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International Arbitration and Procedure: Transparency, Legitimacy and Bias



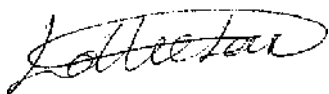
Dear Readers,

As always, I am very happy to be writing the Editorial Note for Volume 3, Issue 1 of the *Groningen Journal of International Law*: International Arbitration and Procedure. The topic is one of great current relevance for both academics and practitioners in the field of international dispute resolution.

The volume of international arbitration is ever increasing, with a proliferation of international investment treaties. This has raised questions regarding the balancing of different interests at stake, the openness of procedures and the correct forum for bringing disputes. As the field of international arbitration continues to expand, more effective and innovative solutions are called for. In the current issue of GroJIL our authors approach issues of transparency, legitimacy and bias in international arbitration. Each contribution focuses on providing solutions to the gaps, inconsistencies and downfalls that continue to pervade international arbitration.

Volume 3, Issue 1 marks the first full issue featuring GroJIL's new image. I am extremely grateful to our Graphic Designer for developing our new logo and helping us establish a signature style. The GroJIL Editorial Board has also worked relentlessly to ensure a smooth publication process. The commitment of the Editing Committee, the PR Committee, and the Editorial Board has allowed GroJIL to take even more steps forwards in its development. I would like to thank the whole GroJIL team, and our wonderful Board members for their fantastic work and dedication. I am very excited to continue working closely with the team on the forthcoming issue on global health law, and to make even more progress in our professional development.

Happy reading!



Lottie Lane
President and Editor-in-Chief
Groningen Journal of International Law

Groningen Journal of International Law

Crafting Horizons

ABOUT

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

MISSION

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

PUBLISHING PROFILE

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact [groningenjil@gmail.com](mailto: groningenjil@gmail.com).

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Groningen Journal of International Law

International Arbitration and Procedure: Transparency, Legitimacy and Bias

volume 3, issue 1

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Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?

Gabriele Ruscalla^{*}

Keywords

INVESTOR-STATE ARBITRATION; REFORMS; TRANSPARENCY; LEGITIMACY; HOME-STATES' AMICUS CURIAE SUBMISSIONS

Abstract

In the last decades, transparency has become a fundamental principle in international adjudication. It is usually defined as including concepts such as public access and disclosure of documents or information.

Due to the high impact of the activities of international institutions on civil societies and the growing relevance of individuals as subjects of the International Community, it became evident that there was a need to: 1. make the decision-making processes of international organisations more transparent; 2. increase the accountability of the international institutions towards civil societies; 3. give access to the public to international dispute settlement mechanisms.

For the purpose of this article, the third aspect, ie access to the public to international dispute settlement mechanisms, will be considered. In particular, even though reference will be made to other international dispute settlement systems, the practice of international investment and commercial arbitral tribunals will be dealt with.

The article will then study the role of transparency in international arbitration, highlighting three main challenges. First, the author will consider the difficult relation between transparency and confidentiality in arbitral proceedings. As this issue is extremely delicate in international commercial arbitration, this practice will be the focus of this section of the article.

Second, transparency as a tool to reach a higher level of consistency in international arbitration will be discussed. This is a highly topical issue in international arbitration, as shown by the United Nations Commission on International Trade Law (UNCITRAL) negotiations that led to the adoption in 2014 of the Rules on Transparency in Treaty-based Investor-State Arbitration. As a matter of fact, UNCITRAL looked into the issue of *amicus curiae* briefs provided by the investor's home State on issue of treaty interpretation, to secure more consistent and harmonised interpretations of standards in investment arbitration. The author will explore whether consistency through transparency is desirable in international arbitration.

Third, the paper will deal with the growing tendency to codify standards in international arbitration. This phenomenon is well illustrated by the current negotiations on investment and trade treaties such as the *EU-US Transatlantic Trade and Investment Partnership* (TTIP) and the *EU-Canada Comprehensive Economic and Trade Agreement* (CETA) that provide for specific provisions on transparency relating to investor-to-State disputes. The necessity and effectiveness of this codification will be investigated.

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I. Introduction

The concept of transparency in international law is broad and has three distinct dimensions. ‘Institutional transparency’ is the level of transparency that international organisations and institutions apply to their daily activities.¹ ‘Legislative transparency’ evaluates the level of transparency of the law-making processes in international law.² ‘Procedural transparency’ concerns the way international courts and tribunals apply and enforce international legal norms.³

However, achieving a single definition of transparency in international law is difficult because the international legal arena is a ‘universe of inter-connected islands’, where fragmentation seems to prevail over unity.⁴ Each area of international law has developed its own substantive and procedural rules and the international community has established as many international courts and tribunals as there are areas of international law. As a result, it seems that a single concept of transparency for all fields of international law cannot arise.⁵

International investment law and arbitration have been criticised by important actors in the field – mostly academics and non-governmental organisations (NGOs) – that regularly claim a lack of transparency. These criticisms are mainly directed at the investor-State dispute settlement (ISDS) mechanisms provided for by International Investment Agreements (IIAs), due *inter alia* to the existing tension between confidentiality and transparency in international arbitration. While legal commentators note inconsistent interpretations of international investment law standards,⁶ political and social observers condemn the legitimacy crisis of the arbitration system as a whole.⁷ This

¹ Major international organisations have undertaken programs promoting accountability through transparency. See for instance, the several initiatives, such as the United Nations, *Strengthening Accountability*, at <un.org/en/strengtheningtheun/accountability.shtml> (accessed 10 May 2015) and the European Commission, *Transparency Portal*, at <ec.europa.eu/transparency/index_en.htm> (accessed 5 May 2015).

² The online public consultation on investment protection and investor-State dispute settlement (ISDS) in the *Transatlantic Trade and Investment Partnership* (TTIP) agreement was launched by the European Commission on 27 March 2014. Such initiative clearly shows that international institutions have started acknowledging the relevance of the inclusion of all stakeholders interested in the negotiation of multilateral treaties. See the dedicated website of the European Commission, *Trade: Consultations: Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, concluded 13 July 2014, at <trade.ec.europa.eu/consultations/index.cfm?consul_id=179> (accessed 20 May 2015).

³ Delaney, J and Barstow Magraw Jr, D, “Procedural Transparency”, in Muchlinski, P, Ortino, F and Schreuer, C, eds, *The Oxford Handbook of International Investment Law*, (Oxford University Press, 2008), 721.

⁴ Pauwelyn, J, “Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands”, 25 *Michigan Journal of International Law* (2004) 903.

⁵ See for instance, Bianchi, A and Peters, A, eds, *Transparency in International Law* (Cambridge University Press, Cambridge, 2013). The authors analysed the concept of transparency as applied to the several fields of international law (ie, international environmental law, international economic law, international human rights law, international health law, international humanitarian law, international peace and security law), showing that a general definition of ‘transparency in international law’ does not exist.

⁶ Banifatemi, Y, “Consistency in the Interpretation of Substantive Investment Rules”, in Echandi, R and Sauvé, P, eds, *Prospects in International Investment Law and Policy* (Cambridge University Press, 2013), 200.

⁷ United Nations Conference on Trade and Development (UNCTAD), *Transformation of the international investment agreement regime*, 17 December 2014, TD/B/CII/EM4/2, 3.

perception is particularly strong in investment arbitration where public interests are directly involved.⁸

In international law, transparency encompasses several procedural values, notably access to parties' written and oral submissions, public accessibility to hearings and communication (ie publication) of the judicial decision.⁹ If we limit the scope of transparency to international investment law and arbitration, it 'generally takes the form of disclosure to third parties or of third-party participation in arbitral proceedings.'¹⁰ The United Nations Commission on International Trade Law (UNCITRAL) Working Group II on Arbitration and Conciliation has agreed that

[T]he substantive issues to be considered in respect of the possible content of a legal standard on transparency would be as follows: publicity regarding the initiation of arbitral proceedings; documents to be published (such as pleadings, procedural orders, supporting evidence); submission by third parties ("amicus curiae") in proceedings; public hearings; publication of arbitral awards; possible exceptions to the transparency rules; and repository of published information ("registry").¹¹

In particular, the access of non-disputing actors to parties' submissions is relevant in arbitration proceedings for at least two reasons. First, legal experts as well as the general public can get information concerning the development of a specific procedure. As we mentioned above, information is particularly important and ever more demanded in international investment arbitration, where public interests are at stake. Second, access to documents gives non-disputing parties the opportunity to intervene in proceedings through an *amicus curiae* submission.¹² These submissions have two main general purposes: either they discuss in a critical way a matter falling within the dispute, or they interpret a treaty provision.¹³

As discussed further below, this latter type of *amicus curiae* is seen as a potential instrument to increase harmonisation and consistency of investment treaty interpretation. It is then in this regard that the connection between transparency, consistency and legitimacy in international investment law is established. The legal theorist, Thomas

⁸ *Id.*, 4:

(a) Legitimacy. It is questionable whether three individuals, appointed on an ad hoc basis, can be entrusted with assessing the validity of States' acts, particularly when they involve public policy issues. The pressures on public finances and potential disincentives for public-interest regulation may pose obstacles to countries' sustainable development paths;

(b) Transparency. Although the transparency of the system has improved since the early 2000s, ISDS proceedings can still be kept fully confidential if both disputing parties so wish, even in cases where the dispute involves matters of public interest.

⁹ Nuemann, T and Simma, B, "Transparency in International Adjudication", in Bianchi, A and Peters, A, eds, *Transparency in International Law* (Cambridge University Press, Cambridge, 2013) 436, 437.

¹⁰ Feliciano, FP, "The "Ordre Public" Dimensions of Confidentiality and Transparency in International Arbitration: Examining Confidentiality in the Light of Governance Requirements in International Investment and Trade Arbitration", in Nakagawa, J, ed, *Transparency in International Trade and Investment Dispute Settlement* (Routledge, Oxon, 2013), 19.

¹¹ United Nations Commission on International Trade Law (UNCITRAL), REPORT: *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, 20 October 2010, para 31.

¹² Nuemann and Simma, *supra* nt 9, 437–438.

¹³ In international investment arbitration, the first type of *amicus curiae* is often submitted by non-governmental organisations whereas the second type is usually presented by the investor's home State.

Franck, has stated that ‘requirements about how rules are made, interpreted and applied’ are necessary to define a system of rules as fair and legitimate¹⁴

Four elements – the indicators of rule legitimacy in the community of states—are identified ... *determinacy*, *symbolic validation*, *coherence* and *adherence* (to a normative hierarchy). To the extent rules exhibit these properties, they appear to exert a strong pull on states to comply with their commands. To the extent these elements are not present, rules seem to be easier to avoid by a state tempted to pursue its short-term self-interest.¹⁵

The term coherence should be understood as the ‘consistency of the rule and its application with other rules’.¹⁶ UNCITRAL took a similar position during negotiations for the Rules on Transparency in Treaty-based Investor-State arbitration¹⁷

[Transparency] was also seen as an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such. Those challenges were said to include, among others: an increasing number of treaty-based investor-State arbitrations, including an increasing number of frivolous claims; increasing amounts of awarded damages; increasing inconsistency of awards and concerns about lack of predictability and legal stability; and uncertainties regarding how the investor-State dispute settlement system interacted with important public policy considerations. It was said that legal standards on increased transparency would enhance the public understanding of the process and its overall credibility.¹⁸

Having briefly described the link between transparency, consistency and legitimacy in international investment law and arbitration (Figure 1 below), the article will first analyse the tension between transparency and confidentiality in international arbitration (section II). In this section, both values will be dealt with in general terms, encompassing all stages of arbitration proceedings (ie access to documents, public hearings, submission of third parties and publication of the awards).

Then, the relation between transparency through the publication of awards, the establishment of (or the refusal to establish) a doctrine of precedents in investment arbitration and the possibility to increase consistency of the law will be considered and analysed (section III).

Next, the issue of non-disputing parties’ submissions will be discussed. This is a highly topical issue as the UNCITRAL work on the 2014 Rules on Transparency shows. As a matter of fact, UNCITRAL looked into the issue of *amicus curiae* briefs both to secure

¹⁴ Franck, TM, *Fairness in International Law and Institutions* (Clarendon Press, Oxford, 1995), 7–8.

¹⁵ Franck, TM, “Legitimacy in the International System”, 82 *American Journal of International Law* (1988) 705, 712.

¹⁶ Brunnee, J and Toope, SJ, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, Cambridge, 2010), 53.

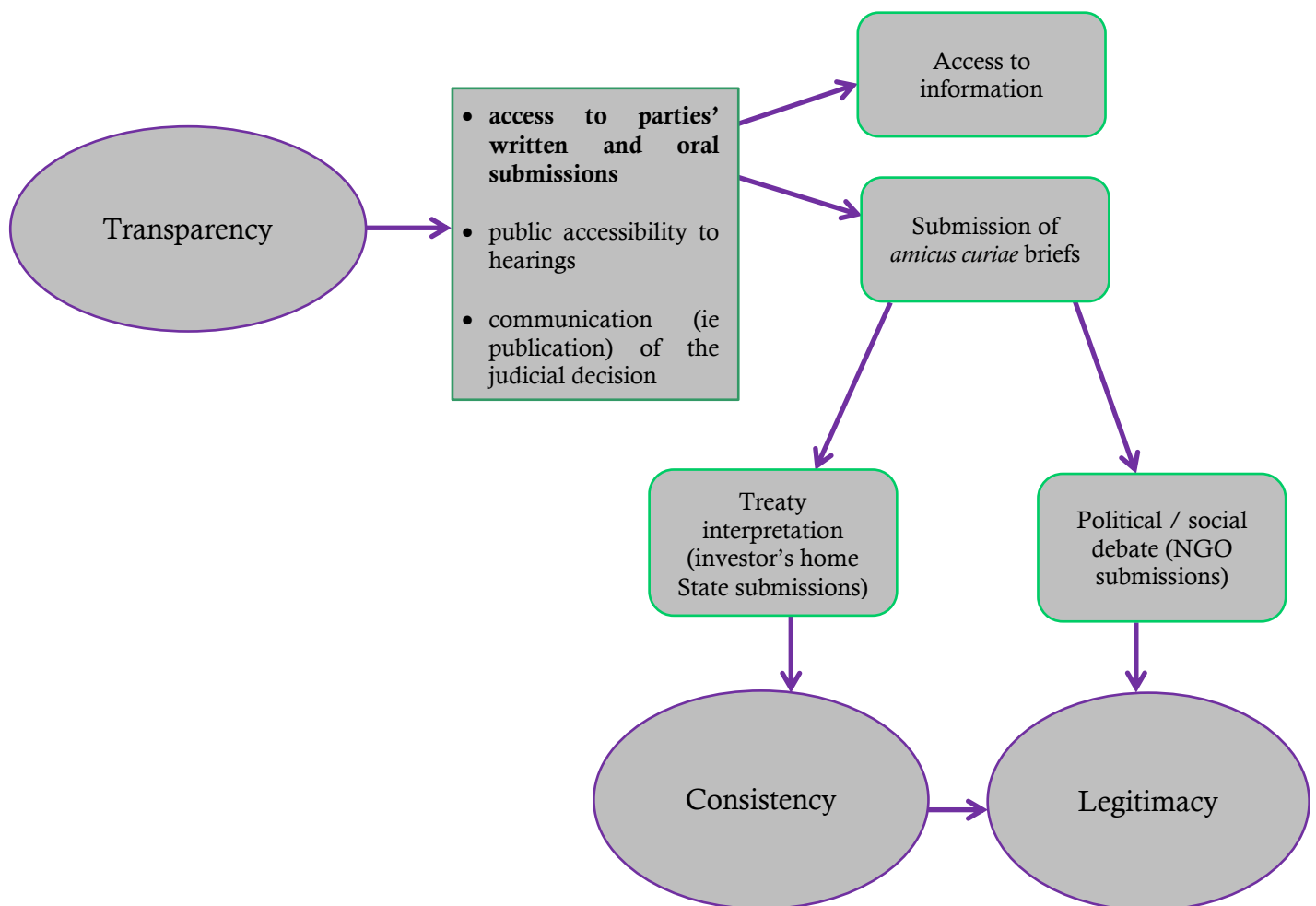
¹⁷ UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, effective 1 April 2014 (UNCITRAL Rules on Transparency) or (Rules on Transparency).

¹⁸ UNCITRAL, REPORT: *Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, 20 October 2010, para 17 [emphasis added].

more consistent and harmonised interpretations of investment law standards and to increase legitimacy of the system (section IV).

Finally, the article will deal with the growing trend to codify transparency standards that were not included in previous IIAs. This phenomenon is well-illustrated by the investment policies of Canada and the United States (section V).

Figure 1. The Connection Between Transparency, Consistency and Legitimacy in International Investment Law and Arbitration



II. Transparency and Confidentiality: Are They *Competing Values*?

Confidentiality and transparency are both general values of international arbitration. They have been described as ‘competing values’, but some scholars have seen the possibility of adjusting one to the other depending on the specific case.¹⁹ Is confidentiality the big enemy of transparency? If one considers State-to-State adjudication, the answer seems to be in the affirmative. In the words of an international law scholar

Transparency epitomizes the prevailing *mores* in our society and becomes a standard of (political, moral and, occasionally, legal) judgment of people’s conduct. ... In contrast, the opposites of transparency, such as secrecy and confidentiality, have taken on a negative connotation. Although they remain paradigmatic narratives in some areas, overall they are largely considered as manifestations of power, and, often, of its abuse.²⁰

As regards international arbitration, the discussion is more complicated because both private and public interests are directly involved in the dispute. Confidentiality is thought of as an instrument to protect the interests of both the foreign investor and the host State. In international economic relations, reputation is essential: the actors involved in arbitration proceedings might not want to expose their business conduct to the international community.²¹ This is why documents relating to the procedure and awards are often categorised as undisclosed confidential information. Also, confidentiality might protect the *ad hoc* essence of international arbitration that resolves ‘individualised disputes between individual parties and only those parties’.²²

II.1. ‘Conservative’ Views Promoting Confidentiality

It is well known in international commercial arbitration²³ that, even if it is not the primary reason,²⁴ transnational corporations prefer international arbitration because their business secrets and confidential information are better protected than in international litigation. Some international arbitration experts favor maintaining this standard because they consider it as ‘one of the attractions of arbitration in the eyes of arbitration users’.²⁵

¹⁹ Buys, CG, “The Tensions between Confidentiality and Transparency in International Arbitration”, 14 *The American Review of International Arbitration* 121, 121. See also, Feliciano, *supra* nt 9, 20.

²⁰ Bianchi, A, “On Power and Illusion: The Concept of Transparency in International Law”, in Bianchi, A and Peters, A, eds, *Transparency in International Law* (Cambridge University Press, Cambridge, 2013), 2.

²¹ Ortino, F, “Transparency of Investment Awards: External and Internal Dimensions”, in Nakagawa, J, ed, *Transparency in International Trade and Investment Dispute Settlement* (Routledge, Oxon, 2013), 132.

²² Banifatemi, Y, “Mapping the Future of Investment Treaty Arbitration”, *American Society of International Law – Proceedings of the 103rd Annual ASIL Meeting* (2010) 323, 325.

²³ For an analysis of the confidentiality in international commercial arbitration, see, Smeureanu, IM, *Confidentiality in International Commercial Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2011). See also, Müller, C, “La confidentialité en arbitrage commercial international: un trompe-l’œil?”, 23(2) *ASA Bulletin* 216 (2005).

²⁴ Buys, *supra* nt 19, 122.

²⁵ Gaillard, E, and Savage, J, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, Alphen aan den Rijn, 1996), 733. See also Lazareff, S, “Confidentiality and

Supporters of this view also stress that not only the arbitral procedure should be confidential but also the outcome of that procedure, thus preventing the publication of the arbitral award.²⁶ The same idea was expressed by a former secretary general of the Court of International Arbitration of the International Chamber of Commerce (ICC), who acknowledged that ‘indeed it became quickly apparent to me that should the ICC adopt a publication policy or any other policy, which would mitigate or diminish the strict insistence on confidentiality by the ICC, this would constitute a significant deterrent to the use of ICC arbitration’.²⁷

In international investment arbitration, confidentiality is considered an even more delicate issue. If it is true that public interests are regularly at stake in investor-State international economic relations, most IIAs were negotiated and concluded in an era when procedural transparency was not considered a topical issue in international arbitration. Also, most IIAs ‘refer to mechanisms inspired by international commercial arbitration as the main option for investor-State dispute settlement which is by nature based on confidentiality of the proceedings’.²⁸ This is not surprising as, despite international law being always applicable as substantive law in investment arbitration, the procedure in investment arbitration is not ‘different from the arbitral process generally [because] [i]nvestment treaty arbitration can be properly defined as a “sub-system” of international arbitration’.²⁹ Moreover, it is generally recognised that International Centre for Settlement of Investment Disputes (ICSID) arbitration has adopted the structure, forms and procedures of commercial arbitration. The fact that IIAs include commercial arbitration as dispute resolution options in their ISDS shows how commercial arbitration has influenced the shape of the ICSID regime.³⁰

Among the arbitral institutions, the London Court of International Arbitration (LCIA) has adopted the more conservative arbitration rules (LCIA Rules) in relation to confidentiality,³¹ with the presumption that the entire arbitration proceeding is confidential. Article 30 states that all awards, materials, and documents,³² as well as the

Arbitration: Theoretical and Philosophical Reflections”, *ICC Bulletin – Special Supplement* (2009) 81, 81–82:

What an absurdity to postulate that confidentiality is not part and parcel of commercial arbitration. It is inconceivable that such a procedure, whether domestic or international, should take place in the public eye ... Confidentiality thus has its roots in the desire for a system of justice suited to the world of commerce ... Confidentiality is justified in particular by the need to maintain the secrecy inherent in business dealings;

Trackman, LE, “Confidentiality in International Commercial Arbitration”, 18(1) *Arbitration International* (2002) 1.

²⁶ Loquin, E, “Les Obligations de Confidentialité dans l’Arbitrage”, 2 *Revue de l’Arbitrage* (2006) 323, 344.

²⁷ Bond, S, “Expert Report of Stephen Bond Esq (in *Esso/BHP v Plowmann*)”, 11(3) *Arbitration International* (1995) 273, para 6. See also, Born, GB, *International Commercial Arbitration*, (2nd ed, vol II, Kluwer Law International, Alphen aan den Rijn, 2014), 2782: “Confidentiality of the arbitral proceedings serves to centralize the parties’ dispute in a single forum and to facilitate an objective, efficient and commercially-sensitive resolution of the dispute, while also limiting disclosure to of the parties’ confidences to the press, public, competitors and others”.

²⁸ UNCITRAL, *Note by the Secretariat – Settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement*, A/CN.9/WGII/WP160, 5 August 2010, 5.

²⁹ Banifatemi, Mapping the Future of Investment Treaty Arbitration, *supra* nt 22, 324.

³⁰ McLachlan, QC, “Investment Treaty Arbitration: The Legal Framework”, in van den Berg, AJ, *50 Years of the New York Convention*, (ICCA Congress Series No 14, Kluwer Law International, Alphen aan den Rijn, 2009) 95, 98–100.

³¹ London Court of International Arbitration (LCIA), *LCIA Arbitration Rules*, effective 1 October 2014 (LCIA Rules).

³² Article 30(1), LCIA Rules.

deliberations³³ of the arbitral tribunal are confidential. Moreover, the award is not published³⁴ and hearings are held in private,³⁵ unless all parties agree in writing. If the parties agree on the publication of the award, the rules require that the arbitral tribunal has to be favourable to this as well.³⁶

Similar provisions are contained in the *Swiss Rules of International Arbitration* (Swiss Rules)³⁷ that provide for privately held hearings³⁸ as well as full confidentiality of awards, orders, and materials,³⁹ unless the parties otherwise agree in writing. Unlike the LCIA Rules, deliberations of the arbitral tribunal are always confidential and no exception is laid down.⁴⁰ As for the publication of the award, the procedure requires both parties to agree to it⁴¹ and the final decision lies with the Secretariat of the Swiss Chambers' Arbitration Institution.⁴²

II.2. 'Progressive' Views: Less Confidentiality, More Transparency

With investor-State arbitration cases increasing, civil society and other actors in the international investment regime have started demanding more openness and transparency in arbitral proceedings.⁴³ In particular, the general public has expressed interest in participating in the system, in observing the activities of foreign investors and in evaluating the host State's exercise of public functions in their economic relations with foreign investors.⁴⁴ However, transparency is not only an issue in investment arbitration. International commercial arbitration can be affected by the tension between transparency and confidentiality for at least five reasons.

First, even though commercial arbitrations are usually conducted between private parties, one of the disputing parties can be a State, a State entity or a State instrumentality. In fact, a State can act both in its sovereign capacity (*jure imperii*) under public international law and participate in international commercial arbitrations in its private capacity (*jure gestionis*).⁴⁵ In the latter case, the public interest can be involved in purely commercial international arbitrations. Second, due to this presence of public interest issues, the general public could be affected by the outcome of a commercial arbitration proceeding in several ways.⁴⁶ Examples of public interests at stake in commercial arbitration include *inter alia* cases dealing with national defence issues,

³³ Article 30(2), LCIA Rules.

³⁴ Article 19(4), LCIA Rules.

³⁵ Article 30(3), LCIA Rules.

³⁶ Article 30(3), LCIA Rules.

³⁷ Swiss Chambers' Arbitration Institution, *Swiss Rules of International Arbitration*, effective 1 June 2012 (Swiss Rules).

³⁸ Article 25(6), Swiss Rules.

³⁹ Article 44(1), Swiss Rules.

⁴⁰ Article 44(2), Swiss Rules.

⁴¹ Article 44(3)(c), Swiss Rules.

⁴² Article 44(3)(a), Swiss Rules.

⁴³ Schreuer, C, Malintoppi, L, Reinisch, A and Sinclair, A, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, Cambridge, 2009), 697–698.

⁴⁴ Ortino, *supra* nt 21, 133–134.

⁴⁵ Heiskanen, V, "State as a Private: The Participation of States in International Commercial Arbitration", 7 *Transnational Dispute Management* (2010) 1, 2.

⁴⁶ Buys, *supra* nt 19, 135.

agriculture, a State's oil, gas and other natural resources, commercial embargoes and telecommunications.⁴⁷

Third, transparency is fundamental in those commercial arbitration cases where misconduct or unlawful activities (for example, corruption, bribery, money laundering and fraud) have been committed by public officers or by officials of foreign transnational corporations.⁴⁸ In such cases, (transnational) public policy prevails over confidentiality. Fourth, confidentiality can also affect the development of the so-called autonomous arbitral legal order.⁴⁹ In particular, if compared with a national judge who is considered a real actor in the domestic legal order, '[L]a parole de ce prophète [the arbitrator] demeure confidentielle; il ne peut pas être, comme le juge, un véritable acteur de l'ordre juridique. La voix de l'arbitre n'est pas audible, ou difficilement dans la société'.⁵⁰ Fifth, confidentiality can also be dangerous for the arbitral procedure. In fact, when confidential, an award

may be just part of a series of other (related or unrelated) awards which may reinforce or contradict the submitted award's conclusion. Neither the tribunal nor the other party may be aware of the fact that the award submitted is just one part of a larger puzzle selected by the submitting party with its tactical preferences in mind.⁵¹

As a consequence, one of the parties or even the arbitral tribunal could miss the broader picture of a case.

In accordance with this tendency to downplay confidentiality in international arbitration, some scholars argue that the principle of confidentiality in international

⁴⁷ See for instance, Romero, ES, "Are States Liable for the Conduct of Their Instrumentalities? ICC Case Law" in Gaillard, E and Younan, J, eds, *State Entities in International Arbitration* (IAI Series on International Arbitration No 4, Juris Publishing, 2008), 31. See also ICC Commission on Arbitration and ADR, REPORT: *States, State Entities and ICC Arbitration*, ICC Document 862-1 ENG, 2012, at <iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities-under-the-ICC-Rules-of-Arbitration/> (accessed 5 May 2015), 3–4: The report gives States and State entities recommendations concerning their involvement in (private contractual) commercial arbitrations and investment arbitrations. 'As arbitration agreements for commercial arbitration involving states and state entities are formed differently from those in investment arbitration, the recommendations regarding each will be set out separately'.

⁴⁸ Feliciano, *supra* nt 9, 20.

⁴⁹ For a definition of the notion of 'autonomous arbitral legal order', see Fouchard, P, "L'Autonomie de l'Arbitrage Commercial International", 1965(1) *Revue de l'Arbitrage* (1965) 99; Oppetit, B, "Philosophie de l'Arbitrage Commercial International", 120(4) *Journal du Droit International* (1993) 811; Gaillard, E, "Souveraineté et Autonomie: Réflexions sur les Représentations de l'Arbitrage International", 134(4) *Journal du Droit International* (2007) 1163; Gaillard, E, "L'Ordre Juridique Arbitral: Réalité, Utilité, Spécificité", 55 *McGill Law Journal – Revue de Droit de McGill* (2010) 891; Gaillard, E, *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, 2010); Gaillard, E, "International Arbitration as a Transnational System of Justice", in van den Berg, AJ, ed, *Arbitration: The Next 50 Years*, (ICCA Congress Series 16, Kluwer Law International, Alphen aan den Rijn, 2012) 66; Gaillard, E, "Transcending National Legal Orders for International Arbitration", in, van den Berg, AJ, ed, *International Arbitration: The Coming of a New Age?* (ICCA Congress Series No 17, Kluwer Law International, Alphen aan den Rijn, 2013) 371.

⁵⁰ (The dictum of this prophet [the arbitrator] is confidential; the arbitrator's voice is not audible beyond rare exceptions): Ancel, J-P, "L'Arbitre Juge", 2012(4) *Revue de l'Arbitrage* (2012) 717, 723.

⁵¹ Wälde, T, "Confidential Awards as Precedent in Arbitration: Dynamics and Implication of Award Publication" in Banifatemi, Y, ed, *Precedent in International Arbitration* (IAI Series on International Arbitration No 5, Juris Publishing, 2008), 118.

arbitration is not to be considered as *lege lata*⁵² and, even when the principle exists, its application depends on the specific circumstances of the case.⁵³ National courts have followed the same approach.⁵⁴ Only a few countries recognise the existence of an obligation of confidentiality in international arbitration. On the contrary, most jurisdictions provide for confidentiality only when it is established by the applicable law, by the *lex arbitri* or by consent of both parties.⁵⁵ For instance, the English *Arbitration Act* of 1996 does not address the issue of confidentiality. As a result, despite the English common law considering confidentiality to be an implied term of every arbitration agreement,⁵⁶ experts have advised the parties to expressly stipulate confidentiality in an arbitration agreement.⁵⁷

In France, confidentiality in international arbitration is no longer the general rule under French law. The New French Arbitration Law⁵⁸ distinguishes domestic arbitration from international arbitration. Confidentiality of arbitral proceedings is applied only to the former.⁵⁹ The only requirement for confidentiality in international arbitration concerns an arbitral tribunal's deliberations.⁶⁰ As in English law, French arbitration lawyers have recommended that the parties include, if they so wish, reference to confidentiality in any arbitration agreement.⁶¹

As a result, one can clearly state that confidentiality is not an overriding principle of international commercial arbitration as most arbitration statutes and arbitration rules do not contemplate a general principle of confidentiality.⁶² This is also implicitly recognised

⁵² Paulsson, J and Rawding, N, "The Trouble with Confidentiality", 5(1) *ICC Bulletin* (1994) 48. See also Delvolvé, J-L, "Vraies et Fausses Confidences, ou les Petits et les Grands Secrets de l'Arbitrage", (3) *Revue de l'Arbitrage* (1996) 373.

⁵³ Poudret, J-F and Besson, S, *Comparative Law of International Arbitration* (Sweet & Maxwell, London, 2007), 316.

⁵⁴ Supreme Court of Sweden, *Bulgarian Foreign Trade Bank Ltd v AI Trade Finance Inc* (English translation), Case No T 1881-99, 27 October 2000; High Court of Australia, *Esso Australia Resources Ltd and Consorts v Plowman* (1995) 183 CLR 10; United States District Court, *United States v Panhandle Eastern Corporation*, 119 FRD 346 (Del, 1988). See also Cour d'Appel de Paris (France), *Société National Company for Fishing and Marketing "Nafimco" v Société Foster Wheeler Trading Company AG*, 22 January 2004: The Cour d'Appel decided that 'la partie, qui requiert une indemnisation pour violation de la confidentialité de l'arbitrage doit s'expliquer sur l'existence et les raisons d'un principe de confidentialité dans le droit français de l'arbitrage international' (A party claiming for compensation for violation of confidentiality in an arbitration proceeding must prove the existence of a confidentiality principle in the French law on international arbitration). Such a request means that the existence of an obligation of confidentiality is not evident.

⁵⁵ Feliciano, *supra* nt 9, 16.

⁵⁶ Court of Appeal of England and Wales, *Ali Shipping Corporation v Shipyard Trogir* [1997] EWCA Civ 3054: In this case, the Court stated that all documents prepared for and used during the arbitration proceedings, transcripts, notes as well as the award are subject to confidentiality, unless the parties have otherwise agreed.

⁵⁷ Gerbay, R, "Confidentiality vs Transparency in International Arbitration: The English Perspective", 9(3) *Transnational Dispute Management* (2012) 1, 3.

⁵⁸ *Code de procédure civile (Code of Civil Procedure)*, France (2005), as amended by Décret no 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage (Decree No 2011-48 of 13 January 2011 reforming the law on arbitration), (New French Arbitration Law).

⁵⁹ Article 1464(4), New French Arbitration Law.

⁶⁰ Article 1506, New French Arbitration Law: referring to Article 1479.

⁶¹ Gaillard, E and de Lapasse, P, "Le Nouveau Droit Français de l'Arbitrage Interne et International", 3 *Recueil Dalloz* (2011) 175, 184.

⁶² Kluwer Arbitration Blog, Mourre, A and Vagenheim, A, *Arbitral Jurisprudence in International Commercial Arbitration: The Case for a Systematic Publication of Arbitral Awards in 10 Questions*, 28 May 2009, at <kluwerarbitrationblog.com/blog/2009/05/28/arbitral-jurisprudence-in-international-commercial-

by those who strongly support the existence of such a general principle. For instance, Serge Lazareff – a supporter of confidentiality in international arbitration – admits that ‘if the parties wish to benefit from maximum confidentiality, they should resort to a clause’.⁶³ It is clear that, if parties need to explicitly agree to a clause, the principle contained in that clause cannot be considered generally recognised by the international arbitration community.

The tendency toward higher transparency in international arbitration is adopted by several institutional arbitration rules as well. ‘Progressive’ arbitration rules include those established by the American Arbitration Association (AAA Rules),⁶⁴ the International Chamber of Commerce (ICC Rules),⁶⁵ the Chamber of Arbitration of Milan (CAM Rules)⁶⁶ and the Society of Maritime Arbitrators (SMA Rules).⁶⁷

In the arbitration rules of the American Arbitration Association, confidentiality is still the general rule concerning all aspects of the proceedings,⁶⁸ hearings are held privately,⁶⁹ and awards are not published⁷⁰ unless the parties have otherwise agreed. However, the provision concerning the publication of arbitral awards allows the institution to publish ‘selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and the identifying details’, unless the parties have decided otherwise.⁷¹

With regard to the ICC Rules, although proceedings are not generally open to third parties, access is given if the parties and the arbitral tribunal have so agreed.⁷² An important innovative provision in the ICC Rules is that the confidentiality rule is reversed compared to the LCIA and Swiss Rules. Article 22(3) states that

Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.⁷³

This means that confidentiality is not the general presumption in the ICC Rules. If a party does not raise a request for confidentiality, the arbitral tribunal is free not to apply this principle.

The CAM Rules do not include any provision on the participation of third parties at hearings. However, any third party participation is difficult to envisage as the confidentiality of arbitral proceedings and arbitration awards is fully protected.⁷⁴ The original and more liberal provision is Article 8(2), which allows the institution, for the

arbitration-the-case-for-a-systematic-publication-of-arbitral-awards-in-10-questions.../> (accessed 6 May 2015).

⁶³ Lazareff, *supra* nt 25, 88.

⁶⁴ American Arbitration Association, *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)*, effective 1 June 2014 (AAA Rules).

⁶⁵ International Chamber of Commerce (ICC), *ICC Rules of Arbitration*, effective 1 January 2012 (ICC Rules).

⁶⁶ Chamber of Arbitration of Milan, *Arbitration Rules*, effective 1 January 2010 (CAM Rules).

⁶⁷ Society of Maritime Arbitrators, *Maritime Arbitration Rules*, effective 23 October 2013 (SMA Rules).

⁶⁸ Article 23(6), AAA Rules.

⁶⁹ Article 37(2), AAA Rules.

⁷⁰ Article 30(3), AAA Rules.

⁷¹ Article 30(3), AAA Rules.

⁷² Article 26(3), ICC Rules.

⁷³ Article 22(3), ICC Rules.

⁷⁴ Article 8(1), CAM Rules.

purposes of research, to publish the award in an anonymous format. The objection of a party may be raised exclusively during the proceedings – that is, before the award is rendered.⁷⁵

The SMA Rules on arbitration proceedings show the most liberal approach: no provision on confidentiality is included in the text. As for third party access to the hearings, Section 17 establishes that ‘persons having a direct interest in the arbitration are entitled to attend hearings’.⁷⁶ Finally, the institution publishes awards unless both parties object to publication before the award is issued.⁷⁷ This approach is even more transparency-oriented than that of the CAM Rules. Whereas the CAM Rules require only one objection to the publication of the award, the SMA Rules state that both parties need to object in order to impede the publication of the final decision.

III. Consistency Through Publication of Arbitral Awards: The Rise of a *Stare Decisis* Doctrine?

Confidentiality, transparency and the establishment of a system of binding precedent are strictly connected. In fact, where decisions are not publicly available, precedents cannot develop.⁷⁸ Legal precedents are used by judges in most national legal systems to ensure a more predictable, certain and foreseeable legal order.⁷⁹ The use of precedent in domestic judges’ reasoning facilitates this foreseeability. In international arbitration, as in international law, there is no directly or indirectly expressed obligation to follow legal precedent.

However, it is commonly recognised that, even though international jurisdictions are not bound to follow their own or other’s precedents,⁸⁰ a *de facto* case law has developed.⁸¹ This is also true for jurisdictions dealing with international economic law issues such as the WTO dispute settlement system⁸² and international investment tribunals.⁸³

⁷⁵ Article 8(2), CAM Rules.

⁷⁶ Section 17, SMA Rules.

⁷⁷ See Society of Maritimes Arbitrators Inc, *Publications*, at <smany.org/sma-pubs.html> (accessed 5 May 2015).

⁷⁸ Reinisch, A, “The Role of Precedent in ICSID Arbitration” in Zeiler, G, Welser, I, Power, J, Pitkowitz, N, Kremslehner, F, Klein, P and Klausegger, C, eds, *2008 Austrian Arbitration Yearbook* (Manz’sche Verlags, Vienna, 2008), 495: ‘That is exactly why precedent has played a relatively minor role in traditional international commercial arbitration which often remains confidential until resolution of a dispute’.

⁷⁹ Guillaume, G, “The Use of Precedents by International Judges and Arbitrators”, 2(1) *Journal of International Dispute Settlement* (2011) 5, 5. See also, Kaufmann-Kohler, G, “Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture”, 23(3) *Arbitration International* (2007) 357, 359; Born, G, *International Commercial Arbitration* (2nd ed, vol III, Kluwer Law International, Alphen aan den Rijn, 2014), 3810–3817.

⁸⁰ Lauterpacht, H, *The Development of International Law by the International Court* (Cambridge University Press, Cambridge, 1982), 13: ‘The Court has not committed itself to the view that it is bound to follow its previous decisions even in cases in which it later disagrees with them’.

⁸¹ Guillaume, *supra* nt 79, 5. See also Lauterpacht, *supra* nt 80, 9–11. For an analysis of the use of precedents in the European Court of Human Rights, see Lupu, Y and Voeten, E, “Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights”, 42(2) *British Journal of Political Science* (2012) 413. See also Acquaviva, G and Pocar, F, “Stare Decisis” in *Max Planck Encyclopedia of Public International Law* (online ed, Oxford University Press, 2012).

⁸² See for instance, Sacerdoti, G, “Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models” in Rovine, AW, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010* (Martinus Nijhoff, Leiden, 2011), 225.

Generally speaking, in international commercial arbitration, confidentiality plays a role suppressing the rise of a precedent doctrine. First, only a few international commercial awards are publicly available. Second, only a few of these awards refer to previous arbitral awards. Third, almost all of the awards that refer to precedents, do so for procedural matters such as objection to jurisdiction, powers of the tribunal to order provisional measures and applicable law.⁸⁴

The issue here is to understand whether the absence of reference to precedents is due to the arbitrators' lack of interest and trust in the *stare decisis* doctrine or whether this absence is due to some internal elements of the international arbitration system that could be changed. In relation to this topic, arbitration scholars and practitioners can be grouped in three categories. The first category is those who believe a *stare decisis* doctrine in international arbitration neither exists nor is necessary.⁸⁵ The second category is those authors who, even if they do not exclude the existence of a precedent doctrine in international arbitration, do not recognise its necessity in the field of international commercial law. In particular, Professor Kauffman-Kohler has pointed out that the fact that arbitrators want to maintain their 'freedom to apply the law that allow [them] to 'mint' the rules to take into account the specificities of each case' does not match with the idea of precedent.⁸⁶

The third category strongly supports the idea of precedents in international commercial arbitration. The members of this category have highlighted that, in order to be considered an autonomous system of justice ensuring predictability and certainty, international commercial arbitration needs to accept the role and existence of arbitral precedents.⁸⁷ This means that if a series of arbitral awards is consistent and homogeneous on a specific legal question, these decisions will have 'persuasive authority on arbitrators called upon to decide on the same issue'.⁸⁸ Such a position has been confirmed by commercial arbitral tribunals that were influenced by prior awards between the parties. For instance, in an ICC Award, the arbitral tribunal stated that

⁸³ Reinisch, A, "The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration" in Buffard, I, Crawford, J, Pellet, A and Wittich, S, eds, *International Law Between Universalism and Fragmentation* (Martinus Nijhoff, Leiden, 2008), 123–124; Reed, L, "The De Facto Precedent Regime in Investment Arbitration: A Case for Proactive Case Management", 25(1) *ICSID Review – Foreign Investment Law Journal* (2010) 95; Douglas, Z, "Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?", 25(1) *ICSID Review – Foreign Investment Law Journal* (2010) 104; Bjorklund, AK, "Investment Treaty Arbitral Decisions as Jurisprudence Constante" in Picker, CB, Bunn, ID and Arner, DW, eds, *International Economic Law: The State and Future of the Discipline* (Hart, Oxford, 2008), 265; Schreuer, C and Weiniger, M, "A Doctrine of Precedent?" in Schreuer, C, Ortino, F and Suchlike, P, eds, *Oxford Handbook of International Investment Law* (Oxford University Press, Oxford, 2008), 1188; Kaufmann-Kohler, G, "Is Consistency a Myth?" in Banifatemi, Y, ed, *Precedent in International Arbitration?* (IAI Series on International Arbitration No 5, Juris Publishing, 2008) 137.

⁸⁴ Kaufmann-Kohler, Arbitral Precedent, *supra* nt 79, 362–363.

⁸⁵ Redfern, A, "International Commercial Arbitration: Winning the Battle" in Bender, M, ed, *Private Investors Abroad: Problems and Solutions in International Business in 1989* (The Southwestern Legal Foundation, Dallas, 1990), 11–12; Blackaby, N, Partasides, C, Redfern, A and Hunter, M, *Redfern and Hunter on International Arbitration* (5th ed, Oxford University Press, Oxford, 2009), 577.

⁸⁶ Kaufmann-Kohler, Arbitral Precedent, *supra* nt 79, 365 and 375–376.

⁸⁷ Mourre and Vagenheim, *supra* nt 62; Born, *International Commercial Arbitration*, vol III, *supra* nt 79, 3822.

⁸⁸ Perret, F, "Is There a Need for Consistency in International Commercial Arbitration?" in Banifatemi, Y, ed, *Precedent in International Arbitration*, (IAI Series on International Arbitration No 5, Juris Publishing, 2008), 33.

Enough has been said to show that the [previous] Decision is *res judicata* as between the ME company and the defendant, but not as between the claimant and the defendant. This does not mean that the [previous] decision can be ignored. Parts of it represent an authoritative ruling on the position of ME country law on certain matters that may be relevant in this case.⁸⁹

In the famous *Dow Chemical Award*, the arbitral tribunal ruled that

The decisions of these tribunals [ICC arbitral tribunals] progressively create case law which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond.⁹⁰

If one looks at investment arbitration, the publication of arbitral awards is often considered an essential tool to increase consistency and facilitate development of the law.⁹¹ In fact, although a general rule on precedents in international investment arbitration does not exist, most arbitral tribunals have recognised the relevance of previous awards or decisions. An analysis of investment cases shows that arbitral tribunals have adopted four different approaches. Some tribunals have clearly stated that no doctrine of precedent exists in international arbitration and that they are not bound by any previous decision. According to this view, each tribunal is constituted *ad hoc* to decide the case between the parties to the particular dispute.⁹²

Other arbitral tribunals have declared that the fact that previous decisions are not binding does not preclude the tribunal from considering arbitral decisions and the arguments of the parties, to the extent that the tribunal may find that they shed any useful

⁸⁹ *Licensor v Licensee*, ICC Case No 6363, Final Award, 1991, XVII *Yearbook of Commercial Arbitration* (1992) 186, 201.

⁹⁰ *Dow Chemical France ia v Isover Saint Gobain*, ICC Case No 4131, Interim award, 23 September 1982, IX *Yearbook of Commercial Arbitration* 131, 136. See also, ICC Case No 7061, Final Award, 28 November 1997 (unpublished, quoted in Born, *International Commercial Arbitration*, vol II, *supra* nt 27, 3824):

The arbitration is not bound by the X award; nor are the parties to these arbitration proceedings. There can be no issue estoppel. Nonetheless, it provided a helpful analysis of the common factual background to this dispute. Accordingly, we have borne its findings and conclusions in mind, whilst taking care to reach our own conclusions on the materials submitted by these parties in these proceedings.

⁹¹ Ortino, *supra* nt 21, 133.

⁹² See, for instance, *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitioners from Third Persons to Intervene as “Amici Curiae”, UNCITRAL, 15 January 2001, para 51; *Enron Creditors Recovery Corporation and Ponderosa Assets, LP v Argentine Republic*, Decision on Jurisdiction, ICSID Case No ARB/01/3, 14 January 2004, para 40; *Bureau Veritas, Inspection Valuation, Assessment and Control, BIVAC BV v Republic of Paraguay*, Decision on Jurisdiction, ICSID Case No ARB/07/9, 20 May 2009, para 58; *Burlington Resources Inc v Republic of Ecuador*, Decision on Jurisdiction, ICSID Case No ARB/08/5, 2 June 2010, para 100; *Caratube International Oil Company LLP v Republic of Kazakhstan*, Award, ICSID Case No ARB/08/12, 5 June 2012, para 234; *Quasar de Valores SIVAC SA et al (Formerly Renta 4 SVSA et al) v Russian Federation*, Award, SCC Case No 24/2007, 20 July 2012, para 24; *Kilic Insaat Ithalat Sanayi ve Ticaret Anonim Sirketi v Turkmenistan*, Award, ICSID Case No ARB/10/1, 2 July 2013, paras 7.1.3 and 7.6.1–7.6.3; *Muhammet Cap & Sehil Insaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, Decision on Jurisdiction, ICSID Case No ARB/12/6, 13 February 2015, para 275.

light on the issues that arise for decision in the case.⁹³ Tribunals following this approach seem to consider previous decisions as factual information.⁹⁴

A third category includes tribunals stating that, even though they are not officially bound to follow previous decisions, they should pay due regard to them and explain the reasons leading to eventual departure from previous interpretations.⁹⁵ Finally, some arbitral tribunals have gone further deciding that, even if not bound by previous decisions, they ought to follow solutions established in a series of consistent cases, comparable to the case at hand.⁹⁶

IV. The Issue of Non-Disputing Parties' Submissions (*Amicus Curiae* Briefs): A Source of Consistency?

The term *amicus curiae* refers to 'a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'.⁹⁷ Such petitions are not limited to investment arbitration. All international courts and tribunals have faced requests by non-disputing parties to participate in international proceedings.⁹⁸ While the presence of *amicus curiae* has not yet generally developed in public international law adjudicatory bodies,⁹⁹

⁹³ See, *Fireman's Fund Insurance Company v United Mexican States*, Award, ICSID Case No ARB(AF)/02/01, 17 July 2006, para 172; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, Partial Award on Jurisdiction and Liability, SCC Case No V064/2008, 2 September 2009, para 111; *Chevron Corporation (USA) and Texaco Petroleum Corporation (USA) v Republic of Ecuador [I]*, Partial Award on the Merits, PCA Case No AA 277, 30 March 2010, paras 163–164; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, Award, ICSID Case No ARB/07/14, 22 June 2010, paras 172–173; *RosInvestCo UK Ltd v Russian Federation*, Final Award, SCC Case No V079/2005, 12 September 2010, para 285; *Yukos Universal Limited (Isle of Man) v Russian Federation*, Final Award, PCA Case No AA 227, 18 July 2014, para 1606.

⁹⁴ See, for instance, *Tulip Real Estate and Development Netherlands BV v Republic of Turkey*, Decision on Bifurcated Jurisdictional Issue, ICSID Case No ARB/11/28, para 47.

⁹⁵ See, inter alia, *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, Award, ICSID Case No ARB/03/16, 2 October 2006, para 293; *Sociedad Anónima Eduardo Vieira v Republic of Chile*, Award, ICSID Case No ARB/04/7, 21 August 2007, paras 223–224; *Glamis Gold Ltd v The United States of America*, Final Award, UNCITRAL, 8 June 2009, para 8; *Crompton (Chemtura) Corp v Government of Canada*, Award, UNCITRAL, 2 August 2010, para 109; *Daimler Financial Services AG v Argentine Republic*, Award, ICSID Case No ARB/05/1, 22 August 2012, para 52; *Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v Ukraine*, Award, ICSID Case No ARB/08/11, 25 October 2012, para 211.

⁹⁶ See, for instance, *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, Award, ICSID Case No ARB/04/19, 18 August 2008, para 117; *Saipem SpA v The People's Republic of Bangladesh*, Award, ICSID Case No ARB/05/07, 30 June 2009, para 90; *Saba Fakes v Republic of Turkey*, Award, ICSID Case No ARB/07/20, 14 July 2010, para 96; *Jan Oostergetel and Theodora Laurentius v Slovak Republic*, Final Award, UNCITRAL, 23 April 2012, para 145; *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic*, Award, ICSID Case No ARB/03/23, 11 June 2012, para 897; *KT Asia Investment Group BV v Republic of Kazakhstan*, Award, ICSID Case No ARB/09/8, 17 October 2013, para 83; *Renée Rose Levy and Gremcitel SA v Republic of Peru*, Award, ICSID Case No ARB/11/17, 9 January 2015, para 76.

⁹⁷ Gardner, BA, ed, *Black's Law Dictionary* (9th ed, West Group, 2006).

⁹⁸ See, for instance, Sands, PJ and Mackenzie, R, "International Courts and Tribunals, Amicus Curiae" in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online ed, 2008).

⁹⁹ The International Court of Justice (ICJ) allowed a submission by an *amicus curiae* only once, in an advisory proceeding. See, ICJ, *International Status of South-West Africa*, Advisory Opinion, ICJ Reports 1950, 11 July 1950. In two following advisory proceedings, the ICJ refused requests to submit information by NGOs: ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*

submissions have become frequent in the last two decades in WTO law¹⁰⁰ and in international investment arbitration.¹⁰¹ This is mostly due to the close relationship between economic and commercial interests on the one hand and the public interest on the other.

Traditionally, in international investment arbitration, *amicus curiae* briefs have been submitted by a non-governmental organisation (NGO) ‘active in the area of human rights or the environment that has an interest in a dispute that gives rise to issues of human rights or the environment’.¹⁰² However, over time, the nature of the submitting parties has changed and it is no longer limited to public interest advocacy groups.¹⁰³ A non-disputing State (home State) can also submit petitions *sua sponte* or at the request of the arbitral tribunal, in particular when interpretation of a treaty provision is questioned.

In the paragraphs below, the pros and the cons of the latter type of ‘friends of the court’ submissions in investment arbitration are scrutinised.¹⁰⁴

(*South West Africa*) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971, 21 June 1971; ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 8 July 1996. As for the International Tribunal for the Law of the Sea (ITLOS), see ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, ITLOS Reports 2011, 1 February 2011. See also, ITLOS, *The “Arctic Sunrise” Case (Kingdom of the Netherlands v Russian Federation)*, Order on the Request for the Prescription of Provisional Measures, ITLOS Case No 22, 22 November 2013.

¹⁰⁰ See, for instance, Stern, B, “The Emergence of Non-State Actors in International Commercial Disputes Through WTO Appellate Body Case-Law” in Sacerdoti, G, Yanovich, A and Bohanes, J, eds, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, Cambridge, 2006), 372.

¹⁰¹ See, for instance, Stern, B, “Civil Society’s Voice in the Settlement of International Economic Disputes”, 22(2) *ICSID Review – Foreign Investment Law Journal* (2007) 280; Obadia, E, “Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration”, 22(2) *ICSID Review – Foreign Investment Law Journal* (2007) 349; Grisel, F and Vinuales, JE, “L’Amicus Curiae dans l’Arbitrage d’Investissement”, 22(2) *ICSID Review – Foreign Investment Law Journal* (2007) 380.

¹⁰² Kaufmann-Kohler, G, “Non-Disputing State Submissions in Investment Arbitration: Resurgence of Diplomatic Protection” in Boisson de Chazournes, L, Kohen, MG and Vinuales, JE, eds, *Diplomatic and Judicial Means of Dispute Settlement* (Martinus Nijhoff Publishers, Leiden, 2012), 312.

¹⁰³ Levine, E, “Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation”, 29(1) *Berkeley Journal of International Law* (2011) 200, 212.

¹⁰⁴ There is another kind of intervention from third-party States in international adjudication. For instance, Article 62 of the ICJ Statute allows intervention of a third State that ‘has an interest of a legal nature which may be affected by the decision of the case’. The Court denied requests to intervene pursuant to Article 62 in some cases: see, for instance, ICJ, *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)*, Judgment on the Application for Permission to Intervene by the Government of Malta, ICJ Reports 1981, 14 April 1981; a Chamber of the Court permitted a limited intervention by Nicaragua in a maritime aspect in the case ICJ, *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, Judgment on the Application for Permission to Intervene by Nicaragua, ICJ Reports 1990, 13 September 1990. The full Court also permitted a limited intervention by Equatorial Guinea in the case ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, Order on the Intervention from the Republic of Equatorial Guinea, ICJ Reports 1999, 21 October 1999. In investment arbitration similar cases exist. For instance, in NAFTA arbitrations, interventions by a third State that is neither the host State nor the home State are common (see, for instance, *Mesa Power Group, LLC v Government of Canada*, Submission of Mexico Pursuant to NAFTA Article 1128, UNCITRAL, PCA Case No 2012-17, 25 July 2014). In ICSID arbitrations, an exemplary case is *Siemens AG v Argentine Republic*, Annulment Proceeding, Letter from Lisa J Grosh to Claudia Frutos-Peterson, ICSID No ARB/02/8, 1 May 2008. In that case, the United States, although not party to the BIT under which the dispute was brought, felt the necessity to intervene to protect US investors in connected cases.

IV.1. Home States' Amicus Curiae Submissions as Interpretative Tools: Some Examples From International Investment Arbitral Awards

The practice of submissions from the home State in international investment cases is not new. In the 1983 rules of the Iran-United States Claims Tribunal, a provision allowing submission by the non-disputing State already existed.¹⁰⁵ Similar provisions are included in the *North American Free Trade Agreement* (NAFTA),¹⁰⁶ the 2012 US Model BIT,¹⁰⁷ the 2004 Canadian Model BIT,¹⁰⁸ as well as several Free Trade Agreements (FTAs) concluded by the US and Canada.¹⁰⁹

Due to the importance of the issue, after the 2006 Amendment, the ICSID Arbitration Rules include an article dealing with submissions by non-disputing parties. Article 37(2) reads as follows:

After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “nondisputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute.¹¹⁰

The wording ‘person or entity; should be broadly interpreted to encompass ‘a natural person, a juridical person, an unincorporated NGO or a State’.¹¹¹ In the NAFTA context, the home State filed several submissions concerning interpretation of the investment provisions of the treaty. For instance, in *Marvin Feldman v Mexico*, the United States submitted an *amicus curiae* brief to support its national investor and interpreted Article 1117(1) of NAFTA in a broad way, stating that this provision did not bar a claim brought by a natural person who was a citizen of the United States and a permanent resident of Mexico.¹¹² In another NAFTA case, *Matalclad Corporation v Mexico*, the foreign investor was a US citizen. The United States intervened in the proceedings by expressing its views on several aspects, including the NAFTA regime covering local governments and municipalities and the definition of the term “tantamount to expropriation”.¹¹³ In a more recent case, *Mesa Power Group v Canada*, the United States submitted a brief dealing with

¹⁰⁵ Iran-United States Claims Tribunal, *Rules of Procedure*, Notes to Article 15, para 5:

The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments – or, under special circumstances, any other person – who is not an arbitrating party in a particular case is likely to assist the tribunal in carrying out its task, permit such Government or person to assist the tribunal by presenting oral or written statements.

¹⁰⁶ Article 1128, NAFTA. See also the Statement of Non-Disputing Party Participation of the NAFTA Free Trade Commission of 7 October 2003.

¹⁰⁷ Article 28(2), *US Model Bilateral Investment Treaty* (2012) (US Model BIT).

¹⁰⁸ Article 35, *Canada Model Foreign Investment Protection Agreement* (2004) (Canada Model FIPA) or (Canada Model BIT).

¹⁰⁹ For the US, see, for instance, Article 10.20.2, *Central American Free Trade Agreement* (FTA) (2004). For Canada, see, Article X.35, *Comprehensive Economic and Trade Agreement* (CETA).

¹¹⁰ Article 37(2), ICSID, *ICSID Arbitration Rules* (2006) (ICSID Arbitration Rules).

¹¹¹ Antonietti, A, “The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules”, 21(2) *ICSID Review – Foreign Investment Law Journal* (2006) 427, 435.

¹¹² *Marvin Roy Feldman Karpa v United Mexican States*, Submission of the United States of America on Preliminary Issues, ICSID Case No ARB(AF)/99/1, 6 October 2000, paras 2–12.

¹¹³ *Metalclad Corporation v United Mexican States*, Submission of the Government of the United States, ICSID Case No ARB(AF)/97/1, 9 November 1999, paras 3–9.

interpretation of several NAFTA standards of treatment, including the minimum standard of treatment and national treatment.¹¹⁴

In disputes under bilateral investment treaties, home State submissions are less frequent. Also, the non-disputing State does not often file *amicus curiae* submissions *sua sponte*, but is usually invited to express its views by the arbitral tribunal. For instance, in *Aguas del Tunari v Bolivia*, the Tribunal requested that the Government of the Netherlands submit documents concerning comments it had made before the Dutch parliament relating to jurisdiction issues under the *Netherland-Bolivia Bilateral Investment Treaty* (BIT) applicable to the dispute.¹¹⁵ In *Eureko v Slovak Republic*, the Dutch Ministry of Economic Affairs was invited by the arbitral tribunal to express its position on the tribunal's jurisdiction.¹¹⁶ The Dutch Government provided observations and attached a letter received by the Slovak Ministry of Foreign Affairs bearing on the alleged termination of the BIT. Although helpful, the arbitral tribunal considered its submissions unnecessary.¹¹⁷

In *SGS v Pakistan*, the home State took the initiative to intervene without being invited by the arbitral tribunal. Switzerland wrote to ICSID noting that the arbitral tribunal's interpretation of the umbrella clause was too narrow and did not reflect the intention of the BIT's contracting parties at the time the treaty was concluded. The Swiss Government, as home State, complained that the arbitral tribunal should have consulted both States before issuing its interpretation.¹¹⁸ However, as the Swiss Government sent the letter after the decision of jurisdiction was rendered, the submission did not have any impact on the final decision.

IV.2. The Role of the UNCITRAL Rules on Transparency in Framing the Home-State Submissions

Since 2008, the UNCITRAL has officially recognised the relevance of ensuring transparency in investor-State dispute resolution.¹¹⁹ There were three forms of transparency discussed by UNCITRAL Member States, namely a model clause for inclusion in the IIAs' ISDS, specific arbitration rules and guidelines for States, arbitrators and parties involved.¹²⁰ Delegations supported the idea of including legal standards on transparency as a supplement to the UNCITRAL Arbitration Rules,¹²¹ 'in the form of

¹¹⁴ *Mesa Power Group LLC v Government of Canada*, Submission of the United States of America, UNCITRAL, PCA Case No 2012-17, 25 July 2014, paras 5–15. See also *Detroit International Bridge Company v Government of Canada*, Submission of the United States of America, PCA Case No 2012-25, 14 February 2014.

¹¹⁵ ICSID, *Aguas del Tunari v Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, para 258.

¹¹⁶ *Eureko BB v The Slovak Republic*, Award on Jurisdiction, Admissibility and Suspension, PCA Case No 2008-13, 26 October 2010, paras 154–174.

¹¹⁷ *Eureko BB v The Slovak Republic*, paras 155–163 and 217–219.

¹¹⁸ *Société Générale de Surveillance SS v Islamic Republic of Pakistan*, Note in Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/01/13, 1 October 2003.

¹¹⁹ UNCITRAL, *Report of United Nations Commission on International Trade Law*, 16 June–3 July 2008, (Forty-First Session), A/63/17, para 314.

¹²⁰ UNCITRAL, *Note by the Secretariat: Settlement of commercial disputes: Preparation of rules of uniform law on transparency in treaty-based investor-State dispute settlement*, 5 August 2010, A/CN.9/WGII/WP160/Add 1, 5 August 2010, paras 22–31.

¹²¹ UNCITRAL, *REPORT: Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, 20 October 2010, para 76.

clear rules rather than looser and more discursive guidelines'.¹²² UNCITRAL adopted the Rules on Transparency¹²³ that require disclosure of a wide range of information submitted to and issued by the tribunals, and facilitate participation by *amicus curiae* and non-disputing State parties.

