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Editorial

Professor Loukas Mistelis

Clive M Schmitthoff Professor of Transnational Commercial Law and Arbitration, Queen Mary University of London[1]

Professor Kun Fan

Associate Professor, Faculty of Law and Justice, University of New South Wales[2]

Dear Colleagues,

Welcome to the first issue of our journal, marking a significant milestone in our shared journey to explore and address contemporary challenges in international arbitration. We have curated a diverse and thought-provoking collection of articles, case comments, and book reviews that reflect the dynamic and multifaceted nature of our field.

This issue begins by addressing the critical themes of challenges and reform in investment arbitration. In 'The Seven Cardinal Sins of Investment Dispute Settlement', Pellet provides a comprehensive critique of the fundamental flaws in investment dispute mechanisms. Pellet identifies seven key issues that hinder effective resolution. Arroyo's 'Investment Arbitration in the New Era: Engine or Obstacle in the Fight Against Climate Change?' explores the dual role of investment arbitration in climate change mitigation. While the paper points to similar criticisms against investment arbitration, Arroyo ends with a more positive tone, pointing to the role of investment arbitration in the fight against climate change. Mourre and Camillacci's article, 'The UNIDROIT Principles as a Tool for the Internationalisation of Contracts by Arbitral Tribunals', underscores the

1 LLB (Athens), MLE (Hannover), FCIArb, Member of the Athens Bar, Foreign Registered Lawyer (England and Wales), graduate studies (Strasbourg, Keio, Leiden), Director of QMUL LLM in Comparative and International Dispute Resolution.

2 PhD (University of Geneva, summa cum laude), LLM (NYU), LLB (China Foreign Affairs University), accredited mediator, arbitrator and domain names panelist, admitted to New York Bar.

significance of the UNIDROIT Principles in harmonizing international contract law and promoting consistency in arbitral decisions. The authors argue for the broader application of these principles to enhance fairness and predictability in international contracts.

In the Sectoral Focus section, this issue focuses on AI and arbitration. Migliorini's 'Automation & Augmentation: Artificial Intelligence in International Arbitration' explores how AI is transforming international arbitration. It highlights the integration of AI into arbitral processes and the new skills required for lawyers and arbitrators to navigate this AI-driven environment. Paulsson and Suresh's article, 'AI: The Modern Tribunal Assistant – Impact on Enforceability of Arbitral Awards under the New York Convention', discusses how AI impacts the enforceability of arbitral awards under the New York Convention.

Global Development in Arbitration and Institution in Focus provide an important overview on latest developments in arbitration. Stein's analysis, 'The IBA Guidelines on Conflicts of Interest in International Arbitration 2024', provides a detailed overview of the key changes to the guidelines, offering practical insights for arbitrators and practitioners. Lu's 'Overview of Dispute Resolution in the Digital Environment in China' offers a comprehensive overview of on landscape of resolving disputes arising from digital transactions in China and examines how arbitration institutions such as CIETAC responds to these challenges.

Our Case Comments section provides critical insights into recent court decisions affecting arbitration. Boog's comment on the Swiss Supreme Court's rejection of the CJEU's Komstroy ruling and Vasile's analysis of Romania's Supreme Court decision on the establishment of arbitral institutions offer valuable perspectives on these significant rulings. These case comments illuminate the evolving judicial landscape and its implications for arbitration practices.

The Book Reviews section enriches this issue with in-depth analyses of recent publications. Majeed's review of 'On Arbitration: V. V. Veeder QC, Selected Writing and Contributions to the Development of Law' (edited by Wordsworth and Veeder) provides a captivating overview of this comprehensive collection of writings on arbitration law and practice, celebrating the unique contributions of the legendary lawyer Johnny Veeder. Vagenheim's review of 'Investment Arbitration and Climate Change' by Ipp and Magnusson offers a nuanced analysis of the intersection between investment law and climate change policies, emphasizing the urgent need for legal frameworks that support environmental sustainability.

As we launch this journal, our goal is to foster a platform for rigorous debate, innovative ideas, and practical solutions in international arbitration. We hope that the insights presented in this issue contribute to the ongoing development of fair and effective arbitration practices worldwide.

Last, not least, the production on this first issue of this new venture is the seamless collective effort of the editorial board, the chief editors and managing editor. We are committed to diversity and innovation and welcome for future issues contributions from thought leaders and new voices in our field.

Professor Loukas Mistelis & Professor Kun Fan

Chief Editors

July 2024

Foreword

Jean-Remi de Maistre
Co-Founder & CEO, Jus Mundi

We are extremely proud to introduce the inaugural issue of the Jus Mundi Arbitration Review (JMAR), our academic journal dedicated to the field of arbitration. This initiative marks a significant milestone in our mission[1] to democratize access to international legal information, thereby fostering a more efficient and just global legal system.

At Jus Mundi, we believe that there cannot be global justice without equal access to comprehensive, accurate, and current legal information from across the world. This belief drives our commitment to enhancing accessibility to legal knowledge, particularly through initiatives like this open-access journal.

The field of arbitration was chosen for this journal due to its critical role in resolving disputes in an increasingly interconnected world. Arbitration is one of the most used methods of resolving disputes, both internationally and domestically. It offers a unique blend of flexibility, efficiency, enforceability and confidentiality, making it indispensable to the global legal system.

Through this journal, we aim to cultivate a scholarly community that values transparency and inclusivity. Each article, study, and commentary is carefully considered to ensure it not only contributes to the existing body of knowledge but also encourages practical improvements and innovation in arbitration practices globally.

We have embarked on this journey with the vision that enhancing the availability of specialized legal scholarship can inspire change and drive progress towards global justice. By providing open access to high-quality research, we invite legal scholars, practitioners, policymakers, and students from around the world to gain new insights and share their expertise, thus enriching the global discourse on arbitration.

1 Jus Mundi is a Société à mission, read more at https://jusmundi.com/en/our-mission.

Jus Mundi has put together an Editorial Board of some of the leading academic thinkers in arbitration, from around the world, with a deliberate focus on equality, diversity, and truly global views. On behalf of Jus Mundi I extend my thanks to all on the Editorial Board, without whom this important publication would not be possible, and I will name each of them as it is appropriate in our inaugural edition: our humble thanks to Professor Loukas Mistelis and Professor Kun Fan (our Chief Editors), and to the Editorial Board comprising Professor Crina Baltag, Dr. Rukia Baruti, Dr. Adriana Braghetta, Dr. Kabir Duggal, Dr. Dalia Hussein, Professor Andrés Jana, Professor Joongi Kim, and Professor Esmé Shirlow.

Thank you all, including Dr. Andrew Willcocks and Alexandre Vagenheim, for making this inaugural edition a great success, and I also extend Jus Mundi's thanks to the authors in this first issue of the Jus Mundi Arbitration Review.

Articles

Seven Cardinal Sins of Investment Dispute Settlement

Professor Alain Pellet[1]

ABSTRACT

Although the criticisms of the investor-State dispute settlement (ISDS) are unequally valid, some of its flaws are obvious and deserve to be considered as 'capital sins', namely: legal uncertainty, the length and muddle of decisions, the excessive length of the procedure and its cost, the quasi-systematic recourse to experts, the 'americanisation' of the proceedings and the bickering spirit which accompanies it, the culture of entre-soi and the suspicion of partiality of the arbitrators. All this suggests that, although probably irreplaceable (but improvable), the ISDS is corrupted by money and the greediness of its players.

INTRODUCTION

The investor-State dispute settlement (ISDS) mechanism[2] has become the subject of criticisms, more or less vehement depending on their origin, more or less con-

1 Professor Emeritus, Université Paris Nanterre; former Chairperson, UN International Law Commission; member and former President, *Institut de Droit international;* honorary President, French Society for International Law (www.AlainPellet.eu). My warmest thanks to Ysam Soualhi for his particularly valuable and efficient help in preparing this article, and many thanks to Catharine Titi for her meticulous review of a previous draft of this article as well as to Esmé Shirlow, Dalia Hussein and Andrew Willcocks for their remarks on the last version of the draft.

2 See for example E. Gaillard, 'Les manœuvres dilatoires des parties et des arbitres dans l'arbitrage commercial international', *Revue de l'arbitrage*, 1990, issue 4, 759-796; 'Sociology of International Arbitration', *Arbitration international* 31, 2015, 1-17; 'Seven dirty tricks to disrupt an arbitration and the responses of international arbitration law', *Arbitration International*, vol. 39, Issue 3, September 2023, 361-378. See also H. Sachetim and R. Codeço, 'The Investor-State Dispute Settlement System Amidst Crisis, Collapse, and Reform', *Arb. Brief*, 6, 2019, 20 *et seq.*; S. Wilske and M.T. Adams, 'What's Really Wrong With ISDS? - A Critical Analysis of Phantom Issues and Real Issues Triggered by Practice and Technological Development', *Contemporary Asia Arbitration*

vincing depending on their purpose. The present article, which was first conceived as a sadly posthumous tribute to the late professor Emmanuel Gaillard,[3] aims to summarize the main criticisms that can be made of the small world of international investment litigation[4] and some of its practices. Being only an occasional participant, this article is written as an 'engaged spectator'. Moreover, it covers a very vast subject and is much more a mood piece than a scientific study.

In his stimulating lecture at The Hague Academy of International Law, Emmanuel Gaillard described the specificities of arbitration as follows:

> *La liberté des parties de préférer aux juridictions étatiques une forme privée de règlement des différends, de choisir leur juge, de forger la procédure qui leur paraît la plus appropriée, de déterminer les règles de droit applicables au différend, quitte à ce qu'il s'agisse de normes autres que celles d'un système juridique donné, la liberté des arbitres de se prononcer sur leur propre compétence, de fixer le déroulement de la procédure et, dans le silence des parties, de choisir les normes applicables au fond du litige, soulèvent autant de questions de légitimité. Plus fondamentalement encore, le fait que l'arbitre rende une décision privée sur le fondement d'une volonté des parties qui l'est tout autant soulève la question de la source de ce pouvoir et de la juridicité de la décision qui en résulte.*[5]

These characteristic traits of arbitration explain both the attraction that this method of dispute settlement has for investors and certain abuses that it can be criticised for. In a rather arbitrary manner, I have grouped them under seven headings to match the seven cardinal sins whose list, equally arbitrary, was drawn up

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Journal, vol. 17, No. 1, 2020, 1-34; F. Marisi, 'Criticisms of Investor-State Arbitration', in *Rethinking Investor-State Arbitration*, Springer, 2023, 85-97.

3 The first version of this text dates back to August 2022. If those *Mélanges* are eventually published, I intend to publish the present article, with a few adjustments, in French, in that volume, with the agreement of both the editors of the *Jus Mundi Arbitration Review* and those of the *Mélanges Gaillard*.

4 To be compared with the even smaller 'world of international justice' (J.-P. Cot, *in Société française pour le droit international, La juridictionnalisation du droit international*, colloque de Lille, Pedone, 2003, 511-522 – French original: '*Le monde de la justice internationale*').

5 E. Gaillard, 'Aspects philosophiques du droit de l'arbitrage international', *Recueil des cours*, 2007, vol. 329, 62 ; 'The freedom of parties to prefer a private form of dispute resolution over state courts, to choose their judge, to shape the procedure they deem most appropriate, to determine the rules of law applicable to the dispute, even if they are norms from a different legal system, the freedom of arbitrators to rule on their own jurisdiction, to establish the proceedings, and, in the absence of guidance from the parties, to choose the applicable norms for the substance of the dispute, raise numerous questions of legitimacy. More fundamentally, the fact that the arbitrator renders a private decision based on the will of the parties, which is equally private, raises the question of the source of this power and the legality of the resulting decision' (my translation). Note that this description applied to commercial arbitration; but it can be transposed to investment arbitration, except that the will of the parties is only half private and the other half public; this only complicates matters.

in the 6th century by Pope Gregory the Great:[6] legal uncertainty (Section 1), the length and sometimes the unintelligibility of decisions[7] (Section 2), the excessive length and costs of the procedure (Section 3), often linked to the (too) systematic use of experts (Section 4), its Americanisation and the resulting spirit of chicanery (Section 5), which is a consequence of the '*entre-soi*' that reigns in this 'small world' (Section 6), and which contributes to the doubts that certain behaviours raise as to the impartiality of the arbitrators (Section 7).

***

1. LEGAL UNCERTAINTY

Concerns about the 'consistency, coherence, predictability and regularity of arbitral awards rendered by investor-State dispute settlement tribunals' are the first of the categories of 'concerns' identified by the Working Group established by UNCITRAL in 2017[8] on the reform of the investor-State dispute settlement regime.[9] More broadly, they are also probably among the most frequently formulated concerns and those that have attracted some of the strongest controversies.

In his 2018 'Lalive Lecture' on *The Myth of Harmony in International Arbitration*, Emmanuel Gaillard highlighted that '[h]armony is [...] a concept which lawyers are particularly fond of. Lawyers are inherently conservative and therefore perceive positively values such as harmony, consistency and predictability'.[10] And he concluded: 'This instinctive urge for order is a curious phenomenon as, in every

6 They are greed, wrath, envy, gluttony, lust, pride and sloth. Some (only) of these are not totally unrelated to the subject of this article.

7 I use the word 'decisions' to refer to all the documents adopted by the tribunals during the proceedings and reserve 'awards' for the outcome of the proceedings on the merits.

8 See Report of the United Nations Commission on International Trade Law, fifty-fifth session, Supplement No. 17, A/72/17, para. 264. Similarly, the International Bar Association reports that more than half of the participants in its extensive 2016 survey on investment treaty arbitration expressed concerns about the same issue (International Bar Association, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, oct. 2018, 3.

9 Other categories identified are 'concerns about arbitrators/decision-makers', 'concerns about costs and duration of proceedings' and, as a catch-all, 'other concerns' which include lack of transparency, abusive claims and third-party funding issues (UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session, 14 May 2018, A/CN.9/935, para. 44). For its part, Working Group 7 of the ISDS Academic Forum has identified, on this basis, six themes of concern: '(1) excessive costs; (2) excessive duration of proceedings; (3) lack of consistency in legal interpretation; (4) incorrectness of decisions; (5) lack of arbitral diversity; and (6) lack of independence, impartiality, and neutrality of ISDS adjudicators' (*Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 15 March 2019, para. 2 <https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf> last accessed 17 July 2024.

10 E. Gaillard, *The Myth of Harmony in International Arbitration*, ICSID Review 2019-3, 553 – footnotes omitted.

system, a little bit of chaos, or absence of harmony, is necessary in order for the system to evolve'.[11] 'A little bit of disorder', why not? but not too much... In fact, it is not so many lawyers who are 'inherently conservative' than the law itself, which is essentially an instrument of security in social relations; and when they resort to a tribunal, the parties legitimately wish to be able to assess with a reasonable degree of certainty their chances of success by relying on the stability of the applicable rules and their interpretation. Weighing the parties' chances of success is also of great interest to the tribunals to ensure that courts and tribunals are not flooded with claims which have no chance of success and sometimes are even of an abusive nature' at the stage of establishing their competence.[12] However, the prognosis is far from easy in the context of the investor-State dispute settlement.

Whether one postulates the existence of an 'arbitral legal order'[13] or isolated legal orders created by each constituent treaty,[14] they are always, inevitably, by nature incomplete systems of norms. Nevertheless, it must be considered that, in both cases, the legal order in question is rooted in international law and that, to use and

11 *Ibid.* – mentioning St. A Kauffman, *The Origins of Order: Self-Organization and Selection in Evolution, OUP, 1993, 173 and M. Mitchell, Complexity: A Guided Tour*, OUP, 2009, 34. See also T. Schultz, 'Against Consistency in Investment Arbitration', in Z. Douglas, J. Pauwelyn, and J.E. Viñuales eds., *The Foundations of International Investment Law: Bringing Theory into Practice*, OUP, 2014, 297-316. For a recent view of the disadvantages, but also the advantages, of 'moderate incoherence', see e.g. J Arato, C. Brown, and F. Ortino, 'Parsing and Managing Inconsistency in Investor-State Dispute Settlement', *Journal of World Investment & Trade* 21(2-3), 346 *et seq*.

12 *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, para. 151. See also *Impregilo S.p.A. v. Islamic Republic of Pakistan (II)*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 254; *Bureau Veritas, Inspection, Valuation, Assesment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 112; or *Dan Cake S.A. v. Hungary*, ICSID Case No. ARB/12/9, Decision on Request for the Continued Stay of Enforcement of the Award, 25 December 2018, para. 51.

13 See. Gaillard, *supra* n 5, 91-95, paras. 40-43; See also: F. Grisel, *L'arbitrage international ou le droit contre l'ordre juridique*, Fondation Varennes, 2011 and 'The Arbitral Legal Order: Evolution and recognition', in T. Schultz and F. Ortino eds., *The Oxford Handbook of International Arbitration*, OUP, 2020, 554-568 or, more nuanced: D. Sindres, *La distinction des ordres et des systèmes juridiques dans les conflits de lois*, LGDJ, Lextenso, 2008, 297-305; T. Schultz, 'The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences', *Journal of International Dispute Settlement* 2(1), 2011, 59-85; W. Kidane, *The Culture of International Arbitration*, OUP, 2017, 74-76. *Contra:* F. Latty, 'Le point de vue du droit international des investissements', in *La mise en œuvre de la* lex specialis *dans le droit international contemporain*, journée d'étude SFDI, Pedone, 2017, 131.

14 See A. Pellet, 'Le droit international à la lumière de la pratique – Pour une théorie de la réalité', *Recueil des cours* 414, 2020, paras. 74-76. See also: *Salini Costruttori S.P.A. v. The Federal Democratic Republic of Ethiopia, Addis Ababa Water and Sewerage Authority*, ICC Case No. 10623/AER/ACS, Award, 7 December 2001, para. 128; *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, SCC Case No. 2017/060, Final Award, 8 March 2021, para. 321; *BayWa r.e.AG (formerly Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH) v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Annulment, 8 May 2023, para. 185 and the abundant case-law quoted.

transpose the famous formula[15] of the Court of Justice of the European Communities in the *Van Gend en Loos* case, it is 'a new legal order *of international law*' ('*un nouvel ordre juridique* de droit international').[16] It follows that, in the absence of applicable treaties (in general there are few outside the treaty creating the tribunal and, where applicable, the general convention defining the conditions for its constitution and procedure), investment tribunals must refer to unwritten sources of public international law, customary rules, and general principles of law.

But this only imperfectly resolves the question of applicable law: general international law may be silent or too incomplete or imprecise to meet the exigencies of a case and, in any event, the relevant norms, if any, will generally have to be interpreted. This is where the issue of legal uncertainty comes in, due to many factors which the International Bar Association has helpfully identified by listing the three 'catalysts' of the lack of coherence in investment arbitration jurisprudence – the use of very general legal concepts, the decentralisation of the investor-State dispute settlement regime and its relative novelty – 'magnified' by two elements ('magnifiers of inconsistency'): 'Factual commonality' and the publicity of awards.[17] In the absence of any uniform and hierarchical system of control, tribunals tend to take advantage of this lack of hierarchy to make decisions as they see fit, without worrying too much about the consistency of the case law.

The terms of the debate were well set out in the decision on jurisdiction and liability in *Burlington v. Ecuador*: after recalling that the investor-State dispute settlement regime does not know the rule of precedent (*stare decisis*),[18] a point on which there is little disagreement, the majority of the Tribunal indicated that it was of the opinion 'that it must pay due consideration to earlier decisions of international tribunals' and that:

> subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law.[19]

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15 Unfortunately, it was abandoned shortly afterwards in *Costa* v. *ENEL*, which omitted the mention of 'international law' (See CJEC, 5 February 1963, C-26-52, *Van Gend & Loos*, 1963, 23 and CJEC, 15 July 1964, C-6-64, *Costa v. Enel*, 1964, 1158).

16 CJEC, 5 February 1963, No. 26-62, *Van Gend & Loos*, 1963, 23 (italics added).

17 *Supra* n 8, 6-7.

18 The decision refers to *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67; *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, paras. 30-32; see A.A. Yusuf and G. Yusuf, 'Precedent & Jurisprudence Constante', in M. Kinnear and others eds., *Building International Investment Law – The First 50 Years of ICSID*, Wolters Kluwer, 2016, 74 *et seq*.

19 *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010, para. 100, and decision on Liability, 14 December 2012, para. 187. In the same

For her part, Brigitte Stern expressed the minority view that she 'considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend'.[20]

That each case must be decided on its own merits is quite obvious; but it seems to me untenable to claim that each tribunal can decide in splendid isolation and proclaim itself, not without arrogance, 'sovereign'[21] or, as the *SGS Philippines* tribunal did, rely, rather cynically, on future tribunals to provide the stability that the authors of the decision say they want while at the same time they compromise it.[22] The result is well known: the multiplication and persistence of serious contradictions in jurisprudence.[23] While it is acceptable that different facts assessed in the light of different investment treaties may lead to divergent results – although

sense, see *Saipem* supra n 18 para. 67; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, para. 58; or *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, note 187. See however the nuanced position of L. Reed, 'The '*De Facto*' Precedent Regime in Investment Arbitration: a Case for Proactive Case Management', *ICSID Review: FILJ*, 2010-1, 95.

20 *Burlington Resources, Inc. v. Republic of Ecuador*, *ibid.*; for a recently expressed similar view, see e.g.: *Encavis and others v. Italian Republic*, ICSID Case No. ARB/20/39, Award, 11 March 2024, para. 607.

21 See among various examples: *AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, para. 30; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, *supra* n 12, para. 58; *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, para. 171, footnote 149.

22 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 97.

23 To give just a few examples, see: *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Preliminary Objections to Jurisdiction, 27 November 1985, para. 84 compared with *Southern Pacific Properties Limited v. Arab Republic of Egypt*, ICC Case No. YD/AS No. 3493, Award, 11 March 1983, para. 54 compared with *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, 13 September 2001, para. 161. See also the divergent interpretations of Article XI of the Argentina-US BIT with regard to the excuse of necessity: *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 304-394 *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 226; *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, paras. 304-305; see also, more recently, the opposition between arbitral tribunals as regards their jurisdiction to settle intra-European disputes, *Adria Group B.V. and Adria Group Holding B.V. v. The Republic of Croatia*, 31 October 2023, Decision on Intra-EU Jurisdictional Objection, ICSID Case No. ARB/20/6, paras. 234-235 compared to *Green Power K/S and SCE Solar Don Benito APS v. Kingdom of Spain*, 16 June 2022, Award, SCC Case No. V2016/135, para. 475 (whose procedural law was Swedish law) or Award, 17 November 2021, *Energo Pro v. Bulgaria*, ICSID Case No. ARB 15/19, paras. 451 *et seq.* – more specially 561 *et seq.*). See also the numerous examples in A. Pellet, '2013 Lalive Leture: The Case Law of the ICJ in Investment Arbitration', *ICSID Review - Foreign Investment Law Journal*, 2013, 28-2, 7 *et seq.* (in French: A. Pellet, 'La jurisprudence de la Cour internationale de Justice dans les sentences CIRDI', *Journal du droit international Clunet*, No. 1-2014, 6-8 citing abundant case law).

the appealing art of distinguishing[24] should not be abused – it is not acceptable that the same facts, submitted to two different instances, lead to antinomic results.[25] And it is quite absurd to argue 'there is no good reason for allowing the first tribunal in time to resolve issues for all later tribunals':[26] everything must begin at some point, and it is quite normal for the first tribunal dealing with a question to set the tone, leaving it to subsequent tribunals to assess the interpretation of the rule thus given, even if it means setting it aside either on the basis of facts (different from those in the original case) or by challenging, through reasoning, the one followed in the initial decision – which is what the *SGS Philippines* tribunal did.[27] '[W]hen ruling on a case, arbitrators … should not ignore generally accepted practices, but rather seek to conform to the interpretative approaches of other arbitral rulings or, if they disagree, articulate and explain the reasons for their deviation … In this manner, they contribute to the development of a consistent or at least coherent jurisprudence and, more generally, to the legitimacy of the legal system as a whole'.[28] And, contrary to what I fear is the majority view – and one which I have sometimes encountered in my practice as an arbitrator – I hold the opinion that it is the duty of the arbitral tribunal to refer to relevant 'precedents'[29] even if the parties fail to do so, provided the tribunal deems it beneficial to support its reasoning – *juria novit curia* or *juria novit abiter*.[30]

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24 See e.g. D. Riché, 'Ne pas suivre les précédents dans l'arbitrage international' *in* SFDI, *Le précédent en droit international*, Pedone, Paris, 2016, 393 *et seq.* See also e.g. C. Kessedjian, 'To Give or Not to Give Precedential Value to Investment Arbitration' *in* P. Alford, C.A. Rogers (eds.), *The Future of Investment Arbitration*, OUP, 2009, 59 and M. Bennouna and A. Pellet, 'Case law and precedents in interstate litigation and advisory proceedings', 23 August 2023, commentary to guideline n° 4, para. (8) – to be published in *IDI Yearbook*, 2023.

25 In her excellent monography, K. Diel-Gligor distinguishes three forms of inconsistency: '*i Same Dispute, but Multiple Proceedings; ii Different Disputes, but Same Legal Issues; iii Temporal Distinction: Parallel vs. Successive Proceedings*' (*Towards Consistency in International Investment Jurisprudence. A Preliminary Ruling System for ICSID Arbitration*, Nijhoff International Investment Law Series, vol. 7, 2017, 157-163. On parallel proceedings, see in particular the analysis of the International Bar Association, *supra* n 8, 15-18.

26 *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, *supra* n 22, para. 97.

27 K. Diel-Gligor, *supra* n 25, 152.

28 *Ibid.*, 152 – footnotes omitted. In the same sense: UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Possible reform of ISDS - Consistency and related matters, 2018, A/CN.9/WG.III/WP.150, paras. 38-40.

29 By using the word 'precedent', I do not mean to suggest that the rule of *stare decisis* is applicable in international law - which is why I put the word in inverted commas. But in continental systems, too, reference is commonly made to judicial precedents, including in the judgments of national courts.

30 *Contra:* C. Kessedjian, 'To Give or Not to Give Precedential Value to Investment Arbitration Awards', in *The Future Of Investment Arbitration*, 2009, 67-68; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, para. 287; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, para. 295; *Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5, Award, 19 April 2021, para. 20.

As noted in the Report submitted to the *Institut de Droit International* in 2023 on 'Case law and precedents in interstate litigation and advisory proceedings', '[t]he difficulty lies in finding a middle ground between, on the one hand, a mechanical application of the precedent that can sometimes amount to blind adherence, and, on the other hand, the submission of the previous solution to a thorough examination which would render useless any recourse to the precedent'.[31] Rightly, a majority of ICSID tribunals have repeatedly stressed that they 'ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case'.[32]

Without denying the margin of appreciation which every judge (and arbitrator) necessarily has in applying and interpreting the relevant rules, in particular BITs, '[s]imilar provisions of related investment treaties should be analyzed and applied in similar ways' and '[g]iven the overwhelming similarity of the rights promulgated in investment treaties, it is vital to make a comprehensive effort to harmonize and clarify the development of these standards'.[33] And, more generally, as the *ADC v. Hungary* tribunal pointed out, it is certain that 'cautious reliance on certain principles developed in a number of ... cases, as persuasive authority, may advance the body of law'.[34] This is the value of the consistent jurisprudence that emerges from the turbulent stream of arbitral decisions. They contribute powerfully to reinforcing the legitimacy of the arbitral tribunal and of investment litigation as a whole. Unfortunately, the emergence of these case law clarifications is overdue[35] despite the exponential abundance of 'precedents',[36] and the observation I made a while ago

31 M. Bennouna and A. Pellet, 'Case law and precedents in interstate litigation and advisory proceedings', 23 August 2023, commentary of the Preamble, para. (24) (footnotes omitted) – to be published in IDI, *Annuaire* 2023.

32 ICSID, Award, 27 August 2009, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan*, n° ARB/03/29, para. 145. See also Award, 4 October 2013, *Metal-Tech Ltd. v. Uzbekistan*, n° ARB/10/3, para. 116; Award, 9 January 2015, *Renée Rose Levy and Gremcitel S.A. v. Peru*, n° ARB/11/17, para. 76.

33 S.D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', *Fordham L. Rev.* 73, 2005, 1619. See also: K. Diel-Gligor, *supra* n 25, 141.

34 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 293; see also e.g.: *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. (formerly Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A.) v. Argentine Republic (II)*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, para. 189; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award, 2 July 2018, para. 299.

35 The expression 'constant jurisprudence' is rarely used by arbitrators, who assert its existence with parsimony. For rare examples, see *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008, para. 33; *Yukos Capital SARL v. The Russian Federation*, PCA Case No. 2013-31, Final Award, 23 July 2021, para. 435.

36 *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, 6 September 2019, para. 621; *Mathias Kruck, Frank Schumm, Joachim Kruck,*

still seems accurate[37]: 'some' *jurisprudences constantes* are now well established on a limited number of points (including, it is true, some very important aspects, such as the recognition of shareholder capacity to litigate[38] or the legal value of provisional measures[39]) but on many others, numerous and equally seminal, a regrettable jurisprudential muddle continues to reign (e.g. as regards the definition of 'investment',[40] the meaning of the Fair and Equitable Treatment (FET) standard,[41] the consequences of most favoured nation clauses,[42] or the effects of umbrella clauses[43]). In these conditions, to speak of 'the' jurisprudence of the ICSID (a framework that is nonetheless partially institutionalized), and, *a fortiori*, of an international (or transnational, it does not matter) jurisprudence in the field of investment litigation would be audacious to say the least.

Jürgen Reiss and others v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, 19 April 2021, para. 115; *AS PNB Banka, Grigory Guselnikov and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Procedural Order No. 9 (Decision on Representation of AS PNB Banka), 9 August 2021, para. 56.

37 See A. Pellet, *supra* n 23, 6-8 mentioning an abundant jurisprudence (see also, 223-224).

38 D. Müller, *La protection de l'actionnaire en droit international: L'héritage de la* Barcelona Traction, Pedone, 2015, 236**,** para. 461 ou 331-333, para. 685.

39 A. Pellet, *supra* n 23, 18 and 30 *et seq*.

40 See A. Gilles, *La définition de l'investissement international*, Larcier, 2012, 534 p.; B. Poulain, 'L'investissement international, définition ou définitions' in P. Kahn and T. Wälde, *Les aspects nouveaux du droit des investissements internationaux*, Martinus Nijhoff Publishers, 2007, 123-150; D. Chain and J. Lai, 'Two Decades after *Salini v Morocco*: The Case for Retaining the Salini Test with Modifications', *Arbitration International*, vol. 39-1, March 2023, 63-84; O. Kesikili, The Concept of Investment Under the ICSID Convention <https://kesikli.com/news-insight/2022-08-23-the-concept-of-investment-under-the-icsid-convention/> last accessed 17 July 2024; M. Petsche, *The Concept of Investment in ICSID Arbitration*, OUP, 2023, 224 p.

41 See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; compared with: *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 or *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367. On current attempts at rationalisation, see OECD Secretariat, ''Fair' and 'equitable' treatment provisions in investment treaties A large-sample survey of treaty provisions', *The Future of Investment Treaties*, research note, 12 April 2023, 16-22 <https://www.oecd.org/daf/inv/investment-policy/fair-and-equitable-treatment-research-note.pdf> last accessed 17 July 2024.

42 See the concurring and dissenting opinion, still relevant, of B. Stern attached to *Impregilo S.p.A. v. Argentine Republic (I)*, ICSID Case No. ARB/07/17, Award, 21 June 2011. See also M. Mangan, 'Substantive Protections: MFN', *GAR* <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/second-edition/article/substantive-protections-mfn> last accessed 17 July 2024.

43 See in this regard the 'SGS war' (*SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, paras. 165-166; compared with: *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, *supra* n 22, paras. 121 *et seq*) even if it now seems to have been won over by *SGS Philippines* (what is to be regretted); see also: *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, *supra* n 12, para. 138; see A. Reinisch, C. Schreuer, *International Protection of Investments. The Substantive Standards*, CUP, 2020, 968; see also B. Samson, *Les clauses parapluies des traités de promotion et de protection des investissements*, Dalloz, vol. 227, 2023, XIX-481.

The inconsistencies in the solutions adopted are a source of uncertainty for the litigants. Even if the legal uncertainty thus created does not generally lead to radical consequences of the type reflected, for instance, in denunciation of the Washington Convention by Bolivia, Ecuador, Venezuela and Honduras,[44] it contributes to undermining the legitimacy of the investor-State dispute settlement system (or non-system), which is criticised for many reasons, is increasingly decried by public opinion[45] and is increasingly coming up against the 'passive resistance' of losing States.[46]

As things stand, it is unlikely that the goodwill of arbitrators will remedy the cacophony of the case law. Only a greater awareness on their part, which would lead them to be more modest and to play more 'collectively' by taking more systematically into consideration not only the constant jurisprudence but also the 'jurisprudential trends', can remedy the cacophony of the case law[47] and is likely to put an end to the current situation that contributes greatly to the extreme unpredictability and instability of the investor-State investment settlement system. However, trying to draw conclusions from uncertainty as such in order to decide not to apply an award in a domestic legal system, as is possible in the United Kingdom,[48] seems to be too radical and would add uncertainty to uncertainty. In the long term,[49] it is to be hoped that real control mechanisms (not necessarily an appeal

44 One of the reasons for Bolivia's withdrawal in 2007 was the lack of consistent jurisprudence and an appeals process (see M. Tulio Montanes, *Introductory Note*, 46 I.L.M., 2007, 969). Ecuador re-ratified the Washington Convention in 2021.

45 Cf. the protests against the adoption of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada or that of the Transatlantic Trade and Investment Partnership (TTIP) largely due to the introduction of an EIDR mechanism. See the general analyses of E. Voeten, 'Public Opinion and the Legitimacy of International Courts', *Theor. Inq. Law* 14-2, 2013, 411, and, more recent, from R. Brutger and A. Strezhnev, 'International Investment Disputes, Media Coverage, and Backlash Against International Law', *Journal of Conflict Resolution* 66-6, 2022, section 2.

46 See in this respect the growing tendency of States not to pay the compensation due at the end of the proceedings. The list of the twenty worst payers includes not only Russia and Venezuela, but also Spain and Italy (see. N. Lavranos, Report on Compliance with Investment Treaty Arbitration Awards 2023, *International Law Compliance* (2nd updated edition, 23 October 2023), 11 <https://www.internationallawcompliance.com/wp-content/uploads/2023/10/FULL-Report-2023-DEF-25-OCT-.pdf> last accessed 17 July 2024.

47 This should also apply to individual or dissenting opinions, the multiplication of which risks weakening the force of 'precedents': it is not essential to explain every rallying vote or even every minority vote. See *infra* pp. 27 to 29.

48 See the United Kingdom Arbitration Act, art 68(2)(f).

49 The reform of the investment dispute system even if it is under way, is probably not close to being completed (cf. M. Langford and A. Roberts, *UNCITRAL and ISDS Reforms Hastening slowly* <https://www.ejiltalk.org/uncitral-and-isds-reforms-hastening-slowly=/> last accessed 17 July 2024. After differences of opinion were belatedly expressed (UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-fifth session (New York, 27-31 March 2023) (A/CN.9/1131), it is now envisaged that the Advisory Center project will be discussed in 2024 (UNCITRAL, Possible reform of investor-State dispute settlement (ISDS)

body,[50] but, if possible, a global institution)[51] will ensure a minimum of consistency in the jurisprudence.[52] Even in the case of semi-institutionalised arbitration mechanisms such as ICSID, this is not the case at present. As one *ad hoc* committee put it in vigorous terms: 'The annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. The responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals'.[53] The result is inconsistent jurisprudence that creates uncertainty about the applicable rules and a lack of predictability, which, as has been aptly noted, 'naturally causes counsel to run every available argument'[54] – a source of supplementary length and costs of the proceedings. The possibilities of instituting reforms within the system to combat this sin are limited since any reform project 'might lead to further fragmentation if only adopted by a limited number of States and might result in legal uncertainty if they were to be applied in conjunction with existing treaty provisions as well as applicable arbitration rules'.[55] *Cardinalis sin*.

Draft statute of an advisory centre on international investment dispute resolution Note by the Secretariat, 7 February 2024 (A/CN.9/WG.III/WP.238), para. 37) and that the ISDS reform would be fully in place in 2027 (see e.g.: A. Roberts and T. St John, 'UNCITRAL and ISDS Reform: Moving to the Delivery Phase', 22 November 2023, *EJIL:Talk*! <https://www.ejiltalk.org/uncitral-and-isds-reform-moving-to-the-delivery-phase/> last accessed 17 July 2024.

50 ICSID *Secretariat, Discussion Paper: Possible Improvements of the Framework for ICSID Arbitration*, 22 oct. 2002, 14 *et seq*.

51 See *ibid*. A. Pellet, 'Annulment *Faute de Mieux* – Is There a Need for an Appeals Facility', *in* N. Jansen Calamita, D. Earnest and M. Burgstaller (eds.), *The Future of ICSID and the Place of Investment Treaties in International Law*, Investment Treaty Law Current Issues IV, British Institute of International and Comparative Law, 2013, 255-274 or 'Appel ou annulation des sentences CIRDI ? Retour sur un débat sans conclusion', in *Mélanges offerts à Charles Leben*, Pedone, 2015, 355. In the same sense, see J. Arato, Ch. W. Brown and F. Ortino, *supra* n 11, 360-368.

52 See the work of UNCITRAL Working Group III (see *supra* n 9): 'Investor-State Dispute Settlement Reform' including its report on the work of the resumed 38th session (Vienna, 20-24 Jan. 2020) (A/CN.9/1004/Add.1), the Note by the Secretariat for the 43rd session (sept. 2022) (A/CN.9/WG.III/WP.221) or the Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9-13 October 2023) (A/CN.9/1160). The mechanisms provided for in the CETA (arts. 8.27 and 8.28) go in the appropriate direction in this respect. See also the project to set up an advisory body which could also help to ensure a minimum of consistency, in particular at UNCITRAL, Report of Working Group IIII (Investor-State Dispute Settlement Reform) on the work of its forty-seventh session, Draft statute of an advisory centre, 27 November 2023, A/CN.9/WG.III/WP.236.

53 *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Decision on Annulment, 19 October 2009, para. 24. See also: *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, para. 65.

54 T. Landau, C. Brown and MM. Waibel, A World Without Investment Arbitration? in C. Bull, L. Malintoppi and C. Partasis (ed.), ICCA Congress Series, 2022 Edinburg, *Arbitration's Age of Enlightenment?* (Kluwer 2023), 18.

55 Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9-13 October 2023), A/CN.9/1160, 27 October 2023, para. 89.

2. LENGTH AND MUDDLE OF DECISIONS

A French lawyer used to the – sometimes excessive – conciseness of the judgments of the *Cour de cassation* and the *Conseil d'État*[56] cannot but be dismayed by the length of the awards and other decisions of the investment tribunals, which are on average longer than the judgments of the ICJ. According to the Confucian maxim, 'it is an equal wrong to sin by excess or by defect'.

Surely one cannot blame investment awards for the sin of excess of brevity and inflation is even galloping – the first ICSID award had (in its English translation) less than 6,000 words.[57] The last ten awards published at the time of writing average approximately 69,000 words. If you look hard enough, you can find a few awards of reasonable size[58] but on average they are unnecessarily large and some are downright obese.[59]

One of the reasons for this excessive weight is the systematic repetition – sometimes almost word for word – of the parties' arguments, which can take up more space in the decision than the tribunal's reasoning.[60] If one adds the reminder of the facts, which also often takes up a lot of space, all the more so as the useful facts are generally – and very normally – included in the legal discussion, the result is awards whose useful part is reduced to little. Apart from the resulting waste of time

56 Beyond the administrative courts, the decisions of civil law courts are usually shorter than those of common law courts, even if they are also subject to inflation. For a statistic study on the length of French courts decisions, see X. Beauchamp-Tremblay and A. Dusséaux, 'Not Your Grandparents' Civil Law: Decisions Are Getting Longer. Why and What Does It Mean in France and Québec?', 20 June 2019 <https://www.slaw.ca/2019/06/20/not-your-grandparents-civil-law-decisions-are-getting-longer-why-and-what-does-it-mean-in-france-and-quebec/> last accessed 17 July 2024.

57 *Adriano Gardella S.p.A. v. Côte d'Ivoire*, ICSID Case No. ARB/74/1, Award, 29 August 1977 <http://internationalinvestmentlawmaterials.blogspot.com/2011/09/adriano-gardella-spa-v-cote-divoire.html> last accessed 17 July 2024, the original French version seems never to have been published. See also among the very first awards, *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award, 8 August 1980 which is only 14,000 words long (and this, even, is superfluously long).

58 Among some recent examples: *Mera Investment Fund Limited v. Republic of Serbia*, ICSID Case No. ARB/17/2, Decision on Jurisdiction, 30 November 2018; *PACC Offshore Services Holdings Ltd v. United Mexican States*, ICSID Case No. UNCT/18/5, Award, 11 January 2022; *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Final Award, 31 January 2022.

59 See for example: *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.* (382 pages) or *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Award, 18 May 2022 (360 pages).

60 In the decisions *PACC Offshore Services Holdings Ltd v. United Mexican States*, ICSID Case No. UNCT/18/5, Award, 11 January 2022, *supra* n 58, and *Westmoreland Mining Holdings, LLC v. Government of Canada*, ICSID Case No. UNCT/20/3, Procedural Order No. 3 (Decision on Bifurcation), 20 October 2020, *supra* n 58, the Parties' arguments constitute 55% and 64% of the decisions, excluding the reminder of the procedure.

for the conscientious reader,[61] this excessive length – or rather lengths – makes it impossible to see the line of reasoning followed by the tribunal.

I have consistently complained about this in the tribunals in which I have served (including as president) but my protests on this point have always been dismissed by my co-arbitrators on the pretexts that:

(i) the parties must be convinced that their arguments have been taken into consideration;

(ii) by being more concise, the award could be annulled by an *ad hoc* committee.

Neither of these arguments is convincing.

Admittedly, the parties are entitled to have all their arguments carefully examined and must be able to ascertain 'whether or to what extent a tribunal's findings are sufficiently based on the law and on a proper evaluation of relevant facts'[62] and lawyers should be careful not to 'confiscate' the law[63] on the wrong pretext of its technicality. It is essential that the recipient of the decision understand its meaning – and the 'parties' are not only the lawyers who defended them, but the investors or the States lawyers represent. No doubt they can explain the meaning of a decision that is incomprehensible to the uninitiated, but lawyers must not ask for the award to be served in order to exonerate themselves from any responsibility in the event of the rejection of their submissions – do not tell me that this is unthinkable: I have witnessed these little arrangements with the hard truth on several occasions. In any case, clear and simply argued decisions are a condition of their legitimacy. As the *ad hoc* Committee noted in *Bolivia v. Tidewater*:

> The legitimacy of the process depends on its intelligibility and transparency. The statement of reasons allows the Parties to understand the process through which the tribunal makes its findings. Therefore, it is '*the Tribunal's duty to identify, and to let the parties know, the factual and legal premises leading the Tribunal to its decision*.[64]

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61 I admit that I am not: in general, when I read an award, I go straight to the 'position of the Tribunal' even if I then refer to the arguments of the parties and the facts if they are not sufficiently clear from the reasoning followed by the arbitrators.

62 *Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment, 5 September 2007, para. 98. See also: *Ioan Micula, Viorel Micula and others v. Romania (I)*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 157.

63 More than other disciplines, law is often a jargon-filled discipline, and specialists too often try to make it seem inaccessible to the uninitiated. Many investment decisions would benefit from being written in terms that are more accessible to lay men.

64 *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment, 27 December 2016, para. 163 quoting *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, 5 February 2002, para. 79.

And, despite the fears expressed by excessively apprehensive arbitrators, ICSID committees *ad hoc* generally refrain from censoring awards on the grounds of alleged excessive conciseness once it appears that the parties' arguments have been duly taken into account. When an *ad hoc c*ommittee annuls an award, it will usually not be because of the conciseness of the arbitrators but because 'the Tribunal's reasoning [...] is not clear at all, such that the Committee [...] has struggled to understand the Tribunal's line of reasoning'.[65]

Indeed, as provided for by Article 48(3) of the ICSID Convention, an 'award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based' and, consequently, an award which does not establish the grounds on which it is based is susceptible to annulment, in accordance with Article 52(1)(e) of the same Convention. However, as summarised by the *Enron v. Argentina ad hoc* committee:

> [T]he tribunal is required only to give reasons for its decision in respect of each of the questions. This requires the tribunal to state its pertinent findings of fact, its pertinent findings as to the applicable legal principles, and its conclusions in respect of the application of the law to the facts. If the tribunal has done this, the award will not be annulled on the basis that the tribunal could have given more detailed reasons and analysis for its findings of fact or law, or that the tribunal did not expressly state its evaluation in respect to each individual item of evidence or each individual legal authority or legal provision relied upon by the parties, or did not expressly state a view on every single legal and factual issue raised by the parties in the course of the proceedings. The tribunal is required to state reasons for its decision, but not necessarily reasons for its reasons.[66]

Another reason for the excessive weight of arbitral decisions is the practice of personal opinions. Whatever some scholars may think,[67] the opinions, whether

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65 *Agility Public Warehousing Company K.S.C. v. Republic of Iraq*, ICSID Case No. ARB/17/7, Decision on Annulment, 8 February 2024, para. 152 quoting *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment, 5 April 2016, para. 128.

66 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 juillet 2010, par. 222. See also *CEAC Holdings Limited v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment, 1 May 2018, para. 98; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Decision on Annulment, 13 April 2020, para. 245.

67 See Ch. Brower and Ch. Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded', Arbitration International 29, 2013, 8-43 responding to A. Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration, in M.H. Arsanjani, J. Cogan and S. Wiessner eds., *Looking to the Future Essays on International Law in Honor of W. Michael Reisman*, Brill, 2011, 821-843. See also the reply from A. Jan van den Berg, 'Charles Brower's Problem with 100 Per Cent–Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', *Arbitration International* 31, 2015, 381-391 and the more moderated opinions from

individual or dissenting, contribute to the confusion much more than they simplify the understanding of awards. And the confusion is even greater when the opinion comes from the president of the tribunal.[68]

Although this is by no means a general principle applicable to all disputes,[69] there is obviously no question of denying the right of arbitrators to attach their opinion – in any case if it is dissenting –[70] to the decision at least when this is provided for in the applicable statutory or regulatory texts. But, here again, moderation is the key. According to statistics, which seem reasonably reliable,[71] about one fifth of the awards are accompanied by a personal opinion.[72]

Of course, it may happen that the minority arbitrator really has something to say and considers that reasons of principle 'compel' him or her to write a dissenting opinion. Some famous ones[73] have helped to initiate an interesting doctrinal debate (although I have some doubts as to whether the parties care much about such an aspect and whether it is the subject of the litigation), and even to influence the jurisprudence.[74] But for a useful opinion, how many are more indicative of their author's

C. Titi, 'Investment Arbitration and the Controverted Right f the Arbitrator to Issue a Separate or Dissenting Opinion', *The Law & Practice of International Courts and Tribunals* 17-1, 2018, 197-216.

68 See the famous dissenting opinion by P. Weil in the *Tokios Tokelés v. Ukraine* (ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004) – which has always seemed to me to be perfectly well founded in substance – which led to the resignation of its author; see the comment by A.J. van den Berg, 'The Role of Dissenting Opinions', in *Building International Investment Law – The First 50 Years of ICSID*, *supra* n 18, 585-592. Professor Barberis' statement' in *Guinea Bissau See Senegal* challenging the arbitral tribunal's answer to the first question asked in the special agreement (*Delimitation of maritime boundary between Guinea-Bissau and Senegal*, Decision, 31 July 1989, 119) did not simplify the follow-up to the case either (*Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Judgment, 12 November 1991, paras. 19, 26, 30 to 33, 41 and 59-60).

69 See Article 35 of the Statute of the CJEU, which establishes the secrecy of deliberations, but does not provide for the possibility of issuing an opinion or a declaration attached to the decision, or Article 52 of the 1899 Hague Convention for the Pacific Settlement of International Disputes, which only allows the members of the tribunal to 'record their dissent when signing'.

70 It is not clear that individual opinions can be equated with dissenting opinions when only the latter are provided for in the statute of the court or tribunal.

71 Although one can always quibble with the details; See Ch. Brower and Ch. Rosenberg, *supra* n 67, 29.

72 S. D. Franck, 'Arbitration Costs: Myths and Realities in Investment Treaty Arbitration', OUP, 2019, 71; C. Titi, *supra* n 67, 198. Brower and Rosenberg report that the *ratio* of dissenting opinions is higher in the supreme courts of common law States (62% on the United States) (*ibid.*, 31), but the comparison is hardly conclusive; these are much larger courts/tribunals than arbitral tribunals with typically three members.

73 See e.g. the dissenting opinion of Prosper Weil in the *Tokios Tokelés v. Ukraine* case, *supra* n 68; See also the opinion of Thomas Wälde in *International Thunderbird Gaming Corporation See The United Mexican States*, arbitral award, 1st Dec. 2005 or the concurring and dissenting opinion of Professor Brigitte Stern in *Impregilo S.p.A. v. Argentine Republic (I)*, *supra* n 42.

74 See W. Brennan, 'In Defense of Dissents', *Hastings Law Journal* 37, 1986, 430. See also C. Titi, *supra* n 67, 205-207.

desire to justify herself or himself in the eyes of the party that appointed her – a hypothesis made all the more plausible by the fact that almost all the dissenting voices come from the losing party's arbitrator, which, moreover, casts some doubt on their impartiality –[75] or, in Professor van den Berg's well-crafted perfidious formula, a certain 'intellectual exhibitionism'.[76]

This is all the more regrettable given that there are other ways for these recognition-starved arbitrators to popularise their arguments. It has been pointed out that the parties generally select highly competent arbitrators, often talented law professors or lawyers, who do not hesitate to express themselves publicly in books, articles or lectures;[77] provided that they do so in an abstract manner and without betraying the secrecy of the deliberations, they can always defend the point of view they consider correct in this way. On balance, a footnote or, at the very least, a reference in the award itself to the disagreement of one of the arbitrators is surely less damaging and confusing than a lengthy dissenting opinion – and there are some very lengthy ones – for example, that of Dr. Jürgen Voss in *Lemire v. Ukraine*[78] which is not far longer than those of Judge Schwebel in the *Nicaragua case* before the ICJ;[79] but it is not always necessary to follow the World Court's examples when they are wrong. This is especially true when the dissenting opinion is acrimonious and tends to discredit – rather than criticise – that of the majority.[80]

Here again the only credible way[81] to avoid the muddle of lengthy decisions clouded by unnecessary dissenting opinions is for arbitrators to exercise restraint. From the reluctance with which appeals in this direction have been met, this is not a given. *Cardinalis sin.*

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75 See *infra* pp. 53.

76 A.J. van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration', *supra* n 67, 832.

77 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?', *supra* n 9, 43-44.

78 *Joseph Charles Lemire v. Ukraine (II)*, ICSID Case No. ARB/06/18, Award, 28 March 2011, Dissenting Opinion of Arbitrator Dr. Jürgen Voss (Award), 173 pages and 107 pages for the award itself. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, Dissenting Opinion of Dr. Santiago Torres Bernárdez, 193 pages and 213 pages for the award itself.

79 ICJ, 26 November 1984, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment: 51 pages; dissenting opinion of Judge Schwebel, 80 pages; 27 June 1986, Merits, judgment: 137 pages; dissenting opinion of Judge Schwebel, 269 pages.

