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A DATA ANALYSIS OF THE IRAN-US CLAIMS TRIBUNAL'S JURISPRUDENCE: LESSONS FOR INTERNATIONAL DISPUTE-SETTLEMENT TODAY

by Damien Charlotin

I. INTRODUCTION

On January 19, 1981, representatives of the United States (US) and Iran assembled in Algiers at the invitation and good offices of the Algerian government to sign what became known as the Algiers Accords.[1] Most of the Accords' provisions dealt with diplomatic relations and the main focus then provided that the US would unfreeze Iranian assets held in the US in exchange for the release of 52 American hostages in Iran.

One set of provisions would however go on to acquire greater importance.[2] Given the number of ongoing proceedings before US and Iranian courts, the Algiers Accords provided for an Iran-United States Claims Tribunal that would hear the "claims of nationals of the US against Iran and claims of nationals of Iran against the United States,"[3] as well as certain disputes between the two governments.[4]

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[1] The Algiers Accords was a set of agreements that included the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, 75 AM. J. INT'L L. 422 (1981) [hereinafter Claims Settlement Declaration]. Iran previously signed a similar agreement with Iran. *See* Bernard Gwertzman, *U.S. and Iran sign accord on hostages: 52 Americans could be set free today*, NEW YORK TIMES (Jan. 19, 1981).

[2] *See generally* CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL (1998). For a good summary of the events leading to the Algiers Accord and the beginning of the Tribunal, see generally Gunnar Lagergren, *The Formative Years of the Iran-United States Claims Tribunal*, 66 NORDIC J. INT'L L. 23 (1997).

[3] Claims Settlement Declaration, *supra* note 1, art. II(1).

[4] These were named "B disputes." A third set of disputes, "A disputes," concerned the interpretation of the Algiers Accords.

Thirty-seven years running, the Tribunal's output of more than 800 reasoned decisions, the bulk of which were rendered at a time when arbitral awards were relatively unavailable, is a remarkable resource for arbitration scholars and practitioners.[5] This corpus has contributed to arbitration practice[6] and in particular to the development of the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).[7] The Tribunal's jurisprudence has been cited by international courts and tribunals on substantive and procedural issues,[8] and scholars analyze its jurisprudence as a source of international judicial practice.[9]

This role and importance has fallen from view as the number of scholarly works on the Tribunal has dropped in recent years.[10] Furthermore, the Tribunal has entered a "long twilight" phase where few, gargantuan and seemingly intractable disputes remain pending. Still, the Tribunal's history and practice remain relevant and warrant our interest as a remarkable and under-investigated dataset. Retracing that history and practice with data analysis methods, this paper revisits past questions on the Tribunal and its work to inform today's international arbitration practice and scholarship.

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[5] Richard Lillich, in one of the earliest yet major works on the subject, called this jurisprudence "a goldmine of information for perceptive lawyers." RICHARD LILLICH, *Preface*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 i, vii (Richard B. Lillich ed., 1984). But doubts about the relevance of the tribunal's jurisprudence have arisen. *See* BROWER & BRUESCHKE, *supra* note 2, at 650; *infra* part V.

[6] *See* BROWER & BRUESCHKE, *supra* note 2, at 653 ("The mushrooming literature on the Tribunal's decisions is further testimony that the Tribunal's awards are sufficiently substantive for many commentators on international law.").

[7] *See*, generally, STEWART A. BAKER & MARK D. DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1 (1992); *see also* Karl-Heinz Böckstiegel, *Applying the UNCITRAL Rules: The Experience of the Iran-United States Claims Tribunal*, 4 BERKELEY J. INT'L L. 266, 266-67 (1986). An earlier version of the UNCITRAL arbitration rules applied to the Tribunal proceedings.

[8] *See*, *e.g.*, UP & C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award, ¶ 315 (Oct. 9, 2018) (citing Too v. Greater Modesto Ins. Assocs. & United States, Award No. 460-880-2 (Dec. 29, 1989), 23 Iran-U.S. Cl. Trib. Rep. 378 (1991)).

[9] *See*, *e.g.*, Timothy G. Nelson, *The Defector, the Missing Map and the "Hidden Majority" – Coping with Fragmented Tribunals in International Disputes*, TRANSNAT'L DISP. MGMT. (2018).

[10] *But see* KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 183 (2014).

Part II below introduces the dataset and reviews in particular the overall outcome of the disputes before the Tribunal. Part III studies the Tribunal's most important personnel: the judges, their terms on the bench, their coalitions, and the decisions they supported or opposed. This part also probes the Tribunal's decision to share its work between chambers and the many advocates who appeared before the Tribunal. These two parts indicate that the Tribunal has been mostly successful at dealing with hundreds of cases without breaking down or be abandoned by one of the parties.

Part IV looks further into the Tribunal's decisions and outcomes by studying the judges' concurring and dissenting opinions and it discusses their role in shaping the Tribunal's jurisprudence. Part V covers the topics treated in Tribunal awards and in the separate opinions. Part VI draws on the preceding material to explore whether the Tribunal's experience should be discounted for its alleged political outlook—a common reproach that will likely accompany discussions of the Tribunal's legacy and a reflection that is relevant to any dispute resolution system with party-appointed judges.

II. THE CLAIMS

A. *The Dataset*

Under the Algiers Accords, all claims needed to be lodged with the Tribunal before January 19, 1982 or be deemed time-barred.[11] The claims that were registered were then sorted between small claims valued at less than US$250,000 where the US and Iranian governments would represent their respective nationals; claims exceeding US$250,000 where the individual claimants could stand on their own; and State-to-State claims.

More than 3,800 claims were filed before that cut-off date.[12] Most claims did not

[11] Disputes between the US and Iran as to the interpretation of the Accords, however, could, and have been, filed at any time.

[12] David D. Caron & John R. Crook, *The Tribunal at Work*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 133, 136 (David D. Caron & John R. Crook eds., 2000) [hereinafter Caron & Crook, *The Tribunal at Work*] (stating that there were 3,948 claims total); Maciej Zenkiewicz, *Judge Skubiszewski at the Iran-United States Claims Tribunal*, 18 INT'L CMTY. L. REV. 151, 154 (2016) (stating that 3,860 claims were filed, but

result in an award, however, as many were settled. One of the Tribunal's great successes was to encourage the parties to settle their disputes[13] and to provide a "relatively apolitical setting substantially walled off from other areas of bilateral conflict" between the two governments.[14] This development is readily observable from Figure 1 below, which records the full dataset of published decisions broken down by type of document. A sizeable 33% of the Tribunal's output consisted of awards on agreed terms, which sanctioned the settlement of the parties.[15]

Of the cases that were not settled or abandoned, the judges have dealt (so far) with several hundreds of them, with just a few claims, all of them between the US and Iran directly, still pending as of late 2018. This impressive output goes a long way to explaining the importance of the Tribunal's practice for international dispute settlement. Although some judges and parties originally expected the Tribunal to last for no more than three years,[16] the importance of the Tribunal's work came to exceed its contemporary equivalents,[17] especially at a time when arbitration, albeit on a rise,

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they acknowledge the discrepancies between different authors on the exact figure); Lagergren, *supra* note **Error! Unknown switch argument.**, at 27 (stating that 3,836 claims were filed: "2,782 claims of less than U.S. US$250,000, so-called 'small claims', 964 larger claims and 70 state-to-state claims"). The Tribunal's website remains vague about the exact number, only mentioning that "[a]pproximately 1,000 claims were filed for amounts of US$250,000 or more, and approximately 2,800 claims for amounts of less than US$250,000." *About the Tribunal*, IRAN-UNITED STATES CL. TRIB., https://www.iusct.net/Pages/Public/A-About.aspx.

[13] Awards on agreed terms did not enter the analyses below—although some of these awards have elicited interesting separate and dissenting opinions.

[14] Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 140; *but cf. id.*, at 145 (criticizing the Tribunal's willingness to push for settlements). The Iranian and U.S. governments notably agreed to a lump-sum payment that settled most small claims and some B claims between them. United States v. Iran, Award No. 483-CLTDs/86/B38/B76/B77-FT (June 22, 1990), 25 Iran-U.S. Cl. Trib. Rep. 328, 330.

[15] According to Brower and Brueschke, nearly half of the awards issued by the Tribunal were on agreed terms. BROWER & BRUESCHKE, *supra* note 2, at 14.

[16] *See* George H. Aldrich, *The Selection of Arbitrators*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 65, 68 (David Caron & John R. Crook eds., 2000).

[17] Over the same course of 12 years when the Tribunal rendered 90% of its awards (i.e., 1981 to 1993), the International Court of Justice (ICJ) issued a dozen judgments and orders on

had not reached the prevalence it has today.

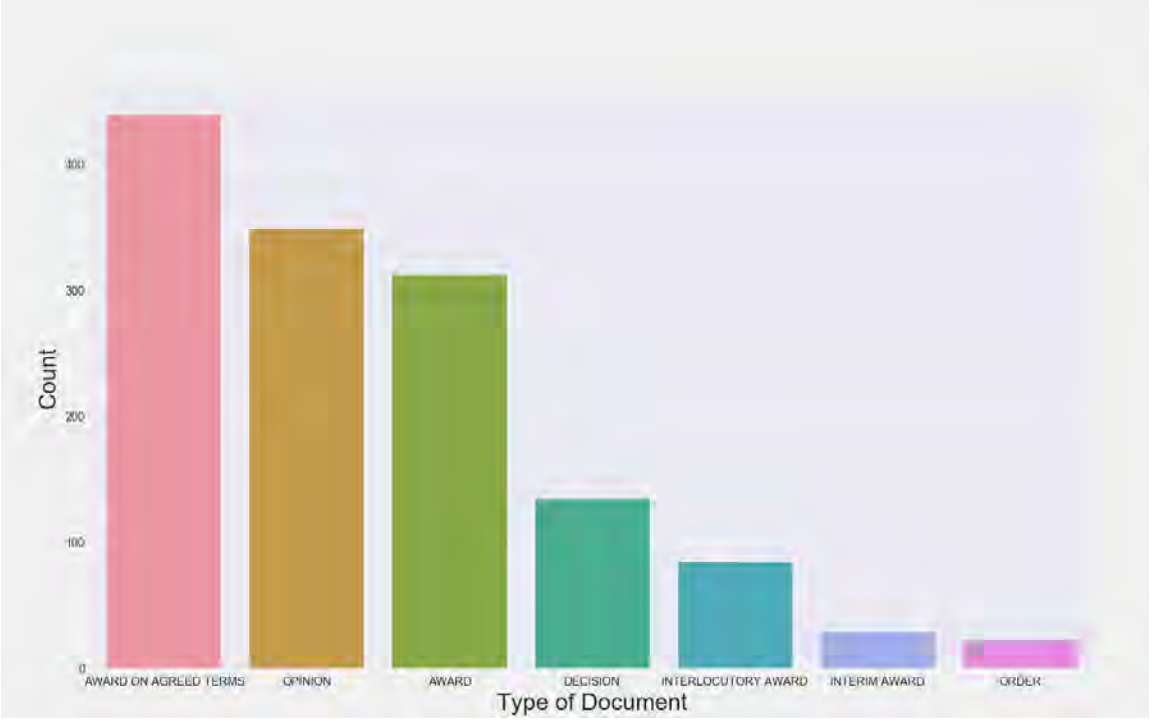

Figure 1: Full dataset

Most of this output came in the Tribunal's first decade. After slow beginnings, the Tribunal reached an impressive pace until 1991-1992[18] when it started its long twilight. Since then the Tribunal has been facing cases directly between the US and Iran, often based on sensitive contracts (e.g., weapons) and more politically fraught disputes. Figure 2 retraces the distribution of awards and decisions published over time, distinguishing between awards on agreed terms and other decisions.

provisional measures, and the International Centre for Settlement of Investment Disputes (ICSID) oversaw less than 10 arbitrations. *See* Michael Waibel & Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (2017), http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf. *Cf.* Brice M. Clagett, *The perspective of the claimant community*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 59, 62 (David Caron & John R. Crook eds., 2000) ("All in all, disposition of virtually all of the large private claims . . . within twelve years is not a disgraceful record.").

[18] Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 133 (describing the period between mid-1982 to 1991 as "the Tribunal's most productive period").

Figure 2: Distribution of awards and decisions

Remarkably, Figure 2 marked a slump in 1984, which represents the aftermath of the "Mangard incident" where two judges appointed by Iran assaulted third-party judge Nils Mangard on the steps of the Tribunal on September 3, 1984. This incident "pretty well shut [the Tribunal] down for several months until the two Iranian judges on the Tribunal who were involved in the incident were removed from the scene and replaced by gentler sorts."[19]

B. *Outcomes*

Another interesting feature of the Tribunal's organization was that Iran's liabilities as decided by the Tribunal or under settlement agreements were supposed to be paid out of a US$1 billion fund initially seeded with Iranian assets in the US That fund, however, had to be replenished as soon as its assets fell under US$500 million, and Iran's failure to do so starting in the 1990s led to several disputes aimed at interpreting Iran's obligations in this respect.[20]

[19] *See* BROWER & BRUESCHKE, *supra* note 2, at 657.

[20] Sean D. Murphy, *Securing Payment of the Award*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL

The sums awarded ran from US$100[21] to US$68.2 million[22] without interest, which was often set at 10% or 12%. The amounts awarded to US claimants in contentious proceedings, however, are dwarfed by those resulting from settlement: US$495 million out of a total of US$2.14 billion as of 1998.[23]

Based on these numbers, it might seem that the US and its nationals were the winners before the Tribunal—and indeed, many commentators have concluded as much. For instance, Judge Brower explained the willingness of Iran to challenge judges given the State's numerous losses: [T]he Iranians have become very discouraged when they keep losing, losing, and losing, that's all about, but they don't take well to it, which is the reason for all of these challenges [to other judges.][24]

In the same vein, a former assistant to Judge Holtzmann opined that "[i]t is not a secret that in the eighteen-year history of the Tribunal, no Iranian arbitrator has ever voted to deny the claims of an Iranian claimant (or, conversely, to award damages to a US national or the United States.)"[25] This perception likely fed the Iranian judges' frequent accusations of bias towards the American judges and, in their words, the

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AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 299, 301-02 (David Caron & John R. Crook eds., 2000).

[21] Baygell v. Iran, Award No. 231-10212-2 (May 2, 1986), 11 Iran-U.S. Cl. Trib. Rep. 72, 75 (reimbursing the claimant an outstanding debt for an unused plane ticket).

[22] Sedco Inc. v. Nat'l Iranian Oil Co., Award No. 309-129-3 (July 2, 1987), 15 Iran-U.S. Cl. Trib. Rep. 23, 185.

[23] Koorosh H. Ameli, *The Iran-United States Claims Tribunal*, *in* THE PERMANENT COURT OF ARBITRATION: INTERNATIONAL ARBITRATION AND DISPUTE RESOLUTION: SUMMARIES OF AWARDS, SETTLEMENT AGREEMENTS AND REPORTS (P. Hamilton et al. eds., 1999), 246 (1999) [hereinafter Ameli, *The Iran-United States Claims Tribunal*]. No particular arrangement was made for paying successful Iranian claimants and counterclaimants, who occasionally had to enforce their awards in the U.S.

[24] Remarks of Charles N. Brower, *Plenary Keynote: Decision making in International Courts and Tribunals: A Conversation with Leading Judges and Arbitrators*, 105 PROCEEDINGS ANN. MEETING-AM. SOCIETY INT'L L. 215, 221 (2011) (alterations added).

[25] Jeffrey L. Bleich, *Reflections on the Tribunal's Waning Years*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 345, 347 (David Caron & John R. Crook eds., 2000) (alteration added). Part **V** below probes that claim and reviews its significance.

"so-called 'neutral' arbitrators."[26] Accusations of bias recur in numerous dissents authored by Iranian judges,[27] with no equivalent in the opinions written by American judges.

Yet when a few points are clarified, the picture that arises from the Tribunal's output is more balanced. First, the large majority of cases were brought by US claimants or the US government, on its own or on behalf of claimants for minor claims, against an Iranian party. Out of the 670 cases or groups of cases in the dataset, 579 had a US claimant whereas only 89 had an Iranian claimant against the US government.[28] Even if every case had an equal chance of success with a similar expectation of gains, US claimants would have gained more. An analysis of the Tribunal's overall result should take into account this asymmetry of claims.

Second, Iran was far from losing dramatically at all turns, and it was even awarded around US$1 billion in claims and counter-claims from the Tribunal.[29]

Under the 581 documents with a Tribunal decision (awards and decisions), there are 365 victories (including partial victories) for US claimants against 210 victories for Iran, on the assumption that every defeat on jurisdiction or the merits for a US

[26] *See* Iran v. United States, Decision No. DEC 32-A18-FT (Apr. 6, 1984), 5 Iran-U.S. Cl. Trib. Rep. 251, 277 n. 1 (dissenting opinion by Iranian arbs.).

[27] *See*, *e.g.*, Economy Forms Corp. v. Iran et al., Award No. 55-165-1 (June 13, 1983), 3 Iran-U.S. Cl. Trib. Rep. 42, 54 (dissenting opinion by Kashani) ("The majority carries its breach of impartiality, and its bias in favour of the Claimant, to such an extreme that in its Award it openly proceeds to make statements contrary to fact."); Watkins Johnson Co. et al. v. Iran, Award No. 429-370-1 (Jan. 8, 1990), 22 Iran-U.S. Cl. Trib. Rep. 257, 258 (dissenting opinion by Noori) ("The majority's findings in this Case . . . are so unjust and inequitable, and so contrary to the Contract, the law and principles of logic accepted by all mankind that I cannot concur in the Award, . . . if this arbitral Tribunal had approached the Case equitably, totally without bias and prejudice[.]").

[28] It was always against the U.S. government because the full Tribunal decided (over the dissent of the three Iranian arbitrators) that it had no jurisdiction over the claims of Iran against U.S. nationals. *See* Iran v. United States, Decision No. DEC 1-A2-FT (Jan. 26, 1982), 1 Iran-U.S. Cl. Trib. Rep. 101, 104.

[29] *See* Ameli, *The Iran-United States Claims Tribunal*, *supra* note 24, at 247 (noting that "at least in monetary terms, the outcome of the Tribunal's operation appears to have resulted in some balance between the two sides, despite controversy over a number of Tribunal awards").

claimant was a win for the Islamic Republic.[30] Counting only formal partial or final awards, the picture is even more balanced with 167 victories for US claimants and 145 for Iranian defendants. The numbers are summarized in Table 1 below.

	Winner (all decisions)		Winner (final awards only)	
Claimant Nationality	**Iran**	**US**	**Iran**	**US**
Iran	26	60	9	23
US	184	313	136	145
Total	**210**	**373**	**145**	**168**

Table 1: Win rates

Figure 3 further retraces this distribution of outcomes over time for both groups of claimants. There were more positive outcomes for US claimants at the outset because many of these decisions were interlocutory or partial awards that upheld the Tribunal's jurisdiction—even if the case was eventually dismissed on the merits.[31]

Figure 3: Outcome distribution, six-month rolling average

[30] Every decision on jurisdiction that left at least some claims of U.S. nationals standing was coded a "U.S. winner" because anything but a full-fledged dismissal of the claims was a defeat from Iran's point of view. *See* Nils Mangard, *The Interpersonal Dynamics of Decision-Making (II)*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 253, 257 (David Caron & John R. Crook eds., 2000) ("[Iran], I have been told, counted a case as lost if one single dollar was awarded to the American party.") (alteration added). Not all cases were clear and some decisions were reinterpreted from defeat to victories by arbitrators. *See* Iran v. United States, Decision No. DEC. 62-A21-FT (May 4, 1987), 14 Iran-U.S. Cl. Trib. Rep. 324, 334 (separate opinion by Bahrami-Ahmadi & Mostafavi).

[31] *See*, *e.g.*, Behring Int'l Inc. v. Iran et al., Award No. 523-382-3 (Oct. 29, 1991), 27 Iran-U.S. Cl. Trib. Rep. 219, 246 (dismissing the claims and ordering the claimant to pay Iran's costs despite winning on jurisdiction and interim measures).

We can delve further: not all loses carry the same weight. The more "political" claims between the two governments ("B" cases) or the cases on the interpretation of the Algiers Accords ("A" cases), for instance, were presumably more likely to sting. Yet, I find that the Iranian government lost (on the whole) 49 of the 68 decisions in B and A cases, and only won in 19 other cases.

These considerations suggest that the Tribunal's experience has *not* been entirely negative for Iran.[32] Despite some high-profile cases and important defeats for Iran on the interpretation of the Algiers Accords, and more than US$2 billion in compensation (mostly from settlements), the figure that emerges from the Tribunal's jurisprudence is more balanced than a simple win rate would suggest.

The same discrepancy between perceptions and reality can be found in investment arbitration today. There are stakeholders arguing that the system favors investors, but a sober review of the facts suggests a more balanced picture. To a larger extent even than the IUSCT, investment arbitration is asymmetrical[33] such that a win rate of 50% for each party should not be treated as a proper benchmark. Pointing out that asymmetry makes things worse because states can only "not lose," as many do, is nothing more than a talking point—it has no bearing on the question of whether individual tribunals are set to decide in favor of one particular party.[34]

The Tribunal set an important precedent for establishing that an asymmetrical dispute-settlement system can work well[35] despite occasional tensions between its

[32] Likewise, see T Schultz and E Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study' (2014) 25 *European Journal of International Law* 4: "[…] findings [about winning rates] would say strictly nothing about any perception of bias, which is a different question altogether […]."

[33] *Id.* ("[Respondent states] are the claimant in less than 1 per cent of the claims and accordingly we consider such situations to be statistically irrelevant.") (alteration added).

[34] With respect to investment arbitration, commentators have tried to change the picture of overall balanced outcomes between states and investors by discounting disputes won on jurisdictional objections, see, e.g., Howard Mann, *ISDS: Who Wins More, Investors or States?*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT at [1] (2015), but this is misleading because winning on jurisdiction is still a "win."

[35] The Tribunal had predecessors in the mixed claims commissions that started in the 19th century.

judges.

III. THE TRIBUNAL

A. *Judges*

Nine judges sit on the Tribunal. Three are appointed by the US, three by Iran, and the last three are "third-country judges."[36]

US Judges		**Third-party Judges**		**Iranian Judges**	
Name	*Chamber*	*Name*	*Chamber*	*Name*	*Chamber*
Salans	III	Arangio-Ruiz	III	Enayat	III
Holtzmann	I	Bellet	II	Sani	III
Allison	III	Riphagen	II	Shafeiei	II
Duncan	I	Mangard	III	Kashani	I
Mosk	III	Virally	III	Ahmadi	II
Aldrich	II	Lagergren	I	Mostafavi	I
Brower	III	Briner	II	Khalilian	II
McDonald	I	Ruda	II	Ansari	III
		Böckstiegel	I	Noori	I
		Broms	I	Aghahosseini	III
		Skubiszewski	II	Ameli	I
				Yazdi	II

Table 2: list of judges 1981-2009

There were fewer US judges than Iranian judges over the Tribunal's lifespan, which is explained by their longer average term on the Tribunal.[37] The US judges (more than double the Iranians' average stay) – and thus, perhaps, a more central place when it comes to their influence "on the ground"; since they participated in more proceedings and sat with more co-judges than the others.

A network analysis reveals which judges were central to the Tribunal's work based

[36] *See* Claims Settlement Declaration, *supra* note 1, art. III(1).

[37] With an end date of July 17, 2009 (date of the last decision in the dataset), U.S. judges had an average of 5,619 days on the Tribunal, against 3,700 for third-country judges and 2,763 days for Iranian judges.

on how often they were hearing a case. Figure 4 reproduces this analysis with nodes colored according to their connections with other nodes.

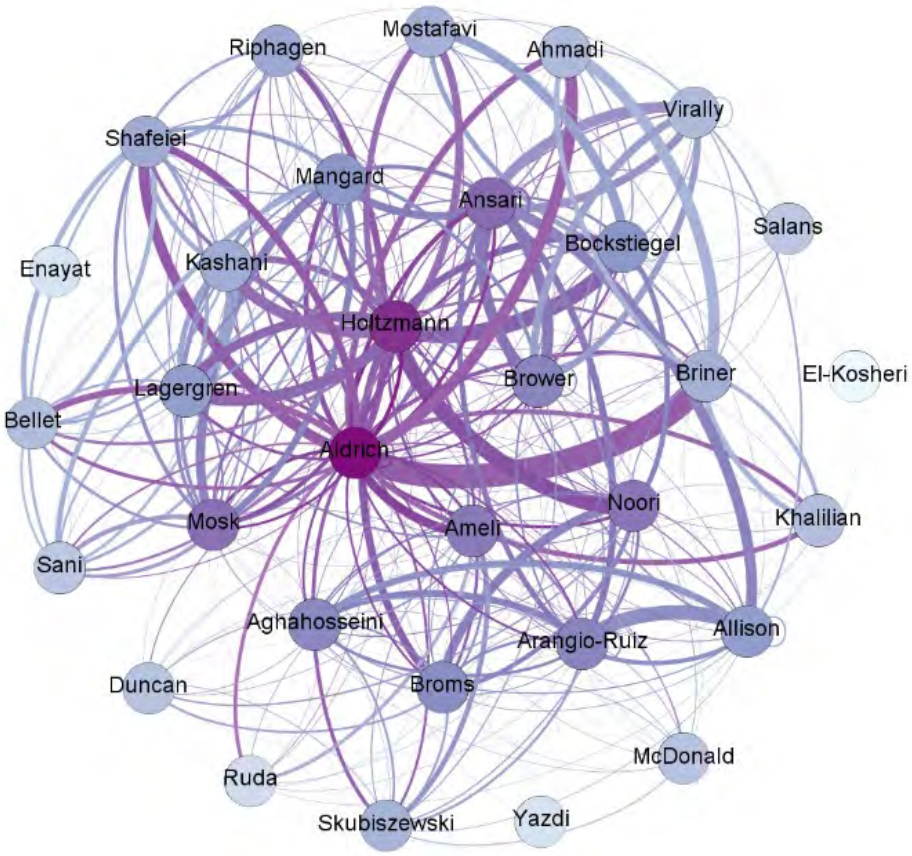

Figure 4: Network analysis of judges[38]

The algorithm behind Figure 4 puts the more important individuals based on connections in the center, placing more marginal ones outward. As expected, the US judges have stronger links with co-judges. At any point, parties were more likely to encounter the same US judge who could draw from broader experience on the Tribunal.[39]

B. *Chambers*

As contemplated in the Algiers Accords, the President of the Tribunal split his

[38] Judge El-Kosheri from Egypt was picked to replace the Iran-appointed judge in Case Nos. 20 & 21.

[39] Until the appointment of Judge Gabrielle McDonald in 2001, there were only male judges on the tribunal. Aldrich recounts that the American delegation in 1981 would not propose female third-party judges over the objections of the Iranian judges. Aldrich, *supra* note 17, at 68.

eight colleagues into three chambers with semi-random case assignments. Each chamber was composed of an Iran-appointed judge, a US-appointed judge, and a third-country judge as chair. Because of complicated arrangements, departures, recusals, etc., however, many party-appointed judges sat on panels different from the one originally designated. Third-country judges, by contrast, could not move because they chaired the panels.

The division into chambers could have occasioned problems in at least two respects. First, it could affect the outcomes of the cases depending on the inclinations of the chair to side with either the US or Iranian judge.[40] In practice, however, the outcomes varied little between chambers, which treated nearly equal number of cases.[41]

Overall Result	**Majority Awards**	**Unanimous Awards**	**All awards**
CHAMBER ONE	91	84	175
Iran	20	44	64
US	71	40	111
CHAMBER THREE	108	68	176
Iran	22	37	59
US	86	31	117
CHAMBER TWO	77	96	173
Iran	13	59	72
US	64	37	101
FULL TRIBUNAL	44	13	57
Iran	7	7	14
US	37	6	43

[40] Clagett, *supra* note 18, at 63 n. 24 ("Iran has chosen its candidates [for third-party judge] skilfully; they proved disastrous for claimants unlucky enough to have cases in their chambers.").

[41] The sums awarded also did not differ dramatically once we account for the fact that different cases have different expectations of gains. In total, Chamber I awarded US$132 million to American claimants and US$20 million to Iranian claimants and counterclaimants; Chamber II awarded respectively US$144 million and US$12 million; and Chamber III respectively US$246 and US$7 million in compensation.

Total	**320**	**261**	**581**

Table 3: Outcomes per Chamber

Looking at the figures of each individual chair, two deviate from the general pattern and saw US claimants win less than 2/3 of the disputes. With Judges Broms and Ruda, Iranian claimants prevailed in 2/3 of the decisions.

	Winning side				
	Iran		**US**		**Total**
Chair	**Count**	**Percentage**	**Count**	**Percentage**	
Bellet	10	37.04%	17	62.96%	27
Bockstiegel	21	23.60%	68	76.40%	89
Briner	37	42.05%	51	57.95%	88
Broms	**29**	**67.44%**	**14**	**32.56%**	**43**
Lagergren	18	23.08%	60	76.92%	78
Mangard	18	28.13%	46	71.88%	64
Riphagen	8	38.10%	13	61.90%	21
Ruda	**14**	**66.67%**	**7**	**33.33%**	**21**
Ruiz	27	42.86%	36	57.14%	63
Skubiszewski	9	30.00%	21	70.00%	30
Virally	14	28.57%	35	71.43%	49
Total	**205**	**35.78%**	**368**	**64.22%**	**573**

Table 4: Outcomes per Chair

These numbers should not be over-interpreted: Judge Ruda, for instance, chaired the fewest number of cases,[42] and he favored Iran overall with 14 unanimous decisions. Meanwhile, 19 of Mr. Brom's decisions in favor of Iran were unanimous. Further, while Judges Broms and Ruda were among those who least found for US claimants, they also did not award great sums to Iranian parties. Mr. Ruda actually never awarded any sum to an Iranian claimant or counterclaimant.

[42] Aldrich surmised that Mr. Ruda left the tribunal prematurely after being subject to the "pervasive Iranian tactics of verbal and psychological abuse." Aldrich, *supra* note 17, at 72.

Moreover, the precedential value of the Tribunal's awards might have been less than what it would have been had the awards been rendered by the full Tribunal, as the Tribunal's jurisprudence could have fragmented between the different chambers.[43]

A network analysis of all citations in the Tribunal's jurisprudence shows that this was not the case. Figure 5 below displays every citation between the Tribunal's awards and decisions, represented as nodes of varying size[44] and color according to the issuing chamber.[45] The algorithm places groups of decisions that mostly cite themselves out towards the edge.

Figure 5 shows that there is no coherent block of decisions by chamber that only cite themselves. Except with the Tribunal's decision on dual national claims (the large orange node on the left), decisions by the full Tribunal were not central to the Tribunal's jurisprudence.

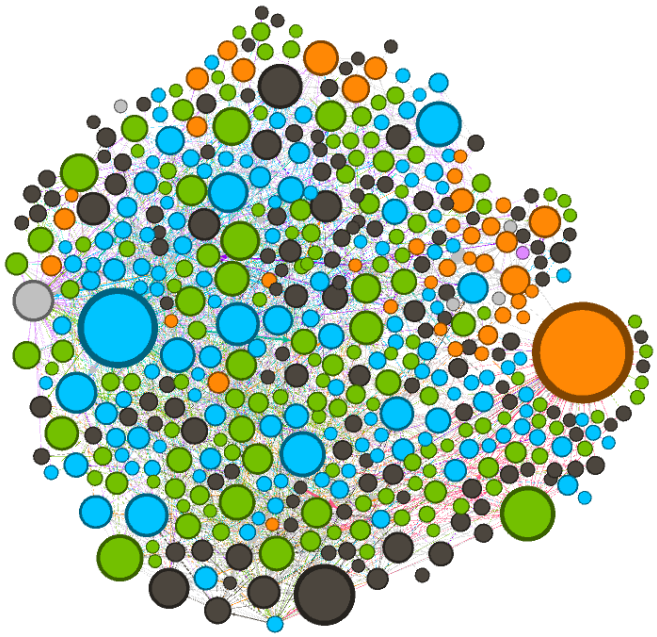

Figure 5: Awards and decisions, network analysis

[43] A similar point was made about the ICJ and its ad hoc chamber procedure. *See* MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT 171 (2008).

[44] Node size depends on the number of incoming citations to a given node.

[45] Chamber I's decisions are blue, II's are green, and III's are black; the full Tribunal's awards and decisions are orange.

C. *Counsel*

Finally, this section turns to those who appeared as counsel before the Tribunal. Counting every appearance, more than 1,300 advocates appeared on behalf of US claimants, against 241 for Iranian respondents. This proved important. The Tribunal was one of the first international bodies before which a large number of private law advocates, often unfamiliar with arbitration, came to plead—and in the process many became international arbitration practitioners.[46] Likewise, another commentator stated that the Tribunal's "long twilight" proved to be "a rare training ground for young attorneys who wish to participate meaningfully in the making of decisional, international law" and that "the Tribunal's twilight has expanded the ranks of international arbitration-trained attorneys who will hopefully contribute to this field in the future."[47]

Many of today's regulars of international arbitration have engaged with the Tribunal on behalf of a party or as a judge or clerk. Out of a list of today's 170 most frequently appointed investment arbitrators,[48] more than 20 have crossed the Tribunal's path in some capacity.[49]

IV. CONCURRENCES AND DISSENTS

A striking aspect of Figure 1: Full dataset is the number of concurring and dissenting opinions written by the judges. For every three decisions by the Tribunal (including awards, orders, etc.), the dataset has two separate opinions by judges in their individual or joint capacity.[50]

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[46] *See* James Crawford, *The International Law Bar*, *in* INTERNATIONAL LAW AS A PROFESSION 338, 342 (Jean d'Aspremont et al. eds., 2017).

[47] Bleich, *supra* note 26, at 352.

[48] This is Investment Arbitration Reporter's list of arbitrators where only individuals with three or more appointments to an investment tribunal are included. *Arbitrator Profiles*, IA REPORTER, https://www.iareporter.com/arbitrator-profiles-directory/.

[49] This is likely underestimated because the names of the Tribunal's clerks do not appear in the dataset, which records only the judges and counsel present at the hearing.

[50] Lack of consistency in the titles and designation of opinions (many are only described as "Separate Opinion"), and the fact that some opinions dissent only in part means that the opinion labels are not clear. The difficulty was noted by the first President of the Tribunal.

This number however only accounts for fully written opinions. Not all concurrences and dissents were written, and statements of dissent recorded under the judge's signature at the end of the award were sometimes the only indication that an award was not adopted unanimously.[51] When all these dissents (accompanied or not by an opinion) are tallied up, there were nearly more decisions with dissents than unanimous decisions. Of the decisions on jurisdiction and the merits, 259 were unanimous (of which 92 occasioned a concurrence) while 322 were accompanied by a dissent. Figure 6 below plots the number of unanimous and majority decisions over time.

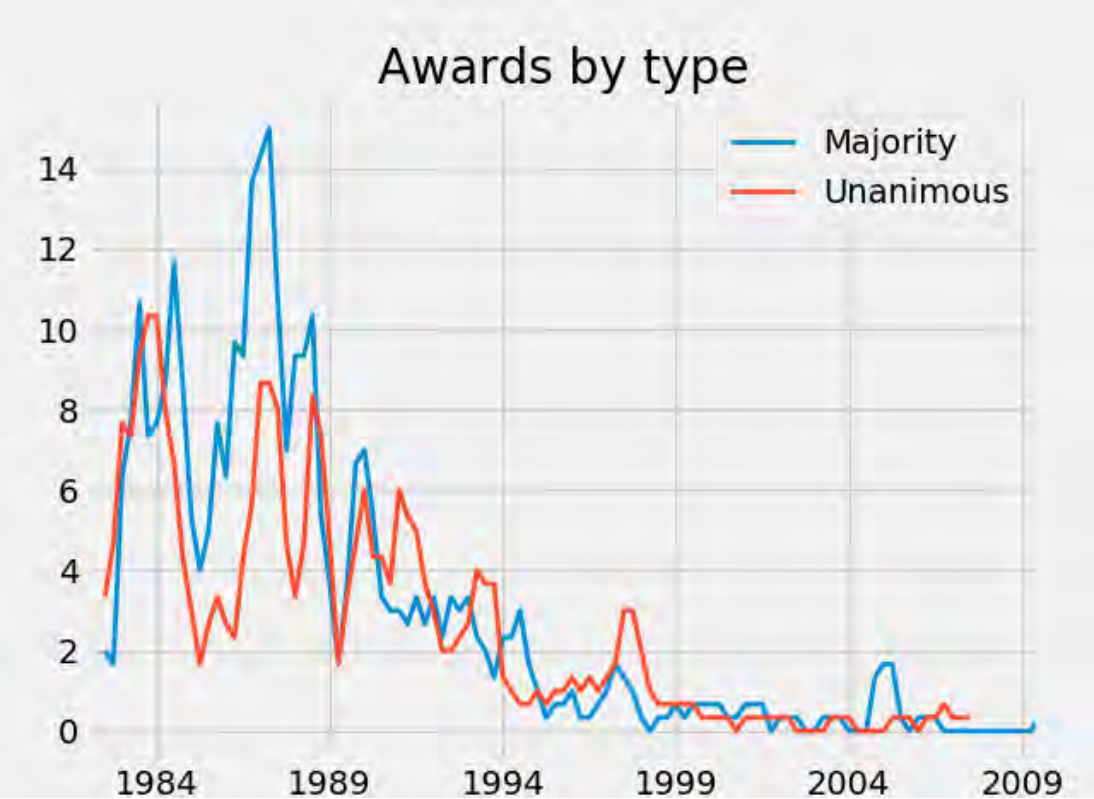

Figure 6: Awards by type, over time

Lagergren, *supra* note 2, at 31 ("And, indeed, many opinions labelled 'concurring' are in reality dissenting opinions." *Cf.* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 357 (note by Shafeiei) ("On principle, a 'concurring opinion' applies when one member of the Tribunal concurs with the other members of the Tribunal in regard to the conclusion arrived at, but does not concur with its reasoning.").

[51] *See* Lagergren, *supra* note 2, at 28 (suggesting that judges "failed to develop a genuine sense of collegiality").

Table 5 further breaks down separate opinions according to the nationality of the judges (rare opinions by neutral judges are omitted) and the outcome of the case to reveal who dissented in what circumstances.

Overall Result	**# Docs (awards only)**	**Concurrences**		**Dissents**	
		US *arb.*	*Iran arb.*	US *arb.*	*Iran arb.*
US	373 (167)	46 (28)	27 (3)	49 (40)	263 (150)
Iran	210 (145)	9 (4)	70 (55)	47 (36)	28 (12)
Total	**581 (312)**	**55 (32)**	**97 (58)**	**96 (76)**	**291 (162)**

Table 5: Concurrences and Dissents per judge nationality and overall outcome[52]

These numbers support the observation that "[i]n practice, the Iranian members recorded a dissenting vote in virtually every case in which the decision was against Iran."[53] Indeed, when it came to final awards, only 17 cases saw no dissent from the Iranian judge—and often in cases when the respondent was not the Iranian government (typically, a US respondent),[54] or when the outcome was such that, even if Iran lost, it was on terms broadly favorable to it. [55]

A. *Role of Individual Opinions*

Why write a dissenting opinion?[56] It was not necessarily to influence the majority decision because it was common for judges to file their dissent after, sometimes much after, the award was rendered.[57] Judges might rather have wanted to influence future

[52] The "Concurrences" column records every instance where the award explicitly records an judge as concurring.

[53] Howard M. Holtzmann, *Drafting the Tribunal Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 75, 91 (David Caron & John R. Crook eds., 2000) (alteration added).

[54] Iran Touring & Tourism Org. v. United States, Award No. 347-B63-3 (Feb. 25, 1988), 18 Iran-U.S. Cl. Trib. Rep. 84, 87.

[55] Schering Corp. v. Iran, Award No. 122-38-3 (Apr. 13, 1984), 5 Iran-U.S. Cl. Trib. Rep. 361, 375 (dissenting opinion by Mosk) (clarifying that Iran's liability was very limited compared to the original claims).

[56] *See generally* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE 821 (Mahnoush Arsanjani et al. eds., 2010).

[57] *See*, *e.g.*, Watkins Johnson et al. v. Iran et al., Award No. 429-370-1 (July 27, 1989), 22 Iran-U.S.

awards and decisions[58] or to undermine the authority of a solution for later panels.[59] Some judges explicitly described opinions as strategic tools[60] because they were conscious that the Tribunal was setting precedent.[61]

Some separate opinions are telling here. Judge Khalilian wrote in his dissent referring to the majority decision, "in light of the blatant defects therein, . . . it will not be possible to rely upon this Award as precedent."[62] Judge Bahrami once opined that he "would hope that such an award which is, as set forth above in this Opinion, devoid of legal reasoning and legal justification, will not be held up as a precedent in

Cl. Trib. Rep. 257, 257 (dissenting opinion by Noori) (filed on Jan. 8, 1990).

[58] *See* Parviz Ansari Moin, *The Interpersonal Dynamics of Decision-Making (III)*, *in Drafting the Tribunal Rules*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 263, 266 (David Caron & John R. Crook eds., 2000) (describing some opinions as "putting psychological pressure on the panel and paving the way for the next cases and awards"); *see also* BROWER & BRUESCHKE, *supra* note 2, at 661 (explaining how the existence of third-country judges created "predictable dynamic, namely competition for the 'hearts and mind' of" these judges and asserting that "[w]here the vast bulk of claims is asserted against one side, namely Iran, clearly it is the Iranian side that must display the greater concern as regards the attitude of the third-country judges").

[59] *See* Lagergren, *supra* note 2, at 31 ("However, the authority of the awards is limited by the fact that the awards mostly are accompanied by forceful dissenting and concurring opinions. . . . Accordingly, care must be exercised in concluding from the Tribunal's awards that an opinio juris commune's is emerging.").

[60] *See* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 357 (note by Shafeiei) ("Instead, the fact is that Mr. Aldrich proceeded to state his opinions on the merits under the guise of submitting a 'Concurring Opinion,' and that he thereby condemned the Respondent in favour of the American Claimant. There, Mr. Aldrich gives his opinion on such issues as expropriation, control and the method of valuation, all which are matters at issue in other cases. This act is in violation of the interests and defences of the Respondent, and in fact constitutes prejudgement.).

[61] Peter D. Trooboff, *Settlements*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 283, 297 (David Caron & John R. Crook eds., 2000) ("One point is clear – the Iranians were acutely sensitive to the precedent that would be set by an averse Tribunal award in certain key cases including those involving the legal principles governing expropriation and breach or [sic] contract. It seems clear, as Judge Aldrich's *ITT* concurrence emphasizes, that some settlements that occurred late in the proceedings resulted from an Iranian effort to avoid the issuance of such precedent-setting awards.").

[62] Phillips Petroleum Co. Iran v. Iran, Award No. 425-39-2 (June 29, 1989), 21 Iran-U.S. Cl. Trib. Rep. 79, 196 (statement by Khalilian).

the Tribunal's future proceedings."[63]

This approach might however actually backfire. Providing the majority of the Tribunal is mindful of the persuasiveness of its approach and decision, an award that prompts a contemporaneous dissenting opinion might actually be better reasoned in order to answer the dissent's criticism.[64]

One way to test this proposition is to observe the importance of awards based on how many times they were cited in subsequent decisions. This reveals that majority awards were cited nearly twice as often in subsequent awards and nearly four times as often when counting subsequent citations in separate opinions. The very award that Judge Khalilian hoped would not be seen as a precedent eventually became one of the most cited by the Tribunal in later awards. Majority awards are also nearly three times longer than unanimous awards, reaching 9,500 words on average compared to 3,500 words for unanimous awards, which might explain why they were relied on more.[65]

The direct impact of separate opinions on a given debate is likely limited because separate opinions are rarely cited in later awards.[66] The dissent of Judge Lagergren, the neutral judge and Tribunal chair in *INA Corp. v. Iran*, is cited, for instance, in *Sedco Inc. v. National Iranian Oil Co.*, but only to suggest that the proper compensation standard for expropriation was not firmly established. Tellingly, when it was cited in *Philipps Petroleum Co. v. Iran*, it was followed shortly by Judge Holtzmann's concurring opinion criticizing Lagergren's views as obiter dicta.[67] Likewise, today's

[63] Gen. Dynamics Tel. Syst. Ctr. Inc. v. Iran, Award No. 192-285-2 (Oct. 4, 1985), 9 Iran-U.S. Cl. Trib. Rep. 153, 180 (dissenting opinion by Bahrami).

[64] *See* BAKER & DAVIS, *supra* note 2, at 154.

[65] This accords with what can be observed at the United States Supreme Court and Federal Court of Appeals. *See* Lee Epstein, William M. Landes, & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 103 (2011).

[66] The same occurs in the American judicial context. *Id.*

[67] It was not, however, that the Tribunal shied away from citing separate opinions as proper authority because individual judges at the ICJ were sometimes cited in awards. *See*, *e.g.*, Bank Markazi Iran v. Fed. Reserve Bank of New York, Iran-U.S. Cl. Trib., Award No. 595-823-3 (Nov. 16, 1999), 26 Y.B. Com Arb. 689, 670-71 (2001) (quoting Barcelona Traction, Light & Power Co.

individual opinions in investment arbitration are rarely cited.[68]

Concurrences and dissents had greater importance in other separate opinions, although party-appointed judges were more likely to cite judges from their side. This is reflected in Figure 7 below, which retraces all the citations from one judge (individually and in joint opinions), to another.[69] There were few opinions by neutral judges, and fewer were cited later, although Judge Lagergren's opinion in *INA Corp.* became a focus of debate for both US and Iranian judges as can be observed from its central position in Figure 7.

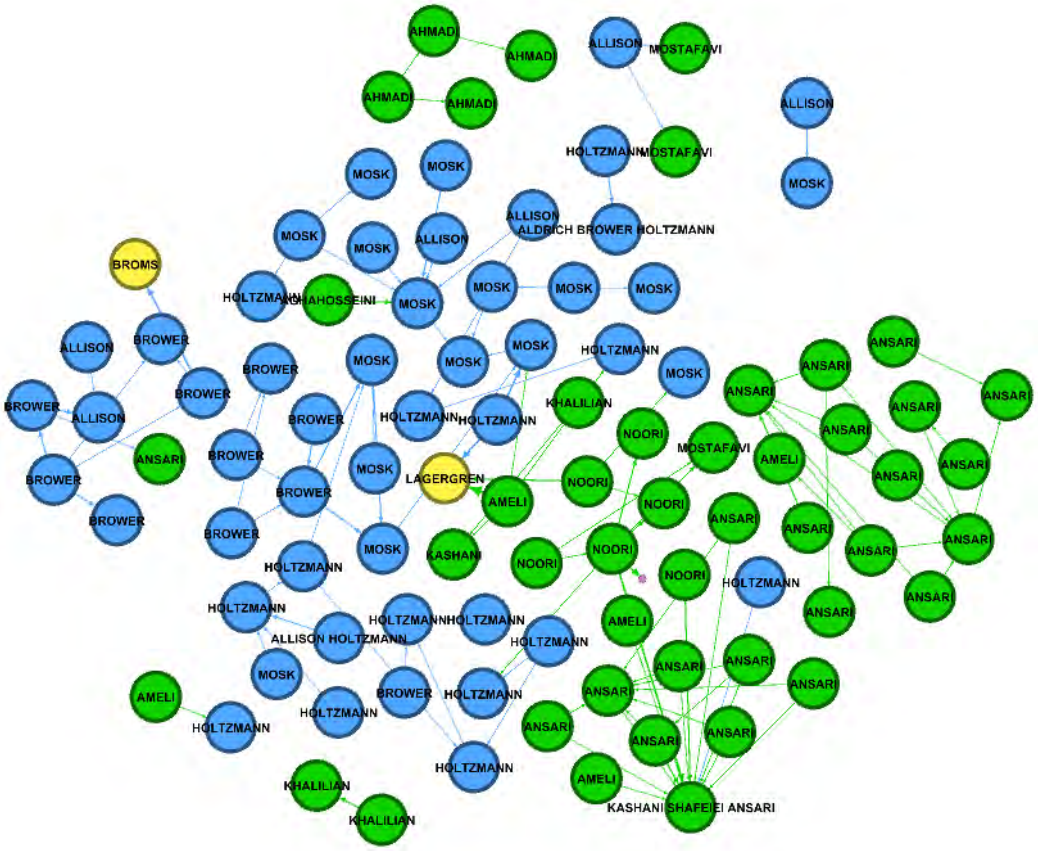

Figure 7: Citations between individual judges' opinions

(Belg. v. Spain), Preliminary Objections, 1964 I.C.J. Rep. 6, 99 (July 24) (dissenting opinion by Morelli, J.)).

[68] *See* van den Berg, *supra* note 58, at 826.