Unlike ICSID Arbitration Rules, the *travaux préparatoires* of the UNCITRAL Transparency Rules show that delegations discussed the possibility of dealing separately with each type of submission by non-disputing parties.

It was observed that two possible types of *amicus curiae* should be distinguished and perhaps considered differently. The first type could be any third party that would have an interest in contributing to the solution of the dispute. A second type could be another State party to the investment treaty at issue that was not a party to the dispute. It was noted that such State often had important information to provide, such as information on *travaux préparatoires*, thus preventing one-sided treaty interpretation. In response, it was said that an intervention by a non-disputing State, of which the investor was a national, could raise issues of diplomatic protection and was to be given careful consideration. It was suggested that third parties who could contribute to the resolution of the dispute could be identified and invited by the arbitral tribunal to assist it. *The home State of the investor could be one such third party.*¹²⁴

At the fifty-third session of the Working Group, it was observed that a State Party to the investment treaty that was not a party to the dispute could also wish to be invited, or have a treaty right to make submissions. It was noted that such State(s) often had important information to provide, such as information on the *travaux préparatoires*, thus preventing one-sided treaty interpretation.¹²⁵

Thus, in order to contribute to clarifying the legal regime applicable to the two categories of submissions and to mark the differences,¹²⁶ two different articles were included in the UNCITRAL Transparency Rules: Article 4, dealing with submissions by third persons; and Article 5, regulating submissions by a non-disputing Party to the treaty. For the purpose of this paper, the analysis will only focus on Article 5.

¹²² UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fourth Session*, (New York, 7–11 February 2011), A/CN.9/717, 25 February 2011, para 26.

¹²³ UNCITRAL, *Report of United Nations Commission on International Trade Law* (Forty-Sixth Session, 8–26 July 2013), A/68/17, para 128; UNCITRAL, UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, effective 1 April 2014 (UNCITRAL Transparency Rules).

¹²⁴ UNCITRAL, *REPORT: Settlement of commercial disputes: preparation of a legal standard on transparency in treaty-based investor-State arbitration*, Working Group II (Arbitration and Conciliation) of the work of its fifty-third session (Vienna, 4–8 October 2010), A/CN.9/712, 20 October 2010, para 49 [emphasis added].

¹²⁵ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fifth Session* (Vienna, 3–7 October 2011), A/CN.9/736, 17 October 2011, para 78.

¹²⁶ *Id.*, para 83.

IV.3. Positive and Negative Impacts of Article 5(1) of the UNCITRAL Transparency Rules

Article 5(1) states that ‘the arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty’. This provision has been subject to several debates comparing its pros and cons.

As acknowledged in the UNCITRAL’s Working Group II report, an element supporting the home-State submissions in investment arbitral proceedings is the fact that the State party to the IIA ‘might bring a perspective on the interpretation of the treaty, including access to the *travaux préparatoires* which might not be otherwise available to the tribunal, thus avoiding one-sided interpretations limited to the respondent State’s contentions’.¹²⁷ Furthermore, acceptance of submissions from the home State would ensure that balanced and comprehensive information would be provided to the arbitral tribunal,¹²⁸ thus enhancing transparency in investment arbitration.¹²⁹

Finally, the tool of *amicus curiae* used by the home State has been described as less problematic than a State-to-State arbitration or litigation because it would provide ‘the authentic view of the home state as to the contracting parties’ intention, supported by contemporaneous documentation and/or witness testimony’¹³⁰ without the need of initiating another proceeding that would run parallel to the investor-State arbitration. The State-to-State arbitration provision is contained in most bilateral investment treaties and multilateral agreements.¹³¹ Such arbitrations usually address issues of application and interpretation of treaty provisions,¹³² but they have also included claims of diplomatic protection.¹³³ Compared to the submission of an *amicus curiae* brief, a State-to-State

¹²⁷ *Id.*, para 86.

¹²⁸ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-eighth Session* (New York, 4–8 February 2013), A/CN.9/765, 13 February 2013, para 44.

¹²⁹ Transparency in international arbitration has been described as a set of concepts such as public access, procedural transparency, as well as the governmental obligation to disclose information. See, for instance, Bjorklund, AK, “The Promise and Peril of Arbitral Precedents: The Case of Amici Curiae” in Hoffman AK, ed, *Protection of Foreign Investment Through Modern Treaty Arbitration – Diversity and Harmonization* (ASA Special Series No 34, 2010) 165, 175.

¹³⁰ Banifatemi, Consistency in the Interpretation of Substantive Investment Rules, *supra* nt 5, 200.

¹³¹ See, for instance, Article 10, French Model BIT (2006); Article 37, US Model BIT; Article 9, Italian Model BIT (2003); Article 27, *Energy Charter Treaty* (1995) 2080 UNTS 95.

¹³² See, for instance, *Peru v Chile* mentioned in Award, *Empresas Lucchetti, SA and Lucchetti Peru, SA v Republic of Peru*, ICSID Case No ARB/03/04, 7 February 2005, para 7: Peru brought an arbitration claim in response to an earlier-initiated investor-state claim brought by the Chilean investor, Lucchetti, against Peru. The State-to-State arbitration was ostensibly designed to resolve a disagreement between Peru and Chile as to the proper interpretation of the *Peru-Chile BIT*. However, the State-to-State arbitration appears to have been abandoned after arbitrators in the separate *Lucchetti v Peru* investor-State case declined to suspend their own proceedings so that the State-to-State proceeding could be pursued; *Republic of Ecuador v United States of America*, PCA Case No 2012-5, Award, 29 September 2012. See, Roberts, A, “State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority”, 55(1) *Harvard Journal of International Law* (2014) 1; Potestà, M, “State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is there Potential?” in Boschiero, N, Scovazzi, T, Pitea, C and Ragni, C, eds, *International Courts and the Development of International Law: Essays in Honour of Tullio Treves* (TMC Asser Press, The Hague, 2013), 753.

¹³³ See, for instance, *Republic of Italy v Republic of Cuba*, Ad-Hoc Arbitration, Final Award, 15 January 2008: Italy brought a claim on behalf of itself and several Italian investors alleging violations of the *Cuba-Italy BIT*. Italy contended that it had ‘double standing’ to bring a direct claim to vindicate its own substantive

proceeding might raise at least three issues. First, political and diplomatic consequences might be detrimental to the economic and commercial relations of the State parties to the treaty. Second, in the context of the same investment dispute, it might be possible that a State-to-State arbitration and an investor-State arbitration run in parallel. The question here is whether the investor-State arbitration proceedings should be postponed until the State-to-State dispute is resolved. Third, one should take into consideration the value of a decision in a State-to-State arbitration for future international investment arbitrations arising out of the same treaty.¹³⁴

Although the UNCITRAL provision of home-State submissions in investor-State arbitrations has been generally positively received, some doubts have been expressed. First of all, during the negotiations of the UNCITRAL Transparency Rules, some delegations challenged the usefulness of such a provision. In particular, 'it was said that non-disputing State(s) Party(ies) to a treaty enjoyed the right to comment on the treaty, or arbitral tribunals might request submissions'.¹³⁵ Moreover, the issue of diplomatic protection might be at stake,¹³⁶ especially if the home-State has the opportunity to file submissions addressing legal and factual matters beyond those of treaty interpretation.¹³⁷ Finally, home-State submissions are limited to a specific treaty and do not influence other

rights and a diplomatic protection claim to vindicate the rights of Italian nationals that had invested in Cuba. Cuba argued that the existence of an investor-State arbitration clause in the treaty prevented Italy from bringing a diplomatic protection claim. The tribunal rejected Cuba's argument but ultimately held that Italy's direct claim failed because its claim on behalf of its nationals failed.

¹³⁴ See, for instance, *CME v The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, paras 87–93. In this case, the Czech Republic requested consultations with the Netherlands to resolve certain issues of interpretation and application of the treaty arising from the Tribunal's partial award. The two contracting States issued 'agreed minutes' that the arbitral tribunal took into account to render its final award. Contradictory views have been provided by scholars. For instance, Professor Amerasinghe stated that

it cannot be denied that there is a 'two-track' system under the BIT. However, it does not mean that the system established under Article VII cannot overlap with, influence and take precedence over the system established under Article VI. Indeed, it seems highly probable and logical that Article VII was included so that any interpretation under Article VII would have to be respected by investor-State arbitral tribunals,

Republic of Ecuador v United States of America, PCA Case No 2012-5, Expert Opinion of Professor Amerasinghe J, CF, 29 September 2012, para 28. In contrast, Professor Reisman expressed that 'a decision emanating from a procedure such as that proposed by Ecuador or from the decision of this Tribunal would not be binding on tribunals exercising jurisdiction under the Article VI investor-State track. Nor would it be an amendment to the BIT': *Republic of Ecuador v United States of America*, PCA Case No 2012-5, Expert Opinion of Professor Reisman, MW, 25 April 2012, paras 57–58.

¹³⁵ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fifth Session* (Vienna, 3–7 October 2011), A/CN.9/736, 17 October 2011, para 81.

¹³⁶ See, in general, Amerasinghe, CF, *Diplomatic Protection* (Oxford University Press, New York, 2008); Juratowitch, B, "The Relationship between Diplomatic Protection and Investment Treaties", 23(1) *ICSID Review – Foreign Investment Law Journal* (2008) 10; Dugard, J, "Diplomatic Protection", in, *Max Planck Encyclopedia of Public International Law* (online ed, 2009), at <opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1028?prd=EPIL> (accessed 7 May 2015); Schreuer, C, "Investment Protection and International Relations" in Reinisch, A and Kriebaum, U, *The Law of International Relations: Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing, Den Haag, 2007), 345; Sacerdoti, G, "Barcelona Traction Revisited: Foreign-owned and Controlled Companies in International Law" in Dinstein, Y, *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers, Dordrecht, 1989), 699.

¹³⁷ UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fifth Session* (Vienna, 3–7 October 2011), A/CN.9/736, 17 October 2011, para 87. See, also, Kaufmann-Kohler, Non-Disputing State Submissions, *supra* nt 102, 305–319.

investment agreements, as a result, consistency would be achieved only in respect of a single treaty.¹³⁸

As a general matter, due to the *ad hoc* character of international arbitration, the access of non-disputing parties to arbitration proceedings should not be systematic and unlimited.¹³⁹ The issue of how to regulate such submissions is a topical one. How have the UNCITRAL Transparency Rules allowed the filling of this gap between positive and negative impacts of home-State submissions?

During the negotiations for the Transparency Rules, the UNCITRAL Working Group II decided to proceed by addressing the concern that guidance should be provided with respect to submission by third parties.¹⁴⁰ Article 5 provides for clear rules establishing that, as for issues of treaty interpretation, the arbitral tribunal shall ensure that: 1. submissions do not disrupt, unduly burden the arbitral proceedings or unfairly prejudice the disputing parties;¹⁴¹ and 2. disputing parties have a reasonable opportunity to react to the submissions.¹⁴²

According to Article 5(2), the requirements for home-State's submissions become stricter when such submissions deal with factual or legal matters beyond treaty interpretation. In this case, beyond Articles 5(4) and 5(5), the requirement of Article 4(3) dealing with third-persons *amicus curiae* is applicable. In accordance with this provision, the arbitral tribunal shall consider: 1. the significant interest of the home-State in the arbitral proceedings; and 2. the value of the submission for the determination of the factual or legal matter.¹⁴³

V. The Increasing Codification of Transparency Rules: the US and Canadian Traditions

Recent investment treaty negotiations show that, in addition to the traditional provisions, some States have codified new standards of transparency that have traditionally been absent in IIAs. This ambitious 'treatification'¹⁴⁴ can be explained in part by the need for the parties to take into account multiple interests of the negotiating States, their civil societies and the business actors involved. An attempt to balance all these interests is the 1998 Organisation for Economic Co-operation and Development (OECD) *Multilateral Agreement on Investment* (MAI) whose negotiations failed for several reasons.

In particular, the MAI's failure was mostly due to the fact that most investment rules are customary in nature and thus subject to competing interpretations by parties representing different interests.¹⁴⁵ For this reason, even since the first BIT between Germany and Pakistan in 1959, it has been easier for States to negotiate bilateral instruments rather than multilateral agreements on investment matters. The spread of

¹³⁸ Banifatemi, Consistency in the Interpretation of Substantive Investment Rules, *supra* nt 5, 200–225.

¹³⁹ Banifatemi, Mapping the Future of Investment Treaty Arbitration, *supra* nt 22, 323–324.

¹⁴⁰ UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-fifth Session (Vienna, 3–7 October 2011), A/CN.9/736, 17 October 2011, para 70.

¹⁴¹ Article 5(4), UNCITRAL Transparency Rules.

¹⁴² Article 5(5), UNCITRAL Transparency Rules.

¹⁴³ Article 4(3), UNCITRAL Transparency Rules.

¹⁴⁴ Salacuse, JW, "The Treatification of International Investment Law: A Victory of Form Over Life? A Crossroads Crossed?", 3(3) *Transnational Dispute Management* (2006) 20.

¹⁴⁵ Meyer, T, "Codifying Custom", 160 *University of Pennsylvania Law Review* (2012) 995, 1054.

bilateral IIAs with various codified standards has made the development of a multilateral investment agreement almost impossible to achieve.¹⁴⁶

Until the beginning of the 2000s, standards included in the IIAs have been broadly drafted, thus being open to different and diverging interpretations by the arbitral tribunals. Afterwards, parties to IIAs felt the need to establish standards that are complete, clear and specific, uncontestable and enforceable.¹⁴⁷ Since the entry into force of the NAFTA in 2001 and the drafting of the Canadian and US Model BITs in 2004, new and more accurate standards of investment protection are today codified in modern IIAs. Examples of this new approach are *inter alia* the inclusion of the ‘right to regulate’ provisions¹⁴⁸ and the transparency standards in the IIAs. In particular, transparency standards are either drafted in detailed terms¹⁴⁹ or they refer to existing external instruments, such as the UNCITRAL Transparency Rules.¹⁵⁰

The concept of transparency standards in investment arbitration has North American origins, as both Canada and the United States have adopted strong policies promoting transparency.¹⁵¹ For instance, in July 2001, the three NAFTA member States issued a note stating that nothing in the NAFTA: 1. imposes a general duty of confidentiality on the disputing parties to an investment arbitration; and 2. precludes the Parties from providing public access to documents submitted to, or issued by, an investment tribunal.¹⁵² Two years later, two other important statements from NAFTA members confirmed the relevance of transparency in investor-State arbitrations. In the first statement, the Free Trade Commission stated that no NAFTA provision limits a Tribunal’s discretion to accept written submissions from a person or entity that is not a disputing party and established clear rules concerning the procedure for such submissions.¹⁵³ In a second set of statements, the United States and Canada expressed their commitment to have public hearings in proceedings commenced under Chapter 11 of the NAFTA.¹⁵⁴

Following the NAFTA policy towards greater transparency in international arbitration, transparency has also been incorporated in the Model BITs of Canada and the United States as a fundamental principle. First, both models include provisions concerning transparency of arbitration proceedings stating that each party is obliged to share with the other party all information concerning law, regulations, procedures and administrative rulings.¹⁵⁵ Second, based on Article 1128 of the NAFTA, the two models

¹⁴⁶ *Id.*, 1065.

¹⁴⁷ Salacuse, JW, *The Three Laws of International Investment* (Oxford University Press, New York, 2013), 331.

¹⁴⁸ Titi, A, *The Right to Regulate in International Investment Law* (Studies in International Investment Law vol 10, Nomos/Hart Publishing, Baden-Baden, 2014), 256.

¹⁴⁹ For instance, the provisions on transparency contained in the US and Canadian Model BITs, briefly analysed below.

¹⁵⁰ See, Article X.33, EU-Canada Comprehensive and Economic Trade Agreement (CETA).

¹⁵¹ Caplan, LM and Sharpe, JK, “United States” in Brown, C, ed, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, Oxford, 2013) 755, 838. Although the reference is to the US policy, the same can be said about Canada.

¹⁵² NAFTA Free Trade Commission, Note on Interpretation of Certain Chapter 11 Provisions, 31 July 2001.

¹⁵³ NAFTA Free Trade Commission, *Statement on Non-Disputing Party Participation*, 7 October 2003.

¹⁵⁴ US and Canada, *Statement on Open Hearings in NAFTA Chapter Eleven Arbitrations*, 7 October 2003, at <ustr.gov/archive/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file143_3602.pdf> (accessed 20 May 2015) and <international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/open-hearing.aspx?lang=en> (accessed 20 May 2015), respectively.

¹⁵⁵ Article 19(1), Canada Model FIPA; Articles 10–11, US Model BIT.

provide the possibility for the non-disputing party to make submissions to the tribunal on a question of interpretation of the treaty.¹⁵⁶ The Canadian Model BIT goes even further than NAFTA, giving the right to the non-disputing party to attend any hearings.¹⁵⁷

The US and Canadian intention to contribute towards increasing transparency in international arbitration is also supported by the fact that the two States have agreed not to apply confidentiality to the LCIA arbitration proceedings relating to the 2006 Softwood Lumber Agreement¹⁵⁸ which provided for all documents to be made public unless the Tribunal issued particular confidentiality orders.¹⁵⁹ The heart of the Canada-United States softwood lumber dispute is the US claim that the Canadian lumber industry was unfairly subsidised by federal and provincial governments and that the prices charged to harvest the timber were set administratively, rather than through the competitive marketplace.

Although the US and Canada agreed in the Agreement to submit their disputes to an arbitral tribunal constituted under the LCIA Arbitration Rules (designed to administer commercial disputes between private parties under strict confidentiality), they opted for a more transparent policy. In particular, due to the serious impact of the dispute on both the US and Canadian economies and civil societies, the two governments decided to make public the pleadings, transcripts, awards and other documents available, as well as to open the hearings to the public.¹⁶⁰

VI. What is Next: Will Transparency in Investment Arbitration Become a Global Value?

In 2013, the UNCITRAL Working Group II was entrusted with the task of preparing a Convention on the implementation of the Rules on Transparency to investment treaties existing before 1 April 2014, applicable regardless of the arbitration rules selected by an investor under a relevant investment treaty.¹⁶¹ The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration was adopted by the General Assembly on 10 December 2014 and was opened for signature in Port Luis, Mauritius, on 17 March 2015.¹⁶²

As mentioned in the previous paragraphs, the US and Canada have been the pioneers of the development of transparency in international investment law both in multilateral *fora* (for example, NAFTA) and in their bilateral investment and commercial relations (BITs and FTAs). However, transparency has become a priority of the investment

¹⁵⁶ Article 35(1), Canada Model FIPA; Articles 28(2), US Model BIT. Both models provide also for submissions from third persons (ie the traditional *amicus curiae*) at Article 39, Canada Model FIPA and 28(3) US Model BIT.

¹⁵⁷ Article 35(2), Canada Model FIPA.

¹⁵⁸ *United States of America v Canada*, Final Award, LCIA Case No 111790, 25 July 2012, at <ustr.gov/sites/default/files/LCIA%20111790%20Award%20of%20the%20Tribunal.pdf> (accessed 20 May 2015).

¹⁵⁹ See, the Softwood Lumber Agreement between the Government of Canada and the Government of the United States of America of 12 September 2006, at <international.gc.ca/controls-controles/softwood-bois_ouvre/other-autres/agreement-accord.aspx?lang=eng> (accessed 20 May 2015) (the Agreement).

¹⁶⁰ See Article XIV(17) and (18), the Agreement.

¹⁶¹ See UNCITRAL, *Report of Working Group II (Arbitration and Conciliation) on the Work of its Fifty-ninth Session* (Vienna, 16–20 September 2013), A/CN.9/794, 26 September 2013, paras 3 and 32.

¹⁶² As of 24 April 2015, ten States have signed the Convention (Canada, Finland, France, Germany, Mauritius, Sweden, Switzerland, Syrian Arab Republic, United Kingdom, and United States of America).

agendas of other important actors in international trade. For instance, the *Australia-Chile FTA* of 2009 includes many transparency standards such as: 1. the possibility for the non-disputing party and third persons to make an *amicus curiae* submission;¹⁶³ 2. the publication of pleadings, memorials, transcripts of hearings, orders, awards and decisions of the tribunals;¹⁶⁴ and 3. the exchanges of regulatory, legislative and administrative information between the parties.¹⁶⁵

The European Union (EU) has also changed its investment policy, trying to improve the system with the inclusion of transparency standards in its BITs and FTAs.¹⁶⁶ This interest toward transparency is particularly apparent since the negotiations of trade and investment agreements between EU and Canada and the United States have started. For instance, the European Commission stated that the *Comprehensive Economic and Trade Agreement* (CETA) reflected a ‘turning point in the European approach to investment policy’¹⁶⁷ and recognised that ‘of the 3000 agreements with ISDS in existence, only the ones to which the United States and Canada are party to have transparency arrangements’.¹⁶⁸ A comparison between FTAs already concluded by the European Union and a third State and FTAs currently under negotiation shows that the EU’s willingness to foster transparency in international investment relations is strong.¹⁶⁹

To this extent, the provisions included in the CETA with Canada are exemplary. The consolidated text includes provisions directly referring to the UNCITRAL Transparency Rules,¹⁷⁰ requires parties to hold open hearings,¹⁷¹ to share information relevant to the arbitration proceedings¹⁷² and allows the non-disputing party submissions on interpretation of the treaty as well as third persons’ *amicus curiae* submissions on matters falling within the scope of the dispute.¹⁷³ Although the *EU-US Transatlantic Trade and Investment Partnership* (TTIP) under negotiation between the European Union and the United States has been subject to several criticisms, one must admit that the transparency provisions provided for by the treaty are complete and more advanced than those included in previous BITs and FTAs concluded by the European Union. As for CETA, non-disputing parties’ submissions and third persons’ *amicus curiae* are permitted,¹⁷⁴ all documents relating to all steps of the arbitration proceedings (from the notice of intent to the final award) are to be made publicly available,¹⁷⁵ and hearings are open to public.¹⁷⁶

¹⁶³ Article 10.21(2) and 10.20(2), *Australia-Chile FTA* (2009) (Australia-Chile FTA).

¹⁶⁴ Article 10.22(1) and (2), *Australia-Chile FTA*.

¹⁶⁵ Article 11.24, *Australia-Chile FTA*.

¹⁶⁶ See European Commission, *Investment Protection and Investor-to-State Dispute Settlement in EU agreements. Executive Summary: A New Start of Investment and Investment Protection*, November 2013, at <trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf> (accessed 20 May 2015), 1.

¹⁶⁷ See European Commission, *Investment Provisions in the EU-Canada Free Trade Agreement (CETA)*, 26 September 2014, at <trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf> (accessed 20 May 2015), 1.

¹⁶⁸ *Id.*, 4.

¹⁶⁹ See European Commission, *Overview of Free Trade Agreements*, at <ec.europa.eu/trade/policy/accessing-markets/investment/> (accessed 20 May 2015).

¹⁷⁰ Article X.33, CETA.

¹⁷¹ Article X.33, CETA.

¹⁷² Article X.34, CETA.

¹⁷³ Article X.35, CETA.

¹⁷⁴ Article 11.22, TTIP.

¹⁷⁵ Article 11.22, TTIP.

¹⁷⁶ Article 11.22, TTIP.

To conclude, it is fair to say that international investment law and arbitration have been witnessing positive developments concerning transparency. Current investment practices show that, generally, governments with mature civil societies able to impose their voices and interests on IIA negotiations are those that are more ready to foster transparency in the international investment system. Therefore, it is not surprising that very detailed, transparency-orientated provisions are incorporated in the IIAs concluded by countries such as Canada, the US, Australia as well as the European Union, where different interest groups (for example, NGOs) are involved in all steps of IIA negotiations. It is worth mentioning that, before foreign direct investments fell within the scope of the EU common commercial policy,¹⁷⁷ the IIAs concluded by Member States – even those that are important actors in the global investment flows – did not include specific and detailed provisions on transparency of the investor-State dispute settlement mechanisms.¹⁷⁸ After the entry into force of the Lisbon Treaty, the European Union has been playing a significant role by subjecting its Member States to the transparency requirements in investment arbitral proceedings.

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¹⁷⁷ Foreign direct investments are part of the EU Common Commercial Policy since the entry into force of the Treaty of Lisbon, on 1 December 2009. See Articles 3 and 207(1), European Union, *Consolidated Version of the Treaty on the Functioning of the European Union* (2012) C326/01.

¹⁷⁸ See, for instance, the BITs ratified by France, Germany, The Netherlands, Spain, the United Kingdom, at <italaw.com/resources/investment-treaties> (accessed 20 May 2015).

Sovereign Default Disputes in Investment Treaty Arbitration: Jurisdictional Considerations and Policy Implications

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Keywords

SOVEREIGN DEFAULT; INTERNATIONAL INVESTMENT LAW; INVESTMENT ARBITRATION; INTERNATIONAL FINANCIAL LAW; SOVEREIGN FINANCING

Abstract

In the aftermath of Argentina's 2001 economic crisis, creditors not participating in the country sovereign debt restructuring insisted on full payment. The triplet of investment arbitration decisions upheld jurisdiction over the mass claims presented by the holdout creditors.¹ Two cases were, however, accompanied by forceful dissents. Subsequently, opinions diverged into two camps on the legal appropriateness and policy desirability of using investment arbitration for solving sovereign default disputes: the first camp supporting the majority's view, and the second siding with the dissenting arbitrators. This article analyses the two approaches as far as jurisdictional requirements for hearing the sovereign bond disputes are concerned as well as potential policy consequences of the use of investment arbitration for these types of disputes. The article assumes a critical position towards the reasoning of the three awards, mostly due to the misconceived apprehension of the requirement of territoriality. In the policy part, the article argues that even if one assumes that enhancement of the creditor's rights is desirable (something which is debatable), investment arbitration does not seem to bring advantages towards that goal. First, the argument of better enforcement of arbitral awards seems to be more apparent than real. Second, as Bilateral Investment Treaties base their protection on nationality, this fact creates unjustifiable preference towards certain creditors and increases unpredictability. This uncertainty upsets the original contractual bargain agreed on the issuance of bonds and has negative repercussions in financial markets. The *ad hoc* nature of investment arbitration only furnishes the uncertainty. Lastly, investment arbitration is a tool for correcting past grievances. Tools for dealing with orderly sovereign defaults should focus on the preventive aspects of sovereign defaults. As a robust multilateral treaty system dealing with sovereign defaults is currently politically unfeasible, a better solution is to reinforce the current system of contractual protections such as collective action clauses or exit consents. Rather than attempting to expand the role of arbitration, resolving sovereign debt issues should be left to actors in financial markets (lenders and borrowers). Financial markets have always proved capable of dealing with sovereign defaults.

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¹ *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on jurisdiction and admissibility, 4 August 2011 (*Abaclat*); other two cases dealing with the same factual matrix are *Ambiente Ufficio SpA and others v Argentine Republic*, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013 (*Ambiente*); and *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014 (*Alemanni*).

I. Introduction

Sovereign borrowing for financing fundamental State functions has been present for many centuries. When States have refused to pay their debts traditionally owed to other sovereign States, they have done so either due to lack of funds or simply because of their unwillingness. International solutions to sovereign defaults utilised throughout history have varied significantly, also due to the fact that the nature of international economy and financial markets has been in a state of constant evolution. Still, international law on sovereign defaults remains an underdeveloped area.² Under the current state of affairs there is nothing like an international law of insolvency, as the process remains political to a large extent.³

The structure of sovereign debt has changed dramatically during the 20th century and every wave of sovereign debt crisis had different characteristics from the previous one. The current international financial market of sovereign lending is dominated by bonds. In the second half of the 20th century, States' financing was funded mostly by loans provided by commercial banks.⁴ The current bond market is characterised by a distinct feature – the secondary market. Bonds are issued to so-called 'underwriters' or 'intermediaries' and the security entitlements arising out of the issuance are subsequently traded in the secondary market to various customers, be they financial institutions or retail bondholders. The result of this is a high diversity of holders of sovereign bonds and a higher number of creditors dispersed across the globe.

State insolvency procedures cannot entirely mirror the procedures of bankruptcy as known in various domestic legal systems. States' assets, not to mention the State itself, cannot be entirely divided between creditors. States simply cannot be liquidated. 'Selling a State' goes against the notion of sovereign equality of States, and due to the specific nature of States' international legal personality, the procedures used for dealing with defaults on sovereign debt cannot be the same as in the domestic context. The corporate nature of a State is of a different quality than that of an enterprise. States have to fulfil many public functions that they owe to their populations and comply with other obligations under international law. Thus, the international legal regime governing sovereign defaults must find an appropriate balance between the interest of the State and its population, which in the end suffers the most from the consequences of default and the interests of creditors. The latter interests at present may vary significantly, but the major interest is nevertheless to get the agreed amount of money due.

The situation of sovereign default is usually attributed to irresponsible economic policies pursued by a State. Although this might be a major factor influencing the existence of default, the situation is hardly that simple. Financial crises may be a result of the general situation of the global economy, which is currently highly interdependent. Thus, the risk of contagion of economic depression is more probable and common.

² Waibel, M, *Sovereign Defaults Before International Courts and Tribunals* (Cambridge University Press, Cambridge, 2011), 12.

³ Fox, H, *The Law of State Immunity* (2nd ed, Oxford University Press, Oxford, 2008), 600.

⁴ This is mostly with the emergence of the doctrine of restrictive immunity. Until the middle of the 20th century, sovereign debts were mere engagements of honour: Buchheit, LC, *Sovereign Debt in the Light of Eternity*, presented at the Graduate Institute of International Development Studies, Geneva, 7 March 2013, at [graduateinstitute.ch/files/live/sites/iheid/files/sites/cfd/shared/docs/2758917_1\(Sovereign%20Debt%20in%20the%20Light%20of%20Eternity%20-%20Draft%20-%20207_3_13\).PDF](http://graduateinstitute.ch/files/live/sites/iheid/files/sites/cfd/shared/docs/2758917_1(Sovereign%20Debt%20in%20the%20Light%20of%20Eternity%20-%20Draft%20-%20207_3_13).PDF) (accessed 10 May 2015), 3.

Furthermore, impacts of climatic conditions, such as extensive draughts, can affect the revenues States gather from crop export. Fluctuations in prices of exported raw materials may also be beyond the control of the State. The causes of a crisis are seldom purely internal. It can be said that the causes of sovereign defaults fall into two categories: mismanagement and misfortune.⁵

The process of finding solutions to an unsustainable debt burden involves negotiations between the State and its creditors, where various interests must be channelled into finding an agreeable solution to the problem. Notwithstanding the nature of the debt instruments in question, the solutions usually consist of, for example, reducing the amount of debt, reductions of principal, lowering the interest rate, prolongation of maturity and at times, even full repayment. The primary issue in the event of default on sovereign debt is to restructure the debt in a way that allows the debtor State to fulfil its payment obligations under workable terms and thus keep being functional as a State. As sovereign debt can be considered a perennial condition,⁶ the result of a State's financial creditworthiness is market access.⁷

In the aftermath of the Argentine financial crisis of 2001, investment treaty arbitration, and the International Centre for Settlement of Investment Disputes (ICSID) in particular, has arisen as a new forum for dissatisfied creditors, where they can pursue their claims on defaulted debts. The intersection between the international regime on sovereign defaults and the world of investment arbitration has materialised with the claims of approximately 180,000 Italian bondholders initiating arbitral proceedings against Argentina.⁸ The issues arising from this new encounter are important for both worlds, ie the practice of sovereign debt restructuring and international financial law on the one hand, and international investment law on the other, which have so far been evolving separately. The main questions which arise are whether the regime of international investment arbitration in its current shape is designed to and suitable for dealing with sovereign defaults, and how the fact that this forum is being used for solving this kind of disputes will affect the practice of States in the event of unsustainable external debts. These issues are not only of a technical legal nature; this encounter brings to the forefront many policy issues of international dispute settlement and international finance.

The role of international law in the regulation of sovereign lending is '[assisting] in providing external disciplines to anchor a sound and solid national monetary policy in international, enforceable disciplines and institutions less exposed to short-sighted national policies of repudiating debt, usually as a result of domestic politics.'⁹ International law in this area ought to provide support for economic development.

⁵ International Law Association (ILA), Sovereign Insolvency Study Group, Wood, PQC, Hunt, B and Waibel, M, REPORT: *State Insolvency: Options for the Way Forward*, The Hague, August 2010, at <ila-hq.org/download.cfm/docid/0A7ACEAC-94A3-4B47-B9E642CF4BEA5D81> (accessed 24 April 2015), 6 (ILA, *Sovereign Insolvency*).

⁶ In a sense that, nowadays, no one expects that a State will have the money once the obligation matures, but that it will simply be able to incur further public debt to repay the older obligation.

⁷ Buchheit, *supra* nt 4, 6.

⁸ *Abaclat*: To be precise, the arbitration later followed with around 60,000 claimants, after some of the bondholders tendered to the 2010 exchange offer. Subsequent cases following the majority in *Abaclat* on the question of jurisdiction and admissibility are *Ambiente Ufficio SpA and others v Argentine Republic*, ICSID Case No ARB/08/9 (formerly known as *Giordano Alpi and Others v Argentine Republic*), Decision on Jurisdiction and Admissibility, 8 February 2013 and Dissenting Opinion of Santiago Torres Bernárdez, 2 May 2013 (*Ambiente*, Dissenting Opinion); *Aleman*.

⁹ Wälde, T, "The Serbian Loans Case: A Precedent for Investment Treaty Protection of Foreign Debt?" in Weiler, T, ed, *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, London, 2005), 383–384.

Therefore, the rules governing international defaults should strike a balance between the respect for sanctity of debt and contractual obligations arising therefrom on the one hand, and the practical needs of the State as far as its population is concerned, on the other. The latter should take into account the realistic possibilities of the debtor country fulfilling its debt obligation without stalling its functioning as a State. The international investment regime should

help to rather than hinder ... restructuring; [it] should support rather than undermine efforts at getting the debtor nation back into a solid financial and monetary position; [it] should not encourage too much of ‘moral hazard’ by completely eliminating the risk consciously assumed ...¹⁰

However, this can be so only on the assumption that this forum is indeed legally available to the distressed debtors. As compared to the issues highlighted in the previous paragraphs, this question is and must be answered only by reference to the law applicable to such disputes.

This article addresses the intersection between the law and practice on sovereign defaults and the international regime for foreign investment. It asks the question whether it is desirable to reinforce creditors’ rights, and particularly what problems in the practice of sovereign defaults can be remedied through the use of investment arbitration. Finally, it attempts to draw policy implications this encounter can bring.

The article proceeds as follows. First, the nature of sovereign defaults on bonds will be described, and the mechanisms available and utilised to deal with them will be briefly presented. In this part, the pertinent issues, especially the problem of holdout creditors and holdout disputes, will be analysed. In the second part, one of the major legal issues arising in investment arbitration on sovereign defaults will be presented. These issues concern jurisdiction of the arbitral tribunal when faced with a sovereign debt related dispute. This part will critically analyse the triplet of decisions on jurisdiction and admissibility thus far issued against the Argentine Republic.¹¹ The third and final part will focus on policy issues and suggestions for future developments on the subject-matter. The article will therefore attempt to build a bridge between international financial law, which has so far been the primary field in which the debate on sovereign lending has occurred, and international investment law. The main emphasis will be put on policy issues that arise out of this encounter.¹²

¹⁰ *Id.*, 386.

¹¹ Substantive investment law and causes of action that can be invoked when applied to a sovereign default, such as expropriation, fair and equitable treatment, umbrella clause, national and most favoured nation treatment, will not be addressed by the paper. For an overview of this topic see e.g., Wälde, *supra* nt 9.

¹² Sovereign lending provided by multilateral lending agencies and governments are not covered by the article as the mechanisms applied to settling their claims differ, mostly due to their international legal personality and their preferential stance in the area of international finance.

II. Sovereign Defaults and Disputes Arising Therefrom

II.1. Current Character of Sovereign Borrowing

Governments fund their functioning mostly through debt. Providers of financing are of three types: 1. So-called official creditors, ie other States; 2. International development institutions, such as the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) or bilateral governmental agencies; and 3. Commercial private creditors, such as private banks, funds or retail commercial creditors.¹³ Two types of government debt exist. First, internal debt denominated in its own currency. A State cannot practically default on its internal debt as it can always print more of its own currency. The second type is the debt this article is focusing on, namely external debt in foreign currency. Although no generally accepted definition of sovereign default exists, we can refer to it as a situation when ‘a scheduled [sovereign] debt [ie a debt incurred by governments] service is not paid beyond a grace period specified in the debt contract.’¹⁴

Sovereign defaults bring along costs for governments and their population and these costs are often quite harsh.¹⁵ From the point of view of financial markets, the government in default incurs costs generally of two kinds. First, sanctions by creditors represented mainly by increased borrowing costs. Second, signalling costs which put the sovereign’s creditworthiness in question and thus further increase the borrowing costs and willingness to lend by potential creditors.¹⁶ It cannot be seen in the interest of the State itself to repudiate the debt entirely or to subject creditors to an unreasonably substantial haircut, as this would have a large effect on the country’s reputation and creditworthiness and would hamper its ability to access further money. Negative consequences for the State’s population would follow.

Sovereign debts are characterised by the lack of effective mechanisms for enforcement as compared to those of corporate debt.¹⁷ Besides that, the presence of sovereign risk in certain types of sovereign debts is what makes such debt different from an ordinary debt between private parties. Sovereign risk materialises in three aspects: 1. Law-making power; 2. Sovereign immunity; and 3. Lack of international features of State insolvency.¹⁸ Elimination of some aspects of sovereign risk is done through various devices, most of which are of a contractual nature, for example, choice of law clauses, while other aspects remain largely un-remedied, for example, sovereign immunity from execution or the lack of bankruptcy-like features on the international level (impossibility of assets freeze, distressed debtor financing, lack of priority rules, etc).

¹³ Barra, M, “Remedies to Default on International Lending: Any Improvement from Bilateral Investment Treaties?”, 2(1) *Transnational Dispute Management* (2005), at <transnational-dispute-management.com/article.asp?key=363> (accessed 24 April 2015).

¹⁴ Hatchondo, JC, Martinez, L and Sapriza, H, “Understanding Sovereign Default” in Kolb, RW, ed, *Sovereign Debt: From Safety to Default* (John Wiley and Sons, Hoboken, 2011), 137.

¹⁵ Common consequences are currency collapses, radical slow-down of the economy, high inflation, possible collapses of banking system, inability of servicing foreign currency debt, drying up of credit, lack of foreign investments, limited access to the international financial market, non-functioning of public services and general impoverishment of the population.

¹⁶ Hatchondo *et al*, *supra* nt 14, 138–139.

¹⁷ Sturzenegger, F and Zettelmeyer, J, *Debt Defaults and Lessons from a Decade of Crises* (MIT Press, Cambridge, 2006), 55.

¹⁸ Barra, *supra* nt 13, 2.

When a State experiences difficulties with serving its external debt, it historically employed various measures, be it rescheduling, moratorium or sometimes repudiation.

II.2. Changes in the Nature of Sovereign Defaults in the Second Half of the 20th Century

II.2.1. 1980s Commercial Bank Loans Crisis and the Brady Plan

The structure of international capital flows changed remarkably in the 1970s. Until then, sovereign debts had been mostly consisting of bonds held by thousands of holders from the major capital exporting countries. The providers of lending had been either sovereign or intergovernmental multilateral lenders. In the 1970s sovereign lending became a domain of syndicated bank loans, and the private sector started to be heavily involved.¹⁹

The 1980s crisis of sovereign debt had its origin in the practice of commercial banks lending large sums of money to developing countries, particularly in Latin America. During the 1970s, commercial banks had accumulated vast amounts of liquidity from oil rich countries, which they needed to invest. As the developed world was suffering from recession, developing countries were ideal candidates to lend the money to. Not to mention that from the borrowing countries' point of view, the loans were also very attractive as high inflation in the US helped to counter high interest rates on the commercial loans.²⁰ By the end of 1970s, due to the 1979 oil crisis, the price of oil skyrocketed, pushing developing countries to borrow more. As prices of other raw materials plummeted, their export revenues decreased and made it difficult to service their debts.²¹

The main coordination channel in the restructuring of the commercial bank debt in the then series of crises in the late 1970s and during the 1980s was the process widely known as 'London Club'. The process involved the so-called 'Bank Advisory Committees' (BACs), which were *ad hoc* international informal associations of senior officials of the banks having the largest exposure in a particular country.²²

Several re-schedulings of the commercial bank loans during the 1980s with Mexico, Argentina, Brazil, Chile and other States, had not been sufficient to solve the crisis, which originally was viewed as a crisis of liquidity and not of solvency.²³ The rescheduling was only postponing a default or some other more definite solution. The final way out of the debt crisis that commenced in the early 1980s with the Mexican crisis took place at the beginning of 1990s, with help from the official sector. The IMF, as the main coordinator, lent money to the States experiencing debt-servicing difficulties, subject to policy adjustments in these countries. The IMF also had an undeniable facilitative role as an honest broker in negotiations between the private sector and the debtor countries. But the resolution of the crises took place with adoption of the 'Brady Plan', which was strongly backed by the US.

In 1989, US Treasury secretary Nicholas Brady announced a restructuring strategy that had, as a main feature, exchange of the commercial bank debt for tradable bonds, so-

¹⁹ Rieffel, L, *Restructuring Sovereign Debt: The Case for Ad Hoc Machinery* (Brookings Institution Press, Washington DC, 2003), 96–97. Commercial banks operating in syndicates of generally 10 to 20 banks were main providers of funds to developing countries.

²⁰ Power, PJ, "Sovereign Debt: The Rise of the Secondary Market and its Implications for Future Restructurings", 64(6) *Fordham Law Review* (1996) 2701, 2707.

²¹ *Ibid.*

²² Sturzenegger and Zettelmeyer, *supra* nt 17, 11.

²³ *Id.*, 17.

called 'Brady bonds'.²⁴ In Brady deals, creditors (represented for every debtor State by a BAC), accepted lower and safer payments where principal was collateralised by zero-coupon US Treasuries (so-called 'securitisation' or 'enhancement').²⁵ The IMF and other official agencies provided financing for buying collateral or for buybacks. Creditors could have chosen between several types of Brady bonds.²⁶ These deals were concluded with approximately 20 developing States experiencing debt-servicing difficulties. Last but not least, the Brady plan support was conditional upon implementation of comprehensive scheduled reforms. Since the implementation of the Brady plan, the nature of sovereign debt has switched from the syndicated bank loans to sovereign bonds as the main form of private debt flows.

II.2.2. Bond Crises of the Late 1990s and Early 2000s

The first wave of defaults on sovereign bonds occurred in 1998, following the Mexican peso crisis of 1994. The nature of these defaults was different from the crises experienced before and struck the markets as a surprise.²⁷ The debate that was initiated then was concerned mostly with ways to increase the involvement of the private sector in restructuring, how to attain more equitable burden sharing between the official and private sector and how the official sector can avoid allegations of bailing-out private creditors via massive rescue packages.²⁸

The foregoing historical exposé is meant to provide wider economic and political context of the crisis that is at the centre of the three Argentinian investment cases. It also was supposed to highlight the fact that the ever-changing nature of sovereign defaults makes it difficult to create a universal solution. Apart from that, it shows that flexible political and financial mechanisms are perhaps better equipped to solve such disputes than adjudicative mechanisms oriented to right past wrongs on the basis of application of law.²⁹ As this paper is based mostly on the recent Argentinian default due to its relevance to investment arbitration, the crisis deserves a brief description.

II.2.2.1. Argentine Financial Crisis

Argentina suffered a major financial crisis at the turn of the century. In 2001 it declared a moratorium on service of its outstanding external debt. This sovereign default is considered to be the largest and the most complex in history.³⁰ In figures, Argentina

²⁴ Besides the bonds, the countries could have chosen other types of assets, eg., debt buybacks or equity participation in privatised State enterprises (swaps). Eg., Rieffel, *supra* nt 19, 150.

²⁵ US Securities and Exchange Commission, *Zeron Coupon Bonds*, at <sec.gov/answers/zero.htm> (accessed 24 April 2015):

Zero coupon bonds are bonds that do not pay interest during the life of the bonds. Instead, investors buy zero coupon bonds at a deep discount from their face value, which is the amount a bond will be worth when it "matures" or comes due. When a zero coupon bond matures, the investor will receive one lump sum equal to the initial investment plus the imputed interest.

²⁶ 'Par bonds' – the same principal but lower interest; 'discount bonds' reduction of face value combined with market interest. These bonds have long maturity, usually of 30 years. Shorter-term bonds were also available – 'PDI (part due interest) bonds' – issued for exchange of past due interest without collateral in US Treasuries.

²⁷ Up to the Mexican crisis of 1994, debt service difficulties had occurred due to current account imbalances. The Mexican crisis started in the form of imbalances in the capital account. The crisis was cured with help of a massive rescue package (USD 50 billion) provided by the US and multilateral lenders. Rieffel, *supra* nt 19, 192,

²⁸ *Id.*, 221.

²⁹ Buchheit, *supra* nt 4, 4.

³⁰ Waibel, *supra* nt 2, 15.

defaulted on about USD 120 billion in private debt and on more than USD 30 billion of official debt.³¹

The causes of the crisis are ascribed partly to the external events such as the fallout of the financial crises in Russia, South East Asia and Brazil, and partly to the internal economic policies. In the beginning of the 1990s Argentina suffered from hyperinflation. During the 1990s the country experienced strong economic growth combined with heavy budget deficit and high interest rates which led to recession. Argentina started to borrow heavily and attracted investors by linking the peso to the US dollar in one-to-one fixed rate. At the turn of the century, Argentina implemented tax increases and pushed up interest rates, reducing confidence in the peso. A decrease in credit rating followed and made interests on debt too high and its service unsustainable. Adverse effects were mostly in the form of capital flight, the money being heavily withdrawn from the banking system, and a large decrease of capital inflow. Following the events the government implemented various emergency measures such as a freeze on banks, debt moratorium etc.³² The impacts on the private sector and population were enormous.

In the subsequent efforts to restructure its debt, the Argentine government moved to offer an exchange of the defaulted bonds for new instruments with modified terms. To the foreign creditors, accepting the exchange offer meant a haircut of about 75% of the originally agreed payments in principal and interest. Nevertheless, approximately 76% of the outstanding bondholders tendered in 2005.³³ Concurrently with the first exchange offer Argentina adopted legislation that it would never propose any future swap with a better offer, and that also prohibited all agencies to settle, in-court or out-of-court, with the holdout creditors.³⁴ However, a second exchange offer followed in May 2010 in which 66% of the holdout bondholders participated. Therefore, the creditor participation rate with both of the exchanges taken together reached 92.5%.³⁵

The non-participant creditors in the Argentinian default first pursued litigation for collecting their debts in the courts of various jurisdictions, but without any significant success in enforcement of the judgments obtained.³⁶ From 2006 onwards several ICSID

³¹ *Id.*, 16.

³² US Congress, Joint Economic Committee, Saxton, J, *Argentina's Economic Crisis: Causes and Cures*, June 2003 at <hacer.org/pdf/Schuler.pdf> (accessed 7 April 2015), 30; Congressional Research Service (CRS), REPORT: Hornbeck, J, *The Argentine Financial Crisis: A Chronology of Events*, 31 January 2002, at <fpc.state.gov/documents/organization/8040.pdf> (accessed 7 April 2015).

³³ Halverson Cross, K, "Arbitration as a Means of Resolving Sovereign Debt Disputes" 17(3) *American Review of International Arbitration* (2006) 335 (Halverson Cross 2006).

³⁴ *Ley 26.017 (Law 26.017)*, Argentina (2005), at <infoleg.mecon.gov.ar/infolegInternet/anexos/100000-104999/103619/norma.htm> (accessed 8 March 2015); United Nations Conference on Trade and Development (UNCTAD), *Sovereign Debt Restructuring and International Investment Agreements* (2011) 2 IIA Issues Note 3 (UNCTAD, *Sovereign Debt Restructuring*).

³⁵ Waibel, *supra* nt 2, 18.

³⁶ After a judgment issued by the Second Circuit Court's Judge Griesa ruling that a *pari passu* clause entitled holdout creditors to the repayment at full face value, while disabling Argentina to pay 93% of the bondholders of the restructured bonds without paying in full to the holdouts, Argentina found itself in a selective default. The discussion of the 'NML saga' is beyond the scope of this article. International reactions to the ruling were far from favourable, though. This is due to the possibility given to holdouts to attach payments on restructured debt, which can seriously undermine any future sovereign debt restructuring. For details see eg., UNCTAD, *Argentina's 'vulture fund' crisis threatens profound consequences for international financial system*, 24 June 2014, at <unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=783&Sitemap_x0020_Taxonomy=UNCTAD%20Home> (accessed 10 March 2015); EJIL Talk!, Desierto, D, *Republic of Argentina v NML Capital Ltd: The Global Reach of Creditor Execution on Sovereign Assets and The Case for an International Treaty on Sovereign Restructuring*, 22 June 2014, at <ejiltalk.org/republic-of-argentina-v-nml-capital-ltd-the-global-

arbitrations have been initiated by the holdout creditors with the view of recovering the outstanding debt in full.

II.2.3. Defaults on Commercial Bank Loans and Sovereign Bonds Compared

The main advantage of bonds is their flexibility in comparison with bank loans. They include less restrictive covenants, have longer maturities and are easily listed and traded on stock exchanges.³⁷ On the other hand, bonds are more difficult to restructure, as the consent of all bondholders of one issue is generally required.

Involvement of BACs in rescheduling in the 1980s and early 1990s was quite efficient and communication channels between the defaulting States and creditors had been functioning rather well. The great difference between the set of crises during 1998–2005 and the commercial bank loans crisis is that in the later crises creditors were highly heterogeneous and were not represented by banks or similar institutions.³⁸ This is mostly due to the emergence of the secondary market where the holder of a sovereign bond can become virtually anyone.³⁹ The diverging interests are amplified by the decreasing number of repeat players in the bond markets compared to commercial bank loans. The emergence of the secondary market brought along new players in the international financial market, so-called ‘vulture funds’. These entities buy distressed debts at highly discounted prices and then attempt to collect the full payment via litigation strategy.⁴⁰

This factor makes creditor coordination a burdensome exercise. Despite this fact, the restructuring of recently defaulted debts took generally less time than the rescheduling negotiations in the 1980s and 1990s of syndicated bank loans. Settlements were usually reached in months, with the exception of Argentina. Sturzenegger and Zettelmeyer ascribe this to a more assertive approach of defaulting States in presenting creditors with take-it-or-leave-it exchange offers. This approach puts pressure on bondholders and as an alternative it provides them only an uncertain and lengthy holdout litigation strategy or sale of bonds at distressed prices.⁴¹ This approach used by States has generally been quite

reach-of-creditor-execution-on-sovereign-assets-and-the-case-for-an-international-treaty-on-sovereign-restructuring/> (accessed 7 April 2015); United States Court of Appeal, *EM Ltd v Republic of Argentina* 695 F3d 201 (2d Cir 2012); United States Court of Appeal, *NML Capital Ltd v Republic of Argentina*, 473 F3d 463 (2d Cir 2007); Halverson Cross, K, “Investment Arbitration Panel Upholds Jurisdiction to Hear Mass Bondholder Claims against Argentina” 15(30) *American Society of International Law Insights* (Halverson Cross 2011); US Congressional Research Service, Hornbeck, J, REPORT: *Argentina’s Defaulted Sovereign Debt: Dealing with the “Holdouts”*, February 2010, at <fpc.state.gov/documents/organization/139277.pdf> (accessed 7 April 2015); Szodruch, A, “State Insolvency – Consequences and Obligations under Investment Treaties” in Hoffmann, R, and Tams, CJ, eds, *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Bade-Baden: Nomos, 2007), 146.

³⁷ Fisch, JE and Gentile, CM, “Vultures or Vanguard?: The Role of Litigation in Sovereign Debt Restructuring” 54 *Emory Law Journal* (2004) 1072; Barra, *supra* nt 13.

³⁸ Fisch and Gentile, *supra* nt 37, 1074. Several informal bondholders associations have been created in the aftermath of the Argentine crisis, eg., Global Committee of Argentine Bondholders (GCAB), at <tfargentina.it/download/GCAB-press-release120104.pdf> (accessed 7 April 2015); Task Force Argentina (TFA), at <http://www.tfargentina.it/english.php> (accessed 7 April 2015).

³⁹ A secondary market of sovereign debt came to existence during the era of 1980s financial crisis as the banks that had provided loans to governments started to trade distressed sovereign debts to third parties in order to limit their exposure to these countries. See eg., Power, *supra* nt 20, 2701; Fisch and Gentile, *supra* nt 37, 1068.

⁴⁰ *Ibid.*

⁴¹ Sturzenegger and Zettelmeyer, *supra* nt 17, 14.

successful, even in the case of the Argentine default, where the losses suffered by the exchanges amount to 75% of the original contracted amount.

II.3. Coordination Between Creditors as a Collective Action Problem – The Issue of Holdouts⁴²

Once a State falls into arrears with its external debt or is undergoing financial difficulties with debt servicing approaching default, creditors have basically two options. First, negotiate with the State a workout of the unsustainable debt, or second, forego a strategy of legal action to enforce their contractual rights in court or in arbitration.⁴³

As mentioned above, one of the obstacles in achieving orderly and fair restructuring is to maintain cooperation between creditors, and in the era of bonds dispersed between various holders this problem is enhanced. Against the background of the current sovereign bond market, this collective action problem materialises in the phenomenon of holdouts. Holdout is a tendency of minority creditors to free ride at the expense of majority creditors. Holdout creditors pursue their contractual rights before various *fora* to achieve a full repayment. When a State is unable to repay its debt in full it cannot be reasonably insisted that full repayment is the only solution to the problem. A majority of creditors are usually aware of these limitations and are willing to undergo some degree of a haircut.

The holdout problem therefore arises from diverging interests of creditors and out of their assessments of success in obtaining full repayment of the debt obligation. ‘If creditors know that a ‘holdout’ can obtain full repayment conditional on a previous debt restructuring, everyone will want to be that holdout, and no one will want to restructure’.⁴⁴ Thus, one of the major challenges in negotiating sovereign debt restructuring is to channel different interests of the parties involved in order to attain a mutually agreeable solution. Due to the number of creditors involved in the current sovereign bond market and the nature of bonds, a great deal of organization is necessary in order to coordinate their collective interests.⁴⁵

Until the middle of the 20th century, without the creditor’s national State interference in the form of diplomatic protection, creditors’ rights were virtually impossible to enforce.⁴⁶ In the 1980s financial crisis, commercial banks providing loans to the defaulting countries were rather few in numbers, thus the issue of holdouts did not come up with a great intensity. When it happened, the tools employed were usually combination of official pressure, debt buybacks, buyouts, but also full repayment in cases of small amounts.⁴⁷ The dissenting banks were often small commercial banks that had

⁴² Apart from the collective action problem, there are other issues with sovereign indebtedness, which cannot be treated here. These issues are, for instance, lack of stay of enforcement against a distressed debtor and lack of priority rules, no formal rules for emergency financing and coordination between workouts of the domestic and foreign debt.

⁴³ Schlemmer, EC, “The Enforcement of Sovereign Debt” in Giovanoli, M and Devos, D, eds, *International Monetary and Financial Law: The Global Crisis* (Oxford University Press, Oxford, 2010), 425.

⁴⁴ Sturzenegger and Zettelmeyer, *supra* nt 17, 64.

⁴⁵ Barra, *supra* nt 13, 3; Fisch and Gentile, *supra* nt 37.

⁴⁶ For the landmark case on sovereign debt before the PCIJ see eg., Permanent Court of International Justice (PCIJ), *Case Concerning Various Serbian Loans Issued in France (France v Serbia)*, 12 July 1929, Series A No 20; for the statutes which restrict the sovereign immunity see eg., Sections 1330 and 1332(a), *Federal Sovereign Immunities Act 1976*, United States, (1976), Public Law 94-583, 28 USC Chapter 33, *State Immunity Act 1978*, United Kingdom (1978).

⁴⁷ Sturzenegger and Zettelmeyer, *supra* nt 17, 11; Fisch and Gentile, *supra* nt 37, 1065.

not had any long-term interest in providing further services on a medium or large-scale basis to the indebted States in future. Thus, for them the concessions on payment terms were not balanced by a vision of future profits.⁴⁸

It is submitted that the availability and effectiveness of judicial remedies affects the attitude of creditors towards restructuring negotiations and the ultimate result of the negotiations. The absence of a formal insolvency regime and regulatory oversight makes holdout litigation, in connection with informal means of political or market pressure, the only *formal* check on the debtor country's opportunistic behaviour.

The existence of holdout creditors serves as a control on opportunistic defaults and unreasonable workout terms or can help to prevent discrimination against minority creditors. On the other hand, holdouts are more often viewed as an obstacle to orderly restructuring, thus burdening majority creditors and citizens of the debtor country. As sovereign bonds are contracts with a State that are governed by law of a particular jurisdiction, usually with a forum selection clause, the readily available option for creditors who do not want to participate in the restructuring is litigation according to the submission clause in the debt instrument. The case law of US and English courts, the most common jurisdictions used, prove that it is possible to obtain a favourable judgment holding the State liable for non-payment.⁴⁹ Nevertheless, the usual lack of attachable assets abroad and immunity from execution that applies in certain cases may pose obstacles for a successful court action.⁵⁰ Hence, it is not surprising why voluntary renegotiation of debt is still the primary method for solving sovereign debt disputes.⁵¹ In other words, the main problem with judicial action against a sovereign entity is the lack of reliable enforcement mechanisms.⁵²

⁴⁸ Fisch and Gentile, *supra* nt 37, 1063.

⁴⁹ See eg., United States District Court, *Allied Bank International v Banco Credito Agricola de Cartago*, 566 F Supp 1440, 1442 (SDNY 1983); United States Court of Appeal, *Libra Bank Ltd v Banco Nacional de Costa Rica, SA*, F2d 47, 49 (2d Cir 1982).

⁵⁰ An illustrative example of the fruitless yet inventive approaches to enforcement of sovereign assets is the seizure of Argentine frigate ARA Libertad by the NML Capital, which was eventually released following a judgment from the International Tribunal of the Law of the Sea (ITLOS), *The "ARA Libertad" Case (Argentina v Ghana)*, Case No 20, Order, 20 November 2012.

⁵¹ ILA, *State Insolvency*, *supra* nt 5, 5. Most of the bond instruments include waivers of sovereign immunity from jurisdiction, but some also include immunity from execution, eg., Brazilian bonds that use arbitration clauses: Halverson Cross 2006, *supra* nt 33, Appendix I; see also Schlemmer, *supra* nt 43.

⁵² Apart from the *NML Capital Ltd v Republic of Argentina*, one example of particularly successful litigation strategy is the now notorious United States District Court for the Southern District of New York, *Elliott Assoc v Republic of Peru*, 948 F Supp 1203 (SDNY 1996); United States District Court for the Southern District of New York, *Elliott Assoc v Republic of Peru*, 961 F Supp 83 (SDNY 1997); United States District Court, *Elliott Assoc v Republic of Peru*, 12 F Supp 2d 328 (SDNY 1998); United States Court of Appeals, *Elliott Assoc v Republic of Peru*, 194 F 3d 363 (2d Cir 1999); United States District Court, *Elliott Assoc v Republic of Peru*, 194 FDR. 116 (SDNY 2000); Court of Appeals of Brussels, *Elliot Assocs, LP v Banco de la Nacion*, General Docket No 2000/QR/92, (8th Chamber, 26 September 2000). Elliott obtained a distressed debt owed by Peru at a discounted price shortly before Peru was about to reach the Brady deal in 1996. After several attempts, it obtained prejudgment attachment of assets and a judgment against Peru from New York courts. A new element for enforcing this judgment was that Elliott did not only attempt to attach Peruvian assets in various jurisdictions but also tried to prevent payment of interests on negotiated Brady bonds which flowed from the restructuring agreement. Before the Brussels Court of Appeals it managed to suspend payments from Euroclear, a clearing agency providing payment from Brady bonds. Under a threat of default on the newly negotiated Brady bonds, Peru decided to settle with Elliot when the due date was approaching. If this strategy were to become a rule, holdout creditors would become a systemic problem preventing any orderly restructuring. Harvard Law School International Finance Seminar, Lopez Sandoval, EL, *Sovereign Debt Restructuring: Should we be worried about Elliot?*, May 2002, at <law.harvard.edu/programs/about/pifs/education/llm/2001--

It has been argued that if the major distortion in sovereign debt is lack of contract enforcement, then improvements in creditor rights should be in the interests of both sides.⁵³ Nevertheless, it is also recognised that this does not necessarily apply when some creditors use legal action in order to get an advantage over other creditors, thus stopping cooperation between each other.⁵⁴ This is exactly the problem of holdouts. Investment arbitration has so far been utilised as one of the *fora* used for enforcement rights of holdouts. It is worth noting, however, that the ultimate and most efficient check on the State's attitude is its ability to access the market for further financing. This incentive has so far proved to be the most important.

II.3.1. Methods of Addressing the Issue of Holdouts

A reasonable solution to the situation of debt servicing difficulties of a country must reflect a country's capacity to pay. The prospects of successfully holding out should not be too high in order not to prevent an orderly restructuring. Nevertheless, States should be aware that they cannot entirely escape their debt obligations and therefore certain leverage left for non-cooperative creditors is a sensible solution for avoiding opportunistic and irresponsible State behaviour. To avoid the holdout issue entirely without comparable enhancement of creditors' rights is not a good solution, as it entices 'moral hazard' on the part of the State. The question is in keeping the holdout problem within limits. The authors defending positive effects of holdouts point out that especially effective coordination and representation of dissenting creditors should be improved.⁵⁵ However, as we pointed out, States themselves have a great incentive to retain their credibility as debtors as this only can secure them market access. The holdout problem can be reasonably tackled through various methods.

II.3.1.1. Collective Action Clauses (CACs)

This purely contractual method is now becoming a standard means to address the holdout problem in debt instruments.⁵⁶ These clauses allow, after an agreement between the debtor and a certain percentage of creditors of one bond issue (usually 75% and more), modifications of the payment terms of the bond issue, including face value, interest and maturity, that are also binding on non-participants.

