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THE CHALLENGE TO ARBITRAL AWARD ON JURISDICTION DIFFERENT SEAT, DIFFERENT STORY

by Kriti Srivastava

I. INTRODUCTION

An arbitral tribunal's jurisdiction can be said to be central to the entire arbitration proceedings. Without proper jurisdiction, the pieces of the proceedings would fall like dominoes. Therefore, the question of whether the arbitral tribunal has jurisdiction to hear the parties becomes pivotal. While a party can object to jurisdiction before the arbitral tribunal itself, such an objection can be dismissed by way of a partial or final arbitral award on merits ("Jurisdiction Award").[1] The unsatisfied party thereafter also gets a second bite at the cherry before the national court of the seat of arbitration.[2] However, this second bite is subject to the timing of the arbitral tribunal's ruling on its jurisdiction, *i.e.*, either as a preliminary question during the arbitral proceedings or as an award on the merits.[3]

The purpose of this article is to consider the timing and efficiency of challenging the Jurisdiction Award during or after the arbitral proceedings, based on the seat chosen by the parties or determined in the arbitration. To critically analyze the question, this article will consider the provisions of (i) the Model Law on International Commercial Arbitration (1985) ("MAL"), (ii) Singapore's International Arbitration Act,[4] and (iii) the Indian Act to understand the different approaches taken by countries regarding the challenge of the Jurisdiction Award before its national court. Thereafter, based on a comparative analysis, this article will critically review the

[1] NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION (2015) 344 [hereinafter Redfern and Hunter].

[2] Leng Sun Chan & Ye Won Han, *Time Limits in Challenging a Tribunal's Jurisdiction*, 23(3) J. OF ARB. STUD. 81, 91 (2013) [hereinafter Chan, *Time Limits*].

[3] *See* UNCITRAL, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, U.N. Sales No. E.08.V.4 (2006), art. 16(3) [hereinafter MAL]; Indian Arbitration and Conciliation Act (1996), § 13(3) [hereinafter Indian Act].

[4] Singapore International Arbitration Act (1996) [hereinafter Singapore Act].

appropriate stage of the challenge to the Jurisdiction Award to ensure the efficiency of arbitral proceedings.

II. THE CHALLENGE BEFORE THE ARBITRAL TRIBUNAL

The question of jurisdiction is subject to the arbitral tribunal's decision, which, in most jurisdictions, must be raised no later than the submission of the statement of defense.[5] It is then for the arbitral tribunal to consider the objections either at a preliminary stage of the arbitration proceedings or decide with the final award on merits. Thereafter, the arbitral tribunal, by the principle of *kompetenz-kompetenz*,[6] may either pass a positive or a negative jurisdiction ruling.[7] To address the central issue regarding challenging the Jurisdictional Award before national courts, the present article will consider a limited scenario where the arbitral tribunal has passed a positive jurisdictional ruling[8] by way of an arbitral award[9] as contemplated under Article 16(3) of MAL.

Since nearly all arbitration laws provide for a challenge procedure to the Jurisdiction Award,[10] such a positive jurisdiction ruling is subject to supervision by the national court[11] of the seat of arbitration.[12] This is because the said court, in its decision on the validity of the Jurisdiction Award, shall have the final word.[13] In such a scenario, the arbitration law in force at the seat of the arbitration shall determine the timeline for challenging the Jurisdiction Award and the efficiency of such a challenge.

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[5] *See* MAL, art. 16(2); Indian Act, § 16(2); Hong Kong Arbitration Ordinance (2014), § 34(2) [hereinafter Hong Kong Act]; Australian Commercial Arbitration Act (2017), § 16(4) [hereinafter Australian Act].

[6] *See* generally, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1141 (2021).

[7] Antony Crockett and Daniel Mills, *A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings*, KLUWER ARB. BLOG, Nov. 8, 2016, https://arbitrationblog.kluwerarbitration.com/2016/11/08/a-tale-of-two-cities-an-analysis-of-divergent-approaches-to-negative-jurisdictional-rulings/.

[8] York Int'l Pte Ltd v. Voltas Ltd., [2022] SGHC 153.

[9] REDFERN AND HUNTER, *supra* note 1.

[10] JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 312 (2003).

[11] MAL, art. 16(3); Indian Act, section 16(6); German Arbitration Act (1998), § 1040(3).

[12] Chan, *supra* note 2.

[13] REDFERN AND HUNTER, *supra* note 1, at 342.

III. THE CHALLENGE TO THE JURISDICTIONAL DECISION

As per Article 16(3) of MAL, if the arbitral tribunal considers and rejects the jurisdictional challenge as a preliminary question, such a Jurisdiction Award shall be subject to further challenge before the national court of the seat of arbitration.[14] Such a challenge before the national court must be made within 30 days after receiving notice of the Jurisdiction Award rejecting the challenge. While the application to the national court is pending, the arbitral tribunal may continue the proceedings and render the final arbitral award. The decision of the court cannot be further appealed, preventing the parties from taking *a third bite at the cherry*.

Further, the drafters of MAL also considered a scenario where, if the party failed to raise a jurisdictional objection under Article 16(2) of MAL, it would be precluded from objecting at the stage of setting aside or enforcement proceedings of the final award.[15] However, evidently the same was not included in Article 16 of MAL.

While Gary Born believes that MAL's challenge procedure primarily prevents delays to the arbitral process,[16] Alan Redfern and Martin Hunter believe that MAL's challenge procedure is also bound to save parties' time and cost in preparing its case should the court deny the arbitral tribunal jurisdiction.[17] Notably, the possible impact of dilatory tactics[18] and the removal of the court's control in challenging the Jurisdiction Award[19] during the arbitral proceedings was discussed by the drafters of MAL.[20]

A. *Singaporean Approach Regarding The Jurisdiction Award*

Interestingly, while Singapore is a Model Law country (having adopted UNCITRAL Model Law, 1985 version[21]), it has derogated from Article 16(3) of MAL. The Singapore

[14] Chan, *supra* note 2.

[15] UNCITRAL, *Official Records of the General Assembly*, Fortieth Session, Supplement No. 17 (A/40/17), 1985, ¶ 122.

[16] GARY BORN, *supra* note 6, at §12.06[B][5].

[17] REDFERN AND HUNTER, *supra* note 1, at 343.

[18] UNCITRAL, *Official Records of the General Assembly*, Seventeenth Session (A/CN. 9/246), 1984, ¶ 51.

[19] *Id.*

[20] UNCITRAL, *supra* note 15.

[21] Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as

Act under Section 10 provides for an appellate mechanism before the national court to challenge the Jurisdiction Award.[22] In Singapore, a decision of the General Division of the High Court under Article 16(3) is not final, and a party can approach the appellate court to the High Court solely with permission.[23] Evidently, Singapore continues to incorporate the position of MAL that the arbitration must continue while the review is ongoing,[24] unless the High Court or the appellate court orders otherwise.[25] While Singapore has derogated from MAL by creating an appellate stage to challenge the Jurisdiction Award, Professor Gary F. Bell believes that no significant delays would ensue as Singapore courts are quite efficient.[26]

The appellate mechanism incorporated by Singapore was also a point of discussion with the drafters of MAL, which considered the possible '*abuse of any immediate right to appeal*'.[27] The main concerns revolved around allowing a party to drag the proceedings or create diversions from the main arbitral proceedings. However, one can presume that owing to Singapore's efficient court system, such an appellate mechanism does not result in delayed arbitral proceedings or abuse of the judicial process. Therefore, depending on the seat of the arbitration, such as Singapore, it is clear that the Jurisdiction Award may not simply attain finality by challenging it before the national court at first instance.

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adopted in 2006, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

[22] CLQ v. CLR, [2021] SGHC (I) 15 (wherein a jurisdiction award was challenged and rejected); *Singapore Court Rejects Award Challenge Based on Repudiation of Arbitration Agreement (Singapore International Commercial Court)*, Prac. L. Arb., Dec. 10, 2021, https://uk.practicallaw.thomsonreuters.com/w-033-7209?transitionType=Default&contextData=(sc.Default)&firstPage=true.

[23] Singapore Act, § 10(4).

[24] MAL, art. 16(3); Gary F. Bell, *Singapore: Singapore's Implementation of the Model Law: If at First You Don't Succeed …, in* THE UNCITRAL MODEL LAW AND ASIAN ARBITRATION LAWS: IMPLEMENTATION AND COMPARISONS 249 (Gary F. Bell ed.,2018).

[25] Andre Yeap et al., *Law and Practice: Singapore. International Arbitration* 2022, CHAMBERS AND PARTNERS, Aug. 16, 2022, https://practiceguides.chambers.com/practice-guides/comparison/434/3458/15035-15041-15044-15049-15055-15063-15067-15072-15076-15078-15082-15086-15090.

[26] Gary Bell, *supra* note 24.

