret, to coordinate national economic embargo policy among these allied states.[114] COCOM consisted of three list categories: (1) Munitions; (2) Atomic Energy; and (3) Dual-Use Technologies.[115] Items regulated by the first two were subject to an outright ban, while dual-use technology products were subject to export control reviews and licensure procedures.[116] COCOM was replaced in 1995 by the Wassenaar Arrangement, which included a newly independent Russian Federation as a member.[117] There are now 42 member countries in Wassenaar, with the notable continued exclusion of China.[118]

The Wassenaar Arrangement shifted the focus of COCOM away from a secretive bi-polar embargo strategy towards transparency, and non-proliferation of potentially dangerous products to rogue states and non-state actors.[119] It contains two publicly available lists: (1) Munitions and (2) Dual-Use Goods and Technologies.[120] The dual-use goods and technologies list contains nine broad, and somewhat outdated

[113] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Vol. I, Founding Documents, Dec. 19, 1995, WA-DOC (17) PUB 001.

[114] Brown, *supra* note 85, at 296-97.

[115] *Id.*

[116] *Id.*

[117] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Vol. I, Founding Documents, Dec. 19, 1995, WA-DOC (17) PUB 001.

[118] *See* www.wassenaar.org.

[119] *See* Brown, *supra* note 85.

[120] *See* List of Dual-Use Goods and Technologies and Munitions List, Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Wa-List (19) (Dec. 5, 2019).

categories.[121] There are also four general criteria which participant states should use in evaluating whether a given technology should be subject to export controls.[122]

The US has demonstrated through BIS rulemaking that it intends to pursue the export control portion of its TNP strategy directly through this framework. But there are inherent problems with this approach. First and foremost, this sort of total economic decoupling was not the task for which the Wassenaar Arrangement was developed.[123] Wassenaar was developed as a consequence of the post-Cold War breakup of the Soviet Union and the issues inherent to that geopolitical process.[124] In that sense, it is modeled to move away from establishing a comprehensive, bi-polar embargo regime towards one focused on non-proliferation to non-State and rogue State actors. Second, with regard to high-tech, the pace of innovation means a given emerging technology is likely to become widely commercially available in a short period of time relative to the time it takes to reach consensus on and to implement multilateral controls.[125]

Finally, because of the growing importance of the Chinese market, it will be much harder to use an informal system to achieve the ends of the TNP strategy since allied trading partners may not have the commercial incentives to subscribe to TNP, absent a clear and immediate national security rationale to do so.[126] If recent events are any

[121] *Id.* These are: special materials and related equipment, materials processing, electronics, computers, telecommunications and information security, sensors and lasers, navigation and avionics, marine, and aerospace and propulsion.

[122] These are: (1) is the technology already available from non-participant countries; (2) do states have any evidence indicating a given export control will be ineffective; (3) do product definitions contain a "clear and objective specification"; and (4) is the product controlled by some other regime, *e.g.*, the Munitions List or Nuclear Suppliers Group. Criteria for the Selection of Dual-Use Items, Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (adopted in 1994, amended by the Plenary in 2004 and 2005).

[123] *See* Heath, *supra* note 25, at 1024 (noting that, in contrast to cold war period, major strategic rivals today are also economic competitors within the same multilateral trading system).

[124] *Id.* Wassenaar was developed during a period in which the international community was focused on bringing former communist countries into the global economic system. The opposite is true of the out-casting measures envisioned by the TNP strategy.

[125] Cindy Whang, *Undermining the Consensus-Building and List-Based Standard in Export Controls: What the United States Export Controls Act Means to the Global Export Control Regime*, 22 J. INT'L ECON. L. 579 (2019).

[126] *See* Brown, *supra* note 85, at 301.

indication, the non-proliferation approach may already be faltering in the EU, which, led by Germany, recently concluded a milestone investment liberalization agreement with China.[127] Cooperation through established multilateral fora, at least under the Trump Administration, has been a secondary tactic for spreading TNP. As a primary tactic, the US has leaned on the extraterritorial impacts of its domestic law and has used bilateral political bartering to impact the operations of Chinese firms on a global level.

2. By Extraterritorial Force of Domestic Law and Policy

The US effort to stymie China's lead in global 5G infrastructure development provides an excellent case study for this dynamic.[128] In early 2018, members of Congress began pressuring US companies to renege on deals to sell Huawei's smartphones to US customers.[129] Within a year, criminal charges were brought against the company and its officers by the DOJ for violations of Iran Sanctions, racketeering conspiracy, and conspiracy to steal trade secrets.[130] Next, Congress passed a bill, the *Secure and Trusted Communications Networks Act* of 2019, which prohibits the use of federal telecoms subsidy programs to acquire telecoms equipment from providers "that pose a national security risk from entering US networks".[131] Simultaneously, the government engaged private 5G network developers that had been using Huawei equipment to disassemble said equipment

[127] *See* European Commission, *Key elements of the EU-China Comprehensive Agreement on Investment*, Press Release, Dec. 30, 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2542.

[128] For a general narrative of this campaign, *see* Garrett M. Graff, *Inside the Feds' Battle Against Huawei*, WIRED, Jan. 16, 2020, https://www.wired.com/story/us-feds-battle-against-huawei/.

[129] Diane Batz, *Exclusive: US lawmakers urge AT&T to cut commercial ties with Huawei – sources*, REUTERS, Jan. 16, 2018.

[130] *See* Indictment, *United States v. Huawei Device Co., Ltd..*, No. 2:19-cr-00010-RSM, 2019 WL 653277 (W.D. Wash. Jan. 16, 2019); Superseding Indictment, *United States v. Huawei Technologies Co., Ltd.*, Cr. No. 18-457 (S-2) (AMD) (E.D.N.Y. Jan. 24, 2019); Office of Public Affairs, *Chinese Telecommunications Conglomerate Huawei and Subsidiaries Charged in Racketeering Conspiracy and Conspiracy to Steal Trade Secrets*, DOJ Press Release (Feb. 13, 2020), https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-subsidiaries-charged-racketeering. These measures came after the arrest of Huawei's CFO in Canada at the request of the United States at the end of 2018. Robert. D. Williams & Preston Lim, *Huawei Arrest Raises Thorny Questions of Law Enforcement and Foreign Policy*, LAWFARE BLOG (Dec. 7, 2018, 11:06 AM).

[131] Public Law No: 116-124 (03/12/2020), https://www.congress.gov/bill/116th-congress/house-b.

and turn to other companies to build out this infrastructure.[132] Huawei has challenged these measures, so far unsuccessfully, as a Bill of Attainder, which in US law is an unconstitutional legislative action targeting and punishing specific (in this case, corporate) persons.[133]

Most strikingly, the Trump administration proposed a rule to tighten gaps in the export control regime established when Huawei was placed on BIS' Entity List in May of 2019.[134] The 2020 rule requires export licenses for US chip design specifications and software used by foreign chip suppliers in any chips shipped to Huawei, licenses which presumably will not be granted.[135] In response to the rule, Taiwan Semiconductor Manufacturing Company ("TSMC") reportedly stopped taking orders

[132] Executive Order on Securing the Information and Communications Technology and Services Supply Chain, Exec. Order No. 13,873, Fed. Reg. 22, 689 (May 15, 2019)(using IEEPA to establish regime to block the sales and purchases of communications tech and services from foreign adversaries on transaction-by-transaction basis); *see*, Jeanne Whalen & Felicia Sonmez, *Huawei business ban leaves rural wireless companies with few alternatives*, WASHINGTON POST, Aug. 19, 2019; *see also* David Shepardson, *US rural telecom networks need $1.8bn to remove Huawei, ZTE equipment – FCC*, REUTERS, Sept. 15, 2020; Margaret Harding McGill, *COVID relief bill provides $7 billion for broadband access*, AXIOS, Dec. 21, 2020 (noting that a US $900 billion COVID relief bill passed by Congress in December 2020 included US$1.9 billion for "rip and replace" efforts to remove Huawei and ZTE equipment from US networks).

[133] *Huawei Technologies USA, Inc. & Huawei Technologies Co., Ltd. v.* USA, 4:19-CV-00159-ALM (E.D. Tex. Feb. 18, 2020). After extensive fact discussion on allegations of Huawei's illicit activity and connections to the Chinese Communist Party, the court engages in a fascinating discussion on the Bill of Attainder question. *Id.* at pp. 15-50. While it found that by including its name, Section 889 of the NDAA was clearly specific to Huawei, the court held that Huawei failed: (1) to find an apposite historical analogy for its '*punishment*' in the common law; (2) failed to demonstrate the Section 889 *functioned* as a bill of attainder as defined by common law; and (3) failed to demonstrate the measure was *intended* to punish Huawei as subject individuals, rather than to achieve the valid security objectives of the government. The court also addressed and dismissed Huawei's arguments that a deprivation of its property rights had not complied with Fifth Amendment Due Process requirements (*i.e.*, the typical avenue for an expropriation claim under US law). The court dictated offhand that Huawei's arguments on interference with future contract and other economic damages were speculative and held that in any case Huawei failed to demonstrate Section 889 was not rationally related to a legitimate legislative purpose. For an excellent discussion of the history of the Constitutional prohibition of Bills of Attainder in the context of the Huawei suit, *see*, Evan Zoldan, *The Hidden Issue in Huawei's Suit Against the United States*, JUST SECURITY, Mar. 28, 2019.

[134] Dep't of Commerce, Bureau of Industry and Security (BIS), *Addition of Certain Entities to the Entity List and Revision of Entities on the Entity List*, Final Rule, 15 CFR 744 RIN 0694-AH86, Aug. 21, 2019; US Dept. Comm. Office of Public Affairs, *Commerce Addresses Huawei's Efforts to Undermine Entity List, Restricts Products Designed and Produced with US Technologies*, PRESS RELEASE, May 15, 2020.

[135] Bob Davis & Katy Stech Ferek, *U.S. Moving Forward with Rule to Limit Chips to Huawei*, WSJ, Mar. 26, 2020. The emphasis on software and design specifications highlights US emphasis on regulating the parts of the global supply chain over which it maintains a firm grasp (85% global market share). *See* Fitch & Santiago, *supra* note 106. Other states have already begun to leverage their dominant positions in various parts of the electronics manufacture supply chain to similar effect. *See*, discussion on South Korea-Japan chemicals trade conflict, *infra* note 207.

from Huawei, one of its largest customers.[136]

The US has engaged in diplomatic efforts, through consultation and intelligence sharing with the UK,[137] Germany,[138] and other NATO members, to encourage them to take up similar measures to block Huawei from their 5G networks which are currently being built by operators using Huawei technology.[139] While several states have demonstrated responsiveness to these efforts, few have decided to go all the way with removing Huawei from their telecoms sectors.[140] For some of these states, International Investment Agreements ("IIAs") with China, and threats proffered by Huawei to bring treaty claims, may be staying their hand.[141] Indeed, many of the aforementioned measures taken against Huawei by the US resemble the scripts of classic international investment law disputes.[142] All that is missing is a treaty establishing consent between the States to arbitration.[143]

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[136] Cheng Ting-Fang & Lauly Li, *TSMC halts new Huawei orders after US tightens restrictions*, NIKKEI ASIA, May 18, 2020.

[137] Helen Warrell, *US presses Boris Johnson with new dossier on Huawei security risks*, FT, Jan. 13, 2020.

[138] Joanna Kakissis, *Despite US Pressure, Germany Refuses to Exclude Huawei's 5G Technology*, NPR, Mar. 20, 2019.

[139] US Dept. of State Office of the Spokesperson, *The Transatlantic Alliance Goes Clean*, Fact Sheet (Oct. 17, 2020) https://2017-2021.state.gov/the-transatlantic-alliance-goes-clean/index.html; Reuters Staff, *Bulgaria signs 5G security declaration with US*, REUTERS (Oct. 23, 2020). The US has also threatened to end all intelligence sharing with countries that use Huawei systems. Reuters Staff, *US won't partner with countries that use Huawei systems: Pompeo*, REUTERS (Feb. 21, 2019).

[140] David E Sanger & David McCabe, *Huawei is winning the argument in Europe, as the U.S. Fumbles to develop alternatives*, N.Y. TIMES, Feb. 17, 2020; Patrick Wintour, *Europe Divided on Huawei as US pressure to drop company grows*, THE GUARDIAN, July 13, 2020.

[141] Glinavos walks through a hypothetical claim by Huawei under the 2003 Germany-China BIT based on the possibility of Germany taking measures towards Huawei similar to those taken by the US with the passage of the Secure and Trusted Communications Networks Act of 2019. Ioannis Glinavos, *Which Way Huawei? ISDS Options for Chinese Investors*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 2451 (J. Chaisse et al. eds., Aug. 2021); *see also* Peterson LE, Hepburn J, *Analysis: as Huawei invokes investment treaty protections in relation to 5G network security controversy, what scope is there for claims under Chinese Treaties with Czech Republic, Canada, Australia and New Zealand?*, IAREPORTER, Feb. 11, 2019.

[142] *See* Catherine A. Rogers, *The World is not Enough*, KLUWER ARBITRATION BLOG, Nov. 6, 2016 (analogizing the factual background of several high-profile international arbitrations to the plot of James Bond scripts, and commenting on the efficacy of arbitration in resolving politically-charged international disputes).

[143] Although it seems a distant memory in today's international economic climate, agreement on a US-China BIT has been attempted by each state at various points in the past fifteen years. *See* Wayne M.

The US has also sought to counter China's tech ambitions with certain "carrots". For example, FIRRMA institutes a "white list" of countries and grants their investors exemption from many transactions otherwise covered by expanded CFIUS jurisdiction.[144] The "white list" operates as a sort of investment security review report card, rewarding states that cooperate and coordinate with US TNP efforts.[145] Conversely, if a friendly state refuses to comply with nonproliferation control regimes like Wassenaar, this refusal technically can form the basis of a presidential determination under FIRRMA to block transactions by investors of that state involving US TID businesses under 50 U.S.C. §4565(f)(9)(A-C).

BIS similarly promulgated a final rule on October 29, 2020 that aims to restrict items potentially destined for China, Russia, and Venezuela that "will make a material contribution to the "development," "production," maintenance, repair, or operation of weapons systems of the PRC, Venezuela, or the Russian Federation".[146] The rule directs BIS to consider, among other factors, the "scope and effectiveness of the export control system in the [immediate] importing country", and the impacts of the export on the US defense industrial base.[147] Thus, for states with major firms looking to frictionlessly utilize US-based technologies, the incentive to demonstrate compliance with the US TNP strategy is baked into the legal process, a la "carrot"

Morrison, A U.S.-*China Bilateral Investment Treaty (BIT): Issues and Implications*, CRS IN FOCUS, Jan.12, 2018).

[144] *See* US Dep't of Treasury, CFIUS Excepted Foreign States (Part 800), *available at* https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius/cfius-excepted-foreign-states; *see also*, Kokusai Shoju Homu, *The CFIUS "White List" Class of 2020: Potential Takeaways for Japan*, Morrison Foerster Insights (Sept. 2020), https://www.mofo.com/resources/insights/200910-cfius-white-list.html.

[145] After pre-set exceptions under FIRRMA expire on February 13, 2022, "CFIUS will make ongoing determinations as to whether the [white-list] country has established and is effectively utilizing a robust process to analyze foreign investments for national security risks and to facilitate coordination with the US on matters relating to national security." 31 C.F.R. Part 800, RIN 1505–AC68, *supra* note 59.

[146] Department of Commerce, Bureau of Industry and Security, 15 C.F.R. Part 742 [Docket No. 201022–0277] RIN 0694–AI05 Amendments to National Security License Review Policy Under the Export Administration Regulations.

[147] *Id.* It should also be noted that the rule includes a presumption for granting license applications which detail a sufficiently commercial use, *i.e.*, a reliably civil end user and/or civil end uses for the product. In the context of the TNP strategy however, given its stance on MCF, it is difficult to say in practice what end user of critical technology would be considered "civil" by the BIS for the purposes of export and re-export. *See*, Section III.C.2 infra.

cake.

In the realm of international credit facilitation, the US Export-Import Bank ("Ex-Im") has been partially retrofitted into a veritable "carrot" factory. The US government directed the bank to extend credit facilities of no less than 20% of its US$135 billion in total assets to counter foreign consumption financing initiatives by China as part of the December 2019 Ex-Im Reauthorization Bill.[148] These funds are already being deployed to persuade foreign telecoms operators to move from Huawei to other developers such as Samsung and Ericsson in building out their 5G networks.[149] The goal is to counter China's push to finance its own lead in standard setting for 5G. A similar effort to coordinate responses to Chinese efforts in AI standard setting was recently announced at the G7.[150]

Although the US is able to articulate coherent concerns linked to Chinese progress in these fields, in passing upon the legitimacy of such measures, the observer is inclined to question: (1) to what degree they are motivated by an anxiety about hard security issues (*i.e.*, backdoor access for the Chinese government to future 5G networks); (2) to what degree they are motivated by an economic concern regarding China setting global standards for 5G;[151] (3) to what degree both are true; and (4) to what degree such questioning has any impact on the validity of the policy – or its ostensible justification as a matter taken out of an "essential security

[148] 12 U.S.C. § 635, *see esp.* subsection (I)(3)(A); *see also* EXIM, *Overview: Program on China and Transformational Exports*, Fact Sheet, June 11, 2020, *available at* https://www.exim.gov/who-we-serve/external-engagement/china-and-transformational-exports-program/fact-sheet.

[149] *See* Anthony Boadle & Andrea Shalal, *US offers Brazil telecoms financing to buy 5G equipment from Huawei rivals*, REUTERS, Oct. 20, 2020.

[150] Matt O'Brian, *US joins G7 artificial intelligence group to counter China*, AP, May 28, 2020.

[151] This line of questioning should not be taken to trivialize the extant concern at the heart of this question. Take the perspective of Erdal Arikan, one of the academics whose work developing the concept of polar codes laid the foundation for 5G technology, "[i]n the internet era, the US produced a few trillion-dollar companies. Because of 5G, China will have 10 or more trillion-dollar companies. Huawei and China now have the lead". Steven Levy, *Huawei, 5G, and the man who conquered noise*, WIRED (Nov. 16, 2020), https://www.wired.com/story/huawei-5g-polar-codes-data-breakthrough/. Since Arikan first published his conceptual research on polar codes in 2009, Huawei has poured hundreds of millions of dollars into researching and patenting design implementations of the concept for its 5G technology. It holds two-thirds of the existing patents in polar codes and is hoping that this method of data "noise reduction" becomes the global standard over alternative options proposed by Qualcomm and others for implementing 5G successfully. *Id.*

interest".[152]

Whatever means it uses to achieve a global consensus, at the state-to-state level, the US needs to find an ephectic audience for its TNP platform. In its overtures to allied states, the US security establishment finds itself competing with a cacophony of commercial and economic counterincentives.[153] If the US fails to effectively multilateralize product and capital controls on dual-use technology, the entire program will likely collapse from internal industry pressures.[154] So, the impact of TNP on private multinational firms has considerable importance to the success of the policy itself. This impact can be traced and quantified by the specific externalities incurred by these firms as a direct result of TNP.[155] As stated above, in the exceptional cases where an externality is imposed avariciously upon a foreign investor so as to frustrate their rights in their property, an investment treaty claim may be had. The primary purpose of most IIAs is to protect foreign investment and promote direct inflows of foreign capital.[156] Therefore, the impacts of TNP on FDI should also be examined on a macro level.

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[152] *See* Eli Greenbaum, *5G, Standard-Setting, and National Security*, HARV. NAT. SEC. J. (July 3, 2018) (arguing that national security concerns associated with dominance of the international standard-setting process and with foreign ownership of 5G patents are not legitimate). Additionally, experts, including a former Chairman of the FCC, have noted that recent US efforts targeting Huawei may be less than germane to their stated objective to secure 5G networks, because they are underinclusive. Tom Wheeler & Robert D. Williams, *Keeping Huawei Hardware Out of the US is Not Enough to Secure* 5G, LAWFARE BLOG (Feb. 20, 2019, 4:18 PM). *See infra* Sections III.B.3 and III.C for further discussion on the meaning of "essential security" and the US policy rationale supporting TNP.

[153] *See* Stephen Ezell, *An Allied Approach to Semiconductor Leadership*, Information Technology & Innovation Foundation (Sept. 17, 2020); Brown, *supra* note 85, at 300-301 (describing the skepticism with which states typically view the policy rationales given for trade controls that have the effect of promoting domestic industry at the expense of foreign markets [in this case by lowering the cost of upstream semiconductor products by erecting barriers to foreign demand]).

[154] *See* Kevin Wolf, *Export Controls Will Become More Effective When They Include Plurilateral Controls*, CENTER FOR A NEW AMERICAN SECURITY, Aug. 13, 2020.

[155] For an example of negative externalities, *see* Kathrin Hille, *Huawei says new US sanctions put its survival at stake*, FT, May 18, 2020. For an example of positive externalities impacting firm decision making, *see* Kif Leswing, *Qualcomm angles to get a piece of the $8bn market for 5G infrastructure*, CNBC BUSINESS, Oct. 20, 2020.

[156] *See* UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series on International Investment Policies for Development (2009); Relja Radovic, *Inherently Unneutral Investment Treaty Arbitration: The Formation of Decisive Arguments in Jurisdictional Determinations*, 2018 J. DISP. RESOL. 143, 150 (2018) (describing the protection of foreign investment as a "teleological ideal" of investment arbitration).

C. *Tech Industry Impacts*

The most immediate impacts of the US TNP strategy *vis-à-vis* China have materialized in the form of a sharp decline in Chinese FDI into the US. In their 2020 annual report on US-China investment trends, the Rhodium Group observed that annual Chinese FDI into the US had dropped from a 2016 peak of US$46 billion to only US$5 billion in each of 2018 and 2019—a low watermark not seen since the financial crisis in 2009.[157] A brief glance at the authors' sector-by-sector breakdown further suggests a root cause.[158] Sectors with low political and regulatory risk (consumer products and services, and automotive) have been the most resilient, while the drop in target sectors of the TNP strategy (information and communications technology, and electronics) is staggering by contrast.[159] This sharp trend, while jarring, is unsurprising given the dynamic nature of the TNP strategy.[160]

As to venture investment, impacts of TNP have been slower to materialize. Chinese venture investors participated in 261 unique funding rounds for US startups, investing an estimated US$2.6 billion in 2019. This represents a drop from $4.7 billion in 2018, but is on a par with 2015-2017.[161] All while overall venture fundraising in the

[157] Thilo Hanemann et al., *Two-Way Street: 2020 Update US-China Investment Trends*, RHODIUM GROUP May 2020 [hereafter "Hanemann"]. The Rhodium Group's analysis of overall China-US capital flows have come to be favored as their methodology takes a bottom-up data approach which identifies, values and aggregates individual FDI transactions. This is to confront the complications inherent in assessment based on official FDI statistics, which tend to measure financial flows based on Balance of Payments Principles which can be distorted by complex global financing structures, tax optimization strategies, intra-company transfers and other factors. Accord Karl P. Sauvant, *Beware of FDI statistics!*, COLUMBIA FDI PERSPECTIVES No. 215 (Dec. 18, 2017).

[158] *See Hanemann* at 22, Figure 6.

[159] *Id.* at 21, Table 2 (showing a 98% drop in inbound Chinese FDI from 2016/17 to 2019 in each the Electronics and Information and Communications Technology sectors, as opposed to an 11% drop in FDI into the Consumer Products and Services sector, a 21% drop in FDI into the Automotive Sector, and a 211% increase in FDI into the Industrial Machinery and Equipment sector over that same period).

[160] *See* Hoon Lee, Glen Biglaiser, Joseph L. Staats, *The effects of political risk on different entry modes of foreign direct investment*, 40(5) INT'L INTERACTIONS 683 (2014) (finding that, in general, firms limit resource commitments in markets with high political risks especially with regard to capital intensive strategies such as M&A).

[161] Haneman, *supra* note 157, at 24. Rhodium Group takes a granular approach in tallying Chinese venture capital in their report, "We do not count the full value of each investment round with Chinese participants, but estimate the pro-rata share of total fundraising round values attributable to the Chinese investor(s)". By contrast, CFIUS reviews the totality of a transaction involving Chinese investors. If a larger funding round is dependent on capital inputs or business synergies from non-controlling but

US remained close to peak 2018 levels in 2019.[162] As with larger merger and acquisition transactions, it appears as though a gradual freeze on Chinese investments in the venture and seed capital space will be at least nominally corrected for by capital flows from investors of different nationalities.[163] Still, macro-level FDI trends cannot account for the increased frictional costs individual companies incur shelving deals,[164] paying for legal and PR services, or losing out on strategic collaborations with Chinese firms.[165]

Anecdotally, Allen Wang, an M&A partner with Freshfields in China, asserts that the question of whether CFIUS will be involved in a given deal, even tangentially so, is one of the primary concerns of his transactional clients.[166] He believes that Japanese and Korean firms have benefited greatly from the absence of Chinese bidders in US tech transactions over the past two years, and he considers the TNP strategy to have been the most successful offensive in the trade war at injuring the Chinese manufacturing base and supply-chain market share, especially with regard to the semiconductor industry.[167] Long term, however Wang sees these initiatives as having strengthened Chinese resolve to build up domestic capabilities in order to reduce Chinese dependence on Western technology.[168] Indeed, the Chinese

non-passive Chinese LPs, a much larger chilling effect may take place than is recorded by this study because the whole fund may be blocked.

[162] *Id.* at 30, Figure 12 (providing a breakdown of Chinese venture capital shifts *vis-à-vis* the general US venture market).

[163] *See* CFIUS Annual Report FY2019, *supra* note 62; *see also* Nevena Simidjiyska, *CFIUS Expanded-How Will the Broadened Scope Affect Private Equity*?, 22 J. PRIV. EQUITY 31 (2018).

[164] *See* Michael Martina & Stephen Nellis, *Qualcomm ends $44 billion NXP bid after failing to win China approval*, REUTERS, July 25, 2018 (noting that Qualcomm was forced to pay a $2bn termination fee to NXP as a result of failing to achieve, what many saw as politically withheld, regulatory approval for a merger).

[165] Jan Knoerich, *Why some advanced economy firms prefer to be taken over by Chinese acquirers*, COLUMBIA FDI PERSPECTIVE No. 187 (Nov. 21, 2016); Jan Knoerich, *Gaining from the global ambitions of emerging economy enterprises: an analysis of the decision to sell a German firm to a Chinese acquirer*, 16 J. OF INT'L MGMT. 177 (2010).

[166] *View from the Valley #4: what will a Biden presidency mean for the global tech industry*?, FRESHFIELDS, BRUCKHAUS, & DERRINGER LLP PODCAST (Nov. 9, 2020), https://www.freshfields.com/en-gb/our-thinking/our-podcasts/technology-quotient-podcast/view-from-the-valley-4-what-biden-presidency-means-for-the-global-tech-industry/ (Wang's comments begin at 20:27).

[167] *Id.*

[168] *Id.*

government has officially expressed this intent, in the form of a plan to invest US$1.4 trillion internally to develop domestic innovation capabilities.[169] If TNP continues to gain legitimacy and momentum, these impacts may represent the tip of an FDI-chilling iceberg.

III. THE SECURITY TABOO IN INTERNATIONAL LAW

Any attempt to systematically regulate the economic and political conflict implicated by technological competition and the TNP strategy must overcome the "security taboo" that looms over the praxis of law. In domestic legal systems, lawyers promoting the rule of law have long struggled to tame the chimeric nature of the security state.[170] Even the less erudite have, on convenient occasion, observed the tendency of policy to bend to the gravity of national security anxieties.[171]

In international law, this relationship between law and national security is both more complex and more pronounced. It is more complex because, at first blush, the core project of international law to transcend the unlimited power of the nation-state is in conflict with the conceptual aim of national security to maintain, promote, and

[169] Bloomberg, *China's got a New Plan to Overtake the US in Tech*, BLOOMBERG NEWS (May 20, 2020), https://www.bloomberg.com/news/articles/2020-05-20/china-has-a-new-1-4-trillion-plan-to-overtake-the-u-s-in-tech.

[170] *See* Oona Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2 (2021); s*ee also infra* Section II.A.1, discussing CFIUS justiciability. Dimitropoulos identifies a spectrum of justiciability among domestic systems, noting that the EU screening guidelines proposal makes domestic court and CJEU review a mandatory feature of investment screening measures, while in the US, CFIUS falls on the opposite end of the spectrum. Dimitropoulos, *National Security: The Role of Investment Screening Mechanisms*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 27 (J. Chaisse et al. eds., 2021) [hereinafter"Dimitropoulos"].

[171] For example, after a February 2020 meeting with executives from GE about export restrictions on aircraft engine sales to China, then-President Donald Trump tweeted the following:

> The United States cannot, & will not, become such a difficult place to deal with in terms of foreign countries buying our product, *including for the always used National Security excuse*, that our companies will be forced to leave in order to remain competitive. We want to sell product and goods to China and other countries. […] As an example, I want China to buy our jet engines, the best in the World. I have seen some of the regulations being circulated, including those being contemplated by Congress, and they are ridiculous. I want to make it EASY to do business with the United States, not difficult. Everyone in my Administration is being so instructed, with no excuses. THE UNITED STATES IS OPEN FOR BUSINESS! (emphasis added)

Donald Trump (@realDonaldTrump), TWITTER (Feb. 18, 2020, 10:29 AM), https://twitter.com/realDonaldTrump/status/1229790099866603521 (account suspended as of Jan. 11, 2021).

protect national identities and the institutional structures of a given nation state.[172] It is more pronounced because international law is still largely defined in negative terms, against the principles of state sovereignty and *Domaine Réservé*.[173] And there is no more fundamentally domestic concern than the security, the conceptual integrity of the "state" itself. As Benton Heath and others have noted, the increased contact between international economic law and national security will need to be addressed by some sort of political consensus if international law is to function at all in the realm of international trade and investment.[174]

This project is ongoing. Yet, as this section discusses, international investment law has already developed mechanisms to defer to genuine security imperatives of the state and to adjudicate instances which are adjacent to, but do not truly implicate, these concerns. ISDS can and should continue to pay respect to the security domain of the state, without obviating the ability of arbitrators to address the particular species of concerns raised by TNP.

A. *Traditional Carve-Outs for Security-Related State Action*

There is no rule of international law that allows states to read open-ended security exceptions into treaties where none exist.[175] But treaties frequently include carve-outs to preserve vital elements of state sovereignty, such as essential security interests.[176] Sometimes, these take the form of general provisions in the text of the treaty itself which narrow the scope of the treaty's applicability or provide loopholes to certain of the treaty's obligations. There are also elements of customary

[172] At least this conflict is apparent for theories of international politics that subscribe to zero-sum reasoning. For more on the role of relative power in international relations, *see* David A. Baldwin, *Power Analysis and World Politics: New Trends versus Old Tendencies*, 31 WORLD POL. 161 (1979).

[173] *See* Katja Ziegler, *Domaine Réservé*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (MPEPIL) (Apr. 2013), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398.

[174] *See* Heath, *supra* note 25.

[175] Susan Rose-Ackerman & Benjamin Billa, *Treaties and National Security*, 40 N.Y.U. J. INT'L L & POL. 437, 439, 441-55 (2008) [hereinafter "Rose-Ackerman & Billa"].

[176] The essential security interest has been the subject of a great deal of scholarship and debate in international investment law. For an important early study by the OECD into the topic, *see* Katia Yannica-Small, *Essential Security Interests under International Investment Law*, INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESTMENT IN A CHANGING WORLD 93-134 (2007).

international law ("CIL") which limit the consequences of a state's breach of its treaty obligations in extenuating circumstances.[177]

In the case of investment treaty arbitration, the rules to be applied by a tribunal are contained within the underlying IIA which grants the tribunal jurisdiction to hear a given dispute. Most all of these treaties contain some form of incorporation by reference of customary or general rules of international law.[178] Although the permutations of future TNP-adjacent disputes are virtually limitless, a common feature of these disputes is that they will inevitably involve some form of security-based exception to either jurisdiction or the merits of the dispute. The following exceptions are the most likely to arise in a TNP-adjacent dispute: (1) non-conforming and non-precluded measures; (2) security exceptions clauses; and (3) the CIL of Necessity. Together, these exceptions form a gauntlet which foreign investors will have to navigate in order to vitiate any potential claims that a host state has denied them the benefits of a given IIA, in violation of said state's obligations in international law.

1. CIL Necessity as an Affirmative Defense to State Responsibility

The customary international law concept of Necessity is an important counterweight to state liability for wrongful acts.[179] Codified in the Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA") at Article 25, Necessity generally allows states to preclude "the wrongfulness of an act not in conformity with an international obligation of that State" if the act "is the only way for the State to safeguard an essential interest against a grave and imminent peril".[180]

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[177] *See* Andrea K Bjorklund, *Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity and Force Majeure as Circumstances Precluding Wrongfulness*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinkski et al. eds., 2008).

[178] *See*, *e.g.*, US Model BIT (2012), art. 30 (provision titled "Governing Law," providing that "… the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law").

[179] For an exegesis on the subject of Necessity, *see* Ryan Manton, Necessity in International Law (2016) (DPhil Thesis, Magdalen College University of Oxford) (on file with University of Oxford Magdalen College Library).

[180] UN General Assembly, *Responsibility of States for internationally wrongful acts: Resolution adopted by the General Assembly*, 28 January 2002, A/RES/56/83, https://www.refworld.org/docid/3da44ad10.html [hereinafter "ARSIWA"], art. 25(1)(a).