80 See e.g. the dissenting opinion of Charles Brower attached to the award in *Daimler Financial Services AG c. Argentine*, *supra* n 30, which is courteously discussed in the award itself (see footnotes 279, 310, 312 or 355).

81 See, however, the range of solutions proposed by UNCITRAL Working Group III to limit the harmful consequences of dissenting opinions (UNCITRAL, Report of Working Group III ((Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Possible reform of ISDS - Consistency and related matters, 2018, A/CN.9/WG.III/WP.151, paras. 35-42).

3. EXCESSIVE LENGTH OF PROCEDURE AND COST

The slowness and excessive costs of the procedure are not necessarily unrelated to the undue length of the decisions. However, the validity of this explanation should not be exaggerated. As I have noted above,[82] the length of the decisions is to a large extent due to the (too long) summary of the facts and the (too long) presentation of the arguments of the parties – both of which are the main culprits of the excessive length of the decisions – which usually stem from the intervention of 'little hands', assisting the tribunal or the arbitrators,[83] or even the registrar of the tribunal or one of his or her assistants. Although some authors give absolution to the sin of slowness on this ground, one must therefore look elsewhere.

Two causes of these delays seem infinitely more explanatory: the excessive workload due to the excessive number of cases that too many 'usual' arbitrators accept to take on[84] and the quibbling which the parties are, unfortunately, all too accustomed to. These two sins are discussed further below. It is sufficient to describe the phenomenon here and to try to determine the role it plays in the, not exceptional disproportionate, increase in costs.

According to recent studies, the reliability of which there is no reason to doubt, the average duration of an investment dispute is 3.73 years and, in the context of ICSID, that of an annulment procedure before an *ad hoc* committee is 1.91 years.[85]

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82 See *supra* pp. 25.

83 I am well aware of ICSID's overly rigid position against arbitrators using an assistant in principle (A. Vidyarthi, 'The Problem of Assistance in Investment Arbitration?' (*Kluwer Arbitration Blog*, 17 April 2019 <https://arbitrationblog.kluwerarbitration.com/2019/04/17/the-problem-of-assistance-in-investment-arbitration/> last accessed 17 July 2024) but such rigidity seems to me to be unjustified when it is precisely a question of summarising the facts or the arguments of the parties when the arbitrators ensure that these pure summaries meet the needs of the tribunal's demonstration. See also UNCITRAL, Code of conduct for arbitrators in international investment dispute resolution and commentary, 2024, articles 6 *c)* and 10.

84 See *infra* pp. 52. For a more nuanced view, see D.D. Caron, 'Arbitrators and the Rule of X', *Legal Studies Research Paper Series: Paper No. 2017-41*, 9-13 and the answer of L. Reed, 'The David Caron Rule of X', *Ecology Law Quarterly*, 2019, vol. 46-1, 2019, 12-14.

85 D. Behn, T. Laudal Berge and M. Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration', *Northwestern J Intl L & Bus* 38(3), 2018, 333, figures included in ISDS Academic Forum Working Group 7, *supra* n 9, 17, and 21. According to another empirical study, '[t]he length of ICSID annulment proceedings varies greatly. The applications in *Astaldi v Honduras* [ICSID Case No. ARB/07/32], *Burlington Resources v Ecuador* [ICSID Case No. ARB/08/5], *Joy Mining v Egypt* [ICSID Case No. ARB/03/11], *KT Asia Investment Group v Kazakhstan* [ICSID Case No. ARB/09/8] *and Levy v Peru* [ICSID Case No. ARB/11/17 were all resolved in less than a year. By contrast, the longest proceedings were in *LG&E v Argentina* [ICSID Case No. ARB/02/1.] which lasted approximately six and a half years' (BIICL and Baker Botts LLP, Empirical Study; Annulment in ICSID Arbitration, 2021, 16). For a summary of the figures – slightly different but broadly consistent, see J.M. Álvarez Zárate *et alii*, 'Duration of Investor-State Dispute Settlement Proceedings', *Journal of World Investment & Trade* 21, 2020, 310-314, and with specific reference

And a recent study using the King's College London database found that cases ranged from 448 days (1 year and 83 days) to 4,375 days (almost 12 years) from the application for arbitration or registration to the final award.[86] This is a lot and does not meet, in particular, the expectations that led to the creation of ICSID.[87] But these figures seem relatively stable[88] and they stand comparison with most other international disputes.[89] However, while some cases are handled with due diligence,[90] the settlement of many others is far too slow.[91]

Without needing to repeat the demonstration – which would go far beyond the scope of this article – one can agree with the 'empirical' finding of Academic Forum Working Group 7 on the investor-State dispute settlement regime:

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to ICSID's the very detailed study, *Schedule 9: Addressing Time and Cost in ICSID Arbitration*, 899-904. To compare: 22 months for cases before the ICC, see HHR, 'Comparing Timelines: What Do Statistics Reveal About the Length of International Commercial Arbitration v. U.S. Federal Litigation?', 21 November 2023 <https://www.hugheshubbard.com/index.php?p=actions/hchhrutils/download/asset&id=508787> last accessed 17 July 2024.

86 J.M. Álvarez Zárate *et alii, supra* n 85, 313.

87 Thus Aron Broches, the father of the Washington Convention, said at the meeting of the Conference's Committee of the Whole: '[T]he object of the convention was to provide a speedy solution to a basic dispute, and not to invite an international proceeding with lengthy introductory and preliminary claims' (*History of the ICSID Convention, Documents Concerning the Origin and the Formulation of the Convention*, vol II, meeting of 18 Dec. 1962, 59, para. 34). See also e.g.: T. Landau, C. Brown and MM. Waibel, 'A World Without Investment Arbitration?', *supra* n 54**,** 18.

88 ISDS Academic Forum Working Group 7, *supra* n 9, 17 (see in this study figures 2.1, 16); however, another study, focusing on the period June 2017 to June 2020, shows, on the contrary, a rather significant increase in the duration of proceedings: 4.5 years for the average duration (3.8 years for the median figure) for ICSID proceedings (4.2 and 3.9 respectively for UNCITRAL proceedings) (M. Hodgson, Y. Kryvoi and D. Hrcka (Allen & Overy, *2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration*, 2021, 33); see also Note by the Secretariat, 'Possible reform of investor-State dispute settlement (ISDS) - cost and duration', UN Doc No A/CN.9/WG.III/WP.153 (31 August 2018), paras. 54-59 <https://undocs.org/en/A/CN.9/WG.III/WP.153> last accessed 17 July 2024.

89 According to the UNCITRAL Working Group III study, on average, the duration of a contentious case before the International Court of Justice would be 2 years, a figure which seems very optimistic, whereas a case submitted to a WTO panel is settled in one year, to which may be added 4 months in the event of an appeal (same remark). See UNCITRAL, Report of Working Group III ((Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session, Possible reform of ISDS, 2018, A/CN.9/WG.III/WP.150, paras. 69 and 72. I don't know where these figures come from: on average, the last ten ICJ cases have lasted almost six years.

90 See for example *Consutel Group S.P.A. in liquidazione v. People's Democratic Republic of Algeria* (PCA Case No. 2017-33) (less than three years); *Itisaluna Iraq LLC, Munir Sukhtian International Investment LLC, VTEL Holdings Ltd., VTEL Middle East and Africa Limited v. Republic of Iraq* (ICSID Case No. ARB/17/10) three years).

91 See for example *AWG Group Ltd. v The Argentine Republic* (ICSID Case No. ARB/03/19) (twelve years); *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) (twenty-two years). A particularly caricatural example is given by the *NIOC v. Israel* case, submitted to an *ad hoc* tribunal in 1994 and still pending after many twists and turns; but after all the *Gabčíkovo-Nagymaros Project* case is still pending before the ICJ since 1993.

> 'The most significant delaying factors concern procedural events that occur during an arbitration, namely bifurcation, arbitrator challenges and arbitrator replacement. They are significantly and strongly associated with longer case durations. Likewise, cases where there is a dissenting opinion from one of the main arbitrators is strongly and consistently associated with a longer case duration than cases without dissenting opinions'.[92]

Although most studies on the reform of the investor-state investment dispute system include under one heading – as I do here – the length and cost of proceedings,[93] the link between both is therefore doubtful.[94] The fact remains that these are not fantasies aimed at justifying chimerical reforms: both phenomena are problematic – the second in particular.

As the saying goes, 'a sin confessed is half-pardoned'. Indeed, the relative transparency of costs in investment litigation is to be credited, which contrasts fortunately with the opacity of the costs incurred by the parties before international courts, including the ICJ, or inter-state arbitration tribunals.

Nevertheless, there are worrying trends. While noting a trend towards stabilisation, a recent study, which is often cited, reports average costs per case of US$4.7 million (and a median cost of US$2.6 million) for States and respectively US$6.4 million and US$3.8 million for investors, with no significant differences between ICSID, UNCITRAL or other arbitrations.[95] As aptly noted by three eminent specialists – not necessarily sharing the same views on all matters: 'There are concerns that the resource-intensive nature of investment arbitration proceedings is untenably costly for developing states with scarce financial and human resources. Likewise, small to medium enterprises with limited financial resources have, in effect, reduced access to investment arbitration'.[96]

There is no doubt that the *Yukos* case was exceptional from many points of view; nevertheless, the fact is that some $60 million in costs (representing 75% of the amount claimed by the claimant), including some $40 million in legal fees, can

92 ISDS Academic Forum Working Group 7 Paper, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, *supra* n 9, 20-21.

93 See for example UNCITRAL, *supra* n 89; M. Hodgson, Y. Kryvoi, D. Hrcka, *supra* n 88.

94 PCA, *Duration and Cost of State-State Arbitration Proceedings* (Submitted to UNCITRAL Working Group III on 24 October 2018), 1: 'To understand what drives costs, the PCA identified the following factors as particular [sic] relevant: the complexity of the case; the parties' conduct; effective case management; cohesion within the tribunal (unanimity or dissenting opinions, etc.). It follows that time is not an independent cost driver, but instead mostly a function of complexity'; A. Miron makes the same observation regarding interstate litigation ('Le coût de la justice internationale: enquête sur les aspects financiers du contentieux interétatique', *AFDI* 60, 2014, 253). *Contra* but this is a simple statement: J.M. Álvarez Zárate *et alii*, *supra* n 85, 309.

95 M. Hodgson *et alii*, *supra* n 88, 4; see also 9-15, with some telling figures.

96 T. Landau, C. Brown and M. Waibel, *supra* n 54, 18.

only upset – and rightly so – a public opinion that is already ill-disposed towards the investor-state dispute settlement regime, despite the justifications given by the tribunal (damages awarded of $40 billion for $100 claimed,[97] quality and importance of written and oral pleadings, excessive fees paid to experts whose input was limited, etc).[98] In many less unusual cases, there is reason to question the size, not to say the enormity, of the costs claimed and often awarded.[99] The average costs mentioned above are themselves very high and may discourage investors who have been cheated out of small sums from resorting to arbitration, and governments (which are sometimes – but quite rarely – represented by government departments, although this would help to limit the expenses formally incurred) may find it difficult to explain to their tax-payers and public opinions the use of public funds for disputes which are often perceived as being for the national courts.[100]

In these costs, the share of arbitration costs *stricto sensu* is moderate. According to the above-mentioned study, during the period 2017-2020, they averaged $958,000 for ICSID arbitrations and $1.05 million for UNCITRAL arbitrations.[101] Compared to the usual fees charged by counsel in such cases, the fees charged, whether for arbitrators' fees or secretarial costs, may be seen as rather moderate[102] and framed by rules to ensure that there is no abuse.[103] This is not the case with regard to the expenses incurred by the parties for their defence, which constitute the bulk of the costs.

97 Moreover, it is difficult to see why costs should be proportional to damages (whether claimed or awarded): a case with little money at stake can be very complicated, a very 'big' case, simple – see for example: *David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica,* ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, para. 762.

98 *Hulley Enterprises Ltd. v. Russian Federation*, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, paras. 1875-1887.

99 To take some examples from recent cases: *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017, paras. 597 and 616: Claimants: 45 571 235.14 dollars; Respondent: 25.917575,43 dollars and various other amounts; *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2013, paras. 1865 and 1872: Claimants: 16 525 543,92 dollars; Respondent: 17 478 518,60 dollars or more recently *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Award, 27 March 2020, paras. 714 and 721: Claimants:18 064 667,51 dollars; Respondent: 6 499 015,80).

100 See *infra* pp. 60.

101 M. Hodgson *et alii*, *op cit.*, *supra* n 88, 4 and 12-23.

102 According to the ICSID Memorandum on Fees and Costs (2005), the fees charged to arbitrators were $3,000 per session day or eight-hour day. As of July 2022, they are now $500 for each hour of work done in connection with the proceedings. In proceedings before the PCA, there is more flexibility to determine the costs, including the fees of the Tribunal members, depending on the characteristics of the case. See Articles 40-43 of the PCA Arbitration Rules 2012.

103 See Articles 59-61 of the ICSID Convention, 39-41 of the UNCITRAL Arbitration Rules and Article 41 of the PCA Arbitration Rules 2012, which establishes that costs must be 'reasonable' (Article 41(1)).

The main component is the fees of the consultants and experts.[104] According to a note prepared by the PCA at the request of UNCITRAL, 'counsel and expert fees can account for 90% of the cost, while tribunal and institutional fees can account for the remaining 10%'.[105] Some amounts seem excessive[106] but these are exceptions. More generally, however, they are difficult to justify when compared, for example, with the average amounts paid by States for cases brought before the ICJ, even though, since Anglo-Saxon law firms have become the main representatives of the Parties before the Court, these have increased considerably and sometimes reach levels that have nothing to envy compared to those paid in investment disputes.[107]

This is not to say that law firms are overcharging the number of hours actually worked (fees are mostly calculated by hour)[108] – although, having frequently had the opportunity to work with Anglo-Saxon 'big law firms',[109] I am often shocked by the excessive number of lawyers and associates working on a case and by the disproportionate amount of time spent on minor aspects of a case. Similarly, I would be reluctant to criticise the hourly fees charged by the most experienced lawyers – mine are often close to the same level – [110] but there are abuses, even if the parties sometimes conceal them by indicating 'average' fees ranging from trainee lawyers to experienced counsel,[111] and one wonders (at least I do) whether it would not be healthy to limit the repetition of costs to the level of the hourly remuneration of arbitrators.[112]

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104 With regard to the experts, see *infra* pp. 38 to 39.

105 PCA, 'Duration and Cost of State-State Arbitration Proceedings', *supra* n 94, 1.

106 In the *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* case, *supra* n 98, the costs of this kind incurred by the claimants amounted to $81,448,578.09. In the *Burlington* and *Ascom* cases *supra* n 99, they were respectively, for the Claimants, of 45 571 235,14 $, and 16,525,543.92 $ for the Respondent. In two footnotes included in a recent otherwise unanimous award in a case in which I acted as arbitrator, I indicated that I (i) regretted an excessive tendency on the part of both Parties to multiply procedural incidents and conduct unnecessary procedural discussions and (ii) felt 'necessary to point out that the amount of expenses claimed by the Claimant is a further example of a worrying trend towards undue inflation of the costs in investment arbitral proceedings' (*Orazul International España Holdings S.L. v. Argentine Republic*, ICSID Case No. ARB/19/25, Award, 14 December 2023, paras. 1053-1054, fns 1273 and 1274).

107 See A. Miron, *supra* n 94, not. 254 and Annexes 2 and 3, 272-274.

108 *Ibid.*, 256-257.

109 It seems to me that the big French firms are completely aligning their practices with those of their American, English or Swiss counterparts.

110 In interstate cases; hostile to the practice of double-hatting, I no longer act as counsel in investment matters (See *infra* pp. 52.) – although for very particular reasons I made an exception in a recent case.

111 On this process (which does not necessarily cover abuses but makes any control impossible), see: *Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, Award, 28 July 2015, para. 968; *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Award, 14 January 2021, para. 375.

112 See *supra* n 102.

I cannot resist the temptation to mention a case – in which I was (and am still when this article is completed) involved, which was very recently disclosed.[113] In that case, the unanimous Award adopted by the Tribunal[114] has been challenged by a Request for annulment lodged by the claimants in the ICSID Secretariat on 22 February.[115] One of the grounds invoked is that regarding the arbitrators' fees: 'it is simply impossible that they properly considered the case record in advance of drafting the Award. The amount of time billed also raises serious questions as to whether the Tribunal could have drafted the Award itself'.[116] In particular, the applicants emphasise that the tribunal chair dedicated only 263 hours to a case that lasted over three years, and which resulted in a 202-page award. This is supposed to demonstrate, according to the applicants, that the tribunal manifestly 'failed to take into consideration all of the parties' pleadings and arguments'.[117] Very tellingly, lawyers are so used to high (no doubt, as a general rule, too high) costs that when three particularly experienced arbitrators arrive at a unanimous solution in a reasonable number of pages (even if this may still be considered excessive) and ask for relatively modest fees, some lawyers may be indignant. This is a clear illustration of the ravages of the profit motive, which is causing a section of the legal profession to lose all sense of proportion.

The adoption by the UN General Assembly on 7 December 2023 of the Code of Conduct for Arbitrators in International Investment, Article 9 of which is devoted to 'Fees and expenses of the arbitrators', could indeed – if effectively respected – very usefully limit the risks of drift as far as the latter are concerned.[118] But, to my knowledge, regrettably, nothing equivalent is contemplated concerning the counsel of the parties.

That said, despite unfortunate exceptions, neither the length of the proceedings nor the costs they generate, taken in isolation, are generally scandalous properly speaking. Nevertheless, overall, dealt together both – without being always linked – are excessive. They could be limited if clients (States or investors) were more scrupulous about the way proceedings are conducted (notably by avoiding the multiplication of often unnecessary procedural incidents)[119] and by systematically putting several lawyers or law firms in competition before choosing them. For their part, arbitral tribunals should be more curious about the reality and validity of the

113 ICSID, 28 February 2024, *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, Request for Annulment, ICSID Case No. ARB/20/11 <https://www.italaw.com/cases/8023> last accessed 17 July 2024. See also E. Brouwer, 'Snow Crab Investors File for Annulment of Award in First Known Treaty Case against Norway', *IAReporter*, 28 February 2024.

114 *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Award, 22 December 2023, para. 70.

115 *Peteris Pildegovics and SIA North Star v. Kingdom of Norway*, ICSID Case No. ARB/20/11, Claimant's Request for Annulment of the Award - 22 Feb 2024.

116 *Ibid.*, para. 23.

117 *Ibid.*, para. 30.

118 UNGA, Resolution adopted by the General Assembly on 7 December 2023, 78/105.

119 See *infra* pp. 46 to 48.

costs incurred before ordering reimbursement. A trend in this direction seems to be emerging;[120] and it is to be welcomed that, in several recent cases, some awards have refused to charge, in whole or in part, the costs of the losing party to the winning party, expressly stressing the futility of certain costs[121] or inexplicable disproportion between the costs incurred.[122] Thus, in its final award, the *Burlington* tribunal noted that the Claimant's costs 'are significantly greater than Ecuador's. (…) The disparity of the levels of costs between the Parties here is an additional reason for which the Tribunal finds it appropriate for each Party to bear its own legal and expert fees and expenses'[123] provided, however, that sometimes a certain imbalance can be admitted, in particular because '[i]t is not unusual for claimants to spend more on costs than respondents given, among other things, the burden of proof'.[124]

Besides a control on the reasonableness of fees by the arbitral tribunals themselves – and possibly by ICSID *ad hoc* committees, national courts could also have their say. Regarding a recent case, which, I understand, was the subject of a certain amount of 'buzz', it was summarised on *IAReporter* that:

> The Claimant in *Diag Human v. Czech Republic* treaty arbitration has prevailed in litigation against his former counsel … with the latter being ordered to reimburse nearly 3 million USD in legal fees for their work on the treaty case.
>
> According to a side letter terms, [said counsel] agreed to a 30% discount on his hourly rate in exchange for a contingency fee in the event of a successful outcome in the treaty arbitration.

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120 See M. Hodgson *et alii*, *supra* n 88, 17.

121 See *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, paras. 1883-1884. See also the older decision *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, para. 626; or *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, para. 703; *Iraq Telecom Limited v. Intercontinental Bank of Lebanon S.A.L., Korek Telecom Company L.L.C. and International Holdings Limited*, LAMC Case No. 175/2018, Final Award, 21 September 2021, para. 1015. See also SCC, Celeste E. Salinas Quero, 'Costs of arbitration and apportionment of costs under the SCC Rules', 2016 <https://sccarbitrationinstitute.se/sites/default/files/2022-11/costs-of-arbitration_scc-report_2016.pdf> last accessed 17 July 2024.

122 See also for example *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/40 and 12/14, Award, 6 December 2016, para. 551**.** See on the contrary: *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012, para. 339: 'One party has invested a lot into this case, the other much less. Each one made its choices and bears the consequences. The Tribunal does not consider that one should necessarily pay for the choice of the other'.

123 *Burlington Resources Inc. v Republic of Ecuador*, Decision on Reconsideration and award, 7 February 2017, *supra* n 99, para. 634. See also: *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Award, 14 January 2021, paras. 401-404.

124 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, *supra* n 34, para. 535. See also *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, Final Award, 23 December 2019, para. 588. It is worth remembering, however, that it is up to each party to prove its case.

> In a new decision dated July 29, 2022, the UK High Court ... stressed that, contingency fee agreements are against public policy save for the narrow statutory exception.[125]

While arbitral tribunals have long refrained from assessing the reality or reasonableness of procedural costs, some are now timidly venturing to do so, as the examples given above show.[126] As Iran-United States Claims Tribunal Judge Howard Holtzmann has explained, there are objective tests for assessing the reasonableness of lawyers' fees:

> Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexity involved. Where the Tribunal is presented with copies of bills for services or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required.[127]

This is an encouraging trend. Nevertheless, the public has some reason to be astonished – and this is sometimes an understatement – at the cost of certain procedures, as well as at their duration, which often seems avoidable. *Peccatum capitalis* or, perhaps, *peccata capitalia* since, eventually, the links between these two sins are rather loose.

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125 D. Charlotin, 'After winning sizeable award against Czech Republic, Swiss investor is also entitled to recover millions in fees paid to former counsel – as UK appeal confirms that contingency arrangement was unlawful', *IAReporter*, 1 August 2022 <https://www.iareporter.com/articles/78409/> last accessed 17 July 2024. See also Court of Appeal on Appeal from the High Court of Justice, Case No CA-2022-002450, para. 2.

126 See also: *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 24.8 or *David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others v. Republic of Costa Rica*, *supra* n 97, paras. 760 *et seq*. According to ISDS Academic Forum Working Group 7, *supra* n 9, 16: 'almost every case requires the engagement of a quantum expert'.

127 *Sylvania Technical Systems, Inc. v. The Government of the Islamic Republic of Iran*, IUSCT Case No. 64, Award (Award No. 180-64-1), 27 June 1985, para. 14. This passage is quoted in *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, *supra* n 34, para. 534.

4. EXPERTS: HIGH COSTS, LIMITED VALUE

The costs of expertise frequently and considerably add to the costs of arbitration proceedings, sometimes to a significant extent, and it is far from clear that the use of experts always meets a real need or, when it does, that it satisfies it.

The most common reason for calling in experts is to assess the damage and the quantum[128] and it must be recognised that this may not be superfluous, although claimants usually have all the material to make such an assessment themselves, and the respondent State should often be able to present its factual objections, using, where appropriate, the research that government services can undertake in the light of the evidence put forward by the other party; on this basis, arbitrators with an average IQ should be able to form their own convictions as a result of this adversarial debate. Unfortunately, this is rarely the end of the matter – this is where experts come in and complicate matters, as they often confuse rather than clarify them. The *ADC v. Hungary* tribunal put it politely:

> The Tribunal is of course grateful to the experts on both sides for their enormous help on the issue of damages. However, the Tribunal feels bound to point out that the assessment of damages is not a science. True it is that the experts use a variety of methodologies and tools in order to attempt to arrive at the correct figure. But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case.[129]

In other awards, it is made clear that the input of expert opinions was of little or no use.[130]

As has been pointed out, the use of experts is becoming more frequent, if not systematic[131] and it can be very costly[132] so that, as with costs in general – in which

128 However using experts may be justified, at least in certain cases, or technical fields like building, transport, meteorological phenomena, etc.

129 *Supra* n 127, para. 532.

130 See *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, *supra* n 121, para. 626; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, para. 884.

131 See ICSID Secretariat, 'Proposals for Amendment of the ICSID Rules', *Working Paper* 1-3, 2018, 204. See LCIA, Experts in International Arbitration, 17 January 2018 <https://www.lcia.org/News/experts-in-international-arbitration.aspx> last accessed 17 July 2024. See also I. Knoll-Tudor and I. Rus, 'Regulating Party-Appointed Experts: How to Increase the Efficiency of Arbitral Proceedings' (*Kluwer Arbitration Blog*, 10 May 2021) <https://arbitrationblog.kluwerarbitration.com/2021/05/10/regulating-party-appointed-experts-how-to-increase-the-efficiency-of-arbitral-proceedings/> last accessed 17 July 2024.

132 Even leaving aside the *Yukos* cases (*supra* n 98), 7 660 707 $ and 60 000 £ for the Claimants and 4 500 000 $ for the Respondent (paras. 1847 and 1856) and *ConocoPhillips Petrozuata B.v.,*

they are frequently included –[133] the tribunals are making a timid attempt to ensure the reasonableness of expert fees.[134]

Without this necessarily being a reason to reduce the repetition of costs, the contribution of expert opinions can be disappointing. Tribunals may find that they are unnecessary in themselves.[135] More often, the conclusions and methodologies followed are so opposed and irreconcilable that, unless the tribunal tries to get the experts themselves to reconcile their points of view,[136] the tribunals are reduced

ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, in which the expert fees were much higher: respectively: 18 351 572.86 $ for the Claimants and 9 510 767 $ for the Respondent (CIRDI Case No. ARB/07/30, Decision on the Rectification of the Award, 29 August 2019). For other examples of awards involving claims for expert fees more than USD 1 million, see for example: *Khan Resources Inc., Khan Resources B.V. and Cauc Holding Company Ltd. v. the Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award, 2 March 2015: 1,112,271.96 $; *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award of the Tribunal, 18 August 2017: Claimants: 1 260 963,4 $: *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/13/38, Award, 14 December 2017: Claimants: 2 585 179,84 $; Respondent: 1,009,017.84 $ to compare with 633,854.91 $ for legal fees; *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018: Claimants: 2 024 216 $; Respondent: 890 482 $; *David R. Aven, Samuel D. Aven, Giacomo A. Buscemi and others v. Republic of Costa Rica*, *supra* n 97: Claimants: 1 299 784,52 approximately three times the costs of the defendant's experts; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019: Claimants: 1 004 798,09; *Clorox Spain S.L. v. Bolivarian Republic of Venezuela*, PCA Case No. 2015-30, Award, 20 May 2019*: claimant: 1 775 776,08 $*; *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019: claimants: 1 604 858,49 $.; *Encavis and others v. Italian Republic*, ICSID Case No. ARB/20/39, Award, 11 March 2024 : claimants: 2 431 566 €; respondent : 1 765 000 €; *ACF Renewable Energy Limited v. Republic of Bulgaria*, ICSID Case No. ARB/18/1, Award, 5 January 2024 : claimants: 6 487 331 $ and 331 042 €; respondent: 19 967 696 €.

133 See *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex)*, ICSID Case No. ARB/10/18, Award, 24 September 2021, para. 343; *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/18/3, Award, 5 November 2021, paras. 253-254.

134 See for example: *Fouad Alghanim & Sons Co. for General Trading & Contracting, W.L.L. and Mr. Fouad Mohammed Thunyan Alghanim v. Hashemite Kingdom of Jordan*, *supra* n 132, para. 514. See also: *1. Enrique Heemsen and 2. Jorge Heemsen v. the Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, para. 451; *Abed El Jaouni and Imperial Holding SAL v. Lebanese Republic*, ICSID Case No. ARB/15/3, Award, 14 January 2021, para. 401.

135 See *supra* n 121.

136 See *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Award, 5 October 2012, paras. 692-697; *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, 30 November 2018, paras. 592-598. See also *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Award, 15 July 2019, paras. 7-20 or *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Award, 11 December 2019, para. 79.

to forming their own opinion independently of the expert opinions provided by the parties. The *Conoco* award is particularly telling in this respect:

> The Tribunal would have preferred to be faced with proposals presented clearly by the experts in such a way that the Tribunal could reach a decision without becoming involved too deeply into the field of economics which, after all, should be the experts' foremost area of expertise. However, such a guided choice is impossible when the experts' proposed discount rates are, respectively, 11.6% and 27.7%, a difference of more than 16%. As another Tribunal noted in a similar situation where the opposing rates were 8.5% and 26%: 'There was an air of unreality with respect to both Parties' arguments with respect to the DCF method'[[137]]. The Tribunal tried ... to direct the experts to confer with the aim of narrowing the gaps between their respective positions related to discount rates, in general, and country risk, in particular. ... It has been faced by a surprising and indefensible refusal, originating – on one or on both sides – either from the experts themselves or from one or both Parties, through the instructions they had given. The Tribunal's approach may imply certain approximations the Parties may have not wanted to undertake by offering their comprehensive assistance. The members of the Tribunal, being exposed to suggestions so extreme that they manifestly cannot be retained, will have to make certain adjustments that some experts may consider to be a deviation from economic discipline.[138]

This situation is detrimental from several points of view: it does not allow the arbitrators, who by definition are lawyers and have no particular knowledge of the technical fields which are the subject of the dispute, to assess the damages in full knowledge of the facts and risks leading to factually debatable decisions or obliging the tribunals to appoint their own experts, which increases the cost and time of the proceedings;[139] and it highlights the true nature of expertise in the context of the investor-State dispute settlement regime: it is essentially an extension of the pleadings.[140] Although the experts state at the beginning of their reports and then swear during their cross-examination that they 'solemnly declare upon [their] honor and conscience that [they] shall speak the truth, the whole truth, and nothing but the truth',[141] they are, in reality, most of the time the auxiliaries of the team of lawyers who 'prepare' them and, as a general rule, they almost entirely espouse the thesis

137 See *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara*, Final Award, 4 May 1999, para. 355.

138 *ConocoPhillips Petrozuata B.v. et alii*, *supra* n 130, para. 884. See also the decisions quoted in *supra* n 136.

139 See *supra* n 94, 4.

140 See PWC (PriceWaterhouseCoopers), 2015 – *International Arbitration damages research: Closing the Gap between Claimants and Respondents* <https://www.pwc.com/sg/en/publications/assets/international-arbitration-damages-research-2015.pdf> last accessed 17 July 2024, 5.

141 ICSID, Arbitration Rules, Rule 38(6).

of the party that recruited them, some of them not hesitating to take, for the needs of the case, positions different from those they had adopted in other cases or in academic publications.[142] Moreover, the tribunals are not dupes: 'Judges and arbitrators are familiar, however, with the expert witness whose evidence manifestly lacks objectivity and favours the party paying his fees. An appearance of partiality does not result in the disqualification of an expert witness. It detracts from the weight that the Tribunal will accord to his evidence'[143] so that the rules on conflicts of interest that apply to arbitrators are not applicable to experts.[144] In these circumstances, it is worth asking whether it would not be simpler, fairer and more useful to abandon the fiction of their independence altogether.[145]

Such a very much needed reform could also serve to dissuade the lawyers conducting the examinations from spending a good part of their time destabilising the experts by raising a host of questions about their *curriculum vitae*, their past commitments, their relationship with the law firm representing their common client – because in both cases it is a question of clientele – and so on. Abandoning these practices, which are as unpleasant for the experts as they are pointless, would save a great deal of time without in any way harming the ascertainment of the truth. What matters is what the experts say – and everyone knows that, despite their oath, in the vast majority of cases they are not independent – and not the reasons that led them to present their expert opinion.

These remarks apply to 'the strange case of expert legal opinions in investment treaty arbitrations',[146] whose very principle is rather confusing: the lawyers who request it are supposed to be competent and only the 'signature' of the person giving the opinion may, perhaps, be of some interest, but the 'return on investment' is not a

142 See for example: *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 304. More indulgently, according to a study: 'Experts are answering different questions, are instructed to treat factual issues differently, genuinely have different opinions' (PWC, *supra* n 140, 2 and 5). See also UNCITRAL, Possible reform of investor-state dispute settlement, Assessment of damages and compensation, Note by the Secretariat, para. 81 <https://uncitral.un.org/sites/uncitral.un.org/files/note_by_the_secretariat_-_assessment_of_damages_and_compensation_.pdf> last accessed 17 July 2024.

143 *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law, 13 December 2018, para. 16. See also: *Luigiterzo Bosca v. Republic of Lithuania*, PCA Case No. 2011-05, Award, 17 May 2013, para. 28.

144 *Ibid.*, *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, para. 18. On the challenge of arbitrators, see *infra* pp. 46 to 48.

145 For less radical proposals – but probably just as likely to go unheard, See *infra* pp. 48, or PWC, *supra* n 140, 5.

146 A. Newcombe, 'The Strange Case of Expert Legal Opinions in Investment Treaty Arbitrations' (*Kluwer Arbitration Blog*, 18 March 2010) < https://arbitrationblog.kluwerarbitration.com/2010/03/18/the-strange-case-of-expert-legal-opinions-in-investment-treaty-arbitrations/> last accessed 17 July 2024.

given: in my experience, it seems to me that the tribunals do not attach much more interest to the opinions of 'legal experts' than to the pleadings of the parties' lawyers – in other words, that they do not add much to them, even though they are, like the latter, carefully studied. Although opposed in principle to 'double-hatting',[147] I have sometimes given such opinions. If they are off the record, this does not pose any particular problem: the client (generally the law firm of the party requesting the opinion) may or may not use the opinion requested, produce it or not, quote it or not. Things are more complicated when the report is intended to be annexed to the pleadings: in this case, it is often necessary to 'negotiate' foot by foot, or even comma by comma, to maintain one's own point of view and not give in to pressure from the client.[148]

Legal expertise is, in a way, 'the height of expertise' in investment litigation. It does not escape the criticisms that can be levelled at the use of experts in general in this field: high cost, often poor value for money, doubtful independence, etc. *Peccatum capitalis*.

5. AMERICANISATION OF PROCEEDINGS – ENHANCING THE SPIRIT OF BICKERING

The massive use of expert evidence (and cross-examination of experts or of the often-numerous witnesses) is one of the most striking manifestations of the Americanisation of proceedings. This is probably due less to the intrinsic superiority of the procedural rules applicable in common law countries than to the widespread domination of Anglo-Saxon or 'American-style' (or 'English-style' – seen from the continent, there are no huge differences) lawyers.[149] This taste for testimony and the trust placed in its veracity goes hand in hand with the place given to orality in common law systems.

Whereas in the civil law countries civil hearings are generally extremely short and mostly non-existent in administrative litigation, they are systematic and sometimes extremely long in common law countries. This explanation for this fundamental difference has been given and it seems convincing:

> In civil law countries, the parties exchange extensive written submissions before entering the hearing phase. These written submissions cover all aspects of the case, give a detailed account of the facts and also introduce the evidence that the parties want to rely on to support their respective cases. Before getting

147 See *infra* pp. 54 to 59.

148 In any case, it is better i) not to accept a contract for legal advice without first making sure that you do not have a problem of principle with the thesis defended by the client; and ii) to set the rules of the game from the outset; even so, it is sometimes heroic to maintain your independence.

149 See *infra* pp. 48.

> to the hearing, the issues in dispute between the parties have crystallized. The hearing can therefore focus on the issues in dispute, while everything that is common ground between the parties, or is irrelevant, will usually not be addressed.[150]

Calling a party as a witness is unthinkable in a trial governed by continental law in accordance with the principle that 'no one can constitute evidence for himself'[151] whereas this is provided for (and quite widely practised)[152] in investment litigation.[153] Still this strange absence of distrust for 'alternative' or 'self-serving truths' and this confidence, which one may find excessive, in the virtues of cross-examination – which I recognise *sometimes* (but rarely), when skilfully carried out, may allow the truth to be advanced a little – at the price of incredible losses of time.[154] As Laurent Lévy and Lucy Reed have noted, 'there is a trend to limit hearing time almost exclusively to witness testimony, curtailing opening argument and saving closing argument for written post-hearing submissions'.[155] But this pervasive use of experts in investment litigation is not justified: quite often the facts speak for themselves and in case of doubts, affidavits would suffice to dissipate uncertainty; recourse to cross-examination should be limited to cases where there is genuine uncertainty, particularly if the written evidence is irreconcilable – but, in this case, rather than endless individual cross-examinations, a confrontation of witnesses would undoubtedly be more likely to get closer to the truth. Yet, the confrontation of

150 R. Harbst, 'Chapter 2: Differences between Common Law and Civil Law Systems in Regard to Witness Examination', in *A Counsel's Guide to Examining and Preparing Witnesses in International Arbitration*, Kluwer, 2015, 8.

151 See France, Cour de cassation, 2nd civil chamber, 6 March 2014, n°13-14295 and Article 1363 of the *Code Civil* specifically concerning the demonstration of a title. In Spanish: '*nadie es lícito fabricar su propia prueba*' (SC del 13 de septiembre de 1994, Rad. 113; SC 028 del 27 de julio de 1999, Rad. 5195, M.P.: Nicolás Bechara Simaencas).

152 Among numerous examples: *FREIF Eurowind Holdings Ltd v. Kingdom of Spain*, *supra* n 14, See also *Alicia Grace and others v. United Mexican States*, ICSID Case No. UNCT/18/4, Procedural Order No. 18 (On the Respondent's Request in Relation to Mr. Yanus' Appearance at the Hearing), para. 13 or *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019.

153 See Article 36 of the ICSID Arbitration Rules, UNCITRAL Article 27; IBA: Article 4(2); LCIA: Article 20.6.

154 *Contra*, see, for example, Gary Born's enthusiasm for the virtues of cross-examination presented as 'one of the most effective means of ascertaining what actually happened' and 'an indispensable engine of the truth-finding process' ('Chapter 15: Procedures in International Arbitration', in *International Commercial Arbitration*, third ed. (Kluwer Law International, 2021), [10] Witness Testimony, mentioning 'U.S. See Salerno, 505 U.S. 317, 328 (U.S. S.Ct. 1992) (Stevens, J., dissenting)'.

155 'Managing Fact Evidence in International Arbitration, in International Arbitration' in A. van den Berg ed., *Back to Basics?*, B&N Exclusive Edition, 2007, 633 and 636. In the same sense: 'The central event in most evidentiary hearings is the examination of the witnesses – usually direct, cross and redirect' ('Chapter 15: Procedures in International Arbitration', *supra* n 154).

witnesses is still not widely used in investment arbitration, except when it is envisaged in a procedural order.[156]

As for the possibility of 'preparing' witnesses, which is also widely accepted[157] and probably unavoidable, it is likely to reinforce the doubts one may have about the spontaneous frankness of their testimony. More often than not, when listening to the examination of witnesses you have the impression of a lesson – prepared with varying degrees of effectiveness and subtlety – by the witness, who reproduces elements of language ('*éléments de langage*') instilled by counsel and rendered with varying degrees of skill.[158]

To be noted also: witnesses are often subjected to personal or 'contextual' questions in the same way as experts, and are often more destabilised by them than experts are. And it must be acknowledged that these are the rare cases where new elements may come to light during the cross-examination phase. However, the process must be used judiciously and without the masochistic stubbornness sometimes displayed by questioners who do not obtain the expected answers. As aptly underlined by Vinson and Reichert:

> [A] point which many lawyers find difficult to grasp is knowing when to stop. If a witness has given an answer in cross-examination that clearly assists the lawyer's case, it can often be a good idea, depending on whether all topics have been covered, to terminate the cross-examination immediately. Often, we see that lawyers are buoyed by the fruits of their efforts and continue on, rather than stopping and letting the impact of that answer linger. Inevitably, the impact of the answer diminishes. A lawyer should always know when to

156 See for example *BSG Resources Limited (in administration), BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea (I)*, ICSID Case No. ARB/14/22, Procedural Order No. 1, 13 May 2015**,** para. 18.15.6.

157 See J. Kirby, 'Witness Preparation: Memory and Storytelling', *J. Int'l Arb* 28, 2011, 401 and 403. In some cases, witnesses are not only 'prepared' (and their expenses reimbursed – which seems normal): they are sometimes paid – quite handsomely – for the time spent preparing their testimony; see e.g.: *OKO Pankki Oyj and others (formerly OKO Osuuspankkien Keskuspankki Oyj and others) v. Republic of Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, para. 370 ('compensation for the time spent' a request not rejected as a matter of principle by the tribunal) or *Belenergia S.A. v. Italian Republic, ICSID Case No. ARB/15/40, Award, 6 August 2019*, para. 637 (consolidated expenses for 'Expert *and witness fees*' – italics added; same remark). Article 4 of the *IBA Rules on the Taking of Evidence in International Arbitration*, which contains very detailed provisions on 'Witnesses of facts' is mute concerning the payment or 'compensation' for the witnesses. General views concerning the issue in domestic law: R. Blume and J. Stavers, 'To Pay Or Not To Pay Witnesses', *Law Week Colorado* <https://www.gibsondunn.com/wp-content/uploads/documents/publications/BlumeStaversPayWitnesses.pdf> last accessed 17 July 2024.

158 See for proceedings before US domestic courts, but transposable to investment arbitration J. Gaal and P. DiLorenzo, 'Horse-Shedding the Witness: When Does Witness Preparation Cross the Line?', 2020 <https://www.bsk.com/uploads/Burton-Award-Article-Horse-Shedding-a-Witness.pdf> last accessed 17 July 2024.

> sit down or switch off the microphone. Such an approach to timing, demonstrating awareness and diligence, will inevitably be more persuasive than carrying on.[159]

As for disclosure requests, also unknown in most continental laws as a procedural step, they have become an almost unavoidable institution in investment litigation in defiance of the general principle that it is up to each party to prove its case –[160] which does not prevent them from proceeding 'by challenge', leaving it to the tribunal seized to draw the consequences of a failure to communicate.[161] In investment litigation, this would sometimes avoid lengthy debates between the parties – during which the proceedings are suspended – and excludes – or at least limits – abuses, in particular 'fishing expeditions', which often impose on the requested party cumbersome and unnecessary searches:

> [D]ocument production cannot be a vehicle for open ended enquiry – the proverbial fishing expedition – and must strike a fair balance between the rights of the requesting party to obtain access to documents held by the other party that are material to its case, on the one hand, and the burden placed on the requested party to search for, locate and produce such documents, on the other. While document production is an important component of enabling an asserting party to meet its burden of proof, and of ensuring that the adverse party cannot hide evidence, it cannot be used to impose disproportionate burdens on the requested party.[162]

159 D.E. Vinson and K. Reichert, 'The Arbitration Process and Persuasion Strategies, Cross-examination and Closing Arguments', *Arbitration: the Art & Science of Persuasion*, OUP, 2022, p. 169.

160 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment - Jurisdiction of the Court and Admissibility of the Application, 26 November 1984, para. 101; *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, 11 February 2022, para. 548. See also Article 1133 of the French *Code civil*.

161 *Argentina — Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56, Report of the Panel, 25 November 1997, para. 6.40; ITLOS, *The M/V 'Louisa' Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment, 28 May 2013, para. 47. The consequences of non-disclosure of information are sometimes even provided for directly in the agreements. For examples of awards drawing consequences of refusals to produce requested documents see e.g.: *Lone Pine Resources Inc. v. Canada*, ICSID Case No. UNCT/15/2, final award, 21 November 2022, paras. 259-267 and 527 (having rejected the claim of expropriation, the tribunal considered it did not have to draw any conclusions from the missing documents); *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, final award, 13 March 2023, para. 704 ('the remaining requests for adverse inferences fail on their merits, as they are contradicted by evidence in the record, including documentary evidence. It would thus not be reasonable or appropriate to draw any inference based on non-production'). See also: UNCITRAL Arbitration Rules, Article 28, 3.: 'If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it'.

162 *Coropi Holdings Limited, Kalemegdan Investments Limited and Erinn Bernard Broshko v. Republic of Serbia*, ICSID Case No. ARB/22/14, Procedural Order No. 5 (Document Production), 8 December

To avoid 'fishing expeditions', the party requesting the disclosure of documents is usually required to draw '(i) a description of each requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist'.[163] The tribunals do their best to avoid these disadvantages by using their discretionary power and direction of procedure[164] but with inconsistent success.[165]

Basically, whether it is a question of the intensive use of experts, the generalisation of cross-examination or requests for the production of documents, the 'Americanisation' of investment litigation reflects, whatever the cause, an advanced and inventive spirit of bickering. This spirit of chicanery extends to the entire procedure, as evidenced by the increasing number of challenges on the grounds of sometimes imaginary 'conflicts', which are aimed more at delaying the procedure (and perhaps increasing counsel's fees) than at ensuring the tribunal's impartiality.[166] As has been written: Looking at the small number of cases when challenges have been successful, one may be inclined to conclude that most of the challenges are used as dilatory tactics or simple attempts at raising the costs of the arbitral process, in the hope that the other party will abandon the field'.[167]

2023, para. 18. See also e.g.: *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 20(4); se also: *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Traiding Ltd. v. Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Award, 19 December 2013, para. 47.

163 *IBA Rules on the Taking of Evidence in International Arbitration*, *supra* n 157 article 3. See also e.g. *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Procedural Order No. 1 on Production of Documents, para. 31.

164 See e.g. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 25 quoting Procedural Order No. 1 of 8 April 2003.

165 See e.g. *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Decision on Provisional Measures, 6 April 2007, para. 43 or *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, para. 70; *ADC v. Hungary*, *supra* n 34, para. 538 and/or *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Award, 14 August 2020, quoting Procedural Order No. 7 of 15 January 2019, para. 70.

166 See *infra* pp. 55.

167 M. Lalonde, '*Quo Vadis* Disqualification?' in M. Kinnear, *supra* n 18, 644. Nevertheless, some applications for disqualification on the grounds of 'proximity' (i.e. for multiple appointments by the same law firm (see *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/14/10, Disqualification of Professor Brigitte Stern, para. 11), or for having served several times with the same co-arbitrator in several cases) are abusive (P. Eberhardt and C. Olivet, 'Profiting from Injustice', in *Corporate Europe Observatory and the Transnational Institute*, 2012). They are facilitated by search engines that identify this occurrence, such as *Jus Mundi*, *International Law Reporter* or *Global Arbitration Review - Arbitrator Research Tool*.

Some cases are a caricature of this taste for bickering. For example, in *Mesa Power v. Canada*, the Tribunal noted that:

> [T]he Claimant advanced a large number of procedural requests in the course of this arbitration. While it was its right to do so, many of these requests unnecessarily burdened the arbitral process and were decided against the Claimant. Further, many 'confidential' and 'restricted access' designations applied by the Claimant and contested by the Respondent were later voluntarily withdrawn. The Claimant also filed proceedings [before US courts]. All of this created a number of procedural difficulties that might have been avoided.[168]

Very prevalent during the 1990s and 2000s,[169] the denunciation of the Americanisation of procedures (both in the context of the investment and commercial arbitration) has lost its vigour over the last fifteen years. This decline is probably due more to the discouragement of lawyers trained in continental law in the face of the Anglo-Saxon steamroller than to a deep conviction of the benefits of the procedural red tape resulting from this Americanisation, which is often a source of slowness and expenses for the parties and, at the same time, of gains for the law firms that promote it. Despite the soothing analyses of certain authors,[170] the famous gap between common law and civil law[171] is not filled: the pendulum still swings – and more than ever – towards the first.[172]

In his masterwork on international commercial arbitration, Gary Born attempts to downplay the impact, or even the existence, of this Americanisation. He argues that, '[t]he reality is that contemporary international arbitration procedures are neither European, American, or Asian – but rather international, flexible and

168 *Mesa Power Group LLC v. Government of Canada, supra* n 121, para. 703 (footnotes omitted); these findings led the court to award 30% of the Respondent's costs to the Claimant (*ibid.*, para. 705). See also *Tennant Energy, LLC v. Government of Canada*, PCA Case No. 2018-54, Final Award, 25 October 2022, paras. 473 and 475.

169 See B. Stern, 'Les États-Unis et le droit impérialiste', in *Le Monde*, 12 Sept. 1996, 12; C.P.R. Romano, 'The Americanization of International Litigation', *Ohio St. J. on Disp. Resol.* 19, 2003, 89; L. Nader, *The Americanization of International Law*, Routledge, 2005; E. Bergsten, 'The Americanization of International Arbitration', *Pace International Law Review*, Vol 18, Issue 1, Spring 2006: 289, 294 and 301; G.M. von Mehrem, A.C. Jochum, 'Is International Arbitration Becoming Too American?', *Global Business Law Review* 2-1, 2011, 47-58.

170 See E.V. Helmer, 'International Commercial Arbitration: Americanized, 'Civilized,' or Harmonized?', *Ohio State Journal on Dispute Resolution* 19-1, 2003, 35-67; G. Born, *supra* n 154, 2283-2492, and more specifically 2404-2405.

171 See E S.H. Elsing and J.M. Townsend, 'Bridging the Common Law-Civil Law Divide in Arbitration', *Arb. Int'l* 18, 2002, 59-65 or S. Hamanaka, 'Legal Traditions as Economic Borders', *Politics and Governance*, 2023, vol.11-4, 235-245.

172 See for example UNCITRAL, *Notes on Organizing Arbitral Proceedings*, 2012, 17 *et seq*; P. Baysal, B. Kağan Çevik, 'Document Production in International Arbitration: The Good or the Evil?' (*Kluwer Arbitration Blog*, 9 Dec. 2018) <https://arbitrationblog.kluwerarbitration.com/2018/12/09/document-production-in-international-arbitration-the-good-or-the-evil/> last accessed 17 July 2024.

efficient ... At the end of the day, there is – and should be – no 'standard' or 'usual' procedural approach in international arbitration, whether common law, civil law, or something else'.[173] There are two major objections to this statement:

- On the one hand, the absence of a standard or usual approach in procedural matters calls for the same criticisms as those that can be addressed to investment litigation in general: it is a source of insecurity and unpredictability and leaves too much room for the subjectivity – even if it is collective – of arbitrators;
- On the other hand, while it is true that common law procedures are not transposed as such into investment law, they nevertheless permeate it very deeply and not necessarily for the better.

Moreover, the author himself gives the fundamental key to this 'Americanist' shift: 'the personal experiences and careers of individual arbitrators can also significantly influence their approach to evidentiary issues'[174] and the same applies to lawyers. Both, arbitrators and counsel, are usually either American or English, or have been trained at universities in the United States or the United Kingdom (or other common law countries), or at least work in 'big law firms' attached to these countries or operating according to the same model –[175] competition obliges.

This undeniable Americanisation (or 'Anglo-Saxonisation') is reflected in the IBA Rules and Guidelines on International Arbitration and in particular in the Rules on the Taking of Evidence. Revised for the third time in 2020, these Rules, which are steeped in common law thinking, without being mandatory, have a very strong influence on the procedures of the ISDS – whether they are expressly adopted, whether arbitrators and parties are invited to refer to them, or whether they are expressly or even unconsciously inspired by them.[176]

The claimed balance[177] between the procedural traditions of common law and civil law is likely to be long overdue. This does not help to dissipate the criticisms against the ISDS which, instead of aligning itself almost completely with the practices of common law, would have everything to gain by trying to appropriate the best and most effective rules and practices of both worlds – those from which international law as a whole is derived – without excluding the possibility of also drawing inspiration from other legal systems if these appear likely to make investment litigation more acceptable and more effective. *Capital sin*.