[27] UNCITRAL, *Official Records of the General Assembly*, Eighteenth Session (A/CN. 9/264), 1985, ¶ 13.

B. *The Indian Approach Regarding The Jurisdiction Award*

Unlike Singapore, which simply adds further steps to the MAL approach under Article 16(3), India has very distinctly departed from Article 16(3) of MAL. The Indian legislature, by Sections 16(5) and 16(6) of the Indian Act, has avoided any *concurrent control*,[28] under which an arbitral tribunal's decision rejecting jurisdictional objections may be challenged immediately before the national court, before issuance of the final award on merits.[29] It is relevant to clarify that, unlike international practice,[30] any ruling on jurisdiction under Section 16 of the Indian Act is not treated as a *partial* or *interim award*[31] (the position of whether the point of limitation is to be treated as a jurisdictional issue under Section 16 is unclear as Supreme Court has passed contradictory judgments[32]). Such ruling is treated as an order by the arbitral tribunal,[33] which forms part of the final award on the merits, by Section 16(6).

Given the judicial interpretation of Section 16 of the Indian Act, it is clear that it was the Indian legislative policy to restrict judicial intervention at the pre-reference stage[34] and restrain the party from intentionally dragging the case.[35] Therefore, when a party is aggrieved from an arbitral tribunal's decision rejecting any challenge to its jurisdiction, it can only seek to set aside the final award for lack of jurisdiction under Section 34 of the Indian Act. By Section 16(6) of the Indian Act, the aggrieved party has no immediate course of action, unlike Singapore, and must await the final award on merits. However, the opposition to such an approach believes that in the event

[28] REDFERN AND HUNTER, *supra* note 1, at 343-344.

[29] Constantine Partasides and Manish Aggarwal, *Jurisdiction of the Arbitral Tribunal*, *in* ARBITRATION IN INDIA 99 (Dushyant Dave et al eds., 2021).

[30] REDFERN AND HUNTER, *supra* note 1, at 503; A.G.K. SARL v. A.M. Todd Co., et al., ICDR Case No. 50-181-T-00230-08, Partial Award on Jurisdiction (Apr. 30, 2009).

[31] Kapal R. Mehra v. Bhupendra M. Bheda, (1998) 4 Bom CR 872 at 6; Rajnigandha Co-operative Group Housing Society Ltd v. Chand Constr. Co., 2002(1) RAJ 212 (Del).

[32] Indian Farmers Fertilizer Coop. Ltd. v. Bhadra Prods., (2018) 2 SCC 534 at 30; Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. N. Coal Field Ltd., (2020) 2 SCC 455 at 7.13, 7.14.

[33] Kapal R. Mehra v. Bhupendra M. Bheda, (1998) 4 Bom CR 872 at 6.

[34] Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. N. Coal Field Ltd., (2020) 2 SCC 455 at 7.13.

[35] Partasides and Aggarwal, *supra* note 29.

the arbitration proceedings continue till the final award is rendered, it would cause an "unnecessary waste of time and costs if the court later sustained the challenge".[36]

IV. QUESTION ON EFFICIENCY

Considering the discussion above, most jurisdictions contain provisions for challenging an arbitral tribunal's jurisdiction in their arbitration laws. Avenues have been created under MAL and in arbitration laws of various countries to allow the aggrieved party to further challenge the Jurisdiction Award (partial or final award) passed by the arbitral tribunal. The question of the efficiency of such procedures would depend on when the issue of jurisdiction gets closure and attains finality.

Singapore and India can be considered examples at the extreme ends regarding their challenge to the Jurisdiction Award. Singapore provides the aggrieved party possibility of questioning the Jurisdiction Award before the General Division of the High Court and thereafter the appellate court, during which time the question of the finality of the Jurisdiction Award must wait. While the arbitration proceedings continue during such time, the finality of the Jurisdiction Award hangs in the balance, having the capability of abruptly ending the proceedings. The time spent and costs incurred till the appellate court arrives at a decision, regrettably against jurisdiction, will bear no fruits. Parties would have no other option but to rethink the resolution mechanism for their disputes from the inception.

Unfortunately for a claimant, the saga of questioning the jurisdiction can not only continue with the jurisdiction ruling during the proceedings (Jurisdiction Award) but could also continue with the final award on merits. While a party has an appeal mechanism to question jurisdiction under the Singapore Act, failure to avail such remedies shall not preclude the aggrieved party from bringing jurisdictional objections during enforcement[37] and even setting-aside proceedings[38] of the final award. Pertinently, the Singapore Court of Appeal, while allowing jurisdictional

[36] UNCITRAL, *Official Records of the General Assembly*, Fortieth Session, Supplement No. 17 (A/40/17), 1985, at ¶ 123.

[37] PT First Media TBK v. Astro Nusantara Int'l BV and others, [2013] SGCA 57.

[38] Rakna Arakshaka Lanka Ltd. v. Avant Garde Mar. Servs. (Priv.) Ltd., [2019] SGCA 33.

objections in enforcement and setting-aside proceedings, was dealing with a party that had boycotted the proceedings, *i.e.*, was a non-participating party.[39] For a claimant, an unchallenged Jurisdiction Award passed during the arbitral proceedings appears to give no solace despite successfully receiving the final award on merits. The issue of the finality of the Jurisdiction Award, therefore, could very well be extended till the end of the proceedings and even be dragged till the enforcement proceedings.

A similar precarious situation appears to be easily predicted with the provisions of the Indian Act. With parties having no immediate response to the ruling on jurisdiction, parties ought to wait for the entire arbitration proceedings to end, to challenge the final award on jurisdiction. The finality to the question of jurisdiction is only attainable upon the challenge to the final award. If the national court concludes that the arbitral tribunal did not have any jurisdiction and sets aside the final award, the parties are simply left with nothing but time and costs incurred, with no result to show. By the end of the arbitration proceedings, both parties would be aware of each other's entire case, evidence, and legal grounds, in an irreversible scenario. While the Indian legislature derogated from Article 16(3) of MAL to avoid any delay caused in arbitration proceedings pending challenge in the national court, empowering the arbitral tribunal to continue with the proceedings could restore a balance. However, since challenging the arbitral award on merits is the only way to attain finality on the issue of jurisdiction for parties with the seat as India, the reason for treating jurisdiction as a preliminary question seems to be losing its flair.

V. CONCLUSION

There appears to be a conundrum in deciding the question of efficiency between the above-mentioned two arbitration systems, more specifically, the simple question of when an arbitral award on jurisdiction would attain finality. The lack of finality for an arbitral award on jurisdiction simply appears to be a sword dangling on the claimant and the tribunal. On the one hand, Singapore has proceeded to have an additional review of the Jurisdiction Award by the appellate court, which is to be

[39] *Id.* at 54.

undertaken during the arbitral proceedings. On the other hand, India, focusing on avoiding any possible dilatory tactics, has removed any interference by the courts during the arbitration proceedings. While one may consider both approaches substantially different, the delayed finality of the Jurisdiction Award appears to be a common ground.

The author believes that since the arbitral tribunal's jurisdiction is the substratum of arbitration, the challenge to the Jurisdiction Award must be resolved at the earliest, thereby attaining finality and binding on parties. The middle ground chosen by MAL under Article 16 successfully addresses the four main concerns: dilatory tactics, court interference, and wastage of time and money. While MAL attempts to create a situation of a *final interim award*,[40] countries that have added certain nuances to their arbitration laws appear to have subtly tilted the playing field towards the party objecting to the arbitral tribunal's jurisdiction.

KRITI SRIVASTAVA is an India-qualified dispute resolution lawyer with over four years of experience handling commercial arbitrations and complex litigations at India's top dispute firms, Cyril Amarchand Mangaldas and Bharucha & Partners, Mumbai. She has gained experience from numerous arbitration proceedings involving telecommunication infrastructure, enforcement of a foreign award, licensing of a movie etc. Having been admitted to the Bar in 2018, her experience also extends to appearances before various forums, including the Bombay High Court, Telangana High Court, Tribunals etc. She has also co-authored several publications on crucial topics in arbitration, white-collar crimes, and litigation. Currently, Kriti is pursuing an LL.M. in International Commercial Arbitration Law at Stockholm University, Sweden, cementing her interest in arbitration.

[40] Emirates Trading Agency LLC v. Sociedade de Fomento Indus. Priv. Ltd., [2015] EWHC (Comm) 1452 at 22.