[69] Each node represents a separate opinion. Green nodes are opinions from Iranian judges, blue from American judges, and yellow from neutral judges.

On the face of it, there was surprisingly little engagement between the two sides, which tended to rely on judges of their own nationality in their opinions. And many dissents resorted to broad disagreements between the Iranian and US blocs.

The clearest example is with dual national claims, which were allowed following the full Tribunal's decision in Case No. A18 and which "generated tremendous controversy."[70] In a strong dissent, the Iranian judge condemned the notion of allowing Iranian nationals (albeit dual nationals) to bring claims against their own government,[71] and they often voiced their opposition thereafter.[72] The decision is often offered as a reason for the "Mangard incident" mentioned above in Part I.

The strength of this dissent, however, means that what became known as "The dissent of the Iranian judge in Case No. A18 was the opinion most cited by other opinions (17 times), even long after the decision on dual national claims was taken. The Iranian judge continuously found against jurisdictional decisions involving dual nationals, [73] and given the sensitivity of the issue, many of the claims were postponed until the 1990s.[74]

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[70] BROWER & BRUESCHKE, *supra* note 2, at 32.

[71] In an important point of background, Caron & Crook, *The Tribunal at Work*, *supra* note 13, at 141, opines that the Iranian judges also suspected that many dual nationals were from powerful and well-connected families that had supported the deposed Shah.

[72] *See* BROWER & BRUESCHKE, *supra* note 2, at 296 (calling it a continuous "source of acrimony" and citing, e.g., Golshani v. Iran, Award No. ITL 72-812-3 (Oct. 24, 1989), 22 Iran-U.S. Cl. Trib. Rep. 155, 160 (dissenting opinion by Ansari)); *see also* MOHSEN AGHAHOSSEINI, CLAIMS OF DUAL NATIONALS AND THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW: ISSUES BEFORE THE IRAN-UNITED STATES CLAIMS TRIBUNAL 33 (2007) ("Of all the cases litigated before the Tribunal, and those include Cases in which giant multi-national oil companies sued Iran for hundreds of millions of dollars, none was so hotly and passionately contested as this interpretative Case between the two States."). No case was brought by a dual national against the U.S. government.

[73] *See* BROWER & BRUESCHKE, *supra* note 2, at 41-42 ("Because the Tribunal's analysis is a fact intensive inquiry into what is largely a subjective and emotional belief on the part of the claimant, its conclusions have frequently divided the Members of the Chambers. The Iranian Members of the Tribunal, in fact, regularly dissent from the finding of dominant and effective United States nationality, evidencing what appears to be continuing dissatisfaction with the Full Tribunal's decisions in *Case No. A18*.").

[74] *See* Zenkiewicz, *supra* note 13, at 159 n. 37.

B. *Tone*

A final aspect of the separate opinions to investigate is the tone adopted by the judges. Acrimony has permeated the Tribunal, which is evinced by the fact that "[u]nanimous decisions were rare in contested cases and the awards were usually accompanied by aggressively drafted dissenting opinions."[75]

Aggressiveness is a factor that can be measured by performing a sentiment analysis, which ranks text based on how relatively positive or negative it is. Dissents presumably should be more negative in tone than concurrences, which are expected to be more positive than majority decisions.

A sentiment analysis was performed over the first 500 characters of every concurring and dissenting opinion with the hypothesis that the introduction would better reveal the sentiments of the judge authoring the opinion. While sentiment analyses as applied to long texts are usually less instructive than for sentence long texts, the difference in mean scores between the categories of texts remains instructive. *The results can be seen* below in Table 6. As expected, dissents, and notably dissents by Iranian judges, were much more negative than other separate opinions.[76] To the extent that these opinions were strategically used to undermine the precedential value of a given decision, it is unclear whether more negativity was a winning strategy.[77]

	Dissenting	**Concurring**
Iranian judge	0.029	0.051
US judge	0.056	0.112

Table 6: Average Sentiment score

[75] *See* Mangard, *supra* note 31, at 255 (alteration added).

[76] The differences between the mean score of the set of dissenting opinions is statistically significant. The survey had a t-score of 2.5 and a p-value of 0.01.

[77] Instead, these findings might indicate that opinions from Iranian judges were directed at a different audience, e.g., domestic interests in Iran. *See* Richard M. Mosk, *The Role of Party-Appointed Arbitrators in International Arbitration: The Experience of the Iran-United States Claims Tribunal*, 1 TRANSNAT'L LAW. 253, 268 (1988) (suggesting that Iranian judges were scrutinized for their actions by their government).

C. *Sources*

Separate opinions also differed starkly on the sources cited for arguing their point of view. An overview of all the sources cited in awards and separate opinions indicates that separate opinions cited the Tribunal's precedents markedly less than in majority and unanimous decisions. Concurring opinions in particular drew from a varied pool of resources.

This presumably stems from a different need to persuade. Concurring opinions were seemingly less constrained, and the authors were free to discuss sources with less authority, while dissenting opinions focused more on proper precedent to highlight contradictions in the Tribunal's jurisprudence.

Citation Target	Concurring	Dissenting	Award
Tribunal's Precedents	37.5	63.6	85.3
Doctrinal Sources	26.0	15.5	4.5
ICJ	11.6	8.4	3.2
Other Awards	14.3	6.8	2.6
Domestic Judgment	5.3	2.6	1.3
Positive Law	2.1	2.4	2.3
ICSID	3.1	0.4	0.7
ECHR	0.2	0.3	0.1

Table 7: Sources cited by type of document, percent

The judges were also likely to cite different sources depending on their nationality as shown in Table 8. Iranian judges, for instance, were unlikely to cite jurisprudence of the International Court of Justice (ICJ). This is perhaps unsurprising given that in the mid-1980s, the Court's reputation with non-Western states had reached a nadir. US judges, conversely, have been more familiar with or have tended to rely more on decisions by tribunals of the International Centre for Settlement of Investment Disputes (ICSID), which might also be because some of the US judges were themselves involved in those disputes.[78]

[78] Judge Brower, for instance, had been counsel for Indonesia in the long-running arbitration

Citation Target	Iran	Neutral	US
Tribunal's Precedents	60.9	28.6	57.3
Doctrinal Sources	16.4	28.6	18.8
ICJ	9.7	23.8	8.2
Other Awards	7.4	9.5	7.7
Domestic Judgment	2.2	4.8	4.2
Positive Law	2.2	/	2.4
ICSID	0.6	/	1.2
ECHR	0.5	4.8	0.1

Table 8: Sources cited by Judge's nationality, percent[79]

V. SUBJECTS AND TOPICS

The limited scope of the Algiers Accords means that only a limited set of disputes went before the Tribunal and thus the judges have often faced the same questions.[80]

To shed light on this, an analysis was performed that identified sets of words and phrases that commonly occur together and at significant rates across the dataset, indicating a distinct topic. The analysis identified 30 core topics, which are listed in Table 9 below.[81] Next, each document (award, opinion, etc.) was reviewed at the paragraph level for these topics to detect the most important of the 30 topics.[82] The analysis relied on the number of times these topics appeared in the Tribunal's documents to gauge their relative importance.

of *Amco Asia Corp. et al. v. Republic of Indonesia*, ICSID Case No. ARB/81/1.

[79] The numbers for neutral judges should be qualified by the fact that individual opinions by these judges are scant. Interestingly, the proportion of scholarly sources found in awards matches those found in other contexts. *See* Nora Stappert, *A New Influence of Legal Scholars? The Use of Academic Writings at International Criminal Courts and Tribunals*, 31 LEIDEN J. INT'L L. 963, 971-972 (2018).

[80] *See*, *e.g.*, Zenkiewicz, *supra* note 13, at 154 (identifying three categories of claims).

[81] Several topics identified by the algorithm were very closely related to particular cases and I discounted them as "Other." The search for topics in individual documents later ignored these "Other" topics to focus on the next most important topic.

[82] More precisely, the analysis is probabilistic, with every document having a probability of "x" of dealing with a given topic "y." The analysis only retained the topics that were above a certain significant probability threshold. Only paragraphs with a citation were parsed to filter out fact-heavy paragraphs and focus on legal topics.

A. *In awards and decisions*

Unsurprisingly, the major topics discussed in awards and decisions align with the topics of scholarly works.[83] The analysis confirms that chambers were often tasked with verifying their jurisdiction over claimants and, following a decision by the full Tribunal on dual national claims, with the dominant nationality of US claimants. On the merits, the Tribunal heard many contract-based cases and counterclaims, and the occasional argument on expropriation. Claims brought by Iranian claimants often focused on principles (A) and (B) of the Accords.[84]

The analysis confirms that the prevalence of the topics varied over time. Looking at the topic "oil," for example, which refers to disputes over oil reserves, productions, etc., indicates that it peaked in early disputes, especially in 1990, when *Philips Petroleum* was decided. The fraught topic of dual national claims peaked in April 1984 when the full Tribunal ruled on its jurisdiction over those claims and then became sporadic before rising again in the 1990s as if the Tribunal had decided to defer the claims until tensions abated – which is exactly what happened according to most commentators.[85]

B. *In opinions*

With some exceptions, concurrences and dissents often focused on more abstract questions of interpretation, jurisdiction, and, in particular, applicable law. While topics like contract, ownership, and counterclaims were among the main matters discussed in the awards themselves, they came up at lower rates in dissents and rarely in concurrences.

Table 9 retraces the total number of topics in concurrences, dissents, and awards, as well as the rate of separate opinions treating a given topic compared to awards–

[83] See, generally, BROWER & BRUESCHKE, *supra* note 2.

[84] Principle (A) obliged the U.S. to restore the financial position of Iran as it was prior to the diplomatic break, while Principle (B) mandated the termination of all external litigation between the parties and their nationals.

[85] *Cf.* David D. Caron & John R. Crook, *Moving to End Game*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 331, 335 (David D. Caron & John R. Crook eds., 2000) ("Following the events of 1984, arbitrators were not inclined to push the dual national cases forward rapidly.").

giving an idea of their importance for individual judges. For instance, questions of unjust enrichment surfaced nearly half as much in dissents as in awards, but barely in concurring opinions.

Topic	Concurrence	Dissent	Award	Concurrence Rate	Dissent Rate
Jurisdiction	54	108	720	7.50	15.00
Procedure	23	69	430	5.35	16.05
Counterclaims	17	59	422	4.03	13.98
Contract	25	85	372	6.72	22.85
Ownership	14	40	347	4.03	11.53
Evidence	23	135	299	7.69	45.15
Interpretation	95	170	233	40.77	72.96
Control	15	50	188	7.98	26.60
Dual Nationality	14	43	180	7.78	23.89
Banking	28	46	164	17.07	28.05
Choice of Forum	14	32	156	8.97	20.51
Force Majeure	15	68	152	9.87	44.74
Interests	39	48	127	30.71	37.80
Principle B	30	32	121	24.79	26.45
Expropriation	11	24	112	9.82	21.43
Interim	13	20	110	11.82	18.18
Request	1	10	109	0.92	9.17
Transfers	6	39	90	6.67	43.33
Caveat	8	27	79	10.13	34.18
Applicable Law	41	52	71	57.75	73.24
Quantum	8	13	70	11.43	18.57
Unjust Enrichment	4	28	59	6.78	47.46
Standard	15	17	59	25.42	28.81
Award	25	9	39	64.10	23.08
Signature	11	13	37	29.73	35.14
Nationality	1	14	34	2.94	41.18
Principle A	4	10	32	12.50	31.25
Litigation	2	13	27	7.41	48.15
Challenge	14	6	26	53.85	23.08
Oil	2	0	9	22.22	0.00
Authenticity	4	5	4	100.00	125.00

Table 9: Topics, number of observations, and as a ratio of observations in awards

Dissents often discussed questions of evidence, which is not surprising. The Tribunal never formally identified a standard of proof,[86] so judges had some discretion in assessing the evidence. Judge Mangard opined that US judges often dissented on this point when stricter European standards were applied.[87] Judge Brower echoed this point, adding that evidential matters left room for the third-country judges to "give in" in the context of always "saying no" to Iran.[88] All this gave judges space to write dissenting opinions on evidence questions.

Interest in topics also differed depending on the author's nationality:

Iran				**US**			
Concurring		*Dissenting*		*Concurring*		*Dissenting*	
Interest	47	Interpretation	154	Standard	232	Evidence	107
Unjust Enrichment	24	Evidence	149	Choice of Forum	94	Control	102
Award	23	Dual	131	Applicable Law	83	Procedure	102
Dual	19	Expropriation	103	Interpretation	62	Interpretation	89
Jurisdiction	6	Standard	103	Interests	52	Nationality	86
Control	5	Principle A	95	Award	40	Applicable Law	83
Counterclaims	5	Jurisdiction	92	Contract	39	Counterclaims	63
Choice of Forum	4	Caveat	85	Jurisdiction	33	Request	63
Interpretation	4	Contract	85	Expropriation	32	Dual	56
Principle B	3	Procedure	85	Control	31	Ownership	56
Applicable Law	2	Control	70	Interim	24	Quantum	46
Banking	2	Counterclaims	62	Principle B	24	Force Majeure	45
Transfers	2	Force Majeure	52	Banking	19	Banking	39
Challenge	1	Choice of Forum	42	Oil	15	Transfers	34

[86] Koorosh H. Ameli, *The Application of the Rules of the Iran-United States Claims Tribunal*, *in* INTERNATIONAL LAW AND THE HAGUE'S 750TH ANNIVERSARY 263, 272 (Wybo P. Heere ed., 1999) ("In various cases, the Tribunal has simply concluded from its interpretation of the evidence what in its view should be the fact, without reference to any standard of proof and justifications for it. Thus, an independent examination of the evidence, even as presented in some of the awards, may allow a different conclusion from what the award has reached.").

[87] Mangard, *supra* note 31, at 259; *and see generally* ANNA RIDDELL & BRENDAN PLANT, EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE (2009).

[88] *See* BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 662 ("Further up the line, decisions may be made on evidentiary issues or regarding damages that legitimately might have been decided either way."). In the same context, Judge Brower also contends that the president in his first full Tribunal case voted with the Iranians only after being sure to be in the minority. *See* Mangard, *supra* note 31, at 259.

Procedure	1	Interests	32	Quantum	15	Caveat	32
		Quantum	30	Counterclaims	14	Interests	32
		Transfers	28	Procedure	11	Choice of Forum	28
		Award	27	Evidence	10	Interim	28
		Ownership	27	Ownership	10	Jurisdiction	27
		Signature	23	Signature	9	Contract	22
		Principle B	15	Force Majeure	6		
		Applicable Law	14	Caveat	5		
		Unjust Enrichment	12	Challenge	4		
		Oil	7	Litigation	4		
		Interim	6	Transfers	1		
		Banking	5	Unjust Enrichment	1		

Table 10: Topics, number of observations, per type and author nationality

The topic of evidence remained one of the most popular, not only in US dissents but also in Iranian ones. It is noteworthy that Durward Sandifer's book, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS, is by far the most cited scholarly authority in the dataset even though it was cited only in separate opinions and rarely in awards.

There are however also marked discrepancies in interests depending on the judge's nationality. Iranian dissents focused more on the topic of dual nationals that the Tribunal ruled it had jurisdiction over, which was also closely related to the issue of dual national claims.[89] US dissents, meanwhile, were often concerned with the topic of control, considering that the Tribunal often denied expropriation claims based on a claimant's failure to show sufficient control of the expropriated entity. The topic of unjust enrichment, which was often an alternative claim against Iranian defendants, arose mostly in Iranian opinions and was relatively ignored by the US judges.

The significance of the differing interests is examined in the next and last parts, which suggest that there were extra-legal motivations that likely motivated the judges.

VI. WAS THE TRIBUNAL POLITICAL AND DOES IT MATTER?

The numbers above shed light on one of the most fraught questions in the

[89] The full Tribunal "caveated" its position on dual national claims by holding that a claimant's dual nationality might be relevant in matters of liability or quantum.

scholarship surrounding the Tribunal's work, standing to undermine its importance and legacy: whether the Tribunal was political and whether this should discount its legacy.[90]

This criticism remains relevant today as it shares much in common with a perennial debate about the role, motives, and influence of party-appointed judges in investment arbitration today.[91]

A. *The Charge*

Some scholars suggest that the Tribunal's awards and decisions were merely the outcome of an adjudicative body permeated by politics and tainted by each side's motivation of winning at all costs.[92] The background of the Tribunal's operations informs these criticisms: relations between Iran and the US have been marked by great tensions since the Iranian Revolution,[93] making it hard to believe the Tribunal was immune. As recounted above in Part II, accusations of impartiality have occasionally flared between the judges themselves.[94]

Several ways to answer this charge have surfaced in the literature. First, it is

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[90] *See* MUTHUCUMARASWAMY SORNARAJAH, THE PURSUIT OF NATIONALIZED PROPERTY 202 (1986).

[91] *See* Waibel & Wu, *supra* note 18, at 8; Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339, 339-48 (2010) (arguing that the politicization in unilateral arbitrator appointments undermines the legitimacy of arbitration).

[92] *See* 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, 105 (1990); *see also* BROWER & BRUESCHKE, *supra* note 2, at 648 (making similar criticisms); Ameli, *The Iran-United States Claims Tribunal*, *supra* note 24, at 246 (noting the "controversies over the precedential value of [the Tribunal's] jurisprudence") (alteration added). The notion that the tribunal was politicized was accepted, for example, by Judge Brower who opined that the tribunal was bound to be "politically affected" due to its structure and the circumstances of its birth. Charles N. Brower, *The Interpersonal Dynamics of Arbitral Decision-Making (I)*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 249, 250 (David D. Caron & John R. Crook eds., 2000).

[93] *See* Zenkiewicz, *supra* note 13, at 173 ("The relationship between those two States can be characterized as unusually tense, if not openly hostile. In that framework, especially when the only cases left were the intergovernmental disputes, the Tribunal members sensed the constant and increasing pressure to decide cases on grounds that were more political than legal.").

[94] *See* ITT Indus. Inc. v. Iran, Award No. 47-156-2 (May 26, 1983), 2 Iran-U.S. Cl. Trib. Rep. 356, 358 (note by Shafeiei).

sometimes pointed out that the charge is a *non sequitur*: the "political" outlook of the judges, if any, does not necessarily mean the solutions adopted and their reading of the law was deficient.[95]

It also bears noting that the principle of coherence should function to refrain judges' willingness to always rule in favor of a party, lest to be accused of deciding contrary to their past decisions. For some authors, the more the Tribunal became a permanent court, the more legitimate it became and the more independent it could venture to be.[96]

Another answer that is more common in the literature denies that the Tribunal was political and insists that judges generally worked and ruled in a professional manner, regardless of the claims before them. [97] Judge Mosk, for instance, said that "[g]enerally, despite diplomatic differences between Iran and the United States and some sharply worded opinions (which are not unheard of in American appellate cases), Iranian and United States representatives to the Tribunal and the arbitrators work together in a civil and courteous manner."[98]

Judge Mosk observed that the US judges (read: "at least") understood that they were not supposed to be representing their government,[99] and he offers several

[95] *See* Caron, *supra* note 98, at 105 n. 1 ("I believe the combativeness of the Iranian arbitrators did not politicize substantive decisions."); *see also* BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 650 ("There would appear in any event to be natural limits to how far political considerations can, in the long run, successfully pervert a publicly carried out process of adjudication controlled ultimately by third-country nationals of high distinction.").

[96] *See* Alter, *supra* note 11, at 186.

[97] BROWER & BRUESCHKE, *supra* note **Error! Unknown switch argument.**, at 655 ("[P]ersonalities, politics and psychological pressures have played a role in some of the Tribunal's more difficult decisions," but that is a "very minute group. . . . In the vast majority of cases, however, the presence of these pressures has not affected the award in any significant way. . . . [I]t is human nature that no person can bear it well to be on the losing side year in and year out. . . . Similarly, few would be comfortable in the position, potentially occupied by third-country judges of the Tribunal, of more or less continually 'saying no' to a party, i.e., Iran.") (alterations added).

[98] Mosk, *supra* note 80, at 270 (suggesting that the argument itself is a *non sequitur* because a tribunal could be highly politicized and still remain "courteous and professional").

[99] *Id.* at 267.

decisions where they voted against the US party.[100] He added, diplomatically, that the Iranian judges "may have been in a more delicate situation" ascribing their difficulties to the revolutionary government at the time, and noting that they rarely voted against Iran and if so only in small cases.[101]

B. *Lessons from the Data*

The data analyzed above lends to Judge Mosk's observation that Iranian judges largely dissented in cases won by the US party. The same discrepancy can to some extent be observed in the voting pattern of the American judges.

While raw statistics should not be overstated,[102] going beyond them confirms that the rare instances of an judge authoring a dissent when its government was broadly successful were often directed at few findings going in the direction of the losing party, who appointed that judge. Thus, if Judge Bahrami wrote a dissent in *FMC Corp. v. Ministry of National Defense*,[103] where Iran's counterclaims exceeded the value of the claimant's claim, it was to undermine the Tribunal's findings on the merits of the claimant's case. On the other hand, in cases won by US claimants, a substantial

[100] *Id.* at 267, nn. 49-50. Mosk notes that the American judges voted for levying a large award against the U.S., but he does not clarify whether the judges dissented from the award. *Cf.* Iran v. United States, Award No. 306-A15(I:G)-FT (May 4, 1987), 14 Iran-U.S. Cl. Trib. Rep. 311, 320 (concurring opinion by Holtzmann et al.) ("This Partial Award implements an earlier Interlocutory Award in this Case from which all three American members of the Tribunal disagreed for the reasons set forth in their Dissenting Opinion.").

[101] Mosk, *supra* note 80, at 268 ("Iranian arbitrators have joined in some awards against Iran, but this occurred infrequently, and generally only when the award was substantially less than the amount claimed.").

[102] This statistical approach to the question has been criticised. *See* Commentary by Kryzysztof Skubiszewski, *The Role of ad hoc Judges*, *in* INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, PROCEEDINGS OF THE ICJ 378, 389 (Connie Peck at al. eds., 1997) ("I am not very convinced that the statistics about voting behaviour, like statistics about the number of ratifications of treaties and similar statistical games, tell us much about the law and the real posture[.]"). But Mr. Skubiszewski's point cuts both ways: some awards were unanimous in appearance, but that could have been, for instance, because a "losing" judge thought it was a win considering that the liability could have been higher. Nevertheless, the "statistics" themselves seemingly mattered greatly to the parties and to the tribunal. *See* Mangard, *supra* note 31, at 261.

[103] FMC Corp. v. Ministry of Nat'l Def. et al., Award No. 292-353-2 (Feb. 12, 1987), 14 Iran-U.S. Cl. Trib. Rep. 111, 103 (dissenting opinion by Bahrami).

number of dissents by the US arbitrators were actually due to Judge Holtzmann on the question of costs (of which, he opined, claimants should be able to recover a larger portion).[104]

Party-appointed judges were also more likely to dissent in high-stake decisions, but not necessarily in disputes between the two governments[105] where the proportion of dissents tracks that of other cases and with Iranian judges even agreeing to find Iran liable.[106] Iranian judges dissented however in all but three of the 149 decisions that ended with a financial outcome in favor of a US claimant. These were presumably higher-stake decisions because Iran reportedly disapproved of any dollar that went the American way. US judges, by contrast, were more inclined to join a decision that found the US government liable.

In short, virtually every separate opinion supported the side that appointed the judge. As Albert Jan van den Berg noted:

> In a tribunal of three, one could imagine that there is about a 33 percent chance that the dissenting opinions would be in favor of that party; or, if one eliminates the presiding arbitrator, the chance may be about 50 percent. It is said that 'the parties are careful to select arbitrators with views similar to theirs.' Assuming—generously—that such a factor influences half of dissenters, the percentage could be assessed to be about 75 percent.[107]

A rate of nearly 100% indicates that something else was the matter. The pattern of dissents supports the observation that the appointment method created partiality.[108]

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[104] *See*, *e.g.*, Sylvania Tech. Sys. Inc. v. Iran, Award No. 180-64-1 (June 27, 1985), 8 Iran-U.S. Cl. Trib. Rep. 298, 329 (separate opinion by Holtzmann).

[105] *But cf.* Allen S. Weiner, *The Iran-United States Claims Tribunal: What Lies Ahead?*, 6 L. & PRAC. INT'L CTS. & TRIBS. 89, 96 (2007) ("As the docket narrows to cases involving only two parties, Tribunal Members may perceive increasing pressure to decide cases on grounds that are more political than legal.").

[106] *See*, *e.g.*, Iowa St. Univ. v. Ministry of Culture & Higher Ed. et al., Award No. 276-B72-2 (Dec. 16, 1986), 13 Iran-U.S. Cl. Trib. Rep. 271, 276.

[107] Van den Berg, *supra* note 57, at 824.

[108] *See id.* at 834 ("Unilateral appointments may create arbitrators who may be dependent in some way on the parties that appointed them.").

As seen in Part IV above, party-appointed judges created two blocks of separate opinions on which to rely and cite—blocks which were aligned with nationality. Table 11 below indicates that the US and Iranian judges were slightly more likely to cite precedent that supported their appointing party, but in all cases, decisions won by the US are over-cited compared to those won by Iran. As also seen in Part IV, Iranian and US judges drew from different types of authorities when supporting their opinions.

Overall Result	# of decisions won	# citations in Iranian opinions	# citations in American opinions	# citations in awards and decisions
Iran	209	250	201	736
US	365	581	825	2783
Ratio	0.57	0.43	0.24	0.26

Table 7: Citations of precedent by cited authority's overall winner

Part V, meanwhile, indicated how the blocks of judges had varying interests in the matters handled by the Tribunal. This is to be expected of judges from different legal systems and traditions. But the fact that some topics (e.g., dual national claims and standards of compensation) remained crucial in separate opinions long after they have, seemingly, been disposed of by an award indicates that this was more than a question of varying interests. Rather, it is hard not see there a certain motivation to relitigate past issues.

All this suggests that at least two of the three judges in a given case cared more about their nationality and the nature of the claims than the pure legal merits.

C. *Does it matter?*

Being politicized does not mean that the Tribunal's findings were tainted. As found in Part IV above, majority decisions tended to be longer and with more citations than unanimous decisions and presumably better reasoned. The advocate attitude of the party-appointed judges might have ensured that the final outcome in the award was all the more reasoned and grounded in law.

In other words, the clear conflicts on the law between irreconcilable judges might have ensured the logical soundness of awards. Later, the precedent also constrained the margin of appreciation of future panels. Ultimately, the outcomes were relatively

balanced, and the political underpinnings of individual cases could not translate into a general political bias that smeared the Tribunal's work.

The assertion that because of the appointment method judges acted based on political affinity, undermining the integrity of awards, goes too far—especially considering that appointing judges with diverging views is often the very aspect of arbitration that is appealing to disputing parties.[109] The Tribunal's experience with hundreds of awards often accompanied by separate opinions was one of balanced outcome, strengthening the merits of the system of party appointments.

VII. CONCLUSION

The Tribunal achieved a remarkable output despite challenges to its legitimacy and function.[110] Past and present tribunals have declined, but the Iran-US Claims Tribunal achieved most of what it was set up for in deciding and settling hundreds of claims. In the process, the Tribunal offered scholars and practitioners an opportunity to gain experience and a corpus of precedent that has influenced the institution of new adjudicating bodies.[111]

The Tribunal's record of decisions and awards is an invaluable dataset. It confirms the Tribunal's success in settling hundreds of claims in a balanced way, even considering the asymmetry of claims, while building jurisprudence *constante*. This dataset is also relevant to the discussion on the role of party-appointed judges and the impact of concurring and dissenting opinions in international dispute-settlement.

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[109] Waibel & Wu, *supra* note 8, at 4.

[110] Those challenges have not abated. *See* Michael Ottolenghi, *Islamic Republic of Iran v. United States: Case Nos. A3, A8, A9, A14, and B61*, 104 AM. J. INT'L L. 474, 478 (2010) (commenting on a 2009 partial award) ("This partial award, issued after Case No. B61 had been on the Tribunal's docket for twenty-seven years, with thousands of pages of pleadings and sixty days of hearings, is a monument to the Tribunal's legitimacy. That the full Tribunal managed to have a partial award signed by all nine members is a tribute to the leadership of late President Krzysztof Skubiszewski, who persevered through two Iranian challenges against him and a scathing attack on the appointing authority (Willem Haak of the Netherlands) who rejected those challenges, all while the full tribunal was deciding Case No. B61.").

[111] *See* David D. Caron & John R. Crook, *Concluding Reflections*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 363, 369 (David D. Caron & John R. Crook eds., 2000) (citing, e.g., the Tribunal's influence on the UN Compensation Commission).

DAMIEN CHARLOTIN is a Ph.D. Candidate in International Law at the University of Cambridge (Corpus Christi College). His thesis, part-law and part-data science, analyses how parties in international litigation and arbitration argue based on authorities and tries to determine what makes an authority authoritative. He also contributes to Investment Arbitration Reporter.

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KEEPING UP WITH LEGAL TECHNOLOGY: THE IMPACT OF THE USE OF PREDICTIVE JUSTICE TOOLS ON AN ARBITRATOR'S IMPARTIALITY AND INDEPENDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION

by Shervie Maramot

I. INTRODUCTION

An arbitrator's independence and impartiality are the cornerstone of international commercial arbitration.[1] In recent years, the rise of third-party funding has called into question an arbitrator's impartiality and independence, especially because of the dual role of arbitrators today. For example, an arbitrator can be, and is usually, acting in his or her own capacity as an arbitrator, and as an employee or a partner of a legal practice.[2]

Questions as to the extent of this well-respected duty in international commercial arbitration have received some clarification by way of the updated 2014 IBA Guidelines on Conflicts of Interest in International Arbitration (IBA Guidelines),[3] and legislation and rules clarifying this duty as enacted by leading seats of arbitration in Asia, such as Hong Kong and Singapore.[4] The International Council for Commercial

[1] *See* STEFAN KRÖLL, JULIAN D.M. LEW & LOUKAS A. MISTELIS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 11-4 (2003); SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST 19 (2009).

[2] The ICCA-Queen Mary Task Force, International Council for Commercial Arbitration and Queen Mary University of London, Report on Third-Party Funding (2018) [hereinafter ICCA-Queen Mary Report on Third-Party Funding], *available at* https://www.arbitration-icca.org/media/10/40280243154551/icca_reports_4_tpf_final_for_print_5_april.pdf.

[3] IBA Guidelines on Conflicts of Interest in International Arbitration, General Standard 6 (2014), *available at* https://www.ibanet.org/Document/Default.aspx? DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafee8918.

[4] *See*, *e.g.*, Hong Kong Arbitration Ordinance ch 690, part 10A, *available at*

Arbitration (ICCA) and the Queen Mary University of London also made a report on third-party funding in April 2018.[5]

The development of international commercial arbitration in more recent years, however, is not confined to existing and increasingly-used trade practices such as third-party funding. A significant question mark rests with the exponential growth of technology cementing itself into the legal profession.[6] Some predictive justice tools are being developed and marketed to third-party funders,[7] and astoundingly, there are records of predictive justice tools being used in cases by decision-makers.[8]

Predictive justice tools are designed to be impartial and independent.[9] Yet, would an arbitrator that uses a predictive tool on the subject matter of the case be impartial, if finding the opposite for the case as to what the technology had suggested? If an arbitrator's decision reflects the same as a predictive justice tool, does it render an arbitrator susceptible to contests as to his or her independence? Could the use of predictive justice tools by third-party funders or parties also affect an arbitrator's duty?

This paper aims to discuss the use of predictive justice tools in international commercial arbitration. Firstly, it will focus on the effects on an arbitrator's usage of predictive tools and how it affects his or her impartiality and independence. Secondly, it will examine the duty of a third-party funder or a party that uses predictive tools in the context of an arbitrator's impartiality and independence.

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https://www.elegislation.gov.hk/hk/cap609; Singapore Legal Profession (Professional Conduct) (Amendment) Rules 2017, *available at* https://sso.agc.gov.sg/sL-supp/s69-2017/.

[5] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2.

[6] ICC Commission Report, Information Technology in International Arbitration (2017), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-information-technology-in-international-arbitration-icc-arbitration-adr-commission.pdf.

[7] *Predictive justice: when algorithms pervade the law*, Paris Innovation Review (June 9, 2017), *available at* http://parisinnovationreview.com/articles-en/predictive-justice-when-algorithms-pervade-the-law.

[8] State of Wisconsin v. Loomis, 881 N.W.2d 749 (Wis. 2016), cert. denied, 137 S.Ct. 2290 (2017).

[9] Carin Devins et al., *The Law and Big Data*, 27 CORNELL J.L. & PUB. POL'Y 357, 365 (2017).

Finally, the necessity of regulating the use of predictive tools within international commercial arbitration will be explored.

II. EMERGING USE OF PREDICTIVE TOOLS IN INTERNATIONAL COMMERCIAL ARBITRATION

A. *Predictive Tools*

Any reference to *predictive justice tools* in this paper means: any mechanism and associated algorithms that utilise predictive analytics or artificial intelligence or machine learning to predict the result of any given dispute, or any associated information.

It is important to note that the technology discussed in this paper is not a product of science fiction and is already in existence. One of the most significant emerging technology products in international commercial arbitration is Dispute Resolution Data. The company shares a partnership with arbitral institutions that provide arbitration-specific data analytics from 136 nations worldwide. Notably, the product is spearheaded by a previous American Arbitration Association (AAA) head and is supported by experts globally.[10]

Other ventures engage in data mining aimed at uncovering patterns from decision-makers' rulings to location-based outcomes on cases and can even reveal connections of individuals involved in a matter.[11]

Supporters of predictive justice tools voice greater transparency and strengthening the consistency of case law with the aim to enhance the objectivity of judicial decisions and thereby reduce the risk of bias and error.[12]

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[10] Karen Maxwell, *Computer says no: data analytics in arbitration*, THOMSON REUTERS PRACTICAL LAW ARB. BLOG (Feb. 9, 2018), *available at* http://arbitrationblog.practicallaw.com/computer-says-no-data-analytics-in-arbitration/; *see also* Dispute Resolution Data, *available at* http://www.disputeresolutiondata.com/.

[11] Jnana Settle, *Predictive Analytics in the Legal Industry: 10 Companies to Know in 2018*, DISRUPTOR DAILY, *available at* https://www.disruptordaily.com/predictive-analytics-legal-industry-10-companies-know-2018/.

[12] Council of Europe, European Commisson for the Efficiency of Justice, Guidelines on how to drive change towards Cyberjustice (2017), at 51, *available at* https://edoc.coe.int/en/module/ec_addformat/download?cle=21e8cadba9839cd22bc295

III. THE USE OF PREDICTIVE JUSTICE TOOLS BY AN ARBITRATOR

There is a dual requirement for arbitrators to remain independent and impartial in international commercial arbitration.[13] This duty begins from his or her nomination and lasts throughout the entirety of an arbitral proceeding.[14]

Impartiality refers to the absence of bias,[15] while independence refers to an arbitrator's freedom to come to a decision on the subject matter without influence from any other party.[16] Deemed as a cornerstone of international commercial arbitration, impartiality and independence of decision-makers preserve public confidence in a fair outcome in proceedings.

The use of predictive justice tools, however, puts into question an arbitrator's ability to remain both impartial and independent. Take for example an arbitrator that uses a predictive justice tool to come to a decision in a proceeding. A predictive justice tool may find in favour of one party through analysing the outcomes of similar cases, or an arbitrator's own prior findings for specific cases. Should an arbitrator find similarly to the result chosen by the predictive justice tool used, it may implicate two inferences. First, an arbitrator may not be biased because his or her decision is supported by the outcome predicted by a tool designed to be objective. Even in this case, an arbitrator may still not fulfil the dual requirement of independence and impartiality as it may imply a lack of independence in coming to a decision assisted by a predictive justice tool. Second, and contrary to the first inference, an arbitrator may be biased because it may indicate an arbitrator's fixed disposition in the matter given his or her prior decisions in similar cases.

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[13] KRÖLL ET AL., *supra* note 1, at 11-5.

[14] *See* UNCITRAL Arbitration Rules (1976), arts. 11, 12.

[15] GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1776-1777 (2nd ed. 2014).

[16] JONAS VON GOELER, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 256 (2016).

On one hand, the use of predictive justice tools can provide greater transparency that commentators and scholars have long been encouraging.[17] This trend is evident from the 2014 overhaul of IBA Guidelines that is designed to be reflective of best practices given today's landscape. On the other hand, it's use may prevent the fulfilment of an arbitrator's duty to be independent and impartial.

There is no known international regulation governing the use of predictive tools by arbitrators, parties or third-party funders. The use of predictive tools, however, is emerging and establishing itself, especially in Europe. The Council of Europe comprising 47 countries are engaged in debates in the reform of the function of judicial systems through the use of predictive justice and artificial intelligence.[18]

As a logical consequence, the use of predictive tools will influence the already increasing number of challenges brought forward against arbitrators, the duty to make disclosures, and the duty to perform investigations in relation to potential or actual conflicts.

A. *Challenges to Arbitrators*

There are particular difficulties in challenging arbitrators. One of the most pressing difficulties is the standard to be used in determining the challenge and whether an arbitrator should recuse from or be disqualified from serving on an arbitral tribunal.

1. Lack of Independence

An arbitrator may be challenged on whether he or she has relationships that can affect his or her capacity as an arbitrator.[19] A reasonable standard test is used to assess an arbitrator's independence.[20]

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[17] *See, e.g.*, Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301 (2006).

[18] Stéphane Leyenberger, *Justice of the future: predictive justice and artificial intelligence*, 16 CEPEJ NEWSLETTER (2018), *available at* https://rm.coe.int/newsletter-no-16-august-2018-en-justice-of-the-future/16808d00c8.

[19] VON GOELER, *supra* note 16, at 253-255, 266-78.

[20] BORN, *supra* note 15, at 1762-1782.

2. Partiality

Partiality, on the other hand, requires a more subjective examination into an arbitrator's mind.[21] Jurisdictions around the world adopt different standards of bias in determining the challenge of an arbitrator.[22] A challenging party may prefer a challenge based on a standard that merely requires an *apprehension of bias* in order to preserve the integrity of the arbitral tribunal.[23] On the other hand, a non-challenging party may prefer a challenge to be decided on a standard for bias such as *a real possibility of bias* to give way to commercial reality.[24]

There are also examples of when a country applies differing standards of bias within its own jurisdictions. For example, the United States does not have a singular standard for partiality.[25] The Second Circuit requires *evident partiality*, whereas the Ninth Circuit adopted a lower threshold of an *impression of possible bias*.[26] In England and Australia, there has been a movement from applying the lower threshold of a *reasonable appearance of bias*, to the *real danger* or *real possibility of bias* in recent

[21] *Id.* at 1775-1776.

[22] *See generally* SAM LUTTRELL, BIAS CHALLENGES IN INTERNATIONAL ARBITRATION: THE NEED FOR A "REAL DANGER" TEST (2009).

[23] R v. Sussex Justices, Ex parte McCarthy, [1924] 1 KB 256, [1923] All ER Rep 233; IBA Guidelines, *supra* note 3, at Explanation to General Standard 2(b); *see also* Country X v. Co. Q, Challenge Decision of 11 January 1995, ICCA Yearbook Commercial Arbitration, Volume XXII (1997); Gallo v. Government of Canada, Permanent Court of Arbitration, Decision on the Challenge to Mr J Christopher Thomas QC, ¶ 19 (Oct. 14, 2009), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0352.pdf.

[24] ASM Shipping Ltd v. TTMI Ltd of England, [2006] 1 Lloyd's Rep 375; LCIA Court Decisions on Challenges to Arbitrators, Case Reference No UN3490, Oct. 21, 2005; A v. B & X [2011] EWHC (Comm) 2345.

[25] Gary Born, *The Different Meanings of an Arbitrator's "Evident Partiality" Under U.S. Law*, THOMSON REUTERS PRACTICAL LAW ARB. BLOG (Mar. 20, 2013), *available at* http://arbitrationblog.kluwerarbitration.com/2013/03/20/the-different-meanings -of-an-arbitrators-evident-partiality-under-u-s-law/.

[26] *See, e.g.*, Morelite Constr. Corp. v. N.Y.C. Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 82 (2d Cir. 1984); Schmitz v. Zilveti, 20 F.3d 1043, 1046 (9th Cir. 1994).

years.[27] Many arbitration laws and civil law jurisdictions apply a *justifiable doubts of bias* ('justifiable doubts') test.[28]

Notably, there is some blurring between the *real possibility of bias* test and the *justifiable doubts* test.[29] For example, the English arbitration legislation applies a *justifiable doubts* test, but the removal of an arbitrator is assessed based on the real possibility of bias.[30] Similarly, a leading UNCITRAL rules Challenge Decision that applies a justifiable doubts test still requires that doubts be so serious to warrant a removal of an arbitrator.[31] Another way of reconciling the two different standards in the context of the English arbitration legislation and the UNCITRAL rules is that a challenge to an arbitrator requires justifiable doubts but that removal requires a more serious threshold.

The different standards of bias reflect the tension between a party's right to appoint its own arbitrator, and the commercial reality of a small business community of arbitrators within it. This tension emphasises that there is a thin line between a party's rightful preference for an expert arbitrator and the preservation of the integrity of an arbitral tribunal. For example, a party may choose an expert of many years in the field that is in dispute to ensure that their side to the dispute is given adequate voice, and consideration by the tribunal.[32] According to a leading commentator, to require complete impartiality is to deny an arbitrator the benefit and insight of his or her experiences, as well as human decision-making.[33] The danger

[27] LUTTRELL, *supra* note 24, at 164-173.

[28] *See* Seung-Woon Lee, *Arbitrator's Evident Partiality: Current U.S. Standards and Possible Solutions Based on Comparative Reviews*, 9 ARB. L. REV. 159 (2017).

[29] BORN, *supra* note 15, at 1778; *see also* LCIA Challenge Decisions, *supra* note 23; KAREL DAELE, CHALLENGE AND DISQUALIFICATION OF ARBITRATORS IN INTERNATIONAL ARBITRATION 243 (2012).

[30] Arbitration Act 1996 (UK) c 23, s 24(1)(a).

[31] *Country X v. Co. Q*, *supra* note 22; DAVID CARON & LEE CAPLAN, THE UNCITRAL ARBITRATION RULES: A COMMENTARY 208 (2nd ed. 2013).

[32] James Crawford, *The Ideal Arbitrator: Does One Size Fit All*, 32 AM. U. INT'L L. REV. 1003 (2017); CARON ET AL., *supra* note 31 at 209.

[33] CATHERINE A. ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 313-315 (2014).

to an arbitrator, however, is exhibiting a predetermined view on the dispute without full consideration of its merits.

Gary Born has argued that there has been an increase in challenges since the IBA Guidelines were first adopted in 2004.[34] This finding provides a possible indication that challenges are increasingly being used as a tactic in international commercial arbitration, or that business environments are shifting in a way that significantly affects international commercial arbitration. It is also possible that these indications combined with the lack of consensus between arbitration users as to a prevailing standard of challenges is at the heart of the issue.

The rise of third-party funding is an example of a business environment shift in recent years that has had a profound effect on international commercial arbitration. It highlighted the lack of consensus on a prevailing standard of challenges, and renewed discussions on the possible use of challenges as an expensive delay tactic in arbitration.[35] While some sort of understanding has been achieved through the increasing preference for arbitrators and parties to make disclosures,[36] the business environment is once again shifting.

The emergence of predictive justice tools within the legal profession is another business environment shift that will undoubtedly affect international commercial arbitration. As exemplified earlier in this paper, the effect of the mere use of predictive justice tools puts into question an arbitrator's impartiality and independence even more directly than third-party funding. It is not far-fetched to conclude that an arbitrator's use of predictive justice tools can result in more challenges, thereby putting into question the trust placed by users of arbitration within the institution of arbitration itself.

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[34] BORN, *supra* note 15, at 1859.

[35] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2; *see also* CARON ET AL., *supra* note 31, at 271-272; BORN, *supra* note 15, at 1916; Mark Baker & Lucy Greenwood, *Are Challenges Overused in International Arbitration?*, 13 J. INT'L ARB. 101-102 (2013).

[36] ICCA-Queen Mary Report on Third-Party Funding, *supra* note 2; IBA Guidelines, *supra* note 3.

Loomis v. Wisconsin[37] highlights the possible impact of using a predictive justice tool on a party's right to due process and a fair proceeding. Although this case originated in a criminal law context, the concept of fairness is inherently entrenched in all legal proceedings. As a result, it confers inferences as to how predictive justice tools can affect international commercial arbitration.

In *Loomis*, the applicant sought to have the Wisconsin Supreme Court ruling in *State v. Loomis* to be overturned on the basis of a breach of due process. A risk-assessment software was used by a judge who cited the software's finding in sentencing. The court noted that proper use of the assessment does not violate due process.[38] The United States Supreme Court declined to hear the petition.[39]

At first glance, the use of a predictive justice tool in *State v. Loomis* raises questions as to a decision-maker's independence. Did the court employ its own legal expertise in coming to the decision or did it rely on more than its own expertise? As mentioned earlier in this paper, an objective test is applied in determining whether an arbitrator is lacking independence in international commercial arbitration.[40] With the use of predictive justice tools there may be cases, however, where an arbitrator's intention in using predictive tools will be relevant, and a subjective inquiry into the mind of an arbitrator may be required. The timing of use may also be a factor to consider.

There may be arbitrators that use predictive justice tools out of mere curiosity but using predictive justice tools before coming to a decision may bring to question an arbitrator's impartiality and independence. There may also be arbitrators that use predictive justice tools to strengthen the conclusion they have come to, but if the predictive justice tool produces a different outcome than what an arbitrator originally determined, an arbitrator's impartiality and independence may still be open to

[37] Loomis v. Wisconsin, U.S. Supreme Court, Case No. 2015AP157-CR (2017), *available at* https://www.supremecourt.gov/docketfiles/16-6387.htm.

[38] *State of Wisconsin v. Loomis*, *supra* note 8.

[39] *Loomis*, *supra* note 38.

[40] BORN, *supra* note 15, at 1775-1777.

challenge. Finally, there can be arbitrators like the decision-maker in *State v. Loomis* who use predictive justice tools to come to a decision. As an arbitrator's degree of dependence on using a predictive justice tool in coming to a decision increases, the more likely he or she will be challenged.

B. *What is an Arbitrator's Duty to Make Disclosures?*

The duty of arbitrators to disclose circumstances that may give rise to doubts as to his or her impartiality and independence underpins the requirement of arbitrators to remain impartial and independent.[41]

Disclosure is a requirement whenever circumstances may give rise to doubts as to an arbitrator's impartiality or independence.[42] It enables parties to challenge arbitrators to preserve the integrity of an arbitral tribunal should there be any circumstances that will put into question an arbitrator's impartiality or independence.

C. *Does an Arbitrator have a Duty to Investigate Conflicts?*

Just as disclosure is inherently linked to a challenge of an arbitrator, investigations are linked to making the necessary disclosures relating to actual or potential conflicts to an arbitrator's impartiality or independence.

While there have been cases where an arbitrator's failure to investigate conflicts has not given rise to a successful challenge,[43] there is now an internationally accepted recommendation that an arbitrator need to at least turn his or her mind to a conflict.[44] According to the IBA Guidelines, the failure to investigate conflicts is not a

[41] DAELE, *supra* note 29, at 54; Cour d'Appel de Paris [Paris Court of Appeal], Apr. 12, 2016, JP & Avax v. Tecnimont; Burcu Osmanoğlu, *Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest*, 32(3) KLUWER L. INT'L 325 (2015).

[42] *See e.g.*, UNCITRAL Model Law on International Commercial Arbitration with the 2006 amendments, art. 11.

[43] ConocoPhillips Co. et al. v. Bolivarian Republis of Venezuela, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify L. Yves Fortier, Q.C., Arbitrator (Feb. 27, 2012); s*ee also* IBA Guidelines, *supra* note 3.

[44] *See JP & Avax v. Tecnimont*, *supra* note 42; *see also* IBA Guidelines, *supra* note 3, at General Standard 7(d).

determinative factor in removing an arbitrator, but it is a factor to consider in a challenge. From a practical standpoint, however, a failure to investigate can lead to a failure to make proper and necessary disclosures that can ultimately result in the disqualification of an arbitrator.[45]

1. How far does a duty to investigate conflicts extend?

Regarding the use of predictive justice tools, a question then arises as to whether an arbitrator has a duty to investigate the use of predictive justice tools by his or her nominating party, and any third-party funder involved with his or her nominating party.

The IBA Guidelines does not excuse the lack of knowledge of an arbitrator in relation to potential or actual conflicts.[46] Inquiries made by an arbitrator, however, is confined within reasonableness,[47] as it is accepted that an arbitrator's perspective has limitations.[48] It becomes increasingly difficult in a scenario where an arbitrator turns his or her mind to the possible conflict of an involved third-party funder's use of predictive justice tools as third-party funding details are inherently confidential. An arbitrator who prudently makes inquiries may therefore not necessarily become privy to the use of predictive justice tools by his or her nominating party or any third-party funder that is involved.