The parallels between Necessity and essential security exception clauses are apparent. Yet, while the International Court of Justice ("ICJ") has noted that, "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content",[181] arguing Necessity is likely the wrong tack for states to take in most security-adjacent investment disputes where underlying IIAs contain security exception clauses.[182]

As one commentator, Ji Ma, points out, there are good reasons for states not to rely on CIL necessity in these cases.[183] First, security exception clauses are much stronger.[184] When properly invoked, in most cases they are taken as a total break on jurisdiction rather than an affirmative defense to a treaty violation.[185] Second, the standard for showing Necessity, the "only way" test, is more stringent than even the strictest substantive scrutiny that can be applied to state action in light of security clause exceptions[186]. Third, there is a demonstrable risk of confusion of the standards contained in essential security exceptions treaty clauses with Necessity[187]. In the *Sempra* and *Enron v. Argentina* arbitrations, a failure to distinguish between the two standards was part of the grounds for the annulment of the initial International Centre for Settlement of Investment Disputes ("ICSID") awards.[188] Finally, Necessity

[181] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) ¶ 179.

[182] *See* Bjorklund, *supra* note 177; *accord* comments of Prof. Orrego Vicuna *infra* note 371.

[183] Ji Ma, *International Investment and National Security Review*, 52 VAND. J. TRANSNAT'L L. 899 (2019).

[184] *Id.*

[185] *See, e.g.*, CC/Devas(Mauritius) Ltd. v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits ¶ 293 (July 25, 2016).

[186] Ma, *supra* note 186, at 927.

[187] *Id.* at 921-22.

[188] Sempra Energy Int. v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award ¶¶ 214-217 (June 29, 2010) (finding and explaining that the Tribunal in the merits phase "engaged in an excess of powers by its total failure to apply art. XI ["Security Exceptions"] of the BIT"); Enron Creditors Recovery Corp. v. Argentina, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic ¶¶ 349-51, 405-06 (July 30, 2010) ("The Tribunal [below] found that [the essential security exception of art. XI US-Argentina BIT] was not applicable for the same reasons that it found that Argentina could not rely on the principle of necessity under customary international law. [...] the Committee considers that the substantive operation and content of Article XI and the customary international law principles of necessity, and the

still requires compensation for material loss,[189] whereas the successful invocation of a security exception clause, that excludes application of all substantive treaty protections to a given measure, arguably may not.[190]

2. Non-Conforming and Non-Precluded Measures

As previously noted, many contemporary IIAs include both investment liberalization commitments and investment protection commitments, which cover state conduct pre- and post-establishment, respectively. With regard to the former category, states typically synchronize these commitments with their domestic policy priorities by limiting the general scope of treaty commitments. Ishikawa describes two different general approaches that IIAs take for this purpose: (1) making investment liberalization commitments only to the extent specified in a Schedule of Commitments, or what she calls the "positive list approach"; and (2) excluding from the scope of investment liberalization those non-conforming and non-precluded measures and/or business sectors as are identified in the Annexes of the treaty, what she calls the "negative list approach".[191]

While the General Agreement on Trade in Services ("GATS") takes a positive list approach,[192] Japanese IIAs for the most part, and US IIAs for the whole part, take a negative list approach.[193] Simply put, there is little to no basis in most international

interrelationship of the two, are issues that fall for decision by the tribunal. [...] The Committee has concluded that both the Tribunal's decision that Argentina is precluded from relying on Article XI, and the Tribunal's decision that Argentina is precluded from relying on the principle of necessity under customary international law, are tainted by annullable error).

[189] ARSIWA, *supra* note 180, art. 27(b).

[190] For discussion on the "compensation approach" to security exceptions clause analysis, *see infra* Section III.B.2.

[191] Ishikawa, *supra* note 14, at 85.

[192] *See*, *e.g.*, General Agreement on Trade in Services (1994), https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm#ArticleI.

[193] U.S. 2012 Model BIT, art. 14. Japan-Israel BIT (2017), art. 8; Ishikawa, *supra.* note 14, at 85. Ishikawa also discusses the use of ratchet clauses to prevent the *post-hoc* revision of non-conforming measures listed in the Annexes of more progressive treaties, taking the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP") as an example. *Id.* at 86, note 80, citing CPTPP, art. 9.12, which provides:

Article 9.4 (National Treatment), Article 9.5 (Most-Favoured-Nation Treatment), Article 9.10 (Performance Requirements) and Article 9.11 (Senior Management and Boards of Directors) shall not

investment law agreements to prevent a state from openly and transparently limiting the pre-establishment admission of foreign investment for its own security prerogatives, nor should there be. States are free to contract for themselves bespoke investment liberalization commitments, which allow them to tailor their investment screening measures to their security priorities.

However, as noted above, the functional reach of CFIUS, as amended by FIRRMA, transcends the establishment phase of investment to cover many important post-establishment transactions. The rapid spread of the TNP strategy, especially to legal systems without sufficient guardrails between the law and security forces, is creating a volatile investment climate for technology firms. In the marginal cases where state action contravenes the limitations to which states themselves consent, the state should be held accountable. If investment screening and export control regimes continue to evolve based on the US approach, then it will be on post-establishment measures that most TPA-adjacent claims will hinge.[194]

3. Security Exception Clauses

The fundamental treaty-based mechanism for the elevation of the essential security interest in international law is the security exception clause.[195] Security exception clauses have been utilized in economic agreements since the advent of bilateral Friendship, Commerce, and Navigation ("FCN") treaties, and they are included in many foundational multilateral economic agreements as well, such as the

apply to: (a) any existing non-conforming measure that is maintained by a Party … (c) an amendment to any non-conforming measure referred to in subparagraph (a), *to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment" with these obligations*. (emphasis added).

Ishikawa astutely observes that under such an obligation, a State's ability to deepen or broaden security screening measures without regard to its nondiscrimination and anti-performance requirement commitments is limited (in the case of CPTPP art. 9.12, by the operation of subparagraph (c)). But such ability is not limited if measures can be justified by broad, free-standing security exception clauses that negate the investment liberalization obligations of the whole treaty. *Id.* at 86.

[194] It should also be noted that, absent express stabilization commitments between a foreign investor and home state, tribunals are unlikely to consider the admission of an investment after preliminary security review, standing alone, to constitute a commitment by a host state to refrain from future tightening of their security scrutiny of that foreign investment or investor. *See, e.g.*, Total S.A. v. Argentina, ICSID Case ARB/04/1, Decision on Liability ¶ 312 (Dec. 27, 2010); *see also* El Paso Energy Intl'l Co. v. Argentina, ICSID Case ARB/03/15, Award ¶ 374 (Oct. 31, 2011).

[195] *See* Rose-Ackerman & Billa, *supra* note 175.

General Agreement on Tariffs and Trade ("GATT"). Among the thousands of international economic treaties in force today, there are security exceptions of every stripe and color. The threshold distinction, between self-judging and non-self-judging clauses, has been deliberated upon extensively in the context of largely non-self-judging FCN treaty security exceptions.[196] It is basically trite law that the invocation of a non-self-judging security clause is substantively reviewable.[197]

Self-judging clauses are more difficult to grapple with. In an important paper noting the rise of self-judging essential security interest clauses ("ESIs"), Karl Sauvant classified existing self-judging clauses by two dimensions:[198] (1) scope—(a) *broad* clauses that refer to essential security in the abstract, versus (b) *narrow* clauses that limit security to a predetermined taxonomy of issues; and (2) strength—(a) *conditional* clauses that expressly state measures are not to be applied in arbitrary manner or so as to avoid treaty obligations, versus (b) *strong* clauses that simply state they are self-judging and, (c) *very strong* clauses that expressly preclude judicial deliberation of their invocation.[199]

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[196] In *Nicaragua v. US*, the ICJ held that a non-self-judging security exception did not affect its jurisdiction but that its invocation could be considered as a defense on the merits. It found that the non-self-judging nature of an FCN treaty, as compared with the self-judging character of art. XXI GATT, to be dispositive with regard to the scope of judicial review available to security measures taken by the US. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) ¶ 222. This approach was again followed by the ICJ in the *Oil Platforms* case with regard to article XX of the 1955 Iran-US Treaty of Amity, Economic Relations, and Consular Rights. *See* Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12) ¶ 20.

[197] *See* William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT. L. 283, 295-96 (2010) [hereinafter "Burke-White & von Staden"]. Using the non-self-judging art. XI of the US-Argentina BIT and Argentine economic crisis arbitrations as an example, the authors suggest that tribunals engage in a balancing of rights between the host state and investor pivoting on the germaneness of contested state measures to achieving a given security objective. The authors further divide ISDS into a public law (investor v. broad policy imperative) and private law (investor v. targeted state action) dichotomy, arguing that in the former case, a greater margin of appreciation for the rights of host states to regulate must be given in order to preserve the legitimacy of investment arbitration writ large.

[198] Karl Sauvant & Mevelyn Ong, *The Rise of Self-Judging Essential Security Interest Clauses in International Investment Agreements*, COLUMBIA FDI PERSP. No. 188 (Dec. 5, 2016) [hereinafter"Sauvant & Ong"].

[199] *See* U.S.-Peru TPA, art. 22.2, n.2 ("For greater certainty, if a Party invokes Article 22.2 [essential security exception] in an arbitral proceeding initiated under Chapter Ten (Investment) or Chapter Twenty-One (Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies").

The GATT's Article XXI is an important case study in self-judging security exceptions clauses.[200] Though this clause has rarely been invoked or deliberated upon, largely out of political taboo,[201] a recent WTO panel established to resolve a trade dispute between Russia and Ukraine had occasion to decide on the question of its own competence to consider the invocation of the clause.[202] The Panel began by dismissing the relevance of the *Nicaragua* and *Oil Platforms* ICJ cases which each involved a non-self-judging FCN treaty security clause.[203] The panel held that the GATT Article. XXI was not completely "self-judging" in the manner asserted by Russia, because it contained qualifying language that narrowed the application of the clause to a certain taxonomy of issues.[204] Applying good faith analysis, the panel found that Russia's 2014 actions were taken in a "situation of international emergency" *vis-à-vis* Ukraine, and that the substantive appropriateness of Russia's actions in dealing with these circumstances was within Russia's sole discretion, according to the self-judging language of the chapeau of Article XXI of the treaty.[205] In so holding, the panel rejected both an argument filed by the United States that GATT Article XXI precluded its jurisdiction entirely,[206] and an argument filed by the EU that Russia's invocation of the exception should be reviewable in substance, beyond the shallow inquiry into the presence or non-presence of an objective "emergency in international relations".[207]

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[200] For an excellent study of the development and use of this clause, *see* Mona Pinchis-Paulsen, *Trade Multilateralism and U.S. National Security: The Making of the GATT Security Exceptions*, 41 MICH. J. INT.'L L. 109 (2020) [hereinafter "Pinchis-Paulsen"].

[201] *See id.*

[202] Panel Report, *Russia–Measures Concerning Traffic in Transit*, WTO Doc. WT/DS/512 (adopted Apr. 5, 2019) [hereinafter "*Russia-Transit Panel*"].

[203] *Id.* at n.52.

[204] *Id.* ¶¶ 7.101-102 (noting GATT art. XXI(b)(iii) allows for invocation of the security exceptions in situations presenting "an emergency in international relations").

[205] *Id.* ¶¶ 7.126, 7.146-47.

[206] Responses of the United States of America to Questions From the Panel and Russia to Third Parties, Russia–Measures Concerning Traffic in Transit, WT/DS512 (Feb, 20, 2018), https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.As.Pnl.and.Rus.Qs.fin.%28public%29.pdf.

[207] European Union Third Party Written Submission, Russia–Measures Concerning Traffic in Transit, WT/DS512, (Nov. 8, 2017), https://trade.ec.europa.eu/doclib/docs/2018/february/tradoc_

The Ukraine-Russia conflict certainly provides fertile ground for a security argument to blossom. Yet this dispute has also sown seeds for future Article XXI invocations far astray of this mark. South Korea has recently lodged a challenge at the WTO to measures taken by Japan that increase scrutiny on the licensure of chemical exports which are critical to semiconductor manufacture to Korea.[208] South Korea maintains that these measures are politically motivated. The international semiconductor community has also expressed a principled concern related to the novelty and potential supply chain impacts of these measures.[209] As the export controls at issue are premised on national security considerations, it appears that GATT Article XXI will be revisited.[210] This time, the dispute has pinpoint relevance to the global US TNP strategy.

Some important investment treaties use a similar qualified, self-judging approach to that of the GATT, such as the 2012 Korea-China-Japan Trilateral Investment Treaty.[211] This treaty also includes a codified reiteration of the "good faith" obligation

156602.pdf, at ¶28 ("[the self-judging language in art. XXI(a) is] in reality of very limited relevance, if any, for the interpretation today of Article XXI of GATT 1994").

[208] Request for the Establishment of a Panel by the Republic of Korea, Japan—Measures Related to the Exportation of Products and Technology to Korea, WT/DS590, (June 19, 2020), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/590-4.pdf&Open=True. In July of 2019, Japan removed South Korea from a "white list" of countries receiving preferential treatment under its export control laws, citing an erosion of trust between the parties due to decreased working-level trade and security cooperation over the past three years. South Korea only imports about US$33.6 million worth of these three chemicals each month, but they are vital to manufacture of the US$8.4 billion of semiconductors exported by South Korea each month, demonstrating South Korea's outsized exposure in this trade dispute, and the sensitivity of the semiconductor supply chain to international disputes. Stephen Ezell, *Understanding the South Korea-Japan Trade Dispute and its Impacts on US Foreign Policy*, INFO. TECH. & INNOVATION FOUND., Jan. 16, 2020.

[209] *See* Letter from Computing Technology Industry Association et al. to the Japanese Minister of Economy, Trade and Industry and the Korean Minister for Trade, Ministry of Trade, Industry and Energy (July 23, 2019), https://www.semiconductors.org/wp-content/uploads/2019/07/Final-Multi-AssociationLetter-Japan-South-Korea-Export-Controls-1.pdf.

[210] *See* Pinchis-Paulsen, *supra* note 200, at 112.

[211] Korea-Japan-China Trilateral Investment Treaty, art. 18(1) ("Security Exceptions: 1. Notwithstanding any other provisions in this Agreement other than the provisions of Article 12, each Contracting Party may take any measure: (a) which it considers necessary for the protection of its essential security interests; (i) taken in time of war, or armed conflict, or other emergency in that Contracting Party or in international relations; or (ii) relating to the implementation of national policies or international agreements respecting the non-proliferation of weapons; (b) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security").

which references and disciplines the application of the security exception clause.[212] The 2009 China-Peru FTA is unique in that it contains two security clauses. The clause for the general treaty models the GATT Article XXI and is self-judging and qualified.[213] But there is also a clause that applies only to the investment chapter of the treaty. It has ostensibly self-judging and non-qualified language but includes a clarifying note that the tribunal shall decide whether the security exception applies in any given case.[214] This may indicate a divergence in the level of deference the parties sought to afford trade related and investment related security measures respectively.

The qualification approach has been abandoned in a new generation of exceptionally strong, broad, and unqualified self-judging security exceptions clauses.[215] States that have negative experiences with ISDS may quickly revise their IIAs to reflect their desire to preclude adjudication of security adjacent disputes in the future.[216] Indeed, the proliferation and evolution of self-judging security

[212] *Id.* art. 18(2) ("In cases where a Contracting Party takes any measure pursuant to paragraph 1, that does not conform with the obligations of the provisions of this Agreement other than the provisions of Article 12, that Contracting Party shall not use such measure as a means of avoiding its obligations."). The "good faith" approach is discussed further in Section III.B.1, *infra*.

[213] China-Peru FTA, art. 194.

[214] *Id.* at art. 141, n.19.

[215] *Compare* USMCA, *supra* note 110, at art. 32.2, *with* North American Free Trade Agreement, Jan. 1, 1994 ["NAFTA"], art. 2102. *See also* CPTPP, art. 29.2(b) ("Nothing in this Agreement shall be construed to […] (b) preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."); Regional Comprehensive Economic Partnership ("RCEP"), art. 10.15 (utilizing almost identical construction as CPTPP art.29.2).

[216] For example, India revised its model BIT in 2016 to include a broader security exceptions clause after its experience with the Devas Telecoms dispute. *See* India 2016 Model BIT, https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf, art. 17(1) ("Nothing in this Treaty shall be construed: (i) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; (ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to: (a) action relating to fissionable and fusionable materials or the materials from which they are derived; (b) action taken in time of war or other emergency in domestic or international relations; (c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (d) action taken so as to protect critical public infrastructureincluding communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or (iii) to prevent a Party from

exception clauses in IIAs presents the greatest obstacle to international adjudication of security-adjacent disputes going forward. As of yet, these clauses are not present in the majority of IIAs,[217] but the increasing popularity of self-judging clauses will make it difficult going forward for tribunals to analogize to past precedent in ISDS that applies good faith scrutiny to state measures taken in furtherance of national security objectives.[218]

B. *International Adjudication of Security-Adjacent Measures*

Although there is limited precedent to describe a "one-size-fits-all" approach to security exception analysis, there is enough to describe a pattern by which tribunals typically analyze the meaning of a given treaty's security exception language in light of the security rationale presented by the state. As adjudicators inevitably come into further contact with these exceptions in international disputes, these techniques will have to evolve according to the specific circumstances in which they are deployed.

1. The Good Faith Approach

In the case of a treaty with a non-self-judging security exception, a state's invocation of the clause can almost certainly be considered holistically, by applying the "good faith" approach.[219] The good faith approach is drawn from the CIL principle of *pacta sunt servanda*, which is codified in Article 26 of the VCLT.[220] Theorized most

taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.").

[217] *See* Sauvant & Ong, *supra* note 198. As of early 2016, the authors found 222 self-judging ESI clauses in 1,861 treaties.

[218] *Id.* at Figure 2 (finding that 60% of the IIAs concluded in 2015 contained self-judging security clauses). Past investor-state tribunals, examining US-Argentina BIT art. XI and the Mauritius-India BIT art. 11(3) respectively, each operated under BIT containing a security exception clause with non-self-judging language. *See* Section III.C.3, *infra*.

[219] In the trade context, this approach was also utilized by the Russia-Transit Panel to apply scrutiny to Russia's reliance on the GATT's self-judging, but qualified, security exception. However, the Panel only did so to the extent of determining whether the qualifying condition of the clause had been met. It considered only the objective presence of a "state of emergency in international relations" between Russia and Ukraine, and not Russia's good faith in determining that the measures blocking Ukrainian goods in transit were necessary for its essential security interests. *Russia-Transit Panel*, *supra* note 202. Thus, the "good faith" approach is not necessarily limited in application to clauses which are non-self-judging.

[220] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter "VCLT"], art. 26, ("'*Pacta sunt servanda.*' Every treaty in force is binding upon the parties to it and must be performed

intensely by scholars and practitioners in the wake of the Argentine economic crisis arbitrations,[221] the good faith approach consists of a two-pronged analysis of state measures. First, comes an analysis of the procedural comprehensiveness of state measures, *i.e.*, whether the state has engaged in "honest and fair dealing" with the foreign investor.[222] Second, comes the substantive analysis of whether there is a "rational basis" for the invocation of measures relative to the security policy invoked under the security exception clause at issue.[223] In practice, there is a spectrum of viewpoints on to how to apply good faith analysis to security exceptions clauses, with positions falling between no review and thorough substantive review encompassing both steps of the good faith test.[224]

Despite there being no single consensus articulation of the good faith test, most tribunals considering its application to treaty exceptions across factual contexts agree that at minimum it requires the state to articulate some basis for its invocation of said exception. This is true with regard to self-judging and non-self-judging clauses, though in the former case a tribunal may be hesitant to engage in anything more than a superficial analysis of process while forgoing substance review entirely.[225] This hesitance might be somewhat alleviated by stressing a teleological

by them in good faith"). *See also* Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 268, ¶ 46 (Dec. 20, 1974) ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this CO-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.").

[221] Burke-White & von Staden, *supra* note 197.

[222] *Id.*

[223] *Id.*

[224] *Compare* relative interpretations of the self-judging clause in the US submission, EU submission, and the Panel decision in *Russia-Transit Panel*, *supra* note 202. The degree to which a tribunal engages in review appears to depend most heavily on the construction of the clause itself, the occurrence and location of "it considers" language within the clause, and the factual context of the dispute.

[225] Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France), 2008 I.C.J. 177 (June 4) ¶¶ 145-48 (examining a French court's statement of reasons for refusing to transfer a case file containing defense secrets and constraining its analysis to the question of whether the reasons stated "fell within those allowed for" in treaty exception). *See also id.* ¶¶ 7-11 (declaration of Keith, J.).

method of interpretation under VCLT Article 31(1).[226] Indeed, any invocation of a treaty exception clause requires an act of treaty interpretation on the part of the state. And the teleological approach has been widely used in investment arbitration to reinforce arguments for broad interpretations of, *inter alia*, the meaning of "investment" or of FET in IIAs where definitions clauses of the treaty are ambiguous and the treaty contains a reference to protecting foreign investment in its preamble.[227] If utility can provide grounds to broaden the meaning of "investment", it may provide grounds to narrow the meaning or impact of "it considers" as well, if the circumstances demand it.[228]

As demonstrated by the ICJ majority opinion in the *Norwegian Loans* case, the Argentine economic crisis arbitration, the *Devas* and *Deutsche Telekom* arbitrations, and the *Russia Transit* WTO panel decision, the good faith approach has become the predominant mode of analysis of the invocation of exception clauses in international law. That said, good faith analysis has its limitations and its detractors. With emergency scenarios, it is often difficult for tribunals to understand the perspective of states acting under the pressure of exigent security concerns.[229] What is more, the political implications of intent-based or good faith inquiries can be "quite exacting" on the relationship of the parties and on the legitimacy of the international

[226] VLCT, *supra* note 220, at art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in the light of its object and purpose*") (emphasis added).

[227] *See generally*, Sanja Djajic, *Searching for Purpose: Critical Assessment of Teleological Interpretation of Treaties in Investment Arbitration*, 2016 INT'L REV. L. 1 (2016). For an analysis of this trend with regard to FET, *see* Rachel A. Hird, *Thomas W. Wälde and Fair and Equitable Treatment*, 27 J. ENERGY & NAT. RESOURCES L. 377, 387 (2009).

[228] *See* Section III.B.3 *infra* for more on the imperative that tribunals find some way to consider the treaty meaning of "security" even in cases where defining an "essential security interest" is expressly left to the exclusive discretion of the state.

[229] *See e.g.*, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/97/3, Dissenting Opinion of Samuel K.B. Asante (June 15, 1990), *in* 6 ICSID REV. 574, 593-595 (1991) ("The Tribunal's enunciation and application of due diligence fails to take into account the national emergency and extraordinary conditions under which the Government mounted a strategic and highly sensitive security operation to regain its sovereign control of the area of insurgency. The Government was confronted with essentially aforre mjeure situation. Once it is conceded that the Government had a compelling sovereign duty to undertake a military operation to regain control, the timing and modalities of the security operation must surely fall within its exclusive discretion. In this regard the Tribunal should be slow to second-guess the tactics and strategies of military commanders on the ground.").

adjudicatory process itself;[230] even to the point of rendering good faith analysis completely impracticable in some estimations.[231]

2. The Compensation for Lawful Expropriation Approach

A politically neutral alternative to "good faith" analysis being desirable, some have proposed a compensation-based, lawful expropriation model for dealing with the potential abuse of security justifications–as a more sterile solution.[232] Under this "compensation approach", an investor implores a tribunal to find not that a host state has breached a treaty obligation or committed an international delict, but that it has fairly invoked an exception yet must nonetheless pay compensation for the damage done to the investor by its actions. Perhaps reticent of the traditional geopolitical tension surrounding trade in natural resources,[233] the Energy Charter Treaty codifies this "compensation approach" by including a broad and self-judging security exception, while explicitly clarifying that states cannot expropriate investments without compensation, even for security reasons.[234] This approach appears to have the most utility in avoiding the "exacting" political nature of the good faith question. Indeed, it mirrors the use of non-violation claims at the WTO to remedy harm flowing

[230] Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 52-54 (July 6) (Separate Opinion of Judge Sir Hersch Lauterpacht). It is important to note that Judge Lauterpacht did not dismiss the use of good faith analysis outright, he merely stated it was inappropriate given the broad nature of the French reservation at issue. The limiting factors Judge Lauterpacht would place on the operation of good faith analysis are tied inextricably to the concept of legitimate expectations:

The question of the obligation to act in good faith arises only in relation to legitimate expectations of the other party. But there is only a nominal degree of legitimate expectation in relation to an obligation, in regard to a potentially most comprehensive category of disputes, as to which the party undertaking it expressly declares in advance that it is free to determine both the existence and the degree of its obligation. *Id.* at 48.

[231] *See Certain Norwegian Loans*, *supra* note 230, at 89 (Dissenting Opinion of Judge Read) (stating that, "Practically speaking, it is, I think, impossible for an international tribunal to examine a dispute between two sovereign States on the basis of either good or bad faith or of abuse of law").

[232] *See* Ma, *supra* note 183; Alan O. Sykes, *Economic "Necessity" in International Law*, 109 AM. J. INT'L L. 296, 320-22 (2015); *but see* Anne van Aaken, *On the Necessity of Necessity Measures: A Response to Alan O. Sykes*, 109 AJIL UNBOUND 181 (2015) (advocating for an approach that better considers the unique industry, investor expectations, and economic conditions of the host state instead of imposing externality costs for expropriation in a uniform manner).

[233] *See, e.g.*, AGNIA GRIGAS, THE NEW GEOPOLITICS OF NATURAL GAS (2017); *but see*, *America's domination of oil and gas will not cow China*, THE ECONOMIST, Sept. 17, 2020 (describing a marked shift in resource geopolitics with regard to energy and renewables).

[234] Energy Charter Treaty, Dec. 17, 1994, arts. 13, 24(3), 2080 U.N.T.S. 95.

from measures taken in the name of essential security—which has been proposed by trade law experts as a means to dejudicialize conflicts that sit at the intersection of trade and national security.[235]

The "compensation approach" finds further support in case law regarding the CIL defense of Necessity.[236] Further, compensation for legal expropriation is a well-developed topic within the doctrinal field of international investment law.[237] And even under the strict language of many security clauses to the effect of "nothing in this agreement shall preclude a party from applying measures …",[238] it could be argued, albeit somewhat strenuously, that the compensation approach does not *preclude* the application of measures that expropriate but merely *conditions* expropriation on the subsequent payment of prompt, adequate, and effective compensation.

Despite the apparent benefits of the "compensation approach", its prospects for adoption are somewhat dubious. The tribunal in *Devas* rejected the compensation-based approach. It reasoned that where India took legitimate security measures the Mauritius-India BIT created a hard limit on substantive treaty obligations, including the right to compensation for expropriation.[239] At the same time, recognizing the importance of prompt, adequate, and effective compensation for expropriation to the international investment law regime, the tribunal was careful to segregate what is

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[235] Lamp, *supra* note 40.

[236] *See* Gabcikovo-Nagymaro Project (Hungary/Slovakia), 1997 I.C.J. ¶¶ 152-53 (Sept. 25) (discussing the requirement that compensation be dispensed to an aggrieved party even where Necessity is successfully invoked as an affirmative defense to state responsibility).

[237] OECD, "*Indirect Expropriation*" *and the* "*Right to Regulate*" *in International Investment Law*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2004/04); *see* Sempra Energy Int. v. Argentine Republic, ICSID Case No. Arb/02/16, Award ¶ 396 (Sept. 28, 2007) (citing the Expert Statement of Professor W. Michael Reisman, Hearing Transcript, Vol. 6, February 11, 2006, p. 1007:

of course governments in these circumstances must take measures to restore public order, but from the investment law standpoint – and this is for the future of all investments – international investment law says you may do it, but you must pay compensation. If exceptions are made for like these or other circumstances, the entire purpose of modern investment law, which is to accelerate the movement of private funds into developing countries for development purposes, will be frustrated.).

[238] *See*, *e.g.*, USMCA, *supra* note 110, at *chapeau* of art. 32.2 ("Nothing in this Agreement shall be construed to …").

[239] *Devas* Award, *supra* note 185, ¶ 293.

saw as India's legitimate security claims from the illegitimate *vis-à-vis* the security carve out.[240] Advocates of the "compensation approach" argue that the exercise of scrutinizing a state's national security judgements is more dangerous than ruling a measure is *per se* valid while forcing the state to internalize the costs of that measure.[241]

However, a *pro forma* national security argument by its nature is more concerned with result than legal substance. In the context of truly frivolous national security claims, there is no meaningful difference between a bad faith finding and a non-violation leading to compensation in the perspective of the malfeasant state. The "compensation approach" shows more utility with novel or retrograde, but otherwise legitimate "economic security as national security" arguments. Still, it runs into problems with the somewhat amorphous and stochastically applied police power doctrine, which absolves states of responsibility for loss of property or other economic disadvantages resulting from its nondiscriminatory application of its police power.[242] The "compensation approach" also defies the plain meaning of broad "whole of treaty" security exceptions and defies the apparent policy logic behind including these strong security clauses in the treaty in the first place.[243] This context is relevant for tribunals to consider under Article 31(1) and (2) VCLT.

Additionally, the "compensation approach" is based on a finding of lawful expropriation. This means that to rely on this approach, an investor must establish that an expropriation took place. This could limit its utility for those investors whose

[240] *Id.* ¶¶ 355, 371; Deutsche Telekom AG v Republic of India, Permanent Court of Arbitration, Interim Award (Dec. 13, 2017).

[241] Ma, *supra* note 183.

[242] *See* Restatement (Third) of Foreign Relations of the United States § 712(2) (Am. Law Inst. 1987); *contra*, Peter Charles Choharis, *U.S. Courts and the International Law of Expropriation: Toward a New Model for Breach of Contract*, 80 S. CAL. L. REV. 1, 23-26 (2006) (critiquing US courts for reliance on the "outdated and muddled" Restatement (Third) as a means to uphold sovereign immunity defenses to payment of just compensation in contravention of more established principles of international law).

[243] Heath, *supra* note 25, at 1092 ("It is also unlikely that, as a policy matter, states intended security exceptions to force them to internalize the costs of their security measures. Rather, state parties to trade or investment treaties likely thought that when they imposed sanctions on a designated person or nation or when they forced a foreign company to divest its ownership of a technology firm on security grounds, their trading partners and foreign investors would legitimately expect to bear the costs of such measures.").

claims are grounded in a denial of FET or FPS, for example. Further, the investor's claims will be limited to the fair market value of the investment prior to expropriation, rather than a full accounting for "actual loss".[244] This makes it virtually useless for some investors.[245] In any event, the key benefit of international arbitration is that its practitioners can apply their unique perspectives and experience, with the law and with the political element of commercial disputes, in order to choose the most effective approach given the facts and treaty relationship implicated in each individual case.[246]

3. The Essential Issue: Defining "Security"

No matter the treaty clause or method of analysis applied, a tribunal faced with a security justification for state action must consider the meaning of "security" within the governing law of the dispute at hand. Defining "security" for the purposes of security-adjacent international disputes represents a Gordian knot for both the complexity of the task, and for its political implications.[247] Yet unlike the popular account of Alexander's conquest of Anatolia, in this case the bolder approach to the challenge is not the simpler one.[248] It is not enough for a tribunal seized of jurisdiction in an investment dispute to accept the invocation of a security exception

[244] World Bank, *Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, Guideline IV at 41-44 (1992); *Factory at Chorzów*, (Germany v. Poland), Judgment No. 13, 1928 P.C.I.J. ¶ 47 (Sept. 13) (reparation must, as far as possible, wipe out all the consequences of the *illegal* act and re-establish the situation which would, in all probability, have existed if that act had not been committed"); *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award ¶ 45 (July 25, 2007) ("Actual loss" incurred, can be measured by loss of dividends, [*i.e.* expectation damages]).

[245] For example, say a foreign investor is an activist limited partner in a tech-focused private equity fund and they are forced to sell their position in the fund at a discount on a secondaries market after the fund fails to agree to security mitigation measures with the government of their portfolio companies' domicile. That position may otherwise qualify as an investment protected by the treaty relationship between the foreign investor's home state and the domiciliary state of the portfolio company. Even if the investor can prove the host state engaged in bad faith mitigation negotiations, or the purpose for its security findings was inapposite to the treaty security exception, with the compensation approach the investor would be unable to recover damages incurred, *i.e.*, the difference in sale price and pre-measure market value, from its forced divestiture from the company or the fund.

[246] *See generally* Yves Dezalay & Bryant G. Garth, DEALING IN VIRTUE (UCP 1996); *see also* Section IV.A *infra*.

[247] Inveighing on the notion of contesting a state's characterization of its own security imperatives, Judge Lauterpacht once remarked that it is "doubtful whether any tribunal acting judicially can override the assertion of a State that a dispute affects its security." HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 188 (1933).