173 G. Born, *supra* n 154, 2404.

174 *Ibid.*, [10] Witness Testimony.

175 J.L.V. von Mehren and C. Jochum, *supra* n 169, 47; See also *infra* pp. 51 to 53.

176 See G. Born, *supra* n 173, 2405-2408.

177 See *supra* n 170.

6. THE '*ENTRE-SOI*'

The world of investment litigation largely reflects this growing Americanisation of the ISDS procedure – echoed in the increasing dominance of Anglo-Saxon (especially American) law firms and lawyers. Much larger than that of the ICJ,[178] this microcosm nonetheless practises a somewhat chilly '*entre-soi*' which translates into a withdrawal into the 'Arbitration community' ('*communauté [du droit] de l'arbitrage*') – an expression that specialist analysts proudly use.[179]

For a long time, this 'small world' was confined to professors of private international law and lawyers specialising in international commercial law (and arbitration). They are still largely predominant, despite the fairly recent emergence of a few influential public law specialists such as James Crawford, Gilbert Guillaume, Vaughan Lowe, and Brigitte Stern and, until recently, some judges of the ICJ, before the decision of the Court to limit the possibility of accumulating the functions of occasional arbitrators and that of judge of the Court.[180] It will not come as a surprise that I regret this disproportion – but there is a less subjective reason for this: as mentioned above,[181] the rules and principles of public international law have a considerable place in the ISDS and it is probably not a bad thing that public international law specialists can make their mark on the field – especially in the context of ICSID *ad hoc* committees.

Indeed, a relatively small number of lawyers are at the forefront of both the arbitrator pool and the 'invisible bar' of investment litigation.[182] The *Jus Mundi* search engine announces that the Jus Connect function, which lists all lawyers and experts who have participated in one or more international arbitrations, provides more than 11,740 profiles of arbitrators;[183] *International Law Reporter*, for its part,

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178 See *supra* pp. 14 to 15.

179 See for example IBA, 'Guidelines on Conflicts of Interest in International Arbitration', Resolution of the IBA Council, adopted on 23 Oct. 2014, introduction, 3; S. Brekoulakis and C.A. Rogers, 'Third-Party Funding in Investment Arbitration', in J. Chaisse, L. Choukroune, S. Jusoh, *Handbook of International Investment Law and Policy*, Springer, 2021, 1410; G.A. Bermann, *Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, in Recognition and Enforcement of Foreign Arbitral Awards*, Springer, 2017, xiii, 31 or 488.

180 CIJ, Compilation of Decisions adopted by the Court concerning the External Activities of its Members, 'A. Arbitration activities of Members of the Court', 8 Sept. 2020**.**

181 See *supra* pp. 17 to 18, and *supra* pp. 48.

182 I rely mainly on the very interesting study by M. Langford, D. Behn and R. Hilleren Lie ('The Revolving Door in International Investment Arbitration', *Journal of International Economic Law* 20, 2017, 301-331). There is all the more reason not to doubt the accuracy of their conclusions as they confirm and clarify those of Sergio Puig, on the same theme, carried out three years earlier using a partially different methodology ('Social Capital in the Arbitration Market', *European Journal of International Law* 25, 2014, 387-424).

183 Jus Mundi <https://jusconnect.com/en/directory/arbitrators/all> last accessed 17 July 2024. This figure covers both commercial and investment arbitrage – consulted on 17 July 2024.

counts only 312;[184] but, in reality, even among the latter, only a few can claim to truly belong to the 'arbitration community'. In their above-mentioned 2017 study,[185] the authors show that some thirty lawyers 'monopolise' appointments as arbitrators, most of which they combine with an activity as lawyers or as 'legal experts'.[186] These 'usual suspects' have a dominant influence in the ISDS and occupy a prominent place in the 'arbitration market'. The vast majority of these power brokers are white, older, westernized men, and in any case still western educated –[187] it being noted, however, that the two individuals with the highest number of appointments as arbitrators are women.[188] Arbitration institutions are aware of the problem but the results of their efforts remain limited.[189] The first issue of the 2024 ICSID Caseload – Statistics surveys the appointments made by ICSID by gender and gives the following numbers: for all ICSID Cases since its creation: 15% of women and 85% of men; for the year 2023: 32% women and 68% men;[190] progress is being made, but there is still a long way to go. Moreover the 2022 Report of the Cross-Institutional

184 IAReporter <https://www.iareporter.com/arbitrator-profiles-directory/#arbitrator>, consulted on 17 July 2024.

185 See *supra* n 182.

186 *Ibid*. The authors of this study have produced three tables on the most frequently appointed arbitrators, the most influential arbitrators and the counsel most frequently chosen by the parties. These tables are very informative.

187 See also the findings in the same direction of S.D. Franck and others, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration', *Colum J Transnatl L.* 53, 2015, 466; K. Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation', *Melbourne Journal of International Law* 19(1), 2018, 259 or A. Bjorklund and others, 'The Diversity Deficit in International Investment Arbitration', *Journal of World Investment and Trade* 21, 2020, 2. Defining diversity and mapping the extent of the diversity deficit.

188 Brigitte Stern: 148 appointments in investment arbitrations, of which 22 are pending; Gabrielle Kauffman-Kohler: 83 appointments, of which 17 are pending; plus appointments in commercial and sports law arbitrations (*Jus Mundi* – See *supra* n 183, consulted on 17 July 2024). However, these two exceptions – which S. Puig has described as 'formidable women' (*supra* n 182, 387) – should not be used as an alibi: between them, as has been pointed out, they represent 57% of all female arbitrators appointed (A. Bjorklund and others, *prec.*, 2. Defining diversity and mapping the extent of the diversity deficit, 5) and, while there has been some progress – notably among female Presidents of arbitration tribunals – parity is still far from being achieved (among an abundant literature, See A. Raha, S. Jain, J. Gupta, 'Growing Gender Diversity in International Arbitration: A Half Truth?' (*Kluwer Arbitration Blog*, 28 Sept. 2021) <https://arbitrationblog.kluwerarbitration.com/2021/09/28/growing-gender-diversity-in-international-arbitration-a-half-truth/> last accessed 17 July 2024.

189 ICSID welcomed that '[a]s of June 30, 2019, the 680 individuals on the Panels were of 133 different nationalities, with women comprising 19% ' (ICSID, Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels, 2009, <https://icsid.worldbank.org/sites/default/files/Considerations_for_States_on_Panel_Designations.pdf> last accessed 17 July 2024); See also: UNCITRAL, Report of Working Group III ((Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October - 2 November 2018), paras. 91-98 and 102 and ICSID, *Annual Report 2023*, 32.

190 ICSID Caseload - Statistics, Issue 2024-1, 22. In the same line, see ICCA, *Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings*, 2022, 59.

Task Force on Gender Diversity in Arbitral Appointments and Proceedings notes that, among 590 studied, the significant majority of appointees 'held nationalities from Western Europe and the United Kingdom (45.4%, reflecting a total of 268 appointments). A smaller proportion of women held nationalities from Asia (18.1%, reflecting 107 appointments), Latin America and the Caribbean (12.9%, reflecting 76 appointments) and the USA and Canada (11.2%, reflecting 66 appointments). The least represented nationalities were from Australia and New Zealand, Africa, and the Middle East (comprising 4.1%, 2.5% and 1.9%, respectively)'.[191]

The same profiles are found among legal experts and counsel. As regards the latter, the vast majority belong to Anglo-Saxon law firms or operating according to the same model. The survey of the 30 and 100 law firms most active in international arbitration (commercial and investment litigation combined) carried out each year by *Global Arbitration Review* (GAR) leads *mutatis mutandis* to the same findings:[192] these are large, mainly Anglo-Saxon law firms, usually headquartered in Europe or North America, often with offices scattered around the world; the same applies to firms specialising in expertise before international arbitral tribunals. Significantly, the introduction to the 2022 GAR 30 states that over the years there has been a 'gradual decline in the civil law presence in the table'.[193]

As instructive as these findings are, GAR is above all an almost caricatural illustration of the desire of the players in this claimed community to perpetuate itself. In the introduction to the list of the top 100 law firms active in the field, it is stressed that international arbitration requires very specific skills[194] and it shamelessly promotes the idea of '*entre-soi*':

> In the end, a lot of what the international arbitration specialist brings comes down to the old adage "know your judge" – or its even more important variation "make sure your judge knows you". The longer an advocate spends in the presence of his or her adjudicators, the better they tend to do. This advantage arises for two reasons: improved intuition and the fact that the advocate arrives in front of them with personal capital.
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> [...]

191 ICCA, 'Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings', ICCA Reports No. 8, 2022 Update <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8u2-electronic3.pdf> last accessed 17 July 2024.

192 Global Arbitration Review (GAR) 100 (2024) <https://globalarbitrationreview.com/survey/gar-100/2024> last accessed 9 April 2024.

193 GAR 30 (2022) <https://globalarbitrationreview.com/survey/gar-100/2022/article/the-gar-30-2022> last accessed 9 April 2024.

194 In all honesty, although I have only limited practice in this area, I feel that I have not experienced any particular difficulty in learning about it and practicing it.

> So the challenge has become separating the wheat from the chaff – finding the true specialist counsel.[195]

This has at least the merit of being frank.

However, as Emmanuel Gaillard, criticizing Pia Eberhardt's and Cecilia Olivet's chart describing the interactions between elite arbitrators,[196] has noted, 'it is the conservatism of the parties, both on the State side and on the investor side, which explains the chart. Anecdotal evidence shows that institutions actively seek to appoint newcomers and promote diversity. It is the parties who resist change'.[197] This is correct, at least formally.[198] However, there is another element to this: while on paper it is the States and investors who appoint the arbitrators, their counsel – i.e. the members of the 'club' – still play a very large role in their appointment.[199]

In any case, this does not deny the objective reality that the investor-State dispute settlement regime is the preserve of a fairly small number of lawyers who tend to mix the genres since most of them take on the role of arbitrator, advisor and expert in turn. This widespread practice of 'double-hatting' is a common feature of the legal profession.[200] It obviously strengthens the connections within the 'community' but is not without serious problems.[201] This also leads to a nuance in Emmanuel Gaillard's assertion that '[b]eing an arbitrator has become a social-professional category of its own';[202] the socio-professional category is broader in that it includes all the small world that interacts in international arbitration litigation: arbitrators, of course, but also lawyers (and their associates) – and that is not necessarily healthy.[203]

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195 GAR, Introduction, 22 March 2024 <https://globalarbitrationreview.com/survey/gar-100/2024/article/introduction> last accessed 17 July 2024.

196 P. Eberhardt and C. Olivet, see *supra* n 167.

197 E. Gaillard, 'Sociology of International Arbitration', *supra* n 2.

198 The same can be said of the recruitment of legal teams in interstate litigation. See A. Pellet, 'Conseil devant la Cour internationale de Justice – Quelques impressions', *Mélanges offerts à Hubert Thierry*, Pedone, 1998, 346 (in English: 'Remarks on the 'profession' of Counsel before the International Court of Justice' in United Nations, *Collection of articles by State legal advisers, international organizations and legal practitioners international*, New York, 1999, 148; M. Longobardo, 'States' Mouthpieces or Independent Practitioners? The Role of Counsel before the ICJ from the Perspective of the Legal Value of Their Oral Pleadings', *The Law and Practice of International Courts and Tribunals* 20, 2021, 2.2 Counsel and Advocates or The Legal Assistance to the State.

199 See L. Greenwood, 'Tipping the Balance - Diversity and Inclusion in International Arbitration', *Arbitration International*, 2017, vol. 33, 105.

200 See M. Langford and others, *supra* n 182, 321-328.

201 See *supra* pp. 49 to 53.

202 E. Gaillard, 'Sociology of International Arbitration', *supra* n 2, 4.

203 I am fully convinced that the world of international (inter-state) justice is even (much) smaller and may raise similar criticisms. But it is even more difficult to overcome them given the very small number of inter-state cases submitted to litigation.

One might think that the recurrence of appointments contributes to greater consistency in investment arbitration jurisprudence. 'Yet, on the other hand, concerns of personal reputation and reappointment may also counter the willingness to develop consistent case law. They risk inducing arbitrators to act according to the appointing parties' or the appointing institution's expectations rather than to decide in conformity with existing case law'.[204]

In addition, the fact that a small number of arbitrators are frequently appointed in several cases probably partly explains the excessive delays in making some awards[205] due to their unavailability 'to fully devote themselves to an ISDS case (due to multiple appointments or other engagements as counsel or experts) could be an additional reason'.[206]

These are just some of the inconveniences resulting from the '*entre-soi*' that characterises the world of international arbitration and, especially, of the investor-State dispute settlement regime. More broadly, this confinement is undoubtedly one of the factors explaining public distrust of it. *Peccatum capitalis*.

7. 'JUSTICE MUST BE SEEN TO BE DONE'[207] – SUSPICION OF PARTIALITY

In addition, in itself, the entre-soi characteristic of the 'community of arbitration' , notably in the field of investment, leads to questions about the real neutrality and independence of arbitrators. Assessing an arbitrator's (im)partiality is by definition a matter of subjectivity. As explained by Gabrielle Kaufmann-Kohler, 'impartiality implies the exercise of a judgement that is not influenced by circumstances external to the case or by prejudice against one of the parties to the dispute. Impartiality is subjective; it depends essentially on the judge's state of mind and is measured by appearance, for the good reason that state of mind is difficult, if not impossible, to prove'.[208]

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204 K. Diel-Gligor, *supra* n 24, 164, footnote omitted. A paroxysmal example of this is given by two awards in commercial matters involving the same parties on the same issue with an arbitrator present in both arbitral tribunals based on irreconcilable reasonings (see: Bryan Cave Leighton Paisner, 'Conflicting Awards in Parallel Arbitral Proceedings', 6 October 2021 <https://www.bclplaw.com/en-US/events-insights-news/conflicting-awards-in-parallel-arbitral-proceedings.html> last accessed 17 July 2024).

205 See *supra* pp. 35 to 36.

206 UNCITRAL, *supra* n 89, para. 89.

207 According to Lord Hewart's famous aphorism: 'It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' (King's Bench, ([1924] 1 KB 256, [1923] All ER Rep 233)).

208 G. Kaufmann-Kohler, 'Indépendance et impartialité du juge et de l'arbitre dans le règlement des différends entre investisseurs et États', *Recueil des cours*, 2022, vol. 427, 24 – my translation ; French original: '*l'impartialité implique l'exercice d'un jugement qui ne soit pas influencé par des circonstances extérieures à la cause ni par des préjugés à l'encontre d'une des parties au litige. L'impartialité est*

In a very militant but not uninteresting study from 2012 (but the situation does not seem to have changed much since then), Pia Eberhardt and Cecilia Olivet wrote:

> Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest.[209]

This situation – especially marked in the case of investor-appointed arbitrators[210] – is compounded by the 'double-hatting' of many of the members of this 'elite'.[211]

Despite the overwhelming defence of the profession,[212] the confusion between the roles of arbitrator and lawyer raises serious ethical problems[213] and may contribute to doubts about the neutrality of arbitrators.

Even if the same person were sufficiently schizophrenic to be able to disregard his or her current cases as counsel when sitting as an arbitrator, the fact remains that, if the legal problems posed (and, even more so, the facts) are similar, an impartial observer could have at least a reasonable doubt about his or her objectivity. Moreover, the practice of double-hatting may encourage – or at least allow – 'back-channeling'. As Thomas Buergenthal has noted:

> These revolving-door problems – counsel selecting an arbitrator who, the next time around when the arbitrator is counsel, selects the previous counsel as

d'ordre subjectif ; elle relève essentiellement de l'état d'esprit du juge et se mesure à l'aune de l'apparence pour la bonne raison que l'état d'esprit est difficile, voire impossible à prouver'.

209 P. Eberhardt and C. Olivet, *supra* n 196, 8.

210 D. Gaukrodger, K. Gordon, 'Investor-State Dispute Settlement. A Scoping Paper for the Investment Policy Community', *OECD Working papers on International Investment* 2012/03, 43.

211 See *supra* pp. 49 to 53.

212 There are some brilliant exceptions – including P. Sands (see 'Conflict and Conflicts in Investment Treaty Arbitration: Ethical Standards for Counsel', in A. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers*, Brill, 2012, 28-49; 'Developments in Geopolitics - The End(s) of Judicialization?', ESIL Conference 2015, 12 Sept. 2015, as reprinted in *EJIL:Talk!*, 12 October 2015 <https://www.ejiltalk.org/2015-esil-annual-conference-final-lecture-developments-in-geopolitics-the-ends-of-judicialization/> last accessed 17 July 2024; 'Conflict of Interest for Arbitrators and/or counsel' in M. Kinnear, *supra* 18, 655-668; W.W. Park, 'Arbitrator Integrity: The Transient and the Permanent', *San Diego Law Review*, 2009, vol. 46, 629-704. See *contra*: J. Crawford, 'The Ideal Arbitrator: Does One Size Fit All?', *American University International Law Review*, 2018, vol. 32-5, 1002-1022.

213 S. Manciaux, 'L'éthique et le statut des arbitres', in R. Maurel dir., *Le droit international des investissements au prisme de l'éthique*, Lexisnexis, 2021, 181 and 182.

arbitrator – should be avoided. *Manus manum lavat*, in other words – you scratch my back and I'll scratch yours, does not advance the rule of law.[214]

The UNCITRAL Code of conduct for arbitrators in investments disputes deals directly with this issue considering the risk for arbitrators to be at the same time arbitrators and legal representative or expert witness on cases involving 'same measures', 'same or related party (parties)' or 'same provision(s) of the same instrument of consent'.[215] The elements mentioned just before cast a different suspicion on the arbitrator's impartiality: a former arbitrator must abstain for 3 years from being a legal representative or expert witness when a case involves the 'same measures' or the 'same or related parties' with which he had to deal as an arbitrator, as opposed to 1 year's abstention for cases involving 'the same instrument of consent'.[216] These are only very narrow and insufficient limitations.

Despite the criticisms, the practice continues and, when challenged, the tribunals are reluctant to sanction a conflict of interest on this basis.[217] One of the few exceptions is the famous case of *Hrvatska Elektroprivreda v. Slovenia* in which the arbitral tribunal decided to exclude a counsel from a pleading team because he belonged to the same chamber as the president of the Tribunal;[218] although the decision was contrary to the principle that parties may freely choose their lawyers, it can be explained by the particular circumstances of the case; on the other hand, it does not address with sufficient clarity the question of whether lawyers belonging to the same chamber may participate in the same case in different roles; from the perspective of the continent, this typically British quirk is irrelevant.

More generally, the principles of impartiality, neutrality and independence of arbitrators[219] are essential to the credibility of the investment investor-State dispute system – like Caesar's wife, they must not be open to suspicion. However, the way in which they are appointed lends itself all the more easily to suspicions of bias as the networks of relations between those who appoint and those who are appointed are dense.[220]

214 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law', *Transnational Dispute Management* 3(5), 2006. See also: P. Eberhardt and C. Olivet, *supra* n 196, 43-45.

215 UNCITRAL, Code of conduct for arbitrators in international investment dispute resolution and commentary, 2024, article 4.

216 *Ibid*.

217 See however, the judicial-arbitral soap opera of which Emmanuel Gaillard was the subject in the *Telekom Malaysia Berhad v. Republic of Ghana* case, which ultimately led him to renounce his role as counsel in the *RFCC Consortium v. Kingdom of Morocco* case; see also *RSE Holdings AG v. Republic of Latvia (II)*, PCA Case No. 2022-41, Decision on the Challenge to Amy Frey, 24 June 2022.

218 *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, ruling on the participation of a legal counsel, 6 May 2008.

219 There is no need to discuss the existence of one or three principles here.

220 See *supra* pp. 49 to 53.

There is no doubt that '[a]n arbitrator must be both independent and impartial ... Thus if an arbitrator has some personal or professional connection to one of the parties, or to the lawyers acting for one of the parties, this may be ground for disqualification. Equally, if an arbitrator has expressed an opinion on the merits of the dispute, this may, of itself, be a ground for disqualification'.[221] These are serious causes of conflict that would justify the challenge of the arbitrator. But tribunals have been reluctant to act on challenges even though the prevailing standard for disqualifying an arbitrator seems to have changed since 2015: under the terms of Article 57 of the ICSID Convention, the challenge of a tribunal member should be based on a ground 'a manifest lack of the qualities required', it now appears that the mere appearance of partiality is the applicable test.[222] The recent decision of a PCA Arbitral Tribunal by which two of the three unchallenged Members of the Arbitral Tribunal constituted in the case of the *Dispute concerning the detention of Ukrainian naval vessels and servicemen*, upheld the challenges raised by the Russian Federation against Professor Donald McRae, President, and Judge Rüdiger Wolfrum, Member of the Arbitral Tribunal, for 'lack of independence and impartiality as a result of their votes in support of the ... "Declaration of the Institute of International Law on Aggression in Ukraine"'[223] illustrates this evolution – even if in an inter-state contest. However, the rarity of positive decisions on challenges of arbitrators is undoubtedly due to the *entre soi* phenomenon, but the taste for bickering as reflected by the multiplication of challenges probably also plays a part in this.

In any case, according to Marc Lalonde 'it is striking to see that in twenty-one cases [out of eighty-six challenges], the challenged arbitrators resigned, even when s/he submitted that there was no proper basis for it. ... It may well be that some arbitrators are of the view that the simple fact of being challenged puts them in a situation when they will be considered by the challenging party as antago-

221 *Bridgestone Americas, Inc. and Bridgestone Licensing Services, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Tribunal's Ruling on Claimants' Application to Remove the Respondent's Expert as to Panamanian Law, 13 December 2018, para. 14. See also for example: *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Challenge of Charles N. Brower, 8 December 2009, para. 25; *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, 12 August 2010, paras. 22 *et seq.*; and the remarks by P. Eberhardt and C. Olivet, *supra* n 196, 42.

222 Comp. *Blue Bank International & Trust Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Decision on the Parties' Proposals to Disqualify a Majority of the Tribunal, 12 November 2013 and *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on the Proposal to Disqualify a Majority of the Tribunal, 1 July 2015 ('Articles 57 and 14(1) of the ICSID Convention do not require proof of actual dependence or bias; rather, it is sufficient to establish the appearance of dependence or bias') and the analysis by M. Lalonde, *supra* n 167, 644.

223 PCA, 6 March 2024, *Dispute concerning the detention of Ukrainian naval vessels and servicemen (Ukraine v. Russian Federation)*, Decision on Challenges, PCA No. 2019-28. See also the dissenting opinion of Sir Christopher Greenwood.

nistic to it and that it might be better for the arbitral process that they should not continue in office in such a case'.[224] The author says he does not share this view. I am in favour of it if, at least, the legitimate doubts about the impartiality of the arbitrator are such as to raise suspicion not only about the decision of the tribunal but, beyond that, about the very integrity of the system, which is based on the trust of the parties.[225] There is no shame for an arbitrator to take a position opposite to the submissions of her or his appointing party[226] – even if this is far from being the preferred scenario for investment arbitration.[227] The parties-appointed arbitrators' specific role is to ensure that all the relevant aspects of those submissions have been duly taken into account.[228] In this respect, they are in a similar position as the judges *ad hoc* in the ICJ.[229]

The predictability of arbitrators' positions is also a problem.[230] It is common knowledge that some individuals will (almost) always side with the investor and others with the State. This has several disadvantages:

- it makes it more difficult – and often impossible – to reach a consensus within the tribunal, even though it is rare (particularly in matters of *quantum* of compensation) for one party to be completely right and the other completely wrong;[231]

- it amounts to placing the burden of the decision-making solely on the president of the tribunal, whereas a truly collective solution would undoubtedly

224 M. Lalonde, *supra* n 167, 645.

225 I have never been formally challenged; however, in one case I was so exasperated by the attitude of one of the parties' lawyers that I indulged in remarks that might have raise doubts about my impartiality. He complained about this and, despite friendly pressure from my co-arbitrators, I thought it best to defer.

226 A. Rogers, 'Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality', *Harvard International Law Journal*, 2023 Bocconi Legal Studies, 137-201.

227 M. Waibel and Y. Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration', January 2017, Tables 3 and 4 <https://www.yanhuiwu.com/documents/arbitrator.pdf> last accessed 17 July 2024.

228 See also *infra* pp. 58 to 59.

229 See the interesting personal opinions of judges *ad hoc* Lauterpacht and Franck under ICJ, 13 September 1993, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order - Further Requests for the Indication of Provisional Measures, Separate opinion of Judge *ad hoc* Lauterpacht, paras. 4-6; ICJ, 17 December 2002, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, Dissenting opinion of Judge *ad hoc* Franck, paras. 9-12.

230 This issue is very different from that concerning the predictability of the applicable law dealt with in Section 1. Right to the contrary, it could be alleged that, counter intuitively, the consistency of the positions of one arbitrator or another, impervious to arguments unfavourable to either the investor or the State, is likely to prevent the emergence of consistent case law to the opposite effect.

231 See *supra* pp. 38 to 42.

have a better chance of being accepted by both parties, and it reinforces the risk of what Yves Derains has called 'the 'arbitral terrorism' of a chairman deliberating only with himself';[232]

- as a result, it makes the appointment of the president a fundamental issue that sometimes turns into a headache;
- in a broader perspective, it certainly does not contribute to confidence in the neutrality of arbitrators 'in general', even if, individually, the sincerity of the persons concerned is in general not in question[233]: as it has been written, 'It is a far better practice to appoint a person who may, by reason of culture or background, be broadly in sympathy with the case theory to be put forward, but who will be strictly impartial when it comes to assessing the facts and evaluating the arguments on fact and law'.[234]

The radical solution proposed by some authors to abandon the practice of appointing arbitrators by the parties[235] is neither realistic nor probably desirable,[236] unless one renounces what makes arbitration special and attractive to the parties: the knowledge that they can count on a member of the tribunal who is particularly

232 Y. Derains, 'La pratique du délibéré arbitral', in *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, 2005, 221 and 224 – my translation; French original: '*le 'terrorisme arbitral' d'un président ne délibérant qu'avec lui-même*'. I have to say that in all the tribunals I have served on, the President has always been concerned to give real consideration to the views of his or her co-arbitrators. My other co-arbitrators are occasionally less open for reasons that have in some cases seemed to me more ideological than legal and one at least acted as 'super lawyer' for his appointing party.

233 See the decision on Professor Brigitte Stern's application for disqualification, which the Claimant intended to base on the number of her dissenting votes depending on whether the majority of the Tribunal had decided in favour of the State or the investor (*Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Bolivarian Republic of Venezuela*, *supra* n 167, para. 9).

234 'Chapter 4. Establishment and Organisation of an Arbitral Tribunal' in N. Blackaby, C. Partasides, and others., *Redfern and Hunter on International Arbitration*, sixth ed., OUP, 2018, 254. The 2022 edition of that book makes the same point specifically regarding the role of the President of the Tribunal: 'In addition to choosing an arbitrator with appropriate knowledge of the relevant area of law, it is essential for parties to recognise the importance of experience in international arbitration, particularly for a sole arbitrator or for the presiding arbitrator who is usually solely responsible for the proper and effective control of the proceedings. The sole or presiding arbitrator may have to perform this function against the background of differences of culture and legal training on the part of the parties and particularly of their counsel'.

235 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session, 28 Jan. 2020, A/CN.9/1004/Add.1, paras. 103-104; M. Langford, D. Behn, M.C. Malaguti, 'The Quadrilemma: Appointing Adjudicators', in *Future Investor-State Dispute Settlement, Academic Forum on ISDS Concept Paper* 2019/12, 13 Oct. 2019, 2.2.1 Institutional Appointment of Tribunal.

236 E. Sussman, 'The Debate: Unilateral Party Appointment of Arbitrators', *ABA Section of Int'l L*, 1(1), 2013, 2; see also Ch. Brower and Ch. Rosenberg, *supra* n 67, 9.

attentive to ensuring that their arguments are heard and understood. And there is nothing scandalous about the fact that they can make sure, when making the appointment, that the arbitrator in question has no prejudices hostile to their arguments; on the other hand, they cannot demand or even raise the question of a voting commitment in their favour.[237]

It can be considered that

– The very frequent coincidence of the views of the arbitrators, as expressed in their votes and dissenting opinions, with the views of the party that appointed them;

– The almost systematic recurrence of positions taken by certain arbitrators in favour of either the State or the investor;

– The massive confusion between the functions of arbitrator and counsel and the rarity with which conflicts of interest based on this ground are sanctioned,

are not condemnable in themselves.

The fact remains that the combination of these practices is likely to raise – and does raise – systemic doubts about the impartiality of arbitrators and, consequently, about the very integrity of the investor-State dispute settlement regime. Justice must not only be done but must be seen to be done. *Peccatum capitalis*.

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I did not include in my list of 'seven sins' the 'anti-Third World' bias[238] of which the investor-State dispute settlement regime is often accused. Although it continues to appear in some awards – particularly in relation to the grant and calculation of damages[239] – it is statistically inaccurate[240] and can hardly be retained during the current period marked by the rallying of many 'southern' countries to the liberal ideology in this area (albeit with a touch of political illiberalism), whose investors use the same instruments as those of Western countries to protect their own investments in those of the North. According to the 2024 ICSID Caseload - Statistics, 55% of the awards upheld claims in part or in full, 31% dismissed all claims and 14% declined jurisdiction.

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237 See D. Bishop and L. Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration', *Arb. Intl*. 14, 1998, 395, 395-396; C. Brower and C. Rosenberg, *supra* n 67, 14.

238 A convenient concept but one that is increasingly difficult to define.

239 See the partly dissenting and partly concurring opinion of B. Stern attached to *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 56.

240 S.D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, *supra* n 72, 144 *et seq*.

Is this enough to absolve investment dispute settlement of its seven key sins – and a few others? I doubt it. The causes of the abuses, whether venial or more worrying, that have been briefly analysed above, whether they affect the countries of the South or those of the North, are obviously multiple. But I cannot help thinking that they have their source above all in the luxuriant practices of Anglo-Saxon law firms, which often seem to me to be motivated more by maximising their profits than by the search for procedural efficiency.[241]

In addition to the lure of gain, there is an ideological bias in favour of economic liberalism – the two perhaps going hand in hand – which indeed inspires the system: the unshakeable belief in the benefits of foreign investment - which is less widely shared today than it was (at least in Western countries) when the system was established in the late 1960s. The aim was to remove investment disputes from the jurisdiction (or incompetence) of host country tribunals, which were suspected, in many cases not without some reason, of being biased and not independent of political authorities. This is probably still partly true, although the situation has improved (at least as regards the training of national judges). But today, the promoters of the system have been caught at their own game: they are in turn being brought before international arbitration tribunals, which are much more costly and not necessarily more sympathetic to their interests than national courts.

It seems rather utopian to try to return to the classic rule that it is the national courts of the host State that should decide on disputes concerning a foreign investment. Despite sporadic public outcry, States, let alone economic operators, remain overwhelmingly in favour of the investor-State dispute settlement regime and the investment arbitration community (or is it a lobby?) is undoubtedly strong enough to oppose a radical overhaul. Nevertheless, there seems to be a consensus for some significant reforms. In doing so, it would be good to keep in mind Emmanuel Gaillard's wise warning: 'one cannot forget that arbitration is intended for the parties and not for all the other actors that gravitate around it'.[242]

241 On this overall analysis, I largely agree with the conclusions of P. Eberhardt and C. Olivet. Olivet, 'Profiting from Injustice', *supra* n 167, *passim* and not. 15: 'As the number of international investment disputes has grown, arbitration has become a money-making machine in its own right'.

242 E. Gaillard, 'Sociology of International Arbitration', *supra* n 2, 4.

Investment Arbitration in the New Era: Engine or Obstacle in the Fight Against Climate Change?

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ABSTRACT

Climate change related disputes have been arising for quite a while. Sometimes they are related to States' efforts to embark in energy transition; other times, environmental concerns are advanced to justify some States' decisions in their relationships with investors. This article explores if investment arbitration is the right mechanism to deal with these disputes. To do so, it is the author's contention that criticism against investment arbitration must be seriously considered, as the main institutions, some academics and also arbitral tribunals have been doing in the last decade.

INTRODUCTION

Climate change is no longer a risk, but a reality; and one that continues to worsen every day for the planet and present and future generations. We no longer face a potential contingency, but an actual state of urgency. This is not a recent situation; it has been known for decades, since the First World Climate Conference organized

1 This humble contribution was originally published in Spanish in the *Revista Argentina de Arbitraje* (Universidad Austral), under the editorship of Professor Roque J. Caivano, to whom I would like to express my sincere gratitude.

in 1979 by the World Meteorological Organization (WMO). Given the irrefutable evidence, climate change has rightly climbed up the international agenda in recent years, perhaps now gaining the importance that it should always have had.

A key issue in the fight against climate change is the implementation of the energy transition, replacing fossil fuels with renewable energy. States have reached a consensus on certain commitments, thus taking an important step in the right direction. Now, however, the most challenging part remains: implementing said commitments on a global scale and across all sectors of the economy, which presents challenges for both public and private actors.

In this context, discussions on climate change have penetrated virtually all fields. Arbitration (particularly investment arbitration) has not been exempt and, in fact, has emerged as a central focus of debate. On the one hand, some see investment arbitration as an *obstacle* in the fight against climate change, mainly because the efforts of States to pass decarbonization policies carry the risk of potential lawsuits by investors with legacy fossil energy projects. On the other hand, the arbitration community has strongly defended the current arbitration regime, to the point of proposing it as the ideal *engine* to deal with the new generation of climate-related disputes. The two positions have been largely disconnected, each advancing arguments like mantras and leaving little room for reconciliation.

This article (i) explains the main concerns (or criticisms) that have been raised regarding investment arbitration in the fight against climate change; (ii) analyses those concerns from different angles, as well as the areas where the current arbitration system can be improved; and (iii) concludes that while investment arbitration is not necessarily an obstacle in the fight against climate change, the existing concerns must be seriously addressed to turn it into an engine in this battle.

I. THE AREAS OF TENSION BETWEEN INVESTMENT ARBITRATION AND THE FIGHT AGAINST CLIMATE CHANGE

States' mitigation commitments are mainly regulated in the following international instruments (which form part of what is known as the *climate change regime*): (i) the United Nations Framework Convention on Climate Change (UNFCCC);[2] (ii) the Kyoto Protocol till 31st December 2020;[3] and more recently, (iii) the Paris Agree-

2 The UNFCCC (1992, in force since 1994) established a general framework for international cooperation to fight climate change and achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' (Article 2; *see* also Article 4 on *commitments*).

3 The Kyoto Protocol (1997, in force since 2005) aims at reducing 'anthropogenic carbon dioxide equivalent emissions of greenhouse gases' (Article 3).

ment.[4] The latter defines how States will implement their commitments under the UNFCCC to keep the increase in global warming below two degrees Celsius (and preferably at 1.5 degrees Celsius) compared to pre-industrial levels. These ambitious goals require immediate and, in some respects, drastic action. Among other measures, fossil energy must be replaced with renewable energy, translating into regulatory changes to phase out, prohibit, or limit fossil energy projects and encourage *green* projects. The concrete strategy and pace of implementation of these measures depends on each State and the specific commitments assumed by them.

This climate change regime has given rise to an avalanche of disputes of all kinds, including litigation before national courts,[5] commercial arbitrations,[6] and inter-state disputes before international tribunals,[7] among others.[8] Investment arbitration is another particularly relevant category.[9]

Concerns regarding investment arbitration revolve around the tension between, on the one hand, the obligation of States to adopt decarbonization measures or mitigation actions and, on the other hand, the protection that investment treaties offer to foreign investors and the consequent risk of arbitration claims for any economic damages that regulatory changes may cause to existing fossil energy projects and activities. It is said that this tension between the State's *right to regulate* and investment protection could lead to a *regulatory chill*, thus hindering the much-needed energy transition.

4 The Paris Agreement (2015, in force since 2016) is the first instrument to establish binding commitments to fight climate change (Article 2).

5 The last few years have seen a wave of climate change litigation across the globe and in different forms, including: (i) lawsuits filed by non-governmental organizations (NGOs) claiming that States should increase their efforts against climate change; (ii) corporate disputes over how to align corporate strategies with decarbonization policies; and (iii) *greenwashing* disputes over misleading information about alleged *green* projects. *See* Joana Setzer and Catherine Higham, 'Global trends in climate change litigation', *London School of Economics* (2021), p. 5.

6 A report by the International Court of Arbitration of the International Chamber of Commerce (ICC) highlighted that disputes related to sectors relevant to climate change (such as construction, engineering, and energy) account for a significant share of its cases. *See* 'Resolving Climate Change Related Disputes through Arbitration and ADR', *ICC* (2019), § 3.2.

7 For example, the Commission of Small Island States on Climate Change and International Law (COSIS), requested an advisory opinion from the International Tribunal for the Law of the Sea to clarify the scope of the obligations of States to protect the marine ecosystem under the United Nations Convention on the Law of the Sea (ITLOS Case No. 31/2022).

8 The United Nations General Assembly requested an advisory opinion from the International Court of Justice on the obligations of States in relation to climate change under various international treaties (General Assembly Resolution No. A/77/L.58, March 1, 2023).

9 Climate change presents an array of challenges in the field of international arbitration. Another interesting aspect, which exceeds the scope of this article, is how to adapt the arbitration process to reduce its carbon footprint; for example, by increasing virtual hearings and the widespread use of digitized documents, among other modalities.

This concern is mainly related to one of the most common standards of investment protection embodied in investment treaties: the *fair and equitable treatment* (FET) standard.[10] FET is a broad standard that, according to abundant case law, protects, among other things, the *legitimate expectations* generated by the State to attract investors with a view of good and long-lasting projects. Thus, if an investor invested years ago in a fossil energy project because the legal framework offered optimal conditions, the abandonment of such a legal regime could, in certain circumstances, affect its legitimate expectations. Examples of such disputes include the following:[11]

- *Westmoreland Mining Holdings v. Canada*, where the investor owned coal mines and alleged that, after advancing plans to cancel coal consumption, the government compensated coal-fired power generators (for having to change their business model) In contrast, it did not compensate the mining companies for their losses.[12]

- *Koch Industries v. Canada*, concerning measures that cancelled the so-called *emission trading markets*.[13]

- *Uniper v. The* Netherlands, in relation to the Dutch Climate Change Act (of 2019), alleging that it led to the closure of coal-fired power plants to achieve the goals of the Paris Agreement.[14]

There is also a long record of investment arbitrations concerning environmental issues, even if not directly linked to climate change or the Paris Agreement, such as *Vattenfall v. Germany*, concerning the cancellation of a nuclear power plant construction project, in the context of Germany's abandonment of nuclear power in the wake of the Fukushima disaster (in 2011).[15]

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10 Of course, other investment protections such as the prohibition of expropriation without compensation are also relevant.

11 *See* other examples of such disputes in Risteard de Paor, 'Climate Change and Arbitration: Annex Time before there won't be A Next Time', *Journal of International Dispute Settlement* (vol. 8/1, 2017), pp. 183-186.

12 *Westmoreland Mining Holdings v. Canada* (ICSID Case No. UNCT/20/3), Notice of Arbitration, August 12, 2019, §§ 4-11; Final Award, §§ 5, 252. A potential claim by an Australian miner against Spain has also been reported, in relation to an energy transition law that banned uranium mining. *See* 'Miner threatens Spain over uranium ban', *Global Arbitration Review,* February 1, 2021.

13 *Koch Industries v. Canada* (ICSID Case No. ARB/20/52), Request for Arbitration, December 7, 2020, §§ 2-9.

14 Uniper eventually withdrew its claim because it reached a settlement agreement with the Netherlands. *Uniper SE et. al. v. The Netherlands* (ICSID Case No. ARB/21/22), Order Discontinuing Proceedings, March 17, 2023, §§ 14-21.

15 This claim was initiated in 2012, prior to the Paris Agreement. It has been reported that the parties reached a settlement agreement. *Vattenfall v. Germany* (ICSID Case No. ARB/12/12), Order Discontinuing Proceedings, November 9, 2021, § 313; 'Germany to pay nuclear operators 2.6 billion euros for plant closures', *Reuters*, March 5, 2021.

It is, therefore, understandable that, in this context, some tension transpires between the investment arbitration regime and the energy transition goals. The key question, however, is how serious and irreconcilable that tension is and whether it requires a total abandonment of the current investment arbitration regime, including its (few or many) advantages.

II. THE SPECIFIC CONCERNS ABOUT THE ROLE OF INVESTMENT ARBITRATION IN THE FIGHT AGAINST CLIMATE CHANGE

Concerns about the legitimacy of investment arbitration date back some time ago, when different groups (including States, civil society, academia, and the press) began to inquire about this dispute resolution mechanism, especially when used to resolve claims against States that involve public interest.[16] The initial criticisms escalated around 2015 when the European Union (EU) highlighted certain shortcomings of the system, mainly: (i) the ample and broad standards of protection in investment treaties; (ii) the discretion of arbitrators to interpret those standards; (iii) certain doubts about the independence and impartiality of arbitrators (due to the involvement of the parties in their appointment, as well as the trend for arbitrators to also act as counsel or experts); (iv) inconsistencies in the case law; and (v) lack of transparency.[17] To resolve these issues, the European Union proposed the creation of a permanent multilateral investment court, including an appellate instance; a proposal that soon gained the support of other States and renowned specialists.[18]

This proposal led to the formation of a specialized working group at the United Nations Commission on International Trade Law (UNCITRAL), in which representatives of the States, together with specialists in international law, have

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16 Michael Waibel et. al., 'The Backlash against Investment Arbitration: Perceptions and Reality', *Kluwer Law International* (2010); Gabrielle Kaufmann-Kohler and Michele Potestà, 'Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?' *CIDS Report*, June 3, 2016, §§ 15-16. These early instances in which arbitration (including commercial arbitration) came under scrutiny included a series of press articles in the *New York Times*. *See* Michael McIlwrath, 'Professionalizing Arbitration: A Response to the New York Times Articles on Privatizing Justice' (*Kluwer Arbitration Blog,* November 4, 2015) <https://arbitrationblog.kluwerarbitration.com/2015/11/04/professionalizing-arbitration-a-response-to-the-new-york-times-articles-on-arbitration/> last accessed 13 July 2024.

17 Gabrielle Kaufmann-Kohler and Michele Potestà, *supra* n 16, §§ 18-23.

18 *Ibid.*; Gabrielle Kaufmann-Kohler and Michele Potestà, 'The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards', *CIDS Supplemental Report*, November 15, 2017. *See*, also, the European Commission's website: <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en> last accessed 13 July 2024.

been discussing a potential reform of the investment arbitration system (Working Group III).[19] With moments of greater and lesser traction, Working Group III continues to meet periodically to discuss the most extreme proposal (the creation of a permanent court), as well as other intermediate alternatives (such as the creation of an appeal mechanism to complement the current system). Regardless of the final outcome, this has undoubtedly become a key space for discussion.

The concerns became more and more frequent and were reinforced when the climate situation burst onto the global agenda, despite not being a new issue. Thus, the fight against climate change and its interaction with investment arbitration became one of the main axes of the debate. Since then, the discussion has expanded to new horizons. In 2022, a report by the United Nations Intergovernmental Panel on Climate Change highlighted the need for immediate action and suggested that investment treaties create a regulatory chill.[20] In the same vein, in late 2023, one of the many special rapporteurs appointed by the UN Human Rights Council submitted a report to the General Assembly on the obstacles that investment arbitration would pose to the battle against climate change.[21] Advancing numerous criticisms, this report argues that investment arbitration has dire consequences for the fight against climate change, environmental protection, and human rights.[22] These criticisms are not new but reflect a more generalized discontent, in line with those discussed within Working Group III. Needless to say, bringing this discussion to the United Nations, an international organization where States are well represented, is really valuable.

Of the range of criticisms raised in recent years, some have more merit than others, but, in any case, all of them are relevant and must be analysed. This analysis requires some nuances and clarifications to avoid misunderstandings about the functioning of investment arbitration.

A. Investor bias

A generic (but equally strong) criticism is that investment arbitration prioritizes the interests of investors over those of the States.[23] The truth, however, is that there is no empirical evidence of this. The number of investment arbitrations (concluded and ongoing) is significant, and each case is different (both in the facts and the applica-

19 *See* UNCTAD's website: <https://uncitral.un.org/working_groups/3/investor-state> last accessed 13 July 2024.

20 United Nations Intergovernmental Panel on Climate Change, 'Climate Change 2022: Mitigation of Climate Change', *Cambridge University Press* (2023), p. 1499.

21 David R. Boyd, 'Paying polluters: the catastrophic consequences of investor-state dispute settlement for climate and environmental action and human rights', *United Nations*, Doc A/78/168, July 13, 2023.

22 *Ibid.*, § 11.

23 *Ibid.*, §§ 7, 12, 34, 73.

ble law), making it difficult (if not impossible) to categorically affirm a general trend. Even looking at the success rate of investors, the most basic (and perhaps unfair) metric, this does not prove an obvious bias but rather shows relatively balanced results.[24] One of the most comprehensive databases on the subject, administered by the United Nations Conference on Trade and Development (UNCTAD), shows that of the 924 public investment arbitrations concluded as of July 2023, some 344 were decided in favour of States, and 260 were decided in favour of investors.[25] Of course, the somewhat negative perception of the general public must still be taken into account, although such perception is hardly corroborated by the existing data.

B. Regulatory chill (due to the threat of lawsuits).

More specifically, many claim that investment arbitration would lead to a *regulatory chill*.[26] This concern is theoretically understandable and should be addressed. However, it also cannot be taken lightly as it is difficult to establish a direct link between the risk of investor lawsuits and the possibility of implementing new decarbonization policies. To some extent, this criticism relates to the *number* of claims against States for regulatory changes in the implementation of *green* policies,[27] but only a few cases are directly related to climate change.[28] While these cases continue to increase, many of them remain pending and their outcome is uncertain. It is thus premature to predict how tribunals will interpret the interaction between investor protection and climate commitments. Similarly, many of the oft-cited cases in recent years (e.g., against Spain, Italy, or the Czech Republic) concern a different

24 For example, the Special Rapporteur indicates that investors have won approximately 60% of the cases (between 1987 and 2017). *Ibid.*, § 31. An UNCTAD report indicates that of the hundreds of environmental and fossil fuel cases (between 1987 and 2002), investors have won less than 40% of the time. *See* 'Treaty-based investor-state dispute Settlement cases and climate action', *UNCTAD* (vol. 4, September 2022), p. 3 (figure 2), p. 5 (figure 6).

25 *See* UNCTAD Investment Policy Hub, <https://investmentpolicy.unctad.org/investment-dispute-settlement> last accessed 13 July 2024, home page. In the remaining cases: (i) the State was found liable without awarding damages to the investor; (ii) the parties reached a settlement agreement; or (iii) proceedings were discontinued.

26 David R. Boyd, *supra* n 21., §§ 49-52.

27 If the mere threat of claims against the State was a valid reason to criticize a justice system, then State courts should be shut down as the number of climate change litigation cases against States is overwhelmingly higher than in arbitration. A report by the London School of Economics indicates that, as of 2021, there were at least 1,800 litigations before State courts. Notably, in these lawsuits, States are being demanded to implement even more aggressive decarbonization measures. *See* Joana Setzer and Catherine Higham, *supra* n 5, p. 5.

28 One study found that, of more than sixty awards rendered in recent years (under the Energy Charter Treaty), while some of them referred to climate change, none discussed the topic substantially. *See* Anja Ipp, Annette Magnusson and Andrina Kjellgren, 'The Energy Charter Treaty, climate change and clean energy transition: a study of the jurisprudence', *Climate Change Counsel* (2022), p. 32. *See* Statement of the Permanent Court of Arbitration to the Sixth Committee of the United Nations General Assembly, Session No. 73 (October 2018), § 26.

situation; investors with renewable energy projects (presumably needed under the Paris Agreement) and their allegation that the States have altered the regulatory framework, rendering the projects unviable.[29]

States have committed themselves to respect certain guarantees expressed in investment treaties and also, more recently, to curb climate change. Both freely assumed obligations are valid and must be honoured. While there may be some tension between the two types of obligations, this does not necessarily mean that compliance with one precludes compliance with the other. As some tribunals have explained, even if investment treaties are considered to provide for some level of legal stability, this does not entail an *ad eternum* freezing of the regulatory framework and does not prevent the State from adjusting such framework in the face of genuine changes of circumstances. The exercise of this undeniable regulatory power, however, is not without consequences. The State's right to regulate may allow changes to the regulatory framework that the State itself promoted (and any specific promises made) to attract foreign investment when it needed it. However, if certain factual and legal conditions are met, the State may be required —because it is voluntarily obliged to do so— to compensate the investors affected by that decision. Of course, as the energy transition progresses, future regulatory changes will become more predictable for investors, who will be more constrained from invoking protections to their (abstract) expectations.[30] The question of which regulatory changes will fall into this category should be analysed on a case-by-case basis.[31]

Even if the tension is truly irreconcilable (which does not seem obvious), ways can still be found to fine-tune the balance between protecting investors and protecting the planet from the adverse effects of global warming. States can amend investment treaties or issue joint interpretations to adjust the available protections and ensure that they do not affect policies that genuinely seek to combat climate change. For example, States can carve out treaty protections for fossil energy projects.[32] Another alternative is to '*contractualize'* investment protections (as was more common in the past), thus allowing States to assess the value of specific projects and customize the degree of protection they deserve, as well as to impose obligations on investors (e.g., with respect to environmental preservation).[33] One difficul-

29 *See* Wendy Miles and Merryl Lawry-White, 'Arbitral Institutions and the Enforcement of Climate Change Obligations for the Benefit of all Stakeholders: The Role of ICSID', *ICSID Review - Foreign Investment Law Journal* (vol. 34/1, 2019), pp. 18-22.

30 Lucy Greenwood, 'The Canary Is Dead: Arbitration and Climate Change', *Journal of International Arbitration* (vol. 38, 2021/3), p. 317.

31 Novel issues will also arise and tribunals will have to analyze them carefully, such as the valuation of fossil projects in a world that is transitioning to *green* projects.

32 Some investment treaties have expressly limited the State's obligation to maintain legal stability. *See*, e.g., Hungary-Kyrgyzstan Bilateral Investment Treaty (2020), Article 3(2).

33 States could also bring claims against investors. By way of example, Peru initiated a contractual arbitration against an investor, which was later withdrawn. *Peru v. Caravelí Cotaruse Transmisora de Energía* (ICSID Case No. ARB/13/24).

ty of this option is the need to negotiate each contract or to prepare template contracts for certain categories of projects (e.g., by sector or geographic area, among other criteria). In this regard, a working group recently formed by the International Institute for the Unification of Private Law (UNIDROIT) and the ICC is working on international investment contract models.[34] This initiative demonstrates good efforts to address the current criticisms.

C. Environmental protection

Another criticism is that investment treaties do not adequately regulate environmental protection issues. For example, the UN Special Rapporteur on the human right to a clean, healthy, and sustainable environment suggests that investment treaties do not address environmental issues and that these are overlooked by tribunals.[35] While investment treaties have been generally silent on climate change, some treaties do refer to environmental issues, in various forms.[36] For example:

- The 2012 U.S. Model Bilateral Investment Treaty contains a section regulating environmental issues.[37]
- India's 2005 Model Bilateral Investment Treaty obliges investors to respect environmental laws, and clarifies that the treaty does not prevent the State from taking measures it deems necessary to preserve the environment.[38]
- The 2016 Canada-European Union Comprehensive Economic and Trade Agreement (CETA) provides that the State parties maintain their right to regulate to achieve legitimate policies on environmental matters (among other aspects), further clarifying that the exercise of this right to regulate does not violate the treaty, even when affecting investors.[39]
- The 2016 Trans-Pacific Partnership (TPP) states that investment protections do not prevent States from adopting measures to preserve the environment.[40]

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34 This is a collaboration between UNIDROIT and the ICC Institute of World Business Law. *See* <https://www.unidroit.org/work-in-progress/investment-contracts-upicc/> last accessed 24 July 2024.