Should an arbitrator obtain information as to the use of predictive justice tools by his or her nominating party or an involved third-party funder, disclosures are not necessarily required. Take for example an arbitrator who has knowledge about the use of a predictive tool by his or her nominating party. This does not automatically place doubts as to the arbitrator's impartiality or independence, unless the arbitrator also has knowledge of the determination put forward by any predictive justice tool utilised. If an arbitrator was to make an investigation only on the use of predictive

[45] *See JP & Avax v. Tecnimont*, *supra* note 42.

[46] IBA Guidelines, *supra* note 3, at General Standard 7(d).

[47] KRÖLL ET AL, *supra* note 1, at 268.

[48] VON GOELER, supra note 16, at 5.

justice tools but not on the outcome produced by such tools, an arbitrator may not need to make a disclosure. An arbitrator, however, may still invite a challenge by shutting his or her eyes as to the possible conflict arising from the determination of predictive justice tools.[49] This places an arbitrator in a lose-lose situation in which doubts may emerge whether present disclosure and investigation requirements are fulfilled or not.

IV. THE USE OF PREDICTIVE TOOLS BY PARTIES AND THIRD-PARTY FUNDERS

As far as this author is aware, there is currently no obligation on third-party funders to disclose how they conduct their business even if it can directly or indirectly result in doubts as to an arbitrator's impartiality or independence.

There is, however, a recommendation for a nominating party to inform an arbitrator, the arbitral tribunal and other parties and arbitration institutions of relationships that may result in conflict.[50] In addition, leading seats of arbitration such as Singapore and Hong Kong have incorporated disclosure obligations in their respective legislation or professional conduct rules, affirming the international preference for disclosure.[51] Notably, the Legal Profession (Professional Conduct) Rules 2017 requires lawyers involved in the relevant proceeding to disclose the existence of funding arrangements, while the Hong Kong Arbitration Ordinance requires parties to make disclosures. These regulations do not, however, extend to the use of predictive justice tools, and instead refer to relationships or otherwise focus on funding arrangements. It appears, therefore, that there is no requirement or recommendation to disclose an emerging use of predictive justice tools that, concerningly, can impact an arbitrator's duty to remain impartial and independent more directly than third-party funding could.

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[49] STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 50 (2012).

[50] IBA Guidelines, *supra* note 3, at General Standards 7(a), 7(b).

[51] Singapore Legal Profession Rules, *supra* note 4; Hong Kong Arbitration Ordinance, *supra* note 4.

Pursuant to a recommended wide-reading of the IBA Guidelines,[52] if the term "relationships" can somehow encompass a licensing agreement or any other agreement that allows a party the use of predictive justice tools, then parties' use or knowledge of use may fall under the ambits of the current disclosure framework. The expansion of the term "relationship," in the IBA Guidelines however, may still be inadequate to provide a guidance in the use of predictive justice tools because "relationships" typically refer to connections between one legal person to another, or other business entities.[53]

A. *Predictive Justice Tools and its Impact on Disclosure Obligations*

As a result of technology pinpointing the most appropriate decision-maker to preside over an arbitration as a result of relevant historical awards made,[54] international commercial arbitration may witness an increase in repeat appointments.

Repeat appointments may be rendered an issue because a challenging party "may be concerned about the real motives behind the repetition."[55] On the other hand, repeat appointments are usually a result of an arbitrator's qualities and experience in the field that makes an arbitrator desirable without giving rise to dependence or partiality.[56] Repeat appointments are ideally assessed on a two-tiered basis.[57] Firstly, quantitatively through the number of appointments made within a specific period of time, and secondly, qualitatively through the factors that led to the repeat appointments.

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[52] IBA Guidelines, *supra* note 3, at General Standards 19, 20.

[53] *See* BORN, *supra* note 15 at 1767-1776, 1834-1850.

[54] *See* SETTLE, *supra* note 11.

[55] ALFONSO GOMEZ-ACEBO, PARTY-APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION 114, 5-44 (2016).

[56] BORN, *supra* note 15, at 1882.

[57] JAN PAULSSON & GEORGIOS PETROCHILOS, UNCITRAL ARBITRATION 80 (2017); Will Sheng & Wilson Koh, *Think Quality and Not Quantity: Repeat Appointments and Arbitrator Challenges*, 34(4) J. INT'L ARB. 711 (2017). *See also* Cofely Ltd. v. Anthony Bingham & Knowles Ltd [2016] EWHC 240.

The IBA Guidelines propose that a quantitative approach does not necessarily result in disqualification, but is still assessed on a case-by-case basis.[58] There are a number of cases that are able to assist in determining a quantitative threshold, but such thresholds remain different from one case to another.[59] Some can be distinguished on available facts,[60] but with others, only excerpts are available from otherwise confidential proceedings.[61]

Repeat appointments were at issue in the case of *CC/Devas v. India.*[62] The challenged arbitrator was recused because the arbitrator cited his own previous standing in cases he has sat in as the president of those arbitral tribunals. The use of predictive justice tools that specialise in pinpointing the most appropriate arbitrator based on an arbitrator's historical findings in similar cases can therefore prove problematic. The distinguishing difference between an arbitrator who cites his or her own standing in previous cases and a predictive justice tool is that in the former, an arbitrator expressly confirms the previous standing. Is there, however, a material difference between the two?

Before the advent of predictive justice tools, parties were able to choose the most suitable arbitrator through previous dealings with that arbitrator, or through word of mouth in the business community that arbitrators operate in.[63] After all, the freedom of parties to select their own arbitrator is seen as one of the greatest strengths of arbitration.[64] This manual determination of an appropriate arbitrator may not be any

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[58] IBA Guidelines, *supra* note 3, at General Standards 19, 6.

[59] BORN, *supra* note 15, at 1881-1882.

[60] CC Devas (Mauritius) Ltd., Devas Employees Mauritius Private Ltd. & Telecom Devas Mauritius Ltd. v. The Republic of India, Permanent Court of Arbitration, Decision on the Respondent's Challenge to the Hon. Marc Lalonde and Prof. Francisco Orrego Vicuña, ¶¶ 21, 36, 38, 45, 56, 61 (Sept. 30, 2013), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf.

[61] BORN, *supra* note 15, at 1881-1882.

[62] *CC/Devas v. India*, *supra* note 61.

[63] UGO DRAETTA, BEHIND THE SCENES IN INTERNATIONAL ARBITRATION 103 (2011).

[64] ROGERS, *supra* note 33, at 323.

different to what a predictive justice tool may conclude. The use of predictive justice tools, just as similarly as an arbitrator that cites his or her previous standing, however, can be an irrefutable indication of partiality that causes tension with fairness in arbitration. In international commercial arbitration, it is accepted that justice must not only be done, but also seen to be done.[65]

The use of predictive justice tools should not be disregarded as it can be beneficial in encouraging transparency within international commercial arbitration. There is presently no prevailing standard in deciding on the recusal of arbitrators, and data analytics may bring the community of international commercial arbitration closer to determining a more unified standard. It may also have the consequential benefit of widening the pool of arbitrators that has traditionally been considered as small.

V. THE NEED FOR REGULATION ON THE USE OF PREDICTIVE JUSTICE TOOLS

In December 2018, the Council of Europe adopted the first European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems ("Ethical Charter").[66] The primary aim of the Ethical Charter is to improve the efficiency and quality of the judicial system while respecting fundamental individual rights, including ensuring impartiality.[67]

The balance that the Ethical Charter tries to strike within national judicial processes should also be adopted within the use of predictive justice tools in international commercial arbitration. While it is important to discuss the impact that predictive justice tools can have on international commercial arbitration, it is just as crucial to examine the present capabilities of such technology to determine the extent of regulation necessary to prevent hindrances to commercial reality.

A. *Predictive Justice Tools Have no Added Effect into Decision-Making*

[65] *Sussex*, supra note 22, at 259.

[66] Council of Europe, European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems (2018), *available at* https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c.

[67] *Id.* at 9.

The French Ministry of Justice deployed test projects to determine whether technology by a French start-up, Predictice, could benefit the courts.[68] Predictice uses data analytics to assess historical litigation data in order to provide predictive insight in current cases. The French State's magistrates, however, found that the software did not presently provide additional value to their decision-making capabilities.

In relation to an arbitrator's impartiality and independence, the case study conducted by the French Ministry of Justice is evidence that the use of predictive justice tools does not necessarily materially affect decision-making in the present. As a result, the use of predictive justice tools should not automatically result in doubts as to an arbitrator's impartiality or independence. Predictice, however, is one technology out of the many that is undergoing continuous development. The finding of the French Ministry of Justice portrays the need to scrutinise not only the intention behind the use of a predictive technology and the timing of the use of such technology, but also the aims of the technology that has been used.

B. *Predictive Justice Tools Carry Forward Bias*

It has been contended that nominated arbitrators can act as legal translators, sympathetic to the arguments of his or her nominating party,[69] and that they are not expected to be completely impartial.[70] Even if this kind of flexibility on impartiality is permitted to honour the parties' right to select their own arbitrator, there are notable issues that can be addressed. For example, the lack of gender diversity in international commercial arbitration. Assessing historical data through predictive justice tools may carry forward the permitted impartiality of arbitrators, albeit to the

[68] *French Magistrates See 'No Additional Value' in Predictive Legal AI*, ARTIFICIAL LAWYER, Oct. 13, 2017, *available at* https://www.artificiallawyer.com/2017/10/13/french-justice-ministry-sees-no-additional-value-in-predictive-legal-ai/.

[69] CRAWFORD, *supra* note 32, at 1003.

[70] ROGERS, *supra* note 33, at 323.

exclusion of a wider perspective brought about by gender diversity that is currently lacking in international commercial arbitration.[71]

Ultimately, and in reference to the earlier discussion on repeat appointments, predictive justice tools may provide clarity as to when repeat appointments breach an arbitrator's duty to remain impartial and independent. As a result, it may encourage more gender-diverse appointments that will lengthen the current short-list of expert arbitrators available to arbitration users.

C. *The Present Legal Environment*

The Ethical Charter that has recently been adopted is a useful and necessary reminder of the importance of using such technology to encourage efficiency and transparency while upholding impartiality and fairness.

Existing frameworks within international commercial arbitration that attempt to address conflicts to an arbitrator's impartiality and independence, or on the use of predictive justice tools in the legal profession are, however, presently inadequate in light of emerging technologies. As predictive justice tools continue to develop, and as the international commercial arbitration community increasingly adopts such technology, clearer standards are required on its use by arbitrators, parties and any involved third-party funders.

Predictive justice tools are not created equal. Some are created to assist, and some are created to confer judgments just like human decision-makers do but faster. The development of regulations should consider an overhaul of (1) the method by which independence is assessed and (2) disclosure obligations for both arbitrators and parties.

1. The Method by which Independence is Assessed

The present method of assessing independence through relationships require expansion into all external influences to an arbitrator. With the emergence of

[71] F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish Than First Thought*, 15(3) DISPUTE RESOLUTION MAGAZINE 14 (2009); F. Peter Phillips, *It Remains a White Male Game*, Intenational Inst. for Conflict Prevention & Resolution, Nov. 27, 2006, *available at* http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/90/categoryId/86/It-RemainsA-White-Male-Game-NLJ.aspx.

predictive justice tools, factors that can influence an arbitrator's decision-making now extend beyond traditional relationships with legal persons and other business entities.

Now that law firms are beginning to develop their own technology,[72] a wider-reading of "relationships" pursuant to the IBA Guidelines would be inadequate. The technology would remain in-house with no relationship to refer to. A possible solution is to refer to "connections" instead of "relationships" as it can encompass a broader definition that includes a connection or a link between a user and the technology through the act of using predictive justice tools.

The present objective assessment of independence may become more akin to the way impartiality is assessed. While impartiality is assessed subjectively by peering into the mind of an arbitrator, it is also examined objectively based on observable indications of partiality.[73]

The type of predictive justice tool and its intended legal solution, together with the arbitrator's intention of using such technology and the timing of use of that technology, are factors that will require consideration. This proposed assessment extends beyond looking at factual connections and delves into a subjective assessment into the mind of an arbitrator through observable indications of a connection through the usage of predictive justice tools. Notably, this is similar to the way impartiality is now assessed.

Although the distinction between impartiality and independence has been given weight,[74] the advent of predictive justice tools and its impact may result in a standard assessment that involves both subjective and objective elements.

2. Disclosure Obligations for both Arbitrators and Parties

Arbitrators may face a lose-lose situation where they may be found in conflict by having knowledge of the determinisation of a predictive justice tool on the outcome

[72] Reena Sengupta, *Lawyers are finally converts to technology*, THE FINANCIAL TIMES, Oct. 6, 2016, *available at* https://www.ft.com/content/c00f6598-83f3-11e6-8897-2359a58ac7a5.

[73] BORN, *supra* note 15, at 1776-1777.

[74] *Id.*

of a proceeding they are involved in, or by investigating a nominating party's use of predictive justice tools but not the outcome determined by the technology.

Rogers argues, however, that more transparency in arbitration through disclosures may result in an initial increase in challenges followed eventually by a decrease in challenges as standards of recusing arbitrators become clearer.[75] While challenges can delay arbitral proceedings and impose unnecessary costs,[76] delay is not seen as an insurmountable barrier in upholding an impartial and independent tribunal.[77] In encouraging disclosures, the expansion of "independence" to "connections" that can encompass the use of predictive justice tools is also beneficial to disclosure standards that presently refer to "relationships."[78] Nevertheless, the quickly evolving nature of technology may require new standards each time it progresses, creating the possibility of a constant stream of challenges that address the evolving functionality of predictive justice tools.

VI. CONCLUSION

As technology progresses and entrenches itself in international commercial arbitration, the current frameworks that uphold procedural fairness need to correspondingly develop. To maintain existing frameworks as they are presently is to invite a new grey area for arbitrators and parties as to the extent of investigation and disclosure necessary in order to fulfil their duties.

The international commercial arbitration community is likely to benefit from first standardising thresholds in the challenge of arbitrators to prepare itself for potential changes in the way an arbitrator's impartiality and independence is assessed. These potential changes may also lead to another standardisation by harmonising the tests that evaluate an arbitrator's impartiality and independence.

As the new Ethical Charter emphasises, the adoption of legal technology is to ultimately encourage efficiency and transparency while maintaining impartiality and

[75] *See* ROGERS, *supra* note 17.

[76] BORN, *supra* note 15, at 1916.

[77] KRÖLL ET AL., *supra* note 1, at 10-52.

[78] *See, e.g.*, IBA Guidelines, *supra* note 3.

fairness in decision-making. Embracing predictive justice tools may just provide a prevailing standard in challenges to an arbitrator's impartiality and independence, and perhaps even encourage a more diverse pool of arbitrators that will contribute a wider perspective to the community of international commercial arbitration.

SHERVIE MARAMOT attended Monash University in Melbourne, Australia where she received her Bachelor of Laws (with Honours) and Bachelor of Commerce (Finance) in 2018. Her graduate career is focused on the extended enterprise of organisations, and the Australian energy sector's regulation and compliance at Deloitte Australia. Shervie has a keen interest in the intersection between technology and the law, which stems from her background in technology consulting and participation in international competitions such as the 2018 Willem C. Vis International Commercial Arbitration Moot and the 2019 ICC International Commercial Mediation Competition.

BACK TO THE FUTURE?
INVESTMENT PROTECTION AT A TIME OF UNCERTAINTY

by D. Brian King & Jue (Allie) Bian

I. INTRODUCTION

With the rapid growth of foreign investment around the globe, the issue of investment dispute settlement has gained prominence in the minds of investors and the legal community alike. Among the different mechanisms currently available, investment arbitration under bilateral and multilateral investment treaties has become, and has remained, the option most frequently pursued by investors.

Recent developments have, however, raised concerns over the ongoing availability and reliability of the investment arbitration regime. Against that background, this paper considers what other investment protection options could be available in a world in which investment treaty protection is constrained or uncertain. As suggested below, part of the answer may lie in the past—that is, in the investment protection strategies, typically involving commercial arbitration, which investors used in the age before investment arbitration achieved its current prominence. After summarizing the current challenges to the existing regime, this paper surveys some of those strategies and assesses their ongoing utility.

II. PROBLEM: THE UNCERTAIN FUTURE OF INVESTMENT TREATY ARBITRATION

Investment treaty arbitration, which allows investors to bring claims directly against the host state before an international arbitration tribunal, has seen tremendous growth over the past two decades.[1] It has served not only as a valuable avenue of recourse for investors facing existing disputes, but also as a source of comfort for companies planning future investments. Many investors now choose to structure their investments through countries that have favorable investment

[1] The number of new cases registered at ICSID increased from 11 in 1998, to 21 in 2008, and to 56 in 2018. *See ICSID Caseload – Statistics (Issue 2019-1)* (Int'l Ctr. for Settlement of Inv. Disputes, Wash., D.C.), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

treaties with the host state of the investment. Such structuring has proven so useful in practice that, anecdotal evidence suggests, it is employed nearly universally by sophisticated foreign investors.

Recently, however, a confluence of factors has raised concerns over the future reliability of the investment treaty regime.

- *First,* a number of frequently-named respondent states have either unilaterally withdrawn from their existing bilateral investment treaties ("BITs") or refused to renew expiring treaties.[2] Some have also denounced the Convention on the Settlement of Disputes between States and Nationals of Other States (the "ICSID Convention").[3]
- *Second*, certain traditionally pro-investor states have shown signs of cabining investment treaty protections. This is reflected, for example, in the new model BIT promulgated by The Netherlands in 2018.[4] Compared with the earlier

[2] For example, Ecuador denounced ten of its BITs between 2008 and 2010, and then the remaining 16 in 2017. *See* Int'l Inst. for Sustainable Development, *Ecuador Denounces its Remaining 16 BITs and Publishes CAITISA Audit Report*, INV. TREATY NEWS, June 2017, at 18, https://www.iisd.org/sites/default/files/publications/iisd-itn-june-2017-english.pdf. Meanwhile, Bolivia allowed eight of its BITs to expire, and then collectively denounced the remaining 13. *See* Aldo Orellana López, *Bolivia Denounces its Bilateral Investment Treaties and Attempts to Put an End to the Power of Corporations to Sue the Country in International Tribunals*, ALAINET.ORG (Apr. 7, 2014), *available at* https://www.alainet.org/en/active/75151. In South Africa, the South African Department of Trade and Industry decided, after a review of its existing BIT policies, to terminate its first-generation BITs and to refrain from entering into BITs in the future unless there were compelling economic and political reasons to do so. *See* Dep't of Trade and Industry, *Update on the Review of Bilateral Investment Treaties in South Africa*, *available at* www.thedti.gov.za (Feb. 15, 2013), *available at* https://www.thedti.gov.za/parliament/2013 /bit's_in_sa.pdf. India, meanwhile, has terminated 76 of its BITs between 2016 and 2019. *See* DEP'T. OF ECON. AFFAIRS OF INDIA, *Bilateral Investment Treaties (BITs)/Agreements*, *available at* https://dea.gov.in/bipa.

[3] Bolivia withdrew from the ICSID Convention in 2007, followed by Ecuador in 2009, and then Venezuela in 2012. INT'L CTR. FOR SETTLEMENT OF INV. DISP., LIST OF CONTRACTING STATES AND OTHER SIGNATORIES OF THE CONVENTION (as of Apr. 12, 2019) at 5, https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

[4] The Netherlands Model Investment Agreement, Oct. 26, 2018, https://globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf.

(2004) version, the 2018 Dutch model BIT provides a narrower definition of qualifying "investors"—apparently in an effort to require investors to maintain more substantial connections with the Netherlands—as well as reduced substantive protections.[5]

- *Third*, a number of states and regions are shifting away from the traditional investor-state dispute settlement ("ISDS") model and experimenting with alternative mechanisms. In response to the *Achmea* decision,[6] all 28 European Union (EU) Member States recently resolved to terminate their intra-EU BITs by December 6, 2019.[7] Separately, the EU Council has instructed the Commission to open negotiations for the establishment of a multilateral investment court, on which all or most of the judges would likely be appointed by the Member States, to replace current ISDS mechanisms.[8] Meanwhile, the

[5] For example, limitations have been imposed on the national treatment and most-favored-nation provisions, and the scope of the umbrella clause has also been narrowed. *See id.* at arts. 1(a), 1(b)(ii), 8.3, 9.5.

[6] Case C-284/16, Slovak Republic v. Achmea BV, EU:C:2018:158, *available at* http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=3287046.

[7] Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgement of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 15, 2019), *available at* https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

[8] *See* Press Release, *Multilateral Investment Court: Council Gives Mandate to the Commission to Open Negotiations* (Mar. 20, 2018), EUROPEAN COMMISSION, *available at* https://www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations; *see also* Eur. Council Doc. 12981/17 ADD 1 on the Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes (Mar. 20, 2018), *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf. The new Comprehensive and Economic Trade Agreement ("CETA") between Canada and the European Union likewise provides for an investment court system. *See* Comprehensive and Economic Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, Oct. 30, 2016, art. 8.29, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22017A0114(01)&from=EN.

> reincarnation of NAFTA—the US-Mexico-Canada Agreement—does not provide for ISDS between the United States (US) and Canada, while the claims that US and Mexican parties can raise against the Mexican and US governments, respectively, have been limited in scope.[9]

Given the unsettled future of investment treaty arbitration, investors are wise to consider alternative dispute settlement options, and to plan their investments accordingly from the outset. As discussed below, this would likely include greater incorporation of contractual protections, with commercial arbitration as the dispute resolution backstop. At the same time, states are well-advised to consider the alternatives that investors may pursue, or structure investment contracts to pursue, in formulating their own policies on foreign direct investment.

III. LESSONS FROM THE PAST: THE AIR FRANCE CASE AND THE BÖCKSTIEGEL GUIDELINES

A useful way to conceptualize the alternatives to ISDS is to look back at the past, and to consider the legal strategies that investors employed before the contemporary form of ISDS existed. In that period, there were few or no bilateral or multilateral investment treaties that could offer substantive protections for investments and give rise to direct causes of action against states. Instead, the available legal instrument was the investment contract itself, and the available dispute resolution option was commercial arbitration.[10] This created obstacles to achieving effective relief from adverse state action, and legal doctrines developed to address those challenges.

A. *The Challenges*

[9] *See* Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between; *see also* Public Citizen-Global Trade Watch, *NAFTA 2.0 and Investor-State Dispute Settlement (ISDS): U.S.-Canada ISDS Is Terminated, Expansive Investor Rights Eliminated and New Review Procedures Mostly Replace ISDS between US and Mexico*, https://www.citizen.org/sites/default/files/nafta-2.0-and-isds-analysis.pdf.

[10] Theoretically, investors could also bring claims in the domestic courts of the host state. However, due to concerns about the potential lack of impartiality, transparency, and delay, domestic litigation is often avoided by foreign investors. *See*, *e.g.*, Gas Natural SDG, S.A. v. Argentine Republic, ICSID Case No. ARB/03/10, Decision on Jurisdiction, ¶ 29 (June 17, 2005).

The unique characteristics of investment contracts provide the background for the analysis. Investment contracts are typically entered into by a private investor and a public entity, which is sometimes the state itself, but is often a separate state-owned legal entity (such as a national oil company). When a state or state-owned entity concludes an investment contract, it assumes the role of a private contracting party and agrees to abide by the terms of the contract. However, because the state retains its status as a sovereign, it could potentially abuse its sovereign powers to interfere with or undermine the investment contract. For example, the state could change its laws in a manner that negatively impacts the economics of the investment; or it could unilaterally modify, cancel, or expropriate the contract. The 2007 nationalizations in the oil sector in Venezuela provide a recent example of sovereign powers being used in precisely these ways.[11]

Meanwhile, where the investment contract is concluded with a state-owned entity and not the state itself, the state-owned entity may be in a unique position to influence state actions in its favor, while using its separate legal personality from the state as a shield. When the state takes action against the investor, such as enacting an adverse piece of legislation, the state-owned entity can argue that the state action is an external event that constitutes *force majeure*, or otherwise precludes liability on the state-owned company's part for any resulting breach or non-performance of the investment contact. Although this might sometimes be an accurate description of the factual situation, there is always a risk that it is merely a pretext to avoid liability that should rightfully lie with the state-owned entity.

In short, as has been well-explained elsewhere,[12] investment contracts differ from ordinary private contracts due to the sovereign capacity of the state, and the separate legal personalities of the state and state-owned entities. Thus, any meaningful

[11] *See, e.g.*, Reuters, *Factbox: Venezuela's nationalizations under Chavez* (Oct. 7, 2012), https://www.reuters.com/article/us-venezuela-election-nationalizations/factbox-venezuelas-nationalizations-under-chavez-idUSBRE89701X20121008.

[12] *See* Charles N. Brower & Shashank P. Kumar, *Investomercial Arbitration: Whence Cometh It? What Is It? Whither Goeth It?*, 30 ICSID REV. 35 (2015).

substitute for ISDS should be able to accommodate these unique features of investment contracts and the disputes that may arise under them.

B. *Legal Doctrines to Address the Challenges*

In the pre-ISDS period, national court judges and arbitral tribunals developed legal doctrines to address the unique circumstances of disputes under contracts involving a state or its progeny. As early as 1970, the French *Cour de Cassation* weighed in on the issue in an instructive way, albeit in the context of a domestic dispute. The case was the much-discussed *Air France* decision.[13]

The *Air France* case involved a dispute under a collective bargaining agreement between Air France—at that point in time, still 70% owned by the state—and its flight personnel. In brief, the agreement required Air France to extend to its flight personnel any financial advantages accorded to ground personnel. In 1963, the governmental authority regulating Air France declined to permit the airline to make certain payments that its flight personnel had claimed under this arrangement. The French courts overturned that regulatory decision five years later; Air France proceeded to pay the principal amount that had been withheld from its flight personnel but refused to pay interest on it. Air France's defense to the interest claim was *force majeure*, as defined in a section of the French Civil Code which provided that a party's non-performance is excused where it is due to "an external cause which cannot be attributed to [that party]."[14] The government had forbidden it from paying the principal amount at the time it was due, Air France argued, and therefore it should not be liable to pay interest.

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[13] Cour de Cassation [Cass.][Supreme Court], Apr. 15, 1970, Decision No. 69-40253, 249 Bull. des arrêts Cour de Cassation Chambre sociale 199 (Fr.) [hereinafter "*Air France Decision*"]; *see also* Conclusions by *Avocat Général* on the Cour de Cassation [Cass.][Supreme Court], Apr. 15, 1970, Decision No. 69-40253, Recueil Dalloz, *Jurisprudence* (1971) (Fr.) [hereinafter "*Air France Mellottée Conclusions*"].

[14] *See Air France Decision*, *supra* note 14, at 2 (referencing French Civil Code art. 1147, which provided: "A debtor shall be ordered to pay damages, if there is occasion, either by reason of the non-performance of the obligation, or by reason of delay in performing, whenever he does not prove that the non-performance comes from an external cause which may not be ascribed to him, although there is no bad faith on his part."). *See* C. CIV., art. 1147 (Fr.)(1970).

Following the recommendation of the *Avocat Général*, the *Cour de Cassation* rejected Air France's *force majeure* defense on the ground that the decision taken by the regulatory authority was not external to the company.[15] In considering whether the governmental act was imputable to Air France, the *Avocat Général* had noted that: nearly 70% of Air France's capital was owned by the government; half of the members of its board of directors were government officials or persons nominated by them; the company's financial management was strictly controlled by the government; and the remuneration paid to its employees was subject to prior approval by the government.[16] Thus, according to the *Avocat Général* (whose position the *Cour de Cassation* accepted):

> In view of the foregoing, it is extremely shocking that *Air France*, a private law entity, hides behind Air France, a public law entity, to avoid complying with its contractual obligations and therefore escape the consequences of a delay inherently related with the functioning of its bylaws. If this position were admitted, it would become too easy for [public] companies to rid themselves of their obligations. It would be sufficient for them to cause a withdrawal of authorization and afterwards claim *factum principis*. There would no longer be any balance or security in terms of legal relations . . . . [T]he intervention of the public authority, which is organically related with the normal operation of the company, does not represent an external cause which can be held against third parties and contracting parties.[17]

The US Supreme Court addressed an analogous issue, in the international context, in the case of *First National City Bank v. Banco para el Comercio Exterior de Cuba.*[18] The question in that case was whether the *Banco para el Comercio Exterior de Cuba* [Foreign Trade Bank of Cuba] ("BANCEC") could, based on its separate legal

[15] *Air France Decision*, *supra* note 14, at 2 ("[T]he subsequent irregular intervention of this authority in an attempt, as such, to hinder the performance of the obligations stipulated in such a manner cannot be opposed by the debtor subject to such regulation as an unforeseeable and insurmountable act of a third party external to it.").

[16] *Air France Mellottée Conclusions*, *supra* note 14, at 109.

[17] *Id.*

[18] First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611 (1983); *but see* Rubin v. Iran, 138 S. Ct. 816, 818 (2018).

personality from the state, avoid a set-off claim based upon the Cuban government's expropriation of First National's assets. The Supreme Court held that the claim could be asserted against BANCEC in circumstances where: it was wholly-owned by the Cuban state; the corporate purpose of BANCEC was to support the international trade policy of the Cuban government; the government received all of BANCEC's profits; and Ernesto "Che" Guevara was simultaneously the President of BANCEC and the Cuban Minister of State.[19] In essence, the Supreme Court upheld a veil-piercing claim in order to prevent the state-owned entity from shielding itself from liability for a closely related act of the state.

Arbitral tribunals in the pre-ISDS era showed themselves willing to adopt similar solutions. Thus, in some cases where state-owned entities invoked *force majeure* or related defenses to contractual breach based on an act of state, tribunals rejected those defenses and held the state-owned entity liable.[20]

Drawing on prior jurisprudence and scholarship, Professor Karl-Heinz Böckstiegel, one of the leading commentators on the status of state-owned entities in international arbitration, put forward a proposed analytical framework in a seminal publication in 1984.[21] Among other issues, he examined the question of when an act of state could be considered as a *force majeure* event that excuses a state-owned entity's breach of an investment contract. Approaching the question as "a matter of proof and presumption,"[22] the Böckstiegel Guidelines address two issues—administrative acts of states, and legislative acts—as potential *force majeure* circumstances, and provide as follows:

> A. *Acts of state in the form of administrative acts*
> 1. Due to the presumption that a state will not have its executive organs act to the detriment of its own foreign trade organs, including state enterprises, administrative acts of state

[19] First Nat'l City Bank, 462 U.S. at 614.

[20] KARL-HEINZ BÖCKSTIEGEL, ARBITRATION AND STATE ENTERPRISES: SURVEY ON THE NATIONAL AND INTERNATIONAL STATE OF LAW AND PRACTICE 47 (1984); *see also id.* at n.67 (citing examples in arbitral practice).

[21] *Id.* at 46-48.

[22] *Id.* at 47.

> should in principle not be considered as *force majeure*.
> 2. This presumption is not applied, however, if it can be seen *prima facie* or can be proved by the state enterprise that the administrative act was caused by general considerations not connected with this contract or this sort of contract.
> 3. In spite of rule 2 the presumption under 1 is applicable again, if the private party proves that in its specific case the general considerations did not apply.[23]
> *B. Acts of state in the form of law*
> 1. If it is not a general law but a law for an individual case, the same rules apply as under A.
> 2. A general law, due to its *per definitionem* general character, will in principle have to be recognized as *force majeure*.
> 3. Rule B2 does not apply, however, if the private enterprise supplies at least *prima facie* evidence that it was in the interest of the state not to fulfil its contractual obligations which was the motivation of the law.[24]

The analysis under the Böckstiegel Guidelines is thus the following: where an administrative act of state is invoked by a state-owned entity, the *force majeure* defense is presumptively unavailable, subject to proof by the state entity that the administrative act was unconnected with the contract at issue (i.e., that it had a general motivation). However, when the governmental measure invoked is a general act of the legislature, the *force majeure* defense is presumptively available, unless the claimant can provide evidence suggesting that the measure was motivated by the wish to avoid the contractual obligation at issue.

[23] *Id.*

[24] *Id.* at 48.

The Böckstiegel Guidelines received considerable approval in subsequent literature.[25] They have also been applied by commercial arbitration tribunals in resolving problems in relation to claims of *force majeure*.[26]

Thus, in the pre-ISDS period, legal doctrines emerged to avoid unfair results in cases where acts of state provoked breaches of contract by state-owned entities.[27] In the current period of uncertainty about the ongoing availability of ISDS, it is worthwhile for investors to recall those doctrines, and to take them into account in investment planning.

IV. STRATEGIES FOR THE FUTURE: SMART CONTRACTUAL DRAFTING

The principles discussed above can be invoked in situations where an investment contract contains no specific provisions protecting the investor against adverse governmental measures. To promote greater certainty, however, contracts should be drafted to include specific provisions aimed at achieving similar results. There are

[25] *See*, *e.g.*, CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 295-303 (2008) (applying the Böckstiegel Guidelines to analyze whether a state-owned enterprise can raise a defense of *force majeure* based on an act of its own public authority to excuse a breach of an international contract); L.J. Bouchez, *Prospects for International Arbitration: Disputes between States and Private Enterprises*, 8 J. INT'L ARB. 81, 90-91 (1991) (citing the Böckstiegel Guidelines and concluding that acts of state specifically interfering with a contract made by a state-owned entity are not a basis for *force majeure*); IGNAZ SEIDL-HOHENVELDERN, CORPORATIONS IN AND UNDER INTERNATIONAL LAW 55 (1987) ("Can a State corporation rely on its separate personality to plead that an act of State constitutes *force majeure*, freeing the corporation from a contract with a third party? The third party may sometimes have good reason to think that the State may have acted *jure imperii* in order to escape from a commitment contracted *jure gestionis* by its [state-owned entity]. Böckstiegel recognizes that the other party to the contract may have great difficulty in proving such a connivance. He would therefore place the burden on the [State-owned] corporation to prove that the act of *force majeure* had been taken for the benefit of the general public good and not only for the benefit of the corporation.").

[26] *See*, *e.g.*, *Krupp-Koppers v. Kopex*, *Interim Award* ("German FR Engineering Company v. Polish Firm"), 12 Y.B. COM. ARB. 63, 67 (1987); Pierre Lalive, *Arbitration with Foreign States or State-Controlled Entities: Some Practical Questions*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 289, 294 (Julian D.M. Lew ed., 1987) (discussing Eurodif arbitration).

[27] Protective doctrines have also developed in the context of investment contracts concluded directly with states—including the theory of "internationalization" of state contracts, and prohibitions on states invoking their internal law to avoid agreements to arbitrate. *See* Brower et al., *supra* note 13, at 41.

various types of contractual clauses that can be employed to accomplish this purpose, and the present section addresses three of them: stabilization clauses; compensation provisions; and *force majeure* clauses.

A. *Stabilization Clauses*

A stabilization clause in an investment contract addresses the extent to which subsequent changes in the host state's laws and regulations can affect the rights and obligations of the parties to the contract. The main purpose of including a stabilization clause is to protect the investor against changes in host state law that could diminish or destroy the value of the investment. Historically, stabilization clauses contained relatively broad phrasing that sought either to prohibit the state from enacting legislation that was inconsistent with the contract, or to exempt the investment contract from the application of new, adverse legislation. Those broad provisions faced criticism from some developing nations and non-governmental organizations, which argued that they unduly impinged upon the sovereignty of a state to enact legislation and to regulate its own economy, especially on matters pertaining to the environment, public health and human rights.

The modern forms of stabilization clauses are more varied and nuanced, and they cover the spectrum from most to least restrictive of the host state's legislative freedom. Here, we highlight three common variations.

1. Freezing Clauses

The most restrictive iteration, as mentioned above, is the traditional "freezing clause," which specifies that the law as it exists at the time of execution of the contract will be the governing law of the contract, such that the investor will be exempt from subsequent changes in laws and regulations.[28] A typical example of a freezing clause can be found in the contract at issue in the *Texaco Overseas Petroleum Co. v. Libya* arbitration, which stated: "This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations

[28] *See* MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 71-72 (3d ed. 2017).

in force on the date of execution . . . . Any amendment to or repeal of such Regulations shall not affect the contractual rights of the Company without its consent."[29]

In terms of scope, a freezing clause can either broadly cover all relevant national regulatory regimes, or it can be limited to specific areas such as tax law.[30] An example of the latter variant is the so-called "taxes in lieu" or "tax paid" clause—often found in production sharing contracts ("PSC")—which provides that the investor will take its share of production free and clear of all taxes, royalties, and similar charges, and thereby insulates the investor from future tax and royalty increases. For example, Qatar's Model Development and Production Sharing Agreement of 2002 contained a clause providing as follows: "The Government shall assume, pay and discharge or cause to be discharged on behalf of [the investor] all Qatar income tax of the [investor] . . . . [The national oil company], acting on behalf of the Government shall perform these duties."[31]

2. Renegotiation/Economic Equilibrium Clauses

A second popular iteration consists of "renegotiation" or "adaptation" clauses, which provide that on the occurrence of a triggering event—typically, an adverse change in host state law—the contract will be renegotiated to restore the pre-existing "economic equilibrium."[32] There are two potential pitfalls to avoid in drafting such clauses: it is critical (*i*) to define with some precision what restoring the "economic equilibrium" means, and (*ii*) to provide a binding backstop in case the renegotiation is

[29] Texaco Overseas Petrol. Co. v. Gov't of the Libyan Arab Republic, *Ad-Hoc*, Award, ¶ 3 (Jan. 19, 1977), 17 I.L.M. 1 (1978).

[30] *See* PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY 70 (2010).

[31] QATAR, Model Development & Production Sharing Agreement of 2002 Between the Gov't of Qatar and Contractor (North Field), § 22.5, *available at* https://www.resourcecontracts.org/contract/ocds-591adf-6349675951/download/pdf.

[32] *See* Kyla Tienhaara, *Foreign Investment Contracts in the Oil & Gas Sector: A Survey of Environmentally Relevant Clauses*, 2 INV. TREATY NEWS 1, Oct. 2011, at 12, https://www.iisd.org/pdf/2011/iisd_itn_october_2011_en.pdf ("Stabilization clauses come in various forms . . . . A more nuanced version is often referred to as an 'economic equilibrium' clause, which requires the government to restore the balance of risks and rewards established in a contract when it is upset by a new regulation or tax.").

unsuccessful. A useful example is the clause contained in the PSC between a subsidiary of Eni and the Nigerian National Petroleum Company, which was at issue in a recent arbitration between the two parties:

> In the event that any enactment of or change in the laws or regulations of Nigeria or any rules, procedures, guidelines, instructions, directives or policies, pertaining to the Contract introduced by any Government department or Government parastatals or agencies occurs subsequent to the Effective Date of this Contract which materially and adversely affects the rights and obligations or the economic benefits of the CONTRACTOR, the Parties shall use their best efforts to agree to such modifications to this Contract as will compensate for the effect of such changes. If the Parties fail to agree on such modifications within a period of ninety (90) days following the date on which the change in question took effect, the matter shall thereafter be referred at the option of either Party to arbitration under Article 21 hereof. Following [the] arbitrator's determination, this Contract shall be deemed forthwith modified in accordance with that determination.[33]

3. Hybrid Clauses

A third type of stabilization clause is the so-called "hybrid clause," which combines two or more forms of stabilization. An example, based on a PSC with a North African State, reads as follows:

> This PSC is governed by Hydrocarbon Law 52,100 as currently in force.
>
> Clause 6(a): The Contractor shall take its share of production free and clear of all charges, taxes, royalties and similar contributions.
>
> Clause 6(b): All charges, taxes, royalties and similar contributions that would otherwise be payable by Contractor shall be paid by the [national oil company] . . . .
>
> Clause 23: In the event of a change in law that affects the economic equilibrium of this PSC, the parties shall agree to modify its terms in order to restore the economic equilibrium.

While such hybrid clauses have the potential of offering a useful combination of protections, they can also create ambiguity or even contradiction. Therefore, parties should pay special attention to ensuring that the different elements of a hybrid

[33] *See* Nig. Agip Exploration Ltd. v. Nig. Nat'l Petrol. Corp., No. 17-cv-04483 (S.D.N.Y. June 14, 2017)(Ex. 2 to Declaration of Jerome Finnis at Section 19.2).

stabilization clause are consistent with each other and do not impose conflicting obligations.

Finally, it is worth noting that stabilization clauses can be included in contracts with either a state-owned entity, or the state itself (for example, in the form of a "freezing clause"). In contrast, the two contractual mechanisms discussed in the following subsections apply only to contracts with the former.

B. *Indemnification Provisions*

A second type of contractual provision intended to mitigate the risk of adverse governmental measures is an indemnification provision, which typically provides that in the event the state takes certain adverse measures—such as the imposition of new or discriminatory taxes—the state-owned party to the investment contract will indemnify the investor in whole or in part. For example, in the mid-1990s, the Venezuelan national oil company, *Petróleos de Venezuela*, S.A. ("PDVSA"), included such clauses in association agreements with foreign parties for the exploitation of Venezuela's extra-heavy crude oil reserves.[34] The advantage of including such a provision is that it eliminates the need to establish any breach on the part of the state-owned entity in order for payment to be due. Such contractual liability is supplementary to that which may arise on the part of the state, in its own right, under a BIT or other investment protection instrument.

C. *Force Majeure Provisions*

Third, and again in the context of an investment contract with a state-owned entity, a properly drafted *force majeure* clause can effectively allocate the risk of adverse governmental action to the state-owned company. In other words, such a clause can expressly mandate the result reached in *Air France* and envisaged in the Böckstiegel Guidelines.

Force majeure provisions typically provide that a party will not be liable for non-performance caused by an external, non-attributable act—which, as the *Air France* case illustrates, could include governmental measures. For investment protection

[34] *See* Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Award, ¶¶ 38-44 (Oct. 9, 2014).

purposes, *force majeure* can instead be contractually defined in a way that *excludes* adverse governmental measures: in particular, by expressly specifying circumstances that do *not* constitute *force majeure* events. For example, discriminatory or targeted actions by the state against the foreign party or its investment can be specifically excluded from the scope of *force majeure*. In terms of the consequences of such (excluded) events, the clause should go on to specify whether the state-owned party merely has a duty to use reasonable efforts to mitigate the effects, or whether it instead directly incurs liability for any resulting non-performance or breach.[35] With these details specified in the contract, a later tribunal will be able to apply the particular allocation of risk in respect of governmental measures that the parties have agreed.

V. PARALLEL PROCEEDINGS IN COMMERCIAL AND INVESTMENT ARBITRATION

The contractual mechanisms surveyed above are of course not exclusive of other remedies. In most cases, an investor can pursue claims arising out of the same, or substantially similar, facts before both a commercial arbitration tribunal and an investment tribunal. This has in fact become increasingly common in practice. Recent prominent examples include the parallel investment treaty claims against Venezuela, and commercial arbitration claims against PDVSA, pursued by ExxonMobil in the wake of the 2007 Venezuelan oil expropriations.[36]

Investors are able to pursue such claims, either simultaneously or sequentially, because the same state action can give rise both to a breach of contract and a breach of the state's international obligations. Different legal instruments—the contract in the case of commercial arbitration, and the investment treaty in the case of investment arbitration—provide different rights for the investor, which arise under

[35] A clause imposing the latter result might, for example, read as follows: "Failure of a Party to fulfill any obligation incurred under this Agreement shall be excused and shall not be considered a default thereunder during the time and to the extent that such non-compliance is caused by an event of *force majeure*, except that if the event of *force majeure* is an act of [the host state], such event of *force majeure* shall not preclude an action for damages against [the state-owned entity] for the non-performance of the relevant obligation."

[36] *See* Venez. Holdings, Award, ¶ 379.

different governing laws and therefore give rise to separate causes of action.[37] The distinction between contract claims and treaty claims, even when both are asserted against the state itself, has been well-established since the *Vivendi I* annulment decision, which held as follows:

> As to the relation between breach of contract and breach of treaty . . . [a] State may breach a treaty without breaching a contract, and *vice versa* . . . .
> In accordance with this general principle (which is undoubtedly declaratory of general international law), whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT, by international law; in the case of the Concession Contract, by the proper law of the contract, in other words, the [municipal law].
> In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the tribunal will give effect to any valid choice of forum clause in the contract . . . .
> On the other hand, where the "fundamental basis of the claim" is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent State or one of its subdivisions cannot operate as a bar to the application of the treaty standard. At most, it might be relevant—as municipal law will often be relevant—in assessing whether there has been a breach of the treaty.[38]

Subsequent investment tribunals have followed this approach in allowing investment claims to go forward so long as they allege, on a *prima facie* basis, breaches of an investment treaty.[39] And so the investor may be able to obtain, in

[37] *See*, *e.g.*, Sempra Energy Int'l. v. Argentine Republic, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶ 123 (May 11, 2005); *see also* Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 113 (July 3, 2002).

[38] Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶¶ 95, 96, 98, 101 (July 3, 2002) (internal footnotes omitted).

[39] *See*, *e.g.*, SGS Société Générale de Surveillance S.A. v. Republic of Paraguay, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶ 128 (Feb. 12, 2010); Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Jurisdiction, ¶¶ 41-45 (Aug. 3, 2006); Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, ¶¶ 132-33 (June 16, 2006); Eureko B.V. v. Republic of Poland, UNCITRAL, Partial Award, ¶¶ 92-114 (Aug. 19, 2005); Impregilo S.p.A. v. Islamic Republic of

effect, two bites at the same factual apple by pursuing parallel proceedings. Where the target of one of the actions is a state-owned entity, as opposed to the state itself, this may also offer advantages in terms of enforcing any resulting award.[40] Commercial entities, even if fully state-owned, are typically not in a position to claim sovereign immunity as a defense to enforcement, unlike the state itself.[41]

To be sure, the pursuit of parallel proceedings can give rise to possible concerns, including the risk of inconsistent decisions and the potential for double recovery.[42] These risks are, however, capable of being addressed. Tribunals have at their disposal various legal doctrines, such as *res judicata*[43] and estoppel,[44] to reduce the risk of inconsistent results; and the potential for double recovery can be addressed through appropriate stipulations in the awards in either or both proceedings.[45]

VI. CONCLUSION

At a time of uncertainty about the ongoing availability and scope of ISDS, international commercial arbitration has the potential to fill gaps that may arise from changes to the investment arbitration regime. The degree of success that can be achieved by commercial arbitration depends on its adaptability to a unique characteristic of investment contracts–specifically, the ability of the state to use its

Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶¶ 286-90 (Apr. 22, 2005); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Decision on Jurisdiction, ¶¶ 75-85 (Dec. 8, 2003); SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, ¶¶ 146-48 (Aug. 6, 2003); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶¶ 70-76 (July 17, 2003).

[40] *See*, *e.g.*, Gene M. Burd & Bradford J. Kelley, *Light at the End of The Tunnel: Enforcing Arbitral Awards Against Sovereigns*, MEALEY'S INT'L ARB. REP., Nov. 2017, at 3.

[41] *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 444 (2nd ed. 2009).

[42] *See* Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Jurisdiction, ¶ 51 (May 16, 2006).

[43] For example, the tribunal in *Inceysa v. El Salvador* found that *res judicata* would apply if there was an identity of parties and claims. *See* Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 214 (Aug. 2, 2006).

[44] *See* Apotex Holdings Inc. v. United States of America, ICSID Case No. ARB(AF)/12/1, Award, ¶ 7.18 (Aug. 25, 2014).

[45] *See*, *e.g.*, Venez. Holdings, Award, ¶¶ 380-81.

sovereign powers to put a thumb on the scale of the contractual balance. Equipped with the appropriate legal doctrines, and with properly drafted contracts before them, commercial tribunals should be able to meet the challenge. As history has shown, the Böckstiegel Guidelines and similar principles in domestic jurisprudence can provide useful legal frameworks. In addition, investors can make use of tools such as stabilization clauses, indemnification provisions, and protective *force majeure* clauses to shift the risk of adverse regulatory change, in whole or in part, to their contractual counterparties. Further, in many cases, commercial arbitration will be available as a supplement to whatever ISDS options remain open to the investor.

States and state-owned entities, for their part, may also usefully consider non-ISDS alternatives in framing their investment policies and investment contracts. Their incentives may not be fully aligned with those of investors, but both sides have an interest in a dispute resolution regime that strikes a workable balance between their competing perspectives.

The future in this regard remains unwritten. But the lessons of the past may provide useful guidance in charting the path.