DIVERGENT FAIR AND EQUITABLE TREATMENT STANDARDS UNDER NAFTA AND THE USMCA

by Serhat Eskiyoruk & Ezgi Ceren Cubuk

I. INTRODUCTION

The United States-Mexico-Canada Agreement ("USMCA") entered into force on July 1, 2020,[1] and replaced the North American Free Trade Agreement ("NAFTA").[2] The USMCA's investment protection provisions for foreign investors diverge from NAFTA in certain respects. Notably, investors are subject to some restrictions in bringing investor-state dispute settlement ("ISDS") claims under the USMCA because Canada has not consented to the ISDS mechanism. Further, before initiating arbitration, investors under the USMCA are obligated to pursue legal action against the host state's measures before the local courts and obtain a final judgment or demonstrate that they could not after 30 months of local proceedings.[3]

Notwithstanding these changes to ISDS, the USMCA has a legacy claims provision to protect investors who acquired rights before NAFTA expired.[4] The legacy claims provision has a three-year sunset clause, which expires July 1, 2023.[5] However, a foreign investor wishing to take advantage of the legacy claims provision must send a notice of intent to arbitrate at least 90 days before the claim is submitted.[6] Thus, the date for filing legacy disputes has expired on April 1, 2023.

There are also numerous issues concerning the availability of certain standards of protection and their scope under the USMCA. While the USMCA provides consent to ISDS for the direct expropriation based on the breach of the minimum standards of

[1] Agreement between the United States of America, the United Mexican States, and Canada, Nov. 18, 2018, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Invest ment.pdf (entered into force July 1, 2020) [hereinafter USMCA].

[2] North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

[3] USMCA, *supra* note 1, Annex 14-D, art. 14.D.5.

[4] *Id.* Annex 14-C.

[5] *Id.* Annex 14-C(3).

[6] *See id.* Annex 14-C(2)-(3); NAFTA, *supra* note 2, art. 1119.

treatment, investors cannot initiate an arbitration for the indirect expropriation relying on this protection. Further, the agreement does not provide the fair and equitable treatment standard explicitly, which is one of the most important protections in investment treaties. On the other hand, foreign investors who have entered into a covered government contract with the host state have the right to initiate arbitration proceedings for violations of all the substantive protections available under the USMCA.[7]

In this respect, this article will explain FET briefly and address certain influential cases to explore the importance of this clause for investment disputes. It will also distinguish between how FET is treated under investment treaties compared to broader international law. Thereafter, it will assess the differences between NAFTA and the USMCA, evaluated in light of the ISDS mechanism.

II. FET STANDARD

FET for foreign investors is commonly required in bilateral, regional, and multilateral treaties, and its breach is the most invoked protection in investor-state arbitration.[8] This standard provides a widespread coverage of investment protection without having to rely on any other standard of protection. For instance, the FET standard can provide a basis for redress where there is insufficient basis to find that an expropriation has occurred.[9] As FET does not have a precise definition, which is often drafted in vague terms,[10] it is critical to interpret the specific language of the FET provision at issue. The Vienna Convention on the Law of Treaties ("VCLT")[11] is an essential tool of interpretation. VCLT Article 31(1) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[12] In

[7] USMCA Annex 14-D, art. 14.D.3.

[8] Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 10 (2014).

[9] PSEG Global Inc. v. Turkey, ICSID Case No. ARB/02/5, Award, ¶ 238-39 (Jan. 19, 2007).

[10] *See*, *e.g.*, German Model BIT art. 2(1), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2865/download.

[11] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

[12] *Id.* art. 31(1).

addition, FET's meaning is often determined by state practice, decisions of international tribunals, and, more importantly, the circumstances of the case.[13]

While FET may stand alone in an agreement, this protection can also be incorporated by application of other standards of treatment, such as MFN and national treatment. Although arbitration awards do not establish binding precedent, investment case law guides the standards of protection under FET, which may include legitimate expectations, non-discrimination, fair procedure, transparency, proportionality, and sustainable development.[14]

Tribunals often consider certain "concrete principles" when evaluating whether states have breached their FET obligations: (i) "the State must act transparently"; (ii) "the State is obliged to act in good faith"; (iii) "the State's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory or lacking in due process"; and (iv) "the State must respect procedural propriety and due process."[15]

A. *Legitimate Expectations*

A significant element of the FET standard is the protection of the investor's legitimate expectations, which requires a certain level of stability and consistency in the legal framework of the host state. To determine the investor's legitimate expectations, tribunals consider three factors cumulatively: (i) whether there was a specific representation by the state, (ii) whether the investor relied on the representation, and (iii) whether the investor's reliance was reasonable.[16]

While some tribunals determine the legitimate expectations using these three factors, others may consider only whether there is a reasonable basis for the investor's expectations. Under this approach, tribunals focus on the stability of the state's legal and business framework while analyzing the breach of FET claims.[17] The investor's concern is the protection provided by the fundamental legal stability of the

[13] *See* IOANA TUDOR, THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 77, 120, 155 (2008).

[14] Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award, ¶ 583 (July 29, 2008).

[15] *Id.* ¶ 609.

[16] Allard v. Barbados, PCA Case No. 2012-06, Award, ¶ 194 (July 27, 2016).

[17] CMS Gas Transmission Co. v. Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005).

host state when the investor wants to make long-term investments in the host state. For instance, in *Eiser Infrastructure Ltd. v. Spain*,[18] the tribunal was concerned about changes in the State's legislative framework for renewable energy. The tribunal held that there was a breach of the FET standard contained in Article 10(1) of the Energy Charter Treaty[19] and explained:

> Fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. [T]he legitimate expectations of any investor [. . .] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.[20]

The tribunal also considered whether drastic changes to the host state's legislative regime frustrated the legitimate expectations of investors.[21] In addition, another tribunal held that a change to the regulatory framework is not in itself a violation. "What is prohibited however is for a State to act unfairly, unreasonably, or inequitably in the exercise of its legislative power."[22]

On the other hand, legitimate expectations should also be considered together with the investor's due diligence undertaken prior to making an investment. An investor will have a right of protection of its legitimate expectations provided that it exercised due diligence, and its legitimate expectations were reasonable in light of the circumstances.[23] In other words, investors are expected to conduct proper due diligence before investing in a host state. This includes undertaking reasonable efforts to collect information about the rules and regulations governing their proposed investments.

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

[19] Energy Charter Treaty, Dec. 17, 1994, 2080 U.N.T.S. 100, 34 I.L.M. 360.

[20] *Eiser* ¶ 382 (internal quotations omitted and edits in original).

[21] *Id.* ¶ 348.

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

[23] *Id.* ¶ 333.

B. *Non-Discrimination*

FET also includes protection against discrimination based on the nationality of the foreign investor. This protection is a well-established element in arbitral proceedings. Tribunals may also consider allegations of discrimination based on harassment, coercion, or arbitrariness against the foreign investor.[24] For example, in *Saluka Investments BV v. Czech Republic*,[25] the tribunal evaluated non-discrimination under the FET standard by considering the reasonableness of a public policy. In that case, the claimant asserted a violation of FET, claiming that the government granted massive financial assistance to its competitors.[26] The tribunal held that because state-owned banks benefited from governmental assistance, whereas the privatized bank was exempted, such conduct manifestly violated the requirements of consistency, transparency, even-handedness, and non-discrimination.[27] The tribunal explained,

> [i]n particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.[28]

C. *Fair Procedure*

Due process is a fundamental requirement for the rule of law and referred in main international and constitutional instruments. The Fifth and Fourteenth Amendments of the U.S. Constitution require procedural propriety and due process. European Court of Justice jurisprudence indicates that this principle applies to, *inter alia*, the duration of the process.[29] In one case, an arbitral tribunal held that an extraordinarily long trial constituted a denial of justice and, thus, a breach of FET.[30] Accordingly, the

[24] *See* Tudor, *supra* note 13, at 155, 180-81.

[25] Saluka Investments BV v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006).

[26] *Id.*

[27] *Id.* ¶ 307.

[28] *Id.*

[29] König v. Germany, App. No. 6232/73, ¶ 105 (Eur. Ct. H.R. June 28, 1978).

[30] Casado v. Chile, ICSID Case No. ARB/98/2, Award, ¶ 653 (Apr. 22, 2008).

FET standard requires states to afford foreign investors procedural propriety and due process, just as they would their nationals.

D. *Transparency*

Foreign investors also may allege a breach of the FET standard by relying on the transparency of the host state's action. The host state's legal procedures should be apparent, unambiguous, and readily accessible to the investor. For example, in *Maffezini v. Spain*,[31] funds from the investor's loan had been transferred by a government institution without the investor's consent. The tribunal held that the lack of transparency with respect to this loan transaction was incompatible with Spain's commitment to ensure the investor FET under the BIT.[32]

E. *Proportionality*

Proportionality and reasonableness are other crucial factors in determining a violation of FET. Proportionality is evaluated by comparing the effects and the goal of the state measure.[33] An ICSID tribunal evaluated the proportionality of a state's acts according to the following factors:[34]

> Where the administration wishes to impose a severe penalty, then it appears to the Tribunal that the State must be able to demonstrate (i) that sufficiently serious harm was caused by the offender; and/or (ii) that there had been a flagrant or persistent breach of the relevant contract/law, sufficient to warrant the sanction imposed; and/or (iii) that for reasons of deterrence and good governance it is appropriate that a significant penalty be imposed, even though the harm suffered in the particular instance may not have been serious.