[248] *See* Gordian knot, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Gordian-knot.

clause by a respondent state uncritically and unequivocally. To do so would be to invite an interpretation of a component of the treaty that would, by its subjectivity, degrade the very legal quality of the instrument itself.[249] This would run counter to the teleological principle of interpretation that the language of a treaty be given effet utile (*ut res magis valeat quam pereat*),[250] which (though not explicitly mentioned in the VCLT) is a principle commonly put to the task of treaty interpretation.[251] Tribunals must engage to some degree with the meaning of "security" when considering TNP-adjacent measures, even if only implicitly and indirectly.[252]

The distinction between an "essential security" interest as used in most treaties, and a "national security" interest as used in domestic law has yet to be defined authoritatively.[253] Yet there is some agreement that "essential" suggests a focus on the existential components of statehood or nationhood.[254] In the context of the law

[249] *Accord Certain Norwegian Loans*, *supra* note 230, at 52 ("If thus practically every matter can be plausibly, though not necessarily accurately, described as a matter essentially within the domestic jurisdiction of the State concerned and if that State is the sole judge of the question, it is clear that, as the result, the element of legal obligation is reduced to a vanishing point.").

[250] This mashup of French public law and Latin canon law means to give terms, "useful effect (so that the matter may flourish rather than perish)". AARON FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2009).

[251] *See, e.g.*, Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Other Points*, 33 BYIL 203 (1957).

[252] *See* Heath, *supra* note 25, at 1068 ("A tribunal may also find a violation where a state's articulated rationale in support of a given measure clearly falls outside of the scope of the exception or subverts the entire treaty regime, such as when a state claims that economic autarky constitutes an essential security interest under a treaty meant to further trade liberalization.").

[253] There are some instances in international law instruments in which the "essential" is qualified or otherwise demarcated. For example, Article 346 of the Treaty on the Functioning of the European Union allows for exceptions from the application of EU law where necessary for the, "protection of the essential interest of security which are *connected with the production of or trade in arms, munitions and war material*." Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 346, June 7, 2016, OJ (C 202) 1 [hereinafter "TFEU"] (emphasis added). There may be further evidence buried in the negotiating history of various treaties. For example, the negotiating history of the US-Philippines FCN demonstrates that the term "national emergencies", as used in that security exception, was understood as emergencies that "might not have regard to international situations; that a threat of uprising or an earthquake might be a national emergency," and that this concept "had a physical connotation, such as volcanic eruption or war." Telegram from the U.S. Embassy in Manila to the U.S. Dep't of State, July 20, 1948, (U.S. Dep't of State File No. 711.962/7-2048).

[254] *See* Julien Chaisse, *Demystifying Public Security Exception and Limitations on Capital Movement: Hard Law, Soft Law and Sovereign Investments in the EU Internal Market*, 37 U. PA. J. INT'L L. 583 (2015); *see also* William J. Moon, *Essential Security Interests in International Investment Agreements*, 15 J. INT'L ECON. L.

of Necessity, which depends upon the protection of an "essential state interest", the ILC Committee of experts on State Responsibility declared that an "essential interest" is one which involves, "political or economic survival, the continued functioning of [a state's] essential services, the maintenance of internal peace, the survival of a sector of [a state's] population, the preservation of the environment of [a state's] territory or a part thereof, etc."[255] The prevailing view seems to be that "essential" serves a narrowing function.[256] In this way, claiming a national security interest as "essential" can lay bare just what factors a given state considers fundamental to its nationhood, and to its vitality as a Nation-State.[257]

As for "national security", Arnold Wolfers, a pioneer of Realism in the field of International Relations, described the concept of "national security" as having both

481, 500 (2012) (asserting that essential security interests are fundamentally tied to traditional security imperatives).

[255] *Documents of the Thirty-Second Session*, [1980] 2 Y.B. INT'L L. COMM'N 14, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

[256] *See Russia-Transit Panel*, *supra* note 202, ¶¶ 7.130-31 ("'Essential security interests', which is evidently a narrower concept than 'security interests', may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally"). Alternatively, it could be argued that the word "essential" denotes an ephemerality of interest—in other words, something which can be a *security* matter in some cases, but need not be concretely, eternally, and exclusively so in all cases. This was the meaning ascribed by Judge Lauterpacht in the *Certain Norwegian Loans* case to the phrase "*essentially* within the domestic jurisdiction", which appeared in the French reservation to ICJ jurisdiction in that case. *Certain Norwegian Loans*, *supra* note 230, at 51:

> For, in the first instance. it will be noted that the French reservation in issue refers not to matters which are *according to international law exclusively* within the domestic jurisdiction of the State, but to matters which are *essentially* within the domestic jurisdiction. There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so – an aspect of the question for which the Advisory Opinion of the Permanent Court of International Justice in the case of *Tunis and Morocco Nationality Decrees* provides an instructive and authoritative illustration. Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally – all those matters have been claimed to be essentially within the domestic jurisdiction of States. It is not necessary for me to express an opinion on the subject. (emphasis in original).

[257] For its part, China has expressed a security ontology that conceptualizes national security as having military, political, economic, technological, and even cultural dimensions. *See* National Security Law of the People's Republic of China (2015), Ministry of Nat. Def. of China (Mar. 3, 2017), https://www.chinalawtranslate.com/en/2015nsl/ (unofficial translation); *see also* Xi Jinping, THE GOVERNANCE OF CHINA, Foreign Languages Press, at 222 (2014).

objective and subjective elements.[258] This distinction may have practical utility when considering the implications of a self-judging versus a non-self-judging security exception clause. In the former case, tribunals might look only to indicia of subjective fear of a value threat in the governmental machinations of the invoking state,[259] while in the latter they can consider objectively whether the conditions of a threat to values are met by broader factual circumstances.[260] Most importantly, this interpretation lends further credibility to the argument that the erstwhile magical "it considers" language might have meaning beyond simply signifying a self-judging, hard stop to judicial review.

According to Judge Baker, formerly Chief Judge of the US Court of Appeals for the Armed Forces, US national security law serves the purpose of establishing normative values, prescribing due process, and granting the state the substantive authority to act in its own best interest while defining the boundaries of that action (along with the boundaries of that interest).[261] Using this frame of reference, it is apparent that the US TNP strategy operates for both outward and inward security purposes—each an objective with normative and legitimizing functions. In this way, we can also see the TNP strategy, outside of the context of the interstate US-China rivalry, as a mechanism by the state to reclaim sovereignty from the private sector with regard to technological capability and strategic "edge".[262]

Again, the velocity of national security law in this inward direction stands to be contested, because it has not only the tendency but also the objective of

[258] Arnold Wolfers, *National Security as Ambiguous Symbol*, 67 POL. SCI. Q. 481, 485 (1952) ("Security, in an objective sense, measures the absence of threats to acquired values, in a subjective sense, the absence of fear that such values will be attacked.").

[259] *I.e.*, an emphasis on procedural analysis, as advocated by Heath, *supra* note 25.

[260] *I.e.*, a substantive analysis. In each case the values that form the content of "national security" are apparent from representations made by the State in, *e.g.*, national security laws and strategy publications.

[261] Honorable James E. Baker, *Artificial Intelligence and National Security Law: A Dangerous Nonchalance*, STARR F. REP. 1 (2018).

[262] Brian Seamus Haney, *Applied Artificial Intelligence in Modern Warfare and National Security Policy*, 11 HASTINGS SCI. & TECH. L.J. 61, 94-95 (2020) ("[M]ilitaries and intelligence services depend on the private sector for essential goods and services [...] one argument is the United States' national security law is in the hands of private companies, rather than the Government").

redistributing the free market benefits of innovation.[263] It does so specifically by limiting foreign persons' participation in the US market, and generally by rhetorically emphasizing the state's dominion over private action before a sound legal basis for that action is determined. The challenge posed by TNP for states and tribunals alike will be in cleanly separating the legitimate hard-security concerns: about foreign adversary access to critical infrastructure, data, and technological military edge, from an internal, private market contest between public and private actors.

C. *The National/Essential Security Interest in TNP*

1. The Policy Foundation of TNP

At the core of the US TNP strategy, is the resurrection of a belief that economic security is coextensive with national security.[264] The contours of this thinking are reminiscent of an era in global politics, from 1945 to 1991, that was dominated by the US-Soviet adversarial paradigm.[265] The attendant economic policy prescription is neo-autarkic.[266] Executive officials within the Trump Administration were clear in their representations to domestic private industry,[267] and to the international

[263] *See* Wakely & Indorf, *supra* note 60, at 28-31; *see also* Robert D. Williams, *In the Balance: The Future of America's National Security and Innovation Ecosystem*, LAWFARE BLOG (Nov. 30, 2018, 3:01 PM).

[264] White House, *National Security Strategy of the United States for 2017*, at 17 (Dec. 2017) ("Pillar II: Economic Security is National Security"), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf; Peter Navarro, White House Nat'l Trade Council Dir., Keynote Address at the National Ass'n for Business Economics Conference (Mar. 6, 2017) (stating that the US trade deficit is a threat to national security), https://www.c-span.org/video/?424924-3/peter-navarro-outlines-trump-administrations-trade-policy-economic-policy-conference.

[265] *See* Harold Hongju Koh & John Choon Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 INT'L L. 715 (1992).

[266] *See* Jeffrey Gedmin & Robert B. Zoellick, "*We Tried Autarky in the 1930s. It Didn't Work Very Well*", 15(6) THE AMERICAN INTEREST (April 14, 2020) (interview with Robert B. Zoellick, former President of the World Bank (2007-2012), US Deputy Secretary of State (2005-2006), and US Trade Representative (2001-2005), providing historical and experiential insight into contemporary crisis and nature of the desire to "decouple" the US from China).

[267] Mike Pompeo, Speech on Silicon Valley and National Security at the Commonwealth Club of San Francisco, CA (Jan. 13, 2020),

President Trump has taken action to confront China's theft and predatory economic practices. He's demanding respect and reciprocity. [...] He knows that economic security is, in fact, at the core of my mission set: to provide national security, to protect each and every one of you. And we've put export controls on parts that go into the CCP's nationwide surveillance machine. We've applied much greater scrutiny to technology exports that could have military use. [...] Our government agencies are

security community,[268] that they believed US national and collective global security depend upon changing Chinese behavior by hardening Chinese access points to global technology markets. There is a rhetorical emphasis in this strategy on utilizing economic pressure to force China to abandon some of its more obtuse economic-planning policies.[269]

In many ways, this concern is a new symptom of a lingering anxiety. A bipartisan commission was established by Congress to consider the security dimensions of China's participation in the global economic system, shortly before China's accession to the WTO.[270] The US-China Economic and Security Review Commission ("USCESR") Commission has been active over its 20-year mandate, but recently it is assuming a more active role in the national debate on China. China's perspective on its own technological development has been the subject of increased scrutiny by the US policy community as well.[271] To many, China's initiatives in this realm represent a new and dangerous permutation of China's larger economic reliance on State

cooperating in new ways to stop the Chinese military from using our own innovation against us. And we're putting our allies and partners on notice about the massive security and privacy risks connected to letting Huawei construct their 5G networks inside of their countries. And too, protecting America's innovating – innovative capacity is at the center of what we're trying to do in these talks.

[268] Prepared Remarks by Secretary of Defense Mark T. Esper at the Munich Security Conference (Feb. 15, 2020),

The [National Defense Strategy] states that we are now in an era of Great Power Competition, with our principal challengers being China, then Russia, and that we must move away from low intensity conflict and prepare once again for high-intensity warfare… I want to focus on the Pentagon's top concern: the People's Republic of China. […] I continue to stress to my friends in Europe – and just this past week again at the NATO Defense Ministerial in Brussels – that America's concerns about Beijing's commercial and military expansion should be their concerns as well… The reality of the 21st century is that many economic decisions are also national security decisions … our collective future may hang in the balance if we fail to make the hard choices now for the long run.

[269] *Id.*

… we want China to behave like a normal country that adheres to the international rules and order that generations before us have fought hard to protect and preserve. And that means the Chinese government needs to change its policies and behaviors. If the PRC will not change its ways, then defending this system must be our collective priority. We can only do this by making greater investments in our common defense; by making the hard economic and commercial choices needed to prioritize our shared security; and by working together to maintain a ready and capable alliance network […].

[270] Charter of the USCESR Commission, *available at* https://www.uscc.gov/charter.

[271] The recent work of the Center for Security and Emerging Technology (CSET) is prolific and exemplary. *See, e.g.*, Ryan Fedasiuk, *Chinese Perspectives on AI and Future Military Capabilities*, CSET POLICY BRIEF (Aug. 2020).

Capitalism.[272]

2. Traditional/Hard Security: Military-Civil Fusion and Military Edge

The keystone of the argument that Chinese access to technology implicates traditional security concerns, is the concept of Military-Civil Fusion (MCF).[273] Concern over this general phenomenon, a martial offshoot of Chinese State Capitalism, is what ties together technology transfer and national security. The term "State Capitalism" captures a range of economic activity in which the government, through SOEs, engages in commercial activity in the private sector.[274] While China's economy has evolved from byzantine central planning towards a more decentralized market economy in the past 40 years, it has yet to metamorphosize completely into a free market system. Despite China's accession to the WTO in 2001, a symbolic entry into the community of free market states, China's consistent deployment of State Capitalism creates enormous friction with its firms' participation in global markets.[275]

MCF builds on a process of integration between China's civilian economy and defense industrial base that is facilitated by the central authority of China's Communist Party.[276] This integration began during China's economic liberalization in the 1980s and 1990s and progressed in two stages: (1) a retooling of state heavy industry and military enterprise to produce consumer goods; and (2) a "spinning on" of advances in commercial tech into military applications.[277] Whereas military-civil

[272] Esper, *supra* note 268 ("China's growth over the years has been remarkable, but in many ways it is fueled by theft, coercion, and exploitation of free market economies, private companies, and colleges and universities."); *but see* Ji Li, *I Came, I Saw, I Adapted: An Empirical Study of Chinese Business Expansion in the United States and Its Legal and Policy Implications*, 36 NW. J. INT'L L. & BUS. 143, 194 (2016) (characterizing State Capitalism with Chinese characteristics as a "phantom menace").

[273] *See* US Dept. of State, *Military-Civil Fusion and the People's Republic of China*, Fact Sheet (2020), https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/mcf-and-the-prc/; *see also* Katherin Hille & Richard Waters, *Washington Unnerved by China's 'military-civil fusion'*, FT, Nov. 8, 2018.

[274] *See* MING DU, CHINA'S STATE CAPITALISM AND WORLD TRADE LAW (2014).

[275] *Id.*; *see also* JULIEN CHAISSE ET AL., EXPANSION OF TRADE AND FDI IN ASIA: STRATEGIC AND POLICY CHALLENGES 40 (2009).

[276] U.S.-China Economic and Security Review Commission, *Chapter 3, Section II: Emerging Technologies and Military-Civil Fusion: Artificial Intelligence, New Materials, and New Energy*, *in* 2019 REPORT TO CONGRESS (2019) (hereinafter "USCESRC Report").

[277] *Id.* at 237, nn.6-10.

integration took a top-down approach to guiding industrial and military improvements, military-civil *fusion* is society-wide in scope and involves a lighter-touch, bottom-up approach. As the national security community sees it, China is now directing its civilian research institutions, national-champion MNCs, investment-funds, and other nominally private, commercial actors to effect technology transfer from the West by both licit and illicit means.[278]

Implicit in the TNP strategy is an "endgame" assumption, *viz.* that effective implementation of MCF means that all commercial advances in Chinese technological and manufacturing capabilities are by extension military advances as well. This conclusion forms the major premise of the syllogism informing US TNP strategy.[279] In a nutshell, the logic is as follows: if China succeeds in acquiring and commercializing a given advanced technological concept, it will gain a technological military advantage by fiat.[280] China is in fact pursuing a broad strategy to extricate, adopt, manufacture and commercialize critical technologies.[281] Therefore, China will

[278] *Id.* at 237, nn.11-12; U.S.-China Economic and Security Review Commission, Hearing on Technology, Trade, and Military-Civil Fusion, written testimony of Elsa Kania, June 7, 2019, https://www.uscc.gov/hearings/technology-trade-and-military-civil-fusion-chinas-pursuit-artificial-intelligence-new [hereinafter "Kania"].

[279] *See* US Department of Commerce (Office of Public Affairs), *Commerce Adds China's SMIC to the Entity List, Restricting Access to Key Enabling US Technology*, Press Release, Dec. 18, 2020, https://www.commerce.gov/news/press-releases/2020/12/commerce-adds-chinas-smic-entity-list-restricting-access-key-enabling.

[280] *Id.* In 2017, General Secretary Xi created a special oversight body to facilitate interagency coordination, the Central Commission for Integrated Military and Civilian Development, which he chairs. Wei Qi, *Chinese President Takes on New Role to Spearhead Civilian-Military Tech Transfer*, SOUTH CHINA MORNING POST, Jan. 23, 2017. General Secretary Xi's leadership of the commission signals military-civil fusion's intended centrality in defense industrial planning, but also underscores the need for strong authority to overcome bureaucratic hurdles in implementation. Kania, *supra* note 278. Three central goals can be distilled from President Xi's public statements on the MCF initiative: (1) generate coordination between the defense and civilian sectors to improve the sophistication of China's military technology; (2) create cohesion in Chinese industry and academia to support military objectives; and (3) leverage industrial planning to drive technological innovation and economic growth. U.S.-China Economic and Security Review Commission, *Hearing on What Keeps Xi Up at Night*, testimony of Greg Levesque, Feb. 7, 2019, https://www.uscc.gov/hearings/what-keeps-xi-night-beijings-internal-and-external-challenges.

[281] While the Belt and Road Initiative can be seen as an external manifestation of this broader policy, China's "Made in China 2025" strategy is the most obvious internal manifestation. Published in 2015, it summarizes a ten-year plan to ramp up domestic sourcing of key technological inputs such as semiconductors and to utilize government funding and support to achieve domestic capacity in ten core industries: (1) advanced information technology; (2) robotics and automated machine tools; (3) aircraft

gain military advantage through their economic planning measures unless their progress on this front is impeded by economic force. The findings of the USCESR Commission reflect this presumptive formula.[282]

In response to the threat of MCF, the US has rapidly stepped up its effort to limit China's technological ascent. The Trump Administration utilized the IEEPA and NEA broadly to declare national emergencies and lay the groundwork for administrative action on rare earth mineral shortages,[283] an issue which the Obama administration had earlier sought to deal with through the WTO.[284] The US has denied visas to Chinese researchers through the State Department and has prosecuted dozens, whom it accuses of engaging in espionage on behalf of the Chinese military, through the DOJ.[285] It has even increased the potential liability carried by the academic institutions who would host Chinese researchers.[286] It has imposed product export sanctions using the commerce control list, targeting specific firms that it sees as agents of China's technological dominance strategy.[287] It has encouraged US institutional investors to divest their holdings of Chinese stocks, and banned

and aircraft components; (4) maritime vessels and marine engineering equipment; (5) advanced rail equipment; (6) new energy vehicles; (7) electrical generation and transmission equipment; (8) agricultural machinery and equipment; (9) new materials; and (10) pharmaceuticals and advanced medical devices. *See* Max J. Zenglein & Anna Holzmann, *Evolving Made in China 2025: China's Industrial Policy in the Quest for Global Tech Leadership*, MERCATOR INST. FOR CHINESE STUD. (July 2, 2019).

[282] *See* USCESRC Report, *supra* note 276.

[283] *See* Alistair MacDonald, *US Steps up Efforts to Counter China's Dominance of Minerals Key to Electric Cards, Phones*, WSJ, Oct. 5, 2020.

[284] *See Request for the Establishment of a Panel by the United States, China-Export Duties on Certain Raw Materials*, WTO Doc. WT/DS508/6 (Oct. 14, 2016).; Appellate Body Report, *China-Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012).

[285] A notable recent example involved a Chinese-native Raytheon missile engineer who took and operated his company laptop while on vacation in China. He was sentenced to three years in federal prison for violating ITAR export control laws. US DOJ Press Release, *Former Raytheon Engineer Sentenced for Exporting Sensitive Military Related Technology to China*, Nov. 18, 2020. Criminal Docket https://www.courtlistener.com/docket/14782208/united-states-v-sun/.

[286] George P. Varghese et al., *The China Initiative Heads to School*, WilmerHale Publications, Mar. 24, 2020.

[287] *See* discussion on Huawei in Section II.B.2, *supra*.

investment by US persons in firms found to aid the Chinese military.[288] Most notable of all are the enhancements made to the regulatory infrastructure for foreign investment and product export, covered in Section II above. These modifications and their global doppelgangers draw a direct lineage to the US concern with Chinese MCF.

Concerns began to arise as Chinese investment into very early-stage US companies increased dramatically from 2013 to 2018.[289] Michael Brown, head of the Defense Innovation Unit of the US Department of Defense, documented this trend and forecast its implications in a groundbreaking 2018 paper, which directly inspired the legislation that became FIRRMA and the ECRA. In that paper, he wrote:

> Because the U.S. economy is open, foreign investors, including those from China, are able to invest in the newest and most relevant technologies gaining experience with those technologies at the same rate as the U.S. does. The U.S. government does not currently monitor or restrict venture investing nor the potential transfer of early-stage technology. … CFIUS reviews specific deals on a case-by-case basis (rather than systematic assessments of acquisitions or acquirers) and only deals that involve a controlling interest by foreign investors (usually mergers and acquisitions), [so] CFIUS is only partially effective in protecting national security since its jurisdiction is limited. The other principal tool to inhibit technology transfer is the U.S. export control regime. Export controls are effective at deterring exports of products to undesirable countries and can be used to prevent the loss of advanced technologies but controls were not designed to govern early-stage technologies or investment activity. Importantly, to be effective, export controls require collaboration with international allies, a long process where cooperation is not assured.
>
> U.S. military superiority since World War II has relied on both U.S. economic scale and technological superiority. … the technologies which will create the Third [generation of military superiority] Offset are to a large extent being developed by early-stage technology companies with significant commercial markets. If we allow China access to these same technologies concurrently, then not only may we lose our technological superiority but we may even be facilitating China's technological superiority. That China will grow to be an economy as large as ours may be inevitable; that we aid their mercantilist

[288] Dawn Lim, *State Department Urges Universities to Disclose China Stocks Held in Index Funds*, WSJ, Aug. 21, 2020; Gordon Lubold & Dawn Lim, *Trump Bars Americans From Investing in Firms That Help China's Military*, WSJ, Nov. 12, 2020; Frances Yoon, *Trump's China Blacklist Sparks Reviews at Index Compilers*, WSJ, Nov. 23, 2020.

[289] Office of the US Trade Representative, Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974, 147-48 (Mar. 22 2018); Brown & Singh, *supra* note 7 ("Chinese investment activity in early stage technology deals is also growing rapidly and peaked in 2015 with Chinese investors participating in 271 deals, with total deal value of $11.5 billion. This represented almost 16% of the value of all technology deals in that year ($72 billion)").

> strategy through free trade and open investment in our technology sector is a choice. As a result, while strategic competition with China is a long-term threat rather than a short-term crisis, preserving our technological superiority and economic capacity are important issues for national focus today.[290]

Brown details China's central government planning initiatives relating to technology transfer and venture capital.[291] He documents a bevy of investment activity up and down the company value chain, from the Sinovation firm in the venture capital space,[292] to the spike in globally active Chinese private equity funds (627 active from 2013-2015),[293] to the use of special purpose vehicles to obscure beneficial ownership in specific acquisitions,[294] to investments by Chinese companies such as Baidu, Alibaba, Tencent, and JD.com directly into US companies.[295] Brown also alleges that these companies use anti-competitive commercial tactics to lower the purchase price of their target firms.[296] The bipartisan passage of FIRRMA signals that Brown's perspective has found unified support of the US legislature. The parroting of both the language and content of Brown's analysis signals adoption by the executive branch as well.[297] The US government's position on Chinese technology

[290] *See* Brown & Singh, *supra* note 7, at 2-3.

[291] *Id.* (citing APT1: *Exposing One of China's Cyber Espionage Units*, MANDIANT REPORT (2013) (demonstrating the use of targeted cyber-attacks to understand the scope of a technology, its IP value, and where it resides within a company followed by cyber theft or industrial espionage to steal that technology)).

[292] *Id.* at Appendix 3.

[293] *Id.* For perspective, these funds typically have 10-year investment horizons and usually participate in active management of portfolio companies to extract value from the initial invested capital. Brown identifies one of the most globally active Chinese PE investors as Yunfeng Capital, started by Alibaba and Ant Financial founder Jack Ma. Ma's ties to the government are contentious. He recently ran afoul of financial regulators for his public criticism, leading to a sudden cancelation of Ant's IPO. Jing Yang & Lingling Wei, *China's President Xi Jingping Personally Scuttled Jack Ma's Ant IPO*, WSJ, Nov. 12, 2020.

[294] *Id.* Brown uses the somewhat infamous example of Canyon Bridge Partners, a special purpose vehicle which combined Chinese capital with US management expertise in an attempt to acquire Lattice Semiconductor for US$1.3 billion. The attempt was blocked by CFIUS in 2017.

[295] *Id.*

[296] *Id.* (citing Elizabeth Dwoskin, *China Is Flooding Silicon Valley with Cash*, THE WASHINGTON POST, Aug. 6, 2016).

[297] Defense Production Act Policy Coordinator, Peter Navarro used Brown's titular language, that of "protecting the crown jewels" of US innovation, when describing US Trade Policy goals in an interview with NPR in 2018. *See Trump Administration Announces New Restrictions On China*, NPR, May 30, 2018, https://www.npr.org/2018/05/30/615414604/trump-administration-announces-new-restrictions-on-china.

acquisition is thus both clear and unified.

In the hard security sense, the traditional ambit of non-proliferation regimes, artificial intelligence or machine learning (deep learning, reinforcement learning and deep-reinforcement learning) technologies (collective, "AI") is prime among US concerns.[298] The strategic importance of AI for the future of military conflict has been compared to that of nuclear arsenals and aviation technology for the twentieth century.[299] But even more than nuclear or aviation technology, the technology that forms the broad classification of "artificial intelligence" is subject to vague categorization. Within the wider category of AI, it is deep learning, reinforcement learning, and deep reinforcement learning algorithms which garner the most national security focus.[300] These systems are particularly relevant to producing AI applications which are effective in asymmetrical conflict, which threatens US conventional military dominance.[301]

This AI-anxiety is most acute with regard to the development of autonomous weapons systems and with regard to security protocols protecting critical cyber infrastructure.[302] Advancements in these areas are already challenging established concepts in the law of armed conflict.[303] As regulators scramble to keep pace with developing technology, definitional challenges will metastasize in other areas of law as well. Thus, while the national security concern regarding AI is *prima facie* valid, it will be difficult to assess the specific application of the TNP policy to any given product or transaction without a great deal of technical proficiency and contextual

[298] *See* Gregory C. Allen, *Understanding China's AI Strategy: Clues to Chinese Strategic Thinking on Artificial Intelligence and National Security*, CTR. FOR A NEW AM. SEC. (Feb. 6, 2019). According to the USCESR Commission, "China's strategists see AI as a force multiplier across systems, a potential asymmetric advantage against high-value conventional weapons systems, and even a harbinger of a new mode of combat, where superior algorithms prove operationally decisive". USCESRC Report, *supra* note 276, at 220.

[299] *See* Baker, *supra* note 261; Brown & Singh, *supra* note 7, at 2-3.

[300] For an excellent primer on artificial intelligence, machine learning, informatics and national security written for legal professionals, *see* Haney, *supra* note 262.

[301] *See* Brown & Singh, *supra* note 7.

[302] Haney, *supra* note 262, at 77-85.

[303] *See* Rebecca Crootof, *Autonomous Weapons Systems and the Limits of Analogy*, 9 HARV. NAT'L SEC. J. 51 (2018).

knowledge. This challenge may present an opportunity for a new generation of advocates and adjudicators, with high degrees of technological literacy, to step into the breach opened by the US and China's emerging technological conflict.[304]

The full industrial coverage of the TNP strategy is also indeterminate, perhaps infinitely so. While operational AI applications are the endgame concern of the TNP strategy, for practical reasons the strategy casts a far broader net.[305] The mathematical concepts that inform deep learning, reinforcement learning, and deep reinforcement learning progress are not novel *per se*,[306] and advancements in these fields are largely open-sourced.[307] So, relative advancement in AI, supercomputing, and machine learning is largely dependent on its base inputs—advanced microchips and massive data aggregation on which machine learning algorithms can be trained.[308] The myriad inputs that construct real-world applications for AI become the main targets of the non-proliferation regime, which aims ultimately to slow the spread of China's relative AI superiority.[309] Equally important is relative supremacy in Internet of Things ("IoT") networking, *i.e.* the ability to communicate, command, and control robotic systems on the battlefield of the future.[310] In this regard,

[304] An underappreciated benefit of international arbitration is that it strengthens the demand for technical and subject-matter proficiency of legal practitioners through private market competition for instruction and appointment in specific high-stakes disputes. *See* Yves Dezalay & Bryant G. Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice out of the Competition for Transnational Business Disputes*, *in* DEALING IN VIRTUE 33 (1996).

[305] USCESRC Report, *supra* note 276, at 214 (*recognizing* that technological advancement in AI primarily relies on: (1) increased computing power (*i.e.*, semiconductor improvements); (2) the sophistication of algorithms (most of which are open source), and (3) mass data sets on which to train those algorithms).

[306] For example, Haney notes that the fundamental learning model used in reinforcement learning algorithms, the Markov Decision Process, was developed in 1913 and "remains state-of-the-art in AI today". Haney, *supra* note 262, at 68 (citing Gely P. Basharin, et al., *The Life and Work of* A.A. *Markov*, 386 LINEAR ALGEBRA AND ITS APPLICATIONS 4, 15 (2004); GEORGE GILDER, LIFE AFTER GOOGLE 75 (2018)).

[307] Haney, *supra* note 262 (pointing to Google TensorFlow as a prominent example of AI open sourcing).

[308] *Id.* at 75 ("Deep learning, reinforcement learning, and DRM provide a framework for analyzing state-of-the-art technical applications of AI tech. While the mathematical models underlying these systems are not new, their capabilities have shown rapid improvement symbiotically with the massive amount of information/data that humans have begun collecting at the dawn of the digital age.").

[309] Saif M. Khan & Alexander Mann, *AI Chips: What are they and Why they Matter*, CTR. FOR SEC. AND EMERGING TECH. (Apr. 2020).

[310] USCESRC Report, *supra* note 276, at 232, n.187 (citing John Chen et al., *China's Internet of Things*, SOSi Special Programs Division, 69–81 (prepared for the U.S.-China Economic and Security Review

familiarity with the 5G systems that will power these networks is critical.

This bottom-up non-proliferation approach works well for limiting the spread of biological and chemical agents, or fissionable nuclear materials—technologies that have limited commercial applications. Indeed, it is the limited impact of these non-proliferation regimes on the private sector have made them generally uncontroversial.[311] With the TNP strategy, however, the targeted inputs are more diffuse and are overwhelmingly developed by commercial firms for commercial purposes. And it is exceedingly difficult to separate, in most cases, the design of a given tech from its possible or probable usage.[312]

Another important feature of the concerns surrounding Chinese technology supremacy is that they are largely forward looking.[313] This makes it difficult to estimate the security relevance of TNP measures as against their more immediately apparent economic impacts. It will be important for arbitrators to develop deference strategies when dealing with governmental measures that lean on prospective hard national security concerns for their justification.[314] What may be even more important, however, is developing a system to distill economic protectionism from hard security concerns when measures are applied in an overbroad or under inclusive manner vis-à-vis a given state's economic competitors. To be sure, there are real and meaningful hard security concerns informing the US TNP strategy, but the larger

Commission) (Oct. 25, 2018)); *see also*, Paolo Coella, *5G and IoT: Ushering in a new era*, Ericsson, https://www.ericsson.com/en/about-us/company-facts/ericsson-worldwide/india/authored-articles/5g-and-iot-ushering-in-a-new-era.

[311] Take the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and the international safeguard system that prevents the diversion of fissile materials into weapons as a prominent example. *See* UN Office for Disarmament Affairs, *Treaty on the Non-Proliferation of Nuclear Weapons*, Fact Sheet, available at https://www.un.org/disarmament/wmd/nuclear/npt/; *see also*, World Nuclear Ass'n, *Safeguards to Prevent Nuclear Proliferation*, Information Library Fact Sheet (Sept. 2018), available at https://www.world-nuclear.org/information-library/safety-and-security/non-proliferation/safeguards-to-prevent-nuclear-proliferation.aspx.

[312] *See* Brown & Singh, *supra* note 7, at 24 ("… controlling a broad technology will be highly controversial within the venture and technology community where the largest markets are for benign, commercial purposes.").

[313] USCESRC Report, *supra* note 276, at 232 (concluding, "[a]lthough China's current capabilities do not appear to indicate any *immediate* substantial threat, the intent of China's industrial policy and military strategy is clear") (emphasis added).

[314] *See* Ishikawa, *supra* note 14, at 94-96.

portion of its concern and impacts relate to economic competition with China and maintaining US tech exceptionalism.[315]

3. Industrial Planning & Economic Security

TNP, as developed under the Trump Administration, was fundamentally tied to a larger desire to engage in various modes of rigorous economic and industrial planning. Addressing the problem of America's shrinking industrial manufacturing base formed a core component of Trump's electoral mandate in 2016.[316] While Trump's method seems novel against the backdrop of mainstream post-war US economic policy, it is really more retrograde.[317] The US is concerned that its "innovation edge" is dulling,[318] and that if Chinese firms continue to appropriate technology from the West, they will be able to manufacture and commercialize these technologies at a rate and cost efficiency that will kill US competitors in the cradle.[319] It is worth considering then, how this fear manifests within the US TNP regime, and whether these economic security imperatives can be considered to be taken in the "essential security interest" of the state.