D. BRIAN KING is an independent arbitrator with offices in New York and in London, where he is an associate member at 3 Verulam Buildings. His areas of subject matter expertise include energy, construction, life sciences, and international investments. Alongside his arbitrator practice, Brian teaches at the New York University School of Law. Until December 2018, Brian was a partner in the international arbitration group at Freshfields Bruckhaus Deringer, where he practiced for twenty years. Over the course of his career, Brian acted as counsel in more than 100 cases, including two of the largest investment arbitrations to date. He has also served as chair, co-arbitrator, sole arbitrator or emergency arbitrator in complex disputes across industry sectors, and under all major sets of arbitration rules. Educated at Princeton University and the New York University School of Law, Brian practiced in Europe for thirteen years before returning to New York in 2007. He is a frequent lecturer and publisher on arbitration topics.

JUE "ALLIE" BIAN is an associate in the International Arbitration group at Freshfields Bruckhaus Deringer US LLP. She represents clients in both investment and commercial arbitration matters. She holds a J.D. from Harvard Law School and a Bachelor's degree from Vassar College.

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CORRUPTION AS A JURISDICTIONAL BAR IN INVESTMENT TREATY ARBITRATION: A STRATEGIC REFORM

by George Martsekis

I. INTRODUCTION

It comes with no surprise that illegality and corruption have now become particularly pervasive. As a recent OECD Report on Combating Corruption and Fostering Integrity reveals, there is a grave concern that OECD and non-OECD countries are infected with abuse of executive authority and manipulation of the legislature and judiciary with regard to legal and regulatory capture, as well as constraints on information access and transparency, all of which are pernicious to a robust rule of law.[1]

Despite a global convergence of rules and instruments that regulate and condemn corrupt practices, issues of corruption in investor-State arbitration are complex and frequent, as they typically involve difficult factual and legal allegations at almost every stage of the arbitral process.[2]

This article attempts to address these challenges in three parts. Section I explains that ISDS suffers from corruption not only in cases involving tainted global transactions but also by many host States' involvement in corrupt procurement schemes, which later invoke illegality defenses to derail proceedings. Moreover, it investigates the difference between illegality defenses in investment treaty arbitration and international commercial arbitration.

Section II examines the evolution of illegality defenses in case law to identify the different stages at which illegality (and specifically corruption) defenses exist.[3] The

[1] High-Level Advisory Group, *Report to the OECD Secretary-General on Combating Corruption and Fostering Integrity* Mar. 16, 2017, *available at* http://www.oecd.org/corruption/HLAG-Corruption-Integrity-SG-Report-March-2017.pdf.

[2] Michael Hwang S.C. & Kevin Lim, *Corruption in Arbitration Law and Reality*, 8 ASIA J. 1, 2 (2012).

[3] A distinguishing analysis between illegality variations and corruption will precede this examination.

distinction is significant, as the lawfulness of the acquisition of the investment is a condition precedent for the conferral of jurisdiction to the tribunal, whereas unlawful *ex post* acts involving an acquisition may pertain to the merits of the dispute.[4] Likewise, the question of whether a plea of illegality relates to a claim's admissibility or the jurisdiction or merits stage is a central one. Moreover, local authority investigations touch upon the jurisdiction of the tribunal and questions of *res judicata*.

Section III provides recommendations for strategic reform. It answers the vital question of whether there is a need to elevate the above-referenced principles to a jurisdictional threshold (similar to *ratione personae*, *ratione materiae*, *ratione voluntatis* and *ratione temporis*) to unify different approaches concerning the stage in which each illegality defense occurs. In doing so, tribunals would achieve greater consistency and be empowered to rule on pending criminal court investigations. Moreover, explicit anti-corruption language adopted in treaty text would enhance the rule of law.

The article concludes with practical considerations for investors and host States, in particular over whether a host State is permitted to procure a bribe and then rely on it to successfully dismiss the investor's claim on jurisdictional grounds, and whether any restitution or non-contractual remedy is available to the investor, notwithstanding its own participation in the bribery.

II. ILLEGALITY DEFENSES IN THE ISDS SYSTEM

There is relatively little guidance regarding how tribunals *should* handle corruption defenses given the recent reinvigoration of anti-corruption investigations, particularly in developed countries. Yet, a decent body of arbitral jurisprudence exists.[5] Before touching upon the issue, however, it is worth distinguishing between illegality and corruption defenses and how this contrast differs in international commercial arbitration.

[4] Zachary Douglas, *The Plea of Illegality in Investment Treaty Arbitration*, 29 ICSID REVIEW 155, 156 (2014).

[5] Jason W. Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 726 (2012).

A. *Distinction between Illegality and Corruption*

As the tribunal in *Hamester v. Ghana* held:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation as such constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.[6]

What constitutes corruption and fraud or any other deceitful conduct as a manifestation of illegality merits further analysis. The ensuing confusion in drawing the line between corruption and illegality must be resolved. While the practical definition of corruption involves the promise of exchange of a benefit in return for an act or omission between a natural or legal person and a public official,[7] illegality is broader for two reasons. First, it extends by definition beyond corruption to cover bribery and fraud. Second and more importantly, its perception by host State laws differs. For instance, certain payments to government officials to expedite services are prohibited by the UK Bribery Act and national laws; on the other hand, these are not condemned by the OECD Convention. Not to mention such acts are expressly permitted under the U.S. Foreign Corrupt Practices Act 1977 ("FCPA").[8] Each jurisdiction therefore has a different interpretation of corruption.

The most important implication of the distinction between corruption and illegality is found in two key aspects. First, in *Metal-Tech v. Uzbekistan*, the Tribunal was sensitive to the active debate that corruption findings "come down heavily" on claimants while at the same time exonerating defendants that have participated in the corruption scheme.[9] This happens because corruption is more complex in nature than

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[6] Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, ¶ 123 (Jun. 18, 2010).

[7] Florian Haugeneder & Christoph Liebscher, *Chapter V: Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof*, *in* AUSTRIAN ARB. Y.B. 539, 539 (2009) (Christian Klausegger et al. eds.,2009).

[8] *See* HWANG & LIM, *supra* note 2, at 3.

[9] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 389 (Oct. 4,

illegality (*i.e.*, fraud), because it requires the involvement of multiple actors. In contrast, illegality involves only one participant and is therefore less troublesome. This was the case in *Inceysa v. El Salvador*, where the Tribunal found that the foreign investor's contract was based on forged financial documents and intentional misrepresentation and concealment, and therefore it could not benefit from an investment effectuated by illegal means and enjoy the protection of the host State.[10] As Professor Schill succinctly emphasizes, illegality "[d]oes not cover illegal conduct by the State itself or the latter's acquiescence into illegal conduct of the investor."[11]

Second, illegality in the form of fraud or another improper act under host State law is much easier to prove. Relevant jurisprudence typically examines the illegal act in accordance with host State law clauses in the applicable treaty. On the other hand, the clandestine or the *quid pro quo* concept of corruption is difficult to establish, at least *prima facie*, regardless of what should be the standard of proof for invoking it.[12] This is an inherent problem if someone contemplates the different legal approaches as to what constitutes corruption versus a valid commission fee.

B. *Why is Corruption Immense in Investment Treaty Arbitration? The Sword and the Shield*

Transparency International released its 2017 Global Corruption Barometer (GCB) Report on the corrosive impact of corruption. The findings suggest that it is a common worldwide phenomenon; nearly one in four public service users have to pay a bribe each year.[13] In public procurement, the European Commission estimates that

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2013).

[10] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award, ¶ 242 (Aug. 2, 2006).

[11] Stephan W. Schill, *Illegal Investments in International Arbitration*, Jan. 4, 2012, *available at* https://ssrn.com/abstract=1979734 or http://dx.doi.org/10.2139/ssrn.1979734.

[12] Florian Haugeneder, *Corruption in Investor-State Arbitration*, J. WORLD INV. & TRADE 323, 338 (2009).

[13] *Global Corruption Barometer: Citizen's Voices from Around the World*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/news/feature/global_corruption_barometer_citizens_voices_from_around_the_world.

approximately €120 billion ($163 billion) is lost each year to corruption.[14] It would be naive to think that corruption did not concern the ISDS system as a major pillar of stimulating and protecting foreign direct investment (FDI) and capital commitments. Over time, investment treaty arbitration has undoubtedly been an emerging space for the enforcement of international norms, including standards for transparency and anti-corruption.[15] In its ISDS chapter, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[16] requires from its members a commitment to anticorruption; this is probably the pedigree necessary to combat corruption in the future. However, the danger of corruption is so pervasive that it curbs the effectiveness of ISDS. That said, early awards noted that corruption defenses have been used systematically as a "shield" by host State defendants to block claims on jurisdictional grounds.[17] As discussed below, these corruption defenses might undermine the valid jurisdiction of arbitral tribunals. As Professor Yackee indicates, allowing tribunals to weigh and assess the involvement of the investor and State in a corrupt transaction may encourage public officials to express their corrupt sentiments since their right to raise a corruption defense, despite the State's

[14] *Curbing Corruption in Public Procurement: A Practical Guide*, TRANSPARENCY INTERNATIONAL, https://www.transparency.org/whatwedo/publication/curbing_corruption_in_public_procurement_a_practical_guide.

[15] Danielle Young, *Is Corruption an Emerging Cause of Action in Investor-State Arbitration?* THE GLOBAL ANTI-CORRUPTION BLOG, Jan. 22, 2016, https://globalanticorruptionblog.com/2016/01/22/is-corruption-an-emerging-cause-of-action-in-investor-state-arbitration-2/.

[16] *Trans-Pacific Partnership*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text

[17] *Id.*; A well-known example in this regard is *World Duty Free v. Kenya*, whereby the investor delivered a personal donation of US $2 million to the President of Kenya to secure concessions in airports. When the claimant alleged expropriation of its contractual rights, Kenya invoked the bribe as a defense. The benefit of corruption defenses to a host State is blatantly evident in *Siemens v. Argentina*, where the multinational corporation won a US $200 million ICSID award against Argentina for the expropriation of its investment. When Argentina initiated annulment proceedings, it came into light that Siemens executives had induced public officials into bribing. *See* Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/08, Award (Feb. 6, 2007).

involvement, is endorsed by a tribunal.[18] Moreover, it could trigger public dissatisfaction with the current international investment system by inciting the misconception that the system is biased against the policy decisions of certain developing States.

Another controversial issue is the use of corruption as a "sword," meaning that corruption could comprise the foundation of a cause of action. This is true as far as the *Yukos v. Russian Federation* decision is concerned. The company's cause of action against Russia was based partly on "fabricated legal proceedings" and "fabricated evidence" as a result of corrupt Russian officials against the company and its chairman.[19] This suggests that investors may have a valid cause of action when a breach of "fair and equitable treatment"[20] overlaps with the corrupt conduct of public officials.[21] These legal phenomena therefore call for the radical reshaping of the ill-organized area of corruption defenses. Without such a reform, ISDS's design would inevitably be prone to misuse by disputing parties and eventually systematic failure.

C. *How Different is the Plea of Illegality in International Commercial Arbitration?*

The present analysis would be ineffectual without a rigorous examination of illegality in the context of international commercial arbitration. The doctrines of separability and *competence-competence* ensure that a tribunal will be deprived of jurisdiction to adjudicate illegality defenses in only a limited number of instances.[22]

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[18] Jason Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*? IISD, Oct. 19, 2012, https://www.iisd.org/itn/2012/10/19/investment-treaties-and-investor-corruption-an-emerging-defense-for-host-states/.

[19] *See* YOUNG, *supra* note 15.

[20] Which encompasses due process, transparency and the protection of investors' legitimate expectations.

[21] *Id.*; *See* Yukos Universal Ltd. (Isle of Man) v. The Russian Federation, PCA Case Rep. Case No. AA227, Final Award (2014).

[22] *See* DOUGLAS, *supra* note 4, at 160. Separability doctrine prescribes that the arbitration clause in the main contract is separate and distinct from the main contract and the validity therefore of the arbitration clause is not determined by the validity of the main contract and vice versa. JULIAN D M LEW, LOUKAS A MISTELIS & STEFAN M KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 6-9 (Kluwer Law International, 2003). By contrast, the doctrine of

Typically in commercial arbitration disputes, the economic effects of the transaction are negotiated and implemented at the same time based on a single instrument upon which the parties have deliberately and mutually agreed: the commercial contract.[23] Yet in investment arbitration, there is a physical and temporal disconnect between the investment commitment by the foreign investor and the host State and the conclusion of the agreement to arbitrate.[24] In other words, the foreign investor must have acquired assets in the host State that satisfy the requirements of an investment in accordance with the investment treaty.[25] The investment treaty includes the offer to arbitrate; by filing the notice of arbitration, the foreign national accepts the offer and the consent to arbitration is effectively established. Thus, it is crucial to emphasize that the doctrines of separability and *competence-competence* are likewise applicable in ISDS. Apart from the different way of formulating the arbitration agreement, the basic notion is the same. As the Tribunal in *Malicorp v. Egypt* opined:

> There is nothing to indicate that the consent to arbitrate, as distinct from the consent to the substantive guarantees in the [BIT], was obtained by misrepresentation or corruption or even by mistake. The allegations of the Respondent relate to the granting of the Concession. However, it is not the Contract that provides the basis for the right to arbitrate, but the State's offer to arbitrate contained in the [BIT] and the investor's acceptance of that offer. The offer to arbitrate thereby covers

competence-competence refers to this unique power of tribunals to rule on their own jurisdiction. This is endorsed in Article 23(1) of the UNCITRAL Arbitration Rules (2010), which pertinently reads:

The arbitral tribunal *shall have the power to rule on its own jurisdiction*, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null shall not entail automatically the invalidity of the arbitration clause.

A similar approach is reflected in Article 41 of the ICSID Convention: "(1) The Tribunal *shall be the judge of its own competence*. (2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

[23] *See* DOUGLAS, *supra* note 4, at 161.

[24] *Id.*

[25] *Id.*

> all disputes that might arise in relation to that investment, including its validity.[26]

However, in an ISDS context, the ground is more slippery than that encountered in international commercial arbitration. Unlike the separability doctrine effect in the commercial arbitration context, corruption defenses in investment treaty arbitration can impair consent mainly because the offer to arbitrate covers all disputes arising out of the investment including its validity.[27] What is more, corruption defenses are more difficult to prove where state executives and branches enjoy broad legitimization. Finally, the host State may gain an unequal advantage. In particular, investment contracts—which involve the State's power to act not only as respondent but also foreign investment protector and law-giver—manifest its sovereign power, which, under certain circumstances, negates the arbitrability of disputes on the basis of sovereign immunity. In this way, manipulative discretion of the host State often frustrates an investor's expectations to proceed with arbitration. Even worse, the investor may not have restitution remedies for its investment in the host State simply because the latter raised a successful jurisdictional objection regarding corruption and the tribunal dismissed the case at an early stage.[28] Correspondingly, the possibility to test *objective arbitrability* in international commercial arbitration, as provided in Article V(2)(b) of the New York Convention for corruption allegations contrary to public policy, does not exist in ISDS. ISDS is designed to provide a delocalized adjudication and enforcement mechanism, whereby the jurisdiction of domestic courts to review investment awards on public policy grounds, including corruption, is scarcely available.[29] That said, corruption is more pernicious in the ISDS framework.

III. THE ASSESSMENT OF THE PLEA OF ILLEGALITY BY TRIBUNALS

[26] Malicorp Ltd v. Arab Republic of Egypt, ICSID Case No ARB/08/18, Award, ¶ 119 (Feb. 7, 2011).

[27] *Id.*

[28] *See* HAUGENEDER, *supra* note 12, at 330.

[29] ICSID Convention, art. 54 (1): "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." The scope therefore for refusing enforcement on public policy grounds is limited.

This section elucidates how tribunals have treated corruption allegations to date and constructs a clear and useful formula for tribunals striving to accept or deny jurisdiction. The key determinants of corruption as a bar to jurisdiction and the interplay of domestic court investigations with the tribunal's decision-making comprise the heart of this section.

A. A *Fragmented Approach*

The relevant jurisprudence on corruption allegations in the making and performance of foreign investments has led to different and inconsistent outcomes.

In *Metal-Tech v. Uzbekistan*, Uzbekistan asserted that the claimant had violated Uzbek law by paying over US$4 million to government authorities in exchange for approving its investment and granting favorable treatment.[30] The tribunal considered this issue as a jurisdictional one. It determined that the BIT explicitly contained a legality requirement. It ultimately ruled that it lacked jurisdiction on the grounds that "the rights of the investor against the host State, including the right of access to arbitration, could not be protected because the investment was tainted by illegal activities, specifically corruption. The law is clear—and rightly so—that in such a situation the investor is deprived of protection.[31]

The Tribunal in *Inceysa v. El Salvador* followed the same reasoning. It denied jurisdiction due to lack of consent, illegality, fraud and good faith by stating:

> The foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, "nobody can benefit from his own fraud."[32]

[30] Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, ¶ 279 (Oct. 4, 2013).

[31] *Id.* at ¶ 422 (emphasis added)

[32] *Inceysa*, *supra* note 10, at ¶ 242.

By falsifying the facts and forging financial documents, Inceysa did not make its investment in accordance with Salvadoran law. The majority of arbitral tribunals construe "in accordance with host State law" clauses as a jurisdictional matter.[33]

At the same time, the Tribunal in *Saba Fakes v. Turkey* held that the occurrence of illegality was a jurisdictional matter since the BIT contained a clause allowing investments only "in accordance with the laws and regulations in the host State."[34]

Other tribunals considered the issue of corruption and illegality at the admissibility stage. For example, *World Duty Free v. Kenya* is a landmark case. The investment had been procured by a bribe paid to the President of Kenya, however, the plea of illegality was not treated as an impediment to jurisdiction leading to the Tribunal's conclusion that "the Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action.*"[35] In the Tribunal's view, the procurement of the investment violated international public policy. In particular, it considered that corruption by bribing state officials is one of the most egregious crimes, and as such, a state contract afflicted by corruption is legally unenforceable without offending the public conscience.[36] Thus, if the plea of corruption is successful based on a violation of international public policy, the claim shall be inadmissible.[37]

The rationale for examining this claim at the admissibility stage is related to the tribunal's responsibility to condemn any violation regardless of the applicable law so as

[33] *See* SCHILL, *supra* note 11.

[34] Saba Fakes v. Republic of Turkey, ICSID Case No. ARB/07/20, Award, ¶ 115 (July 14, 2010).

[35] A legal doctrine in Latin stating that an action cannot arise from a dishonorable cause; World Duty Free Co. Ltd. v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 179 (Oct. 4, 2006); *see* DOUGLAS, *supra* note 4, at 180.

[36] *See* DOUGLAS, *supra* note 4, at 173 ("Corruption of a state officer by bribery is synonymous with the most heinous crimes because it can cause huge economic damage; and its long-term victims can be legion. The offence lies in bribing a person to exercise his public duty corruptly and not in accordance with what is right and proper for the state and its citizens. Like any other contract, a state contract procured by bribing a state officer is legally unenforceable, as an affront to the public conscience.").

[37] *Id.* at 180.

to make clear that the tribunal will not assist to vindicate any rights that violate public policy.[38]

The tribunal in *Churchill Mining v. The Republic of Indonesia* adopted a similar approach,[39] holding that claims arising under fraud and forgery are inadmissible as a matter of international public policy.[40]

Some tribunals have also addressed questions of corruption and illegality generally during the merits phase of the proceedings. This was true in *Kim v. Uzbekistan*, where the Tribunal concluded that issues pertaining to corruption after the initial investment were more "properly addressed at the merits stage."[41] In *Al Warraq v. Indonesia*, moreover, the Tribunal determined that the corruption assertions were a merits-based question, even though, at the merits phase, it held that the investor's claims were inadmissible due to a public interest provision contained in the treaty.[42]

Based on the analysis above, tribunals assess corruption allegations inconsistently and imprecisely, which creates confusion as to what criteria is relevant for

[38] *Id.*

[39] With respect to fraud and not corruption.

[40] Churchill Mining PLC v. Republic of Indonesia, ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40, Award, ¶ 508 (Nov. 29, 2016).

[41] Mark W. Friedman, Floriane Lavaud & Julianne J. Marley, *Corruption in International Arbitration: Challenges and Consequences*, GLOBAL ARB. REV., Aug. 29, 2017, *available at https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146893/corruption-in-international-arbitration-challenges-and-consequences.* *See also* Vladislav Kim v. Republic of Uzbekistan, ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 552 (Mar. 8, 2017).

[42] Mark W. Friedman, Floriane Lavaud & Julianne J. Marley, *Corruption in International Arbitration: Challenges and Consequences*, GLOBAL ARB. REV., Aug. 29, 2017, *available at https://globalarbitrationreview.com/insight/the-arbitration-review-of-the-americas-2018/1146893/corruption-in-international-arbitration-challenges-and-consequences.* *See also* Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, ¶ 99 (Jun. 21, 2012); Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award ¶¶ 683(6), 155 (Dec. 15, 2014).

determination. The challenge for a tribunal therefore is to determine which stage of the proceedings is most appropriate to address a corruption allegation.

B. *The Key Determinants of Corruption as a Bar to Jurisdiction*

This sub-section identifies the following distinguishing factors to ascertain whether corruption bars jurisdiction or alternatively becomes an issue examined at the admissibility and merits stage. Before illustrating the key determinants classifying corruption allegations in the three distinct stages discussed, it is important to understand the fundamental rationale for this distinction.

1. Distinguishing Jurisdiction from Admissibility

Jan Paulsson has offered some useful insights in this regard. If the reason for challenging a claim is to bar it from the particular forum, then it is a jurisdictional challenge; but if it is that the claim should not be heard at all, then the issue is one of admissibility.[43] The tribunal in *Waste Management v. Mexico* clearly differentiated between these two concepts: "Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective-whether it is appropriate for the tribunal to hear it. If there is no title to jurisdiction, then the tribunal cannot act."[44] This is significant because mischaracterizing the issue would entail an unjustified expansion of the scope for challenging awards and frustrate the expectations of the parties for an effective resolution of their dispute.[45]

2. Corruption in the making and performance of the investment

Having in mind this principal distinction, corruption allegations are addressed as a jurisdictional issue if the illegality affects the consent of the parties to arbitrate.[46] To

[43] Jan Paulsson, *Jurisdiction and Admissibility*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION 613 (ICC Publishing, 2005).

[44] Waste Management, Inc v. Mexico, ICSID Case No ARB(AF)/00/3, Dissenting Opinion of Keith Highet, ¶¶ 57-58 (Apr. 30, 2014).

[45] *See* PAULSSON, *supra* note 44, at 601.

[46] *See* SCHILL, *supra* note 11.

establish jurisdiction after a valid consent to arbitrate is made, it is crucial that the investment's assets are acquired in accordance with host State law, otherwise no lawful investment exists.[47] Although it is possible that the investment has been lawfully acquired but for an illicit purpose, it would pose a high evidentiary burden for the defendant host State. In this case, there are two possibilities. The procurement of an investment for an illicit purpose—for example paying millions of dollars as a bribe to the public officials for the construction of a power plant, or serious accusations of money laundering, which contravenes international public policy—would be examined at the admissibility stage.[48] Otherwise, if the evidence available demonstrates it violates the law of the host State, then this would be characterized as an issue going to the merits of the dispute.[49]

Finally, some States sign BITs on the condition that there are certain registration requirements in the treaty without which the beneficiaries of the investment cannot be protected under the treaty. In that case, if a plea of corruption relates to such a requirement, the tribunal should examine it at the jurisdictional stage. On the other hand, if the plea of corruption concerns a registration requirement, which is not expressed in the treaty as such but is likely found in the host State law, or the subsequent use of the investment and its purpose contravenes the host State law, then it will be addressed during the merits.[50]

3. The "Clean Hands" Doctrine

A critical factor in whether corruption defenses are addressed in jurisdiction, admissibility, or merits phases is the doctrine of "clean hands." It captures the idea that "if some form of illegal or improper conduct is found on the part of the investor, his or her hands will be 'unclean', [and] his claims will be barred and any loss suffered will lie where it falls."[51] This principle reflects the legality requirement enshrined in

[47] *See* DOUGLAS, *supra* note 4, at 178.

[48] *Id.* at 184.

[49] *Id.*

[50] *Id.*

[51] Aloysius Llamzon, *Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State*

the "in accordance with the law of host State" clause of many bilateral investment treaties. Tribunals have held that the substantive treaty protections cannot be provided once the investments are contrary to the law of the host State, as this is an issue of jurisdiction rather than admissibility.[52] The *Hamester* award offers an illustrative aspect although without making explicit reference to the doctrine:

> An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law.[53]

As a practical matter, it is worth noting that the doctrine could be invaluable where there is *not* an explicit legality requirement in the treaty. If there is any corruption defense raised in such a scenario, it shall be examined under the "clean hands" doctrine. Second, according to the *Yukos* Tribunal, the "unclean hands" doctrine is not a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.[54] However, the Tribunal in *Fraport II* advocated the application of international legal principles, such as the "clean hands" doctrine or doctrines of the same effect, absent an express treaty provision barring illegal investments.[55] Given that the doctrine is part of international law, it is applicable under three cumulative criteria, according to the Tribunal in *Niko v. Bangladesh*: (1) the breach must concern a continuing violation; (2) the remedy must be employed to deter continuance in the future, not damages for past violations; and (3) a causation or reciprocity between the relief sought by the investor and the acts

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of the 'Unclean Hands' Doctrine in International Investment Law: Yukos as Both Omega and Alpha, 30 ICSID REVIEW 315, 316. (2015).

[52] Patrick Dumberry, *State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration after the Yukos Award*, 17 J. WORLD INV. & TRADE 229, 233 (2016).

[53] Gustav F W Hamester GmbH & Co KG v. Ghana, ICSID Case No ARB/07/24, Award, ¶ 125 (June 18, 2010).

[54] *Yukos*, *supra* note 21, at 1358.

[55] Fraport AG Frankfurt Airport Services Worldwide v. Philippines, ICSID No ARB/01/01, Award, ¶ 328 (Mar. 31, 2014).

involving unclean hands as alleged by the host State.[56] Moreover, under international public policy, it would then be addressed as a ground for inadmissibility.[57] Ultimately, any explicit obligation to make the investment "in accordance with the host State law" clause, as incorporated in the treaty, should be treated as a jurisdictional matter under the "clean hands" doctrine. The situation may differ if there is an implicit obligation. If so, "such an implicit obligation should not be considered as a jurisdictional prerequisite,"[58] but the tribunal may nonetheless find an investor's claim related to "unclean hands" inadmissible.

C. *Domestic Court Investigations and the Power of the Tribunal*

Parties may (and often do) invoke domestic court findings on corruption schemes to manipulate the establishment or futility of the tribunal's jurisdiction, depending on their interests. Such instances raise the following issue: to what extent may a tribunal rely on local court proceedings to find jurisdiction or, on the other hand, denounce it on grounds of *res judicata*? In *Niko v. Bangladesh*, the Tribunal relied on the Supreme Court of Bangladesh's finding that the contract in question was not obtained by a "flawed process by resorting to fraudulent means."[59] It also relied on a related Canadian proceeding that found that "[Niko] company has never been convicted of a similar offence nor has it been sanctioned by a regulatory body for a similar offence."[60] The Tribunal acknowledged the local court proceedings' decisions to establish its jurisdiction over Niko's claim, which precisely reflects the importance of domestic court proceedings in ascertaining a tribunal's jurisdiction. Nonetheless, this is not always true. As seen in *Inceysa v. El Salvador*, the Tribunal declined to defer to local

[56] Niko Resources (Bangladesh) Ltd v. People's Republic of Bangladesh, ICSID Case No ARB/10/18, Decision on Jurisdiction, ¶¶ 481-83 (Aug. 19, 2013).

[57] Aloysius Llamzon & Anthony Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct*, *in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES – ICCA CONGRESS SERIES NO. 18451, 515 (Albert Jan van den Berg ed., 2015)

[58] *See* DUMBERRY, *supra* note 53, at 236.

[59] *See Niko*, *supra* note 57, at 423.

[60] *Id.* at 427.

court proceedings to ascertain jurisdiction. In particular, the claimant argued that the Supreme Court of El Salvador upheld the bidding process (allegedly tainted by illegality in the respondent's view) and as a result, the Tribunal was bound by its determination. The Tribunal rejected this argument, emphasizing that the legality of the investment belonged to its own jurisdictional determination, and therefore *res judicata* did not apply.[61] Put otherwise, the Tribunal was free to determine its own jurisdiction. What is essential is that a tribunal will decide on its own competence, and any domestic proceedings on corruption do not impede its jurisdiction to rule on the merits.

IV. A STRATEGIC REFORM

The goal of this Section is twofold. First, it proposes a corrective reform of the ISDS system in light of the deleterious effects of corruption in foreign investments. Second, it offers practical recommendations on whether a State may raise corruption defenses or whether investors are availed of any remedies, notwithstanding their participation in the corrupt act.

A. *Urgency for Integrity of the System and the "Filtering Process"*

It is important to emphasize the need to protect the ISDS system from the corrosive effects of frequently employing a corruption defense to strike out an investor's claim. The need to preserve the integrity of the ISDS system emanates from the basic notion of illegality in national legal systems, namely that local courts do not become a forum to condone serious wrongdoing.[62] However, the fragmented approach among different tribunals regarding corruption defenses decreases predictability and reliability. Moreover, the scope of a tribunal's jurisdiction may be threatened by *res judicata* effects and pre-determination of domestic court proceedings. Under this prism, tribunals would benefit from a "filtering process" to appropriately assess corruption defenses and effectively purify the ISDS system.

[61] *See* FRIEDMAN, LAVAUD & MARLEY, *supra* note 45. *See also Inceysa*, *supra* note 10, at ¶¶ 53-63, 67, 209, 212, 209.

[62] *See* DOUGLAS, *supra* note 4, at 168.

First, an explicit reference to corruption and the need to deter illegal conduct are found in Article 26.7 of the TPP about measures to combat corruption: "In order to prevent corruption, each Party shall adopt or maintain measures as may be necessary, in accordance with its laws and regulations."[63] Article 26.8 also discusses maintaining the integrity of public officials: "To fight corruption in matters that affect trade and investment, each Party should promote, among other things, integrity, honesty and responsibility among its public officials."[64] Attaching an Annex to the ICSID Convention would similarly enhance transparency and uphold a policy of deterrence. In any case, this policy of deterrence would be safeguarded by "[respecting] the integrity of the law of the host State [that] is surely better assured by seeking to emulate on the international plane the consequences of an illegality in national law."[65]

Second, such a process would clarify issues of jurisdiction when a criminal investigation before local proceedings is underway. In such instances, a stay of proceedings by the tribunal would be appropriate. It seems doubtful, though, that the tribunal would be obstructed from engaging with the host State's criminal laws if jurisdiction is established.[66]

Third, an addition to the wording of ICSID Convention Rule 41(5), which prescribes that a preliminary objection that a claim is *manifestly without legal merit*,[67] would be

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[63] *The Trans-Pacific Partnership*, *Chapter 26: Transparency and Anti-Corruption*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

[64] *Id.*

[65] *See* DOUGLAS, *supra* note 4, at 169.

[66] *Id.* at 167-68.

[67] ICSID Rules of Procedure for Arbitration Proceeding, 2006 INT'L CTR. FOR SETTLEMENT INV. DISP., Rule 41(5) ("Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, *file an objection that a claim is manifestly without legal merit*. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.") (emphasis added).

beneficial if it referred to instances under which corruption defenses qualify as a jurisdictional bar. This filtering process would also elevate the adoption of corruption to a public policy threshold, similar to *ratione materiae*, and would facilitate the tribunal's inquiry as to when examination of corruption defenses is most appropriate in the proceedings. To the extent that this proposed reform does not suffer from overregulation, the integrity and efficiency of the system will be preserved.

B. *Practical Considerations for the Investor and the Host State*

Imagine that a Contractor (A) from a State (Y) enters into negotiations with the Minister of Economics and Development (B) of the host State (X) for the construction of a power plant generating public electricity. B lures A into the payment of a commission fee of 9% of the contract price, which guarantees the smooth and unimpeded performance of the contract.[68] The Contractor pays the agreed sum to the Minister, but the rights of A under the contract are later expropriated on public policy grounds (*e.g.*, environmental damage). A brings a claim against X, but X challenges the jurisdiction of the tribunal on the corruption scheme initiated by B, who has recently been prosecuted by local authorities. Can X invoke the corruption defense to thwart the investor's claim?

This is not an unusual phenomenon. Quite frequently the host State procures a bribe without hesitating later to rely on that bribe to prohibit a prospective investor out of its investment claim on jurisdictional grounds.

First, it should be mentioned that a State cannot hide behind any illegality to avoid its obligations to contracting parties. In *Siag v. Egypt*, the Tribunal construed the ILC Articles and prior ICSID awards to adopt a broad interpretation of state responsibility: "[T]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any

[68] International Institute for the Unification of Private Law (UNIDROIT), UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 136 (2016), *available at* https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf. .

other functions."[69] The Tribunal further emphasized that illegal conduct and conduct exceeding the authority of the state organ is attributable to the State under international law.[70]

In addition, the Tribunal employed the doctrine of equitable estoppel to rule that a State cannot avail itself of the benefits of the underlying treaty when it is comfortable to do so and repudiate it once performance becomes onerous. In other words, a party cannot benefit from its omission to do due diligence. The claimants in that case while they were involved in the development of a project genuinely believed they were Egyptian nationals although they had lost at that time their Egyptian nationality. The Tribunal accepted claimants' submission that the conduct by which they acquired Egyptian passports and did business in Egypt was consistent with good faith and was not done with the intention of misleading Egypt. Egypt knew or should have known as a matter of Egyptian law that they had lost the Egyptian nationality and therefore the claimants could not be estopped from denying the Egyptian nationality at a later time.[71] More significantly, a State cannot benefit from its own wrongdoing. In that sense, the State cannot invoke the corruption defense,

[69] Waguih Elie George Siag v. The Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶ 193 (Jun. 1, 2009), *in* Matt Reeder, *Estop That! Defeating a Corrupt State's Corruption Defense to ICSID Bit Arbitration*, 27 AM. REV. INT'L ARB. 311, 319 (2016).

[70] *Id.* at 195 (*quoting* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 196 (Oxford Univ. Press, 1st ed., 2008)); *see also Draft Articles on Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n 26, art. 9, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), *available at* http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf.

[71] As a creation of equity, estoppel is grounded in the notion that a person ought not to benefit from his or her wrongs. *See Siag*, *supra* note 70, at ¶ 483. Brownlie notes that "[a] considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 616 (Oxford Univ. Press, 6th ed., 2003). Sir Hersch Lauterpacht, in addition to the statement cited above, offered the view that "[a] State cannot be allowed to avail itself of the advantages of the treaty when it suits it to do so and repudiate it when its performance becomes onerous. It is of little consequence whether that rule is based on what in English law is known as the principle of estoppels or the more generally conceived requirement of good faith. The former is probably not more than one of the aspects of the latter." *See Siag*, *supra* note 70, at ¶ 483.

particularly when the wrongfulness of its organ, is attributable to the State itself. The State therefore cannot hide behind the illegality of inducing the investor in the corruption scheme, i.e., the commission fee.

The question then becomes when and how a State can safely invoke this defense—notwithstanding its participation in illegal arrangements—and how a future investor can be protected in asymmetrical scenarios in which the illegality defense works as an incentive for the host State to favor a corrupt act.[72] To prevent these phenomena from occurring in investment treaty arbitration and after a careful balancing of the interests of the parties, tribunals can arrive at three possible solutions:

(a) First, if the investigation finds that the investor corruptly procured the investment contract, the corruption defense creates an incentive for the host State to expropriate the investor's rights or renegotiate the contract on onerous terms.[73] The investor could be offered the opportunity to cure its wrongdoing by incorporating a treaty provision stating that, in case corruption or bribery renders the contract unenforceable, the host State relinquishes any right to invoke the corruption defense upon payment of damages to the host State. Consequently, arbitral proceedings will not become futile and investors may still retain access to a neutral forum to protect their assets.[74]

(b) Second, if the host State is culpable for luring the investor into a corruption scheme, as already explained, it will be barred from raising this defense by virtue of state responsibility and estoppel. However, the situation may be different if the host State gives assurances for the prosecution of the perpetrators and the imposition of criminal fines and disgorgement penalties.

[72] Giacomo Rojas-Elgueta, *The Legal Consequences of Corruption in International Arbitration: Towards a More Flexible Approach?* KLUWER ARB. BLOG, Jan. 20, 2016, http://arbitrationblog.kluwerarbitration.com/2016/01/20/the-legal-consequences-of-corruption-in-international-arbitration-towards-a-more-flexible-approach.

[73] Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework for FCPA-ICSID Interaction*, 63 DUKE L. J. 1200, 1236 (2014).

[74] *Id.* at 1238.

(c) Third, the investor might be able to bring a corruption claim directly against the host State. This is not a far-fetched scenario, as seen above, since a fair and equitable treatment examination by the tribunal may foster a cause of action in a corruption claim. Moreover, a potential investor may enjoy non-contractual remedies. For example, an investor may receive restitution notwithstanding its participation in the corrupt scheme, with the ultimate purpose of compensating the work done based on the value of the project. This approach may also deter unscrupulous host States from resorting to corruption defenses, which would put parties' incentives on equal footing on whether to access the ISDS system.

V. FINAL REMARKS

This article attempts to define the scope of corruption and illustrate why and how it interrelates with ISDS. Though a common phenomenon in international commercial arbitration, corruption is more perverse in the ISDS system because it systematically deals with the threefold power of the host State to act as respondent, lawgiver, and investment protector. In this way, the foreign investor is subject to its full sovereign power. Over time, tribunals have adopted different methods to assess corruption defenses, which has contributed to a fragmented approach concerning the proper evaluation of these defenses. This has propelled inconsistency and made the system more vulnerable to corruption defenses. Examining the different stages at which the plea of corruption and illegality arise, namely jurisdiction, admissibility, and merits, should be subject to further critical analysis and thus guide tribunals correctly in shaping the law. The argument based on the foregoing observations is supplemented by a strategic reform proposal, which would elevate corruption to at least a public policy and explicit threshold issue to eliminate party misuse of corruption defenses. Furthermore, the practical considerations included in the last section demonstrate under which circumstances the host State can rely (or not) on a corruption defense and what additional legal protection the investor may enjoy. It is not the author's intention to lean on either party's position. Rather, it is to provide equal footing for both the investor and the host State and to provide a comprehensive tool for tribunals

faced with corruption issues.

GEORGE MARTSEKIS is an Attorney-at-Law (Athens, Greece). He specialized in international arbitration and public international law matters. George worked as an Associate with the New York office of Grant & Eisenhofer, P.A. on securities fraud litigation and primarily on investment treaty arbitration. He earned an LLM (Hons) from Georgetown University Law Center on a Georgetown Law Scholarship, and an LLM from Queen Mary University of London (School of International Arbitration). George is also a graduate of National and Kapodistrian University of Athens. He regularly writes on complex and contested international arbitration issues.

THE BLURRING OF THE LINE BETWEEN CONTRACT-BASED AND TREATY-BASED INVESTMENT ARBITRATION

by Laurence Boisson de Chazournes

Traditionally, a distinction has been made between contract-based and treaty-based investment arbitration. However, as with the impassable wall separating Pyramus from Thisbe, there are cracks enabling the two to mix. Among the warning signs is the question of the law applicable in its various facets to the substance of the dispute.

I. APPLICABLE LAW: WHERE IS THE LINE?

One of the perforations of the boundary between contract-based and treaty-based investment arbitration relates to the law applicable to the merits. In both types of arbitration, tribunals tend to intertwine domestic and international law. This approach, however, raises questions, particularly when tribunals do not consider the choice of law clauses provided by investment agreements.

In contract-based investment arbitration, various scenarios can be found regarding the applicable law. Yet, in this plurality, there is a propensity to consider both sets of norms. This is particularly the case where investment contracts do not contain a choice of law provision. This happens frequently. For instance, in its first 20 years of its existence, only half of the cases that were brought under the International Centre for Settlement of Investment Disputes (ICSID) Convention on the basis of an investment contract involved an applicable law clause.[1] Under Article 42(1) of the ICSID Convention, arbitral tribunals were thus required to apply the law of the State party to the dispute and "such rules of international law as may be applicable."[2] International law wields a dual role in such circumstances, that is, it may be "*complementary* (in the case of a 'lacuna' in the law of the State), or *corrective*,

[1] A.R. PARRA, THE HISTORY OF ICSID 178 (Oxford University Press (2012)).

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

should the State's law not conform on all points to the principles of international law."[3] Parties may also provide for such a role directly through a choice of law clause. Indeed, the provision on the applicable law may allow for recourse to international law, if necessary, and not merely domestic law alone. This was the case in *AGIP S.p.A. v. People's Republic of the Congo*, where the parties had agreed that "Congolese law, supplemented where necessary by any principle of international law, shall apply."[4]

That said, even where the parties have agreed to the sole application of national law, international law may still apply. This is so when States incorporate international law as part of their domestic law, which is the case in a significant number of national legal systems.[5] Even so, international law is germane to the extent that it is permitted by the fundamental laws of States or their constitutional provisions. Examples include, *inter alia*, the laws of Argentina,[6] Cameroon,[7] France,[8] Switzerland,[9] and the US.[10]

In some cases, arbitral tribunals went beyond the parties' agreement on the sole application of national law and resorted to international law in the same way as in the absence of an agreement, *i.e.*, in a supplementary or corrective manner. For example,

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[3] *See*, *e.g.*, Klöckner Industrie-Anlagen GmbH, et al. v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, *ad hoc* Committee Decision, ¶ 122 (May 3, 1985) (emphases in original); Amco Asia Corp., et al. v. Republic of Indonesia, ICSID Case No. ARB/81/1, *ad hoc* Committee Decision, ¶¶ 514-15 (May 16, 1986); Amco Asia v. Indonesia, ICSID Case No. ARB/81/1, Award in Resubmitted Proceeding, ¶ 580 (May 31, 1990).

[4] AGIP S.p.A. v. People's Republic of the Congo, ICSID Case No. ARB/77/1, Award, ¶ 323 (Nov. 30, 1978) (transl. by the author).

[5] *See* ANDRÉ NOLLKAEMPER, NATIONAL COURTS AND THE INT'L RULE OF LAW 73-74 (Oxford University Press (2008)).

[6] CONSTITUTION OF THE ARGENTINE NATION, art. 75(22); *see also* BG Group Plc. v. Republic of Argentina, UNCITRAL, Award, ¶ 97 (Dec. 24, 2007).

[7] CONSTITUTION OF THE REPUBLIC OF CAMEROON, art. 45.

[8] CONSTITUTION OF FRANCE (1958), art. 55.

[9] *See*, *e.g.*, A & B v. Government of the Canton of Zurich, Appeal Judgment, Case No. 2P.273/1999, ILDC 350, partly published as BGE 126 I 242; ILDC (Sept. 22, 2000).

[10] U.S. CONST., art. VI(2).

in *Autopista Concesionada de Venezuela CA v. Venezuela*, despite the parties' incorporation of Venezuelan law into the Concession Agreement,[11] the Tribunal held:

> [It is] a well-accepted practice that the national law governing by virtue of a choice of law agreement (pursuant to Article 42(1) first sentence of the ICSID Convention) is subject to correction by international law in the same manner as the application of the host state law failing an agreement (under the second sentence of the same treaty provision).[12]

Other tribunals have followed similar lines of reasoning, stressing the regulatory role of international law.[13] In other words, in contract-based investment arbitration, there appears to be a "general reluctance to abandon international law."[14]

In addition, the choice of domestic law alone does not preclude the application of transnational public policy. This category refers to the principles and values of international public policy as to which a broad consensus has emerged in the international community.[15] These principles always remain applicable, even where the parties have agreed on national law, as illustrated by *World Duty Free v. Kenya.* In that case, the Tribunal held that claims based on contracts of corruption or on contracts obtained by corruption could not be upheld "as a matter of *ordre public international* and public policy under the contract's applicable laws."[16] Bribery, as the

[11] Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, Award, ¶ 94 (Sept. 23, 2003).

[12] *Id.* ¶ 207.

[13] *See*, *e.g.*, Liberian Eastern Timber Corp. v. Republic of Liberia, ICSID Case No. ARB/83/2, Award, 2 ICSID Reports 346, 358-359 (Mar. 31, 1986); Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award, ¶¶ 80-84 (May 20, 1992); Duke Energy Int'l Peru Invs. No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Decision on Jurisdiction, ¶ 162 (Feb. 1, 2006).

[14] CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 585-586 (2d ed. 2009). The author speaks indiscriminately of contracts and treaties.

[15] *See* Laurence Boisson de Chazournes, *Fundamental Rights and International Arbitration: Arbitral Awards and Constitutional Law*, *in* ARBITRATION ADVOCACY IN CHANGING TIMES 309, 322-323 (Albert Jan van den Berg ed., 2011).

[16] World Duty Free Co. v. Republic of Kenya, ICSID Case No. Arb/00/7, Award, ¶ 188 (Oct. 4, 2006) (emphasis in original). *See also* Institute of International Law, *Resolution on Arbitration Between States, States Enterprises or State Entities, and Foreign Enterprises*, 5 ICSID REV.-FILJ 139 (1990).

Tribunal explained, "is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy."[17]

This brief overview on contract-based investment arbitration is indicative of the tendency to intertwine national and international law. This intermingling is not unique to this type of arbitration; it is also found in treaty-based investment arbitration.

Many investment treaties, whether bilateral or multilateral, contain a choice of law clause providing for the application of international law, including the provisions of the said agreement, as well as the law of a contracting party which is a party to the dispute.[18] In other words, the choice of law provision refers both to national and international law. Other agreements, in particular multilateral treaties, include an exclusive reference to international law. For example, Article 26(6) of the Energy Charter Treaty provides that "[a] tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."[19] Nevertheless, this does not mean that domestic law is totally excluded.

That said, in most cases, investment treaties do not contain a choice of law clause.[20] As a result, the default rule contained in Article 42(1) of the ICSID

[17] World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157, n.19 (Oct. 4, 2006).

[18] *See*, *e.g.*, Agreement between the Swiss Confederation and the Republic of Argentina on the Promotion and Reciprocal Protection of Investments, Nov. 6, 1992, art. 10(7); Agreement between the Belgo-Luxembourg Economic Union and the Republic of Burundi Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 12, 1993, art. 8(5); *see also* Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within MERCOSUR, Jan. 17, 1994, art. 9(5).

[19] Energy Charter Treaty, Dec. 17, 1994, art. 26(6); *see also* North American Free Trade Agreement, Jan. 1, 1994, art. 1131. As an example of a bilateral treaty, *see*, *e.g.*, Agreement between the Spanish Kingdom and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments, Oct. 10, 2006, art. 15.

[20] *See*, *e.g.*, Agreement between the Czech Republic and the Republic of Cyprus for the Promotion and Reciprocal Protection of Investments, June 15, 2001, art. 8; Agreement between the Swiss Confederation and the Republic of Cuba concerning the Reciprocal Promotion and Protection of Investments, May 26, 1996, art. 10.

Convention applies, providing that the law of the State party to the dispute governs, as well as "such rules of international law as may be applicable." Yet, some arbitral tribunals have held that relying on a treaty to bring its claims implicitly indicated that international law applied.[21] Conversely, treaties that provide for the exclusive application of international law do not mean that national law is excluded. Indeed, while the types of investment protected by a treaty falls within its scope, the content and extent of each category are defined by the domestic law of the host State that is a party to the dispute.[22] In other words:

> In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law. Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law.[23]

It follows from the above that in treaty-based investment arbitration as well, the applicable law consists of a combination of national and international law. The distinction is blurred, whether the arbitration is contract-based or treaty-based.

II. ACCOUNTABILITY AND TRANSPARENCY: IS THERE A LINE?

Another common point is the trend towards investor accountability and greater transparency that permeates both investment contracts and investment treaties. At the outset, it should be recalled that, from the formation of ICSID, the disputes envisaged were essentially claims involving breaches of investment contracts.[24] This relative balance between investors' and States' rights and obligations changed when

[21] *See*, *e.g.*, Middle East Cement Shipping & Handling Co. S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, ¶ 87 (Apr. 12, 2002); ADC Affiliate Ltd. & ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 290 (Oct. 2, 2006).

[22] Zachary Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74(2) BRITISH Y.B. INT'L LAW 151, 197-211 (2004); ERIC DE BRABANDERE, INVESTMENT TREATY ARBITRATION AS PUBLIC INTERNATIONAL LAW 127 (2014).

[23] *See* Emmis Int'l Holding BV v. Republic of Hungary, ICSID Case No. ARB/12/2, Award, ¶ 162 (Apr. 16, 2014); Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award, ¶ 331 (Dec. 19, 2016).

[24] A. R. PARRA, *supra* note 3, at 132.

treaty claims emerged in the early 1990s. At that time and thereafter, the balance of rights and obligations shifted towards investor protection.