Ultimately, there should be rationale and a balance between the state's regulatory authority and investors' rights. Besides, states must act in good faith and reasonably while using their autonomy to provide FET to foreign investors.

III. FET AS A MINIMUM STANDARD OF TREATMENT UNDER NAFTA

In general, customary international law imposes a minimum standard of treatment for foreign investors in the host state's territory. A breach of the

[31] Maffezini v. Spain, ICSID Case No. ARB/97/7, Award (Nov. 13, 2000).

[32] *Id.* ¶ 83.

[33] Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003).

[34] Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 416 (Oct. 5, 2012).

international minimum standard of treatment may not only occur by bad faith but also by unfair and inequitable conduct. With respect to distinguishing the FET standard, the main issue is whether the concept of fair and equitable treatment under FET might be limited to the international minimum standard of customary international law or whether it might be constructed independently as a self-contained treaty standard. FET might be regarded as equivalent to the minimum standard of treatment by including customary international law provisions in the agreement.

Regarding the scope of the FET standard, tribunals often take a broader approach than under the international minimum standard.[35] Tribunals have highlighted the importance of having specific rather than abstract expectations with specific evidentiary support for the alleged expectation.[36]

In light of customary international law, some agreements, such as NAFTA, include the FET provision as a minimum standard without adding any additional requirements. For example, Article 1105(1) of NAFTA ("Minimum Standard of Treatment") requires that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[37] Thereby, Article 1105 of NAFTA links the FET standard to international law and requires the host state to treat covered investments no less favorably than that required by (customary) international law.

Article 1131(2) of NAFTA states that the NAFTA Free Trade Commission ("FTC") may issue interpretations of NAFTA, which are binding on arbitral tribunals. Due to the potential of different interpretations of this provision by arbitral tribunals, the FTC issued an interpretation stating that Article 1105(1) prescribes the customary

[35] *See*, *e.g.*, Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Award (July 14, 2006); Genin v. Estonia, ICSID Case No. ARB/99/2, Award (Jan. 1, 2006); Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[36] *See*, *e.g.*, Minnotte v. Poland, ICSID Case No. ARB (AF)/10/1, Award, ¶¶ 194-96 (May 16, 2014).

[37] NAFTA, *supra* note 2, art. 1105.

international law minimum standard of treatment as the minimum standard of treatment required to be afforded to investments of foreign investors.[38]

The FTC's interpretation of the FET standard has been adopted by tribunals as a principle limited to Article 1105(1). In *Resolute Forest Products Inc. v. Canada*,[39] the tribunal applied the FTC's interpretation and held that the FET standard is restricted to the minimum standard of treatment under Article 1105 as required by customary international law.[40] On the other hand, the *Metalclad Corp. v. Mexico*[41] tribunal did not restrict itself to the FTC's interpretation and incorporated the obligation of transparency into the concept of FET and other sources of international law.[42]

IV. THE USMCA

The USMCA tends to track the structure of NAFTA by having a separate chapter devoted to investment protections. Chapter 14 of the USMCA also includes two interpretational annexes: the first on the meaning of "customary international law" (Annex 14-A) and the second on "expropriation" (Annex 14-B). However, there are notable differences between the USMCA and NAFTA. Unlike in NAFTA, Canada is not a party to the USMCA's ISDS section (Annex-14D). As such, investor-state arbitration under the USMCA is limited to potential claims against the United States and Mexico.

Moreover, Article 14.6(1) of the USMCA ("Minimum Standard of Treatment") states that "[e]ach Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security."[43] Accordingly, FET is regarded as an international minimum standard under the USMCA.

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[38] Organization for Economic Cooperation and Development, *Fair and Equitable Treatment Standard in International Investment Law* at 10-11 (2004), *available at* http://dx.doi.org/10.1787/675702255435; NAFTA FTC, North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions (July 31, 2001), *available at* http://www.sice.oas.org/tpd/nafta/commission/ch11understanding_e.asp.

[39] Resolute Forest Products Inc. v. Canada, PCA Case No. 2016-13, Award (July 25, 2022).

[40] *Id.* ¶ 736.

[41] Metalclad Corp. v. Mexico, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2000).

[42] *Id.* ¶ 70.

[43] USMCA, *supra* note 1, art. 14.6(1).

The USMCA's investment protection provisions can be categorized as follows: legacy investments, standard protections for non-privileged investors, dispute resolution procedures, and investment disputes protections related to covered government contracts.

A. *Legacy Investments*

The rights and claims derived while NAFTA was in force can be raised as "Legacy Investments"[44] under Annex 14-C of the USMCA. Annex 14-C provides that legacy investment claims and pending claims can be brought in accordance with Chapter 11, Section B of NAFTA.[45] By way of the legacy claim protection, investors from Mexico, the United States, and Canada may commence arbitration proceedings under NAFTA.

NAFTA's investor-state dispute resolution mechanism remains in place for legacy investments for three years following NAFTA's termination. The USMCA provides this three-year sunset period for investors with legacy investments made between January 1, 1994, and June 30, 2020. Investors have until July 1, 2023, to assert these claims under NAFTA, assuming they have complied with the six-month waiting period and the 90-day notice of intent period on or before July 1, 2023.[46] In other words, in accordance with NAFTA Chapter 11, legacy investment claims still must be brought after the six-month cooling-off period and 90-day notice of intent to arbitrate before commencing arbitration.

B. *Standard Protection for Non-Privileged Investors*

The requirements for bringing a claim against Mexico or the United States are addressed under Annex 14-D. Like with NAFTA, the USMCA requires affording investors the minimum standard of treatment, including FET and FPS.[47] Comparing

[44] *Id.* Annex 14-C(6)(a) ("'legacy investment' means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of NAFTA 1994, and in existence on the date of entry into force of this Agreement").

[45] *Id.* Annex 14-C(1).

[46] *Id.* Annex 14-C(3) ("A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.").

[47] *Id.* art. 14.6 ("Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond

the wording of both agreements, the USMCA refers to the term "customary international law" instead of just "international law," as was used in NAFTA.

However, Article 14.D.3 states that a non-privileged investor may only submit a claim to arbitration on the basis of (i) Article 14.4 (National Treatment) or Article 14.5 (Most-Favored Nation Treatment), except with respect to the establishment or acquisition of an investment; or (ii) Article 14.8 (Expropriation and Compensation), except with respect to indirect expropriation. In other words, the most common ground for investment claims, FET, is not granted to non-privileged investors under USMCA Article 14-D.

As stated above, the NAFTA FTC interpreted the FET standard as narrowly as possible by limiting the standard to the minimum standard of treatment under customary international law. Nevertheless, even if NAFTA Article 1131(2) references the binding nature of FTC interpretations,[48] a few tribunals have questioned whether the FTC note was a legitimate amendment or interpretation. For example, the *Pope & Talbot Inc. v. Canada*[49] tribunal discussed this issue under four factors: (1) whether the interpretation put forward by the FTC was a valid exercise of the FTC's power of interpretation and so binding on the Tribunal; (2) if so, what effect did the interpretation have in relation to awards already made by a tribunal (the retroactivity issue); (3) the construction and application of the interpretation; and (4) the nature and content of customary international law in the context of Article 1105 and its application to the facts of the case at issue.[50] The tribunal broadly concluded that the FTC's interpretation was not binding and was invalid. As previously noted, prior arbitral awards are not binding precedent but may be taken into account by tribunals

that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.").

[48] NAFTA, *supra* note 2, art. 1131(2) ("An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.").

[49] Pope & Talbot Inc. v. Canada, UNCITRAL, Award in Respect of Damages (May 31, 2002).

[50] *Id.* ¶ 16.

in subsequent cases.[51] Such a potential broad review might be grounds for negotiators to expressly clarify and limit the standard of treatment to the so-called international minimum standard in the agreement.

The USMCA clarifies in Annex 14-A that "[t]he Parties confirm their shared understanding that 'customary international law' generally and as specifically referenced in Article 14.6 (Minimum Standard of Treatment)."[52] Article 14.6 explicitly states that FET is part of customary international law. Therefore, all subprinciples of the FET standard, namely the protection of legitimate expectations, non-discrimination, due process, transparency, and proportionality, are within the principles of international law. For example, a tribunal interpreted minimum fair and equitable treatment under the U.S.-Ecuador BIT, which provides in Article II (3) (a): "investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security, and shall in no case be accorded less favorable than that required by international law."[53]

It is important to discuss whether FET is a binding legal obligation under customary international law. The USMCA, like NAFTA, accepts FET as a part of customary international law under Chapter 14. Annex 14-A incorporates the obligations of customary international law into the USMCA without any need of a specific provision, thereby requiring the host states to comply with customary law in its treatment of covered investments. In *S.D. Myers, Inc. v. Canada*,[54] an UNCITRAL tribunal highlighted that NAFTA's heading of "Minimum Standard of Treatment" imports the requirements of international law.[55]

In *Técnicas Medioambientales Tecmed, S.A. v. Mexico*,[56] the scope of fair and

[51] RosInvestCo UK Ltd. v. Russia, SCC Case No. V079/2005, Decision on Jurisdiction, ¶ 49 (Oct. 1, 2007); *see generally* Christoph Schreuer & Matthew Weiniger, *A Doctrine of Precedent?*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski, Frederico Ortino, & Christoph Schreuer eds., 2008).