35 David R. Boyd, *supra* n 21, § 7.

36 Wendy Miles and Merryl Lawry-White, *supra* n 29, pp. 12-14; Markus Gehring and Marios Tokas, 'Synergies and Approaches to Climate Change in International Investment Agreements Comparative Analysis of Investment Liberalization and Investment Protection Provisions in European Union Agreements', in S Maljean-Dubois, H. Ruiz Fabri and S. Schill (eds.), 'Special Issue: International Investment Law and Climate Change', *Journal of World Investment & Trade* (vol. 23, 2022), pp. 782-789.

37 U.S. Model Bilateral Investment Treaty (2012), Article 12.

38 India's Model Bilateral Investment Treaty (2005), Articles 12.1(iii), 16.1(v).

39 Canada-European Union Comprehensive Economic and Trade Agreement (2016), Preamble, Article 8.9(1) and (2).

40 Trans-Pacific Partnership (2016), Article 9.16.

- The 2016 Morocco-Nigeria Bilateral Investment Treaty establishes a broad regulatory power on environmental matters. It obliges investors to maintain an environmental monitoring system and, in particular, to maintain an ISO certification on environmental management.[41]

Also, some treaties already include references to sovereign obligations on climate change in different forms and scope.[42] While one would like to see this trend grow faster, these changes inevitably take time; ultimately, the States could accelerate the pace through new treaties. For example:

- The 2019 Netherlands' Model Bilateral Investment Treaty expressly recognizes the obligations under the Paris Agreement, noting also the importance for investors to analyze, identify, and mitigate the potential environmental risks of their projects.[43]

- The 2023 Investment Protocol to the African Continental Free Trade Agreement (AfCFTA) mentions the obligation for States, in accordance with their domestic climate change policies, the principle of Common but Differentiated Responsibilities, and relevant international climate change instruments, to promote and facilitate investments that support actions to mitigate greenhouse gas emissions and measures to adapt to the negative impacts of climate change.[44]

- A study identified more than sixty investment treaties that refer to the Global Compact, the Sustainable Development Goals (SDGs), and the principles of corporate social responsibility, all instruments prepared by the UN.[45] These standards, however, remain little used in practice.

Obviously, the needs of society (as well as the perception of these needs) may vary over time. Already in 1994, the Preamble of the Energy Charter Treaty (ECT) expressly referred to climate change and the urgent need for an energy transition. It also refers to environmental issues and sovereign obligations in other environmental instruments, requiring an effort to minimize environmental damage from energy projects and to develop renewable energies.[46] Three decades later, however, certain changes in circumstances, and the accumulated practical experience, have led several States to conclude that the ECT is no longer suitable to address energy-related matters in the current climate juncture.

41 Morocco-Nigeria Bilateral Investment Treaty (2016), Articles 13, 18(1).

42 Markus Gehring and Marios Tokas, *supra* n 36, pp. 782-786.

43 The Netherlands' Model Bilateral Investment Treaty, Articles 6.6 and 7.3.

44 Protocol on Investment to the African Continental Free Trade Agreement, Article 26.

45 'Corporate Responsibility (CR) Series', *Lalive* (issue 5, 2022), p. 1.

46 Energy Charter Treaty (1994), Preamble, Article 19.

For their part, several tribunals have considered the importance of environmental protection and even applied or referred to some extent to certain principles of international environmental law. Of course, whether the integration of environmental concerns and application of these principles is correct depends on the analysis of each specific case. For example:

- In *Perenco v. Ecuador*, the tribunal held that, given the existence of two possible reasonable interpretations of the local laws, the more environmentally protective interpretation should take precedence.[47]
- The *Eco Oro v. Colombia* tribunal recognized the State's obligation to protect the environment. Arbitrator Philippe Sands KC issued a dissenting opinion arguing that this type of case requires caution due to the challenges presented by climate change and consideration of the *precautionary principle*.[48]
- In *David Aven v. Costa Rica*, concerning the discovery of wetlands that led to the cancellation of a tourism project, the tribunal rejected the claim based on certain requirements under domestic law.[49]
- In *Cortec Mining v. Kenya*, the tribunal denied jurisdiction because the investor had breached its environmental obligations under domestic law.[50]
- In *Lee-Chin v. The Dominican Republic*, the tribunal noted that, as an adjudicator of transnational disputes, it could not ignore the environmental risks involved in the case, recognizing that environmental protection is an essential priority in all human activity and that, in certain circumstances, environmental measures may be necessary to ensure national security interests.[51]

D. Protection of human rights

Criticism extends beyond the subject of climate change, covering human rights issues such as the right to a healthy environment.[52] This criticism is valid, although

47 *Perenco v. Ecuador* (ICSID Case No. ARB/08/6), Interim Decision on Environmental Counterclaim, August 11, 2015, § 495.

48 *Eco Oro v. Colombia* (ICSID Case No. ARB/16/41), Partial Dissent of Professor Sands, September 9, 2021, §§ 28, 33.

49 *David Aven v. Costa Rica* (ICSID Case No. UNCT/15/3), Final Award, September 18, 2018, § 585.

50 *Cortec Mining v. Kenya* (ICSID Case No. ARB/15/29), Award, October 22, 2018, §§ 345-347, 364-365.

51 *Lee-Chin v. Dominican Republic* (ICSID Case No. UNCT/18/3), Final Award, October 6, 2023, § 238. *See* Rodrigo Macin and Liliana Perez, 'Environmental Protection Policies and Foreign Investment in Latin America: Lessons from Michael Anthony Lee-Chin v. the Dominican Republic' (*Kluwer Arbitration Blog,* January 7, 2024) <https://arbitrationblog.kluwerarbitration.com/2024/01/07/environmental-protection-policies-and-foreign-investment-in-latin-america-lessons-from-michael-anthony-lee-chin-v-the-dominican-republic/> last accessed 13 July 2024 .

52 David R. Boyd, *supra* n 21, §§ 53, 60, 74.

it is also difficult to generalize. For instance, several tribunals have recognized the relevance of human rights and their duty to take them into account, including the right of access to water.[53] The fact that human rights considerations may become relevant in certain cases does not mean that they cannot be reconciled with the protections promised to investors. In this regard, the tribunal in *Suez v. Argentina* explained that human rights obligations (notwithstanding their relevance) do not excuse States from honouring their investment treaty commitments, and States must respect both.[54] This explanation does not imply that the way in which investment treaties (and tribunals) deal with human rights cannot (or should not) be improved.

E. Excessive confidentiality (or secrecy)

Many label arbitration as a *secretive* forum with no room for public participation.[55] While arbitration is traditionally perceived as confidential (which does not mean it always is), the reverse paradigm has developed quite rapidly in investment arbitration.[56] Starting with the fact that the existence of cases has almost always been public, further trends towards transparency have only increased thereafter. Even before the creation of specific rules on transparency, tribunals understood the public interest involved and established rules to allow the participation of interested third parties (*amicus curiae*) or access by the general public to certain information.[57] These (and other) trends have been embodied, for example, in the UNCITRAL Rules, the Rules of the International Centre for Settlement of Investment Disputes (ICSID), and in other modern arbitration rules.[58] Much remains to be done in terms of transparency, but the arbitral community is on the right track.

53 *Suez v. Argentina* (ICSID Case No. ARB/03/17), Decision on Liability, July 30, 2010, § 240; *Urbaser v. Argentina* (ICSID Case No. ARB/07/26), Award, December 8, 2016, §§ 1193-1199. *See* Ursula Kriebaum, 'The Right to Water Before Investment Tribunals', *Brill,* November 28, 2018, pp. 24, 28. For its part, the tribunal in *Bear Creek v. Peru* discussed the concept of *social license* for the preservation of indigenous communities in relation to the exploitation of natural resources. *Bear Creek Mining Corporation v. Peru* (ICSID Case No. ARB/14/21), Award, November 30, 2017, § 406.

54 *Suez v. Argentina* (ICSID Case No. ARB/03/17), Decision on Liability, July 30, 2010, § 240.

55 David R. Boyd, *supra* n 21, §§ 21-26.

56 Diego P. Fernández Arroyo, 'La transparencia como paradigma del arbitraje de inversiones', in Attila M. Tanzi et. al., *International Investment Law in Latin America: Problems and Prospects*, Brill, 2016, pp. 244-271.

57 Farouk El-Hosseny and Ezequiel H. Vetulli, 'Amicus Acceptance and relevance: The Distinctive Example of Philip Morris v. Uruguay', *Netherlands International Law Review* (vol. 64, 2017), pp. 76-77. It is worth noting that, on the occasions when hearings have been broadcasted, public interest has been limited.

58 *Ibid.*, pp. 78-86.

F. Arbitrators also acting as counsel or experts (*double hatting*)

Another criticism is the widespread practice of many arbitrators who also act as counsel and/or experts in other cases.[59] This criticism goes beyond the issue of climate change, but is one of the most legitimate concerns. While it cannot be ruled out that a person may diligently wear the *arbitrator hat* in some cases and the *counsel (or expert) hat* in others (which depends on subjective factors), it is understandable that this circumstance creates reasonable doubts among users. These doubts naturally increase when dealing with sensitive issues of public interest, such as climate change. Although perhaps not as quickly as it should, the arbitral community has taken steps (some large and some smaller) to address this concern. For instance, UNCITRAL and ICSID have published a Code of Conduct setting forth rules to limit the practice of *double hatting*.[60]

G. Amount of the damages claimed

Another circumstance often said to aggravate the consequences of investment arbitration is that the amounts at stake can reach hundreds of millions (if not billions) of dollars, mainly for lost profits. On this point, it should be noted that many investment cases relate to large projects, where damages can truly reach those figures, although there are also instances in which the amounts claimed can appear to be *inflated*, at least at first sight. In fact, even when they admit a claim, arbitrators tend to award compensation significantly lower than that requested by the investor.

In view of this, the Special Rapporteur recommends limiting the compensation that investors can claim, equivalent to the sunk costs and excluding lost profits.[61] It goes without saying that economic compensation only proceeds if the tribunal finds that the State violated its obligations in the first place. Once liability is established, limiting compensation for an investment operating as a going concern to the sunk costs may, depending on the circumstances, appear to be arbitrary. This, moreover, might be contrary to the principle of customary international law of full reparation that requires compensation to, as far as possible, 'wipe out all the consequences of the illegal act'.[62] Loss of profits is generally accepted as an element of just compensation under international law, as well as in comparative law. From a more practical standpoint, leaving investors who commit hundreds of millions of

59 David R. Boyd, *supra* n 21, §§ 27-29.

60 UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (2023), Article 4. Among other specifications, the norm states: 'Unless the disputing parties agree otherwise, an Arbitrator shall not act concurrently as a legal representative or an expert witness in any other proceeding involving: (a) The same measure(s); (b) The same or related party (parties); or (c) The same provision(s) of the same instrument of consent.'

61 David R. Boyd, *supra* n 21, §§ 30-32.

62 *Chorzów Factory (Germany v. Poland)*, PCIJ (Series A, No. 13 of 1928), p. 47.

dollars (often through a complex financing structure involving multiple parties) at the mercy of the State's conduct, with only the possibility of recovering their sunk costs, may seem unrealistic.

H. Proposal to abandon investment treaties

On the basis of the above criticisms, the most radical proposals aim at terminating investment treaties[63] or, at least, ending recourse to arbitration. These proposals, however, are not so simple to implement. Treaties are governed by their own terms, as well as by international law. The practical effect of terminating treaties is not immediate, by virtue of the so-called *sunset clauses*, pursuant to which treaties remain in force for several years after their termination. Thus, in a theoretical scenario where all treaties are terminated today, they would still remain applicable at dawn tomorrow (and for several more years). The situation might be different if States were to *amend* treaties by common agreement, which would be hard to coordinate, especially with respect to multilateral instruments. That said, States are already taking action in this direction, some slowly and others with more dynamism.[64] For instance, the new treaty between Mexico, the United States, and Canada (which replaces NAFTA) restricts access to arbitration.

Another example is the exodus from the ECT for various reasons, including its alleged incompatibility with the energy transition. On the other side of the spectrum, there is a proposal to modernize the ECT to contemplate the Paris Agreement commitments, for example, through option clauses for fossil fuel investments.[65] Likewise, the EU continues its policy against investment arbitration, proposing its replacement with a permanent multilateral investment court. This situation illustrates the tension between the different positions and some efforts to find an intermediate solution.

I. Proposal to resolve investment disputes before the local courts

In a world without investment treaties, investors should submit any claims before the local courts of the host state, as proposed by the Special Rapporteur.[66] This

63 David R. Boyd, *supra* n 21, §§ 74-75.

64 An UNCTAD report indicates that, between 2013 and 2022, States have terminated some 400 investment treaties. *See* 'Trends in the investment treaty regime and a reform toolbox for the energy transition', *UNCTAD* (vol. 2, August 2023), p. 4 (figure 3).

65 *See* Johannes Tropper and Kilian Wagner, 'The European Union Proposal for the Modernisation of the Energy Charter Treaty - A Model for Climate-Friendly Investment Treaties?' in S Maljean-Dubois, H Ruiz Fabri and S Schill (eds.), *supra* n 36, pp. 821-824.

66 David R. Boyd, *supra* n 21, § 75(c)(v).

return to the old ideas of Carlos Calvo may be valid but not necessarily obvious. States' resources are usually limited, and expecting the judiciary to resolve such large and complex disputes on technical issues in a reasonable time is unrealistic (depending on the country in question). In fact, when States have had claims against investors, they have brought them as counterclaims in the same arbitration rather than before the local courts.[67] States are also free to agree that the dispute must first be submitted to their local courts, as many treaties provide by means of the *litigation requirement* (usually for 18 months), a mechanism that has rarely led to a real resolution of the dispute. In any case, the domestic law applied by the courts often contains guarantees similar to those in investment treaties, for example, that an expropriation requires compensation.[68]

As can be seen, some of these criticisms have to do with the *applicable law* (i.e., the substantive content of investment treaties), and others with arbitration as a *mechanism* for resolving disputes. While some criticisms have more merit than others, it cannot be denied that there is widespread dissatisfaction among users and civil society.[69] In this context, the arbitral community must come to terms with the fact that it is losing the *fight* with public opinion, as warned by Alexis Mourre.[70] The arbitral community should not consider itself threatened but rather embrace the criticism to foster constructive changes. Like any justice system, investment arbitration is not perfect, and as long as the criticisms are legitimate, they should be discussed and appropriately addressed. In fact, certain criticisms on which there is consensus (although this is always debatable), far from being ignored, are at the center of the debate, and possible solutions are being considered; for example, in Working Group III, with the active participation of States. This is the right way forward.

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67 *See*, for example, *Urbaser v. Argentina* (ICSID Case No. ARB/07/26), Award, December 8, 2016, § 1110; *David Aven v. Costa Rica* (ICSID Case No. UNCT/15/3), Final Award, September 18, 2018, § 689; *Perenco v. Ecuador* (ICSID Case No. ARB/08/6), Interim Decision on Environmental Counterclaim, August 11, 2015, § 5; and *Burlington v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Liability, December 14, 2012, § 87.

68 For example, in *Vattenfall v. Germany*, the German Constitutional Court itself confirmed that the investor should be compensated. *See* Nikos Lavranos 'The German Constitutional Court Judgment in the Vattenfall case: Lessons for the ECT Vattenfall Arbitral Tribunal', (*Kluwer Arbitration Blog*, December 29, 2016) <https://arbitrationblog.kluwerarbitration.com/2016/12/29/german-constitutional-court-judgment-vattenfall-case-lessons-ect-vattenfall-arbitral-tribunal/> last accessed 13 July 2024.

69 The Queen Mary University of London's survey on the Future of International Energy Arbitration (2022) indicates that only 25% of respondents considered arbitration to be appropriate for resolving climate change disputes (p. 6).

70 'We're losing the ISDS fight, warns Mourre', *Global Arbitration Review,* January 19, 2024.

III. A CLOSER LOOK INTO THE ROLE OF INVESTMENT ARBITRATION IN THE FIGHT AGAINST CLIMATE CHANGE

Despite being valid, many of the above criticisms focus on only one side of the battle against climate change: how to end fossil energy/fuel projects. However, the other side of the coin should not be ignored: a broad matrix of new investments is needed to implement renewable energy projects. It is uncontroversial that the goals of the Paris Agreement can only be achieved through substantial investment and climate finance, as the required technology and infrastructure are highly sophisticated and, hence, costly.[71] The International Renewable Energy Agency has estimated that achieving the relevant targets would require approximately US$ 550 billion annually.[72] While this presents attractive opportunities for investors, at the same time, the success of potential projects is subject to State regulation and the risk of regulatory abuse. Thus, the interaction between States and foreign investors will only grow.

In this scenario, genuine disputes may arise when the parties have different understandings of how a particular situation should be regulated. It cannot be assumed that States will always act within the contours of the law, and pretending that investment claims will disappear is unrealistic. For instance, just as States sometimes invoke a *state of necessity* to justify their acts and the discussion focuses on the link between the alleged emergency and the concrete measures, so too can there be discussions about whether certain measures affecting fossil energy projects are truly necessary under the Paris Agreement. If a State cancels a fossil energy project without respecting due process, however valid the underlying objective, it should not be surprising to see investors filing a claim for unfair and inequitable treatment, although its outcome will depend on the factual and legal elements of the specific case. Similarly, if a State cancels several fossil energy projects and only compensates local investors, foreign investors are likely to file a discrimination claim. In practice, cases are not that simple; energy projects being large, technically complex, and subject to multiple regulations, it is impossible to predict all the potential situations, so each case requires a rigorous analysis of the facts and the applicable law.

This reality requires a neutral, specialized, efficient, and sophisticated mechanism to resolve disputes. Historically, arbitration has met this need with reasonable effectiveness. Arbitration offers a combination of sophistication and flexibility that

71 Green hydrogen, for example, is as attractive as it is expensive. This is particularly relevant in Latin America, where vast quantities of natural resources are at rest.

72 Risteard de Paor, *supra* n 11, p. 190.

allows the process to be adapted to any type of dispute,[73] including cases on environmental issues and climate change. In fact, States are regular users of arbitration for inter-state disputes, including environmental and climate change cases,[74] thus confirming its advantages.

Another key issue on the international agenda is progress toward sustainability. It should be remembered that this is not only linked to the environment but also to other aspects. For instance, the United Nations Sustainable Development Goals (SDGs) refer to the promotion of access to justice, both nationally and internationally.[75] Arbitration has all the qualities to achieve this important goal. While it is not proven that the current arbitration regime drives investment (or that its absence would halt investment),[76] it is undeniable that such a regime is an important guarantee for investors who, in fact, have used it repeatedly. It is worth remembering that virtually all investment treaties offer the possibility of submitting disputes to the local courts, and no investor opts for this option. For example, investors might not invest in countries listed at the bottom of the transparency and rule of law rankings (which unfortunately exist) or would do so on other terms if the only recourse against adverse State measures was the local judiciary.

Some argue that abandoning the current arbitration regime would not affect the flow of investment. It is hard to find an answer to this question. However, entering this new era that requires the highest levels of investment in history by withdrawing the protections for foreign investors may not be the most sound strategy. Investors commit significant amounts of capital with a view to obtaining a return; their expected return is subject to multiple factors, including the risk of regulatory changes. The need for investment, on the one hand, and the investor's expectations, on the other, need to be balanced in light of the common objective to curb climate change.

Sometimes, the States themselves may engage in behaviour that affects the environment (perhaps unintentionally) to the detriment of the goals of the Paris Agreement. Investment arbitration could also assist in these situations by

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73 Wendy Miles and Merryl Lawry-White, *supra* n 29, pp. 26-30. For example, since 2001, the Permanent Court of Arbitration (PCA) has offered a set of Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment. These, however, have not been used much in practice.

74 For example, international arbitration is one of the main options for resolving disputes under the United Nations Convention on the Law of the Sea (1998) (Annexes VII and VIII). Likewise, the UNFCCC contemplates arbitration as one of the available methods of dispute resolution, as well as the jurisdiction of the International Court of Justice, although the main method is conciliation (Article 14). The Paris Agreement adopts the same solution as the UNFCCC (Article 24). *See* Wendy Miles and Merryl Lawry-White, *supra* n 29, pp. 7-9.

75 Sustainable Development Goal No. 16.3 on peace, justice and strong institutions ('Promote the rule of law at the national and international levels and ensure equal access to justice for all').

76 For example, Brazil is one of the few countries that does not participate in the current investment protection system and yet receives a significant flow of foreign investment.

prompting States to comply with their own commitments or even sanctioning their non-compliance. For instance, in *Peter Allard v. Barbados*, the investor alleged that the State's negligence in the operation of a state-owned wastewater treatment plant had polluted the natural reserve of its eco-tourism project. The investor alleged that Barbados had breached its obligations under the United Nations Convention on Biological Diversity and the Convention on Wetlands of International Importance. While the tribunal rejected the claim, it noted that in certain circumstances, it is possible the State itself can be subject to environmental protection obligations.[77]

For their part, States can also file counterclaims requesting economic compensation for environmental damages caused by investors. For example, the *Burlington* and *Perenco* cases, both against Ecuador, resulted in successful counterclaims, ordering the investors to pay substantial compensation to remedy environmental damages (US$ 41 million and US$ 54 million, respectively).[78]

The benefits of arbitration are not static but have been developed and refined over time. Following that trend, arbitration could (and should) continue to evolve to better address climate change issues. For instance, the fundamental principles of environmental protection could potentially become *transnational law*,[79] as has happened with other subjects like corruption and the *clean hands* doctrine. Investment treaties often call for the application of *international law* (in line with the 1969 Vienna Convention on the Law of Treaties),[80] which could open the door to a deeper construction of the interaction between investor protections (in investment treaties) and climate commitments (in the Paris Agreement or similar instruments).[81] In this vein, tribunals will need to analyse investment treaty protection standards in light of climate change treaties.

In short, international arbitration has significant advantages, both for foreign investors and for sovereign States, which are worth maintaining, and its solid foundations would allow arbitration to continue evolving and improving those aspects that require adjustments. A first step in this direction would be to focus on the common goal of the global community (controlling climate change), leaving aside any absolutism that little contributes to the real goal.

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77 *Peter Allard v. Barbados* (PCA Case No. 2012-06), Award, June 27, 2016, §§ 33-34, 43, 50, 178, 244, 252, 266.

78 *Perenco v. Ecuador* (ICSID Case No. ARB/08/6), Award, September 27, 2019, § 1023(b); *Burlington v. Ecuador* (ICSID Case No. ARB/08/5), Decision on Counterclaims, February 7, 2017, § 1099.

79 *See* Wendy Miles and Merryl Lawry-White, *supra* n 29, pp. 15-17.

80 For example, Article 26(6) of the ECT (1994) provides that the tribunal 'shall decide the issues in dispute in accordance with this Treaty and the applicable rules of international law.' *See* Vienna Convention on the Law of Treaties (1969), Article 31(3)(c).

81 On the possibility of applying other international treaties to investment disputes (in addition to the investment treaty at issue), *see* Stephan W. Schill (ed.), *Schreuer's Commentary on the ICSID Convention*, Cambridge University Press, 3rd ed., 2022, pp. 867-868 (§§ 236-237).

CONCLUDING REMARKS

Modern arbitration became strong (and successful) to the point that it was perceived as a neutral forum for resolving complex transnational disputes, with a certain specialization, with the necessary flexibility to adapt to different disputes, and in a relatively short time. These features helped arbitration become the preferred forum for resolving such disputes, including those between investors and States. While climate change disputes pose new challenges, arbitration also offers a panoply of tools to resolve them appropriately. With these tools, diligent and responsible arbitrators can ensure compliance with international law, prevent frivolous claims or abuses by investors, and serve justice. The current arbitration system is not perfect, just like any other justice system, but it works reasonably well.

That said, in many aspects where genuine criticism exists, there is certainly room for improvement. This dynamic is what we have seen in recent years, with the main arbitration rules and the case law responding to some of the criticisms described herein. We all have a role to play in addressing the urgency of climate change. The arbitral community (including counsel, arbitrators, institutions, and academics), especially the young generations, must take responsibility for addressing the concerns and contributing to the continuous evolution of the system. Such a need for improvement can be achieved without dismantling the system altogether. Among others, initiatives like those of Working Group III, UNIDROIT, and the ICC provide an appropriate space to explore alternative normative frameworks tailored to the challenges of today's world.

Even if the most radical proposal to reform the investor-state dispute settlement system (the replacement of arbitration with a permanent multilateral court) were to move forward in the coming years, the current system would still remain in place for a considerable period of time, either as it is now or coexisting with the new judicial system. During that time, which could be long and key to the climate situation, it is necessary to lay the foundations for arbitration to become an effective engine in the fight against climate change. In the end, this battle should not divide the arbitral community, governments, and environmental groups; the real enemy is big, and its threat is serious. Therefore, we must all strive to reconcile differences and join forces to achieve our common goal.

The UNIDROIT Principles as a Tool for the Internationalisation of Contracts by Arbitral Tribunals

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ABSTRACT[3]

The UNIDROIT Principles can serve as a tool for arbitral tribunals to apply domestic laws from an international perspective, even without specific reference to the UNIDROIT Principles or international principles by the parties. In this regard, they are frequently used by arbitral tribunals to confirm domestic solutions. More interestingly, they can also be applied by arbitral tribunals to address inadequacies in domestic law, i.e., in cases when the law is ill-suited for an international context, subject to interpretative divergence, or when there is a gap in the applicable domestic law. UNIDROIT Principles can also be used in the field of international sales when the CISG applies, as well as in matters of payments, interest, and loss assessment. However, their application by arbitral tribunals should remain secondary and should not lead to an unprincipled and arbitrary setting aside of the applicable domestic legal rules.

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3 This article is drawn from the lecture given by Alexis Mourre on 22 September 2023 at the UNIDROIT-Roma 3 10th Annual International Arbitration Lecture. The oral form of the presentation has been maintained.

INTRODUCTION

This article seeks to address the use by international arbitrators of the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts ('UNIDROIT Principles') as a tool for the internationalisation of contracts. What should be understood by 'internationalisation' in the context of this article is the application of non-national substantive rules to a contract that is otherwise submitted to a given domestic law. One of the paradoxes of contemporary international arbitration is that while it is the product of the parties' will to take their disputes out of domestic courts, in most cases the same parties chose to resolve these disputes according to a given national law. This, however, has not always been the case. Forty years ago, Professor René David wrote that:

> We reject as foreign to arbitral practice and baseless as a matter of principle the distinction drawn between arbitration in law and arbitration in equity. The concern of arbitrators, in accordance to the parties' wishes, is to arrive at a just solution rather than the strict application of the law of a given national state.[4]

That was a conception according to which the submission of a dispute to arbitration naturally implies the setting aside of national laws in favour of a broader conception of international justice. At about the same time, Professor Ole Lando wrote in the same vein that:

> By choosing the lex mercatoria the parties avoid the technicalities of national legal systems as well as rules which are unfit for international contracts.[5]

Indeed, the UNCITRAL Model Law on International Commercial Arbitration ('Model Law') as well as many domestic laws and arbitration rules admit the validity of choice-of-law clauses in favour of non-national rules such as the UNIDROIT Principles. Article 28(1) of the Model Law,[6] Article 1511 of the French Code of Civil Procedure,[7] Article 187(1) of the Swiss Federal Act on Private International Law

4 R. David, *L'arbitrage dans le commerce international* (Paris, 1982) No. 453.

5 O. Lando, 'The Law Applicable to the Merits of the Dispute', in: Sarcevic (ed.), *Essays on International Commercial Arbitration*, Boston (London, 1991) No. 144.

6 Article 28(1) of the UNCITRAL Model Law on International Commercial Arbitration (Rules applicable to substance of dispute): 'The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules'.

7 Article 1511 of the French Code of Civil Procedure: 'The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account' (free translation).

('PILA'),[8] as well as Article 35(1) of the UNCITRAL Arbitration Rules[9] and Article 21(1) of the ICC Arbitration Rules[10] are good examples of the fact that modern arbitration statutes and rules no longer require the parties to opt for a given domestic law, but rather accept choice-of-law clauses in favour of non-national law rules.

Yet, in spite of this permissiveness, it remains true today that, in the vast majority of cases, the parties choose a national law rather than non-national principles to apply to their dispute. Although there is a lack of global statistics, those of the main global institution, the International Chamber of Commerce ('ICC'), are enlightening. In 2020, choice-of-law clauses were included in 95% of the contracts submitted to ICC arbitration. And out of these contracts, only 2% included a reference to rules or instruments other than national laws, such as the *lex mercatoria* or UNIDROIT Principles. [11] The rest referred to a domestic law. Considering that the statistics of the same institution were very similar in 2010, i.e. ten years before, we can see a remarkable stability there.[12]

The conclusion seems straightforward: parties do not want to submit their disputes to non-national rules. And this begs two questions. The first is: why is that? And the second is: what does it means in terms of the parties' expectations as to the way international arbitrators should fulfil their role?

I. EXPLORING PREFERENCES FOR NATIONAL RULES

As to the first question, one can only speculate, but at least two possible explanations come to mind. The first is that the choice of a national law is sometimes part of a more global bargain, where a party agrees to opt out of its own national court system by accepting to arbitrate against the submission of the dispute to its own national law. And the second may be the concern that non-national principles may

8 Article 187(1) of the Swiss Federal Act on Private International Law (Applicable law): 'The arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected'.

9 Article 35(1) of the UNCITRAL Arbitration Rules (2021): 'The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate'.

10 Article 21(1) of the ICC Arbitration Rules (2021): 'The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate'.

11 2020 ICC Dispute Resolution Statistics, published on 3 August 2021 <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-dispute-resolution-statistics-2020/> last accessed 16 July 2024. According to the more recent ICC Dispute Resolution Statistics, in only 2.5% of cases registered in 2021 contracts relied upon included reference to rules or instruments other than national laws. This percentage amounted to 2.6% in 2022 and to 2% in 2023.

12 2010 Statistical Report, ICC International Court of Arbitration Bulletin Vol. 22 No. 1.

not be well suited to resolve the increasing complexities of modern disputes, either because they are too vague or because they are incomplete. There may also be a concern that non-national rules are less predictable than domestic law, because they are not supported by a systematic body of case law and would therefore leave too much discretion to the arbitrators. That latter criticism, however, be perhaps more understandable in respect of the *lex mercatoria* than the UNIDROIT Principles.

The situation therefore seems to be that the parties want to avoid the uncertainties of non-national rules. They want to be able to predict what the outcome of the dispute is likely to be, and therefore prefer to choose a system of legal rules that they believe to be complete, tested, and made predictable by an elaborate body of case law.

This calls for an immediate side comment, which is that the lack of a comprehensive body of case law or precedents applying non-national rules is to a large extent a consequence of the confidentiality of arbitration and the lack of a systematic global principle mandating the publication of awards.[13] It is certainly true that, as far as the UNIDROIT Principles are concerned, many awards are available, in particular on Unilex, [14] but not all of them, and most institutions still maintain the confidentiality of awards and only publish them if the parties consent to it.

This has called from the well-known remarks by Lord Thomas in his 2016 Bailii lecture:

> [T[here are other issues which arise from the resolution of disputes firmly behind closed doors – retarding public understanding of the law, and public debate over its application. A series of decisions in the courts may expose issues that call for Parliamentary scrutiny and legislative revision. A series of similar decisions in arbitral proceedings will not do so, and those issues may then carry on being taken account of in future arbitrations....[s]uch lack of openness equally denudes the ability of individuals, and lawyers apart from the few who are instructed in arbitration, to access the law, to understand how it has been interpreted and applied. It reduces the degree of certainty in the law that comes through the provision of authoritative decisions of the courts[15] [and

13 A. Mourre, '*Precedent and Confidentiality in International Commercial Arbitration: The Case for the Publication of Arbitral Awards'*, in *Precedent in International Arbitration*, Ed. Yas Banifatemi, Juris Publishing, 2008; A. Mourre, '*Arbitral Jurisprudence in International Commercial Arbitration: The Case For A Systematic Publication Of Arbitral Awards In 10 Questions...'* (*Kluwer Arbitration Blog*, 28 May 2009) <https://arbitrationblog.kluwerarbitration.com/2009/05/28/arbitral-jurisprudence-in-international-commercial-arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions/> last accessed 16 July 2024; A. Mourre, 'The Case for the Publication of Arbitral Awards', in *The Rise of Transparency in International Arbitration*, A. Malatesta and R. Sali Eds., Juris Publishing, 2013.

14 UNILEX on UNIDROIT Principles & CISG <https://www.unilex.info/> last accessed 16 July 2024.

15 The Right Hon. Lord Thomas of Cwmgiedd, Lord justice of England and Wales, *Developing Commercial Law through the Courts: Rebalancing the relationship between the Courts and Arbitration*, the Bailii Lecture (2016), §23.

> more recently for a very timely call for transparency by the English High Court in the PI&D annulment].[16]

So, if awards were published more systematically, this reluctance of the parties to opt for the UNIDROIT Principles might diminish. But this is not the topic of this article.

The second question is that of the parties' expectations. Does the choice of a domestic law to apply to the dispute mean that the parties expect it to be decided by international arbitrators in the same way as it would be by a municipal judge? That question was addressed almost 25 years ago by well-known Swiss arbitrator Marc Blessing as follows:

> An arbitral Tribunal would not fulfil its important mission properly if it only satisfied itself that it was correctly applying a given paragraph of a particular national law unless it also satisfied itself that this particular paragraph indeed deserves to be applied in the relevant circumstances and having regard to the parties and their objectively fair and subjectively reasonable expectations.[17]

That statement can be understood in two different ways.

The first is that an international arbitrator would have the power to depart from the applicable domestic law if that law does not meet what the arbitrator believes to be the parties' expectations. Such a vision of the arbitrator's role essentially consists in treating domestic law as a set of secondary contractual rules rather than as a superior norm, the *grundnorm* in which the contract is embedded. The most well-known consequence of this approach is the non-application of national rules having the effect of invalidating the contract.[18]

This approach has been rightly criticized by many authors, in particular Pierre Mayer and Emmanuel Gaillard, and it no longer corresponds to the state of practice

16 *Process and Industrial Developments Ltd. v. The Ministry of Petroleum Resources of the Federal Republic of Nigeria* [2023] EWHC 2638, §§ 589-591: 'The privacy of arbitration meant that there was no public or press scrutiny of what was going on and what was not being done. When courts are concerned it is often said that the 'open court principle' helps keep judges up to the mark. But it also allows scrutiny of the process as a whole, and what the lawyers and other professionals are doing, and (where a state is involved) what the state is doing to address a dispute on behalf of its people. An open process allows the chance for the public and press to call out what is not right. [...] unless accompanied by public visibility or greater scrutiny by arbitrators, how suitable is the process in a case such as this where what is at stake is public money amounting to a material percentage of a state's GDP or budget? Is greater visibility in arbitrations involving a state or state owned entities part of the answer?'.

17 M. Blessing, *Introduction to Arbitration: Swiss and International Perspectives*, Helbing & Lichtenhahn, 1999, p. 212.

18 J.-M. Jacquet, '*L'incorporation de la loi dans le contrat', Travaux du comité français de droit international privé*, 1993-1994, Paris, Pédone, 1996, pp. 23-38.

today.[19] There is now a general acceptance of the fact that if a domestic law applies to the contract, irrespective of whether it has been chosen by the parties or by the tribunal, it applies entirely and governs all aspects of the contract's life, including its validity.

However, Blessing's statement can also be understood more simply as mere statement of fact, which is that an arbitrator and a judge are placed in different situations and therefore do not operate in the same way. And this is true for essentially three reasons.

The first is that an international arbitrator does not have a forum. As a consequence, the arbitrator is not the guardian of a particular legal order and he or she does therefore not feel the same level of loyalty as a municipal judge to the domestic legal system chosen by the parties, including in respect of lines of jurisprudential policy that may be debated in a way or another in a given country.

And the second is that, unlike a judge, the arbitrator will in most cases have no knowledge of the law that he or she is applying. This has several important consequences. The first may be a lack of intellectual intimacy with the applicable legal system. The second is that because arbitrators are guardians of the contract and not of a particular national law, they may focus more on the former and less on the latter. The third is that they may tend to rely on the parties' legal submissions and will not make their own inquiries into a law that they ignore. In addition, when applying the law, they will naturally tend to apply concepts that are common to different systems of law and be reluctant to apply norms which may look idiosyncratic from an international perspective. And the final important consideration that needs to be made in order to understand the difference between arbitrators and judges in their application of national law is of course that their awards are not reviewed on the merits, which gives them a liberty which is completely unknown to judges.

II. ARBITRATOR APPROACHES TO QUESTIONS OF DOMESTIC LAW

Against this backdrop, there is little doubt that arbitrators will tend to approach questions of domestic law with their own lenses, which are international lenses, and that this international perspective may have some influence on the outcome of the dispute. Professor Roy Goode wrote for example that parties to an international transaction expect arbitrators to apply national law with a 'broader brush':[20]

19 P. Mayer, *Droit international privé,* Paris, Monchrestien, 1998, p. 463, § 709 ; P. Fouchard, E Gaillard & B. Goldman, *Traité de l'arbitrage commercial international*, Paris, Litec, 1996, p. 809, § 1439.

20 R. Goode, 'The Freshfields Lecture 1991: The Adaptation of English Law to International Commercial Arbitration', *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management*, 1992, Volume 58, Issue 1, p. 22.

> An international transaction is not the same as a domestic transaction and a dispute between two foreigners is not the same as a dispute between two Englishmen. We can reasonably suppose that when they invoke English law they envisage English law applied with a broader brush and with an eye to established international usage and the need to accommodate the particular factors that are peculiar to transactions involving a foreign element.

This does not mean, however, that arbitrators should retain the power to reject the applicable domestic law. To the contrary, they are in the overwhelming majority very scrupulous in respecting the parties' will to elect a given domestic law. But as Professor Roy Goode noted, most international arbitrators will seek to apply national law from an international perspective rather than putting themselves in the shoes of a domestic judge.

What that exactly means in practice, however, is difficult to assess. In many instances, the bias in favour of an international approach will be subliminal. But in some cases, arbitrators will be confronted to situations in which there is a real case for the application of non-national rules despite a domestic law being applicable.

National law will be applicable to the dispute in two different situations. The first is that of a choice-of-law clause referring to a national law. The second is, in absence of a choice-of-law clause, when the tribunal determines that a national law is applicable to the dispute. In this second scenario, since the arbitrators do not have their own forum and their own system of conflict of laws, the rules that are applicable to the arbitration need to be looked at.

A first possible situation is when these rules, such as the French Code of Civil Procedure or the ICC Arbitration Rules, allow arbitral tribunals to select the 'rules of law' that they believe to be the most appropriate.[21] The second is when the applicable rules mandate the tribunal to select a given law, in which case they may do so either by applying domestic or international conflict of law rules, such as the Rome Convention of 1980[22] or the Rome I Regulation,[23] or by adopting a direct approach. The direct approach is for example allowed by the German Code of Civil Procedure, which Article 1051(2) provides that '[f]ailing any designation by the parties, the arbitral tribunal shall apply the *law of the State* with which the subject-matter of the proceedings is most closely connected'.[24] Article 36(1) of the Japanese Arbitration Law has a similar provision.[25]

21 Article 1511 of the French Civil Code of Procedure; Article 21(1) of the ICC Arbitration Rules.

22 Rome Convention on the law applicable to contractual obligations (1980), *Official Journal C 027*, 26/01/1998 P. 0034 – 0046.

23 Regulation (EC) No 593/2008 Of The European Parliament And Of The Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *Official Journal L 177*, 4/7/2008, p. 6.

24 Free translation.

25 Article 36(1) of the Japanese Arbitration Law: 'The law which the Arbitral Tribunal should comply with in making an Arbitral Award shall be as provided by the agreement of the parties. In this

Once a given domestic law applies to the contract, why should there be the need to resort to rules that are extraneous to that law?

In the vast majority of cases, arbitrators will not encounter any difficulty in applying the applicable domestic law and they will do so without any reference to non-national principles. Interestingly, however, there are many cases where, in spite of a domestic law being applicable, arbitral tribunals introduce in their awards references to non-national principles just to confirm the appropriateness of the solution given by the applicable domestic law. And when they do so, the UNIDROIT Principles are most often referred to. A March 2008 Milan chamber of commerce award for example applied the Italian law which had been chosen by the parties by referring at the same time to Articles 5.1.3, 1.8 and 7.4.3 of the UNIDROIT Principles as 'a confirmation of the same principles at international level'.[26]

These references are generally *obiter* and unnecessary. Yet, they illustrate an interesting psychological aspect of the question, which is that even when the applicable domestic law offers a solution to the problem that they have to resolve, international arbitrators seem to feel that applying a domestic rule to an international contract is not entirely satisfactory.

What is more interesting, however, is the situation in which non-domestic rules are applied not to confirm or support a solution given by domestic law, but to resolve a perceived inadequacy of the applicable domestic law in an international context.

This may occur in three different scenarios. The first is when solutions given by the applicable domestic law are perceived to be ill-adapted in an international context. The second is the existence of an interpretive divergence or an uncertainty on a certain question within that domestic system of law. And the third may be that the applicable domestic law has a gap that needs to be filled.

In all these situations, the arbitral tribunal will find itself in an inherently difficult situation. If the applicable domestic law has been elected by the parties, it cannot in fact be displaced without breaching their will. And if it has been selected by the arbitrators, the tribunal may contradict itself by refusing to apply some of its provisions.

When the applicable law is selected by the tribunal rather than by the parties, and the applicable rules do not mandate the application of a given domestic law, an easy precautionary solution is simply, when selecting the applicable domestic law,

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case, if laws and regulations of a given State have been designated, such designation shall be deemed as designating the laws and regulations of the State which shall be directly applied to the case and not the laws and regulations of the State providing the application of conflicting domestic and foreign laws and regulations, unless a contrary intention has been clearly indicated'.

26 Corte arbitrale nazionale ed internazionale di Milano [unknown] (March 2008), <https://www.unilex.info/principles/case/1301> last accessed 16 July 2024.

to say that it will be applied in light of general international principles of law. This is what was done in ICC case 5835, where the tribunal identified Kuwaiti law as being the law with the closest connection and emphasized that principles generally applicable in international commerce should be taken into account 'in accordance with a well-established practice in international commercial arbitration'.[27] Provided that the applicable arbitration rules do not mandate the application of a given national law, there is nothing objectionable in that kind of finding, which will give the tribunal the needed flexibility in addressing any perceived inadequacy of the applicable domestic law.

But what is the situation when the governing law is a domestic law, with no reference to international principles? That will be the case when the domestic law has been selected by the parties in their contract, when the applicable arbitration rules mandate the tribunal to select a domestic law, or when the tribunal has otherwise selected a domestic law with no reference to international principles.

In the framework of setting aside and enforcement proceedings, State courts have frequently assessed cases where arbitral tribunals applied UNIDROIT Principles to contracts governed by a domestic law without any reference to UNIDROIT Principles or international principles.

The Swiss Supreme Court upheld an award where the arbitral tribunal applied the CISG and UNIDROIT Principles despite the parties' choice of Swiss law. The Supreme Court noted that interpreting 'material breach' according to CISG and UNIDROIT Principles aligned with Swiss law and was reasonable given the international context of the contract. Therefore, the Court dismissed the objection regarding the violation of the arbitral tribunal's mandate and the parties' right to be heard, as the interpretation aligned with common international practice and was not unexpected for the parties.[28]

Similarly, the Paris Court of Appeal ruled that a sole arbitrator applying UNIDROIT Principles without being requested to do so, did not violate Article 1502 (3) and (4) of the French Code of Civil Procedure - *i.e.*, the arbitral tribunal's duty not to exceed its mandate and the parties' right to present their case - as under the applicable ICC Rules and French law, arbitral tribunals are permitted to choose the most appropriate legal rules. The Court justified the sole arbitrator's reference to the UNIDROIT Principles due to the lack of a clear solution in the chosen law and the fact that this reference had no direct impact on the final decision.[29]

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27 ICC Case No. 5835, [unknown], June 1996 <https://www.unilex.info/principles/case/654> last accessed 16 July 2024.

28 Bundesgericht, No. 4A 240/2009, 16 December 2009 <https://www.unilex.info/principles/case/1513> last accessed 16 July 2024.

29 Cour d'appel de Paris, *Société FORASOL v. Société mixte Franco-Kazakh CISTM*, 1998, <https://www.unilex.info/principles/case/1034> last accessed 16 July 2024.

In a 1998 judgment, the United States District Court for the Southern District of California rejected the argument according to which the ICC award that referred to the UNIDROIT Principles violated Article V(1)(c) of the 1958 New York Convention. The Court stated that '[t]he Tribunal's reference to and application of the UNIDROIT Principles and principles such as good faith and fair dealing do not violate Article V(1)(c). The Tribunal applied these principles to differences contemplated by and falling within the terms of the submission to arbitration and therefore the Award does not violate Article V(1)(c)'.[30]

Therefore, in these instances, State courts upheld and recognized awards where arbitral tribunals applied UNIDROIT Principles.

Taking a step back, how do arbitral tribunals apply non-national rules in instances where a domestic law is applicable?

III. APPLYING UNIDROIT PRINCIPLES WHERE GOVERNING LAW IS DOMESTIC

A first possible technique to apply non-national rules such as the UNIDROIT Principles in presence of an applicable domestic law would be to characterize such rules as trade usages. That option supposes that the rules applicable to the arbitration give to the tribunal the mandate to apply trade usages in any case. For example, Article 21(2) of the ICC Arbitration Rules provide that, even in presence of a choice of law, the tribunal shall in any case take account of the relevant trade usages.[31] Article 28(4) of the Model Law,[32] Article 1511 of the French Code of Civil Procedure,[33] Article 822 of the Italian Code of Civil Procedure,[34] and Article 1054 of the Dutch Code of Civil Procedure,[35] have similar provisions.

30 United States District Court, S.D. California, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, No. 98-1165-B, 7 December 1998 <https://www.unilex.info/principles/case/652> last accessed 16 July 2024.

31 Article 21(2) of the ICC Arbitration Rules: 'The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages'.

32 Article 28(4) of the Model Law: 'In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction'.

33 Article 1511 of the French Code of Civil Procedure: 'The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate. In either case, the arbitral tribunal shall take trade usages into account' (free translation).

34 Article 822 of the Italian Code of Civil Procedure: 'Arbitrators shall decide in accordance with the rules of law [...]' (free translation).

35 Article 1054 of the Dutch Code of Civil Procedure 'The arbitral tribunal shall make its award in accordance with the rules of law [...]' (free translation).

The question then arises whether non-national rules of law such as the UNIDROIT Principles can be treated as trade usages and therefore be used to disapply inadequate provisions of the selected domestic law. In order to reach this result, it is first of all necessary to establish that the UNIDROIT Principles are a codification of the general principles of law. This is not too difficult. For example, in the 1995 award in the *Arthur Andersen* arbitration, the general principles of law were applicable by choice of the parties and the sole arbitrator resolved the dispute exclusively based on the UNIDROIT principles.[36] Mention can also be made of the ICC award 7365, where the Arbitral Tribunal referred to Article 6.2.3(4) of the UNIDROIT Principles, pointing out that the concept of hardship 'has been incorporated into so many legal systems that it is widely regarded as a general principle of law. As such, it would be applicable in the instant arbitration even if it did not form part of the Iranian law'.[37]

There is in fact a significant level of consensus on the fact that the UNIDROIT Principles are a codification of generally accepted principles of contract law. The 1994 Introduction to the UNIDROIT Principles declares to that effect that: '[f[or the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems'.[38] In a 1995 ICC award in case 7110, the arbitral tribunal stated that the UNIDROIT Principles reflect 'general legal rules and principles enjoying wide international consensus, applicable to international contractual obligations and relevant to the Contracts'.[39] And in the ad hoc award in the Heirs of Sulu v. Malaysia, the sole arbitrator considered that: '[t]he UNIDROIT Principles reflect the character of generally accepted principles and rules of international commercial law'.[40]

However, it would not be acceptable to just rubberstamp the UNIDROIT Principles as such with no further inquiry. For example, the tribunal in ICC case 7365 rejected the characterization of Article 7.4.9 of the UNIDROIT Principles on the *dies a quo* of interest as reflecting an international principle on the basis that the Iran-US Claims Tribunal had adopted a different solution.[41]

Once the UNIDROIT Principles are characterized as general principles, it is also necessary, in order to reach the desired result, to adopt a broad definition of trade usages that encompasses the general principles, which is conceptually more difficult.

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36 ICC Case No. 9797/CK/AER/ACS, *Andersen Consulting Business Unit Member Firms v. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Cooperative*.

37 ICC Case No. 7365, *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc.*, 5 May 1997 <https://unilex.info/principles/case/653> last accessed 16 July 2024.

38 UNIDROIT Principles of International Commercial Contracts 1994, page 5 of the Introduction.

39 ICC Case No. 7110, [unknown], June 1995 <https://unilex.info/principles/case/713> last accessed 16 July 2024.

40 Ad hoc arbitration, preliminary award, *Nurhima Kiram Fornan et al. v. Malaysia*, 25 May 2020 <https://unilex.info/principles/case/2344> last accessed 16 July 2024.

41 *Supra* n 37.

This is the position that has been adopted forty years ago by Eric Loquin, according to which the usages and the general principles of international commerce serve the same function and should not be distinguished.[42] According to Loquin, both are to be seen as expressions of the rise of a jurisprudential law that contributes to the development of the *lex mercatoria* independently from national law. A similar position has been adopted in several awards at the end of the last century, such as in the Iran Atomic Energy Organization case, where Pierre Lalive, Berthold Goldman and Jacques Robert supplemented the Irani law that had been adopted by the parties by general principles of international law, such as the general principle of good faith and *pacta sunt servanda*.[43]

Other authors have however objected to the assimilation of the general principles to usages in absence of a common and constant practice to use them, and absent an *opinio juris* that they constitute hard law. And in fact, the statistics mentioned at the beginning of this article, according to which in most cases the parties elect a domestic law to apply to their contract, would not seem to be compatible with the existence of such an *opinio* juris. An example of the reservations that the assimilation of the UNIDROIT Principles to trade usages provoke is ICC award 11256, in which the Arbitral Tribunal held that the UNIDROIT Principles ‘do not generally reflect trade usages’.[44]

The strongest criticism against the theory that the UNIDROIT principles can be applied as usages has been expressed by Emmanuel Gaillard in his 1991 article in the *Liber Amicorum* in honor of Pierre Bellet on the distinction between the general principles of law and trade usages.[45] According to Gaillard, the usages and the general principles of law are different in nature and can therefore not be conflated. Gaillard also noted that there is a significant level of uncertainty in the definition of usages.

Some authors, such as Eric Loquin, have to the contrary embraced a broad definition of usages, which includes the general principles of law that emerge from a comparative law analysis as well as from the elaboration of non-binding norms such as the UNIDROIT Principles insofar as they reflect a sufficient level of international consensus.[46] These principles can be for example the principle of good faith, *pacta sunt servanda* or estoppel.

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42 E. Loquin, ‘L’application de règles anationales dans l’arbitrage commercial international’, in *L’apport de la jurisprudence arbitrale, CCI* No. 4401 1, 1986.67; E. LOQUIN, La réalité des usages du commerce international, Revue internationale de droit économique, 1989, II, p. 195.