To be sure, the fear that America is falling behind in manufacturing is not without

[315] In 2019, President Trump issued The Executive Order on Maintaining American Leadership in Artificial Intelligence, Exec. Order No. 13,859, 84 Fed. Reg. 3967 (Feb. 14, 2019). Though largely symbolic, the order crystalized several administrative priorities regarding AI, among them the mandate that, "the United States must promote an international environment that supports American Al research and innovation and opens markets for American Al industries, while protecting our technological advantage in Al and protecting our critical Al technologies from acquisition by strategic competitors and adversarial nations".

[316] Peter Navarro, *America's Military-Industrial Base is at Risk*, N.Y. TIMES, Oct. 4, 2018.

[317] The Founders debated robustly on the subject of internal and external governmental controls in support of domestic manufacturing, with the very first Treasury Secretary delivering to the House of Representatives a detailed report in 1791 on "the subject of Manufactures; and particularly to the means of promoting such as will tend to render the United States, independent on foreign nations, for military and other essential supplies." Alexander Hamilton, *Report on the Subject of Manufacturers*, Communicated to Congress in Philadelphia (Dec. 5, 1791).

[318] *See* Ashish Arora *et. al.*, *Why the US Innovation Ecosystem is Slowing Down*, HARV. BUS. REV. (Nov. 26, 2019) (asserting that in an era where large corporations have largely spun off their innovative research functions, venture capital has become an important bridge between research intensive academia and development-minded private business firms).

[319] Erik Roth, Jeongmin Seong, Jonathan Woetzel, *Gauging the Strength of Chinese Innovation*, MCKINSEY Q. (Oct. 2015) (finding that China has an innovation lead in traditional manufacturing industries where low costs provide a competitive advantage, and that China leads in innovation by leveraging a concentrated supply base and expertise in automation and modular design, *e.g.* electronics, solar panels, & construction equipment).

merit, especially with regard to critical technology industries.[320] And AI (taken as a broad industrial category that includes the constituent technologies that power it) presents perhaps the clearest transformative economic opportunity since the invention of electricity.[321] Furthermore, there are clear military and hard security dimensions to this problem, as the Assistant Treasury Secretary for Investment Security describes in one vivid anecdote:

> Before my legal career, I was an officer in the U.S. Navy's submarine service, serving on the fast-attack submarine USS Salt Lake City—what's called a Los Angeles-class submarine. When you live and work in a steel tube operating hundreds of feet below the ocean's surface, you develop a keen sense of your surroundings, and how every single component of that remarkable machine is critical to your survival and your mission. Space is a commodity, and everything on the boat has a specific and important purpose. And much of it is cutting-edge technology, including advanced computers, sonar systems, weaponry, or the noise-quieting materials that turn U.S. submarines into black holes in the depths of the sea.
>
> …
>
> [T]his illustrates just one example of the reality of military preparedness and the importance of each piece of the puzzle, so to speak. The Los Angeles-class fast-attacks of my day—almost 30 years ago—have since been succeeded by the Virginia-class. The Virginias are built by Newport News Shipbuilding and General Dynamics Electric Boat; their nuclear reactors are built by General Electric; and, the torpedoes they carry are built by Honeywell, Hughes, and Westinghouse. With subcontractors, direct and indirect suppliers, engineering service providers, maintenance support, and the like, dozens and even up to hundreds of different companies play a vital role in the submarine sailors' execution of their important national security mission. Now consider all of the other classes of submarines, warships, aircraft, weapons platforms, and command and control systems, and one begins to realize the vastness of our defense industrial base and the importance of protecting it.[322]

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[320] *See* Arora, *supra* note 318; *see also* Asa Fitch, *Intel's Success Came with Making Its Own Chips. Until Now*, WSJ, Nov. 7, 2020 (chronicling Intel's journey as a leader in US microchip production to becoming the last major chip firm to divest its US brick and mortar factory assets to focus solely on chip design). Intel's struggle to compete on this basis is indicative of challenges experienced by US firms across high-tech industries – where the pace of innovation and labor costs often militate against companies holding manufacturing facilities in their asset portfolios.

[321] The Pope has even weighed in on AI in his November 2020 Prayer Intention, calling for advancements in the field to "be human" and to respect the dignity of humanity and of creation. *See Pope's November prayer intention: that progress in robotics and AI "be human"*, VATICAN NEWS, Nov. 5, 2020, https://www.vaticannews.va/en/pope/news/2020-11/pope-francis-november-prayer-intention-robotics-ai-human.html.

[322] Thomas Feddo, *As Prepared, Keynote Remarks at the American Conference Institute's Sixth National Conference on CFIUS*, US Dept. Treasury Press Release (July 20, 2020).

The problem is that the anxiety over the US industrial base and Chinese advancement extends well beyond the traditional national security boundaries of military production, an overstep that the security policy community describes as necessary given the difficulty in drawing clear lines between military and commercial technology.[323] Holistic industrial planning initiatives invite firms to direct resources towards soliciting protectionist favors from the government that defy the reasonable expectations of other free market participants.[324] Ill-defined executive powers, which lack coherent and consistent standards of application can exacerbate this problem.[325] When applied to ventures in emerging technology, where forward-looking profitability assumptions necessarily form the basis of highly speculative company valuations, even a small amount of added political risk can sink entire enterprises. And when the basis for government action is the foreignness of the investor involved, this action implicates a core concern of international investment

[323] *Id.* After describing the importance of weapons system components as unique, in his next breath, Feddo goes on to say:

In today's world the line between military and commercial technology isn't always clear. Increasingly, it's not just foreign investment in the defense industrial base that we must consider, but also whether there might be national security implications of foreign investment in ostensibly commercial enterprises. This could include companies with new technologies that may have future military applications, or which represent the cutting edge of America's tech leadership.

[324] *See* Brown, *supra* note 85; *see also*, *e.g.*, Ian King, *Chip Industry wants $50bn to Keep Manufacturing in US*, BLOOMBERG LAW, Sept. 16, 2020.

[325] A prime example is the use by Qualcomm of a request for CFIUS review as a defensive mechanism to block a hostile takeover attempt by rival firm Broadcom in 2018. Qualcomm successfully appealed to the interagency committee by arguing that the owners of Broadcom, a Singaporean private equity firm that had planned to repatriate the company to the US, would take measures (such as cuts to R&D spending) to finance and extract a return from their investment. This, they argued, would harm the company and, ultimately, the US microprocessor industry and US national security interests writ large. *See* Letter from Aimen N. Mir, Deputy Assistant Sec'y, U.S. Dep't of the Treasury, to Mark Plotkin, Covington & Burling LLP, & Theodore Kassinger, O'Melveny & Myers LLP 2-3 (Mar. 5, 2018). The President subsequently blocked the transaction, citing "credible evidence that Broadcom [...] might take action that threatens to impair the national security of the United States". Presidential Order Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited (March 12, 2018); *but see* Paul Rosenzweig, *Qualcomm v. Broadcom:* A *National Security Issue*, LAWFARE BLOG (Feb. 28, 2018), https://www.lawfareblog.com/qualcomm-v-broadcom-national-security-issue (expressing broader national security concern regarding Qualcomm's role in US 5G development and its contracts with US government requiring top secret facility security clearance).

law as well.[326]

The idea that generalized economic policy can implicate "essential security" interests is also legally problematic.[327] A handful of investment treaty tribunals considering measures taken during the Argentine economic crisis held that purely economic emergencies could implicate the "essential security" interests of a state (at least under the US-Argentina bilateral treaty relationship).[328] In those cases, investors contested a number of internal monetary measures Argentina had taken to head off a looming dollar-reserve crisis. These included: rescinding a measure that had pegged the Argentine peso to the US dollar, requiring that debts and contracts be paid in pesos, and restricting currency transfers and bank withdrawals.[329] The exigency of this emergency situation degrades the position that measures following the US TNP strategy can rely on the Argentina cases for the general proposition that economic security is coextensive with national security. The indeterminate nature of the concerns informing the TNP strategy make it difficult to analogize to any "economic security" case that has come before it. Instead of focusing on the strategy holistically then, tribunals will have to use it for context when examining how specific

[326] *See* Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 10-12 (2005) (articulating three primary rationales regarding the case for free trade and nondiscrimination, each of which are relevant to investment law as well: (1) to avoid the economic incentives of large countries to impose externalities; (2) to counter the disproportionate political influence of domestic groups that favor protectionism; and (3) to dismantle the discriminatory imperial preferences system in place before the institution of the GATT).

[327] *See* Roberts, *supra* note 8; *see also* Moran, *supra* note 58 (warning that CFIUS lacks a clear limiting principle to prevent it from excluding foreign investments from other nations).

[328] CMS Gas Transmission Co. v. The Republic of Argentina, ICSID Case ARB/01/8, Award ¶ 360 (May 12, 2005); LG&E Energy Corp. v. The Republic of Argentina, ICSID Case ARB/02/1, Decision on Liability ¶ 238 (Oct. 3, 2006) ("When a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion"); Continental Casualty Co. v. Argentina Republic, ICSID Case ARB/03/9, Award ¶ 175 (Sept. 5, 2008).

[329] The Argentine Economic Crisis arbitrations have become a prevailing case study for the concept of Necessity, public order exceptions and security exceptions in international economic law. Most tribunals that examined the US-Argentina BIT's security exception concluded that in some cases an internal emergency would suffice to trigger the clause, but the Tribunal in *El Paso Energy Int'l Corp. v. Argentine Republic* decided to draw the line differently. ICSID Case No. ARB/03/15, Award ¶ 588 (Oct. 31, 2011) (finding that "essential security interests" must relate to an *external* threat). Under this approach, it would be difficult to differentiate between external and internal threat were the TNP policy invoked primarily to prevent the offshoring of foundational technology production. Less so if the goal is to prevent an adversary nation access to one or more specific and potentially lethal or force multiplying emerging technologies.

measures taken in furtherance of the strategy impact specific protected rights of foreign investors.[330]

Allowing international tribunals to draw the line around the permissible field of "essential security" actions, as was done in the *Devas* and *Duetsche Telekom* arbitrations,[331] can provide an immediate release valve for some of the financial pressures involved in implementing an holistic TNP strategy.[332] These arbitrations, arising from the same government measure, involved India renouncing a contract for satellite telecoms spectrum distribution on the grounds that the finite spectrum needed to be reserved for a host of public functions, including: defense, para-military forces, public utility services, and other societal needs.[333] While the tribunal excused India's revocation for those parts of the spectrum reserved for military and paramilitary needs, it held that the Mauritius-India BIT's essential security exception did not include public utility services, rural communications, tele-education, crop forecasting, emergency communication and disaster warnings, telemedicine, or other "societal needs".[334]

Still, the *Devas* case is not a perfect surrogate for likely future TNP strategy disputes, which may not lend themselves to as simple a quantification of security vs. non-security interests.[335] It will be more difficult for tribunals to use the *Devas*

[330] Heath suggests that judicial review of security clauses enforces primary and secondary limitations on security and emergency measures. Primary limitations address the categorical scope of security exceptions clauses, placing entire security policies within and without their ambit. Secondary limitations address particular measures: accepting the security rationale as valid but critiquing the validity of the process or the substantive logic by which the state measures are applied to the aggrieved party. *See* Heath, *supra* note 25 (citing OREN GROSS & FIONNUALA NI AOLAIN, LAW IN TIMES OF CRISIS: EMERGENCY POWERS IN THEORY AND PRACTICE 283 (2006)). According to Heath, most approaches, included that utilized by the Russia-Transit WTO Panel, include both primary and secondary limitations.

[331] *See Devas* Award, *supra* note 185, ¶¶ 211-374; Deutsche Telekom AG v. India, PCA Case No. 2014-10, Interim Award ¶¶ 183-291 (Dec. 13, 2017).

[332] *See* Lisa Bohmer, *In now-public Devas v. India BIT award, arbitrators disagree on interpretation of "essential security interest" clause and extent to which national security concerns underlay state's conduct*, IA REPORTER, June 12, 2018.

[333] *Id.*

[334] *Id.*

[335] The Majority in *Devas* ultimately held that the contract cancellation was motivated by a "mix of objectives", both security and ulterior considerations including a fear of political scandal and a desire to address the concerns of other network providers. They decided to split the protection of Claimants'

approach in the case of novel or retrograde security interest claims used to justify "all or nothing" policies–such as blocking chip company transactions to protect a strategic semiconductor manufacturing base, or banning domestic companies from transacting with Huawei to ensure operational superiority in developing and maintaining 5G broadband that hosts both civilian and military spectrum.[336]

Taking all this into consideration: the rise of investment screening and export control "firewalls", the fragility of international supply chains and capital markets for computational and electronics technologies firms, the security imperative of technological edge, and the widening economic fault lines and political cynicism between erstwhile trading partners–one might be tempted to think that this paper describes a problem without a solution. However, there is a means to deescalate, to reprogram, the burgeoning conflict between the US and China which threatens to disrupt global trade and investment in a host of high technology industries. By utilizing established IIAs responsibly, and by advocating for the continued practice of ISDS in this regard, arbitration practitioners can lead a "bottom up" effort to mitigate the adverse political and economic impacts of state-to-state technological competition.

IV. REPROGRAMING THE FIREWALL: THE CASE FOR ISDS

There are two sides to every conflict. For its part, China has developed

investment 60-40 according to this rubric and the facts of the case. *Devas* Award, *supra* note 185, ¶ 373 ("[T]he Tribunal, by majority, is of the view that a reasonable allocation of spectrum directed to the protection of the Respondent's essential security interests would not exceed 60% of the S-band spectrum allocated to the Claimants, the remaining 40% being allocated for other public interest purposes and being subject to the expropriation conditions under Article 6 of the Treaty"). The claimant's arbitrator objected and wrote a dissenting opinion finding that the *post-hoc* nature of the security rational, which on the evidence was developed well after the contract was ordered to be cancelled, precluded a good faith application of the Security Exception by the State. CC/Devas (Mauritius) Ltd. v. India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, Dissenting Opinion of David R. Haigh QC (July 25, 2016).

[336] *See* Heath, *supra* note 25, at 1065. There are factual parallels to TNP insofar as the *Devas* case can be said to be a dispute about critical technological infrastructure, *viz*. telecoms spectrum. However, the nature of the dispute is more akin to the category of "telecoms as a resource" disputes, and less concerned with technological innovation and competition per se. This former category of disputes will likely grow in number along with 5G and the importance of the higher bands of radio frequency through which it operates. *See* Romilly Holland, *Is Spectrum the New Oil: Trends in Investor-State Disputes in the Telecommunications Sector*, 12 DISP. RESOL. INT'L 131 (2018).

exceptionally strict measures for FDI screening and export control,[337] sometimes in response to US regulations or to project political strength.[338] As some commentators have pointed out, this approach may create greater problems for Chinese investors in the form of political retribution.[339] China's involvement with international economic law is confronted by intersecting normative and pragmatic paradoxes. On the one hand, China's firms reap obvious benefits from China's lawful participation in a rules-based system of free, fair, and open global trade and investment. On the other hand, its political leaders have demonstrated cynicism, largely rooted in historical experience,[340] that international law has any content beyond its political symbolism.[341] Going forward, China may decide it would rather lien on political clout

[337] *See* Cathleen H. Hartge, *China's National Security Review: Motivations and the Implications for Investors*, 49 STAN. J. INT'L L. 239 (2013); Wang & Dai, *supra* note 86; Alex Irwin-Hunt & Seth O'Farrell, *China outlines new regulations to review foreign investment*, FDI INTEL. (Dec. 23, 2020) (emphasizing the intentional similarities between China's forthcoming national security FDI screening mechanism and CFIUS).

[338] For example, Qualcomm's US$44 billion acquisition of Dutch company NXP in 2018 was abandoned after Qualcomm failed to achieve regulatory approval for the merger in China. The botched deal ended up costing Qualcomm a US$2 billion termination fee with NXP and a $30bn share buy-back program for shareholders anticipating a bump in share value. Spectators alleged that the failure to issue approval was a retaliatory measure by China in response to increased scrutiny of Chinese investment in the US. Tom Mitchell et. al., *China's suffocation of Qualcomm-NXP merger signals new era*, FT, July 26, 2018. Senator Marco Rubio tweeted in response to the news that the US should "reimpose ZTE ban" referring to the earlier removal of Chinese telecoms giant ZTE from the commerce control list by President Trump against the advice of the Commerce Department. Martina & Nellis, *supra* note 164. The issue ended up costing the US a significant deal of political capital later in the year. After meeting with President Xi for two-hours at the G20 summit, Trump announced among other things that China would be willing to move forward with the Qualcomm-NXP deal, but at that point the timeline for the merger had elapsed, and Qualcomm had already begun its stock-buyback program. Jackie Wattles, *Trump says China is now open to Qualcomm-NXP deal. But it's too late*, CNN BUSINESS, Dec. 3, 2018.

[339] *See* Freshfields, Public interest or protectionism? Navigating the new normal (Oct. 8, 2018) at 45, https://www.freshfields.com/49bbc3/globalassets/imported/documents/228b5055-4cb2-4ee9-b56f-186a4c2bd7f7.pdf (noting a push for "reciprocity" of regulatory measures has played a key role in many of the developments in Western states towards stricter capital import controls).

[340] China's perspective on free trade and on foreign national treatment obligations is deeply marred by its historical experience with colonialism and the Leonine Treaties that codified an uneven relationship with western powers during the 19th and early 20th centuries. *See* Risvas, *supra* note 35, at 89-91, *esp.* n.61.

[341] Jesse Liss, *China's Investment Treaties with Latin America and Implications for South-South Cooperation: Evidence from Firm-Level Data*, 11 TRADE L. & DEV. 269, 297 (2019) (citing, Kate Hadley, *Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law*, 45 GEO. J. INT'L L. 255, 273 (2014) (suggesting that China's BIT program with the global south is motivated by a desire to persuade other countries to not recognize Taiwan, to secure access to resources, and to facilitate durable political ties)).

vis-à-vis developing States than subject itself to mandatory ISDS. This approach seems to reflect more accurately what Chinese MNCs are familiar with domestically at least.[342]

But for practical reasons, China's record of non-participation in ISDS is being challenged by a spate of recent treaty cases brought by Chinese investors, including some SOEs.[343] It remains to be seen whether this trend will hold over time, and whether China can be pulled further into a system of reciprocal investment liberalization commitments. In this way, global TNP presents a major opportunity to reassert the utility of international law as between developed and developing states in a truly reciprocal fashion.[344] As a corollary, if the US abdicates its role as a leader in international institution building, and its allies do not follow its path, it runs the risk of ceding its leading role in current institutions to China.[345]

With this frame of reference, the exigency of "reprogramming" the political conflict between China and the West around emerging technology comes into sharper relief. ISDS has a key role to play in this task. For foreign investors, ISDS provides practical and case-specific standards to prevent the abuse of sovereign power. This protection is critical in light of the growing political incentives to

[342] Ji Li & Wei Zhang, *What Do Chinese Clients Want?*, 15 U. PA. ASIAN L. REV. 86 (2019) (finding, from survey of Chinese firms, that management actors in Chinese MNCs tend to value an understanding of and familiarity with political power dynamics over pure legal expertise or familiarity with legal process when deciding which legal counsel to hire, and suggesting that this is a function of their experience with China's domestic legal-political system).

[343] *See, e.g.*, Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6; China Heilongjiang Int'l Economic & Technical Cooperative Corp. v. Mongolia, UNCITRAL, PCA Case No. 2010-20; Ping An Life Insurance Co. v. Belgium, ICSID Case No. ARB/12/29; Sanum Inv. Ltd. v. Laos, UNCITRAL, PCA Case No. 2013-13; Sanum Inv. Ltd. v. Laos, ICSID Case No. ADHOC/17/1; Beijing Urban Construction Grp. Co. Ltd. v. Yemen, ICSID Case No. ARB/14/30; Wuxi T. Hertz Technologies Co. Ltd. v. Greece, *ad hoc* UNCITRAL arbitration, 2019.

[344] *Accord* Risvas, *supra* note 35, at 110-11. Emphasizing the importance of historical context in understanding the principals and content of law, Risvas problematizes the relationship between the concepts of "sovereign equality" and "non-discrimination" based on the historical experiences of colonization and the cold war. Technological competition presents a relatively low-stakes arena for lawmakers, administrators, diplomats, and legal practitioners to challenge this historical narrative by developing and adhering to international economic rules that apply with equal force to developed and developing states.

[345] *See* Joel Slawotsky, *National Security Exception in an Era of Hegemonic Rivalry: Emerging Impacts on Trade and Investment*, *in* HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY 545 (J. Chaisse et al. eds., Aug. 2021).

discriminate against foreign investors on the basis of their nationality. For states, ISDS provides a means to regulate the commercial activities taken by their counterparts (under the guise of SOEs) without incurring the negative economic impacts of complete decoupling. Despite the prevailing narrative to the contrary, ISDS tribunals are exceedingly deferential to states on matters impugning state sovereignty.

From the perspective of the regulated community, including and especially foreign investors, it is becoming increasingly difficult to define the levers or to trace their operation to any particular coordinate branch of government. For this reason, the scope of this authority should be limited by something approaching an international normative consensus.[346] The proliferation of CFIUS-like investment screening mechanisms among OECD countries amplifies this imperative. Any standard-setting effort will necessarily involve a large element of political deliberation and institution-building, but it will also require some measure of judicial oversight where politics fail.[347]

ISDS is well situated to function as an aid for foreign investors caught in the interstitial regulatory matrices of foreign investment screening regimes. In particular, the emphasis on protecting the property rights of foreign investors and non-reliance on doctrinal concepts like *res judicata* makes international investment law far more flexible than its domestic counterparts.[348] In this context, arbitrators may be better situated than diplomats or domestic courts to navigate the political minefield presented by TNP-adjacent disputes arising out of foreign investment in

[346] *See* Heath, *supra* note 25.

[347] *Id.* The OECD has previously examined the question of investment screening measures during past spikes in geopolitical tension around FDI, *e.g.*, the EU unbundling of Russian gas pipelines and the Dubai Ports World fiasco. *See Guidelines for Recipient Country Investment Policies Relating to National Security*, OECD (2009). In this case the OECD failed to impose hard limits to discipline the use of security exemptions.

[348] *See* W. Michael Reisman, '*Case Specific Mandates*' *versus* '*Systemic Implications*': *How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture*, 29(2) ARB. INT'L 131 (2013) (asserting that under investment treaties, international investment arbitrators are only authorized to act as 'law-appliers' and as such they should, and largely do, stick to their case-specific mandate rather than extrapolating to make decisions with 'systemic implications'); *accord* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture*, 23(3) ARB. INT.'L 357 (2007).

global technology companies.

Investment treaty arbitration has developed powerful norms that, through continued international treaty practice, have become sufficiently diffuse that they can displace otherwise stable precedents in other fields of law. One prominent example, with a great deal of relevance to FIRRMA-like investment screening mechanisms, is the issue of shareholder standing.[349] Additionally, some have argued that, if tribunals are willing to embrace geopolitical analysis, international investment law can provide an effective medium for the resolution of strategic investment disputes.[350] Others might note that from an historical perspective, arbitration has long provided a means to resolve disputes regarding investments with geopolitical implications (if not geopolitical intentions) while minimizing political and military costs.[351] There are clear benefits to all stakeholders in using ISDS to "reprogram" the political conflicts at the heart of global TNP policies.

A. *Protecting Non-Controlling, Non-Passive Equity-Holders*

The policy underlying FIRRMA makes explicit its intention that CFIUS target transactions involving non-controlling, but non-passive foreign investors.[352] This category is painted with exceptional breadth, as any foreign investor that holds any sort of investment instrument, be it: convertible bond, warrant, share-specific contractual right, etc., which has the *possibility* to achieve for the investor some sort of control, information-access, or technology facilitation rights.[353] One major advantage of treaty arbitration for these investors lies in the fact that, in the event of unjustified interference with their property rights, they will likely have a cause of

[349] In the 2007 *Diallo* case, the ICJ recognized that in "contemporary international law" the question of shareholder standing is "essentially governed" by investment treaties; so much so that the rules of investment treaties could be said to displace traditional rules on diplomatic espousal of shareholder claims. Ahmadou Sadio Diallo (Rep. Guinea v. Dem. Rep. Congo), 2007 I.C.J. 103, ¶ 88 (June 27, 2007). *See also* David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L. L. 104 (1990).

[350] Anatole Boute, *Economic Statecraft and Investment Arbitration*, 40 U. PA. J. INT'L L. 383, 388 (2019).

[351] NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF US INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS, 1893–2013 (2013).

[352] Brown & Singh, *supra* note 7.

[353] *Id.*

action under international investment law that might be otherwise unavailable to them under the domestic law of corporations.[354]

Often in investment disputes, damage will manifest to a given investor in the form of a loss of share value or of dividends in a domestic enterprise of the host State. Insofar as these equity ownership rights are damaged by the flow from synchronous losses to the underlying enterprise, (*e.g.* an expropriation of the enterprise's assets or a ban on the enterprise exporting its products) the losses are "reflective" under the definition used in most domestic company laws.[355] Most of these laws take the position that the loss may only accrue to the company itself, so as to avoid jeopardy to the defendant of duplicitous claims and double recovery.[356] International investment law, however, generally recognizes the right of minority shareholders to bring claims for such losses.[357]

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[354] *Compare* Johnson v. Gore Wood & Co. [2000] UKHL 65, *with*: RosInvestCo UK Ltd. v. Russian Federation, SCC Case No. V079/2005, Final Award ¶¶ 606-07 (Sept. 12, 2010) (finding that the applicable treaty expressly clarified that shareholders, be they majority or minority shareholders, also have a claim for protection under if expropriatory measures are taken "only" against the company and not directly against the shareholders themselves); Camuzzi Int'l S.A. v. Argentine Republic I, ICSID Case No. ARB/03/2, Decision on Objections to Jurisdiction ¶¶ 63-64 (May 11, 2005) (a "minority shareholder has a right of action for a loss deriving from damage to the company in which it had invested, agreeing that the fact that a host state does not explicitly interfere with share ownership is not decisive; rather, the issue was whether a breach of the treaty led with sufficient directness to the loss or damage in respect of a given investment."); Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision of the Tribunal on Objections to Jurisdiction ¶ 81 (Aug. 25, 2006) (finding that as the claimant [a minority shareholder] invoked treaty rights concerning its investment, the claim could not be construed as derivative or indirect, as if it were brought on behalf of or in contravention of the rights of its subsidiaries).

[355] *See* Johnson v. Gore Wood & Co., *supra* note 354 (famously expressing the English Law principle barring the award of reflective losses to a shareholder bringing a claim independent of the company in which they hold shares); Julien Chaisse & Lisa Zhuoyue Li, *Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss*, 52 STAN. J. INT'L L. 51, 55-58 (2016) [hereinafter "Chaisse & Li"] (examining the treatment of claims for reflective loss in German, French, US, UK, and Hong Kong company laws).

[356] Chaisse & Li, *supra* note 355.

[357] While the concept of reflective loss is not explicitly discussed or regulated by investment treaties, shareholder standing as "investor(s)" under IIAs presents a valid avenue for such losses to be recovered should they be merited. *Id.* at 69. *See also* Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as Investors and Jurisdiction Ratione Temporis*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 19 (2005) ("[I]t is beyond doubt that shareholders have standing [...] to submit claims separate and independent from the claims of the corporation" and "this principle applies to all shareholders, no matter whether or not they own the majority of the shares or control the corporation.").

The reality in many cases is that legally offensive measures are not *directed* at the company, but at the specific foreign investors who hold equity in that company. Sometimes these are taken by majority shareholders themselves, hiding behind the guise of the corporate form.[358] The risk that government or parastatal entities operating a joint venture company, or private native investors might abuse a majority position to extract value from foreign minority investors is only heightened in times of political tension.

International investment law has exceptional advantages in addressing this sort of concern in an effective and equitable manner. This is owing to the bespoke nature of consent to arbitration in IIAs,[359] and owing to the ability in ISDS for arbitrators to ignore (where appropriate) the legal formalism inherent in domestic company law doctrine surrounding the legal fiction of corporate personality.[360] These are not *ex aequo et bono* findings. They rely on the broad and inclusive definitions of "investment" found in most IIAs.[361] This creates a far more stable investment environment, and ultimately increases the value of domestic firms' non-controlling

[358] *Accord Dodge v. Ford Motor Co.*, 204 Mich. 459 (Mich. 1919) (implicating the relatively unmitigated power of controlling shareholders over the business decisions of the firm). The facts of this particular dispute are commonly discussed in corporations law curricula to demonstrate the ability of majority shareholders to abuse this position to force concessions from minority shareholders, especially in privately held corporations for which shares are less easily liquidated.

[359] *See*, *e.g.*, NAFTA, arts. 1116, 1117; William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc. v. The Government of Canada, PCA Case No. 2009-04, Award on Damages, ¶¶ 372-389 (Jan. 10, 2019) (finding that NAFTA arts. 1116 and 1117 create separate tracks for investors and for domestically incorporated companies to bring treaty claims, and that in principle this may limit minority shareholder ability to recover damages for reflective losses under the NAFTA).

[360] *See* Verza Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40(1) U. PA. J. INT'L L. 192 (2018) (noting that the presumption favoring minority shareholder standing in investment arbitration allows minority shareholders to make decisions that affect the company and to ostensibly benefit at the expense of the corporation, but that this is a normative good given the policy goals of international investment law). The author proposes a private ordering solution, *i.e.*, that individual corporations include provisions in their charters and bylaws waiving the right of shareholders to bring reflective loss claims in arbitration where this reflects the true agreement of equity holders in the company. *Id.* at 251.

[361] *See*, *e.g.*, Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Jurisdiction ¶¶ 115-19 (Oct. 24, 2011); CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award ¶ 392 (Sept. 13, 2001) (finding shares to be a covered investment under the treaty, and as such that expropriation of a local company must be considered by the tribunal insofar as it could affect the value of the claimant's shares).

equity.[362]

This is but one example of international investment law demonstrating remarkable adaptivity as a field of *lex specialis*.[363] By emphasizing the individualized protection of foreign property rights, the field has organically developed a work-around to the issue of shareholder standing confronted by the ICJ in a more general fashion in the *Barcelona Traction* case.[364] Meaningful engagement with international investment law norms can provide similar benefits to states, beyond the obvious attraction of inward FDI. Because of the emphasis of treaty law on state consent and the exceptional deference of arbitrators to issues implicating state sovereignty, ISDS can provide an excellent forum for states to regulate their economic interactions with rival powers,[365] set global economic rules for the deployment of State Capitalism,[366] and generally work to demarcate the line between commercial and sovereign action.[367]

B. *Regulating Commercial Geopolitics Through Treaty Practice*

Confronting this argument are valid critiques which emphasize the predilection of developed states, waxing in recent years, to reclaim elements of their sovereignty over foreign investment regulation from the field of international law.[368] National

[362] Korzun, *supra* note 360.

[363] For more on this adaptivity characteristic, *see* Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed*, 29(2) ICSID REV. 372 (2014).

[364] Barcelona Traction, Light and Power Co., Ltd., 1970 I.C.J. 4, ¶¶ 35-36, 40-41 (Feb. 5).

[365] Boute, *supra* note 350.

[366] Julien Chaisse, *Ascent: Stress, Shock, and Adaptation of the International Law on Foreign Investment*, 27 MINN. J. INT'L L. 339 (2018).

[367] Charles N. Brower & Shashank P. Kumar, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, 30(1) ICSID REV. 35 (2015) (identifying within ISDS a distinct, hybrid field of law, having elements of private and public law, which addresses the relationship between foreign investors and host States based on a complementarity between contractual and treaty-based dispute settlement processes).

[368] *See, e.g.*, Dimitropoulos, *supra* note 170. Dimitropoulos asserts that the "delimitation of sovereignty by investment treaties and tribunals" is the *raison d'etre* for a systemic move away from international law and towards domestic law in regulating foreign direct investment. Though the author identifies a valid concern with the (ab)use of ISDS, he is putting the cart before the horse. In the US experience at least, international obligations relating to foreign investment are tertiary concerns of the policy community behind (1) economic impact; and (2) domestic law considerations such as due process. In

Security, Essential Security, Necessity, and the Right to Regulate are all concepts that implicate the very existential basis of statehood.[369] As such, any discussion of these topics in international law must begin with the presumption that measures taken in relation to a state's primary internal prerogatives are *prima facie* valid.[370]

Indeed, even when ruling against a state invoking a national security defense, tribunals are wont to signal a degree of deference to a state's determination of its own security interests.[371] A failure by arbitrators to afford states robust deference in these domains inevitably invites controversy. A track record of such, invites disqualification on the grounds of evident partiality.[372]

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other words, domestic regulation of foreign investment in populist regimes is better viewed as an indigenous phenomenon, because these regimes have no regard, rhetorically at least, for the value of international obligations or institutions. This does not mean that they are free from the real negative economic impacts of rejecting normative rules of international conduct, *viz.*, "outcasting". *See* Hathaway & Shapiro, *supra* note 33.

[369] The first three concepts are discussed in detail in Section II, *infra*. As to Right to Regulate, Boute notes that much of the literature on the Right to Regulate has focused on the right to regulate to prevent negative environmental externalities of investment but that this literature might be equally applicable to the right to Regulate against security externalities of existing investments in strategic assets. Boute, *supra* note 350, at 405.