CACs are designed to avoid free riding and they are used as incentives for better coordination between creditors and for enhancement of the efficiency of restructuring negotiations. They usually incorporate provisions on collective bondholders' representation, majority restructuring provisions and components on minimum

2002/sp44.pdf> (accessed 7 April 2015), 26; Olivares-Caminal, R, "To Rank Pari Passu or Not to Rank Pari Passu: That is the Question in Sovereign Bonds after the Latest Episode of the Argentine Saga" 16 *Law and Business Review of Americas* (2003) 745. A similar strategy was rejected by Belgian courts in *LNC v Nicaragua*; English courts in *Kinsington v Democratic Republic of Congo*; *Red Mountain Finance v Democratic Republic of Congo* (*ibid*). However, US court decisions in the recent litigation by *NML v Argentina* (an offshore unit of Elliot Associates) shows resurrection of this questionable legal logic.

⁵³ Sturzenegger and Zettelmeyer, *supra* nt 17, 62.

⁵⁴ *Ibid*.

⁵⁵ Fisch and Gentile, *supra* nt 37, 1106. They propose provision on, eg., fiscal agency, trust indentures, minimum percentages to commence litigation or even limiting the class of eligible bondholders.

⁵⁶ Collective Action Clauses (CACs) can be found in more than 90% of new bond issues, UNCTAD, *Sovereign Debt Restructuring*, *supra* nt 34, 6.

enforcement percentages of bondholders that must be achieved in order to initiate holdout litigation.⁵⁷

Although the use of CACs has not been yet properly tested in litigation, it has been argued that CACs may limit holdout adjudication in the way that they additionally prevent successful invocation of an International Investment Agreement (IIA) arbitration. First, once workout is achieved according to the CAC the terms of the original bond have been lawfully changed. Second, the minimum enforcement component can be argued to be interpreted as covering any kind of dispute settlement.⁵⁸ One of the issues that has been pointed out as not entirely susceptible to be addressed by CACs is a problem of aggregation – how to make bond instruments of one issue regulate other bond issues of the same issuer. The limits of this purely contractual device are evident when tackling this problem.⁵⁹

II.3.1.2. Exit Consents

So-called ‘exit consent’ is a method that utilises the existing amendment clauses in bond instruments in a way that they encourage the holdouts to participate in the exchange. The amendment clauses generally allow with agreement of the issuer and certain percentage of creditors (e.g. usually from 50–70%) to change certain terms of the debt. However, these changes cannot affect the payment terms, such as the due date or the amount of principal or interest rate. The borrowing country may therefore make the creditors participating in the exchange also agree (exit consent) on the changes (exit amendments) in the old bonds so to make them less attractive and induce the holdouts to take part in the exchange. The amendments are in the interest of both the majority bondholders and the issuer. Although not being tested in practice, these amendments, it has been suggested, can go as far as changing the governing law of the bond or eliminating provisions on acceleration. Other options are, for example, removing immunity waivers, forum selection clauses, negative pledges, or provisions obliging the issuer to list the bonds on the exchange, thus reducing bonds’ liquidity. This method has been used in three recent restructurings of sovereign debts (Ecuador 2000, Uruguay 2003, Dominican Republic 2005).⁶⁰

II.3.1.3. International Bankruptcy Procedure – SDRM

The boldest out of the proposals designed to solve the issue of holdouts and other pertinent problems of international law on sovereign insolvency is a statutory regime resembling an international bankruptcy procedure. Such a proposal has been recently

⁵⁷ See eg., European Union, Euro area Model CAC 2012, at <europa.eu/efc/sub_committee/cac/cac_2012/index_en.htm> (accessed 7 April 2015).

⁵⁸ UNCTAD, *Sovereign Debt Restructuring*, *supra* nt 34, 6: Arguably, if a Bilateral Investment Treaty (BIT) offer to arbitrate that can be reads as ‘any dispute arising out of an investment’, meaning covering both treaty and contract claims, why cannot a similar provision in a contract have the same effect? Cf Han, Y and Han, SD, “Sovereign Debt Restructuring under the Investor-State Dispute Regime”, 31 *Journal of International Arbitration* (2014) 1, 75, 83: who argue that ‘such exclusion ought to be express and specific’. However, the incongruity of this argument is shown, as in one instance they claim that specific types of debt instrument must be included in the general definition of investment in the BIT unless they are explicitly excluded, and in another instance they claim that CACs should not bind minority creditors regarding ICSID arbitration as long as this is not made explicit.

⁵⁹ Eichengreen, B and Mody, A, “Is Aggregation a Problem for Sovereign Debt Restructuring?”, 93(2) *Economic Review* (2003).

⁶⁰ See eg., Buchheit, LC and Gulati, M, “Exit Consents in Sovereign Bond Exchanges”, 48 *UCLA Law Review* (2000) 59; Sturzenegger and Zettelmeyer, *supra* nt 17, 62.

made by the IMF⁶¹ and was subsequently rejected. It does not seem that any similar reform is on the table for the time being. It is evident that statutory solution to international bankruptcy is politically very difficult to put through. The system was supposed to be based on a multilateral international convention and supplemented by IMF Article amendments. It would provide for a statutory regime of State insolvency dispute settlement forum with institutional support of the IMF. States would be able to file for restructuring proceedings, whereby ensuing restructuring plans could be accepted by majority of creditors and binding on dissenters. It would allow for stay of enforcement proceedings against the State, creditors' priority rules and would provide for a mechanism for provision of new money by private creditors with necessary protective measures. The proceedings would be followed by IMF suggested policies to be implemented for protecting the debtor's capacity to pay.⁶²

II.3.1.4. Holdout Arbitration

In current practice, arbitration is not a widely used method of resolving holdout disputes arising from sovereign bonds. A notable exception is Brazil, whose bonds as a rule include arbitration clauses.⁶³ Several reasons why litigation is preferred over arbitration in the sovereign bond disputes arena may be identified.⁶⁴ It might be the creditors' fear of equitable considerations playing larger role in arbitration, lack of appeal and lower predictability, availability of summary judgments and interim relief in litigation and finally the 'lock-in' effects of standardised 'boilerplate' contracts used in the financial markets.

In investment arbitration, and arbitration in general, the debtor-State has certain influence over the composition of the tribunal deciding the case. This might be one of the reasons for creditors' preference of 'tested' domestic courts. Conversely, this may be a reason for States to include arbitration clauses. Even with the apparent enforcement advantage over the domestic judgment of international awards, particularly in the case of ICSID Convention, the issue of immunity from execution remains applicable even in this case.⁶⁵ As far as the New York Convention is concerned, the grounds for refusal of

⁶¹ Krueger, AO, *A New Approach to Sovereign Debt Restructuring* (International Monetary Fund, USA, 2002).

⁶² *Ibid*; for further discussion see eg., Eulis, R, "The Feasibility of the IMF's Sovereign Debt Restructuring Mechanism: An Alternative Statutory Approach to Mollify American Reservations", 19(1) *American University International Law Review* (2003) 107.

⁶³ Halverson Cross 2006, *supra* nt 33, 341. Historically, however, arbitration clauses have been used in sovereign debt instruments, although they have been barely complied with. Arbitration clauses began to appear in the sovereign debt instruments for loans provided by private creditors particularly from the US and the UK to Latin American and Caribbean States in the first decades of 20th century. See Weidemaier, MC, "Contracting for State Intervention: The Origins of Sovereign Debt Arbitration", 73 *Law and Contemporary Problems* (2010) 335. One theory explains the early use of arbitration clauses in the late 19th and the first half of 20th century not as a means of settling disputes, but as a projection of power of creditors from industrialised countries. Weidemaier notes that some arbitration clauses referred the disputes directly to the official of the national state of the lender, eg., the US Secretary of State *Id* 344. Thus, the arbitration clauses were rather used to signal the readiness of a third party, a national state, to intervene if the obligations were not fulfilled. The author also links this practice with conclusion of Drago-Porter Convention which precluded use of force for recovering debts, but not in cases when a borrowing country refused to arbitrate.

⁶⁴ Halverson Cross 2011, *supra* nt 36, 6–7, 51; Waibel, *supra* nt 2, 163; Weidemaier, MC, "Disputing Boilerplate", *UNC Legal Studies Research Paper No 1158611* (July 2008), at <ssrn.com/abstract=1158611> (accessed 26 April 2015).

⁶⁵ Article 55, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524 (ICSID Convention). Schlemmer, *supra* nt 43, 443; Where the author argues for not granting immunity from execution in cases of arbitration based on the principle of estoppel (waiver of

enforcement, especially on public policy grounds in Article V, can also provide a certain leeway for the State not to make the award enforceable.

Advantages of treaty arbitration may, however, become particularly strong in cases where a debt instrument lacks any forum selection clause.⁶⁶ Although, this situation can be regarded as marginal, the Greek economic crisis makes this scenario closer to reality, as the majority of the restructured Greek bonds are governed by Greek law and thus disputes are submitted to the courts of Athens.⁶⁷ It is rather probable that Greek courts would not be particularly receptive to the claims of bondholders against their government.⁶⁸ Yet, the prospect of holdout investment arbitration against Greece has so far proved not to be of major concern.⁶⁹

III. Investment Arbitration and Disputes over Sovereign Defaults

The present part of the article addresses the applicability of the regime of investment arbitration on disputes arising from defaults on sovereign bonds. The trio of Argentine bondholders' cases will serve as a basis for the discussion. Due to the limitations of space, this part will only critically examine the treatment of the *ratione materiae* jurisdictional threshold. Other pertinent issues the triplet of decisions have raised are left out.⁷⁰

III.1. *Ratione Materiae* Jurisdiction of the Centre

Article 25 ICSID defines the jurisdiction of the Centre as covering 'any legal dispute arising out of an investment.' This sentence defines the subject-matter jurisdiction of the Centre, and the term 'investment' is crucial here. Even though this term is not defined in

immunity from jurisdiction by agreement to arbitrate should imply also waiver of immunity from execution).

⁶⁶ Wälde, *supra* nt 9, 403.

⁶⁷ Choi, SJ, Gulati, M and Posner, EA, "Pricing Terms in Sovereign Debt Contracts: A Greek Case Study with Implications for the European Crisis Resolution Mechanism", *University of Chicago Olin Law and Economics Working Paper No 541*, (1 February 2011), at <papers.ssrn.com/sol3/papers.cfm?abstract_id=1713914> (accessed 7 April 2015).

⁶⁸ It can be argued, however, that dissatisfied creditors may try to utilise the enforcement mechanisms provided by the EU legal framework; see eg., Glinavos, I, "Investors vs. Greece: The Greek "Haircut" and Investor Arbitration Under BITs", (May 2012), at <papers.ssrn.com/sol3/papers.cfm?abstract_id=2021137> (accessed 7 April 2015), 12.

⁶⁹ The participation in the Greek sovereign debt restructuring through the statutory insertion of collective action clauses led to 95,7% participation. Holders of bonds governed by English law were settled separately, thus the possibility of holdout arbitration remained negligible. Norton, E, "International Investment Arbitration and the European Debt Crisis", 13 *Chicago Journal of International Law* (2012) 291.

⁷⁰ One of the most debated issues was consent to mass claims proceedings. For discussions see eg., Demikrol, B, "Does an Investment Treaty Tribunal Need Special Consent for Mass Claims?" 2(3) *Cambridge Journal of International and Comparative Law* (2013) 612; Steingruber, AM, "Case Comment – *Abaclat and Others v Argentine Republic*: Consent in Large-scale Arbitration Proceedings", 27(2) *ICSID Review* (2012) 237; van Houtte, H and McAsey, B, "Case Comment – *Abaclat and Others v Argentine Republic*: ICSID, the BIT and Mass Claims" 27(2) *ICSID Review* (2012) 231; Strong, SI, "Heir of *Abaclat*? Mass and Multiparty Proceedings: *Ambiente Ufficio SPA v Argentine Republic*", 29 *ICSID Review* (2014) 149; Bees, J und Chrostin, J, "Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID: The *Abaclat* Case", 52(2) *Harvard International Law Journal* (2012) 505; Strong, SI, "Mass Procedures in *Abaclat v Argentine Republic*: Are They Consistent with the International Investment Regime?", 3 *Yearbook on International Arbitration* (2013) 261.

the Convention, the majority view, as expressed in case law and doctrine, is that the term has an objective meaning, although it is encompassing and inclusionary.⁷¹ The prevailing view is that the use of the term investment in Article 25 of ICSID provides for ‘outer limits’⁷² or a ‘hard core’⁷³ of the jurisdiction of the Centre.

However, the general adherence to the objective approach leaves open the question as to how to determine the objective core.⁷⁴ Elements of an investment developed by tribunals differ from case to case. They vary from a liberal approach (contribution with money or assets, element of risk, certain duration)⁷⁵ to rather a bold list of requirements (contribution of money or assets, certain duration, element of risk, investment made in order to develop an economic activity in the host State, investment made in accordance with host State; investment made in good faith).⁷⁶

There are also views which hold that the agreement between two States as to the definition of an investment materialised in the BIT should trump any perceived limitations of Article 25.⁷⁷ The arguments used in support of this position are purportedly pragmatic considerations, or are based on selective arguments from the drafting history of the Convention and implicitly on purported evolutionary interpretation of the ICSID.⁷⁸ This subjectivist view is not supported in this article. The fact that BITs use varying definitions shows that there is a lack of common understanding of the term, and therefore that BITs cannot be used individually or in aggregate to determine the content of the term as used in ICSID.⁷⁹ In this respect, a multilateral character of ICSID should be considered.⁸⁰ IIAs are usually concluded on a bilateral basis and reflect an understanding of what should be treated as an investment as between the contracting parties. This bilateral concept cannot have a transforming effect on the terms used in a multilateral

⁷¹ *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 31 July 2001, para 44 (*Salini v Morocco*);, *Phoenix Action Ltd v The Czech Republic*, ICSID Case No ARB/06/5, Award, 6 April 2007 (*Phoenix Action Case*); *Fedax NV v The Republic of Venezuela*, ICSID Case No ARB/96/3, Decision on Objections to Jurisdiction, 11 July 1997 (*Fedax Case*); *Mr Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on Annulment, 1 November 2006; Schreuer, C, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, Cambridge, 2009), 117; Broches, A, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, 132(8) *Recueil des Cours* (1972) 330; Mortenson, JD, “The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law”, 51(1) *Harvard Journal of International Law* (2010) 257; Waibel, *supra* nt 2, 215.

⁷² Broches, *supra* nt 71, 330.

⁷³ *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Dissenting Opinion of Professor Abi-Saab, 4 August 2011, para 46 (*Abaclat*, Dissenting Opinion).

⁷⁴ Schreuer, *supra* nt 71; Waibel, *supra* nt 2; Douglas, Z, *The International Law of Investment Claims* (Cambridge University Press, Cambridge, 2009), 191.

⁷⁵ *Saba Fakes v Republic of Turkey*, ICSID Case No ARB/07/20, Award, 14 July 2010, para 110; *LESI-Dipenta v Algeria*, ICSID Case No ARB/03/8, Award, 10 January 2005, para II.13(iv).

⁷⁶ *Phoenix Action Case*.

⁷⁷ *Abaclat*, paras 364–365; *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Annulment, 16 April 2009, para 73 (*MHS*); Krishan, D, “A Notion of ICSID Investment,” 6(1) *Transnational Dispute Management* (2009) 14.

⁷⁸ In *Abaclat*, the majority held that it would be against the ‘spirit’ of ICSID to create limits, which neither the ICSID Convention nor the Parties to the BIT intended to create. Thus, the only relevant criterion is that the investment creates a value protected by the BIT (paras 364–365); *MHS*, para 73. The Committee stated that IIAs are currently the main basis of the caseload before ICSID and to disregard definitions used therein would risk crippling the institution.

⁷⁹ Waibel, *supra* nt 2, 217; Dolzer, R, “The Notion of Investment in Recent Practice” in Charnovitz, S, Steger, DP and Van Den Bossche, P, eds, *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge University Press, Cambridge, 2005), 263.

⁸⁰ See Waibel, *supra* nt 2, 214–215, *Phoenix Action Case*, para 96.

convention. If the BIT definition goes beyond the requirements of ICSID there is no jurisdiction.⁸¹ In this respect, it is appropriate to add that ICSID is an adjudicative mechanism of a specialised jurisdiction, therefore the variety of disputes submitted to it cannot be limitless and be left solely to the parties' consent.⁸² The fact that the term was intentionally left undefined does not mean it has no meaning, or that the meaning can be filled based solely on what the parties to the BIT or a dispute agree on. This would effectively mean merging the requirement of a 'dispute arising out of an investment' with the requirement of written consent to arbitration.⁸³

As this article supports the objective reading of the term investment in Article 25, the so-called double-barrelled test is considered to be applicable in any ICSID arbitration: the nature of the transaction or right in question has to fall both within the ambit of Article 25 of ICSID and also under the bilateral definition of the applicable BIT.⁸⁴

Schreuer has extracted from the case law, ICSID interpretation and the drafting history five typical characteristics of investments.⁸⁵ First, the investment should have certain duration and should be expected to be long-term; the second characteristic is a certain regularity of profit and return; thirdly, the assumption of risk, which is usually shared by both sides; fourth, the commitment of resources should be substantial; and last but not least, is the requirement extracted from the Convention's object and purpose, and that is the contribution to the host State's development.⁸⁶ Schreuer further adds qualification as far as the regularity of profits is concerned: he claims that most tribunals have not applied this requirement as critical. Douglas stresses the interaction between legal and economic characteristics of an investment, whereby the legal dimension means that an investment should have a character of property right situated *in the territory* of the host State, economic characteristics retain only three of the above stated characteristics. These are commitment of resources, assumption of risk and expectation of return.⁸⁷ Other authors add necessity of connection with a certain commercial undertaking and emphasise the need for the requisite territorial link.⁸⁸

The present author agrees and submits that the issue of sovereign bonds will not raise any issue as far as duration is concerned; the fact of trading on the secondary market should not change the conclusion. Sovereign bonds mature on an agreed period in the debt instrument, a period which is usually long enough to be in line with the case law varies between two and 30 years. Nevertheless, a bondholder as a claimant in investment arbitration must be considered an investor. On the secondary market, bonds can change owners after a very short time – should this influence the decision on jurisdiction of the tribunal? *Fedax* tried to distinguish the transaction in question (which was a promissory note issued by Venezuela) from volatile capital that 'come[s] in for quick gains and leave[s] immediately thereafter.'⁸⁹ By arguing that, even in case of every other

⁸¹ Schreuer, *supra* nt 71, 124.

⁸² *Ambiente*, para 439. However, dissenting arbitrator Torres Bernárdez accuses the majority of adhering to the subjectivist theory: *Ambiente*, Dissenting Opinion, paras 190–201.

⁸³ Gaillard, E, "Identify or Define? Reflections on the Evolution of the Concept of Investment in ICSID Practice" in Binder, C, ed, *International Law for the 21st Century: Essays in the Honour of Christoph Schreuer* (Oxford University Press, Oxford, 2009), 410.

⁸⁴ See eg., Schreuer, *supra* nt 71, 117; *MHS*, para 55; *ČSOB v Slovakia*, ICSID Case No ARB/97/4, Decision on Objections to Jurisdiction, 24 May 1999, para 66–68 (*ČSOB*).

⁸⁵ Schreuer, *supra* nt 71, 128–129.

⁸⁶ Originally formulated in *Fedax Case* and subsequently in *Salini v Morocco*.

⁸⁷ Douglas, *supra* nt 74.

⁸⁸ Waibel, *supra* nt 2, 231.

⁸⁹ *Fedax Case*, para 43.

endorsement of a promissory note, Venezuela enjoys continuous credit benefit, the *Fedax* tribunal fails to elaborate on how this volatile capital should in fact be identified in practice.

Likewise, the criterion of the contribution of economic development is left out from our inquiry. This is mostly for its subjective nature and incapability of being transposed into an operational legal test.⁹⁰ Although ideally a protected investment should contribute to the economic development of the host State, it is affirmed here with the opinions that see difficulties arising from operationalisation of this criterion in the proceedings.⁹¹ The article submits that contribution to the economic development of the host State does not need to be included in the test for identification of an investment under ICSID as a separate criterion. If there are the above analysed requirements in the form of commitment of capital, having the necessary territorial link and connection with certain economic activity, shared risk and certain duration, and they are made for the commercial return, they should qualify for under Article 25.

III.1.1. Sovereign Bonds as an Investment under ICSID

It has been argued that the understanding of the concept of investment in financial markets differs from the definition used in a foreign investment context.⁹² The question whether sovereign debt instruments, like bond security entitlements, fall within the ambit of Article 25 of ICSID is a question of treaty interpretation, not an issue of consent.⁹³ Investment case law has deemed financial instruments to be a protected investment in the majority of cases where such instruments were under scrutiny. Therefore, promissory notes⁹⁴ and loans⁹⁵ have been deemed to be covered. Decisions ruling to the contrary, however, have also been rendered.⁹⁶ Lengthy pages have been occupied in the *Abaclat*, *Ambiente* and *Alemanni* decisions, and in the subsequent literature by the analysis of how wide the ‘outer limits’ of the ICSID investment are. The present article, however, adopts the view that the sovereign debt securities such as those under scrutiny in the Argentine cases are outside of the ambit of ICSID and the applicable BIT for much more prosaic and technical reasons – that is because they are not located within the territory of Argentina and do not exhibit the requisite investment risk.

III.1.1.1. Territoriality Requirement

It has not been contested that commitment of money or other resources is one of the essential elements of an investment. In case of sovereign bonds traded on the secondary market, there are two connected issues. First of all, it is whether the resources invested by the bondholder must be transferred to the host State, in other words if there is any necessity for a territorial link.⁹⁷ And second, must the transaction to which the

⁹⁰ Dissenting arbitrators in *Abaclat* and *Ambiente* both took issue with both of these requirements. Yet, their arguments have much less force than their other points relating to territoriality and risk sharing.

⁹¹ Douglas, *supra* nt 74, 202; Waibel, *supra* nt 2, 234; *LESI-Dipenta*.

⁹² Waibel, *supra* nt 2, 217; see also Dolzer, *supra* nt 79, 261; *Abaclat*, Dissenting Opinion, para 41.

⁹³ Waibel, *supra* nt 2, 213; *Joy Mining Machinery Limited v Egypt*, ICSID Case No ARB/03/11, Award, 6 August 2004, para 49 (*Joy Mining*); *Abaclat*, Dissenting Opinion.

⁹⁴ *Fedax Case*.

⁹⁵ *ČSOB; Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, paras 214–216.

⁹⁶ *Joy Mining*, paras 42–50; *PSEG Global v Turkey*, ICSID Case No ARB/02/5, Decision on Jurisdiction, 4 June 2004, para 189.

⁹⁷ Douglas, *supra* nt 74, 191: Douglas sees it as one of the aspects of economic materialisation of an investment.

bondholder is a party, standing alone, qualify as an investment? The former issue arises also due to the territorial requirement under IIAs,⁹⁸ and the latter one is often subsumed under the heading of ‘dispute arising directly out of an investment’ in the ICSID Convention.

Waibel stresses the importance of the question of whether it is sufficient for bonds to qualify as an investment at issuance, or if it is necessary that a purchase of a security entitlement on the secondary market must qualify as an investment too. Although *Fedax* and *ČSOB* (cases cited by the Argentine bondholders’ tribunals) seem to answer the question in the negative, he claims that it should be answered affirmatively as this is the only transaction to which the bondholder is a party.⁹⁹ The case law shows that even when a particular transaction, which is the subject-matter of a dispute, in and of itself, does not qualify as an investment, the jurisdiction of the tribunal is upheld when this transaction is part of a larger investment operation that is considered to be an investment.¹⁰⁰ Schreuer concludes that when an ancillary but vital transaction is made in a separate form or even between separate entities, this does not deprive it of a direct relation to the investment.¹⁰¹

The *Abaclat*, *Ambiente* and *Alemanni* cases stress that the security entitlements cannot be viewed in isolation and that they make sense only when the economic transaction of bond issuance and subsequent trading of security entitlements is viewed as a whole.¹⁰² These decisions overemphasise the concept of ‘economic unity’ in disregard of important legal principles that should guide them.

First of all, in *Abaclat*, *Ambiente* and *Alemanni* the bondholders were only party to the secondary market purchase, not to the rest of the transactions. The Tribunal dealt with the question in a way which treated security entitlements as a separate investment. However, if the security entitlement does not separately qualify as an investment (as our analysis below shows), there is a problem of the lack of personal jurisdiction. This is because, in order to become an investor, one needs to hold an investment. The Argentine cases seem to disregard factual as well as legal characteristics of the financial markets and the underlying transactions. It is certainly a stretch to treat two transactions that are operating on the different markets, with different actors, different dynamics and different legal frameworks as having ‘economic unity’, something which dissenting arbitrators rightly pointed out.¹⁰³

Second, the theory of economic unity has a rather dubious legal basis and disregards legal characteristics of the transactions at hand. While, as a tribunal deciding according to law, it should be guided by these characteristics. If the claimants hold security entitlements and these are the only assets that might form the investment, we need to determine whether these are indeed situated within the territory of Argentina. This is made more important by the fact that this requirement is explicitly stated in both the ICSID Convention and in the applicable BIT. The rationale behind the BITs is to reduce the sovereign risk associated with a State’s enforcement jurisdiction.¹⁰⁴ This is why,

⁹⁸ Eg., Article 1(1), *Argentina-Italy BIT* (1993).

⁹⁹ Waibel, *supra* nt 2, 218.

¹⁰⁰ Eg., *Holiday Inns v Morocco*, ICSID Case No ARB/72/1, Decision on Jurisdiction, 12 May 1974; *ČSOB*, para 72. For a contrary conclusion focusing instead on the transaction of the dispute see *Joy Mining*, paras 42–50.

¹⁰¹ Schreuer, *supra* nt 71, 112 [emphasis added].

¹⁰² *Abaclat*, para 358; *Ambiente*, para 327.

¹⁰³ *Abaclat*, Dissenting Opinion, paras 69–72; *Ambiente*, Dissenting Opinion, paras 153–161.

¹⁰⁴ Douglas, Z, “Property, Investment and the Scope of Investment Protection Obligations” in Douglas, Z, Pauwelyn, J and Vinuales, JE, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, Oxford, 2014), 23.

whenever a contractual right is a protected investment, it must be legally located in the host State. This determination must be made according to the rules of private international law, which determine the *situs* of the transaction in question.¹⁰⁵ The problem with the decisions in *Abaclat*, *Ambiente* and *Alemanni* is that they willfully disregard the applicable rule of private international law that the *situs* of a contract is ‘where it is properly recoverable or can be enforced ... In respect of securities which are “immobilised” or “immaterialised” by their deposit within the international clearing and depository system.’¹⁰⁶ For the tribunals, what matters is for whose benefit the funds are ultimately available; the so-called concept of continuous credit benefit – a controversial dictum taken from *Fedax*.

Apart from the disregard of the principle of territorial jurisdiction and the private international principle determining the *situs* of securities, Douglas mentions another problem with the way in which the Argentine bondholders’ tribunals treated the territoriality requirement. This is that the test of ‘continuous credit benefit’ cannot be applied as a general rule without leading to absurd results. If this test were to be used to establish the requisite territoriality,

Then the purchase of Argentine beef from an Argentine state-owned distributor in Italy would be capable of constituting an investment in Argentina, as would the purchase of a visa to travel to Argentina at its consulate in Rome, as would the purchase of a ticket to fly from Rome to Buenos Aires on Aerolíneas Argentinas.¹⁰⁷

The three tribunals attempted to mask this problematic proposition by relying on the previous case-law relating to the debt instruments. However, upon closer examination of the facts of the cases invoked, the far-reaching consequences drawn by the Argentine bondholders’ cases are not supported. Certainly, the cited cases do not support articulation of a general principle of ‘continuous credit benefit’ credited to them.

The tribunal in *ČSOB v Slovakia* held that, although the loan in question did not cause any transfer of funds from the claimant to Slovakia, it was sufficient that this loan was an instrument in the overarching project of privatisation of a bank which qualified as an investment – *a project to which the claimant was a party*. *Abaclat* and *Ambiente* attempted to align with the decision of *ČSOB*, stressing that the security entitlements cannot be viewed in isolation and make sense only when the economic transaction of bond issuance is viewed as a whole.¹⁰⁸

There are, however, two major factual differences between *ČSOB*, on the one hand, and the Argentine cases on the other. First, in the Argentine cases, the bondholders were only party to the secondary market purchase, not to the rest of the transactions, and second, there is no connection with a particular economic project in the country. The tribunals do not see this fact as having any bearing on the decision as long as the money

¹⁰⁵ *Id.*, 27.

¹⁰⁶ *Ibid.*, referring to Collins, L, ed, *Dicey, Morris and Collins on The Conflict of Laws* (Sweet and Maxwell, London, 2006).

¹⁰⁷ *Id.*, 28: this result was also pointed out by the dissenting arbitrator in *Ambiente*, Dissenting Opinion, paras 181 and 188.

¹⁰⁸ *Abaclat*, para 358; *Ambiente*, para 327.

is ultimately available to the host country.¹⁰⁹ We have already established that there is no legal principle which would dictate application of this criterion.

It is true that a territorial link in the form of services being carried out in the territory of the State or in the form of funds transferred into the host State was not held to be a necessary precondition for jurisdiction in other cases related to debt instruments. Some authors view this as supporting the position in *Fedax*, therefore justifying treatment of instruments traded on the secondary financial markets as investments.¹¹⁰ However, this does not mean that there are no other governing principles at play.

In *SGS v Pakistan*, the pre-shipment services were to be carried out outside Pakistan's territory by SGS' affiliates. Pakistan's arguments that the investment was not made within the territory of Pakistan were rejected. The Tribunal ruled that first, SGS' services gave rise to a 'claim to money' as covered under the BIT; second, Pakistan gave a public law concession to SGS, thus a 'right conferred by law' protected under the BIT; and third, SGS made certain payments directly in Pakistan.¹¹¹ One can clearly see the existence of a concession right governed by the host State's law, hence clearly subjected to the territorial jurisdiction of the host State.

Similarly, in *SGS v Philippines*, with the factual background largely resembling the Pakistani case, the Tribunal in addition stressed the purpose of the whole transaction as being an 'improvement of inspection and import services and associated customs revenue gathering [in the Philippines]'.¹¹² Yet, one should certainly not treat this as anything more than *obiter*.

The present author opines that the above-mentioned decisions cannot be held entirely applicable to the case of sovereign bonds. First, in *Fedax* as well as in the *SGS* cases, there was an underlying transaction to which the tribunals referred as being the overarching investment project and which was subjected to the host State's territorial jurisdiction. The promissory notes in *Fedax* were tied to the financing of a specific investment project and were governed by Venezuelan law; they were not abstract financial instruments providing funding of the general treasury. Similarly, *SGS* concession contracts were linked to particular commercial projects, even receiving the status of public law concessions. Bond contracts are not usually (and certainly not in the Argentine bondholders' cases) governed by the host State's law – the place of issuance is elsewhere – and the only link with the country is that the financing is transferred to the country's general treasury at the time of the issuance.

The particulars of the cases when applied to different circumstances should not be disregarded. Bond securities are difficult to locate in the territory of the host country.¹¹³ Professor Abi-Saab, in his dissenting opinion, stated that portfolio investments indeed cannot be excluded *per se*, but whether they fall within the ICSID jurisdiction must be ascertained in the circumstances of a particular case.¹¹⁴ The present author embraces this view. It behoves mentioning that the *Alemanni* tribunal dealt with the issue in a

¹⁰⁹ *Abaclat*, para 375; *Ambiente*, para 503: where the majority states that the specificity requirement cannot be found anywhere in the BIT.

¹¹⁰ Alexandrov, SA, "The 'Baby Boom' of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as 'Investors' under Investment Treaties", 6(3) *Journal of Foreign Investment & Trade* (2005) 387, 408–409; Szodruch, A, *supra* nt 36, 149.

¹¹¹ *SGS v Pakistan*, ICSID Case No ARB/01/13, Decision on Jurisdiction, 5 May 2004, paras 76, 134 and 135.

¹¹² *SGS v Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, paras 100–112.

¹¹³ Szodruch, *supra* nt 36, 144.

¹¹⁴ *Abaclat*, Dissenting Opinion, para 61.

somewhat different (one may say more appropriate), yet not entirely correct way. The tribunal stated that it is sufficient that the original asset held by underwriters was undoubtedly capable of falling within the *ratione materiae* jurisdiction. All other questions relating to the individual claimants were joined to the merits stage.¹¹⁵

III.1.1.2. Element of Investment Risk

Nor is the element of risk is treated unambiguously in the case law. Many tribunals stated that the risk required for investment should not be merely a commercial risk.¹¹⁶ The State's obligation to pay the principal and interest in bonds is fixed, unconditional and not tied to the success of any economic operation (unless one wishes to understand the functioning of the State as an economic operation, yet such broad analogies are seldom helpful in solving concrete cases). The only risk present is a risk of non-performance, a purely commercial risk that is inherent in any commercial transaction. Non-performance in this case is represented by a default. This risk is reflected in the price of sovereign lending in international financial markets. The *Fedax* tribunal got away with a brief statement that the existence of a dispute regarding repayment proves the existence of a risk. But the qualification of that risk is lacking, therefore it seems that for the *Fedax* tribunal, any risk suffices. If this is a material content of the risk criterion, then the criterion becomes superfluous, as it will be satisfied every time an investor brings a claim. Other tribunals found that risk is present in any long-term commercial transaction and this has been viewed as sufficient.¹¹⁷ The opinion advocated here is that the risk that is understood as necessary for an investment implies certain control of the investor over the success of the operation. In the case of bonds, the bondholder cannot influence whether the principal and interest is paid.

Several authors emphasised that the risk relevant for investment under Article 25 is a risk that is shared between the parties regarding a certain entrepreneurial project.¹¹⁸ This particular requirement shows that there exists a remarkable difference within the pool of portfolio debt investments. This difference explains the qualification needed where portfolio investments are concerned, as expressed in Professor Abi-Saab's dissenting opinion in *Abaclat*.¹¹⁹ Corporate bonds for instance show clear relation to the corporation in question. Similarly, the promissory notes scrutinised in *Fedax* could have been clearly documented as being connected with a particular project. On the other hand, sovereign bonds can only be connected with the host country's general treasury. Also Schreuer in his commentary states that the risk is usually shared.¹²⁰

The problem of bonds and security entitlements satisfying the criterion of operational risk led the dissenting arbitrator in *Ambiente* to reject even the original bonds issued by Argentina to the underwriters as protected investment.¹²¹ According to Torres Bernárdez, the majority's decision is circular, because it at once rejects a simple commercial

¹¹⁵ *Alemanni*, para 296–297.

¹¹⁶ *Joy Mining*, para 57.

¹¹⁷ *Bayindir v Pakistan*, ICSID Case No ARB/03/29, Decision on Jurisdiction, paras 134–136; *MHS*, para 112.

¹¹⁸ Waibel, *supra* nt 2, 237. See also Voss, J, "The Protection and Promotion of Foreign Direct Investments in Developing Countries: Interests, Interdependencies, Intricacies", 31 *International and Comparative Law Quarterly* (1982) 686.

¹¹⁹ *Abaclat*, Dissenting Opinion, para 61; Sacerdoti, G, "Bilateral Treaties and Multilateral Instruments on Investment Protection", 269 *Recueil des Cours* (1997) 251, 307.

¹²⁰ Schreuer, *supra* nt 71, 128.

¹²¹ *Ambiente*, Dissenting Opinion, paras 180–189.

transaction such as sale of Argentine cars as investment and at the same time approves bonds as bearing a different type of risk. He states that

By issuing and selling in accordance with contemporary international practice, the Argentine Republic created and made circulate in effect “financial products” of her own as a means of getting in the primary market liquidity for funding the State’s general budgetary needs. Once issued, Argentina received the money looked for by selling the said “product” to placement banks (or underwriters) who, in turn, resell generally the bonds to other banks or institutions ...¹²²

He concludes that Argentina was hence acting as a commercial actor and was not ‘hosting’ any investment, merely selling a financial product. Accordingly, the risk is merely commercial.¹²³ This clearly resonates with the above quoted Douglas’ conclusions on *Abaclat’s* treatment of the territoriality requirement. The results of applying what Torres Bernárdez calls the ‘erroneous public interest test’ are manifestly absurd and unreasonable, as they make every commercial dealing with a government an investment.¹²⁴

III.1.1.3. *Prima Facie Violation of the Treaty*

That the three tribunals started from the mistaken assumption about territoriality is manifest in their treatment of *prima facie* violations of the treaty, a requisite jurisdictional threshold. Particularly the *Ambiente* tribunal was seemingly at pains when reasoning in order to arrive at the affirmative conclusion. The majority admitted that the emergency legislation (the measure at hand) was not capable of altering the terms of legal rights and obligations arising from different laws and jurisdictions.¹²⁵ But then the majority started to mention the potential impact of the legislation on the ‘contractual equilibrium’ which might have been unilaterally modified. As this equilibrium has been modified by a sovereign act, *prima facie* jurisdiction is satisfied.¹²⁶ One is left to wonder how the contractual equilibrium might have been *legally* modified by the sovereign act in question, when legal rights and obligations as well as their regulatory framework remained intact.

The fact that there was an exercise of sovereign power is beyond dispute. However, the majority cannot answer how the link between this exercise and any modification of the contractual equilibrium came into existence, even assuming the facts are proved to be correct in the merits phase. This reasoning, when applied to an analogous situation between two corporate equals, says that when there is a contract between the two corporations, and the board of directors issues a resolution to the company’s executives

¹²² *Id*, para 183.

¹²³ He refers to *Romak SA v The Republic of Uzbekistan*, UNCITRAL, Award, 26 November 2009, paras 229–230: where the tribunal stated

All economic activity entails a certain degree of risk. As such, all contracts – including contracts that do not constitute an investment – carry the risk of non-performance. However, this kind of risk is pure commercial, counterparty risk, or, otherwise stated, the risk of doing business generally. It is therefore not an element that is useful for the purpose of distinguishing an investment and a commercial transaction. An ‘investment risk’ entails a different kind of *alea*, a situation in which an investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations.

¹²⁴ *Ambiente*, Dissenting Opinion, para 181.

¹²⁵ *Ambiente*, para 547.

¹²⁶ *Id*, para 548.

ordering them that the contract should not be performed, this very decision may constitute a violation of the contract, regardless of whether the contract has in fact been performed.¹²⁷ The fact that the decision is by a sovereign changes nothing and nor does the treaty/contract distinction.¹²⁸

To sum up, sovereign bonds and the security entitlements issued and circulated on their basis (at least those at issue in the Argentine bondholders' cases) suffer from conditions which make them legally unfit for satisfying two critical jurisdictional requirements, namely being invested 'in the territory of the host State' and exhibiting an element of 'investment risk.' This, in turn, also makes the *prima facie* violation difficult to establish.

III.2. Sovereign Bonds under IIAs

To answer completely whether sovereign debt restructuring issues can come under the scrutiny of an investment tribunal, it must be also determined if sovereign debt instruments are covered by a particular IIA. It is true that only in some cases of sovereign bonds, the problems discussed above will be rectified. The most widely used definition for IIAs is a broad asset-based open-ended definition that uses the terms along the lines of 'investment means every kind of asset', combined with an illustrative list.¹²⁹ Sovereign bonds are intangible assets that are characterised as claims to money.¹³⁰ They are in forms of debt as opposed to equity. A traditional open-ended asset-based definition without further qualifications is apt to include sovereign bond and security entitlements, however assuming that the territorial link and the element of risk are satisfied.¹³¹ Some IIAs provide for bonds explicitly in their illustrative lists, but provisions in various BITs differ regarding the treatment of debt instruments as investments and also regarding the coverage of a sovereign debt.

Some treaties, particularly US BITs, subject the types of assets in the illustrative list to typical characteristics of an investment, namely commitment of capital or resources, expectation of gain or profit and assumption of risk.¹³² Specifically with respect to bonds, debentures, other debt instruments and loans, US Model BIT 2012 contains an explanatory footnote stating that

¹²⁷ That this fact might have implications on the obligation of good faith is another, but unrelated, matter.

¹²⁸ *Alemanni*, para 300: The tribunal embraced in its cursory analysis the circular view that through a combination of governmental policy and legislative action – thus quintessentially sovereign acts – the Republic of Argentina went beyond a mere failure to pay the sums contractually due to its creditors, and that this happened under circumstances which lay outside the normal legal remedies and controls that exist for the benefit of creditors in the case of private bankruptcy.

Again, the question of how the contractual rights can be *prima facie* affected remains unanswered. States exercise sovereign power in multifarious ways. However one cannot conclude from that that the exercise has legal effects outside of the State's territory, even if that was intended.

¹²⁹ Vandevelde, K, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press, Oxford, 2010) 125; See eg., Article 1(b), *Netherlands-Czech Republic BIT* (1991)

the term "investments" shall comprise every kind of asset invested either directly or through an investor of a third State and more particularly, though not exclusively ... iii. title to money and other assets and to any performance having an economic value.

¹³⁰ Douglas, *supra* nt 74, 180. Many BITs also state 'bonds' in their lists.

¹³¹ This may be arguable in case of bonds such were the Greek Eurobonds governed by Greek law.

¹³² Article 1, definition of 'investment', *US Model Bilateral Investment Treaty 2012*, at <italaw.com/sites/default/files/archive/ita1028.pdf> (accessed 9 April 2015).

[s]ome forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.¹³³

Although this explanatory note does not really explain much, it may be debated whether sovereign bonds satisfy characteristics of an investment, namely the assumption of risk under the US Model BIT. Some US BITs also require claims to money for being covered to be associated with an investment in its own right.¹³⁴

Other IIAs subject protection of a particular claim to money to associations with an economic activity and even certain duration. Thus, the Czech Republic-Denmark BIT protects investments as ‘every kind of assets invested in the territory of the other Contracting Party in connection with economic activities and for the purpose of establishing lasting economic relations.’¹³⁵

NAFTA Article 1139 provides for an exhaustive list of types of assets. It covers only enterprise-based debts with qualifying original maturity of at least three years, which particularly exclude interests in State-enterprises. It also covers

interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as (i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise[.]

In addition NAFTA contains carve outs relating to commercial transactions.¹³⁶ Sovereign bonds thus cannot qualify as an investment under NAFTA.

The India-Mexico BIT uses similar language to NAFTA Article 1139 and thus excludes debt instruments relating to the sovereign or to State enterprises.¹³⁷ Several other treaties use a similar enterprise-based definition of investment as far as debt instruments are concerned.¹³⁸ Explicit exclusion of sovereign debt instruments is less common, but can be found.¹³⁹

¹³³ *Ibid.*

¹³⁴ Article 1(a)(iii), *US-Argentina BIT* (1991): ‘a claim to money or a claim to performance having economic value and directly related to an investment’; Similarly see Article 1(6)(c), Energy Charter Secretariat, *Energy Charter Treaty* at <encharter.org/fileadmin/user_upload/document/EN.pdf> (accessed 9 May 2005).

¹³⁵ Article 1(1), *Czech Republic-Denmark BIT* (1991–2009).

¹³⁶ Chapter 11, Article 1139, *North American Free Trade Agreement* (NAFTA):

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money.

¹³⁷ Article 1(7), *Mexico-India BIT* (2007).

¹³⁸ Article 1(d)(2), *US-Bahrain BIT* (1999).

¹³⁹ See eg., Article 1(aa), *Croatia-Azerbaijan BIT* (2007): ‘investment does not mean: a) bonds, debentures or other debt instruments to, or a debt security issued by, a Contracting Party or a State enterprise of a Contracting Party’; see also Article 1(a)(iii), *Japan-Colombia BIT* (2011).

Portfolio investments in general are sometimes excluded from the treaty coverage altogether. Denmark-Poland BIT provides that the term ‘investment shall refer to all investments in companies ... and giving the investor the possibility of exercising significant influence on the management of the company concerned.’¹⁴⁰

As noted above, many IIAs include the requirement that an investment is made in the territory of the other State. The three Argentine bondholders’ cases seem to follow *Fedax’s* debateable and legally incorrect ‘continuous credit benefit theory’ instead of having recourse to the established principles of private international law.¹⁴¹ Professor Abi-Saab wrote in his dissenting opinion that fulfilment of the territorial requirement is not present as security entitlements are ‘free-standing and totally unhinged’.¹⁴²

Last but not least, certain IIAs provide for a specific regime for sovereign debt restructuring altogether.¹⁴³ Those clauses often appear in recent IIAs, FTAs in particular, in the form of treaty annexes. The special regime usually limits the causes of action available to foreign investors in disputes relating to sovereign debt, namely to national treatment and MFN treatment. The regime also distinguishes between ‘negotiated restructuring’, where a certain percentage of creditors participate and non-negotiated one, where investor is subject to a cooling-off period.¹⁴⁴ The latter distinction is not always present.¹⁴⁵

To sum up, whether sovereign bonds and related security entitlements qualify as a protected investment under an IIA depends largely on the treaty applicable. Any generalisations beyond those mentioned above are difficult to draw. Nevertheless, it is submitted that fulfilment of the territorial requirement present in a large number of IIAs should be subject to careful scrutiny by arbitral tribunals in cases of sovereign bonds. We add that even in the absence of an explicit territoriality requirement in the treaty, this condition is always applicable, as BITs cannot protect investments, which are not located within the territory of their contracting parties.

IV. Policy Issues Arising from the Use of Investment Treaty Arbitration for Sovereign Debt Disputes

Apart from the legal problems, there are several policy and institutional concerns that arise when discussing the application of investment treaty arbitration to sovereign defaults disputes. This final part bridges the first two parts of the paper and discusses the policy questions that are implicated by investment arbitration on sovereign bonds, both for the law of sovereign defaults and for the international investment regime.

It is important to stress that use of investment treaty arbitration for resolving sovereign debt disputes must be assessed within the broader framework of the sovereign insolvency

¹⁴⁰ Article 1(1)(b), *Denmark-Poland BIT* (1990); *Turkey Model BIT*.

¹⁴¹ There are other cases following *Fedax’s* reasoning, eg., *Inmaris Perestroika and ors v Ukraine*, Decision on Jurisdiction, ICSID Case No ARB/08/8, 8 March 2010, para 124; For an opposite ruling see, *Gruslin v Malaysia*, Award, ICSID Case No ARB/99/3, 27 November 2000, para 25.7; in the NAFTA Context: *Canadian Cattlemen v United States*, Award on jurisdiction, UNCITRAL, IIC 316 (2008), 28 January 2008, para 144.

¹⁴² *Abaclat*, Dissenting Opinion, para 108.

¹⁴³ Annex G, *United States-Uruguay BIT* (2005); Annex 10-A, DR-CAFTA, *Central America-Dominican Republic-United States FTA* (2004); Annex 10-B, *Chile-United States FTA* (2003); Chapter 10, Annex 8, *China-Peru FTA* (1994).

¹⁴⁴ UNCTAD, *Sovereign Debt Restructuring*, *supra* nt 34, 7–8; Article 10.1 and 10.8, *Peru-Singapore FTA* (2009).

¹⁴⁵ Annex 10-A, DR-CAFTA, *Central America-Dominican Republic-United States FTA* (2004).

debate. Investment arbitration can be, however, considered as only one of the tools possibly used in this field. To paraphrase the ILA Study group, the key question is whether sovereign defaults should continue to be exclusively dealt with by a voluntary agreement between the debtor State and creditors or if a backdrop statutory formal insolvency regime is needed, and also whether the rights of creditors should be strengthened.¹⁴⁶ Investment arbitration cannot, for the time being, be utilised as a general international insolvency mechanism, but undoubtedly can contribute to reinforcing creditors' rights. It should be noted that this part does not claim to be conclusive on the issues discussed and rather attempts to emphasise the major policy concerns.

Under the current state of law, investment arbitration is at best to be utilised as another forum for holdout creditors where they can pursue their claims for full repayment. The question necessarily arising in this regard is whether it is desirable to reinforce creditors' rights in this manner and thus enhance the power of holdout creditors. Affirmative answer to this question presupposes positive effects of holdouts and also insufficient creditors' protection under the current regime. In contradistinction, a negative answer is based on the premise that holdouts are disruptive and prevent orderly sovereign debt workouts. However, a disagreement exists on the effects of augmentation of current creditors' rights. One view is that the reinforcement is necessary as a check on irresponsible State policies and sovereign over-borrowing. Without improving current creditors' remedies, States are induced into a moral hazard.¹⁴⁷ Another position deems this unnecessary as it can lead into a hostage situation, when minority creditors that bought sovereign debt on discounted prices may exploit good faith creditors willing to go with restructuring.¹⁴⁸

This paper claims that previous experience with sovereign defaults shows that motivation to regain the access to markets for further financing and the credibility loss connected with opportunistic defaults States are pushed to settle with their creditors on terms as favourable within their limits. However, if we presume that it is desirable to increase the enforceability of creditors' rights against sovereign States, what can be answered, nevertheless, is whether investment arbitration is actually apt to enhance creditors' protection and whether this dispute settlement mechanism is suitable for addressing the issue.

IV.1. Suitability of Investment Arbitration for Solving Sovereign Debt Disputes

Working on the presumption of desirability of augmenting protection of creditors' rights, this sub-chapter highlights main advantages and disadvantages of the utilisation of investment arbitration in the field.

IV.1.1. Advantages – Enforcement Prospect and Bargaining Chip

The main advantages pertain to the perceived improvement in enforcement combined with traditional advantages of arbitration, such as neutrality, efficiency and the possibility of choosing arbitrators.¹⁴⁹ Additionally, it is claimed that as investment treaty arbitration decreases sovereign risk, it thus allows the debtor countries to achieve better credit

¹⁴⁶ ILA, *Sovereign Insolvency*, *supra* nt 5, 5.

¹⁴⁷ ILA, *Sovereign Insolvency*, *supra* nt 5, 45; see also Fisch and Gentile, *supra* nt 37.

¹⁴⁸ ILA, *Sovereign Insolvency*, *supra* nt 5, 46; see also, Buchheit, LC and Gulati, M, "Sovereign Bonds and Collective Will", 51(4) *Emory Law Journal* (2002) 1317.

¹⁴⁹ Halverson Cross 2006, *supra* nt 33, 339–341.

terms.¹⁵⁰ This can be, however, achieved rather in a long-term, once investment arbitration is tested over time.¹⁵¹

As far as enforcement is concerned, in the case of sovereign bonds, the creditor has always an unconditional claim against sovereign once the debtor State defaults under the bond instrument. Some authors therefore argue that as this claim against sovereign

is based on an unconditional promise to pay in the debt instrument and is normally capable of objective determination (did the sovereign pay or not?), there is little advantage to the lenders in adding to the claim against the sovereign for breach of the contractual payment obligation any additional claims against the same respondent for breach of international law obligations set out in an investment treaty.¹⁵²

The same author adds that since the sovereign immunity from execution remains applicable, the advantage of better enforcement of investment awards might be more apparent than real.¹⁵³

Domestic litigation practice over sovereign debt shows that the current enforcement mechanisms leave the debtor State in a much stronger position.¹⁵⁴ The enforcement argument is based partially on the empirical observation that investment awards, ICSID awards in particular, enjoy a high level of voluntary compliance.¹⁵⁵ Still, ICSID Awards should only be enforced in the Member States as final judgments of the domestic courts. Nevertheless, the case of Argentina shows that the results are not that straightforward. This conclusion calls for further qualification, as both ICSID Convention and New York Convention leave still considerable space for refusing enforcement or for non-execution.¹⁵⁶ The general lack of attachable assets abroad further qualifies the enforcement advantage. Moreover, as of the time of writing,¹⁵⁷ investment arbitration has recorded only three decisions on the subject pending the determination of merits. How the matter will be addressed on the merits remains to be seen, as well as how the perceived enforcement advantages will prove to be effective in collecting the awards. Be that as it may, what is viewed to be yet another contribution of investment arbitration into the context of sovereign defaults is the use of the method or the resulting award as a bargaining chip.¹⁵⁸ Incorporation of ICSID into the World Bank group further reinforces the bargaining leverage in favour of compliance with ICSID awards.¹⁵⁹

¹⁵⁰ Wälde, *supra* nt 9, 404; Waibel, *supra* nt 2, 316–318; Halverson Cross, *supra* nt 33. Another view holds that unavailability of investment arbitration for sovereign debt restructuring is unlikely to have negative effects on investors' confidence and States' ability to borrow on international financial markets: UNCTAD, *Sovereign Debt Restructuring*, *supra* nt 34, 8.

¹⁵¹ Waibel, *supra* nt 2, 316–317.

¹⁵² Kantor, M, "Are/should sovereign loans/debt be covered by BITs?", 2(1) *Transnational Dispute Management* (2005).

¹⁵³ *Ibid.*

¹⁵⁴ Szodruich, *supra* nt 36, 148.

¹⁵⁵ Hatchondo *et al*, *supra* nt 14, 184; Waibel, *supra* nt, 2, 211.

¹⁵⁶ Article 55, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524, (ICSID Convention); Article V, United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) 330 UNTS 3 (New York Convention).

¹⁵⁷ (10 March 2015).

¹⁵⁸ Wälde, *supra* nt 9, 421; Waibel *supra* nt 2, 212.

¹⁵⁹ Halverson Cross, *supra* nt 33, 341.

IV.1.2. Disadvantages – Nationality, Predictability, Ad Hocism and Lack of Preventive Tools

It is submitted here that under the current state of law, the cons of investment arbitration in sovereign bonds area outweigh the advantages.

A State's BITs coverage is limited and, as a result, investment claims can be pursued only by the nationals of the other contracting parties. Nationality of bondholders is by no means limited to the pool of nationals protected under the host States' BITs. Taking into account the pace at which the bond security entitlements can be traded on the secondary market, there seems to be no strong rationale as to the granting of IIA-covered holders priority over nationals not protected by the BITs. This would run counter to the well-established principle of equal treatment of creditors in debt restructuring.¹⁶⁰

Coverage of investment treaties for sovereign debts is incidental to the nationality of bondholders. This has two consequences: it creates arbitrary inequality between different bondholders and it encourages abusive treaty shopping.¹⁶¹ If investment arbitration proves to be a more efficient means of holdout litigation, then certain bondholders holding exactly the same bond instruments of the same issue, as others will effectively own bonds with higher legal protection. This should have impact on the price of the bonds on the financial market. Nevertheless, the incidence of bondholders' nationality cannot be anyhow controlled by the debtor State at the time of the issue. Additionally, bondholders of the host State's nationality and the entire group of official creditors will be excluded.¹⁶² The conclusion reached here is that this creates legal uncertainty for the debtor State and undermines the contractual bargain agreed on the issuance. Additionally, the intervention of investment tribunals risk upsetting contractual equilibrium achieved during the bond issuance, and thus has further negative repercussions in the financial markets.¹⁶³

Moreover, as was shown in the part dealing with security entitlements as investment under ICSID, it is argued that bonds can rather qualify as an investment on the issuance but the same cannot be said about the secondary market purchases, although *Abaclat*, *Ambiente* and *Alemanni* have decided otherwise. Should future tribunals follow the dissenters, this can create discrimination between institutional creditors, ie bond underwriters, and retail bondholders buying the security entitlements on the secondary market. It is submitted that such differential treatment can be justified as the two are not in the same position and have different roles in the bond issuance process.

The second area of concern is that current regime of investment arbitration operates on an *ad hoc* basis, even under the aegis of the World Bank in the case of ICSID. This feature can further decrease predictability of the outcomes.¹⁶⁴ Should the investment arbitration be institutionalised in a standing body or equipped with some sort of standing appellate mechanism (the idea politically unfeasible), the predictability necessary in case of sovereign defaults would be secured to a larger extent. Certainty and predictability are important for functioning international capital markets and both regimes on foreign investments and sovereign defaults should take full account of it. As stated before,

¹⁶⁰ Szodruch, *supra* nt 36, 150.

¹⁶¹ Reinisch, A, "State Insolvency – Consequences and Obligations under Investment Treaties – Comment" in Hoffmann, R and Tams, CJ, eds, *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos Publishers, Baden-Baden, 2007) 175–176.

¹⁶² *Id*, 177.

¹⁶³ Waibel, *supra* nt 2, 316.

¹⁶⁴ Reinisch, *supra* nt 161, 177.

investment arbitration can deal only with the issue of holdouts. Therefore, certain linkage and institutional cooperation with other actors in the sovereign default field, ie with multilateral institutions such as IMF, IBRD, official lenders and other private players, would be necessary to address other issues (distressed financing, stay of proceedings, priority of creditors and the like). As the institutional background of *ad hoc* investment tribunals is weak, it is very probable that costs and complexity of restructuring, taking place in still largely a political realm, would be increased.¹⁶⁵ This leads to the last drawback of the regime noted here, namely the lack of preventive tools.

Investment arbitration is a mechanism oriented exclusively to the past, ie to correct and remedy past grievances. The international system for solving sovereign debt crises should primarily be concerned with the tools for preventing sovereign defaults. Even if sufficiently grounded in a firm institutional framework and after elimination of arbitrary distinctions based on nationality, investment arbitration should be used merely as one of the tools available for dealing with sovereign debt disputes. Investment arbitration is by no means a panacea for States' debt crises.¹⁶⁶

Some authors even point out that the purposes of BITs and sovereign insolvency regime, whatever its current informal state, do not match and even seem to run against each other. BITs are directed primarily to protection of foreign investment in order to balance the State's regulatory power and political risk, whereas sovereign insolvency regimes go in the direction of protecting the State from its creditors. As the State cannot be liquidated, the creditors are required to suffer certain haircuts in order to keep a balance towards the State's functions and the welfare of its citizens.¹⁶⁷ As ICSID has a selective jurisdiction as far as nationality is concerned and also excludes certain types of creditors, it cannot serve as a general forum for State insolvency. Mechanisms such as SDRM require jurisdiction over all the debtor State's creditors whereby guaranteeing equal treatment of them.¹⁶⁸

Finally, should States prefer to exclude hearing of sovereign bond disputes under ICSID, they have a readily available option to exempt certain types of dispute from ICSID coverage by a declaration under Article 25(4). So far no State has used the option.¹⁶⁹

V. Conclusion

The article highlighted the main areas of concern when investment arbitration is used as a dispute settlement method for solving sovereign default differences. It has been demonstrated that the field of State insolvency is an area where a wider set of tools is necessary to address complex issues arising therefrom. The view advocated here was that

¹⁶⁵ Waibel, *supra* nt, 2, 318.

¹⁶⁶ The inappropriateness of adjudication for dealing with sovereign debt crises has been pointed out by Lee Buchheit. Buchheit, *supra* nt 4.

¹⁶⁷ Gnam, P, "State Insolvency – Consequences and Obligations under Investment Treaties, Comment" in Hoffmann, R and Tams, CJ, eds, *The International Convention for the Settlement of Investment Disputes (ICSID): Taking Stock after 40 Years* (Nomos Publishers, Baden-Baden, 2007), 169–170.

¹⁶⁸ Reinisch, *supra* nt 161, 177.

¹⁶⁹ International Centre for the Settlement of Investment Disputes, REPORT: *Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, in Contracting States and Measures Taken by Them for the Purposes of the Convention*, July 2012, at <icsid.worldbank.org/apps/ICSIDWEB/icsidocs/Documents/ICSID%208%20-%20latest%20-%20Nov%2010%202014.pdf> (accessed 9 April 2015).

investment arbitration can at best serve as one of the forums available for holdout litigation.

In the area of international financial law there is clearly a lack of formal regimes for State insolvency. Even though attempts have been made, they were subsequently rejected. Any further attempt to introduce arguably a bold global institutional framework based on a multilateral treaty is not likely to be successful in the near future. This is partly due to the fact that the current, to a large extent contractual, approach connected with consensual negotiated debt restructuring in case of a default, has not proven to be unsustainable or unworkable. Such problems as an international stay of enforcement pending restructuring, lack of priority rules or provision for emergency private distressed financing remain unresolved.

Two aspects of sovereign risk in international regimes on sovereign defaults have not been entirely addressed by the current devices – the issue of sovereign immunity from execution and connected enforcement problems and the issue of lack of bankruptcy-like features in the international realm. It has been argued that investment arbitration as another avenue for holdout adjudication may partly alleviate the former aspect. It has been argued that should this forum be favourable to creditors without concurrent adjustments towards formal bankruptcy features, the balance between creditors' and debtors' rights can swing towards a higher protection of the former and thus impede future orderly restructuring. Holdout litigations based on *pari passu* clauses have proved, however, that they can lead to highly discomfoting results, and even throw a restructuring country back to a default. Reasonable debt workouts should take full account of State's good faith efforts to remedy the situation and its real economic and financial capabilities in order to be held to its debt obligations. Investment arbitration is an *ad hoc* mechanism dealing with isolated claims adjudicating past grievances allegedly committed against the claimants. It cannot be expected that such a mechanism could be properly equipped to see and address a complex picture of intertwined economic and financial realities involved in sovereign defaults.

It has also been argued throughout the article that the legal basis for upholding jurisdiction over sovereign bonds under applicable international treaties is not free from objections. Under the current state of law, the problem of nationality requirements under IIAs creates unjustified discrimination between various bondholders and from a policy perspective is not tenable.

Professor Abi-Saab in his dissenting opinion called for caution when admitting jurisdiction in investment arbitration cases and warned from ever-extending jurisdiction of investment tribunals. This can induce a backlash against the system that might be already visible. However, if sovereign debt instruments will prove to be another field occupied by investment arbitration, States might need to be more cautious when they offer solutions in a debt restructuring process to their creditors. Attempts to use investment arbitration are not peculiar to the Argentine crisis, but are more pressing with the current Eurozone crisis of Greek debt restructuring.¹⁷⁰ Investment arbitration should, nevertheless, be used for sovereign debt disputes only in conjunction with appropriate

¹⁷⁰ See Karadelis, K, "Greece: a new Argentina?", 7(4) *Global Arbitration Review* (2012) at <globalarbitrationreview.com/journal/article/30603/Greece-new-argentina/> (accessed 9 April 2015); Network for Justice in Global Investment, Stirk, D, *Proposed Greek Collective Action Clauses Law May Trigger Its International Law Obligations*, at <justinvestment.org/2012/02/proposed-greek-collective-action-clauses-law-may-trigger-its-international-law-obligations/> (accessed 9 May 2015); Glinavos, *supra* nt 68.

institutional adjustments in the field of both investment law and international insolvency regimes.

In the long run, the availability of treaty arbitration in area of debt restructuring could help this procedure to reach a mutually beneficial result to a larger extent for the State and the creditors. The interest of both sides must be taken in to account. Investment arbitration should not serve as an obstacle by the use of which a minority of creditors might block a majority consensual restructuring.