43 Ad hoc arbitration, *Company Z and Others v. State Organization ABC*, April 1982, Yearbook Commercial Arbitration 1983, at 94, 101 *et seq*.

44 ICC Case No. 11256, [unknown], 2003 <https://unilex.info/principles/case/1423> last accessed 16 July 2024.

45 E. Gaillard, ‘La distinction des principes généraux du droit et des usages du commerce international’, in *Etudes offertes à Pierre Bellet* (Litec 1991) pp. 203 *et seq*.

46 E. Loquin, ‘Les règles matérielles du commerce international (III. – Droit du commerce international, Quatrième Séance)’, *Revue de l’Arbitrage 2005*, Volume 2005, Issue 2), pp. 443-464.

The narrow approach advocated by authors such as Gaillard, conversely, is based on the contractual practices that are customarily adopted in certain industries, such as commodities trading or maritime commerce. According to that approach, usages would at the same time be sectorial and specialized, which excludes general principles of law.

Depending on which of these two conceptions is adopted, the UNIDROIT Principles may or may not be included in the concept of usages, with in the latter case the consequence that they may displace the domestic law chosen by the parties.

It may be viewed, as Gaillard advocated, that the broad *lex mercatoria* approach is not desirable in presence of a choice of law because it introduces a great level of uncertainty in the application of the law which may lead parties to reject arbitration.[47] If used in such a way, the UNIDROIT Principles would in fact become a factor of confusion and uncertainty instead of increasing the transparency and predictability of transnational law.

A second possible way to introduce non-national principles in presence of an applicable domestic law is to make a distinction based on whether the law has been selected by the parties or by the tribunal. The idea here would be that when the law has not been selected by the parties, but by the tribunal, the tribunal would have more discretion to introduce an element of internationality in the contract. For example, in ICC case 5835, in which the tribunal selected Kuwait law together with 'principles generally applicable in international commerce', it did so by noting that its approach was supported by the fact that the parties had refrained from making a choice of law in their contract.[48] There is however no example of an arbitral tribunal having, after having decided that a domestic law applied, partly disapplied that law in favour of international principles on the basis that it was not elected in the contract. In fact, there is no reason to draw such a distinction: whether the domestic law has been selected by the parties or by the tribunal, it should apply in the same manner.

A third possible way of setting aside an otherwise applicable domestic law rule is to reject it as being ill-adapted in an international context. This is what the ICC tribunal has done in case 8385 by rejecting the treble damages provided by the U.S. RICO law[49] on the basis that, by electing U.S. law in an international context, the parties could not have consented to treble damages.[50] One should however not draw too general conclusions from this decision, which can be explained by the

47 E. Gaillard, Trente ans de lex mercatoria. Pour une application sélective de la méthode des principes généraux du droit, Clunet, 1995, No. 1, pp. 10-12.

48 ICC Case No. 5835, [unknown], June 1996 <https://unilex.info/principles/case/654> last accessed 16 July 2024.

49 Racketeer Influenced and Corrupt Organizations Act, Organized Crime Control Act, 1970.

50 ICC Case No. 8385, [unknown], Clunet 1997, at 1061 *et seq*.

specific features of treble damages in U.S. law and their punitive nature. The rejection of the domestic law norm, in a case such as this, is better explained based on international public policy considerations than on the parties' expectations.

Once these theories are rejected, there are three situations in which an arbitral tribunal could legitimately introduce the UNIDROIT Principles in presence of an applicable domestic law: first the use of the UNIDROIT Principles on an interpretive basis, second their use as a gap filling tool, and finally their use to complement the 1980 Vienna Convention on the International Sale of Goods ('CISG'). Mention should also be made of the use of the UNIDROIT Principles in addressing issues of quantum, currency of payment, and interest, which raise specific issues.

The first of these is the use of the UNIDROIT Principles as a tool of interpretation. The Preamble of the UNIDROIT Principles provide that they may be used to interpret or supplement domestic law. The UNIDROIT Principles seem to suggest that such interpretive rule could be applied on a standalone basis. In fact, the Preamble provides that the UNIDROIT Principles 'shall be' applied when the parties have elected them to govern their contract, and 'may be' applied either when the parties have selected general principles or the *lex mercatoria*, or in absence of a choice of law. The Preamble then say that that the Principles may also 'may be used' to interpret domestic law, which suggests that such rule purports to be applicable as a tool of interpretation of domestic law even in absence of a parties' choice to that effect.

The first question that arises is whether the difference between the terms 'may be applied' and 'may be used' has any significance. It is in fact difficult to understand what distinction there may be between these two terms. A rule that is not applicable can in fact hardly be 'used'. The answer to that question may be the suggestion that aside to their application as the *lex contractus*, the UNIDROIT Principles may also be used as a source of inspiration in presence of an otherwise applicable domestic law. That is precisely the language used by the UNIDROIT commentary, which states that in case of a 'doubt as to the proper solution to be adopted' under the applicable domestic law, 'either because different alternatives are available or because there seem to be no specific solution at all', then 'it may be advisable to resort to the Principles as a source of inspiration'.[51]

And the immediately subsequent question is that of the legal basis for such use of the UNIDROIT Principles when a domestic law applies. The official UNIDROIT commentary to the Preamble says that the UNIDROIT Principles allow to interpret domestic law 'in accordance with internationally accepted standards and/or the special needs of cross-border trade relationships', but this does not answer the question of the legal basis for this internationalisation of the applicable domestic law.

51 UNIDROIT Principles of International Commercial Contracts 2016, page 5 of the Preamble.

In order to address this question, a distinction should first of all be made between matters of interpretation of the contract and matters of applicable law. The applicable law will in most cases contain norms on the interpretation of contracts, and it would not be acceptable to replace them with those included in Chapter 4 of the UNIDROIT Principles if the two are inconsistent. The interpretive role that is given to the UNIDROIT Principles in presence of an applicable national law should therefore apply to that law rather than to the contract.

It may be, however, that the applicable domestic law either does not contain rules of its own on the interpretation of contracts, which is probably a rare situation, or that these rules are uncertain. An example of such a situation is given by an ad hoc award made in New Zealand in 1995, published on Unilex under No. 628. In this case, the law of New Zealand was applicable. The tribunal found that such law was uncertain as to whether post-contractual conduct is admissible evidence of the parties' intent. In order to resolve that uncertainty, the tribunal resorted to Articles 4.1, 4.2 and 4.3 of the UNIDROIT Principles by positing that there is 'no more definitive contemporary international statement governing the interpretation of contractual terms than the UNIDROIT Principles'.[52]

Another example is given by a UK Supreme Court decision of 2018 in *Rock Advertising v. MWB Business Exchange Centers.*[53] Interestingly, in this case, it is the Supreme Court rather than an arbitral tribunal who resorted to the UNIDROIT Principles to address the matter, which was found to be controversial in English law, of whether a 'no oral modification clause' prevents the parties from modifying the contract orally, which it did by applying Article 2.1.18 of the UNIDROIT Principles. A further interesting example is a 2016 decision of a Quebec court of appeal, where the Court applied the UNIDROIT Principles as a comparative law synthesis such as to enlighten the court 'as to the desirable evolution of the jurisprudence in a civil law jurisdiction such as Quebec'.[54]

Two other interesting court decisions can be mentioned. The first is a 21 October 2010 decision of the Portuguese Supreme Court, in which the court held that Portuguese law was uncertain as to the possibility of combining the termination of a contract with the award of expectation damages, and applied Articles 7.3.5(2) and 7.4.2 of the UNIDROIT Principles to grant compensation for loss of profit.[55] The second is a 2014 decision of the Jerusalem District Court in a case *Haim Levy LTD.*

52 Ad hoc arbitration, [unknown], Auckland, 1995 <https://unilex.info/principles/case/628> last accessed 16 July 2024.

53 *Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited* (Appellant), [2018] UKSC 24, 16 May 2018 <https://unilex.info/principles/case/2147> last accessed 16 July 2024.

54 *Churchill Falls (Labrador) Corporation Ltd. c. Hydro-Québec*, Quebec Court of Appeal, 500-09-024690-141, 8 August 2016 <https://unilex.info/principles/case/1968> last accessed 16 July 2023.

55 Portugal Supreme Court, 1285/07.7TJVNF.P1.S1, 21 October 2010 <https://unilex.info/principles/case/1653> last accessed 16 July 2024.

vs. Karas Motors LTD, where the court decided to supplement the applicable Israeli law by applying Article 5.1.8 of the UNIDROIT Principles to terminate a long-term contract on the basis of a unilateral notice.[56]

The fact that in these instances it is the national court itself which used the UNIDROIT Principles to interpret its own law is interesting: it shows that in an international context, by resorting to the UNIDROIT Principles as an interpretive tool, the court is applying its own law rather than setting it aside. And the conclusion should be that if a domestic judge can do it, there should be no reason why an international arbitrator applying that same domestic law should not be able to do it.

The answer should not be very different for the gap-filling role of the UNIDROIT Principles. In fact, whether the law is silent or unsettled on a particular question of substance does not change the problem: in both cases, the law does not offer an answer. That gap-filling role of the UNIDROIT Principles has however been criticized by certain authors, in particular by Emmanuel Gaillard, who have questioned the very idea that a domestic system of law can have lacunae.[57] According to Gaillard, in fact, when the courts of a given country are faced with a question that is not expressly dealt with by their domestic system of law, they will resolve the difficulty by applying the general principles of that domestic law as opposed to general principles drawn from non-national rules such as the UNIDROIT principles.[58]

Gaillard also pointed to the fact that the idea that a domestic system of law could be incomplete would be an inheritance of the post-colonial vision illustrated by the 1951 Continental shelf award where Lord Asquith repudiated the applicable Abu Dhabi law as being primitive in favour of principles rooted in good sense and the common practice of civilized nations.[59]

That perspective is however unduly rigid.

First, the fact that domestic courts themselves used the UNIDROIT Principles to address matters that were unsettled in their own law shows that it is not necessarily the case that gaps should only be filled by resorting to principles that are intrinsic to the relevant legal order. Second, it may well be that a given law does not have general principles of its own allowing to resolve these matters. For example, many African states have adopted codes or legislation inherited from their old colonial power, without a *renvoi* to all the general principles of the legal order of the

56 *Haim Levy (Jerusalem Vehicle Agency and District Car Repair) 1998 LTD. vs. Karas Motors LTD*, Jerusalem District Court, 2014, <https://unilex.info/principles/case/2195> last accessed 16 July 2024.

57 E. Gaillard, Trente ans de lex mercatoria. 'Pour une application sélective de la méthode des principes généraux du droit', *Clunet*, 1995, No. 1, pp. 12-14.

58 *Ibid.*, p. 13.

59 *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi: Award of Lord Asquith of Bishopstone*, 1952, 1(2) International and Comparative Law Quarterly 247-261.

old colonial power and matters of interpretation of these laws are then frequently pleaded with reference to the laws of that former colonial power.

Why in such cases would the UNIDROIT Principles not be a more appropriate gap-filling tool? It is interesting to note, in this respect, that the UNIDROIT has engaged in 2003, with Marcel Fontaine leading this effort, in a project to assist L'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) to prepare a Uniform Act on Contracts based on UNIDROIT Principles.[60] That project, however, seems to have been unsuccessful due to concerns expressed by a number of African and French authorities that this would have amounted to an abandonment of the French legal tradition shared by the majority of the member states. The sensitivities and the willingness to maintain ties with the French legal order may however have diminished in the current African context. If that is the case, one could wonder whether the 2003 project could not be revived and the UNIDROIT Principles become again a viable option to interpret or supplement the domestic law applicable to the commercial contracts in the OHADA zone in an international context. [61]

This parenthesis being closed, there are multiple examples in which arbitral tribunals have resorted to the UNIDROIT Principles to fill gaps, such as ICC award 8264, which concerned the lack of a provision in Algerian law on the compensability of a loss of chance,[62] or ICC award 9078, in which the tribunal noted the lack of a provision in German law on the compensability of a loss of chance and therefore applied the UNIDROIT Principles.[63]

There is therefore room for the application of the UNIDROIT Principles in order to fill gaps in the applicable domestic law, even though such role should remain residual and limited to those instances in which domestic law does not offer general principles allowing to resolve the uncertainty without having to resort to other rules.

IV. UNIDROIT PRINCIPLES IN THE INTERPRETATION OF THE CISG

A distinct situation is that of the use of the UNIDROIT Principles to interpret the 1980 CISG. Article 7(1) of the CISG provides that '[i]n the interpretation of this Convention, regard is to be had to its international character and to the need to pro-

60 Draft OHADA Uniform Act on Contract Law.

61 M. Fontaine, 'L'avant-projet d'Acte uniforme OHADA sur le droit des contrats; quelques réflexions dans le contexte actuel, in L'arbitre, l'avocat et les entreprises face au droit des affaires de l'OHADA', *JADA—Journal africain de droit des affaires*, Special issue, 2013, pp. 74-86.

62 ICC Case No. 8264 [unknown], April 1997 <https://unilex.info/principles/case/658> last accessed 16 July 2024.

63 ICC Case No. 9078 [unknown], October 2001 <https://unilex.info/principles/case/1059> last accessed 16 July 2024.

mote uniformity in its application and the observance of good faith in international trade'. The first observation is that, as the CISG is an international treaty, its interpretation is subject to the 1969 Vienna Convention on the Law of Treaties (VCLT). What is then the exact meaning of Article 7(1) of the CISG? Is it meant to depart from the VCLT? Rather, it should in our view be read in a manner consistent with Article 31-1 of the VCLT, according to which '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. In other words, Article 7(1) of the CISG does not add anything to Article 31-1 of the VCLT and leaves no room to the UNIDROIT principles as a tool of interpretation of the CISG itself.

Article 7(2) of the CISG also provides, however, that:

> [Q]uestions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

This rule posits a hierarchy of norms whereby general principles take precedence on the applicable domestic law. The general principles on which the CISG is based are, arguably, the general principles of contract law applicable to international sales.

When the criteria set by Article 1 of the CISG are satisfied, the CISG is the domestic law applicable to an international sale. Article 7(2) therefore allows, as a matter of domestic law, to fill matters not addressed in the CISG by giving precedence to international principles over that domestic law.

It is then perfectly admissible to consider that these general principles are those that the UNIDROIT Principles have codified, insofar as applicable to sales.

An example of the application of the UNIDROIT Principles to supplement the CISG by a national court is given by a September 2012 decision of the French Court of appeal of Reims.[64] In this case, the parties had chosen Polish law to apply to their sales contract and the CISG was therefore applicable as the Polish law of international sales of goods. A dispute arose further to a request for the renegotiation of the price as a consequence of an increase of the price of raw materials. The seller invoked hardship and relied on Article 9 of the CISG on the incorporation of usages to apply Article 6.2 of the UNIDROIT Principles as a trade usage.

The Court of appeal rejected the assimilation of the UNIDROIT Principles to a usage by noting that there was no evidence of a regular practice between the parties to renegotiate prices. The Court of appeal nonetheless accepted that the

64 *D21 v. Gabo*, Cour d'Appel de Reims, 11/02698, 4 September 2012 <https://unilex.info/principles/case/2121> last accessed 16 July 2024.

UNIDROIT Principles had a title to apply under Article 7(2). The Court first noted that the question of hardship in discussion, although not excluded by the CISG, was not regulated by it. Then, it noted that under Article 7(2) of the CISG, the filling of lacunae in the CISG has to be done in priority by applying the general principles upon which it is based, and only subsidiarily by applying the applicable internal domestic law norms. Then, the Court said that the applicable Polish law did not prevent the application of general principles for all matters not regulated by the CISG, and that the UNIDROIT Principles, which are designed 'to provide solutions to the problems of international trade', were acceptable as they were generally used 'to interpret and supplement the CISG as stated in their Preamble'. A similar decision was made, also concerning a matter of hardship, by the Belgian Court of cassation in June 2009.[65]

V. UNIDROIT PRINCIPLES IN THE ASSESSMENT OF DAMAGES, CURRENCY OF PAYMENT AND INTEREST

As a final note, mention has to be made of the use of the UNIDROIT Principles in matters concerning the assessment of damages.

The UNIDROIT Principles contain in Section 7 a complete set of norms on compensation, which may be more developed than that provided by the applicable domestic law.[66] For example, unlike the CISG, the UNIDROIT Principles provide for the compensation of non-pecuniary losses such as physical suffering or emotional distress.[67] Two examples in which the UNIDROIT principles were applied to regulate the compensation of a loss of chance are the previously mentioned ICC awards 8264 of 1999[68] and 9078 of 2001.[69]

Other principles, such as those provided in Section 6 on the currency of payment and the principle of nominalism, may not be regulated in the applicable domestic law.

The provisions on interest are especially illustrative. In providing at Article 7.4.9 that the rate shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, the UNIDROIT Principles offer a rule that is particularly well adapted to international

65 Court of Cassation of Belgium, Court of Cassation of Belgium, C.07.0289.N, 19 June 2009 <https://unilex.info/principles/case/1456> last accessed 16 July 2024.

66 ICC Case No. 13152 [unknown], 2004 <https://unilex.info/principles/case/1419> last accessed 16 July 2024.

67 Article 7.4.2 of the UNIDROIT Principles.

68 ICC Case No. 8264 [unknown], April 1997 <https://unilex.info/principles/case/658> last accessed 16 July 2024.

69 ICC Case No. 9078 [unknown], October 2001 <https://unilex.info/principles/case/1059> last accessed 16 July 2024.

contracts on a matter that is often not regulated by domestic law or where the application of a statutory legal rate would not be well adapted.

In a matter such as interest, where it is amply recognized that arbitrators enjoy wide discretion, the UNIDROIT principles offer a welcome tool for the internationalisation of the contract in spite of its submission to a domestic law. An example of this is ICC award 13152 of 2004, where the arbitral tribunal determined that, regardless of the law governing the dispute, the UNIDROIT Principles permit the application of '*a just and reasonable*' rate of interest.[70]

CONCLUSION

We can conclude with a note of caution and a note of hope.

The note of caution is the same one that by Pierre Lalive sounded when the UNIDROIT Principles were first adopted in 1994:[71] it would be a very dangerous disservice to arbitration to allow international arbitrators to set aside the domestic law applicable, whether by choice of the parties or by application of a choice-of-law rule, and to replace it at their will with non-national principles.

This way of applying the UNIDROIT Principles should be precluded on the basis of their assimilation to trade usages. It should also be precluded based on the old and now superseded assimilation of the applicable law elected by the parties to contractual provisions, which has led some tribunals to set aside invalidating norms of the applicable law. It is also precluded as an interpretative or gap-filling tool if the relevant domestic law has its own rules of interpretation or general principles allowing to address the problem.

The note of hope, however, is that there still is ample room left for the application of the UNIDROIT Principles, even in the presence of an applicable domestic law. This is true in presence of a gap in the applicable domestic law or in the field of international sales, when the CISG applies, as well as in matters of payments, interest, and loss assessment, in which international arbitrators enjoy wide discretion and the UNIDROIT Principles offer rules that are well adapted to international contracts.

But again, the use of the UNIDROIT Principles should remain residual in the presence of an applicable domestic law and should not amount to an unprincipled and arbitrary setting aside of the otherwise applicable domestic law rules.

70 ICC Case No. 13153 [unknown], 2004 <https://www.unilex.info/principles/case/1419> last accessed 16 July 2024.

71 P. Lalive, 'L'Arbitrage International et les Principes Unidroit' in Bonell/Bonelli, *Contratti Commerciali Internazionali e Principi Unidroit*, Milan 1997, p. 89.

Sectoral Focus: Artificial Intelligence & Arbitration

AI: The Modern Tribunal Assistant – Impact on Enforceability of Arbitral Awards under the New York Convention

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ABSTRACT

This paper explores how Artificial Intelligence (AI) impacts the enforceability of arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ('the New York Convention' or 'NYC'). It discusses the potential use of AI and proposes a classification system for AI's role in arbitration, ranging from tasks that require minimal supervision to full supervision, examining AI's potential influence on award drafting, document review, and decision-making processes. Key concerns include accountability, transparency, and party autonomy. Recommendations include careful assessment by national judges, developing new rules and codes of conduct for arbitrators, and assessment of AI's impact on

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international arbitration. The paper suggests establishing a task force within an international body for a first attempt at regulating AI in dispute resolution. The authors emphasize the need for collaboration among lawyers, policymakers, and AI specialists to ensure AI is used ethically and beneficially, while safeguarding the integrity and legitimacy of the arbitration process.

INTRODUCTION

Technology is a useful servant but a dangerous master.[3]

Awards will likely be made in the near future whose drafting may utilize Artificial Intelligence (AI). The awards will be the result of AI technologies. For instance, AI could be used to structure or analyze exhibits. It is important to understand exactly what this means and how the technicalities interact with the New York Convention. AI could be used by the tribunal while drafting the award, or by the counsel to assist drafting submissions, or by a vendor such as AI-based transcription.

We use a broad definition of AI to include any technology that appears to emulate the performance of a human.[4] AI mimics human abilities, like learning, reasoning or problem-solving through advanced technology and algorithms. A wide-range of possibilities are covered and implications are similarly broad: AI could have been used at any stage in the arbitration, including in drafting the award.

Stakeholders in the field cannot gauge the spectrum across which technologies develop: neural networks and deep learning algorithms now perform tasks once exclusive to humans. Cross-sectoral learnings could allow for AI to outperform humans in spheres of problem solving and decision making: for example, AI has revolutionized efficiency and decision-making processes in the aviation industry –

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3 Christian Lange, *Nobel Lecture: Internationalism*, 13 December 1921 <https://www.nobelprize.org/prizes/peace/1921/lange/lecture/> last accessed 11 July 2024.

4 For those desiring a more detailed definition, they can refer to the the definition adopted by the High-Level Expert Group of Artificial Intelligence established in 2018 by the European Commission: 'Artificial intelligence (AI) refers to systems designed by humans that, given a complex goal, act in the physical or digital world by perceiving their environment, interpreting the collected structured or unstructured data, reasoning on the knowledge derived from this data and deciding the best action(s) to take (according to pre-defined parameters) to achieve the given goal. AI systems can also be designed to learn to adapt their behaviour by analysing how the environment is affected by their previous actions. As a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)', High-Level Expert Group on Artificial Intelligence, *A definition of AI: Main capabilities and scientific disciplines*, 18 December 2018 <https://ec.europa.eu/futurium/en/system/files/ged/ai_hleg_definition_of_ai_18_december_1.pdf> last accessed 11 July 2024.

algorithms digest vast amounts of data on weather patterns, air traffic and aircraft performance to optimize flight paths resulting in increased safety, cost savings and environmental benefits.[5]

The focus of this article is the NYC and AI. This is unchartered territory. How will AI be used in the arbitration or in the award? An annex is included in the article, which is our preliminary attempt at a scale with various levels of AI, illustrative activities, the corresponding supervision and AI-human relationship. This is a working draft and will be developed with time.

THE NEW YORK CONVENTION

The New York Convention was concluded in 1958 for the recognition and enforcement of arbitral awards and agreements.[6]

In 2012, ICCA published the Young ICCA Guide on Arbitral Secretaries ('ICCA Guide').[7] Young ICCA formed the Task Force on the Use and Appointment of Arbitral Secretaries to consider the views of the international arbitration community on the issue of arbitral secretaries and to develop a transparent and robust approach to their use and appointment. This approach is codified in the ICCA Guide.[8] Benefiting

5 The availability of data, advanced algorithms and massive increases in computing power means that AI can already offer genuine advances to aviation, European Aviation High Level Group on AI, *FLY AI Report – Demystifying and Accelerating AI in Aviation / ATM*, 5 March 2020, p. 10 <https://www.eurocontrol.int/publication/fly-ai-report> last accessed 11 July 2024. See also, SESAR deployment in EU <https://assets.ctfassets.net/krj50g99u3hm/35IFzHWiIJ8kkOFPMm4Fir/32f6939b4ed0617c4b54c63f946947cb/541280-SESAR-FACTSHEET_2023_08.pdf > last accessed 11 July 2024; Airbus Airman and S Fleet <https://aircraft.airbus.com/en/services/enhance/skywise/skywise-solutions> last accessed 11 July 2024 (existing software to monitor health of the aircrafts in a fleet, and also offer both real time and predictive solutions); European Union Aviation Safety Agency, Artificial Intelligence Roadmap, February 2020, <https://www.easa.europa.eu/en/document-library/general-publications/easa-artificial-intelligence-roadmap-10> last accessed 11 July 2024 (predictive maintenance can increase aircraft availability by 35%); International Civil Aviation Organization, Working Paper AN-Conf/13-WP/232, p.3 <https://www.icao.int/Meetings/anconf13/Documents/WP/wp_232_en.pdf> last accessed 11 July 2024 ('New paradigms with AI may increase anticipatory and decision making capabilities within complex and uncertain environments. AI systems have high potential in ATM, specifically in areas which involves decision making under uncertainty (e.g. conflict detection and resolution) and prediction with limited information (e.g. trajectory prediction).').

6 Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), p. 97. See also, ICCA, *Guide to the Interpretation of the 1958 New York Convention* <https://www.arbitration-icca.org/second-edition-judges-guide-2024> last accessed 11 July 2024.

7 ICCA Reports No. 1: 'Young ICCA Guide on Arbitral Secretaries' ('Young ICCA Guide') <https://www.arbitration-icca.org/icca-reports-no-1-young-icca-guide-arbitral-secretaries> last accessed 11 July 2024.

8 Young ICCA Guide <https://www.arbitration-icca.org/icca-reports-no-1-young-icca-guide-arbitral-secretaries> last accessed 11 July 2024.

from the synergy between certain tasks that may be accomplished by AI and by arbitral secretaries, the Guide provides useful insights.

The Guide focuses on the task of arbitrators and the requirement of users, but does this with a good dose of realism. It reminds the reader of the reality that parties tend to appoint highly sought-after arbitrators with enough of the experience that is needed to handle the voluminous, substantively complex and procedurally technical arbitrations.[9]

> In practice, many arbitrators responsibly make full use of arbitral secretaries, beyond the purely administrative sphere, to help them in the discharge of their functions. Indeed, to ensure that the maximum benefit is derived from the appointment of an arbitral secretary, the responsibilities entrusted to the arbitral secretary must go beyond the purely administrative. To limit the arbitral secretary's role in supporting the arbitral tribunal to administrative matters only would largely eliminate the gains in efficiency sought through the appointment of a secretary. In order to minimize the risk of diluting the arbitrators' personal mandate, however, tribunals must closely instruct and supervise the arbitral secretary. Ultimately, it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience and expertise. If an arbitrator exercises poor judgment in determining what tasks to assign to the arbitral secretary, it reflects badly on the institution of arbitral secretaries.[10]

Drawing a parallel with AI is straightforward: simply substitute 'arbitral secretary' with AI.

How does the use of AI then affect the award? Is this still an award made under the NYC? Does it give rise to potential refusal of enforcement under Articles V(1) and (2)?

A. Scope of the NYC

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought. (Article I(1))

9 *Ibid.*, p.1.

10 *Ibid.*, Commentary on Article 3 on the role of arbitral secretaries, pp. 11-12.

The first question: does an award, which has been made with the use of AI, fall under the scope of the NYC?

Any award made in a State other than the State of the recognition or enforcement court falls within the scope of the Convention. The second category of awards covered by the Convention are those which are considered as non-domestic in the State where recognition or enforcement is sought.[11]

Article I(1) reads: 'made in the territory of another State'. Does the word 'made' mean that the other State is the legal seat of arbitration or is it merely the physical venue? And what about the cloud and server locations? Do these matter? Gerold Herrmann wrote:

> While a-national (or "free-floating") awards are more common in the imaginative world of radical de-localizers than in the real world, we may wish to anticipate future space awards, rendered in cyberspace (virtual "CYBITRATION©" awards by seatless on-line arbitration centres) or in outer space ("ORBITRATION©" by the "Galactic Arbitration Center").[12]

Newest to the list is Arbitraverse™.[13] Would awards drafted with the use of AI be a-national awards? There is no definitive answer whether such awards fall within the scope of the NYC,[14] thereby leaving it to the enforcement court's discretion to determine the meaning of these terms and their relation to the scope of the NYC.

Furthermore, Article I(1)'s reference to 'differences between the parties' indicates that the award must dispose of (a part of) the dispute between the parties. Also, the courts have relied on Article I(2) in order to define awards as those with a quasi-judicial character but still based on party autonomy. All is based on the parties' intent: did they accept to be bound by the decision in question?[15]

The drafters chose not to define the words 'arbitration' or 'award'. The NYC is an international treaty and a part of public international law. Consequently, the courts called upon to apply the Convention must interpret it in accordance with the rules of interpretation of international law, which are codified in Articles 31 and 32 of the

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11 ICCA, *Guide to the Interpretation of the 1958 New York Convention* <https://www.arbitration-icca.org/second-edition-judges-guide-2024> last accessed 11 July 2024, p. 21.

12 Gerold Herrmann, 'Does the World Need Additional Uniform Legislation on Arbitration? The 1998 Freshfields Lecture', *Arbitration International* Vol. 5 (1999), pp. 211-236 as cited in Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), p. 112.

13 This Trademark Registration is applied by Nomology Technology Pvt. Ltd. at Chennai (India) in August 2022, and is described as 'Downloadable virtual goods, namely computer programs and software in relation to dispute resolution and dispute avoidance' < https://www.startupwala.com/trademarks-registration/search-CHENNAI-ARBITRAVERSE-5590483> last accessed 11 July 2024.

14 Marike R. P. Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016), pp. 112-114.

15 *Ibid.*, p. 117.

Vienna Convention on the Law of Treaties.[16] When problems arose in the application of the formal requirement of Article II, almost half a century after the birth of the Convention, UNCITRAL drafted recommendations favoring an interpretation based on those current usages in international trade.[17] Subject to further research, a good faith interpretation – in line with ordinary meaning, object, purpose and prevailing practices in international trade – a conclusion may be made that awards drafted with the use of AI falls under the scope of the NYC.

B. Phase I

Once a petitioner has submitted the documents as defined in Article IV, it is entitled to the recognition and enforcement of the award (Phase I) unless the respondent proves that one or more grounds for refusal of recognition and enforcement of the award as exhaustively set forth in Article V(1) applies or the court finds one of the grounds in Article V(2) to be applicable (Phase II).[18]

> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement, shall, at the time of the application, supply:
>
> (a) the duly authenticated original award or a duly certified copy thereof;
>
> (b) the original agreement referred to in article II or a duly certified copy thereof.
>
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent (Article IV)

The second question: are there any reasons to deny an enforcement request in phase I? Under Article IV, the successful party would have to submit the award, the agreement, either originals or certified copies, or translations where relevant.[19] A court can grant the enforcement if the applicant has complied with the requirements listed in Article IV while assessing the submission of documents on a *prima facie* basis only.

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16 *Supra* n 11, p. 12.

17 *Supra* n 14, p. 84.

18 *Supra* n 11, p. 68.

19 On Article IV(2): 'Courts tend to adopt a pragmatic approach. While the Convention does not expressly state that the translations must be produced at the time of making the application for recognition and enforcement, a number of courts have, however, required translation to be submitted at the time of making an application.', see *supra* n 11, p. 73.

With that, the request for enforcement ought to be simple, aligning with the purpose of the New York Convention, which contributes to the effectiveness of international arbitration. Yet, in practice, Article IV became a volatile article and the subject of unscrupulous use by counsel and judges alike.[20] This stems from the text of Article IV, which mandates certified copies and authenticated signatures. By securely housing unalterable originals, blockchain addresses numerous concerns outlined in Article IV of the New York Convention.[21]

Blockchain and AI are distinct technologies. The former is a decentralized ledger technology which ensures integrity in data management, and has direct relevance to Article IV of the NYC. AI on the other hand refers to the development of computer systems capable of performing tasks that typically require human intelligence, such as learning, problem solving, and decision making. Blockchain and AI can be used together in certain applications, such as enhancing the security and efficiency of AI systems or providing data integrity for AI-generated insights. We can look to the stimulus and support of blockchain when considering the introduction of AI in the dispute resolution space.

C. Phase II

The third question: could the losing party in the arbitration successfully rely on Article V for the refusal of enforcement of the award?

Certain common themes have emerged in various soft law instruments concerning the use of tribunal secretaries in international arbitration: party autonomy, transparency, disclosure, limited mandate, supervision and generally ensuring that the tribunal's fundamental decision making power is not outsourced.[22] Much of the same themes apply to the use of AI.

1. Due Process

> The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. (Article V(1)(b))

Does the use of AI somehow affect the notice requirement or the ability of a party to present its case? Judicial application of the notice ground under Article V is clear. If the lack of notice has not altered the conduct of the arbitration and the outcome

20 Marike Paulsson, 'The Blockchain ADR: Bringing International Arbitration to the New Age' (*Kluwer Arbitration Blog*, 9 October 2018) <https://arbitrationblog.kluwerarbitration.com/2018/10/09/blockchain-adr-bringing-international-arbitration-new-age/> last accessed 11 July 2024.

21 *Ibid.*

22 See subsections under this heading for sources of soft law concerning the use of tribunal secretaries in international arbitration.

thereof, courts are likely to dismiss the respondent's attempt to stop enforcement.[23] An argument may arise that intervention of AI has adversely impacted a party's right to notice in scenarios where electronic case management systems automatically generate emails for notices and schedule hearings, and the system glitches.

Nuances arise with the last six words of Article V(1)(b). Did the use of AI somehow hinder a party from presenting its case or participating in the proceedings? Do arbitrators comply with due process, hearing and addressing all arguments when they then use AI to 'hear'?

In *Consorcio Rive*, the US Court of Appeals for the Fifth Circuit emphasized a narrow interpretation of due process under Article V(1)(b), aligning it with a pro-enforcement stance. Despite the respondent's refusal to participate in the arbitration in Mexico due to safety concerns, after papers were filed for a criminal investigation against him by the claimant, the court was unpersuaded by the argument that this prevented fair presentation of its case.

> BC had ample opportunity to defend itself even without David Briggs' physical presence at the arbitration. ... The strong federal policy in support of encouraging arbitration and enforcing arbitration awards dictates that we narrowly construe the defense that a party was "unable to present its case". ... BC could have simply sent an attorney or other corporate representative to represent it at the arbitration. Briggs himself could have participated by telephone. Additionally, BC participated in the arbitration to the extent that it designated an arbitrator and filed over 80 pages of legal argument and documentation in support of its position at the arbitration.[24]

Combing a narrow interpretation of due process, a pro-enforcement attitude, and applying the principle of estoppel, the utilization of AI to conduct tasks such as legal research or review of voluminous submissions may be acceptable. This is more so where the use of AI has been disclosed to a party during the arbitration and no objection was made. Transparency and party consent provide protection: awards may perhaps be safer where the tribunal has given a detailed disclosure on the choice of AI, extent of its use, the types of materials shared with the AI (like confidential materials), its level of influence, among others factors.

The use of tribunal secretaries often include transparency requirements: soft law might require the tribunal's selection of the candidate to take into account all

23 *Supra* n 14, pp. 185-187.

24 *Consorcio Rive, S.A. de C.V. (Mexico) v. Briggs of Cancun, Inc. (US) v. David Briggs Enterprises, Inc.* (US) (5th Cir. 2003) in *Yearbook Commercial Arbitration* XXXI (2006) (US no. 472) at 1429-1438. See *supra* n 14, pp. 186-187.

circumstances of the case.[25] They may be required to provide the resume of the secretary[26] or disclose the tasks that the secretary will carry out[27]. Independence is yet another requirement.[28] In a similar vein, the choice of the AI system (taking into account not just facts of the case, but also the nature of the AI system which in turn requires an understanding of the underlying biases of the training data and programming) and its use may perhaps need to be disclosed to the parties.

2. *Mandate and composition:*

The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced. (Article V(1)(c))

The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. (Article V(1)(d))

Courts tend to interpret the arbitration clause broadly and are thus reluctant to accept evidence to the effect that a tribunal has exceeded its mandate.[29] There is precedent of challenges made to arbitral awards, indicating that arbitrators are hired to fulfil a specific role, implying that this responsibility cannot be delegated.[30] In the *Yukos* proceedings, the Hague Court of Appeal ruled that a tribunal has the procedural right to engage assistants or secretaries for drafting awards, as long as it assumes responsibility for the final decision. Although the tribunal had failed to fully disclose to the parties on the nature and extent of the secretary's work, this

25 Article 2(1), Young ICCA Guide; Article 2, SIAC Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, 2 February 2015 ('SIAC Practice Note') <https://siac.org.sg/practice-note-for-administered-cases-on-the-appointment-of-administrative-of-secretaries> last accessed 11 July 2024; Article 2.1, HKIAC *Guidelines on the use of a secretary to the Arbitral Tribunal*, 1 June 2014 ('HKIAC Guidelines') <https://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/services/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal_R.pdf> last accessed 11 July 2024.

26 Article 2(2), Young ICCA Guide; Article 2.3, HKIAC Guidelines; para. 204, LCIA Guidance Note for Parties and Arbitrators ('LCIA Guidelines') <https://www.lcia.org/adr-services/guidance-note.aspx#10.%20%20TRIBUNAL%20SECRETARIES> last accessed 11 July 2024.

27 LCIA Guidelines. para. 203.

28 Young ICCA Guide, Article 2(3); LCIA Guidelines, para. 214; SIAC Practice Note, Article 4; HKIAC Guidelines, Article 2.10.

29 *Supra* n 14, pp. 188-190.

30 This has been recognized in soft law on tribunal secretaries, for example see HKIAC Guidelines, Article 3.2 ('The arbitral tribunal shall not delegate any decision-making functions to a tribunal secretary, or rely on a tribunal secretary to perform any essential duties of the tribunal.').

did not amount to a major procedural violation. Further, 'the circumstance that [the tribunal secretary] has written parts of the arbitral awards cannot lead to the conclusion that the Tribunal was composed in violation of statutory rules or rules agreed between the parties'.[31] On mandate, the Court said:

> Contrary to the opinion of the Russian Federation, there is also no unwritten rule to the effect that a secretary or assistant is not allowed to write parts of the award. As long as no concrete party agreements have been made in this respect and the (substantive) decisions are taken by the arbitrators themselves without the influence of third parties, it is left to the discretion of the Tribunal to what extent it wishes to use an assistant or secretary for the drafting of the arbitral award. The Court of Appeal is of the opinion that the reticent review provided by Article 1065(1)(c) DCCP also applies here; the violation of the mandate must be serious.[32]

Transposing this to the use of AI in awards. Can AI be used to draft an award? Would the AI system(s) then be a fourth arbitrator? Would use of the AI be a violation of the tribunal's mandate? What is the extent of disclosure required? To what extent is the tribunal responsible?

Two aspects appear key: first, accountability. The tribunal is responsible for the award and the decision therein.[33] Would their responsibility and duty of supervision extend to any errors or omissions that may have been caused by the AI systems involved in making the award? Or would the AI systems have immunity?[34] This is also then linked to the question of whether AI systems have legal rights (such as being recognized as the inventor of patents, or in our case an extension of tribunal's immunity) or liabilities (such as harm caused by self-driving vehicles, or in our case a breach of mandate or duties of confidentiality and privacy).[35]

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31 *Yukos Universal Limited (Isle of Man) v. The Russian Federation,* PCA Case No. 2005-04/AA227, Judgment of the Hague Court of Appeal (Unofficial English Translation), 18 February 2020, para. 6.6.13.

32 *Ibid.*, para. 6.6.14.1.

33 Soft law states that a tribunal cannot outsource decision making function to a tribunal secretary. Young ICCA Guide, Article 1(4); HKIAC Guidelines, Articles 3.2 and 3.4; LCIA Guidelines, para. 201. There is also a responsibility of supervision vested on the tribunal: Young ICCA Guide, Article 1(5); LCIA Guidelines, para, 201; HKIAC Guidelines, Article 3.1. See also, *SVAMC Guidelines on the Use of Artificial Intelligence in Arbitration, 30 April 2024*, Guideline 6 ('An arbitrator shall not delegate any part of their personal mandate to any AI tool. This principle shall particularly apply to the arbitrator's decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence.').

34 Secretaries are accorded with an extension of the tribunal's immunity. Young ICCA Guide, Article 2(7) ('The parties shall accord the same immunity to the arbitral secretary as that accorded to the arbitral tribunal.').

35 Young ICCA Guide, Article 2(8) ('The arbitral secretary shall be bound by the same duties of confidentiality and privacy as the arbitral tribunal.').

Second, knowledge and consent of the parties.[36] Party autonomy is one of the main pillars of arbitration. Perhaps parties could agree upfront on the use of AI systems. But this suggestion may not necessarily be easy: bestowing the responsibility on parties who don't see eye-to-eye after a dispute has arisen might cause delays because of their own non-consensus. At times, depending on the level of AI systems used, it may be necessary to engage an expert to assess potential subconscious influences – which may for instance arise from training data bias; algorithmic bias; human-AI interaction and perceived authority of technology; cognitive biases including confirmation or anchoring bias; or, internalization of cultural and societal norms by AI systems which may not necessarily aligned with impartiality – on decision-making. The cost: delays until consensus is reached.

3. *Public policy:*

> Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country. (Article V(2))

Article V(2) protects the sovereign rights of Contracting States. States naturally surrender as little as possible even when they otherwise find it in their interest to enter into international agreements.[37] Notwithstanding the bargain, the dominant approach is for courts to apply a narrow understanding of public policy.[38]

Courts also reconcile with realism. When applying public policy, the Quebec Court of Appeal prioritized party autonomy over its notions of sovereignty.[39] The rationale for this decision to refuse the enforcement was to protect the parties' right to design the arbitration as they deemed fit:

> [I]n an increasingly globalized business world, the legislator encourages parties to settle their disputes by arbitration according to certain rules, and that if these rules are not followed and courts acquiesce in the violation, merchants will leave arbitration.[40]

36 Tribunal secretaries can only be appointed with the knowledge and consent of the parties. Young ICCA Guide, Article 1(2); HKIAC Guidelines, Article 2.1; SIAC Practice Note, Article 3; LCIA Guidelines, para. 203.

37 *Supra* n 14, p. 217.

38 *Ibid.*, pp. 225-230.

39 *Ibid.*, pp. 225-226.

40 *Smart Systems Technologies Inc. (US) v. Domotique Secant Inc.* (Canada) (Court of Appeal Quebec 2008), in Yearbook Commercial Arbitration XXXIII (2008) (Canada no. 25), at 464-472. See also, *supra* n 14, pp. 225-226.

Further work is necessary to understand whether the losing party in the arbitration can successfully rely on Article V for the refusal of enforcement of an award drafted with the use of AI. At first glance, transparency, party consent, and tribunal accountability in AI usage appear crucial to mitigate challenges based on due process, mandate, composition, and public policy grounds.

With the exponential growth and corresponding use of AI, it might be easy to foresee parties accepting and potentially encouraging the use of AI by the tribunal. The international regulatory background is ripe: over 50 governments have formally endorsed the OECD/G20 AI Principles.[41] The Universal Guidelines for AI,[42] the Rome Call for AI Ethics,[43] the African Commission on Human Rights and People's Rights,[44] China's Recommendation on Regulation of Algorithms,[45] EU's AI Act,[46] Singapore's Model AI Governance Framework[47] are all markers.

The African Commission on Human and Peoples' Rights Resolution, in particular, makes specific reference to commercial decision making:

> Noting that the various uses and potential uses of AI technologies, robotics and other new and emerging technologies in the criminal justice system, law enforcement, immigration, border control, elections, *commercial decision-making* etc. have implications for various rights under the African Charter such as the right to life; right to privacy; right to dignity; right to liberty; right to equality

41 OECD AI Principles <https://oecd.ai/en/ai-principles> last accessed 11 July 2024; see also, Center for AI and Digital Policy, *Artificial Intelligence and Democratic Values – 2021*, February 2022 <https://www.caidp.org/reports/aidv-2021/> last accessed 11 July 2024, p. 3.

42 Universal Guidelines for Artificial Intelligence, 23 October 2018 <https://thepublicvoice.org/ai-universal-guidelines/> last accessed 11 July 2024. Endorsements can be accessed at <https://www.caidp.org/universal-guidelines-for-ai/> last accessed 11 July 2024.

43 Rome Call for AI Ethics <https://www.romecall.org/wp-content/uploads/2024/02/RomeCall_report-web.pdf> last accessed 11 July 2024.

44 African Commission on Human and People's Rights, *Resolution on the need to undertake a Study on human and peoples' rights and artificial intelligence (AI), robotics and other new and emerging technologies in Africa* - ACHPR/Res. 473 (EXT.OS/ XXXI) 2021 <https://achpr.au.int/en/adopted-resolutions/473-resolution-need-undertake-study-human-and-peoples-rights-and-art> last accessed 11 July 2024.

45 DigiChina, Translation: Internet Information Service Algorithmic Recommendation Management Provisions – Effective March 1, 2022 <https://digichina.stanford.edu/work/translation-internet-information-service-algorithmic-recommendation-management-provisions-effective-march-1-2022/> last accessed 11 July 2024.

46 Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes (Adopted by the Committee of Ministers on 13 February 2019 at the 1337th meeting of the Ministers' Deputies) <https://search.coe.int/cm/pages/result_details.aspx?objectid=090000168092dd4b> last accessed 11 July 2024.

47 Personal Data Protection Commission Singapore, *Singapore's Approach to AI Governance* <https://www.pdpc.gov.sg/help-and-resources/2020/01/model-ai-governance-framework> last accessed 11 July 2024.

> and non-discrimination; freedom of assembly; and the right to freedom of expression; [Emphasis added][48]

In March 2024, the UN General Assembly adopted a landmark resolution on the promotion of safe, secure and trustworthy AI.[49] The resolution recognizes the potential of AI to accelerate progress towards the Sustainable Development Goals while emphasizing the need for responsible AI governance to avoid negative impacts such as discrimination and privacy violations. It encourages international cooperation, capacity building, and inclusive participation in AI development and regulation. It is here that soft law may bring the required legitimacy and assurance for tribunals and courts to accept the use of AI.

CONCLUDING REMARKS

Disclosure and transparency, party consent, and supervision of the AI-systems' outputs and non-delegation of decision making would likely allow for enforcement under the NYC.

Tomorrow's AI will be more sophisticated than today. Tomorrow's technology tends to surprise, or in some cases shock. AI is growing exponentially and many don't have an intuitive grasp of what this growth rate is and how such improvements can have a cross-sectoral influence and a potential effect on human organization. The ripple effect will (if it hasn't already) reach the shores of the arbitration process. In April 2024, addressing the 1st Singapore-India Conference on Technology, Chief Justice Sundaresh Menon spoke of the revolutionary capability of technology:

> When we think of what technology might become, we have to recognise that the significance of those developments will not lie in the notion that technology will mimic what humans have historically done or offer a cheaper, human-like alternative; rather, the significance of the ever-growing capability of technology will lie in its ability to offer solutions to the legal problems facing the world in ways that are completely different from the ways in which we lawyers and judges have been solving those problems for hundreds of years. Just think of how Google Maps has provided a completely different solution for those who used to use a paper map to find their way; or how e-mail and smartphones have transformed the way in which we communicate and access information. These transformations had nothing to do with replicating their pre-digital counterparts.[50]

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48 *Supra* n 44.

49 United Nations General Assembly, Resolution A/78/L.46, 11 March 2024 <https://undocs.org/Home/Mobile?FinalSymbol=A%2F78%2FL.49&Language=E&DeviceType=Desktop&LangRequested=False> last accessed 11 July 2024.

50 Chief Justice Sundaresh Menon, *Judicial Responsibility in the Age of Artificial Intelligence*, 13 April 2024, para. 4 <https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-

How do we ensure that the integrity of the arbitral process is not compromised with the AI revolution? We introduce the following resolutions, which hopefully will provide a platform for future dialogue on AI and the NYC:

1. National judges apply the NYC. Chief Justice Menon posits that the bedrock on which societies are founded is 'the goal of preserving and strengthening the rule of law', and its maintenance and protection are the 'ultimate responsibility' of the judiciary.[51]
2. There are clear advantages to AI. In terms efficiency and cost, it is needed. At the same time, its effect on social structures, governance, labor and employment, environment, human rights all require careful assessment. Its hallucinatory tendencies, black-box decisions, biases in underlying training data and programming all require attention.
3. Arbitration is based on party autonomy: party autonomy is best served if the outcome of the arbitration is legitimate and one aligned with the parties' arbitration agreement.[52] There is no substitute for care when it comes to ensuring the recognition and enforcement of the arbitration agreement under Article II of the NYC.[53] As long as parties can contractually agree to something that doesn't violate public policy and mandatory laws they could arguably agree to the use of AI in their arbitration agreement.[54] When the conduct of the arbitration is based on the parties' agreement (either in the arbitration agreement or subsequently in the arbitration process), the disclosure and use of AI is enveloped in transparency, the underlying systems are designed with care, counsel and tribunal are trained and equipped to use it right, AI will very likely enhance efficiency and reduce costs in arbitration.
4. Arbitrators could receive guidance in how to comply with due process when using AI and use full transparency when using it. For this, we could tap into disclosure rules like the soft law for tribunal secretaries. Dialogue between AI specialists and adjudicators will facilitate understanding of AI-systems and judicial processes.
5. New rules and codes of conduct could be developed for the mandate of arbitrators and clearly define which items should not be subjected to AI systems, the level of supervision needed, or amount of caution to be exercised. For instance, in 2023, IBA announced an AI task force which is examining AI regulation, its impact on the legal profession and advocating for best practices among bar associations.[55]

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justice-sundaresh-menon--keynote-speech-at-the-inaugural-singapore-india-conference-on-technology> last accessed 11 July 2024.

51 *Ibid.*

52 *Supra* n 14, p. 175.

53 *Ibid.*, p. 94.

54 *Ibid.*, for a checklist on making the Arbitration Clause 'Convention Proof', see pp. 94-95.

55 International Bar Association (IBA), *IBA & AI: Artificial intelligence, the law and the legal profession* <https://www.ibanet.org/Presidential-project-AI-Tech> last accessed 11 July 2024.

6. Although the NYC was not drafted during the AI revolution, drafting history reiterates the drafters' intent that arbitration is based on party autonomy.[56]

AI is in use by the judiciary: the Singapore courts have signed a Memorandum of Understanding with Harvey to develop a generative AI programme that aims to help users of the Small Claims Tribunal.[57] In India, TERES is used by the Supreme Court of India for AI-driven real time transcription of court proceedings and Vidhik Anuvaad Software, a machine-assisted translation tool trained by AI, is used to translate judicial documents, orders, and judgments from English into 11 vernacular languages and vice versa.[58] The Hangzhou Internet Court has implemented an evidence analysis system that uses cutting-edge technologies such as blockchain, AI, big-data, and cloud computing. This system analyzes and compares all evidence presented by both parties, transforming it into a list of evidence and relevant exhibits. The information is then sorted and classified before being visually presented to the human judge for their consideration.[59] In Mexico, courts can use AI to give advice on determining whether someone is entitled to a form of social security or not.[60]

The rate of growth of AI is revolutionary, and it is important to stay ahead and understand the technology before we attempt to regulate. Lawyers, adjudicators and policy makers need to open dialogue with technologists. With every passing day, technology is transforming and regulators are playing catch-up. The UN General Assembly resolution calls upon its agencies to enhance their response to the opportunities and challenges posed by AI[61]. It calls for collaborative efforts among governments, private sectors, civil society, and international organizations to

56 For a consolidated list of drafting history referring to party autonomy, see *supra* n 14, Annex II, p. 248.

57 Justice Goh Yihan, *Perspectives on Artificial Intelligence – A View from Singapore*, 20 April 2024, para. 6 <https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-goh-yi-han--address-at-the-standing-international-forum-of-commercial-courts> last accessed 11 July 2024.