[370] *See* Eastern Sugar B.V. v. Czech Rep., SCC Case No.088/2004, Partial Award ¶ 272 (Mar. 27, 2007) (emphasizing that the State must be afforded appreciation for "some measure of inefficiency, a degree of trial and error, [and] a modicum of human imperfection"); GAMI Inv., Inc. v. Mexico, UNCITRAL, GAMI Investments, Incorporated v Mexico, Final Award¶ 114 (Nov. 15, 2004) (finding that Mexico's perception of a legitimate goal in favor of public policy, though misguided, was not a treaty violation).

[371] Deutsche Telekom AG v Republic of India, PCA Case No 2014–10, Interim Award ¶ 235 (Dec. 13, 2017) ("In respect of the existence of essential security interests, the Tribunal accepts that a degree of deference is owed to a state's assessment. However, such deference cannot be unlimited"); *Devas* Award, *supra* note 185, ¶¶ 244-45 ("The Tribunal has also no difficulty in recognizing the 'wide measure of deference...'. National security issues relate to the existential core of a State. An investor who wishes to challenge a State decision in that respect faces a heavy burden of proof, such as bad faith, absence of authority or application to measures that do not relate to essential security interests.").

[372] Take the challenge to Prof. Orrego Vicuna by India in the *Devas* case—the only known successful challenge to an arbitrator for partiality due to issue preclusion. The basis for the challenge was that Prof. Vicuna could not approach the question of the semantic content of the phrase "essential security" within the Mauritius-India BIT with an open mind. This was based on the allegation that he had made his firm position apparent in three arbitrations under the Argentina-US BIT (which was found to have materially similar terms in its security exception), and most fatally in an academic article following the annulment of those awards in which he wrote the following:

While the interlinking of treaty and customary law requirements in respect of necessity has been held to be a manifest error of law in the context of a particular case [referring to the decision of the CMS annulment committee], one may respectfully wonder whether the error of law might not lie with the approach suggesting that a rather vague clause of a treaty might be able to simply do away with the obligations established under the same treaty.

Further, states are overwhelmingly free to tailor their treaty obligations as they see fit. There is no basis in customary international law for the proposition that states may not discriminate amongst one another in their international economic relations.[373] Even where they submit themselves to treaty obligations, their sovereign character remains legally paramount.[374] On the merits, as Brower and Kumar note, investment treaty arbitration relies intimately on domestic legal rules for substantive content.[375] And in enforcement, the continued participation of domestic courts gives states the opportunity to reassert "public policy" concerns regarding the achievement of any given arbitral award.[376]

These are not normative assumptions; they are positive realities. In light of these truths, and of the evidence apparent in arbitration's long track record as a mode of international adjudication, one is inclined to question the disbelief in the legitimacy

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In this light the discussion about whether the availability of the defense should first be examined under the treaty and, only if unsuccessful, examined next under customary international law, appears to be somewhat circular. If the treaty precludes the defense there is no second shot at it under customary law. If it provides for an exception and this is not defined, its examination under customary international law will be the first and only shot supplementing the treaty vacuum. It is the two shots that would appear to run counter to the strictness of the requirements of international law.

Appointed by the PCA, ICJ president Judge Tomka upheld the challenge on the grounds that Prof. Vicuna could not be impartial with regard to the inevitable issue of the Mauritius-India BIT's security exception. *Devas v. India*, PCA Case No. 2013-09, Decision on the Respondent's Challenge to Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator ¶¶ 60-65 (Sept. 30, 2013).

[373] OPPENHEIM'S INTERNATIONAL LAW, VOL 1, 373-377 (Robert Jennings & Arthur Watts QC eds., 9th ed. 1992).

[374] *See* Amco Asia Corp. and others v. Republic of Indonesia, ICSID Case No ARB/81/1, Award (Nov. 20, 1984) 24 ILM 1022, 1029.

[375] Brower & Kumar, *supra* note 367, at 55 (stating the ISDS, "has to account for the reality that the bundle of rights that constitute the investment is grounded in domestic law. The treaty cannot be wholly separated from the contract or from domestic law. The treaty and the contract are mutually reinforcing").

[376] It is at this stage that the true "positive" element of international law shine through, what Hathaway and Shapiro identify as "Adjudicated and Non-in-Kind" enforcement in the form of a partial abdication of sovereign immunity *vis-à-vis* an injured investor. Hathaway & Shapiro, *supra* note 33, at 327-28. Experience demonstrates that the law in this domain does bend to political gravity. Take the ICSID convention's otherwise clear provision that awards are subject to *ex parte* enforcement, ignored in *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, in the face of stronger concerns relating to diplomatic practice and the potential for a reciprocal loss of sovereign immunity. 863 F.3d 96 (2d Cir. 2017).

of the process projected by its various detractors.[377] Once the notion that ISDS involves an obsolescing sovereignty bargain is removed, policymakers can turn to another fear, central to the TNP pathos, that states will use their commercial appendages to abuse the openness of the global economic for geopolitical gain.[378] State capitalism is a reality—one which international investment law is slowly but surely digesting.[379] As the system continues to adapt through evolving treaty practice,[380] it represents perhaps the best opportunity to strip the political venom from foreign government controlled firms.[381]

ISDS can help states establish clear standards and clear left and right boundaries for action related to questions of "geoeconomics" and "national security". It can promote cross-border investment flows, technology transfer, and vital access to liquidity for firms in growing industries and in emerging markets. But it can only do so effectively and efficiently, if the measures states use to carve-out sovereignty in important domains like national security are not abused to shield state action that is primarily commercial in nature.

Though it will be difficult no doubt, the process of ISDS can adapt to resolve disputes which nominally involve legitimate national security concerns. And when invoked legitimately, adherence to agreed-upon normative restraints on a state's regulatory powers should not be characterized as some insidious threat to security or sovereignty. Rather, ISDS acts as a case-specific safety valve.[382] It is a mode of transnational law in the sense arrived at by Judge Jessup,[383] which polishes the opaque, smooths out uncertainty, and promotes legitimate investment that would

[377] *See* Brower & Schill, *supra* note 30 (cataloguing and rebutting various critiques of procedural and substantive inequities alleged to be inherent to investment treaty arbitration by critics thereof).

[378] *See* Esper, *supra* note 268; Brown & Singh, *supra* note 7; Pompeo, *supra* note 267; *accord* Boute, *supra* note 350.

[379] Chaisse, *supra* note 366, at 344.

[380] Boute, *supra* note 350.

[381] *See* Meg Lippincott, *Depoliticizing Sovereign Wealth Funds Through International Arbitration*, 13 CHI. J. INT'L L. 649, 651 (2013).

[382] *See* Reisman, *supra* note 348; Kaufman-Kohler, *supra* note 348.

[383] Judge Jessup defined "transnational law" as "all law which regulates actions or events that transcend national frontiers." PHILIP C JESSUP, TRANSNATIONAL LAW 2 (1956)."

otherwise be chilled by what appears before the foreign investor in the guise of a totalizing and unforgiving regulatory firewall.

V. CONCLUSION

As of the time of writing, Chinese investors have brought a US$3.5 billion claim against Ukraine for measures related to blocking their repeated attempts to acquire a controlling stake in the Ukrainian aerospace company Motor Sich.[384] Motor Sich is one of the world's largest manufacturers of civilian and military turbine engines for aircraft but has struggled financially from 2014 owing to the loss of its chief export market in Russia.[385] Despite the financial situation of Motor Sich, the consummation of significant prior purchases of its stock by Chinese investors, and the fact that the rights to the technology utilized by Motor Sich is held by a separate Ukrainian SOE; the Antimonopoly Committee of Ukraine blocked each of Skyrizon's outright purchase attempts. For justification, Ukraine cited violations of antitrust laws and the need to prevent the transfer of sensitive military technology.[386]

Since 2017, Skyrizon's shares in Motor Sich have been frozen pending a still-ongoing national security review by Ukraine's security service. In March of 2020, a Kiev court rejected an appeal by Skyrizon's owners to unfreeze the shares.[387] And in December of 2020, Skyrizon's shareholders submitted a notice of arbitration to Ukraine.[388]

Many see the offers by Skyrizon as an attempt by China to exploit Motor Sich's financial distress in order to advance China's lagging military aviation capabilities.[389]

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[384] Cosmo Sanderson, *Ukraine faces multibillion claim over blocked aerospace deal*, GLOB. ARB. REV., Dec. 7, 2020.

[385] Olena Lennon, *Motor Sich and America's Pressure Campaign in Ukraine: Can it Keep the Chinese at Bay?*, FOCUS UKRAINE BLOG, WILSON CENTER: KENNAN INSTITUTE (Oct. 29, 2020), https://www.wilsoncenter.org/blog-post/motor-sich-and-americas-pressure-campaign-ukraine-can-it-keep-chinese-bay.

[386] *Id.*

[387] Natalia Zinets, *Ukraine court rejects Chinese appeal in aerospace deal opposed by Washington*, REUTERS, Apr. 17, 2020, https://www.reuters.com/article/us-ukraine-motorsich/ukraine-court-rejects-chinese-appeal-in-aerospace-deal-opposed-by-washington-idUSKBN21Z1AY.

[388] Sanderson, *supra* note 384.

[389] *Id.*

For this reason, the US has been active in lobbying Ukraine to prevent the acquisition, [390] including by suggesting updates to Ukraine's domestic foreign investment screening mechanism to block the transfer of strategic assets,[391] and proposing that US investors acquire the company instead.[392]

Whatever the motivation, the method here is part and parcel of the US' TNP playbook. This paper has documented the levers and ontology of that strategy. The technological and military competition between the US and China that fuels TNP is spilling over across borders and into commercial transactions and commercial enterprises in dual-use technologies. Clearly, ISDS is already working its way into the seams of this conflict. As tension continues to build, and calls for decoupling grow louder, ISDS will continue to serve as a pin; holding together the fabric of global economic relations until a more permanent political consensus can be stitched together.

Marcus Aurelius, while ruminating on his anxiety about the future, developed the maxim that one should, "meet [the future], if you have to, with the same weapons of reason which today arm you against the present".[393] The Trump Administration may have been a temporary anomaly in the otherwise unbroken chain of liberal economic trade policy in the post-WWII economic order.[394] Or, it may portend a general rebuke of the liberal world order and the beginning of a new era in world trade and investment. One thing is clear: in either theoretical scenario the hard reality of technological competition is here to stay. How the political and economic risk attending that competition will be managed is up to the legal and policy practitioners

[390] Brett Forrest, *US Aims to Block Chinese Acquisition of Ukrainian Aerospace Company*, WSJ, Aug. 23, 2019.

[391] Katya Gorchinskaya, *Ukraine Prepares to Snub China in Aerospace Deal with US Help*, FORBES, Feb. 17, 2020, https://www.forbes.com/sites/katyagorchinskaya/2020/02/17/ukraine-prepares-to-snub-china-in-aerospace-deal-with-us-help/?sh=1c0951c7328c.

[392] Brett Forrest, *Security Contractor Erik Prince Is in Talks to Acquire Ukraine's Motor Sich*, WSJ, Nov. 5, 2019.

[393] MARCUS AURELIUS, MEDITATIONS, Book VII, (8), (c. 161–180 AD).

[394] *See* Patrick Pearsall, *The Biden Administration Approach to Investment Arbitration? Retail Multilateralism*, KLUWER ARBITRATION BLOG, Nov. 9, 2020; Lester, *supra* note 16 (analyzing public comments in which Biden's nominee for US Trade Representative expressed the need, motivated by domestic political headwinds, to maintain an aggressive stance toward China).

of the future.

Effective tools already exist to manage the frictions between State and State, and between State and foreign investor. Indeed, arbitration between nation-states has existed on the international plane for as long as the concept of the sovereign state has.[395] Even faced with the specter of unknown weapons and conflicts of the future, there is no need to break the mold by which today's robust system of international trade and investment is bonded. Rather, states and investors should choose to arm themselves with the familiar and well-worn tools of the present and embrace the benefits of ISDS to resolve the inevitable TNP-adjacent disputes of the future.

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[395] *See* Henry T. King Jr. & Marc A. Le Forestier, *Papal Arbitration—How the Early Roman Catholic Church Influenced Modern Dispute Resolution*, 52(3) DISP. RES. J (1997) (describing the Church's historic role as arbitrator among Christian sovereigns beginning in the 13th century).

BOOK REVIEW:
INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION BRUSSELS I, BREXIT AND BEYOND BY CHUKWUDI OJIEGBE

Reviewed by Sarah Vasani & Daria Kuznetsova

I. INTRODUCTION

The relationship between the European Union (EU) and international arbitration has been described as "the most dramatic confrontation between two international legal regimes seen in a great many years."[1] Although this quote was directed at international investment arbitration (and notably, the EU's open hostility towards intra-EU BITs), EU law increasingly interacts and conflicts with international commercial arbitration as well.

EU law presently does not directly regulate commercial arbitration. Rather, a host of arbitration laws and practices exist across the EU Member States. In *International Commercial Arbitration in the European Union Brussels I, Brexit and Beyond*, Chukwudi Ojiegbe explores the EU's approach to international commercial arbitration and the conflict between the EU regime on the one hand and commercial arbitration on the other.

II. THE BOOK

The book is comprised of eight chapters analyzing the interaction between international commercial arbitration and EU law and the potential impact of Brexit on commercial arbitration within the UK.

In the Introduction, Ojiegbe sets the scene by providing a brief overview of Brexit and the EU's regulation of commercial arbitration, including the historical background to the EU arbitration/litigation interface (Chapter 1).[2] He explains the problems that arise when matters of international commercial arbitration interact

[1] George A. Bermann, *European Union Law and International Arbitration at a Crossroads*, 42 FORDHAM INT'L L.J. 967 (2019).

[2] CHUKWUDI OJIEGBE, INTERNATIONAL COMMERCIAL ARBITRATION IN THE EUROPEAN UNION: BRUSSELS I, BREXIT AND BEYOND 3 (2020).

with the EU Brussels I Regime comprised of (1) the 1968 Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters ("Brussels Convention");[3] (2) the Council Regulation (EC) No. 44/2014 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation");[4] and (3) Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast").[5]

The author begins by examining the impact of Brexit on the EU principle of mutual trust that serves as a basis for judicial cooperation in civil and commercial matters under the Brussels I Regime (Chapter 2).[6] The mutual trust principle does not apply in the context of international arbitration because arbitral tribunals are not courts of the Member States.[7] Nevertheless, the Court of Justice of the European Union (CJEU) has employed this principle to prohibit the use of anti-suit injunctions by the Member States' courts in support of arbitration proceedings.[8] In Ojiegbe's view, following Brexit, UK courts are no longer bound by EU law principles such as mutual trust or the decisions of the CJEU.[9] Accordingly, one can expect the UK courts to part ways with the CJEU, and allow for the granting of anti-suit injunctions in favor of arbitration,[10] another boon for London as a preeminent seat of arbitration.

In Chapter 3, Ojiegbe provides a comprehensive analysis of the scope of the arbitration exclusion under the Brussels I Regime. He explains that despite arbitration being expressly excluded from the material scope of the Brussels I Regime, the interaction of commercial arbitration with this regime remains controversial. In

[3] September 27, 1968, 1972 O.J. (L 299) 1.

[4] Council Regulation 44/2001, 2000 O.J. (L 12) 1 (EC).

[5] Council Regulation 1215/2012, 2012 O.J. (L 351) 1 (EU).

[6] *Id.* at 42.

[7] *Id.* at 72.

[8] *Id.* at 40.

[9] *Id.* at 69.

[10] *Id.*

particular, it is unclear what aspects of arbitration-related matters resolved by Member State courts are covered by the exclusion.[11] As a result, the jurisdiction of Member State courts and arbitral tribunals may overlap, thereby causing uncertainty and unpredictability for the arbitral process.[12]

Chapter 4 analyzes the problem of parallel proceedings between Member State courts and arbitral tribunals, which creates the risk of conflicting decisions,[13] as well as the mechanisms that may be deployed to resolve this problem.[14] The author explains that while arbitral anti-suit awards, anti-arbitration injunctions, and anti-suit injunctions may halt parallel proceedings and their undesirable consequences, these mechanisms are often controversial as they are deemed to interfere with the proceedings in the foreign forum.[15] Furthermore, Ojiegbe likewise explains that the *lis pendens* rule fails to resolve the problem of parallel proceedings because national courts and arbitral tribunals are not equal forums for the purpose of this rule.[16] In the author's view, no effective mechanism exists that can resolve the problem of parallel proceedings.[17] He suggests that close cooperation between the Member State courts and arbitral tribunals could alleviate this problem. In particular, he suggests that Member State courts should stay the proceedings once their jurisdiction is challenged based on an arbitration agreement and arbitration proceedings are commenced.[18] The courts then will have the opportunity to review the arbitral tribunal's decision at the recognition and enforcement stage.[19]

Chapter 5 deals with recasting the Brussels I Regulation and provides an overview of EU legislators' proposal to resolve the arbitration/litigation interface in the Recast.

[11] *Id.* at 84.

[12] *Id.* at 77.

[13] *Id.* at 111.

[14] *Id.* at 112.

[15] *Id.*

[16] *Id.* at 160.

[17] *Id.* at 156.

[18] *Id.* at 158.

[19] *Id.*

The European Commission (EC) proposed to partially delete the arbitration exclusion and give priority to either the seat court or the arbitral tribunal to determine the existence and validity of arbitration agreements, *i.e.*, the court whose jurisdiction is contested on the basis of the existence of the arbitration agreement shall stay the proceedings in favor of the seat court or the arbitral tribunal.[20] A number of Member States have criticized this approach because (1) it would conflict with the existing regime under the New York Convention that does not give priority to either the seat court or the arbitral tribunal in determining the validity or scope of arbitration agreements; and (2) it could result in granting the EU exclusive external competence in the area of international commercial arbitration.[21] The Brussels I Recast, which came into force in 2015, did not include the EC's proposal.[22]

Chapter 6 analyzes whether the inclusion of arbitration in the scope of the Brussels I regime would create the exclusive external competence of the EU in aspects of international arbitration.[23] After analyzing the CJEU's approach to EU external competence, the author answers this question affirmatively.[24] Although the EU's exclusive competence with respect to international commercial arbitration could harmonize arbitration within the EU and resolve the problems associated with the arbitration/litigation interface, the unique features of arbitration render the EU's exclusive competence over these matters undesirable for its Member States.[25] Under the current regime, Member States can legislate in the area of international arbitration.[26] Their national laws differ with regard to the scope of arbitration agreements and/or the types of matters that may be referred to arbitration.[27] The author interestingly observes that granting the EU exclusive competence in relation

[20] *Id.* at 177–78.

[21] *Id.* at 186–88.

[22] *Id.* at 192.

[23] *Id.* at 193.

[24] *Id.* at 224.

[25] *Id.* at 225.

[26] *Id.* at 227.

[27] *Id.* at 226.

to arbitration could stifle competition between the arbitration seats within the EU, as well as impact the juridical stability enjoyed by the commercial arbitration regime in most Member States.[28]

Chapter 7 contains a thorough overview of the Brussels I Recast and its practical effects. The Brussels I Recast updated the provisions of the Brussels I Regulation. While the Recast restates that arbitration is excluded from its scope of application, it provides guidance on the scope of the arbitration exclusion as follows:[29] (i) Member State courts are permitted to rule on the existence and validity of arbitration agreements in accordance with their national laws;[30] (ii) decisions by Member State courts on the existence and validity of arbitration agreements are excluded from the Brussels I Recast;[31] (iii) the Member State courts' judgments on the substance of the matter, where the arbitration agreement has been nullified, could still be enforced and recognized in accordance with the Brussels I Recast;[32] and (iv) the Brussels I Recast is inapplicable to actions or ancillary proceedings relating to the establishment of the arbitral tribunal, the powers of arbitrators, the conduct of arbitration procedure, and any action or a judgment concerning the annulment, review, appeal, recognition, or enforcement of an arbitral award.[33] The author argues that these clarifications fail to completely address the arbitration/litigation interface as they do not deprive Member State courts of their jurisdiction to review arbitration agreements, and they fail to establish the priority of either the arbitral tribunal or the courts at the seat of the arbitration to determine the questions of the scope, existence, and validity of arbitration agreement.[34] According to Ojiegbe, further reform is needed.[35]

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[28] *Id.* at 227.

[29] *Id.* at 230.

[30] Council Regulation 1215/2012, *supra* note **Error! Bookmark not defined.**, at Recital 12, ¶ 1.

[31] *Id.* at Recital 12, ¶ 2.

[32] *Id.* at Recital 12, ¶ 3.

[33] *Id.* at Recital 12, ¶ 4.

[34] Ojiegbe, *supra* note 2, at 249.

[35] *Id.*

Finally, in Chapter 8, the author summarizes his conclusions. The interaction between international commercial arbitration and the Brussels I Regime remains controversial despite the express exclusion of arbitration from the scope of the Brussels I Regime.[36] This controversy could be lessened by allowing Member State courts with jurisdiction under the Brussels I Regime the possibility of staying litigation in favor of the arbitral tribunal.[37]

III. CONCLUSION

International Commercial Arbitration in the European Union Brussels I, Brexit and Beyond offers an extensive structured analysis of the interaction between international commercial arbitration and the EU Brussels I Regime and thoughtfully contributes to the timely and important topic of the impact of Brexit on international commercial arbitration in the EU.

In addition to providing a comprehensive overview of the existing regulations impacting international commercial arbitration in the EU, Ojiegbe thoughtfully contextualizes this overview by setting out the historical background of the Brussels I Regime and articulating his ideas about necessary reforms to the existing regime. The book thus provides useful guidance for arbitration practitioners, academics, and legislators alike.

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[36] *Id.* at 263.

[37] *Id.* at 262.

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BOOK REVIEW:
THE TROUBLE WITH FOREIGN INVESTOR PROTECTION BY GUS VAN HARTEN

Reviewed by Fernando Tupa

I. INTRODUCTION

The new book The Trouble with Foreign Investor Protection by Gus Van Harten[1] is a thought-provoking—sometimes even brazen—and insightful monograph, which poses a very sharp criticism to the investor-state dispute settlement ("ISDS") system. The author studies the historical roots of current ISDS and how the sudden discovery by arbitrators of asymmetrical sovereign consent, coupled with expansive interpretations of vague concepts in investment treaties, prompted the fast development of this powerful system that institutes what he considers to be wealth-based inequality under international law. He also explores the links between multinational corporations and certain pro-ISDS advocates—to whom he refers as "leading hawks"—that were instrumental to the reshaping of international law in favor of foreign investors, creating what could be viewed as a "world supreme court" with the power to review decisions made by national institutions that is under the sway of investors. His work also features the reactions of states to the expansive and abusive use of ISDS, as well as surveys the efforts to reform this defective system that is clearly prejudicial to sovereign states.

The book is divided into seven chapters and one annex, covering all these subjects in great detail. Summaries and thoughts on each part of the book are offered below, in sequence.

II. THE BOOK

A. *Chapter 1: National Threshold Issues*

Chapter 1 provides the context in which the ISDS system was built, largely based on global inequality, since countries granted extraordinary foreign investment protections to huge corporations and ultra-wealthy individuals without giving them

[1] GUS VAN HARTEN, THE TROUBLE WITH FOREIGN INVESTOR PROTECTION (Oxford University Press 2020).

corresponding responsibilities. The author anticipates his highly critical perception of ISDS by stating that in ISDS "one finds examples of unfairness, conflicts of interest, and public money flowing to private actors on dubious grounds." This chapter introduces certain themes that are developed throughout the book; for instance, how ISDS "is an extraordinary tool for safeguarding wealth," and how it "back[s] inequality and augments the power of corporations in relation to government." It also provides an overview of foreign investor protections and dispels the common arguments made in favor of ISDS, such as that it improves the investment climate or that foreign investors cannot rely on national institutions and require ISDS to protect their investments. This introductory chapter also explains how ISDS would not have exploded without a powerful legal industry behind it, in particular by the power of a group of repeat players who often played multiple roles in ISDS as counsel, expert witnesses, treaty negotiators, and arbitrators.

B. *Chapter 2: Origins of ISDS Treaties*

Chapter 2 tracks down the origins of the current ISDS system. It begins by providing an explanation about the links between the first wave of ISDS treaties and post-colonial violence, since most of those first treaties emanated from a former colonial power (which wanted to protect their corporations in newly independent countries) or from the World Bank. The author then observes how ISDS treaties grew more rapidly in the 1980s, driven by capital-exporting countries. The chapter also examines the background of the creation of the International Centre for Settlement of Investment Disputes (ICSID) through which western states tried to guard against the grave risks presented by decolonization.

Van Harten critically considers that the ISDS system created by those treaties—ICSID being the leading arbitration house—substitutes arbitrators for judges to boost the position of foreign investors in their relations with sovereign states. He further analyzes the great expansion of investment treaties in the 1990s and the critical role played by the United States government in this expansion. The author highlights how, with the help of specialist lawyers, the treaties of the 1990s laid the basis for an ISDS litigation explosion. The chapter concludes by posing the proposition that if ISDS

continues to expand, it will eventually make all countries semi-independent, as it extends privileges to investors and allows corporate lawyers to act as supreme judges by using vague laws to issue rulings that create public debt and discredit the sovereign.

C. *Chapter 3: Activation of the Treaties*

In Chapter 3, the author explores how ISDS treaties give far-reaching powers to arbitrators, in particular by not requiring a more specific statement of consent by the state for investor claims to be valid and actionable. Van Harten explains that foreign investor claims became possible only after arbitrators decided that investment treaties contained sovereign consents that granted authority to arbitrators to hear such claims. The notion of asymmetrical sovereign consent was first recognized in *Asian Agricultural Products, Ltd. (AAPL) v. Sri Lanka*,[2] in which—according to Van Harten—the majority overcame the impediment of consent "by legal wizardry." ICSID approved the tribunal's innovative approach. The APPL arbitration was followed by other cases in which the same reasoning was applied (such as *Saar Papier Vertriebs GmbH v. Poland*,[3] *American Manufacturing and Trading, Inc. v. Zaire*,[4] *Fedax N.V. v. Venezuela*,[5] and *Ethyl, Corp. v. Canada*[6]), which are analyzed at great length in this chapter. The conclusion of the author is that the arbitrators' liberal interpretation in these early cases—validating the theory of asymmetrical sovereign consent—paved the way "for an expansionist ISDS movement in which the fortunes of investors and arbitrators are closely aligned."

D. *Chapter 4: The Most Powerful Protections*

Chapter 4 offers a critical analysis of the main standards of protections offered by investment treaties. It shows how ISDS treaties give foreign investors the most powerful protections of any private actor in international law. Van Harten explains

[2] Asian Agric. Prods., Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Award (Jun. 27, 1990).

[3] Saar Papier Vertriebs GmbH v. Poland, UNCITRAL, Final Award (Oct. 16, 1995).

[4] Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997).

[5] Fedax N.V. v. Venezuela, ICSID Case. No. ARB/96/3, Award (Mar. 9, 1998).

[6] Ethyl Corp. v. Canada, NAFTA/UNCITRAL, Award on Jurisdiction (Jun. 24, 1998).

how ambiguous concepts in investment treaties have been interpreted by arbitrators in investor-friendly ways, intensifying the pressure on governments and allowing investors to challenge a wide array of sovereign decisions. He also highlights that treaties do not create investor responsibilities that are actionable in the same manner as their protections.

The expansive interpretation of treaty protections began with *Metalclad v. Mexico*, in which concepts such as indirect expropriation and fair and equitable treatment were interpreted heavily in favor of investors.[7] Such trend continued with other cases, such as *Von Pezold v. Zimbabwe*[8] (which underscored the procedural unfairness in ISDS), *Tokios Tokelés v. Ukraine*[9] (where nationality shopping was allowed), and *Sedelmayer v. Russia*[10] (which endorsed indirect ownership of investments). The author also explains how under ISDS treaties, foreign investors can avoid the institutions that govern others in a country by bringing claims against the country, since foreign investors are excused from the duty to exhaust local remedies. The ISDS system—starting with *Lanco v. Argentina*[11] —also allows investors to avoid contractually agreed forums to resolve their disputes. Finally, ISDS treaties also fix the problem of enforcement for foreign investors—as they can pursue enforcement with relative ease against the losing country's assets in other countries—that is also coupled with the intense pressure a country may face to pay awards from the investor's home country, the World Bank or other financial institutions.

E. *Chapter 5: Special Access to Public Funds*

Chapter 5 deals with the imbalance created by ISDS treaties, which provide generous protections to foreign investors that would be impossibly expensive to provide to all as a result of their special access to public compensation, allowing them to make extraordinary threats against governments. The chapter further analyzes

[7] Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[8] Von Pezold v. Zimbabwe, ICSID Case No. ARB/10/15, Award (Jul. 28, 2015).

[9] Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award (Jul. 26, 2007).

[10] Sedelmayer v. Russia, *Ad Hoc*, Award (Jul. 7, 1998).

[11] Lanco Int'l Inc. v. Argentina, ICSID Case No. ARB/97/6, Decision on Jurisdiction (Dec. 8, 1998).

issues such as how ISDS allows investors to challenge a country's laws and win compensation free from public or judicial scrutiny, the prospect of foreign investors receiving compensation from the state if the country does not accept the investors' will, and how the risk of arbitrators ordering uncapped compensation could be a concern for governmental officials when contemplating a law or regulation that investors might oppose.

The author also explores some key features of ISDS, such as the right of an investor to pick one arbitrator directly and to jointly choose the presiding arbitrator, who would otherwise be imposed by an appointing authority, most likely by one of the arbitration houses. Another important tool of ISDS is the power of the most-favored-nation clause to expand treaty protection—starting with the *Maffezini v. Spain*[12] ruling—that the author qualifies as "a wand for arbitrators to wave when converting ISDS treaties into a functionally multilateral deal that maximizes special protections for foreign investors in general." Van Harten also covers the competition between arbitrators, lawyers, and arbitration houses within the ISDS industry, which affects "the legitimacy of the whole system," and allows for limited judicial oversight to the arbitrators' decisions and different options for secrecy contemplated in the arbitration rules.

F. *Chapter 6: Intimidating Sovereigns*

Chapter 6 examines the ways in which ISDS jeopardizes sovereign states by undermining regulation, democracy, and security. The main focus of this chapter is the regulatory chill generated by ISDS since certain elements of ISDS treaties "create an exceptionally powerful tool for changing sovereign minds." Some of those most salient elements are: exclusive access by foreign investors to ISDS, which allows them to challenge sovereign decisions; the ability of investors to win uncapped amounts of compensation; the breadth and ambiguity of the protections; the vagueness of treaty safeguards for the state's regulatory role; the international enforceability of ISDS rulings; the use of for-profit arbitration to decide claims, with little or no access to judicial review; and the inability of states to bring claims against investors.

[12] Maffezini v. Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000).

The author provides several examples of regulatory chill in which ISDS contributed to state decisions and had even led governments to reconfigure their institutional processes. Some of the examples analyzed in depth are: the *Ethyl v. Canada* case, in which a foreign investor used ISDS to stymie the Canadian government's efforts to check pollution by banning trade in a gasoline additive; the use of ISDS by foreign investors in Indonesia to unwind deals that dated from a corrupt era; Colombia privileging a private health insurer due to a threat of an ISDS claim, which led to a change in the government's processes; the dispute between Vatenfall and Germany, in which ISDS was used as pressure for approval of a coal-fired power plant in Hamburg at the expense of increased pollution; the *Philip Morris* saga, where ISDS was used to delay anti-tobacco regulations; and Romania pulling back from heritage protection threatened by ISDS.

G. G. *Chapter 7: Fault Lines and the Future of ISDS*

Chapter 7 addresses some of the current concerns with ISDS, its effect on globalization, and the reactions by many states, which are trying to limit expansive interpretations of treaty obligations and are pursuing reform of ISDS. In particular, this chapter explores the efforts by the European Union to replace ISDS with an investment court system in its new economic agreements and to push for a multilateral investment court to replace ISDS in existing treaties, the reform discussions at UNCITRAL, the renegotiated NAFTA, and the withdrawal of some countries from investment treaties.

H. H. *Appendix: Leading Hawks of ISDS*

In this appendix, the author elaborates on the professional background and the decisions rendered by six arbitrators, to whom he refers as the "leading hawks" of ISDS (Yves Fortier, Francisco Orrego Vicuña, Charles Brower, Marc Lalonde, Stephen Schwebel, and Gabrielle Kaufmann-Kohler), including examples of their investor-friendly records. He studies how these individuals interpreted investment treaties in a way that expanded treaty protections and reviews their rulings on contested legal issues—such as claims by minority shareholders or involving questionable investments; the interpretation and scope of controversial concepts such as most-

favored nation treatment, fair and equitable treatment, and umbrella clauses; and the availability of the national security exception, among others.

III. CONCLUSION

Van Harten takes us through an entertaining journey that critically examines all the deeply disturbing problems that the current state of the ISDS system creates. The book analyzes how ISDS was ill-conceived, digging into its historical roots, and reveals how through expansive interpretations of vague concepts in investment treaties, it is reshaping international law to unimaginable levels, benefiting multinationals and tycoons, and creating inequality in favor of foreign investors. It also teaches how ISDS can be used as a weapon of extortion against states—intimidating sovereigns and restricting their ability to regulate in the public interest—and intends to raise awareness about the chilling effect of ISDS claims on state decisions. In short, this well-written study poses a sharp criticism to ISDS, echoing the concerns expressed by many states, which one rarely finds nowadays amid the prolific pro-ISDS literature.