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Drafting and Interpreting International Investment Agreements from a Sustainable Development Perspective

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Keywords

INVESTMENT TREATY ARBITRATION; INVESTMENT TREATY INTERPRETATION; SUSTAINABLE DEVELOPMENT; INVESTMENT POLICY MAKING; SYSTEMIC TREATY INTERPRETATION

Abstract

The proliferation of International Investment Agreements (IIAs) and treaty-based investment arbitration has raised concerns over the extent to which IIAs are actually fair and are able to balance the interests of foreign investors and States. The strong protections afforded by IIAs to investors may restrict the host State's ability to regulate for the public interest and potentially allow newly adopted public policies to be subject to compensation.

Several economic transactions that have qualified as investments for treaty protection have fallen short of contributing to the host State's sustainable development. They have not added to the generation of employment and growth, the transfer of new technologies and knowledge or the strengthening of infrastructure. Nor have many of these economic transactions contributed to the home country's development. Moreover, regulatory measures adopted with the aim of fostering sustainable development (ie environmental measures) have been successfully challenged by investors. In some cases tribunals have interpreted these measures as creeping or indirect expropriations, therefore requiring compensation.

Both the lack of consideration for the host State's interests under international investment law and the limitation to the State's policy space have been perceived as having negative implications for the development of the country, and in particular for the adoption of sustainable policies. Though little empirical evidence exists, it has been suggested that investment arbitration is a threat to the adoption of public policy regulations and may even have a 'chilling effect' on them.

A possible way forward is the negotiation of a new generation of investment treaties, as well as the renegotiation and revision of the existing ones. These changes are needed in order to balance the interests of States and investors and to incorporate innovative features in light of the necessary policy space that States require in order to foster sustainable development through the application of dynamic social and environmental norms and regulations. Another alternative is the adoption of interpretative approaches, which ultimately foster sustainable development goals. The preferred options are the contextual and dynamic interpretation of the intention of the contracting States, as well as the systemic integration of international rules and norms into investor-State disputes.

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I. Introduction

The international investment regime is an emerging and rapidly evolving field of international law.¹ It is essentially constituted of a large number of International Investment Agreements (IIAs) negotiated over the last five decades. IIAs tend to resemble each other in their structure and content. They also pursue the same objective of protecting foreign investments and investors from the illegal actions of host States through the establishment of certain rules and standards of treatment.

One of the most important features of investment treaties is that they provide foreign investors access to international arbitration for the settlement of investment disputes. This mechanism has led to an explosion of international investor-State dispute settlement (ISDS) cases. Indeed, the total cumulative number of known treaty-based cases filed by the end of 2013 surpassed 560.²

The proliferation of cases has given rise to several concerns. The increasing number of proceedings not only runs the risk of developing inconsistencies and incoherence in international investment law regime,³ but it also creates the perception that IIAs are devices that can immunise investors from the compliance of *bona fide* social and environmental laws and regulations.⁴ Indeed, foreign investors have used the protection afforded by IIAs to challenge newly enforced public policy measures, requesting the suspension of the measure, or compensation for the losses suffered.⁵

Moreover, as some claim, investor-State arbitration may have a ‘chilling effect’ on the States’ legitimate public policy initiatives and regulatory actions.⁶ States may become reluctant to adopt measures for environmental protection, safety and public welfare if they feel threatened by potential claims from foreign investors. All of this has raised concerns that States’ efforts to pursue sustainable development (SD) objectives may be undermined by the strong treaty protections afforded to foreign investors. This might

¹ Salacuse, JW, *The Law of Investment Treaties* (Oxford University Press, Oxford, 2010), 6–16.

² United Nations Conference on Trade and Development (UNCTAD), REPORT: *Recent Developments in Investor-State Dispute Settlement*, IIA Issues Note, 1 April 2014, at <unctad.org/en/publicationslibrary/webdiaepcb2014d3_en.pdf> (accessed 17 April 2015), 1.

³ See generally Dolzer, R and Schreuer, C, *Principles of International Investment Law* (Oxford University Press, Oxford, 2008), 35–37.

⁴ Ruggie, JG, *Stabilization Clauses and Human Rights*, A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, 11 March 2008, at <cdm16064.contentdm.oclc.org/cdm/ref/collection/p266901coll4/id/2486> (accessed 17 April 2015).

⁵ See *Ethyl Corporation v The Government of Canada*, NAFTA/UNCITRAL, Preliminary Tribunal Award on Jurisdiction, 24 June 1998; *Methanex Corporation v United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *Dow AgroSciences LLC v The Government of Canada*, NAFTA/UNCITRAL, Notice of Arbitration, 31 March 2009; *FTR Holdings SA, Philip Morris Products SA and Abal Hermanos SA (Switzerland) v Oriental Republic of Uruguay*, ICSID case No ARB/10/7, Request for Arbitration, 19 February 2010; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v The Federal Republic of Germany*, ICSID Case No ARB/09/6, Award, 11 March 2011; *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Nuclear Energy GmbH, Kernkraftwerk Brunsbüttel GmbH und Co oHG, Kernkraftwerk Krümmel GmbH und Co oHG v The Federal Republic of Germany*, ICSID Case No ARB/12/12; *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12.

⁶ For further discussion on this issue, Moloo, R and Jacinto, J, “Environmental and Health Regulation: Assessing Liability Under Investment Treaties”, 29(1) *Berkeley Journal of International Law* (2011) 1; See also Paparinskis, M, “Regulatory Expropriation and Sustainable Development” in Gehring, MW, Cordonnier-Segger, MC and Newcombe, A, eds, *Sustainable Development In International Investment Law* (Kluwer Law International, Alphen aan den Rijn, 2011), at <ssrn.com/abstract=1698192> (accessed 17 April 2015).

threaten the legitimacy of the investor-State dispute settlement system, to the detriment of States and foreign investors. Within this context, the purpose of this paper is to contribute some reflections on how to achieve the necessary protections of foreign investors while promoting States' sustainable development through investment agreements.⁷

To begin with, this paper makes an assessment of the current framework of investment treaty provisions from a sustainable development perspective. With this aim, the paper uses several examples, including the definition of investment, investor and expropriation. It suggests that existing treaty provisions and the interpretation given to them by arbitral tribunals fall short of assisting – and sometimes even constrain – contracting States in pursuing SD outcomes.

Second, this paper examines recent investment policy-making undertaken with the aim of fostering SD-friendly IIA clauses. In so doing, it will provide an initial review of recent State practice regarding the adoption of SD treaty provisions. Likewise, it will mention the policy options offered in UNCTAD's *Investment Policy Framework for Sustainable Development* (IPFSD).⁸

Finally, this paper argues that sustainable development objectives can also be incorporated in international investment law through the application of a 'SD-oriented interpretation' within the context of investor-State dispute settlement (ISDS) cases. The judicial function of investment tribunals and the interpretative techniques rooted in customary international law offer ample justifications and entry points for the adoption of such an interpretative approach.

II. The Current Framework of International Investment Law and Sustainable Development

At present, more than 3,200 IIAs have been concluded with the purpose of promoting and protecting foreign investments.⁹ Over time, a series of concerns have emerged regarding today's multi-faceted and multi-layered network of treaties.¹⁰

First, investment treaty provisions tend to be drafted in very general terms, usually lacking specificity and clarity. This has provided tribunals with broad interpretative discretion, allowing them to take 'expansionary views' on the scope of application and the meaning of these provisions. Through that, tribunals have contributed to a lack of predictability and certainty as well as a certain fragmentation of international investment law. Second, IIAs contain little to no straightforward references of the parties' intention to foster sustainable development goals. In some IIAs, these references are expressed vaguely or in an indirect manner. This combination of broad interpretations by arbitral

⁷ While SD is the overall objective and theme of this paper, an in-depth discussion on the content and meaning of sustainable development is beyond its scope. Instead, the paper uses SD as embracing the three pillars of economic development, social equity and environmental protection, as set out in the United Nations Report of the World Commission on Environment and Development (WCED) in 1987, also known as the Brundtland Report; UN General Assembly, *Report of the World Commission on Environment and Development*, 11 December 1987, (96th plenary meeting) A/RES/42/187.

⁸ United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Framework for Sustainable Development* (July 2012) at <unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf> (accessed 6 May 2015) (IPFSD).

⁹ UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies*, 2012, at <unctad.org/en/PublicationsLibrary/wir2012_embargoed_en.pdf> (accessed 17 April 2015), 84.

¹⁰ For a full discussion of concerns see, for instance, UNCTAD, *World Investment Report 2014: Investing in the SDGs: An Action Plan*, at <unctad.org/en/PublicationsLibrary/wir2014_en.pdf> (accessed 17 April 2015), Chapter III.B.

tribunals and weak references to SD, together with strong substantive and procedural protections given to foreign investors, has resulted in the concern that IIAs can be detrimental to countries' broader SD goals.

In the following section, this paper reviews a few examples of where tribunals have adopted wide, inconsistent and even contradictory interpretations to the requirements *ratione personae*, *materiae* and, in terms of procedural aspects, disregarded what States had intended to see applied in ISDS cases. Arbitral tribunals have upheld jurisdiction over disputes that States might never have envisaged as being the subject of arbitration, or found violations of provisions for regulatory actions long perceived to be outside the realm of IIAs. In many instances, this has touched upon issues of great relevance for countries' SD objectives.

II.1. Broad Interpretation of the Definition of Investment

One of the most important IIA provisions is the clause setting out the scope and definition of investment.

Through this provision, signatory countries determine which investments benefit from the treaty's protection. IIA treaty practice varies, with the two most important choices embraced by States being the asset-based definition and the enterprise-based definition of investment. Both, as open-ended approaches, have favoured a broad definition of investment.¹¹

One recurring issue relates to the question whether IIAs should only protect – and hence attract – responsible or sustainable development enhancing investment (eg. investments that generate employment, transfer new technologies, strengthen infrastructure or build knowledge). Alternatively, should IIAs be a tool to protect (or attract) any kind of foreign capital and at any cost for the host State?

The open-ended approach to treaty drafting and the extensive interpretations adopted by arbitral tribunals have given rise to developments that may have an adverse effect on countries' sustainable development objectives. First, treaty protection has been extended to transactions that have fallen far short of contributing to the host State's economic growth. Second, treaty protection has been granted to investments that have disregarded the host State's national laws and regulations, resulting in a situation where illegal investments have benefitted from treaty protection. Both situations will be further explained.

II.1.1. Does any Transaction Qualify as Investment?

In theory, States conclude investment treaties to attract foreign direct investments (FDI), which is a potential vehicle for the transfer of technology and can contribute relatively more to growth than domestic investment.¹² However, not every economic transaction may be qualified as an investment, nor should be protected by investment treaties.

Many economic transactions fall far short of stimulating broad-based economic growth or generating the necessary linkages required to make FDI work for sustainable economic development.¹³ In fact, simple sales transactions, purchases of goods and short-

¹¹ UNCTAD, REPORT: *Scope and Definition: A sequel, Series on Issues in International Investment Agreements II*, 2011, at <unctad.org/en/Docs/diaeia20102_en.pdf> (accessed 17 April 2015), 21.

¹² Borensztein, E, de Gregorio, J and Lee, J-W, "How does foreign direct investment affect economic growth?", 45 *Journal of International Economics* (1998) 115.

¹³ Gallagher, K and Chudnovsky, D, eds, *Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America* (Anthem Press, London, 2010).

term commercial credits do not contribute to development of the host State since they do not help generate employment, nor do they provide knowledge, transfer of skills or technology to the local community. Furthermore, these transactions may not even have any return to the home country.

The case *Patrick Mitchell v Democratic Republic of Congo (DRC)* was an attempt to categorise a legal counselling firm as an investment. The arbitral tribunal decided that a US national, who had operated a small law firm in the DRC, was an investment. However an *ad hoc* committee annulled this arbitral award because the original tribunal had ‘manifestly exceeded its power’ and had failed to State its reasons for finding that Mr Mitchell had made ‘investments’ covered under the relevant investment treaty and the ICSID Convention.¹⁴

In *Malaysian Historical Salvors v the Government of Malaysia*,¹⁵ the sole arbitrator held that although the contract did provide some benefit to Malaysia there was not a sufficient contribution to Malaysia’s economic development to qualify as an ‘investment’ for purposes of Article 25(1) of the Convention. Nonetheless, the annulment committee had an opposing view and considered that the sole arbitrator limited itself to the analysis of the requirements under the Convention, but failed to apply the bilateral investment treaty, which has a broad definition of the term investment. Moreover, the annulment committee considered that the investment made by the Malaysian Historical Salvors was a contribution that had cultural and historical value to the country.¹⁶

Although ICSID decisions do not constitute precedent, and ICSID tribunals are not bound by previous decisions, several tribunals have coincided with the identification of some features required for an investment to qualify as a covered investment: 1. It must have certain duration and a regularity of profit and return; 2. There must be an assumption of risk involved, usually by both sides; 3. There must be a commitment; and 4. The economic operation must have significance for the host State’s development.¹⁷ These features are now known as the ‘*Salini* test’.

Some tribunals have applied this test to determine whether the requirement of having an investment in the host State is satisfied.¹⁸ Nonetheless, other tribunals have

¹⁴ *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No AERB/99/7, Award, 9 February 2004; *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No AERB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006.

¹⁵ The Malaysian Historical Salvors (MHS) was a marine salvage outfit owned by a British national that retrieved thousands of pieces of Chinese porcelain from the Strait of Malacca in the 1990’s. In contract with Malaysia, the company was to receive a portion of the proceeds from the sale of the treasure; however, MHS maintained that it received a smaller cut of the profits than was promised under the contract. For more information, see International Institute for Sustainable Development, *Investment Treaty News*, at <iisd.org/itn> (accessed 17 April 2015).

¹⁶ *Malaysian Historical Salvors, SDN, BHD v The Government of Malaysia*, ICSID Case No ARB/05/10, Annulment Decision, 16 April 2009.

¹⁷ *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52. Some tribunals have considered that the fourth condition is included in the other three.

¹⁸ This is the formula adopted in *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No ARB/03/11, Award on Jurisdiction, 6 August 2004; *Jan de Nul NV and Dredging International NV v Arab Republic of Egypt*, ICSID Case No ARB/04/13, Decision on Jurisdiction, 16 June 2006; *Helnan International Hotels A/S v Arab Republic of Egypt*, ICSID Case No ARB/05/19, Decision of the Tribunal on Objection to Jurisdiction, 17 October 2006; *Mr Patrick Mitchell v Democratic Republic of the Congo*, ICSID Case No ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006; *Saipem SpA v The People’s Republic of Bangladesh*, ICSID Case No ARB/05/07; *Malaysian Historical*

disregarded the application of the *Salini* test. In particular, the *Phoenix* tribunal rejected the notion that a contribution to development should be criteria of an ICSID investment, on the view that development of the host State is impossible to ascertain.¹⁹ In *Pey Casado v Chile*, the tribunal considered that the feature of contribution is in fact included in the other features of the investment, as a consequence but not a condition for, or an essential component of it.²⁰

From the above analysis, it is worth recalling that even if the ICSID Convention is silent on the definition of the term ‘investment’, in its preamble it states that private international investment has a role in the international cooperation for States’ economic development. Hence, ICSID tribunals should interpret ‘the term investment in the light of the objectives and purposes of the Convention and take into account, explicitly or implicitly, the significance of the investment for the host State’s development. The major aim of the Convention was to encourage the economic development of State parties by way of foreign investment.

Through investment treaties, contracting States can provide specific rules and definitions as well as additional requirements for purposes of granting jurisdiction to ICSID tribunals. However, they cannot oppose, disregard or extend the Convention’s requirements because it is the Convention which sets the general framework for ICSID Jurisdiction. As Prosper Weil stated

it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention.²¹

II.1.2. Should Investment Treaties Protect Illegal Investments?

Due to broad interpretations, treaty protection has been extended in one way or another to investments which have been operated by willful misrepresentation, fraud, in bad faith, or in violation of national or international public policy.

The fact that ‘illegal’ investments are protected by IIAs is detrimental to SD because it may convey the message that foreign investors are not expected to respect and comply with the laws and regulations of the host State in areas such as labour, antitrust, human rights and environmental laws. Also, investments made through corrupted practices have a direct and pernicious effect on the economic development of countries, notably so in developing countries.²²

In *Occidental v Ecuador*, the tribunal found that the investors breached a clause of the participation contract by purporting to transfer rights under the contract without the required ministerial authorisation. As a consequence to the contractual breach, the Minister of Energy and Mines declared the termination (*caducidad*) of the contract. The

Salvors, SDN, BHD v The Government of Malaysia, ICSID Case No ARB/05/10, Award on Jurisdiction, 17 May 2007.

¹⁹ *Phoenix Action Ltd. v The Czech Republic*, ICSID Case No ARB/06/5, Award, 15 April 2009, para 85.

²⁰ *Victor Pey Casado and President Allende Foundation v Republic of Chile*, ICSID Case No ARB/98/2, Award, 8 May 2008, para 232.

²¹ *Tokios Tokeles v Ukraine*, ICSID Case No ARB/02/18, Decision on Jurisdiction, 29 April 2004, (Dissenting Opinion, Weil P) para 13.

²² *F-W Oil Interests Inc v The Republic of Trinidad and Tobago*, ICSID Case No ARB/01/14, Award, 3 March 2006, para 212.

tribunal qualified the investors' conduct as a 'wrongful act', 'negligence', 'grave mistake' and 'unlawful act'.²³ Furthermore, since the investors did not seek nor obtain the required authorisation, the tribunal found that investors acted negligently and committed an unlawful act which contributed in a material way to the prejudice which the investors subsequently suffered when the contract was terminated.²⁴ Through these findings, the tribunal concluded that by committing this 'material and significant wrongful act' investors only contributed 25% of the prejudice which they suffered when the Ministry adopted the punitive measure (termination of the contract).²⁵ The dissenting arbitrator was of the view that 'the consequence of the fault committed by the Claimants, when they violated the Ecuadorian law, was overly underestimated and insufficiently taking into account the importance that each and every state assigns to the respect of its legal order by foreign companies.'²⁶

Notwithstanding the *Occidental v Ecuador* case, it appears to be an emerging consensus that illegal investments should not be protected by investment treaties and, in particular, by the investor-State dispute settlement mechanism. Several investment tribunals have dealt with investors' misconduct and have acknowledged that investors' illegal behaviour may have an international legal effect and may be taken into account during an arbitration proceeding.

In *Saluka v Czech Republic* the tribunal recalled that investments must have been made in accordance with the provisions of the host State's laws, and that unlawful investments were not entitled to protection under the treaty.²⁷ Similar conclusions were reached in *Salini Costruttori SpA and Italstrade SpA v Kingdom of Morocco*²⁸ and in *Tokios Tokelės v Ukraine*.²⁹

The tribunal in *LESI SpA et Astaldi SpA v Algeria* stated that investments made in violation of fundamental governing principles lose their protection.³⁰ Along the same lines, the tribunal in *Rumeli Telekom v Kazakhstan* recalled that in order to receive the protection of a bilateral investment treaty, the disputed investments have to be in conformity with the host State's laws and regulations and that investments in the host State will only be excluded from the protection of the treaty if they have been made in breach of fundamental legal principles of the host country.³¹

Other important cases under which investments were not protected by the ISDS mechanism due to their illegal character are *Inceysa Vallisoletana SL v Republic of El Salvador*³² and *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*.³³

²³ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, 5 October 2012, paras 662–692.

²⁴ *Occidental v Ecuador*, paras 679–680.

²⁵ *Occidental v Ecuador*, para 687.

²⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No ARB/06/11, Dissenting Opinion Stern B, para 4.

²⁷ *Saluka Investments BV v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 204, 217.

²⁸ *Id*, para 46.

²⁹ *Tokios Tokelės v Ukraine*, paras 84–85.

³⁰ *LESI SpA et Astaldi SpA v République Algérienne Démocratique et Populaire*, ICSID Case No ARB/05/3, Decision, 12 July 2006 (translated from French), para 83.

³¹ See also, *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Award, 27 August 2008; *Alasdair Ross Anderson et al v Republic of Costa Rica*, ICSID Case No ARB(AF)/07/3, Award, 19 May 2010; *Philippe Gruslin v Malaysia*, ICSID Case No ARB/99/3, Award, 27 November 2000; *Phoenix Action v Czech Republic*; *Gustav FW Hamster GmbH and Co KG v Republic of Ghana*, ICSID Case No ARB/07/24, Awards, 18 June 2010.

³² *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID Case No ARB/03/26, Award, 2 August 2006.

Yet, several scholars as well as investment tribunals have suggested that investor's conduct should more frequently influence the award of monetary damages. For instance, in *MTD Chile SA v Republic of Chile*, the tribunal reduced by half the damages that were awarded to the claimant because of his own behaviour.³⁴

Thus, the above cases suggest that due consideration should be given to the legality requirement of the investment. A balanced approach is needed between the promotion and protection of investments and the investor's duty to comply with the substantive legal framework during the admission process of the investment as well as its lifespan. Fostering investors' compliance with domestic laws and fundamental principles as well as with the proper standards to conduct their business is positive from the perspective of SD.³⁵

II.2. Broad Interpretation of the Definition of Investor

Another important IIA provision is the clause setting out the scope and definition of 'investors'. Through this provision signatory countries determine which foreign investors benefit from the treaty's protection. Treaty practice varies in the criteria used for determining the nationality of legal entities, ie the country of organisation or incorporation, the country of the seat or the country of ownership or control. In many cases, IIAs use a combination of criteria.³⁶

Investment treaties which only adopt the test of the place of constitution or incorporation as the criteria to define foreign investors may be misused. For instance, nationals of a contracting State may incorporate an entity in the other contracting State and then bring back the assets as protected foreign investments, so as to take advantage of the protection against their own country.³⁷ Equally, investors may incorporate an entity in third countries with the aim to acquiring the protection of investment treaties that they would not otherwise have in their home State's jurisdiction. These situations are known as treaty shopping and round-tripping.³⁸

Several issues merit attention in this regard. First, the potential abuses of the 'corporate nationality' and, in general, treaty shopping may result in host States becoming the object of claims by 'mailbox companies'.³⁹ Second, the contracting parties' intention is circumvented by investors' operating through shell companies. Third, these shell companies do not have a real link or substantial business activity in their place of incorporation, and hence do not contribute to the home State's economic development.

Tribunals have adopted broad interpretations on these issues in a series of cases, for example, the following. In *Tokios Tokelés v Ukraine* the tribunal decided that, although it was 99% owned and two thirds managed by Ukrainian nationals, the company Tokios Tokelés was a Lithuanian national. It reached this conclusion by interpreting the

³³ *Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines*, ICSID Case No ARB/03/25, Award, 16 August 2007: Award was annulled by the Decision on the application for annulment, 23 December 2010; however, the issue about the illegality of the investment was not subject of further analysis by the ad hoc committee.

³⁴ *MTD Equity Sdn Bhd And MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004.

³⁵ Further issues on legality of the investment are dealt with below.

³⁶ UNCTAD, *Scope and Definition*, *supra* nt 10, 81.

³⁷ *Id.*, 15.

³⁸ Sornarajah, M, "The Retreat of Neo-Liberalism in Investment Treaty Arbitration" in Rogers, CA and Alford, RP, eds, *The Future of Investment Arbitration* (Oxford University Press, Oxford, 2009), 279.

³⁹ UNCTAD, *Scope and Definition*, *supra* nt 10, xiii.

ordinary meaning of the terms contained in the definition of investor under the bilateral treaty.⁴⁰

As a consequence of the interpretation, in accordance with the ordinary meaning of the words, the tribunal found itself competent to resolve a dispute that was ultimately between the host State and its own nationals, who were able to benefit from the ISDS mechanism through the creation of a foreign subsidiary. This decision did not take into account the objective and purpose of either the ICSID Convention or the Ukraine-Lithuania bilateral investment treaty. The ICSID Convention was meant for promoting private international investment and settling disputes between a contracting State and nationals of the other contracting State.⁴¹ The Convention is thus in a peculiar situation, as it neither covers disputes between two governments (since these disputes may be brought to the International Court of Justice or the Permanent Court of Arbitration), nor disputes between States and their own nationals, since they may be brought to domestic courts or domestic arbitration.⁴²

In *Saluka v Czech Republic*, the tribunal agreed that *Saluka* had no real connection with the State party to the investment treaty and that it was a mere shell company under Japanese ownership. It also acknowledged the disadvantages of the formalistic test, in particular the risk for treaty shopping, but concluded that it cannot impose upon the parties a definition of ‘investor’ other than that which they themselves have agreed.⁴³

In a more recent case, *Abaclat et al v Argentina*, the tribunal held that securities entitlements acquired by claimants in secondary securities markets outside Argentina were investments. According to the dissenting opinion,

the ... case is ... the first one to come before an ICSID tribunal in which the alleged investment is totally free-standing and unhinged, without any anchorage, however remote, into an underlying economic project, enterprise or activity in the territory of the host state. None of the logical short-cuts put forward by the majority award to palliate this absence, holds water.⁴⁴

The above cases illustrate the broad interpretations given to the investor’s definition. It is important to note that through investment treaties, contracting parties aim to protect their investors when investing abroad. A strong reason for doing so is that both parties benefit from this foreign investment. On the one hand, from the perspective of a capital importing country, investments can contribute to its economic development, ie by generating employment, transferring new technologies, infrastructure and knowledge. On the other hand, from the capital-exporting perspective, its national investors will increase their profits abroad and hence will contribute to the economy of the home country, ie by paying taxes and repatriating profits as well as the home country’s balance of payments.

⁴⁰ *Tokios Tokelés v Ukraine*.

⁴¹ Preamble, International Center for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2006) 575 UNTS 159.

⁴² Schreuer, C, *The ICSID Convention: A Commentary* (2nd ed, Cambridge University Press, Cambridge, 2009), 25.

⁴³ *Saluka v Czech Republic*, para 229.

⁴⁴ *Abaclat and Others v Argentina*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011; *Abaclat and Others v Argentina*, ICSID Case No ARB/07/5, Dissenting Opinion Abi-Saab, G), 28 October 2011, para 118.

Abuses on the part of investors and treaty shopping diminish the common will of the contracting States. Treaty shopping disregards the fact that treaties are negotiated based on each party's needs and strengths, and also that treaties contain their own internal balance. As Professor Stern has mentioned, it looks like we are 'walking towards a general system of compulsory arbitration involving states for all matters relating to international investments'.⁴⁵

It might be the case that a State concludes an investment treaty with another State in order to attract investors from that State because of a specific reason. This could include the fact that the home State has strong environmental laws and regulations, and therefore its nationals have already developed environmental friendly technology, or because national investors already comply with certain standards regulated by their home States, even if investing abroad. However, by treaty shopping, including the use of the most favoured nation's treatment clause, several provisions of the main treaty may be disregarded (ie, clauses on denial of benefits as well as the definition of investment and investor).

II.3. Broad Interpretation of the Expropriation Clause

Another key IIA clause is the one on expropriation. As part of their regulatory power, States have the right to expropriate. The idea behind the expropriation clause on investment treaties is to protect foreign property and investments from States' measures that detrimentally affect them. Investment treaties only regulate the conditions that need to be met for the expropriation of foreign property. If these conditions are met, including an appropriate compensation, the expropriation is considered lawful and the State does not engage in international responsibility.

However, tribunals have stated that expropriation

includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.⁴⁶

While direct expropriations have been easy to identify, indirect expropriations have been the object of debate and discrepancy amongst investment tribunals as well as host States. Drawing the line between an indirect expropriation and a *bona fide* non-regulatory measure adopted for public interest has been, in practice, very difficult.

The perception that general regulatory measures adopted for public interest may be challenged as *de facto* takings, and thus may require compensation, have raised grave concerns. States may be discouraged or unwilling to adopt new public regulations. Their ability to regulate in favour of health, environment and human rights is then affected and restrained. This limitation to the regulatory space of States can reduce States' ability to

⁴⁵ Stern, B, "ICSID Arbitration and the State's Increasingly Remote Consent: Apropos the Maffezini Case" in Charnovitz, S, Steger, DP and Van den Bossche, P, eds, *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (Cambridge University Press, Cambridge, 2005), 259.

⁴⁶ *Metalclad Corporation v Mexico*, ICSID Case No ARB(AF)/97/1, Final Award, 30 August 2000, para 103.

achieve legitimate policy objectives and impede their realization of sustainable development goals.

It has been strongly debated whether 1. Foreign investors have to bear the whole costs when a *bona fide* regulatory measure which nullifies their investments is adopted, ie by not being compensated even if the State measure has substantially affected their investment; and 2. Society has to bear the costs for having adopted a new regulatory measure in the society's benefit, and therefore investors get compensated.⁴⁷ The answer will depend on the analysis of several issues such as whether the measure is viewed as unreasonable or discriminatory. If investors had legitimate expectations, the impact of the measure on the investment and whether there has been an unjust enrichment of the State. However, good governance, which is part of sustainable development principles, does not mean that States should compensate all and every situation where *bona fide* measures affect investments.

By way of illustration, it is helpful to recall few investment cases where tribunals have dealt with challenges to States' regulatory measures. In *Petrobart v Kyrgyz Republic* the tribunal affirmed that States, as contracting parties to investment treaties, are under the obligation to carry out reorganisation (in this case the restructuring of a system for supply of oil and gas) in a way which shows due respect to investors.⁴⁸ In *Marion v Costa Rica*, the investor was denied the permits to develop a beachfront tourist project because the area was preserved for endangered leatherback turtles. The tribunal found that

while there can be no question concerning the right of the government of Costa Rica to expropriate property for a *bona fide* public purpose, pursuant to law, and in a manner which is neither arbitrary or discriminatory, the expropriatory measure must be accompanied by compensation for the fair market value of the investment.⁴⁹

In *SAUR v Argentina* the tribunal analysed the police powers doctrine, which allows the State to adopt regulations in the public interest. The tribunal acknowledged that police power regulations impose a limitation on the freedom of foreign investors in the management, maintenance, use disposal and enjoyment of their investments. Accordingly, those policy power regulations may qualify as indirect expropriations. The tribunal also agreed that policy power regulations do not constitute a wrongful act according to customary law and that, in certain circumstances, compensation is not even necessary.⁵⁰ Nevertheless, the tribunal emphasised that, in the instant case, the investment treaty required compensation for any regulation adopted by the State in its policy powers' exercise.⁵¹

In *Quasar de Valors v Russian Federation*, the tribunal held that,

where the value of an investment has been substantially impaired by state action, albeit a *bona fide* regulation in the public interest, one can see the force in the proposition that investment protection treaties might not allow

⁴⁷ Higgins, R, *The Taking of Property by the State: Recent Developments in International Law* (vol 176, Martinus Nijhoff Online, Leiden, 1982).

⁴⁸ *Petrobart Limited v Kyrgyz Republic*, SCC No 126/2003, Arbitral Award, 29 March 2005, para VIII.8.9.

⁴⁹ *Marion Unglaube v Republic of Costa Rica*, ICSID Case No ARB/08/1, Award, 16 May 2012, para 205.

⁵⁰ *SAUR International SA v Argentine Republic*, ICSID Case No ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, para 398.

⁵¹ *Id*, paras 406–407.

a host State to place such a high individual burden on a foreign investor to contribute, without the payment of compensation, to the accomplishment of regulatory objectives for the benefit of a national community of which the investor is not a member.⁵²

Several other cases could be cited to show the difficulties of distinguishing compensable expropriations from non-compensable regulations adopted in the public interest, including for the protection of health and the environment. Yet, for purposes of the analysis, it suffices to say that findings that regulatory measures need to be compensated may preclude the adoption of legitimate regulations, and this would be detrimental for the achievement of SD goals. It is therefore necessary to balance investors' legitimate rights with the State's legitimate right to regulate. States should not lose their domestic policy space to regulate development objectives such as the incorporation of environmental provisions, corporate social responsibility norms, and human rights into their legal system.

Furthermore, treaty protection cannot be seen as a guarantee for risk-free activities on the part of investors. Foreign investment occurs within a complex and sophisticated legal framework of tax, antitrust, administrative, labour, environmental, human rights and other laws and regulations. Investors who take the decision to invest in a foreign country should be aware that there is always a risk that the legal and regulatory framework changes in the absence of assurances to the contrary. The possible changes in domestic regulatory framework and policies, such as fiscal treatment, repatriation of assets, and other State actions are in fact considered a traditional part of the political risks of investment.⁵³

Similar situations arise with respect to the broad interpretation given to other key treaty provisions such as most favoured nation treatment clause and the fair and equitable treatment provision. Moreover, in several investment cases the State's regulatory power has been challenged as having simultaneously breached the expropriation provision as well as other key investment treaty standards. Tribunals have applied different views and considerations to determine whether the regulatory measure has breached IIA provisions or not. The result is the same

Host states are concerned about a shrinking of domestic policy space occasioned, based on vague standards of investment protection by international arbitrators who exercise interpretative powers over the content of investment treaty obligations and who are *de facto* able to restrict even policy choices made by democratically elected legislators.⁵⁴

Concerns that IIAs may diminish states' regulatory policy space in favor of investors' private interests has led to different reactions by states. This will be further analysed in the next section.

⁵² *Quasar de Valores SICAV SA et al (Formerly Renta 4 SVSA et al) v Russian Federation*, SCC Case No 24/2007, Award, 20 July 2012, para 23.

⁵³ Muchlinski, P, *Multinational Enterprises and the Law* (2nd ed, The Oxford International Law Library, Oxford, 2007).

⁵⁴ Schill, S, *International Investment Law and Comparative Public Law*, (Oxford University Press, New York, 2010), 7.

III. Fostering Sustainable Development Objectives Through Investment Policy Making

When States negotiate IIAs they are accepting a restriction of their policy space in favour of foreign investors. However, it is not until States face a claim that they are aware of the extent to which the IIA may restrict their regulatory powers. Different reactions by States have been adopted: attempts to withdraw from the investment regime, and attempts to reform or modify it. The former manifests itself through efforts limiting States' exposure to ISDS cases; the latter through the adoption of IIAs with innovative features aimed at boosting parties' SD objectives.

In the following subsections, this paper will list several States' attempts to withdraw from the international investment regime by denouncing the ICSID Convention and investment treaties (subsection 2.1). Then, it will discuss States' willingness to achieve sustainable development objectives through the adoption of a new generation of investment treaties (subsection 2.2). The latter will give special attention to the Investment Policy Framework for Sustainable Development (IPFSD) recently adopted by the United Nations Conference on Trade and Development (UNCTAD), which is a valuable tool for the successful implementation of this new generation of investment treaties.

III.1. Attempts to Limit Investment Tribunals' Jurisdiction: Withdrawing from the ICSID Convention and/or Denouncing International Investment Treaties

The Republic of Ecuador tried to limit ICSID jurisdiction by notifying the Centre, pursuant to Article 25(4) of the ICSID Convention that it will not submit to ICSID's jurisdiction for disputes that arise in matters concerning the treatment of investments in economic activities related to the exploitation of natural resources such as oil, gas, minerals or other resources. Then, Ecuador denounced the ICSID Convention. Finally, it decided to terminate its bilateral investment treaties (BITs) by denouncing nine treaties in 2008,⁵⁵ and by launching a process to analyse whether the remaining BITs, in particular their ISDS clause, were consistent with the newly adopted Constitution of 2008. The Constitutional Court of Ecuador declared the ISDS clauses contained in the BITs with Argentina, Canada, Chile, China, Finland, France, Germany Great Britain and Ireland, The Netherlands, Sweden, Switzerland,⁵⁶ the United States of America and Venezuela as unconstitutional. As a consequence of these findings, Ecuador sent a notification denouncing the BIT concluded with Finland and may do the same with other BITs.⁵⁷

Bolivia also denounced the ICSID Convention as a first step to avoid investor-State arbitration.⁵⁸ Furthermore, it sent a notice in 2011 to the US Government expressing its

⁵⁵ BITs concluded with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay.

⁵⁶ The BIT concluded with Switzerland in 1968 did not contain an ISDS provision, but it was also declared contrary to the Constitution because of the State-State dispute settlement provision, at <correconstitucional.gob.ec/> (accessed 27 March 2015).

⁵⁷ *Ibid.*

⁵⁸ Denunciation made in 2007.

intention not to renew the *Bolivia-USA BIT* once it arrives towards its end.⁵⁹ Likewise, Venezuela denounced in 2008 the BIT concluded with The Netherlands and is planning to renegotiate or to terminate the remaining 24 Bilateral Investment Treaties. In addition, in 2012 Venezuela withdrew from ICSID. Along the same lines, the BIT concluded between El Salvador and Nicaragua was denounced.⁶⁰ And more recently, South Africa expressed its intention not to renew its BIT with the Belgium-Luxembourg Economic Union and 12 other BITs it previously entered into with other European Union (EU) Member States.⁶¹

III.2. Adoption of the New Generation of Investment Treaties

In addition to denouncing and withdrawing from the investment system, there is the possibility to negotiate ‘sustainable development enhanced’ investment treaties or to renegotiate and revise the existing ones. It is worth noting that contracting States may also issue interpretative declarations in order to clarify the scope and meaning of key treaty provisions. Many countries have opted for this option and are negotiating or renegotiating agreements with some safeguards and other innovative features. Mainly, States are seeking to find a balance between the private interests of investors and the States’ necessary policy space to accomplish sustainable developments goals.

It is within this context that the United Nations Conference on Trade and Development (UNCTAD) has developed an *Investment Policy Framework for Sustainable Development* (IPFSD). The purpose of the IPFSD is to facilitate the drafting of IIAs that create synergies with wider economic development goals, foster responsible investment and ensure policy effectiveness. This policy framework consists of a set of 11 core principles and a comprehensive list of policy options for the negotiation and design of investment treaty clauses, covering pre and post-investment establishment, qualitative aspects of investment, special and differential treatment to investors, reservations, exceptions and other concrete options. These options include provisions designed to strengthen the sustainable development dimension of the international investment policy regime, resolve issues stemming from the regime’s increasing complexity and to adjust the balance between the rights and obligations of States and investors.

Examples of IIA provisions that have incorporated or reflected sustainable development related concerns are discussed below.

III.2.1. Preambles with SD references

Preamble provisions are the contracting parties’ inspirational statements. They are useful for interpretation purposes. Several investment treaties have tried to include a reference, although sometimes vague, to the need of both contracting parties to pursue sustainable development objectives.

⁵⁹ Network for Justice in Global Investment, *The Emerging Challenge to the Investor-State Regime*, 30 August 2012 at <justinvestment.org/2012/08/the-emerging-challenge-to-the-investor-state-regime-2/> (accessed 6 May 2015).

⁶⁰ UNCTAD, “Denunciation of the ICSID Convention and Bits: Impact on Investor-State Claims”, 2 *IIA Issues Note* (December 2010) 1, at <unctad.org/en/Docs/webdiaeia20106_en.pdf> (accessed 5 May 2015).

⁶¹ The notice of termination was contained in a letter entitled, “Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union”, from Maite Nkoana-Mashabane, Minister of International Relations and Co-operation, to the Ambassador of the Kingdom of Belgium to South Africa, Johan Maricou, 7 September 2012.

For example, Azerbaijan's BITs concluded with Estonia (2010) and Czech Republic (2011) state in their preamble: 'Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of sustainable development...' Similarly, the preamble of the *Colombia-Japan BIT* (2011) says: 'Recognizing that these objectives and the promotion of sustainable development can be achieved without relaxing health, safety and environmental measures of general application...'. The *Japan-Papa New Guinea BIT* (2011) also states

Recognizing that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and that cooperative efforts of the Contracting Parties to promote investment can play an important role in enhancing sustainable development...

III.2.2. IIA's Definitions Reflecting SD Considerations:

III.2.2.1. Investment

UNCTAD's IPFSD suggests that one option regarding the definition of investment could be to indicate that protected investments shall fulfil specific characteristics according to the parties' needs and expectations, such as delivering a positive development impact on the host country and assets acquired for the purpose of establishing a lasting economic relation (Option 2.1.2). Providing further qualifications, clarifications and explanatory notes to the term investment allows countries to attract foreign direct investment (FDI) conducive to sustainable development and to protect transactions that contracting parties consider beneficial for them.

Another option, which may be complementary to the aforementioned option, is to offer treaty coverage only to legal investments at both the admission stage (2.1.2) and during its lifespan (7.1.1). In fact, IIAs may expressly contain a provision indicating that investments must continue to function according to the laws and regulations of the host State or insisting that only foreign investment complying with these laws and regulations 'from time to time in existence' will qualify for protection.⁶² This requirement aims to promote investor compliance with the laws and regulations of the host State.

However, it is worth making some clarifications of the legality requirement. Investors are required to observe the substantive legal and regulatory norms of the host State, which may be applicable to their investments even if they are difficult to comprehend, such as taxation law. This does not mean that the host State can abuse its legislative power and create inconsistency or arbitrariness where rules are applied to one person, and not to another, or at one time and not another, or recognised and enforced by one organ of the State and ignored by another. But the legality requirement may not be understood to imply that foreign investments have to comply with each and every provision of domestic law or else risk forfeiture of the protection afforded by the IIA, or with norms that are strictly considered as formalities. In fact, as Professor Dolzer has stated, it would appear implausible to argue that each infraction of the local laws would deprive the investor of the guarantees laid down in an IIA.

Such a conclusion would also contradict general principles of law, such as Article 27 of the Vienna Convention, which provides that a State party may not invoke the

⁶² Sornarajah, M, *The International Law on Foreign Investment* (3rd ed, Cambridge University Press, Cambridge, 2010), 227.

provisions of its internal law as justification for its failure to perform a treaty.⁶³ With a very similar approach, the arbitral tribunal in *Tokios Tokelés v Ukraine* stated that ‘to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty.’⁶⁴ Also, the *Fraport v Philippines* tribunal recalled that in some circumstances, the law in question of the host State may not be entirely clear and mistakes may be made in good faith.⁶⁵ Furthermore, to accept that overcoming the illegality of the investment will always deprive the investor from the IIA protection gives the possibility to the host State to unilaterally withdraw its commitments under the IIA towards the foreign investment by imposing new and high requirements to the investment in such a way that it would become illegal.

III.2.2.2. *Investor*

Regarding the definition of investors, one option that fits with SD objectives is to require investors to have their seat and substantive business activities in their home country in order to be considered as nationals of this country. Alternatively, it may be possible to include a denial of benefits clause (2.2.2) to avoid legal entities without real economic activity in their home State to benefit from IIA protection. For instance, the recently concluded Canada-China Foreign Investment Promotion and Protection Agreement (2012) contains a clause on denial of benefits which allows countries to deny benefits at any time, including after the filing of a case. The contracting parties’ intention was to carve out from the definition of investor ‘shell companies’ owned by nationals of a third-country.

Regarding the treaty practice, the *USA-Uruguay BIT* concluded in 2004 (which was not in force yet) was replaced by a new BIT concluded by the signatories in 2005. Modifications were made to Article 17 (denial of benefits) and the selection of arbitrators in the settlement of disputes. In addition, for greater certainty, many explanatory notes were incorporated in the definition of investment, investment agreement, investment authorization and financial services.⁶⁶ More recently, the *China-Cuba BIT* concluded in 1995 was modified by the parties in 2010. Amongst other amendments, parties clarified the scope and the meaning of the term ‘investment’ and they included a new requirement for legal entities to qualify as investors (ie entities need to conduct substantial business activities in their place of incorporation, to be considered as nationals of a contracting State).

III.2.3. Standards of Protection and Treatment Clauses with SD Considerations:

III.2.3.1. *Expropriation*

The right to regulate is crucial for achieving States’ particular policy objectives and concerns, including sustainable development goals. The expropriation clause in IIAs is one of the clauses that may limit most States’ regulatory space. That is the reason why a good option is to draft a detailed provision clarifying what constitutes indirect expropriation in order to provide guidance to tribunals, and to prevent expansive

⁶³ Dolzer, R, and Stevens, M, *Bilateral Investment Treaties*, (Kluwer Law International, The Hague, 1995); *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, Award, 16 August 2007, para 304.

⁶⁴ *Tokios Tokelés v Ukraine*, paras 83–86.

⁶⁵ *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, para 396.

⁶⁶ For further reference, Organisation of American States, *Foreign Trade Information System (SICE)*, at <sice.oas.org> (accessed 27 March 2015).

interpretations. It is also necessary to explain the circumstances and the criteria to determine and differentiate non compensable regulatory measures from indirect expropriation. As UNCTAD's IPFSD policy options acknowledges, it is very important to specify the standard of compensation when an expropriation has occurred.

Some clarifications of what does and does not constitute expropriation are found in the Annex III of the *Colombia-Japan BIT* (2011)

... 2. The determination of whether a government measure or a series of government measures of a Contracting Party, in a specific fact situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, among other factors:

(a) the economic impact of the government measure or series of government measures, although the fact that such measure or series of such measures has an adverse effect on the economic value of investments, standing alone, does not establish that an indirect expropriation has occurred;

(b) the extent to which the government measure or series of government measures interferes with distinct and reasonable expectations arising out of investments;

(c) the character of the government measure or series of government measures, including whether such measure is non-discriminatory; and

(d) the objectives of the government measure or series of government measures including whether such measure is taken for legitimate public objectives.

3. Except in such circumstances as when a measure or a series of measures is so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives in accordance with paragraph 1 of Article 15 do not constitute indirect expropriation.

It is worth noting that older IIAs also contain some explanations regarding indirect expropriation and some others also include exceptions and reservations in respect to health and environment. (ie *Australia-Chile Free Trade Agreement (FTA)* (2008); many Foreign Investment Promotion and Protection Agreements (FIPAs) signed by Canada such as *Canada-Peru BIT* (2006), *Canada-Jordan* (2009) and *Canada-Slovak Republic BIT* (2010); several United States FTAs such as the ones concluded with Australia (2004), CAFTA-DR (2004), Chile (2003) and Morocco (2004).

III.2.4. Achievement of SD Objectives Through Other Treaty Provisions

SD may be achieved through the adoption of several other treaty provisions. Contracting parties can make clear that they will preserve their right to regulate for public interest by describing situations and circumstances where treaty protection does not apply or by adopting 'defence clauses' agreeing that certain policies taken pursuant to sustainable development do not constitute treaty violations. States can also acknowledge that they

shall not lower environmental and labour standards in order to attract foreign investments.

One such treaty example is the *Korea-Peru FTA* (2011), Chapter 9, Article 9.9, which states:

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

2. The Parties recognize that it is inappropriate to encourage investment by relaxing their health, safety, or environmental measures. Accordingly, *a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion, or retention in its territory of an investment of an investor*. If a Party considers that the other Party has offered such encouragement, the Parties shall consult, upon request, with a view to avoiding any such encouragement.⁶⁷

Similarly, the *India-Malaysia Comprehensive Economic Cooperation Agreement* (2011), Article 10.20, says

Measures in Public Interest: Nothing in this Chapter shall be construed to prevent: (a) a Party or its regulatory bodies from *adopting, maintaining or enforcing any measure, on a non-discriminatory basis*; or (b) the judicial bodies of a Party from taking any measures, consistent with this Chapter that is *in the public interest, including measures to meet health, safety or environmental concerns*.⁶⁸

Through exceptions and exclusion clauses, States may decide to exclude from the scope of application of the treaty issues related to culture, health and the environment that are sensitive for the achievement of sustainable development. Similarly, key sectors necessary for the attainment of sustainable development may be excluded from the treaty application.

III.2.5. Encouraging Anti-corruption Practices and the Corporate Social Responsibility

In the last few decades increasing attention has been paid to anti-corruption practices and to the duties of investors towards the countries in which they invest. There is growing consensus around the idea of ‘international corporate social responsibility’ in response to the perception that there is a loss of corporate accountability, partly resulting from increasing globalisation. The idea rests on obligations that corporations should be liable to the societies in which they operate. International governmental organisations have expressed their interest in the need of all actors, including non-State actors, to observe the preservation of some fundamental principles, such as respect towards human rights and sustainable development.

⁶⁷ [Emphasis added].

⁶⁸ [Emphasis added].

Within the international investment law regime, the bulk of international obligations have fallen upon host States. By contrast, investors and home States have few, if any, international obligations.⁶⁹ IIAs, with few exceptions, have been solely focused on creating rights for investors and legal obligations for states. A small number of recent IIAs carve out space for States to impose duties on the investor to comply with certain standards of conduct, such as national laws and internationally recognized Corporate Social Responsibility (CSR) standards, or to carry out good corporate governance practices in order to enhance the sustainable development dimension of CSR.⁷⁰ Few other investment treaties have incorporated States' efforts to prevent and combat corruption. For instance, the *Colombia-Japan BIT* (2011), in its Article 8, observes

Measures against Corruption: Each Contracting Party shall ensure that measures and efforts are undertaken to *prevent and combat corruption* regarding matters covered by this Agreement in accordance with its laws and regulations.⁷¹

However, the most significant level of regulation still falls upon States. On the one hand, home States have adopted a legal and regulatory system that might be used to ensure that multinational enterprises base and conform to certain standards of good corporate citizenship.⁷² On the other hand, local laws of the host State exercise regulatory control towards foreign investments and investors, mostly when the investor is a multinational enterprise. Common examples are the regulation of domestic labour and antitrust laws.

Therefore, enterprises are thus expected to conduct themselves in accordance with proper standards, observing fundamental principles and to conduct investments in a reasonable manner. Investors are expected to respect and comply with the laws and regulations of both home and host States primarily because the high levels of mandatory regulation in the business sphere remains at the national level.⁷³

UNCTAD sees corporate social responsibility as the *quid pro quo* for the protection of investors and investments under international investment treaties.⁷⁴ Furthermore, UNCTAD's Investment Policy Framework contains some options that are designed to promote responsible investment by encouraging investors' compliance with universally recognized CSR standards.

III.2.6. Investor-State Dispute Settlement Clauses

ISDS clauses may limit the range of disputes that can be subject to arbitration, may preclude investors not in compliance with domestic laws to have recourse to arbitration or may enlarge the possibility of the host State to bring counterclaims in relation to investor unconscionable behaviour.

⁶⁹ Muchlinski, *supra* nt 54, 84.

⁷⁰ For example the investment agreement for the (Common Market for Eastern and Southern Africa) COMESA Common Investment Area (CCIA) imposes an obligation on investors to comply with local laws and the CARIFORUM-EC Economic Partnership Agreement incorporates anti-corruption obligations for investors.

⁷¹ [Emphasis added].

⁷² Muchlinski, *supra* nt 1, 84.

⁷³ *Ibid.*

⁷⁴ UNCTAD, *The Social Responsibility of Transnational Corporations*, New York and Geneva, 1999, at <unctad.org/en/Docs/poiteiitm21_en.pdf> (accessed 13 April 2015).

While States may be willing to renegotiate or provide further clarifications to the scope of investor-State dispute settlement provisions, several countries have decided to exclude ISDS clauses in their investment agreements.

An example of such is the *China-Cuba BIT* concluded in 1995 and modified by the parties in 2010. The ISDS provision was replaced with a more detailed one.⁷⁵

Australia, New Zealand and India are examples of countries willing to exclude ISDS provisions from investment treaties. The *Australia-Malaysia FTA* concluded in 2012 does not contain such a provision,⁷⁶ while India has publically stated that it is planning to exclude arbitration clauses from its BITs, which is currently under negotiation with the European Union, Australia, New Zealand and other countries.

Notwithstanding the intention of the parties to negotiate, renegotiate, revise and issue interpretative declarations on IIAs, with the aim of balancing public regulatory interests of States with private interests of investors, the effect and impact of their clauses cannot be assessed unless they are interpreted and applied by investment tribunals to concrete situations. It thus remains unclear whether these safeguards, exceptions, reservations and explanatory notes will be meaningful and effective to pursue SD objectives. Nevertheless, this should not discourage States from engaging in such a process.

Furthermore, even with investment treaties in their current form, sustainable development objectives can be achieved through the application of a SD oriented interpretation within the context of investor-State dispute settlement cases. This will be discussed in the next section.

IV. Systemic Interpretation of IIAs in Their Current Form: Achievement of Sustainable Development Objectives

States' willingness to ensure consistency between their long-term sustainable development strategies and their existing investment treaties may be achieved through negotiation, renegotiation or revision of IIAs that incorporate sustainable development friendly provisions. Nonetheless, due to the fact that the vast majority of investment treaties negotiated over the last five decades by more than 176 countries⁷⁷ are currently in force, the task of reviewing and renegotiating IIAs with SD oriented provisions will be no mean feat.

Additionally, it is hard to achieve coherence between IIAs in their current form and the new generation of investment treaties that may be negotiated with SD friendly provisions. This is due to the fact that the potential application of the most favoured nation treatment clause may result in disregarding stricter provisions contained in these innovative treaties.

⁷⁵ China-Cuba, Modification of The Agreement on the Promotion and Mutual Protection of Investments between the Government of the People's Republic of China and the Government of the Republic of Cuba, 3 April 2010, at <tfs.mofcom.gov.cn/article/h/bk/201003/20100306805846.shtml> (accessed 13 April 2015).

⁷⁶ *Malaysia-Australia Free Trade Agreement (FTA)*, 22 May 2012, at <www.miti.gov.my/cms/documentstorage/com.tms.cms.document.Document_7257fc06-c0a81573-2ce72ce7-76d00623/MAFTA.pdf> (accessed 13 April 2015).

⁷⁷ An example of ethical rules to be observed by arbitrators if parties so establish is the *Code of Ethics for Arbitrators in Commercial Disputes* formulated by a special joint committee of the American Bar Association (ABA) and the American Arbitration Association (AAA), revised in 2003 and effective since March 1, 2004.

Furthermore, the effects and impact of sustainable development friendly provisions introduced in the new generation of investment treaties is yet to be assessed. It remains unclear how arbitral tribunals will interpret and apply these provisions.

Within this context, the form in which to achieve coherence between sustainable development objectives and investment treaties is to apply a SD oriented interpretation of IIAs. Such an interpretation would encourage States to pursue their SD long-term policies and would be useful – and necessary – to reduce the risks of future threats to global sustainability. The justifications for the adoption of such an interpretative approach are grounded in customary international law.

This section will first recall the role of investment tribunals and then will explain two interpretative approaches (the subjective dynamic approach and systemic integration of norms) that may be adopted by investment tribunals in order to foster SD.

IV.1. The Role of Treaty-based Arbitral Tribunals

The exercise of the arbitrators' authority and powers to hear and render a decision derives from the parties' consent.⁷⁸ This is a primary consequence of the consensual nature of arbitration.⁷⁹ Arbitrators will thereby conduct the arbitration and decide the dispute as submitted by the parties and in accordance with the legal and even ethical framework chosen by the parties as well as by the rules otherwise binding the tribunal.⁸⁰ Thus, in general terms, the first and main duty of the tribunal is towards the parties: arbitrators' task is to decide the case at hand and to do their best effort to render an enforceable award. Contrary to national judges, arbitrators do not render 'justice' in the name of any State.

However, the scope of the tribunal's authority is also circumscribed by the governing law rules under which tribunals operate. There are several possible sources of arbitrators' powers which may act alternatively or cumulatively: international treaties between sovereign States (investment treaties, ICSID Convention), domestic laws, direct agreement between the investor and the State.

Against this background, this paper argues that tribunals' role is not limited to act on behalf of the disputing parties. Instead, tribunals' role also contributes to the development of international law. This is because the awards influence the behaviour of investors, States and – most importantly – the development of international investment law by concretising the scope and content of international standards of protection of foreign investors as well as generating new rules.

Though no formal doctrine of judicial precedent exists in international investment law, the decisions of arbitral tribunals may contribute as authoritative interpretations of the substantive obligations contained in IIAs, and may be seen as a subsidiary means for the determination of the rules of the international law on foreign investment.

Moreover, investment arbitration touches upon subject matters that raise public interest concerns and may affect the regulatory power of States. Arbitrators have the power to review and strike down State decisions, regulations, and national regulations.⁸¹

⁷⁸ Notwithstanding the foregoing, once the arbitral tribunal is constituted and arbitrators are empowered, they have a high degree of autonomy and authority to decide procedural and substantive matters.

⁷⁹ So true is that the parties' agreement empowers arbitrators, that parties may replace, revoke arbitrators at any time, and even put an end to the arbitration proceedings at any time.

⁸⁰ An example of ethical rules is the ABA guidelines.

⁸¹ Choudhury, B, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?", 41 *Vanderbilt Journal of Transnational Law* (2008) 775.

This has characterised investment arbitration as part of the evolving concept of global administrative law.⁸² As a scholar mentioned, arbitrators ‘exercise interpretative powers over the content of investment treaty obligations and ... are the facto able to restrict even policy choices made by democratically elected legislators.’⁸³

For these reasons, investment arbitrators need to ensure coherence of the international investment regime within the context of public international law in general. They cannot, for instance, disregard or contradict international environmental agreements or human rights obligations.

IV.2. Interpreting the Intention of the Parties as Reflected in the Treaty Text

Tribunals, when interpreting international investment treaties, must have due regard to the intention of the parties having formulated them as expressed in the text.⁸⁴ Tribunals’ interpretation process will be guided by the customary and general principles of treaty interpretation which have been embodied in the Vienna Convention on the Law of Treaties (VCLT).

Articles 31–32 of the VCLT set forth the general rules of interpretation. In order to give effect to the intention of the contracting parties of a given treaty, tribunals need to look into the ordinary meaning of the words in their *context* and in the light of the treaty’s *object and purpose*. Consideration of the treaty’s object and purpose ensures the effectiveness of its terms (*effet utile*).⁸⁵ The preamble plays an important role for the purpose of understanding and interpreting the context of the treaty.

Both the ICSID Convention and the vast majority of the IIAs acknowledge in their preamble the importance of FDI for the promotion of economic development. The ICSID Convention’s primary aim was the promotion of economic development through the creation of a favourable investment climate that could be largely improved with the establishment of an effective system for settlement of disputes. According to the Executive Director’s Report on the Convention

the creation of an institution designed to facilitate the settlement of disputes between States and foreign investors can be a major step toward promoting an atmosphere of mutual confidence and thus stimulating a larger flow of private international capital into those countries which wish to attract it.⁸⁶

⁸² Van Harten, G, *Investment Treaty Arbitration and Public Law* (Oxford University Press, New York, 2008); Van Harten, G and Loughlin, M, “Investment Treaty Arbitration as a Species of Global Administrative Law,” 17(1) *European Journal of International Law* *European Journal of International Law* (2006) 121.

⁸³ Schill, S, *International Investment Law and Comparative Public Law* (Oxford University Press, New York, 2010), 7.

⁸⁴ As the ILC Commission observed ‘the text must be presumed to be the authentic expression of the intentions of the parties’: see Watts, A, ed, *The International Law Commission 1949-1998: Volume Two: The Treaties* (Clarendon Press, 2000), 687.

⁸⁵ Villiger, M, “The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission” in Cannizzaro, E, ed, *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, New York, 2011), 110.

⁸⁶ International Bank for Reconstruction and Development, *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 18 March 1965, at <icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB.htm> (accessed 13 April 2015), para 9.

Likewise, in general terms, IIAs contain statements incorporated in the preamble which acknowledge the importance of promoting foreign investment and the flow of capital. Indeed, foreign investments are perceived to enhance the economic cooperation to the mutual benefit of signatory parties and to intensify and expand economic activities, prosperity and development of both parties.⁸⁷

Within this context, it seems that the idea of concluding IIAs is neither to attract all kind of foreign capital nor at all costs; but to foster individual business initiative because it will support growth and prosperity of signatory countries. The ultimate rationale behind this is that the *raison d'être* of States is to provide wealth to their inhabitants. In a famous statement, Aristotle asserted that the State 'comes to be for the sake of living, but it remains in existence for the sake of living well'.⁸⁸

It is thus necessary to adopt a rational interpretation of IIAs, taking into account the real intention of States when concluding those agreements. A balanced approach means that IIAs cannot protect foreign transactions that are detrimental to the development of any of the signatory countries. To conclude otherwise, would be contrary to the intention of the contracting parties and therefore would lead to an unreasonable interpretation.

IV.3. Systemic Integration of Norms in Treaty Interpretation

Safeguarding the unity and coherence of international law has been a concern addressed by the International Law Commission. In 2006 a report was issued seeking to provide solutions to the problems of coherence in international law which resulted from the 'emergence of the new and special types of law, 'self-contained regimes' and geographically or functionally limited treaty-systems'.⁸⁹ Amongst other conclusions, the ILC suggested that rules, principles and norms of international law viewed as a legal system act in relation to, and to be interpreted against the background of other rules and principles. Equally, the Working Group stated that certain types of general law, such as *jus cogens*, must not be derogated from by the *lex specialis*.⁹⁰

The ILC conclusions are interrelated with Article 31(3)(c) of the VCLT. According to this provision, '[e]very treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary'.⁹¹ In this sense, both, conventional and customary international law rules existing at the time of the conclusion of the treaty as well as subsequently, may be relevant for interpretative purposes.⁹² This article envisages treaty interpretation against the whole background of international law, including general, regional or local customary rules as well as rules contained in bilateral or multilateral treaties.⁹³ This general principle for treaty

⁸⁷ Random investment treaties were analysed and all of them had in their preamble a reference to economic development, economic cooperation, prosperity or a similar wording.

⁸⁸ Korab-Karpowicz, WJ, *On the History of Political Philosophy: Great Political Thinkers from Thucydides to Locke* (Pearson, New York, 2012), 39.

⁸⁹ International Law Commission, REPORT: *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th session (2006), A/CN.4/L.682, para 15.

⁹⁰ *Id.*, paras 251.1 and 251.10.

⁹¹ Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester University Press ND, 1984), 139.

⁹² *Report of the International Law Commission, Fifty-eighth session* (1 May–9 June and 3 July–11 August 2006) General Assembly Official Records, Sixty-first session, Supplement No 10 (A/61/10), 415, para 22. See also Bekker, PHF, Dolzer, R, and Waibel, M, *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (Cambridge University Press, 2010), 348–349.