[52] USMCA, *supra* note 1, Annex 14-A.

[53] *See*, *e.g.*, Occidental Exploration & Production Co. v. Ecuador, LCIA Case No. UN 3467, Final Award, ¶ 180 (July 1, 2004).

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

[55] *Id.* ¶¶ 259-63.

[56] Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award (May 29,

equitable treatment was also taken "from international law and the good faith principle."[57] In a London Court of International Arbitration case, the tribunal interpreted FET under the treaty at issue and concluded that investments shall at all times be accorded FET according to the treaty, which stated that investments "shall in no case be accorded treatment less favorable than that required by international law."[58] The critical question that arises is whether a violation of an obligation under a treaty could be within a tribunal's jurisdiction, even though the obligation is not specified as a ground for a claim under the treaty.

Customary international law is an evolving standard. In *ADF Group Inc. v. United States*,[59] the tribunal held that both customary international law and the minimum standard of treatment are constantly in the process of development.[60] Some commentators, such as Ioana Tudor, argue that FET should be viewed as a "standard."[61] Others treat it as an embodiment of the rule of law.[62] Another question that may arise is whether all sub-principles of the FET standard, namely the protection of legitimate expectations, non-discrimination, due process, transparency, and proportionality, might be considered within the principles of international law.

In *Rumeli Telekom S.A. v. Kazakhstan*,[63] the BIT at issue did not impose a FET obligation on the host state; nevertheless, the tribunal concluded that Kazakhstan violated the FET standard.[64] The tribunal indirectly applied another provision of the

2003).

[57] *Id.* ¶ 155.

[58] *Occidental* ¶¶ 180-92.

[59] ADF Grp. Inc. v. United States, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003).

[60] *Id.* ¶ 179.

[61] Tudor, *supra* note 13, at 155.

[62] Stephen Schill, *Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law*, Institute for International Law and Justice Working Paper 2006/6, *available at* https://iilj.org/wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf.

[63] Rumeli Telekom A.S. v. Kazakhstan, ICSID Case No. ARB/05/16, Award (July 29, 2008).

[64] *Id.* ¶ 618.

1995 U.K.-Kazakhstan BIT by means of the most-favored-nation clause, which referred to the FET obligation.[65]

C. *Dispute Resolution Procedure under Annex 14-D of the USMCA*

The USMCA provides for a dispute resolution procedure where the parties should initially seek to resolve the dispute through consultation and negotiation.[66] The parties may refer the dispute to a non-binding, third-party dispute settlement procedure, such as good offices, conciliation, or mediation.[67] The claimant shall deliver to the respondent a written notice of its intention to submit a claim to arbitration (notice of intent) at least 90 days before submitting any claim to arbitration as a cooling-off period.[68]

In addition, Article 5 of Annex 14-D requires claimants to initiate and maintain domestic litigation proceedings for thirty months (or to a final decision) before initiating arbitration, with a limited exception if domestic recourse would be obviously futile.[69]

Appendix 3 to Annex 14-D further provides for the submission of a claim to arbitration by establishing a "fork in the road" provision and states that a U.S. investor may not submit an arbitration claim against Mexico if such claim for a breach of USMCA obligations has been submitted before a court or administrative tribunal of Mexico.[70]

D. *Investment Disputes Related to Covered Government Contracts*

Annex 14-E of the USMCA provides protection for investors covered by government contracts. According to Annex 14-E, Mexico and the United States agreed to continue investment arbitration with respect to certain disputes. The

[65] *Id.* ¶ 575; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 153 (Aug. 27, 2009).

[66] USMCA, *supra* note 1, Annex 14-D.2.

[67] *Id.*

[68] *Id.* Annex 14-D.3(2).

[69] Daniel Garcia-Barragan et al., *The New NAFTA: Scaled-Back Arbitration in the* USMCA, 36 J. INT'L ARB. 739, 743 (2019).

[70] *Id.*

claimant must be a party to a government contract defined as "a written agreement between a national authority of an Annex Party and a covered investment or investor of the other Annex Party, on which the covered investment or investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor in a covered sector."[71]

Moreover, Annex 14-E provides protections for investors that are covered by a government contract or engaged in activities in the same covered sector in the territory as an enterprise of the respondent that the claimant owns or controls directly or indirectly, which is a party to a covered government contract. The USMCA defines a "covered sector" as:

> (i) activities with respect to oil and natural gas that a national authority of an Annex Party controls, such as exploration, extraction, refining, transportation, distribution, or sale,
> (ii) the supply of power generation services to the public on behalf of an Annex Party,
> (iii) the supply of telecommunications services to the public on behalf of an Annex Party,
> (iv) the supply of transportation services to the public on behalf of an Annex Party, or
> (v) the ownership or management of roads, railways, bridges, or canals that are not for the exclusive or predominant use and benefit of the government of an Annex Party.[72]

Under this Annex, a claimant can bring a dispute related to a government contract when a respondent breaches any obligation under Chapter 14 and that claimant has incurred loss or damage by reason of or arising out of that breach. In addition, no claim shall be submitted to arbitration under this provision if less than six months have elapsed from the events giving rise to the claim; and more than three years have elapsed from the date on which the claimant first acquired, or should have acquired, knowledge of the breach alleged under this provision and knowledge that the claimant has incurred loss or damage.[73]

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[71] USMCA, *supra* note 1, Annex 14-E(6)(a). In addition to investors with covered government contracts, this Annex also provides protections for investors "engaged in activities in the same covered sector in the territory as an enterprise of the respondent that the claimant owns or controls directly or indirectly, which is a party to a covered government contract." *Id.* Annex 14-E(2)(a)(i)(A)(2).

[72] *Id.* Annex 14-E(6)(b).

[73] *Id.* Annex 14-E(4).

For investment disputes between Mexico and the United States related to a covered government contract, investors can bring claims regarding violation of the minimum standard of treatment. However, Article 14.6(4) states that "the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result."[74] The Article does not involve fair and equitable treatment on its face.

On the other hand, those investors with covered government contracts are not subject to limitations like the other investors under the USMCA. For example, investors with covered government contracts do not need to exhaust domestic remedies to commence an arbitration proceeding; but these investors are still subject to notice requirements and a cooling-off period. They can also bring claims regarding indirect expropriation and violation of the minimum standard of treatment.

V. CONCLUSION

International investment treaties play a critical role in international relations and the global economy. The USMCA is a substantial instrument in North America in this regard after replacing NAFTA. However, it might be possible to witness a legacy claim that arose under NAFTA before the sunset clause expires, if a notice of intent to arbitrate under NAFTA has been sent by April 1, 2023, namely three years after its termination for United States, Mexican, and Canadian investors. This is important given the critical differences between the USMC and NAFTA. With respect to ISDS, notably, Canada has not consented to the ISDS mechanism under the USMCA and there are several limitations on investors from Mexico and the United States to use arbitration or to initially submit disputes to local courts.

Further, any claim asserting FET will likely not be smooth under the USMCA. The tribunal would likely consider whether the contract is a covered government contract and whether the investment sectors are related to oil, natural gas, or some public services. On the other hand, customary international law is an evolving standard, and some tribunals may still allow the discussion of whether FET is a binding legal

[74] *Id.* art. 14.6(4).

obligation under customary international law and whether it can be the basis for a claim even if it is not expressly provided for. The USMCA and its limitations regarding ISDS might be a model form for other international agreements in the near future, like the previous United States-involved agreements.

DR. SERHAT ESKIYORUK is a Lecturer at ATU and a Research Fellow at the Ministry of Energy and Natural Resources. Dr. Eskiyörük did his Master and Ph.D (London) on international dispute resolution. He has acted as an Arbitrator, Counsel, and Legal Expert in ICSID, ISTAC, LCIA, ICC, TOBB, and ICA arbitrations. Dr. Eskiyörük was a Founding President of the Union of Turkish Bars Arbitration Center, Legislation Commissioner of the Istanbul Arbitration Center Act, and Delegate of ICSID Arbitration Rules Reform. He is also a member of the Working Group of the ICC National Committee (Turkey) on Arbitration.