Interestingly, this balance is undergoing a new evolution. Investment treaties increasingly impose obligations on investors and now contain provisions allowing States to bring counterclaims.[25] These new obligations often consist of the requirement to respect the law of the host State, as well as public order and morality.[26] In some cases, these obligations go further and include respect for human rights, the obligation to conduct environmental and social impact assessments,[27] and the requirement to comply with soft law standards such as those of corporate social responsibility.[28]

On their side, investment contracts are likewise redefining this balance by increasingly including clauses to ensure compliance with national law and corporate social responsibility standards, as well as the obligation to carry out environmental and social impact assessments.[29] One such example is the concession contract concluded between Liberia and Firestone Liberia, which contains a clause stipulating that:

> except as explicitly provided in this Agreement, Firestone Liberia Inc. shall be subject to Law as in effect from time to

[25] *See* Laurence Boisson de Chazournes, *Changes in the Balance of Rights and Obligations: Towards Investor Responsabilization*, *in* LA PROTECTION DES INVESTISSEMENTS ETRANGERS: VERS UNE RÉAFFIRMATION DE L'ETAT? 83-95 (T. El Ghadban et al. eds., 2018).

[26] *See*, *e.g.*, Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, Jun. 5, 1981, art. 9; Treaty Establishing the Common Market for Eastern and Southern Africa, Nov. 5, 1993, art. 13.

[27] *See*, *e.g.*, Southern African Development Community (SADC) Model BIT (2012), arts. 13, 15; Reciprocal Investment Promotion and Protection Agreement between Morocco and Nigeria, Dec. 3, 2016, arts. 14, 15.

[28] *See*, *e.g.*, Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with the Economic Community of West African States (ECOWAS), Dec. 19, 2008, art. 16.

[29] *See*, *e.g.*, Concession Agreement Between the Republic of Liberia and ADA Commercial Inc., *in* HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 435 (P.-M. Dupuy & J. E. Viñuales eds., 2013). *See also* Annex 4 of the Georgia and Azerbaijan Host Government Agreements on the South Caucasus Pipeline, *available at* https://www.bp.com/en_az/caspian/aboutus/legalagreements.html.

> time, including with respect to labor, environmental health and safety, customs and tax matters, and shall conduct itself in a manner consistent with Liberia's obligations under international treaties and agreements in so far as those have the effect of Law in Liberia.[30]

Although this rebalancing is still in its infancy, it will undoubtedly affect investment arbitration, whether it is based on a contract or treaty.

In terms of transparency, a similar trend is emerging, affecting both investment treaties and contracts. On the one hand, treaty obligations are becoming more stringent. Substantive obligations are incorporated to provide individuals with the necessary information. In practice, this includes public enquiries and the conduct of environmental and social impact assessments. At the same time, investment contracts face a comparable evolution. New statutes are being adopted at the domestic level, imposing greater transparency. For instance, the Tanzania Extractive Industries (Transparency and Accountability) Act of 2015 requires that "all concessions, contracts, and licenses relating to extractive industry companies" be published.[31] Similarly, the Mexican Hydrocarbons Law of 2014 requires public authorities to publish, *inter alia*, (1) the conditions and rules for bidding processes which have been used to award exploration and extraction contracts; (2) the number of exploration and extraction contracts currently in force; and (3) their terms and conditions.

Likewise, new soft law standards have been developed with a view to improve transparency. This is the case of the Extractive Industries Transparency Initiative Standard, implemented by 51 States. It requires greater transparency from the oil,

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[30] Amended and Restated Concession Agreement Between the Republic of Liberia and Firestone Liberia, Inc., art. 30.1, *in* Zachary Douglas, *The Enforcement of Environmental Norms in Investment Treaty Arbitration*, *in* HARNESSING FOREIGN INVESTMENT TO PROMOTE ENVIRONMENTAL PROTECTION: INCENTIVES AND SAFEGUARDS 415, 434-435 (P.-M. Dupuy & J. Vinuales eds. 2013).

[31] The Tanzania Extractive Industries (Transparency and Accountability) Act, 2015, art. 16(1)(a), *available at* http://www.teiti.or.tz/wp-content/uploads/2014/03/The-Tanzania-Extractive-Industries-Transparency-Accountability-Act-2015.pdf; *see also* the Hydrocarbons Law of Mexico, Aug. 11, 2014 (updated on Nov. 15, 2016), arts. 88-91.

gas, and mining industries "in the context of respect for contracts and laws."[32] It calls on States to publish in a timely and accurate manner "information on key aspects of their natural resource management, including how licences are allocated, how much tax, royalties and social contributions companies are paying."[33] Companies are not left out: they are required to make comprehensive disclosures about material payments made to Governments.

As we have just seen, this desire for greater transparency and investor accountability transcends the dividing line between investment contracts and investment treaties. The recent proposals to amend the ICSID Arbitration Rules to ensure greater transparency in arbitral proceedings exemplify this. They make no distinction according to the type of arbitration.[34] Ultimately, there seems to be a "publicization" of investment law to the extent that investment contracts follow a parallel evolution to investment treaties.

PROF. LAURENCE BOISSON DE CHAZOURNES is a professor in international law at the Faculty of Law of the University of Geneva. She is the Director of the Geneva LL.M. in International Dispute Settlement (MIDS) and Co-Director of the Center for International Dispute Settlement (CIDS). She is a member of the Global High-Level Panel on Water and Peace and an Associate Member of the Institute of International Law. In the field of dispute settlement Laurence Boisson de Chazournes has acted as Counsel before the International Court of Justice (ICJ) and other dispute settlement fora, has served as chairperson of WTO arbitration panels on pre-shipment inspections and as an arbitrator for ICSID and other arbitration fora (inter alia, PCA, ICC). Moreover, she is a member of the Permanent Court of Arbitration (PCA), a member of the WTO indicative list of governmental and non-governmental panelists and an arbitrator of the Court of Arbitration for Sport (CAS). In 2018, she was a member of the CAS ad hoc Division at the Olympic Winter

[32] *See* Extractive Industries Transparency Initiatives (EITI) Standard Requirements, 2016, Principle 6, *available at* https://eiti.org/sites/default/files/migrated_files/english_eiti_standard_0.pdf.

[33] *See* EITI Fact Sheet, Mar. 2019, available at https://eiti.org/document/eiti-fact-sheet.

[34] *See* the proposals for Amendment of the ICSID Rules, Working Paper, Schedule 8 on transparency – access to documents, access to hearings, and non-disputing party participation in ICSID proceedings, *available at* https://icsid.worldbank.org/en/Documents/Amendments_Vol_3_Complete_WP+Schedules.pdf.

Games in PyeongChang (Rep. of Korea). She is also a member of the Hong Kong International Arbitration Center, of the list of Arbitrators of the World Intellectual Property Organization (WIPO) as well as of the list of Conciliators of the International Centre for Settlement of Investment Disputes (ICSID). Laurence was Co-Chair of the 2013 ASIL Annual Meeting, is Counsellor to the ASIL Executive Council and a member of the AJIL Board of Editors.

KEYNOTE REMARKS:
STATE PARTIES IN CONTRACT-BASED ARBITRATION:
ORIGINS, PROBLEMS AND PROSPECTS OF PRIVATE–PUBLIC ARBITRATION

by Charles N. Brower

Keynote address delivered at the 16th Annual ITA-ASIL Conference held in Washington, D.C., on March 27, 2019.

The keynote introduces the kinds of contractual disputes involving public actors that are settled through arbitration, discuss the drivers for such arbitrations, and provide a conceptual framework to analyze these arbitrations. It discusses in particular to which extent contract–based private–public arbitrations should be treated in the same manner as private–private commercial arbitration, or whether they should be related closer to the debates we have in the context of investment treaty arbitrations.

I. INTRODUCTION

It is an honor and privilege to stand before you today to deliver the Keynote Address for the 16th Annual ITA-ASIL Conference. Our topic is the theory and practice of private-public arbitration,[1] with particular attention devoted to the role of state parties in contract-based arbitration. I have been asked to lay down the conceptual groundwork and to provide a status check on such arbitrations and, after some reflection, let me tell you, I am not pleased.

The nature of international investment law is largely premised on a "false trichotomy." The fallacious view is that somehow there are clean borders separating commercial arbitration, treaty-based investor-state arbitration, and inter-state forms of dispute resolution involving foreign investments. This is an absolute fallacy.

[1] *See* Alex Mills, *The Public-Private Dualities of International Investment Law and Arbitration*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 97 (Chester Brown & Kate Miles, eds., 2011); Julie Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 367 (2014); Stavros Brekoulakis & Margaret Devaney, *Public-Private Arbitration and the Public Interest under English Law*, 80 MOD. L. REV. 22 (2017); Stephan Schill, *Transnational Private-Public Arbitration as Global Regulatory Governance: Charting and Codifying the Lex Mercatoria Publica*, European Research Council, Amsterdam Center for International Law (2013–2018), *available at* https://acil.uva.nl/content/research-projects/current-research-projects/lexmercpub-kopie-2.html?1555407083981.

In truth, international investment law encompasses all three forms of dispute resolution.[2] The key feature of investor-state dispute settlement (ISDS) is that it opposes private economic interests and the exercise of sovereign legislative, executive or judicial powers. What matters is not the stage on which the dispute is played out, but rather the competing private and public interests at stake.

In 2013, I delivered the annual Alexander Lecture at the Chartered Institute of Arbitrators in London titled "Investomercial Arbitration: Whence Cometh It? What Is it? Whither Goeth it?"[3] In that lecture, I coined the term "investomercial arbitration." I sought by this phrase to reframe how one ought to think about international investment law. "Investomercial" destroys the "false trichotomy" by exposing the true private-public nature of the foreign investment relationship. I propose in three parts to canvass the origin, the current posture and the prospects of contract-based private-public, or, shall we say, "investomercial" arbitration.

II. ORIGIN

The protection of foreign property traditionally has underpinned the development of public and private international law.[4] As a field of concentration, it gained significant global interest in the post-colonial era, as former empires sought to ensure that the foreign property of their nationals and corresponding business

[2] For inter-state dispute settlement, primary examples include Mixed Claims Commissions (*e.g.*, Iran-United States Claims Tribunal) and investment-relevant cases before the International Court of Justice (*e.g.*, Case Concerning Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy), Judgment, Merits, 1989 I.C.J. 15 [hereinafter "ELSI"]). For commercial arbitration, examples include disputes arising out of the breakdown of private and public economic relations (*e.g.*, disputes where one party is a state-owned enterprise). For treaty-based investment arbitration, examples include jurisprudence administered under the arbitration rules that frequently govern investor-state dispute settlement (*e.g.*, UNCITRAL Arbitration Rules). The common theme across these fields of dispute settlement is the private-public dimension.

[3] Charles N. Brower, *Investomercial Arbitration: Whence Cometh It? What is it? Whither Goeth It?*, 8 INT'L J. ARB., MED. & DISP. MGMT. 179 (2014).

[4] Evidence of early privately-financed infrastructure projects date back to the early antiquity era, *circa* 312 BC. For a brief historical account of early complex long-term contracts, *see* HERFRIED WÖSS ET AL, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS 26–31 (2014) [hereinafter WÖSS].

interests in their former colonies enjoyed legal protection.[5] Established means—*i.e.*, local remedies and diplomatic protection—were largely deemed insufficient over time due to the "politicization" of disputes,[6] the threat of or actual use of force,[7] and ultimately delayed and unsatisfactory outcomes if the matter ever reached an international adjudicative body.[8] Since consensus has not been achieved on a multilateral investment agreement,[9] the international community has adopted

[5] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW, 14 et seq. (2008).

[6] *See*, *e.g.*, Sir Hersch Lauterpacht, *The Subjects of the Law of Nations*, 63 L. Q. REV. 438, 454 (1947).

[7] One example is the 1956 Suez Canal crisis when Egypt nationalized (and seized control of) the Suez Canal and its operating company. A strategically important intersection between the Mediterranean Sea and Indian Ocean that eased commerce, the British and French, who both had stakes in the canal, responded with military force. Thomas T.F. Huang, *Some International and Legal Aspects of the Suez Canal Question*, 51 AM. J. INT'L L. 277 (1957). The term "gunboat diplomacy" is frequently used. *See*, *e.g.*, Richard B. Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 1, 3 (R. Lillich ed. 1983). Even in modern times, economic (and possibly military) sanctions continue to play a role. For example, Argentina settled outstanding arbitration awards in 2013–2014 owed in part to the United States implementation of certain economic pressures (*i.e.*, certain trade measures, including limiting access to World Bank and Inter-American Development Bank credit and loan facilities or refusing to support the restructuring of Argentina's US$7 billion Paris Club debt). *See* Roger Alford, *Using Trade Remedies to Enforce Arbitration Awards*, KLUWER ARB. BLOG, Mar. 22, 2014, http://arbitrationblog.kluwerarbitration.com/2014/03/22/using-trade-remedies-to-enforce-arbitration-awards/?print=pdf; Arturo C. Porzecanski, *The Origins of Argentina's Litigation and Arbitration Saga, 2002–2014*, AM. U. WORKING PAPER SERIES, Paper No. 2015-6 (May 13, 2015), *available at* http://fs2.american.edu/aporzeca/www/Origins%20of%20Argentinas%20Litigation%20&%20Arbitration%20Saga.pdf.

[8] *See*, *e.g.*, ELSI, *supra* note 2. The ELSI case took 21 years before the dispute was settled (six years before the local courts and 15 years of diplomatic exchanges between the United States and Italy).

[9] Examples of multilateral codifications attempts include: Draft Convention on Investments Abroad [1959 Abs-Shawcross Draft] *reproduced in* UNCTAD, *International Investment Instruments: A Compendium* (Vol. V), p. 301, U.N. Doc. UNTAD/DITE/2 (Vol. V) (2000); Draft Convention on the International Responsibility of States for Injuries to Aliens, *reprinted in* Louis B. Sohn & R. R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM .J. INT'L L. 545, 548 (1961); OECD, Draft Convention on the Protection of Foreign Property, 1962, 2 I.L.M. 241 (1963); OECD, *Draft Convention on the Protection of Foreign Property, 1967*, 7 I.L.M. 117 (1968); Multilateral Agreement on Investment: Draft Consolidated Text, DAFFE/MAI(98)7/Rev1 (Apr. 22, 1998).

treaty-, contract-, and legislation-based arbitration as the mainstream methods to overcome these shortcomings, as collectively they provide foreign investors with procedural and substantive rights that are directly enforceable against host states (and their entities) on the international plane.

While treaty-based arbitration is the darling of ISDS today, contract-based arbitration is its kissing cousin. The International Centre for Settlement of Investment Disputes' (ICSID) 2019 first quarter statistics reveal that treaty-based arbitrations constitute 75% of its registered cases. Contract-based arbitration holds second place at 16%. At 9%, arbitrations permitted by a host state's national legislation round out the total.[10] Historically, state contracts were the safest way to protect foreign investment.[11] Many historical landmarks would not have been built but for private financing. For example, many of London's bridges, the Gotthard railway tunnel under the Alps in Switzerland, the Suez Canal in Egypt, and the "Chunnel" linking England to the Continent were all privately financed projects.[12] Accordingly, "state contracts"[13] have evolved from one-sided agreements into true partnerships covering a wide array of projects and engaging multiple legal fora.

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[10] ICSID reports 706 total cases, which is not a full accounting of all known ISDS cases but largely representative of the whole. The ICSID Caseload–Statistics, Issue 2019-1, at 10, *available at* https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf [hereinafter ICSID Statistics].

[11] For an overview of contractual protection through diplomacy (early 1800s-early 1900s), *see* JEAN HO, STATE RESPONSIBILITY FOR BREACHES OF INVESTMENT CONTRACTS 11–19 (2018). And, for an overview of the early contractual protection through international adjudication vis-à-vis mixed claims commissions (early 1900s-1920s), *see id.* at 19–36. ICSID originally was created to address dispute resolution of concession contracts. *Consultative Meeting of Legal Experts, Bangkok, Thailand, 27 April-1 May 1964, in* HISTORY OF THE ICSID CONVENTION (1968). *See also* J. Christopher Thomas & Harpreet K. Dhillon, *The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards*, 32 ICSID REV. 459, 473 (2017). Rudolf Dolzer and Christoph Schreuer further describe such contracts as building blocks for the legal regime of oil and gas projects by multinational companies. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 79 (2d ed. 2012) [hereinafter DOLZER & SCHREUER].

[12] WÖSS, *supra* note 4, 27.

[13] There may be subtle legal and political connotations attached to the various terms used to describe private-public contractual arrangements. For convenience, and without prejudice

Over time, there have been ebbs and flows in the use of investment contracts. The first portion of the twentieth century included the First and Second World Wars, a period that featured an international trend of political and economic instability as well as the advancement of nationalistic ideologies. In response, the later opening up of investment contracts with states became a primary legal means for establishing large infrastructure projects such as highways, bridges, airports and power plants, as well as the set-up and maintenance of natural resource extraction and essential

to the various interpretations, "investment contract," "foreign investment contract" and "state contract" are used interchangeably throughout this written contribution. Accordingly, there are many ways to describe these arrangements. Traditional state contracts were known as concession contracts, which generally were long-term contracts providing exclusive rights to develop and harvest natural resources whereby the state received royalties based on the resources extracted. Modern state contracts may include modern concession agreements (which are largely the same as traditional concession contracts, but the state retains a greater degree of control of and return on the extraction of resources); production-sharing agreements; skill-specific (management/technical/service) contracts; turnkey contracts; joint venture agreements; licensing and transfer of technology agreements; and build, operate and own (BOO) and build, operate and transfer (BOT) agreements. For a general overview, *see* JAN OLE VOSS, THE IMPACT OF INVESTMENT TREATIES ON CONTRACTS BETWEEN HOST STATES AND FOREIGN INVESTORS 17–24 (2010) [hereinafter VOSS]. In some jurisdictions (particularly civil law countries under the Code Napoleon tradition), a distinction is made between a concession (*i.e.*, private party provides service to public and takes an end-user risk) and a private-public partnership (*i.e.*, private party provides service to public and undertakes risk in the existing market). A Public-Private Partnership ("PPP") may be defined as "a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance." World Bank, *PPP Knowledge Lab*: *PPP Reference Guide*, (2017), *available at* https://pppknowledgelab.org/. In addition to country-specific PPP laws, available are international guidelines relevant to PPPs: UNCITRAL, *Legislative Guide on Privately Funded Infrastructure Projects*, UN Doc. A/CN.9/SER.B/4 (2001), *available at* http://www.uncitral.org/pdf/english/texts/procurem/pfip/guide/pfip-e.pdf; UNCITRAL, *Model Legislative Provisions on Privately Financed Infrastructure Projects*, (2004), *available at* http://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf; OECD, EBRD *Core Principles for a Modern Concession Law* (2006), *available at* https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Core%20Principles%20for%20Modern%20Concession%20Law_EN.pdf; OECD, *Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships*, (2012), *available at* https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf. See also, World Bank, *Public-Private Partnerships*, http://www.worldbank.org/en/topic/publicprivatepartnerships/overview. Another commonly used term to describe private-public contracts is the "economic development agreement."

services (*e.g.*, hospitals, schools, transportation, waste management and telecommunications).[14]

In addition to recording each contracting party's rights and responsibilities, at the heart of these contracts is the allocation of risk. A future return is expected based on up-front provision of capital, technology, skill or service. When the investment is made in a foreign jurisdiction and is intended to be long-lasting, the risks that already are inherent in the foreign economy and its regulatory climate are further heightened if the state contract calls for the private foreign investor to build and maintain facilities essential to the local populace, such as, for example, the local water supply. But the foreign investor is usually at a disadvantage because the host state is not just a contracting party; it has a second, paramount role as a sovereign legislator. Thus, whereas the foreign investor is totally bound by the "sanctity of a contract" (*i.e.*, *pacta sunt servanda*), the host state's second role as sovereign power may incite it to abandon its contractual obligations in response to a changing government agenda due to demands of its citizenry. In order to mitigate, if not eliminate, the risks arising from this imbalance, the foreign investor may, or may not, be successful in bargaining for inclusion in the state contract of one or another, or a combination, of the following: (1) a favorable applicable governing law, possibly international law or a combination thereof with a national law; (2) a favorable dispute resolution clause, *e.g.*, neutral international arbitration;[15] or (3) a stabilization clause.[16]

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[14] EU public authorities (over 250,000), for example, spend around 14% of GDP on the purchase of services, works and supplies. European Commission, *Public Procurement*, https://ec.europa.eu/growth/single-market/public-procurement_en.

[15] One recalls the governing law provisions in the 1970's Libyan oil concession agreements: "This Concession shall be governed by and interpreted in accordance with the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals." *See* LIAMCO v. Libya, Award of 12 April 1977, 62 Int'l L. Rep. 140 (1982); BP Exploration Co. (Libya) Ltd. v. Libya, Awards of 10 October 1973 and 1 August 1974, 53 Int'l L. Rep. 297, 302–303 (1973).

[16] *See*, *e.g.*, Energy Charter Treaty Secretariat, *Model Host Government Agreement*, *in* MODEL INTERGOVERNMENTAL AND HOST GOVERNMENT AGREEMENTS FOR CROSS-BORDER PIPELINES, Art. 37.2 [Option 2] 93 (2d ed., 2008), *available at* https://energycharter.org/fileadmin/DocumentsMedia/Legal/ma2-en.pdf ("The Host

III. PROBLEM

The main problem, as I see it, is the misguided belief—the myth, if you will—that commercial arbitration, treaty-based investor-state arbitration, and inter-state dispute settlement processes operate in water-tight compartments (*i.e.*, the "false trichotomy"). The relationships among these three processes is much more fluid. It should be obvious that contract-based disputes, when involving private and public actors, inevitably will deal with issues of concern to both private and public spheres of economic regulatory life. Perpetuation of the mythical trichotomy leads to fragmentation, artificially walling off each of the three types of investment dispute resolution processes from one another.[17] My solution to this misconception is, as I already have stated, the all-embracing concept of "investomercial" dispute settlement, which offers a normative and pluralistic perspective that bridges the divide heretofore separating the trio of private-public foreign investment dispute settlement processes from one another.[18]

Next, I discuss two types of investment disputes, *i.e.*, (1) contractual and (2) inter-state, in relation to treaty-based and legislation-based investor-state disputes, in an effort to dispel the "false trichotomy" by demonstrating just how, despite their differing legal fora, they are all private-public disputes.

Government shall take all actions available to it to restore the Economic Equilibrium established under this Agreement and any other Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in [insert name of the State] law (including any laws regarding Taxes, health, safety and the environment) occurring after the Effective Date…").

[17] For more on fragmentation of international law, *see* International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *Report of the Study Group of the International Law Commission*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), *available at* http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[18] "Normative pluralism" is "the idea that behavior can be evaluated from the perspectives of a variety of normative orders or normative control systems and thus, importantly, can also be justified from a variety of such perspectives." Jan Klabbers & Touko Piiparinen, *Normative Pluralism: An Exploration*, *in* NORMATIVE PLURALISM AND INTERNATIONAL LAW: EXPLORING GLOBAL GOVERNANCE 13, 14 (Jan Klabbers & Touko Piiparinen eds., 2013).

A. *Treaty-Based and Legislation-Based Arbitration*

By their nature, investment arbitrations arising under treaties or pursuant to legislation necessarily involve private-public arbitration, as the invitation to arbitrate is extended by a host state to foreign investors.[19]

The situation is less clear for contract-based investment arbitrations. At this point, it may be helpful to clarify that when I refer to contract-based investment arbitration, I mean that the contract and not, for example, the subject matter of the dispute (*i.e.*, the investment), operates as the basis for arbitration. In treaty-based and legislation-based investor-state dispute settlement, there are many examples, however, of the investment itself being the basis of the arbitration.[20] Unfortunately, contract-based arbitration disturbingly often is characterized as a form of international commercial arbitration despite the clear private-public relationship that exists between the parties, a point to which I will return shortly.

There also are instances, at least in treaty-based investor-state arbitrations, in which a host state may act as the claimant and the foreign investor as the respondent. The drafters of the ICSID Convention in fact expressly contemplated equal access for the host state,[21] but despite this formal equality, there have been few such cases. Notably, the handful of known such cases are all contract-based arbitrations.[22]

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[19] *See, e.g.*, U.S. Model BIT, 2012, Art. 24(1)(a)–(b), *available at* https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

[20] *See, e.g.*, ATA Const., Indus. & Trading Co. v. Jordan, ICSID Case No. ARB/08/2, Award (May 18, 2010).

[21] "[T]he Convention permits the institution of proceedings by host States as well as by investors and the Executive Directors have constantly had in mind that the provisions of the Convention should be equally adapted to the requirements of both cases." ICSID, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Art. III(13), at 41, *available at* https://icsid.worldbank.org/en/Documents/resources/ICSID_Conv%20Reg%20Rules_EN_2003.pdf.

[22] *See, e.g.*, Gabon v. Société Serete S.A., ICSID Case No ARB/76/1 (settled); Gov. of the Province of E. Kalimantan v. PT Kaltim Prima Coal & Others, ICSID Case No ARB/07/3, Award on Jurisdiction (Dec. 28, 2009), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8031_4.pdf; Peru v. Caraveli Cotaruse Transmisora de Energia S.A.C., ICSID

B. *Private-Public Arbitration*

International commercial arbitration is generally regarded as the preferred method of settling contract disputes in international commerce. It frequently involves private-private disputes relating to purely commercial matters. I am not concerned with these types of disputes except where at least one of the parties is a state. As mentioned, investment contracts frequently are formed as a joint arrangement with state-owned companies, and with increasing frequency, private-public arbitrations are being camouflaged as private-private disputes. For example, from 2017 to 2018, 15% of the caseload of the International Court of Arbitration of the International Chamber of Commerce (ICC) consisted of state-owned or parastatal entities as a party to the arbitral proceeding, up from 11% in 2016.[23] A significant majority of these cases were contract-based arbitrations.[24] I refer next to three disputes, as Exhibits A, B, and C, that demonstrate the private-public nature of contracts concluded by foreign investors with state-owned entities.

Exhibit A is *Dow Chemical Co. v. Petrochemical Industries Co.* Petrochemical Industries Company ("PIC") is a subsidiary of the state-owned Kuwait Petroleum Corporation. The roots of this contract-based arbitration date back to a US$17.4 billion joint venture agreement between Dow Chemical and PIC called "K-Dow." The terms of the agreement included a promise by PIC to pay US$7.5 billion for a 50% interest in certain petrochemical assets of Dow Chemical.[25] For its part, Dow Chemical agreed to hand over chemical plants and other assets to K-Dow in exchange

Case No ARB/13/24, Resolution to suspend proceedings (Dec. 26, 2013), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw9043.pdf.

[23] In 2017, 810 cases were registered with the ICC, which involved 150 state or parastatal entities. In 2018, 842 cases were registered with the ICC, 143 involved state or parastatal entities. International Chamber of Commerce Court of Arbitration, *ICC Dispute Resolution 2018 Statistics* (2019) at 8–9, *available at* https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/.

[24] Only four treaty-based investment cases were registered with the ICC in 2017. Since 1996, the ICC has administered 40 treaty-based investment arbitrations. *Id.* at 56.

[25] Petrochemical Indus. Co. (KSC) v. The Dow Chem. Co. [2012] E.W.H.C. 2739 (Comm) at ¶ 2 (Oct. 11, 2012), *available at* http://www.bailii.org/ew/cases/EWHC/Comm/2012/2739.html.

for approximately US$9 billion in cash that it planned to use to fund a US$15 billion acquisition of Rohm & Haas, a specialty chemicals company.[26] The relationship soured when PIC jumped ship in December 2008 as a result of parliamentary pressure and concern about declining oil prices in light of the fast-approaching global recession.[27] Dow Chemical responded by initiating arbitration, arguing that the deal's collapse nearly ruined its deal with Rohm & Haas and forced it to divest assets to obtain short-term financing.[28] The ICC tribunal held in 2012 that PIC was liable for the botched merger and awarded damages to Dow Chemical in excess of US$2 billion.[29]

Exhibit B is *Esso Exploration & Production Nigeria Ltd. & Shell Nigeria Exploration & Production Co. Ltd. v. Nigerian National Petroleum Corp.* This case involved a dispute over crude oil allocation and related tax matters under a 30-year production-sharing contract for extracting oil from the Erha Deepwater oil field, which is along

[26] Ed Crooks, *Dow Chemical Wins $2.2bn in Kuwait Damages*, FINANCIAL TIMES (May 24, 2012), *available at* https://www.ft.com/content/cc79eaca-a5a8-11e1-a3b4-00144feabdc0.

[27] Sebastian Perry, *Dow wins US$2bn Over Cancelled Kuwaiti Venture*. GLOBAL ARBITRATION REVIEW (May 24, 2012), https://globalarbitrationreview.com/print_article/gar/article/1031361/dow-wins-ususd2-billion-over-cancelled-kuwaiti-venture?print=true.

[28] Sebastian Perry, *Dow Sees Bump to Kuwait Award*, GLOBAL ARBITRATION REVIEW (Mar. 04, 2013), https://globalarbitrationreview.com/print_article/gar/article/1032147/dow-sees-bump-to-kuwait-award?print=true.

[29] Kyriaki Karadelis, *UK Court Keeps US$2 Billion Dow Award Intact*, GLOBAL ARBITRATION REVIEW (Oct. 22, 2012), https://globalarbitrationreview.com/print_article/gar/article/1031700/uk-court-keeps-ususd2-billion-dow-award-intact?print=true. *See also* Abdelghani Henni, *Analysis: Kuwait's Costly K-Dow Misadventure*, REVIEW REFINING & PETROCHEMICALS MIDDLE EAST (June 27, 2012), *available at* https://www.refiningandpetrochemicalsme.com/article-10412-analysis-kuwaits-costly-k-dow-misadventure.

the Nigerian coast.[30] Under the contract,[31] Esso Exploration and Production Nigeria Limited ("Esso") and Shell Nigeria Exploration and Production Company Limited ("Shell") were responsible for exploration and extraction of the oil, which latter was to be split according to the contractual formula. After the project was launched, a dispute arose over the right to allocate oil quantities and the accuracy of the tax returns. The investors brought this case to arbitration when the Nigerian National Petroleum Corporation ("NNPC"), the state-owned oil company, began unilaterally to lift oil based on its own estimates. A majority tribunal issued a final award in 2011 against NNPC for US$2.7 billion, finding among other things that NNPC had breached the contract by over-lifting crude oil and that Esso and Shell had the exclusive right to estimate the tax payable on the oil lifted.[32]

Exhibit C is *Crescent Petroleum v. National Iranian Oil Company*. This case concerned a breach of contract claim brought by a United Arab Emirates-based private company, Crescent Petroleum Company International Ltd. and its subsidiary ("Crescent Petroleum") against Iran's state-owned oil company, National Iranian Oil Company ("NIOC"). In April 2001, the two entities entered into a long-term gas supply

[30] Charles N. Brower & Michael P. Daly, A *Study of Foreign Investment Law in Africa: Opportunity Awaits*, *in* INTERNATIONAL ARBITRATION AND THE RULE OF LAW: CONTRIBUTION AND CONFORMITY, ICCA Congress Series No. 19 (Andrea Menaker ed., 2017). *See also* Production Sharing Contract Between Nigerian National Petroleum Corporation & ESSO Exploration & Production Nigeria Ltd., May 21, 1993, *available at* https://lbrcdn.net/cdn/files/gar/articles/Esso_NNPC_PSC.pdf; Sebastian Perry *Nigerian Oil Fight Heads to US*, GLOBAL ARBITRATION REVIEW (Nov. 13, 2014), https://globalarbitrationreview.com/print_article/gar/article/1033869/nigerian-oil-fight-heads-to-us?print=true.

[31] Production Sharing Contact Between Nigerian National Petroleum Corporation & Esso Exploration & Production Nigeria Ltd., May 21, 1993, *available at* https://lbrcdn.net/cdn/files/gar/articles/Esso_NNPC_PSC.pdf.

[32] Caroline Simpson, *Oil Cos. Spar Over Dismissal Of $2.7B Nigerian Award Row*, LAW360 (Feb. 4, 2019), https://www.law360.com/articles/954679/print?section=banking [hereinafter Simpson]; Damien Charlotin, *Analysis: $2.7 billion Award by Fortier and Brower Surfaces as a Result of Nigerian Efforts to Block Enforcement; Ruling in Favour of Shell and Exxon Entities Touched on Constitutional Questions, as well as Tax Stabilization*, IAREPORTER (Feb. 15, 2019), https://www.iareporter.com/articles/analysis-2-7-billion-award-by-fortier-and-brower-surfaces-as-a-result-of-nigerian-efforts-to-block-enforcement-ruling-in-favor-of-shell-and-exxon-entities-touched-on-constitutional-questions-as-we/ [hereinafter Charlotin].

and purchase contract, which was governed by Iranian law and referred all disputes, including those relating to the validity of the contract, to arbitration.[33] In July 2009, Crescent Petroleum commenced arbitration against NIOC, claiming that it had failed to deliver any gas since 2005 in breach of the multi-billion dollar contract.[34] In a majority award, the tribunal found that the contract was valid and binding upon the parties and that NIOC remained in breach of its obligation since 2005.[35]

All three of these disputes involved so-called private-private actors, but the effect that these multibillion-dollar awards have had (or will have) in Kuwait, Nigeria, and Iran cannot be ignored.

For *Dow Chemical v. PIC*, the ICC arbitration award created friction in the country's corridors of power. Questions were raised about who should shoulder the blame, which fragmented and polarized its parliament.[36] The *Dow Chemical* dispute also has been kindling for critical analysts, who suggest that the failure of the K-Dow plan due to political pressure remains one of the reasons why international companies are wary of making investments in Kuwait.[37]

For *Esso & Shell v. NNPC*, the award was nearly immediately set aside by the Federal High Court in Abuja, Nigeria, which held that tax matters were not arbitrable under Nigerian law and that the arbitrators had exceeded their jurisdiction.[38] The

[33] Nat'l Iranian Oil Co. v. Crescent Petroleum Co. Int'l Ltd. & Anor. [2016] E.W.H.C. 510 (Comm), ¶ 1 (Mar. 4, 2016) [hereinafter NIOC v. Crescent Petroleum].

[34] Alison Ross, *Crescent Petroleum Files Against Iran's Oil Company*, GLOBAL ARBITRATION REVIEW (July 22, 2009), https://globalarbitrationreview.com/article/1028490/crescent-petroleum-files-against-irans-oil-company.

[35] NIOC v. Crescent Petroleum, *supra* note 33 at ¶¶ 3, 34–36.

[36] Camilla Hall, *Kuwaiti Oil Minister Quits Over Dow Chemical's Compensation*, FINANCIAL TIMES (May 27, 2013), *available at* https://www.ft.com/content/1d6d5cee-c6e3-11e2-a861-00144feab7de.

[37] Dalal Al Houti, *Arbitration in Kuwait: Time for Reform?*, KLUWER ARBITRATION BLOG (Feb. 20, 2015), http://arbitrationblog.kluwerarbitration.com/2015/02/20/arbitration-in-kuwait-time-for-reform/.

[38] Ruling from The Federal High Court in Abuja, Suit No. FHC/ABJ/CS/923/11 (May 2012), *available at* https://lbrcdn.net/cdn/files/gar/articles/Esso_and_Shell_v_NNPC_-_Federal_Court_of_Abuja_set_aside_decision_May_2012.pdf.

Nigerian Court of Appeal confirmed the Federal High Court decision in part, determining that the contractual dispute under a Production Sharing Contract which resulted in the over-lifting of available crude oil to satisfy royalty and tax obligations under the Petroleum Profit Tax Act was in essence a tax dispute and was therefore not arbitrable.[39] The two oil companies have recently brought enforcement proceedings before the U.S. District Court for the Southern District of New York, in which they have claimed that the "Nigerian judicial system was rigged against them" and that the Nigerian courts would not order "NNPC, a key generator of state revenues, to pay compensation under an arbitral award."[40] The *Esso & Shell v. NNPC* dispute is one of five Nigeria-seated arbitrations brought against the NNPC under the same 1993 model production sharing contract, which have resulted in substantial awards against NNPC and reported interference from Nigerian courts.[41]

The *Crescent Petroleum v. NIOC* dispute was inflamed due to allegations by NIOC that the contract was not enforceable because it was procured by a bribe. NIOC alleged a conspiracy between a UK national, an alleged "fixer" on behalf of Crescent, and an individual related to the former Iranian president[42] to influence the finalizing

[39] The High Court also held that the disputes as to the contractual right to prepare petroleum profits tax returns and to determine the allocation of oil-lifting between the national oil company and the Contractor in the Production Sharing Contract were contractual claims and upheld the arbitration award in that respect. Olufunke A. Adekoya & Ibifubara Berenibara, *Nigeria: Case Review: Esso Petroleum and Production Nigeria Limited & SNEPCO v. NNPC*, MONDAQ (June 4, 2018), http://www.mondaq.com/Nigeria/x/707222/Arbitration+Dispute+Resolution/Esso+Petroleum+And+Production+Nigeria+Limited+SNEPCO+v+NNPC.

[40] Charlotin, *supra* note 32. On February 4, 2019, a hearing was held in New York by a federal judge to determine whether the award should be confirmed in light of its set-aside in Nigeria. Simpson, *supra* note 32.

[41] Sebastian Perry, *Shell Takes Nigerian Oil Award to New York*, GLOBAL ARBITRATION REVIEW (May 27, 2016), https://globalarbitrationreview.com/print_article/gar/article/1036367/shell-takes-nigerian-oil-award-to-new-york.

[42] Anthony McAuley, *Iran's Gas Dispute with Sharjah's Crescent Petroleum Enmeshed in Politics*, THE NATIONAL (Apr. 13, 2015), *available at* https://www.thenational.ae/business/iran-s-gas-dispute-with-sharjah-s-crescent-petroleum-enmeshed-in-politics-1.86124 [hereinafter McAuley].

of the contract.[43] The tribunal found that although there had been discussions about a corrupt payment, it was never put into effect and that there was no evidence of imbalance in the parties' agreement.[44] At the time of the proceeding, Iran, a country with the world's largest natural gas reserves, was attempting to re-establish its relationships with international oil companies in anticipation of sanctions being lifted in connection with a deal on its nuclear program with the international community.[45] The case naturally gained a lot of international attention, not just because it involves billions of dollars, but also because it has been closely enmeshed in Iranian politics and an alleged corruption scandal, important factors companies consider when making foreign investment decisions. Indeed, when the case was initiated, another oil company publicly vowed to do no more business in Iran "given the . . . circumstances."[46] Moreover, although a direct connection has not been established, the case was also linked to the kidnapping and murder of a British-Iranian businessman, Abaas Yazdi, who provided video evidence during the arbitration.[47]

Exhibits A, B, and C serve as instructive examples. When a state is party to a private contract-based arbitration, there is immediate tension between private and public interests. While there are notable differences in the approaches taken by the parties, and in the processes involved, in contract-based arbitration versus treaty-based and legislation-based arbitrations,[48] there is no avoiding the serious economic and political consequences involved. Thus, careful analysis must be given to

[43] *Id.*

[44] NIOC v. Crescent Petroleum, *supra* note 33 at ¶ 37. Sebastian Perry, *Crescent Sees Award in Iran Gas Case*, GLOBAL ARBITRATION REVIEW (Aug. 11, 2014), https://globalarbitrationreview.com/print_article/gar/article/1033617/crescent-sees-award-in-iran-gas-case?print=true.

[45] McAuley, *supra* note 42.

[46] *Id.*

[47] *Id.*

[48] For example, the parties normally flip-flop their individual positions on whether the government conduct in question constitutes an act *jure imperii* (dominion act) or act *jure gestionis* (commercial act) depending on the legal fora and applicability of international law to the dispute. *See* VOSS, *supra* note 13, at 177–78.

seemingly private-private contract-based arbitration involving state parties because of the potentially negative effects felt by the taxpayer, the political finger-pointing, the potentially tarnished reputation of the state, and the resulting deterrent effect on future foreign direct investment.

C. *Public-Public Arbitration*

Touted as an important precursor to modern investment treaty arbitration, mixed claims commissions remain a means of inter-state dispute settlement available to address private-public contractual disputes.[49] History demonstrates that such international tribunals frequently have exercised jurisdiction over contractual claims.[50] The Iran-United States Claims Tribunal, which was established in the wake of the 1979 Iran-United States hostage crisis to handle the mass of disputes and claims arising from the Islamic revolution in Iran, is a modern-day success story. Article II of the Claims Settlement Declaration provides jurisdiction, in part, as follows:

> An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of [either State] against [the other State] ... if such claims are outstanding ... and arise out of debts, contracts, ... expropriations or other measures affecting property rights...[51]

Importantly, the hybrid private-public nature of this Tribunal was further confirmed by the choice of law provision:

> The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines

[49] David Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, *in* INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY 161 (Mark W. Janis ed., 1992).

[50] *See*, *e.g.*, Il. Cent. R.R. Co. (USA) v. Mexico, Mexico-US General Claims Commission, 4 REP. INT'L ARB. AWARDS 21, 22, 24 (Mar. 31, 1926), *available at* http://legal.un.org/riaa/cases/vol_IV/21-25.pdf.

[51] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Article II (Jan. 19, 1981), 75 AM. J. INT'L L. 418, 423 (1981) *available at* http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf [hereinafter Iran-US Claims Settlement Declaration]. *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, 130 (1990).

> to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances.[52]

And, indeed, the vast majority of the cases before the Tribunal have involved such private-public contract claims.[53]

The investment treaty regime also contemplates inter-state arbitrations as a means to address private-public disputes involving contracts.[54] Almost all BITs include state-to-state arbitration as an option and despite the public-public aspect of that arena, private interests are in fact the underbelly of the known inter-state case examples.[55]

In *Italy v. Cuba*,[56] Italy brought a claim on behalf of itself and several Italian investors alleging violations of the Cuba-Italy BIT. While both claims ultimately failed (Italy's direct claim failed because its diplomatic claims failed), the tribunal regarded a three-year contract to train staff and hire equipment for the operation of a beauty salon in the premises of a state-owned hotel as an investment. The closure of the salon without notice by the state-owned hotel on the ground that it had been providing a tattoo service that was not included in the list of services authorized by the Ministry of Internal Commerce was viewed by the majority of the tribunal as a

[52] Iran-US Claims Settlement Declaration, *supra* note 51, Art. V.

[53] *See, e.g.*, Amoco Int'l Fin. Corp v. Iran, 15 IRAN-U.S. CL. TRIB. REP. 189 (1987); Philips Petroleum Co. Iran v. Iran, 21 IRAN-U.S. CL. TRIB. REP. 79 (1989).

[54] *See generally* Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT'L L.J. 1 (2014); Clovis Trevino, *State-to-State Investment Treaty Arbitration and the Interplay with Investor-State Arbitration Under the Same Treaty*, 5 OXFORD J. INT'L DISP. SETTLEMENT 199 (2014); Michele Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential?*, *in* INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 753 (Nerine Boschiero et al. eds., 2013).

[55] As a point of clarity, while neither of the examples described in the text arose from a contract-based arbitration, that procedural pathway remains available.

[56] Republic of Italy v. Republic of Cuba, Sentence préliminaire, [Interim Award] (Ad Hoc Arb. Trib. Mar. 15, 2005), *available at* http://italaw.com/sites/default/files/case-documents/ita0434_0.pdf; Republic of Italy v. Republic of Cuba, Sentence finale [Final Award] (Ad Hoc Arb. Trib. Jan. 15, 2008), *available at* http://italaw.com/sites/default/files/case-documents/ita0435_0.pdf [hereinafter Italy v. Cuba, Final Award].

commercial activity of hotel management not involving an exercise of governmental authority.[57]

Host and home states of investors also may engage in arbitration to overcome disagreeable treaty interpretations. There are two cases of this nature: *Peru v. Chile* and *Ecuador v. United States*.[58] In the first case, Peru, in response to a disagreeable interpretation of the Peru-Chile BIT by the tribunal hearing the *Lucchetti v. Peru*[59] case, commenced a state-to-state arbitration seeking to suspend the ongoing *Lucchetti* investor-state arbitration on the ground that the concurrent inter-state arbitration had interpretive authority.[60] The *Lucchetti* tribunal itself refused to suspend its proceedings, whereupon Peru ceased pressing its case against Chile.

The second case began after Ecuador disagreed with the tribunal's interpretation of the U.S.-Ecuador BIT's "effective means" clause in *Chevron v. Ecuador*.[61] The *Ecuador v. United States* tribunal declined jurisdiction, finding that in fact there was no dispute between the two states as to the correct interpretation of the "effective means" provision of their BIT.[62]

A further example of private and public interests intertwining at a public-public level is when state-owned enterprises ("SOEs") act as claimants.[63] SOEs increasingly are active in foreign direct investment flows, with 550 state-owned cross-border

[57] Italy v. Cuba, Final Award, *supra* note 56 at ¶¶ 144–69.

[58] Ecuador v. United States, UNCITRAL, Permanent Court of Arbitration, Case No. 2012-5, Award, (Sept. 29, 2012), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw7940.pdf.

[59] Empresas Lucchetti, S.A. & Lucchetti Peru, S.A. v. Peru, ICSID Case No. ARB/03/4, Award (Feb. 7, 2005), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0275.pdf.

[60] *Id.* ¶¶ 7, 19.

[61] Chevron v. Ecuador, UNCITRAL, Permanent Court of Arbitration, Final Award (Aug. 31, 2011), *available at* https://www.italaw.com/sites/default/files/case-documents/ita0154.pdf.

[62] Ecuador v. United States, *supra* note 58, at ¶¶ 207, 227–28.

[63] *See generally*, Albert Badia, PIERCING THE VEIL OF STATE ENTERPRISES IN INTERNATIONAL ARBITRATION 157–60 (2014); Mark Feldman, *State-Owned Enterprises as Claimants in International Investment Arbitrations*, 31 ICSID REV. 24, 24–25 (2016).

entities in possession of more than US$2 trillion in assets.[64] Despite the outward appearance of public-public dispute–i.e., SOE v. host state–ISDS tribunals have adopted and applied the test outlined by ICSID's chief architect, Aron Broches, which seeks to determine jurisdiction based on whether the activity in question was commercial or sovereign in nature. For example, in assessing whether a state-owned claimant had standing under Article 25(1) of the ICSID Convention, the *Ceskoslovenska Obchodni Banka, A.S. ("CSOB") v. Slovakia* tribunal wrote:

> [I]t cannot be denied that for much of its existence, CSOB acted on behalf of the State in facilitating or executing the international banking transactions and foreign commercial operations the State wished to support and that the State's control of CSOB required it to do the State's bidding in that regard. *But in determining whether CSOB, in discharging these functions, exercised governmental functions, the focus must be on the nature of these activities and not their purpose.* While it cannot be doubted that in performing the above-mentioned activities, CSOB was promoting the governmental policies or purposes of the State, *the activities themselves were essentially commercial rather than governmental in nature.*[65]

More recently, in *Beijing Urban Construction Group v. Yemen*,[66] the tribunal upheld the application of the Broches test, hence in line with CSOB, and found that state-owned Beijing Urban Construction Group ("BUCG")'s participation in an airport project was that of a commercial contractor and not as an agent of the Chinese government. Notably, the tribunal also found that the Chinese government's role as the ultimate decision-maker was irrelevant.[67]

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[64] UNCTAD, *World Investment Report 2014, Investing in the SDGs: An Action Plan*, 20 (2014), *available at* https://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.

[65] Ceskoslovenska Obchodini Banka A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, ¶ 20 (May 24, 1999) [hereinafter CSOB], *available at* https://www.italaw.com/sites/default/files/case-documents/ita0144.pdf (emphasis added).

[66] Beijing Urban Const. Group Co. Ltd. v. Yemen, ICSID Case No. ARB/14/30, Decision on Jurisdiction (May 31, 2017), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8968.pdf.

[67] *Id.* ¶ 43.

Similarly, in *Masdar Solar & Wind Cooperatief v. Spain*,[68] the tribunal adopted the CSOB reasoning and was unprepared to accept the respondent's submission that the dispute was between two states, finding that Masdar did not exercise a public function prerogative, nor that the United Arab Emirates exercised control over the claimant and its investment decisions.[69] Accordingly, the upfront sovereign versus commercial distinction as a jurisdictional requirement for disputes involving SOEs as claimants ensures that the dispute is treated as a private-public one.

IV. THE PROSPECTS FOR "INVESTOMERCIAL" ARBITRATION

Taking stock of the ISDS landscape, it is clear that we are experiencing the winds of change. Reform efforts are being discussed and debated before UNCITRAL's Working Group III.[70] Some changes are organic. ICSID, exercising leadership as an ISDS institution, is undergoing its fourth Arbitration Rules amendment process.[71] Other leading arbitral institutions also have revised their arbitration rules.[72] Investment agreements, such as Chapter 14 of the new Canada-United States-Mexico Agreement ("CUSMA"), are continuing to be negotiated and concluded.[73]

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[68] Masdar Solar & Wind Cooperatief U.A. v. Spain, ICSID Case No. ARB/14/1, Award (May 16, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw9710.pdf.