⁹³ Villiger, *supra* nt 82, 111.

interpretation is known as systemic integration of norms within the international legal system.⁹⁴

International courts and tribunals have already dealt with the principle of systemic integration. It was in the *Gabčíkovo-Nagymaros* case that the ICJ observed the relevance of environmental norms in the interpretation of existing treaties.⁹⁵ Likewise, in the *Oil Platforms* case the Court acknowledged that the treaty at hand was ‘intended to operate wholly independently of the relevant rules of international law’ and therefore the application of the relevant rules of international law (Article 31(3)(c) of the VCLT) relating to this question formed an integral part of the task of interpretation entrusted to the Court.⁹⁶

In the *Mox Plant* case, arbitral tribunals were invited to consider several environmental protection treaties.⁹⁷ Also in the *Shrimp-Turtle* case before the WTO Dispute Settlement Understanding, the Appellate Body looked beyond trade rules and made extensive reference to international environmental agreements.⁹⁸

Investment tribunals have also acknowledged, although vaguely, this principle. In *Asian Agricultural Products Ltd. v Sri Lanka* the tribunal considered that the investment treaty in question was not a

self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.⁹⁹

Similarly, in *Metalclad v Mexico*, the tribunal agreed that treaty interpretation shall include any relevant rules of international law applicable in the relations between the parties.¹⁰⁰ However, the tribunal failed to state those relevant rules. In *Ioannis Kardassopoulos v Georgia* the tribunal considered that the relevant rules include those of general customary international law.¹⁰¹

In the same regard, the tribunal in *RosInvestCo v Russian Federation* emphasised that the relevant rules applicable in the relations between the parties must be taken as a reference to rules of international law that ‘condition the performance of the specific rights and obligations stipulated in the treaty – or else it would amount to a general licence to

⁹⁴ Campbell, M, “The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention”, 54(2) *International & Comparative Law Quarterly* (2005) 279.

⁹⁵ International Court of Justice (ICJ), *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, ICJ Reports 1997, 25 September 1997, 7, para 111.

⁹⁶ ICJ, *Oil Platforms Case (Iran v United States of America)*, ICJ Reports 2003, 6 November 2003, para 41.

⁹⁷ International Tribunal on the Law of the Sea (ITLOS), *The MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order of 3 December 2001, (2002) 41 ILM 405, 413.

⁹⁸ World Trade Organization Dispute Settlement Body, *US Import Prohibition of Certain Shrimps and Shrimps Products*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998.

⁹⁹ *Asian Agricultural Products Ltd v Sri Lanka*, ICSID Case No ARB/87/3, Final Award, 27 June 1990, para 21.

¹⁰⁰ *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, para 70.

¹⁰¹ *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Decision on Jurisdiction, 6 July 2007, para 208.

override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.’¹⁰²

The foregoing examples suggest that investment tribunals may incorporate in their legal process of interpretation other treaties, customary rules, or general principles of law that may be of relevance when assessing a particular dispute. In doing so, consideration to environmental and human rights norms will be given and SD is thus enhanced.

In more concrete terms, systemic integration could play a relevant role when asserting the scope of open-ended terms in investment treaties as well as when standards of treatment and protection require being weighed against legitimate regulatory measures adopted with the purpose of complying with environmental or human rights norms. In particular, IIA clauses on fair and equitable treatment, full protection and security or expropriation must be interpreted in light of relevant rules, principles and treaties applicable in the relations between the contracting parties. Furthermore, systemic integration may be applicable for balancing investment protection with public policy objectives.

As stated by the ILC, systemic integration should apply in the presumption that ‘[in] entering into treaty obligations, the parties *do not intend to act inconsistently* with generally recognized principles of international law.’¹⁰³

Systemic integration is thus a relevant tool for incorporating environmental protection norms, human rights and other relevant rules in investment treaty disputes. This integration not only safeguards the coherence of international law but also allows taking into account SD objectives established in those relevant instruments.

V. Conclusion

In order to foster sustainable development through the application of dynamic social and environmental norms and regulations, States need to have enough domestic policy space to regulate. Constraints on this policy space may impact the achievement of SD objectives, and investment treaties may be perceived as a limitation.

Investment treaty provisions are usually drafted in vague and broad terms and they lack strong references to sustainable development. This has given wide interpretative discretion to investment tribunals when balancing the protection of investors’ rights with the interests of the host State. Several investment treaty provisions such as the definition of ‘investment’ and ‘investor’ as well as provisions regarding the treatment of investors have been interpreted in favour of investment protection without taking into account broader considerations which are, ultimately, closely connected to a countries’ sustainable development policies.

States’ reactions towards these broad interpretations have been diverse. Some States are trying to withdraw from the international investment regime while others are willing to shift their international investment policy towards the new generation of investment agreements. This new generation of IIAs is characterised by drafting treaty provisions that foster sustainable development through innovative features.

With the aim to assist countries in the drafting of this new generation of investment agreements UNCTAD has developed its Investment Policy Framework for Sustainable Development. Furthermore, IPFSD’s core principles for investment policymaking for

¹⁰² *RosInvestCo UK Ltd v Russian Federation* SCC Case No V079/2005, Award on Jurisdiction, 1 October 2007, para 39.

¹⁰³ Report of the International Law Commission, *supra* nt 89, para 19 [emphasis added].

sustainable development may serve as additional guidance for investment tribunals' interpretative approaches.

Despite the willingness to shift towards new policies, States may face several constraints. The renegotiation and revision of existing agreements may be in practice very difficult. Furthermore, the application of investment agreements with SD features may be limited, ie through the application of the most favoured nation treatment clause.

Within this context, investment tribunals play a fundamental role in integrating sustainable development considerations into investment disputes. Investment tribunals may resort to the Vienna Convention on the Law of Treaties in order to adopt contextual, dynamic and systemic interpretative approaches in favour of the notion that investment agreements ought to pursue the countries' overall development, going beyond the mere achievement of economic goals. Instead, investment should now be viewed as sustainable, responsible and to be protected. Investment should forthwith incorporate the concepts of sustainability and responsibility.

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Evidentiary Rules in International Arbitration – A Comparative Analysis of Approaches and the Need for Regulation

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Keywords

INTERNATIONAL COMMERCIAL ARBITRATION; TAKING OF EVIDENCE; PROCEDURAL RULES; COMMON LAW; CIVIL LAW; LEGAL CULTURES

Abstract

The article discusses the procedure of taking evidence in international commercial arbitration from the perspective of balancing different legal cultures and values. It analyses the results of the existing evidentiary rules and attempts to harmonise the procedure, and their sufficiency in terms of securing the interests, expectations and rights of the parties involved in the international arbitration. The actual outcome must be estimated taking into consideration the balancing of the relationships and the differences between legal cultures, fairness and flexibility. In the first instance the author analyses each of the legal systems, civil law and common law, in order to compare the differences and similarities in terms of the procedure, especially in relation to evidentiary issues. A further step involves the analysis of the need for harmonised rules of procedure and in particular evidentiary rules in international arbitration and the factors in the determination and application of the rules, with a focus on the role of the tribunal's discretion, the parties' autonomy, as well as the impact of cultural background. Furthermore, the International Bar Association (IBA) Rules on Taking of Evidence in International Arbitration are analysed in terms of their completeness in such areas as admissibility and assessment of evidence, which permits the comprehension of the strengths and weaknesses of the IBA Rules and the need for the introduction of further rules. Finally, conclusions follow as to the proper way of balancing the competing values and approaches and the need for the application of new solutions in terms of taking of evidence in order to achieve the desired outcome in arbitral proceedings.

I. Introduction

Economic globalisation has led to the increasing development of international arbitration, being a private, informal and non-judicial form of dispute resolution. In the absence of transnational civil courts, which would have a universal jurisdiction over commercial cross-border private disputes, international arbitration is the preferred mechanism of dispute resolution, which permits the parties to submit the dispute to a non-national tribunal. Since the parties come from different jurisdictions, speak different languages and have different legal backgrounds and cultures, international commercial arbitration is inevitably linked with the possibility of conflicts and misunderstandings. The differences between the parties' approaches, legal backgrounds and expectations are

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often so significant that international commercial arbitration becomes a true clash of legal cultures.¹

As culture influences behaviour, values, attitude, legal background and many other aspects of life, the cultural differences between the parties of international commercial arbitration have a strong impact on the arbitral proceedings. Not only do the expectations of the parties in relation to the international arbitral process vary depending on their respective legal backgrounds, but also those of the arbitrators and legal counsel. The participants in the international arbitration process naturally expect to have conflicts resolved according to the values and norms familiar to them. Hence, the cultural legal background determines the approach of the participants in international arbitration, as they expect the arbitration to be similar to what they are accustomed to in their own legal system. This is particularly evident when it comes to the procedural issues of international arbitration. The differences in the legal systems are well pronounced not only between cultures, but also between countries belonging to the same culture. However, while the substantive norms differ from country to country, the procedural norms in their basic form are, most of the time, common to a particular legal culture. Nowadays the predominant legal systems and cultures are common law and civil law. Further subdivision may be observed within each of these systems, based on the region, religion and tradition, such as Arab countries,² Non-Arab African countries, Latin American countries, and East Asian countries.³ However, the cultural clash in relation to international arbitration is mainly observed between the common law and civil law systems.

The divergences between civil and common law in international arbitration influence whole proceedings, but they particularly affect evidentiary issues. Taking evidence is one of the most important parts of the proceedings as it has a direct impact on the outcome of the arbitration. The approach adopted in the procedures for taking evidence, methods of presentation, admissibility, relevance and weight of documentary and oral evidence are of great importance for the parties taking part in dispute resolution. Evidentiary rules and procedures vary significantly between civil law and common law traditions. The differences are the most pronounced when it comes to the preparation and submission of documentary evidence, oral evidence from witnesses of fact and expert witnesses, the actual conduct of evidentiary hearings, as well as the general approach to the proceedings, the role of the tribunal, counsel and the conduct of the proceedings. Many participants of the arbitration proceedings expect the proceedings to be conducted in a similar way to the national litigation they are familiar with. Legal counsel experienced in litigation often make the assumption that international arbitration is just an international litigation and the same rules of evidence and tactical approach can be adopted. This might be the case when the parties are not very experienced in international arbitration and may not know enough about the cultural expectations and legal tradition of the other participants. A clash of different legal traditions and expectations may have a negative impact on the result of the arbitration, when the participants do not recognise the mutual

¹ Cremades, BM, "Powers of the Arbitrators to Decide on the Admissibility of Evidence and to Organize the Production of Evidence", 10(1) *ICC International Court of Arbitration Bulletin* (1999) 49.

² For a detailed description of the legal system of Arab countries and Shari'a see Fadlallah, I, "Arbitration Facing Conflicts of Culture", 25(3) *Arbitration International* (2009) 303.

³ For a detailed description of the legal system of Non-Arab African countries, Latin American countries, East Asian and Arab countries see Pair, LM, "Cross-cultural Arbitration: Do the Differences between Cultures Still Influence International Commercial Arbitration Despite Harmonization?", 9(1) *ILSA Journal of International & Comparative Law* (2002) 57.

approach and do not understand it. Each party is influenced by its legal background, nationality and tradition and international arbitration must be conducted in a way that bridges the differences in order for the proceedings to be neutral and fair. The influence of the legal background not only relates to the parties and their counsel, but also to the arbitrators, as their legal culture may affect the way they conduct the proceedings and their choice of evidentiary approach. An arbitrator, as any other participant of the international arbitration, trained in a particular legal culture will naturally tend to apply the principles familiar to them based on their legal background. However, in order not to oversimplify, it must be underlined that experienced lawyers, with knowledge of the differences in legal cultures, will most of the time try to adopt an international approach towards evidentiary issues instead of rigidly sticking to their legal training and background. In particular, the personal characteristics of the arbitrators such as experience, legal training, age, time commitments and expertise will definitely play a role in the approach adopted by them in terms of evidence. This transnational approach is the result of recent attempts to harmonise arbitral proceedings⁴ and the fact that to some extent the gap between common and civil law in terms of evidentiary rules has been successfully reduced. Nevertheless, the issue of cultural differences in international arbitration is still relevant today, as the clash of cultures continues to exist. Despite increased globalisation and the flow of information about other legal systems, culture continues to play a role. There are still issues that need to be resolved and the need for mutual understanding is a subject of great importance. In order to overcome cultural problems emerging in international arbitration with a particular emphasis on the evidence, one should understand those differences, their source and impact on the approach, and use them creatively in order to obtain the best outcome of international arbitration. Only through mutual understanding, preparation, knowledge and respect might the problems in cross-cultural international arbitration be avoided and resolved. The following part of this article will briefly discuss the procedural differences in the process of taking evidence in the common and civil law traditions, the general approach adopted by each legal system and the source of those differences. Such knowledge is essential in order to understand the conflicts that may arise in international arbitration as a result of the clash of different legal cultures. The analysis will not cover substantial law.

II. Civil Law and Common Law Diversity in Terms of Procedure and the Approach to Fact Finding

As stated above, the greatest differences in terms of fact-finding can be noticed between two main legal families, civil law and common law. Differences can be observed in the methodology of the approach in each of the systems, the role of the judge/arbitrator, the role of counsel, the pleadings, the way the evidence is introduced including document discovery, fact witnesses and other aspects of the legal proceedings such as the ethics of counsel. The differences apply to both national litigation and national arbitration in the two systems, as similar rules are adopted in terms of procedure when the proceedings are national. Within the common law and civil law countries further divisions take place, as each of the countries has developed its own procedure, the general rules, however, are

⁴ In particular, International Bar Association (IBA), *Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, at ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (accessed 27 April 2015).

common for the countries belonging to the particular legal family. The most common determinant to distinguish both systems is the traditional division into continental civil law based on civil codes and the common law which is based on case law and precedent. In this article the two main systems will be discussed with regards to the US and England on one side and the European countries on the other side as the representatives of two legal cultures, even though some differences in the procedure from country to country apply.

II.1. Method: Adversarial Versus Inquisitorial System and Their Main Characteristics

The methodology of the approach in the proceedings is one of the main differences distinguishing common law and civil law. The legal approach determines the participants' expectations in terms of procedure, since it is the core element that influences all further divergences between those two legal cultures. The approach to the proceedings concerns the role and function of judges/arbitrators in proceedings and the way they are organised. Common law is characterised by the adversarial approach, where the judges do not play an active role in the dispute before them. Their role is limited to ensure the equity and fairness of the proceedings, while the parties are the protagonists and it is left to them to introduce all the issues of the dispute in the proceedings. The matters, questions and objections not raised by the parties will not be taken into consideration by the judges.⁵ The adversarial approach influences all stages of the proceeding, determining the rules of evidence presentation, exclusionary rules and the role of counsel. This system obligates the parties to present all the relevant evidence in their possession, including evidence which is adverse to their own interest.⁶ The common law system also developed elaborate evidence and exclusionary rules, which was partly due to the fact that historically evidence was judged by juries composed of lay persons often not even literate and with no legal background.⁷ For this reason, the common law is mostly oriented towards oral evidence and hearings, as the evidence was discussed and accessed orally, which permitted the jury to fully understand and evaluate it. A further result of the adversarial approach and the presence of the jury is the division of interlocutory proceedings and the final hearing. Historically, counsel had to select and properly present information and gather evidence, because the jury composed of laypersons might have considered irrelevant evidence or failed to evaluate it correctly. The jury was only selected and received information after the interlocutory proceedings. Therefore, all the information needed to be introduced again to the jury.⁸

Civil law is characterised by the totally opposite approach. The inquisitorial method focuses on the active role of the judge or arbitrator. The judge is in charge of the conduct of the proceedings. The role of the judge is to investigate the case, establish all the facts and the law while the parties and their counsels assist in this process. This approach also

⁵ Vercauteren, L, "Note and Comment: The Taking of Documentary Evidence in International Arbitration", 23 *The American Review of International Arbitration* (2012) 341.

⁶ Waincymer, J, "Approaches to Evidence and Fact Finding" in Waincymer, J, *Procedure and Evidence in International Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2012), 746.

⁷ Smit, RH, "Roles of the Arbitral Tribunal in Civil Law and Common Law Systems with Respect to Presentation of Evidence" in Van den Berg, AJ, *Planning Efficient Arbitration Proceedings: The Law Applicable in International Arbitration*, (vol 7, Kluwer Law International, Alphen aan den Rijn, 1996), 161.

⁸ Pair, *supra* nt 3, 62.

influences all the other issues in the proceedings, including the rules of evidence. The parties are not required to present all the relevant evidence. They can determine which evidence they wish to rely on without being forced to present the evidence not in line with their interests. The active participation of the judge/arbitrator in the proceedings is linked to the historical roots of civil law, when under the Roman Law judges were highly educated and trained magistrates, capable of assessing the case and the evidence correctly. Consequently, civil law gives much emphasis to written evidence and documents since there was no need for oral explanation of the evidence to the judges during the hearings, as opposed to the common law jury. Furthermore, as according to the inquisitorial approach the judge is also the fact-finder, there is no need to separate the stages of the proceedings into the pre-hearing and hearing phases.

The approaches presented above reflect different views of each of the legal systems in the search for the truth. For the common law participants in the proceedings, the main goal of the process is the search for the factual truth, which is determined by the final decision.⁹ On the other hand, in the civil law tradition, where the parties only bear the burden of proof of their own case, the rules of law will be applied only to the facts revealed by the parties, in line with the Roman Law rule *da mihi factum, dabo tibi jus*.¹⁰ Thus the factual aspects are the exclusive domain of the parties whereas the domain of the judge is the legal aspects. The truth is relative, being that which emerges from the proceedings, in comparison to the objective truth found in common law.

II.2. Pleadings

Generally, the pleadings stage is the first step in the proceedings in which a party brings its suit. Pleadings are formal written statements which are filed with the court and which include a party's claims or defences to another party's claims. According to the approach adopted in each of the legal systems, the importance given to pleadings is different.

In the common law tradition, pleadings have less value, since preference is given to oral presentation of the case. A pleading is a brief pre-hearing statement of a claim or defence, possibly combined with a counterclaim.¹¹ Common law lawyers tend to prepare pleadings in a very limited, almost bullet-point form,¹² with no evidence attached or legal arguments made, with the intention that the details necessary to understand the case will be provided later orally during the hearing. This is the consequence of the adversarial approach and the historical fact that the jury was composed of lay persons, as mentioned above, often illiterate, when oral persuasion was more efficient and paper documents were less persuasive than emotional witness statements and live testimony. For the same reasons the weight given to the advocacy of a common law lawyer in order to secure

⁹ de Boisseson, M, "Comparative Introduction to the Systems of Producing Evidence in Common Law Countries and the Countries from Roman Law Tradition" in International Chamber of Commerce, *Taking of Evidence in International Arbitration Proceedings* (ICC Publishing SA, 1990), 101.

¹⁰ Give me the fact, I'll give you the law. See Mourre, A, "Differenze e convergenze tra Common Law e Civil Law nell'amministrazione della prova: Spunti di riflessione sulle IBA on Taking of Evidence" in Istituto Superiore di Studi sull'Arbitrato, International Chamber of Commerce, *La prova nell'arbitrato internazionale. Atti del convegno svoltosi a Roma il 5 febbraio 2010* (Edizioni Lapis, Rome, 2011), 88.

¹¹ Laeuchli, UM, "Civil and Common Law Contrast and Synthesis in International Arbitration" in American Arbitration Association, *Handbook on International Arbitration Practice*, (Juris, New York, 2010), 40.

¹² Lew, JDM and Shore, L, "International Commercial Arbitration: Harmonizing Cultural Differences" in American Arbitration Association, *Handbook on International Arbitration Practice* (Juris, New York, 2010), 6.

tactical and strategic advantage is greater than that given to written pleadings. The common law lawyer is accustomed to extensive oral arguments.

In the civil law tradition, pleadings are lengthy documents, including a claim or a defence and description of the facts and legal arguments, as all information has to be identified and provided in writing in detail. The pleadings have exhibits attached, being considered the evidence in the case. Pleadings are presented orally during the hearing, however, they are most often read from the written document, and are far from the common law lawyers' tactical speeches. As traditionally the judges were well-trained professionals, they could easily extract the most important facts from the written documents instead of lengthy oral statements and witness examination. Written documents in civil law are expected to support the claims and points of view of the party and the evidence should be identified as early as possible.

II.3. Hearings and Oral Evidence

In accordance with the prevailing method of presenting the case, hearings as well as their duration and form vary between common law and civil law. Hearings and trials are much longer in common law countries, which is a consequence of the historical factors specified above. As the common law system gives greater importance to oral submissions and the presentation of the evidence to the jury, the hearings are a crucial part of the proceedings. Pleadings do not contain many details of the case, evidence or legal arguments; hence, during the hearing the most important facts of the case are revealed. Having historically developed the tradition of oral advocacy, hearings permit legal counsel to express fully their tactical and strategic capacities. A common law hearing starts with limited opening statements, followed by the examination and cross-examination of witnesses, which may last for days or weeks, to close with limited closing arguments of counsel where they sum up all the evidence presented during the trial.¹³

Hearings in civil law countries, where the pleadings contain a detailed description of facts, legal arguments and attached documentary evidence and where a couple of rounds of written submissions between the parties takes place, are not the central part of the proceedings. In some cases, where the crucial facts can be established based on contracts or other documentary evidence, the hearing can be totally omitted. Whenever there is still a need for oral submissions and evidence, the hearing is conducted, however, in much shorter time limits in comparison to the common law tradition, as it usually takes one or two days. During the hearing the parties restate their claims and the witnesses are heard if needed.

The conduct, form and length of a hearing are related to the method of examination of oral evidence, namely the witnesses and experts. In common law cases witness testimony is the crucial evidence and huge weight is given to the examination and cross-examination of the witness. Again, this is a consequence of the preference for oral proceedings and the jury deciding on the facts of the case on the basis of what they heard from the witnesses and counsel's oral submissions.

In civil law countries, there is a general mistrust of witness testimony and greater weight is given to documentary evidence, since the professional judge could hardly be influenced by the aggressive tactics of counsel typical in the common law or the emotional testimony of the witnesses, which may be effective in the case of the jury. In

¹³ Hanotiau, B, "The Conduct of the Hearings" in Newman, LW and Hill, RD, eds, *The Leading Arbitrators' Guide to International Arbitration*, (2nd ed, JurisNet, New York, 2008), 361.

this context the tactics and methods of witness examination in both of the legal systems are significantly different.

Common law lawyers, in particular US lawyers, are well trained in tactical witness examination as it is considered the focal point of the trial. This is related to the fact that in the adversarial approach to the proceedings the judge is not the protagonist and does not lead the examination of the witness, leaving its conduct to counsel. The court controls the mode and order of the interrogations but does not ask questions itself. The examination of witnesses can be divided into the examination-in-chief (or direct examination) and cross-examination. The main difference is that examination-in-chief refers to the examination of a witness called by the same party that is examining the witness whereas cross-examination refers to oral questioning of a witness called by the opponent party. A witness called by the opponent party is generally seen as a hostile witness, hence, the rules of the examination, modes of questioning and techniques used by counsel are different. Counsel are specifically trained in the techniques and prescriptive rules of questioning which form a part of advocacy and are acquired through experience, forming a set of skills which are crucial for the Common lawyer's practice.¹⁴ The techniques serve the purpose of complying with the rules of examination-in-chief and cross-examination and developing the capacity for questioning the witness in a way particular to each of the examinations, that is: in a logical, readily comprehensible and ultimately persuasive manner in the case of examination-in-chief or in a more aggressive manner, aimed to reveal error, uncertainty or falsity in the case of cross-examination.¹⁵ The prescriptive rules of examination state what is permitted and what is prohibited in cross-examination of a witness. The most fundamental rule universal in common law jurisdictions relates to leading questions. Leading questions are generally prohibited in direct examination and permitted (and most often desired and widely used by counsel) in cross-examination, which is due to the fact that in direct examination counsel examines the witness called by the party he represents so he should not suggest the answers, presumably helpful to his or her case, by leading questions. In cross-examination leading questions are one of the most important tactics, together with an aggressive, adversarial and destructive attitude.

Witness examination in civil law countries is not as important a part of the proceedings as in the common law tradition, due to written documents being the preferred form of evidence. A main difference in terms of witness examination is the fact that in the civil law tradition the proceedings are conducted in accordance with the inquisitorial approach, hence the judge is the protagonist of the interrogation. In some jurisdictions the judge is the only person who can directly ask questions of the witness, without the intervention of counsel. In others, counsel may ask questions only after the judge has finished the interrogation. Generally, there is no division into direct examination and cross-examination and the same rules apply to both counsels. The court controls the conduct of the examination, and the sort of questions asked, which generally shall not be leading questions, include comments or ask for a witness' opinion, however, often there are no codified rules as to the content of the questions asked by counsel. It is

¹⁴ The famous Ten Commandments of Cross Examination proclaimed by Irving Younger, a scholarly state judge in New York and teacher of trial advocacy. See Smit, RH, "Cross-examining Witnesses before Civil Law Arbitrators" in Newman, WL and Sheppard Jr, BH, eds, *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, New York, 2010), 246.

¹⁵ Cremandes, BM, Cairns, DJA, "Cross-examination in International Arbitration: Is it Worthwhile?" in Newman, WL and Sheppard Jr, BH, eds, *Take the Witness: Cross-Examination in International Arbitration* (JurisNet, New York, 2010), 227–228.

not a common practice, as opposed to the common law tradition, to examine the witness in an aggressive, tricky and confusing manner, as the oral evidence is not a crucial means of establishing facts, hence, the sophisticated methods and techniques of advocacy are not the main part of a civil law counsel's practice. On the contrary, the aggressive approach of counsel tending to embarrass, trick or bully the witness is not seen positively by the judge and might result in the judge admonishing counsel as to the modality of questioning.

II.4. Expert Witnesses

In common law traditions the experts are appointed by the parties in order to give the opinion on the technical or other complex matters requiring the specific knowledge which is relevant for the party. The party is free to select an expert of its choice as there is no official list of experts held by the courts. The expert produces a written report on the issue in question and is then examined in a way similar to other witnesses, as he or she does not act as the party's advocate.¹⁶ The cross-examination of experts serves to verify whether he or she is impartial and is not misleading the court. It also tests the expert's competence so the techniques of advocacy in examining the expert are as widely used as in examining the witness.

In civil law tradition the experts are appointed by the judge upon the request of the parties or within the authority of the judge to act *ex officio*. The court holds the list of experts in various fields and the expert is chosen from the list. There might be one or more experts appointed by the court, depending on the specific information needed. The expert is asked to issue a report on a matter requested by the court and the parties may formulate questions and issues they consider important and which should be covered in the report. After the issuing of the report the parties have the opportunity to make written comments on the report and to request the summoning of the expert to attend the hearing in order to be examined by the court and the parties. The examination of the expert by the parties is, however, quite limited in comparison to the cross-examination conducted by the counsel in common law countries. The cost of the expert report are covered directly by the court, however, these costs are first advanced by the parties. The parties may request another expert to be appointed. However, in order for the court to satisfy this requests, it must be persuaded that the expert lacks competence or the report has some significant inconsistencies and might not be relied on.

II.5. Documentary Evidence

Documentary evidence and the approach toward it is the aspect in which the two legal systems vary the most. In common law, where the proceedings were historically based on oral submissions and evidence due to the presence of the jury, less weight was given to the documentary evidence. However, since the jury was often illiterate, the documentary evidence had to be gathered beforehand, selected and assessed by the counsel in order to present it later to the jury. This led to the development of the pre-hearing stage of the proceedings, in which all the documentary evidence was supposed to be presented and submitted to the other party. In the contemporary common law countries, the discovery of documentary evidence is the key feature in the pre-trial stage of the proceedings. The

¹⁶ Brown, D, "Oral evidence and experts in arbitration" in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 80.

approach concerning the search of the factual objective truth is represented by the obligation of both parties to present and submit all the relevant evidence, both incriminating and favourable for the case. The documents, which include inter alia correspondence, emails and notes, are the prevailing evidence being produced in the discovery stage, however, all the other physical evidence is also included. The common law countries, especially the US, permit the discovery of an extremely broad variety of documents, which often leads to time- and cost-consuming proceedings. This is less true in the case of other common law jurisdictions, for example, England.¹⁷ In fact, the so called ‘fishing expeditions’ are often used by common law counsel as a tactic to exhaust or burden the opposite party. Documentary evidence gathered during discovery is assessed by counsel and only the documents relevant to the case are presented as evidence in the proceedings. The written evidence in common law tradition is introduced and authenticated by counsel and explained by witnesses during the hearing.

In civil law tradition the legal and factual arguments are preferably supposed to be proven by the documentary evidence, which is submitted with the pleadings in the early stages of the proceedings. As judges are professional lawyers and they conduct the proceedings in the inquisitorial way, they can quickly assess the case based on the attached documentary evidence. The judge conducts his own enquiries into the issues of fact and law.¹⁸ Since the approach taken is the search for procedural truth, there is no need for the pre-trial discovery, as the case is being assessed based on the evidence produced freely by each party, without the obligation to produce all the relevant documents in their possession. The parties do not have to produce unfavourable evidence to the opposite party. There is almost no discovery in the civil law countries, which limits the time of the proceedings as well as the costs. The only possibility of limited discovery and forced document production may take place in the case of a third party being in possession of a document essential for the case or a specifically identified document in the possession of a party, which is relevant in the course of the proceedings. In those cases the court may order the production of this document. The documentary evidence, which is typically submitted with the written pleadings and memorials, is self-authenticating. The weight given to the documentary evidence, especially to the official documents issued by State organs is greater than that given to any other type of evidence.

II.6. Ethics

The legal culture also influences the ethics of counsel, since there are different standards and approaches toward the conduct of the proceedings. It is an usual and desired practice for common law lawyers to prepare a witness to testify. The preparation of a witness is commonly known as horseshedding.¹⁹ A failure to adequately prepare a witness both for direct and cross-examination may be regarded as professional misconduct. The necessity to prepare the witness for testimony is due to the adversarial approach adopted by the

¹⁷ Karrer, PA, “The Civil Law and Common Law divide: An international arbitrator tells it like he sees it” in American Arbitration Association, *Handbook on International Arbitration and ADR* (2nd ed, Juris, 2010), 53.

¹⁸ Davidson, BR, Muller, W and Riegler, S, “Procedural matters checklist” in Hanessian, G and Newman WL, *International Arbitration Checklist* (2nd ed, JurisNet, 2009), 90.

¹⁹ Horseshedding being the instruction of a witness favourable to one’s case about the proper method of responding to questions while giving testimony. For more detailed description of the practice of preparing witness see Rifkind, RS, “Practice of the horseshed: Preparation of the witnesses by counsel in America” in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 55.

common law procedures. While documentary evidence is important, their evaluation and organisation is given by the oral testimony. In the highly developed technical and tactical cross-examination of witnesses, the counsel may not conduct this process without knowing what the witness will say and what may potentially be said by the opposite party's witnesses. What is a common practice in common law tradition, is being seen as unethical and prohibited in the civil law tradition. The preparation of a witness is prohibited for civil lawyers and for English as well, even though they come from common law tradition. In most continental European countries the counsel may approach and interview witnesses, but cannot prepare them to testify (for example, Austria, Germany, Sweden), however in other civil law countries the Rules of Conduct of the Bar included in ethical codes prohibit the counsel to interview witnesses (for example, Belgium, Italy, France).²⁰ Professional misconduct is subject to the disciplinary sanctions of Bar Authorities.

Another difference in ethics is the obligation of English lawyers to refer to the relevant case law, both favourable and unfavourable, whereas in civil law tradition the counsel may refer to the law and the precedent court decisions, but is not obliged to do so, since the judge is actively involved in the search for truth and applying the law. Moreover, in the German tradition, the counsel can speak in confidence with the opposite party's counsel without revealing the details of this communication to the client, whereas in common law the counsels cannot have secrets towards their clients.²¹

It has been shown above that civil law and common law vary significantly in terms of procedure, taking evidence, approaches and techniques. Understanding the differences and knowing the sources of them is the key to the mutual comprehension when it comes to the clash of the two cultures in transnational disputes and international arbitration proceedings, especially in cases where the parties come from two opposite legal traditions and tend to apply their own legal approach.

III. The Need for Harmonisation of Procedural Rules

Having analysed the main differences between common and civil law tradition, it becomes clear that the expectations of the parties coming from each of the system and being involved in international dispute are significantly different. In terms of procedure the two systems represent almost opposite positions in key matters, starting from the approach adapted, the role of the judge, the conduct of the proceedings, search for truth, counsel's position and their practice, to evidentiary means. It seems that the major differences are present in terms of the taking of evidence and the weight that each system gives to various means of evidence, namely oral and documentary evidence. The taking of evidence has major influence on the outcome of the dispute, since it permits the gathering of all the necessary evidence to support ones' case. In international arbitration serious conflicts may arise due to the differences of legal traditions of the parties, in addition to the main substantive dispute between them. For this reason, defining the procedural rules has become a crucial issue for the international practitioners and institutions taking part in international arbitration. However, since legal traditions vary so significantly, the major problem is the choice of such procedural rules which would

²⁰ van Houtte, H, "Counsel-witness relations and Professional misconduct In Civil law systems", in Levy, L and Veeder, VV, eds, *Arbitration and Oral Evidence* (ICC Publishing, 2004), 106.

²¹ Winter, JB and Newman, LW, "Cultural factors and language" in Hanessian, G and Newman, LW, eds, *International Arbitration Checklist* (2nd ed, JurisNet, 2009), 80.

satisfy both traditions and would not particularly favor any of the approaches. Hence, harmonising procedural rules of international arbitration proceedings has become a particular problem in an international society. Harmonising such different approaches is not an easy task and may lead to a variety of results, as combining some of the rules and approaches may not be fully satisfactory for either side.

Many institutions have set their own procedural rules to provide the parties with specified provisions which facilitate the conduct of international arbitration. The development of international arbitration in recent years has led to the amendments of rules and certain harmonisation of the practices used in the conduct of the proceedings, however with diverse effects. The rules according to which the international arbitration will be conducted are usually not the subject of arbitration agreements between the parties, since during the process of signing the contract the parties focus on only a few provisions in relation to the international arbitration, such as the seat of arbitration, the language, the number of arbitrators, and only sometimes deciding on the institutional rules governing the proceedings. However, most of the times, even if they do choose the institutional rules, they are not familiar with them and do not fully realise how the proceedings will be conducted. Usually, only after a dispute arises, the parties start to realise that there are many significant differences between their legal traditions influencing their expectations. Depending on the rules chosen, the extent of the parties' autonomy and the arbitrators' powers concerning the conduct of the proceedings differ. Usually the institutional rules are silent when it comes to detailed conduct of the proceedings, especially in relation to evidentiary matters. Institutional rules, such as UNCITRAL,²² ICC,²³ LCIA Rules²⁴ provide only general provisions in terms of the taking of evidence. They define the procedural issues such as the request for arbitration, constitution of the tribunal, place of arbitration, the language and the other case management provisions, however, when it comes to the establishment of facts of the case, they usually contain only few generic articles, leaving the details to be set by the parties or the tribunal. In cases where the parties come from different legal traditions, finding a common ground as to the gathering of evidence might be problematic and lead to further conflicts. On the other hand, in the absence of agreement between the parties, one of the parties may feel unsatisfied or even deprived of its right to be heard and to present its case. In this situation, the tribunal in its authority sets the rules governing the taking of evidence and applies the rules familiar to its legal background and the opponent party's background. Hence, more detailed rules of evidence are required.

²² United Nations Commission on International Trade Law (UNCITRAL), *Arbitration Rules (as revised in 2010)*, 6 December 2010, A/RES/65/22 at <uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html> (accessed 18 April 2015).

²³ International Chamber of Commerce (ICC), *Rules of Arbitration*, in force as of 1 January 2012, at <iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> (accessed 18 April 2015).

²⁴ London Court of International Arbitration, *Arbitration Rules*, effective 1 October 2014, at <lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx> (accessed 18 April 2015).

III.1. IBA Rules on the Taking of Evidence in International Arbitration

The international community has recognised the abovementioned problems and provided a solution to fill the gaps in institutional arbitration rules. The International Bar Association (IBA) has provided guidance to parties in relation to the taking of evidence in international arbitration. Since the IBA Committee is composed of practitioners from all over the world,²⁵ it was qualified to create a set of international rules, which would be satisfying for parties coming from different legal backgrounds. The first version of the Rules was adopted in 1983 as *Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration*. The feedback from the international community was positive and the Rules were seen as an example of harmonisation of procedures regarding the taking of evidence in international arbitration. With time, new problems and new procedures had to be developed, since international arbitration became more popular as a method of dispute resolution. As a result, the Rules were updated in 1999 as the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*. This version of the rules was also well accepted and received as useful harmonisation in the procedures used in international arbitration. The ultimate revision of the rules took place in 2010 when IBA established the *IBA Rules on the Taking of Evidence in International Arbitration* (IBA Rules) (deleting from the title the word ‘commercial’ so that the Rules could also be used in the investment arbitration).

The IBA rules of evidence contain procedures initially developed in the civil law and the common law systems, which is why they are widely used in both institutional and *ad hoc* international arbitration proceedings. The IBA Rules may be adopted by the parties and the tribunals as a whole or in part, and they may also be used just as guidelines. The IBA Rules are not intended to substitute the institutional rules such as ICC, LCIA or UNCITRAL rules, as they do not contain the rules for the whole international arbitration procedure. They simply fill some gaps in terms of the procedure of taking evidence. The IBA Rules have been considered as the harmonisation of the differences in international arbitration procedure, however, it is disputable whether these Rules actually satisfy the needs and the expectations of the participants of the arbitral proceedings by creating a harmonised set of rules originating from common and civil Law tradition or if they only create a hybrid system which still does not completely resolve the existing issues in an efficient way. This problem will be discussed below.

²⁵ The 1999 IBA Working Party was led by Giovanni Ughi of Italy, and its members were Hans Bagner, Sweden; John Beechey, England; Jacques Buhart, France; Peter Caldwell, Hong Kong; Bernardo M Cremades, Spain; Otto De Witt Wijnen, The Netherlands; Emmanuel Gaillard, France; Paul A Gelinas, France; Pierre A Karrer, Switzerland; Wolfgang Kühn, Germany; Jan Paulsson, France; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Hans van Houtte, Belgium; and Johnny Veeder, England. The 2010 IBA Rules of Evidence Review Subcommittee was led by Richard Kreindler of United States/Germany, and its members were David Arias, Spain; C Mark Baker, United States; Pierre Bienvenu, Canada; Antonias Dimolitsa, Greece; Paul Friedland, United States; Nicolás Gamboa, Colombia; Judith Gill QC, United Kingdom; Peter Heckel, Germany; Stephen Jagusch, New Zealand; Xiang Ji, China; Kap-You (Kevin) Kim, Korea; Amy Cohen Kläsener, Review Subcommittee Secretary, United States/Germany; Toby T Landau, QC, United Kingdom; Alexis Mourre, France; Hilmar Raeschke-Kessler, Germany; David W Rivkin, United States; Georg von Segesser, Switzerland; Essam al Tamimi, United Arab Emirates; Guido S Tawil, Argentina; Hiroyuki Tezuka, Japan; Ariel Ye, China: *Commentary on the revised text of the 2010 IBA Rules on the Taking of Evidence in International Arbitration*, 2010, at <ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (accessed 26 May 2015).

III.2. Determination and Application of Rules of Evidence, Parties' Autonomy and Arbitrators' Discretion

One of the reasons why international arbitration is a preferred means of dispute resolution, apart from the intentional avoidance of the national courts, is the freedom the parties enjoy in choosing the rules that will govern the arbitration. An important advantage is the right of parties to appoint their own arbitrators who can be qualified in the matter which is the subject of the dispute and decide on the legal background of the arbitrators. Parties can create their own procedural rules and the standards of the proceedings, as the arbitration is founded on their will. Different systems of law may regulate different aspects of the proceeding. The recognition and enforcement of the arbitration agreement can be governed by one system of law while the recognition and the enforcement of the award may be governed by another. A third system might apply to the proceeding and a fourth to the substantive matters of the dispute.²⁶

Although the parties have the powers to decide the procedural rules, including the taking of evidence, applicable to arbitration when drafting the substantive contract and the arbitral clause, they rarely do that, choosing only the institutional rules, if they choose any at all, under which the arbitration will be conducted. If parties explicitly set the particular evidentiary rules guiding the procedures, they will have to be respected by the arbitral tribunal unless they violate the mandatory norms of due process. Usually, however, the parties only choose the institutional rules which will govern the whole arbitration process, such as the ICC Rules or the LCIA Rules. Most arbitral rules do not provide detailed provisions as to how the evidentiary proceedings shall be conducted, leaving much freedom to the parties and to the arbitral tribunal in setting those rules. They usually contain a provision stating that the tribunal shall proceed to establish the facts of the case by all appropriate means, leaving a wide discretion to the tribunal. This intentional gap gives freedom to the parties and the tribunal in setting some more specific rules and in the absence of agreement between the parties, the tribunal has the discretion to set such rules. Even where there is a lack of previous agreement between the parties as to the evidentiary rules, it is possible to set them before the commencement of the arbitration. However, in a situation of conflict, this is sometimes impossible. The parties may also agree upon particular rules during the proceedings or before the hearing. In the event of a lack of agreement between the parties, the arbitral tribunal has a discretionary power to decide about the procedure, admissibility, materiality and weight of evidence. However, it has to consider the right of the parties to be heard, the opportunity to present the case, the norms of due process, fairness, equal treatment and the expectations of the parties. As parties may come from different legal background and have different views on many aspects of the procedures of taking evidence, the arbitral tribunal must seek an efficient and appropriate solution suitable in the given circumstances. Since the tribunal might be also influenced involuntarily by its own legal background, it is particularly important that it decides upon the rules carefully and with the utmost possible participation of the parties.

It is desirable for the tribunal to adopt the IBA Rules on taking evidence in international arbitration in cases where the parties come from different legal backgrounds and in case they have not come to any agreement on the procedures of taking evidence.

²⁶ Hunter, M and Redfern, A, *Law and Practice of International Commercial Arbitration* (3rd ed, Sweet and Maxwell, 1999), 1–2.

The IBA Rules to some extent have reduced the gap between common and civil law in terms of evidentiary rules.

The IBA rules can be adopted as a whole, as the rules governing evidence, in part or as guidelines not strictly binding the tribunal. The IBA Rules are to be considered supplementary to the legal provisions of the institutional rules, *ad hoc* rules or other rules chosen by the parties, hence, they do not influence the application of those rules, since they fill in gaps intentionally left in those procedural frameworks with respect to the taking of evidence. According to the article 1 of the IBA Rules, in case of conflict with any mandatory provision of law determined to be applicable to the case by the parties or by the arbitral tribunal, the rules will not be applicable to that extent. In case of conflict between any provisions of the IBA Rules and the institutional rules, *ad hoc* rules or any other procedural rules established by parties or the tribunal, the tribunal shall apply the IBA Rules in the manner that it determines best, in order to accomplish the purposes of both the institutional rules and the IBA Rules, unless the parties agree to the contrary. Hence, the IBA Rules give the tribunal the discretion to apply the rules in the way that it determines the most appropriate. Moreover, the tribunal also enjoys the power to interpret the IBA Rules accordingly to their purpose and in a manner most appropriate to a particular case in any event of the dispute in relation to the meaning of the provisions of IBA rules. The discretion of the arbitral tribunal is significant also in cases where the IBA Rules and the institutional or other agreed rules are silent on some matter concerning evidence and when the parties have not agreed otherwise. In such case the tribunal can conduct the procedure of taking evidence in a way it deems appropriate, in accordance with the general principles of the IBA Rules. This solution provides further flexibility of the proceedings when some additional issues in terms of evidence arise. The IBA Rules invite the parties and the tribunal to consult each other at the earliest time possible to agree in an efficient, economical and fair process of taking evidence.

As stated above, the process of the taking of evidence is due to the parties' autonomy, since they have the freedom to set the rules of the taking of evidence tailored for their specific case and circumstances. In the event of a lack of selection of any rules of evidence and failure to reach an agreement, the parties are subject to the discretion of the tribunal in relation to evidentiary rules. Limitations to parties' autonomy are the norms of due process, fairness and the mandatory rules of the applicable law and selected institutional rules. However, even in the event of the tribunal's discretion in deciding the rules of evidence or its interpretation, the tribunal has to consider the interests of both parties, their expectations, right to be heard and their legal background as the tribunals' discretionary power always has its source in the will of the parties to arbitrate.

The discretionary power of the tribunal to decide about the rules of taking evidence includes also the admissibility of certain types of evidence. Since national rules on admissibility do not bind the tribunal, problems related to the technical rules of admissibility such as leading questions in direct examination of a witness, hearsay or the testimony of an individual being an employee of one of the parties will not be applicable in international arbitration. Such concepts might be crucial for the parties coming from a certain legal background when in their traditions the evidentiary rules prohibit the admission of this evidence. In international arbitration this evidence would not be excluded, unless the parties have explicitly agreed on admissibility of some types of evidence. The parties must be aware not to rely on the technical rules concerning admissibility during the proceedings, especially when the tribunal is composed of arbitrators coming from different background than theirs. Arbitrators are extremely reluctant to limit evidence that can be submitted and normally permit the parties to present evidence, including the introduction of materials of questionable relevance,

because they are concerned that their award will not be recognised or enforced by national courts due to a party being unable to present its case.²⁷

Notwithstanding that, some evidence might not be admissible due to violations of public policy, protection by privilege or secrecy. Moreover, the rules of admissibility, even if not applicable, may matter at the stage of assessment of the evidence by the tribunal. The tribunal may assess that the evidence which has been admitted does not have probative value or has little value. Given that, a question may arise as to how the arbitral tribunal actually assesses the value of evidence and whether the parties may know in advance that some of the evidence presented by them will not have a strong value.

III.3. Cultural Diversity's Impact on Determination of the Rules

The determination of the rules of evidence depends widely on the background of the parties. The cultural diversity in terms of legal tradition, views on the evidentiary matters, the approach and the expectations of the parties influence their vision of the best procedural rules appropriate for their dispute. When parties come from the same legal tradition, agreeing on certain rules of evidence may be much simpler, since the parties have a similar view on most of the evidentiary matters, the prevalence of the documentary or oral evidence, the method of examining the witnesses, the expert evidence, the discovery of documents and the approach of the tribunal. However, when the parties come from different legal traditions, defining the rules of evidence might be the focal point of the dispute, particularly when both of the parties and their counsels are not experienced in international arbitration. Additional problems might arise if the arbitral tribunal is composed only of arbitrators coming from the legal background of one of the legal parties and are inexperienced in disputes between parties representing opposite legal traditions. The legal and cultural background, even of arbitrators, is not to be underestimated. The Arbitrators are probably the most flexible of all the participants of the arbitration, however, still they have the baggage of some principal values coming from their own legal tradition and this is a significant factor to take into consideration. It is probable that an arbitrator trained in a particular legal culture will tend to apply the principles familiar to them when conducting the proceedings and addressing particular issues. This can constitute a serious problem for the parties and their counsel in preparing their case and trying to ascertain which legal approach will be taken by the tribunal and how its background may affect the conduct of the proceedings. To that extent, the knowledge of the differences, approaches and expectations of the participants of the international arbitration is of a fundamental importance. The counsel and the parties are far less flexible in reaching the agreement as to the evidentiary rules. This leads to the clash of cultures and tailoring the appropriate rules of evidence might be a harsh task. The IBA Rules are said to be the compromise between the common law and civil law tradition, which harmonises the legal traditions, methods, approaches and views on the taking of evidence. However, the IBA Rules are not just the compilation of the rules present in different legal traditions and their harmonisation, but rather a new, hybrid system which includes some of the features of both of the system. The IBA Rules also create their own procedures, uniquely different from those of the civil law or common law traditions. The IBA Rules contain procedures that are not present in the proceedings

²⁷ Von Mehren, GM and Salomon, C, "Submitting Evidence in an International Arbitration: The Common Lawyer's Guide", 20(3) *Journal of International Arbitration* (2003) 288.

before the national courts. However, some issues that are the source of conflict between the two legal traditions are not covered or are merely mentioned in the IBA Rules.²⁸ Consequently, it is debatable whether the IBA Rules are actually a satisfying compromise and whether they are sufficiently adjusted to the needs of parties coming from different backgrounds. Due to the broadness of the matter and the limited length of the present article, it is not possible to analyse all the IBA Rules provisions in relation to all the forms of evidence. Hence, for the purpose of this study, only the issues of assessment and admissibility of evidence and the absence of some provisions in the IBA Rules will be discussed.

IV. Admissibility and Assessment of Evidence According to IBA Rules of Taking Evidence

The assessment of the evidentiary material depends on many elements which may influence the value and credibility of the evidence. This part of the article will discuss potential factors which are important for the assessment of the gathered evidence by the arbitral tribunal.

One of the major concerns of the parties and the lawyers, especially those coming from common law traditions, in relation to taking of evidence, is whether the evidence will be admissible. However, in international arbitration, strict rules as to the admissibility of the evidence do not apply and the principles governing the admissibility of the evidence are less rigid. The limits of the admissibility in case of international arbitration are defined by the discretion of the arbitral tribunal and the parties' agreement. If the parties adopt some evidentiary rules, such as IBA Rules, admissibility may be governed by them. However, in most cases, evidentiary rules give little guidance as to admissibility, stating only the main principles, leaving the decision at the discretion of the arbitrator. The parties of the arbitral proceedings may submit and produce many kinds of different evidence, of which the relevance, weight and credibility may vary. The material submitted in the case, if not challenged by the parties, will be assessed by the tribunal at the end of the proceedings. Article 9(1) of the IBA Rules provides that the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence. The arbitrators might be reluctant in refusing to admit some evidence because it might possibly lead to a challenge of the award. Moreover, the liberal approach to admitting any evidence might be reasonable in light of the fact that a challenge of the award based on the merits is usually not allowed. However, the discretion of the arbitrator in this case may not be regarded by the parties as fair. The arbitral tribunal, on the other hand, should consider the efficiency principle and avoid allowing massive document production that may be irrelevant, in order to prevent delays and unnecessary costs for the parties. To some extent, the arbitrators tend to be more restrictive as to limiting the admissibility of evidence based on procedural rather than substantive grounds. They might reject evidence submitted after a deadline rather than on ground of substantive inadmissibility. The standards of admissibility in the case of civil law arbitrators are lower than those coming from a common law tradition. Hence, the result as to the admissibility may depend on the composition of the tribunal and the background of the practitioners. In case of common law tribunals, the practitioners from

²⁸ Matters such as hearsay, legal privilege, adverse inference, professional conduct and ethics, timing of the document production scope of disclosure, burden and standard of proof, witness' examination and preparation.

civil law tradition should be aware not to rely only on the evidence which, in the tradition of the arbitrator, might be considered inadmissible. Similarly, the common law lawyer should be mindful that a civil law tribunal might not take into consideration the evidentiary rules regarding admissibility. However, an experienced tribunal, especially one composed of arbitrators of mixed legal traditions, will take an international and flexible approach and will focus on finding the facts of the case that are necessary for establishing the issues between the parties rather than being limited by rules of evidence and its legal background.²⁹

The IBA Rules do not provide much guidance as to how admissibility is to be determined, leaving it to the discretion of the tribunal. As each jurisdiction may have different restrictions on this matter, conflicts and misunderstandings may arise. The admissibility may relate to the exclusion of corporate officers of the party, the approach to hearsay, prohibition of the evidence obtained from the illegal sources, or the prohibition of leading questions during direct examination. The tribunals, having little guidance from the IBA Rules, will tend to focus on the party's right to be heard and to present its case, rather than on the exclusion of the evidence, allowing all the evidence and deciding on their weight rather than excluding them as inadmissible.

Some standards of admissibility of the evidence by a tribunal is provided in Article 9(2) of the IBA Rules which, however, is not exclusive and does not include the issues which in some jurisdictions are considered as limiting or excluding the admissibility of the evidence. One such issue is that of hearsay, which is not admissible in common law jurisdictions. The tribunal allowing hearsay as evidence shall ensure that the witness is accurately examined and the weight of such evidence shall be balanced with other evidence that may confirm its credibility. It shall be taken into consideration by the parties that even if the evidence is admitted, it does not mean that it will be considered as having a probative value.

IV.1. Legal Privilege and Secrecy

Article 9(2) (b) and (e) of the IBA Rules relates to privilege and confidentiality as grounds for denying a request to produce documents. The party requested to produce documents shall indicate that the requested documents include privileged and confidential documents if it wants the request to be denied. In relation to the request for production of documents, the IBA Rules do not provide in detail which privilege should be taken into consideration leaving it to the discretion of the tribunal and the parties. Hence, the tribunal will carefully consider any claims of privilege and confidentiality filed by a party. The tribunal may handle the issues of privilege and confidentiality in consultation with the parties in various ways, such as by granting the request to produce such documents on condition that it will not be distributed by the other party outside of the arbitral proceedings, or by asking an independent expert to review the documents and indicate which parts of those documents are relevant for the case. The tribunal is to take into consideration the interest of both parties and the need to safeguard confidential documents, balancing the efficiency of the procedures with the principles of fairness and accuracy.

The IBA Rules do not specify how the tribunal will determine which legal or ethical rules are applicable in order to exclude the evidence due to legal impediment or privilege,

²⁹ Redfern, A, Hunter, M, Blackaby, N and Partasides, C, *Law and Practice of International Commercial Arbitration*, (Sweet andMaxwell, London, 2004), 296.

stating only that such rules are determined by the tribunal. Such a generic provision may be a source of conflict since common and civil law traditions have different approaches towards legal privilege. The evidentiary privilege concerns rules that allow a party not to produce a document or other evidence to the other side of the proceedings or in a certain investigation or dispute. The most common type of privilege concerns the counsel-client communications, namely communications or documents created for purposes of preparing for the proceedings or notes made by a lawyer. In common law tradition the protection of certain communication or documents is privileged, while in civil law countries it is generally referred to as confidential.³⁰ The principle of confidentiality relates to the client-counsel relationship and is usually set out in the ethical rules in each jurisdiction, stating that in the absence of the client's informed consent, the counsel must not reveal information relating to representation.³¹ In the civil law tradition, other forms of communication protected by the confidentiality relate to the communication with the doctor, between the close family members and confession before the priest. In international arbitral proceedings the most common privilege issues concern the communication between the counsel and their client, counsel's work products, and the settlement attempts, being all the communication entitled 'without prejudice'.

In common law jurisdictions, the discovery in the pre-trial phase of the proceedings does not involve the documents related to the work of the counsel and their relations with the client. Communication with external counsel is privileged, however, in some jurisdictions the communication with in-house lawyers does not enjoy the same level of protection. The privilege applies both to the communication, work products and any materials which are produced during the process of legal advice or representation in the litigation.

In the civil law tradition, the party is not obliged to provide any documents that may harm its case, hence the concept of privilege is not so common, as the party does not need to be protected from the mandatory disclosure. However, the communication between the lawyer and their client and all documentation submitted in the process of legal advice are protected by a professional obligation of secrecy. The civil law lawyer is obliged by the ethical rules and codes of conduct to maintain in secrecy all the information that came to their knowledge during their professional conduct. The lawyers can refuse to give evidence which relates to the communication with and representation of the client, even in court proceedings.³² However, this obligation does not bind the client, who cannot refuse to give testimony in case of proceedings against the lawyer or other proceedings, when asked to give evidence about the legal advice received.

In the event of international arbitration between the parties coming from both common law and civil law jurisdictions, some conflicts concerning privilege may arise. Since privilege and confidentiality have different scopes in each of the traditions, a question may arise as to which of these approaches the tribunal will apply in order to provide fair proceeding. While it might be determined that particular evidence is not covered by the client-counsel privilege, the ethical duty of confidentiality might still

³⁰ Waincymer, J, *Approaches to Evidence and fact Finding in Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012), 801.

³¹ Centre for Professional Responsibility, Michmerhuizen, S, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, May 2007, at <americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_at_torney.authcheckdam.pdf> (accessed 26 May 2015).

³² von Schlabrendorff, F and Sheppard, A, *Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution* (Liber Amicorum in Honour of Robert Briner, 2005), 752.

apply. Moreover, it would seem unfair if one of the parties benefited from having privilege and the other not. As the IBA Rules do not give an answer to this question, it has been proposed that in cases where there is a conflict of privileges and the rules differ as significantly as they do between the common law and civil law systems, it does not appear in accordance with legal ethics to apply different rules of privilege to different parties.³³ The expectations of the parties should be taken into consideration and the most appropriate solution is the application of the most favourable privilege. As the parties will be treated with consideration, equality and fairness, the arbitral tribunals can determine which privileges may be applicable to each party and allow any party to claim the same legal privilege available to the other party. This approach seems to be acceptable for both sides and the risk of challenging the award will be lowered. Moreover, the arbitrators should not consider the adoption of wide privileges as an obstacle to truth-finding since generally, even in national litigation, the courts do not need such communication between lawyers and clients as an indispensable means of establishing the facts of the case. For the sake of avoiding the conflicts of cultures in this regard, it would be advisable that the IBA Rules adopt a similar approach and include a more precise provision in relation to privilege.

IV.2. Other Reasons for Evidence Exclusion

Among other reasons for the exclusion of evidence, in Article 9(2)(a) the IBA Rules also refer to the lack of materiality and relevance. The tribunal may exclude any irrelevant evidence, if it assesses that it has no evidentiary value for proving the facts or that lacks materiality. The relevance and materiality of a request for document production are mandatory requirements for admissibility. A document is considered relevant if it is likely to prove the facts from which the legal conclusions are drawn.³⁴ The document is material when it is necessary in aiding the consideration of a legal issue by the tribunal.³⁵ Hence, if the fact can be proven by other means, then there will be no need for the additional document to be produced even if it is relevant for the case. In order for the tribunal to assess the materiality and relevance of the requested documents, the parties clearly indicate the factual allegations they want to establish by the documents. For those reasons, it is important that the request for production is filed in a precise phase of the proceedings, permitting the tribunal to become familiar with the case, claims and the evidence that needs to be provided in order to prove the alleged facts. The arbitrators can assess the relevance and materiality only at the time of the filing of the request, which is referred to as '*prima facie* relevance'.³⁶ The arbitrators may point out that they will not be in the position to rule on the ultimate relevance of the documents until the issues in the case have been finally determined.³⁷

The relevance and materiality of the documents is related to the burden of proof for the factual allegation criterion. As underlined by Yves Derains

³³ *Id.*, 771.

³⁴ Kaufmann-Kohler, G, and Bartsch, P, *Discovery In International Arbitration: How Much is Too Much?* (SchiedsVZ, Heft 1, 2004), 18.

³⁵ *Ibid.*

³⁶ Hamilton, V, "Document Production in ICC Arbitration", *ICC International Court of Arbitration Bulletin, Special Supplement, Document Production in International Arbitration* (2006) 63, 69.

³⁷ Hanotiau, B, "Document Production in International Arbitration: A Tentative Definition of "Best Practices", *ICC International Court of Arbitration Bulletin, Special Supplement, Document Production in International Arbitration* (2006), 117.

to be efficient, document production must serve the purpose of bringing to the arbitral tribunal's knowledge not just any documents relevant and material to the outcome of the dispute, but documentary evidence without which a party would not be able to discharge the burden of proof lying upon it.... On the other hand, when a document production request is disputed, the arbitrators have the responsibility of determining whether the requesting party actually needs the documents to discharge the burden of proof. If not, the request should be denied. ... When assessing requests, arbitrators must carefully check that the burden of proof actually lies on the requesting party³⁸

Derains also points out that the arbitral tribunal often grants the request for document production only if they appear relevant to the case and material to the outcome of the dispute, irrespective of whether the party making the request actually bears the burden of proof.³⁹ Hence, a request for document production will be denied when a party fails to indicate the allegations it wants to prove and fails also to explain that without the documents its burden of proof cannot be discharged. In such cases it might be enough for the other party to be reminded by the request that it has not satisfied its burden of proof and to voluntarily produce the requested document.

The evidence which is unreasonably burdensome to acquire can also be excluded from the proceedings. Such burdensomeness may include situations where there is a large quantity of evidence, where evidence is difficult to obtain or access (in case of witnesses), or where other evidence exists, which is sufficient for establishing the facts. The burdensomeness of the document production is another issue to be considered. As stated in the Article 9(2)(c) of the IBA Rules, the request for production of document shall not place undue, unreasonable burden on the producing party. The burdensomeness is related to the requirement of specificity of the request since the lack of the detailed description, or a request which is too broad, will create an unreasonable burden for the requested party in identifying and producing the document. Accordingly, such a request shall not be granted, however, the tribunal shall in each case, take into consideration the importance of the document in the fact finding process and balance it with the degree of the burden it presents.

IV.3. Burden of Proof, Standard of Proof and Weight of Evidence

The burden of proof is considered to be an important element in evidentiary proceedings. In most legal traditions, a party bears the burden of proof, meaning the burden of proving the facts upon which the party relies in support of its claims. In other words, a party has to prove its own allegations. In international arbitration, the burden of proof is less important than before national courts and arbitral rules are often silent about it. The IBA Rules do not mention the burden of proof that a party shall bear. In the absence of such rules, the tribunal enjoys wide discretion as to how to treat the burden of proof. Usually the arbitrators apply the principle of *actori incumbit probatio*, ('he who avers has the burden of proving') meaning that the burden of proof lies on the person making the particular assertion. The burden of proof is highly relevant in deciding a case. As the parties submit

³⁸ Derains, Y, "Towards Greater Efficiency in Document Production before Arbitral Tribunals: A Continental Viewpoint", *ICC International Court of Arbitration Bulletin*, Special Supplement, *Document Production in International Arbitration* (2006), 87.

³⁹ *Ibid.*

a wide range of evidence without regard to who bears the burden of proof, the tribunal may consider the burden of proof if, at the end of the proceedings, a clear and convincing answer is not found.⁴⁰

Similar to the burden of proof, the standard of proof is also not expressly referred to in the IBA Rules. A standard of proof defines the criteria before something can be considered to be proven. It can also be referred to as the level of proof.⁴¹ In international arbitration, a more flexible approach is favoured over the application of strict rules. Where, in the rare event, the arbitrators refer to the standard of proof they are applying, they tend to do so in accordance with the approach of their legal culture. In the common law legal system, the standard of proof in civil litigation is generally the comparative one of the balance of probabilities, which version is more likely true than any other. In the civil law system, the laws and legal doctrine refer to non-comparative concepts of the 'conviction of the judge'.⁴² In international arbitration the standard of proof applied can be summarised as a 'balance of probability'.

Since in international arbitration many evidential rules that are present in national jurisdictions do not apply, such as some admissibility rules, burden of proof or standard of proof, the weighing of evidence is an important part of the process of decision-making by the tribunal. The weight given to documentary evidence is slightly higher than that given to evidence provided by a witness. The tribunal also gives less weight to evidence which has been gathered in circumstances of hearsay, even if there is no rule which forbids hearsay evidence, as the tribunal tends to avoid the possibility of challenge of the award. Moreover, the tribunal may be influenced by its own legal background when deciding on the weight of witness statements, cross-examination of witnesses or the direct examination conducted by the tribunal itself. The tribunal takes into consideration the non-production reasons, destruction of evidence and all the other possible reasons which did not result in refusal of the admission of the evidence, but need to be weighed in order to give them a proper evidentiary value in the consideration of principles of fairness and equality.