EZGI CEREN CUBUK is an experienced arbitration attorney with more than six years of practice before various tribunals. She represented the Republic of Turkey in international arbitration cases. After gaining broad experience, she completed her Master's in Law at the University of Miami as she continues to work in the field of arbitration. She represents Energy Disputes Arbitration Center in the US, and she currently works at Foodman Firm P.A., in Miami, Florida.

REMEDY OF SECOND LAST RESORT? REMANDING THE AWARD TO THE ARBITRAL TRIBUNAL

by Jeet Shroff & Abhik Chakraborty

I. INTRODUCTION

A recent US Court of Appeals decision in *Smarter Tools Inc. v. Chongqing* SENCI *Import & Export Trade Co., Ltd.*[1] has recast the spotlight on the *functus officio* doctrine, which holds that an arbitrator loses the competence to reconsider questions submitted for arbitration once an award is issued[2] because it is necessary to prevent "re-examination of an issue by a nonjudicial officer potentially subject to outside communication and unilateral influence."[3] The issue of what remedy parties have for arbitral awards that are or could be successfully set aside on non-substantive grounds is critical from the point of view of efficiency and litigation costs. The issue has divided scholars: one view is that the only remedy available to parties is to have the award vacated;[4] another view is that the doctrine is outmoded and needs to be junked outright.[5] However, caselaw from the United States and India points toward an alternative to this all or nothing approach. In several cases now, American and Indian courts have employed innovative legal reasoning to bring the dispute to a close without requiring parties to go through arbitration all over again. We examine some of these cases and distill the principles that could form the basis for consistent application.

II. THE US POSITION ON REMISSION OF AN AWARD

In late January 2023, in *Smarter Tools Inc. v. Chongqing SENSI Import & Export Trade Co., Ltd.*, the US Court of Appeals for the Second Circuit ("Second Circuit") upheld a district court ruling that remanded an ICDR arbitration award to the

[1]Smarter Tools Inc. v. Chongqing SENCI Imp. & Exp. Trade Co., Ltd., 57 F.4th 372 (2d Cir. 2023).

[2] *See, e.g.*, T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 342 (2d Cir. 2010).

[3] *See, e.g.*, LLT Int'l, Inc. v. MCI Telecomms. Corp., 69 F. Supp. 2d 510, 515 (S.D.N.Y. 1999)

[4] *See* Thomas Webster, *Functus Officio and Remand in International Arbitration*, 27 ASA BULL. 441, 442–443 (2009).

[5] *See* Hans Smit, *Another Judicial Misstep in Correcting an Arbitral*, 12 AM. REV. INT'L ARB. 435 (2001).

arbitrator notwithstanding the *functus officio* doctrine.[6] Despite finding that the arbitrator had failed to issue a reasoned award (as he was required to do under contract), the district court did not vacate the award. Instead, it remanded the award to the arbitrator for a clarification of his findings. The reasoned award subsequently issued by the arbitrator was then confirmed.[7]

Overruling arguments that the arbitrator had become *functus officio*, the Second Circuit noted that US Circuit Courts of Appeal have recognized several exceptions to the *functus officio* doctrine such as ambiguity,[8] indefiniteness,[9] failure to address a later arising contingency,[10] clarification[11] and to assist the reviewing court to determine if the arbitrator had manifestly disregarded the law.[12] In this case, the Second Circuit noted that the original award lacked reasoning and the remand was thus justified as it sought only a clarification (and not a substantive modification of the award). According to the Second Circuit, it simply made "no sense to redo an entire arbitration" in such circumstances. The Second Circuit thus held that, given the presumption in favor of enforcing an award, the arbitrator's failure to render a reasoned award did not fall under the narrow reading of Section 10(a)(4) of the Federal Arbitration Act[13] ("FAA") and did not require that the original award be vacated. Instead, a failure to issue a reasoned award, made the award "imperfect in matter of form not affecting the merits of the controversy"[14] bringing it within the purview of Section 11 of the FAA, which justified a remand of the award.

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[6] *Smarter Tools*, 57 F.4th at 383.

[7] *Id.*

[8] *See*, *e.g.*, N.Y. Bus Tours, Inc. v. Kheel, 864 F.2d 9, 12 (2d Cir. 1988).

[9] *See*, *e.g.*, Ams. Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985).

[10] *See*, *e.g.*, *Gen. Re Life*, 909 F.3d at 548.

[11] *See*, *e.g.*, Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985); Hardy v. Walsh Manning Sec., L.L.C., 341 F.3d 126, 134 (2d Cir. 2003).

[12] *Smarter Tools*, 57 F.4th at 379–380.

[13] Section 10 of the Federal Arbitration Act lists grounds for vacating an award, whereas section 11 names those for modifying or correcting one.

[14] *See* 9 U.S.C. § 11(c).

III. THE INDIAN POSITION ON REMISSION OF AN AWARD

Indian courts have taken a similar approach. Under Section 34(4) of the Indian Arbitration Act, 1996 ("Arbitration Act") when deciding an application for setting aside or vacating an award, Indian courts can remand the award to the tribunal to take measures to "eliminate the grounds for setting aside the arbitral award." We will refer to this as the Section 34(4) Exception.[15]

Whether the Section 34(4) Exception allows courts to remit an award for lack of adequate reasoning is a question that recently came up before the Indian Supreme Court in *Dyna Technologies v. Crompton Greaves Ltd.*[16] In *Dyna*, an award was vacated by the Madras High Court on the merits on the basis that the award was not within the terms of the contract. The High Court also held that the award lacked proper reasoning. On appeal, the Supreme Court reversed the High Court's decision on the basis that "courts should not interfere with an award merely because an alternative view on facts and interpretation of contract exists."[17] The Supreme Court further held that the High Court should not have ignored the Section 34(4) Exception since the primary grievance of the award debtor was that the award had gaps in reasoning.[18] The Supreme Court ruled that the Section 34(4) Exception must be applied where an award "does not provide any reasoning or if the award has some gap in the reasoning or otherwise and that can be cured so as to avoid a challenge based on the aforesaid curable defects under Section 34," whereas a vacation of the award under Section 34 can only take place "when there is complete perversity in the reasoning."[19]

The Supreme Court accordingly identified three categories of awards for the purpose of ascertaining whether a remand is appropriate: perverse, unintelligible and

[15] Arbitration Act (1996), § 34(4) ("On receipt of an application under Sub-section (1), the court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.").

[16] M/s. Dyna Technologies Pvt. Ltd. v. Crompton Greaves Ltd., (2019) SCC OnLine 1656 (India).

[17] *Id.* ¶ 27.

[18] *Id.* ¶ 28.

[19] *Id.* ¶¶ 36, 38.

poorly reasoned awards. Perverse awards or awards revealing a fundamental flaw in reasoning or the decision-making process are liable to be challenged on the grounds for vacation, since remanding such an award would amount to directing a reconsideration of the case. In contrast, unintelligible awards (i.e., awards having no reasoning as defined by the Court) or awards with gaps in reasoning can be cured by remanding the awards to the tribunal under the Section 34(4) Exception.

That said, the dispositive portion of *Dyna* is inconsistent with its ratio– unintelligible awards cannot be enforced as they first need to be cured by remitting it to the tribunal. On the facts, the Court found the award to be unintelligible as it was rendered "without reasoning" and was "confusing and ha[s] jumbled the contentions, facts and reasoning without appropriate distinction". However, the award was neither set aside nor was it remanded. The Court instead partially enforced the award[20] as it held that "remand would not be beneficial as this case has taken more than 25 years for its adjudication."[21] In so holding, the Court failed to apply its own reasoning to cure the defect in the award.

On an aside, it is worth noting that in exceptional circumstances, the Indian Supreme Court, under Article 142 of the Constitution ("Article 142"), has powers to take decisions in the interest of justice, even if it is not rooted in any statute. In the past, the Supreme Court has invoked Article 142 to enforce a minority award after setting aside the majority award on public policy grounds, as it felt that referring the parties for fresh arbitration would cause further delay.[22] However, in *Dyna*, the Supreme Court did not refer to Article 142 at all.

[20] *Id.* ¶¶ 12, 44. The Supreme Court's final direction was: "In totality of the matter, we consider it appropriate to direct the Respondents to pay a sum of Rs. 30,00,000/- (Rupees Thirty Lakhs only) to the Appellant in full and final settlement against claim No. 2 within a period of 8 weeks, failing which the Appellant will be entitled to interest at 12% per annum until payment, for providing quietus to the litigation." This was a partial enforcement of the award as the arbitrator had awarded a sum of Rs. 27,78,125/- with interest at 18% p.a. with its Award dated 30th April, 1998 and Correction to Award dated May 5, 1998.

[21] *Id.* ¶ 38.

[22] Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India (NHAI), (2019) SCC OnLine 677 (India), ¶ 49.