[69] *Id.* ¶¶ 170–72.

[70] *See*, *e.g.*, UNCITRAL, Working Group III: Investor-State Dispute Settlement Reform, 37th Session 1–5 April 2019, New York, *available at* https://uncitral.un.org/en/working_groups/3/investor-state.

[71] The first two amendment processes were in 1984 and 2003, which resulted in relatively modest changes. The third amendment process took place from 2004–2006. On October 7, 2016, ICSID began its fourth process and, in December 2018, ICSID closed a second round of public consultations. ICSID, *The ICSID Rules Amendment Process*, *available at*, https://icsid.worldbank.org/en/documents/about/icsid%20rules%20amendment%20process-eng.pdf.

[72] *See*, *e.g.*, ICC Rules of Arbitration in 2012 and 2017, SCC Arbitration Rules in 2010 and 2017, CIETAC Arbitration Rules in 2012 and 2015, ICDR International Dispute Resolution Procedures in 2014.

[73] Canada-United States-Mexico Agreement ("CUSMA"), signed Nov. 30, 2018, Chapter 14: "Investment," *available at* https://international.gc.ca/trade-commerce/assets/pdfs/agreements-accords/cusma-aceum/cusma-14.pdf.

Other suggested changes, however, are more disruptive to the *status quo*. South Africa, India, Indonesia, Venezuela, Bolivia, and Ecuador have decided to either terminate, re-negotiate, or not renew BITs.[74] In 2017, more international investment agreements were terminated (22) than were concluded (18).[75] More recently, to facilitate conclusion of the 11-member Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"),[76] New Zealand signed five side letters with Australia, Brunei Darussalam, Malaysia, Peru, and Vietnam excluding compulsory ISDS.[77] It is a well-known fact that the European Union (EU) is seeking to establish a permanent Investment Court System.[78] Recently, on January 15 and 16, 2019, representatives of the EU took a small step towards ending the BIT regime as we know it. Three political declarations were issued which addressed consequences of the European Court of Justice's *Slovak Republic v. Achmea* decision in relation to intra-EU BITs. The core declaration, signed by 22 members, pledged to "terminate all [intra-EU] bilateral investment treaties" and put the international community on notice that

[74] Charles N. Brower & Jawad Ahmad, *Why the "Demolition Derby" that Seeks to Destroy Investor-State Arbitration?*, 91 S. CAL. L. REV. 1139, 1144–53 (2018) [hereinafter Brower & Ahmad].

[75] UNCTAD IIA Issues Note, Recent Developments in the International Investment Regime (May 2018) at 2 *available at* https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf.

[76] Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), Dec. 30, 2018, Chapter 9, *available at* https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx.

[77] Two versions exist: (1) full exclusion (Australia and Peru (no former BIT, so ISDS practice remains the same) and (2) escalation approach (Brunei Darussalam, Malaysia, Viet Nam). *See generally* Brenda Horrigan & Vanessa Naish, *New Zealand Signs Side Letters with Five CPTPP Members to Exclude Compulsory Investor-State Dispute Settlement*, Herbert Smith Freehills Arbitration Notes (May 9, 2018), *available at* https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-to-exclude-compulsory-investor-state-dispute-settlement/.

[78] *See also*, European Economic and Social Committee, Opinion of the European Economic and Social Committee on 'Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes', OFFICIAL JOURNAL OF THE EUROPEAN UNION (Mar. 22, 2019), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017AE6154&from=EN.

"no new intra-EU investment arbitration proceedings should be initiated,"[79] a stance shared in varying degrees by six more members in subsequent declarations.[80] Though some debate concerning the operability of the intra-EU BIT survival of sunset clauses remains,[81] a wholesale reset by the EU seems to be in the works. A point furthered by the EU and its Member States, who, on January 18, 2019, in advance of the UNCITRAL Working Group III meeting in April 2019, prepared a submission on "establishing a standing mechanism for the settlement of international investment disputes"[82] along with a "possible work plan" for Working Group III.[83] And even more recently, on January 29, 2019, Advocate General Bot of the European Court of Justice, upon a request from the Kingdom of Belgium, issued an opinion that the Investment Court System proposed in the Comprehensive Economic and Trade Agreement ("CETA") is compatible with EU law.[84]

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[79] Declaration of the Member States of 15 January 2019 on the Legal Consequences of the *Achmea* Judgment and on Investment Protection, European Commission (Jan. 17, 2019) *available at* https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en [hereinafter 22 EU Member Declaration].

[80] Declaration of the Representatives of the Governments of the Member States of 16 January 2019 on the Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, Euro. Commission (Jan. 17, 2019) *available at* https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf [hereinafter 5 EU Member Declaration]; Declaration of the Representative of the Government of Hungary of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (Jan. 17, 2019), *available at* https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf [hereinafter Hungary Declaration].

[81] Damien Charlotin & Luke E. Peterson, *Analysis: Four Additional Takeaways from Achmea-Related Declarations by EU Member States*, IA REPORTER (Jan. 17, 2019), https://www.iareporter.com/articles/four-additional-takeaways-from-todays-achmea-related-declarations-by-eu-member-states/.

[82] Submission of the European Union and its Member States to UNCITRAL Working Group III: Establishing a Standing Mechanism for the Settlement of International Investment Disputes (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf.

[83] Submission of the European Union and its Member States to UNCITRAL Working Group III: Possible Work Plan for Working Group III (Jan. 18, 2019), *available at* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157632.pdf.

[84] Opinion of Advocate General Bot, ECLI:EU:C:2019:72 (Jan. 29, 2019), *available at*

Despite these changes, none of them take away from the fact that contract-based arbitration will persist as a favorable dispute resolution mechanism for certain cross-border matters.[85] In fact, the advent, if it occurs, of the EU investment court system, which excludes investors from any role in the appointment of its judges, who are to be appointed solely by states or international organizations composed exclusively of states, I predict will lead to greater resort to state contracts. Two of my respected peers in the field, Rudolf Dolzer and Christoph Schreuer, explain:

> Large-scale investments may last for decades. They involve interests of the investor, as well as the public interests of the host state. General legislation of the host country may not sufficiently address the nature of the project and the kind of interests concerned. The legal setting of an investment may need to be adjusted to its specifics and complexities by way of an investment contract. The investment contact will also reflect the bargaining power of both sides under the circumstances of the individual project. Therefore, investors and host states often negotiate investment agreements. Not surprisingly, no general pattern applicable to all situations has emerged in practice.[86]

Moreover, and despite a pattern of uniformity, an empirical study from 2013 reveals that contract-based arbitrations are settled more frequently than treaty-based arbitrations.[87] The authors suspected the difference is owed to greater certainty in outcome when compared to investment treaty-based arbitrations.[88]

As we progress through these tumultuous times of reflection and reform, I fall back on the thesis of this Keynote, which is to implore you to view all investor-state dispute fora as "investomercial" arbitrations. One must see through the "false

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http://curia.europa.eu/juris/document/document.jsf?docid=210244&mode=req&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=9637024.

[85] *See, e.g.*, Brower & Ahmad, *supra* note 74; Charles N. Brower & Jawad Ahmad, *From the Two-Headed Nightingale to the Fifteen-Headed Hydra: The Many Follies of the Proposed International Investment Court*, 41 FORDHAM INT'L L.J. 791 (2018).

[86] DOLZER & SCHREUER, *supra* note 11 at 79.

[87] Roberto Echandi & Priyanka Kher, *Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration*, 29 ICSID REV. 41, 52 (2014).

[88] *Id.* at 52–53.

trichotomy" and better analyze our reform efforts. For example, plural-hatting, which refers to the practice of simultaneously combining the roles of arbitrator, counsel, expert, or secretary in different cases, is a topic of heated debate within the international arbitration field.[89] Without weighing in on the various merits or demerits of the practice, if rules are to develop, they ought to be purposeful, principled and inclusive. One way to achieve that end is to view the alleged conflicting relationships through the "investomerical" lens in order most effectively to evaluate whether the individual's roles relate to all forms of private-public dispute settlement.[90] To accept otherwise would mean we are fooling ourselves and turning a blind eye to the problem that is the "false trichotomy."

V. CONCLUSION

The hybrid nature of private-public arbitration means it is not wholly divorced from private-private or public-public "investomercial" disputes because, while superficially they may appear to be different, underneath they are the same.

[89] Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECO. L. 301 (2017).

[90] On October 25, 2018, in the annual address the President of the International Court of Justice (ICJ) to the General Assembly, President Yusuf announced that the Court has adopted new restrictions on its sitting Members acting as arbitrators in inter-state and mixed arbitration. Particularly, he said "they will not participate in investor-state arbitration or in commercial arbitration." Abdulqawi A. Yusuf, Speech by H.E. Mr. Abdulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly, Oct. 25, 2018, at 12, *available at* https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf [hereinafter Yusuf]. The ICJ's change of direction follows a report released by the International Institute for Sustainable Development in November 2017 highlighting that sitting ICJ judges had acted as arbitrators in 90 investor-state disputes. Nathalie Bernasconi-Osterwalder & Martin Dietrich Brauch, *Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS*, International Institute for Sustainable Development Commentary (Nov. 2017), *available at* https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf. President Yusuf explained the reason for the new restriction is to address the increasing workload at the ICJ, but the effect removes the possibility of "double-hatting." *Yusuf*, at 11–12. Notably, sitting ICJ judges are still permitted to sit on non-ICJ inter-state arbitrations. Since traditional forms of dispute resolution (*i.e.*, diplomatic protection of foreigners; mixed-claims commissions) and certain international investment agreements contemplate state-to-state dispute settlement, the newly implemented restrictions do not preclude the possibility that "investomercial" disputes will be arbitrated by sitting Members of the ICJ.

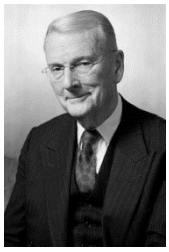
Contract-based arbitration is a seasoned, effective, decentralized, *ad hoc* means of resolving disputes. The current growing pains faced in the investment arbitration world raise serious questions regarding the consistency and legitimacy of investment protection in light of a state's right to regulate, which contribute to greater uncertainty in global economic governance. ICSID was established in 1966. It took six years before the first dispute was registered with ICSID. Within its first 34 years of existence, ICSID awards were issued in only 31 cases.[91] In short, it took a long time before ICSID was accepted as a leading institution to resolve investment disputes. Presently, however, there are 154 States Parties to the ICSID Convention.[92] All 28 members of the EU recently declared inapplicable all intra-EU treaties that include ICSID arbitration clauses as means to resolve foreign investment disputes despite long-time ICSID membership and co-existence of the intra-EU treaties and Union law.[93] Now, it is safe to say we are experiencing that the "fix" is in. The EU-proposed investment court system, should it not die, as incidentally I hope it will, is not a panacea for investomercial disputes. Rather, it is an idea, in my view a very bad one, certainly an idea that has an unclear future. Ironically, that investment court system is advertised to enhance certainty and predictability, yet it would create uncertainty by its very existence. Will this lead to a global "FDI chill?" My answer is "Yes." Investors, not wishing for their disputes to be decided by a "kangaroo court" composed only of judges appointed by putative respondents, rather than, as now, tribunals to the constitution of which they contribute equally with their state respondents, will do one of three things: (1) they may decline to invest, to the disadvantage of states in need of foreign investment; (2) if they can, they will negotiate a contract with the state, but to the extent the terms they are able to negotiate do not give them the desired substantive and procedural protections, especially an

[91] ICSID Statistics, *supra* note 10, at 7.

[92] ICSID, *List of Contracting States and Other Signatories of the Convention*, *available at* https://icsid.worldbank.org/en/Pages/icsiddocs/List-of-Member-States.aspx.

[93] 22 EU Member Declaration, *supra* note 79; 5 EU Member Declaration, *supra* note 80; Hungary Declaration, *supra* note 78. Of the 28 signatories, only Poland is not a Member to the ICISD Convention.

acceptable arbitration clause, the consequently higher risk element built into the price they charge the state will mean that the state will spend that much more for the investment than it otherwise would have had to pay, again to the disadvantage of states in need of foreign investment; or (3), in the absence of the ability to negotiate a contract with the state that grants it any protection at all, *i.e.*, if forced to rely on the investment court system, here, too, the consequently higher risk element built into the price they charge the state, in the event they do decide to invest, will mean that the state will spend far more for the investment than it otherwise would have had to pay, once more to the disadvantage of states in need of foreign investment. So, the bottom line is that the EU's dream of a permanent investment court system is inherently anti-foreign investment, as it will, at worst, prevent it, and, at best, make it much more expensive, hence the poor will pay more to get less, because host states wish to insulate their treasuries from potentially valid legal claims.



THE HONORABLE CHARLES N BROWER has been a Judge of the Iran-United States Claims Tribunal in The Hague since 1983 and has served as Judge *Ad Hoc* of the Inter-American Court of Human Rights. He has been Acting Legal Adviser for the US Department of State, Deputy Special Counsellor to the President of the US, and a member of the US Secretary of State's Advisory Committee on Public International Law, of the Register of Experts of the United Nations Compensation Commission and the Panels of Arbitrators and Conciliators of the International Centre for Settlement of Investment Disputes. He is a past President of the ASIL and Chair of the Advisory Board of the ITA. He is a former partner and Special Counsel at White & Case LLP in both New York City and Washington, D.C., where he handled litigation in federal and state courts throughout the U.S., including jury trials, bench trials, and appeals, in a wide range of civil, administrative, and criminal proceedings, while specializing during the last 30 years in the handling of disputes involving States or State entities before international courts, tribunals and commissions. He is also a member of 20 Essex Street Chambers in London. In 2009 Judge Brower was awarded the American Society of International Law's Manley O. Hudson Medal for "pre-eminent scholarship and achievement in international law ... without regard to nationality," and in 2010 received the Stefan A. Riesenfeld Award of the University of California Berkeley School of Law (Boalt Hall) in recognition of "outstanding achievements and contributions in the field of international law." He is a past President of the American Society of International Law (1996-1998), and a past Chairman of the Institute for Transnational Arbitration (1994-2000), which bestowed on him its "Pat Murphy Award" in 2013. In 2015, he became the fourth recipient of the Global Arbitration Review's Lifetime Achievement Award.

KEYNOTE REMARKS:
6TH ANNUAL ITA-IEL-ICC JOINT CONFERENCE ON INTERNATIONAL ENERGY ARBITRATION

by Eileen Akerson

Keynote address delivered at the 6th Annual ITA-IEL-ICC Joint Conference on International Energy Arbitration held in Washington, D.C., on March 27, 2019.

When I became KBR's General Counsel, I inherited a full docket of litigation and arbitration matters. That docket predominately included claims and litigation arising from our US Government Services business. Fortunately, along with it, came KBR's highly capable Head of Litigation, Mark Lowes. Mark deserves the credit for building and managing an excellent team of internal and external lawyers that deftly handled those disputes for KBR.

Over the last several years, as the Government Services matters have been successfully resolved, they have been replaced by a rise in disputes involving our Hydrocarbons business.

As a backdrop for some of my comments today, I would like to provide a little background on the types of services KBR offers and the types of projects we perform around the world.

KBR is a global provider of professional services and technologies across the Hydrocarbons and Government Services sectors. We employ approximately 38,000 people worldwide (including our joint ventures) with customers in more than 80 countries, and operations in 40 countries.

In the Government Services industry, we are serving government customers globally, including capabilities that cover the full lifecycle of defense, space, aviation, and other government programs and missions, from research and development, through systems engineering, test and evaluation, and program management, to operations, maintenance, and field logistics.

Since the early days of the US oil and gas industry, KBR has been at the forefront of some of the major milestones in the global hydrocarbon industry. From building

the first offshore platform out of sight of land in the mid-1940s, to revolutionizing fertilizer production in the 1960s through to the creation of a new ammonia process and pioneering the Liquefied Natural Gas (LNG) industry by designing and constructing one-third of the world's LNG production.

Our capabilities include a wide portfolio of proprietary technologies, such as those related to ammonia production. These technologies enable owners to operate efficient, low-cost, and reliable ammonia production plants as well as improved environmental compliance with reduced carbon dioxide and nitrogen oxide emissions. In addition, as some of you know, green production of ammonia is gaining attention as a low or carbon-free source of fuel.[1]

Our portfolio of LNG projects includes facilities in some of the world's most remote and demanding locations: an island nature reserve in Australia, coral reefs in Yemen, mangroves in Indonesia, and pristine coastlines in Africa and Australia.

Each of these projects, and those like them, involve a unique set of risks that could impact project design requirements and execution strategy, with the potential for associated cost increases and schedule delays.

Comprehensive analysis is required for a multitude of potential issues, including applicable regulatory or environmental requirements, logistics constraints, political stability, safety and security, local content requirements, soils conditions, and many other issues.

For the project on the nature reserve in Australia, stringent quarantine requirements were in place to ensure that the natural habitat remained pristine. Requirements included an interim staging area off the island for all items to be inspected prior to final shipment to the project site on the island. This requirement factored into schedule and logistics planning, with the associated risks allocated between the parties.

Accordingly, project risks require thoughtful discussion by the parties and clear

[1] Robert F. Service, Ammonia– a renewable fuel made from sun, air, and water– could power the globe without carbon, Science Journals (July 12, 2018), https://www.sciencemag.org/news/2018/07/ammonia-renewable-fuel-made-sun-air-and-water-could-power-globe-without-carbon.

agreement as to which party should bear the impact of a particular risk.

I always say that "the devil is in the details," and by that I am referring to the exhibits and definitions in a project agreement. Perfectly drafted terms and conditions are not much use if they do not align with the commercial terms and scope of work. I view the terms and conditions, commercial terms, and scope of work like the three legs of a stool: if they are not aligned, the stool falls over.

KBR may perform engineering, procurement, and construction (EPC) contracts under various commercial models, whereby portions of our services may be compensated on a lump sum, unit rate, and/or reimbursable basis, respectively. It is imperative that the commercial terms, scope of work and related exhibits, and terms and conditions all align within the contract.

When I started at KBR nearly 20 years ago, the typical Total Installed Cost (TIC) for a LNG project was between US$1-2 billion, and that was considered sizeable at the time. In this era of megaprojects, estimates for TICs may reach tens of billions of dollars. Indeed, a single purchase order or subcontract issued on a project alone may be valued at US$1-2 billion.

As owners and contractors seek to minimize costs for more competitive and viable projects, they are exploring innovative technologies that create prototype risk, with significant financial consequences for the party assuming the risk if the technology does not perform as intended.

As an EPC contractor on a large LNG project, there are interactions with a wide variety of project participants, such as the Project Owner, joint venture partners, local and international subcontractors and suppliers, as well as technology licensors. Our clients may be state-owned or publicly listed companies as well as developers. Needless to say, the potential for disputes among project participants is high. Thus planning ahead for those disputes must be a priority during negotiations and not deferred to the last possible moment.

Considering our global footprint and the challenging aspects of our operations, it follows that we encounter a fair number of international disputes. It is my responsibility to oversee our efforts to avoid disputes in the first instance and

position us for successful resolutions when they do arise, which they inevitably do.

International arbitration for multinational companies often is the only option when it comes to cross-border dispute resolution. With respect to the option of arbitration, I have a few statistics for you to consider.

In 2017, which is the most recent year for available data, energy cases represented 19% of the new arbitration case load at the International Chamber of Commerce (ICC)[2] and 24% of all arbitrations referred to the London Court of International Arbitration (LCIA).[3]

The US remained the most frequent nationality among parties to arbitrations before the ICC, comprising 8.4% of parties in 2017 filings.[4]

In addition, according to more than 60% of respondents to Queen Mary University's 2018 International Arbitration Survey, enforceability of awards and avoiding specific legal systems or national courts were identified as two of the most valuable characteristics of international arbitration.[5]

I would caution, however, to monitor the solvency of your counter-party throughout the process and have a strategy on enforcement and collectability of an award. You may "win the battle but lose the war" if you fail to collect on a favorable decision.

Often from a user standpoint, however, the system does not work as it should. By way of example, some of you may be familiar with the *Commisa v. Pemex* matter.[6] In

[2] 2017 ICC Dispute Resolution Statistics, *in* ICC DISP. RESOL. BULL. 2018 ISS. 2, 61 (2018), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf.

[3] LCIA Facts and Figures: 2017 Casework Report, 5 (2018), *available at* http://www.lcia.org/News/lcia-releases-2017-casework-report.aspx.

[4] 2017 ICC Dispute Resolution Statistics, *in* ICC DISP. RESOL. BULL. ISS. 2, 53 (2018), *available at* https://cdn.iccwbo.org/content/uploads/sites/3/2018/07/2017-icc-dispute-resolution-statistics.pdf.

[5] Queen Mary Univ. of London Sch. Of Int'l Arb., 2018 International Arbitration Survey: The Evolution of International Arbitration, 7 (2018), http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

[6] Corporación Mexicana de Mantenimiento Integral, S. De R.L. de C.V. v. Pemex-Exploración y

the *Pemex* case, a dispute arose between Pemex and one of our subsidiaries, Commisa, relating to a platform project in Mexico. Commisa had completed 94% of the work when the project was seized and our workers were ejected from the site.[7] While an arbitration between our subsidiary and Pemex was pending before the ICC, Mexico passed a new law exempting the government from the type of proceeding we were engaged in.[8] Nevertheless, in December of 2009, the ICC found largely for us and in August 2010 that award was enforced in the Southern District Court of New York. Pemex appealed that decision and simultaneously sought to have the arbitral award annulled via an amparo action in a Mexican court. While Pemex's appeal of the award was pending, the court in Mexico ruled to annul the arbitral award.[9]

Following the annulment decision in Mexico, Pemex successfully petitioned the Second Circuit to remand the case back to the District Court, which again found for KBR.[10] This ruling was also challenged, and we finally prevailed before the Second Circuit prior to settling amicably with Pemex.[11] This was the first time the Second Circuit confirmed an annulled international award.[12]

From the date, the Notice of Arbitration was filed in December of 2004 to the eventual settlement of the matter in early 2017, the arbitral process took a little over 13 years—as you can see, we had a few detours along the way to the recovery of nearly half a billion dollars.

Producción, 962 F. Supp. 2d 642 (S.D.N.Y. 2013); Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción, 832 F.3d 92 (2d Cir. 2016), cert. dismissed, 137 S. Ct. 1622 (2017).

[7] *Pemex*, 832 F.3d at 98.

[8] *Id.* at 99.

[9] *Id.*

[10] *Id.*

[11] *Id.* at 112; Press Release, KBR, Inc., KBR Recovers Almost Half Billion Dollar Judgment, Resolves Lengthy Commercial Dispute (Apr. 10, 2017), https://kbr.com/Pages/KBR-Recovers-Almost-Half-Billion-Dollar-Judgment-Resolves-Lengthy-Commercial-Dispute.aspx.

[12] In its first decision on the issue in Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 196 (2d Cir. 1999), the Second Circuit upheld the district court's refusal to enforce an award that had been set aside in Nigeria, where the arbitration was seated.

While delays in the arbitration process may not always be avoidable, the *Pemex* case highlights the significant challenges for in-house counsel in managing stakeholder expectations, controlling costs, and mitigating delays.

I recognize that I am speaking to a room of highly skilled in-house and external counsel, arbitrators, and consultants. Indeed, when asked to give the keynote speech at this conference, I replied that I would be the least qualified person in the room to do so. I hope, however, that I can share some helpful insights that I have learned from my experiences at KBR.

What the *Pemex* matter reinforces for me, as well as some of the other matters KBR is currently handling, is that successful outcomes in disputes are shaped by many factors. In *Pemex*, we had several excellent firms that worked collaboratively together, a well-thought-out strategy, and a well-respected panel. It also helps that over the passage of time, emotions dissipate with the turnover of personnel.

Positioning for the successful resolution or avoidance of disputes starts at the very beginning—during the negotiation of your transaction.

You need to understand your counter-party and their business drivers, assess the likelihood that a dispute may arise, and negotiate an appropriate dispute resolution clause. Too often the discussion of dispute resolution is addressed at the end of the negotiation and inadequately drafted in the contract or, if so, subsequently traded away for another deal point. Having been a transactional lawyer negotiating those deals, I know all too well the pressures to do so. I recently heard someone describe the dispute resolution clause as the "Cinderella clause", arguably "the hardest working, least appreciated clause in the contract."

Do not wait until you are ready to trigger the dispute resolution process to involve external counsel and technical or claims consultants. Engage them early to help frame your strategy for avoiding a dispute or, if inevitable, to assist you in shaping your arbitration strategy. As Mark often remarks to me, "hope for the best but plan for the worst."

On our large international projects, we often partner with one or two other companies for additional expertise and to share risks. Do not assume that they have

the same experience or appetite for arbitration or litigation. You need to be respectful of their views and experience as you seek alignment on the formation and execution of a dispute resolution strategy.

To that end, we typically form a legal committee comprised of a legal representative from each partner company. In the early phases of a project, KBR often selects a transactional lawyer from the business to be its representative. As the project progresses and the potential for a dispute increases, however, it may be necessary to replace that individual with someone with more dispute resolution experience.

In KBR's experience, a successful working relationship with external counsel requires the following:

- A good understanding of our business and appreciation of the expectations of the many stakeholders (such as a Board, Executive Management, Investor Relations, Finance) that in-house counsel may be managing throughout the dispute process. We may engage outside counsel in those discussions, and the ability to provide clear and pragmatic guidance is highly valued;
- Clear lines of communication and reporting between internal and external counsel, which is critical when there are multiple disputes and different firms handling them;
- Alignment with our business objectives and drivers, as well as flexibility and creativity as and when those objectives change;
- Assurance that we are meaningfully involved in the arbitration process, including case management, selection of arbitrators, approval of documents and attendance at hearings; and
- A balance struck between cost, quality, speed and certainty of outcome. I recognize that we have a large role in assisting external counsel to achieve that balance.

In conclusion, I would like to remind you that the dispute resolution clause could become the most important provision in your contract. Unfortunately, much like Cinderella, it is too often overlooked until it is needed.

EILEEN AKERSON is Executive Vice President and General Counsel at KBR. Eileen is responsible for overseeing legal issues for KBR, a global provider of differentiated professional services and technologies across the asset and program life cycle within the Government Services and Hydrocarbons sectors. KBR employs approximately 34,000 people worldwide, with customers in more than 80 countries. Prior to becoming General Counsel, Eileen served in an operational role at KBR as Senior Vice President, Commercial, responsible for project commercial management and oversight of the review and approval process for significant transactions and joint venture relationships. In this role, Eileen developed particular expertise in the area of risk management of lump sum and cost reimbursable contracts. Previously, Eileen served at KBR as Vice President–Legal & Chief Counsel, responsible for managing the global legal functions for the Hydrocarbons Business Group. She also provided advice to senior management on company policies affecting ethics and compliance matters. Before joining KBR in 1999, Eileen was in private practice as a lawyer in Washington D.C. practicing in the areas of toxic tort and public and private sector construction litigation. Eileen is a graduate of The Catholic University of America, Washington, D.C., J.D. 1991; B.A. 1987.

PANEL DISCUSSION:
RESOURCE NATIONALISM IN EMERGING MARKETS

Sylvia Noury, *Moderator*

R. Doak Bishop, *Panelists*
Juan Carlos Boué, *Panelists*
Kate Brown de Vejar, *Panelists*
E. Ned Mojuetam, *Panelists*

Keynote address delivered at the 5th ITA–IEL–ICC Joint Conference held in Houston, Texas on January 18-19, 2018.

This panel addressed the prevailing trends in so-called "resource nationalism" in emerging markets, focusing on Latin America and Africa. Are we moving beyond outright expropriations? What are the more sophisticated ways in which governments are seeking to maximize their returns from their natural resources? How have investors reacted to such policies? How can the right balance be struck in this critical sector between legitimate sovereign policies seeking to protect the public interest and the legitimate expectations of investors?

SYLVIA NOURY: The topic of this panel is a somewhat controversial one: resource nationalism in emerging markets. As you might imagine this topic often elicits very different views, especially depending on which side of the investor-state divide one stands. We have tried to structure this panel to bring various different perspectives to bear. I, as moderator, will try to draw those perspectives out without taking a particular side myself. I will quickly introduce our panelists.

First, Doak Bishop, a partner in King & Spalding LLP, and co-chair of the firm's international arbitration group. Doak, of course, specializes in energy disputes and is best known for representing corporate investors against Latin American states. Thus, he will be bringing the corporate investor counsel view to bear on this panel.

Next is Juan Carlos Boué, a Senior Research Fellow at the Oxford Institute for Energy Studies. He began his professional life at Petróleos Mexicanos, and later became Special Advisor to the Venezuelan Minister of Oil and Petroleum, the President of Petróleos de Venezuela, and the Vice Minister for Hydrocarbons during the era of the Chavez Nationalizations, This gives you some clue to which perspective

he might be bringing to this particular topic.

Next is Kate Brown de Vejar, who is a partner in DLA Piper in Mexico City. She also specializes in investor-state arbitration and international arbitration in general. She has significant experience, perhaps not surprisingly, in Latin America, although she does bring her Australian experience as well. Kate will be bringing today the perspective of counsel for the state.

Last but not least, Ned Mojuetam, who is general counsel for Chevron Africa and Latin America Exploration and Production, also based here in Houston. He has been previously based in London, Perth, and Nigeria. He has a global view of the issue. He has dealt with governments and sought resolution of these kinds of issues for many years, He brings extensive experience from the corporate investor perspective.

I should say that it became clear to all us that we had one threshold, perhaps an existential question to address before we talked in more substance: what do we mean by resource nationalism? Before delving into the detail of our topic, I should say that "resource nationalism in emerging markets" is an interesting way of phrasing it, because of course it is not *just* emerging markets that are subject to resource nationalism. Everyone in this room would know that when we talk about resource nationalism we have moved far beyond the old-fashioned outright expropriation, like the nationalization of oil fields in Libya and Iran in the 1950s and 1970s. Now, of course, there is a more nuanced spectrum of resource nationalism. I want to present threshold question to the panel: Ned, would you give the corporate investor perspective on what resource nationalism mean?

E. NED MOJUETAM: Thank you Sylvia. Sylvia has indicated that there are various definitions of the term resource nationalism, and each one of us will have a particular view of these definitions. Rather than go through all of them, I will highlight what I consider to be the ends of the spectrum. At one end of the spectrum, the view is that it is the predisposition of states and governments to control natural resources. At the other end of the spectrum there is the view that efforts to improve the benefits of the state and the government derive from natural resources. I understand and agree with the reference to control because I think governments already control

natural resources. That is why states regulate natural resources and why they license them.

There tends to be a view that would identify control, expropriation, or seizure, as examples of resource nationalism. Perhaps that is the case, but what I think a more rounded and liberal definition is one that recognizes efforts by states to increase the benefits they get from their natural resources for their local economy, and for the local workforce.

SYLVIA NOURY: Thank you, Ned. Kate?

KATE BROWN DE VEJAR: I think the fact is that there is something fundamentally wrong with the term "resource nationalism" itself. It implies there is something negative about a state wanting to ensure that sufficient benefits accrue to its population from the exploitation of its finite and, by definition, valuable natural resources—the idea of nationalism is thought of as something so horrible. I think there is something wrong with the language used to describe the concept.

SYLVIA NOURY: Juan Carlos?

JUAN CARLOS BOUÉ: I share Kate's viewpoint about the usefulness of the term "resource nationalism" overall. Resource nationalism is a term that characterizes resource owners essentially as capital importers who merely sponge off the entrepreneurship and technical powers of others, taking advantage and exploiting what Raymond Vernon used to call the Obsolescing Bargain.[1] It is not a positive description. It amounts to a long list of things that companies do not like governments to do; it is a very long list indeed. However, at least in my experience, the concerns tend to dissipate when evaluated in the light of economic facts rather than assumptions or statements on the part of investor. I will return to that.

R. DOAK BISHOP: We are being entirely too diplomatic. Resource nationalism could be considered as a neutral term about protecting a nation's interest. But it can also, and in fact often is, used as a conative term, a pejorative term, similar to "economic nationalism" for example. I am not sure, however, if it necessarily is a

[1] RAYMOND VERNON, SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISES (Longman 1971).

pejorative term. It seems to be used elsewhere these days. I tend to think of resource nationalism as a circumstance in which a government takes an opportunist attitude toward it resources and tries to claw back the benefits that it had bestowed upon international oil companies through a contract or a concession or through regulations. It is also a situation where the government is trying to after the fact–after the company has gone in and drilled the wells, made all of its investment, obtained production, etc.–to increase its own take at the expense of the international oil company. That is the way I would describe resource nationalism. It is not quite as diplomatic.

SYLVIA NOURY: This debate over the meaning of resource nationalism shows us that there is perhaps a fine line between what some would call legitimate national interest and what others would call illegitimate resource nationalism, to take Doak's expression of it. Ned, where does this line fall in your view?

E. NED MOJUETAM: There is clearly a difference of opinion as to whether the term "resource nationalism" is negative or not. If you step back from the connotation of the term and try to see the meaning of it, and apply that meaning to what states do, there is perhaps usefulness in the term. It makes us think about what is in a state's interest. Some will view expropriation, asset procedures, imposition of heavy taxes as being in a state's interest, but I differ.

State interests must be thought of as something positive in the medium to long term, as well as in the short term. If a state acts in a particular way that violates a previous agreement that threatens the relationship with private investors, who have come in to the country on the basis of documented promises by the government; if you put those actions side by side with those promises, then I would argue that the actions of a state that violate those agreements is not in the national interest. It sends the wrong messages to investors and potentially exposes the government to liability.

However, other actions by states do not necessarily violate their agreements, and one area where that is fairly common is local content requirements. There are many examples of states going too far using such tools, but I would submit that many states are learning. The journey to getting that right is a long one. For example, the intent

behind local content is positive. To the extent that state's get it right and are reasonable in this approach to trying to benefit the local economy and do not in the process violate laws or a preexisting agreement, those actions in my view fall within a limited category of resource nationalism. These actions can help a country get more benefit from their national resources and therefore would be in the country's best national interest.

Now, where is the line? The line would fall where a country acts in violation of laws or contracts; of agreements it has signed and violates the promises it has made to foreign investors. If a country does that, this would not be, in my view, in the country's best national interest. Therefore, that is where a line would fall; between acting in the best national interest of government and resource nationalism.

SYLVIA NOURY: Thank you, Ned. This of course requires discussion of the documented promises, or the agreements that have been established. Perhaps investors and states may differ in their interpretation of what those agreements and promises were. I suspect that Juan Carlos might have something to say about that.

JUAN CARLOS BOUÉ: Ned's and Doak's comments are quite useful because they characterize resource nationalism essentially as shorthand for breach of contract; and it is usually reported like that in the media. For example, the government of Albania takes issue with how certain costs in a production sharing agreement are being reported and arbitration is initiated. The press reports it as Albania trying to rewrite the contract. In another example, Uganda taxes the proceeds of asset sales in Uganda. This could be the beginning of a slippery slope, but when an arbitral tribunal decides that the Ugandans were correct, the press does not pay so much attention. What is interesting about this, as Sylvia hints at, is that often the alleged breaches of contract are nowhere to be found in any contract subscribed by the parties. An even stranger circumstance occurs when there is a contract between the parties involved in the dispute, but the claimant alleges that the contract is of no relevance in determining the breaches that the state committed. A good example of

this is the case of Exxon vs. Venezuela[2] in which the ICSID annulment panel recently upheld the Venezuelan government's viewpoint.

Slightly more interesting than the issue of contracts is the question of money, that Doak touched upon. The concept of resource nationalism is predicated on the notion that resource production consists of the application of entrepreneurial skills and technology to the exploitation of these resources and that the role of governments is merely to make sure that this happens with the least friction possible. However, this overlooks the fact that there are two sides to the resource production business. These resources have owners and the owners expect a fair remuneration for them. Thus, investment is not enough. But the conception behind resource nationalism seeks to deny this—right for compensation—and say that the role of government is merely to foster investment.

According to this view, the only scarce resource is capital. The application of capital is the sole source of value and, hence, only capital and profit are of any legitimacy. Any actions companies take to maximize profits are OK, up to, an including, aggressive tax planning, as it is now called, whereas the actions of the government can be, and usually are, characterized as a breach of contract. So, yes, this a slightly different perspective.

SYLVIA NOURY: We all can probably agree on the fact that these issues will ultimately be decided on the facts of each particular case. Of course, a tribunal will look at whether this is a contract and what that contract says. Uganda is an interesting example because the two best known cases there, Heritage[3] and Tullow[4], had two very different contracts at play. One of them involved a tax exemption and the other did not. Perhaps that fact will ultimately determine what the result will be.

We mentioned policy levers—such as local content—and we should explore those. Why do governments pull these levers? What has brought them to use that power?

[2] Exxon v. Venezuela, ICSID Case No. ARB/07/27, Decision on Annulment (Mar. 9, 2017).

[3] Heritage Oil & Gas Ltd. v. Uganda, UNCITRAL, Award (2015).

[4] Tullow Uganda Operations Pty. Ltd. and Tullow Uganda Ltd. v. Republic of Uganda, ICSID Case No. ARB/13/25, Order Taking Note of the Discontinuance of the Proceeding (July 15, 2015).

What is it that investors have done? Or, what outside circumstances have made them pull the levers? I think that is a good question for Kate. Why is it that governments do this? Do you think that the investors should be cast as the victims in this situation? Or, do they contribute to the problem?

KATE BROWN DE VEJAR: When a country is not receiving a "fair" share of the benefits which derive from the exploitation of their natural resources, then the state steps in to take corrective action. It is easy to point to the act of the state and call it resource nationalism, whether it is the institution of a windfall profits tax or a change to the law or regulation to say that the state needs an increased participation in petroleum projects. It is easy to say that this action is the cause of disruption or uncertainty. That, however, is a very simplistic approach. I think the correct answer explores the "why." Why did the situation become so untenable economically, politically, and in the public opinion, that the state had to take that action?

The focus of our discussion today is Latin America and Africa, but as an Australian in Mexico, I want to draw upon some examples from Australia. I believe these are illustrative of these exact kinds of issues arising in a jurisdiction which is not a high sovereign risk jurisdiction.

First, there are the current domestic gas prices in Australia. I do not know how many of you have heard about this in the headlines, but given the relatively low LNG export prices in the last couple of years many LNG terminals, which are relatively recent investment in construction in Australia, are operating well below name plate capacity, a number of LNG producers particularly on the East coast are using conventional gas rather than the higher cost coal seam gas (CSG) to feed their plants to meet their contractual obligations while still making a profit. This has had the effect of depleting the conventional gas available for local consumption, both on the wholesale market–to industry–and the retail market–to households. This has pushed up local prices to a point where there has been a real shift in public opinion, and it has become a really "hot potato" political issue.

This has caused an investigation by Australian Competition and Consumer Commission, the ACCC, which released an interim report in September 2017 on the

wholesale gas market, finding that 2018 would in fact be a year that there is a significant short fall.[5] There is not enough gas, and this is reflected in gas prices offered to industry. Prices are multiples of historic levels, and they are multiples of the prices for exactly the same gas when purchased in Japan. The same problem affects the cost of household gas to the point where it is making headlines. I want to give you some examples of the headlines: "The Great Gas Robbery" reads one headline. Statements in the press include, "[w]hen you next look in horror at your gas bill, think this: you are the unwitting victim of a gigantic game of risk shifting by the multinationals."[6]

There have been government inquiries followed by the adoption by the government in July 2017 of what is called the Australian Domestic Gas Security Mechanism, which permits the government to implement gas export restrictions in the event of the declaration of a short fall year. That's drastic and very serious. That could mean the breach of any number of supply agreements entered into by international LNG companies.

In order to avoid 2018 being declared a short fall year, which would trigger these export controls, in October 2017 the LNG producers on the East coast entered into a heads of agreement with the federal government. By this agreement the LNG producers committed to offer sufficient gas to meet the expected short fall and any emerging additional short fall through the good faith offering of gas to the domestic market on reasonable terms. Thus, there are no export restrictions yet, but the Southern states of Australia have been experiencing an inordinately hot summer.

The agreement just relates to shortfalls, but it is not a solution to price, and prices remain very high. Thus, whether the Australian public will also continue to tolerate the extraordinarily high household costs of gas remains to be seen.

I have a second example rather briefly. In December last year the Australian tax

[5] Australian Competition & Consumer Comm'n Gas Inquiry 2017-2020, Interim Report (Sept. 2017), *available at* https://www.accc.gov.au/publications/serial-publications/gas-inquiry-2017-2020/gas-inquiry-september-2017-interim-report.

[6] Andrew Probyn, *The Great Gas Robbery is Happening Before Our Eyes. But What Can We Do About It?*, http://www.abc.net.au/news/2017-03-17/the-great-gas-robbery/8363798.

office released public records showing that Exxon Mobile Australia reported no taxable income and paid no corporate tax in the years 2013 to 2014 and 2014 to 2015, despite reporting an annual income of 9.6 billion and 8.5 billion Australian dollars in those year, respectively.

There is nothing that Australians hate more than a tax cheat. Maybe losing to the English at cricket, but that has not happened this summer. The headlines are awful, and the Australian government has launched a senate committee investigation into Exxon Mobile Australian's tax records. There is no outcome yet, but Exxon Mobile has already lost in the public opinion. The pressure on the government to take corrective action in this regard is very, very high.

I present these examples because the measures discussed, such as export controls, tax investigations, and possibly an unfavorable tax assessment applied to past financial years are types of measure which are typically labeled resource nationalism. As these examples from Australia show, a democratic government and a developed country, maybe forced to react to public outcry and immense politic pressure. These pressures build up because there is evidence that private resource companies are reaping hefty rewards from the exploitation of finite national resources and not enough benefit is inurning to the state, or it is actually the public that is subsidizing those profits.

The behavior of private resource companies, whether it is using conventional gas through their LNG plants in order to make sure that they can still make a profit or meet the profitability forecast to please shareholders, or engaging in tax minimization schemes, contribute significantly to the problem of the imbalance, which is the trigger for state action. Private resource companies need to understand that states and their constituents expect, and legitimately so, that they will be paid a "fair" price for giving that company the right to exploit a finite natural resource. Any arrangement, contractual or otherwise, which ultimately means that the state is not receiving a "fair" benefit—for example, that Australian households have to pay double what the same gas cost in Japan—those are not sustainable arrangements and they will provoke state corrective action. That is what generates the uncertainty that

nobody wants—not the state or the investor.

I wanted to come back to what I thought was a good definition of where the line of legitimate verses illegitimate state action might lie. I think Ned framed it in positive terms. When parties come to an arrangement, maybe a high tax level is initially good, but what about the mid to long term? The resource-companies relationship with the state has to last and circumstances do change. They need to foster that relationship over the duration of a long-term investment. Thus, if the contract the company negotiated hard for, no longer makes sense in the context of that long-term relationship changes have to be made. It is not in the company's interest to damage a long-term relationship with the state.

SYLVIA NOURY: Thank you, Kate. We will be tackling tax as a substantive issue later, so I will not make any comments on that in particular. But I would like to ask Ned to offer his observations on this point.

E. NED MOJUETAM: Yes, Kate you made very good points. I represent investors, so we tend to think long term. I am going to move away from who is right and who is wrong. What is important is how each side reacts to the pressure. States are sovereign. They have the right to act—pass laws, regulate, etc. However, it is in the interest of states to be measured in how they react. Reactions should not be excessive on the part of the state. Private investors should also be willing to listen where it is obvious that the contract terms as they are no longer sustainable. Both sides should come together and to try to find solutions.

If you step away from the complexity of who is right and who is wrong and focus on a solution that could avoid a dispute, then that is the path to an outcome that, hopefully, will work for everyone, including pressure from society. Whether or not the investor is a victim depends on how they behave. If they are pushing the rules or pushing the boundaries, they cannot portray themselves as victims. If they are wrong, they cannot be victims. However, if they are working within the rules and circumstances have changed to the point where something has to be done, then state ought to engage with investors and seek out solutions. Companies have shown that they can at least sit down and work with states to find the right outcomes for

everyone. To the extent that they do that, it can reduce the negativity associated with resource nationalism.

R. DOAK BISHOP: We have a way of determining who is right and wrong, and that is to study the contract, to examine the laws, to analyze the regulations. That is how we tend to define what the boundary between illegitimate conduct and legitimate conduct is—studying the contract, examining the laws, and analyzing the regulations. We tend to look at the issue of normative conduct and determine whether such action it is an attempt to circumvent provisions in a contact, such as a fiscal stabilization clause.

Kate mentioned "fair" price, that resource companies are entitled to a "fair" price. Well, that is a "siren" song. Resource companies are entitled to the contract price that they negotiated. That is why companies have negotiations; that is why they enter into the long-term contracts. That is what a company is entitled to, not what the government wants it to be later, trying claw back benefits and saying: "We are going to define what price you get."

SYLVIA NOURY: Thanks, Doak. We have two substantive issues we are going to tackle. One is local content, which Ned mentioned earlier, and the other is taxation. Ned, can you kickoff with local content and perhaps from your experience in both Africa and Latin America give us a little elaboration on what this means?

E. NED MOJUETAM: There is no generally accepted definition of "local content." It is really a general strategy by states to try and improve the benefits to the local economy and the local workforce. The general concept around local content is sustainable development for the local economy, and technology skills development for local workforce, among others. How you implement it is important to the keep a positive relationship with the investor.

The World Bank states that local content policies "[a]im to leverage the extractive value chain to generate sustained and inclusive growth through economic diversification and employment opportunities."[7] Fairly general, but specific enough

[7] World Bank, http://www.worldbank.org/en/topic/extractiveindustries/brief/local-content-in-oil-gas-and-mining.

to indicate the objective and principles behind the concept itself. This has been described as, if you like, a moderate form of resource nationalism. Perhaps it is. However, sovereign states have a right to improve the local economy, to improve the local workforce and the rest. I will give two other perspectives besides the World Bank.

The Nigerian local content regulation defines local content as the quantum of composite value added or created in the Nigerian economy. To make that determination the regulation evaluates the systematic development of capacity and capabilities through the deliberate utilization of Nigerian human resources, materials, and services in the Nigerian oil and gas industry. When Nigeria started to use these regulations, everyone was resistant. Companies were resisting it. Now, companies highlight their contributions to local content, using that as a way to get mileage in the social realm. Companies show how they help the local economy, how they are part of the local population, how they are part of the country, actually. They are not outsiders just coming in to reap the benefits and leave.

There is a relationship between the definition of resource nationalism and local content, to the extent that local content that benefits from natural resource exploitation, applied to the local workforce and the local economy to encourage sustainable growth. I have seen many examples where states and companies have worked together collaboratively to achieve a positive result.

My final example is Brazil, where local content is defined as the contractual commitment of purchasing local goods and services on a competitive basis. The intent and objective is clear—helping the local economy grow and develop a local workforce. As an investor, you want to be able to work with the government to achieve this goal. In conclusion, I will say that companies have come to see that, when the local workforce is developed and is skilled, it is more cost effective to get the skills that they need locally than to import them.

SYLVIA NOURY: It seems that this could be a very good area of collaboration between states and investors. However, Doak made a good point; one always has to measure that against the existing contracts, the existing obligations. Of course, when

you have dramatic measures which contravene existing agreements, then the state might find itself on the wrong side of the line. A good example, which of course has not yet been ultimately tested, is in South Africa. There, some of the local content rules are more far reaching, such as the divestment of twenty-six percent of mining companies which must be transferred to historically disadvantaged South Africans. One case that was brought to test that, the Foresti case,[8] settled before an ultimate merits award was rendered. It would be interesting to see the results when some of the more far reaching local content laws are tested.

I am going to move on to tax. I want to hear a little bit from Doak on what the high-profile manifestation is of what some call resource nationalism. We have seen it all over the world, it is not just restricted to Africa and Latin America. One of the biggest examples, of course, is India. Doak, how about a synopsis from your perspective?

R. DOAK BISHOP: Over the past 15 years, in particular, with oil prices fluctuating, we have seen an attempt by many countries to impose new taxes or increase taxes on international oil companies. I will take three examples. Algeria a few years ago imposed a tax on exceptional profits which resulted in several investment arbitrations against Algeria. Ecuador, in the early 2000s adopted law 42, which imposed a 50% they referred to as participation, not a tax—there were tax stabilization clauses at least arguably in its contracts with IOCs, so they referred to this as a participation not a tax—and that would apply when oil prices were above 30 dollars a barrel. Later, by a presidential decree, that 50% amount was increased to ninety-nine percent of the exceptional profits. Venezuela imposed a 33% extraction tax, which it later increased to 50% and then on to 95%.

I am going to leave those three examples, and I want to talk specifically about three cases in this area that lead to awards. I think these are instructive. All of them involve the government of Ecuador. The Perenco vs. Ecuador[9] case is the first one.

[8] Piero Foresti, et al. v. The Republic of South Africa, ICSID Case No ARB (AF)/07/1, Award (Aug. 4, 2010).