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KEYNOTE REMARKS:
REGULATING ARBITRATOR ETHICS: GOLDILOCKS' GOLDEN RULE

by Constantine Partasides, QC

Keynote address delivered at the 33rd Annual ITA Workshop and Annual Meeting held virtually, on June 16, 2021.

I. INTRODUCTION

Ladies and gentlemen, let me begin at the 2012 ICCA Congress in Singapore.[1] A great debate took place between Houston's own Doak Bishop and Toby Landau, then of London. Their battleground and topic of debate was whether international arbitration needed a code of ethics. Their focus was on the code of ethics for counsel, but the philosophical *joust* that ensued between them equally could have applied to the positives and negatives of regulating the system of international arbitration more generally.

Mr. Bishop, in one corner, argued that public competence is an essential element of our system, that international arbitration needs to be able to police itself, and that this should take the form of a uniform code of ethics for international arbitration.

Mr. Landau, in the opposite corner, sounded an alarm bell against the specter of ever-expanding regulation. The practice of arbitration he warned was increasingly overburdened with protocols, codes, and guidelines. "We are witnessing," he said, "the pandemic spread of a highly contagious condition: *legislitis*, a virulent affliction that manifests itself in an involuntary urge to publish booklets of rules, guidelines, and principles on every conceivable arbitration subject."

Without commenting on whether the Houstonian or the Londoner won the battle of the soundbites during that memorable debate, there can be no doubt as to who has since won the war of ideas. Because since that debate, the world of arbitration has

[1] For more information, *see generally Breakout Session C3 The Relationship Between International Arbitration and the Regulator(s): The Need for Ethical Codes, Guidelines and Best Practices for Arbitration Counsel, Arbitrators, Arbitral Secretaries and Arbitral Institutions: The DB/MS Rio Code, the ILA Code and the CCBE Draft Code*, *in* INTERNATIONAL ARBITRATION: THE COMING OF A NEW AGE?, 17 ICCA CONG. SERIES 465, 465-537 (Albert Jan van den Berg, ed., 2013).

continued to come down firmly on the side of increasing regulation, most prominently and most relevantly for my subject today, in the form of introducing guidelines with respect to the regulation of arbitrators' duties of impartiality and independence, as well as the related duty of disclosure.

Arbitral institutions are similarly issuing more guidance on the meaning and application of those ubiquitous standards, with some institutions (such as the LCIA) are going further still and publishing their reasoned arbitrator challenge decisions, which provides practitioners with the application of those principles *inconcreto*. The International Bar Association's (IBA) has also played a significant role, since first publishing[2] (and subsequently updating[3]) their debated, yet still widely relied upon, *IBA Guidelines on Conflicts of Interest in International Arbitration* (the "IBA Guidelines").

As a practitioner, I have certainly supported and even advocated for the growth of this kind of guidance, on the basis that the growing number of participants in the arbitral process has rightly heightened demands for clarity as to the meaning of those important standards of independence and impartiality, and predictability and transparency as to the manner of their application.

We perhaps should be a little more blunt about the importance of that guidance. The prime paucity of guidance that often handed a broader discretion to a largely well-meaning arbitral elite was no longer good enough for a process of now global importance in which, unlike in national court justice, parties select their arbitrator. In addition, we need to keep reminding ourselves of that fundamental difference between judges and arbitrators when we consider the question of regulating arbitrator duties.

Let us look at what the UK Supreme Court said about that difference only a few months ago, in the case of *Halliburton v. Chubb*[4] pertaining to a challenge to a well-

[2] *See generally* International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, May 22, 2004 (first issuance).

[3] *See generally* International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, Oct. 23, 2014 (updated Aug. 10, 2015).

[4] *See generally* Halliburton Co. v Chubb Bermuda Insurance Ltd [2020] UKSC 48.

known arbitrator for his failure to disclose certain arbitrator appointments that had given rise to doubts as to his impartiality. There the Court observed that "arbitrators have a legal duty to make disclosure of facts and circumstances which would or might reasonably give rise to the appearance of bias. The fact that an arbitrator has accepted appointments in multiple references concerning the same or overlapping subject matter with only one common party is a matter which may have to be disclosed, depending upon the customs and practice in the relevant field. In cases in which disclosure is called for, the acceptance of those appointments and the failure by the arbitrator to disclose appointments taken in combination might well give rise to the appearance of bias."[5]

As we look at the words of the UK Supreme Court, arbitration proponents may take issue with the description offered in that passage, however, coming as they do from the highest court in the most popular seat of arbitration in recent years, they are not to be ignored.

I believe that there are particularly good reasons for us to have clear standards of conduct for arbitrators and to regulate them robustly. So, I do not appear before you today as someone who is against regulation, but I do appear before you to say, almost exactly ten years after that great debate in Singapore took place, that I now believe that in different ways both of our debaters that day have been proven to be right.

I would like to propose two propositions that are relevant to the discussion, which will be illustrated by reference to a recent, prominent national court decision that demonstrated the value of international arbitral codes and guidelines in encouraging consistency and resisting parochialism. I will also refer to a recent and ongoing initiative relating to a new code for arbitrators, which I fear is in danger of going too far.

II. PROPOSITION 1: THE VALUE OF GREATER REGULATION OF ARBITRATOR ETHICS

The first proposition is that we have seen the value over the last decade of greater regulation of arbitrator ethics. To illustrate this first proposition, I am going to return to the case that I have mentioned, the UK Supreme Court's recent decision on

[5] *Id.* ¶ 136.

arbitrator challenges in the seminal case of *Halliburton v. Chubb*.[6]

The *Halliburton* case concerned two primary issues, (1) whether an arbitrator may accept multiple appointments in interrelated cases with only one common party without thereby giving rise to an appearance of bias; and (2) the related question of whether and to what extent an arbitrator may do so without disclosure. In this case, the underlying dispute concerned the Deepwater Horizon oil spill of 2010, with which many may be familiar, in which Halliburton had provided well cementing services that were implicated as one possible contributing cause of the disaster. After settling a number of US civil claims brought against it, Halliburton (a multinational corporation and one of the world's largest oil field service companies) sought to recover those settled amounts under its liability insurance with Chubb Insurance. Chubb, however, disputed coverage and the relevant insurance policy provided for *ad hoc* arbitration in London before a tribunal composed of three members.

While the parties each appointed an arbitrator without issue, they could not reach an agreement concerning the appointment of the tribunal chair. Following a contested application to the English high court, Chubb's preferred candidate was subsequently appointed to chair the tribunal. Almost a year into that first arbitration, however, the same chairman then accepted a separate appointment by Chubb, as its party appointed arbitrator involving the same legal team in another arbitration also related to the Deepwater Horizon incident, but this time involving the owner of the oil rig, Transocean (*i.e.*, not Halliburton), and the chairman failed to disclose this new arbitrator appointment by Chubb to Halliburton. Many months later, upon discovering the chair's subsequent new appointment, Halliburton applied for his removal under Section 24 of the English Arbitration Act, arguing that circumstances existed that gave rise to justifiable doubts as to his impartiality.[7]

These circumstances show the difficulties intrinsic to a system of justice where

[6] *See generally id.* I note that I appeared as counsel for one of the intervenors before the Supreme Court in that case, the ICC Court of Arbitration.

[7] Arbitration Act 1996, Section 24(1)(a) (provision titled "Power of court to remove arbitrator," and providing that "[a] party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds– (a) that circumstances exist that give rise to justifiable doubts as to his impartiality . . .").

parties can select their decision-maker, and in this case, how a party's subsequent selection may have a potential to affect an already impaneled tribunal. They also show an important counterbalance of disclosure, and how disruptive of the entire process a failure to disclose early on, or at all, can be. In these circumstances, it is not difficult to see Halliburton's resulting concern with the repeat appointment. Indeed, the chairman had accepted an appointment in a second case by one of the existing disputing parties, in a related dispute in which only one of the two parties to the first arbitration would have access to him. What is more, their chairman did not disclose this separate appointment, thereby not only leaving Halliburton in an unequal position to Chubb, but entirely ignorant in that fact until it discovered the subsequent appointment by happenstance. On these facts one would think that Halliburton had compelling grounds for challenge, however its challenge was rejected both by the English High Court and then again by the Court of Appeals, in decisions which raised more than a few eyebrows within the arbitration community.

The Court of Appeals' reasoning on the two key issues that I identified earlier is informative for present purposes. On the first issue of multiple appointments, the Court of Appeals held that the mere fact of the multiple appointments in interrelated arbitrations with one common party did not itself give rise to an appearance of bias, without there being, in the Court of Appeals' words, something more.[8] Nevertheless, the court did not elaborate what that something more needed to be, notwithstanding that it acknowledged that multiple appointments in these circumstances can give rise to what it described as legitimate concerns.[9] Those concerns related primarily to the creation of an inequality between the parties by putting Chubb in a privileged position of having unilateral access to the common arbitrator on related issues.[10] And by putting the common arbitrator in a position of having information on those related issues that have not been derived from the parties' submissions in the arbitration in question.

[8] Halliburton Co. v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817 ¶¶ 53, 76.

[9] *See id.* ¶¶ 48, 77.

[10] *Id.* ¶ 77.

On the second issue of disclosure, although the Court of Appeals agreed with Halliburton that these circumstance ought to have been disclosed, and indeed that such nondisclosure itself reached a legal duty to disclose,[11] it found that the breach had no consequences on the facts of the case because there was, as it subsequently transpired, ultimately only a limited degree of overlap between the two arbitrations.[12] The court considered that in the end, the Transocean arbitration was determined on a preliminary issue that did not arise in an earlier Halliburton case.[13]

The Court of Appeals decision demonstrates how difficult it is to assess fact-specific conflicts questions, how arbitrator disclosure practices vary widely, and how the outcomes of challenges to impartiality—even in mature arbitration jurisdictions—still have the capacity to surprise.

Because the Court of Appeals decision appeared to many to be out of line with international standards, both on the question of multiple appointments of interrelated cases and on the possible consequences of nondisclosure, when Halliburton appealed that decision to the UK Supreme Court, the ICC, the LCIA and a number of other arbitral institutions applied to intervene as nonparties to give the court the benefit of their international perspective. That Supreme Court hearing took place in November 2019, and the Supreme Court's judgement was rendered less than a year ago in November 2020. In its decision, the Supreme Court, too, rejected the challenge of the arbitrator, on the basis that the English Arbitration Act requires that the court ascertain whether the circumstances that give rise to a justifiable doubt as to impartiality exists at the time—not of the nondisclosure, not of the challenge, but at the time subsequently of the court's decision on the challenge.[14] In this regard, the Court considered that by the time of those court decisions rejecting the challenge, the dismissal of the Transocean case on a preliminary issue that did not arise in the Halliburton case only served to underscore that the two cases were insufficiently

[11] *Id.* ¶¶ 83-91.

[12] *Id.* ¶ 96.

[13] *Id.* ¶¶ 99-100.

[14] Halliburton Co. v Chubb Bermuda Insurance Ltd [2020] UKSC 48 ¶¶ 121-23.

interrelated.[15]

Whether one agrees or disagrees with the Supreme Court's decision, it illustrates the difficult and fact-specific nature of arbitrator conflict issues and confirms the risks to the process if arbitrators under-disclose. In addition, although the Supreme Court did not remove the arbitrator, it did clarify certain disquieting elements in the Court of Appeals decision, thereby finally bringing the English law on independence, impartially and the duty of disclosure squarely back in line with prevailing international standards.[16]

With regards to the first specific issue in the appeal, the Supreme Court helpfully confirmed that where an arbitrator accepts appointments, in multiple references concerning overlapping subject matter, this may, depending on those circumstances, give rise to an appearance of bias.[17]

On the second issue of disclosure, the Supreme Court confirmed that disclosure was indeed a legal obligation and that the failure to disclose in circumstances of multiple appointments in interrelated cases itself might well give rise to an appearance of bias.[18]

The UK Supreme Court's judgment offers a profoundly important analysis on the subject of arbitrators' duties. For present purposes, just as important as the outcome is the way in which the Court arrived at its judgement, and the role that international standards and guidelines played in contributing to the Court's analysis.

Remarkably, all of the parties relied on the IBA Guidelines on Conflicts of Interest in making submissions to the Supreme Court as to the prevailing international practice today and agreed that the IBA Guidelines represent an international consensus. They argued that there was an important interest in ensuring that English law was not at odds with that international consensus. Although the differing parties did not always have precisely the same view as to the meaning and effect of the IBA

[15] *Id.* ¶ 149.

[16] *See id.* ¶¶ 151-57.

[17] *Id.* at ¶ 130.

[18] *Id.* at ¶ 136.

Guidelines, notably the applicant Halliburton, the intervenors the ICC, the LCIA (as well as other intervening institutions), and the respondent Chubb (whose legal team included one Toby Landau) all relied upon and placed emphasis on the IBA Guidelines. As counsel for the intervenors at the hearing, it was striking to see how those guidelines afforded all of the parties an immensely valuable common framework from which that hard fought debate could ensue.

From the perspective of an international practitioner interested in ensuring that English law did not depart from emerging international norms, without the IBA Guidelines, it would have been far more difficult to present to the court prevailing international practice in a reliable and objective way. The UK Supreme Court itself similarly relied with confidence on the IBA Guidelines in various places,[19] in a decision that was quite clearly drafted carefully to avoid any charge of departure from that international consensus.

Although one of many court decisions that have referred to and relied on the IBA Guidelines around the world, the *Halliburton* case provides a striking real life illustration of how the rules and regulations generated by the international arbitration community can assist in ensuring common standards are interpreted and applied in a manner that is consistent across different jurisdictions, in a way befitting of a system of justice which aspires to be truly global. This decision eloquently speaks to the positive contribution that rules, standards, and guidelines created by the international arbitration community can have on the outcome of proceedings.

III. PROPOSITION 2: THE DANGERS OF OVER-REGULATION

I fear that we are seeing increasing signs of overzealous overregulation, and the still evolving ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in Investor State Dispute Settlement (the "Draft Code") illustrates some of the concerns that many practitioners have in this regard.[20] A collaborative initiative, the Draft Code was drawn up by ICSID and UNCITRAL and has been the subject of consultation

[19] *See id.* ¶¶ 71, 80.

[20] For more information, *see generally* ICSID, Code of Conduct for Adjudicators in International Investment Disputes and Code of Conduct Resources, https://icsid.worldbank.org/resources/code-of-conduct (providing an overview as well as draft versions, comments, and working papers).

within the forum, in particular of the UNCITRAL Working Group III on ISDS reform. Although the draft code remains a work in progress,[21] the versions of the Draft Code circulated so far are ripe for discussion, as there is still an opportunity for concerned arbitral citizens to make their views known before the Draft Code is finalized, which is presently expected sometime in 2022.

The new Draft Code could be set to have a laudable central aim, mainly addressing the particular ethical issues that may arise for an arbitrator in investment treaty arbitration, the most obvious of which is the double-hatting syndrome in which the same individuals serving as arbitrator and counsel in different cases under different investment treaties that may raise the same correlated questions of law, which justifiably gives rise to concern that warrant increased regulation. The Draft Code addresses this issue, and includes draft proposals, which would prohibit such double-hatting subject to party consent. Whether the prohibition will be limited to narrower circumstances involving only overlapping facts and parties remains to be seen, as that debate is ongoing.

While the initiative to introduce regulations addressing ethical issues that commonly arise in investor-State arbitration, there is cause for concern that the new regulatory initiative has mushroomed in scope. Rather than seeking to address only those issues that might be said to be particular to arbitrators appointed in investment treaty arbitrations, it has been prepared as a comprehensive code that defines the duties of independence and impartiality in a manner that is not entirely consistent with arbitral practice or the way in which those duties have been violated, identifies other duties not addressed by courts or arbitral institutions around the world, and arguably overlaps with existing guidelines such as the IBA Guidelines in a way that may sow confusion. As a result, I suggest that the Draft Code in its present form constitutes regulatory overreach, which in the age of the tactical challenge may create many more problems than it ultimately solves.

[21] A first version of the Code was published on May 1, 2020, following which ICSID and UNCITRAL received extensive input on the draft through consultation with State delegates and other interested stakeholders. A second version of the Code was published on April 19, 2021 was published considering the feedback received. *See generally id.*

A. *ICSID/UNCITRAL Code, Draft Article 3*

According to the major arbitral rules and statutes around the world, the principles of independence and impartiality are focused, understandably, on circumstances that give rise to or evidence a risk of dependence or partiality. Article 3 concerning Independence and Impartiality will now embellish that focus on factual circumstances by inviting debates on whether a particular arbitrator might be influenced by various emotions, amongst them the fear of criticism.[22]

There is no doubt that the strength of character to withstand a fear of criticism is usually a virtue we should welcome in international arbitrators. But requiring it, in a code of conduct would elevate a virtue into a duty, thereby opening a door to a whole new category of challenges to arbitrators and their decisions. This raises a number of evidentiary questions: How do you prove a fear of criticism? How do you disprove it? Is some concern that your decision will invite criticism necessarily a bad thing? Are those arbitrators who pay no regard to what others think necessarily the best adjudicators? This kind of appreciation of an arbitrator's character and approach should not be a matter subject to regulation.

Considering these questions in the context of far more challenging factual situations, such as the complex scenario presented in *Halliburton v. Chubb*, raises questions as to how challenges under this provision will play out in practice. Indeed, it likely will be as difficult to set forth evidence showing a fear of criticism and may add fuel to the fire surrounding arbitrator challenge debates. Experienced regulators in other fields tend to advise that in formulating regulations less is more, that those who regulate should beware the law of unintended consequences, and in this instance, the unintended consequences of regulating in this way are not so difficult to see.

[22] *See* ICSID and UNCITRAL, *Draft Code of Conduct for Adjudicators in International Investment Disputes*, Version 2 dated Apr. 19, 2021, art. 3(1) ("Adjudicators shall be independent and impartial, and shall take reasonable steps to avoid bias, conflict of interest, impropriety, or apprehension of bias."); *id.* art. 3(2) ("In particular, Adjudicators shall not: (a) be influenced by self-interest, fear of criticism, outside pressure, political considerations, or public clamor … .").

B. *ICSID/UNCITRAL Code, Draft Article 6*

Article 6 of the Draft Code titled "Other Duties" does not stop at embellishing the duties of independence and impartiality, as it goes further and identifies other ancillary duties.[23] While it is certainly to be hoped that your arbitrators will display high standards of civility and competence, a regulatory code of conduct should not be a place to list virtues. Elevating a virtue into a duty creates an additional basis to challenge an arbitrator and his decision. In the age of the tactical challenge, what will parties bent on disruption make of duty to display high standards of competence? If such a party claims that an arbitrator has made a mistake of law, will that allow it to contend that the arbitrator has failed to display that required standard of competence? In this way, will such a duty therefore become a back door to a right of an appeal for a mistake of law? Can we be confident that such a provision will not be used and abused to challenge an arbitrator simply because she has arrived at a decision that a challenging party considers to be wrong? There can be no doubt that the questions this provision gives rise to will quickly become more than simply theoretical questions, and these are precisely the kinds of questions that those who regulate should be considering in the process.

C. *ICSID/UNCITRAL Code, Draft Article 10*

Arguably one of the most important provisions of the Draft Code, draft Article 10 titled "Disclosure Obligations"[24] deals with an arbitrator's disclosure obligations on which many modern challenge situations turn, as was the case in *Halliburton v. Chubb*

[23] *See id.* art. 6(1) ("Adjudicators shall: (a) display high standards of integrity, fairness, and competence; (b) make best efforts to maintain and enhance the knowledge, skills, and qualities necessary to fulfil their duties; and (c) treat all participants in the proceeding with civility.").

[24] *See id.* art. 10(1) ("Adjudicators shall disclose any interest, relationship or matter that may, in the eyes of the parties, give rise to doubts as to their independence or impartiality, or demonstrate bias, conflict of interest, impropriety or an appearance of bias. To this end, they shall make reasonable efforts to become aware of such interest, relationship, or matter."); *id.* art. 10(2) ("Adjudicators shall make disclosures in accordance with paragraph (1) and shall include the following information: (a) Any financial, business, professional, or personal relationship within [the past five years] with… (b) Any financial or personal interest in: (i) the proceeding or its outcome; and (ii) any administrative, domestic court or other international proceeding involving substantially the same factual background and involving at least one of the same parties or their subsidiary, affiliate, or parent entity as are involved in the IID proceeding; and (c) All IID [and non IID] proceedings in which the Adjudicator has been involved in the past [5/10] years or is currently involved in as counsel, expert witness, or Adjudicator.").

already discussed. Specifically draft Article 10(2)(c) addresses a circumstance that might be particularly significant in the context of investment treaty arbitration and requires the disclosure of all other treaty arbitrations or indeed any other arbitrations that an arbitrator has been involved in over the last five or ten years in an effort to address the problem of double-hatting. One can debate however whether the disclosure requirement for such an extended period of time casts too wide a net or is even remotely realistic. Over that time period arbitrators may have been involved in hundreds of cases, including commercial arbitrations, many of which are far less likely to be relevant in any event to the issues that arise again and again in treaty arbitrations.

The portions of draft Article 10 that are of a more general nature and address issues that are not unique to investment-treaty arbitration, appear to be duplicative of grounds already covered by other instruments, in particular the IBA Guidelines which have already proven to be useful in cases such as *Halliburton v. Chubb*, and raises many questions. Is this general standard of disclosure intended to be the same as the IBA Guidelines? Is it intended to be a departure? If so, does that mean that the IBA Guidelines are no longer considered as representing an international consensus on disclosure standards? What effect will that have on future attempts to present these IBA Guidelines as an international standard of best practice to courts that might otherwise favor more parochial solutions? Again, these are questions that those who regulate should be asking themselves, and I would respectfully suggest those driving forward this Draft Code of Conduct might ask themselves again.

IV. PROPOSITION 3: GOLDILOCKS' GOLDEN RULE

As the *Halliburton* saga and the ICSID and UNCITRAL Draft Code of Conduct illustrate, arbitrator challenges are complex and can give rise to a number of issues that have a material impact on the conduct of proceedings. I have sought to illustrate some of the unintended pitfalls that can accompany expansive regulation in the form of the presently evolving ICSID and UNCITRAL Draft Code of Conduct. As international arbitration has become an increasingly popular and successful method for resolving disputes, new interest groups are understandably involving themselves

in the way in which the process works and creating new and more expansive regulation in an effort to standardize the process. Of course, while there can be positives drawn from these changes, there may be unintended consequences for overregulating the conduct of arbitration proceedings. Just as underregulation may no longer be adequate for the modern arbitral processes, so the resulting overregulation can quickly become the road to arbitral hell.

As the question of how to strike the right balance of regulation is not a new one, there are lessons to be learned from examining the waxing and waning cycles of regulation in other fields. As one example, the literature for the state of company regulation that was introduced in the financial sector following the financial crisis of 2008 may prove instructive. In a study published by Aizenman in 2011, he discusses the paradox of underregulation, and how prolonged periods of economic tranquility reducing demand for regulation and inducing underregulation can itself contribute to financial calamity. On the other side of the regulation paradox, he warns of the tendency to underregulate in good times and the risks associated with overshooting the adjustment needed following a crisis. And he tells us that "these considerations suggest the need to strive towards Goldilocks," his golden rule of prudential regulation.[25]

V. CONCLUSION

When we regulate for our system of arbitration, let us be objective so that we can create clear, readily applicable standards that do not require an attempt to read a challenged arbitrator's mind. Let us be incremental. Given the acceptance of the IBA Guidelines, new efforts should build off that baseline, not duplicate it. In an effort to

[25] J. Aizenman, *Financial Crisis and the Paradox of Underregulation and Overregulation*, *in* LESSONS FROM EAST ASIA AND THE GLOBAL FINANCIAL CRISIS, ABCDE WORLD BANK CONFERENCE VOLUME, 217-218 (Annual Bank Conference on Development Economics) (Justin Yifu Lin and Boris Pleskovic, eds., 2011) (observing "the tendency to underregulate in 'good times' and the risk associated with overshooting the adjustment needed following a financial crisis. Both underregulation and overregulation may reflect the paradox of financial regulation: the success of the prudential regulator or a prolonged period of economic tranquility lead to complacency, reducing the demand for the regulator's services, inducing underregulation, which leads to a financial calamity. … The demand for regulation declines during prolonged good times, increasing the ultimate cost of eventual crises. The other side of the regulation paradox is the hazard of overregulating … . These considerations suggest the need to strive toward a golden rule of Goldilocks prudential regulations.").

strike the right balance, let us subject all new regulations to a cost-benefit analysis by asking the essential question: "What is the marginal benefit of the new regulation and does that benefit outweigh the inevitable unintended consequences of all new regulations?" Let us not react to the perception of underregulation in the world of arbitration by now moving to the other regulatory extreme. In a phrase, let us follow Goldilocks' golden regulatory rule.

Thank you very much for your attention.

CONSTANTINE PARTASIDES QC is one of the founding partners of Three Crowns and has appeared as counsel in some of the largest international arbitrations of the last two decades. In addition to his counsel work, Constantine appears regularly as arbitrator, including in disputes that involve States and State entities. He has experience acting as Chairman or Sole Arbitrator in cases under the ICC Rules, the LCIA Rules, the SCC Rules, and the UNCITRAL Rules. Constantine is recognized internationally in all major directories and publications at the top of the arbitration market. Constantine is a co-author of the fourth, fifth, and sixth editions of the leading textbook on international arbitration, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION. He is a Director of the LCIA Board. Constantine is a solicitor-advocate (Higher Courts Civil) and was appointed Queen's Counsel in 2014. He was educated at King's College, London and Cambridge University.

REPORT ON THE PANEL "ENERGY ARBITRATIONS: DIALOGUE BETWEEN EUROPE AND THE AMERICAS"

by Konstantin Mishin

I. INTRODUCTION

At the 2021 ITA-ALARB Americas Workshop's Young Lawyers Roundtable "Energy Arbitrations: Dialogue Between Europe and the Americas," moderated by Sebastian Briceño, the Panel discussed three main topics:

1. Recent developments of the energy sector in Europe and its application in the Latin American context;

2. Comparative analysis of the Argentine arbitration saga from the crisis of 2001 and the current wave of arbitrations against Spain; and

3. Construction arbitrations related to energy facilities such as refineries, gas pipelines, generation plans and their particularities in the Latin American context.

II. RECENT DEVELOPMENTS OF THE ENERGY SECTOR IN EUROPE AND ITS APPLICATION IN THE LATIN AMERICAN CONTEXT

Santiago Bejarano [1] started his intervention by confirming that the recent developments in energy arbitration will have significant repercussions in the future. The decision of Court of Justice of the European Union (CJEU) in *Republic of Moldova v. Komstroy*[2] is one of the examples of this. It followed its 2018 ruling in *Achmea* BV *v. Slovak Republic*, [3] where the CJEU recognized that intra-EU bilateral investment treaties did not conform to EU law. *Achmea* raised a fundamental question about whether EU governing treaties have any precedence over other treaties that were similarly signed by those nations. Considering that the Vienna Convention on the

[1] Santiago Bejarano is a lawyer at Latham & Watkins LLP, New York, dual-qualified in New York and Colombia, advises clients doing business in Latin America, international arbitration and white-color matters, leading arbitration practitioner by Who's Who Legal.

[2] Judgment of the Court (Grand Chamber), Case C-741/19, *Republic of Moldova v. Komstroy, a company the successor in law to the company Energoalians*, ECLI:EU:C:2021:655, 2 September 2021.

[3] Judgment of the Court (Grand Chamber), Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea* BV, ECLI:EU:C:2018:158, 6 March 2018.

Law of Treaties does not provide that one type of international law precedes another kind, many arbitration tribunals have already declined the *Achmea* approach concluding that the EU law takes no precedence over other international laws.

In *Komstroy*,[4] the court concluded that the dispute resolution mechanism in article 26 of the Energy Charter Treaty (ECT)[5] is incompatible with EU law following the reasoning in *Achmea*. *First*, the dispute resolution mechanism would lose the uniformity required by EU law by delegating authority over EU questions to arbitral tribunals. *Second*, since the ECT is a part of the EU law, its application entails application of EU law; and it is incompatible with the principles of the EU law for an arbitration tribunal to decide this dispute.

Another example of development related to this case is the standing to bring a claim by a non-party (Moldova) to the EU before the CJEU. The court admitted Moldova's claim because the arbitration was seated in Paris; therefore, both parties agreed to apply the EU law.

In the second part of his presentation, Santiago Bejarano explained that the fair and equitable treatment standard, particularly the notion of legitimate expectations, has significantly developed in recent years. The 1960s-1990s generation of investment treaties established a general application that provided fair and equitable investment treatment and nothing beyond this.

The early *Neer*[6] case had established a high threshold for fair and equitable treatment, and the subsequent tribunals added some content to this standard. Considering that earliest investment treaties have both a fair and equitable treatment provision and a provision for a minimum standard of treatment, the cases dealing with them have interpreted that FET has to be broader than the minimum standard of treatment.

However, based on said interpretation, many states perceived that the investment

[4] *Komstroy*, *supra* note 2 at ¶ 66.

[5] Energy Charter Treaty, Dec. 17, 1994, art. 21(1).

[6] Neer (U.S.) v. Mexico, 4 Rep. Int'l Arb. Awards 60, 61-62 (1926) (deciding that "the treatment of an alien, in order to constitute an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would recognize its insufficiency").

arbitration system tilted in favor of the investor, realizing that the FET standard is exceedingly general and lacks clear definitions of what is allowed and what is not under this standard. The recent treaties in this area, including those involving EU and the Latin American states, show that states became more careful while drafting investment treaties. The new investment agreements include specifications of what should and should not be considered a violation of the FET standard.

Finishing his presentation, Santiago Bejarano emphasized that Latin American states take an assertive approach to treaty negotiations in what regards the FET standard. For example, while negotiating a BIT with France in 2014, Colombia persuaded France to have a very specific definition of FET. It reflects the overall position of Latin American states who are guided by the practice of the early 2000s, stating that they did not intend the FET standard to go this far.

Some European states, like Spain, draft the current FET provisions more precisely, covering only the most egregious, unreasonable, and arbitrary measures. Under this new type of provisions, the FET standard cannot be used to influence the state's regulatory power.

Florencia Villaggi, commenting on the *Komstroy* topic, mentioned that, *first*, because the European Treaties guarantee the principle of supremacy of the EU law over other laws, countries that voluntarily signed up for that should comply with this, especially in the ECT cases.

Second, the CJEU in *Komstroy* highlighted that its decision does not apply to commercial arbitration. Article 344 of the Treaty on the Functioning of the European Union provides that the EU Members shall not submit its disputes concerning the interpretation or application of the EU Treaties to the outside-EU mechanism.[7] However, European states participate in commercial arbitration, including through its state-owned companies. It means that the EU Members *voluntarily* submit their commercial cases for dispute resolution to a system outside of the Treaties.

[7] The Consolidated Version of the Treaty on the Functioning of the European Union, 1957 O.J. (C 202), art. 344.

III. COMPARATIVE ANALYSIS OF THE ARGENTINE ARBITRATION SAGA FROM THE CRISIS OF 2001 AND THE CURRENT WAVE OF ARBITRATIONS AGAINST SPAIN

Florencia Villaggi[8] found a few similarities between the Argentine arbitrations that arose from the crisis of 2001 and the current wave of arbitrations against Spain. The first similarity is the history of both arbitration surges.

Argentina liberalized its economy to recover from hyperinflation, canceling many regulations and encouraging foreign investors' investment, particularly in the energy sector. One of the encouragements was the convertibility law that equaled one Argentinian peso to the US dollar.

Ten years later, a currency crisis hit Asia, Russia, and Argentina's neighbor Brazil. The Brazilian Real devaluated more than ten times, which made Argentinian exports less competitive than Brazilian exports, which caused a massive deficit in Argentina. The convertibility law precluded the government from fighting this crisis, which led to a substantial financial crisis in Argentina.

In the late 1990s, Spain launched the regulatory framework that attracted investment to the renewable sector in order to meet EU goals by 2010. Spain issued a new electricity sector law which regulated renewables, under which (1) the government subsidized over 90% of this sector's tariff, and (2) the government was selling the electricity of the renewables first, before any other, regardless of price. Many financial investors considered these conditions very attractive, and the 2010 target was reached swiftly, receiving 150% more investments in this sector than was predicted.

When Spanish economy collapsed during the 2008 global financial crisis, the GDP fell from 3.7% in 2007 to -3.6% in 2009; the unemployment rate leapt to 25%, it led to an enormous reduction in electricity demand. Considering that Spain received 150% more renewable energy investments than they predicted that these renewable energy producers had a priority in selling their energy first, and that they were 90% subsidized, consumers could not pay for this electricity, which led to a huge deficit

[8] Florencia Villaggi is Of Counsel at Herbert Smith Freehills LLP, New York, ICC YAF Representative for the North American chapter, she has been ranked as a Rising Star in international arbitration.

in this sector.

The second similarity was the issue of finding a balance between a state's right to regulate in times of economic crisis and investors' rights. Even though the measures differed, both Argentinian and Spanish measures impacted the investors' returns. Argentina had to get out of the convertibility law. The government has frozen all the investors' tariffs, and they were paid in a USD 1 = 1 Peso ratio, but they will be paid in pesos only now. On the contrary, Spain did not freeze the tariffs.

The third similarity is that the investors in Argentinian and Spanish cases claimed that governmental measures during the economic crisis violated the FET by breaching legitimate expectations.