58 *Supra* n 50, para. 26.

59 Xuan H. (2021), *One-Click Access to Evidence Analysis Results, Hangzhou Internet Court Launches Intelligent Evidence Analysis System*, China Courts Network <https://www.chinacourt.org/article/detail/2019/12/id/4747683.shtml> last accessed 11 July 2024.

60 UNESCO, *Global Toolkit on AI and the Rule of Law for the Judiciary*, 2023 <https://unesdoc.unesco.org/ark:/48223/pf0000387331> last accessed 11 July 2024.

61 United Nations General Assembly, Resolution A/78/L.46, 11 March 2024, para. 10 ('Calls upon specialized agencies, funds, programmes, other entities, bodies and offices, and related organizations of the United Nations system, within their respective mandates and resources, to continue to assess and enhance their response to leverage the opportunities and address the challenges posed by artificial intelligence systems in a collaborative, coordinated and inclusive manner, through appropriate inter-agency mechanisms, including by conducting research, mapping and analysis that benefit all parties on the potential impacts and applications; reporting on progress and challenges in addressing issues; and cooperating with and assisting developing countries in capacity building, access and sharing the benefits of safe, secure and trustworthy artificial intelligence systems in achieving all 17 Sustainable Development Goals and sustainable development

ensure the ethical and beneficial use of AI while bridging digital divides and fostering inclusive development.

Technology can be a useful servant but a dangerous master.[62] AI ought to serve, transform, and resolve the crisis international arbitration finds itself in:[63] its regulation must be timely yet not paralyze its journey. Although AI leads stakeholders in unchartered territories, it could create pathways forward in an era of unprecedented challenges.

in its three dimensions – economic, social and environmental; stressing the need to close artificial intelligence and other digital divides between and within countries;').

62 *Supra* n 3.

63 Arbitration has found itself in a public relations crisis due to, among other factors, a perception of bias, issues regarding the selection of arbitrators, and concerns about enforceability of awards. In the context of investor-State arbitration, see for example UN General Assembly, Report A/78/168, 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, David R. Boyd, Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights', 13 July 2023 <https://documents.un.org/doc/undoc/gen/n23/205/29/pdf/n2320529.pdf?token=T2G1tVJ9js83M9uBEV&fe=true> last accessed 11 July 2024.

Annex: The Paulsson-Suresh Progressive AI Supervision Scale ('Paulsson-Suresh Scale')

Use of AI in the arbitral process, and its direct or indirect influence on the final award, falls on a scale with two extremes. On one extreme, AI plays a docile assistant and on the other it requires a very high level of supervision and reliance on its results requires a high degree of caution. We propose the following scale as an initial starting point, which we will refine and develop over time.[1]

Scale	***Description***	***AI – Human relationship***	***Illustrative activities***
Minimal super-vision (Level 1)	Basic AI performs tasks. Arbitrator can rely on vendor support.	Human operator (generally outsourced) only for initial systems design and critical monitoring.	– Spelling and grammar corrections. – OCR (optical character recognition): improving resolution of poor scans. – NER (named entity recognition): deriving actors / dates / etc. – Voice activated electronic presentation of evidence.
Limited super-vision (Level 2)	AI undertakes limited amount of information analysis. AI performs simple tasks. Arbitrator or counsel can carry out these tasks with the assistance of generic AI tools available in the market.	Requires human supervision and intervention for design, implementation, and inter-mittent monitoring. AI use is more procedural and unlikely to affect the substantive portions of the award.	– Drafting emails following text suggestions. – Evaluation of a single document: theme-based and actor-based sum-maries, and preparation of summaries of case law. – Categorize / filter documents and evidence: emails, dates, author. – Calendaring and scheduling assistance. – Derive a chronology of events extracted from a single document or a limited set of documents. – Transcription. – Translation. – Automatically hyperlink submissions with corresponding exhibits in the record.
Moderate super-vision (Level 3)	AI undertakes informational analysis and supports with discrete and slightly complex tasks. AI is used on a broader database of documents. Depending on amount of reliance by the arbitrator, AI use may directly or indirectly affect portions of the award. Arbitrator uses specifically curated AI for the legal sector.	Requires human oversight and occasional intervention. Arbitrators to validate the accuracy of analysis, results, and summaries, refining them as needed.	– Arbitrator selection and conflict check assistance. – Draft of PO 1 based on parties' initial submissions. – Draft of procedural history and uncontested facts in an award based on party submissions using large language models. – AI analyses document content to determine key themes and topics. Summarization algorithms generate concise summaries of docu-ments, highlighting important information. – Simple querying across voluminous submissions. – Smart scheduling (based on personal calendars and time zones).

1 The authors would like to thank the technology teams at TERES and BCDR for their patience and specialized inputs.

Scale	***Description***	***AI – Human relationship***	***Illustrative activities***
High super-vision (Level 4)	High-risk and more complex tasks undertaken by AI-systems. Both process and outcomes to be closely monitored and vetted by the arbitrator. Arbitrators to interpret AI-generated insights, making strategic decisions based on the analysis. Enterprise-grade AI solutions, specifically designed for the underlying industry / sectors. (e.g. construction, finance, aviation etc.).	Close monitoring required by the arbitrator, as conclusions of the AI could affect substantive portions of the award.	– AI conducts advanced analytics on documents, identifying patterns, trends, and insights. Text mining and machine learning techniques are applied to uncover hidden relationships and correlations within documents. – Costs calculators and settlement engines. – Identification of relevant case law. – Visual AI to assist with video analytics by examining photographs and footages of site visits and other visual evidence.
Full super-vision (Level 5)	Arbitrator's adjudicative mandate is evoked. Bespoke and custom-built AI solutions which is trained on comprehensive dataset, aggregated and unified resources, knowledge of the industry and has access to parties' histories and specialized knowledge of the case and players.	Full monitoring required by arbitrator, as conclusions of the AI could affect substantive and operative portions of the award.	– Support checking for blind spots and subconscious biases by analysing trends in past decisions. – Support evaluation across multiple documents and checking for consistency with prior stance of the arbitrator in published awards / articles. – Assist flagging inconsistencies in evidence. – Fraud detection.

Automation & Augmentation: Artificial Intelligence in International Arbitration

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ABSTRACT

This article investigates the interplay between the automation of traditional tasks and the creation of new roles and functions in international arbitration, driven by the growing adoption of artificial intelligence (AI) particularly generative AI. Firstly, the article reviews findings from various fields outside of law that suggest AI can promote economic growth, enhance working conditions, and create new job opportunities through the integration of 'automation' and 'augmentation'. It then evaluates recent initiatives by arbitration institutions to integrate AI into arbitral processes, focusing on the skills that arbitrators will need to navigate this new AI-driven environment.

INTRODUCTION

A few years ago, humans lost the world championship of the game of 'Go' (a board game similar to chess) to an AI system.[2] Google's DeepMind had trained a program, called 'AlphaGo', using data from thousands of human amateur and professional games of Go. In 2016, AlphaGo played human World Champion Lee Sedol and won 4-1. In 2018, DeepMind created 'AlphaGo Zero', which had been trained

1 Ph.D. (European University Institute, EUI); LLM (Paris 1, Pantheon-Sorbonne); Admitted to practice law in Paris (*CAPA*).

2 The story and data are available here: Emily Willingham, 'AI's Victories in Go Inspire Better Human Game Playing' (*Scientific American* 13 March 2023) <https://www.scientificamerican.com/article/ais-victories-in-go-inspire-better-human-game-playing/> last accessed 11 July 2024.

to play Go not on human data, but simply by playing games against itself, starting from completely random play. After only a handful of days of play, AlphaGo Zero defeated AlphaGo by 100 games to 0. While the complete computerization of the game of Go seemed to have relegated humans to irrelevance, a process known as 'augmentation' started to happen when human Go players started training with AI systems. Eventually, in 2023, a human player regained the championship against the machine.[3] In a review study, a group of cognitive scientists have hypothesised that training with AI programs 'may have prompted human players to break away from traditional strategies and induced them to explore novel moves, which in turn may have improved their decision-making'.[4]

Similarly to the fear of human irrelevance in the game of Go, the rapid uptake of AI, and particularly of generative AI products based on large language models (LLM) capable of analyzing and producing written documents, has sent waves of alarm across the legal profession. Lawyers have expressed fear that machines powered by generative AI could ultimately 'replace' them.[5] This anxiety is partly rooted in the dramatic growth in the wage premium associated with higher education since the 1980s.[6] Lawyers, having invested significantly in their education to secure these premiums, are understandably concerned about losing this economic advantage. This apprehension extends to the field of arbitration, where innovations that threaten the traditional conduct of proceedings may be met with distrust.

However, research from different disciplines suggests that thinking of technological innovation, and of automation of tasks as a lose-lose game where jobs are lost and never created, may be too simplistic. On the contrary, the introduction of disruptive technologies, such as generative AI, may in fact produce both negative impacts, as well as more positive consequences on economic growth and job creation.[7] In particular, the historical precedent set by general-purpose technologies, such as the internal combustion engine and electricity, suggests that these type of

3 *Ibid.*

4 Minkyu Shin, Jin Kim, Bas van Opheusden and Thomas L. Griffiths, 'Superhuman artificial intelligence can improve human decision-making by increasing novelty' (2023) 120(12) *Proceedings of the National Academy of Sciences of the United States of America* <https://www.pnas.org/doi/abs/10.1073/pnas.2214840120> last accessed 11 July 2024.

5 Edward Felten, Manav Raj and Robert Seamans, 'Occupational, industry, and geographic exposure to artificial intelligence: A novel dataset and its potential uses' (2021) 42 *Strategic Management Journal* 2195, 2203-2204 (explaining that lawyers are at high risk of occupational instability due to new technologies). See also Joanna Goodman, *Robots in law: how artificial intelligence is transforming legal services* (Globe Law and Business 2016) pp. 17-26 (discussing the role of AI in law at a time where generative AI was not yet a reality).

6 David H. Autor and David Dorn, 'The growth of low-skill service jobs and the polarization of the US labor market' (2013) 103 *American Economic Review* 1553, 1553-1597.

7 David Autor, 'Polanyi's paradox and the shape of employment growth', National Bureau of Economic Research, Working Paper 20485, 2014 <https://www.nber.org/papers/w20485> last accessed 11 July 2024.

technologies, with their ability to revolutionize many different sectors and levels of the supply chain, are amenable to trigger waves of complementary innovations.[8] In such contexts, individuals, businesses, and professions that invest in the necessary skills could reap substantial benefits from technological innovation.

This is not to suggest that AI technology is risk-free. On the contrary, the author of this contribution has highlighted elsewhere a series of problems arising from the mass uptake of AI-based products.[9] Legislators around the world are currently debating how to better frame this technology so that its benefits for society are greater than the risks and are shared equally among the different groups.[10] However, as a consequence of this complex movement, whereby innovation triggers both a disappearance of traditional roles and the creation of new professional needs and functions, the legal profession must evolve and adapt. As noted by Susskind, for lawyers to remain successful in the AI era, acquiring AI literacy is crucial. Those who do not develop these skills risk losing their professional relevance in this rapidly changing landscape. [11]

This article addresses the synergy between the automation of traditional tasks and the creation of new functions and roles in international arbitration, which comes from the inevitable uptake of AI, particularly generative AI, within the field. It focuses particularly on the use of generative AI products during arbitral proceedings and from the arbitrators' perspective. The article is structured as follows. Part 1 discusses the findings in disciplines other than law suggesting that AI has the potential to drive economic growth, improve working conditions, and create new job opportunities, especially as a result of the synergy between 'automation' and 'augmentation'. Part 2 examines the most recent proposals by institutions in the field of arbitration for integrating AI into arbitral proceedings, with a view to what skills lawyers and arbitrators will need in the brave new world of AI.

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8 Bryn Erik Brynjolfsson and Tom Mitchell, 'What Can Machine Learning, Do? Workforce Implications' (2017) 358 *SCIENCE* 22 Dec 2017, 1530-1534.

9 See for example: Sara Migliorini, '"More than Words": A Legal Approach to the Risks of Commercial Chatbots Powered by Generative Artificial Intelligence' (2024) *European Journal of Risk Regulation* 1, 9; Sara Migliorini, 'Biometric Harm' (2023) 5 *Law, Technology and Humans* 238; Rostam J. Neuwirth and Sara Migliorini, 'Unacceptable Risks in Human-AI Collaboration: Legal Prohibitions in Light of Cognition, Trust and Harm' (2023) CEUR Workshop Proceedings <https://ceur-ws.org/Vol-3547/paper4.pdf> last accessed 11 July 2024.

10 Anu Bradford, *Digital Empires: The Global Battle to regulate technology* (Oxford University Press 2023) 117. For an overview of ongoing legislative changes in various jurisdictions around the world, see for example: White & Case, 'AI Watch: Global regulatory tracker' <https://www.whitecase.com/insight-our-thinking/ai-watch-global-regulatory-tracker#magazine-content> last accessed 11 July 2024.

11 Richard Susskind, *Tomorrow's Lawyers: An Introduction to Your Future* (3d edn, Oxford University Press 2023) pp. 300-310.

I. AI'S IMPACT ON KNOWLEDGE AND LEGAL WORK

Unlike previous industrial revolutions, the uptake of AI, and specifically generative AI, has the potential to put pressure on knowledge workers, including lawyers, and to displace their jobs, which have traditionally been spared by automation. Indeed, traditionally, substituting computer-intensive machinery for workers performing routine, task-intensive jobs had depressed demand for workers in both blue-collar production and white-collar office, clerical, and administrative support positions, and had reduced the set of middle-skill career jobs available to–non-college-educated workers more generally.[12] This movement, however, had largely spared lawyers, who benefitted grandly from the skill-premium associated with their advanced degree.[13]

The uptake of generative AI, however, has put pressure on knowledge workers, including lawyers. While recognizing the disruptive effect of this technology, this section builds on studies in economics and other disciplines, to argue that the widespread uptake of AI may not be merely considered as a matter of automation, i.e. replacing human tasks with machines; rather, it represents a synergy where automation enhances human capabilities, creating a dynamic interplay that, if correctly harnessed, may transform legal jobs and foster collective economic growth.

Therefore, in the field of ADR and arbitration, this would mean that automated systems will handle preliminary case assessments, document analysis, and data management, allowing human arbitrators and mediators to concentrate on nuanced decision-making and negotiation processes that require a deep understanding of human behaviour and legal principles. The result is an arguably more efficient and effective resolution process, benefiting both clients and legal professionals.

Indeed, according to studies in the field of economics, an often overlooked but significant effect of computerization of tasks is its dual ability to both replace and enhance human labour.[14] This dual role is essential for understanding how productivity growth can increase the value of tasks that require uniquely human abilities. Focusing solely on the loss of jobs misses the key economic mechanism through which productivity improvements boost the significance of human-specific tasks.

More specifically, the introduction of generative AI at scale in the workplace has proven to increase productivity significantly, in two distinct ways. On the one

12 Autor and Dorn (*supra* n 6) 1553. The authors also identify two additional factors, unrelated to technology and automation, that have contributed to this shift: the decline in the penetration and bargaining power of labour unions in the United States, along with globalization and the influx of goods from low-income countries.

13 *Ibid.,*1589-1595.

14 Autor (*supra* n 6) 2.

hand, by automating routine and repetitive work, technology allows human workers to dedicate their efforts to more complex, creative, and judgment-intensive activities that machines are incapable of performing. This shift not only preserves but enhances the importance of human labor in the economy, as it allows workers to engage in higher-order tasks that require advanced cognitive skills. For example, in an interesting book about the impact of AI on knowledge workers, the following irreplaceable human qualities are identified: conceptualizing and programming AI systems, offering a comprehensive viewpoint, integrating and synthesizing diverse systems and outcomes, overseeing machine performance, recognizing the strengths and limitations of AI, extracting necessary information, and convincing people to follow AI-generated advice.[15]

On the other hand, productivity is also fostered by accelerating the dissemination of knowledge and upskilling of entry-level and less expert workers. For example, one of the first studies on the impact of widespread access to a generative AI assistant in the workplace has shown significant benefits.[16] In particular, the study in question has shown that access to AI assistance can boost the productivity of human workers by 14%, enabling them to resolve more customer issues per hour. Interestingly, these gains are most pronounced among less-experienced and lower-skill workers. This is because generative AI systems capture and disseminate the best practices of top performers, democratising knowledge that was previously inaccessible.[17]

In the legal context, this means that junior lawyers and paralegals may perform at higher levels of proficiency, reducing the learning curve and enhancing their contributions to their firms. In a nutshell, as 'automation' takes over routine tasks such as document review and case law research, augmentation empowers legal professionals to focus on strategic thinking and client interactions. This shift not only enriches the job roles of current employees but also creates new opportunities for those entering the legal field.

In conclusion, the synergy between automation and augmentation in the legal world, particularly in ADR and arbitration, is poised to transform legal jobs, create new opportunities, and drive economic growth. In the process of automating some work, other work can be augmented. As a consequence, 'skill premia'[18] that have contributed to widening inequality may be eroded. Thus, it is quite plausible that

15 Thomas H. Davenport and Julia Kirby, *Only Humans Need Apply: Winners and Losers in the Age of Smart Machines* (Harper Business New York 2016) 89-253.

16 Erik Brynjolfsson, Danielle Li, and Lindsey R. Raymond 'Generative AI at Work', National Bureau of Economic Research, Working Paper 31161, 2023 <https://www.nber.org/system/files/working_papers/w31161/w31161.pdf> last accessed 12 July 2024.

17 *Ibid.*

18 Daron Acemoglu, 'Patterns of Skill Premia', *The Review of Economic Studies*, Volume 70, Issue 2, April 2003, Pages 199-230.

the use of AI to automate tasks will both increase productivity and decrease income inequality. If so, then we may want more automation, not less.[19]

II. THE INTEGRATION OF AI TOOLS IN INTERNATIONAL ARBITRATION

If, as the previous section has argued, the international arbitration community, along with parties and the whole system of international commercial justice is poised to be disrupted and also benefit from the uptake of AI technology, particularly generative AI, it remains to be assessed how to better integrate AI in arbitral proceedings. Such process of integration needs to allow harnessing the benefits of automation and augmentation while mitigating the risks of job displacement and de-humanization of the process. This section explores the current status of the uptake of AI in arbitration and also the first attempts at framing such uptake with specific rules.

1. AI in the arbitration community today

The first step for integrating AI into arbitral proceedings is to assess the current status of AI uptake within the arbitral community. The 2023 Arbitration Survey on AI Use in International Arbitration conducted by BCLP LLP (hereinafter, the '2023 Survey') consolidates insights from over 200 arbitration practitioners,[20] exploring the extent, benefits, risks, and future considerations of AI use in the arbitration process. The findings of the 2023 Survey convey a very interesting portrait of the current status of confidence in and readiness for AI in the arbitration community. According to the survey:

- *Arbitration practitioners who are utilizing AI in their daily work are still a minority.* Only 28% of respondents have used the text-generative AI tool ChatGPT professionally, while 72% have not. In addition, 30% of respondents declare using AI for document review and text formatting/editing. And perhaps not surprisingly, a majority are hesitant to use AI for generating texts in arbitral awards (62%) and legal submissions (53%).

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19 Ajay Agrawal, Joshua S. Gans, and Avi Goldfarb, 'Do we want less automation? AI may provide a path to decrease inequality', *SCIENCE* 13 Jul 2023 Vol 381, Issue 6654 pp. 155-158.

20 Bryan Cave Leighton Paisner LLP, *BCLP Annual Arbitration Survey 2023* <https://www.bclplaw.com/a/web/tUW2SW6fjHrpXVrA7AfWkS/102932-arbitration-survey-2023-report_v10.pdf> last accessed 12 July 2024. The composition of the surveyed practitioners is as follows: Professional backgrounds: participants included lawyers, in-house counsel, arbitrators, experts, academics, and legal technology providers; Geographical distribution: responses came from across the globe, including North America, Europe, Asia, Africa, and Latin America; Legal systems and sectors: 57% of respondents come from common law backgrounds, 13% from civil law, and 23% from both. They are involved in diverse sectors like construction, energy, technology, and finance.

- *The surveyed practitioners generally understand the benefits of AI, but are also very aware of the risks*. On the one hand, 85% of respondents ranked time-saving as a top benefit, and 60% valued cost-effectiveness. In-house counsel particularly emphasized time-saving (65%). On the other hand, 88% of respondents are concerned about AI-generated inaccuracies; and while 90% of respondents believe it remains crucial to understand AI decision-making processes, yet 69% rated their confidence in this understanding as low. In addition, 87.5% are worried about breaches of confidentiality, while the generation and circulation of 'deepfakes' (86%), AI's impact on the integrity of evidence (49%) and improper delegation of tasks (81%) are also significant concerns.
- Regarding specifically *the usage of AI by arbitrators*, 79% of respondents doubt arbitrators' technical capabilities regarding AI, with 73% of arbitrators themselves lacking confidence. Moreover, 76% call for more transparency about AI use by arbitrators, and 71% think arbitrators should disclose any AI application in arbitration.
- Overall, *the surveyed participants would like to see a more structured approach to the integration of generative AI into arbitration proceedings*. For example, 60% advocate for greater transparency in AI usage, particularly for drafting expert reports (72%) and document review (65%). In addition, 63% of participants support regulating AI use in arbitration, with preferences split between 'soft law' guidelines (39%) and arbitration rules (26%). Only 13% oppose regulation altogether.

2. The formalization of rules for the integration of AI in International Arbitration

At the time of writing, the formalisation of rules for the integration of AI in arbitral proceedings is still at the initial stage. On the side of formal, top-down regulation, it bears noticing that the European legislator has finalized the text of the EU AI Act,[21] a regulation that lays down rules for releasing AI-based products on the European market. While the EU AI Act has a very broad scope and the ambition of regulating all types of AI technologies deployed in all sectors – health, law enforcement, employment and more – it also regulates the deployment of AI tools in dispute resolution. While at the time of writing the EU AI Act has just been published in the

21 Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), PE/24/2024/REV/1 OJ L, 2024/1689, 12.7.2024.

Official Journal and many details of its implementation need to be fixed, the arbitral community must be aware of its potential impact in international arbitration.[22]

Considering, instead, instances of self-regulation, it shall be mentioned that the Silicon Valley Arbitration & Mediation Center (SVAMC) Guidelines on the Use of Artificial Intelligence in Arbitration (hereinafter, the 'SVAMC Guidelines') were released on 30 April 2024, after a public consultation.[23] These Guidelines are one of the first formalized frameworks for the ethical and effective deployment of AI-based tools in arbitration proceedings. The SVAMC Guidelines are structured into three main parts: general guidelines for all participants, specific guidelines for parties and representatives, and guidelines for arbitrators. The below offers a brief overview and analysis of the SVAMC Guidelines, whit a special focus on the arbitrators' perspective:

- *Some of the SVAMC Guidelines are directed at ensuring the proper behaviour and accountability of the participants in arbitration proceedings.* Guideline 1 articulates a responsibility for all participants involved in arbitration proceedings to 'familiarise themselves with the AI tool's intended uses'. It also requires all participants to 'make reasonable efforts to understand each AI tool's relevant limitations, biases, and risks and, to the extent possible, mitigate them'. Guideline 4, which is directed at party representatives, clarifies – without any addition to the existing framework - that 'any applicable ethical rules or professional standards of competent or diligent representation when using AI tools in the context of an arbitration'. Interestingly, Guideline 4 also attributes responsibility to parties and party representatives on record 'for any uncorrected errors or inaccuracies in any output produced by an AI tool they use in an arbitration'. In addition, Guideline 5, also directed to party representatives, prevents them from using any forms of AI in ways that either 'affect the integrity of the arbitration or otherwise disrupt the conduct of the proceedings', or 'falsify evidence, compromise the authenticity of evidence, or otherwise mislead the arbitral tribunal and/or opposing party(ies)'.

- *Guideline 2 regulates confidentiality and disclosure to parties, two cornerstone principles of the arbitral procedure*. In particular, Guideline 2 articulates a duty for all participants in the arbitration proceedings 'to safeguard con-

22 Maxi Sherer, 'We Need to Talk About … the EU AI Act!' (*Kluwer Arbitration Blog*, 27 May 2024) <https://arbitrationblog.kluwerarbitration.com/2024/05/27/we-need-to-talk-about-the-eu-ai-act/> last accessed 12 July 2024. See also the debate in: 'Regulation of AI: Global trends' (Ciarb, 13 June 2024), available on YouTube <https://youtu.be/CGmhE0_78uU?si=HDAk6Ombb3iBHGxt> last accessed 12 July 2024.

23 Silicon Valley Arbitration & Mediation Center (SVAMC), *Guidelines on the Use of Artificial Intelligence in Arbitration*, 1st Edition 2024 <https://svamc.org/wp-content/uploads/SVAMC-AI-Guidelines-First-Edition.pdf> last accessed 12 July 2024.

fidential information (including privileged, private, secret, or otherwise protected data)'. In this respect, the guidelines give some details regarding how, practically, this can be achieved, though such strategies must be adapted, based on tools and their affordances. In particular, submission of confidential information to an AI tool should only happen with 'appropriate vetting and authorisation' from the interested party(ies). Arbitration participants should only choose tools that 'adequately safeguard confidentiality' and pay attention to the confidentiality and data use policies 'offered by available AI tools and opt for secure solutions'. According to Guideline 3, as a principle 'disclosure that AI tools were used in connection with an arbitration is not necessary as a general matter, though 'decisions regarding disclosure of the use of AI tools shall be made on a case-by-case basis taking account of the relevant circumstances, including due process and any applicable privilege'.

- *Finally, a set of Guidelines are directed to the arbitrators.* Guideline 6 declines the principle of non-delegation of decision-making responsibilities in the context of AI usage: 'an arbitrator shall not delegate any part of their personal mandate to any AI tool, particularly their decision-making process. The use of AI tools by arbitrators shall not replace their independent analysis of the facts, the law, and the evidence. According to Guideline 7, respect for due process requires an arbitrator not to rely on AI-generated information outside the record, unless provided in the applicable procedural and substantial rules, 'without making appropriate disclosures to the parties beforehand and, as far as practical, allowing the parties to comment on it'. Guideline 7 also lays down the rules that sources that cannot be verified independently and outside of the AI tools, shall not assumed to be accurate or even existent by the arbitrator.

The SVAMC Guidelines are a very interesting first attempt by the arbitration community to start integrating AI in arbitration proceedings, while respecting the core principles of arbitration, such as confidentiality, party autonomy, and professional ethics. However, a few comments are warranted. While the SVAMC Guidelines lay down clear and reasonable rules, they remain a high-level, general set of recommendations. Undoubtedly, more research and training are necessary to complete them with more hands-on solutions, notably regarding the best mitigation strategy for confidentiality risks and biases, which could be particularly suited in international arbitration. It also appears that great responsibility is placed on the industry and the institutions that are developing AI-based tools to be used in the arbitration, for example when it comes to ensuring the confidentiality of the information, which may produce the effect of merely shifting responsibility up the AI supply chain, without addressing the issue completely. Finally, regarding disclosure, Guideline 3 does not take into account that the necessity to disclose the use of AI tools may

indeed arise from hard-laws, that may enter into force shortly, such as the EU AI Act, or even those that are already in force.[24]

Regarding the specific SVAMC Guidelines directed at arbitrators, it bears noticing that they might appear already partly 'outdated' by existing systems and procedures that allow machines to play the role of arbitrator or mediator. For example, systems such as SmartSettle and Kleros are fully automated and allow decisions to be taken by machines. In addition, as convincingly pointed out by a recent publication of the NCIA,[25] the Model Law, as well as most arbitration laws around the world, do not contain a specific reference to arbitrators as 'humans' yet, which can allow users to legally appoint a machine as an arbitrator. In addition, as also pointed out by the NCIA, while the fact that an arbitrator needs to be a human seems like an 'obvious requirement',[26] and is undeniable that, when appointed an arbitrator cannot delegate their power, the issue of whether parties can decide to nominate an AI system, rather than a human, to decide their dispute is an entirely different issue.

3. The duty of technological competence and of uptaking technology to save costs and time

As a final remark, and while the formalization of rules for the integration of AI-based tools in international arbitration is still in the making, it is important to remember that some existing principles of arbitration and professional ethics suggest that the arbitration community should engage in a collective effort to leverage the technology in the interest of parties and the good administration of international justice.

As has been pointed out,[27] Rule 1.1 of the ABA Model Rules of Professional Conduct, which has been adopted by most US states in recent years, mandates that 'a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology'.[28] Similarly, a statement re-

24 For example, in separate research to be released in future, I am exploring the relevance of Art. 22 of the GDPR regulating the disclosure of automated decision-making to international arbitration.

25 Nairobi Centre for International Arbitration (NCIA), 'Artificial Intelligence 'AI' in International Arbitration: Machine Arbitration' <https://ncia.or.ke/wp-content/uploads/2021/08/ARTIFICIAL-INTELLIGENCE-AI-IN-INTERNATIONAL-ARBITRATION.pdf> last accessed 12 July 2024.

26 *Ibid.* On a similar topic, see research into whether and why legal persons may be appointed as arbitrators: João Ilhão Moreira and Riccardo Vecellio Segate, 'The 'It' Arbitrator: Why Do Corporations Not Act as Arbitrators?', *Journal of International Dispute Settlement*, December 2021 Vol. 12, Issue 4, pp. 525-557 <https://doi.org/10.1093/jnlids/idab022> last accessed 12 July 2024.

27 Katia Fach Gómez, *The Technological Competence of Arbitrators: A Comparative and International Legal Study* (Springer International Publishing 2023) 57-100.

28 American Bar Association, *Model Rules of Professional Conduct, 2024 Edition* <https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/> last accessed 12 July 2024.

leased in 2020 by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe emphasizes that 'judicial training should adapt to the emerging needs, including the use of IT'. [29]

When it comes to arbitrators specifically, it has been convincingly argued that while an arbitrator's duty to possess technological competence is not yet generally codified in the current arbitration rules, such a duty does exist and its existence may be derived both from procedural rules granting arbitrators broad powers to conduct arbitration and from ethics rules that refer to diverse arbitrators' duties.[30]

However, the research analysed above shows the importance of understanding the precise applicability of each type of AI-based product for specific tasks, which in turn is crucial for maximising the economic impacts that may emerge from the analysis of the introduction of disruptive technologies.[31] In this respect, it is hoped that more arbitration practitioners and scholars take up the task of reflecting carefully on how to best integrate AI in all aspects of arbitration proceedings, in a way that both automates time-consuming tasks, while 'augmenting' humans, allowing them to concentrate on high-value tasks, to enhance efficiency and cost-saving.

CONCLUSIONS

AI is poised to disrupt but also significantly enrich the processes of international arbitration. On one hand, AI can automate tasks, such as case management and document review, and overall reduce the time associated with arbitration procedures. On the other hand, by automating these tasks, AI favours upskilling more junior members of the community, disseminates best practices and ultimately frees up human resources for more high-level cognitive tasks and those functions that require human judgement.

However, the transformative power of AI also necessitates a thoughtful approach to its implementation to ensure that it serves to enhance, rather than undermine, the core values of arbitration. In this respect, it seems that all participants in the arbitral community, from practitioners to institutions, have a duty to embrace AI responsibly, insofar as it can enhance the process and allow it to better serve the purpose of delivering justice to the parties.

Arbitral institutions and arbitrators, in particular, bear a significant responsibility in this respect. They must ensure that AI integration respects and upholds

29 *Supra* n 27.

30 Katia Fach Gómez, 'Where Is Arbitrators' Technological Competence Regulated?', in *The Technological Competence of Arbitrators: A Comparative and International Legal Study* (2023), European Yearbook of International Economic Law: 57-100.

31 Brynjolfsson, Erik and Tom Mitchell, 'What Can Machine Learning, Do? Workforce Implications', *SCIENCE* December 2017, 358, 1530-1534.

the fundamental principles of party autonomy and confidentiality. To this end, it is hoped that institutions and other professional bodies establish guidelines and frameworks to govern the use of AI, in accordance with the most recent legislative instruments on the matter, and also that training initiatives on AI for arbitrators are developed to equip them with the necessary skills to utilize it effectively.

Global Developments in Arbitration

The IBA Guidelines on Conflicts of Interest in International Arbitration 2024

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ABSTRACT

The IBA Guidelines on Conflicts of Interest in International Arbitration of 2024 update – without overhauling – the 2014 version by fine-tuning drafting, clarifying ambiguities, incorporating established arbitral practice, and reinforcing various fundamental principles.

INTRODUCTION

On 25 May 2024, the Council of the International Bar Association ('IBA') approved an updated version of the Guidelines on Conflicts of Interest in International Arbitration (the '2024 Guidelines'),[2] published by the IBA Arbitration Committee to replace the IBA Guidelines on Conflicts of Interest in International Arbitration of 2014 (the '2014 Guidelines').[3] Below are the key updates to the 2024 Guidelines.

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2 IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration 2024*, 25 May 2024 <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024> last accessed 19 June 2024.

3 IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration (Compare 2014 And 2024 Versions)* <https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-comparison-2014-2024> last accessed 19 June 2024.

I. OVERVIEW OF THE 2024 GUIDELINES

The 2024 Guidelines now state that 'the General Standards [in Part I] should control the outcome' of an arbitrator's analysis whether to serve or make a disclosure.[4] Accordingly, 'the General Standards [in Part I of the Guidelines] govern over the illustrative Application Lists [in Part II]'.[5] These specifications were added to avoid situations where arbitrators would exclusively rely on the examples set forth in the Application Lists to determine their disclosure obligations, instead of looking at those obligations more broadly.

The 2024 Guidelines have reinforced disclosure standards by incorporating the following provisions into the General Standards:

- '[I]n determining whether facts or circumstances should be disclosed, an arbitrator should take into account all facts and circumstances known to the arbitrator',[6] including those communicated to the arbitrator by the parties and resulting from the arbitrator's own 'reasonable enquiries';[7]
- 'if the arbitrator finds that the arbitrator should make a disclosure, but that professional secrecy rules or other rules of practice or professional conduct prevent such disclosure, the arbitrator should not accept the appointment, or should resign';[8]
- '[t]he stage of the arbitration must not influence the arbitrator's decision as to whether facts or circumstances should be disclosed';[9] and
- '[a]n arbitrator's failure to disclose certain facts and circumstances that may, in the eyes of the parties, give rise to doubts as to the arbitrator's impartiality or independence, does not necessarily mean that a conflict of interest exists, or that a disqualification should ensue'.[10]

4 *Supra* n 2, Part II: Practical Application of the General Standards at para. 1.

5 *Ibid*.

6 *Ibid.*, General Standard 3(a), previously para. (d) of the Explanatory Note to General Standard 3 of the 2014 Guidelines.

7 *Ibid.*, General Standard 7.

8 *Ibid.*, General Standard 3(e), previously para. (d) of the Explanatory Note to General Standard 3 of the 2014 Guidelines.

9 *Ibid.*, General Standard 3(f), previously para. (e) of the Explanatory Note to General Standard 3 of the 2014 Guidelines.

10 *Ibid.*, General Standard 3(g), previously para. (c) of the Explanatory Note to General Standard 3 of the 2014 Guidelines.

II. THE DEFINITION OF 'RELATIONSHIPS' HAS BEEN BROADENED AND CLARIFIED

The General Standards provide that '[t]he arbitrator is in principle considered to bear the identity of the arbitrator's law firm'. Considering the evolution in the structure of international legal practice and the related question of what constitutes a law firm, the 2024 Guidelines clarify the meaning of 'law firm',[11] and that cooperation or profit-sharing between firms 'may provide a basis for deeming an arbitrator to bear the identity of such other firms';[12]

The General Standards foresee a 'top down' approach to determine whether a legal entity or person should be considered to bear the identity of a party to the arbitration (e.g., whether a parent can be considered to bear the identify of its subsidiary).[13] The 2024 Guidelines clarify that third-party funders could fall under this category if they 'have a direct economic interest' in the case, 'a controlling influence on a party to the arbitration, or influence over the conduct of proceedings'.[14] In so doing, the 2024 Guidelines removed the more restrictive definition of 'third-party funder' found in the 2014 Guidelines[15] and adopted a broader concept to accommodate the evolving nature of the field; and

A new provision has been added to the General Standards to introduce a 'bottom up' approach to determine whether a legal entity or person should be considered to bear the identity of a party to the arbitration[16] (e.g., that 'a subsidiary may be considered to bear the identity of the parent company when the parent company has a controlling influence over it').[17] It was considered that this was a lacuna in the 2014 Guidelines that warranted updating in light of current arbitral practice.

The 2024 Guidelines expand the parties' duty to inform. Parties are now required to inform arbitrators of any 'person or entity [they] believ[e] an arbitrator should take into consideration when making disclosures in accordance with General Standard 3' and 'to explain these persons' and entities' relationship to the dispute'.[18]

11 *Ibid.*, para. (a) of the Explanatory Note to General Standard 6.
12 *Ibid.*
13 *Ibid.*, General Standard 6(b).
14 *Ibid.*, para. (b) of the Explanatory Note to General Standard 6.
15 Para. (b) of the Explanatory Note to General Standard 6 of the 2014 Guidelines.
16 *Ibid.*, General Standard 6(c).
17 *Ibid.*, para. (c) of the Explanatory Note to General Standard 6.
18 *Ibid.*, para. (a) of the Explanatory Note to General Standard 7.

III. RED, ORANGE AND GREEN APPLICATION LISTS UPDATED

A number of updates have been carried out across the Application Lists to improve drafting and consistency, and to reflect the current state of international arbitral practice. This means that the Application Lists have not been re-invented but rather fine-tuned. The most significant changes to the Application Lists are discussed below.

The Red Lists have been updated to maintain in the Non-Waivable Red List circumstances where an arbitrator represents a party and derives significant income therefrom, either directly or through the firm,[19] but to move to the Waivable Red List the situation where the firm, without the arbitrator's direct involvement, represents a party and derives significant financial income therefrom;[20]

The Orange List has been updated in four main ways:

1. By making explicit that arbitrators hired by parties or counsel to assist with mock hearings must disclose this fact;[21]

2. By addressing expert work, including circumstances under which an arbitrator may be involved in other arbitrations as an expert, work with an expert in another matter where the arbitrator is counsel, or otherwise have been affiliated with an expert;[22]

3. By requiring disclosure of an arbitrator's concurrent service with a fellow arbitrator in another matter,[23] as well as when an arbitrator and counsel for one of the parties currently serve together as arbitrators in another matter;[24] and

4. By updating the footnote addressing specialized fields of arbitration (e.g., sports, maritime) to eliminate carve outs to disclosure in these specialized areas;[25] and

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19 *Ibid.*, para. 1.4 of the Non-Waivable Red List.

20 *Ibid.*, para. 2.3.6 of the Waivable Red List.

21 *Ibid.*, para. 3.1.4 of the Orange List.

22 *Ibid.*, see paras. 3.1.6, 3.2.9, 3.3.2, and 3.3.6 of the Orange List.

23 *Ibid.*, para. 3.2.13 of the Orange List..

24 *Ibid.*, para. 3.2.12 of the Orange List.

25 IBA Council, *IBA Guidelines on Conflicts of Interest in International Arbitration 2024,* 23 October 2014 <https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918> last accessed 19 June 2024, footnote 5 provides that, if it was 'the practice in certain types of arbitration [...] to draw arbitrators from a smaller or specialised pool of individuals and [...] frequently appoint the same arbitrator in different cases, no disclosure of this fact is required, where all parties in the arbitration should be familiar with such custom and practice'. This footnote has become

The only change to the Green List has been to make explicit that an arbitrator need not disclose the fact that an expert appearing before the arbitrator in one matter, also appeared or is appearing before the arbitrator in another matter.[26]

CONCLUSION

In conclusion, the 2024 Guidelines are the product of over a year's work by a revision task force composed of over 60 individuals involved in the field of international arbitration. The task force's members hailed from diverse professional and geographic backgrounds, representing counsel, arbitrators, experts, third-party funders, academics, and in-house counsel from the four corners of the globe. They thoroughly investigated the many questions that can – and have – arisen with respect to conflicts and disclosures but revised with a light touch. As a result, and as mentioned above, the 2024 Guidelines merely update – and do not overhaul – the 2014 Guidelines, such that the 2024 Guidelines should remain a useful and familiar tool for the international arbitration community.

Footnote 3 in the 2024 Guidelines and been updated to provide: 'In certain types of arbitration, such as maritime, sports or commodities arbitration, arbitrators may be drawn from a specialised pool of individuals or selected from a mandatory list. Parties active in those fields may be aware of a custom or practice for appointing parties frequently to appoint the same arbitrator in different cases. In that event, while disclosure of multiple appointments may still be desirable consistent with section 3.1.3, the scope of disclosure and consequences of repeat appointments may differ from those set forth in these Guidelines'.

26 *Supra* n 2, para. 4.5.1 of the Green List.

Institutions in Focus: CIETAC

Institutions in Focus: CIETAC

Overview of Dispute Resolution in the Digital Environment in China

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ABSTRACT

The rapid growth of China's digital economy has brought forth new challenges in dispute resolution within this dynamic environment. This article provides an introduction to the landscape of resolving disputes arising from digital transactions in China including those involving online transactions, intellectual property, and data privacy. Further, it discusses relevant legislation in China and examines how legal communities, particularly the China International Economic and Trade Arbitration Commission (CIETAC), responds to these challenges.

I. THE DEVELOPMENT OF THE DIGITAL ECONOMY IN CHINA

1. Overview of the scale of the digital economy

In recent years, China has seen a substantial expansion of its digital economy, in line with the rapid growth of the global digital economy. China's digital economy, now the world's second largest by overall scale, has exhibited robust growth

1 This article is based on a presentation by the author, at a seminar themed *Dispute Resolution in Digital Trade* and organized by the China International Business & Economic Law Center of University of New South Wales, Australia. The author would like to acknowledge Ms. Qingyu Mao for her assistance in conducting research for this paper.

momentum.[2] At the main forum of the Global Digital Economy Conference 2023 in Beijing, a research report revealed that between 2016 and 2022, China's digital economy expanded by $4.1 trillion USD, achieving a compound annual growth rate of 14.2 percent.[3] The scale of China's digital economy grew to 50.2 trillion yuan (about 6.96 trillion U.S. dollars) in 2022.[4] The digital economy constitutes 41.5 percent of the country's GDP, transforming it into a vital force for consistent growth and evolution.[5]

2. China unveils plan to promote digital development

In February 2023, China unveiled a plan outlining the comprehensive blueprint for the country's digital growth. The plan aims to achieve substantial advancements in creating a digital China by 2025, focusing on enhancing digital infrastructure connectivity, and achieving significant breakthroughs in digital technology innovation.[6]

According to the plan, by 2035, China aims to lead globally in digital development, ensuring cohesive progress across economic, political, cultural, social, and ecological domains.[7] The plan involves fostering deep integration of digital technology with the real economy and applying it in sectors such as agriculture, manufacturing, finance, education, healthcare, transportation, and energy.[8] The goal is to create a digital nation characterized by efficient government services, a dynamic cyberspace culture, accessible digital public services, and effective ecological governance empowered by digital tools. Additionally, the plan includes initiatives to establish an independent system for digital technology innovation, promote business leadership in technological advancements, and strengthen intellectual property protection. [9]

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2 See China Daily, 'China's economy at critical phase of transition' <https://www.chinadaily.com.cn/a/202403/20/WS65fae229a31082fc043bdc9f.html> last accessed 12 July 2024.

3 See Xinhua News Agency, 'Economic Watch: China leads acceleration of global digital economy' <https://english.news.cn/20230706/c6c8f9c7fa7a4253bb71251515ca26bd/c.html> last accessed 12 July 2024.

4 See the State Council Information Office of the People's Republic of China, 'China's economy ushers in digital transformation' <http://english.scio.gov.cn/in-depth/2023-11/10/content_116806911.htm#:~:text=In%202022%2C%20China's%20digital%20economy,press%20conference%20during%20the%20summit> last accessed 12 July 2024.

5 *Ibid.*

6 See The State Council of the People's Republic of China, 'China unveils plan to promote digital development' <https://english.www.gov.cn/policies/latestreleases/202302/28/content_WS63fd33a8c6d0a757729e752c.html> last accessed 12 July 2024.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*

II. DISPUTE RESOLUTION IN THE DIGITAL ENVIRONMENT IN CHINA

1. Legislation in China related to the digital economy

China has enacted numerous legislative measures to regulate and govern the burgeoning digital economy. These laws address critical issues such as data security, privacy protection, and the prevention of monopolistic practices. By implementing robust regulatory frameworks, China aims to foster a fair and competitive market environment while promoting innovation and sustainable growth in the digital sector. These legislative efforts underscore China's commitment to balancing economic development with effective governance in the digital age.

1.1 *Data Protection*

The *Data Security Law of China*[10] and the *Personal Information Protection Law of China*[11] are the key pieces of legislation in the field of data protection in China, both of which came into effect in 2021. In 2022, China promulgated a series of more specific regulations, aiming to implement and refine the requirements of the preceding two laws in detail.

1.2 *E-commerce*

The *E-Commerce Law of China*,[12] effective since January 1, 2019, is the core law applying to both B2B and B2C e-commerce in China. In addition, rules and regulations regarding competition, intellectual property, consumer rights, data protection, cybersecurity and advertisement, as well as those applying to specific industries, act as the major pieces of the legal framework governing e-commerce activities in China.

1.3 *Cybersecurity*

The *Cybersecurity Law of China*[13] established China's fundamental legal framework of cybersecurity. According to the *Cybersecurity Law*, network operators must adhere to the cybersecurity multi-level protection system's requirements,

10 Data Security Law of the People's Republic of China <http://www.npc.gov.cn/englishnpc/c2759/c23934/202112/t20211209_385109.html> last accessed 12 July 2024.

11 Personal Information Protection Law of the People's Republic of China <http://en.npc.gov.cn.cdurl.cn/2021-12/29/c_694559.htm> last accessed 12 July 2024.

12 E-Commerce Law of the People's Republic of China <http://mg.mofcom.gov.cn/article/policy/201912/20191202923971.shtml#:~:text=Article%2013%20An%20e%2Dcommerce,any%20law%20or%20administrative%20regulation> last accessed 12 July 2024.

13 Cybersecurity Law of the People's Republic of China <http://www.lawinfochina.com/Display.aspx?Id=22826&Lib=law&LookType=3> last accessed 12 July 2024.

ensuring networks are secure from interference, damage, or unauthorized access. This includes preventing data leaks, theft, or tampering on the network.[14]

1.4 *Digital Economy Promotion*

On April 3, 2024, the National People's Congress of China (NPC) announced that several NPC deputies had put forward a proposal to draft a Digital Economy Promotion Law aimed at modernizing the governance system and capabilities of the digital economy.[15] The NPC stressed that the Law aims to regulate various risks and issues, including excessive data collection, leakage, misuse, and infringement, violations of scientific and technological ethics, internet fraud, pornography, illegal virtual currencies, infringement of personal information and privacy, threats to national security, and threats to human security.[16] Additionally, the NPC clarified that the Law would focus on defining the roles and guiding the development direction of the digital economy, promoting the building of digital infrastructure and industrialization, and improving the efficient utilization of data resources. [17]

2. Overview of the digital economy-related cases adjudicated by courts in China

After the outbreak of COVID-19, the digital economy, especially e-commerce, has experienced significant development, with China emerging as a leading player in this rapidly expanding international trade sector. This has resulted in a rise in cross-border disputes among the stakeholders of E-commerce.

The rapid growth of the digital economy has also brought new legal challenges. Chinese courts have strengthened the judicial protection of the digital economy, conducted trials for various kinds of cases featuring new models and new business forms in accordance with the law, in an effort to promote the high-quality development of the digital economy.

2.1 *Beijing Court*

Over recent years, the People's Court of Beijing Haidian District has handled numerous intellectual property disputes related to the digital economy.[18]

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14 Article 21 of the *Cybersecurity Law of China*.

15 See the National People's Congress of People's Republic of China, 'China: NPC announces proposal of Digital Economy Promotion Law' <http://www.npc.gov.cn/npc/c2/c30834/202404/t20240403_436287.html> last accessed 12 July 2024.

16 *Ibid.*

17 *Ibid.*

18 See China Daily, 'Beijing court sees rise in disputes involving digital economy' <https://www.chinadaily.com.cn/a/202404/25/WS6629d40aa31082fc043c3f2b.html> last accessed 12 July 2024.

According to a report released on April 24, 2024, the court has accepted 4,840 cases concerning digital economy in the last three years, constituting 56.7 percent of all its IP cases.[19]In addition, there have been increased efforts to enhance the quality of case adjudication, aiming to support the industry's healthy growth.[20]

2.2 *Shanghai Court*

On December 18, 2023, the Shanghai High People's Court held a press conference to release ten typical cases concerning the digital economy. According to the press conference, efforts have also been made to innovate the judicial research and trial models. Led by the Changning Court in Shanghai, the city has built its first online litigation platform that covers the whole process of case filing, service, evidence exchange, mediation, hearing, etc. A judicial diagnosis reporting system has been initiated to regulate the emerging business models in cyberspace.

Relying on the Shanghai Court Digital Economy Judicial Research and Practice (Jiading) Base, a research system has been formed to cover the four types of cases: (1) cases involving the processing of personal information or the use of the Internet to infringe on the personality rights of people; (2) cases involving the rights and interests of property in the form of data and the order of market competition; (3) cases involving the legal obligations of platform operators/data algorithm users and the relevant subjects' rights and interests; (4) cases involving the infringement of rights and interests in the form of data, the use of data technology to commit cyber-crimes, and the black and grey markets. The ten typical cases released at the press conference fall under the four categories above. Some are related to cutting-edge issues such as data circulation and algorithm application. These cases reflect the judicial policies and adjudicative principles of Shanghai courts in serving and guaranteeing the healthy development of the digital economy.[21]

2.3 *Hangzhou Court*

The Hangzhou Internet Court, China's pioneering Internet court, primarily handles disputes related to e-commerce, reflecting Hangzhou's status as China's most prosperous city in this sector, due in part to Alibaba's presence.[22] 'The

19 *Ibid.*

20 *Ibid.*

21 See Shanghai High People's Court, 'Shanghai Courts Released Ten Typical Cases on the Digital Economy' <https://www.hshfy.sh.cn/shfy/web/xxnr.jsp?pa=aaWQ9MTAyMDM0MzE3MCZ4aD0xJmxtZG09bG0xNzEPdcss z&zd=xwzx> last accessed 12 July 2024.

22 Xuejun Hong, Jiangqiao Wang, Wan Xiao & Yuexu Lai, 'Exploration and Reflection on Hearing Cross-border E- commerce Cases', *People's Judicature (人民司法)* (No. 34, 2021), a journal under the Supreme People's Court of China.

types of cross-border e-commerce accepted by the court including: (1) Sales contract disputes. Such disputes are the second most common cross-border e-commerce disputes, accounting for 40%. Such cases mainly concern product quality disputes. (2) Product liability disputes. Such cases concern product quality problems and personal/property damage to users. (3) Agency service contract disputes. Such disputes mainly concern buyers entrusting others to purchase goods on overseas e-commerce platforms. (4) Network service contract disputes. As the most common cross- border e-commerce disputes and accounting for 45%, such disputes concern consumers suing operators of cross-border e-commerce platforms. (5) Intellectual property disputes. Such disputes include infringement disputes in parallel imports, such as disputes arising from cross-border e-commerce platform notification and counter- notification'.[23]

3. How Chinese courts respond to the development of the digital economy: Taking the Supreme People's Court's 'One-Stop' Diversified International Commercial Dispute Resolution Platform as an example

To meet the demand of parties for a 'One-Stop' dispute resolution mechanism, the Supreme People's Court of China has established the 'One-Stop' mechanism for the diversified resolution of international commercial disputes, which connects litigation, arbitration, and mediation. So far, 10 international arbitration institutions including CIETAC has been incorporated into the 'One-Stop' mechanism.