IV. CONCLUSION

Both India and the United States have applied innovative tests to avoid a full-fledged arbitration when tribunals issue awards that are unreasoned or poorly reasoned. In so doing, both have recognized that the cost of vacating an unreasoned or unintelligible award in the first instance are significant and avoidable. Courts thus are instead encouraged to remand the award to the tribunal so that the gaps in reasoning can be plugged by the tribunal itself. Given that the tribunal is not required to make any substantive changes to its decision, this solution does not erode the *functus officio* doctrine's purpose, which is to prevent arbitrators from changing their rulings under an outside influence.

Nevertheless, it is not ideal if, as in *Dyna*, a court dons the tribunal's hat instead of remanding the award and, as a result, enforces an unintelligible award by either supplying its own reasoning or through some other means. This approach runs counter to the principle of party autonomy and is not necessary given the existence of this simple, yet effective solution of remand.

JEET SHROFF, is an SJD Candidate at the Georgetown University Law Center.

ABHIK CHAKRABORTY is a Juriste (Lawyer) at Clifford Chance LLP (Paris). The views expressed in this article are strictly those of the author and should not in any way be attributed to Clifford Chance LLP or other members of the firm.

SUMMARY DISPOSITIONS: HOW PARTIES MAY ENCOURAGE ARBITRATORS TO ADOPT NEW CASE MANAGEMENT PRACTICES

by Andreina Escobar

I. INTRODUCTION

In January 2023, the International Chamber of Commerce (ICC), the Institute for Transnational Arbitration (ITA), and the Institute for Energy Law (IEL) held a joint conference titled 11th ITA-IEL-ICC Joint Conference on International Energy Arbitration-Houston. One panel—"Back to the Future or the New Normal (No, this is not a Panel on Virtual Hearings)"—focused on the new trends in case management. The conversation was moderated by Caroline Richard (Partner at Freshfields Bruckhaus Deringer in Washington D.C.), and the panelists were J. Brian Casey (arbitrator at Bay Street Chambers in Toronto), Pedro Jose Izquierdo (counsel at Sullivan & Cromwell LLP in New York), and Ema Vidak Gijković (independent arbitrator in New York). The panel discussed various new trends, including *sua sponte* bifurcation, deviations from template procedural orders, and summary dispositions, as examples of recent changes that tribunals have increasingly adopted since the beginning of the COVID-19 pandemic.

This article will focus on one particular trend: summary dispositions. First, the article covers the background of summary dispositions. Second, the article identifies the existent arbitration rules on summary dispositions. Third, the article further considers potential due process concerns arising from summary dispositions. Fourth, the author explores practices that parties may implement to help tribunals innovate in case management. Finally, the author concludes and offers suggestions.

II. BACKGROUND

Summary dispositions in international arbitration are procedures that allow parties to request arbitral tribunals to dispose of a claim or defense without a full hearing on the merits.[1] A summary disposition can take various forms, such as a

[1] David Ryan and Kanaga Dharmanda, *Summary Disposal in Arbitration: Still Fair or Agreed to be Fair*, 35 J. INT'L ARB. 31, 32 (2018).

motion to dismiss, summary judgment, or partial award.[2] After a party applies for a summary disposition, the tribunal may dismiss the claim if it finds it to be clearly meritless.[3] However, in so doing, tribunals generally will apply a high standard, thus making it difficult for movants to succeed on their application. [4]

As the panel discussed, there are many benefits and some drawbacks to summary dispositions. The article will briefly list some. On one hand, summary dispositions increase efficiency. These procedures can save costs and time, allowing tribunals to dispose of claims or defenses that are manifestly without merit or that can be resolved based on undisputed facts or legal issues.[5] In so doing, a tribunal can resolve a dispute that otherwise could have taken years to resolve in just a few months. Additionally, the availability of summary disposition procedures increases flexibility, which is already one of the advantages of international arbitration.[6] As the panel explained, summary disposition—just like other new case management tools—allows tribunals to adapt each procedure to the specific needs of the case.

On the other hand, summary dispositions have drawbacks. As further discussed below, the use of summary dispositions can raise concerns about due process, particularly if they are used to dispose of claims or defenses without providing the parties with a reasonable opportunity to be heard or to present their evidence.[7] The lack of due process can be significant given that the award could be set aside based on these concerns.[8] Additionally, summary dispositions could increase costs in the

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[2] *Id.*

[3] *See e.g.*, ICSID Rules of Procedure For Arbitration Proceedings, Rule 41.5 (2022) [hereinafter ICSID Arbitration Rules].

[4] *See e.g.*, Mainstream Renewable Power and Others v. Germany, ICSID Case No. ARB/21/26, Decision on Respondent's Application under ICSID Arbitration Rule 41(5) (January 18, 2022), ¶ 121.

[5] Martin F. Gusy, *Saving Time and Cost – International Arbitration without Hearing on the Merits*, 41 ZDAR 36, 38 (2018).

[6] *See* Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION § 15.01(A) (3d. 2020).

[7] *See* Gusy, *supra* note 5, at 38.

[8] *See* New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V(1)(b), 330 U.N.T.S. 38, 7 I.L.M. 1046 [hereinafter "New York Convention"] ("The party against whom the award is invoked … was otherwise unable to present his case.").

long run if the tribunal does not grant the application. Given these due process concerns, summary dispositions impose a high evidentiary threshold on the movant,[9] making it hard to get the application granted. If not granted, the preparation and filing of a motion for summary disposition could incur costs additional to those that would be otherwise necessary to resolve the dispute, resulting in an increased cost of arbitration.[10]

III. ARBITRATION RULES THAT EXPLICITLY ALLOW SUMMARY DISPOSITIONS

Increasingly, international arbitration centers have explicitly included in their rules the tribunal's power to grant dispositive motions. However, the specific nature of the summary disposition procedures under these rules vary:

1. **International Centre for Settlement of Investment Disputes (ICSID):** Under the Article 41(5) of the 2021 ICSID Rules, parties may file, "no later than 30 days after the constitution of the tribunal," an application to dismiss a claim that is manifestly without merit.[11] "If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect."[12]
2. **London Court of International Arbitration (LCIA)**: Article 22.1 (viii) of the LCIA Arbitration Rules gives the tribunal the power "to determine that any claim, defence, counterclaim, cross-claim, defence to counterclaim or defence to cross-claim is manifestly outside the jurisdiction of the Arbitral Tribunal, or is inadmissible or manifestly without merit; and where appropriate to issue an

[9] *See e.g. Mainstream Renewable Power and Others*, at ¶ 121 ("The standard is thus set high.").

[10] *See* Caline Moauwad and Elizabeth Silbert, A *Case for Dispositive Motions in International Arbitration*, 2 BCDR INT'L ARB. REV. 77, 90 (2015) ("[T]he decision to hold hearings in these proceedings has raised the complaint that an unsuccessful Rule 41(5) procedure does nothing more than delay the case and create additional costs.").

[11] ICSID Arbitration Rules, Rule 41(5).

[12] *Id.*, Rule 41(6).

order or award to that effect."[13] The rules refer to this as "Early Determination."[14]

3. **Singapore International Arbitration Centre (SIAC)**: Under Rule 29 of the Arbitration of SIAC, "a party may apply to the Tribunal for the early dismissal of a claim or defence on the basis that: (a) a claim or defence is manifestly without legal merit; or (b) a claim or defence is manifestly outside the jurisdiction of the Tribunal."[15] The tribunal can, "after giving the parties the opportunity to be heard, decide whether to grant, in whole or in part, the application for early dismissal under Rule 29.1."[16]
4. **Hong Kong International Arbitration Centre (HKIAC)**: Article 43.1 of the HKIAC 3028 Administered Arbitration Rules reads:

   > the arbitral tribunal shall have the power, at the request of any party and after consulting with all other parties, to decide one or more points of law or fact by way of early determination procedure, on the basis that:
   > (a) such points of law or fact are manifestly without merit; or
   > (b) such points of law or fact are manifestly outside the arbitral tribunal's jurisdiction; or
   > (c) even if such points of law or fact are submitted by another party and are assumed to be correct, no award could be rendered in favour of that party.[17]

5. **Stockholm Chamber of Commerce (SCC):** Article 39 of the SCC Arbitration Rules states "[a] party may request that the Arbitral Tribunal decide one or more issues of fact or law by way of summary procedure, without necessarily taking every procedural step that might otherwise be adopted for the arbitration." [18]

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[13] LCIA Arbitration Rules (2020), Art. 22.1 (viii).

[14] *Id.*

[15] SIAC Arbitration Rules (2016), Rule 29.1.

[16] *Id.* at Rule 29.3.

[17] HKIAC Administered Arbitration Rules (2018), art. 43.1.

[18] SCC Arbitration Rules (2023), art. 39.1.