In Argentinian cases, concession contracts that governed 99% of all investments in energy sectors had stabilization clauses, which established that convertibility law was a part of the regulatory framework under which concessions were granted. Many tribunals concluded that the government specifically committed not to change this regulatory framework of investment.

In Spain, there were no concessions; the government incentivized investors by regulations only, which are obviously subject to change. Tribunals agreed that there was no specific commitment not to modify regulatory framework; however, they sided with investors confirming that the investors had legitimate expectations under FET that the regulatory framework should not be *radically* changed.

IV. CONSTRUCTION ARBITRATIONS RELATED TO ENERGY FACILITIES SUCH AS REFINERIES GAS PIPELINES GENERATION PLANS AND THEIR PARTICULARITIES IN THE LATIN AMERICAN CONTEXT

In her opening statement, Jessica Beess und Chrostin [9] explained that ECT construction and energy arbitrations are highly dependent on the contract structure: a lump sum contract and a cost-reimbursement contract. The vast majority of the disputes arises from issues concerning the allocation of risk between an owner and a contractor when one of the following goals is not achieved: (1) schedule overruns, (2)

[9] Jessica Beess und Chrostin is a Senior Associate at King and Spalding, she represents clients in international commercial and investment treaty arbitration and inter-state arbitration, as well as in international disputes before the US courts, she is a member of the global Advisory Board of ICDR Y&I, and Secretary of the International Law Committee of the New York City Bar.

budget overruns.

The most common reason contractors bring claims against owners is (1) to recover costs that an owner disputes or (2) to determine the appropriate allocation of risk for unforeseen events.

Contracts to design and build energy infrastructure involve many elements of technical complexity: technical specifications, compliance with environmental and local regulations, energy targets, etc.

Many contractor-owner disputes nowadays concern unexpected events: government-mandated shutdowns, delays and cost overruns, new safety requirements and protocols, work hours limitations, restrictions on on-site access, supply chain interruptions, delays in obtaining permissions, or other government agency responses.

Even though these issues are not unique, Latin America has one of the poorest track records for project delays and cost overruns, so the pandemic compounds in the matters of the unforeseeable future.

In her second topic, Jessica explained that that the common law doctrine of frustration of purpose allows a party to set aside a contract, where an unforeseeable event radically changes or undermines the parties principal purpose for entering into the contract or to excuse nonperformance; the frustrated purpose should be so fundamental and essential to the contract that without it, the parties would have never entered into the transaction.

Some Latin American jurisdictions accept the approach established by the frustration of purpose. For example, Article 1090 of Argentina's Civil and Commercial Code provides that frustration of purpose may serve as a ground for termination of the contract.

The doctrine of frustration also is now recognized in Mexico.

Peru does not yet recognize this doctrine, but there has been a proposal to add the frustration of purpose to article 1372(A) of the preliminary draft reform of the Peruvian Civil Code. This shows that some Latin American jurisdictions are contemplating introducing the common law concept of frustration of purpose into

their domestic judicial system.

Similar doctrines may exist that carry different names and are conceptually distinct but ultimately allow to deal with unexpected hardships if there are similar results in the frustration of purpose. Brazil does not recognize the frustration doctrine, but it acknowledges the impossibility of performance doctrine, which is closely related to frustration. The distinction between the impossibility of performance and frustration concerns the duty specified in the contract and whether they can be performed in fact. Still, frustration affects the purpose and the reason for the party entering into a contract. Under Brazilian law, the parties can be released from the contractual obligations in limited circumstances, and the contract can be discharged when there is an impossibility of performance. So, even though frustration doesn't exist, the impossibility of performance is conceptually related to the frustration of purpose.

In conclusion, Jessica highlighted that Latin American countries tend to introduce the frustration of purpose doctrine into their legal systems. Even if this doctrine is not recognized in some jurisdictions, lawyers need to be vigilant and diligent in researching remedies because there are doctrines that might assist parties facing unexpected obstacles.

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A REPORT ON THE PANEL "COMMERCIAL ARBITRATIONS RELATING TO REGULATORY CHANGES"

by Lena Raxter

Keynote address delivered at the 2021 ITA-ALARB Americas Workshop, "Winds of Change: The Impact of Regulatory Changes in Latin America on International Arbitration" on 8 September 2021.

This panel discussed procedural and substantive issues in investment treaty arbitrations arising out of regulatory measures, such as the right balance between investors' rights and state regulatory powers, when regulatory measures give rise to treaty breaches; the relationship between local constitutional and/or administrative challenges and investment treaty claims; and the effectiveness of consultation processes between investors and Governments.

I. INTRODUCTION

In September 2021, the Institute for Transnational Arbitration (ITA) and the Latin American Association of Arbitrators (ALARB) held a virtual conference to discuss how recently enacted laws and regulations governing renewable energy, oil and gas, insurance, and mining industries impact contract and investment treaty rights. The first panel, titled "Commercial Arbitrations Relating to Regulatory Changes," addressed how regulatory changes across all sectors can affect and become part of commercial arbitration.

Mark W. Friedman (Debevoise & Plimpton, New York City/London) moderated the panel, which included Mónica Jiménez González (Secretary General, Ecopetrol S.A., Bogotá), Kate Brown de Vejar (DLA Piper, Mexico City), Fabiano Robalinho Cavalcanti (Sergio Bermudes Advogados, Rio de Janeiro), Elisabeth Eljuri (Independent Arbitrator, Elisabeth Eljuri, P.A., Miami).

In their discussion, the panelists address five important questions that arise from commercial arbitrations related to regulatory changes. First, what types of claims may the parties bring? Second, what defenses are available to the parties in a dispute with a state? Third, what remedies are available? Fourth, what defenses apply to purely private disputes resulting from regulatory changes? Lastly, fifth, what are the implications of commercial arbitration on other dispute resolution options? In

addressing these issues, the panelists lay out a comprehensive framework for how to approach commercial arbitrations that arise from regulatory changes.

II. COMMERCIAL ARBITRATION RESULTING FROM REGULATORY CHANGES

Mark W. Friedman began the conversation by addressing commercial arbitrations between state entities and private companies that arise due to a regulatory change imposed by the state. Such commercial arbitration with the state itself or state entities due to regulatory changes are not uncommon. Many contracts with states or state entities include arbitration clauses that are of a commercial nature, such as provisions to provide services like waste collection, electricity, or supplying products to a state or state agency. For example, in a contract for a natural resource concession—oil and gas, energy, or mining, for instance—between the state or state company and a private commercial party, there is an arbitration clause providing for some form of commercial arbitration. Afterwards the state does something that is of a regulatory nature, like imposing new tariffs or royalties, or shutting down production at the mine for environmental reasons. The question then arises: what does a commercial arbitration look like in such a situation?

D. *Types of Claims Parties may Bring*

To start off the conversation, Kate Brown de Vejar laid out the framework for what types of claims typically arise in commercial arbitration arising from regulatory change. She highlighted a recent example of this happening: the windfall profit taxes instituted during the exceedingly high petroleum prices that occurred from 2008 to 2012. During this period, the legal community had the benefit of seeing how the companies affected by these measures reacted to them—whether the effected companies brought any claims and, if so, in what fora.

Ms. Brown de Vejar went on to explain the steps to this analysis and the questions lawyers must address. Take, for example, an international company with a production sharing contract or concession with a state-owned entity in the natural resources sector. Suddenly, the government implements a regulatory measure that severely impacts the company. What should they do?

The first step is to look at the contract. What does it say about what the impact

of new regulations might be? A typical production sharing agreement may provide that the state-owned entity will absorb all taxes or that the international company may take its production share free of taxes.

The next question therefore is, what does this mean? Does it mean free of all taxes at the time the parties entered into the contract? Does it mean free of all taxes that may be implemented in the future? Would the state-owned entity even have the power to enter into an agreement that absorbs all future potential fiscal liability that a government may impose? Was the language of the contract backed by some legislation that permitted such an absorption? Was it backed up by a presidential decree or order of some sort? The key to answering these questions is the exact language used in the contract, as well as any legislative or executive frameworks that supported the contract. Is there language in the contract that attempts to either maintain the economic balance of the fiscal burden between the companies? Alternatively, is there a renegotiation or rebalancing mechanism in the event that there is a new fiscal measure? How effective is that language?

Lastly, what do you do if you are unable to renegotiate terms that maintain an adequate or acceptable economic balance between the parties? If the parties cannot amicably decide what to do with new regulatory measures, then that is where the commercial arbitration arises. In the commercial arbitration itself, the parties are asking for interpretation of the contract terms. For instance, interpretation may be used to determine whether the language of a stabilization clause is effective. Interpretation may also be necessary to determine whether the contract is actually impacted by the new measure and, if so, how. Moreover, where there is language like "all taxes are to be paid by the state-owned entity," the meaning of this phrase in the contract and within the regulatory regime is a matter of interpretation. Does it mean all taxes at the time the parties created the contract, or all future taxes and other fiscal measures imposed upon the production activities in that country?

In concluding, Ms. Brown de Vejar highlighted the importance of understanding that there are many available dispute resolution options. Companies affected by these measures always have the option to go to local courts to challenge the new

measure, perhaps on the grounds of its constitutionality. For example, in Mexico and many other Latin American countries, companies have the option of an *amparo* challenge,[1] which can—in some circumstances—result in the immediate suspension of the measure.

Additionally, companies may attempt to bring parallel proceedings before multiple arbitral tribunals. This was the case when Algeria implemented a windfall profits tax that heavily affected the production sharing agreements of companies like Mærsk and Anadarko.[2] As a result, these two companies brought parallel UNCITRAL[3] and ICSID[4] arbitrations under their contract with the state-owned entity, Sonatrach S.P.A. The companies justified the parallel proceedings by arguing that the new measures breached a stabilization clause, which then breached the obligations under the contract in terms of legitimate expectations and umbrella clause obligations. These cases demonstrate the importance of considering all dispute resolution options available to the parties.

E. *Defenses Available in a Commercial Arbitration with a State*

Elisabeth Eljuri continued the discussion by addressing what defenses are available to states and state entities during a commercial arbitration. In a true, purely commercial relationship with a state company, a private party may raise any of the traditional commercial defenses.

Many times, the state companies wait until arbitration to file a claim against the contractor or the investor company. Once the contractor or investor company brings an arbitral claim, the state files a corresponding counterclaim. For example, maybe a

[1] *See generally* Gloria Orrego Hoyos, *The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action* (Apr. 2013), https://www.nyulawglobal.org/globalex/Amparo.html; David Hoyos & Ana Catalina Mancilla, *The Amparo: Key Factor in the Arbitration Scene of Central America and Mexico* (Aug. 28, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/28/the-amparo-key-factor-in-the-arbitration-scene-of-central-america-and-mexico.

[2] ANNOUNCEMENT—SETTLEMENT OF ALGERIAN TAX CLAIMS, https://investor.maersk.com/news-releases/news-release-details/settlement-algerian-tax-claims.

[3] Anadarko Algeria Co. & Maersk Olie, Algeriet A.S. v. Sonatrach S.P.A., UNCITRAL (discontinued in 2012).

[4] Mærsk v. Algeria, ICSID Case No. ARB/09/14, https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB/09/14 (initiated in 2009).

state did not pay the contractor precisely because it was a breach of the quality of the performance that they had expected. As a result, the state will file a counterclaim based on lack of performance. It is common to see such claims.

As a first step, though, a lawyer must determine whether the defense available is jurisdictional or whether the defense goes to the merits of a claim.

1. Jurisdictional challenge: Arbitration clause

Ms. Eljuri introduced the issue of challenges against the arbitration clause itself. This may be the case when the state party or the state itself raises issues that are constitutional; or the issue may arise from the commercial arbitration law of the state or even arise from the bylaws of the particular state-owned company. Sometimes the challenge against an arbitration clause is based on a technicality and other times it may be more of a substantive argument.

Further, if it is a multi-tiered clause, there may be some defenses related to whether the claimant has exhausted the required pre-requisites for dispute resolution. For example, some contracts require the parties to participate in negotiations prior to bringing an arbitration claim. However, this pre-requisite can add a layer of complication to any dispute when the counterparty refuses to participate in negotiations. Because these criteria are mandatory, refusal to participate in the negotiations may create a barrier to dispute resolution.[5]

2. Jurisdictional challenge: Choice of Venue

Mr. Friedman introduced another jurisdictional challenge based on choice of venue clauses. Some contracts include clauses that designate the proper court based on the subject matter of the dispute. For example, a clause may state that a dispute regarding technical matters can go to arbitration, but all disputes regarding legal issues must go to the local courts.

Mr. Friedman then asked Fabiano Robalinho Cavalcanti to elaborate on his experience with this type of clause. Mr. Cavalcanti explained that he often sees various kinds of jurisdictional limitations in dispute resolution clauses. This type of

[5] *See generally* Marisa Marinelli & Andrew N. Choi, *When Pre-Arbitration Requirements Lead to Disputes Over Dispute Resolution Clauses*, N.Y.L.J. (Mar. 13, 2017), https://www.hklaw.com/en/insights/publications/2017/03/when-prearbitration-requirements-lead-to-disputes.

clause presents some advantages because parties often face technical issues when executing a contract, which often only arise during construction, for instance, or later during operation. If a dispute arises that is exclusively about technical issues, this type of clause works pretty well. However, if a dispute arises where it is difficult to disassociate the technical and legal matters, a clause designating technical and legal issues to different jurisdictions will add a significant degree of complexity to the dispute.

For a practical example, imagine a contract for the creation of a hydroelectric plant. If the parties disagree about whether the engine should run clockwise or counterclockwise, and the contract and the technical specifications are silent on the issue, this type of clause might offer a quick and efficient solution for the dispute. However, if one of the parties argues that the engine should run clockwise because the contract establishes that the operation should follow a certain standard, then the dispute is no longer merely or exclusively about technical issues and parties begin to spend time disputing about the proper jurisdiction, which is not their focus. An effective way to prevent this problem is to establish that, in the absence of an agreement between the parties on the jurisdiction of quasi technical and legal disputes, the provision that grants the broadest jurisdiction should prevail.

Another frequent problem arises from clauses that establish a regime where some disputes go to arbitration, and some go to the court. This distinction was quite common in disputes where a party needed an injunction before the constitution of the arbitral tribunal. It was quite useful because the parties had to be able to resort to a court to get a remedy before the constitution of the tribunal. However, this is much less necessary nowadays considering that many arbitral institutions offer emergency arbitrators.

There are some contracts that establish different jurisdictions based on the merits of the dispute, which may be overly complicated. For example, a contract may exclude from the jurisdiction of the arbitral tribunal claims related to economic imbalance. However, unless the law of the state prohibits the specific matter from being resolved by arbitration, this kind of distinction adds unnecessary complexity to

the dispute. For example, a party may have a claim for economic imbalance and a claim for termination of the contract, which would be difficult to isolate one from the other. If the contract requires that separate jurisdictions must address the two elements of the dispute, there will be a problem.

Ms. Gonzalez followed up on Mr. Cavalcanti's comments by explaining that, for state-owned companies, the first step is to maintain a good relationship with your contractors because you may be working with these companies for a long time. On the other hand, the company must stay competitive because, even if it is a state-owned enterprise, there are other shareholders, and the company wants to be competitive at a national and international level.

If a contract requires parties to bring technical and legal disputes in different venues, but the dispute in question is both technical and legal, the action the company should take depends on the circumstances of the dispute. A state-owned company knows that it may have cases before a variety of venues—administrative courts, national courts, arbitral tribunals, etc. For state-owned companies, it may be better to go before a local court. However, ultimately, competitiveness is important, so these companies put international arbitration clauses into their contracts to attract investment.

Moreover, a company must move fast. Therefore, a contract may include a jurisdiction limitation clause for technical issues to help resolve these issues faster without delaying the project or program. With respect to international arbitration, parties must also bear in mind the potential of investor-state arbitration where multiple proceedings may occur. In the end, the choice of venue depends on the contract and the relationship the parties have.

Companies may also have private contracts with regulators that are governed by private law. In that case, the parties must be careful to clearly establish that their relationship is private in nature and governed by private law. Nevertheless, in these private disputes, parties will sometimes raise defenses or claims that are more public-related. In such a situation, the lawyers must look at the language of the full contract, not only the arbitration clause.

When the dispute has underlying technical issues, but the ultimate consequences are legal in nature, the choice of venue all depends on the contract. The contract would need to define the scope of the litigation carefully—*e.g.*, specifically define how specialized a "technical" issue must be and any related time limits for the proceeding. If the scope is not well determined, the dispute almost always defaults to a "legal dispute." What the company does not want is to have parallel proceedings that involve both issues. Accordingly, the contract needs to specifically limit what "technical" means and who is actually deciding this. Otherwise, it could be a vastly different adjudicator for these types of issues.

Lastly, the parties need to understand whether, by law, the venue chosen can make a final and binding expert determination on the technical issue. Many times, the venue does not have this capacity because "final and binding" in principle applies to decisions of an arbitral tribunal. Thus, on a practical level, the lawyer needs to understand the contract. For example, is this technical expertise a precondition to being able to file an arbitration? Is it meant to be final and binding as a matter of law? Assuming the answer to these questions is yes, then there is the issue of a contractual breach that has a technical element.

This analysis is very factually specific. For example, in Mexico, the hydrocarbons law[6] passed in 2013 has a provision that says that certain contractual breaches must go to the Federal Court systems while other breaches may go to international arbitration. It is exceedingly difficult to think that a dispute involving a major multi-million-dollar project will be split into multiple venues, but sometimes the legislation itself creates this situation. This specific example is a clear contractual dispute; however, disputes can be even more complex than that.

3. Defenses on the Merits: Force Majeure

Another defense explained by Ms. Eljuri was a defense on the merits claiming

[6] *See generally* Bradly J Condon, *Mexican energy reform and* NAFTA *Chapter 11: Articles 20 and 21 of the Hydrocarbons Law and Access to Investment Arbitration*, 9 J. WORLD ENERGY L. & BUS. 203 (2016); *cf.* José Ramón Cossío Díaz & José Ramón Cossío Barragán, *The Ruel of Law and Mexico's Energy Reform: The New Energy System in the Mexican Constitution*, BAKER INST. PUB. POL'Y AT RICE U. (2017), https://www.bakerinstitute.org/media/files/files/68d55ed8/MEX-pub-RuleofLaw_JR2-042417.pdf (examining the legal issues created by Mexico's energy reform measures in 2013 and 2014).

force majeure.[7] In such a situation, the key question is whether the parties that drafted the contract were careful enough to exclude acts of the state from the definition of force majeure. To the extent that the drafters did not exclude state acts within this definition, the state itself may use a force majeure clause as a valid excuse to take an otherwise impermissible action. While typically you would think there is a separation between the regulator and the state company that signed the contract, the issues of attribution and piercing arise regarding whether the state's action truly was "beyond the party's control" and unforeseeable, as required when a party argues force majeure.[8]

4. Defense on the Merits: Administrative Contracts

Ms. Eljuri also introduced the set of defenses that arise from administrative contracts in civil law jurisdictions specifically.[9] Contracts with a state may qualify as administrative when the contract is based on national interest considerations, or it involves sizeable infrastructure or energy resources. In this case, states have a set of defenses that arise from the administrative nature of the contract. One such notable defense is that the state party has the power to make unilateral changes to the contract as a matter of exorbitant powers. If the state exercises this power, the next question is whether the unilateral changes may apply retroactively. This question raises a new set of complex issues regarding local law and retroactivity.

5. Defense on the Merits: Stabilization Clause

Ms. Eljuri then introduced the defenses that result from the interplay between stabilization clauses and changes in law. Contracts may expressly include stabilization clauses, or they may result from a provision in the local law. Contracts for natural resources often include this type of clause, but the clauses are rare for other types of projects. Whatever the origin of the stabilization, a party may

[7] *Force Majeure*, CORNELL LAW SCHOOL: LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/force_majeure (last visited Dec. 2, 2021).

[8] *See generally* Merner Melis, *Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration*, 1 J. INT'L ARB. 213 (1984).

[9] This is true for civil law jurisdictions, but not for common law jurisdictions. *See generally* Maged Shebaita, *The Notion of Administrative Contracts in Civil Law System vs Common Law System* (Oct 6, 2020), https://ssrn.com/abstract=3706353.

challenge the clause because its scope does not cover what is being argued or simply from a legal perspective. For an example of the latter, a stabilization clause may be invalid because it does not meet the formalities that the local law requires.

6. Defenses on the Merits: Corruption

Ms. Eljuri concluded her remarks by explaining the common defense that corruption caused the retention of the contract. This argument goes to the heart of whether there is a valid contract to begin with or whether the contract can be annulled. For example, a state may claim that a significant contract was obtained by corruption and therefore should be annulled.

Mr. Cavalcanti then followed up on this defense by explaining its application in Brazil. A state may raise a corruption defense when the state enterprise essentially eliminates obligations under a contract and evades what would otherwise be a contractual liability. In Brazil, there are many cases in which state entities, particularly the federal government, raise the claim that the relevant contract is derived from corruption.

This claim often arises in two distinct situations, and the approach to addressing it varies accordingly. In the first, the contract was created as a result of the corruption itself, but it is an existing contract that has been executed. In the second, the contract is the means of corruption, such as paying a kickback. These two discussions generate two different solutions because, in the case of the latter, the underlying contract does not exist since there is no rendering of services. The contract is only a means for paying for the corruption.

F. *Remedies Available in Disputes with States*

Mr. Friedman followed up the defense discussion by asking Ms. Brown de Vejar to explain the remedies available to parties. Specifically, are commercial arbitrators able to give effective kinds of non-monetary remedies or relief when a regulatory change causes significant disruption to an ongoing project? Is it possible for commercial arbitrators to essentially injunct the regulatory change to prevent it from taking effect, thereby providing the parties a chance to fully address all the legal rights and get a binding final award?

Ms. Brown de Vejar responded that she has never seen a commercial arbitral tribunal attempt to suspend the measure itself in that context. Moreover, she struggled to think of a scenario where they would have jurisdiction to do so, and she could imagine a court challenge coming very quickly if an arbitral tribunal even attempted to do so. The fact is, the state has enacted a measure, the state actor is obviously compelled to comply with that measure, and the arbitral tribunal can of course look at the economic impact and assess whether there are damages available to the harmed party. However, in terms of whether the arbitral tribunal could order a provisional measure that would stop the effect of that measure on the relationship, the answer is probably no. For that, the parties would need to go to the courts of jurisdiction.

For Mexico and Latin America, the best and quickest solution to this issue would be an amparo challenge[10] or other constitutional challenges that can effectively suspend the measure. There are numerous examples of companies in the Mexican renewable energy sector where players apply to the local courts for amparos to stop the impact of new measures on their businesses.[11] These cases are a good example of this mechanism working better than trying to get a provisional measure from a commercial arbitration.[12]

Ms. Brown de Vejar then introduced a second scenario where a contract exists between two private actors, which is somehow impacted by a state measure. In this case, the parties probably have more of a chance to obtain a provisional measure that helps them cope in the interim period as they work out how the measure will impact their relationship. It would not actually suspend the effect of the measure, though. For example, an arbitrator would certainly be able to suspend interest running on overdue payments or put disputed monies in escrow if there is sufficient urgency or

[10] *See supra* note **Error! Bookmark not defined.**.

[11] *See generally* Carlos Loperena Ruiz, *The Process of Amparo in Commercial Matters*, 6 U.S.-MEX. L.J. 43 (1998).

[12] *But see Regulatory Develops in the Mexican Power Sector—Chapter 3: Tipping the Scales in favor of State-owned Companies*, SHEARMAN & STERLING (Mar. 1, 2021), https://www.shearman.com/Perspectives/2021/03/Regulatory-Developments-in-the-Mexican-Power-Sector-Chapter-3.

danger. Such a danger could be a risk of bankruptcy to one of the parties if they are forced to comply with the new measure in a way that would impact them irreparably. In terms of regulating the economic impact between the parties, there is more of a chance to obtain injunctive measures suspending the effects of the regulation.

G. *Defenses in Purely Private Disputes Resulting from Regulatory Changes*

Mr. Friedman then followed up on the second situation proposed—in a purely private contractual relationship, could the parties invoke changed circumstances? For example, Company A buys products from Company B, who manufactures the products. A state then implements an environmental safety regulation banning a certain component used to produce the products, making it much harder for Company B to manufacture the products. There may be challenges at the state level about the arbitrariness or rationality of the regulatory measure, but, as between Companies A and B, how do they deal with the regulatory change? Can the regulatory change give rise to legal or contractual defenses even between private commercial parties that are not state or state enterprises?

1. Changed Circumstances

Ms. Eljuri agreed that changed circumstances would be a natural defense for Company B in a claim brought by Company A. However, the exact criteria necessary for the defense would depend on whether the parties are in a common law or civil law jurisdiction. A lawyer would start with the contract and see what the contract says—*e.g.*, is there a force majeure clause? If the parties are in a large complex project, are there multiple contracts? Are the force majeure provisions consistent in the contracts? The lawyer would need to look at the force majeure provisions in detail, as well as the exact requirements for unforeseeability, causation, and, particularly, mandatory notice provisions.

2. Doctrines that Apply as a Matter of Law

Outside of the contract, some of these doctrines apply as a matter of law. Typically, in a common law dispute, parties may make arguments of either force

majeure, frustration, or impossibility.[13] In civil law, parties would claim things like hardship,[14] which is sometimes contemplated by the law[15] and sometimes borrowed from soft law.[16] Whatever its title and source, the important thing is understanding what the contract and the applicable substantive law[17] say about the potential availability of the defense. For example, occasionally an unforeseeability defense cannot also have an argument for force majeure if the event was perfectly foreseeable. This topic has been discussed extensively post-pandemic.[18] However, these discussions often overlook a key question—was the force majeure the spread of COVID or was it the resulting lockdown?

3. Risk Allocation Clauses

Another set of comparable provisions are risk allocation clauses.[19] If the event is force majeure, and it is no one's fault, the question is how the contract allocated that risk. Similarly, with limitation of liability clauses that contain a financial cap on the liability, who bears the risk for intentional harm, for instance. Generally, however,

[13] Mayukh Sircar, *Business Interruption and Contractual Nonperformance: Common Law Principles of Frustration, Impracticability and Impossibility*, HUTCHISON PLLC (Apr. 9, 2020), https://www.hutchlaw.com/blog/business-interruption-and-contractual-nonperformance-common-law-principles-of-frustration-impracticability-and-impossibility.

[14] *See*, *e.g.*, Frederick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance*, AM. BAR ASSOC. (2006), https://www.arnoldporter.com/-/media/files/perspectives/publications/2006/04/hardship-and-changed-circumstances-as-grounds-fo__/files/publication/fileattachment/hardship_excuse_article.pdf.

[15] For example, in France and Brazil. *See* French Civil Code, art. 1195; *Contract Law: Force Majeure and Hardship in Brazil*, LAWS OF BRAZIL (Mar. 18, 2020), https://lawsofbrazil.com/2020/03/18/contract-law-force-majeure-and-hardship-in-brazil.

[16] *See*, *e.g.*, UNDROIT PRINCIPLES, CHAPTER 6: PERFORMANCE—SECTION 2: HARDSHIP, https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/chapter-6-section-2 (last visited Dec. 2, 2021).

[17] The applicable substantive law is not always the law of the seat. *See* Franco Ferrari & Linda Silberman, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, *in* Franco Ferrari & Stefan Kröll (eds.), CONFLICTS OF LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION (2019).

[18] *See*, *e.g.*, S Esra Kiraz & Esra Yildiz Ustun, *COVID-19 and* force majeure *clauses: an examination of arbitral tribunal's awards*, UNIFORM L. REV. (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7798591.

[19] *Cf.* Mark Gelowitz, Geoffrey Hunnisett & Elie Farkas, *Force majeure clauses: Contractual risk allocation and the COVID-19 pandemic* (Dec. 8, 2020), https://www.osler.com/en/resources/critical-situations/2020/force-majeure-clauses-contractual-risk-allocation-and-the-covid-19-pandemic.

limitation of liability clauses are set aside if there is gross negligence or willful misconduct.

H. *Implications of Commercial Arbitration on other Dispute Resolution Options*

Mr. Cavalcanti raised another significant problem that the parties may face. What happens when there are parallel proceedings where one case involves the private party and the state entity, and another is purely between two private parties. For example, Company A brings a claim against the State based on a regulation and Company B brings a claim against Company A for a failure to fulfill a contract as a result of the regulation. In that scenario, how do you organize those proceedings? One is a consequence of the other, and the decision of one proceeding may impact the other. This is an issue of dispute resolution in general because this problem happens both in arbitration and in courts when there are several types of proceedings ongoing.

1. From a State-Owned Company's Perspective

Monica Jimenez Gonzalez continued this discussion by explaining how a state-owned company's commercial arbitrations may fit into the overall network of dispute resolution options. First, to be clear, there are distinct categories for each party: the private companies, the companies whose shareholders include the state, and the regulators that are part of the state. This distinction is important because state-owned companies are not always in agreement with how the state is functioning. Specifically in respect to regulation, the state-owned company is in a hard place because it needs to maintain its competitiveness and contractual relationships, and sometimes the state's regulatory measure may make it difficult for the company to achieve this goal.

Regarding the available proceedings, first there is the administrative proceedings where one party challenges the regulatory measure. Some states also allow for constitutional challenges, as well as administrative challenges. Then there are the commercial arbitration clauses that may be included in the contract. Additionally, there may be relevant bilateral investment treaties under which the parties may bring a claim.

There are many complications that may arise when a company is deciding which proceeding to use. For a state-owned company, there is a level of pressure which arises from the nature of the employees of that company, who are deemed public servants. State-owned entities may also have other authorities that look at how they manage funds that come from the state and how the company deals with disciplinary actions. It is extraordinarily complex.

Consequently, it all comes down to strategy—what is the objective? What is going to happen with the counterparty? We have found ourselves in positions where we need to delay or make sure the investor-state arbitration will take a long time, given that we needed to first try to resolve the local proceeding or the commercial arbitration. This is not easy because, first of all, there may be different tribunals, which brings in the importance of having arbitrators in the commercial arbitration that will understand the details of the country where the proceedings are happening. In this situation, the company will also need an order with the state so that its defense is not put in jeopardy.[20] Thus, this depends on evidence, timing, the tribunal, the council that is representing you in both arbitrations, and the council you are using locally. It depends on what side you are on. Strategically, you must map out all of this and make sure everyone understands the overall strategy.

Ms. Gonzalez concluded by explaining that a party may need to take inconsistent positions in the different fora. That said, the good news is the different fora all look at different issues, so that defense is available to explain that the positions may be contradictory but they each address different issues. However, if you foresee that there will be a contradiction between these various proceedings, then the key is timing. You must make sure that you go fast in the commercial arbitration so that it will not impact whatever comes up in the investor state arbitration. It is vital to bear in mind sequence, strategy, timing, what remedies are available in each proceeding,

[20] *See* David Roney & Benjamin Moss, *Summary Dispositions in International Arbitration – A Procedural Tool with Both Benefits and Risks*, SIDLEY (Dec. 16, 2020), https://www.sidley.com/en/insights/publications/2020/12/summary-dispositions-in-international-arbitration-a-procedural-tool-with-both-benefits-and-risks (explaining the arbitral tribunal's power to render summary dispositions to ensure that the arbitration is both prompt and efficient).

and the council strategy map.

2. From a Private Company's Perspective

In her final remarks, Ms. Brown de Vejar responded to Ms. Gonzalez's comments by explaining their application for private companies. Strategy, timing, who your arbitrators are—the considerations are all the same. In a situation where a regulatory change creates claims that the harmed party may bring under arbitral clauses, under a bilateral investment treaty, or through the courts, how does the lawyer choose how to proceed?

The first step is addressing what provisional measures the company needs, which often may only be granted by local courts. The company could also look at emergency arbitration if that is an option under the contract. In deciding between these two options, the company must ask whether the considered proceeding would be capable of granting the desired provisional measure. If both can, then the company should ask whether one has better decision makers than the other.

If the two options are a commercial arbitration or an investor-state arbitration, the second step is considering the relationship with the state. The continuity of the company's operations with the state is a primary concern. A company should not sue the state lightly; it should only sue the state if it is at the point of exit. This would occur when the company's value in the country is destroyed and the relationship with the administration has deteriorated significantly.

We do see examples of claimants strategizing and pursuing one avenue of proceedings only to realize it was not the correct strategy. For example, a company may prioritize a treaty claim because they think this would allow the company to avoid a limitation on damages provision in the contract. The ultimate strategy, however, depends on the facts of the case and the desired outcome.

III. CONCLUSION

The panel provided an in-depth view of the substantive issues arising from regulatory changes and outlined the positions of the major stakeholders, giving the audience a brief, yet complete view of the state of play in the relationship between investor-state arbitration and states regulatory interests.

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A REPORT ON #YOUNGITATALKS "ARBITRATION & INSOLVENCY: WHEN THEORY MEETS PRACTICE"

by Alicia Yeo

I. INTRODUCTION

In October 2021, the young practitioners' group of the Institute for Transnational Arbitration ("Young ITA") held a virtual webinar to explore the practical issues that arise at the intersection of insolvency and arbitration, from both Brazilian and US law perspectives. This panel was the closing event of São Paulo Arbitration Week. It presented insights on arbitration and insolvency from the perspectives of lawyers involved in shaping its practice and discussed recent developments in the area (such as the newly published International Bar Association ("IBA") Toolkit on Insolvency and Arbitration and the new Brazilian Bankruptcy Act).