On 31 March 2024, the online 'One-Stop' Diversified International Commercial Dispute Resolution Platform is established by the International Commercial Court of the Supreme People's Court of China.[24] It is a full-process online dispute resolution service platform, which connects international commercial courts, international commercial arbitration institutions, international commercial mediation institutions, and expert committees of the Supreme People's Court. It provides support and convenience for parties to international commercial disputes in choosing diversified methods such as mediation, arbitration, or litigation for resolving international commercial disputes.

The online platform currently includes functional sections such as 'mediation services', 'arbitration services', 'litigation services', and 'supporting services'. It generates, sends, receives, stores, and exchanges relevant materials according to

23 *Ibid.*

24 China International Commercial Court (CICC) of the Supreme People's Court of China <https://cicc.court.gov.cn> last accessed 12 July 2024.

the process of the case, and provides relevant materials and information to relevant parties, institutions, and expert committees.[25]

4. Arbitration would be a perfect tool to resolve digital related disputes

There is anticipated growth in disputes within the digital economy, with arbitration being an effective tool for resolving these conflict:

First, in the field of digital economy, disputes often demand specialized knowledge and solid understanding of technology and its implications. Arbitrators, distinguished by their expertise in relevant fields such as technology, intellectual property, and data privacy, are frequently better equipped than court judges to adjudicate these complex issues. By leveraging arbitrators' specialized knowledge, parties involved in digital economy disputes can benefit from resolutions that are both fair and informed by the latest technological developments. [26]

Moreover, arbitration offers a notable advantage over court proceedings in terms of efficiency. The procedural flexibility allows for expedited timelines and tailored processes, which can be crucial in the fast-paced environment of digital business. [27]

Furthermore, digital economy disputes usually involving parties from different jurisdictions. Arbitration provides a distinct advantage in this global context due to the enforceability of arbitral awards across international boundaries under the New York Convention. [28]

5. How can arbitration adapt to digitalization? – CIETAC's experience

The COVID-19 pandemic has brought about a transformation in the current business landscape, driven by swift technological advancements. As a result, the arbitration community is actively seeking effective methods to utilize digital tools and solutions to tackle challenges and anticipate future needs in resolving disputes.

25 CICC, 'The "one-stop" international commercial dispute diversification platform of the Supreme People's Court has been upgraded and revised', 1 April 2024 <https://cicc.court.gov.cn/html/1/218/149/192/2461.html> last accessed 12 July 2024.

26 Jacopo Piemonte, 'Has arbitration a future in the new "data driven" economy?', 21 Oct 2022 <https://www.ibanet.org/has-arbitration-a-future-in-data-driven-economy> last accessed 12 July 2024.

27 *Ibid.*

28 *Ibid.*

Most of the cases accepted by CIETAC are cross-border, and with large dispute amount and complicated facts. In order to improve the efficiency of the arbitration procedure, CIETAC explored to use the technology to link the arbitral tribunal, the parties and the arbitration institution, and developed a standardized and informationized work flow and administrative mechanism.

5.1 *Online Filing System*[29]

In order to improve the level of service provided via the Internet technology, to improve the efficiency of the CIETAC case-filing and simplify the case-filing process, CIETAC has simultaneously developed Online Case Filing System (PC Side) and WeChat Public Account Service for concerned parties (mobile phone).

Through the PC-based Online Filing System, the parties can complete the registration, login, information-filling, case file-uploading application. The parties can successfully file their cases online after CIETAC case manager reviewing the case, requesting correction or further information (if any), online generating the Application for Arbitration. Meanwhile, for the convenience of progress-tracking, parties can simply check the status and review the feedback/comment via PC or WeChat.

Users' needs at case application were fully considered throughout the early stage of developing the system, so that users will no longer be limited by time and geography in the stage of arbitration application, which can effectively save the resources and complete the filing procedure in an efficient and convenient fashion. The online filing system has been developed with user-friendly interface and easy operation; PC-side and mobile-side linkage support; parties' information and background processing system real-time docking; filing system data encryption; case progress real-time reminder, etc., which can substantively meet the parties' need for online submission of documents arbitration institution's need for online review.

From 2020 to 2023, 4833 CIETAC cases were filed online. Especially, in 2023, 1804 cases were filed online, accounting for one third of the total number of cases filed, reflecting a year-on-year increase of 34.63%.

5.2 *Intelligent Hearing Platform*[30]

CIETAC cases often involve parties from different cities in China or different countries, hence CIETAC began to develop its online hearing system as early as the time before the COVID-19. The COVID starting from late 2019 accelerated the pace that CIETAC put into use the online hearing platform. In April

29 CIETAC Online Filing System <http://www.cietacodr.org/> last accessed 12 July 2024.

30 CIETAC Intelligent Hearing Platform <https://kt.cietac.org/> last accessed 12 July 2024.

2020, the Intelligent Hearing Platform of CIETAC was formally launched and, to ensure the smooth running of the virtual hearings, CIETAC has specially released its Provisions on Virtual Hearings based on CIETAC Arbitration Rules to address the procedural and technical issues of parties' concern. With such technology and procedural regulations, the participants can join a virtual hearing from any place, saving the time and cost for the parties. From 2020 to 2023, 4318 oral hearings were conducted online through the CIETAC Intelligent Hearing Platform. Especially, in 2023, 1,631 hearings were held online, representing nearly one-third of the total hearings. Virtual hearings facilitated parties from 35 countries and regions, satisfying the urgent needs of the parties for efficient, convenient, and cost-effective arbitration service.

Based on the *CIETAC Provisions on Virtual Hearings (Trial)*,Characteristics of the Intelligent Hearing Platform are:

i) Virtual hearings are strictly confidential. Non-parties to the arbitration, arbitration agents and/or other arbitration participants, if without the authorization of the parties or the permission of the arbitral tribunal, are not allowed to take part in the virtual hearing. The account and the password are the virtual IDs of the parties, arbitration agents and other arbitration participants to a virtual hearing. The parties, arbitration agents and other arbitration participants shall use their own accounts to participate in the virtual hearing and keep their account and password information properly, and shall not allow others to use their accounts to participate in the virtual hearing under their names.[31]

ii) The facial recognition system would help the case manager to check the identification of the parties, arbitration agents and other arbitration participants. No one may impersonate the parties, their agents or other arbitration participants to participate in the virtual hearing.[32]

iii) Witnesses, experts and appraisers shall take part in the virtual hearing at a place designated or approved by the arbitral tribunal. In principle, they are not allowed to participate in the hearing in the same room with the parties, their agents and other arbitration participants.[33]

The specially built online hearing platform of CIETAC not only ensures the hearing be organized in a professional way as in a physical arbitration hearing, but also guarantee that the hearing and relevant data be in a confidential manner, not accessible to outsiders of the dispute.

31 Article 1 of the *CIETAC Provisions on Virtual Hearings (Trial)*.

32 *Ibid.*

33 Article 6 of the *CIETAC Provisions on Virtual Hearings (Trial)*.

5.3 *CIETAC 2024 Arbitration Rules: embracing technological advances*[34]

The new CIETAC Arbitration Rules prompt the use of digitalization and artificial intelligence ('AI') in arbitration procedures.

The practice of online arbitration during COVID-19 provided experience for the technical construction and mechanism for online arbitration. As the arbitration participants did see the advantages of online arbitration, it is expected that the online arbitration will become a normal practice in the post-COVID era. The new Arbitration Rules thus address issues that will on one hand make arbitration procedures smarter and more digitalized, on the other provide regulations for such practice.

There are a few provisions in the 2024 Rules regarding the use of digital technologies:

i) Electronic service of documents-prioritized:

Article 8 of the Rules states that arbitration documents may be served electronically, with electronic service being given priority. Article 21 further specifies that parties may submit documents electronically, emphasizing this as the preferred method.

ii) Online case filing-specified in the arbitration rules:

The practice of online case filing, which has been in use for years both before and during the COVID-19 pandemic, is now formally established in the Rules under Article 11.

iii) Electronic signature-specified in the arbitration rules:

It is also stipulated that the electronic signature of arbitrators on the arbitral award is equivalent to their handwritten signature. Furthermore, the arbitral award can be served electronically with the consent of the parties or when CIETAC considers necessary (Art. 52 (7)(10)).

iv) Virtual hearing-decision made by the tribunal:

Additionally, Article 37.5 allows the tribunal to determine, in consultation with the parties, the method of conducting a hearing—whether it be in person, through videoconference, or via any other suitable mode of communication.

34 CIETAC 2024 Arbitration Rules <http://www.cietac.org/index.php?m=Page&a=index&id=531&l=en> last accessed 12 July 2024.

5.4 *ADR Services of CIETAC: APEC Online Dispute Resolution (ODR)-CIETAC Platform & CIETAC IP Dispute Resolution Center & CIETAC Domain Name Dispute Resolution Center*

5.4.1 APEC Online Dispute Resolution (ODR)-CIETAC Platform[35]

The Asia-Pacific Economic Cooperation (APEC) online dispute resolution (ODR) mechanism was an APEC-sponsored initiative to provide quick, inexpensive ODR service for resolving B2B cross-border disputes of low value through ODR proceedings of negotiation, mediation and arbitration, under the APEC Collaborative Framework for ODR of Cross-Border B2B Disputes (Collaborative Framework) and its Model Rules of Procedure, so as to promote B2B cross-border confidence and healthy development of the business environment in the Asia-Pacific Region. [36]

As an important APEC economy, China has been actively advocating and supporting the Collaborative Framework. CIETAC, as the first arbitration institution in China and a well-known international arbitration institution, was recommended by the Ministry of Justice to be one of the first Chinese ODR service providers under the Collaborative Framework. CIETAC has been officially recognized by APEC as one of the present five ODR service providers listed on its official website.

The APEC ODR Platform is now officially launched. Parties may access the platform from APEC's official website or CIETAC's official website. Through this platform, CIETAC provides ODR service with an entirely online process of negotiation, mediation and arbitration to resolve B2B cross-border commercial disputes, especially for micro, small, and medium enterprises (MSMEs).

Under the APEC ODR mechanism, after its commencement, the APEC ODR proceedings will go through 3 stages, namely, negotiation, mediation and arbitration, which will be entirely conducted on the ODR platform. If the parties fail to settle their dispute during the negotiation stage, CIETAC will appoint a neutral from its List of Neutrals to assist with the resolution of the dispute. If no settlement is reached during the mediation stage, the parties will proceed to the arbitration stage for final resolution of the dispute. The quick and inexpensive APEC ODR proceedings make full use of existing

35 APEC Online Dispute Resolution (ODR)-CIETAC Platform <https://casettle.odrcloud.cn/CIETAC.html> last accessed 12 July 2024.

36 CIETAC, 'APEC Online Dispute Resolution (ODR)·CIETAC Platform Officially Launched-Innovative measures taken to facilitate cross-border trade and dispute resolution in digital economy' <http://www.cietac.org/index.php?m=Article&a=show&id=18411&l=en> last accessed 12 July 2024.

internet technologies, and greatly reduce the dispute resolution costs for corporate parties in international trade, which provides an innovative paradigm and path for cross-border low volume commercial dispute resolution, and contributes to the a more convenient and economic international legal business environment for cross-border trade.

5.4.2 CIETAC IP Dispute Resolution Center

On July 22 2022, CIETAC IP Arbitration Center was inaugurated. The center aims at leveraging the advantage of arbitration in resolving international commercial disputes, and also plays an important part in meeting the market demand for IPR dispute resolutions.

5.4.3 CIETAC Domain Name Dispute Resolution Center[37]

The Domain Name Dispute Resolution Center of CIETAC was established in 2000. The Center devotes itself to providing online alternative dispute resolution (ADR) services in the areas of intellectual property and information technology.

As the provider appointed by China Internet Network Information Center (CNNIC), CIETAC Domain Name Dispute Resolution Center is providing dispute resolution services with regard to .CN domain names (including the former Chinese-character domain names managed and maintained by CNNIC).

As the Beijing Office of Asian Domain Name Dispute Resolution Center (ADNDRC) which is one of the four domain name dispute resolution providers approved by the Internet Corporation for the Assignment of Names and Numbers (ICANN), CIETAC Domain Name Dispute Resolution Center is also providing domain name dispute resolution services in regard to general top level domain names (gTLDs) such as .com, .net and .org.

CONCLUSION

China's digital economy has rapidly developed, driven by robust governmental initiatives and strategic planning aimed at fostering innovation and economic growth. Regarding dispute resolution in the digital environment, China has established a comprehensive legal framework that addresses the complexities of digital economy-related cases. The adjudication of digital economy-related cases by Chinese courts reflects a proactive approach in adapting judicial processes to the challenges posed by technological advancements.

37 CIETAC Domain Name Dispute Resolution Center <http://www.odr.org.cn/> last accessed 12 July 2024.

Arbitration has emerged as an indispensable tool for resolving disputes in the digital realm, offering efficiency and flexibility. CIETAC's proactive adaptation to digitalization through innovations like online filing systems, intelligent hearing platforms, and updated arbitration rules underscores its efforts as a leading arbitration institution to provide cutting-edge dispute resolution services aligned with technological advancements.

As China continues to navigate the complexities of the digital economy, its integrated approach to digital development and dispute resolution may set a good example for other countries seeking to harness technology for economic progress while ensuring effective legal recourse in a rapidly evolving digital landscape.

Case Comments

Swiss Supreme Court rejects CJEU's *Komstroy* ruling

Dr. Christopher Boog
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***EDF v Kingdom of Spain*, Swiss Federal Supreme Court, 4A_244/2023 of 3 April 2024**

INTRODUCTION

On 3 April 2024, the Swiss Federal Supreme Court (the 'Swiss Supreme Court', 'Supreme Court' or 'Court') handed down a landmark decision confirming the jurisdiction of a Swiss-seated arbitral tribunal over an intra-EU investment dispute under the Energy Charter Treaty ('ECT').

Before the Swiss Supreme Court, Spain had – among other grounds[2] – challenged an award rendered by an *ad hoc* arbitral tribunal constituted on the basis of Article 26 ECT on the ground that it lacked jurisdiction. Spain argued that, following the CJEU's judgment in *Republic of Moldova v Komstroy LLC*,[3] either the ECT's dispute resolution provisions in Article 26 ECT do not apply to intra-EU disputes or else EU law takes precedence over the ECT.

The Swiss Supreme Court rejected both arguments. It found that it was not bound by the CJEU's ruling in the *Komstroy*. Going beyond that finding, the Swiss Supreme Court noted that it was 'not convinced' by the CJEU's reasoning in

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2 Spain raised a number of other grounds for challenge, which the Swiss Supreme Court equally rejected; see Decision 4A_244/2023 of 3 April 2024 consids. 5 and 6.

3 Case C-741/19 *Republic of Moldova v Komstroy LLC* [2021] EU:C:2021:655.

Komstroy, pointing out that 'EU bodies have been waging a crusade' against arbitration to settle investment disputes of an intra-EU nature. The Court went on to perform its own detailed analysis of the ECT and EU law, applying the rules on treaty interpretation under the Vienna Convention on the Law of Treaties ('VCLT'), to determine whether intra-EU disputes fall within the scope of the ECT and, if so, whether EU law could invalidate Spain's consent to arbitrate pursuant to Article 26 ECT. The Supreme Court found that not to be the case.

I. FACTS

In 2007, Spain implemented a number of regulatory measures aimed at incentivizing foreign investment in the renewable energy sector.

As of 2010, Spain started retracting features of those regulations. This resulted in a flurry of investment treaty arbitrations against Spain, all of which were brought on the basis of the ECT.

In 2016, French company EDF, which had invested in a Spanish renewable energy project, brought one of those claims under the ECT against Spain. The *ad hoc* arbitral tribunal constituted to hear EDF's claim was seated in Geneva.

In the arbitration, Spain raised several jurisdictional objections, including that, under EU law, a claim brought by an investor of one EU Member State against another EU Member State under the ECT cannot be subject to investor-state arbitration (the 'intra-EU objection'). Spain based this argument on the CJEU's judgment in *Komstroy* and also sought to rely on an award rendered in another intra-EU arbitration brought under the ECT in the matter of *Green Power v Spain*.[4] In *Green Power*, the arbitral tribunal had rejected jurisdiction over the dispute under the ECT on the basis that it was an intra-EU dispute.[5] *Green Power* is the only known instance of an arbitral tribunal applying the *Achmea*[6] and *Komstroy* line of argument and accepting the intra-EU objection.

The arbitral tribunal issued its final award in April 2023, unanimously rejecting Spain's jurisdictional objection.

Spain challenged the award before the Swiss Supreme Court on several grounds, including alleged lack of jurisdiction based on the CJEU's *Komstroy* ruling.

4 *Green Power Partners K/S and another v Kingdom of Spain*, SCC Arb No V2016/135, Award (16 June 2022).

5 *Ibid.* The tribunal found that selecting Sweden as the seat of the arbitration implied the application of EU law, and particularly of the *Achmea* and *Komstroy* decisions to determine the tribunal's jurisdiction. The tribunal decided that it lacked *ratione voluntatis* jurisdiction. In order to reach this conclusion, the Tribunal analyzed the importance of the Declaration of Member States of 15 January 2019 to understand the intention of the parties regarding the application of EU law and its supremacy over ECT provisions.

6 Case C-284 *Slowakische Republik v Achmea BV* [2018] ECLI:EU:C:2018:158.

II. THE SWISS SUPREME COURT'S RULING

1. Introduction

The Swiss Supreme Court's judgment spans 18 pages and is very diligently reasoned. The Court's reasoning regarding the application of *Komstroy* and its interpretation of the ECT and EU law covers 10 of those 18 pages. That reasoning is summarized in the following, quoting the Supreme Court to the extent possible in order to grasp not only the content but also the vigor of its reasoning and language adopted.

2. The ECT must be interpreted in accordance with Articles 31 *et seq*. of the Vienna Convention

The Swiss Supreme Court recalled that when faced with a complaint of lack of jurisdiction pursuant to Article 190(1)(a) of the Private International Law Act ('PILA'), the Supreme Court 'may…be called upon to interpret the meaning of certain terms used in a bilateral or multilateral investment treaty'.[7]

The Court went on to emphasize the seemingly obvious, which is that '[t]*he ECT must be interpreted in accordance with Article 31 et seq. VCLT*, which essentially codifies customary international law', before recalling the principles of the VCLT.[8]

The Supreme Court also stated that even if it was aware of the importance of arbitral awards rendered in the field of international investment protection, 'the Court will endeavor to determine for itself the meaning to be given to certain terms of an international treaty, taking into account, where appropriate, the doctrine and drawing inspiration therefrom'.[9] The Court further stressed that 'the solutions reached in certain arbitration cases are not binding on other arbitral tribunals or on the Swiss Supreme Court, so that arbitral case law cannot be regarded as a source of law in the strict sense of the term'.[10] Nevertheless, the Court found that 'as this case involves assessing the jurisdiction of an arbitral tribunal, constituted on the basis of Art. 26 ECT, to hear a dispute of an intra-EU nature, the Supreme Court will draw inspiration, among others, where appropriate, from awards issued by various arbitral tribunals that have had to rule on the same legal issue'.[11]

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7 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.1, referring among others to DSC 149 III 131 consid. 6.4.1; 144 III 559 consid. 4.1; 141 III 495 consids. 3.2 and 3.5.1; Decision 4A_172/2023 of 11 January 11 2024 consid. 4.2.1. The Supreme Court's Decision 4A_244/2023 of 3 April 2024 was rendered in French; any quotes in this article are a free, AI-assisted translation by the author.

8 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.2 (emphasis added).

9 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.1.

10 *Ibid.*

11 *Ibid.*

3. The Supreme Court refused to 'attach any particular value to the CJEU's ruling in Komstroy'

The Swiss Supreme Court commenced its analysis of the intra-EU objection by stating that 'when ruling on the jurisdiction of an arbitral tribunal, [the Swiss Supreme Court] may be called upon to examine preliminary questions arising under foreign law'.[12] The Court recalled that 'it does so with full cognition, but in principle adheres to the majority opinion expressed on the point under consideration, or even, in the event of controversy between doctrine and case law, to the opinion issued by the Supreme Court of the country that enacted the applicable rule of law'.[13]

In the same breath, the Supreme Court considered 'it useful to recall that the present dispute falls within the broader context of the very legality of recourse to investment arbitration, within the EU, to settle disputes of an intra-EU nature'. The Supreme Court stated that '[f]or several years now, *EU bodies have been waging a crusade against such international arbitration*'.[14]

The Court went on to summarize the CJEU's main findings in *Achmea* and *Komstroy*, recalling that in its judgment handed down in the *Achmea* case, the CJEU ruled that an arbitration clause inserted in a bilateral investment treaty concluded by two EU Member States was contrary to EU law. The CJEU confirmed this view for multilateral investment treaties, ruling in *Komstroy* that Article 26(2)(c) ECT must be interpreted as meaning that it is not applicable to disputes between a Member State and an investor from another Member State concerning an investment made by the latter in the first Member State.[15]

The Swiss Supreme Court concluded its summary of the CJEU's case law by finding that 'in arriving at this solution, the CJEU emphasized the need to preserve the autonomy and specific character of EU law, *taking no account whatsoever of international law or the rules of treaty interpretation*'.[16] The Court found that it was for 'this reason in particular' that 'the decision in question has been strongly criticized by many commentators', referring to a list of authorities on international law which had criticized both the *Achmea* and *Komstroy* decisions.[17]

12 *Ibid.*

13 *Ibid.*, referring to Decision of the Swiss Supreme Court ('DSC') 142 III 296 consid. 2.2.

14 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.5 (emphasis added).

15 *Ibid.*

16 *Ibid.* (emphasis added).

17 *Ibid.*, referring to Nikos Lavranos and others, 'The Meltdown of the Energy Charter Treaty [ECT]: How the ECT was ruined by the EU and its Member States' (2023) 1 *SchiedsVZ* 38; Giulia Wolff, 'The Impact of the CJEU's Komstroy Decision on Investor-State Arbitration' (2023) 5 *SchiedsVZ* 281; Jérémy Jourdan-Marques, 'Chronique d'arbitrage: après Komstroy, Londres rit et Paris pleure' (Dalloz Actualité, 17 Septembre 2021) <https://www.dalloz-actualite.fr/flash/chronique-d-arbitrage-apres-komstroy-londres-rit-et-paris-pleure> last accessed 7 July 2024; Alan Dashwood,

The Supreme Court went on to find that unlike national courts of EU Member States, the courts of non-EU States such as Switzerland are not obliged to apply or to comply with EU law, 'EU law being a *res inter alios acta* for these States'.[18] According to the Supreme Court, 'it follows that the *decisions handed down by the CJEU,* and in particular the Komstroy ruling, *are not binding on a State court* called upon to rule on an action against an award made by an arbitral tribunal sitting *in Switzerland*'.[19]

Reciting its own case law,[20] the Supreme Court confirmed that when it is called upon to examine questions of foreign law, 'it will in principle, in the absence of a majority opinion on the point at issue and in the event of controversy between doctrine and case law, adopt the opinion issued by the supreme court of the country that enacted the said rule'.[21] According to the Court, this rule, 'which may however be subject to exceptions, is undoubtedly relevant when the Federal Supreme Court has to resolve a specific preliminary question arising under foreign law, as the supreme court of the State in question is undoubtedly in a better position to specify its nature and scope'.[22]

In this case, though, the Supreme Court felt compelled to depart from this rule. It thus found that 'when it comes to determining whether the rules adopted by a community of States, such as the EU, should take precedence over those deriving from a multilateral international treaty, such as the ECT, binding the said community, its Member States and third-party States[,] … the legal issue is not simply a matter of assessing the scope of a foreign legal norm, but of examining the legal relationship between the rules enshrined in various international instruments'.[23]

In the event of a conflict between such rules, the Supreme Court highlighted that 'the judicial authority set up by the said community of States may be tempted,

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'Republic of Moldova v Komstroy LCC: Arbitration under Article 26 ECT outlawed in Intra-EU Disputes by Obiter Dictum' (2022) 1 *European Law Review* 127; Paschalis Paschalidis, 'From Achmea to PL Holdings, Republic of Moldova, and Opinion 1/20: The End of Intra-EU Investment Treaty Arbitration' in Daniel Sarmiento and others (eds), *Yearbook on Procedural Law of the Court of Justice of the European Union* (Max Planck Institute Luxembourg for Procedural Law Research Paper Series 2022); Paschalis Paschalidis, 'Intra-EU Application of the Energy Charter Treaty: A Critical Analysis of the CJEU's Ruling in Republic of Moldova' (2022)1 *European Investment Law and Arbitration* 3; Björn P. Ebert and Friedrich Weyland, 'Weitere Rechtsschutzdefizite in der EU?' (2022) 1-2 Recht der Internationalen Wirtschaft 20; Rayyan El Issa, 'La place contestée de l'arbitrage international en droit de l'investissement' (Phd Droit, Université Paris-Saclay, 2023); Stephan Wilske and others, 'The View From Europe: What's New in European Arbitration?' (2023) 73 *Dispute Resolution Journal* 79; Cristian Gallorini, 'The Termination of Intra-EU Investor-state Arbitration and the Enforceability of Intra-EU Awards in The United States District Courts' (2022)1 *ELTE Law Journal* 25.

18 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.5.
19 *Ibid.* (emphasis added).
20 DSC 142 III 296 consid. 2.2.
21 Decision 4A_244/2023 of 3 April 2024 consid. 7.6.5.
22 *Ibid.*
23 *Ibid.*

as in the Komstroy case, to assert the primacy of its law over that of the other international agreement'.[24] That, so the Swiss Supreme Court, would be giving such a court's decision the '*character of a pro domo plea*', i.e. pleading its own case.[25]

Consequently, the Supreme Court found that it '*will not attach any particular value to the CJEU's ruling in Komstroy,* but will instead seek to ascertain for itself the meaning and scope of art. 26 ECT and, if necessary, to determine whether EU law can indeed call into question the validity of the consent given by the State resorting to arbitration to settle its dispute with the respondent'.[26]

4. Intra-EU disputes fall within the ambit of Article 26 ECT

The Swiss Supreme Court proceeded to an in-depth analysis of the ECT based on the principles of the VCLT.

The Court started with the unconditional consent to arbitrate any dispute under the ECT pursuant to Article 26(3)(a) ECT, finding that '[t]here is nothing in the *wording* of Article 26 ECT that suggests that the scope of 'unconditional consent' to arbitration is subject to other limits [than those set out in Article 26], and does not in fact cover disputes of an intra-EU nature'.[27] The Supreme Court found that '[s]uch a finding could therefore only be adopted on the basis of the other interpretation criteria set out in art. 31 VCLT'.[28]

The Court thus proceeded with a *systematic interpretation* of the ECT, addressing Spain's argument that a combined reading of Articles 1(3), 1(10), and 25 ECT established the existence of an autonomous legal regime, within the ECT, specific to EU Member States.[29] Spain argued that the ECT sets aside an area of competence transferred to the EU and recognizes the primacy of EU law over the ECT.[30] The transferred powers thus fall outside the scope of the ECT and the EU has sole competence to lay down the rules applicable in the areas concerned, and to monitor their application through the CJEU.[31] According to Spain, this applies particularly to the internal electricity market and foreign direct investment.[32]

24 *Ibid.*
25 *Ibid.* (emphasis added).
26 *Ibid.* (emphasis added).
27 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.1.
28 *Ibid.* (emphasis added).
29 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.2.
30 *Ibid.*
31 *Ibid.*
32 *Ibid.*

The Swiss Supreme Court was ‘not convinced by this argument’:[33]

- Article 1(3) ECT does no more than define a ‘Regional Economic Integration Organisation’ (‘REIO’) as any organization set up by States to which they have transferred powers in specific areas, some of which are governed by the ECT, including the power to take decisions binding on them in those areas.[34]

- Article 1(10) ECT ‘merely specifies that the “area” of an REIO covers the area of the Member States of such an organization’.[35] According to the Court, ‘these two definitions do not mean that the competences transferred by certain States to a REIO, in this case the EU, fall outside the scope of the ECT, and that the areas concerned are governed exclusively by the rules of EU law’.[36] The Supreme Court found that the fact that States party to the ECT have decided to transfer certain areas of competence to the EU does not mean that they are no longer bound by the provisions of an international treaty they have ratified, including in relations between EU Member States.[37] As for the concept of the REIO area defined in Article 1(10) ECT, the Supreme Court opined that ‘it in no way leads to the conclusion that an autonomous legal area exists within the ECT itself, subject exclusively to EU law’.[38]

- Article 25(1) ECT states that the provisions of the Treaty are not to be interpreted as obligating a contracting party which is a party to an Economic Integration Agreement (‘EIA’) to extend, under the cover of most-favored-nation treatment, to another contracting party which is not a party to that EIA, preferential treatment applicable between the parties to that EIA by virtue of the fact that they are parties to that EIA. The Court found that ‘[i]t thus appears that EU Member States – which are bound by an EIA within the meaning of Article 25(2) ECT – are not obliged to grant third States the prerogatives resulting from such an agreement’. According to the Supreme Court, this provision simply demonstrates that the EU and its Member States decided, during the negotiations surrounding the conclusion of the ECT, to insert into the said treaty ‘certain rules expressly intended to delimit the contours and scope of specific provisions of the ECT’, such as the most-favored-nation treatment clause in connection with an EIA.[39]

33 *Ibid.*
34 *Ibid.*
35 *Ibid.*
36 *Ibid.*, referring to *Vattenfall and others. v Germany,* ICSID No. ARB/12/12, Decision on the Achmea Issue (31 August 2018) para. 180.
37 *Ibid.*
38 *Ibid.*, referring again to *Vattenfall and others* (*supra* n 36) para. 180.
39 *Ibid.*, referring to *Ekosol S.p.A. v Italian Republic*, ICSID No. ARB/15/50, Decision on Italy’s request for immediate termination and Italy’s jurisdictional objection based on inapplicability of the

- This being the case, the Court found that:

  > [I]f the EU and its Member States really intended to restrict the application of other ECT rules in their mutual relations, or to limit the scope of their unconditional consent to arbitration proceedings brought by investors from third countries, such an intention could and should have been clearly expressed in the text of the ECT finally adopted, which was not the case.[40]

  According to the Swiss Supreme Court, '[t]his is all the more true given that the EU, before concluding the ECT, had already on several occasions inserted disconnection clauses in multilateral treaties, authorizing EU Member States not to apply the rules of such a treaty in their mutual relations'.[41] In the present case, *no disconnection clause had been included in the ECT*.[42] The Court saw the fact that such a disconnection clause was ultimately not included as a 'supplementary argument in favor of the possibility of submitting intra-EU disputes to arbitration in accordance with Article 26(3)(a) ECT'.[43] The Court also added that '[i]t is, therefore, certainly no coincidence that, when the draft modernized ECT was adopted in June 2022, the parties wished to introduce a new provision specifying that Article 26 ECT would not apply between Member States of the same REIO'.[44]

Turning pursuant to Article 31(1) VCLT to the *object and purpose* of the ECT, the Swiss Supreme Court found that the ECT aims to promote international cooperation and investment flows in the energy sector – without making any geographical distinction as to the origin of investors – in order to serve the ultimate cause of energy security.[45] According to the Supreme Court, '[g]ranting investors located in an EU Member State the right to initiate arbitration proceedings against another Member State undoubtedly contributes to achieving such an objective, and is in keeping with the spirit of the ECT'.[46] On the other hand, so the Court, 'to deprive the investors concerned of such an option would be counterproductive from the point of view of encouraging international investment flows'.[47] The Court went on to find that '[t]his is all the more true as Article 16 ECT, which governs the relationship between

Energy Charter Treaty to intra-EU disputes (7 May 2019) para. 95.

40 *Ibid.*, referring to *Vattenfall and others* (*supra* n 36) para. 202.

41 *Ibid.*, referring to *Vattenfall and others* (*supra* n 36) para. 203 and *Ekosol* (*supra* n 39) para. 92.

42 *Ibid.*

43 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.6.

44 *Ibid.*

45 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.3.

46 *Ibid.*

47 *Ibid.*, referring to *Vattenfall and others* (*supra* n 36) para. 198; and *Mercuria Energy Group Limited v Poland*, SCC No. V 2019/126, Final Award (29 December 2022) para. 393.

the said treaty and other international agreements, is intended to guarantee investors the right to demand a settlement of the dispute that is most favorable to them'.[48]

The Court then addressed two declarations issued by European Communities and Spain along with other EU Member States that purportedly support Spain's jurisdictional argument. The first is the '1997 Declaration'.[49] According to the Supreme Court, the 1997 Declaration was of no help to Spain's case:

- First, the title of the declaration revealed that it was formulated on the basis of Article 26(3)(b)(ii) ECT, which is why its scope was limited to the particular case covered by that provision.[50]
- Second, contrary to what Spain had argued, the 1997 Declaration applied only to the European Communities and not to its Member States.[51]
- Third, the 1997 Declaration made no distinction between disputes of an intra-EU nature and those involving an investor from a non-EU Member State; there is – so the Supreme Court – no mention of the alleged exclusive jurisdiction of the CJEU to hear disputes between an EU Member State and an investor from another Member State.[52]
- Finally, the Supreme Court pointed out that the 1997 Declaration expressly refers to the possibility of resolving investment disputes by arbitration, without specifying that such a procedure would be excluded when the dispute is of an intra-EU nature.[53]

For similar reasons, the Swiss Supreme Court also rejected Spain's argument based on the so-called 'Declaration of the 22',[54] which Spain had sought to invoke on the basis of Article 31(3)(a) and (b) VCLT. Spain argued that the Declaration of the 22 constitutes a subsequent agreement between the parties on the interpretation of

48 *Ibid.*

49 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.4; European Communities declaration of 17 November 1997 pursuant to article 26(3)(b)(ii), ECT (EC 1997 Declaration), which, among other things, provided that: '[a]ny case brought before the [CJEU] by an investor or another contracting party in application of the forms of action provided by the constituent treaties of the Communities falls under Article 26(2)(a) ECT. Given that the Communities' legal system provides for means of such action, the European Communities have not given their unconditional consent to the submission of a dispute to international arbitration or conciliation'.

50 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.4.

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*, referring to *Vattenfall and others* (*supra* n 36) para. 189 *et seq.*

54 In January 2019, EU Member States issued declarations recognising the legal consequences of *Achmea*. Altogether, 22 Member States declared that, as a result of *Achmea*, intra-EU disputes under the ECT were incompatible with EU law and article 26 of the ECT should be disapplied in intra-EU disputes.

the ECT, and in particular on the scope of the arbitration clause in Article 26 ECT, respectively a subsequent practice followed in the application of the ECT.[55] The Supreme Court disagreed:

- Article 31(3)(a) and (b) VCLT requires an agreement or practice of the parties to the treaty. In this case, the Declaration of the 22 was not formulated by all the parties to the ECT, but only by certain States.

- The document was not signed by all EU Member States, since six of them refused, at the time it was drafted, to describe the arbitration clause in the ECT as incompatible with EU law.[56]

- In these circumstances, the Declaration of the 22 cannot *a priori* be identified as a subsequent agreement between the parties on the interpretation of the ECT or its application within the meaning of Article 31(3)(a) VCLT, nor as a subsequent practice in the application of the said treaty within the meaning of article 31(3)(b) VCLT.[57]

- The Supreme Court added that:

  > A closer look at the Declaration of the 22 also confirms that it does not, in fact, seek to interpret the provisions of the ECT, but only to clarify the legal consequences of the *Achmea* judgment, which had nothing to do with the ECT. Thus, it is above all a declaration of intent, for political purposes, by the 22 concerned States, who intended to give, in the future, a new reading to their unconditional consent to the arbitration provided for by the ECT, in order to set aside the contrary solutions, potentially prejudicial to their interests, retained by various arbitral tribunals.[58]

  According to the Court, it is not clear from the Declaration of the 22 that the concerned EU Member States never validly consented to intra-EU disputes being submitted to arbitral tribunals.[59]

- In any event, 'even if the Declaration of the 22 were to be recognized as having some value under Article 31(3) VCLT, it could not be given retroactive effect'.[60]

The Swiss Supreme Court concluded by finding that Article 26(3)(a) ECT interpreted in good faith in accordance with the ordinary meaning to be given to the terms

55 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.5.

56 *Ibid.*

57 *Ibid.*

58 *Ibid.*, referring to *Ekosol* (*supra* n 39) para. 222 *et seq.*

59 *Ibid.*

60 *Ibid.*, referring to *Ekosol* (*supra* n 39) para. 226.

of the treaty in their context and in the light of its object and purpose '*precludes the argument that the unconditional consent given by the resorting State to the submission of any dispute to an arbitration procedure does not cover disputes of an intra-EU nature*'.[61]

Since the application of the principles of interpretation laid down in article 31 VCLT did not lead to a result that is manifestly absurd or unreasonable, the Court found that it did not need to take recourse to the supplementary means of interpretation under Article 32 VCLT.[62]

5. Article 26 ECT is not incompatible with EU law

The Swiss Supreme Court then turned to the issue of the alleged primacy of EU law over the ECT.

Spain based its reasoning on the premise that there is a conflict between Article 26 ECT and certain norms of the TFEU. The Supreme Court stated that it was aware that the CJEU had concluded in *Komstroy* that Article 26 ECT was incompatible with EU law. However, the Swiss Supreme Court added, in no uncertain terms, that it 'is not convinced by the reasoning adopted by the CJEU in Komstroy, since it is *based essentially, if not exclusively, on the requirement to preserve the autonomy and specific character of EU law, without taking any account of international law or the rules of treaty interpretation*'.[63]

In any case, the Court repeated that the *Komstroy* ruling is not binding on it, since the obligation of the national courts of EU Member States to respect the decisions of the CJEU – when the seat of arbitration is located in one of those States – is not binding on judicial authorities outside the EU, such as Switzerland.[64]

The Supreme Court went on to analyze the TFEU and concluded that '*the existence of a conflict between Article 26 ECT and the EU treaties has not been established*'.[65] It recalled that since the entry into force of the Lisbon Treaty, Article 207(1) TFEU has conferred exclusive competences to the EU in the field of foreign direct investment.[66] According to the Supreme Court, '[t]his does not mean, however, that norms contained in previously concluded multilateral international treaties have automatically become contrary to EU law'.[67] Although Article 267 TFEU did indeed

61 Decision 4A_244/2023 of 3 April 2024 consid. 7.7.6 (emphasis added).

62 *Ibid.*; The Court did note again in this context the fact that during the negotiations of the ECT, the EU had attempted to introduce a disconnection clause into the treaty, yet to no avail.

63 Decision 4A_244/2023 of 3 April 2024 consid. 7.8.2 (emphasis added).

64 *Ibid.*

65 *Ibid.* (emphasis added), referring to *Vattenfall and others* (*supra* n 36) para. 212 and *Mercuria Energy* (*supra* n 47) para. 419.

66 *Ibid.*

67 *Ibid.*

provide that the CJEU has jurisdiction to give preliminary rulings on the interpretation of the EU's founding treaties (TEU and TFEU), as well as on the validity and interpretation of acts adopted by the EU institutions, including the EC Treaty, since the latter has also been ratified by the EU, 'it does not follow from the wording of art. 267 TFEU that the CJEU's jurisdiction in this area is exclusive'.[68] The Supreme Court emphasized that, in its ruling in *Komstroy*, the CJEU itself had held that, according to its established case law, an international agreement providing for the establishment of a court to interpret its provisions, whose decisions are binding on the EU institutions, including the CJEU, is not, in principle, incompatible with EU law.[69]

Turning to Article 344 TFEU, the Supreme Court found that this provision, too, did not suggest any incompatibility between Article 26 ECT and EU law.[70] Member States merely undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein. According to the Court, it follows from the wording that it applies to Member States and not to their nationals.[71] Moreover, Article 344 TFEU provides only that EU Member States may not have recourse to a dispute resolution mechanism other than those provided for in the Treaties; it does not indicate that said States may not be sued before other judicial authorities.[72] Last but not least, the Court noted that the provision refers exclusively to disputes concerning 'the interpretation or application of treaties'.[73] Pursuant to Article 1(2) TFEU, the term 'the Treaties' refers to the TEU and the TFEU. Therefore, it 'does not appear that Article 344 TFEU also covers investment disputes between an EU Member State and an investor located in another Member State'.[74] In view of the foregoing, the Court found that it 'is *not possible to conclude that there is any conflict between the aforementioned rules of the TFEU and Article 26 ECT*'.[75]

6. EU law does not prevail over the ECT

Even though it concluded that Article 26 ECT is not incompatible with EU law, the Swiss Supreme Court went on to find that even if it were, '*there is nothing to suggest,* in terms of the principles of public international law, *that the rules of the TFEU should take precedence over those of the ECT*'.[76]

68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*
72 *Ibid.*
73 *Ibid.*
74 *Ibid.*
75 *Ibid.* (emphasis added).
76 Decision 4A_244/2023 of 3 April 2024 consid. 7.8.3 (emphasis added).

The Court argued that while it is true that Article 31(3)(c) VCLT requires account to be taken of any relevant rules of international law applicable in the relations between the parties, it is questionable whether that norm refers only to rules of international law applicable between all parties to the treaty or whether it could also encompass norms binding only certain contracting States.[77] In any event, so the Court, 'it does not follow from Article 31(3)(c) VCLT that other international commitments entered into by certain State parties to the ECT should prevail in the event of a conflict with the provisions of that treaty'.[78] The Supreme Court confirmed rather that the rules of a multilateral treaty must, in principle, be interpreted in the same manner for all the contracting parties, and not be given a different meaning depending on the other agreements concluded by some of them, on pain of undermining legal certainty.[79]

In a similar vein, the Swiss Supreme Court found that the rules of conflict between international treaties, enshrined in Article 30 VCLT, also did not result in the primacy of EU law over the ECT:[80]

- The TFEU could not take precedence over the ECT by virtue of the principle of *lex posterior derogat priori*, embodied in Article 30(3) VCLT.[81]

- Nor 'can it be accepted that EU law is hierarchically superior to the EC Treaty by virtue of Article 30(2) VCLT'.[82]

- The Court recalled that for Article 30(2) VCLT to apply, one of the treaties would have to specify that it is 'subordinate' to the other, or mention that it is not to be considered incompatible with the other treaty.[83] Here, the Court found that the ECT contains a specific rule governing the relationship between the Treaty and an international agreement concluded previously or subsequently by two or more contracting parties in that Article 16 ECT stipulates that no norm of an international treaty concluded by two or more contracting parties before or after the conclusion of the ECT may be interpreted as derogating from the provisions of Parts III or V of the ECT, nor from the right to require settlement of a dispute on this point in accordance with the ECT, where such provisions are more favorable to the investor or investment. The Court found that this specific conflict rule, adopted by the parties when signing the ECT, confirms that the right of an investor to submit a dispute to an arbitral tribunal in accordance with Article 26 ECT was

77 Decision 4A_244/2023 of 3 April 2024 consid. 7.8.3.1.

78 *Ibid.*

79 *Ibid.*, referring to *Vattenfall and others* (*supra* n 36) para. 156; *Ekosol* (*supra* n 39) para. 125.

80 Decision 4A_244/2023 of 3 April 2024 consid. 7.8.3.2.

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

to be guaranteed, notwithstanding any less investor-friendly conditions that may be provided for in other international treaties.[84]

- According to the Supreme Court, '[i]f the parties to the ECT had really wished to set up a special regime for EU Member States, by specifying that the dispute resolution mechanism provided for under EU law was to take precedence over Article 26 ECT, they could and should have explicitly mentioned this in the text of the ECT'.[85]

- As the parties had not done so, Article 16 ECT meant that Article 26 ECT takes precedence over the dispute resolution mechanism provided for in the TFEU.[86]

The Swiss Supreme Court finally dismissed Spain's argument based on Article 41 VCLT that the EU Member States had concluded an agreement to modify the ECT in their mutual relations only.[87] According to the Supreme Court, Article 41(a) VCLT does not provide for the possibility of amendment: '[t]here is … nothing to suggest that the ECT would grant the Member States of an REIO the option of adopting a special regime in their mutual relations, derogating from the provisions of the ECT'.[88] Moreover, the Court found that even if such a modification were not prohibited by the ECT, pursuant to Article 41(1)(b) VCLT an agreement concluded by two or more parties to a multilateral treaty, the purpose of which is to modify the treaty in their mutual relations only, is only possible if a number of cumulative conditions are met.[89] In the present case, the Court found that those conditions were not met.[90]

7. Conclusion

In sum, the Swiss Supreme Court rejected Spain's jurisdictional objection.

It also rejected Spain's objection under a different ground for annulment related to the *Green Power* award. The dissenting opinion issued by one of the arbitrators on liability mentioned in passing that the tribunal had not deliberated on the *Green Power* award. Spain argued that this meant that the award should be annulled under one or more grounds of Article 190(2)(a), (b) or (e) of the PILA. The Supreme Court disagreed, noting that the PILA does not require any specific form for deliberations. It suffices that the arbitrators had the opportunity to express their views, which was the case here as the award stated that the tribunal was not persuaded by the

84 *Ibid.*
85 *Ibid.*
86 *Ibid.*
87 Decision 4A_244/2023 of 3 April 2024 consid. 7.8.3.3.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*

reasoning in *Green Power*, confirming that the *Green Power* award was addressed by the tribunal during its deliberations.[91]

COMMENT

This is the first time that the Swiss Supreme Court was tasked to rule on the jurisdiction of a Swiss-seated arbitral tribunal over intra-EU investment disputes.

While the outcome of the decision was not unexpected, given that it is in line with the overwhelming majority of ECT awards and Switzerland is not bound by CJEU rulings, the Supreme Court rejected the reasoning in *Komstroy* in significantly stronger terms than it usually applies.

Further, it carried out a particularly thorough analysis of the ECT and EU law under public international law, having stressed that the CJEU's ruling in *Komstroy* lacked any such analysis. This included addressing in quite some detail points that would appear rather obvious, including that the ECT must be interpreted in accordance with the VCLT, and then, unlike the CJEU, actually doing so.

It is also noteworthy that whilst the Court made clear that it is not bound by arbitral precedents, in a case such as the present it would account for such case law, which is demonstrated by the frequent referencing by the Supreme Court of various awards rendered by ISDS tribunals constituted under the ECT, in cases where similar issues were addressed.

Taken together, one cannot shed the impression that the Swiss Supreme Court wanted to make the specific point that, unlike the CJEU, it was guided in its decision by international law and international law only, including particularly the rules of the VCLT, rather than by extraneous influences. As such, the decision is to be welcomed.

It will be interesting to see to what extent courts in other jurisdictions, including those faced with applications to enforce arbitral awards issued in intra-EU investment disputes, will be influenced by and follow the Swiss Supreme Court's diligent legal reasoning. In the past, judgments in England[92] and the United States[93] – after some initially conflicting judgments in the United States[94] – have sided with

91 Decision 4A_244/2023 of 3 April 2024 consid. 5.

92 Giving precedence to the ICSID Convention over EU law, see *Micula and other v Romania* [2020] UKSC 5; *Infrastructure* Services *Luxembourg and Energia Termosolar v Spain* [2023] EWHC 1226 (Comm).

93 *Micula and others v Romania*, No 23-7008 (D.D.C. 2024).

94 In 2023, two judges in the District Court for the District of Columbia had issued conflicting decisions on the enforceability of intra-EU awards. *NextEra Energy Global Holdings BV and NextEra Energy Spain Holdings BV v Spain*, 656 F. Supp. 3d 201 (D.D.C. 2023) (rejecting the intra-EU objection

the Supreme Court's findings, whereas courts in EU Member States – unsurprisingly – considered the intra-EU objection to be justified.[95]

Finally, on 26 June 2024, a few weeks after the Swiss Supreme Court's decision, all EU member states except Hungary signed an *inter se* declaration (the '2024 Declaration') to 'reaffirm, for greater certainty, that they share a common understanding' that Article 26 ECT 'cannot and never could serve as a legal basis for intra-EU arbitration proceedings'.[96] That understanding is said to be based on the ECJ's ruling in *Komstroy* as well as on 'the primacy of EU law, recalled in Declaration No 17, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, as a rule of international law governing conflict of norms in their mutual relations with the result that in any event Article 26 [ECT] does not and could not apply as a basis for intra-EU arbitration proceedings'.[97] The preamble of the 2024 Declaration refers to the rules of international law as codified in the VCLT and states that, 'reflecting a general principle of public international law', the interpretation of the ECT in *Komstroy* applies as of the approval of the Treaty by the EU and its member states.[98] Other than these mere references to public international

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to enforcement) and *9REN Holding SÀRL v Spain*, No 19-CV-01871 (D.D.C. 2023) (rejecting the intra-EU objection to enforcement); versus *Blasket Renewable Invs, LLC v Spain*, 665 F. Supp. 3d 1 (D.D.C. 2023) (accepting the intra-EU objection and denying enforcement of the award). These judgments were appealed (ref appeals Nos: *NextEra*, No 23-7031; *9REN*, No 23-7032; and *Blasket*, No 23-7038). The Court of Appeals for the District of Columbia Circuit, in charge of deciding the appeals, has heard the parties and invited the US Department of Justice ('DOJ') to submit an *amicus curiae* and to participate in the oral arguments. The DOJ's *amicus curiae* argues in favor of the 'correct' interpretation of the USA's Foreign Sovereign Immunities Act. *NextEra Energy Global Holdings BV v Spain*, No 23-7031 (D.D.C. 20 April 2023); *NextEra Energy Global Holdings BV v Spain*, No 23-7031 (D.D.C. 5 June 2024); Susannah Moody, 'US weighs into Spain's fight over intra-EU awards' (*GAR News*, 6 February 2024) <https://globalarbitrationreview.com/article/us-weighs-spains-fight-over-intra-eu-awards > last accessed 2 July 2024. Erik Brouwer, 'USA files amicus curiae submission before us appeals court, supporting Spain's attempts to reverse anti-anti-enforcement injunction and review intra-eu argument at enforcement stage' (*IARepoerter*, 6 February 2024) <https://www.iareporter.com/articles/usa-files-amicus-curiae-submission-before-us-appeals-court-supporting-spains-attempts-to-reverse-anti-anti-enforcement-injunction-and-review-intra-eu-argument-at-enforcement-stage/> last accessed 3 July 2024.

95 German Federal Supreme Court, Cases I ZB 43/22, I ZB 74/22, and I ZB 75/22 (27 July 2023); see also judgment of 17 June 2024, in which the Svea Court of Appeal decided to set aside a 2018 award rendered in the *Greentech and others (now Athena Investment) v Italy*, an intra-EU arbitration, which proceeded under the ECT, finding that the award was incompatible with EU law and Swedish public policy. This judgment was rendered only a few weeks after the same Court set aside another intra-EU ECT award against Italy. *Italian Republic v CEF Energia* BV, Case No T 4236-19 (27 May 2024); *Italian Republic v Athena Investment A/S and others*, Case No T 3229-19 (17 June 2024).

96 Declaration on the Legal Consequences of the Judgment of the Court of Justice in *Komstroy* and Common Understanding on the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings of 26 June 2024, para. 1.

97 *Ibid.*, para. 1.