In the process of weighing evidence, the tribunal distinguishes between direct and indirect evidence. Direct evidence is preferred and will generally be given more weight than indirect evidence. However, indirect evidence is generally accepted by international tribunals, and if direct evidence is not available, indirect evidence is the only method of proof. Similarly, if direct evidence is impeached, indirect evidence may be decisive.⁴³ As stated by the International Court of Justice in the *Corfu Channel* case, 'indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion'.⁴⁴

⁴⁰ Bockstiegel, K, "Presenting, Taking and Evaluating Evidence in International Arbitration" in Carbonneau TE, executive ed, Jaeggi J, Partridge, SK, assistant eds, *Handbook on International Arbitration and ADR* (JurisNet, 2010), 81.

⁴¹ Zuberbuhler, T, Hofmann, D, Oetiker, C, and Rohner, T, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of Evidence in International Arbitration*, (Schulthess, 2012), 169.

⁴² Landolt, P and Reeves, BN, "Burden and Standard of Proof in Competition Law Matters Arising in International Arbitration" in Blanke, G, and Landolt, P, eds, *EU and US Antitrust Arbitration: A Handbook for Practitioners*, (Kluwer Law International, Alphen aan den Rijn, 2011), 160.

⁴³ Pietrowski, R, "Evidence in International Arbitration", 22(3) *Arbitration International* (2006) 373.

⁴⁴ International Court of Justice, *The Corfu Channel Case (United Kingdom v Albania)*, ICJ Reports 1949, 9 April 1949, 18.

V. Balancing the Competing Values: The Need for the Application of New Solutions

The differences in approaches between the civil and common law are evident. As has been discussed, in the field of taking evidence the clash of cultures is inevitable since each of the traditions has its own rules, expectations and ethics, which are deeply rooted in the mentality of the practitioners from civil and common law tradition. Their expectations are usually a reflection of the procedures and rules applicable in the domestic court proceedings to which they are accustomed. The differences in the case of evidence laws are relatively important because in almost every area, the different traditions present an almost opposite approach. International arbitration, by its nature, combines these legal traditions, however, whether this is a successful ‘marriage’ is disputable. Since the international arbitral procedure is characterised by the absence of restrictive rules governing the form, submission, admissibility and evaluation of evidence, it is important that some guidance and indications exist in order to facilitate the conduct of proceedings for the parties coming from different legal backgrounds. The general approach of international tribunals is to keep open the possibilities to submit evidence that will assist in establishing the truth with respect to disputed facts. Generally, all evidence, documentary and testimonial, is admissible and the tribunal itself determines the relevance, materiality and probative value of the evidence. However, together with this flexibility comes a concern about the fairness of the proceedings and the interest of the parties. While the IBA Rules provide a wide discretion to the tribunal, it is imperative that some more specific guidelines exist, since in many areas the IBA Rules are too general and leave some gaps as to which disputes may arise between the parties. This is the case especially when it comes to issues such as legal privilege, hearsay, timing of the production of documentary evidence and the burden and standard of proof, in which guidelines may be helpful in combining the different approaches of common and civil law.

The IBA Rules implement a hybrid system which favours neither civil nor common law. The mechanism present in the IBA Rules is a new system, which combines some of the aspects of each legal system, but also implements new solutions. The question is whether such a solution, without more specific guidelines, is satisfactory for both sides while none of the original approaches of the parties is implemented, but instead the ‘half measures’ solutions are suggested and the broad discretion of the arbitral tribunal is used as a means of solving this problem. A combination of various rules from different legal systems is not always the best solution, especially when it does not provide the proper and precise rules of their implementation, hence a hybrid system of taking evidence in its current form may lead to embodying the weaknesses of each system. The discretion of the tribunal is not enough in order to provide the satisfactory evidentiary solutions in the problematic issues. In the view of the author, the IBA Rules, being a step forward towards harmonisation (if not already being itself a harmonised system) still miss important elements in order to provide a satisfactory solution. Instead of very general rules which are a combination of legal rules from civil and common law jurisdictions that fail to detail how the solutions shall be implemented and leave a very broad discretion to the tribunal, the IBA Rules should, contain some more detailed and precise provisions as to the taking of evidence. Another solution could be the introduction by the arbitral institutions of precise protocols or guidelines containing default rules on the most questionable issues which are not present or are too generic in the IBA Rules. This should be the case especially in relation to documentary evidence, which still causes

major conflicts between the parties, in relation to the scope of disclosure and the possibilities to refuse the production in case of privilege, secrecy and confidentiality. The professional conduct and ethics of counsel are another weak point of the IBA Rules, as there is a lack of precise provisions and only a general provision detailing the possibility of interviewing the witness.⁴⁵ Parties coming from civil law traditions may consequently be disadvantaged. It is not defined to what degree the contact with the witness is allowed and where the limit between a simple interviewing and preparing the witness for the hearing and so called 'coaching' the witnesses lies. Greater detailed rules as to what standards to adopt in witness examination, cross-examination, and witness statement preparation are crucial in order to avoid the unequal treatment of the parties, particularly where one party has an advantage in terms of not being bound by ethical rules. It has been argued that notwithstanding the actual state of harmonisation in international arbitration proceedings, the parties', attorneys' and arbitrator's cultural and legal background and experience materially affect the success and outcome of the arbitration proceedings. The inexperienced participants are bound to be disadvantaged in the current state of affairs. There are still a number of areas in which a consensus has yet to emerge and more precise rules to be established. The arbitral discretion is insufficient in securing satisfactory solutions for both of the parties. The Preamble to IBA Rules in paragraph 3 states that the 'taking of evidence shall be conducted on the principles that each Party shall act in good faith and be entitled to know, reasonably in advance of any Evidentiary Hearing or any fact or merits determination, the evidence on which the other Parties rely'. The good faith principle is to be taken into consideration by the tribunal when deciding on the particular matters of the proceedings and may lead to negative consequences for the parties in the event of bad faith. The principle of good faith serves as guidance for the parties inexperienced in the proceedings and the tribunal on how to proceed, however, it may lead to confusion, particularly between the parties coming from different backgrounds, as to what is seen as acting in good faith, and towards whom the good faith shall be shown. The IBA Rules do not explain in detail how to understand the good will principle and do not give the examples on what standards the tribunal should follow in assessing the failure to act in good faith. The breach of good faith might be constituted by the excessive document production requests, failure to comply with the document production order, holding back the documents on which the party relies on in attempt to surprise the other party in the later stage of the proceedings.⁴⁶ The principle stated in the same paragraph of the Preamble giving the party the right to know in advance what evidence the other party relies on is the rule applicable to all the other provisions of the IBA Rules. The party shall always be informed as of side's actions, arguments and evidence in order to be able to prepare itself for the rebuttal. The arbitral tribunal shall take this rule in consideration when deciding upon the acceptance of late submission of evidence.

The search for fairness may lead to further abuse or conflicts since the standards of due process, the right to be heard and the possibility to present one's case may be understood in different ways by the parties coming from different legal backgrounds. What is seen as due process by the common law lawyer, might be seen as unjustly burdensome and causing delay by the civil law lawyer. Procedural rules and the IBA Rules give the tribunal guidance as to the conduct of the proceedings, however, in the absence of precise

⁴⁵ Article 4(3), IBA Rules.

⁴⁶ Zuberbühler, T, Hofmann, D, Oetiker, C and Rohner, T, *IBA Rules of Evidence, Commentary on the IBA Rules on the Taking of evidence in International Arbitration*, (Schulthess, 2012), 5.

rules the main task of the tribunal is to balance carefully the efficiency, fairness and equality of evidence presented. The discretionary power of the arbitrators is not absolute and is limited by the parties' autonomy and rights, whereas the principles and main features of the proceedings are the result and, simultaneously, the main goal of the arbitral proceedings. The parties' rights of due process are the limits to the arbitrator's discretion and the arbitrator has a duty to ensure those rights. At the same time, the parties' rights are guaranteed by the arbitrator's discretion in the event of attempts by the other party to diminish them. The arbitrator is a reconciler of the competing principles enabling the adjustment of the proceedings to the needs of particular case. The administration of the case by the arbitrator must be conducted with respect to time and cost, the party's rights, accuracy of facts and legal norms. This must be considered impartially and independently.

The discretion of the arbitral tribunal and its role in balancing various values also applies to the balancing of the differences between the parties' legal backgrounds and cultures. One very difficult aspect of the equal and fair treatment of parties is the extent to which the tribunal shall take into account the legal background of the party, since it cannot apply different standards to each of the parties in this regard. The IBA Rules are helpful and provide guidelines, however, they leave a vast discretion to the tribunal in most of the cases when a conflict could arise and when the approaches are difficult to combine. The gaps in the IBA Rules are to be filled by the discretion of the tribunal, which may not be an easy task. The notions of fairness and due process are also influenced by the legal culture, since what is a due process for one party might seem unfair to another. The lack of precise rules also leads to situations in which the identical positions of the parties may be treated in a different way and the outcome of a dispute may depend not upon factual accuracy, but upon the personality of the relevant arbitrator.

The level of compromise and harmonisation reached by the IBA Rules, is to some extent very efficient, and its broad acceptance confirms the success of such initiatives. The guidelines are often very helpful in conducting the process of taking of evidence, however, they do not resolve some of the procedural challenges which might be encountered by the tribunal and the parties. The rules on how to resolve those challenges are needed in order to properly balance all the values, principles and rights at stake in arbitration proceedings. The discretion of the tribunal is often not a sufficient guarantee for the fairness of the proceedings. What the participants of international arbitration want is a precise award which is predictable based on the particular circumstances. The wide discretion of the tribunal and the lack of precise rules leave the parties in uncertainty as to whether their case will be dealt with in an accurate and fair manner. In order to avoid judicialisation of international arbitral proceedings, more precise rules would act as the guidelines and default rules, so that there is no danger in the proceedings evolving into international litigation, since the parties would always have the power to decide whether to adopt them. In this regard, rather than leaving those issues to the discretion of the tribunal and creating uncertainty for the parties, more precise rules could be adopted, either by amendment of the existing IBA Rules and the inclusion of the solutions for the matters they do not cover, or by way of the setting the default rules, which would prevent the creation of the stiff and binding procedural rules, but would at the same time provide some certainty for the parties who would know in advance of the proceedings which rules would be adopted.

The current state of the rules governing the proceedings in relation to the taking of evidence is unsatisfactory. It has been shown that the IBA Rules, which are the most advanced existing rules in that regard and which combine the approaches from both civil

and common legal systems, provide a new, synthesised system of rules governing the taking of evidence. This, to some extent, works well and these rules are widely used by practitioners. However, they do have some weaknesses, which result in the dissatisfaction of the parties, further conflicts and may lead to the challenge of the award if the arbitral tribunal exercise the discretion left by the IBA Rules in an unfair way. The IBA Rules are a compromise between both legal systems which are not yet definitively elaborated and lack some more detailed rules. The silence of the IBA Rules or by leaving the solution of these problems to the arbitrators is their main weakness and a reason for some parties' discontent. The parties expect accuracy of awards and predictability of proceedings over the wide discretion given to the arbitrator. The broad application of the IBA Rules results from the fact that they do provide some rules and guidance in case of evidentiary matters which were missing in the institutional rules and were left to the discretion of the arbitrators. The existing problems and the issues raised by the practitioners in relation to the lack of guidance in a number of evidentiary matters mean, however, that the international society does want the introduction of certain rules and solutions and the predictability of the procedure. More precise rules are needed in order to ensure the fairness and efficiency of the proceedings, with the consideration of the approaches and expectations of the different parties, providing certainty and predictability of the proceedings. Striking a balance between efficiency, fairness and accuracy entails reconciliation of different legal traditions and rules. A certain degree of harmonisation does exist and will continue to emerge. However, the uniformity does not and maybe will never exist in the light of the variety of expectations and approaches. The need for the detailed rules may seem opposite to one of the main goals of the arbitration which is flexibility. However, flexibility will always exist, taking into account a party's autonomy to adopt the set of precise rules. Too much flexibility and leaving the controversial issues to the arbitrator's discretion may sometimes lead to confusion and uncertain results. It is not surprising that the parties of international arbitration desire certainty within the rules adopted and an ordered process without surprises. Flexibility may seem crucial at the time of drafting of the arbitral agreement, however, when the dispute arises the parties will be more satisfied with the certainty of the procedures and a fair and accurate award.

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Procedural Fairness and Efficiency in International Arbitration

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Keywords

DUE PROCESS; ARBITRATION; EFFICIENCY

Abstract

Procedural due process requires all legal proceedings to be fair and that every party involved is given notice of the proceedings, are treated equally, and are given an opportunity to be heard and to deal with the case of its opponent before a decision is made by a lawfully constituted tribunal or decision maker. However, while the mandatory due process requirements are of utmost importance within international arbitration, where are its limits? How far shall the equal treatment and procedural fairness go, and can it happen at the expense of procedural efficiency? The users of international arbitration tend to be concerned on the delays and high expenses of arbitration. A recurrent complaint is the ‘judicialisation’ of arbitration; that the procedure is becoming as equally formal dispute resolution proceeding as litigation. Simultaneously, the international arbitration field has been promoting arbitral cost and time efficiency, by incorporating relevant provisions to national arbitration laws, institutional arbitration rules and to other soft law elements. This contribution addresses the balance between the requirements of due process and efficiency within international arbitration.

I. Introduction

The concept of due process traces its origins back to the English common law system. The rule, first accepted in England, that individuals shall not be deprived of life, liberty, or property without legal authority and an opportunity to defend themselves pre-exists written constitutions. King John’s *Magna Carta* (1215) defined the rights of English subjects against the authority of the king and is an early example of a ‘constitutional’ guarantee of due process. Charter 39 declares that ‘[n]o free man shall be seized, or imprisoned ... except by the lawful judgment of his peers, or by the law of the land...’. The phrase ‘due process of law’ appeared as a substitute for the *Magna Carta*’s ‘the law of the land’, in a statute of King John’s successor (King Henry III) that restated *Magna Carta*’s guarantee of the liberty of the subject.¹ Due process requirements are therefore

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¹ The Carta Magna as we know it today is considered to have been re-invented by Sir Edward Coke, in the seventeenth century. For further details, see UK Supreme Court, Lord Sumption, *Magna Carta then and now*, Address to the Friends of the British Library, 9 March 2015, at <supremecourt.uk/docs/speech-150309.pdf> (accessed 21 March 2015).

considered to be constitutional guarantees of an individual in relation to the State and authorities.

The application of constitutional due process is traditionally divided into two categories: a) substantive due process, and b) procedural due process. These categories derive from a distinction made between two types of law. On the one hand, substantive law creates, defines and regulates rights. On the other, procedural law refers to the formal steps to be taken in enforcing substantive law. Thus, procedural due process is understood to set limits on the exercise of power by the State by requiring that it follow certain rules.

Procedural due process requires all legal proceedings to be fair and that each party involved is given notice of the proceedings, treated equally, and given an opportunity to be heard and to deal with the case of its opponent before a decision is made by a lawfully constituted tribunal or decision maker. Considerations of due process are also relevant in international arbitration, even where a State is not involved in the dispute as a party. This contribution will only address issues of procedural (and not substantive) due process in the context of international arbitration, and its tensions with 'efficiency of the procedure'.

While the mandatory due process requirements are of utmost importance within international arbitration, where are the limits? How far shall the equal treatment and procedural fairness go, and can it happen at the expense of procedural efficiency?

The users of international arbitration tend to be concerned about the delays and high expenses of arbitration. A recurrent complaint is the 'judicialisation' of arbitration, that is, the procedure becoming as equally formal dispute resolution proceeding as litigation.² Simultaneously, the international arbitration field has been promoting arbitral cost and time efficiency by incorporating relevant provisions into national arbitration laws, institutional arbitration rules and to other soft law elements. Thus, the balance between the requirements of due process and efficiency within international arbitration are addressed in this contribution.

II. Due Process in International Arbitration

Arbitration is not a product of contemporary but of antique times. Commercial disputes were settled by resorting to arbitration in ancient Egypt,³ Greece⁴ and Rome.⁵ Its contemporary and most comprehensive definition is perhaps the one that describes arbitration as a 'process by which parties consensually submit a dispute to a non-governmental decision maker, selected by or for the parties, who renders a binding decision finally resolving the dispute in accordance with neutral, adjudicative procedures

² Queen Mary, University of London, School of International Arbitration and PwC, REPORT: *International Arbitration Survey 2013: Corporate Choices in International Arbitration: Industry Perspectives* (2013), at <pwc.com/gx/en/arbitration-dispute-resolution/index.jhtml> (accessed 21 April 2015).

³ Mantica, M, "Arbitration in Ancient Egypt", 12 *Arbitration Journal* (1957) 155, 158–160: Where the author describes examples of arbitration clauses to resolve disputes in funerary trust agreements dated as far as 2500 BC.

⁴ Roebuck, D, *Ancient Greek Arbitration* (Holo Books, Oxford, 2001). See also Velissaropoulos-Karakostas, J, "L'arbitrage dans la Grèce antique – Epoques archaïque et classique", 1 *Revue de l'Arbitrage* (2000) 9, 18–26: where the author outlines the arbitral procedure in Greece in the 4th and 5th century BC.

⁵ Stein, PG, "Arbitration Under Roman Law", 41 *Arbitration: The Journal of the Chartered Institute of Arbitrators* (1974) 203.

affording the parties an opportunity to be heard'.⁶ However, there are numerous other definitions of international arbitration.⁷

A fundamental feature of arbitration is that the arbitral award is a final and binding determination of the parties' disputes. Arbitral awards are widely recognised and enforced, even internationally. In fact, the entire justification of international arbitration is founded on the international enforceability of arbitral awards under the *New York Convention on the Recognition and Enforcement of Foreign Awards*, which has been ratified by 154 States.⁸ For the international enforceability to happen, States indirectly delegate jurisdictional powers to arbitral tribunals through the recognition of the parties' agreement. With this delegation of powers comes a type of trade-off in the form of minimum quality standards of procedural safeguards or 'due process'.⁹ This is mainly because by opting for arbitration, parties to a dispute waive their constitutional rights to have their dispute heard by a national court.¹⁰ Therefore, as arbitration is a kind of substitute for court procedure, some procedural standards need to be met to compensate for the loss of access to a court.¹¹ Outsourcing the adjudicatory public functions of a sovereign State calls for observance of the most essential rules of procedure, that is, due process.

Consequently, due process in international arbitration requires, first, that the parties' agreement to arbitrate their dispute will be respected and enforced, that they will effectively have access to arbitration as their chosen means of justice, and that they will have a meaningful opportunity to participate in the lawful constitution of the arbitral tribunal. The core guarantees of procedural due process comprise the arbitrator's duty to treat the parties equally, fairly and impartially, and to ensure that each party has an opportunity to present its case and deal with that of its opponent. It also comprises the arbitral tribunal's duty to deal with all of the issues that are put to it. Therefore, access to arbitration is not enough; the procedure itself must also be fair.

II.1. International Framework of Due Process

An important question then is what are the sources of due process in international arbitration. Are the (constitutional) safeguards of due process found in State court systems also applicable to arbitration proceedings? Even though national arbitration laws impose due process requirements, these laws do not provide a comprehensive definition of due process. And even though there seems to be a general consensus on the importance of due process guarantees in international arbitration, its exact meaning, parameters and details vary from one legal system to another. Not only national legislation but also international arbitration conventions recognise and impose requirements of due process. They do so by denying recognition and enforceability of

⁶ Born, G, *International Commercial Arbitration* (Kluwer Law International, Leiden, 2014), 291.

⁷ Lew, JDM, Mistelis, LA and Kröll, SM, eds, *Comparative International Commercial Arbitration* (Kluwer Law International, Leiden, 2003), 1–5.

⁸ United Nations Commission on International Trade Law (UNCITRAL), *Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958), at <uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> (accessed 21 April 2015).

⁹ Kurkela, M, and Turunen, S, *Due Process in International Arbitration* (Oxford University Press, Oxford, 2010), 201.

¹⁰ Lew *et al*, *supra* nt 7, 5–34.

¹¹ Kurkela and Turunen, *supra* nt 9, 2.

arbitral awards if basic essential elements of procedural fairness have not been satisfied.¹² Therefore, it has been said that the law of arbitration is the law of the enforcement.¹³

Even enforceability, as the criterion to provide a unique and inclusive definition of due process, proves to be challenging.¹⁴ The enforcement of an award may be refused *ex officio*¹⁵ by a competent court or it may require the action of the party against whom the enforcement is sought. The unenforceability may be automatic and cannot be remedied,¹⁶ or it could be remedied by the lapse of time.¹⁷ An award could be enforceable in one jurisdiction but not in another.¹⁸

If rules of procedure vary among jurisdictions, and may even have a different hierarchy and weight within a single jurisdiction, how should due process in a given arbitration be identified and defined? Are the due process safeguards in international arbitration linked to those of any national legal system? In that case, would it be the legal system of the seat of the arbitration, the place where the actual arbitration is conducted or certain evidence is produced, as the place where the award will potentially be enforced? Conversely, are there international, delocalised, procedural rules in arbitration? If so, would national courts be bound to respect them when hearing challenges against the award or its enforcement?

II.2. Procedural Freedom

One of the hallmarks of arbitration is the parties' power to shape the arbitration proceedings. The United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law),¹⁹ as all other national and international arbitration legislation, guarantees the freedom of the parties to tailor what rules of procedure will be implemented, subject to a few mandatory provisions containing the general due process requirements.²⁰ The parties may tailor the proceedings by preparing their own individual set of rules or by referring to standard rules of arbitration institutions. These laws also empower arbitrators to conduct the arbitration in such a manner, as they consider appropriate, if the parties were silent or have failed to reach an agreement.²¹ These powers of the arbitrators include the power to determine the admissibility, relevance, materiality and weight of any evidence.

Autonomy of the parties in determining the rules of procedure is of special importance in international cases, since it allows the parties to select the rules according to their specific wishes and needs, without restrictions imposed by traditional and possibly

¹² Article V(1)(b), United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) 330 UNTS 3 (New York Convention); Article IX-1(b), *European Convention on International Arbitration* (1961) 484 UNTS 349; Article 5.1.b, Organization of American States (OAS), *Inter-American Convention on International Commercial Arbitration*; see also Born, *supra* nt 6, para 26.05.[3].

¹³ Petrochilos, G, *Procedural law in International Arbitration* (Oxford University Press, Oxford, 2004), 39.

¹⁴ Kurkela and Turunen, *supra* nt 9, 4.

¹⁵ Section 55, *Swedish Arbitration Act*, Sweden (1999) SFS 1999, 116; Article 35(2), UNCITRAL, *UNCITRAL Model Law on International Commercial Arbitration*, 1985 with amendments as adopted in 2006 (Model Law). See also National Commercial Court of Appeal of Argentina, *American Restaurants Inc y otros v Outbank Steakhouse Int*, 20 April 2011, La Ley 2011, B, 593, AR/JUR/29420/2010.

¹⁶ Section 33, *Swedish Arbitration Act*.

¹⁷ Article 34(3), Model Law.

¹⁸ Article V(2)(a), New York Convention.

¹⁹ UNCITRAL, *Model Law on International Commercial Arbitration* (1985 with amendments from 2010).

²⁰ Article 19, Model Law. The most fundamental provisions that the parties cannot derogate from are those of procedural fairness, eg., Article 18 Model Law.

²¹ *Ibid.*

conflicting domestic concepts, thus obviating the risk of surprises. The supplementary discretion of the arbitral tribunal recognised in the Model Law is equally important, as it allows the tribunal to tailor the conduct of the proceedings to the specific features of the case, without being hindered by any restraint that may stem from local law, including any domestic rule on evidence.²² Also, it provides grounds for displaying initiative in solving procedural questions not regulated in the arbitration agreement or the applicable arbitration law.

Under the label of party autonomy, States have left wide areas of arbitration law unregulated. Paradoxically, this lack of regulation has not resulted in fewer rules. On the contrary, private actors have occupied the space left by States with often dense and highly detailed soft law rules.²³ Some have seen this as a loss of one of the beauties of arbitration.²⁴ On the opposite side are those who see this as a positive trade of flexibility for predictability.²⁵

Soft law norms are generally understood to be those that cannot be enforced by public force. These norms can emanate from State actors, be they legislators, governments or international organisations. These can also emanate from non-State actors, such as private institutions and professional or trade associations with an international character.²⁶ In the international arbitration arena, numerous guidelines, standards and codes of ‘best practices’ for the conduct of the proceedings have been issued by groups such as the Chartered Institute of Arbitrators, the International Bar Association, the International Chamber of Commerce, the International Law Office, UNCITRAL and the American Arbitration Association.

In spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it of their own accord.²⁷ This normative weight is enhanced when soft law rules are codified. Soft law codification serves a useful purpose in increasing procedural uniformity, certainty and predictability amongst parties from different judicial traditions.²⁸

And even national (hard) laws in arbitration are drafted according to international conventions, guidelines, and ‘model laws’. Also, given that arbitration is the dispute resolution method most used for cross-border dealings, the users, arbitrators and cases are international too. Therefore, national procedural rules and guarantees cannot apply exclusively. In her often-cited paper – *Globalization of Arbitral Procedure*, Professor Gabrielle Kaufmann-Kohler comments that the globalisation of arbitration occurs primarily under the auspices of national arbitration laws, in a classical fashion, and that

²² Other provisions in the Model Law recognise party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters. For example, on issues related to the place of the arbitration (Article 20) and the language to be used in the proceedings (Article 22).

²³ Park, WW, “The Procedural Soft Law of International Arbitration: Non-governmental Instruments” in Mistelis, LA and Lew, JDM, *Pervasive Problems in International Arbitration* (Kluwer International, Leiden, 2006), 146–147: where Park discusses the problem under the name of ‘judicialisation’ of international arbitration.

²⁴ *Id.*, 141.

²⁵ *Id.*, 149.

²⁶ Kaufmann-Kohler, G, “Soft Law in International Arbitration: Codification and Normativity”, 1(2) *Journal of International Dispute Settlement* (2010) 284.

²⁷ *Ibid.*

²⁸ *Id.*, 299.

globalisation of the arbitral procedure is possible thanks to the freedom that various national legislations grant to the parties and to the arbitrators.²⁹

Therefore, cross-legal approaches, similar to those that exist for substantive law should be observed in cross-border disputes. It does not come as a surprise then that some scholars advocate that the law of due process in international arbitration has a structure or character similar to that of the law developed by merchants, called *lex proceduralia*.

Like *lex mercatoria*, the due process in international arbitration (*lex proceduralia*) would be a set of norms that floats above national jurisdiction and various systems of soft law.³⁰ *Lex proceduralia* also refers to the international and customary nature of the body of law in question instead of being just a part of the national formally valid system of norms.³¹

Although the internationalisation of due process is present in different arbitration laws and institutional rules around the globe, the specifics of those provisions differ in practice.

II.3. The Due Process Guarantees in Different Arbitration Laws

Article 18 of the Model Law embodies the principles that the parties shall be treated with equality and given a full opportunity of presenting their case. The English *Arbitration Act* does not adopt the same qualifier (full opportunity). Instead, it requires that the parties have a *reasonable* opportunity.³² In France, the law provides that ‘the arbitral tribunal shall rule after having heard the parties or having given them the opportunity to be heard’. Similarly, in the Netherlands, the arbitration law imposes on the arbitral tribunal the obligation to give each party ‘an opportunity to substantiate his claims and to present his case’. In Switzerland, ‘the Arbitral tribunal shall ensure ... the right of both parties to be heard...’. Equally, in Sweden, ‘the arbitrators shall afford the parties, to the extent necessary, an opportunity to present their respective cases...’.

As noted by the secretariat of UNCITRAL, a number of provisions in the Model Law illustrate the parties’ fundamental procedural rights. For example, Article 24(1), which deals with the general entitlement of a party to oral hearings, provides that, unless the parties have agreed that no oral hearings be held for the presentation of evidence or for oral arguments, the tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

Another illustration of procedural fairness is Article 24(3) of the Model Law, which provides that all statements, documents and other information supplied by a party to the tribunal shall be communicated to the other party, and that any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the other parties. Something similar is provided for in relation to the evidence of a tribunal-appointed expert. In these cases, the Model Law requires the expert, after delivering his or her report, to participate in a hearing where the parties may

²⁹ Kaufmann-Kohler, G, “Globalization of Arbitral Procedure”, 36 *Vanderbilt Journal of Transnational Law* (2003) 1313.

³⁰ Kurkela and Turunen, *supra* nt 9, 8. See also Smit, H, “Proper Choice of Law and *Lex Mercatoria Arbitralis*” in Carbonneau, TE, ed, *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (Transnational Publishers Inc, New York, 1990), 59; Gaillard, E, *Legal Theory of International Arbitration* (Martinus Nijhoff, Leiden, 2010), 1–10.

³¹ *Id.*, 202.

³² Section 33(1)(a), *Arbitration Act 1996*, England; Article 1485, *Code de procédure civile (Civil Code of Procedure)*, France (2005); Article 1039, *Dutch Arbitration Act*, The Netherlands (1986); Article 182, *Private International Law Act 1987 Chapter 12 – International Arbitration*, Switzerland; Section 24, *Swedish Arbitration Act*.

put questions to the expert and present expert witnesses to testify on the points in dispute, if such a hearing is requested by a party or the tribunal deems it needed.³³ In order to enable the parties to be present at any hearing and at any meeting of the tribunal for inspection purposes, the parties must be given notice in advance.³⁴

International norms on proper procedures enhance the substantive correctness and legitimise decisions. The better the parties' opportunities to provide the basis for the decision, the more correct the substantive outcome is likely to be. Even a good and correct result does not compensate for a bad and unfair procedure.³⁵

Counsels at various businesses have voiced the importance of a fair outcome in every dispute, but a fair result has to be solidly backed-up by a set of legal rules. This is to allow corporate counsels accurately to manage their dispute resolution risk assessment *ex-ante*. In other words: 'fairness yes, commerciality yes, but *via* a predictable route.'³⁶

Guaranteeing the parties' access to arbitration, and treating them fairly and ensuring they have an opportunity to present their cases also forms part of an arbitrator's obligation owed to the parties. In managing cases, due process needs to be balanced against the arbitrator's duty to ensure the efficient and timely completion of their mandate to resolve the dispute. Could there be a conflict between procedural fairness and efficiency? Does procedural fairness increase costs? If so, is it efficient to leave aside some formalities and focus on the substance of the dispute? Increasing costs may even be seen as putting limits to access to arbitration and thus to justice, for those parties with weaker financial muscle.

Therefore, fairness also requires some degree of efficiency, since justice too long delayed becomes justice denied. Equally, without fairness an arbitral proceeding could hardly be considered an efficient mechanism of dispute resolution.

III. Efficiency in International Arbitration

Without making a generalisation regarding the needs of the users of arbitration, an ideal arbitration would be simultaneously conducted in an equal, neutral, flexible, cost-efficient and rapid manner while tailored to the particularities of each dispute. Efficiency is often assimilated with only cost and time efficiency, but the other side of the same coin is to gain the efficient proceedings without risking either the correct outcome or the due process.³⁷ Parties to arbitration are obviously not after a cheap dispute resolution process at the expense of a well-founded outcome. At its best, an efficient arbitration process can be equivalent to good case management and thereby result in a correct outcome. It does not have to be an 'either ... or' scenario.

The relation between parties' procedural autonomy and the mandatory requirements of due process has been discussed above, but the third dimension of the same topic is the efficiency of arbitrations. How can the objectives of efficiency be aligned with the

³³ Article 26(2), Model Law.

³⁴ Article 24(2), Model Law.

³⁵ Kurkela and Turunen, *supra* nt 9, 203.

³⁶ The Arbitration Institute of the Stockholm Chamber of Commerce, Nappert S, *Commentary on the Corporate Counsel Panel Discussion*, at The Stockholm Arbitration Summit: The Role of Law, 22 May 2014, Sweden.

³⁷ Newmark C, "Controlling Time and Costs in Arbitration" in Newmark, C, ed, *Leading Arbitrators Guide* (Juris Publishing, New York, 2006), 81; Risse, J, "Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings", 23(3) *Arbitration International* (2013) 5: where Risse considers the quality as an alternative to saving time and costs.

requirements of arriving to a 'correct', enforceable arbitral award and the requirements of due process? The concept of efficient arbitration entails numerous features, which are explained below.

The efficiency-related formal discussions first arose over two decades ago around the issue of disruption and delays in arbitration proceedings.³⁸ The obstructive tactics of recalcitrant parties are of course an unfortunate reality of arbitrations, as well as an acknowledged procedural feature. Back in 1990, Working Group I on Preventing Delay and Disruption of Arbitration discussed different ways of combating disruption at an International Council for Commercial Arbitration (ICCA) Congress held in Stockholm. These ways covered the issues of appointment of arbitrators and conduct of the proceedings, among other matters.³⁹ As a result of the congress, the following means of preventing obstruction in arbitrations were decided upon:

1. Arbitrating in an arbitration-friendly seat where the legislation provides fewer opportunities for obstruction
2. Using arbitration rules designed to prevent delay and disruption
3. Using the possibility to supplement the rules by additional agreements under party autonomy
4. Appointing arbitrators 'courageous enough' to use their procedural discretion
5. Arbitrating under an institution's administration.⁴⁰

These criteria may seem almost trivial in 2015, but they entail the core essence of efficient arbitration even today. The discussions in that congress cemented the foundations, and the 'construction work' was erected on these corner stones.

Only four years later, at the 1994 ICCA Congress in Vienna, the discussion had already been taken further. The Working Group then debated the advantages and disadvantages of reforming detailed arbitration laws and rules. The fear was that excessively detailed arbitration statutes and rules would only give reason to an increasing number of challenge proceedings, delays and costs.⁴¹ This would have naturally been the exact opposite of the objectives of efficient arbitral proceedings. The core conclusion of the discussions around that congress was that the regulating should not result in complicating arbitrations, but in simplifying them. It was stated that in order to enhance efficiency, one should consider whether some cases should have only one arbitrator instead of three and how to procedurally deal with summary proceedings and interim

³⁸ International Council for Commercial Arbitration (ICCA), Working Group I, *Preventing Delay and Disruption of Arbitration* ICCA Congress, Stockholm, 1990; Working Group I, *Planning Efficient Arbitration Proceedings*, ICCA Congress, Vienna 1994.

³⁹ Holtzmann, HM, "How to Prevent Delay and Disruption of Arbitration: Lessons of the 1990 ICCA Stockholm Congress" in van den Berg, AJ, ed, *Preventing Delay and Disruption in Arbitration and Effective Proceedings in Construction Cases: International Congress Proceedings* (ICCA Congress Series No 5) (Kluwer Law International, Leiden, 1991), 21–22.

⁴⁰ *Ibid.*

⁴¹ Marriott, AL, "Pros and Cons of More Detailed Arbitration Laws and Rules" in van den Berg, AJ, ed, *Planning Efficient Proceedings: The Law Applicable in International Arbitration* (ICCA Congress Series No7) (Kluwer Law International, Leiden, 1996), 71.

measures. He had a practical approach to developing functional soft law, stating that ‘[w]e must have rules which reduce the need for and time spent in hearings, but not as a result increasing the volume of documents and written submissions.’⁴²

These concerns and the suggestive course of direction raised in 1994 were developed even further. The international arbitration community is headed towards the said goals and discussion has become more intense around the topic. The culmination point for the multiple discussions on efficiency of arbitration has so far been the 2007 publication, *Techniques for Controlling Time and Costs in Arbitration*, which is a report by the International Chamber of Commerce (ICC) Commission on arbitration.⁴³ The purpose of the report was to encourage parties involved in arbitration to make mutual and conscious decisions in the early stages of arbitration on the conduct of the proceedings. The Report was practically implemented in the renewed arbitration rules of the ICC, which came into force on 1 January 2012. Thereafter the ICC has published a second edition of the Report to reflect the various modifications made in the 2012 *ICC Rules of Arbitration* (ICC Rules).⁴⁴

The ICC was not the first to promote the efficiency of arbitration by incorporating provisions related thereto, but because the ICC rules are a universally acknowledged signpost in international arbitration, its impact has major significance. One of the guiding principles of the new ICC rules was improving the time and cost efficiency of arbitration.⁴⁵ The ICC has been proactively identifying the importance of effective case management as the ICC Commission has also published a guide for in-house counsel and other party representatives on effective arbitration case management in early 2015.⁴⁶ This publication naturally contributes to the standardisation of the soft law on the rules of arbitral efficiency.

From the parties and counsels perspective, the International Bar Association has also issued *Guidelines on Party Representation in International Arbitration* (2013),⁴⁷ which are inspired by the principle that party representatives should act with integrity and honesty, and should not engage in activities designed to produce unnecessary delay or expense, including tactics aimed at obstructing arbitration proceedings.

Alongside the ICC, other international arbitration institutes that have recently revised their arbitration rules have developed rules favouring efficiency. For example, the 2014 rules of the London Court of International Arbitration (LCIA) (LCIA Rules) also explicitly aim to promote efficiency in arbitration.⁴⁸ The rules empower arbitral tribunals

⁴² *Id.*, 72.

⁴³ International Chamber of Commerce (ICC) Commission on Arbitration and ADR, Task Force on Reducing Time and Costs in Arbitration, REPORT: *Techniques for Controlling Time and Costs in Arbitration*, 2007.

⁴⁴ International Chamber of Commerce (ICC) Commission on Arbitration and ADR, Task Force on Reducing Time and Costs in Arbitration, REPORT: *Techniques for Controlling Time and Costs in Arbitration*, (2nd ed., 2014) at <iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Techniques-for-Controlling-Time-and-Costs-in-Arbitration/> (accessed 30 April 2015).

⁴⁵ See Articles 22–24 and Appendix IV, ICC, *ICC Rules of Arbitration*, (2012) in force as of 1 January 2012 (ICC Rules).

⁴⁶ ICC Commission on Arbitration and ADR, REPORT: *Effective Management of Arbitration – A Guide for In-House Counsel and Other Party Representatives* (2015). See also, Grierson, J, and van Hooff, A, *Arbitrating under the 2012 ICC Rules* (Kluwer Law International, Leiden, 2012), 7.

⁴⁷ International Bar Association, *Guidelines on Party Representation in International Arbitration* (2013) at <ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx> (accessed 10 May 2015).

⁴⁸ Sabharwal, D, and Zaman, R, “Vive la difference? Convergence and Conformity in the Rules Reforms of Arbitral Institutions: The Case of the LCIA Rules 2014”, 31(6) *Journal of International Arbitration*

with procedural discretion to avoid unnecessary delay or expense for the sake of a ‘fair, efficient and expeditious means for the final resolution of the dispute’.⁴⁹

While taking steps towards arbitration rules in favour of efficiency, arbitration institutions have had to bear in mind the founding requirement of international enforceability of arbitral awards. As the drafters have had to balance between the objectives of efficiency and fairness, we are currently closer to a universal consensus than ever before. However, analysing the efficiency related provisions in recently revised arbitration rules leads to an interesting outcome. A distinction can be made between the two categories of arbitral efficiency: a) regulatory means of promoting explicit default efficiency; and b) authorisation for the tribunal’s discretion regarding the conduct of the proceedings. Both of the categories are naturally subject to party autonomy and the mandatory requirements of due process, but what do they actually mean?

III.1. Explicit Default Efficiency

By the first category, the authors refer to provisions actually incorporated into arbitration laws, rules or agreements. One of the most explicit efficiency-related issues is the default number of arbitrators in the arbitral tribunal. A three-member arbitral tribunal causes higher fee costs compared with a sole arbitrator, and it also causes reconciliation difficulties as to three individuals’ schedules. It is undisputedly impractical to have a default arbitral tribunal consisting of three arbitrators deciding a subjectively small and simple dispute.

Nevertheless, the Model Law maintains the classical approach in relation to the number of arbitrators. According to Article 10(2), and similarly to other national arbitration acts,⁵⁰ the number of arbitrators shall be three if the parties fail to determine the number themselves.

However, this line of regulation does not reflect a unanimous understanding of modern requirements of default efficiency. There is also legislation to the contrary. For instance, according to Section 15(3) of the English *Arbitration Act* (1996), the tribunal shall consist of a sole arbitrator if there is no agreement as to the number of arbitrators. Similarly, Section 5 of the US *Federal Arbitration Act* foresees a single arbitrator as the default, unless otherwise provided in the agreement by the parties. This line of regulation promotes efficiency in a straightforward manner, by setting a higher threshold for establishing a three-member tribunal.

The sole arbitrator as the default rule of a legislative model also reflects the trend of international arbitration institutions. Article 12 of the ICC Rules states that, where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator. Similarly, according to Article 5.8 of the LCIA Rules from 2014, a sole arbitrator shall be appointed unless the parties have agreed in writing otherwise.⁵¹

(2014) 707; London Court of International Arbitration (LCIA), *LCIA Arbitration Rules*, effective 1 October 2014 (LCIA Rules).

⁴⁹ Article 14.4(ii), LCIA Rules.

⁵⁰ See eg., Sections 12(2) and 13, *Swedish Arbitration Act*; Section 1034(1), *Code of Civil Procedure*, Germany (2005) Federal Law Gazette I, 3202, last amended by Article 1 of the Act of 10 October 2013, *Federal Law Gazette I*, 3786.

⁵¹ See also Article 6.1, Singapore International Arbitration Centre (SIAC), *Arbitration Rules of the Singapore International Arbitration Centre* (5th ed, 2013); Article 16, Finland Chamber of Commerce (FAI), *Arbitration Rules of Finland Chamber of Commerce* (2013) (FAI Rules).

Despite this, the United Nations Commission on International Trade Law (UNCITRAL) *Arbitration Rules* as revised in 2010⁵² (UNCITRAL Rules) still set a default tribunal of three arbitrators if the parties have not agreed that there should be only one.⁵³ Similarly, the Article 12 of the 2010 *Arbitration Rules* of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Rules)⁵⁴ establishes that where the parties have not agreed on the number of arbitrators, the arbitral tribunal shall consist of three arbitrators. The default provisions in the UNCITRAL Rules and SCC Rules are not that surprising considering that the respective arbitration laws they are inspired by (the Model Law and the Swedish *Arbitration Act*), also refer to default three-member tribunals, as explained above.

Other efficiency promoting regulative issues are specific time limits that have been set in institutional rules (likely the essence of many potential disputes). For instance, according to Article 5(1) of the ICC Rules, the answer to the request for arbitration shall be submitted within 30 days from the receipt of the request from the Secretariat. A similar 30-day time limit is in Article 4 of the UNCITRAL Rules and a 28-day time limit from the commencement of the arbitration in Article 2.1 of the LCIA Rules.

Arbitration rules also contain provisions as to the delivery of the award. According to Article 30(1) of the ICC Rules, the time limit within which the arbitral tribunal must render its final award is six months. A similar six-month limit for making the final award has also been set in Article 37 of the SCC Rules.

Another way of setting an efficient time for rendering the award is the one chosen by the LCIA. Pursuant to Article 15.10 of the LCIA Rules, the tribunal is required to make its final award ‘as soon as reasonably possible’ after the last submission.

The ICC Rules have taken the efficient award drafting to the next level. The Rules impose on the arbitral tribunal the obligation to inform the ICC Secretariat and the parties after the last hearing of the date by which the tribunal expects to submit its draft award for the ICC Court’s scrutiny. Similarly, the tribunal arbitrating under LCIA Rules must also notify the parties and LCIA Registrar of its timetable for considering, drafting and issuing the award.

Article 14.1 of the LCIA Rules also aims for proactive arbitrator efficiency by requiring that the tribunal make contact with the parties within 21 days of its formation, to begin clarifying the issues in dispute and setting out the procedure. This requirement is similar to the Terms of Reference peculiarity contained in Article 23 of the ICC Rules, and the tribunal’s obligation to convene a prompt case management conference⁵⁵ and a procedural timetable.⁵⁶

Another example related to explicit time limits provisions in arbitration are the ‘expedited procedures’ many institutions have included in their rules. The expedited proceedings may be advantageous when the dispute is of simpler nature, without a lot of written evidence or if the dispute is of a small monetary value. For instance, the SCC has a separate set of rules for expedited arbitrations. According to them, the parties may submit a limited number of submissions and shorter deadlines are applied in the expedited procedure than those in the procedure under the Arbitration Rules. More

⁵² With a minor Investor-State Arbitration related addition in 2013.

⁵³ See Article 7(1), UNCITRAL, *UNCITRAL Arbitration Rules* (as revised in 2010) (UNCITRAL Arbitration Rules).

⁵⁴ Stockholm Chamber of Commerce (SCC), *Arbitration Rules* (2010) in force as of 1 January 2010 (SCC Rules).

⁵⁵ Article 24(1), ICC Rules.

⁵⁶ Article 24(2), ICC Rules.

importantly, Article 36 of the SCC Expedited Arbitration Rules⁵⁷ provides for a three-month time limit for rendering the award, from the date upon which the arbitration was referred to the Arbitrator.

The examples described above do not intend to be an exhaustive list of the techniques and tools available to promote efficiency in arbitration. Specific provisions in laws and arbitration rules, guidelines, reports and 'best practices' will play an important role as the attitude of all the parties involved in the arbitration. Party representatives, the parties themselves, their in-house counsels, the arbitral tribunals, and the institution share different levels of responsibility in the efficient management of the arbitration.

III.2. Tribunal's Discretionary Efficiency

Let us turn to the second category of efficiency tools in arbitration and, more specifically, the tribunals' discretion (and duty) over procedural efficiency. Arbitral tribunals' general procedural discretion has been included in many arbitration laws and rules in order to ensure effective case management.⁵⁸

The ICC Rules have, among others, a new Article 22(1) under which the arbitral tribunal *and* the parties are to 'make every effort to conduct the arbitration in an expeditious and cost-effective manner having regard to the complexity and value of the dispute'. Moreover, after consulting the parties, the arbitral tribunal may adopt such procedural measures as it considers appropriate in order to ensure effective case management.⁵⁹ Thus, the rules truly provide flexibility for the proceedings empowering the tribunal to proportionally assess the dispute's complexity and value to the process.⁶⁰

For the exercise of good-management discretion, Appendix IV of the ICC Rules lists different techniques for the tribunal to use to control time and cost of the arbitration. Thus, tribunals in ICC arbitrations are vested with discretionary powers, but also provided with means of expressing that discretion in an efficient manner. Nothing stops tribunals under other institutional rules or *ad hoc* arbitrations from following the guidelines provided by the said Appendix. At the end of the day, those techniques simply aim to avoid unnecessary oral hearings, limiting the length of written submissions and overlapping oral witness testimonies in any arbitration. It has been argued that none of these measures would actually result in anything innovative, as the efficiency objective is not a new concept.⁶¹ One could also argue to the contrary, that the inclusion of these means of effective case management into the arbitration rules contributes to the development of norms (soft law), and bolsters predictability and harmonised international standards.

Although arbitral tribunals have at their disposal a plethora of tools and discretionary powers to conduct arbitrations in an efficient way, and are always respectful of essential procedural guarantees, in practice, conflicts between efficiency and procedural fairness do exist. When that happens, arbitrators are put to the test on their ability to find that delicate balance that will safeguard the recognition and enforceability of their award.

⁵⁷ SCC, *Rules for Expedited Arbitration* (2010) in force as of 1 January 2010 (SCC Rules) at <sccinstitute.com/dispute-resolution/rules/> (accessed 10 May 2015) (Expedited Arbitration Rules).

⁵⁸ See eg., Article 19, Model Law; Article 17(1), UNCITRAL Arbitration Rules; Article 22(2), ICC Rules; Article 19(1), SCC Rules; Article 25.1, FAI Rules.

⁵⁹ Article 22(2), ICC Rules.

⁶⁰ Grierson, J and van Hooft, A, *Arbitrating under the 2012 ICC Rules*, (Kluwer Law International, Leiden, 2012), 13.

⁶¹ *Id.*, 14.

IV. Two Sides of the Same Coin?

Dr Joerg Risse introduced a dilemma of the ‘magic triangle’, a familiar concept to those within the world of investments, which is also relevant in the context of arbitration. The triangle’s corners represent the desired objectives of arbitration, which cannot be reconciled simultaneously in a single arbitration. Only two corners can be picked at once. Risse’s corners are ‘time efficiency’, ‘cost savings’ and ‘quality of the award’.⁶² As described above, the first two of these cornerstones of arbitration can be categorised to the one and same concept of arbitral efficiency. Thus, the authors have repurposed the triangle to trying to find the balance between the corners of ‘party autonomy’, ‘due process’ and ‘efficiency’.

Because arbitration awards are final and binding and they cannot be appealed on their merits, the mandatory procedural provisions have a crucial weight in the safeguarding system of judicial review of arbitral awards. Therefore, the mere objective of efficient proceedings cannot easily outweigh due process.⁶³ Thus, the issue is more likely to be defining the scope of applying both concepts at the same time.

For example, under English law, arbitral discretion is exercised in the shadow of party autonomy and also Section 68 of the English *Arbitration Act*, which permits a party to the arbitration to challenge the award on the ground of serious irregularity affecting the proceedings (the tribunal or the award). Serious irregularities include, among others, the arbitrator’s failure to comply with procedural fairness and also with efficiency.⁶⁴ Efficiency aims to promote the optimum administration of justice, but it is only in extreme cases of ‘inefficiency’ that an award may be refused recognition or enforcement. This is when inefficiency has caused ‘substantial injustice’ to the applicant. The possibility that an arbitrator be less efficient than the parties expected remains a risk assumed by them.⁶⁵

In some cases, by trying to balance out the duty to treat the parties fairly (due process) and the duty to promote efficiency, arbitral tribunals have been unable to succeed in their duty to render an enforceable award. An example of the difficulties arbitral tribunals face when weighing procedural fairness and efficiency is the *Caribbean Niquel v Overseas Mining* case.⁶⁶ In the case, the parties entered into a joint venture with the objective of operating a mine. A dispute arose before the mine had even become operative. As a result, one of the parties commenced arbitration and sought damages pursuant to the theory of ‘lost profit’. In its decision, the tribunal indeed awarded the claimant a compensation for damages, but based on the theory of ‘lost chance’. In setting aside the proceedings, the court held that the award violated the parties right to be heard (due process), because the

⁶² Risse, J, “Ten Drastic Proposals for Saving Time and Costs in Arbitral Proceedings”, 23(3) *Arbitration International* (2013) 4.

⁶³ Born, *supra* nt 6, 2124.

⁶⁴ Section 33, *Arbitration Act 1996*, England. In a similar vein, Section 21, *Swedish Arbitration Act* stipulates that arbitrators shall handle the dispute in a speedy manner, although its non-observance would not, *per se*, constitute a ground for setting aside the award.

⁶⁵ Park, WW, “The Four Musketeers of Arbitral Duty: Neither One-for-all nor All-for-one”, in Derains, Y and Lévy, L, eds, *Is Arbitration Only as Good as the Arbitrator? Status, Powers and Role of the Arbitrator* (Dossiers, ICC Institute of World Business Law, 2011), 25.

⁶⁶ Paris Court of Appeals, *La Societe Commercial Caribbean Niquel v La Societe Overseas Mining Investments Ltd*, 25 March 2010, Chamber 1, 08/23901.

parties had not had an adequate opportunity to comment on the different (and not invoked) legal basis for the calculation of damages.⁶⁷

Prior to making its decision, and in order to respect due process, the tribunal should have (supposedly) scheduled a hearing or a set of written submissions for the parties to comment on the non-alleged legal theory of lost chance. Unfortunately this would have affected, at least, the tribunal's duty to make a decision without unnecessary delays and create extra expenses – ie limit overall efficiency. More importantly, the arbitrators would have risked raising doubts as to its impartiality, because it could have been interpreted as if they were siding with one of the parties (claimant) and advancing perhaps a more appropriate legal basis for its claim.

Understandably, the tribunal may have tried to avoid awarding damages based on grounds (lost profit) that would have certainly not compensated the correct amount (if any at all), for an enterprise that had not even begun to operate. In any case, the arbitrators' apparent intention to enhance efficiency betrayed a more fundamental duty, which is to ensure the procedural fairness needed to render an enforceable award.

Another example of the tensions between due process and efficiency is the consolidation of multiple disputes into a single arbitration. In general terms, consolidation of two or more claims into one single procedure involving all related parties and disputes, aims to avoid repetition or duplication of the same evidentiary materials, to minimise costs and to avoid the hassles of contradicting outcomes.⁶⁸

A first decisive question is whether any related claims can (or should) be consolidated into one proceeding. An example may serve again to illustrate the tension between efficiency and due process. In the *Stolt-Nielsen v Animal Feeds* case,⁶⁹ there were multiple actions by different parties against several ship-owners, under similar arbitration agreements. The claimants requested a single, consolidated proceeding to address their combined claims. The respondents opposed to it. In a partial award, the tribunal construed the arbitration agreements so as to allow the consolidation of claims. In doing so, it bore in mind that certain preconditions had to be met, such as common questions of law and fact among the different claims. In vacating the award, the US Supreme Court held that the arbitrators had exceeded their powers by imposing its own policy choice rather than deciding pursuant to the applicable law.⁷⁰ Even if the proceedings may be seen as more efficient, the court understood that the respondent's procedural right not to be subjected to a class (consolidated) arbitration, to which they had not consented, had to be respected.

Again, this decision shows that even efficient case management with the best intentions requires observance to (sacrosanct) procedural guarantees of due process. This is so even if efficiency has to take a step back in favour of some delays and further costs.

⁶⁷ *Id*, confirmed by decision Cour de Cassation, Première chambre civile, *La société Overseas Mining Investments Limited v La société Commercial Caribbean Niquel*, 29 June 2011, Arrêt No 785 (10-23.321).

⁶⁸ However, consolidation may end up being less efficient and more costly for a party with a small claim, the settlement of which is likely to take longer and is, accordingly, less cost-effective.

⁶⁹ US Supreme Court, *Stolt-Nielsen SA v Animal Feeds International Corp*, 27 April 2010, 559 US 662.

⁷⁰ *Id*, 676, 1770 2.

V. Conclusion

Observance of the procedural fairness (procedural due process) is embedded in arbitration as a one-stop mechanism to determine disputes, as a venue that substitutes the parties' constitutional right to seek justice from a national court. As violations of the basic procedural fairness give rise to sanctions, arbitrators are (and should be) concerned with identifying the relevant rule of due process applicable at the different stages of the arbitral proceedings. While the sources may vary, the core of the principle of due process will likely remain the same, but its specifications will again need to fluctuate and adjust to different legal cultures. The existence of different cultural baselines implies that a procedural decision by the arbitrators may deviate from one of the parties' understanding of procedural integrity. Practices that constitute an expression of procedural fairness in one legal system may be not used in another due to being unethical or even prohibited.

With the aim of promoting an optimum administration of justice outsourced from the State, arbitrators also have a duty towards efficiency. Although the duties to observe procedural guarantees of due process and efficient administration of the arbitral proceedings may face intricate tensions, procedural fairness must prevail for the arbitral award to be recognised and enforceable. Inefficiency may not carry serious consequences on the award, unless it in fact causes serious injustice – at least under certain arbitration laws. Therefore, due process and efficiency can be seen as the two sides of the same coin. The arbitrators' mission then is to find the delicate equilibrium between the two.

Yet, as William Park observed,⁷¹ the penalty for a breach of an arbitrator's duty of fairness carries a certain irony. The sanctions do not fall directly on the arbitrator who breached his or her duty. Instead, the price of the arbitrators' misconduct falls on the prevailing party, which must suffer annulment of an award for breach of fundamental procedural integrity.

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www.grojil.org

⁷¹ Park, *supra* nt 65, 25.

Arbitration in EU Jurisdiction Regulation: Brussels I Recast and a New Proposal

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Keywords

ARBITRATION; BRUSSELS I RECAST; EU JURISDICTION REGIME; ARBITRATION AGREEMENT

Abstract

The relationship between the European jurisdiction regime and arbitration is one of the areas generating confusion and disputes. The Brussels I Regulation clearly excludes arbitration from its scope to avoid conflicts with the New York Convention, but arbitration-related issues, such as the validity of arbitration agreements, either as an independent claim or an incidental question, frequently arise in courts. The scope of the Brussels I Regulation in terms of arbitration has been addressed by the Court of Justice of the European Union in a number of decisions, such as *Marc Rich v Societa Italiano Impianti*, *Van Uden*, and *Front Comor*. None of them have provided a satisfactory answer. In order to provide clarification and to reconcile the European jurisdiction Regulation and the New York Convention, the Brussels I Recast has inserted a new recital specifically addressing the relationship between court jurisdiction and arbitration. This article aims to assess the effect of the new recital and whether it has appropriately resolved the difficult questions on the relationship between jurisdiction and arbitration in the European Union.

I. Introduction

When the judicial cooperation on jurisdiction and recognition and enforcement of judgments was established in the European Community, there was a clear intention that this Convention should only cover court proceedings, excluding arbitration.¹ This exclusion was reaffirmed in the subsequent reforms and modernisation, including the 1978 Accession Convention,² the Brussels I Regulation,³ and the recent Brussels I Recast.⁴ Arbitration is excluded because there are many international treaties on

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¹ Article 1(4), *Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (Consolidated Version) (1968) OJ C27/1 (Brussels Convention).

² Article 1(4), *Convention of Accession of 9 October 1978 of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters* (1979) OJ L304/1.

³ Council of the European Union (EU), *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, (2001) OJ L12/1 (Brussels I Regulation).

⁴ EU, *Regulation (EU) No 1215/2012 of the European Parliament and the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)*, (2012) OJ L351/1 (Brussels I Recast).

arbitration which may conflict with the European jurisdiction regime.⁵ In particular, the New York Convention on Recognition and Enforcement of Arbitral Awards (New York Convention)⁶ is a very successful international framework, which applies to all Member States of the Brussels I regime. Article 71 of the Brussels I Regulation provides that the Regulation will not prejudice the treaty obligations of Member States under other international conventions in matters relating to jurisdiction, recognition and enforcement of judgments. Excluding arbitration from the Brussels I regime aims to avoid potential conflicts and to allow the Brussels I regime to perform alongside the New York Convention.

Arbitration is a private dispute resolution method, separate from court jurisdiction. However, arbitration can never work without the support and supervision of the court. The court's assistance is required to enforce arbitral awards, to appoint or remove arbitrators, to determine the place of arbitration, to provide preliminary ruling on substantive law, to extend the time limit to make awards, to incorporate arbitral awards into court judgments, to refer the parties to arbitration and to issue anti-suit injunctions to prevent the parties from breaching a valid arbitration agreement by commencing a foreign action. The court's supervision is also required to review arbitrators' jurisdiction, to scrutinise the arbitration procedure, to issue anti-arbitration injunctions, to restrain illegitimate arbitration processes, and to set aside arbitral awards in exceptional circumstances.

Therefore, it is hard to draw a clear-cut line between arbitration and court proceedings. Arbitration or arbitration-related issues frequently come before courts. The official reports on the Brussels Convention and the Court of Justice of the European Union (CJEU) case law fails to provide a systematic and consistent answer, which has led to tremendous uncertainties in practice. The European Union (EU) lawmakers have realised the difficulty and have made the relationship between arbitration and the EU jurisdiction regime one of the main issues that was examined in the review process that led to the reform of the jurisdiction regime, which resulted in the Brussels I Recast. The Brussels I Recast has maintained the same exclusion of arbitration but provided the guidance and explanatory notes in Recital 12, which aim to clarify the complexity and provide certainty in practice. This article, nevertheless, argues that the Brussels I Recast does not effectively remove all the practical problems arising out of the interaction between jurisdiction and arbitration. Three principles are proposed to provide an effective framework and to reconcile the conflict between Brussels I Recast and the New York Convention.

II. Brussels I Regulation

II.1. Exclusion of Arbitration from the Jurisdiction Regime

The Brussels I Regulation provides: 'The Regulation shall not apply to...arbitration.'⁷ It does not clarify what is included in the word 'arbitration'. Arbitration may include arbitration proceedings, court proceedings ancillary to arbitration, disputes relating to

⁵ Jenard, P, *Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, (1979) OJ C59/1, 13.

⁶ United Nations, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (1958) 330 UNTS 3 (New York Convention).

⁷ Article 1(2)(d), Brussels I Regulation.

arbitration, such as validity and scope of arbitration agreements, and disputes arguably subject to arbitration. A report by Jenard on the Brussels Conventions provides that

The Brussels Convention does not apply to the recognition and enforcement of arbitral awards; it does not apply for the purpose of determining the jurisdiction of courts and tribunals in respect of litigation relating to arbitration for example, proceedings to set aside an arbitral award; and, finally, it does not apply to the recognition of judgments given in such proceedings.⁸

This report provides a simple and non-exhaustive list of the matters covered by the word ‘arbitration’. Those matters mentioned in the report are generally proceedings relating to arbitral awards or arbitration proceedings. Those issues are clearly included in the New York Convention and there is little dispute regarding their exclusion. The Schlosser Report has provided more detailed guidance.⁹ It recognised two conflicting opinions on the position of arbitration in the Brussels I regime. The first was proposed by the UK, suggesting the exclusion covers ‘all disputes which the parties had effectively agreed should be settled by arbitration, including any secondary disputes connected with the agreed arbitration’.¹⁰ The other view suggests that the exclusion only aims to omit arbitration proceedings from the Brussels I regime. In other words, issues relating to the validity and existence of arbitration agreements should continue to be covered by the Brussels I regime.¹¹

The variation leads to diversity in practice, where a matter is brought before a court and the court holds that the arbitration agreement is invalid and moves on to give judgment. The first interpretation suggests that this issue relates to arbitration and should be excluded from the Brussels I regime. The courts of other Member States, therefore, do not need to recognise and enforce this judgment. The second interpretation, on the contrary, includes this issue within the Brussels I regime. Other Member States are then obligated to enforce the court’s judgment.¹² The Schlosser Report states that the Brussels I regime does not cover court proceedings ancillary to arbitration proceedings, including a judgment determining the validity of an arbitration agreement and a decision to refer the parties to arbitration.¹³

It seems that a broad approach was proposed by the Schlosser Report. This approach can be justified for two reasons. First, since the exclusion of arbitration aims to reconcile the conflict between the European jurisdiction regime and the New York Convention, the scope of these two instruments should be mutually exclusive. That means everything covered in the New York Convention should be excluded from the scope of the Brussels I Regulation. The New York Convention primarily deals with recognition and enforcement of foreign arbitral awards, but it also covers other arbitration-related issues, including the validity of arbitration agreements and the court referring the parties to

⁸ Jenard, *supra* nt 5.