Moderated by Young ITA's North America Chair Lídia Rezende (Chaffetz Lindsey, New York), the panel discussion centered on three topics that often arise in the international arbitration and insolvency space: (1) the right to initiate arbitration when insolvency procedures are involved; (2) the viability of arbitration proceedings brought by insolvent parties, particularly with regard to security for costs; and (3) the enforceability of arbitral awards. The panelists were Ruth Teitelbaum (Arbitrator, Mediator and Advisor, New York), Eduardo A. Mattar (Padis Mattar Advogados, São Paulo), Jennifer Permesly (Skadden, New York), and André Luis Monteiro (Quinn Emanuel, London).

They offered a breadth of experience across a range of different jurisdictions and professional backgrounds. Monteiro is Of Counsel at Quinn Emanuel and a former Visiting Scholar at Queen Mary University of London. Teitelbaum currently practices as arbitrator and mediator in international arbitrations but was previously Head of Underwriting at a hedge fund. Mattar, founding partner of Padis Mattar Advogados, focuses on arbitration, insolvency, and special situations, and is a restructuring expert. Permesly, partner in the International Litigation and Arbitration Group of Skadden, is also co-chair of the IBA's Insolvency and Arbitration Group.

II. TOPICS OF DISCUSSION

A. *The Right to Arbitration*

The first question addressed by the panel was whether the initiation of insolvency procedures against a party is capable of precluding the right of that party to initiate arbitration proceedings.

Permesly provided a primer to this layered and complex question, with a focus on the US perspective.

She explained that the insolvency regimes in various jurisdictions do indeed purport to preclude arbitration where the insolvency process has already begun. However, it is unclear whether insolvency rules applying in one jurisdiction must be followed or considered by arbitrators acting in other jurisdictions. The IBA was particularly interested in this question and sought to provide guidance to practitioners in the IBA Toolkit on Insolvency and Arbitration, the development of which Permesly oversaw as co-chair of the IBA's Insolvency and Arbitration Group.

Structurally, the right to arbitration tends to derive from an entirely different statute or set of rules from insolvency regimes across various jurisdictions. In the US, for instance, arbitration operates under a very strong federal preference for arbitration per the Federal Arbitration Act ("FAA"). Yet, the US insolvency regime is under a different statute with a very strong policy rationale that seeks to provide a single forum for the resolution of creditors' claims relating to an insolvent entity. Quoting from the court in *In re Bethlehem Steel Corp.*, she notes that there are sometimes disputes involving both the Bankruptcy Code and the FAA which will present a conflict of "near polar extremes," whereby bankruptcy policy exerts an "inexorable pull towards centralization" while arbitration policy advocates for a "decentralized approach towards dispute resolution."[1] As such, the US and other jurisdictions across the world have struggled to strike the right balance when it comes to reconciling these two seemingly irreconcilable areas of law. Permesly summarized the four general approaches taken by various jurisdictions surveyed by

[1] *In re Bethlehem Steel Corp.*, 390 B.R. 784 (Bankr. S.D.N.Y. 2008)

the IBA's Insolvency and Arbitration Group, noting that the approaches tended to diverge greatly. The IBA ultimately recommended that arbitrators should first consider the default position in the jurisdiction regulating the insolvency, then assess that position's impact on the right to arbitration.

Monteiro then gave an overview of Brazil's recently updated approach to arbitration and insolvency. Brazil's new Bankruptcy Act came into force in January 2021. Notably, the new rules acknowledged the intersection between arbitration and insolvency—an overlap which was not acknowledged in the previous iteration of the Brazilian Bankruptcy Act or the Brazilian Arbitration Act. Monteiro also explained that the new laws took a rather liberal and arbitration-friendly approach, highlighting two particular provisions.

First, Article 6, paragraph 9 provides that a preexisting arbitration agreement is not discharged by the initiation of insolvency proceedings. As such, liquidators or trustees cannot discharge a pre-existing arbitration agreement when the insolvency process begins, nor is it necessary to seek the court's permission to enforce the arbitration agreement against an insolvent party. Neither creditors nor insolvent parties are prevented from commencing or continuing arbitration proceedings after judicial reorganization or winding up orders are issued. Monteiro noted that the position taken by Article 6, paragraph 9 codified the approach already followed by the courts in case law.

Second, Article 22, paragraph III(c) provides that a trustee or liquidator will take over the management of the estate's legal representation in court proceedings and arbitrations. Upon the issuance of winding up orders, the trustee/liquidator will be able to manage legal affairs—it may choose to hire lawyers, replace lawyers, discuss potential settlements, and other such actions. However, Monteiro emphasized that this change does not stay ongoing arbitration proceedings, which will otherwise continue.

B. *Viability of Arbitration Proceedings*

Rezende then steered the discussion towards how parties decide whether to initiate arbitration proceedings at all. What factors parties that are in insolvency

proceedings or nearing insolvency usually consider when deciding whether to file for arbitration? Who makes the decision to initiate arbitration proceedings? Does an insolvent party need funding to initiate arbitration proceedings?

Mattar, informed by his experiences as restructuring counsel, provided insight from a Brazilian perspective. He noted that counterparties to the debtor in liquidation or arbitration proceedings are unlikely to be recognized as creditors by bankruptcy courts if there is not already an arbitral or other judicial award acknowledging the debt they are owed. As such, these counterparties are disincentivized from staying arbitration or liquidation proceedings.

On the question of who decides whether to initiate arbitration, Mattar explained that the decision generally falls to (i) the debtor-in-possession, or (ii) the debtor's trustee, receiver, or administrator if it is no longer in possession. Mattar noted that Brazil takes a very liberal approach with regard to what a debtor-in-possession can do, as its decisions do not require approval from the courts. For the second scenario, Mattar explained that liquidation proceedings in Brazil (somewhat equivalent to Chapter VII proceedings in the US) mean that the debtor is separated from its assets and liabilities—consequently, these assets and liabilities are under the management of said trustee, receiver, administrator or equivalent. That entity is charged with deciding how to manage disputes. It may decide to take over arbitration proceedings already in place or to start new arbitration proceedings.

Whether an insolvent party needs funding to initiate arbitration proceedings depends on how the funding is structured, both for reorganization and liquidation proceedings. If the funding is structured in a manner whereby it only considers the financing of the insolvent debtor to bear the costs of the dispute, then the court's approval is not required—debtor-in-possession logic applies. For liquidation proceedings, the court's approval is not a requirement but is generally recommended. If the financing can be considered a transfer of assets (as opposed to granting the funder the right to participate in the claim), then court authorization may be needed for judicial reorganization and certainly needed for liquidation.

Teitelbaum added a further dimension to the picture by explaining the decision-

making process for potential funders, having previously worked as Head of Underwriting at a third-party funder. She defined "third-party funding" as non-recourse capital from a capital provider which is not a part of the existing capital structure of the company involved in insolvency proceedings or a dispute. "Non-recourse" means that if the claimant does not win or obtain a form of monetary settlement, the funder receives no repayment. In the context of insolvency, liquidators may seek third-party funding where existing shareholders of the company are unable or unwilling to finance legal claims, including international arbitration claims, which would be a source of funds for distribution among creditors.

Teitelbaum observed that there are many ways for a funder to lose, even if the claimant wins. On a basic level, the cost and time required to monetize a claim may mean the funder would have been better off investing in something less risky. Additionally, the funder also loses out if the respondent actually has no attached assets or is otherwise unable to pay. Furthermore, the funder's ability to collect the proceeds of a dispute is affected if there is a flaw in the funding transaction or intravenous circumstances such that the funder is unable to secure its share of the claim proceeds. If there are accusations of fraud relating to the transaction, this can also affect the funder's ability to recover its share. For example, Argentina accused Burford Capital and the claimants of fraud in *Teinver* S.A., *Transportes de Cercanías* S.A. *and Autobuses Urbanos del Sur* S.A. *v. Argentine Republic*.[2]

In the context of insolvency, a key issue is who owns or controls the claim. An important covenant made by the claimant (*i.e.* the recipient of the funds) in a funding agreement is that the claimant actually owns the claim and that no one else has a lien on the claim. If reorganization occurs and the claimant loses ownership of the claim to another entity and that entity is not party to the funding agreement, the funder may have issues recovering its proceeds. As such, funders must weigh the risks of loss of ownership occurring when deciding whether to provide funding.

Additionally, funders consider whether they are willing for the funding agreement

[2] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Annulment (May 29, 2019).

to become public record. Funding agreements approved by courts will become part of the record—this means there will be a disclosure of the funding agreement itself, rather than a mere disclosure of the existence of funding.

Teitelbaum observed that there are two current trends in this area. First, some funders appear more likely to take on significant risk by purchasing bankrupt companies, which allows control but requires the funders to provide significant capital. She noted that this arguably might not even qualify as third-party funding. Second, other funders are heading in the opposite direction—they avoid any direct relationship with the insolvent party or claim itself, and instead fund law firms through portfolio financing or other routes. This avoids issues of governance and ownership of claims but raises some ethical issues for the lawyers involved.

Rezende then turned the discussion towards security for costs. She asked the panelists what factors are normally considered by tribunals when deciding on applications for security for costs.

Monteiro explained that, generally, if it seems likely that the claimant will not be able to pay adverse costs award, tribunals usually allow the respondent to apply for security for costs. The mere fact that a claimant has obtained funding from a third party does not necessarily mean that there is a material deterioration in the claimant's finances. The significance of the third-party funding depends on why the claimant sought such funding—financially stable claimants may also choose to share risk and liquidity through such arrangements. While the answer might be found in the funding agreement, parties often have concerns about the disclosure of such agreements, as also alluded to by Teitelbaum. Where the party seeking security for costs was already aware that the insolvent party was struggling financially, arbitrators may also consider that the former should not be awarded security for costs, since it knowingly took on the risk of suing an insolvent party. In this case, the question being asked is, "Who took the risk at the beginning of the commercial or business relationship?"

Mattar took this further and clarified that the fact that the debtor is in insolvency proceedings does not mean that security for costs is required—a common misconception. In fact, this might even indicate that the tribunal should not award

security for costs. This is because once the debtor is in judicial reorganization or liquidation proceedings, the debtor's pre-existing and ongoing obligations are protected against pre-petition claims to enable the debtor to comply with those ongoing obligations. Financing a pre-existing arbitration dispute falls within this category of protected obligations—priority is given to administrative expenses arising from the need to defend its own interests. However, Mattar cautioned that this is still case-specific. Some insolvent companies may not be able to foot arbitration bills or have empty estates.

To round off this segment of the discussion, Teitelbaum gave an overview of current trends relating to security for costs. On one hand, the number of applications for costs involving insolvency proceedings has increased. However, this has not been met with an equal increase in the number of decisions from tribunals awarding such costs. In Teitelbaum's view, it is likely that there will be increased demand for transparency in funding disclosure and a greater possibility that claimants will have to post security. She noted, however, that the current case law on security for costs is troubling—there is still no coherent view or policy on the role arbitrators should play in deciding the post-award priority of creditors. The lack of a coherent policy creates significant uncertainty and makes international arbitration more costly for all involved. Third party funders are more likely to need to obtain expensive insurance policies, which increases the share of proceeds they will take from the claimants.

Teitelbaum used the tribunal's decision in *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex v. Turkmenistan* as a case study to demonstrate the issues arising in the context of third-party funding and security for costs applications.[3] In *Unionmatex*, the majority of the tribunal initially ordered the claimant to post US$3 million in security at the request of the respondent, on the basis that the funding agreement stated the third-party funder was not liable for any adverse costs award. Shortly after, the claimant proved incapable of complying with the order to post security. On the basis of denial of justice concerns, the tribunal

[3] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35 (2018).

then decided to rescind its initial order for security for costs and allow the arbitration to proceed. Teitelbaum noted that the tribunal seemed dismayed or surprised that the funder did not simply put up the US$3 million, which showed that they lacked understanding of how costly the capital is—the true cost to the claimant is much higher than US$3 million, as the claimant likely had to give up a large portion of the potential proceeds in order to obtain such funding (considering its poor bargaining position as a bankrupt entity going up against a foreign sovereign).

To Teitelbaum, this case demonstrated that arbitrators lack a coherent view of their role in relation to security for costs in an insolvency context, as they seem to engage in potentially inappropriate prejudgment of the creditworthiness of the parties in order to make these decisions. She predicts that the coming years will see a rise in arbitrator challenges on the basis of their security for costs decisions, as the reasoning provided often is opaque or not strong enough.

C. *Enforceability of Awards Involving Insolvent Parties*

The panel then turned to what happens once an arbitration award is actually issued.

The first issued raised by Rezende was how tribunals can ensure the enforceability of their awards, in the context of parallel insolvency proceedings conducted in jurisdictions different from the seat of arbitration.

Permesly began with a reminder that the overarching principle of arbitration is to issue an enforceable arbitration award, so arbitrators must consider how the award may be stymied by insolvency proceedings. She noted that there are generally two schools of thought, both of which tend to be extremes—one is too deferential to bankruptcy courts and the other does not pay sufficient heed to the insolvency proceedings.

Drawing on her experience with the IBA Toolkit, Permesly noted that one similarity among all the jurisdictions the IBA Insolvency and Arbitration Group surveyed was that an arbitration award is not automatically enforceable if insolvency proceedings are ongoing—the award will at least need to be brought before a court, whereby the winning party will receive the same consideration as any other creditor

in the insolvency proceedings. In other words, an arbitration award does not allow a creditor to circumvent insolvency proceedings via the New York Convention's enforcement mechanisms to receive payment before all other creditors.

A creditor may be able to enforce the arbitration award in other jurisdictions beyond the jurisdiction where the insolvency proceedings are taking place. However, the court assessing the enforcement action will have to carefully consider conflict of laws and public policy issues which arise where insolvency proceedings are ongoing elsewhere.

Permesly then helpfully walked through the IBA Toolkit's checklist for practitioners, which contained a comprehensive list of questions to guide practitioners in ensuring that the arbitration award at hand is enforceable. This checklist can be found in the Annex of the Toolkit.

Related to the enforceability of arbitration awards is the question of whether third-party funders can secure payment from arbitration awards where insolvency is involved. On this point, Teitelbaum advised that the clearest solution is for the funder to already have priority in the debt structure. Otherwise, the priority and timing of pay-out from the award proceedings is likely very precarious.

Additionally, Mattar provided insight on how one should handle offsetting in relation to the arbitration award where this might impinge on the priority of creditors in insolvency proceedings. Rezende asked what tribunals ought to do in a situation whereby a claimant's claims and a respondent's counterclaims are both at least partially granted and there would ordinarily be an offset, except one party is subject to insolvency proceedings. Should the tribunal allow an offset? If so, what does this mean for the priority of creditors in the bankruptcy proceedings?

Mattar's answer as to whether a tribunal should allow the offset is that it depends on how the substantive law gives effect to the co-existence of a debt and a credit between two parties. In Brazil, the off-setting is automatic—if the tribunal determines before judicial reorganization or liquidation that there is indeed credit for the claimant against the respondent and vice versa, this will be off-set at that point. However, if the insolvent debtor has credit against the counterparty where there was

no debt before the arbitration claim was filed, but the debt was declared in the course of the arbitration proceedings, then the claim is considered pre-petition and the debt is post-petition. In that case, there should not be an offset. Mattar noted that the question of whether the arbitration claim was brought pre-petition or post-petition is one for the bankruptcy court to determine, not the tribunal.

III. CONCLUSION

In the course of the discussion, the panelists explored the various points of tension and overlap between arbitration and bankruptcy, focusing on Brazil's and US' perspectives. They covered issues across the lifecycle of arbitration proceedings– beginning with the right of arbitration, the panel then moved to the viability of arbitration proceedings and ended on the enforceability of arbitration awards. Complete with an overview of recent developments in the arbitration and bankruptcy space, this webinar provided a comprehensive introduction to a complex and interesting area of practice.

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A REPORT ON #YOUNGITATALKS
"THE PSYCHOLOGY OF WITNESS EVIDENCE AND ITS ROLE IN TRIBUNAL DECISION-MAKING"

by Alexander Westin-Hardy

I. INTRODUCTION

On October 27, 2021, Young ITA organized an event on the topic of "The Psychology of Witness Evidence and its Role in Tribunal Decision-Making", hosted by Allen & Overy in London. Katrina Limond (Young ITA UK Chair, Allen & Overy London) and Robert Bradshaw (Young ITA UK Vice-Chair, Lalive London) led a roundtable discussion paneled by Professor Kimberley Wade (Professor of Psychology at the University of Warwick), Christopher Newmark (Arbitrator, Mediator and former Chairman of the ICC Commission on Arbitration and ADR), Professor Aldert Vrij (Professor of Applied Social Psychology at the University of Portsmouth) and Professor Maxi Scherer (Queen Mary University of London; WilmerHale).

Katrina Limond began by giving a brief introduction and summary of recent developments highlighting the importance of psychology in dispute resolution, particularly for witness evidence. These developments include publication of the ICC Commission Report on The Accuracy of Fact Witness Memory in International Arbitration (the "ICC Report")[1] and the introduction of a new Practice Direction governing trial witness statements in the Business and Property Courts of England and Wales.[2]

II. THE RELIABILITY OF FACT WITNESS MEMORY

Robert Bradshaw opened the discussion; the first topic being the reliability of fact witness memory. Professor Wade explained that eliciting detailed and accurate reports from witnesses can be difficult. Multiple studies have demonstrated the fallibility of witness memory, and Professor Wade pointed to two key explanations for

[1] INTERNATIONAL CHAMBER OF COMMERCE, THE ACCURACY OF FACT WITNESS MEMORY IN INTERNATIONAL ARBITRATION (2020).

[2] Civil Procedure Rules, Practice Direction 57AC.

why honest witnesses may nevertheless misremember events. First, a witness's memory can be influenced by information (and misinformation) they encounter after the event, including practices commonly employed by arbitration counsel in preparing witness evidence. For instance, evidence such as emails, meeting minutes or photographs may unconsciously override a witness's recollection of events. Similarly, discussing events with other witnesses can "contaminate" witnesses' memories. To reduce the risk of such contamination, Professor Wade highlighted recommendations in the ICC Report including interviewing witnesses separately and eliciting reports before witnesses can confer. Second, a witness's personal perspective matters and witnesses' beliefs and motivations may unconsciously bias the way they report information. This is particularly relevant in international arbitration, where witnesses will often take a particular perspective, either as claimant or respondent, especially when testifying on behalf of their employer. Subtle differences in the phrasing of questions can also affect a witness's answers, and even influence their recollection of events.

Mr. Newmark and Professor Scherer provided practitioners' views on witness memory. Professor Scherer noted that as an arbitrator, her experience has been that witness memory is not set in stone but is contextual. She highlighted the importance for arbitrators of asking open questions, and recommended all practitioners review the ICC Report and the recommendations for witness preparation in an article by Professor Wade and Dr Cartwright-Finch.[3] Mr. Newmark provided an example of wording he has used in a procedural order with an option to describe how witness evidence has been prepared—it remains to be seen how this will affect the content of witness evidence and cross-examination.

III. WITNESS CREDIBILITY AND DETECTING DECEIT

The second topic was witness credibility, including how to detect verbal and non-verbal cues of deception. Both Mr. Newmark and Professor Scherer agreed that identifying dishonest witnesses is extremely difficult in practice and emphasized that

[3] Kimberley Wade & Ula Cartwright-Finch, *The Science of Witness Memory: Implications for Practice and Procedure in International Arbitration*, 39(1) J. INT'L ARB. 1 (Feb. 2022).

they place greater importance on the substance of witness evidence than its delivery. It is all too easy to misinterpret common physical manifestations such as sweating, twitching, foot-tapping, or gaze aversion as signs of dishonesty, when they may simply be the result of nervousness, individual habits, or cultural differences. Professor Scherer emphasized that judging whether witness evidence is credible involves a contextual assessment, and that the only reliable indicator of dishonesty is the presentation of directly contradicting documentary evidence. Professor Vrij, a leading expert on the psychology of deceit, agreed that reliance on non-verbal cues and body language is a poor method for identifying whether someone is lying; there is no universal "tell" in liars' behavior. He highlighted a number of errors in the conventional wisdom. For example, while fidgeting is often seen as a sign of dishonesty, liars in fact typically make fewer movements due to the greater cognitive load of fabricating a story. Focusing on the speaker's appearance may actually hinder credibility assessments. A more reliable indicator of honesty is the amount of information provided by a witness; truth-tellers give more detailed answers than liars. In practice, Professor Vrij concluded, interviewers should focus on listening to witnesses rather than watching them and, if aiming to facilitate verbal lie detection, should ask open rather than closed questions.

IV. THE PERSPECTIVE OF AN ARBITRATOR

Third, Mr. Newmark gave an arbitrator's perspective on assessing witnesses and the impact of witness evidence on tribunal decision-making. He explained that while witnesses can provide helpful context, few cases turn solely on witness evidence. He noted that the most effective way for counsel to deploy witness evidence is to focus on the issues of fact that cannot be proved by documents, a strategy that gives the tribunal the essential information they need to make an award but that limits the scope for cross-examination. Mr. Newmark also suggested that counsel consider using descriptive narratives or chronologies in written briefs or opening submissions in place of witness evidence. He reiterated that witness statements need not be unduly lengthy, that first drafts of statements should not be produced until after the witness has been interviewed, that witnesses should not argue the case, and that

witnesses should be able to acknowledge any gaps in their memory.

V. THE EFFECT OF REMOTE TESTIMONY

Finally, Professor Scherer discussed remote hearings and the effect of remote testimony on assessing witnesses. Professor Scherer discussed the results of a recent survey into remote hearings which showed that, while experts and counsel rated them as worse for giving evidence and conducting cross-examinations, tribunal members found them better for developing an understanding of the case and for assessing witness and expert evidence.[4] Professor Scherer suggested that hybrid hearings may offer advantages, including more effective assessment of witness evidence up-close on-screen, easier recall of recordings of the hearing and improved communication amongst legal teams and tribunal members.

VI. PRACTICAL TIPS FOR PRACTITIONERS

The panel answered questions from the audience, including considerations for witnesses testifying in a second language (and the potential pitfalls of using an interpreter unless necessary), the impact of time on a witness's memory, and how obvious it can be to tribunal members when witness statements are drafted by lawyers. Katrina Limond rounded off the discussion by providing some practical tips for practitioners, including considering the practical points in the ICC Report and listening (and reviewing transcripts) closely to pick out discrepancies in evidence that may indicate deceit.

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[4] Gary Born, Anneliese Day & Hafez Virjee, *Remote Hearings (2020 Survey): A Spectrum of Preferences*, 38(3) J. INT'L ARB. 292 (2021).

A REPORT ON #YOUNGITATALKS "MÉXICO Y EL ARBITRAJE DE INVERSÍON"

by Juan Pablo Gómez-Moreno

I. INTRODUCTION

On December 9, 2021, Young ITA hosted the live webinar #YoungITATalks Mexico, a live debate on the Mexican experience with investment arbitration. The event was moderated by Rodrigo Barradas (Von Wobeser y Sierra, Mexico City), who discussed with panelists Alan Bonfiglio (Mexican Economy Secretariat, Mexico City), Laura Zielinski (Holland & Knight, Mexico City), and Juan Pablo Hugues (Foley Hoag LLP, Washington, D.C.).

The event was part of the #YoungITATalks Online series, several virtual events taking place across the world, with webinars, workshops, and interviews covering a wide array of arbitration-related topics. This time, panelists had a chance to discuss relevant cases and precedents that became milestones of international arbitration, as well as to consider current trends in the field and make a balance of the situation today.

II. CURRENT STATUS OF MEXICO'S INVESTMENT AGREEMENTS

Alan Bonfiglio explained that Mexico is one of the countries with the most free-trade agreements (FTAs) and investment agreements (BITs) in Latin America and the world. Currently, Mexico is a party to 30 BITs. Besides, it is noteworthy that Mexico's consent to existing investment arbitrations cases has not emerged from a domestic law or an arbitral clause in a contract but from treaties. The North American Free Trade Agreement (NAFTA) played a major role in this regard, influencing subsequent agreements signed by Mexico, mostly BITs. This tradition started in the 90s when Mexico decided to join a global trend of free-market economies and become part of the multilateral trading system. Since the early years of NAFTA, Mexico expected future investment disputes under the rules of the International Centre for Settlement of Investment Disputes (ICSID) and the United Nations Commission on International Trade Law (UNCITRAL).

III. MEXICO'S TRADITION OF INTERNATIONAL DISPUTES

Juan Pablo Hugues discussed the history of Mexico as a party to international treaties and its experience with investment arbitration. *Firstly*, he pointed out that Mexico has historically favored the settlement of disputes before international tribunals, subject to the rules of public international law and regardless of whether the other party is a state or a private entity. This is explained by the fact that, since its first days of independence, Mexico was already a party to the mixed claims commissions that operated from 1825 until the second part of the 19th century to settle disputes with nationals of other states. Additionally, Mexico was the only Latin American country that participated in the 1899 and 1907 Hague Conventions that led to the creation of the Permanent Court of Arbitration (PCA).

Secondly, while Mexico has a long-standing tradition of international disputes, its experience with cases of public international law has been rather negative. Accordingly, Mexico has faced adverse awards with high amounts in damages, as well as results that led to a significant loss of its sovereignty and territory. These experiences have left an effect that translates to Mexico's current relationship with international arbitration.

Notably, the *Clipperton* case[1] illustrates the Mexican experience with disputes under public international law. In this 1933 arbitration, Mexico lost to France an island located in the Pacific Ocean because it abandoned the territory after the 1910 Mexican Revolution. These two forces, Mexico's tradition of international dispute settlement and the negative results arising from such proceedings, leave a big question on why Mexico is still a party to such treaties. The reason, rather than a political one, could respond to economic interests aligned with the idea that Mexico has opted for using FTAs and BITs to attract foreign investments.

IV. CASES FILED AGAINST MEXICO

Laura Zielinski underscored that Mexico has been subject to 37 investment cases, which is a high number. Unlike claims brought against other countries, such as

[1] Republic of France v. United Mexican States, Award, 2 R.I.A.A. 1105 (January 28, 1931), https://legal.un.org/riaa/cases/vol_II/1105-1111.pdf.

Venezuela, Argentina, and Spain, these cases have not been a reaction to a specific situation or industry. This means that Mexico has faced investment cases frequently over the years, most of them before ICSID. Juan Pablo Hughes commented that, comparing Mexico's experience with that of other Latin American countries, it is hard to determine whether such experience has been positive or negative overall. However, observing the data of other countries with similar conditions, such as Argentina, Colombia, and Indonesia, the Mexican experience seems to be one of the best because the State has faced a reasonable amount of investment disputes considering its large number of BITs, as well as its developed economy and large population.

V. FIRST ARBITRATIONS AGAINST MEXICO

Alan Bonfiglio also went back in time to the mixed claims commissions established in the 19th century. Particularly, the one with the US under the Bucareli Treaty of 1923 was of special importance as, by signing these instruments, Mexico expected to gain some legitimacy after its independence. The milestone under this commission was the *Neer* case,[2] arising from the killing of US citizen Paul Neer by a group of bandits on Mexican soil, which is of fundamental importance today because it discussed the high standard of proof for claims under the minimum standard of treatment (MST) and fair and equitable treatment (FET) standards.

Today, these issues have extended to modern NAFTA claims and other investment disputes. Mr. Bonfiglio then identified certain sagas of investment disputes. The first saga was on the management of wastes and included the cases of *Metalclad*[3] and *Waste Management*.[4] The second dealt with measures to impose taxes on fructose syrup. Then, a third saga is one of the diversified cases, including several industries such as energy, telecommunications, real estate, and gambling.

[2] L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 4 R.I.A.A. 60, 60-66 (October 15, 1926), https://legal.un.org/riaa/cases/vol_IV/60-66.pdf.

[3] Metalclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, https://www.italaw.com/cases/671.

[4] Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/98/2, https://www.italaw.com/cases/1155.

VI. HIGH-PROFILE MEXICAN CASES

Laura Zielinski pointed out that, while the case of *Neer* is not commonly associated with Mexico, it is indeed an important precedent for public international law. In contrast, the most notorious Mexican disputes are *Metalclad* and *Tecmed*,[5] mostly because they elaborate the FET standard and propose a very broad interpretation of the concept of 'legitimate expectations' of the investor. Additionally, there are recent cases such as *Lion v. Mexico*[6] decided in 2021, in which the tribunal found that failures of the Mexican judiciary were so significant that, even if there was no corruption or bad faith, they met the challenging burden of proof of a denial of justice.

Juan Pablo Hugues focused on the saga of NAFTA cases concerning corn syrup at the beginning of the 21st century, particularly on the 'countermeasures' defense argued by Mexico in three of these proceedings, which was innovative. These disputes, in particular, *Cargill*[7] and Corn Products,[8] are key because the tribunals (i) clarified the standard of countermeasures under public international law; (ii) determined whether they could have jurisdiction over measures adopted by a state that was not a party to the dispute; and (iii) concluded that investors, not just states, had rights under these treaties according to public international law.

Alan Bonfiglio highlighted that the syrup cases were also very political and notorious, to the point they were preceded by an antidumping investigation within the World Trade Organization (WTO). Further, he focused on the case of *Robert Azinian et. al.*[9] This was a key dispute that tends to be overlooked when compared with its twin and more prominent dispute, the *Metalclad* case. Notably, this was the

[5] Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, https://www.italaw.com/cases/1087

[6] Lion Mexico Consolidated L.P. v. United Mexican States, ICSID Case No. ARB(AF)/15/2, https://www.italaw.com/cases/3828.

[7] Cargill, Incorporated v. United Mexican States, ICSID Case No. ARB(AF)/05/2, https://www.italaw.com/cases/223.

[8] Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/1, https://www.italaw.com/cases/345.

[9] Robert Azinian, Kenneth Davitian, & Ellen Baca v. United Mexican States, ICSID Case No. ARB (AF)/97/2, https://www.italaw.com/cases/114.

first NAFTA case, which dealt with the cancellation of a concession for the collection of garbage and referred to important issues such as the difference between treaty and contract claims, as well as the standard of denial of justice.

VII. BIG PICTURE OF THE MEXICAN EXPERIENCE

Laura Zielinski said that Mexico is represented by a professional team with a lot of experience. Notably, it has an in-house team to manage its cases and does not rely much on external counsels. The State is not antagonistic to investment arbitration. Contrary to other countries like Argentina, the State has complied with all the awards against it, which is something that inspires trust in foreign investors and gives an overview of the Mexican experience as a good one.

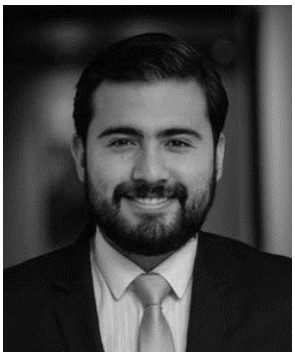
VIII. CURRENT TRENDS AND CHANGES

Alan Bonfiglio noted the current debates for a reform of the investment protection regime. Referring specifically to the discussions in ICSID and Group III of UNCITRAL, he pointed out that these trends reflect the concerns of several states, including Mexico. Mostly, those related to the 'megaclaims' for millions of dollars but additional concerns include parallel proceedings, actions brought by minority shareholders, as well as claims of the state.

Laura Zielinski said that she has not identified an opposition of Mexico to investment disputes, as did the EU recently. However, it is necessary to put clear limits on the guarantees offered to foreign investors. While there is no Model Mexican BIT as in other countries, probably the treaties that best reflect the position of the state are the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the BIT with Hong Kong.

IX. MEXICANS AS FOREIGN INVESTORS

Juan Pablo Hugues mentioned that Mexico's attitude towards BITs not only attracted investment claims but also gave Mexicans an opportunity to bring claims themselves against other states. For instance, the first NAFTA Chapter 11 dispute was a claim by a Mexican pharmaceutical investor in 1996 against the US.



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- Recognition as an *Academic/Government/Non-Profit Member* in publications

Arbitral Institution Membership – Invitation Only

(*open by invitation only to select Arbitral Institutions with significant international caseloads*)

- One Advisory Board representative with all **Advisory Board Member benefits** described below
- An opportunity to co-sponsor the annual Americas Workshop in Latin America
- Recognition as an *Arbitral Institution Member* in publications

Young ITA Membership - $0

(open to individuals under 40)

- Free membership in ITA as a *Young ITA Member* (does not include membership on the Advisory Board)
- Free attendance at Young ITA programs and meetings and the annual ITA Forum in Dallas
- Young ITA member discount at the annual ITA Workshop and all other ITA programs, publications and online educational products
- Opportunity to serve in the Young ITA leadership
- Opportunity to participate in Young ITA online fora
- Free subscription to the ITA e-journal *ITA in Review* and e-newsletter *News & Notes*
- Recognition as a *Young ITA Member* in publications

Advisory Board Member Benefits

- Free attendance at the ITA Annual Meeting and Workshop OR the Annual Americas Workshop
- Free attendance at the members-only ITA Forum
- Member discount at all other ITA programs
- Free subscription to all ITA video and audio online educational products
- Free subscription to ITA's e-journal *ITA in Review* and quarterly newsletter *News and Notes*, with its *Scoreboard of Adherence to Transnational Arbitration Treaties*
- Opportunity to participate in the committees, leadership and other activities of the Advisory Board
- Recognition as an Advisory Board member in publications
- If qualified, the right to appear on the IEL Energy Arbitrators List

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