98 *Ibid.*, preamble.

law, the 2024 Declaration does not include any analysis of public international law and would thus appear to suffer from the same shortcomings identified by the Swiss Supreme Court in its decision of 3 April 2024 in relation to the *Komstroy* reasoning and the Declaration of the 22. Hungary issued its own declaration, also on 26 June 2024, stating its understanding that Article 26 CET is not applicable to intra-EU disputes as a result of *Komstroy*. Hungary goes on to state, however, that, based on international law, the 'withdrawal of the applicability of Article 26 [ECT] in intra-EU arbitration proceedings may be ensured in accordance with international law by a future amendment of the [ECT] trough bilateral or multilateral treaty between all or certain parties to the treaty in accordance with Article 40 and 41 [VCLT]'.[99] Hungary's declaration thus emphasizes the inconsistency and irreconcilability between the approach taken by the EU and public international law.

99 Declaration of the Representative of the Government of Hungary of 26 June 2024 on the Legal Consequence of the Judgment of the Court of Justice in *Komstroy* and of the Non-Applicability of Article 26 of the Energy Charter Treaty as a Basis for Intra-EU Arbitration Proceedings, para. 1.

Romania's Supreme Court Decides that Associations and Foundations Based in Romania Can Only Set Up Arbitral Institutions if Authorized by Law

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Decision No 12, High Court Of Cassation And Justice, Romania[2]

INTRODUCTION

In a recent development of Romanian arbitration law, associations and foundations based in Romania will require express authorization by law in order to set up arbitration institutions. This is the conclusion of the Romanian High Court of Cassation and Justice, Romania's supreme court, in a decision issued 17 June 2024.[3] Although not yet released with reasons it is evident that its inevitable and immediate consequence is a narrowing of the definition of institutional arbitration. Once reasoned and published in the Official Monitor, the decision will come into effect.[4]

The decision was issued following an appeal in the interest of the law, a procedure which is intended to ensure the uniform interpretation of the law across

1 FCIArb. The author would like to thank Andreea Resmeriță for her assistance with translations from Romanian to English.

2 Minutes of Decision no 12 of 17 June 2024, High Court of Cassation and Justice.

3 Minutes of Decision no. 12 of 17 June 2024, High Court of Cassation and Justice.

4 Romanian Civil Procedure Code ('C.proc.civ.') art 517(4).

Romanian courts. Such appeals may be brought, as was the case here, by the Prosecutor General of the High Court of Cassation and Justice, at the request of the Justice Minister, after they have identified disparate interpretations of a legal provision across Romanian courts.[5]

In initiating the proceedings at issue in this comment, the Prosecutor General noted the proliferation of arbitral institutions set up under the aegis of an association or a foundation registered in Romania, and their use of 'deceptive and contradictory terms' which are likely to create confusion. In particular, the Prosecutor General observed that some associations make use of social media to recruit 'judicial arbitrators', requiring only that they pay a tax and hold a university degree, which need not be in the legal field.[6]

It should be noted at the outset that the High Court's decision only applies to associations and foundations established according to Romanian law. It therefore does not produce effects with respect to foreign institutions which may organize arbitrations seated in Romania. Surprisingly or not, the Romanian High Court's interpretation of the definition of institutional arbitration fits into a wider, regional context of modifications made to arbitration laws with similar effects. Other Central and Eastern European jurisdictions – notably Hungary, Bulgaria and Latvia – have similarly placed limitations on the ability to set up arbitral institutions, either through checks and balances, or additional requirements for eligibility.

I. THE RELEVANT LEGAL PROVISIONS ANALYSED BY THE HIGH COURT

The Romanian Civil Procedure Code ('C.proc.civ.') entered into force in 2013 and includes a definition of institutional arbitration in art 616(1):

> Institutional arbitration is that form of arbitration that is constituted and functions permanently under the auspices of an organization or a domestic or international institution or as an **autonomous non-governmental public interest organization, pursuant to the law**, based on its own rules that are applicable to all the disputes that are brought before it for resolution under and arbitration agreement [emphasis added].

The conditions for the organization of institutional arbitration outlined in the Code thus include two possibilities: that the arbitral institution be set up by 'an organization or a domestic or international institution', or by 'an autonomous non-governmental public interest organization, pursuant to the law'. The appeal before

5 C.proc.civ. art 514.

6 Appeal in the interest of the law No. 156/35/III-5/2024 of 16 April 2024 ('Appeal'), 1.

the High Court concerned exclusively the second possibility. This provision applies both to domestic and international arbitrations seated in Romania.[7]

Associations and foundations based in Romania are established as per Government Ordinance no. 26/2000 of 30 January 2000. Under art 38(1), associations and foundations may apply for and obtain the status of public interest organizations through an order of the government (i.e. an administrative act) if certain cumulative conditions are met. The conditions include a report of 'significant activities' already undertaken, and either proof of 'significant results' or letters of recommendation from domestic or foreign competent authorities. Following the High Court's decision, authorization by law will become a requirement in addition to that of acquiring 'organization in the public interest' status.

II. THE PROSECUTOR GENERAL'S OPINION

In the request for appeal, the Prosecutor General argued art 616(1) associations and foundations are excluded from the types of organizations which can organize institutional arbitration. As such, according to the Prosecutor General, no association or foundation may set up arbitral institutions, not even where they have acquired the status of 'organization in the public interest'. However, associations and foundations are the only forms of 'autonomous non-governmental public interest organizations' to which art 616(1) refers. An interpretation of the kind proposed by the Prosecutor General would have deprived the relevant provision of any effects. Although a number of the Prosecutor General's conclusions will be analyzed here, it should be noted that the High Court's interpretation is not as restrictive. Instead, the High Court opted to give effect to the provision, but in narrow circumstances.

First, the Prosecutor General noted that the legal problem is a result of the 'imperfect form in which the provisions of art 616(1) […] define institutional arbitration through listing the juridical entities which may organize' institutional arbitration.[8] Moreover, the requirement of 'pursuant to the law' must be seen as attached to the form of institutional arbitration organized by non-governmental organizations.[9] The Prosecutor General argued that 'pursuant to the law' in the context of art 616(1) in effect requires non-governmental organizations to be classified as 'organizations of public interest' by law, before they commence any institutional arbitral activities. By contrast, associations and foundations can apply for 'organization of public interest' status of their own will, obtain it through an administrative act, and only after they have already achieved 'significant results' in the activities they pursue.[10] To the Prosecutor General, the latter 'cannot be equated, nor can it be confused with

7 C.proc.civ. art 1111.
8 Appeal, 33.
9 *Ibid.*, 44.
10 *Ibid.*, 36

an *ex lege* qualification of the relevant organization as one of public interest,' and the Civil Procedure Code clearly envisages this.[11]

Moreover, the Prosecutor General noted the Romanian Constitutional Court has developed a 'firm preference [...] for respecting the principle of legality which, with respect to alternative dispute resolution mechanisms, has a particular dimension, in the sense that the activity of organs which function in the judicial system must be provided for in law and must also respect the constitutional principles of uniqueness, impartiality and equality of justice'.[12] Arbitration is an alternative jurisdiction to national courts with nearly equal competences, and under Romanian law arbitral awards are final and binding on the parties.[13] In this context, the Prosecutor General argued, only an *ex lege* 'public interest organization' classification ensures that the principle of legality is complied with. To allow otherwise would be prejudicial to parties who assume they have agreed to institutional arbitration but are in fact before an *ad hoc* tribunal disguised as institutional.[14]

The Prosecutor General also considered the legislator's intention in the history of institutional arbitration in Romania.[15] By including a definition of institutional arbitration in the Civil Procedure Code, the legislator intended to establish in law what was already the factual *status quo*. All arbitral institutions in existence then – especially the Court of International Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania ('CICA/CCIR') and its associated regional chambers – were classified as organizations of public interest by law.[16] The lawmaker thus gave legal effect to an already established practice. The intention behind C.proc.civ. art 616(1) was not, however, to broaden the scope of institutional arbitration beyond what was already the norm.[17]

III. PRELIMINARY CONCLUSIONS ON THE EFFECTS OF THE DECISION

As already noted, the decision is yet to be reasoned and published. In the meantime, however, some conclusions can still be drawn from the ruling. Decisions of the High Court do not have retroactive effects,[18] which naturally means that, upon the decision's publication in the Official Monitor, associations and foundations

11 *Ibid.*, 50
12 *Ibid.*, 48.
13 C.proc.civ. art 606.
14 Appeal (*supra* n 6), 53.
15 *Ibid.*, 36.
16 *Ibid.*, 41-42.
17 *Ibid.*, 46-47.
18 This can be derived from the fact that the decision becomes binding upon publication, as per C.proc.civ. art 517(4).

established in Romania will no longer be able to set up arbitral institutions unless expressly authorized by law, even where they have acquired the status of 'organization of public interest' under the conditions set out in OG 26/2000.

Two significant consequences flow from this lack of retroactivity of the High Court's decisions, concerning those associations and foundations which have already set up an arbitral institution. On the one hand, the publication of the decision will not lead to their dissolution. On the other hand, once the decision is published, the existence of these arbitral institutions and their ability to function according to the law will be affected *for the future*. More specifically, arbitral awards issued by these arbitral institutions will be subjected to the conditions of legality outlined in Romanian law.

Moreover, recalling that art. 616(1) C.proc.civ. contains two possibilities for setting up arbitral institutions, the High Court's decision does not affect those arbitral institutions set up 'under the auspices of an organization or a domestic or international institution', but only those under the second possibility, established by an 'autonomous non-governmental public interest organization, pursuant to the law'. Since the appeal only concerned the second alternative, it is evident that the decision will not produce effects with respect to the first possibility.

As already mentioned, by virtue of the principle of territoriality, the decision only affects those associations and organizations established according to Romanian law. Practically speaking, international arbitral institutions (e.g. ICC, LCIA, VIAC, SCC), all of which may organize arbitrations seated in Romania, can continue to do so. The appeal strictly concerned arbitral institutions set up by associations and foundations established in Romania.

IV. A COMPARATIVE PERSPECTIVE: THE CEE REGION

The requirement of authorization by law as instituted by the Romanian High Court may seem formalistic or even rigid, especially since a preponderance of jurisdictions do not have similar provisions regarding institutional arbitration. In fact, many arbitral laws do not even define institutional arbitration.[19] Yet within the broader (but still regional) context of Central and Eastern Europe, it is not so evidently unique. In recent years, a number of amendments have been brought to arbitral laws which restricted the capability of setting up arbitral institutions, or placed additional controls on them.

In the period immediately after 1989, in an attempt to attract and secure investments, these formerly communist countries quickly liberalized their arbitration

19 See for example the UNCITRAL Model Law, the English Arbitration Act 1996, the Swedish Arbitration Act.

laws. At the same time, in a manner perhaps atypical for international arbitral institutions,[20] arbitral courts were set up by law, usually attached to national chambers of commerce.[21] The old Romanian Civil Procedure Code, for example, did not define institutional arbitration, and only expressly allowed parties to choose either institutional or *ad hoc* arbitration in art 3411. Over time, however, lawmakers across the region saw fit to place some limits – practitioners have argued that this may be a consequence of a traditionally formalistic approach in the region.[22] A definition of institutional arbitration was not included until the new Civil Procedure Code, and the applicable provisions were separated from those on *ad hoc* arbitration.

In Bulgaria too, amendments brought to the Bulgarian International Commercial Arbitration Act 1988 ('ICA Act')[23] in 2017 gave the Bulgarian Justice Minister control over arbitral institutions through inspections.[24] The Minister can verify that the arbitration court complies with the law, and court presidents are obliged to provide free access to the premises and records of the institution. Where violations by either the institutions or the arbitrators are found, the Minister is empowered to issue mandatory instructions, and fines if the instructions are not complied with.[25]

In Hungary, arbitral institutions were transformed with the amendments brought to the Hungarian Arbitration Act, which came into effect 2018. Three permanent arbitral courts were explicitly established by law: the Court of Commercial Arbitration, the Permanent Court of Arbitration for Sport, and the arbitral court attached to the Hungarian Chamber of Agriculture, Food and Rural Development.[26] As a result, as reported by practitioners, two courts ceased to exist as of 2018: the Money and Capital Markets Arbitration Court, and the Energy Arbitration Court.[27] In certain respects, this mirrors the requirement for authorization by law introduced by the Romanian High Court.

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20 For example, the LCIA is a not-for-profit company limited by guarantee.

21 See Vratislav Pechota, 'Estonia Establishes a Permanent Arbitration Tribunal' [1991] *American Review of International Arbitration* 2:2.

22 Olga Sendetska, Olga Hamama, 'Draft Bills on Registration Requirements for Arbitral Institutions: Is Ukraine Joining the Regional Trend?' (*Kluwer Arbitration Blog*, 5 June 2021) <https://arbitrationblog.kluwerarbitration.com/2021/06/05/draft-bills-on-registration-requirements-for-arbitral-institutions-is-ukraine-joining-the-regional-trend/> last accessed 4 July 2024.

23 The Act applies to both international and domestic arbitrations, and is an adapted version of the UNCITRAL Model Law. An English version of the Act may be found on Arbitration Bulgaria, <https://arbitrationbulgaria.com/wp-content/uploads/2021/08/International-Commercial-Arbitration-Act-Bilingual.pdf> last accessed 4 July 2024.

24 This has been reported on by practitioners in 'CMS Expert Guide to International Arbitration: Bulgaria' <https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/bulgaria> last accessed 4 July 2024.

25 See ICA Act 1988 art 52, and art 53(3) on sanctions.

26 Hungarian Arbitration Act art 59(1)-(2).

27 Wolf Theiss, 'New arbitration regime in Hungary' <https://www.wolftheiss.com/insights/new-arbitration-regime-in-hungary/> last accessed 4 July 2024

The problem of 'pocket arbitrations' in Latvia is a well-known example of the misuse of liberal arbitration laws. In 2013, over 200 arbitral institutions existed in Latvia as a consequence.[28] In 2014, the Latvian lawmaker adopted the first Arbitration Law, although practitioners say it mostly consisted of provisions which already existed in – and were extracted from – the Latvian Civil Procedure Law. The 2014 Act did not include set aside powers for Latvian courts, which commentators argued would have been necessary to prevent the further proliferation of arbitral institutions.[29] After a 2023 Constitutional Court judgment condemning the existing court control mechanism as incomplete and a violation of the right to a fair trial,[30] further amendments were made to the Civil Procedure Law to include a right to set aside arbitral awards.[31]

The Latvian example may be exceptional – it has been dubbed the 'arbitration unicorn'[32] – but is nonetheless another relevant case of the lawmaker stepping in to prevent an abuse of arbitration. Currently, the Latvian Arbitration Law provides that 'the permanent arbitration court may be established by an association registered with the Register of Enterprises (founder of the permanent arbitration court), whose purpose of activity is the operation of the permanent arbitration court'.[33]

Similar intentions to amend the law as it relates to arbitral institutions also existed in Estonia, but they did not materialize. Arguably, however, the Estonian context was distinct from that of its Baltic neighbour. The only arbitral institution until 2010 was the Arbitration Court of the Estonian Chamber of Commerce and Industry.[34] Moreover, practitioners argued that the issue at the time was automatic enforcement of arbitral awards issued in Estonia, rather than a liberal regime for

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28 Valts Nerets, 'What Has Changed in Six Years Since the Latvian Arbitration Law "Reform" and What Needs to Be Changed' (*Kluwer Arbitration Blog*, 11 March 2021) <https://arbitrationblog.kluwerarbitration.com/2021/03/11/what-has-changed-in-six-years-since-the-latvian-arbitration-law-reform-and-what-needs-to-be-changed/> last accessed 4 July 2024.

29 *Ibid.*

30 Maija Tipaine, Toms Krūmiņš, 'Latvian Constitutional Court: Absence of a Mechanism for Setting Aside of Arbitral Awards Violates the Rights to a Fair Trial' (*Kluwer Arbitration Blog*, 22 March 2023) <https://arbitrationblog.kluwerarbitration.com/2023/03/22/latvian-constitutional-court-absence-of-a-mechanism-for-setting-aside-of-arbitral-awards-violates-the-rights-to-a-fair-trial/> last accessed 4 July 2024.

31 Valts Nerets, Paula Šūtava, 'Latvia Takes a Bold Leap: Embracing International Standards with the Arbitration Law Reform' (*Kluwer Arbitration Blog*, 19 April 2024) <https://arbitrationblog.kluwerarbitration.com/2024/04/19/latvia-takes-a-bold-leap-embracing-international-standards-with-the-arbitration-law-reform/> last accessed 4 July 2024.

32 Nerets, 'What Has Changed' (*supra* n 28).

33 Latvian Arbitration Law s 2(1).

34 Kalle Pedak and Urmas Kiik, 'Estonia' in *Getting the Deal Through – LexisNexis Arbitration Expert*, 1.

arbitral institutions.[35] Amendments brought to Estonian arbitration law instead introduced a requirement of recognition of arbitral awards prior to enforcement[36] and limited the arbitrability of consumer disputes.[37]

In Ukraine too, partly in response to a 'lack of trust in domestic arbitration',[38] and partly with the intent to increase the number of arbitral institutions in order to 'improve the investment climate in the Ukraine',[39] two draft bills were put before the Parliament in 2021 which would have introduced new requirements for setting up institutional arbitrations.[40] Ukrainian law distinguishes between domestic and international arbitral institutions headquartered in Ukraine – in particular, the former cannot organize international arbitrations.

Draft Bill 3411 would introduce a procedure for registration of domestic institutions, which would be required to be set up by non-profit organizations in existence for a minimum of five years.[41] The application for registration would be subject to review and recommendation by an industry self-regulated organization – in some ways mirroring the requirement for attainment of 'public interest organization' status in Romanian law. The bill's Progress Report shows that it passed the first reading in 2021 and is now awaiting second reading.[42]

As for international arbitral institutions, Draft Bill 5347 would require that the non-profit organization be registered in Ukraine for a minimum of 10 years or registered abroad with a branch in Ukraine, and that the organization had been the founder of an arbitral institution abroad which functioned for at least five years. The review and recommendation requirement would not apply for these institutions.[43] They should also be distinguished from international institutions like the ICC, VIAC, LCIA or others – i.e. foreign institutions which may organize arbitrations

35 Pirkka-Marja Põldvere, (Ärileht Delfi, 11 November 2015) 'Vandeadvokaat vahekohtutest: tarbijakaitse huvides ei tohiks äritegevust üleregulerida' <https://arileht.delfi.ee/artikkel/72924315/vandeadvokaat-vahekohtutest-tarbijakaitse-huvides-ei-tohiks-aritegevust-ulereguleerida> last accessed 4 July 2024.

36 See the Estonian Civil Procedure Code art 753(1). The grounds for annulment of an arbitral award are found in art 751.

37 Karolina Ullman (*Njord Lawfirm News,* 8 May 2019) 'NJORD Estonia: Conclusion of arbitration agreements with consumers restricted under Estonian law' <https://www.njordlaw.com/njord-estonia-conclusion-arbitration-agreements-consumers-restricted-under-estonian-law> last accessed 4 July 2024.

38 Draft Bill No 3411 dated 29 April 2020.

39 Draft Bill No 5347 dated 8 April 2021.

40 Olga Sendetska and Olga Hamama, 'Draft Bills on Registration Requirements' (*supra* n 22)

41 *Ibid.*

42 As per the official website of the Ukrainian Rada <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68714> last accessed 4 July 2024.

43 Olga Sendetska and Olga Hamama, 'Draft Bills on Registration Requirements' (*supra* n 22).

seated in Ukraine – to which the provisions did not apply. The bill's Progress Report shows that the bill is being worked on in the committee.[44]

CONCLUSION

Undoubtedly, the number of countries in Central and Eastern Europe (not to mention further afield) where legislatures have intervened by regulating either the setting up or the functioning of arbitral institutions is larger than enumerated here.[45] Such developments nonetheless offer a general context for the Romanian High Court's decision. What is clear from the brief comparison is that the lawmaker's intervention in the setting up and the functioning of arbitral institutions is not a rarity. Moreover, in some jurisdictions, it appears that this is a traditional solution to place limits of this kind, and in similar ways, as evident from the above examples.

On the other hand, the circumstances giving rise to changes in arbitral law differ in each jurisdiction, so a common pattern in the lawmakers' responses cannot be established. While it is clear that the lawmaker intervened to correct misuses of the law or errors in the functioning of arbitral institutions, the solutions are not the same, and neither was the legal context giving rise to the measures. It is, however, interesting to note that the modification of the law in Romania is not a legislative one, but a judicial interpretation of the law with *erga omnes* effects – the same law, it should be said, which has been in effect, unchanged, since 2013.

44 As per the official website of the Ukrainian Rada <https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=71614> last accessed 4 July 2024.

45 For example, Russia and Belarus have also placed limits on institutional arbitration by law.

Book Reviews

Book review: On Arbitration

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Sam Wordsworth KC & Marie Veeder (Eds), *On Arbitration: V. V. Veeder QC, Selected Writings and Contributions to the Development of Law* (OUP 2023)

INTRODUCTION

It is a rare skill to map the intersection between history and law in a text that reads like a political thriller with undertones of literary legal satire. It is a rarer skill to do so without compromising on the accuracy of historical facts and acuity of legal scholarship. What sets this book apart from the many on legal history is precisely that; it dives deep into apparently disparate historical events to show how they influenced the law of international arbitration. Complex legal issues become inestimably more interesting when referenced to the role played by personalities such as Lenin, Queen Victoria, Yul Bryner. This is all a testament to the uniqueness of the author, Mr. Van Vechten Veeder QC, globally known as Johnny Veeder. Who would think of beginning a lecture on the International Centre for Settlement of Investment Disputes (ICSID) by asking 'who can name an arbitrator that was a saint' then show a photograph of Maxim the Greek?[2] And complex legal issues become inestimably more interesting when infused with wit and satire. The reader of a book on

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2 Sam Wordsworth and Marie Veeder (eds.), *On Arbitration: V. V. Veeder QC, Selected Writings and Contributions to the Development of Law* (1st edn., OUP 2023) 455; 306.

international arbitration does not ordinarily expect to break into laughter. Yet, it is impossible to read the chapter titled 'Is there a need to revise the New York Convention?' without frequent chuckles. But this is a satire stitched with a finely-crafted legal argument on a very real issue whether the 1958 Convention can deal with complex political-legal exigencies of contemporary commerce.

Johnny Veeder was an advocate, arbitrator, scholar, teacher in his day-job but in the quiet moments of his home in London, England and Manchester-by-the-Sea, USA, where he lived with his wife and daughter, he was a master weaver of the tapestry of time who intertwined threads of history, law and politics to situate the law and development of international arbitration in a transnational continuum and he wove with a singular humanity, empathy, compassion and sense of humour.

For those privileged to have known Johnny Veeder, it is not surprising that he did not compile this book in his own lifetime; the waves in the vast ocean of his knowledge allowed only enough time to touch the shore swiftly sculpted as a lecture, paper, or seminar. It is also not surprising that such an ocean of knowledge could only have been compiled by those who best understood his way of thinking; in this case, the editors Marie Veeder, his wife and Sam Wordsworth, his close friend, student, and colleague.

I. STRUCTURE OF THE BOOK

On Arbitration is a collection of speeches, lectures and papers written and delivered by Johnny Veeder. It opens with an introduction by Stephen M. Schwebel, another great luminary of international arbitration, which is a veritable book review within the book itself.[3] The book is divided into three Parts; each prefaced by a brief, personal introduction by the editors which situate the ensuing chapters in context. The last chapter is followed by a short Postscript of memorials before closing with two appendices; Appendix I contains extracts of five of Johnny Veeder's arbitration awards and Appendix II is the cherry on the icing of the cake i.e. a verbatim record of excerpts from Johnny Veeder's lectures at Kings College London. Those who missed meeting a real master can meet him there for Appendix II gives the reader a glimpse into the fascinating fast-track mind of a leading light. Together, the editors, and contributors bring out the best of Johnny Veeder's professional expertise in international arbitration and his personal qualities. Despite his undoubted genius, he was, above all, humble to a fault; a living embodiment of the human endeavour in international arbitration.[4]

3 *Ibid.*, 481.
4 This was also the title of ICCA 2024 held in Hong Kong, 3-8 May, 2024.

II. ARBITRATION PAST, PRESENT AND FUTURE

Part I titled 'Learning from the Past' surveys the linear as well as lateral history going through the early recorded treaties[5] on inter-state arbitration and the earliest international arbitrations.[6] The role of Russia and Central Asia in the early development of arbitration is illustrated through individual biographical sketches of legal, political figures that only a lawyer steeped in history could draw. Johnny Veeder's own personal journey of research and exploration add to this scholarly analysis of early Russian concessions arbitrations.[7] He deployed this area of history to chart the roots of issues which are live today such as compensation for expropriation, separability of the arbitration agreement, application of general principles of law, truncated tribunals, and Kompetenz-Kompetenz. In the essay titled 'Investor-State Disputes and the Development of International Law: Arbitral Lessons from the Private Correspondence of Queen Victoria and Lenin', the reader can almost picture a disgruntled Queen Victoria learning about the arbitration award against the United Kingdom in the *Alabama Claims* Arbitration in 1872 at Geneva. This arbitration was composed of a collegiate international tribunal, the first international tribunal of its kind in modern times and the basic model for investment arbitration today. While Johnny Veeder ends by revealing that there was no actual letter between the two, the sequence of events in the *Alabama Claims* arbitration leading to the birth of investor-state disputes persuades the reader to agree with the author that there may well have been some form of correspondence between the two.[8]

Part II titled 'The International Arbitral Process' comprises nine chapters addressing issues and challenges of practice analysing aspects of good faith, issue estoppel, jurisdiction, truncated tribunals, and enforcement of interim measures. In his 2001 Goff Lecture on 'The Lawyer's Duty to Arbitrate in Good Faith', Johnny Veeder points out the practical difficulty in applying EU directives on the code of conduct of lawyers by focusing on the article which provides that 'rules governing a lawyer's relations with the courts apply also to his relations with arbitrators ...'.[9] The 2023 decision of the Paris Court of Appeal in setting aside an ICC Award on

5 Hague Convention (signed 18 October 1907, entered into force 26 January 1910) 205 CTS 233; Treaty of Paris (signed 3 September 1783); Jay Treaty (signed 19 November 1794, entered into force 29 February 1796) 39; Treaty of Washington (signed 8 May 1871, entered into force 17 June 1871) 13; Hague Convention (signed 29 July 1899, entered into force 4 September 1900) 187 CTS 429.

6 See e.g., Pope Alexander IV deciding a dispute between Spain and Portugal in 1493; the *Alabama Claims* Arbitration 1872; and the Anglo-Soviet Urquhart Concession 1922 which was never ratified due to Lenin's opposition despite having an arbitration clause. The tide changed after Lenin's death with three major foreign concessions being signed in 1925: the Lena Goldfields concession; the Harriman concession and the Tetiuhe concession.

7 *Supra* n 2, at 3.

8 *Supra* n 2, at 30.

9 *Supra* n 2, at 205.

grounds of an undisclosed close relationship between the claimant counsel and presiding arbitrator show how difficult it is to formulate any universal rules on otherwise universal values, due to differences of perspectives.

On the subject of estoppel, the recent judgment of the UK Supreme Court in *Kabab-Ji SAL v Kout Food Group*[10] where the Court confirmed that issue estoppel applies to arbitration agreements, is a useful case study on the subject addressed in detail by Chapter 13 of the book titled 'Issue Estoppels, Reasons for Awards and Transnational Arbitration'. The matter of parties in subsequent proceedings contradicting an issue of fact or law that has already been distinctly raised and finally decided in earlier proceedings between the same parties is discussed in the context of the 2003 cases of *Aegis v European Re* and *Czech Republic v CME*. The student of international arbitration is aided by the editors who have added extracts from Johnny Veeder's own award in *Apotex Holdings Inc. and Apotex Inc. v United States of America*, ICSID Award of 2014[11] and prefaced the debate on issue estoppel with a sample of Johnny Veeder's customary humour in stating that the foundational case for issue estoppel is an 1836 case in England involving a dead horse.[12]

The final part of the book (Part III) provides a critical roadmap for arbitration practitioners. The opening chapter of this Part titled 'Whose Arbitration is it anyway – The Parties' or the Arbitration Tribunal's?' was a question debated at the 2024 ICCA Congress in Hong Kong. With human rights and climate change organizations emerging as stakeholders, international arbitration affects not just the parties, the tribunal or the lawyers involved; it also affects those who inhabit the places where the subject-matter of arbitration is executed. Johnny Veeder's understanding of the subject a decade ago is instructive. He foresaw a great degree of flexibility on the part on the arbitration tribunal because 'an arbitration tribunal is not a state court' and so the debate 'should not be limited by its theoretical nature and divorced from actual practice'. He makes an analogy of an arbitrator being 'the master of a vessel in dangerous waters, with the owners aboard'[13] and in the context of questions on simple and compound interest awarded in arbitrations, he concludes by saying 'that arbitration awards reflect the practices and exigencies of the parties' trade thereby making the arbitrators the true masters of the arbitral process'. Conversely, being masters of the arbitral process, arbitrators have greater onus to understand the linear and lateral dimension of an arbitration and its stakeholders.

As was Johnny Veeder's specialty, the most important of facts are presented with the lightest of touches: three attributes common to both commercial and

10 *Kabab-Ji SAL v Kout Food Group* [2021] UKSC 48.

11 *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* [2003] ICSID Case No. ARB/01/13

12 *Sybray v. White* (1836) 1 M. & W. 435; 150 E.R. 504.

13 *Supra* n 2, at 347.

investor state arbitration namely, consent, finality and an enforceable award are explained with confidence, then followed by a caveat that the purpose of the lectures is 'to teach students the questions, not the answers because the answers, unfortunately, may change but the questions don't'.

For Johnny Veeder, all international arbitration problems were underpinned by the fact that 'without world trade, there can be no world peace; international arbitration is the oil which lubricates the machinery of world trade'.[14] Problems are posed and suggestions posited by reference to cases which give guidance on how to apply the 'oil' of international arbitration. True to his inherently international approach to law, referenced cases cover a geographical span from Pakistan[15] to Peru[16], and from Indonesia to the Netherlands.

CONCLUSION

Had Johnny Veeder not been the legendary lawyer that he was, he could have been a historian, a satirist, a historical-fiction writer par excellence. His essays are as steeped in jurisprudence as they are in the detail of historical events and his observations remain ahead of his time. In his 2015 paper 'Who are the arbitrators?', he observes that valuable human resources available to arbitration are wasted due to inadvertent gender and race discrimination 'in a process otherwise founded upon rationality'. And with this the reader gets a sense of the ultimate objective of 'dispute resolution' in arbitration. The Arabs say: *khayr al-kalam qalla wa dalla* ('the best of speech is short and succinct'). The brevity of the title *On Arbitration* is poetically juxtaposed with the treasure-trove of profound knowledge and peerless practice of a leading lawyer of our time who embodied, in the true spirit of *noblesse oblige,* the highest standards of intelligence, impeccable integrity and humility.

14 *Supra* n 2, at 207.

15 *Hitachi v Mitsui, Rupali and Ors* [1998] SCMR 1618; *Hubco v WAPDA* [2000] PLD 841 SC.

16 *Supra* n 2, at 381.

Book Review: Investment Arbitration and Climate Change

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Anja Ipp & Annette Magnusson (Eds), *Investment Arbitration & Climate Change* (Wolters Kluwer, 2024)

INTRODUCTION

In *Investment Arbitration & Climate Change*,[2] editors Anja Ipp and Annette Magnusson delve into the intricate and contentious realm where international investment law intersects with urgent climate change imperatives. This volume navigates the conflicting legal obligations faced by States with, on one hand, the necessity to reduce greenhouse gas emissions and avert catastrophic climate impacts, and on the other, the commitment to provide foreign investors with a stable and predictable legal framework crucial for attracting climate-related investments.

After many years of practicing in international arbitration, Ipp and Magnusson co-founded Climate Change Counsel,[3] a think tank dedicated to providing research, analysis, and advocacy on the law of climate change and energy transition. Their unwavering dedication to combating climate change is evident with this book standing as a testament to their relentless pursuit of legal solutions to humanity's greatest challenge. The call to the legal community of John Kerry – '[We] are all

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2 Anja Ipp and Annette Magnusson (eds.), *Investment Arbitration & Climate Change* (Wolters Kluwer, 2024).

3 Climate Change Counsel, 'About Us' <https://www.climatechangecounsel.com/about-us> last accessed 8 July 2024.

climate lawyers now'[4] – resonates, with Ipp and Magnusson's focus on engaging and enabling lawyers to contribute to the fight against climate change. One of their earlier works involved the release of a study on arbitral awards rendered under the Energy Charter Treaty (ECT), highlighting that issues of climate change and energy transition were notably absent from these awards.[5] This report emerged during a time of stark division within the legal community in the context of the modernisation of the ECT.

On one side, arbitration lawyers advocated to 'work with what we've got',[6] with some arguing for a reinterpretation of existing international investment agreements (IIA) through principles like systemic integration, aiming for a coherent international legal system that includes the Paris Agreement, the Glasgow Climate Pact, and EU climate law.[7] On the other side, climate lawyers lobbied for States to abandon the current regime by terminating or withdrawing from existing investment protection treaties and arbitration.[8] Since then, eleven parties announced their withdrawal from the ECT, among which France, United-Kingdom, Germany, Spain, the Netherlands, and Luxembourg. In July 2023, the European Union also proposed a coordinated withdrawal by the Union and all its member States, arguing that the European Commission 'considers the Treaty to be no longer compatible with the EU's climate goals under the European Green Deal and the Paris Agreement' primarily due to concerns over continued fossil fuel investments.[9] This widespread denunciation of the ECT follows a five-year effort to modernize its text to better align with contemporary energy priorities and climate change commitments. Many stakeholders have pointed out that the Treaty imposes constraints

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4 John Kerry, 'General Assembly of the 2021 ABA Hybrid Annual Meeting in Chicago' <https://www.americanbar.org/news/abanews/aba-news-archives/2021/08/john-kerry-to-aba---you-are-all-climate-lawyers-now-/> last accessed 22 June 2024.

5 Climate Change Counsel, 'The Energy Charter Treaty, Climate Change and Clean Energy Transition: A Study Of The Jurisprudence' <https://www.climatechangecounsel.com/_files/ugd/f1e6f3_d184e02bff3d49ee8144328e6c45215f.pdf> last accessed 8 July 2024.

6 Anja Ipp, 'Regime Interaction in Investment Arbitration: Climate Law, International Investment Law and Arbitration', (*Kluwer Arbitration Blog*, 12 January 2022) <https://arbitrationblog.kluwerarbitration.com/2022/01/12/regime-interaction-in-investment-arbitration-climate-law-international-investment-law-and-arbitration/>, last accessed 22 June 2024.

7 *Ibid*.

8 Martin Dietrich Brauch, 'Climate Action Needs Investment Governance, Not Investment Protection and Arbitration' (*CCSI Blog*, 15 March 2022) <https://ccsi.columbia.edu/news/climate-action-needs-investment-governance-not-investment-protection-isds> last accessed 22 June 2024. See also Lucy M. Winnington-Ingram, Elizabeth Farrell, Andrew Meads, and Julie A. Vaughan, 'The UK's withdrawal from the ECT – where do investors stand?', (ReedSmith, Perspectives, 4 March 2024) <https://www.reedsmith.com/en/perspectives/2024/03/the-uks-withdrawal-from-the-ect-where-do-investors-stand?cv=1> last accessed 18 July 2024.

9 Council of the EU, Press Release, 'Energy Charter Treaty: EU notifies its withdrawal' <https://www.consilium.europa.eu/en/press/press-releases/2024/06/27/energy-charter-treaty-eu-notifies-its-withdrawal/> last accessed 8 July 2024.

on States' ability to adopt energy transition policies and continues to support and protect fossil fuel investments, contradicting net-zero targets.[10] Reflecting these concerns, the proposed amendments to the ECT included broader coverage for renewable energy investments and provisions allowing each contracting State to unilaterally exclude investment protections for fossil fuels within its territory.[11] Despite reaching an agreement in principle on the revised text in June 2022, the parties ultimately failed to achieve a common position, leading to these series of withdrawals by EU member States. Last month, the Council of Europe gave the final green light for the EU to withdraw from the ECT after the European Parliament approved it during its last plenary session.[12] Member States who wish to remain contracting parties after the EU's withdrawal will be able to vote during the upcoming Energy Charter Conference – expected to take place by end-2024 – by approving or not opposing the adoption of a modernised agreement.[13] On 26 June 2024, 26 of the 27 EU Member States, along with the EU, signed a Declaration intending to disapply the ECT in both pending and future intra-EU arbitrations to neutralize the ECT's survival clause between them, [14] whether investment tribunals will consider this *inter se* agreement[15] to be valid under public international law, remains to be seen.

While, 'the path ahead is, therefore, very uncertain',[16] this volume brings together, for the first time, arbitration lawyers and system reform advocates to shed light on the complex nexus between international investment law and climate

10 CIEL, IISD, ClientEarth, *Submission to the Organisation for Economic Co-operation and Development on Investment Agreements and Climate Change* (March 2022) <https://www.ciel.org/wp-content/uploads/2022/04/investment-consultation-v3.pdf> last accessed 8 July 2024; Ladan Mehranvar and Sunayana Sasmal, *The Role of Investment Treaties and Investor-State Dispute Settlement in Renewable Energy Investments*, New York: Columbia Center on Sustainable Investment, (CCSI), December 2022 ; Martin Dietrich Brauch, *Reforming International Investment Law for Climate Change Goals in Research Handbook on Climate Finance and Investment* (Cheltenham: Edward Elgar Publishing, September 2020) <https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63> last accessed 8 July 2024.

11 Winnington-Ingram *et al.*, *supra* n 8.

12 Council of the European Union, Decision on the withdrawal of the Union from the Energy Charter Treaty, n° 6509/24, 4 March 2024.

13 Council of the EU, Press Release, 'Energy Charter Treaty: Council gives final green light to EU's withdrawal' <https://www.consilium.europa.eu/en/press/press-releases/2024/05/30/energy-charter-treaty-council-gives-final-green-light-to-eu-s-withdrawal/> last accessed 22 June 2024.

14 *See* Veronika Koromn, 'EU Member States' Diverging Declarations on the Intra-EU Applicability of the ECT: Can the ECT be Disapplied Intra-EU as a Matter of International Law Without Modernization?' (*Kluwer Arbitration Blog*, 17 July 2024) <https://arbitrationblog.kluwerarbitration.com/2024/07/17/eu-member-states-diverging-declarations-on-the-intra-eu-applicability-of-the-ect-can-the-ect-be-disapplied-intra-eu-as-a-matter-of-international-law-without-modernization/> last accessed 18 July 2024.

15 Nikos Braoudakis, Rosanne Craveia, Clémentine Baldon, *Neutralising the ECT Sunset Clause Inter Se*, ICSID Review - Foreign Investment Law Journal, 2024, siae011, pp. 1-24.

16 Patrick W. Pearsall, David Ingle & Gary Smadja, 'The Energy Charter Treaty: A Friend or Foe of Decarbonisation', chapter in *Investment Arbitration & Climate Change* §10.05, p. 261.

change. The book is structured into four sections, each addressing key aspects of the intersection between investment arbitration and climate change.

I. THE NATURE OF CLIMATE-RELATED INVESTOR-STATE DISPUTES

The opening chapter by Beata Gessel-Kalinowska vel Kalisz, Maja Frontczak, and Piotr Paprota outlines various State actions and measures that can trigger investor claims. Using global case law examples, they illustrate how claims arise from State climate legislation, administrative decisions, and investment and contracting decisions. They also explore potential claims stemming from States' failures to curb climate change, typically seen in domestic and international climate litigation. State inaction to support climate change mitigation or adaptation has yet to trigger a climate-related investor claim,[17] while it has been the major driver in climate litigation.[18] Their analysis evidence a new generation of phase-out cases concerning State action motivated by explicit commitment to mitigating or adapting to climate change involving international obligations of States to take appropriate climate actions. Explicit commitments of the State stemming from the Paris Agreement may impact arbitral tribunal's reasoning as to the notion of legitimate expectations constituting an even more important component of the fair and equitable (FET) protection standard.

Marisa Martin and Paul Barker then navigate the complex landscape of carbon markets and emissions trading, examining how foreign investment in these markets could lead to disputes. Carbon finance is injected into countries worldwide as businesses are increasingly seeking carbon credits to meet their net zero commitments. States on their hand are implementing regulation of climate mitigation projects and carbon credits. While issues relating to carbon markets are – for now – uncommon in ISDS cases to date, the anticipated increase in the scale of the voluntary compliance markets coupled with State action to meet their Nationally Determined Contribution (NDCs) increase the likelihood of disputes. In their chapter, they analyze the first publicly reported carbon-market investment dispute,[19] addressing significant jurisdictional and substantive issues, including the legal characterization of carbon credits and treaty protection availability. Their

17 The authors see in *Allard v. Barbados* a precedent of State inaction: *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06 at 244 <https://jusmundi.com/en/document/decision/en-peter-a-allard-v-the-government-of-barbados-award-monday-27th-june-2016> last accessed 26 June 2024.

18 Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot*, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 2024, London.

19 *Koch Industries, Inc. and Koch Supply & Trading, LP v. Canada*, ICSID Case No ARB/20/52 <https://jusmundi.com/en/document/decision/en-koch-industries-inc-and-koch-supply-trading-lp-v-canada-final-award-wednesday-13th-march-2024> last accessed 24 June 2024.

contribution provide substantial guidance on how to mitigate these new risks and invite to consider how investment treaties can be utilized to promote and protect high-quality carbon market investments.

Wendy Miles then discusses claims based on contractual rather than treaty protections, arguing that State climate measures can impact contractual arrangements between foreign investors and State entities, resulting in commercial arbitration claims. The starting point is that international commercial arbitration falls within the body of international economic law which is subject to the duty of States to ensure that it does not permit underlying activities to cause damage to environment and climate.[20] In turn, national enforcing courts should interpret their obligations pursuant to the NY Convention in a manner that is compatible with their obligations pursuant to the Paris Agreement.[21] Arbitral awards will thus need to demonstrate to have taken those obligation into account in their decision making especially in energy systems transition. She emphasizes the need for arbitration to reflect the realities of the climate transition through (i) comprehensive argumentation on factual context taking into account the precise effect of scientific or economics factors on the interpretation of contractual terms,[22] (ii) consideration of applicable climate change laws as mandatory laws or forming part of the factual matrix, and (iii) adapting damages calculations to factor in the costs of the transition.[23] Failing to do so would jeopardize the legitimacy and credibility of international commercial arbitration and the criticism that have targeted investor State arbitration may soon shift to international commercial arbitration.[24]

II. PROCEDURAL CHALLENGES IN CLIMATE-RELATED INVESTMENT DISPUTES

A second section addresses procedural issues likely to arise in climate-related disputes, such as the role of climate science, the potential for States to file counterclaims against investors, and the complexities of calculating compensation for fossil investments in a decarbonizing economy.

Caline Mouawad and Gretta Walters predict that climate science will be integral in disputes intersecting investment protection and climate transition. They examine the role of climate science at each arbitration stage, suggesting it could help assess a State's regulatory rights or evaluate causation and attribution of environmental harm. At the threshold phase, climate science may be critical to support the States's jurisdictional objection that an investment does not qualify for treaty

20 3§03.
21 3§05.
22 *Ibid.*
23 3§07.
24 3§06.

protection in case where treaties expressly recognize that investments contribute to sustainable development.[25] At the liability phase, climate science might be used to evaluate responsibility for realized local harms,[26] to assess the States right to regulate for climate change purposes[27] or through *amicus curiae submissions*.[28] Finally and although the line between liability and damages issues may be blurry, climate science may assist tribunals in valuing potential damages for an investor's claims and a State's counterclaims.

Counterclaims is the subject of the next contribution. Maxi Scherer and Clara Reichenbach explore the ability of host States to file climate-related counterclaims in investment arbitration, potentially alleging that investors failed to mitigate climate impacts or that their investments undermine the host State's climate adaptation efforts. The chapter evaluates the relevant procedural and substantive frameworks for counterclaims in ISDS around the three main hurdles faced by climate-related counterclaims namely consent,[29] admissibility,[30] and the establishment of an obligation.[31] Although tribunals are increasingly showing a willingness to exercise discretion in their interpretation of IIAs to derive obligation to investors from general international law, the most effective avenue remains to establish investor obligations under international law is by imposing binding climate-related obligations on investors under the IIA.[32]

One of the main criticisms of ISDS lies in the fact that foreign investors may be entitled to compensation based on future income from fossil fuel production thereby chilling the implementation of ambitious climate measures in turn warranting reforms in investment treaty policy. In his contribution, Oliver Hailes discusses how tribunals might approach compensation valuation if a State's measures to phase out fossil fuels breach investment treaties. He distinguishes between compensable and non-compensable conduct and outlines a two-stage quantum analysis applicable to fossil investments, suggesting that tribunals may not award the high compensation levels investors seek. With a very convincing analysis, he shows how the various stage of the valuation of compensation (determining the applicable standard of compensation, ascertaining the breach, proving causation, defining the market, selecting the method of valuation, applying that method and reducing the quantum) can only be understood within the organisation of fossil fuel production according to international law, which include the host States obligations under the Paris Agreement.[33]

25 4§02, p. 87.
26 4§03, p. 88.
27 *Ibid.,* p. 91
28 *Ibid.*, p. 97.
29 5§02.
30 5§03.
31 5§04.
32 5§05.
33 6§06.

III. BALANCING INVESTMENT PROTECTION AND THE RIGHT TO REGULATE

Most of all, climate change is a human rights crisis,[34] the present levels of warming are already causing devastating harm to people and ecosystems. If global temperature rise reaches 1.5°C above pre-industrial levels, society at large will experience significantly greater 'climate-related risks to health, livelihoods, food security, water supply, human security and economic growth'.[35] This third section seek to address the balance between treaty-based investment protection and States' rights to regulate in the public interest, particularly in the context of climate crises, older investment treaties, and human rights law.

In the context of investment treaty claims arising from climate change regulation, the FET standard has a central role.[36] Relying upon these clauses broad formulation, investors have sought protection against regulatory changes on the basis of their legitimate expectations or contravened guarantees of stability of the legal and investment framework.[37] Manish Aggarwal and Ridhi Kabra provide an overview of the current state of the fragmented arbitral jurisprudence on this balance, focusing on uncertainties around regulatory changes and compensable indirect expropriation. They analyses arbitral awards that have considered the issue of whether regulatory changes breach the FET standards and in particular investor's rights to a stable and predictable legal framework and respect for their legitimate expectations.[38] Their analysis discusses the different approaches adopted by tribunals to distinguish between non compensable regulation and compensable indirect expropriation.[39] The authors conclude by showing that notwithstanding the recent attempts to address this balance in newer-generation IIA in the last decade, it remains to be seen how these news-generation IIA will be interpretated by arbitral tribunals, as recent case suggests that general provisions to provide for the host state right to regulate might not provide the intended effect.[40]

Helionor de Anzizu and Nikki Reisch contrast the 'right to regulate' in investment law with the 'duty to regulate' in human rights law, arguing that tribunals should view investor claims within the broader context of State obligations to

34 8§.01.

35 IPCC Headline Statements <https://www.ipcc.ch/sr15/resources/headline-statements/> last accessed 8 July 2024.

36 On this topic, see the recent PhD of Thomas Lehman, *International Investment Law and Climate Change: Assessing Energy Investors' Legitimate Expectations in Net Zero Investment Disputes*, Queen Mary University, forthcoming.

37 7§02.

38 7§02.

39 7§03.

40 7§04.

prevent climate harm. States have a duty to take action to prevent and mitigate foreseeable risks to human rights, including risks posed by environmental harm as climate change.[41] Human rights must be read together with international environmental law such as the UNFCCC and the Paris Agreement which oblige States to curb greenhouse gas emissions and take action to keep warming below 1.5° C. States have a duty under both international human rights and environmental law to regulate the conduct of private actors, such as corporations to prevent foreseeable harm to the environmental and human rights due to climate change. The authors note however that although tribunals have the mandate to do so, systemic integration has rarely been invoked in investment arbitration,[42] preferring to justify the prevalence of investment law as *lex specialis*. A compatible coordination entails that 'measures to combat climate change are not an *exception* to investor protection; [but] are the context within which any investor takes place'.[43] This brings the authors to demonstrate how States can implement various strategies and arguments by bringing their human rights obligations.[44]

This analysis is taken a step further with Suzanne Spears contribution where she explores how tribunals can reconcile investor protections with climate-related human rights, suggesting that tribunals are authorized to apply relevant international and national laws and consider transnational public policy. She argues that tribunals should balance investors' rights with human rights and climate.

While reform have sought to align IAAs with climate obligations,[45] frictions between the international investment regime and the duty to regulate in the context of climate change are increasing. These two contributions arrive at opposite conclusions with the former arguing that States defenses in investment arbitration are not sufficient to meet the climate emergency which requires systemic changes including exiting treaties, withdrawing consent to ISDS and developing new multilateral instruments,[46] and the latter, illustrating how future tribunals could help preserve the legitimacy of the investment dispute resolution system if accepted as full socio-political context.[47]

41 8§02.

42 8§03.

43 *Mathias Kruck and others v. Kingdom of Spain,* ICSID Case No ARB/15/23, Partial Dissenting Opinion by Zachary Douglas (13 September 2022, § 57.

44 8§04.

45 Hélionor. de Anzizu, Lukas Shaugg and Amandine Van den Bergue, 'The New Energy Charter Treaty in Light of the Climate Emergency' (Jus Mundi, Daily Jus, 6 July 2022) <https://dailyjus.com/legal-insights/2022/07/the-new-energy-charter-treaty-in-light-of-the-climate-emergency> last accessed 8 July 2024.

46 8§05.

47 9§04. See also Toby Landau, Ciarb Alexander Lecture 2023 <https://youtu.be/2ql6AlR6xec?si=HOp2uAkp7PeDi6q3>last accessed 9 July 2024.

IV. THE ROLE OF INVESTMENT TREATIES IN THE CLIMATE TRANSITION

The final section examines whether treaty-based investment protection supports or hinders the global energy transition, with contrasting perspectives from different authors recalling the polarized views.

Patrick W. Pearsall, David Ingle, and Gary Smadja argue that investment treaties are vital for promoting renewable energy investments. They analyze the potential impact of dismantling the Energy Charter Treaty on the clean energy transition, noting that while treaties do not insulate against regulatory changes, they provide significant investor reassurance. Conversely, Ladan Mehranvar and Lisa Sachs contend that investment law and arbitration hinder the energy transition, arguing that investment treaties are neither necessary nor effective for increasing renewable energy investments. They suggest that the risk of investment claims impedes effective climate action and urge States to consider withdrawing from such treaties to enable dynamic climate regulations.

CONCLUSION

Investment Arbitration & Climate Change expertly bridges the gap between international investment law and the imperative to address climate change. By bringing together diverse perspectives, the editors and contributors illuminate the multifaceted challenges and opportunities at this critical intersection. The book highlights the polarized views within the legal community, presenting arguments from both proponents and critics of the current investment arbitration framework without achieving a consensus. This lack of consensus underscores the complexity and contentiousness of reconciling investment protection with climate action. While the book offers a robust analysis of current issues, it also acknowledges areas requiring further exploration. Future research could delve deeper into the practical implementation of treaty reforms, the evolving role of climate science in arbitration, and the mechanisms for ensuring that investment protection does not undermine urgent climate goals. As the legal landscape continues to evolve, this volume serves as a foundational text, encouraging ongoing dialogue and innovative approaches to harmonize investment arbitration with the global climate transition. The book not only provides a comprehensive overview but also sets the stage for future developments in this vital area of law.

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