⁹ Schlosser, P, *Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice*, (1979) OJ C59/71.

¹⁰ *Id.*, para 61.

¹¹ *Id.*, para 61; Hartley, TC, “The Brussels I Regulation on Arbitration”, 63 *International and Comparative Law Quarterly* (2014) 843, 844.

¹² Schlosser, *supra* nt 9, para 62.

¹³ *Id.*, para 64; Hartley, *supra* nt 11, 844–847.

arbitration.¹⁴ Therefore, the Brussels I Regulation should also exclude arbitration related issues from its scope. Otherwise, some conflicts become inevitable. Second, besides the express scope, the Brussels I Regulation should not act to restrict the purpose of the New York Convention and the Member State's treaty obligation to protect arbitration and the parties' freedom to submit disputes to arbitration. If the Brussels I Regulation only excludes arbitration proceedings but includes matters relating to arbitration, it will hamper the purpose of the New York Convention. It could encourage the parties to submit their disputes subject to an arbitration agreement to the court. Parallel proceedings may exist between court proceedings and arbitration proceedings, which may result in irreconcilable judgments and arbitral awards. Enforcement of arbitral awards in the two systems, ie, the Brussels I Regulation and the New York Convention, causes conflicts that the European legislators aimed to avoid from the very beginning.

II.2. *Marc Rich v Societa Italiano Impianti*

The first case that casts doubt on the arbitration exclusion is *Marc Rich v Societa Italiano Impianti*.¹⁵ In this case, a Swiss company and an Italian company concluded a contract for the sale of crude oil and agreed to submit their disputes to arbitration in London. The parties agreed that three arbitrators would be appointed, one chosen by each party who, together, would select the chair. After disputes arose, Impianti commenced litigation in Italy and Marc Rich commenced arbitration proceedings in London pursuant to the arbitration agreement. Impianti refused to participate in the London arbitration or to appoint an arbitrator according to their agreement. Marc Rich sought the assistance from the English court to appoint the second arbitrator and serve summons on Impianti. Impianti, however, argued that before the English court could appoint an arbitrator and serve summons, the English court must first assess the existence and the validity of the arbitration agreement, which is within the scope of the Brussels Convention. As Impianti first brought the dispute in Italy, where the validity of the arbitration agreement should be duly examined by the Italian court as a preliminary matter, both courts were seized to decide the same cause of action between the same parties. Impianti argued that the *lis pendens* doctrine of the Brussels Convention should apply and the English court, as the second seized court, should stay jurisdiction.¹⁶

This was the first time that the CJEU was seized to give a clear answer to the old conflict between the broad interpretation suggested by the UK and the narrow interpretation suggested by the continental European countries.¹⁷ The CJEU confirmed the broad interpretation and, essentially, the approach suggested by the Schlosser Report. It provided that the Brussels Convention excludes arbitration 'in its entirety', including court proceedings in which the subject matter is arbitration.¹⁸ A related issue the CJEU answered was whether court proceedings where the subject matter is arbitration, only refer to those proceedings where arbitration was the principal issue. Do they also include

¹⁴ Article II, New York Convention.

¹⁵ Court of Justice of the European Union (CJEU), Case C-190/89, *Marc Rich v Societa Italiano Impianti* [1991] ECR I-3855 (*Marc Rich*). For more on this case, see Munro, CM "Marc Rich v Impianti", 3 *International Company and Commercial Law Review* (1992) 116, 116; Hartley, TC, "The Scope of the Convention" 16 *Edinburgh Law Review* (1991) 529, 529; Kaye, P, "Forensic Submission as a Bar to Arbitration", 12 *Civil Justice Quarterly* (1993) 359.

¹⁶ Article 21, Brussels Convention (Article 27, Brussels I Regulation).

¹⁷ Schlosser, *supra* nt 9, para 61.

¹⁸ *Id*, para 18.

proceedings where arbitration-related issues arise as an incidental question? The CJEU refused to provide different treatment to proceedings where arbitration is a primary issue and where arbitration is a preliminary incidental issue. Instead, the CJEU explained that since the court proceedings are regarding appointing an arbitrator, the subject matter of which is arbitration, it should be excluded from the scope of the Brussels Convention, regardless of whether the validity of the arbitration agreement is raised as a preliminary issue.¹⁹ This may also lead to the conclusion that if the main subject matter is not arbitration, even if ruling on the arbitration agreement is required as a preliminary issue, the action should be included in the Brussels I regime.²⁰

Marc Rich clarifies that besides arbitration proceedings, any court proceedings in which the subject matter is arbitration should be excluded from the scope of the Brussels I regime. A decision should be made according to the main subject matter of the proceedings. If any incidental question or preliminary issue may be included in the Brussels I regime, it would not substantively change the fact that the whole proceedings are out of the scope of the Brussels I regime. *Marc Rich* refuses to split the proceedings and treat incidental questions and primary questions separately.

Marc Rich leaves open two important questions. The first is how to handle the validity and interpretation of arbitration agreements as a stand-alone dispute. The second is how to handle interim or protective measures that may be provided to support arbitration.

II.3. *Van Uden Maritime BV v Deco-Line*

The status of arbitration in the Brussels I Regulation is addressed again in *Van Uden Maritime BV v Deco-Line*.²¹ In this case, one of the parties commenced arbitration proceedings pursuant to the arbitration agreement in their contract and applied at the same time to the Dutch courts for interim relief in the form of an order that the defendant pay the debt owed. The question was whether the Dutch court could exercise jurisdiction over the interim relief application under the Brussels I Regulation. It again depends on the scope of the Brussels I Regulation. Where the parties have concluded a valid arbitration agreement, are any court proceedings in relation to the parties' relationship arbitration-related and, therefore, excluded from the Brussels I Regulation? A broad interpretation again supports that the exclusion should be extended to all proceedings relating to the parties' relationship, including interim measures.²² This is because the interim measures sought are 'intrinsically bound up with the subject-matter of an arbitration procedure' and should be regarded as ancillary to the arbitration procedure.²³ A contrary argument is that the subject matter of the interim proceedings is not

¹⁹ *Id*, para 29: 'the exclusion provided for therein extends to litigation pending before a national court concerning the appointment of an arbitrator, even if the existence or validity of an arbitration agreement is a preliminary issue in that litigation'.

²⁰ Hess, B, Pfeiffer, T and Schlosser, P, *Report on the Application of Regulation Brussels I in the Member States* (Study JLS/C4/2005/03) at <ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf> (accessed 10 April 2015), para 107 (Heidelberg Report).

²¹ CJEU, Case C-391/95, *Van Uden Maritime BV v Deco-Line* [1998] ECR I-7091 (*Van Uden*); Rodger, BJ, "Interim Relief in Support of Foreign Litigation", 18 *Civil Justice Quarterly* (1999) 199; Hartley, TC, "Interim Measures under the Brussels Jurisdiction and Judgments Convention", 24 *European Law Review* (1999) 674.

²² This broad interpretation was provided by the German and UK Governments: *Van Uden*, para 26.

²³ *Van Uden*, para 26.

arbitration, but performance of a contractual obligation.²⁴ The CJEU decided that the interim relief proceedings were commenced alongside the main court proceedings. The court that is seized under Article 24 of the Brussels Convention to issue an interim relief should have jurisdiction under the Convention regardless of existing proceedings in another Member State. This means the interim proceedings are independent from and parallel to the main proceedings.²⁵ The CJEU thus suggested that interim proceedings are not court proceedings ancillary to arbitration, because they are ordered alongside arbitration procedures as additional support measures.²⁶ Although *Van Uden* did not address the first gap left by *Marc Rich*, it answered the second question that the nature of interim or protective measures should be determined according to the substantive right they aim to enforce, instead of the proceedings that they could act to support. Interim proceedings in support of arbitration proceedings may still fall within the scope of the Brussels I Regulation.

II.4. *Allianz SpA v West Tankers (Front Comor)*

Ten years after *Van Uden*, a conflicting and controversial ruling on the relationship between arbitration and the Brussels I Regulation was delivered by the CJEU in *Front Comor*,²⁷ where the claimant applied for an anti-suit injunction in an English court restraining the defendant from suing in Italy in an alleged breach of an arbitration agreement which required the parties to submit disputes to arbitration in London. If *Marc Rich* is applied, the Brussels I Regulation does not cover court proceedings the subject matter of which is arbitration. Proceedings to issue an anti-suit injunction to support arbitration based on the decision that an arbitration agreement is valid should be proceedings in which the subject matter is arbitration.²⁸ If applying the ruling in *Van Uden*, the nature of the interim proceedings should depend on ‘the nature of the right that they serve to protect’.²⁹ The anti-suit injunction aims to protect the right of the parties to bring disputes to arbitration. Therefore, pursuant to *Van Uden*, the proceedings to issue anti-suit injunction should be proceedings relating to arbitration and be excluded from the scope of the Brussels I Regulation.

The CJEU, however, ruled that an anti-suit injunction granted against another Member State’s proceedings in favour of arbitration is within the scope of the Brussels I Regulation. The decision does not carefully address case precedents and legal principles within the Brussels I Regulation. After a very brief note that *Marc Rich* and *Van Uden* may lead to a conclusion to exclude the anti-suit injunction in support of arbitration from the scope of the Brussels I Regulation, the CJEU focuses on the policy consideration of preventing the use of anti-suit injunction among Member States.³⁰ The CJEU departed from the ‘subject matter’ test used in both *Marc Rich* and *Van Uden*, and adopted a new test based on the ‘effect’ on the Community.

The *Front Comor* decision, as a primarily policy-based attack on the use of the anti-suit injunction as a tool in the internal market, does not provide a clear answer to the

²⁴ *Van Uden*, para 27.

²⁵ *Van Uden*, paras 28 and 29.

²⁶ *Van Uden*, paras 33–34.

²⁷ CJEU, Case C-185/07, *Allianz SpA v West Tankers*, [2009] ECR I-663 (*Front Comor*).

²⁸ United Kingdom House of Lords, *West Tankers Inc v RAS SpA and others* [2007] UKHL 4, para 13.

²⁹ *Van Uden*, para 33.

³⁰ *Front Comor*, paras 23–31. For more discussion on the three cases, see Tang, *ZS Jurisdiction and Arbitration Agreements in International Commerce* (Routledge, London, 2014), Ch 7.5.

relationship between arbitration and the Brussels I Regulation. In particular, it should not be interpreted in a way suggesting that the validity of an arbitration clause, standing alone, is included in the Brussels I Regulation. It is doubtful whether, without the involvement of an anti-suit injunction or other measures that arguably infringe comity and mutual trust of the Brussels I regime, the same decision will be made with the effect of including decisions on arbitration agreements within the scope of the Brussels I Regulation.

II.5. Conclusion

No systematic and consistent guidance is provided by the CJEU in addressing the relationship between arbitration and the Brussels I Regulation. Pursuant to the previous case authorities, the CJEU provides four suggestions: (1) the Brussels I Regulation does not apply to arbitration proceedings; (2) the Brussels I Regulation does not apply to the court proceedings, the subject matter of which is arbitration; (3) the subject matter and the nature of the court proceedings depend on the nature of the right they seek to protect; (4) exception is given to anti-suit injunctions supporting arbitration, which, for policy reasons, is within the scheme of the Brussels I Regulation.

III. Brussels I Recast

III.1. The Recasting Process and Reform Proposal

The recasting process began with the Heidelberg study, which was completed in 2005. The responses to this study were used as the basis for the Heidelberg Report. The Heidelberg Report advocated wide-ranging reform of the Regulation's relationship with arbitration.³¹ The European Commission, generally based on the Heidelberg Report, published a Report³² and Green Paper,³³ providing a few proposals for reform. Member States also suggested alternate options in their responses to the Green Paper.³⁴ In general, six alternative proposals were considered in the recasting process.

³¹ Heidelberg Report, *supra* nt 20, para 122.

³² European Commission, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, 21 April 2009, COM(2009) 174 final (Commission Report), 7.

³³ European Commission, *Green paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, COM (2009) 175 final, 6 (Commission Green Paper).

³⁴ See eg., the responses to the Commission Green Paper: UK Ministry of Justice, *Review of the Brussels I Regulation (EC 44/2001): Comments from the United Kingdom*, 3 September 2009, 7 (UK Green Paper Response); Hungary, *Hungarian Response to the Commission's Green Paper on the Review of Council Regulation (EC) No 44/2001 on the Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM(2009) 175, 8; Slovenia, *Odgovori RS na vprašanja Zelene knjige o izvajanju Uredbe Sveta ES, št. 44/2001 o pristojnosti in priznavanju ter izvrševanju sodb v civilnih in gospodarskih zadevah, dokument št. COM (2009) 175 z dne 21.4.2009*, 10–11 (translation with the assistance of Miss Janja Čevriz); Permanent Representation of the Republic of Poland at the European Union, *Odpowiedzi na Pytania Zawarte w Zielonej Księdze w Sprawie Przeglądu Rozporządzenia Rady (WE) nr 44/2001 w Sprawie Jurysdykcji i Uznawania Orzeczeń Sądowych Oraz ich Wykonywania w Sprawach Cywilnych i Handlowych* (COM(2009)175, 28 July 2009, 8–9) (translation with the assistance of Miss Marysia Łabno); La Delegation Française, *Réponses des Autorités françaises au Livre vert relatif à la révision du règlement (CE) n°44/2001 du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commercial*,

The first proposal is simple deletion of the arbitration exclusion,³⁵ thereby bringing all court proceedings related to arbitration within the scope of the Brussels I regime, including the proceedings deciding on the validity of an arbitration agreement, appointing an arbitrator, and issuing other ancillary measures. This would likely result in an inappropriate regime: a square peg for a round hole.³⁶ It is inappropriate to allow any Member State to interfere with foreign arbitration proceedings or to grant ancillary measures in relation to foreign arbitration. Furthermore, when the parties choose arbitration they have the intention to avoid the ordinary jurisdiction rules of the Brussels I regime and to be subject to a chosen, neutral forum. Some jurisdiction rules of the Brussels I regime would be inappropriate to support arbitration or to address parties' needs. For example, granting general jurisdiction to the defendant's domicile makes little practical sense in arbitration, where the parties tend to avoid each other's places of business in favour of a neutral forum.³⁷ The simple deletion of the arbitration exclusion could result in parties being able – and in some circumstances, forced³⁸ – to bring actions relating to arbitration in a manifestly inappropriate forum. Perhaps for this reason, the simple deletion of the arbitration exclusion without insertion of bespoke rules has never, to the authors' knowledge, been seriously proposed as an avenue for reform.

The second approach is the 'partial deletion' of the arbitration exclusion.³⁹ The Heidelberg Report suggested deletion of the arbitration exclusion at Article 1(2)(d),⁴⁰ supplemented by a number of bespoke rules on the interface between the Brussels I regime and arbitration, including giving exclusive jurisdiction in ancillary proceedings to the courts at the place of the arbitration,⁴¹ adding a new *lis pendens* rule requiring a mandatory stay of proceedings where the existence of an arbitration agreement is alleged and a court at the designated place of arbitration has been seized for declaratory relief,⁴² and inserting a recital defining the place of arbitration.⁴³ The simple but appealing central

23) (translation with the assistance of Mlle Élodie Fleury); Bundesministeriums des Justiz, *Grünbuch Überprüfung der Verordnung (EG) Nr 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (KOM [2009] 175 endgültig) vorgelegt von der Kommission am 21 April 2009* (translation with the assistance of Frau Eva Loef); all responses are at <ec.europa.eu/justice/newsroom/civil/opinion/090630_en.htm> (accessed 9 May 2015).

³⁵ Heidelberg Report, *supra* nt 20, paras 122–124; Radicati di Brozolo, LG, "Arbitration and the Draft Revised Brussels I Regulation: Seeds of Home Country Control and of Harmonisation?", 7(3) *Journal of Private International Law* (2011) 423, 429.

³⁶ *Ibid.*

³⁷ Bühring-Uhle, C, *Arbitration and Mediation in International Business* (Kluwer, Alphen aan den Rijn, 1996), 135–143.

³⁸ If the arbitration agreement did not specify a place for performance, the only option for a Court to establish jurisdiction over the arbitration agreement would be to rely on the domicile rule.

³⁹ The Commission Report, and the Commission Green Paper advocated partial deletion of the exclusion in this fashion; the Heidelberg Report had previously suggested deletion with the insertion of bespoke rules.

⁴⁰ Heidelberg Report, *supra* nt 20, para 131.

⁴¹ *Id.*, para 132.

⁴² *Id.*, para 134.

⁴³ *Id.*, para 136. See also van Houtte, H, "Why Not Include Arbitration in the Brussels Jurisdiction Regulation?", 21(4) *Arbitration International* (2005) 509, 516–520. See also the independent scholarship of the authors of the Heidelberg Report: Schlosser PF, "Europe – Is It Time to Reconsider the Arbitration Exception from the Brussels Regulation?", 12(4) *International Arbitration Law Review* (2009) 45; Hess, B, "Improving the Interface Between Arbitration and European Procedural Law – the Heidelberg Report on the EU Commission's Green Paper on the Reform of Regulation Brussels I", 1 *Les Cahiers de l'Arbitrage/Paris Journal of International Arbitration* (2010) 17; Hess, B, Pfeiffer, T and Schlosser, PF, "The Findings and Proposals of the Heidelberg Report – a Reply to the ICC French

argument in favour of this approach is that it could resolve parallel proceedings between courts and arbitration and could prevent irreconcilable judgments on ancillary proceedings between Member States.⁴⁴ These proposals, however, are subject to strong criticism.⁴⁵ The criticism generally suggests that this proposal would have resulted in a backward step for pro-arbitration EU Member States, undermined arbitral competence-competence, and interfered with the New York Convention regime. For example, a Member State with particularly strict requirements for the validity of an arbitration agreement could force other Member States to apply those restrictions indirectly, by issuing a Brussels I Regulation judgment on the validity of the arbitration agreement or setting aside an award. This would be an anathema to a pro-arbitration country such as France, which does not currently recognise the judicial annulment of awards in another country under any circumstances.⁴⁶ Regardless of its merits, the possibility of the partial abolition of the exclusion was seriously considered in the recasting process.

The third approach is a return to a so-called ‘true’ arbitration exclusion. This would mean maintaining the exclusion, but wording it more broadly, to the extent that it would revive the anti-suit injunction and render the *Front Comor* decision irrelevant.⁴⁷ The exact proposal from the UK fell into three parts. First, it would reword the arbitration exclusion in Article 1(2)(d), making its scope absolutely clear. The reworded exclusion would read

arbitration, and in particular an action in respect of which the parties have made an arbitration agreement within the meaning of Article II of the New York Convention; an action or judgment on the validity, effect or scope of such an agreement; and ancillary proceedings in relation to such an agreement or any aspect of the arbitral process.⁴⁸

It would then include a recital that a court may refuse recognition and enforcement of a judgment irreconcilable with an arbitration agreement.⁴⁹ Finally, it would insert a provision stating: ‘Nothing in this Regulation affects the application of the New York

Working Group”, 1 *Transnational Dispute Management* (March 2009) at <transnational-dispute-management.com/article.asp?key=1424> (accessed 4 May 2015).

⁴⁴ Heidelberg Report, *supra* nt 20, paras 115–129; van Houtte, *supra* nt 43, 512–520.

⁴⁵ See Pinsolle, P, “The Proposed Reform of Regulation 44/2001: A Poison Pill for Arbitration in the EU?”, 12(4) *International Arbitration Law Review* (2009) 62, 62–65; Pullen, A, “The future of International Arbitration in Europe: West Tankers and the EU Green Paper”, 12(4) *International Arbitration Law Review* (2009) 56; The Arbitration Committee of the IBA, “IBA Submission to the European Commission on Regulation (EC) No. 44/2001”, 10 *Business Law International* (2009) 302; UK Green Paper Response, *supra* nt 34, 7; Radicati di Brozolo, *supra* nt 35, 434.

⁴⁶ See, eg., Cour de Cassation, Première Chambre Civile, France No 42, *PT Putrabali Adyamulia (Indonesia) v Rena Holding, et al*, 29 June 2007, XXXII *Yearbook of Commercial Arbitration* (2007) 299 (*PT Putrabali*).

⁴⁷ UK Green Paper Response, *supra* nt 34, 7.

⁴⁸ *Id.*, 7–8.

⁴⁹ *Id.*, 8:

In order to ensure that all aspects of arbitration are kept outside the scope of this Regulation, and to safeguard the full application and operation between Member States of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (‘the New York Convention’), unaffected by this Regulation, this Regulation should not apply to actions in respect of matters governed by an arbitration agreement under Article II of the New York Convention; actions or judgments on the existence, validity, effect or scope of such an arbitration agreement; or ancillary proceedings relating to such an arbitration agreement or any aspect of the arbitral process; and a judgment should not be recognisable under this Regulation in so far as it is irreconcilable with such an arbitration agreement.

Convention’.⁵⁰ This approach also found support in the European Parliament Report, at least insofar as it would broaden the understanding of the arbitration exclusion.⁵¹

Fourth, the European Commission in its later Proposal suggested a *lis pendens* mandatory stay rule.⁵² It requires the court of a Member State to stay jurisdiction where either the courts at the seat of arbitration or *the arbitral tribunal itself* had been seized. Parties would not be obliged to go to court before commencing arbitration in order to receive the *lis pendens* protection of the Brussels I Regulation: an onerous requirement which would have delayed the proceedings and added expense in cases where, for example, institutional rules would remove any need for court involvement. This proposal found support in the writings of several commentators. It would arguably solve the most significant problem with the Brussels I Regulation’s relationship with arbitration – parallel proceedings – without being overly intrusive into the domestic arbitration law of the Member States.⁵³ The obvious criticism of this proposal is that it would allow the bad-faith tactical litigant to delay or ‘torpedo’ potential court proceedings by attempting to begin vexatious arbitration proceedings where no arbitration agreement had been concluded. However, the proposal is laudable for furthering the aim of eradicating parallel proceedings whilst having less pervasive effects than the partial deletion of the arbitration exclusion and requiring a less radical rethink of the Regulation’s relationship with arbitration or the scope of the arbitration exclusion.

The fifth possible approach is the *ad hoc* harmonisation of arbitration law through various routes. One such proposal is to harmonise the law through European legislation.⁵⁴ This would improve the interface between the Brussels I regime and arbitration by ensuring a uniform standard for the validity of arbitration agreements, set-

⁵⁰ *Ibid.*

⁵¹ European Parliament, *Report on the implementation and review of Council Regulation (EC) 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters*, Session Document A7-0219/2010 (2009/2140(INI)), 5 (Parliament Report).

⁵² Article 29(4), European Commission, *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, 14 December 2010, COM(2010) 748 final, 36 (Commission Proposal):

Where the agreed or designated seat of an arbitration is in a Member State, the courts of another Member State whose jurisdiction is contested on the basis of an arbitration agreement shall stay proceedings once the courts of the Member State where the seat of the arbitration is located or the arbitral tribunal have been seised of proceedings to determine, as their main object or as an incidental question, the existence, validity or effects of that arbitration agreement.

This paragraph does not prevent the court whose jurisdiction is contested from declining jurisdiction in the situation referred to above if its national law so prescribes.

Where the existence, validity or effects of the arbitration agreement are established, the court seised shall decline jurisdiction.

This paragraph does not apply in disputes concerning matters referred to in Sections 3, 4, and 5 of Chapter II.

Article 33(3), Commission Proposal:

For the purposes of this Section, an arbitral tribunal is deemed to be seised when a party has nominated an arbitrator or when a party has requested the support of an institution, authority or a court for the tribunal's constitution.

⁵³ Radicati di Brozolo, *supra* nt 35, 436–440; Benedettelli, MV, “‘Communitarization’ of International Arbitration: A New Spectre Haunting Europe?”, 27(4) *Arbitration International* (2011) 582; Harris, J, “The Commission’s Proposal for reform of the Judgments Regulation”, 26(7) *Butterworths Journal of International Banking and Financial Law* (2011) 389.

⁵⁴ Radicati di Brozolo, *supra* nt 35, 434.

aside standards, and so on, with a supranational court system to ensure consistent interpretation and application. This proposal could therefore feasibly solve, or at least drastically reduce the effect of, the problems caused by the exclusion of arbitration from the Brussels I regime. A doctrinally similar suggestion⁵⁵ is that EU Member States could conclude a protocol to the New York Convention to govern the validity of arbitration agreements.⁵⁶ A protocol is seen as the most suitable instrument because it is unlikely that the New York Convention could be amended, given that it is so widely in force.⁵⁷ It has also been suggested that such a protocol could provide for the possibility of appeal to the CJEU, again, to ensure its uniform interpretation across the Member States.⁵⁸ Both suggestions can be criticised for the risk that they will promote a less arbitration-friendly law than that which would otherwise be applied in the states in which arbitration is popularly conducted, stifling both intra-European competition and competition amongst European Member States and the rest of the world for arbitration business.⁵⁹ The former proposal also raises troubling questions of legislative competence.

Finally, there were those who argued that the problems discussed in the last part were not sufficiently serious to warrant reform and that the best option was to leave things as they were.⁶⁰ However, this ‘if it’s not broken, don’t try to fix it’ approach became untenable for political reasons. The Commission was determined to come up with some kind of reform.⁶¹ For this reason, those who originally favoured that approach tended to begin to favour more minimalist reforms, such as the Commission Proposal of nothing but a *lis pendens* rule.

III.2. Brussels I Recast

The previous section gave an overview of the debate and possible approaches for the Recast to take towards arbitration. The Recast was passed in late 2012 and came into effect in January 2015.⁶² The approach taken was to retain the exclusion of arbitration in Article 1(2)(d) with virtually no changes to the enacting provisions of the Recast itself. The main relevant change is the insertion of Recital 12, which contains four paragraphs clarifying the Recast’s relationship with arbitration. The second is the insertion of a new Article 73(2), which expressly provides for the supremacy of the New York Convention over the Recast. This section shall first consider why the changes have been introduced by way of a recital rather than enacting provisions and the effect this might have on the proper interpretation of the Recast. It shall then examine the changes introduced by each paragraph of Recital 12 and in Article 73(2) in turn.

⁵⁵ *Ibid.*

⁵⁶ van Houtte, *supra* nt 43, 516.

⁵⁷ *Id.*, 517.

⁵⁸ *Ibid.*

⁵⁹ Radicati di Brozolo, *supra* nt 35, 434.

⁶⁰ Draetta, U, and Santini, A, “Arbitration exception and Brussels I Regulation: no need for change”, 6 *International Business Law Journal* (2009) 741.

⁶¹ Radicati di Brozolo, *supra* nt 35, 435.

⁶² Article 66, Brussels I Recast. The Recast will apply to court proceedings initiated on or after 10 January 2015.

III.2.1. Choice of a Recital

Most commentaries on the Brussels I Recast and its relationship with arbitration do not consider the legal nature of a recital, simply assuming that Recital 12 is operative in its entirety.⁶³ It has also been suggested that Article 288 TFEU⁶⁴ renders an EU regulation in its entirety, including its preamble where relevant, binding on Member States.⁶⁵ This slightly oversimplifies what is admittedly a complex matter and could bear upon the proper interpretation of Recital 12.

According to the EU institutions' drafting guide, recitals are included to set out reasons for the enacting provisions, without reproducing them or containing normative provisions.⁶⁶ This is in line with the academic view that recitals should lend context to the enacting provisions.⁶⁷

Recitals can therefore help in the judicial interpretation of unclear enacting provisions.⁶⁸ The CJEU has developed a number of principles regarding the effect of recitals to EU legislation.⁶⁹ It has been held that the language of a recital cannot limit a right contained in the enacting provisions,⁷⁰ but equally, neither can it confer a right clearly not granted nor denied by the operative provisions.⁷¹ The Court is, however, ready to use recitals to interpret the scope of enacting provisions although this is unclear from the enacting provisions themselves.⁷² This is unsurprising, given the CJEU's usual purposive approach to statutory interpretation.

Recital 12 will therefore be capable of giving context to a provision whose meaning or scope is unclear from its wording, such as the arbitration exclusion. It will not, however, be able to grant any sort of right that is not contained in the enacting provisions, nor will

⁶³ See Erk, N, *Parallel Proceedings in International Arbitration: A comparative European Perspective* (Kluwer Law International, Alphen aan den Rijn, 2014), 66–68; Hauberg-Wilhelmsen, L, "The Recast Brussels I Regulation and Arbitration: Revisited or Revised?", 30(1) *Arbitration International* (2014) 169; Camilleri, S-P, "Recital 12 of the recast Regulation: a New Hope?", 62(4) *International and Comparative Law Quarterly* (2013) 899.

⁶⁴ Article 288 (ex Article 249 TEC), *Consolidated version of the Treaty on the Functioning of the European Union* (2012) OJ C326/01 (TFEU): provides in relevant part 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'.

⁶⁵ Carducci, G, "The New EU Regulation 1215/2012 of 12 December 2012 on Jurisdiction and International Arbitration: with Notes on Parallel Arbitration, Court Proceedings and the EU Commission's Proposal" 29(3) *Arbitration International* (2013) 467, 469.

⁶⁶ See European Union, *Legal Services of the European Parliament, Council and Commission, Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union Legislation* (2nd edn, 2013), at <eur-lex.europa.eu/content/pdf/techleg/joint-practical-guide-2013-en.pdf> (accessed 28 April 2015), 19: 'The purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. They shall not contain normative provisions or political exhortations'.

⁶⁷ Editorial, "Contextual legislative elements as fomites", 25(3) *Statute Law Review* (2004) iii.

⁶⁸ See, eg., English and Wales Court of Appeal, *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12, 37–39; International Court of Justice (ICJ), *Case concerning Rights of Nationals of the United States of America in Morocco (France v United States of America)*, ICJ Reports 176, 27 August 1952, 196.

⁶⁹ This is summarised neatly in Klimas, T and Vaiciukaite, J, "The Law of Recitals in European Community Legislation", 15 *ILSA Journal International & Comparative Law* (2008) 61, 83–87.

⁷⁰ CJEU, Case C-162/97, *Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn*, [1998] ECR I-07477, para 54: '...the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question'.

⁷¹ CJEU, Case C-308/97, *Giuseppe Manfredi v Regione Puglia*, [1998] ECR I-07685, para 30.

⁷² CJEU, Case C-288/97, *Consorzio fra i Caseifici dell'Altopiano di Asiago v Regione Veneto*, [1999] ECR I-02575, para 23.

it be able to restrict access to any right contained in such a provision. These principles help give a fuller understanding to the implications of the Recital.

III.2.2. Recital 12, paragraph 1

This Regulation should not apply to arbitration. Nothing in this Regulation should prevent the courts of a Member State, when seised of an action in a matter in respect of which the parties have entered into an arbitration agreement, from referring the parties to arbitration, from staying or dismissing the proceedings, or from examining whether the arbitration agreement is null and void, inoperative or incapable of being performed, in accordance with their national law.

The first sentence of this paragraph merely restates the arbitration exclusion without adding any wider context. The second sentence essentially enshrines the *Marc Rich* principle. The new recital, however, makes one potentially important change to the previous understanding of the exclusion. Previously, the applicability of the Brussels I Regulation was decided using a subject matter test.⁷³ The court's jurisdiction was contingent on the very fact that those proceedings were ancillary to arbitration. In the *Front Comor* case, the main subject matter before the court revolved around merits. Consequently, those proceedings, in their entirety – including incidental questions as to the validity of an arbitration agreement – would fall within the scope of the Brussels I Regulation. This would mean that a court second-seized of an action on the merits could be bound by the decision of the court first-seized on the incidental matter of the applicability of an arbitration agreement.

The rule in the first paragraph of Recital 12 would mean that a court second-seized of a merits action could immediately stay the merits action and refer the parties to arbitration, no matter what has been decided about the arbitration agreement as a preliminary matter in foreign merits proceedings. The first paragraph of Recital 12 therefore tweaks the CJEU's jurisprudence in a subtle, arbitration-friendly fashion, allowing arbitration agreements to function more effectively. The Recital in this way provides guidance on the interpretation of the scope of the enacting provision, Article 1(2)(d).

Finally, it is worth noting that paragraph 1 of Recital 12 mentions that courts may assess some ancillary issues 'with their national law'. The reference to national law is at odds with the New York Convention's provisions, which imply that validity of the arbitration agreement should be judged under to the law chosen by the parties, failing which the law of the juridical seat of the arbitration, failing which the law determined by the international private law rules.⁷⁴ This may mean that, in the desire not to interfere with the operation of the New York Convention, the European legislators have, in fact, impliedly created a new choice of law rule entirely at odds with it.

⁷³ *Marc Rich*, para 26.

⁷⁴ See Articles II and V(1)(a), New York Convention.

III.2.3. Recital 12, paragraph 2

A ruling given by a court of a Member State as to whether or not an arbitration agreement is null and void, inoperative or incapable of being performed should not be subject to the rules of recognition and enforcement laid down in this Regulation, regardless of whether the court decided on this as a principal issue or as an incidental question.

This paragraph overturns the rule in *Front Comor* that judgments on the validity of an arbitration agreement will be subject to the Brussels I Regulation where the main subject matter of the proceedings is also covered by the Regulation. Thus in a scenario where a court is seized on the merits of a dispute, purportedly subject to an arbitration agreement, the judgment of that court as to the validity of the arbitration agreement will no longer fall within the scope of the Brussels I Recast and will never be capable of directly binding another Member State's court. This is a departure from the predominant post-*Front Comor* interpretation of the arbitration exclusion before the Brussels I Recast.⁷⁵ The recital therefore clarifies the intended scope of the exclusion.

III.2.4. Recital 12, paragraph 3

On the other hand, where a court of a Member State, exercising jurisdiction under this Regulation or under national law, has determined that an arbitration agreement is null and void, inoperative or incapable of being performed, this should not preclude that court's judgment on the substance of the matter from being recognised or, as the case may be, enforced in accordance with this Regulation. This should be without prejudice to the competence of the courts of the Member States to decide on the recognition and enforcement of arbitral awards in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958 ('the 1958 New York Convention'), which takes precedence over this Regulation.

The first sentence of this paragraph provides that when a court renders a judgment on the merits after holding an arbitration agreement invalid or inapplicable, its judgment on the merits (but not the arbitration agreement, according to paragraph 2, above) will be enforceable under the Regulation.

The second sentence attempts to address the conflict of obligations that arises when a court has on the one hand the duty to enforce a judgment under the Regulation and, on the other hand, the duty to enforce an arbitral award or agreement in the same dispute under the New York Convention.⁷⁶ Recital 12 states that the duty to enforce such judgments will be 'without prejudice to the competence of the court' to decide on its New York Convention obligation to enforce arbitral awards. It has been suggested that this sentence means that a court faced with a conflicting judgment and arbitral award in the same dispute can recognise and/or enforce the arbitral award in preference to the judgment.⁷⁷ This is not consistent with a plain-text reading of the Brussels I Recast. The existence of a contradictory arbitral award is clearly not a ground for refusing recognition

⁷⁵ Hauberg-Wilhelmsen, *supra* nt 63, 181–182.

⁷⁶ Article III, New York Convention.

⁷⁷ Erk, *supra* nt 63, 67.

and enforcement of a judgment under the Recast.⁷⁸ Therefore a court faced with a conflicting judgment and arbitral award would be considered bound to recognise and/or enforce both the judgment under the Brussels I regime and the arbitral award under the New York Convention, just as it currently would be.

Two main arguments support this view. The first is the fact that the sentence is part of a recital and, therefore, as set out above, is neither capable of creating rights not contained in the enacting provisions, nor of causing derogation from any right expressly contained in the enacting provisions. The enacting provisions of the Brussels I Recast give a litigant the right to have Regulation judgments recognized and enforced in the courts of other Member States.⁷⁹ The provisions also contain an exhaustive list of grounds for refusal of recognition and enforcement, in which the existence of a contradictory arbitral award is not included.⁸⁰ Recital 12, by its legal nature, is not capable of changing this.

The second argument is that, although the New York Convention is given precedence over the Regulation in the enacting provisions,⁸¹ the New York Convention does not in any way provide rules for the recognition and enforcement of judgments, only of arbitral awards. Its precedence therefore means little, because it does not contain conflicting rules. That precedence has a much more obvious application, for example, in terms of the effect of an arbitration agreement on court jurisdiction.⁸² For these reasons, the suggestion that Recital 12, paragraph 3 allows the refusal of enforcement of a Brussels I Regulation judgment on the basis of the existence of a contradictory arbitral award cannot be supported.

The paragraph could perhaps be argued to justify a refusal to enforce a judgment on the ground of the public policy exception.⁸³ This is no different to the situation before the conclusion of the Brussels I Recast, although Recital 12 may add force to the argument that enforcement of arbitral awards is an element of international public policy.⁸⁴ Then again, public policy in the EU is to be construed narrowly,⁸⁵ so this interpretation should not be readily inferred.

There is even less clarity in the Brussels I Recast and Recital 12, paragraph 3 regarding the approach to the recognition and enforcement of a judgment rendered in spite of what the enforcing court considers a valid agreement to arbitrate. The proper approach to this issue is no clearer under the Brussels I Recast than it was under the Brussels I Regulation, because the first sentence of Recital 12, paragraph 3 states that, where another court has rendered a judgment in spite of an arbitration agreement, its judgment on the merits is enforceable under the Recast. The second sentence qualifies this rule as not prejudicing the competence of courts to decide on the enforcement of *arbitration awards* under the New York Convention. This takes precedence over the Recast. Article 73(2), discussed below, states expressly in the enacting provisions that the New York Convention should

⁷⁸ Article 45, Brussels I Recast contains the list of grounds for refusal of recognition and enforcement of judgments under the Recast.

⁷⁹ Articles 36 and 39, Brussels I Recast.

⁸⁰ Article 45, Brussels I Recast.

⁸¹ Article 73(2), Brussels I Recast.

⁸² Because the New York Convention contains a rule on court jurisdiction in Article II, this rule takes precedence over the rules of the Brussels I Regulation for the purpose of establishing jurisdiction over a dispute in respect of which the parties have made an arbitration agreement, as it always has done.

⁸³ Article 45(1)(a), Brussels I Recast.

⁸⁴ Camilleri, *supra* nt 63, 915.

⁸⁵ CJEU, Case C-7/98, *Dieter Krombach v André Bamberski*, [2000] ECR I-01935; CJEU, Case C-38/98, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*, [2000] ECR I-02973.

take precedence over the Recast. But, as mentioned above, the New York Convention also provides a jurisdictional rule that a court ‘...seized of an action in a matter in respect of which the parties have made an agreement [to arbitrate] shall, at the request of one of the parties, refer the parties to arbitration...’.⁸⁶

Recital 12, paragraph 3 does not address the correct approach for a court to take in the situation where it is asked to enforce a judgment rendered in spite of what it views to be a valid arbitration agreement (not award) and is therefore incapable of providing the correct approach to this situation. The first sentence of paragraph 3 states that the court judgment on the merits should be enforceable. The second sentence qualifies this as not affecting the enforcement of *arbitral awards* under the New York Convention, but makes no mention of *arbitration agreements*. The court will find itself facing conflicting obligations under the Brussels I Recast, as interpreted according to Recital 12, paragraph 3 of the Brussels I Recast and Article II of the New York Convention, if it considers the enforcement of a judgment on merits to constitute ‘a matter in respect of which’ the parties have made an arbitration agreement.

It seems in all the circumstances that the difficulties posed by a judgment rendered in spite of an arbitration agreement or award will therefore continue to trouble courts under the Brussels I Recast regime, irrespective of the words of paragraph 3.

III.2.5. Recital 12, paragraph 4

This Regulation should not apply to any action or ancillary proceedings relating to, in particular, the establishment of an arbitral tribunal, the powers of arbitrators, the conduct of an arbitration procedure or any other aspects of such a procedure, nor to any action or judgment concerning the annulment, review, appeal, recognition or enforcement of an arbitral award.

This is simply a restatement of the meaning given to the arbitration exclusion in *Marc Rich*.⁸⁷ According to academic opinion, there is no indication that the exclusion has been strengthened in the fashion desired by the UK so as to reinstate the anti-suit injunction in such proceedings.⁸⁸ That said, it should be noted that Advocate General Wathelet in his opinion in the *Gazprom* case cites this paragraph in support of the contention that anti-suit injunctions in support of arbitration will once again be permitted under the Brussels I Recast.⁸⁹ It remains to be seen at the time of writing whether the CJEU will adopt this Opinion, but it is suggested that this is unlikely. Such a radical change to the prevailing understanding of the arbitration exclusion would surely have been made expressly, and the CJEU’s principle-based reasoning in *Front Comor* is likely to be unaltered by the addition of this vague paragraph that seems to do nothing more than restate the *Marc Rich* rule.

⁸⁶ Article II(3), New York Convention.

⁸⁷ *Marc Rich*, paras 21 and 26.

⁸⁸ Erk, *supra* nt 63, 68; Camilleri, *supra* nt 63, 904–908. Even Moses, who clearly supports the anti-suit injunction and raises the question of the reinstatement of the remedy via the complete exclusion of arbitration, concludes that this is an unlikely outcome. See Moses, M, “Arbitration/Litigation Interface: The European Debate” *Loyola University Chicago School of Law Public Law & Legal Theory Research Paper No 2014-5/6* (2014), 45.

⁸⁹ CJEU, Case C-536/13, *Gazprom OAO, Opinion of Advocate General Wathelet*, 4 December 2014, para 136–137.

III.2.6. Article 73 (2)

This Regulation shall not affect the application of the 1958 New York Convention.

This provision makes clear what ought to have been the case under Article 71 of the Brussels I Regulation:⁹⁰ that the New York Convention takes precedence over the Regulation.⁹¹ Although never tested before the CJEU, the alleged supremacy of the New York Convention would likely have been subject to the same narrow interpretation of Article 71, by which supremacy was given to the CMR⁹² in the *TNT* case. In that case, the CMR was held to have supremacy only insofar as it was consistent with the principles underlying the Brussels I Regulation.⁹³

The express precedence provision in Article 73(2) could be interpreted to mean that the New York Convention takes precedence over the Brussels I Recast completely, not only insofar as it is consistent with the underlying goals of the Recast. This could possibly include giving precedence to the obligation to enforce an arbitral award over the obligation to enforce a Brussels I regime judgment on the same matter, as discussed above. This argument runs afoul of the analysis that there is no actual substantive conflict between the New York Convention and the Brussels I Recast. The New York Convention does not provide any rules concerning the enforcement of court judgments regarding matters in respect of which the parties have made an arbitration agreement. Nor does the Brussels I Recast contain provisions to deal with conflicts between a Regulation judgment and a contradictory arbitral award or an arbitration agreement, as the Hague Convention did in 1971.⁹⁴

The New York Convention has, however, always been treated as supreme in respect of its rule regarding court jurisdiction where the parties to a dispute have concluded an arbitration agreement.⁹⁵ Thus when the parties have concluded an arbitration agreement, a court will never have jurisdiction over the substance of the dispute, even if it otherwise would under the Brussels I regime.

A separate question is whether the jurisdiction provision of Article II(3) New York Convention could be used to justify a refusal to enforce a judgment rendered in spite of an arbitral agreement. This suggestion is weak, especially because the court asked for enforcement of a regime judgment in respect of a matter would be unlikely to view itself as ‘seised of’ the matter which forms the substance of the judgment. Rather it is ‘seised of’ an action for the enforcement of a judgment, which forms a separate basis for

⁹⁰ Article 71(1), Brussels I Regulation provides: ‘This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.’

⁹¹ Roodt, C, “Conflicts of Procedure between Courts and Arbitral Tribunals with Particular Reference to the Right of Access to Court”, 19(2) *African Journal of International and Comparative Law* (2011) 236, 239; Pullen, *supra* nt 45.

⁹² United Nations, *Geneva Convention on the Contract for the International Carriage of Goods by Road*, (1956) 399 UNTS 189 (CMR). The official abbreviation ‘CMR’ comes from the French title of the Convention: *Convention relative au contrat de transport international de marchandises par route*.

⁹³ CJEU, Case C-533/08, *TNT Express Nederland BV v Axa Versicherung AG*, [2010] ECR I-4107, para 51 (*TNT*): in which it was held that ‘Article 71 of Regulation 44/2001 cannot have a purport that conflicts with the principles underlying the legislation of which it is part.’

⁹⁴ Article 12, *Convention on the recognition and enforcement of foreign judgements in civil and commercial matters*, (1971) 1144 UNTS 249 (Hague Convention); Carducci, *supra* nt 65, 477.

⁹⁵ Article II(3), New York Convention.

founding jurisdiction under the Brussels I Regulation, distinct from the merits of the dispute.

Accordingly, it cannot not be argued that Article II(3) of the New York Convention justifies the refusal to recognise and enforce a Brussels I regime judgment rendered in spite of an arbitration agreement, even if the New York Convention takes absolute precedence over the Brussels I Recast.

In conclusion, therefore, it is difficult to see how the specific provision for the precedence of the New York Convention in the Brussels I Recast makes any difference to the general supremacy it had been granted under the Brussels I Regulation.⁹⁶

III.2.7. Criticism of the Recast Approach

It is submitted that the Recast fails to make more than minute changes to the Brussels I Regulation's relationship with arbitration, despite the many problems that had been identified and the proposals made in an attempt to address these.

One might reasonably wonder why the proposals for reform were abandoned so quickly. The original Heidelberg Report and Commission proposals were obviously scaled back in the face of Member State opposition after the circulation of the Commission's Green Paper. The scaled-back proposal of a mandatory stay provision was rejected following strong opposition in Parliament. The Parliament Report states that

it appears from the intense debate raised by the proposal to create an exclusive head of jurisdiction for court proceedings supporting arbitration in the civil courts of the Member States that the Member States have not reached a common position thereon and that it would be counterproductive, having regard to world competition in this area, to try to force their hand.⁹⁷

Anecdotal evidence, as well as the reference to competition for arbitration business, suggests that the UK and French representatives were the main obstacles to agreement. Upon the conclusion of the Recast, the Council's press release also raises other issues, such as the abolition of *exequatur*, and the need to address this as a priority.⁹⁸ Perhaps reaching a compromise on wider reform of the Regulation's relationship with arbitration was simply viewed as an impediment that would delay the achievement of these more important goals.

The addition of Recital 12, as outlined above, has changed next to nothing and addressed none of the perceived problems at the interface between the Brussels I regime and arbitration. Of particular regret is the failure to restrict parallel proceedings. These had been identified as the most significant problem with the relationship between the Brussels I Regulation and arbitration. It was also clearly identified by the Commission as a priority for reform, given it was the focus of the scaled-back proposal following the Green Paper consultation.

Allowing parallel proceedings runs contrary to the principle of mutual trust between Member States of the European Union; it undermines the predictability of and certainty provided by the Brussels I regime, it is inconsistent with the Regime's approach to *lis*

⁹⁶ Erk, *supra* nt 63, 67 nt 390.

⁹⁷ Parliament Report, *supra* nt 33, 5.

⁹⁸ Council of the European Union, *Recast of the Brussels I regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU*, 6 December 2012, 16599/12 PRESSE 483.

pendens in other matters, and it does not align with the principles enshrined in the Brussels I Recast's provisions regarding the choice of court agreements, which expressly promote party autonomy.⁹⁹ This failing in particular, along with the general inertia of the reform process, is open to criticism.¹⁰⁰

IV. Suggestions for Future Reform

The confusion as to the meaning and extent of the arbitration exclusion, as well as the problems that have been identified at the interface between the Brussels I Regulation and arbitration, may recommend a radical new approach. This article will simply identify some crucial principles that should be borne in mind if the rule is subject to reform again in the future.

IV.1. Mutual Trust

'Mutual trust' between Member States has developed as a crucially important normative concept in the European law of jurisdiction. Mutual trust is mentioned in recitals as a foundational principle of the Brussels I Regulation and Recast.¹⁰¹ Mutual trust requires that courts of one Member State respect the right of the court of another Member State to determine its own jurisdiction and respect the result it reaches. The concept underlies the judgment in the *Overseas Union* case,¹⁰² although it is not expressly mentioned. It is also a central part of the *ratio decidendi* in the *Front Comor*, the *Gasser* case and many others.¹⁰³ Mutual trust has also been argued to be a wide-ranging, long-standing tenet of European law, specifically visible in case law concerning fundamental freedoms.¹⁰⁴

Mutual trust in this sense is clearly undermined by the exclusion of arbitration from the Brussels I Regulation. Member State courts are free to second-guess one another's decisions relating to arbitration, whether on the validity of an arbitration agreement or on the setting aside of an award.¹⁰⁵ The decision in the *Front Comor* deprived the courts of Member States of the anti-suit injunction as a means of protecting arbitration

⁹⁹ Recital 22, Article 31, Brussels I Recast; Dowers, NA and Holloway, D, "Brussels I Recast Passed", 16(2) *International Arbitration Law Review* (2013) N18, N20.

¹⁰⁰ For more criticism, see Tang, *supra* nt 30, Ch 7, section 6.2.

¹⁰¹ Recitals 3 and 16, Brussels I Regulation; Recital 26, Brussels I Recast.

¹⁰² CJEU, Case C-351/89, *Overseas Union Insurance Ltd and others v New Hampshire Insurance Company*, [1991] ECR I-03317 (*Overseas Union* case).

¹⁰³ *Front Comor*, para 30; CJEU, Case C-116/02, *Erich Gasser GmbH v MISAT Srl*, [2003] ECR I-14693, para 72 (Gasser). See also CJEU, Case C-139/10, *Prism Investments BV v Jaap Anne van der Meer, in his capacity as receiver in the liquidation of Arilco Holland BV*, [2011] ECR I-9511, paras 27–31; CJEU, Case C-619/10, *Trade Agency Ltd v Seramico Investments Ltd*, ECLI:EU:C:2012:531, 6 September 2012, paras 40–46; CJEU, Case C-456/11, *Gothaer Allgemeine Versicherung AG v Samskip GmbH*, ECLI:EU:C:2012:554, 15 November 2012, paras 28–29.

¹⁰⁴ See Blobel, F, and Spath, P, "The Tale of Multilateral Trust and the European Law of Civil Procedure", 30(4) *European Law Review* (2005) 528, 533, nts 28 and 29. The authors argue that mutual trust is an important element in the decision of the landmark *Cassis de Dijon* case (CJEU, Case C-120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein*, [1979] ECR I-00649).

¹⁰⁵ The situation in the *Front Comor* clearly demonstrates the possibility for conflicting decisions on the validity of an arbitration agreement; for conflicts on the setting aside of an award, see *Putrabali*.

proceedings, but without providing any trust-based alternative, such as a *lis pendens* rule.¹⁰⁶

Rules such as a mandatory stay or a *lis pendens* rule in favour of the court at the seat of the arbitration or the arbitral tribunal could effectively resolve this situation with due respect for the importance of mutual trust. Furthermore, it would be consistent with the principle of mutual trust for Member State courts to respect one another's set-aside judgments.

This suggestion would not overly interfere with the New York Convention, because it exclusively concerns court proceedings related to arbitration rather than the jurisdiction of arbitral tribunals or the enforcement of arbitral awards themselves.¹⁰⁷ It is therefore submitted that, properly drafted, there should be no reason for diffidence on the part of EU legislators in making such changes.

IV.2. Legal Certainty and Predictability

Both the Brussels I Regulation and the Brussels I Recast contain recitals stating that '[t]he rules of jurisdiction should be highly predictable'.¹⁰⁸ The Brussels I regime has always sought to provide clear rules as to jurisdiction and a straightforward *lis pendens* procedure for resolving conflicts of jurisdiction.¹⁰⁹

Indeed, the strict *lis pendens* rule in Article 29 of the Brussels I Recast¹¹⁰ is, and always has been, concerned with the prevention of parallel proceedings and attendant risk of irreconcilable judgments, which are considered to undermine legal certainty and predictability.¹¹¹ The law is focused on preventing parallel proceedings and keeping the system predictable¹¹² to the extent that it can be criticised for being overly rigid, encouraging tactical litigation, and for being unduly unfair.¹¹³

It may indeed be suggested that legal certainty and predictability are as important as mutual trust in international private law. The two seem to go hand in hand in several of the cases concerning mutual trust cited above.¹¹⁴

These important principles are undermined by the possibility of parallel arbitration and court proceedings. They are also undermined by the possibility of the enforcement of

¹⁰⁶ Dowers, NA, "The Anti-suit Injunction and the EU: Legal Tradition and Europeanisation in International Private Law", 2(4) *Cambridge Journal of International and Comparative Law* (2013) 960, 972–973.

¹⁰⁷ Carducci, G, "Arbitration, Anti-suit Injunctions and Lis Pendens under the European Jurisdiction Regulation and the New York Convention", 27 (2) *Arbitration International* (2011) 171, 173.

¹⁰⁸ Recital 15, Brussels I Recast; Recital 11, Brussels I Regulation.

¹⁰⁹ *Ibid*; see generally Brussels I Recast and Brussels I Regulation and specifically the *lis pendens* rules at Article 29, Brussels I Recast; Article 27, Brussels I regulation.

¹¹⁰ Article 27, Brussels I Regulation; Articles 21–23, Brussels Convention.

¹¹¹ CJEU, Case C-144/86, *Gubisch Maschinenfabrik KG v Giulio Palumbo*, [1987] ECR 04861, para 8; *Overseas Union*, para 16; *Gasser*, paras 41, 51; *Jenard*, *supra* nt 5, 41; Fentiman, R, "Article 27", in Magnus, U and Mankowski, P, eds, *Brussels I Regulation* (2nd rev ed, Sellier European Law Publishers, Munich, 2012), 582–584.

¹¹² Fentiman, R, "Introduction to Arts 27-30" in Magnus and Mankowski, P, Eds, *Brussels I Regulation* (2nd rev ed, Sellier European Law Publishers, Munich, 2012), 558–562, 568 (Fentiman, Introduction to Arts 27-30); Layton, A and Mercer, H, *European Civil Practice* (2nd ed, Sweet & Maxwell, London, 2004), 794.

¹¹³ Fentiman, Introduction to Arts 27-30, *supra* nt 112, 569–574; Simons, T, "Cross-border 'Torpedo' Actions. The *lis pendens* rule in European cross-national legislation", 5/6 *The European Legal Forum* (2003) 287. For the question of unfairness, see the discussion of potential breach of Article 6 European Convention on Human Rights (or lack thereof) in *Gasser*, para 56.

¹¹⁴ *Gasser*, para 72; *TNT*, para 49.

set aside arbitral awards, when another arbitral award may subsequently be rendered in the same dispute.¹¹⁵ Legal certainty could also be served by implementing rules such as those discussed above, eliminating parallel proceedings by way of a *lis pendens* rule and requiring the mutual recognition of set aside decisions.

IV.3. The Importance of the Seat of Arbitration

The New York Convention envisages a relatively important role for the seat of arbitration. This can be seen in the set-aside provision of Article V(1)(e) and in the conflicts rules of Article V(1)(a) and (d). Article V(1)(e) allows refusal of recognition and enforcement when ‘The award has not yet become binding on the parties, or has been *set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*’¹¹⁶

The majority view is that the phrase ‘the country in which, or under the law of which’ refers to the juridical seat of arbitration.¹¹⁷ This provision therefore gives potential international force to a decision by the courts of the seat of arbitration to set aside or vacate an award. It is at any rate clear that this provision implies an important, supervisory role for the courts of the seat of arbitration, a role which has long been recognised in this area.¹¹⁸

The conflict rules in Article V(1)(a) and (d) of the New York Convention also give an important role to the law of the seat of arbitration. These rules place the law of the seat of arbitration second only to the law chosen by the parties in establishing the law applicable to the validity of the arbitration agreement and the procedure to be followed by the arbitral tribunal.

It is clear that the New York Convention implies a relatively important role in the arbitral process for the seat of the arbitration. This makes the seat of the arbitration an appropriate forum to be given preference under the jurisdictional rules suggested above.

V. Conclusion

The Brussels I Recast does not provide a satisfactory answer to reconciling the conflict between jurisdiction and arbitration. In particular, the parties are allowed to challenge an arbitration agreement in any Member State. Subject to the national law, parallel proceedings may exist not only between courts but also between courts and arbitral tribunals. An early judgment declaring an arbitration agreement valid may not prevent subsequent proceedings on the same issue or on the merit of the dispute in another Member State. Additionally, a judgment based on the nullity of an arbitration agreement may be recognised and enforced in other Member States irrespective of irreconcilable judgments on ancillary questions in an earlier decision, by the arbitral tribunal, or likely by the recognising State. This attempt to reform the law has been rather unsuccessful.

This article proposes three principles assisting the future reform of this issue, namely, mutual trust, legal certainty and the ‘seat’ approach. Based on the three principles, it

¹¹⁵ See *PT Putrabali*.

¹¹⁶ [emphasis added].

¹¹⁷ Fox, TJ and Wilske, S, “Article II (3)” in Wolff, R, ed, *New York Convention: Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1959 Commentary* (Beck/Hart Publishing, Munich, 2012), 276–277; van den Berg, AJ, *The New York Arbitration Convention of 1958* (Kluwer Law International, Alphen aan den Rijn, 1981), 295.

¹¹⁸ van den Berg, *supra* nt 117, 20.

proposes the mandatory stay *lis pendens* rule, the seat priority rule, the mutual recognition and enforcement rule and the New York Convention superiority rule. Ancillary questions, such as the validity of an arbitration agreement, shall be included within the scope of the Brussels I regime. Judgments shall benefit from the mutual recognition and enforcement in Member States. This is supported by a mandatory stay *lis pendens* rule and subject to the priority of the seat of arbitration. If the supervisory court or the arbitral tribunal is seized to decide the same question, priority should be given to the seat of arbitration. Finally, the New York Convention superiority rule provides that any judgment on the merit irreconcilable with the arbitral awards in the New York Convention should not be recognised or enforced under the Brussels I regime.

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Publication of Investment Treaty Awards: The Qualified Potential of Domestic Access to Information Laws

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Keywords

FREEDOM OF INFORMATION; INVESTMENT ARBITRATION; TRANSPARENCY; POLAND; HUMAN RIGHTS

Abstract

Investment treaties and arbitral rules traditionally impose few legally binding duties on States to release investment treaty awards. Despite this, possibly in light of the growing recognition of a human right of access to public information, recent efforts towards transparency in investment arbitration proceedings have led to significant changes in both legal instruments and State practice. However, many States remain reluctant to commit to transparency obligations, or to comply with transparency obligations where they already exist. This article reviews the utility of one lesser-known tool, domestic freedom of information (FOI) laws, in promoting transparency in the particular context of investment arbitration. The article focuses on the Republic of Poland, a State known to be holding a sizeable number of unpublished investment treaty awards. The Polish experience discussed in this article suggests that, despite the many problems encountered, domestic FOI laws do have the potential, even if qualified, to constitute a factor in the growing trend towards transparency.

I. Introduction

It is well-recognised that investment treaty disputes involve issues of significant public importance. Recent high-profile disputes have addressed the consistency of State measures ostensibly taken to protect public health,¹ the environment² or human rights.³ The conduct at issue in these disputes is governmental conduct, and the money used to pay any eventual compensation order is public money. The tribunals constituted under investment treaties to decide such disputes are not only resolving the

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¹ For instance, the tobacco branding measures at issue in *Philip Morris Asia Ltd v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, 5 October 2012.

² For instance, the alleged pollution to areas of the Ecuadorian Amazon rainforest in *Chevron Corporation and Texaco Petroleum Company v The Republic of Ecuador*, UNCITRAL, PCA Case No 2009-23, 7 November 2014; measures relating to fracking in *Lone Pine Resources Inc v Canada*, UNCITRAL, ICSID Case No UNCT/15/2.

³ For instance, the issues of indigenous land rights in *Bernhard von Pezold v Zimbabwe*, ICSID Case No ARB/10/15; and *Border Timbers Ltd v Zimbabwe*, ICSID Case No ARB/10/25.

dispute, but also providing the public good of (quasi-)judicial, reasoned decisions that hold State officials to account for their actions in the public sphere.⁴

Despite this, these tribunals' decisions are not always made available to the public. While some countries – such as the USA and Canada – are known for adopting a proactive stance on disclosure,⁵ others – such as Poland – have proved to be especially reticent in releasing information about pending or concluded investment treaty claims. Where the parties to a dispute are reluctant to release information, observers who favour transparency must therefore consider alternative means by which information can be obtained.

Section 1 of this article reviews possible obligations of disclosure under investment treaties, arbitral rules or certain domestic laws on enforcement of arbitral awards. Apart from specific and more recent developments, Section 1 finds few binding duties on respondent States (or claimants) to release investment treaty awards.

Section 2, therefore, turns to another potential source of obligations on States to release awards – namely, human rights law. As Section 2 discusses, both international and regional human rights instruments and case-law now recognise a human right of access to information. Domestic governmental authorities, as well as domestic judges, should therefore pay close attention to their human rights obligations when ruling on requests for information, including access to investment treaty awards held by the State. In particular, Section 2 suggests that any exceptions or limitations placed on a general right of access must be interpreted as narrowly as possible, to satisfy the demands of human rights obligations binding on most States in the world.

One means adopted by many States to fulfil this human right of access to information has been to pass domestic laws on freedom of information (the FOI laws). In the absence of a more specific duty of disclosure as shown in Section 1, the article considers in Section 3 the utility of these laws for parties seeking publication of awards. In particular, Section 3 focuses on the Republic of Poland, as it is currently known to be holding a sizeable number of unpublished investment treaty awards. Section 3 discusses a number of recent requests made to Polish authorities for the release of several investment treaty awards, together with efforts in domestic courts to seek to hold the Polish State to its commitments under the 2001 *Law on Access to Public Information*.⁶

As Section 3 makes clear, States have sometimes denied requests for access to investment treaty awards relying on various exceptions in domestic FOI laws. In light of the human rights obligations discussed in Section 2, the article concludes that reliance on these exceptions – at least in the manner demonstrated by the Polish executive, under examination in Section 3 – has not been confirmed on review by the judiciary. Efforts undertaken under the local FOI law have, to a certain degree, been successful. The experience discussed in this article suggests that, despite the many

⁴ Rogers, C, “International Arbitration’s Public Realm” in Rovine, A, ed, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff Publishers, Leiden, 2011).