[9] Perenco Ecuador Ltd. v. Ecuador, ICSID Case No. ARB/08/6, Decision on Remaining Issues

That case arose under the France-Ecuador Bilateral Investment Treaty (BIT), which had a limited tax carve-out provision. Thus, taxes were not entirely carved out of the purview of the BIT, which has turned out to be important. That tribunal found that the taxes in Law 42 were not expropriatory. They found that they were taxes and not just contributions or participations. They found that the 50% tax rate of Law 42 did not violate the Fair and Equitable Treatment (FET) provision of the treaty, but that the 95% rate did violate it. Then there were other clauses that were arguably stabilization clauses, but this tribunal held they were not tax stabilization clauses.

The second case reached very different results and that is the Burlington Resources vs. Ecuador case.[10] It came up under the US-Ecuador BIT, which does have a tax carve-out provision, which arguably means that to come under the treaty you had to prove an expropriation. That tribunal found that Law 42 was a windfall profits tax. It was not expropriatory according to the tribunal. The tribunal held that Ecuador did breach fiscal stabilization provisions in the contract. Ultimately, what the tribunal found was that when Ecuador took the blocks away from Burlington Resources, that was an expropriation and that was the basis of the tribunal's findings. The tribunal awarded a net of 340 million dollars to Burlington as a result of that.

The third case is Murphy Oil vs. Ecuador,[11] which also came up under the US-Ecuador BIT. There the tribunal found that Law 42 was not a tax, and found that it was a participation, which is what it said it was on its face. You will notice that this is the opposite decision the tribunal found in Burlington. This tribunal also found that the clauses 15 to 22 were not tax stabilization provisions. Again, the opposite finding that you saw in the Burlington case. The tribunal found that the 50%rate did not violate the FET provision, but the 95% rate did, and it awarded Murphy about 30 or 35 million dollars.

Now, as you can see, these cases vary substantially in terms of their decisions, in

of Jurisdiction and on Liability (Sep. 12, 2014).

[10] Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability (Dec. 14, 2012).

[11] Murphy Exploration & Prod. Co. Int'l v. Republic of Ecuador, PCA Case No. 2012-16, Partial Final Award (May 6, 2016).

terms of their interpretation of the treaties and their interpretation of the stabilization clauses of the contracts. The lesson to be drawn here is, first, that it matters very much if you have a tax carve-out provision in the treaty, or just a limited carve-out, or none. It matters very much whether you have a fiscal stabilization provision in your contract and exactly what type it is and exactly what the wording of it is. It matters how high the tax rate is.

What can companies overseas do to protect themselves? The obvious answer is: get a fiscal stabilization clause in your contract. There are different kinds that have different legal effects. What I recommend is an allocation of risk or what is also referred to as a tax paid clause, which allocates the risk of any new taxes or any increased taxes to the national oil company so that the national oil company automatically takes on the burdens of any increases in that regard. This tends to solve a lot of interpretative problems. That would be my recommendation.

SYLVIA NOURY: It is interesting to hear about the cases that have come to a resolution in Ecuador. In Algeria my understanding is that there has been only one result in an ICC case where the tribunal found in favor of Algeria, and there have been a variety of settlements. That relates to the point that each contract needs to be looked at very carefully.

We have other tax cases involving capital gains taxes that we have seen around the world we mentioned in India and Africa. Different results coming out in those different cases, so I think the moral of the story, as Doak has said, is to look very carefully at your contract and negotiate it very carefully. I will pass the baton on to Juan Carlos. I would suspect you may have different view about taxation and how that amounts to resource nationalism.

JUAN CARLOS BOUÉ: Ever so slightly different, yes. Again Doak put his finger on the important issues which is the attitude to windfall profits. If you only believe that capitalists are the sole legitimate recipients of the benefits of the exploitation of these resources, then windfalls have to be presented as a reward for entrepreneurship and risk taking even though they are nothing of the kind. By definition these are extraneous events that are driven by scarcity essentially. From Ecuador onwards, we

know that economic regulation of this sort essentially rewards ownership. When there are windfalls these generate returns to capital that are far beyond what is required for its reproduction, and the reproduction of capital is the name of the game in capitalism.

However, this is obscured in disputes by referring to the full enjoyment of investments; as if the enjoyment of investment is only a matter of time—enough time has to transpire—regardless of what happens to prices in the interim. That approach ignores that, because of the behavior of prices, the company may have made all of its money in a year, and in two years it already had a tremendous return on investment. If only it were as easy as reading the contracts, but of course, corporations are not devoid of power. Emphasis is put on the fact that governments are sovereigns, but often they are not nearly as powerful as their corporate counterparts. I have been involved in situations where the contract at issue did have a definition of what the price was and how windfall taxation beyond that would apply; obviously the most famous of these cases is Exxon.[12] If it only were a matter of reading the contract and everybody would be happy, I do not think that is how it works.

The issue with taxes for countries such as Venezuela and Mexico is of great importance because they rely on those taxes. In the UK, where fiscal receipts are extraordinarily, it does not matter that much because the UK does not rely on these receipts, but Venezuela, and to a lesser extent Mexico, did and do. Thus, if you have a situation where the contracts eliminate the fiscal receipts of the country then that is a big problem. In Venezuela this led directly to the rise to power of Hugo Chavez. The extraordinary thing about that is that I do not think that there would be anybody, especially in America who would dispute the fact that the rise of Chavez was a colossal strategic reversal for US interests. This was by far the most pro-American country in Latin America, and yet see what happened.

The reason why that happened was because the proposals of Chavez all of a sudden were seen as reasonable. The context was an economic system where most of the production was in the hands of foreign oil companies and the national oil

[12] Exxon, *supra* note 2.

company, and the national oil company was used as an instrument of foreign oil companies to pay no taxes.

In 2002, for example, no income tax whatsoever was paid from production activities of petroleum in Venezuela. Most of the government income that year came from the fact that it had revised the statutory rate of royalty the previous year and applied that to extractions.

One would have thought that considering where Venezuela went, people especially in America would have been cautious and learned their lessons in terms of not pushing for such liberalization. However, nothing of the kind has happened. The opening of Mexico's markets is a repetition of Venezuela's. All of the important and substantive measures that have to do with economics were patterned after or were pioneered in Venezuela. Measures such as relatively complex profit bases taxation that is very difficult to administer, and the disappearance of the royalties, which are very difficult to evade. This has the effect of allowing companies to reduce their taxable base to zero. The government has even set upper limits—there is a very limited role to cash bonus bidding—on how much companies can pay.

Overall it seems to me that this is going to be a recipe for a huge number of problems in the future. I hope I am wrong, but my impression from the Mexican liberalization as compared to the Venezuelan experience, which of course ended disastrously, is that it can be like in the Talleyrand quote "they forgot nothing, and they learned nothing."[13]

The one thing that they did learn was that the provisions in the Venezuelan arrangements that allowed the government to enact windfall taxation has not been enacted. In Mexico those have not been repeated and instead the fiscal regime has essentially been "contractualized." This is similar to what occurred to the Middle East concession tax regime back in the 1950s. I just do not see how that can end well. My fondest hope is that I am going to be wrong, but I am not that hopeful.

[13] Quote attributed to Charles Maurice de Talleyrand-Périgord. Note potential misattribution as it is recognized that Talleyrand-Périgord may have borrowed from a 1796 letter from a French naval officer Charles Louis Etienne to Mallet du Pan. *See* CRAUFURD TAIT RAMAGE LL.D., BEAUTIFUL THOUGHTS FROM FRENCH AND ITALIAN AUTHORS (Howell 1866)

SYLVIA NOURY: Kate, I think I owe you a right on reply on whether you share such a pessimistic view of your country, in one minute please.

KATE BROWN DE VEJAR: I think there are two questions. The first one is, what on earth is going to be the outcome of the election in July? That is a big question mark and that could have severe impacts. I do not have a crystal ball, but I have been listening very carefully to what Andres Manuel Lopez Obrador is saying.

There's some anxiety, about what will happen if he comes in. At the same time, his inner circle and he have been doing road shows, to showcase what they will bring to the table if he comes to power. One of those things is that respect for and the rule of law will be restored; one of his big platforms is anti-corruption His view is that the current administration has not been very good at respecting the rule of law, so he would like to make that a central platform. Part of that is, obviously, respecting existing contractual terms. That does not mean he will not seek to renegotiate deals that he views as not consistent with how he sees the energy sector.

Irrespective of the outcome of this election, the fundamental question is exactly the one that Juan Carlos poses, which is: are the deals which have already been struck so liberal and so vulnerable to aggressive tax minimization schemes, so as to allow the costs of a particular project to reduce the profit so there is no tax base to tax at the end of the year? Are they so vulnerable to what I would call abuse by the resource companies that there will be a call for change irrespective of the outcome of the elections?

I have a somewhat pessimistic view as well.

SYLVIA NOURY: Thank you, all. I am going to have to draw this session to a close. So I would like to thank our speakers for some very insightful comments on this rather controversial topic.

SYLVIA NOURY is a partner in the Freshfields international arbitration group based in London. Her practice focuses on investor-state disputes in the energy, natural resources and telecoms sectors in emerging markets. She has represented corporations and states in numerous commercial and investment treaty arbitrations, including under the rules of ICSID, UNCITRAL, ICC, LCIA, and AAA. In the ENR sector, Sylvia represented BG, CMS, National Grid, and Total in their treaty arbitrations against the Government of Argentina arising from its 2002 economic emergency measures, leading to four favorable awards against Argentina. She has also represented Anglo American in its treaty arbitration against the Government of Venezuela and Tullow Group in its ICSID arbitrations against the Government of Uganda. Sylvia is a member of the Board of Directors of the Stockholm Chamber of Commerce and a member of the Arbitration Committee of ICC UK, as well as participating in various other arbitration organizations, and has spoken and published widely in the field of arbitration. She is ranked in Chambers, Legal 500 and LATIN LAWYER 250, and is valued for her "outstanding intellect and no-nonsense attitude." She has been selected as one of the 45 leading figures of the international arbitration bar under the age of 45 ("GAR 45 under 45"), featured in The Lawyer's "Hot 100" lawyers and listed by Latinvex as one of Latin America's Top 100 Female Lawyers. Sylvia is a Founder and Co-Chair of the Steering Committee of the Equal Representation in Arbitration Pledge. She holds a law degree from Cambridge University where she was awarded the Clive Parry Scholarship for Public International Law

R. DOAK BISHOP is a partner in King & Spalding's Houston Office. Co-Chair of Firm's International Arbitration Practice Group. B.A. degree with high honors and departmental distinction from Southern Methodist University (1973), and J.D. degree with honors from the University of Texas Law School (1976), Research Editor of the Texas Law Review. Over 35 years of legal practice, with a focus on international arbitration and foreign investment disputes. Board Certified in Civil Trial Law by the Texas Board of Legal Specialization. Board of Directors of the American Arbitration Association; Board of Trustees of the Center for American and International Law; Past Chair of the Institute of Transnational Arbitration; Member, US delegation to the NAFTA Advisory Committee on Private Commercial Disputes; Advisor to the American Law Institute's Restatement of the Law (3rd) of International Commercial Arbitration; Adjunct Professor, SMU Law School (1999) (International Commercial Arbitration), University of Houston Law School (2002) (Foreign Investment Disputes), University of Texas Law School (2013) (Foreign Investment Disputes), and University of Oklahoma Law School (2011, 2012) (Foreign Investment Disputes); Co-Chair, International Litigation Committee of ABA's Litigation Section (1998-2000); Chair, Litigation Section of the State Bar of Texas (1998-1999). Specialties in international arbitration of international energy disputes, investment and infrastructure disputes, construction disputes, and environment issues. Registered more than 25 ICSID arbitrations and represented investors in about

30 investment arbitrations against foreign governments. Arbitrator in about 75 arbitrations, including NAFTA and BIT arbitrations under the UNCITRAL Rules. Editor, THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION (2nd ed. Juris Publishing 2010); co-author with Professor James Crawford and Professor Michael Reisman, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARIES (Kluwers, 2005); Editor, ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS (Juris 2009).

JUAN CARLOS BOUÉ is Senior Research Fellow at the Oxford Institute for Energy Studies. His professional activities have alternated between academia, government, and the oil industry, but they have always been focused on the political economy, industrial economics, and international governance structure of petroleum. Boué began his career at the international trading arm of Petróleos Mexicanos, the Mexican national state oil company, where he eventually became the manager responsible for all commercial aspects of Mexico's crude oil export sales, as well as secretary of the inter-ministerial government committee entrusted with reviewing all oil export pricing and policies. He later became special advisor to the Venezuelan Minister of Energy and Petroleum, the president of the Venezuelan state oil company Petróleos de Venezuela S.A. (PDVSA) and the Venezuelan Vice-Minister for Hydrocarbons and sat on the boards of most of PDVSA's refining ventures abroad. Boué has written widely on the industrial economics of the oil and gas exploration and production, and petroleum refining industries, as well as on auction design for oil and gas bidding rounds, the international arbitration of upstream petroleum agreements and the taxation and political economy of oil in general.

KATE BROWN DE VEJAR is a partner at DLA Piper in Mexico City, where she specializes in international commercial and investment arbitration. She has represented private corporations, sovereign states and state-owned entities in connection with a wide range of commercial and investor-state arbitrations under the leading institutional and *ad hoc* arbitration rules, with a particular focus on complex construction disputes. She is on the Board of Directors of the Mexican Centre of Arbitration for the Construction Industry. Since 2008, she has been a member of the Australian Delegation to UNCITRAL Working Group II. She was co-Chair of Young ICCA (2014-2016) and is on the executive committee of Young Arbitral Women Practitioners. A graduate of Harvard Law School/University of Queensland, Kate is fluent in English, French and Spanish.

EYITEMI NED MOJUETAN is the General Counsel, Chevron Africa and Latin America Exploration and Production (CALAEP) in Houston, Texas, United States. In this role, Ned oversees the legal matters of three upstream Business Units: Nigeria/Mid-Africa, Southern Africa, and Latin America. Before taking up this position, Ned was the General Counsel of Chevron Nigeria Limited and the other Chevron companies in Nigeria, overseeing all the legal matters in the

Nigeria/Mid-Africa Business Unit, a position he has held since May 2012. Ned received his LL.B. (Bachelor of Laws) from the University of Benin in 1988 and was called to the Nigerian Bar in 1989. He received his LL.M (Master of Laws) from the University of London, United Kingdom, in 1998. Ned joined Chevron Nigeria Limited in April 1992 as an Attorney and has held positions of increasing responsibilities since then. Prior to his role as General Counsel of Chevron Nigeria Limited, Ned served as Lead Counsel in the West African Gas Pipeline Project based in London, in the United Kingdom, as the Lead Project Counsel in the OKLNG Project in Nigeria, and as a Senior Counsel, Negotiations & Legal, Chevron Australia Pty Ltd., based in Perth on the Gorgon LNG Project. In addition, Ned had at different times, previously served as Manager, Lands and as Manager, Gas Policy, both for Chevron Nigeria Limited. Ned also served on the Board of Directors of Chevron Nigeria Limited and the other Chevron companies in Nigeria from May 2012 to June 2017. Ned is a member of the Association of International Petroleum Negotiators, the International Bar Association and the Nigerian Bar Association.

PANEL DISCUSSION:
THE FUTURE OF INVESTOR STATE DISPUTE SETTLEMENT AND THE IMPLICATIONS FOR THE ENERGY INDUSTRY

Andrew T. Clarke, Moderator

Prof. Peter Cameron, Panelist
Timothy Foden, Panelist
Alexis Mourre, Panelist
Prof. Marike Paulsson, Panelist
Baiju S. Vasani, Panelist

Panel discussion part of the 6th ITA – IEL – ICC Joint Conference held in Houston, Texas on January 24-25, 2019.

The use of international arbitration as the key mechanism in Investor-State Dispute Settlement (ISDS) is under concerted attack with significant implications for cross-border energy investments. What is driving this rhetoric and is it justified? Is Civil Society opposition to ISDS related to the resurgence of resource nationalism in Africa, or is it another aspect of sovereign states wanting to 'take back control'? Are international investment courts the solution, or just new problem for investors? These issues are being discussed in many venues, but will the proposed solutions bring the foreign direct investment needed to solve the real issues the world faces, or actually undermine it?

ANDREW T. CLARKE: Good morning. This is the ISDS panel discussion, and I will be moderating. Let me introduce the panel participants. We have Alexis Mourre from the International Chamber of Commerce (ICC) in Paris; Professor Peter Cameron from Dundee University; Tim Foden from LALIVE in London; Professor Marike Paulsson from the University of Miami and also with Albright Stonebridge Group; and Baiju S. Vasani from Jones Day.

There are currently 2,369 bilateral investment treaties (BITs) in force as well as 311 other trade or multilateral treaties with investment provisions.[1] These form the framework of the investment treaty system that provides protections for encouraging investment abroad.

[1] United Nations Conference on Trade and Development (UNCTAD), *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, https://investmentpolicyhub.unctad.org/IIA.

In 2018, 26 new international agreements were signed, which is slightly down from 33 in 2017 and 41 in 2016. And yet there is, what has been described as, a growing backlash against ISDS that is driving a concerted effort to reform this system. The fora in which this can be seen include the deliberations on ISDS reform taking place at the United Nations (UN) Commission on International Trade Law (UNCITRAL) Working Group III, the proposal to modernize the Energy Charter Treaty (ECT),[2] new forms of bilateral investment treaties, e.g., new Dutch model BIT,[3] the Stockholm Treaty Lab experiment, group-thinking new ways of creating investment protections for renewable projects, and the Belt and Road Initiative treaties arising from the Chinese development program.[4] Parallel structures have been proposed and are now being introduced. For instance, the investment court established under the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA).[5] These were sparked by a broad reaction to the scope and structure of investment protections, which many non-profit organizations (NGOs) are critical of, and various United Nation organizations, such as UN Conference on Trade and Development (UNCTAD), are now espousing.

What is behind these trends? Is it that states are uncomfortable with the obligations that go with the benefits they receive from international investment? Or, is it simply that they do not want to be sued? Our panel of experts can help put this into context. I now turn to Peter Cameron to lead the charge.

PROF. PETER CAMERON: When it comes to the state perspective on ISDS, there are three important concerns commonly attributed to states.

The first concern is the stance that ISDS is not contributing to development.

[2] Energy Charter Treaty (ECT), Dec. 17, 1994.

[3] The Netherlands Draft Model BIT, May 16, 2018, https://www.internetconsultatie.nl/investeringsakkoorden.

[4] For more information, see generally Priyanka Kher & Trang Tran, *Investment Protection Along the Belt and Road*, The International Bank for Reconstruction and Development / The World Bank, Macroeconomics, Trade, & Investment (MTI) Group, Discussion Paper No. 12 (Jan. 24, 2019), http://documents.worldbank.org/curated/en/373561548341008857 /Investment-Protection-Along-the-Belt-and-Road.

[5] Comprehensive Economic and Trade Agreement (CETA), Canada-EU, Oct. 30, 2016.

However you define it, development is extremely important for many of the countries that receive international investment. States are obviously giving certain things away to obtain that investment, and one of them is ISDS. When states agree to it, however, they do not receive, as they believe, sufficient in return.

The second concern is losing cases. This concern is strong. The amounts in damages when states lose can be substantial, which may turn them away from the system. Indeed, the award-debts damage state budgets, and this is a serious risk as far as states are concerned.

Finally, the third concern is that there is a lack of ready evidence of real benefits to states for accepting ISDS. "You say it is essential, you say it is important, but what are the benefits to us as states?"

Turning to the first point on development, it can be reasonably argued that if hydrocarbons and minerals are not turning the country into a Norway, then the lack of development in the country concerned is the state's responsibility, rather than then investment regime. This might be correct, but it is unlikely to be accepted by the government or the wider public in the country concerned. The result is that we are seeing obligations being introduced in treaties that are socio-political in nature, for example, corporate responsibility. This is exemplified in the Pan-African Investment Code[6] and the Southern African Development Community (SADC) model BIT.[7] The question then arises of how courts are going to interpret the language in these kinds of provisions because it tends to be ambiguous.[8]

Regarding the second point on losing cases, the statistical evidence available does not support this proposition. Generally, states tend to win more than investors, and even when investors win the damages are often much less than those sought.

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[6] Draft Pan-African Investment Code, Dec. 2016, https://au.int/en/documents/20161231/pan- african-investment-code-paic.

[7] SADC Model Bilateral Investment Treaty Template, July 2012, https://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.

[8] *See*, *e.g.*, Agreement for the Promotion and Protection of Investments, Can.-Mong., art. 14, Sept. 8, 2017.

Nonetheless, the fallout can be considerable if a state loses a case. A commonly heard view is that, after all, states are exercising their regulatory powers without which they cannot function. Moreover, states often consider that the damages awarded against them are unfair and out of proportion. The *Yukos Universal limited v. Russian Federation*[9] case is an outlier, but there are other cases where damages are extraordinary and are likely to have a negative impact on the state's budget—Nigeria is a recent example. In response, the EU has proposed to move away from ISDS altogether and establish a multilateral investment court.[10] In different responses, there has been a growth of regional or local arbitration institutions, which may have the effect of legitimizing the existing regime, because this does not present a challenge to it. ISDS is not abandoned—it is getting a regional makeover.

The third point concerns the benefits of ISDS from the state's perspective? "You say you need it, Mr. Investor, especially because our local courts are untested, unreliable, etc. So, if we give it, what do we get out of it?" There is a sense that there is not enough coming back to the state. I will not argue for or against that proposition. It is just one that bears mentioning.

The growth of alternative legal service providers—largely to meet government needs—is also noteworthy. Again, from this we can infer that ISDS is a system that will not go away. But if it is to stay, it may be managed slightly differently. We have seen the growth of NGOs providing legal advice. There are other associations as well, perhaps made up of retired lawyers who are active in this field. Additionally, there are the regional development banks and the African Legal Support Facility[11] that are

[9] Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA227, Award (July 18, 2014) (calculating damages at over US$66 billion).

[10] *See* European Commission, *Investment in TTIP and beyond—The Path for Reform: Enhancing the Right to Regulate and Moving from Current Ad Hoc Arbitration Towards and Investment Court* at 4 (May 5, 2015), http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF ("the EU should work towards the establishment of an international investment court and appellate mechanism with tenured judges with the vocation to replace the bilateral mechanism which would be established").

[11] *See* African Development Bank Group, African Legal Support Facility https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/african-legal-

concerned with advising their member governments on how to deal with disputes. There is an emerging counter force to western law firms. Those that advise investors on bringing investment claims are now facing an alternative legal force supporting states.

BAIJU S. VASANI: If there were two questions that I had in 2018, they would be encapsulated as follows.

First question: how has this backlash affected the ISDS practice? The answer is that it has affected it positively because all the news and attention has increased awareness among investors, and they are now cognizant of the benefits of investment treaties. We have therefore seen an increase in matters, particularly in regard to counseling and restructuring where clients now understand that these treaties are there to protect them.

The second question that I have received often—in fact, I had an associate who came to me with this particular query—is: are you not worried that your ISDS practice is going to die? What are you going to do for the rest of your career now that ISDS is dead? This associate said that he wanted to diversify his practice. "I love working, Baiju, I really like your ISDS stuff, but I think I should do more appellate work." Needless to say, he is doing more appellate work now.

I do, however, accept the question and rise to the challenge. I want to address the question whether there will be a further increase in the high-water mark of work that we are going to see; or are we now seeing the death knell of ISDS?

I am going to predict that ISDS in its current form, mirroring commercial arbitration with party-appointed arbitrators and without court procedures, will stay for decades to come. ISDS, as it is, is not going anywhere. That is my prediction, and I welcome challenges from my fellow panelists and from the floor that argue otherwise.

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The death knell has come about many times. Latin American countries pulled out of the International Centre for Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes between States and Nationals of Other States;[12] Venezuela, Bolivia, they began denouncing the Convention and everyone thought there would be a domino effect. But it did not happen, and if you look at how much engagement there is with the current ICSID rule amendments, it shows that states are today supporting the ICSID system.

Then there was the termination of treaties, *e.g.*, by South Africa, Indonesia, and Russia. Many states claimed that they would terminate their treaties. A few indeed did, and there is support for terminating intra-EU BITs, which is significant given the sheer number of them. There is also NAFTA 2.0 that is not particularly great for ISDS, and we have seen a retreat notably by Canada from the treaty negotiations. This, however, has to be balanced against the number of BITs that are being signed, notably in Asia. Taking, for example, the Chinese, Koreans, and Japanese, and looking at the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[13] the movements are neutralized. BITs and multilateral treaties are not going anywhere. Even within the EU, all we are going to see is a restructuring, like Dyson moving from the UK to Singapore: European companies will shift and restructure to sidestep the demotion of intra-EU BITs.

What is so exciting is the EU's support for a multilateral investment court. Again, I predict that it is not going to happen; there will be no multilateral investment court. The idea that all the states are going to convene and agree on, for instance, who will sit on this court, what nationality they will have, how they will be appointed, whether it will be by election, etc., is fanciful. Moreover, there will be points of conflict between developing and developed states, from states with different political views. It would be easier to maintain the *status quo*, albeit with a few modifications, but

[12] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"].

[13] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Feb. 4, 2016.

everything really remains as it is.

There is the argument that an investment court would create a precedent and bring consistency to ISDS, but there are over two and a half thousand treaties with different text and languages. What precedent can come out of that? It is not as if there is one treaty text in *one* language applying to all; there is no multilateral investment treaty for the world. Therefore, we are never going to create a precedent. It is better to have *jurisprudence constante* where an outlier decision can be circumvented, and a subsequent case decided differently. Whereas if there is a system of precedent and a bad decision is rendered, it might hinder the ISDS system for years to come.

Others also claim: "Well, okay, Baiju, we want people like you out. You are a *double hatter*." I am an ICSID arbitrator and ICSID counsel. They say: "We do not want people like you who represent these bad investors, and then you sit as arbitrator. You do not have a public law background; you are not an administrative law expert." I question whether there is bias; there are statistics suggesting there is none. I also question whether "double hatting" is really an issue because when there is a true conflict, it can be addressed with arbitrator challenges. For investors, however, I think the court will be problematic because the judges will view these disputes through a public law lens. This means there will be a margin of appreciation and discretion for states. Therefore, instead of equality of arms between investors and states, the prism will change in that disputes will be analyzed through the lens of the state; it will be an elaborate judicial review as opposed to a dispute between equal parties.

Finally, in opposing the backlash against ISDS, a difficult position to maintain is that foreign investors should be granted special treatment over domestic investors. In reality, what is so special about foreign investors versus domestic investors? It is a difficult thing to disagree with. The statistics do show there is some correlation between BITs and Foreign Direct Investment (FDI), but not enough to give the class their own special system. We should move to a system that protects investment as opposed to foreign investment because the concept of foreign investment has

become artificial. Today anyone can make a foreign investment and become a foreign investor. Money moves with a simple click of a button. It is not the 1960s where everything was confined. The idea itself that we need FDI as opposed to direct investment is flawed. Furthermore, the multilateral court will be protecting FDI and as long as that is the case, the populace, the Elizabeth Warrens, the Bernie Sanders, everyone in Europe, will continue saying: "Why are you treating these foreigners better?" For this reason, the court will be a process that is not going to work particularly well.

ANDREW CLARKE: Thank you, Baiju. Let us now have a look at the historical context. I ask Marike to comment on this.

PROF. MARIKE PAULSSON: From a historical perspective, there are three lessons to take away. The first lesson begins in the 1840s and 50s. During this period, Lord Palmerston, Britain's foreign and prime minister, famously defended gunboat diplomacy. In international politics, gunboat diplomacy or "big stick policy" refers to the pursuit of foreign policy objectives with the aid of conspicuous displays of naval power, implying a direct threat of warfare. Today, we do well to remember that those kinds of tactics can lead to undesired outcomes. We also do well to remember that when we decide to dispose of a system, *e.g.*, the current system of ISDS that functions well for investors, it can backfire and negatively affect international trade, as well as peaceful commerce. As stated by George Ridgeway, if the international community sees profit in peaceful commerce, it is less likely to disrupt it by fighting wars.[14]
When it comes to sovereignty, I tend to reference Fali Nariman from India who says that sovereign states are like billiard balls: they often collide but seldom do they go in the same direction.[15] And in the White House, we now have something more like a

[14] *See* GEORGE RIDGWAY, MERCHANTS OF PEACE: 20 YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE, 1919-1938 (Little Brown & Co. Pub. 1958) (1938).

[15] Fali S. Nariman, Intervention at the International Council for Commercial Arbitration (ICCA) 3rd Session of Introduction to the New York Convention – The Convention and Sovereignty: Judicial Dialogue on the New York Convention (Nov. 23, 2013), *available at* https://www.arbitration-icca.org/media/2/13915957715800/icca_roadshow_report_india.pdf.

bowling ball. To some extent, we have managed to replace gunboat diplomacy with ISDS. In keeping with this thought, I pose the question to those involved in the ISDS reform debate at the UNCITRAL working group: If you want to move forward with an investment court, how will sovereignty affect the court?

The second lesson takes us back to the 1990s. This is not the first time that the international community is thinking about a permanent arbitration court. In the 1990s, the arbitration community and leading arbitration scholars at the time contemplated a world court that would have had jurisdiction to hear all enforcement requests under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[16] Although it was different than a court hearing disputes between investors and states, it is important to understand why figures like Judge Stephen M. Schwebel and Howard M. Holtzmann rejected the court at the time. Moreover, the enforcement court would have addressed a single treaty, whereas a multilateral investment court is intended to address a multitude of treaties.

What did Judge Schwebel say about the New York Convention court in the 1990s? He referred to the movie, MAN OF LA MANCHA[17] where Don Quixote dreams an impossible dream, and Schwebel said: "The court is like that impossible dream." [18] In thinking about a permanent investment court, will states appoint the arbitrators or adjudicators? If yes, are they actually sovereign appointments? Furthermore, are the states that are appointing members to the court also acting as respondents in disputes submitted to the court? If that is the case, is it then so unlike the enforcement court of the 1990s, from MAN OF LA MANCHA, given that this court actually eliminates party autonomy.

The last history lesson takes us back to 1958. Something to consider is whether decisions rendered by the multilateral investment court can be enforced under the New York Convention. In 1958, the UN delegates addressed article 1(2) of the New

[16] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 1155 U.N.T.S. 331, 7 I.L.M. 1046 [hereinafter "New York Convention"].

[17] MAN OF LA MANCHA (Produzioni Europee Associati, 1973).

[18] *See* Nariman, *supra* note 15, at 2.

York Convention,[19] which provides that awards rendered by permanent arbitral bodies can be enforced under the New York Convention. However, the then Czechoslovakian delegate argued that only awards rendered by permanent arbitral bodies could fall under the New York Convention if those bodies were not courts of justice exercising compulsory jurisdiction, irrespective of whether they were called arbitral bodies. At the time, the delegates found it essential that the submission to the permanent arbitral body had to be voluntary and the consequence of contractual freedom and the autonomous will of the parties in order for the award to fall under the scope of the New York Convention.

Reflecting on a multilateral investment court today, what happens to the element of choice? Will disputes be voluntarily submitted to the court? What will be the identity of this court? Is it actually judicial?

It is important for those participating in the UNCITRAL Working Group III to address those questions because if the court does not have an enforcement mechanism as powerful as the New York Convention, the decisions rendered by it will be a rather worthless piece of paper.

In conclusion, history reminds us that after World War II, the New York Convention delegates rejected the premise that decisions rendered by *de facto* judicial courts would fall under the New York Convention's scope simply because these courts were called permanent arbitration courts. Those existed at the time in the communist East Bloc as an expression of judicial control over business disputes and a rejection of party autonomy. We learned that gunboat diplomacy does not lead to peaceful commerce. We now know that establishing certain permanent courts might work well for Don Quixote, MAN OF LA MANCHA, but it will not likely work for foreign investors.

ANDREW CLARKE: Thank you very much, Marike. Let us turn to Tim Foden to talk about the impact that changes in ISDS or the challenges to the ISDS regime have had in light of resource nationalism.

[19] New York Convention, *supra* note 16, art. 1(2).

TIMOTHY FODEN: I come to you today with both a warning and a call to action. The warning comes from the mining sector, and it is this: Nationalism is not just about cheap looking hats with historical exhortations written on them. It is real and states from Africa to Europe to Asia have rediscovered resource nationalism. The experience of miners should be a warning to the energy sector, and this gives rise to the call to arms. The bulwark against resource nationalism is investment arbitration, yet this particular rampart is under siege. We must act to shield investment arbitration now before energy companies find themselves without effective remedies when resource nationalism turns toward the energy sector.

In the time remaining, I will briefly describe the revival of resource nationalism in the mining sector, explain the hardly coincidental intersection of resource nationalism and the attack on investment arbitration, and finally mention what people in this room may do about this particular conundrum.

Regarding resource nationalism, Tanzania provides a helpful example. In 2017, the president of Tanzania referred to mining companies as "people who call themselves investors with the intention of stealing from Tanzanians."[20] This was not simply rhetoric; the State followed through with drastic changes to the investment framework for mining. Tanzania placed export bans on all mineral concentrates, introduced unfeasible local content requirements, and created new powers for avoiding transactions that the State deemed "unconscionable."[21] Miners immediately felt the impact. For instance, Acacia, a major gold mining company, was hit with an unpaid tax bill of US$190 billion. Following the movement in Tanzania, other African countries like Ghana, Zambia, Sierra Leone, and Mali signaled their intentions of adopting similar measures.

[20] *Magufuli says will Close all Mines if Firms Delay Talks to Resolve Tax Dispute*, The E. Afr., July 22, 2017, https://www.theeastafrican.co.ke/business/Magufuli-threatens-to-close-mines-if-owners-delay-negotiations/2560-4027536-u3cnfqz/index.html

[21] Nadine James, Editorial, *Resource Nationalism on the Rise in Sub-Saharan Africa: Heightened Risk?*, Mining Wkly., June 15, 2018 https://www.miningweekly.com/ article/resource-nationalism-on-the-rise-in-sub-saharan-africa-2018-06-15-1.

The example of the Democratic Republic of the Congo ("DRC") is also illustrative. The DRC, over the course of a single weekend radically overhauled its entire mining framework. The State removed the prior mining code's 10-year stability provision, required that 60% of all earnings be kept in local domestic banks, and hiked tax revenues on all "strategic resources," a designation left entirely to the discretion of the presidency.[22]

Resource nationalism is not limited to Africa. Over the past year and a half, Poland and the Czech Republic have also made efforts to steer mining assets away from foreign investors and into state-controlled mining companies. These States are doing this boldly and saying: We do not want these natural resources in the hands of foreign investors, of Australians, of Americans. This is a call back to the 1960s.

Many might think that this will not happen with the energy sector, after all, oil prices are down, and the "obsolescing bargain" model tends to operate only when commodity prices are high. It is still worth bearing in mind that the mineral super cycle ended years ago, and mineral prices are not incredibly high, yet resource nationalism is in full stride in that particular sector.

Furthermore, resource nationalism does not strictly correlate with high commodity prices. For instance, in 2012, when Argentina nationalized the oil company YPF, oil prices had taken a severe hit in the months leading up to that decision. It seems rather naïve to assume that low oil prices will protect energy companies from resource nationalism because nationalism itself is wildly unpredictable. Ten years ago when I read Philip Roth's brilliant 2005 novel, THE PLOT AGAINST AMERICA where a celebrity, Charles Lindbergh, rises to the presidency of the United States in the 1940s on the back of a slogan, "America First," I could not have predicted in my wildest dreams that ten years later we would have a reality television star rise to the presidency, spouting that same slogan.[23]

All of this is to say that if it happens with minerals, it can happen with oil and gas. In the event that resource nationalism encroaches on the energy sector, energy

[22] *Id.*

[23] PHILIP ROTH, THE PLOT AGAINST AMERICA (2005)

companies might find themselves bereft of effective remedies. In fact, resource nationalism is currently thriving because NGOs, states, and other actors have attacked investment arbitration as a tool of pantomime robber barons who, while twirling their mustaches, extract additional profits from states through litigation. For instance, in 2012 an NGO published a report attacking investment arbitration, and it opened with a comical epigraph that went: "There is little use in going to law with the devil while the court is held in hell."[24] The report proceeds to undermine the entire system as balanced against states.

States have also joined the act. For instance, in 2016, Italy withdrew from the ECT because it had been sued several times; and Europe has recently turned its back on the intra-EU application of the ECT. The attack on investment arbitration is not lost on states that are perusing resource nationalism; we need only look at Tanzania, which has made efforts to gut the mining framework and has banned investment arbitration altogether.

General counsel of energy companies might not be particularly troubled by this conversation because they have direct investment agreements and hence leverage with states, but independents, small and medium-sized enterprises, and smaller contractors do not have that advantage. These actors often have to rely on the investment treaty framework because they cannot bargain for an investment agreement.

Moreover, the detractors of investment arbitration are not limiting their attack to treaties; they are attacking the private tribunals that investment agreements give access to in the event of a breach. As for the leverage that major energy companies have, the past is prologue: the misapplication of that leverage in the 1952 coup[25] to the benefit of the Anglo-Iranian Oil Co. was arguably the catalyst to the very system we have today.

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[24] PIA EBERHARDT & CECILIA OLIVET, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELING AN INVESTMENT ARBITRATION BOOM (2012) (published by Corporate Europe Observatory and the Transnational Institute) (quoting HUMPHREY O'SULLIVAN, THE DIARY OF AN IRISH COUNTRYMAN (1831)).

[25] Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. 92 (July 22).

In calling to arms, we cannot simply defend the system by writing articles and funding think tanks and opinion pieces. To regain the initiative, we must remind the public and policy makers of the grisly precedence of Iran and Guatemala and countless other corporate-driven *coup d'états*. As Judge Schwebel has pointed out for the past few years, investment arbitration is the best and only alternative to gunboat diplomacy. We can actually take part and work to ensure that this recent and unpleasant history does not repeat itself.

ANDREW CLARKE: That is a very useful reminder of parallel experiences from the mining industry and the implications it may have for energy in the future. In considering the institutional perspective, we are very pleased to have Alexis.

ALEXIS MOURRE: The decision by states to reform the system of investment protection is a decision that pertains entirely to states. The decision might be unrealistic or proper, but it is not incumbent on arbitral institutions or the arbitral community to question the legitimacy of that decision. Whether the ISDS reform will result in lower FDI is uncertain and perhaps impossible to predict. Looking at Europe, it is interesting that Europe is strongly opposing ISDS and simultaneously embarking on a more ambitious program of entering trade agreements around the globe than that ever set by the EU.

From an institutional perspective, it is important that stakeholders and the arbitration community are properly consulted in the ISDS debate. The ICC has taken its part in this process. In November 2017, the ICC convened with the Geneva Center for International Dispute Settlement and held round table discussions with UNCITRAL and representatives of the business sector and with the collaboration of Gabriella Kaufmann-Kohler. The ICC is also acting at the UNCITRAL Working Group III and participating in the works of that group.

The concerns that states express with respect to ISDS are serious. There are concerns over consistency, parallel arbitrations, unrelated cases, forum shopping, abuse of process in certain instances, etc. These issues are serious. Moreover, listening to Baiju, I remember a great Italian author who wrote that "everything needs

to change, so everything can stay the same"[26] to describe a strategy for maintaining power. With the ISDS reform, however, I do not think this will happen. Things will change, and we will enter a different landscape. Whether an investment court will happen is uncertain, but the most incredible things are happening around the world these days, and this might happen as well.

There are two aspects to the question of an investment court. First, in Europe, the idea that private arbitrators adjudicate disputes with states has become unsellable. Second, and at the root of the problem, investment protection is based on the net of several thousands of treaties. This creates problems with consistency and forum shopping. To resolve these problems, there must be a multilateral investment treaty dealing with the substance of the standards of protection. There was an attempt to do this between 1995 and 1998, and a draft treaty was discussed within the Organization for Economic Co-operation and Development (OECD) called the Multilateral Agreement on Investment ("MAI"). It was an ambitious project aimed at elaborating a multilateral investment treaty that provided for arbitration. Eventually however, the public became aware of the project because some NGOs took this to the press, which created a political concern. Furthermore, the then socialist government in France withdrew from the discussions, and this ended the multilateral investment treaty project. At the time, the ICC strongly supported the project, and it would still provide support today because it is the policy of the ICC to defend multilateralism, but it is difficult to think that this will happen again.

Regarding current ISDS reforms, the ICC has expressed concerns over a multilateral court as proposed by the EU on three points. The first is party equality, and particularly the constitution of arbitral tribunals because investors will no longer have the possibility of selecting their arbitrators. With a court, there will be a panel of arbitrators chosen by the states, which is a cause for concern.

Another cause for concern is the neutrality of the entire process, on one side, because the panels would be selected exclusively by state parties and, on the other, because of the narrowing pool of available arbitrators and the risk of conflict of

[26] GIUSEPPE TOMASI DI LAMPEDUSA, THE LEOPARD (1958).

interest.

Finally, there is an inefficiency risk resulting from the unavailability of experienced international arbitrators.

All this being said, the possible introduction of a multilateral court will not replace the current ISDS system. There will simply be a more diverse landscape with thousands of BITs surviving. Perhaps there will be multilateral courts in the free trade areas. It would be a more diverse landscape, but ISDS, as it is today with different generations of BITs, would largely survive.

The ICC has a long experience with disputes involving states and state entities and also with treaty-based investment disputes. To date, the ICC has administered about 40 treaty-based arbitrations, and it released in January of this year the guidance note on ICC procedure, covering investment arbitration.[27] Specifically, in investment arbitration, the parties can adopt full transparency in ICC proceedings as in UNCITRAL proceedings.[28] Furthermore, and by way of clarification, article 25 of the ICC rules authorizes the tribunal to accept submissions from non-disputing parties.[29] The note also encourages full disclosure by prospective arbitrators regarding all the treaty-based cases they have participated in as arbitrator, counsel, or expert. Finally, the note states that awards are scrutinized by court members with experience in investment arbitration and that awards will be published within six months unless the parties agree otherwise.

It is worth remembering that investment protection in the early years was based on contract. The same was true for the first years of ICSID, and I believe that the current landscape will lead to more investment protection based on a contract. This is a welcomed development. Given the ICC's experience, it may have an important

[27] *Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration* at 19-20 (Jan. 1, 2019), https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf.

[28] *Id.* at 19. *Cf.* UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014), art. 1 (allowing parties to agree to apply the transparency rules).

[29] ICC Rules of Arbitration (2012), art. 25(3).

role to play in that context. With contracts, the parties can frame the procedures that are better suited for investment disputes. For instance, states have recently asked the ICC to draft a model clause for an investment contract providing for an appeals mechanism, which is allowed under the ICC rules. The ICC did propose a model clause to these states, and it understood that they are using the clause providing for appeals arbitration in their investment contracts.

ANDREW CLARKE: Thank you, Alexis. We have heard different perspectives on ISDS, its future and history, and its prospects of survival. It is uncertain whether we will hear the death knell of investment arbitration, but it is important to consider the consequences. Some authors like Professor Joe Stiglitz at Columbia University believe that ISDS is unnecessary for investors. He cites Brazil as an example of a country where there are no investment protections yet foreign companies continue doing business there. When investing in a foreign country there are the questions of risk, opportunity, balance, and investors have to consider what an acceptable level of risk would be to enter a particular country.

From an investor's point of view, the contractual protections in investment agreements are important, as well as the protections provided in investment treaties. These are important considerations when deciding on where to send investment dollars. Furthermore, we should remember that states are competing for those investments at a time when large investment is necessary to enable economic development and lift the poorest people out of poverty. Accordingly, the world is facing significant investment needs. If the changes to the ISDS system take place, how does the panel think these will affect necessary investment? Baiju?

BAIJU S. VASANI: The statistics show that the vast majority of investment cases are brought by small and medium sized enterprises (SMEs) and individuals, not by major companies. This is largely due to the leverage and political power that major companies have in certain countries. Changes to the ISDS system will largely affect those small and medium sized investors. As Alexis rightly pointed out, there will be a move to use more investment contracts, but the SME investors do not get investment contracts. Governments are not as concerned with these investments, but they are

important nonetheless—even the opening of a hotel brings important capital contributions and know how—and these SME investors are likely to be shut out if the system changes because they will not have the bargaining power to negotiate investment contracts.

ANDREW CLARKE: Marike, did you have a comment?

PROF. MARIKE PAULSSON: Changes to the system of ISDS will be more problematic for SMEs than for large investors; however, everyone should be concerned. The problem is that investors and state representatives—users of this system—are not involved in the current debate about ISDS reforms. For instance, at Albright Stonebridge Group we advise investors about diplomatic engagement, and we brief them about the current trends and developments in international arbitration. Many investors seem to be unaware of these developments and they are taken by surprise and are understandably alarmed because they are the ones who will be impacted by the outcome of these reforms. Furthermore, investor shoud formally engage politicians in this debate or diplomats should consult or engage with state representatives to ensure they understand that a radical replacement of ISDS should not be the first option. The first option must be to take another look at reforming the existing system.

ANDREW CLARKE: Tim?

TIMOTHY FODEN: I agree completely. Regarding Baiju's earlier point on domestic investors being treated less favorably than foreign investors, we must remember that the treaty system was meant to be proscriptive. It was meant to motivate states to change and treat foreign investors one way with the hopes that the liberal treatment afforded would extend to the domestic plane. The system has, to some extent, lost its way—forgetting that point, and there are examples in jurisprudence. In particular, the decision in *Parkerings-Compagniet* A.S. *v. Republic of Lithuania*[30] found that the State was not liable, reasoning that the investor should have known it was investing

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

in a country transitioning to democracy, which should have been part of the risk analysis.[31] The system, however, was created to help that particular investor in that particular situation, but tribunals are so fearful of commenting on a sovereign's conduct that states are allowed to get away with unlawful conduct.

ANDREW CLARKE: Peter, did you have something?

PROF. PETER CAMERON: States are aware that they must continue promoting and protecting investment; however, in the current climate, they will want to ensure they are seen as protecting their sovereignty and regulatory powers. Accordingly, it would be useful to suggest to states ways that they can both protect that sovereignty and continue providing the kind of protections that ensure a continued flow of investment. There can be a balance.

Regarding the SMEs investors, I agree the system was built to benefit some investors more than others, which is exemplified by the energy disputes in Latin America over the last ten, fifteen years. But SMEs are incredibly vulnerable to state action, and the treaty system is an advantage because of the limited leverage they have with states. When faced with negative state action, a small investor is likely to face losses even if they avail themselves of a BIT. That said the treaty system has great value because the SMEs can pull out of the country and still recover some loss– losing their shirt but not their trousers.

ANDREW CLARKE: It is interesting to consider the protections that investors thought they were getting with ISDS under the current regime. From the limited statistics that have been studied, it appears that the chances of success in investment claims are about 30 percent, and after obtaining a favorable decision, the damages awards are on average only 30 percent of the claim.[32] It is important to consider whether investors and in-house counsel find the current ISDS system sustainable and then look at whether states understand the consequences of changing the system. This is important given my concern that many investors are indeed unaware of the

[31] *Id.* ¶¶ 335-38.

[32] Susan D. Franck, *An Empirical Analysis of Investment Treaty Awards*, *in* AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE ANNUAL MEETING, Vol. 101 (March 2007).

changes mentioned earlier.

To the panel then I ask, what are they doing to advise their clients about the prospective changes and how can they interact with the state representatives involved in the debate to encourage a more balanced discussion?

At the UNCITRAL Working Group III deliberations in Vienna, in October and November 2018, I made a similar intervention about the statistics relating to investment claims and a delegate commented to me that the discussions are not about facts but about perceptions, and that changes would be made simply because people think that changes have to be made. This is worrisome. Investors must seek out their state delegations involved in these sessions to ensure the delegates understand the facts.

Furthermore, Alexis mentioned the roundtable the ICC held in Paris, together with the UNCITRAL Working Group Secretariat. I attended that roundtable and made several comments. When I went to Vienna however and asked the Secretariat whether the results of that roundtable had been shared with the delegates, the answer was no.

I do not know how we can get the relevant data presented, or to ensure the viewpoint of investors is also heard, during the deliberations for ISDS reform. With that, I turn back to the panel to hear their perspectives.

ANDREW CLARKE: Alexis, the floor is yours.

ALEXIS MOURRE: On a related note, the manner in which the EU introduced this fundamental change to the system of investment protection is troubling because it was through a decision[33] of the European Court of Justice (ECJ), as opposed to a regulation. Because the decision is poorly drafted, it has the potential for unintended consequences for commercial arbitration. The decision reasons that because arbitral tribunals might have to apply EU law, they are not part of a judicial system, and their awards cannot be referred to the ECJ—hence allowing them to apply EU law without control by the Court—the system must be banned.[34]

[33] Case C-284/16, Slowakische Republik v. Achmea B.V., 2018 E.C.R. 158.