⁵ See, eg., the publicly-available materials posted on the US State Department website, at <state.gov/s/1/c3439.htm> (accessed 03 April 2015).

⁶ *Act of 6 September, 2001 on Access to Public Information*, Poland (2001), Journal of Laws No 112 pos 1198 as amended (the FOI Act). The English translation of the Act available at <unpan1.un.org/intradoc/groups/public/documents/unpan/unpan034035.pdf> (accessed 20 April 2015) is used for the purposes of quotations in this article.

problems encountered, domestic FOI laws do have the potential, even if qualified, to constitute a factor in the growing trend towards transparency.

II. Traditional Disclosure Obligations on Parties to an Investment Treaty Dispute

Although arbitration is traditionally a confidential enterprise, it is clear that many investment treaty awards are voluntarily released by one or both parties to a dispute. In the absence of a voluntary disclosure, what provisions might govern the release of awards? This Section reviews three possibilities: the provisions of investment treaties themselves, the provisions of the arbitral rules that govern the dispute and the provisions of domestic law that govern arbitral award enforcement proceedings.

II.1. Obligations of Disclosure under Investment Treaties

Some investment treaties explicitly provide that final awards and other relevant documents will be made available to the public as a matter of course. For instance, Article 10.21 of the *Dominican Republic-Central America Free Trade Agreement* (DR-CAFTA) requires a respondent State in a claim under DR-CAFTA to publish the notice of arbitration, all pleadings from both parties, and all orders, awards and decisions of the tribunal. Exceptions are permitted only for ‘protected information’ identified by either party, presumably intended to allow redactions of confidential commercial information.⁷ Notably, Article 10.21(5) provides that nothing in the transparency provisions of Article 10.21 ‘requires a respondent to withhold from the public information required to be disclosed by its laws’. In other words, Article 10.21(5) specifies that domestic FOI laws, amongst other relevant domestic laws, are to take precedence over any potential obligation in Article 10.21 of DR-CAFTA to maintain confidentiality over certain information. However, even DR-CAFTA – considered by many to be the high-water mark of transparency in investment treaty-making to date – contains an exception to disclosure if this would be ‘contrary to the public interest’.⁸ Although the claims brought so far under DR-CAFTA have been conducted in a highly transparent fashion (even including live online broadcasts of merits hearings),⁹ the ‘public interest’ exception in Article 21.5 still remains theoretically available to thwart an interested party’s access to final awards in DR-CAFTA cases.

A precursor to DR-CAFTA, the *North American Free Trade Agreement* (NAFTA), sets out a differentiated regime for publication of awards depending on the State party to a dispute. Under Annex 1137.4, the United States and Canada have agreed that an investor (or the State itself) may publish a NAFTA award, while Mexico provides

⁷ Article 10.21(4), *The Dominican Republic-Central America-United States FTA (FTA)* (DR-CAFTA) (2004). The Article specifies that the tribunal shall decide any objections relating to the designation of information designated as ‘protected’. However, the Article does not require any statement of reasons from a party seeking to designate certain information as protected, nor does it specify any grounds on which the tribunal is to determine whether the designation was appropriate or not.

⁸ Article 21.5, *The Dominican Republic-Central America-United States FTA* (2004).

⁹ *Railroad Development Corporation v Guatemala*, ICSID Case No ARB/07/23, Award, 29 June 2012, para 23.

only that the applicable arbitration rules are to govern the matter.¹⁰ Since Mexico is not a party to the ICSID Convention,¹¹ this provision means in practice that either the UNCITRAL Arbitration Rules¹² or ICSID's Additional Facility Rules¹³ (discussed further below) will determine whether NAFTA awards against Mexico may be published by one disputing party without specific consent of the other party.

Meanwhile, the large majority of investment treaties – particularly older ones – are silent on the question of the parties' or the tribunal's duty or power to publish awards and other documents. In disputes under these treaties, the issue may be regulated by the choice of arbitral rules agreed on by the parties to govern the arbitration.

II.2. Obligations of disclosure under arbitral rules

Indeed, the major sets of arbitral rules commonly used in investment arbitration contain various provisions relating to (non-)disclosure of awards and other documents such as jurisdictional decisions or parties' pleadings.

Article 48(5) of the ICSID Convention provides that '[t]he Centre shall not publish the award without the consent of the parties.' This provision captures the underlying ethos of arbitration as a private mechanism of dispute resolution and appears to commit ICSID to a position of confidentiality, as is the norm in arbitration proceedings more generally. States, of course, may favour confidentiality in investment treaty disputes out of a perception that the secrecy of arbitration will avoid embarrassment and jeopardy to the State's investment climate. Similarly, investor claimants may also favour confidentiality, out of a desire to protect their commercial information, to avoid tarnishing their public reputation or, perhaps, to preserve an ongoing relationship with the host State.

However, as a tool of confidentiality, Article 48(5) is limited in two major ways. First, it is clear that the provision applies only to ICSID itself.¹⁴ Article 48(5) does not prevent either or both of the disputing parties themselves to release the tribunal's award.¹⁵ Many ICSID awards are, in fact, voluntarily released by one party (often the successful party). Second, according to the view expressed by Schreuer, strictly speaking Article 48(5) applies only to 'the award', a term which does not include preliminary rulings of ICSID tribunals such as jurisdictional decisions or procedural orders.¹⁶ In some cases where merits and quantum are bifurcated, the final award may consider only issues of calculating damages, the tribunal having already ruled on jurisdiction and merits in a previous 'decision'. In these instances, following the above-mentioned point of view, Article 48(5) would not technically prevent ICSID from unilaterally publishing the jurisdictional or merits rulings while still keeping the final 'award' confidential. However, in practice, ICSID has not followed this 'illogical'

¹⁰ Like DR-CAFTA, Article 21.5, *North American FTA* (NAFTA) also contains a general exception to disclosure in Article 2105. However, the exception is more narrowly framed, covering only law enforcement, personal privacy and financial information, and not including 'public interest'.

¹¹ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) 4 ILM 524 (ICSID Convention).

¹² United Nations Commission on International Trade Law (UNCITRAL), *UNCITRAL Arbitration Rules* (as revised in 2010) (UNCITRAL Arbitration Rules).

¹³ International Centre for Settlement of Investment Disputes (ICSID), *Additional Facility Rules* (2003) ICSID/11/Rev 1 (ICSID's Additional Facility Rules).

¹⁴ Schreuer, C, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2009), 835.

¹⁵ *World Duty Free Company Ltd v Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006, para 16.

¹⁶ Schreuer, *supra* nt 14, 837.

approach¹⁷ and has refrained from publishing any document relevant to an arbitration without the parties' consent.

Since April 2006, following an amendment to the ICSID Arbitration Rules, ICSID is required to 'promptly include in its publications excerpts of the legal reasoning of the Tribunal' in every case.¹⁸ Although ICSID 'has yet to publish excerpts of the reasoning of awards in a systematic manner',¹⁹ it appears that the ICSID Secretariat takes the pragmatic approach of focusing its efforts to collate award excerpts on those awards which have not otherwise been made public.²⁰ For instance, in January 2013, ICSID released excerpts of a 2011 award against the Central African Republic, after neither disputing party took any steps towards the release of the award.²¹ In that case, these excerpts included substantially the entire award, apart from extensive discussion of the facts and each party's pleadings,²² meaning that publication of excerpts under Arbitration Rule 48(4) may come close to fulfilling the objectives of those who favour full transparency in the publication of awards.

Under Article 32(5) of the UNCITRAL Arbitration Rules of 1976, an arbitral award 'may be made public only with the consent of both parties'. On the face of this text, it is unclear whether the injunction on publication applies only to the tribunal, as in the ICSID Convention, or also to the parties themselves. However, the context of Article 32 may suggest that it places obligations only on the tribunal itself, leaving the parties free to determine unilaterally whether one or both may release an award.²³

The revised UNCITRAL Arbitration Rules, released in 2010, include additional language in Article 32(5), now renumbered as Article 34(5). The new provision explicitly takes account of situations where one party has a legal duty to disclose an arbitral award, confirming that a domestic law duty to release an award will override any possible duty of confidentiality found in the UNCITRAL Arbitration Rules themselves.²⁴ The LCIA Rules (less commonly used in investment arbitration) contain a similar provision.²⁵ The SCC Rules,²⁶ meanwhile, direct the Stockholm Chamber of Commerce (SCC) and the tribunal itself to maintain the confidentiality of the award (in Article 46), but do not expressly prohibit the parties from disclosing information.

However, for disputes utilising the UNCITRAL Arbitration Rules and arising out of investment treaties concluded on or after 1 April 2014, the new UNCITRAL Rules on Transparency will apply.²⁷ These rules impose an extensive transparency regime,

¹⁷ *Ibid.*

¹⁸ Rule 48(4), *ICSID Rules of Procedure for Arbitration Proceedings* (2006) (ICSID Arbitration Rules).

¹⁹ Schreuer, *supra* nt 14, 835.

²⁰ ICSID, *Annual Report 2013* (ICSID, 2013) 41.

²¹ *M Meerapfel Söhne AG v Central African Republic*, ICSID Case No ARB/07/10, Arbitral Award, 12 May 2011 (*Meerapfel* case).

²² However, it might be added that, in the *Meerapfel* case, ICSID also redacted the final amount ordered against the respondent State, a potentially significant piece of information.

²³ Except for the second sentence of Article 32(2), all the other provisions of Article 32 are clearly directed to the tribunal itself, and not the parties.

²⁴ Article 34(5) reads that '[a]n award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority'.

²⁵ Article 30.1, London Court of International Arbitration (LCIA), *LCIA Arbitration Rules*, effective 1 October 2014 (LCIA Rules).

²⁶ Stockholm Chamber of Commerce (SCC), *Arbitration Rules* (2010) in force as of 1 January 2010 (SCC Rules).

²⁷ UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, effective 1 April 2014 (UNCITRAL Rules on Transparency).

including publication of substantive pleadings, final awards and other documents associated with arbitration proceedings.²⁸ Furthermore, in December 2014, the UN General Assembly adopted a multilateral convention, the *UN Convention on Transparency in Treaty-based Investor-State Arbitration* (UN Transparency Convention),²⁹ open for signature from 17 March 2015. Under this Convention, a signatory State agrees to apply the UNCITRAL Transparency Rules to any dispute arising under an investment treaty of that State which came into force *before* 1 April 2014 (unless that treaty is included in the State's opt-out list attached to the Convention).

These developments at UNCITRAL are particularly significant because, as between the two major arbitral fora that hear investment treaty disputes, to date it has been UNCITRAL awards that have remained hidden to a much greater degree than awards rendered at ICSID.³⁰ Certainly, the large majority of existing investment treaties were signed before 1 April 2014, meaning that respondent State consent will be required (either given specifically in a dispute or in advance via accession to the new UN Transparency Convention) before the more onerous disclosure provisions will operate. However, the developments add a new source of pressure on host States to agree to publication of awards, and they confirm an unmistakeable trend in favour of publication.

II.3. Obligations of Disclosure During Enforcement Proceedings

As noted by Schreuer,³¹ another occasional means by which investment treaty awards enter the public domain is when the successful party seeks enforcement of the award via domestic courts in a jurisdiction where the losing party holds assets.³² In order to obtain recognition and enforcement of an arbitral award in most jurisdictions, the award itself (and sometimes a translation into the language of the relevant court) must be entered into evidence in the court proceedings. Once this has occurred, the award can become a public document, like any other evidence filed in domestic judicial proceedings. However, not all jurisdictions would permit public consultation of court case files, hindering access to evidence submitted in the course of the court proceedings to the parties and other participants in the proceedings.³³ Furthermore, even where public access to files is possible, there is no simple or systematic means by which to locate and become informed of such domestic enforcement proceedings, limiting the utility of this mechanism of award disclosure.

²⁸ Article 3, UNCITRAL Rules on Transparency.

²⁹ United Nations, *Convention on Transparency in Treaty-based Investor-State Arbitration*, New York, 10 December 2014, A/RES/69/116 (UN Transparency Convention).

³⁰ See, eg., discussion of the Polish cases below. This is largely because the existence of a dispute, at least, is disclosed when ICSID registers a case on its public website, while even the existence of disputes under the current UNCITRAL rules – let alone any documents from the case such as the final award – may never be made public.

³¹ Schreuer, *supra* nt 14, 837.

³² Usually this will be the investor seeking to enforce an award against State assets held in a foreign jurisdiction. However, States may also attempt to enforce tribunal orders for costs against an unsuccessful investor.

³³ In Poland, for instance, the relevant court rules prevent public access to the case file. According to Article 9, Section 2, *Polish Code of Civil Procedure*, cases are publicly heard, unless a specific regulation provides otherwise. However, only parties and other participants in the proceedings have the right to consult the case file and receive copies of documents.

II.4. Conclusions

Overall, whether through voluntary publication by (one of) the parties, mandated publication under the terms of a more recent investment treaty or set of arbitral rules, publication of substantive excerpts by ICSID or disclosure of awards during enforcement proceedings, the substance of many known investment treaty disputes does, at present, find its way into the public domain.³⁴

III. The Human Right of Access to Information

Apart from investment treaties and arbitral rules themselves, one other major source of obligations relating to disclosure of information is found in human rights law. The major human right underpinning the analysis in this Section is the right to freedom of expression. This right is routinely recognised as one of the most fundamental human rights. In its typical manifestation, the right to freedom of expression protects positive acts done by the beneficiary of the right, such as publishing a text, making statements to the media or publicly displaying artistic works or symbols.³⁵ However, it is well-recognised that the right to freedom of expression extends beyond the positive dissemination of information and ideas to others, also entailing a right to *receive* information and ideas from others. Indeed, Article 19 of the *Universal Declaration of Human Rights* (UDHR)³⁶ recognises the ‘right to freedom of opinion and expression’, and explicitly provides that ‘this right includes freedom ... to seek [and] receive ... information and ideas through any media and regardless of frontiers’.

This right of access to State-held information has been increasingly recognised in both international and regional human rights instruments and case-law.

III.1. International Human Rights Law

In 1946, the early days of the United Nations, the General Assembly agreed that freedom of information was ‘a fundamental human right’, ‘the touchstone of all the freedoms to which the United Nations is consecrated’ and ‘an essential factor in any serious effort to promote the peace and progress of the world’.³⁷ More recently, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression stated in 1995 that ‘[a]ccess to information is basic to the democratic way

³⁴ Cf. Hafner-Burton, E, Steinert-Threlkeld, Z and Victor, D, “Transparency of Investor-State Arbitration”, 30 April 2014, at <irps.ucsd.edu/ehafner/pdfs/Transparency_in_Arbitration_2014.pdf> (accessed 03 April 2015), 1: who assert that 40% of final awards in ICSID cases have remained secret over the institution’s lifetime.

³⁵ Harris, D, O’Boyle, M, Bates, E and Buckley, C, *Law of the European Convention on Human Rights* (2nd ed, Oxford University Press, Oxford, 2009), 443–445.

³⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) (UDHR),

³⁷ United Nations General Assembly, *Calling of an International Conference on Freedom of Information*, 14 December 1946, (65th Plenary Meeting) A/RES/59 (I) at <un.org/en/ga/search/view_doc.asp?symbol=A/RES/59%28I%29> (accessed 20 April 2015).

of life. The tendency to withhold information from the people at large is therefore to be strongly checked.’³⁸

The *International Covenant on Civil and Political Rights* (ICCPR)³⁹ also protects freedom of expression in its Article 19. Like the UDHR, the ICCPR confirms that the right to freedom of expression entails not only the right to hold opinions, express ideas and impart information, but also the ‘freedom to seek [and] receive information and ideas of all kinds, regardless of frontiers’.⁴⁰ Article 19 of the ICCPR has been the subject of a General Comment issued in 2011 by the UN’s Human Rights Committee, the treaty body that monitors compliance with the ICCPR by its 168 States parties.⁴¹ General Comments are taken to constitute authoritative interpretations of the meaning and scope of the ICCPR rights.⁴² In its General Comment No. 34, the Human Rights Committee acknowledged that Article 19(2) ‘embraces a right of access to information held by public bodies’.⁴³ Moreover, ‘[t]o give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information’.⁴⁴ For information that is not proactively made available, ‘States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation’ including provisions for reasons and appeals if necessary.⁴⁵

Both General Comment No 34 and Article 19 accept that restrictions on free expression (including access to information) will sometimes be justified. However, Article 19(3) specifies that any restrictions must be ‘provided by law’ and must be ‘necessary ... for respect of the rights or reputations of others’ or ‘for the protection of national security or of public order (*ordre public*)’.⁴⁶ The General Comment offers guidance for States parties seeking to implement restrictions. Where restrictions are to be imposed, they ‘may not put in jeopardy the right itself’, nor may States reverse the ‘relation between right and restriction’,⁴⁷ indicating that restrictions must be narrowly tailored to ensure that release of information remains the default position.

Even the potentially wide-ranging exception for ‘national security’ must be constrained under the approach adopted in the General Comment. ‘Extreme care must be taken’ to ensure that provisions relating to national security ‘are crafted and applied in a manner that conforms to the strict requirements of paragraph 3’.⁴⁸ Such an exception must not be used, the Committee warns, ‘to suppress or withhold from the public information of legitimate public interest that does not harm national security’.⁴⁹

³⁸ United Nations Economic and Social Council, *Report of the Special Rapporteur, Mr Abid Hussain, pursuant to Commission on Human Rights Resolution 1993/45*, UN Doc E/CN.4/1995/32, para 35.

³⁹ United Nations General Assembly, *International Covenant on Civil and Political Rights* (1966) 999 UNTS 171 (ICCPR).

⁴⁰ Article 19(2), ICCPR.

⁴¹ See the ratification information at <indicators.ohchr.org/> (accessed 20 April 2015).

⁴² Crawford, J, *Brownlie’s Principles of Public International Law* (8th ed, Oxford University Press, 2012), 640.

⁴³ Human Rights Committee, *General Comment No 34*, UN Doc CCPR/C/GC/34, 12 September 2011, para 18 (GC34).

⁴⁴ *Id.*, para 19.

⁴⁵ *Ibid.*

⁴⁶ Article 19(3) also permits restrictions to protect public order, public health or morals.

⁴⁷ GC34, para 21.

⁴⁸ *Id.*, para 30.

⁴⁹ *Ibid.*

Furthermore, the General Comment reminds States that any restrictions on the public's ability to seek and receive information must be necessary for a legitimate purpose.⁵⁰ In a slightly different context, the Committee discusses one potential example of an illegitimate purpose (namely, protecting public figures or institutions from criticism), and expresses concern over laws restricting this activity (such as *lèse-majesté* laws).⁵¹ In light of the extensive public interest in investment treaty disputes, these comments from the Human Rights Committee would suggest that a State's refusal of access to investment treaty awards on grounds that to do so would embarrass the government (even if such grounds are not explicitly stated by the authorities) would not conform to the international understanding of the obligations in Article 19 of the ICCPR, binding on 168 States.

The General Comment also reminds States that '[t]he obligation to respect freedoms of opinion and expression is binding on ... [a]ll branches of the State (executive, legislative and judicial)'.⁵² Furthermore, States parties 'are required to ensure that the rights contained in Article 19 of the Covenant are given effect to in the domestic law of the State'. Indeed, according to one non-governmental organisation (NGO) that monitors FOI laws, 100 countries had adopted nation-wide domestic FOI legislation as of September 2014.⁵³ Demonstrating a clear contemporary trend towards transparency, almost all of these countries adopted their FOI laws in the last twenty years (with some remarkable outliers like Sweden, whose FOI law is dated to 1766).⁵⁴

III.2. Inter-American Human Rights Law

Regional human rights instruments also contain instantiations of the right to freedom of expression, and, like the international instruments just reviewed, these regional instruments have also been construed to cover a right of access to information held by the government. In particular, the *American Convention on Human Rights*⁵⁵ contains wording in its Article 13 similar to the ICCPR's Article 19, providing that 'this right [to freedom of expression] includes freedom to seek [and] receive ... information and ideas of all kinds, regardless of frontiers'.

Article 13's connection to freedom of information was examined in the 2006 *Claude Reyes et al v Chile* case before the Inter-American Court of Human Rights. This case related to a proposed large-scale sawmill and timber processing plant located in Tierra del Fuego on Chile's southernmost tip. In 1991, the State's Foreign Investment Committee approved an investment of USD 180 million from US-based investors to construct the sawmill.⁵⁶ The proposed project, in an area of high environmental value,

⁵⁰ *Id.*, para 33.

⁵¹ *Id.*, para 38.

⁵² *Id.*, para 7.

⁵³ The Global Network of Freedom of Information Advocates, *freedominfo.org*, *FOI Countries by Date* (September 2014) at <freedominfo.org/regions/global/foi-regimes/> (accessed 28 March 2015).

⁵⁴ University College London Constitution Unit, *Swedish International Focus (Freedom of the Press Act 1766)*, 30 September 2011 at <ucl.ac.uk/constitution-unit/research/foi/countries/sweden> (accessed 20 April 2015).

⁵⁵ Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969.

⁵⁶ Inter-American Court of Human Rights, *Claude Reyes et al v Chile*, Judgment of 19 September 2006, para 57(6).

attracted significant public attention from observers concerned about the potential adverse effects of logging in the area.⁵⁷

In 1998, while the project was still in its early stages, several individuals, members of a Chilean environmental NGO, submitted a request to the Foreign Investment Committee seeking information on the identity of the investors involved and their environmental track records, as well as details of various other elements of the project. The Committee responded with some of the information requested, but denied other parts, and did not provide reasons for their decision.⁵⁸ The individuals appealed the decision to Chile's Supreme Court, but failed to obtain the information sought. They then took their case to the Inter-American Commission on Human Rights, which itself referred the case to the Inter-American Court after Chile failed to comply with the Commission's finding of a breach.

In a September 2006 ruling, the Court held that Article 13 of the American Convention 'protects the right of all individuals to request access to State-held information', and entails a 'positive obligation of the State to provide it', except where legitimate restrictions apply.⁵⁹ The Court referred to widespread consensus amongst American⁶⁰ and European⁶¹ States that access to government information was essential for democratic participation, and it noted the trend towards establishment of domestic FOI laws.⁶² In particular, the Court said,

[d]emocratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.⁶³

The Court ultimately held that the Foreign Investment Committee's failure to provide the requested information relating to the foreign investment project, without any reasoned explanation for why restrictions on the right to access information might have applied, constituted a violation of Article 13 of the American Convention.⁶⁴

Although the *Claude Reyes* case was heard in a human rights forum, the investment project underlying the case could easily have become the subject of an investment treaty claim against Chile if, for instance, faced with further pressure from local environmental groups, Chile had taken any steps to limit the scope of the logging and sawmill operations after having approved the investment. Any award of a tribunal in a hypothetical Bilateral Investment Treaty (BIT) claim against Chile would be likely to carry great public interest, weighing heavily in favour of its public disclosure – just as

⁵⁷ *Id.*, paras 57(7), 66.

⁵⁸ During proceedings before the Inter-American human rights bodies, the Executive Vice President of the Committee testified that he had refused certain requested information partly because it would have disclosed confidential financial information of the relevant investors, and partly because the Committee did not have the relevant information: *Id.*, para 57(20).

⁵⁹ *Id.*, para 77.

⁶⁰ *Id.*, paras 78–80.

⁶¹ *Id.*, para 81.

⁶² *Id.*, para 82.

⁶³ *Id.*, para 87.

⁶⁴ *Id.*, para 103.

the Inter-American Court ordered in relation to the information initially sought by the *Claude Reyes* petitioners.

III.3. European Human Rights Law

Alongside these developments in the inter-American human rights system, the European Court of Human Rights has also relatively recently taken strides towards recognising a general right to access State-held information of public interest.⁶⁵ Article 10 of the *European Convention on Human Rights* (ECHR)⁶⁶ includes a right to expression framed, once again, in very similar terms to Article 13 of the American Convention and Article 19 of the ICCPR. Article 10 of the ECHR provides that '[e]veryone has the right to freedom of expression. This right shall include freedom to ... receive and impart information and ideas without interference by public authority and regardless of frontiers.'

In its ruling of April 2009 in *Társaság a Szabadságjogokért v Hungary*, the European Court of Human Rights addressed the question of whether the claimant, a Hungarian NGO, had been the victim of a violation of Article 10 ECHR when the Hungarian Constitutional Court had denied access to a complaint that had been filed with it by a member of the Hungarian Parliament. The Hungarian Constitutional Court had contended that the complaint could not be made available to outsiders, such as the NGO, without the consent of its author, the Hungarian Parliamentarian.⁶⁷ Following unsuccessful efforts to gain access via domestic court proceedings, the NGO filed its case at the European Court of Human Rights in Strasbourg.

The Court held that there had been an interference with Társaság's rights, in that the claimant had been prevented from both receiving and, given that it planned to make the constitutional complaint more widely available, imparting information. The Court then considered whether this interference was justified, as permitted under Article 10(2) of the ECHR, by being 'necessary in a democratic society'. In this context, the Court observed that it had 'recently advanced ... towards the recognition of a right of access to [State-held] information'. The Court added that the actual information sought by the claimant was 'ready and available' to the relevant State authority (the Constitutional Court), and 'did not require the collection of any data by the Government'.⁶⁸ A violation of Article 10 was therefore upheld.

Although the Court's ruling was clearly influenced by the fact that the claimant was to be 'characterised, like the press, as a social 'watchdog'⁶⁹ rather than an ordinary citizen, the case certainly demonstrates that refusals of access to information – particularly where the information is 'ready and available' to the government (such as, perhaps, an investment treaty award) – can violate European human rights law. This approach was confirmed more recently in *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*.⁷⁰ There, the Court held that 'a complete refusal to give

⁶⁵ See Hins, W and Voorhoof, D, "Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights", 3 *European Constitutional Law Review* (2007) 114.

⁶⁶ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14 (1950) ETS 5 (ECHR).

⁶⁷ European Court of Human Rights (ECtHR), *Társaság a Szabadságjogokért v Hungary*, 37374/05, 14 April 2009, para 10 (*Társaság* case).

⁶⁸ *Id.*, para 36. In this context, see also section 3.3.2 below.

⁶⁹ *Id.*, para 27.

⁷⁰ ECtHR, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria*, 39534/07, 28 November 2013.

[the applicant] access to any of [the Tyrol Real Property Transactions Commission's] decisions was disproportionate', particularly given that the Commission was a public authority deciding disputes over civil rights of considerable public interest.⁷¹ Similarly, in another recent case, a decision by the Serbian Intelligence Agency to deny certain information to an NGO, who had applied for the information under that country's FOI law, was held by the European Court of Human Rights to violate Article 10 of the ECHR, partly due to the 'unpersuasive' reasons offered by the Intelligence Agency for its refusal.⁷²

IV. Access to Investment Treaty Awards via Domestic FOI Law: a Polish Case-Study

IV.1. Introductory Remarks

This section considers the potential for domestic freedom of information law to play a role in gaining access to investment treaty cases. Drawing on recent experiences, this section focuses on Poland, a State which has kept a number of investment treaty awards unpublished for many years.

At the outset, as noted in Section 1, there is no necessary obligation on respondent States to make public even the fact of a pending dispute, particularly where those disputes are heard in arbitral fora outside ICSID. Indeed, some countries may be involved in ongoing disputes, the details of which are completely hidden from public view. In these situations, it may be difficult to use domestic FOI laws to obtain specific documents, since the existence of those documents will be unknown to the applicant. However, when the existence (at least) of the dispute is known, FOI laws may prove useful. Using Poland as an example, attempts of this kind are described below.

IV.2. The Right to Public Information in the Polish Legal System

Under Article 61 of the Constitution of Poland, 'a citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions.'

As with other fundamental rights guaranteed in the Polish Constitution, this right to public information is not absolute. Limitations can apply in order to 'protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State'.⁷³ However, under Article 31.3 of the Constitution,

⁷¹ *Id.*, paras 46–47.

⁷² ECtHR, *Youth Initiative for Human Rights v Serbia*, 48135/06, 25 June 2013, para 25. See also comments in ECtHR, *Gillberg v Sweden*, 41723/06, 3 April 2012, para 93, to the effect that scientific researchers held 'rights under Article 10 ... to receive information in the form of access to the public documents concerned'.

⁷³ Article 61, *Constitution of the Republic of Poland*, Poland (1997) reads as follows:

1. A citizen shall have the right to obtain information on the activities of organs of public authority as well as persons discharging public functions. Such right shall also include receipt of information on the activities of self-governing economic or professional organs and other persons or organizational units relating to the field in which they perform the duties of public authorities and manage communal assets or property of the State Treasury.

any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic State for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

This constitutional right to public information has been implemented in a 2001 statute, the Act on Access to Public Information (the FOI Act or the Act).⁷⁴ The FOI Act broadens the scope of the constitutional right and covers all persons, not only Polish citizens.⁷⁵ In Article 1.1, it provides that 'each information on public matters constitutes public information in the understanding of the Act and is subject to being made available on the basis of principles and under the provisions defined in this Act.' In Article 1.2, the Act provides that '[t]he provisions of the Act shall not breach the provisions of other acts defining different principles and the mode of access to the information being public information.'

The Act contains several provisions that exempt specific types of information from disclosure by Polish authorities. Thus, access to public information can be refused 'to the extent and on the principles defined in the provisions on the protection of confidential information and on the protection of other secrets being statutorily protected'.⁷⁶ Moreover, 'the right to public information is subject to limitation in relation to privacy of a natural person or the secret of an entrepreneur.'⁷⁷

Upon receipt of a request for access to public information, Polish authorities may decide, as a matter of fact, to provide the applicant with the requested information. This course of action does not require the authority to issue any formal administrative decision under Polish law. However, if for any reason the request is denied, the authority is obliged to render an administrative decision.⁷⁸ In this situation, the applicant is entitled to appeal the administrative decision to a superior authority.⁷⁹ If the initial request was already addressed to the highest relevant authority, such as the

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2. The right to obtain information shall ensure access to documents and entry to sittings of collective organs of public authority formed by universal elections, with the opportunity to make sound and visual recordings.
 3. Limitations upon the rights referred to in paras. 1 and 2 above, may be imposed by statute solely to protect freedoms and rights of other persons and economic subjects, public order, security or important economic interests of the State.
 4. The procedure for the provision of information, referred to in paras. 1 and 2 above shall be specified by statute, and regarding the Sejm and the Senate by their rules of procedure.'

⁷⁴ The FOI Act.

⁷⁵ Article 2, the FOI Act: 'Each person is entitled, with the stipulation of Article 5, to the right of access to public information ...'.

⁷⁶ Article 5.1, the FOI Act.

⁷⁷ Article 5.2, the FOI Act. Although:

The limitation does not relate to the information on persons performing public functions, being connected with performing these functions, including the conditions of entrusting and performing these functions and in the event when a natural person or entrepreneur resigns from the right to which he was entitled to.

⁷⁸ Article 16.1 of the FOI Act: 'The refusal to make the public information available and discontinuation of proceedings to make the information available in the case defined in Article 14, it. 2 by the body of public authority takes place by means of a decision'.

⁷⁹ Article 127 Section 2, *Polish Code of Administrative Procedure* in relation to Article 16.2, the FOI Act.

responsible Minister (as would typically occur in the context of requests for access to investor-State arbitral awards), the possibility of appeal is replaced by a motion for reconsideration of the decision by the same authority.⁸⁰ The FOI Act obliges the authority to render a decision on the appeal (or on the reconsideration) within 14 days.⁸¹ If the competent authorities continue to deny access to the public information, the applicant is entitled to present a claim to the administrative court.

IV.3. First Attempts at Relying on the FOI Act to Access an Investor-State Arbitral Award: *Servier v Poland*⁸²

The first publicly-known attempts to use the FOI Act to obtain copies of one of Poland's many unpublished investor-State arbitral awards commenced in 2012 and targeted the February 2012 award of an UNCITRAL-rules tribunal in *Servier v Poland*. The *Servier* case was brought under the Poland-France BIT and related to pharmaceutical authorisations, implicating both Poland's Ministry of Health and its State Treasury Solicitors' Office (the STSO). The STSO by law represents the Polish State in arbitral proceedings (although it is common that external counsel is also appointed in investment treaty cases).⁸³ Separate motions were filed under the FOI Act to the STSO and to the Ministry of Health. Due to the unprecedented nature of these efforts, various actors were involved in preparing the filings.⁸⁴

⁸⁰ Poland did not designate an entity responsible for conducting investor-State arbitrations. In general, the authority involved in an alleged breach of a Bilateral Investment Treaty (BIT) will represent the State in the arbitral proceedings (together with the State Treasury Solicitors' Office (STSO) and, typically, external counsel). Therefore, the Minister responsible for the sector related to a dispute will be the responsible authority and, thus, addressee of a request under the FOI Act. For avoidance of doubt and for linguistic ease, in the text of this article, the authors refer to the various Ministries, rather than the individual Ministers. However, formally speaking, the Ministers themselves are the authorities that issued the relevant decisions, and that are parties to proceedings before the administrative courts if complaints against such decisions are filed.

⁸¹ Article 16.2, the FOI Act.

⁸² *Les Laboratoires Servier, SAA, Biofarma, SAS, Arts et Techniques du Progres SAS v Republic of Poland*, UNCITRAL (*Servier v Poland*) or (*Servier*).

⁸³ The STSO was created by the *Act of 8 July, 2005 on the State Treasury Solicitors' Office*, *Journal of Laws No 169 pos 1417 as amended*, which also regulates the scope of the STSO's responsibilities.

⁸⁴ Investment Arbitration Reporter; Krzysztof Izdebski from the 'Citizen Network – Watchdog Poland', who undertook the majority of steps described in the present section with respect to the *Servier v Poland* case; the Center for International Environmental Law, which submitted two *amicus curiae* briefs, one of which is available at <italaw.com/sites/default/files/case-documents/italaw1563.pdf> (accessed 10 May 2015); and Professor Andrew Newcombe, who provided an affidavit (dated 26 March 2013) as to the number of published documents relevant in the context of investor-State arbitration, with special focus on the Member States of the European Union.

IV.3.1. The STSO Proceedings

The motion filed with the STSO in May 2012⁸⁵ saw very little initial success, with the STSO replying simply that (in its view) it was not an authority covered by the FOI Act, and therefore was not obliged to release any public information. The applicant filed a motion for reconsideration, but the STSO maintained its position.⁸⁶

A complaint to the relevant Polish administrative court was then filed. In its submissions to the court, the STSO again contended that it was not bound by the FOI Act. Interestingly, though, the STSO further argued that the *Servier* award could not be disclosed due to Article 32(5) of the UNCITRAL Arbitration Rules (1976), which governed the *Servier* arbitration. As discussed in Section 1 above, Article 32(5) provides that awards ‘may be made public only with the consent of both parties’. According to the STSO, Article 32(5) constituted a rule on disclosure (ie, mandating confidentiality) that differed from the rule under the FOI Act (ie, mandating publication). This conflict was resolved, for the STSO, by Article 1.2 of the FOI Act, which (as noted above) reads that ‘[t]he provisions of the Act shall not breach the provisions of other acts defining different principles and the mode of access to the information being public information.’ The effect of Article 1.2, according to the STSO, was that the confidentiality indicated by the UNCITRAL Arbitration Rules should prevail over the disclosure indicated by the FOI Act.⁸⁷

In its judgment of 25 October 2012, the Regional Administrative Court in Warsaw⁸⁸ first confirmed that arbitral awards rendered in investor-State arbitration against Poland constitute ‘public information’ within the meaning of the FOI Act.⁸⁹ The court further ruled, contrary to the STSO’s submissions, that the STSO was an authority bound by the provisions of the FOI Act.

More substantively, the court went on to reject the STSO’s views on Article 1.2 of the FOI Act. In particular, the court found that neither Article 32(5) of the UNCITRAL Arbitration Rules nor Article 8.2 of the *Poland-France BIT* (the clause providing for UNCITRAL investor-State arbitration) could be understood as defining different ‘principles’ or ‘modes of access’ to information under Article 1.2 of the FOI Act.⁹⁰

As a result of the above judgment, the STSO then released a redacted version of the *Servier* award, purporting to comply with the court’s ruling.⁹¹ However, this effort at compliance appeared minimal: the version of the award released by the STSO included only the first and the last pages of the award (in total consisting of 190 pages), with further redactions made even to those two pages. In justifying its refusal to release the full award, the STSO then introduced a new contention, based on the trade secrets of investors.⁹²

⁸⁵ The motion was filed by Krzysztof Izdebski from the Citizen Network – Watchdog Poland.

⁸⁶ As described in the judgment of the Regional Administrative Court of Warsaw, II SAB/Wa 252/12, 25 October 2012.

⁸⁷ As described in the judgment of the Regional Administrative Court of Warsaw, II SAB/Wa 252/12, 25 October 2012.

⁸⁸ *Wojewódzki Sąd Administracyjny w Warszawie*.

⁸⁹ Regional Administrative Court of Warsaw, II SAB/Wa 252/12, 25 October 2012.

⁹⁰ Although the court did not clarify its reasoning on this point, it may have taken this view on the grounds that Article 32(5) of the UNCITRAL Arbitration Rules only prevents the tribunal from disclosing the award, and not the parties themselves, as suggested in Section 1.

⁹¹ Decision of 22 February 2013, on file with authors.

⁹² *Ibid.*

After a further motion for reconsideration and upholding of the decision by the STSO, the applicant once again filed another complaint in the administrative courts, in relation to the newly-alleged ground of trade secrets.

In a judgment of 15 November 2013, the Regional Administrative Court in Warsaw reaffirmed that arbitral awards rendered in investor-State arbitration are ‘public information’ within the meaning of the FOI Act, and that the STSO was bound by the provisions of the FOI Act.⁹³ The court then requested the STSO to provide it with a translation of the English-language *Servier* award into Polish, in order to assess whether all the prerequisites necessary to deny access to public information based on trade secrets were met in the case. The STSO did not possess such a translation, and it did not present the translation to the court. As a result, the court held that the STSO’s decision to refuse access to the award on the grounds that it contained trade secrets, while making this decision on the basis of an English text, was not justifiable under the applicable provisions of the Polish law.⁹⁴ The court therefore annulled both decisions of the STSO. The STSO filed an appeal against this judgment, which remains pending at the time of preparing the present article.

IV.3.2. The First Ministry of Health Proceedings

A separate motion seeking access to the *Servier* award was addressed to the Ministry of Health, who was responsible for representing the State in the case.⁹⁵ While deciding on the motion, the Ministry of Health approached the investor-claimants in the *Servier* case, asking them directly which parts of the award contained trade secrets. Apparently, in light of their response, in August 2012, the Ministry denied access to the award. It argued, among other points, that redacting the award in order to protect the investors’ trade secrets would result in the creation of ‘processed information’, which in turn – according to Article 3 of the FOI Act – can be published only when ‘it is particularly essential for the public interest’.⁹⁶ According to the Ministry, the applicant had not proven the existence of such essential public interest.⁹⁷

After an unsuccessful motion for reconsideration, the applicant again filed a complaint with the administrative court. In its judgment of 7 May 2013,⁹⁸ the Regional Administrative Court in Warsaw agreed that the *Servier* award ‘contains information which is not subject to disclosure because of protection of trade secrets’. However, in its view, redacting this commercial confidential information would not result in creating ‘processed information’ exempt from disclosure under Article 3 of the FOI Act. As a result, the Court found, the applicant could not be obliged to prove a ‘particularly essential public interest’ to justify the motion. Instead, the Court considered that the non-confidential parts of the award should be released, and that

⁹³ Regional Administrative Court of Warsaw, II SA/Wa 909/13, 15 November 2013.

⁹⁴ The court based its decision on the provisions of the Act of 7 October 1999 on the Polish language, *Journal of Laws No 90 pos 999 as amended* (Polish Language Act); and on the Act of 14 June 1960 Code of Administrative Procedure, *Journal of Laws No 30 pos 168 as amended* (Code of Administrative Procedure).

⁹⁵ The motion was filed by Krzysztof Izdebski from the Citizen Network – Watchdog Poland.

⁹⁶ Article 3 of the FOI Act: echoing the ECtHR’s finding in the *Társaság* case, discussed in Section 2, that States have greater obligations to provide information when it is already collected and requires no further work or processing.

⁹⁷ As described in the judgment of the Regional Administrative Court of Warsaw, II SA/Wa 2249/12, 7 May 2013.

⁹⁸ Regional Administrative Court of Warsaw, II SA/Wa 2249/12, 7 May 2013.

the mere fact that parts of the arbitral award contained information protected by law could not justify a total denial of access to the document.

Finally, the Court referred to the October 2012 judgment in the STSO proceedings (discussed above).⁹⁹ The Court reaffirmed the view that Article 1.2 of the FOI Act did not operate to privilege the UNCITRAL Arbitration Rules and *Poland-France BIT* over the FOI Act itself.

Following this judgment, a complete, although partly-redacted, copy of the *Servier v Poland* arbitral award was provided to the applicant.

IV.3.3. The Second Ministry of Health Proceedings

Meanwhile, another motion with respect to the *Servier* award, filed in parallel to the efforts described above, was also addressed to the Ministry of Health.¹⁰⁰ In these proceedings, the Ministry of Health also denied access to the award,¹⁰¹ relying again on the existence of trade secrets in the award. In this case, however, the authority did not claim that redacting the award would result in creation of ‘processed information’. Following a motion for reconsideration, the Ministry upheld its decision,¹⁰² while adding a view that the arbitral award should be treated as an ‘integral part’ and cannot be published ‘in parts’ without releasing trade secrets.¹⁰³

On 20 August 2013, in response to the applicant’s complaint to the administrative courts, the Regional Administrative Court in Warsaw issued a judgment in which it annulled both decisions of the Ministry of Health.¹⁰⁴ As in the *Servier* case, the Court requested the Ministry to provide a copy of the arbitral award translated into Polish in order to verify whether denial on grounds of trade secrets was indeed justified.¹⁰⁵ The Ministry of Health did not possess such a translation, and did not provide it to the Court. The Court therefore concluded that the whole administrative proceedings were inconsistent with the requirements of the domestic law.¹⁰⁶

Although the *Servier* decision had already been released by this stage, as noted above in relation to the first set of proceedings against the Ministry, the Ministry of Health nevertheless filed an appeal.¹⁰⁷ The Supreme Administrative Court, in its judgment of 5 September 2014, confirmed that arbitral awards issued in investor-State proceedings constitute ‘public information’ within the meaning of the FOI Act, and that the Ministry of Health is obliged to release such public information in accordance with the FOI Act.¹⁰⁸ Further, it upheld the arguments of the Court of first instance as to the Ministry’s obligation to base its decision on a Polish translation of the award. Importantly, the Supreme Administrative Court also observed that there were no legal grounds to require the applicant who filed the motion to bear the costs of this translation. However, in a recent, surprising move following the Supreme Administrative Court’s judgment, the Ministry of Health appeared to ignore the

⁹⁹ Regional Administrative Court of Warsaw, II SAB/Wa 252/12, 25 October 2012.

¹⁰⁰ The motion was filed by Filip Balcerzak.

¹⁰¹ Decision of 7 December 2012, on file with authors.

¹⁰² Decision of 28 February 2013, on file with authors.

¹⁰³ *Ibid.* This approach was based, among others, on the fact that the investors opposed publication of the award.

¹⁰⁴ Regional Administrative Court of Warsaw, II SA/Wa 838/13, 20 August 2013.

¹⁰⁵ According to the Polish Language Act.

¹⁰⁶ The Polish Language Act and the Code of Administrative Procedure.

¹⁰⁷ *Skarga kasacyjna*.

¹⁰⁸ Supreme Administrative Court, I OSK 2966/13, 5 September 2014.

judgment, requesting the applicant to bear costs of the translation of the awards into Polish.¹⁰⁹

IV.4. Subsequent Attempts to Obtain Arbitral Awards through the FOI Act¹¹⁰

IV.4.1. *Crespo v Poland*

Following the relative success encountered in the various *Servier* proceedings and the eventual release of a redacted version of the award, attention was turned to other still-unpublished investment treaty awards in cases involving Poland.

One such case is *Crespo v Poland*, a claim under the *Poland-Spain BIT* and the 1998 ICC Arbitration Rules.¹¹¹ A motion to access the 2005 award in this case was filed with the Polish Ministry of Finance.¹¹² The Ministry initially denied the request,¹¹³ and a motion for reconsideration was unsuccessful.¹¹⁴

Two main grounds, already familiar from the *Servier* claims, were relied on by the Ministry. First, the Ministry contended that Article 1.2 of the FOI Act would apply, because, although the Act itself might point towards disclosure, other relevant instruments that provided for ‘confidentiality’ would override the Act by virtue of Article 1.2. In particular, the Ministry cited Article 28 of the 1998 ICC Rules, which provided that ‘additional copies’ of an arbitral award ‘shall be made available on request and at any time to the parties, but to no one else’.¹¹⁵ The Ministry also drew the confidential nature of the arbitral award from Article 11 of the *Poland-Spain BIT* (which contained the State’s consent to ICC arbitration). Second, the Ministry contended that the award contained trade secrets and fiscal secrets, and that redaction of the award to exclude this information would leave the document totally deprived of its content.

As with the *Servier* proceedings, these decisions from the Ministry of Finance were challenged before the Polish administrative courts. On 22 October 2014, the Regional Administrative Court in Warsaw annulled both decisions.¹¹⁶

On the Ministry’s first contention, the Court held that Article 11 of the *Poland-Spain BIT* regulates only the issue of dispute settlement between investors and States. In the view of the Court, this arbitration clause could not ‘define different principles and the

¹⁰⁹ Letter of 15 January 2015, on file with authors. The costs of translation are estimated at the level of PLN 7,166.16. Based on an average exchange rate published by the Polish National Bank from 27 February 2015, it amounts to approximately USD 1,937.85. At the time of publication, no further action has been taken in relation to this motion.

¹¹⁰ This section does not aim to describe in full all the attempts undertaken in order to obtain copies of the arbitral awards rendered in BIT proceedings against Poland. Other proceedings are pending, for example with respect to awards rendered in *Cargill v Poland*, UNCITRAL, Award, 1 March 2008; *Mitch Nocola v Poland* (no known citation); and *TRACO Deutsche Travertinwerke GmbH v The Republic of Poland*, UNCITRAL, Award, 5 September 2012.

¹¹¹ International Chamber of Commerce (ICC), *ICC Arbitration Rules* (1998) (ICC Rules).

¹¹² *Julian Crespo Santamargarita, Juan Ricardo Crespo Santamargarita, Valencia sp z oo v Poland*, ICC, Award, 22 September 2005. The motion was filed by Filip Balcerzak.

¹¹³ Decision of 19 February 2014, on file with authors.

¹¹⁴ Decision of 17 April 2014, on file with authors.

¹¹⁵ The Ministry also cited Article 6, ICC, *Statutes of the International Court of Arbitration*, 1 January 2012, and Article 1, ICC, *Internal Rules of the International Court of Arbitration*, then in force, to underpin a general principle of confidentiality in ICC arbitration.

¹¹⁶ Regional Administrative Court of Warsaw, II SA/Wa 1122/14, 22 October 2014.

mode of access to the information being public information' within the meaning of Article 1.2 of the FOI Act. Furthermore, the Court considered that no other provision of the BIT contained any regulation of access to public information. As for the ICC Rules and the other instruments cited by the Ministry, the Court held that these similarly did not introduce 'different principles' on access to information. In any case, the Court added that these instruments were not of a statutory level; for the Court, only statutory provisions could create an exception to the applicability of the FOI Act under Article 1.2.¹¹⁷

On the Ministry's second contention, the Court decided that, even if parts of the arbitral award contained trade secrets and fiscal secrets, even a 'superficial lecture of the award' allowed it to conclude that the Ministry's decision to deny access to the entire award was not justifiable.¹¹⁸

IV.4.2. *Mercuria v Poland*

A further request for access to public information was directed to the Ministry of Economy, with respect to the awards rendered in *Mercuria v Poland*,¹¹⁹ heard under the *Energy Charter Treaty* and the SCC Arbitration Rules.¹²⁰

In deciding on this request, the Ministry of Economy consulted the investor in the underlying case, who strongly opposed making the awards public even in a redacted form. The Ministry then issued a decision denying access to the award.¹²¹ In this decision, it relied, *inter alia*, on the Article 1.2 exception in the FOI Act, as the Ministries of Health and Finance had also done. However, following a motion for reconsideration, the Ministry conceded that this exception did not apply.¹²²

Despite its concession, the Ministry upheld its decision to deny access based on the confidentiality of the proceedings. It argued that arbitral proceedings and arbitral awards are confidential, according to Articles 27.3 and 46 of the SCC Arbitration Rules.¹²³ It further added that granting access to the awards could give the investor grounds for compensation claims from the State, and would negatively impact relations between foreign investors and Poland. Last, the Ministry argued that it was not competent to assess which parts of the *Mercuria* award contained trade secrets, and thus that it must rely on the investor's indication that the awards in their totality should be treated as trade secrets.

Once again, the applicant filed a complaint to the administrative court. On 15 January 2015, the Regional Administrative Court in Warsaw issued a judgment, in which it annulled both decisions of the Ministry of Economy.¹²⁴

¹¹⁷ *Ibid.*

¹¹⁸ The Ministry of Finance did not appeal, and the judgment became binding only shortly before finalising the present article for publication.

¹¹⁹ *Mercuria Energy Group Limited v Republic of Poland*, SCC, Decision on Jurisdiction, December 2009, and Final Award, 1 December 2011. The motion was filed by Filip Balcerzak.

¹²⁰ Stockholm Chamber of Commerce (SCC), *Arbitration Rules* (2010) in force as of 1 January 2010 (SCC Arbitration Rules)

¹²¹ Decision of 22 May 2014, on file with authors.

¹²² Decision of 10 July 2014, on file with authors.

¹²³ Article 27.3, SCC Arbitration Rules: 'Unless otherwise agreed by the parties, hearings will be in private.' Article 46, SCC Arbitration Rules: 'Unless otherwise agreed by the parties, the SCC Institute and the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.'

¹²⁴ Regional Administrative Court of Warsaw, II SA/Wa 1690/14, 15 January 2015.

The Court affirmed that, even though the right to access to public information is guaranteed at the constitutional level in Poland, the right is not absolute, and can be limited – including, in particular, where a party's trade secrets might be publicly revealed. The Court then analysed the meaning of the term 'trade secrets' in the Polish law. It concluded that the mere will of the investor to keep information secret was not enough, by itself, to qualify it as a 'trade secret' protected by law. Another prerequisite must be met: the information has to constitute technical, technological, organisational or other information of economic value. Thus, the court held that the Ministry of Economy must assess whether the investor's own designation of information as a trade secret was objectively justifiable. For the Court, both formal and material prerequisites must be met in order to deny access to public information, with the burden of proof lying on the investor.¹²⁵

In response to the Ministry's claims of the inherent confidentiality of arbitration, the Court offered some views on the nature of arbitration. The Court described arbitration as a mechanism of dispute settlement according to rules of procedure and substance agreed by the parties in their arbitration agreement, with the competence of the arbitral tribunal based on this agreement. The Court added that one main characteristic of arbitration was that, for the purposes of enforcement, states typically agree to treat arbitral awards as equivalent to judgments issued by State courts. Following the Court's reasoning, the crucial practical relevance of considering arbitral awards as equal to judgments of State courts is visible at the moment of enforcement proceedings. The Court then observed that it is well established in Polish law that judgments of State courts are 'public information' within the meaning of the FOI Act. It concluded that it was impossible to find that the nature of arbitration would limit the applicability of domestic law, particularly where the domestic law right in question was guaranteed at the constitutional level.

In addition, no provisions on access to public information were included in the *Energy Charter Treaty*,¹²⁶ the instrument underlying the *Mercuria* dispute, and no conclusion to the contrary could emerge from any provisions of the SCC Rules, including Articles 27.3 or 46. According to the Court, parties to arbitral proceedings could not agree on anything contrary to binding provisions of law, including the Polish FOI Act. In any case, similar to the findings in the *Crespo* proceedings (discussed above), the Court held that the SCC Arbitration Rules were not statutory-level legal norms and were not universally binding. Last, as mentioned in Section 1 above, the Court also noted that the principle of confidentiality in Article 46 of the SCC Rules is directed towards the arbitral tribunal only and not the parties (including the State) themselves. In consequence, the parties themselves could decide on making the arbitral award public – and this decision could not be made in a manner contrary to binding provisions of law, such as the FOI Act.¹²⁷

¹²⁵ *Ibid.*

¹²⁶ *Energy Charter Treaty* (1995) 2080 UNTS 95.

¹²⁷ The Court's judgment in this case was not yet binding at the time of finalising this article for publication.

IV.5. Signs of a Positive Approach Amongst Polish Authorities Towards Transparency? *David Minnotte v Poland*, *Nordzucker v Poland* and *Saar Papier v Poland*

Despite the difficulties in seeking release of information from Polish authorities described above, there are other, more positive examples of instances where authorities have released awards without the need for resort to the judiciary.

First, the 2005 award in *Eureko v Poland* was released to the public,¹²⁸ although it remains unknown whether it was released by any of the parties to the dispute on their own initiative, or under any other ground.

Second, contrary to its reluctance in publishing the award issued in *Servier v Poland*, the Ministry of Health published copies of the awards in *David Minnotte and Robert Lewis v Poland*¹²⁹ on the authority's own initiative, together with a statement on the case.¹³⁰

The Ministry's decision to publish the *Minnotte and Lewis* award, while being so reluctant to grant access to the *Servier* award, is striking for its lack of consistency. It might be argued that the former case was conducted under the ICSID Additional Facility Rules, which generally introduces a higher level of transparency than applicable in the *Servier* case, which was conducted under UNCITRAL Rules. Alternatively, the reason may be more pragmatic: while Poland was ordered to pay around EUR 4 million in compensation in *Servier*, it prevailed entirely in *Minnotte and Lewis*, including receiving an order for the reimbursement of its costs.¹³¹

There are also examples of immediate positive reactions of the State authorities in response to motions to access public information. For instance, the STSO released to the applicant the award rendered in *East Cement v Poland*¹³² without any need to file a motion for reconsideration or to present a claim to the administrative court. Similarly, following a request under the FOI Act, the Ministry of State Treasury granted access to arbitral awards rendered in *Nordzucker v Poland* and *Saar Papier v Poland*.¹³³ Again, in these cases, there was no need to file a motion for reconsideration or to present a claim to the administrative court. The Ministry of Infrastructure and Development has also released upon request a redacted version of the notice of dispute served on Poland by an Austrian investor (whose identity was anonymised).¹³⁴

¹²⁸ *Eureko BV v Republic of Poland*, Partial Award, 19 August 2005, together with the dissenting opinion.

¹²⁹ *David Minnotte and Robert Lewis v Republic of Poland*, ICSID Additional Facility, Case No ARB (AF)/10/1, Award, 16 May 2014, Decision on the Request for Interpretation of the Award, 22 October 2014.

¹³⁰ Ministry of Health, 'Komunikat' at <www.mz.gov.pl/dla-mediow/informacje-prasowe/komunikat-w-sprawie-david-minnotte-i-robert-lewis-przeciwko-rzeczypospolitej-polskiej-sprawa-icsid-nr-arbaf101-oraz-sprawa-vincent-j.-ryan-i-inni-przeciwko-rzeczypospolitej-polskiej-sprawa-icsid3-nr-arbaf113> (accessed 20 May 2014).

¹³¹ In the amount of USD 1,217,741.29. See, *David Minnotte and Robert Lewis v Republic of Poland*, CSID Case No ARB (AF)/10/1, Award, 16 May 2014, para 217.

¹³² *East Cement for Investment Company v Poland*, ICC, Partial Award, 26 August 2011. The motion was filed by Filip Balcerzak.

¹³³ *Nordzucker v Poland*, UNCITRAL, Partial Award (Jurisdiction), 10 December 2008, Second Partial Award (Merits), 28 January 2009, Third Partial and Final Award (Damages and Costs), 23 November 2009; *Saar Papier Vertriebs GmbH v Poland*, UNCITRAL, Interim Award (Jurisdiction), 17 August 1994, with dissenting opinion, and Final Award, 16 October 1995, with dissenting opinion. The motions were filed by Filip Balcerzak.

¹³⁴ Letter of 20 March 2014, on file with authors. The motion was filed by Filip Balcerzak.

V. Conclusions

Investment disputes concern governmental conduct and implicate public money. The public should, therefore, have the opportunity to become familiar with arbitral awards rendered in investor-State arbitration. Some awards have been released under obligations of disclosure in investment treaties or arbitral rules, as Section 1 demonstrated. Certainly, in this respect, one can observe a trend in favour of transparency of investment arbitration. However, although many awards find their way into the public domain, numerous other awards remain hidden from the public.

The fact that some awards still remain hidden sits in some tension with the growing recognition of the right to access public information, a right guaranteed in the international system of human rights as well as in the Inter-American and European regional systems. As discussed in Section 2, the relevance of this right of access to public information cannot be underestimated. Indeed, in a 2013 report, the then Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression, Frank La Rue, observed that ‘core requirements for democratic governance, such as transparency, the accountability of public authorities, or the promotion of participatory decision-making processes, are practically unattainable without adequate access to information.’¹³⁵ The Special Rapporteur gave the objective of combating corruption as a prime example of a goal calling for ‘the adoption of procedures and regulations that allow members of the public to obtain information on the organisation, functioning and decision-making processes of its public administration’.¹³⁶

A concrete example of the public benefits that flow from disclosure in investment treaty cases is provided by the ICSID case *World Duty Free v Kenya*.¹³⁷ This case involved allegations that Kenya had expropriated the investor’s duty free business at Nairobi and Mombasa airports.¹³⁸ The case collapsed, however, when evidence tendered in the proceedings demonstrated that the former President of Kenya, Daniel arap Moi, had accepted a bribe in return for securing the investor’s project in the host State. Disclosure of this information via the eventual publication of the ICSID award, was crucial in supporting the Kenyan people’s ability to hold public officials to account. Although no freedom of information claim was involved in gaining access to the ICSID award, the case demonstrates the potential for access to information procedures to bring a direct and tangible benefit to efforts aimed at improving governance.¹³⁹

¹³⁵ United Nations General Assembly, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/68/362, 4 September 2013, at <daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/464/76/PDF/N1346476.pdf?OpenElement> (accessed 3 May 2015), para 3. Mr La Rue’s mandate as Special Rapporteur expired in July 2014, with the post currently being held by David Kaye.

¹³⁶ *Ibid.*

¹³⁷ *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No ARB/00/7, Award, 4 October 2006 (World Duty Free).

¹³⁸ According to the investor in the case, Kenya had made it an unwitting participant in a large-scale electoral financing fraud, later deporting the investor’s director, and liquidating and seizing control of the company to destroy evidence of the fraud: *World Duty Free*, para 70.

¹³⁹ It should also be noted that the *World Duty Free* case was not an investment treaty claim, but was brought to ICSID under an arbitration clause in the claimant’s investment contract. However, this does not diminish the importance of the revelations of the case in terms of access to information.

Whether or not this potential can be fully realised, however, remains somewhat unclear following the experience in the Polish case-study described in Section 3. It is true that, in all the cases which were heard by the administrative courts in Poland, the courts annulled the decisions to deny access to public information. Thus, the approach of Polish judiciary is consistent with the importance of the right to access public information, as guaranteed in the Constitution of Poland. It is also in line with the human rights dimension of this right. Even though no express reference to human rights was made by the administrative courts in any of the claims examined in Section 3, the courts' reasoning conforms with the judgments issued by the European Court of Human Rights in *Társaság a Szabadságjogokért v Hungary*, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v Austria* and *Youth Initiative for Human Rights v Serbia*.

The attitude of the Polish executive, meanwhile, tells a slightly different story, demonstrating reluctance to comply with its commitments under the FOI Act. Such an approach is not in conformity with Poland's human rights obligations, which are binding on all branches of the State.¹⁴⁰ Furthermore, it also highlights the fact that the scope of competence of the administrative courts is limited. Although the courts can quash the administrative decisions of Polish authorities, these authorities have, in some instances, simply continued to render decisions denying access to public information on different grounds, therefore breaching their obligation to respect human rights.¹⁴¹

This was seen, for example, in the approach of the STSO (which granted access to two pages out of a 190-page arbitral award) and the Ministry of Health (which required the applicant to pay translation costs without legal basis) with respect to the *Servier v Poland*, described in Section 3. Such behaviour forces applicants to file continual complaints to the administrative courts, amounting to a cat-and-mouse game between the individual and the public authorities. This can significantly delay attempts to obtain arbitral awards, potentially leading applicants to surrender their efforts in the face of State power.

In addition, the arguments invoked by the authorities varied, at least to a certain degree, in every proceeding in which the competent authorities denied access to an award. Almost all of these arguments were ultimately rejected by the administrative courts, with the judiciary agreeing only with the limitation of access by way of redaction to protect investors' trade secrets.

At its most pessimistic, then, Section 3 demonstrates that use of domestic FOI laws requires expert knowledge of the target State's political environment, court procedures and legal system. The Polish experience suggests that FOI claims can be expensive, difficult, complicated and slow.

Despite all this, other recent developments are promising. As Section 3 has shown, the use of domestic access to information laws can, in the right circumstances, be a useful tool in gaining access to long-hidden investment treaty awards, relying on issues of strong public importance. Release of the *Servier v Poland* award may therefore be the first step in a change of attitude amongst Polish authorities on the larger question of transparency in investment treaty arbitration. Such a shift would be entirely in line

¹⁴⁰ GC34, para 7.

¹⁴¹ To avoid such behaviour, the FOI Act even provides for criminal liability. Article 23, the FOI Act: reads as follows: 'Whoever, contrary to the obligation weighing on him, shall not make the public information available, is subject to fine, penalty of restricted liberty or penalty of deprivation of liberty for up to one year.' However, the authors are not aware of any criminal procedure, not mentioning any judgment, based on this provision.

with Poland's (and other countries) human rights obligations outlined in Section 2, and with developments at the United Nations outlined in Section 1. In fact, with respect to some awards, the Polish executive has indeed acted more transparently, for instance by voluntarily publishing the award in *David Minnotte and Robert Lewis v Poland*, and by granting access to other awards upon request under the FOI Act without need for resort to the administrative courts. Thus, efforts under the domestic FOI laws aimed at publishing arbitral awards rendered in arbitral proceedings based on investment treaties have the potential to drive a desirable shift of States' authorities towards transparency in the field.

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