[34] *See id.* ¶¶ 42-60.

This same reasoning, however, could be applied to commercial arbitration where questions of European law are at issue. While this was likely not the intention of the ECJ, there should be concern over the arbitrability of EU law questions in commercial arbitration.

ANDREW CLARKE: Thank you Alexis. Baiju?

BAIJU S. VASANI: I have represented investors and states. As counsel, it is far easier to represent states than it is to represent claimants: not only do claimants carry the burden of proof, the system has many pitfalls for investors.

Furthermore, and looking at the statistics on investor success in investment claims that Andrew mentioned, the detractors of the system highlight that 30 percent of cases are settled and they argue that these should be counted as positive for claimants. Yet when states win on the jurisdiction, the detractors argue that these cases should not be counted as wins for states in the statistics because they represent claims that should never have been brought. Accordingly, the detractors argue that the statistics should only consider the merits cases, and claimants win the majority of the time. The response to that is claimants should win there most of the time because if there is a good claim and the investor is willing to spend millions in bringing the case against the state, the investor should win. That is the only reason an investor is going to spend millions.

Regarding the media coverage, the detractors have fantastic headlines: 'secret courts' and 'corporate suits taking your tax dollars.' But as investors, the public is not drawn by articles on a system that protects investment—it is not a sexy story. The detractors have a stronger voice in that sense.

To turn the tide, we will need to see the corporate world seeking out their government representatives to defend the ISDS system. Reflecting on the 70s or 80s when the United States was quite nationalistic, and Europe conversely was a proponent in the ISDS debate, it was not until corporate America pleaded to the State Department that they were being left behind that the Department began supporting ISDS. The corporate world must convene and make a stand like the detractors are doing.

TIMOTHY FODEN: I agree with what Baiju said.

PROF. MARIKE PAULSSON: Regarding the question of whether the ISDS debate is focusing on facts and real data as opposed to 'fake news,' the recent book by Jeffery Commission and Rahim Moloo[35] is important for anyone participating in the UNCITRAL Working Group to get a better understanding of the factual circumstances surrounding ISDS. A lot of what we are hearing is media and mere perceptions, which is not helpful when a group aims to proceed to replace an existing and functioning system radically.

A troubling point worth mentioning is that some state representatives who are also arbitration specialists argue that having an investment court is a reform while staying with the current system is radical. This line of argument makes no sense, and it is almost propaganda. As to the struggle to have an informed debate, I asked Judge Schwebel some years ago what he thought about Senator Elizabeth Warren's strong anti-ISDS statements, to which he replied, "[I]it is not as if those statements are informed statements." That was a diplomatic way of giving his opinion. It is crucial for politicians and State delegates to make informed statements and choices.

ANDREW CLARKE: Peter, any thoughts on what we can do?

PROF. PETER CAMERON: I am an optimist, and I think we just need to engage in a certain amount of education. That said I want to reflect on a comment by the CEO of the African Legal Support Facility that went, "As long as African countries continue to fall prey to the predatory activities of vulture fund litigations, and as long as they continue to sign poorly structured agreements, our staff will maintain its vigilant posture prepared to redouble its efforts in the field of legal support." The first part suggests that there are vulture fund litigations, which is unclear whether that was meant to apply to ISDS. The second part, however, about poorly structured agreements seems to be a major part of the problem: it takes two to reach an agreement, including poorly structured deals.

Tim mentioned Tanzania earlier and the mineral agreements, which is a good

[35] JEFFERY COMMISSION AND RAHIM MOLOO, PROCEDURAL ISSUES IN INSTITUTIONAL INVESTMENT ARBITRATION (2018).

example. The issue does not only concern resource nationalism. These agreements appear to have been completely illegitimate as far as the government is concerned and hence disputes arise, particularly in the mineral and the energy sector. Notwithstanding that, this scenario is not the fault of ISDS; it is caused by agreements that should have been better negotiated. In the ISDS debate then, there are alternative legal service providers taking a negative view on ISDS. To counter that, we must emphasize the many examples of globalized investment agreements that have benefited states. Moreover, I am sympathetic to investors on this point because it is actually not their job to be involved in the agreement ratification process. They are not lobbyists. They are engaged in business; they are investing.

Finally, there is no united European position on ISDS reform. Finland and Hungary and few others recently clarified that they do not view European law as undermining the role of the ECT. There is a dissent among the 27-member state union, which does create hope for investors regarding the European position in the ISDS debate.

ANDREW CLARKE: Thank you, Peter. It is correct to say that the structure of investment protection was created by states, in their own interests to encourage and facilitate investment. If there is a movement to change the system, it is only appropriate to allow investors to inform them about the potential consequences so states can take whatever action they deem appropriate, but it is a decision that remains entirely with the states.

Returning to the panel, I ask if any has a good idea for this discussion.

PROF. MARIKE PAULSSON: When looking at the ISDS system and the *status quo* that currently exists within the international arbitration community, it is important to consider the broader context and adopt a holistic approach. We must be cognizant that in dispute resolution there are other factors involved, such as diplomatic, political, environmental factors, human rights, etc. Furthermore, we must advise investors that arbitration is not always the only strategy. Often, it is not a strategy at all. Investors need to be provided with a holistic strategy, and counsel must emphasize that there are other options that include mediation, conciliation, and commercial diplomacy, especially in light of the recently concluded UN Convention

on International Settlement Agreements Resulting from Mediation.[36]

TIMOTHY FODEN: Fight fire with fire. The detractors use alarmist's rhetoric, so we can too.

ANDREW CLARKE: Okay, thank you. Peter?

PROF. PETER CAMERON: I strongly suggest we communicate to states that the exercise of their legitimate regulatory powers is not in question. It is a matter of setting some limits for the exercise of those powers in dealing with often long-term, complex, and capital-intensive projects, to get them off the ground. The rules to see these projects through are not threatening; they simply provide investors with security in the long term.

ANDREW CLARKE: Alright, thank you. Alexis?

ALEXIS MOURRE: The striking thing about the discussions on the multilateral investment court is the complete inability of the arbitration community at large to engage in a discussion with the EU. We have been in denial, saying either it is a bad project, or it will not work or they will not do it. I think it might happen and it is already happening. We must engage in a dialogue that is more positive with the EU, particularly in conveying the aims of our propositions and the importance of neutrality. All this for preserving a balance between investors and states, and the effectiveness of the system. A system under a multilateral court, if it is limited to a few judges and completely excludes international arbitrators, will be ineffective. These are concerns that we must convey to the EU commission. We must not be in denial in order to do it. We must understand that it is not a dialogue that can be pressured because there is strong political will on the part of the EU, and this will not change. We must convey our proposals from a technical standpoint to improve what is being submitted for reform.

ANDREW CLARKE: Thank you. I believe that Baiju has now come up with an idea.

BAIJU S. VASANI: We must adjust the current system to remove the points of conflict from the debate. For instance, ICSID has done a fantastic job of bringing fresh

[36] United Nations Convention on International Settlement Agreements Resulting from Mediation, Dec. 20, 2018, U.N. Doc. A/73/17 (opening for signature on Aug. 7, 2019).

arbitrator blood into the system. A point that is often mentioned is that there are only a handful of arbitrators deciding the majority of arbitration cases, which is a negative aspect of the system. Furthermore, the lack of diversity among the handful of arbitrators is disheartening. Broadening the class of appointed arbitrators and enhancing diversity can remove the points of contention from the ISDS reform debate.

Similarly, looking at the efforts to update the ICSID Rules of Procedure for Arbitration Proceedings,[37] states are mainly focusing on security for costs. States are opposed to third-party funders bringing cases and being unable to recoup their costs. Accordingly, modifying provisional measures that provide security for costs are the kinds of adjustments that we must look at. Making these kinds of adjustments slowly chisels away at the ability of detractors to attack the ISDS system.

ANDREW CLARKE: That concludes the remarks from the panel. I will now open up the discussion to the floor.

ALAN CRANE: Thank you for a very interesting discussion. The comments of the panel have largely been about competing visions of multilateralism, adjustments to the ISDS system, and whether there should be a supra-national court system. From what we are seeing around the world with retrenchment and hyper-nationalism, for example, the United States, Britain and Brexit, Italy, Hungary, Brazil, you can go around the globe, is there a possibility of returning to more dysfunction? Instead of multilateralism, investors are left with less structure and support. This seems to be happening in many domestic political systems, and so it might be where we are headed.

ANDREW CLARKE: Certainly, that is a real risk. Looking at the data from UNCTAD in 2018, foreign investment shrank by 19 percent,[38] in addition to the 23 percent drop from the previous year.[39] Investment trends are weak. Part of this is due to the

[37] ICSID Rules of Procedure for Arbitration Proceedings (Apr. 10, 2006).

[38] UNCTAD, 31 INVESTMENT TRENDS MONITOR 1, 1 (2019).

[39] UNCTAD, WORLD INVESTMENT REPORT 2018: INVESTMENT AND NEW INDUSTRIAL POLICIES, at 1, U.N. Sales No. E.18.II.D.4.

international trade wars that are occurring as well as the growing nationalism. Investors have to be more careful about where they do business.

Baiju S. Vasani: I agree with you, Alan, but we must address the movement seeking to radically change the ISDS system. The concern goes to the fact that major companies are better able to cope with volatility; it is the SMEs investors, however, that play a vital role in FDI but are less able to manage volatility. Unfortunately, it is these investors that will suffer.

LUIS ENRIQUE CUERVO: I am Luis Enrique Cuervo, a practicing attorney at Jackson Walker LLP in Houston. Thank you for the presentation. We have not heard much about the mystery and intricacies of human adjudication. For this I want to suggest a comparison. Soccer has been played worldwide, perhaps for longer than we have been dealing with international investment issues. Sometimes referees are scolded when teams lose or win, but everyone continues wanting to play soccer. This is an interesting thought when compared with international arbitration. No one is suggesting that referees be banned, or the game discontinued. There are, however, certain comparisons that are worth noting, such as the games are played and viewed worldwide with full transparency. There is no concern over the knowledge of the rules; everyone knows the rules; and the referees are supposed to enforce them.

Lastly, I have not heard comments regarding professionalism. No one would accept a world cup where a referee has worn the jersey of a team playing in the final. That is a comparison worth considering because everyone enjoys soccer, continues wanting to play the game, and these comparisons could be helpful for considering the future of international arbitration.

ANDREW CLARKE: That is a very interesting comparison. It relates to a discussion I had with state delegates at the UNCITRAL Working Group III discussions where one mentioned that the ISDS debate has become an issue of perceptions. When a state loses an arbitration, they demonize the tribunal and the investor. Nobody focuses on whether the arbitral tribunal arrived at the correct decision and whether the state, for example, ignored its obligations under the stability provisions. As in soccer, you do not see coaches conceding that it was indeed a penalty and their player simply

erred. So, it is a very interesting comparison. Thank you for that thought.

PROF. MARIKE PAULSSON: On the subject of double hatting, if we lived in an idealist Don Quixote world, it would be acceptable to act as counsel or as arbitrator. In an ideal world, we would have law firms where specialists mainly act as arbitrators and firms that focus on counsel work. In the real world, however, there is a strong call for broadening the pool of arbitrators and enhancing diversity. How do we broaden the pool and make it more diverse? We must enable young people to get experience. That said there is an interesting conundrum with younger practitioners that claim they cannot wait for their first arbitrator appointment for which they would have to leave the counsel practice altogether because they cannot wear two hats. There is a sort of twilight zone in the transition phase from counsel to arbitrator, and it is a reality for many up and comers. Not everyone has the opportunity to gain experience as tribunal secretaries, which is the best training for becoming an arbitrator. In a world of MAN OF LA MANCHA, we could wear a single jersey, but this is not how the world functions today.

CONSTANTINE PARTASIDES: Thank you. Let me first congratulate the panel for a stupendous series of interventions—very enjoyable and thought-provoking.
I have a silver bullet. Turning to the soccer analogy, imagine if the world's soccer matches were taking place behind closed doors with no one watching. Imagine what people would say about what was happening in those matches. If the world of international arbitration has nothing to hide, it should open its doors. This is an exhortation that we face and must listen to because we are moving into an age where transparency is valued. The best defense for the ISDS system is to allow people to see it in action.

ANDREW CLARKE: Very good, Constantine. I think one of the greatest challenges will be persuading states to go with that approach. With that, I draw this panel to a close. I want to thank the panel participants, three of whom have written papers on the topics discussed. Again, thank you to all the panel participants for their active involvement in this.

ANDREW T. CLARKE is the General Counsel of ExxonMobil International Limited, based in the U.K. but with regional responsibilities, reflecting the broad nature of the ExxonMobil Group's business in the U.K., Europe, Africa, the Caspian and Russia. Andrew joined Mobil North Sea Limited in 1987 and has lived and worked for the ExxonMobil group of companies for the last 31 years with assignments in the U.K., Indonesia, Turkey, America, Singapore and Qatar. After graduating from Corpus Christi College, Cambridge Andrew qualified as a barrister before becoming an in-house lawyer. His current appointments include: Steering Committee and Past Chair of the CCIAG (Corporate Counsels' International Arbitration Group); member of the Governing Board of ICCA (International Council for Commercial Arbitration), Advisory Council to the Centre of Commercial Law Studies at Queen Mary University London and Chair of the Steering Committee of the Energy Law Institute. Andrew is also on the Advisory Board of the Turkish Commercial Law Review and was appointed a Bencher of The Honorable Society of the Middle Temple in London in 2009. Andrew has a good command of Turkish, together with reasonable French and basic Indonesian. In addition to his legal work, Andrew is also a keen vigneron, with his own properties in Chablis and Irancy, France.

PROF. PETER CAMERON is one of the world's leading authorities in international energy law and serves as arbitrator and expert in international arbitral proceedings. Currently, he sits as an arbitrator on a panel at the International Centre for Settlement of Investment Disputes (ICSID). He is also a member of Landmark Chambers in London. He has provided oral and/or written expert testimony before the LCIA, the ICC in Paris, the Singapore International Centre and the SCC Arbitration Institute. Peter is the co-director of the Centre for International Energy Arbitration and assisted the Scottish Arbitration Centre's efforts to attract the ICCA Conference to Edinburgh in 2020. Peter is Director of the Centre for Energy, Petroleum and Mineral Law and Policy at the University of Dundee, and Professor of International Energy Law. He is the author of many publications including International Energy Investment Law (Oxford University Press) which is entering its second edition.

TIMOTHY FODEN joined LALIVE in 2018 and is a partner of LALIVE (LONDON) LLP. His practice focuses on investor-treaty and complex commercial arbitrations in the mining and energy sectors, with additional experience in technology licensing, commodities and hospitality. Over the last 10 years, he has represented dozens of investors in bringing claims against States under the Energy Charter Treaty and various bilateral investment treaties and represented multiple global mining and energy corporations. Tim also has extensive commercial arbitration experience, having represented, inter alia, international chemical engineering firms, global mining concerns, a leading international hospitality management company and a major aluminum smelter. He

has acted in proceedings under the ICSID, ICC, SCAI, UNCITRAL, LCIA and ICDR arbitration rules and has extensive experience in the enforcement of commercial and ICSID arbitration awards in the courts of the United States, England and Belize. Tim currently serves as a board member of American Qualified Lawyers in London. He acted as co-Chair of Young ICCA (2011-2014), deputy editor of the European International Arbitration Review (2011-2016) and speaks regularly on international arbitration matters around the world. He has been recognized by Global Arbitration Review and Who's Who Legal as a "Rising Star in International Arbitration" for the past two years.

ALEXIS MOURRE has been the President of the ICC International Court of Arbitration since 2015. Before, he was Vice-President of the Court and Vice President of the ICC Institute of World Business Law, co-chair of the IBA Arbitration Committee LCIA Court member and Council member of the Milan International Chamber of Arbitration. Alexis has served in more than 260 international arbitrations, both *ad hoc* and before most international arbitral institutions. He established his own arbitration practice in 2015. He is fluent in French, English, Italian and Spanish, and has a working knowledge of Portuguese.

PROF. MARIKE PAULSSON is the Director of the University of Miami School of Law's International Arbitration Institute. She is a Senior Advisor with Albright Stonebridge Group, a global strategy and commercial diplomacy firm led by Secretary Madeleine Albright and Secretary Carlos Gutierrez. She is the Vice President for North America of the Global Legal Institute for Peace and Conflict Resolution Centre of the University of Sao Paolo and has been appointed member of the Court of the Mauritius Arbitration & Mediation Centre and is a member of the jury for Princess Sabeeqa Bint Ebrahim Al Khalifa Global Award for Women Empowerment with UN Women. Professor Paulsson is the author of 'The 1958 New York Convention in Action' and teaches and writes frequently on the topic of enforcement around the world.

BAIJU S. VASANI is a Partner in the Global Disputes practice of Jones Day, splitting his time between London and Washington DC. He has served as counsel and arbitrator in international arbitrations across a range of sectors and industries involving ICSID, ICC, LCIA, ICDR, SIAC, UNCITRAL Rules, bilateral investment treaties (BITs), the Energy Charter Treaty, NAFTA, DR-CAFTA, and public international law. He has also advised States on the negotiation and drafting of treaties. He currently serves as lead counsel on several investor-state and complex international commercial arbitrations, as well as sits as arbitrator on a select number of cases. He is a Senior Fellow of SOAS University of London, a Fellow of the Chartered Institute of Arbitrators, and on the arbitrator panels of various institutions worldwide, including the ICSID Arbitrator Roster.

CONFERENCE REPORT:
CONFERENCIA ICC–ITA–ALARB, MEDELLÍN, COLOMBIA

por Julieta Ovalle Piedra

Reporte de la Conferencia conjunta de la ICC–ITA–ALARB que se llevó a cabo en Medellín, Colombia el 3 de setiembre de 2019.

El pasado 3 de septiembre de 2019 se llevó a cabo la Conferencia organizada en conjunto por la Cámara de Comercio Internacional (CCI), el Institute for Transnational Arbitration (ITA, por sus siglas en inglés) y la Asociación Latinoamericana de Arbitraje (ALArb), en la nueva sede de la Cámara de Comercio de Medellín para Antioquía (CCMA), en Medellín, Colombia.

Las palabras de bienvenida estuvieron a cargo de Jorge Villegas Betancourt, Secretario General de la CCMA, Alexis Mourre, Presidente de la Corte Internacional de Arbitraje de la CCI, Eduardo Gonçalves, Presidente de la Iniciativa de las Américas de ITA, y Eduardo Zuleta, Presidente de ALArb y Vice-Presidente de ITA, quien resaltó que el objetivo de la conferencia era examinar lo que sucedía en materia de arbitraje en América Latina y en el mundo.

A continuación, tuvo lugar la mesa "Conversando con el Presidente de la Corte Internacional de Arbitraje de la CCI, Alexis Mourre". La entrevista, a cargo de Eduardo Zuleta, abarcó las muy diversas facetas del Presidente de la Corte, desde su incursión en la política, la creación del despacho Castaldi Mourre & Partners, la dirección de "Les Cahier de l'Arbitrage", hasta su actividad académica y literaria que incluye la autoría de la novela "Francesco Pucci, Hérétique". Alexis Mourre habló de su experiencia como Copresidente del Comité de Arbitraje de la International Bar Association (IBA) cuando tomó la iniciativa de sacar las Directrices sobre Representación de Parte en el Arbitraje Internacional, que a pesar de las resistencias que se tuvieron que enfrentar, propongan una solución al problema de cómo se conducen los representantes de parte en el arbitraje internacional. Respecto de las Reglas sobre la Tramitación Eficiente de los Procedimientos en el Arbitraje Internacional, conocidas como Reglas de Praga, Alexis Mourre comentó que las considera regresivas, pues se enfocan en la tradición del derecho civil, a diferencia de

las Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional, que pretenden hacer una casa común para todos. Habló también de la evolución que hay en el deber de declarar en la "Nota a las Partes y al Tribunal Arbitral sobre la Conducción del Arbitraje de Conformidad con el Reglamento de Arbitraje de la CCI".[1] Este deber es más estricto, tomando en cuenta las tendencias de la jurisprudencia sobre las consecuencias de la falta de transparencia. Alexis Mourre también se refirió a la evolución que ha habido en cuanto a la transparencia, diversidad y eficiencia del arbitraje en la CCI desde que él llegó a la Presidencia de la Corte Internacional de Arbitraje. La entrevista finalizó con un consejo para los jóvenes que quieren hacer una carrera en el arbitraje: "Hay que echarse al agua fría y nadar".

El primer panel trató el tema "Debate sobre Leyes de arbitraje: Monismo vs. Dualismo". María Inés Corrá (Bomchil, Buenos Aires) moderó el panel integrado por Carole Malinvaud (Gide Lyrette Nourel, Paris), Fernando Mantilla Serrano (Latham & Watkins LLP, Paris) y Andrés Jana (Bofill Mir & Álvarez Jana Abogados, Santiago de Chile). Las razones que justifican adoptar una regulación dualista o monista varían de jurisdicción en jurisdicción. Mientras que en Francia el dualismo tiene como objetivo proteger el arbitraje internacional como foro natural de las disputas internacionales, en Chile es una manera de calmar los atavismos y no generar resistencia al arbitraje internacional. En México, donde existe un sistema monista, la práctica del arbitraje se inició en el ámbito internacional y el arbitraje doméstico se desarrolló a partir de la misma. Es un sistema que evita las discusiones acerca de cuándo un arbitraje es doméstico o internacional, y que prepara a los abogados en una cultura arbitral uniforme. Ya sea que los Estados adopten uno u otro sistema, en el debate del monismo contra el dualismo podemos encontrarnos ante un falso dilema, porque un arbitraje se puede internacionalizar o nacionalizar, dependiendo de la voluntad de las partes, en la forma en que seleccionen a los árbitros, a los

[1] Cámara de Comercio Internacional, Corte Internacional de Arbitraje, *Nota a las Partes y al Tribunal Arbitral sobre la Conducción del Arbitraje de Conformidad con el Reglamento de Arbitraje de la CCI* (Jan. 2019), https://cms.iccwbo.org/content/uploads/sites/3/2017/03/ICC-Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration_spanish.pdf.

abogados y en la manera en que diseñen el procedimiento.

En el tercer panel participaron Luisa Fernández (Drummond Ltd., Bogotá), Guido Tawil (Árbitro Independiente, Buenos Aires), Mónica Jiménez (Miembro Alterno de la Corte Internacional de Arbitraje de la CCI en representación de Colombia; Ecopetrol, Bogotá), y Guillermo Sánchez Luque (Consejero de Estado, Bogotá), con Maximiliano Londoño (Londoño y Arango Abogados, Medellín) como moderador, discutiendo el tema "Arbitraje en sectores regulados: energía, servicios públicos, gas y petróleo". La problemática en torno a la arbitrabilidad de los actos administrativos y la falta de seguridad jurídica que conlleva fue uno de los temas centrales. Si el Estado ha decidido que las controversias relacionadas con estos sectores regulados sean resueltas en la vía arbitral, lo ideal sería que el propio tribunal arbitral resolviera la legalidad de dichos actos. En todo caso, la decisión se encontraría restringida al acto concreto. Limitar la arbitrabilidad de estas controversias no sólo evidencia un sistema que no confía en la institución arbitral, sino que ocasiona que éstas terminen en litigios paralelos ante tribunales arbitrales y estatales.

El cuarto panel fue un *Mock Case* sobre "Árbitro de emergencia", en el cual Luis Enrique Graham (Hogan Lovells, Ciudad de México) y Juan Felipe Merizalde Urdaneta (Dechert LLP, Washington D.C./Bogotá), actuaron como representantes del Demandante, Santiago Soria (Marval, O'Farrell & Mairal, Buenos Aires) y Silvia Marchili (White & Case LLP; Houston/Miami) como representantes de la Demandada, y Julieta Ovalle Piedra (Bufete Ovalle Favela, Ciudad de México) y Juan Pablo Argentato (Consejero de la Corte Internacional de Arbitraje de la CCI, Paris) como Árbitro de Emergencia y Secretario Administrativo respectivamente, ilustrando las características del Procedimiento de Árbitro de Emergencia previsto en el Reglamento de Arbitraje de la CCI y de las Medidas de Emergencia que pueden ser decretadas.

Las conclusiones estuvieron a cargo de Claudia Benavides Galvis (Presidente de la Comisión de Arbitraje de CCI Colombia; Baker McKenzie, Bogotá), quien hizo una extraordinaria síntesis de los temas que se trataron durante la conferencia.

JULIETA OVALLE PIEDRA es socia de Bufete Ovalle Favela, S.C., Ciudad de México. Julieta obtuvo su Licenciatura en Derecho por la Facultad de Derecho de la UNAM, un LL.M. por la Universidad de Paris 1 Panthéon-Sorbonne y participó en el ICC Advanced Arbitration Academy for Latin America. Fue incluida en el ranking de "Chambers Latin America 2018", de "Chambers Global Guide 2019", en la edición 2019 de la guía "The Best Lawyers in Mexico" y en el ranking de "Who's Who Legal: México 2019" por su práctica en arbitraje, así como en el número "Las abogadas más influyentes en México", de la Revista Foro Jurídico, México, marzo de 2018. Ha fungido como árbitro y abogada de parte en diversos procedimientos arbitrales institucionales y ad hoc, nacionales e internacionales. Es profesora de Arbitraje en el Posgrado de la Facultad de Derecho de la UNAM e imparte conferencias tanto en México como en el extranjero. Fue Representante para Latinoamérica de ICC YAF y Presidente de Grupo de Jóvenes Árbitros de ICC México de 2014 a 2017. Es miembro del Grupo Latinoamericano de Árbitros de la ICC, de la Comisión de Arbitraje de ICC México, del Instituto Mexicano del Arbitraje y del Consejo Directivo del Centro de Arbitraje de la Industria de la Construcción.

#YOUNGITATALKS
THE AMPARO:
KEY FACTOR IN THE ARBITRATION SCENE OF CENTRAL AMERICA & MEXICO

by David Hoyos de la Garza & Ana Catalina Mancilla Uribe

I. INTRODUCTION

In July, San Jose, Costa Rica and Monterrey, Mexico hosted the latest #YoungITATalks forum, which was also carried via videoconference. Panelists from all over Central America and Mexico gathered to discuss and share current trends in their respective countries regarding the recognition, enforcement, and annulment of arbitral awards.

The in-person panels were held at the headquarters of the Costa Rican–American Chamber of Commerce's International Center for Conciliation and Arbitration (CICA-AmCham) in San Jose and the Hogan Lovells office in Monterrey; speakers from El Salvador, Guatemala, Nicaragua, and Honduras also participated in the event through the webinar.

A common topic during both sessions was the relevance of the *amparo* action available in certain jurisdictions that may interfere with procedures related to the recognition, enforcement or annulment of arbitral awards. The speakers discussed how, according to their own experience, this constitutional remedy has become a relevant point to reflect upon when applying for the recognition and enforcement of an award, but most importantly when litigating an annulment request.

II. THE AMPARO IN LATIN AMERICA

As a brief background, in Latin America, the commonly called *amparo*[1] is a means of protection against any violation of a person's (natural or legal) constitutional rights, regardless of whether the entity causing such violation is a public authority or a

[1] Gloria Orrego Hoyos, UPDATE: *The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action*, GLOBALEX (2017), https://www.nyulawglobal.org/globalex/Amparo1.html.

private party. In essence, the *amparo*'s purpose is the direct protection of human rights.

This constitutional remedy was first established in Mexico at the end of the nineteenth century and, since then, it has been adopted by several Latin American countries, including those located in Central America.[2] The reason behind the adoption and similarity of the *amparo* in these countries is based on their constitutions; all of them having a federal instrument that provide an extensive and detailed declaration of human rights. The *amparo* is there to guarantee the protection of those rights.

In the majority of the participants' countries, to challenge an unfavorable arbitral award or to request the enforcement and recognition of a favorable award, the interested party has to apply for such action from the competent judicial authorities. After such processes, many Central American countries'—and Mexico's—legislations provide the *amparo* as a means to challenge the judicial determinations rendered therein. By the *amparo* the parties may allege a violation of their constitutional rights. Some of those allegations may be based on a lack of legal grounds for the ruling court's decision or any other violation to their due process, as these rights are protected by these countries' constitutions.

This constitutional remedy creates obstacles to the purposes of the arbitration proceeding. It forces the litigants to go through two additional judicial instances, delaying the process. That is, for the award to be reviewed or enforced, it must go through the enforcement or vacatur judicial processes and, later, be reviewed in a constitutional proceeding (through an *amparo* action brought against the judicial resolution). These two instances have a direct impact on the proceeding's timeframe and create a risk of an undesirable modification to the substance of the award by judicial authorities.

[2] Cecilia Flores, *Does the New Amparo Law Threatens Arbitration in Mexico?*, KLUWER ARB. BLOG (2015), http://arbitrationblog.kluwerarbitration.com/2015/10/24/does-the-new-amparo-law-threatens-arbitration-in-mexico/.

Notwithstanding these considerations, all speakers agreed that the arbitration scene is substantially improving in Central America and Mexico, noting that the scope of the *amparo* action is being limited or even declared inadmissible in many jurisdictions.

For example, the Guatemalan Constitutional Courts' recent holdings tend to narrow the *amparo*'s scope. According to Sosa, these tendencies need to continue in order for Guatemala to become a competitive regional arbitral seat.[3]

Mexico's and Honduras' recent reforms are also an example of countries making their constitutional remedies less threatening for arbitration. For Mexico, the viable remedy against the annulment´s resolution is now an *amparo directo*. As for Honduras, the annulment process may be solved before another Arbitral Tribunal, therefore, its resolution is not subject to this remedy.

Although the *amparo* may never be completely eliminated from these countries, recent efforts made by the courts and legislators regarding its proceeding, aim for a faster and more efficient mean of protection.

At the #YoungITATalks, among other matters, the speakers from Mexico, Honduras, Costa Rica, and El Salvador had interesting insights regarding the *amparo* procedures in their countries.

III. CHANGES IN MEXICO'S CONSTITUTIONAL REMEDIES

Mexican legislation regulates two different *amparo* proceedings. On one hand, the *amparo directo*—a single instance procedure initiated either before the Supreme Court or the Collegiate Circuit Courts—which is only admissible against the final resolution in a judicial process; one that ends a trial. On the other hand, the *amparo indirecto* is a slower proceeding—subject to two levels of review, brought before a District Court Judge to challenge an unconstitutional or unlawful act generally committed by a non-judicial government official.

[3] Iosif Alexander Sosa, *Arbitration in Guatemala: The Admissibility of the Amparo Action Regarding Judicial Assistance on Jurisdictional Matters*, Kluwer Arb. Blog (2019), http://arbitrationblog.kluwerarbitration.com/2019/04/12/arbitration-in-guatemala-the-admissibility-of-the-amparo-action-regarding-judicial-assistance-on-jurisdictional-matters/.

As part of the 2013 reform to Mexico's *Amparo* Law, an *amparo indirecto* may be filed against private institutions or individuals when they execute acts equivalent to those from an authority. However, Carlos Leal-Isla shared that there have been several dissenting criteria determining that this constitutional remedy cannot be brought against an arbitral award itself. Nevertheless, an *amparo* can be filed against the resolution rendered by the judge in the enforcement proceeding or in the annulment special procedure. A notable comment concerning this remedy is that the available proceeding against such resolution is now the *amparo directo*.

This is an important change in the arbitration scene in Mexico. The *amparo indirecto* is, by essence, a slower proceeding to that of the *amparo directo* because its decision can be appealed to a higher court. This modification was the result of the 2011 reform to the Code of Commerce. That reform abolished the ancillary procedure of annulment in favor of a new annulment special procedure; making its resolution the end of the trial, thus, making the *amparo directo* the only remedy available.

IV. NO AMPARO AGAINST THE ANNULMENT RESOLUTION IN HONDURAS

Unlike Mexico's, the *amparo* action in Honduras can only be filed against resolutions issued by public officials or state authorities. Such proceeding can be initiated before the Supreme Court, before the Appellate Circuit Courts, or before the Specialized Courts depending on the alleged violations. The decision rendered in the *amparo* proceeding does not admit any other remedy.[4]

Regarding the arbitration scene in his country, especially the annulment process against arbitral awards, Roberto Williams commented that, to avoid the obstructions of *amparo*, this process may be brought before another Arbitral Tribunal. This second Tribunal is normally administered by the same Center as the one that administered the original proceeding. This second arbitration is available if previously agreed upon by the parties. The benefits of considering this option is that any resolution issued by the aforementioned Arbitral Tribunal—according to the applicable legislation and

[4] Francisco Daniel Gómez Bueso, EL DERECHO DE AMPARO EN HONDURAS, https://core.ac.uk/download/pdf/30047167.pdf.

recent jurisprudence—is immune to the *amparo* action since it is not rendered by public officials or state authorities.

V. THE PARTICULARITY OF THE AMPARO IN COSTA RICA

The Costa Rican *amparo* is different from other constitutional remedies in the region. In Costa Rica, there is no need to previously exhaust the corresponding judicial remedies. This characteristic grants the user the possibility to proceed directly before the Constitutional Court against any unconstitutional act held by an administrative authority or private party. However, this constitutional remedy is not admissible against judicial decisions.

In the arbitration scene, the Constitutional Court has held that the *amparo* action is inadmissible against the arbitration proceedings and its awards. The reasoning behind such holding is that the special laws on the subject contain the necessary remedies against those proceedings or awards.[5] Christian Díaz also discussed this topic by stating that making the *amparo* unavailable, the Court has made its stand to not intervene in the arbitration procedure.

VI. THE EFFECTIVENESS OF THE AMPARO IN EL SALVADOR AGAINST ARBITRAL AWARDS

Under Salvadoran legislation, an *amparo* can be filed against acts or omissions of public or private entities that violate or restrict someone's constitutional rights. According to article 81 of El Salvador´s Law of Constitutional Proceedings,[6] the resolution rendered in the *amparo* proceeding is final and does not admit any kind of appeal, just like Mexico's *amparo directo*.

There is, however, still a dissenting criterion regarding the faculties of the Judicial Courts to dive in and analyze a constitutional transgression in an arbitral award; especially when it comes to awards issued abroad. Humberto Sáenz commented on the matter describing the situation as a problem—or rather a challenge—that El

[5] *See* Pablo Rey Vallejo, *El Arbitraje y los Ordenamientos Jurídicos en Latinoamérica: Un Estudio sobre Formalización y Judialización*, Universitas (2013), http://www.corteidh.or.cr/tablas/r32022.pdf.

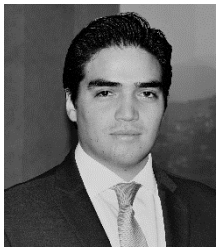
[6] D. Leg. No 2996, Ley de Procedimientos Constitucionales, 186 D. Off. 15, Jan. 22, 1960.

Salvador must face. However, his country is adapting in order to become a more arbitration friendly jurisdiction.[7]

Regarding the effectiveness of the *amparo* against the recognition of an award, Mr. Sáenz noted that, even after being granted the constitutional protection and prevented its recognition in El Salvador, the opposing party may still go to a foreign jurisdiction and request recognition and enforcement under their legislation. Where, as he explained, the judicial authority could ignore the *amparo*'s protection, since the New York Convention[8] does not bind the authorities to recognize a foreign judicial resolution issued in relation to such arbitral award.

VII. CONCLUSION

The insights shared in this #YoungITATalks suggest that, indeed, when applying in this region for the recognition, enforcement, or annulment of arbitral awards, it is very important to consider the *amparo* action available in each jurisdiction. However, as described, the recent changes in the region's legislation regarding the *amparo* proceeding and the latest precedents issued by the judicial authorities on the matter reveal a pro-arbitration tendency, which is undoubtedly a promising sign for the arbitration scene in Central America and Mexico.



DAVID HOYOS DE LA GARZA is a Mexican lawyer working as an associate at the Hogan Lovells office in Monterrey. David specializes in constitutional, commercial, and civil litigation, as well as international commercial arbitration and dispute resolution. He acts as counsel for foreign and local companies on disputes of different nature; ranging from transportation and construction to mining and e-commerce industries.

[7] Manuela de la Helguera, *El Salvador, Towards An Arbitration Friendly Jurisdiction*, Kluwer Arb. Blog (2013), http://arbitrationblog.kluwerarbitration.com/2013/07/24/el-salvador-towards-an-arbitration-friendly-jurisdiction/.

[8] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. I.1, I.2, 1155 U.N.T.S. 331, 7 I.L.M. 1046.

ANA CATALINA MANCILLA URIBE is a law clerk at the Hogan Lovells office in Monterrey, Mexico, where she is part of the specialized team in constitutional, commercial, and civil litigation, as well as international commercial arbitration and dispute resolution. She is currently studying her Law Degree at Monterrey Institute of Technology and Higher Education. She will graduate in December.

YOUNG ITA CHAIR'S REPORT

by Robert Reyes Landicho

Young ITA promotes the involvement of young professionals (under 40) in the international arbitration community through programs, publications, competitions, and other activities. In addition, Young ITA encourages young professionals to become more involved with the ITA as a whole.

During the first half of 2019, Young ITA has built upon its exponential growth, and now has 1465 members on six continents. But perhaps most importantly, Young ITA has cemented its role as a premier young arbitration group with a truly global footprint, with a mission to enhance and cultivate understanding of international arbitration.

I. YOUNG LAWYERS ROUNDTABLES

Young Lawyers Roundtables are presented annually during the ITA Workshop in Dallas, and the ITA-IEL-ICC Joint Conference on International Energy Arbitration in Houston. A review of the 2019 Young Lawyers Roundtables is below.

A. *6th ITA-IEL-ICC Joint Conference on International Energy Arbitration*

The Young Lawyers Roundtable for the 6th ITA-IEL-ICC Joint Conference on International Energy Arbitration was held on January 24-25, 2019, in Houston. Co-Chairs Elizabeth McKee Devaney (Young ITA Immediate Past Vice Chair, Occidental Petroleum Corporation, Houston), Floriane Lavaud, (ICC Young Arbitrators Forum (YAF)), Debevoise & Plimpton, New York) and Krystal Pfluger Scott (IEL Young Energy Professionals (YEP)), Jones Walker, Houston) put together a fantastic program.

The Faculty on the first panel, entitled "Spotlight on Russia: Energy-Related Disputes" included Laura Hardin (Managing Director, Alvarez & Marsal, Houston), Tomas Vail (Vail Dispute Resolution, formerly of White & Case, London), and Thomas Voisin (Quinn Emanuel Urquhart & Sullivan LLP, Paris), moderated by Co-Chair Floriane Lavaud, (Debevoise & Plimpton, New York).

The Faculty on the second panel, entitled "Technology and International Arbitration: Evidentiary Issues and Technology in International Disputes" included

Thomas Stouten (Houthoff, Amsterdam), Stephanie Cohen (Independent Arbitrator, New York), and Elizabeth McKee Devaney (Occidental Petroleum Corporation, Houston).

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

B. *30th Annual ITA Workshop and Annual Meeting*

The Roundtable comprised two panels: "A Tour Around the Arbitration World" and "Change of Circumstances – A Historical Perspective."

The speakers on the first panel were: Demilade Isioma Elemo (Young ITA Regional Chair, for Africa, Folashade Alli, Lagos), Aditya Singh (Immediate Past Chair - Young ITA Regional Chair for Asia, White & Case, Singapore), Saadia Bhatty (Gide, London), and Cristina Ferraro Delgado (Miranda & Amado, Lima). Soledad O'Donnell (Young ITA Regional Chair for North America) moderated the panel.

The Second panel included Florencia Villaggi (Herbert Smith Freehills, New York), Laura Sinisterra (Immediate Past Chair - Young ITA Mentorship Chair, Debevoise & Plimpton, New York), and Miguel Nakhle (Compass Lexecon, Houston). The panel was moderated by Silvia Marchili (Immediate Past Chair – Young ITA, White & Case, Miami).

II. #YOUNGITATALKS

#YoungITATalks is a series of local events presented around the world. The format of each of the talks vary, ranging from workshops, interviews, panel discussions, debates, or other presentation formats that cover a wide range of subjects relating to arbitration. The #YoungITATalks series is designed to educate, to promote conversation, and to share knowledge and experiences among young practitioners throughout the world.

During the first half of 2019, Young ITA hosted three #YoungITATalks in four different cities (and webcast its first #YoungITATalks event via webinar this past July).

A. *#YoungITATalks, Mexico City*

Greenberg Traurig hosted #YoungITATalks, Mexico City which took place on February 7, 2019. Nicole Y. Silver (Greenberg Traurig LLP, Washington D.C.) gave

opening remarks.

The first panel was entitled "The Trajectory of International Arbitration in Latin America" included: Karima Sauma (Current Young ITA Mentorship Chair; Immediate Past Regional Chair for México and Central America, Executive Director of CICA-AmCham Costa Rica) as moderator, with Dra. Blanca Gómez de la Torre (González, Peñaherrera & Asociados, Quito), Kabir Duggal (Arnold & Porter, New York), Fernando Navarro Sánchez (Mediator and Practice Manager Latam, JAMS), and Imad Khan (Hogan Lovells, Houston) as panelists.

The second panel was entitled "Arbitration Trends in the Americas: Who are the winners and who are the losers?" The panel was moderated by Monteserrat Manzano (Former Young ITA Chair, Von Wobeser y Sierra, Mexico City), with panelists Patrick Pearsall (Jenner & Block LLP, Washington, D.C.), Victor Manuel Frías Garcés (Greenberg Traurig, México), Kate Brown de Vejar (DLA Piper, México), Hugo Gabriel Romero (Subsecretaría de Comercio Exterior, México).

B. *#YoungITATalks, São Paulo*

On March 22, 2019, #YoungITATalks São Paulo took place, and was a joint presentation by Young ITA, Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP and TozziniFreire Advogados.

It coincided with the 4th edition of the VIS TozziniFreire Pré-Moot Arguments, and was targeted to participants in the moot, coaches, arbitration practitioners, and students of all levels.

The Faculty included Pedro Guilhardi (Immediate Past Regional Chair for Brazil, Nanni Advogados, São Paulo), Pedro Bento de Faria (TozziniFreire Advogados, São Paulo), Luis Peretti (Secretary General of Câmara de Conciliação, Mediação e Arbitragem CIESP/FIESP, São Paulo), Guilherme Carneiro Monteiro Nitschke (TozziniFreire Advogados, Porto Alegre), Francisco Paulo De Crescenzo Marino (Castro Neves, Daltro & Gomide Advogados, São Paulo), Renata C. Steiner (Cristiano Zanetti Advogados, São Paulo), Laura Ghitti (Huck Otranto Camargo Advogados, São Paulo), Debora Visconte (Visconte Advogados, São Paulo), Mariana Conti Craveiro (ContiCraveiro Advogados, São Paulo), Lucas Mejias (TozziniFreire

Advogados, São Paulo), and André Marini (Shearman & Sterling, New York).

C. *#YoungITATalks, Monterrey, Mexico and San Jose, Costa Rica and Webinar*

On July 19, 2019, #YoungITATalks broadcast a webinar from two locations: Monterrey, Mexico and San Jose, Costa Rica. Others joined remotely via webinar, in our first live broadcast!

The first panel was entitled "Recognition and Enforcement of Awards," and was moderated by Karima Sauma (Current Young ITA Mentorship Chair; Immediate Past Regional Chair for México and Central America, Executive Director of CICA-AmCham Costa Rica). The panelists included Alvaro Castellanos (Consortium Legal, Guatemala), Rodrigo Sánchez (Hogan Lovells, Monterrey, Mexico), Róger Guevara (Batalla Salto Luna, Costa Rica), and Humberto Sáenz (Saénz & Asociados, El Salvador).

The second panel was entitled "Arbitration Trends in the Region: Annulment of Award." The panel was moderated by Sylvia Sámano (Young ITA Regional Chair for Mexico and Central America, Centro de Arbitraje de México), and the panelists included Carlos Leal Isla (Leal Isla & Horváth, S.C., Monterrey, México), Arlen Obando (Legal Solutions, Nicaragua), Roberto Williams (ECIJA, Honduras), and Christian Díaz (García & Bodán, Costa Rica).

III. YOUNG ITA MENTORSHIP PROGRAM

The inaugural cycle of the Young ITA Mentorship Program has just concluded. During the Program, Young ITA paired successful applicants with a senior Mentor and a "Mentorship Facilitator"—an accomplished arbitration practitioner who can assist Mentees in their activities and serve as a liaison between Mentors and Mentees. Mentors, Facilitators, and Mentees then hold quarterly meetings, attend workshops and conferences together, discuss career development, explore opportunities for collaboration, and much more.

The 2019-2020 Young ITA Mentorship Program is already underway, featuring mentors Anibal Sabater (Chaffetz Lindsey, New York), Barton Legum (Dentons, Paris), Alejandro Ogarrio Ramirez, Ogarrio Daguerre, S.C., Mexico City), Nour Hineidi (DIFC Courts, Dubai), Noradèle Radjai (Lalive, Geneva), Alejandro Escobar (Baker Botts, London), Sana Belaid (Cisco, Dubai), Sabina Sacco (Levy Kaufmann-Kohler, Geneva),

Thomas Snider (Al Tamimi & Company, Dubai), Silvia Marchili (White & Case, Miami), Ben Bruton (Winston & Strawn LLP, London/Dubai), Cecilia Flores (Flores Rueda, Mexico City), Amir Ghaffari (Vinson & Elkins LLP, Dubai), Kabir Duggal (Arnold & Porter, New York), Stephen Burke (Baker Botts, Dubai), Edi Grgeta (Analysis Group, Chicago), Alain Farhad (Mayer Brown, Dubai), Dietmar Prager (Debevoise & Plimpton, New York), and Amani Khalifa (Freshfields Bruckhaus Deringer, Dubai).

IV. YOUNG ITA WRITING COMPETITION AND AWARD

After a successful inaugural Young ITA Writing Competition, we are excited for this year's competition. The general topic for the 2019-2020 Competition and Award is: "Transparency in International Arbitration—Desired or Necessary?," although submissions on any other topic in the field of international commercial or investment arbitration are welcome. Submissions are due January 15, 2020.

The two panels of judges include:

(1) In the First Panel:

Robert Landicho (Vinson & Elkins LLP, Young ITA Chair); Dr. Crina Baltag (University of Bedfordshire, Young ITA Vice-Chair); Thomas Innes (Steptoe & Johnson UK LLP, Young ITA Thought Leadership Chair); Catherine Bratic (Hogan Lovells LLP, Young ITA Communications Chair); and Karima Sauma (CICA-AmCham Costa Rica and ULACIT University, Young ITA Mentorship Program Chair).

(2) In the Second Panel:

Prof. Donald Earl Childress III (Pepperdine University School of Law); Prof. Giuditta Cordero-Moss (University of Oslo, Department of Private Law); Dr. Dietmar W. Prager (Debevoise & Plimpton LLP).

V. LOOKING AHEAD

#YoungITATalks is making its first appearance in Hong Kong with a joint social event with the young arbitration group "HK45," sponsored by Debevoise & Plimpton, on September 26, 2019.

Events in are in the works for a #YoungITATalks, Amsterdam, #YoungITATalks, Brisbane (Australia), #YoungITATalks, London, #YoungITATalks, Medellin,

#YoungITATalks, Malibu, #YoungITATalks, Serbia, and #YoungITATalks, Edinburgh, among many other locations. Please visit the Young ITA Website for the latest news and events.

ROBERT REYES LANDICHO is Senior Associate in Vinson & Elkins LLP's Houston office. He focuses in international commercial arbitration, investor-state arbitration, and U.S. commercial litigation. Rob has represented clients or assisted in investor-State disputes at ICSID and under the UNCITRAL rules, as well as in ICC, ICDR, AAA, DIFC, BCDR, LCIA, and *ad hoc* commercial arbitrations. In US courts, Rob has experience with the Foreign Sovereign Immunities Act, act of state doctrine, admiralty and maritime disputes, and questions of jurisdiction over non-US domiciled parties. Rob has particular experience in oil and gas, construction and infrastructure, banking, manufacturing, real estate, franchising, and intellectual property disputes involving Middle Eastern, European, and North, Central, and South American parties. Rob also provides counseling on foreign investment planning, and the drafting of dispute resolution clauses and procedures in foreign and domestic agreements. He is admitted in Texas and has full rights of audience before the Dubai International Financial Centre Courts (Part I & II). Prior to practicing law, Rob worked for the International Organization for Migration–Iraq Mission (a UN-affiliate organization), managing community assistance programs and development projects in Iraq. Rob was also a Fulbright Scholar in Amman, Jordan where he studied Arabic and researched foreign assistance projects in the Middle East.

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

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

A. MISSION

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

B. WHY BECOME A MEMBER?

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

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

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

C. THE ADVISORY BOARD

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

D. PROGRAMS

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

E. PUBLICATIONS

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

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

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

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ITA IN REVIEW

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5201 Democracy Drive
Plano, Texas, 75024-3561
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