IV. DUE PROCESS CONCERNS

Summary disposition procedures in international arbitration may cause due process concerns for arbitrators because they involve disposing of a case or issue without a full hearing or trial on the merits.[19] Meaning, one or more parties may not have the opportunity to fully present their case or defend themselves. This can raise concerns about the fairness of the proceedings and whether each party has been given a full and fair opportunity to presents their case—in other words, due process.[20]

This is a significant concern given that the lack of due process is one of five grounds for setting aside or vacating an award under the New York Convention.[21] The potential for set aside or vacatur for lack of due process harms the value of the potential award.[22] If a court in the seat of the arbitration sets the award aside on this ground, the enforcing party would be unable to take the award to any New York Convention jurisdiction.[23] Just as Casey noted during the panel, this is a very present concern to arbitrators, which they would want to avoid at all costs.

However, other panelists were less concerned. Although a valid concern, due process should not be an issue. As Izquierdo discussed, summary disposition procedures are not unique to international arbitration. Other legal systems, such as those of the US and UK, have similar mechanisms for disposing of cases or issues without a full hearing or trial on the merits. In the US, for example, Rule 12(b)(6) and Rule 56 of the Federal Rules of Civil Procedures provide for, respectively, motions to dismiss and motions for summary judgment.[24] Similarly, in the UK, Part 24 of the Civil

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[19] Born, *supra* note 6, § 15.03.

[20] *See* James P. Duffy, *Dispositive Motions and the Summary Dispositions of Claims in International Arbitration*, IN INTERNATIONAL ARBITRATION IN THE UNITED States 275, 275–276 (2017).

[21] See *id.* ("For many years, it has been a commonly held view that dispositive motions and interim awards that summarily dispose of claims are inappropriate in international arbitration because such motions or awards prevent the opposing party from presenting its case in violation of Article V.1 (b) of the New York Convention."). *See also* New York Convention, *supra* note 8, at art. V(1)(b).

[22] *See* Gusy, *supra* note 5, at 38.

[23] *See id.*

[24] *See* Fed. R. Civ. Pro. 12(b)(6); *see also* Fed. R. Civ. Pro. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

Procedure Rules allows a party to apply for summary judgment. [25]

In the US, procedures for dispositive relief have been widely accepted as useful tools that do not offend due process.[26] In particular, courts in the US routinely receive and consider summary disposition motions.[27] And even further, courts have a long line of precedent allowing domestic arbitral tribunals to decide cases on summary disposition motions.[28] Only in rare instances have US courts not upheld an award decided in a summary proceeding. [29] These exceptions usually involved unfair proceedings, like the tribunal ignoring the existence of a material factual dispute.[30]

Despite due process concerns, it is important to consider that other legal systems, in particular common-law systems, have had similar summary dispositions mechanisms for years. These mechanisms, like in domestic courts, can be useful tools for disposing of cases or issues efficiently without violating due process rights, subject to appropriate safeguards and procedural rules.

V. PRACTICES THAT MAY ENCOURAGE SUMMARY DISPOSITIONS

Overall, the panelists noted that there is still a lot of uncertainty around summary disposition procedures in international arbitration. Although there seems to be an increasing trend towards allowing more summary proceedings, there is still some

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[25] *See* Eng. Civ. Pro. R. 24 ("The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if (a) it considers that (i) that claimant has no real prospect of succeeding on the claim or issue; or (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.").

[26] *See* Duffy, *supra* note 20, at 277 ("The U.S. judicial system has a long history of permitting dispositive motions.").

[27] Joe S. Cecil *et al.*, *Trends in Summary Judgment Practice*: 1975–2000, Federal Judicial Center at 20 (2007) *available at* https://www.uscourts.gov/sites/default/files/summary_judgment_1975-2000.pdf (finding that in six federal district courts, movants filed summary judgment motions in 21% of the cases).

[28] *See e.g.* Ozormoor v. T-Mobile USA, Inc., 2010 WL 3272620, at *4 (E.D. Mich. Aug. 19, 2010) (affirming an arbitration decision issued on summary disposition); Glob. Int'l Reins. Co. Ltd. v. TIG Ins. Co., 2009 WL 161086, at *5 (S.D.N.Y. Jan. 21, 2009) ("[T]he Arbitrator acted well within his discretion when choosing to entertain TIG's motion for summary judgment.").

[29] Int'l Union, United Mine Workers of Am. v. Marrowbone Dev. Co., 232 F.3d 383, 388–40 (4th Cir. 2000) (holding that in an arbitration where there is a factual dispute, the arbitrator had exceeded its authority by denying a full and fair hearing).

[30] *See, e.g, id.*

reluctance from arbitrators to accept these motions. Again, due process concerns, and perhaps arbitrator's individual background, may be playing a role in this slow change. But parties may adopt practices that may help to encourage this change. Although this article does not purport to offer a solution to this complex question, it does provide some suggestions that may help to increase a party's probability that procedures, such as summary disposition, will be adopted in their arbitrations. In particular, there are three things that could help the tribunal be more innovative: 1) arbitration rules, 2) seat of arbitration, and 3) arbitrator selection. The article will now explore each in that order.

A. *Arbitration Rules*

One-way parties seeking innovation may empower their arbitrators to use summary dispositions by adopting rules that explicitly allow tribunals to do so. Although this seems like an obvious avenue, it is actually not that obvious. Tribunals generally have extensive procedural powers to lead the case as they see fit,[31] and it could be argued that this power includes allowing for summary dispositions.[32] But some arbitrators are not willing to take that risk.[33] Most arbitrators do not want to grant themselves powers that are not clearly provided by the applicable rules or laws.

To ameliorate this concern, parties wishing arbitrators to take a more innovative standpoint could adopt rules that explicitly allow for summary dispositions. As earlier stated, many arbitration centers already allow in their rules for dispositive relief, including those of ICSID, HKIAC, SIAC, LCIA, and SCC. [34] By adopting one of these centers' rules, parties are in effect consenting to the tribunal's power to dispose of claims in summary proceedings. This, in turn, could make tribunals more comfortable with the idea of addressing claims in this manner.[35] They would be explicitly

[31] *See* Born, *supra* note 19, § 15.08.

[32] *Id.*

[33] *Id.*

[34] *See e.g.*, ICSID Arbitration Rules, *supra* note 3, at Rule 41.5; LCIA Arbitration Rules (2022), *supra* note 13, at art. 22.1(viii).

[35] Born, *supra* note 19, §15.09.

empowered to do so and would be behaving within the boundaries of their power.

B. Seat of the Arbitration

By selecting a seat of arbitration that recognizes the availability of summary disposition in domestic civil procedures, parties can encourage arbitrators to adopt similar procedures. The availability of summary disposition procedures in domestic courts could help to alleviate or manage arbitrator due process concerns.

As described above, summary disposition procedures are neither unique nor new; rather, these are practices routinely used in the US and in the UK. In fact, as already discussed, courts in these two jurisdictions have already upheld these practices in other contexts.[36] So, although there is still a lot of uncertainty surrounding summary dispositions, choosing a seat of arbitration that already allows this type of procedures may reduce uncertainty in the arbitration context. For example, it is at least clearer that a US court is likely to uphold an award decided in a summary disposition. Given existing precedents from domestic arbitrations and the general acceptance of summary proceedings by US courts, a US court is unlikely to assume that a tribunal inherently denied a party due process because it decided the case via summary disposition procedure.

Arbitrators sitting in jurisdictions like the US or the UK could be receptive to summary proceedings because the awards are more likely to be upheld. This would eliminate—or at least reduce—concerns about an award's vulnerability and could help arbitrators be more flexible about their stance towards summary proceedings. If parties wish to be able to access case management tools such as summary dispositions, adopting a seat that already adopts summary disposition in its domestic practice would probably increase their chances of it happening.

C. Arbitrator Selection

Lastly, parties may shape their arbitration by choosing the right arbitrators. Ultimately, parties choose arbitration because it brings flexibility, autonomy, and

[36] *See e.g. Ozormoor*, 2010 WL 3272620, at*4; *see also* Travis Coal Restructuring Holding LLC v. Essar Glob. Fund Ltd. [2014] EWHC (Comm) 2510, [42]–[54] (Eng.).

predictability (to an extent), and choosing the right arbitrator is a way for a party to exert all of these benefits to lead the case as the parties wish.

If parties wish to have a more innovative arbitrator on these issues, then parties must consider the arbitrator's legal background and past dispositions. First, parties can look at the arbitrators' legal background. Although not always true, arbitrators that come from jurisdictions that allow summary dispositions may be more open and comfortable with deciding cases in that manner because they learned in a system that allows for it. Second, parties should consider an arbitrator's past written decisions and publications—if available. This could be the biggest indicator of the arbitrator's stance on summary dispositions. If the arbitrator has heard and granted summary dispositions in the past, the arbitrator is likely open to the opportunity to do so again. From there, parties can tailor—depending on their needs—who they would appoint.

VI. CONCLUSION

As discussed during the panel, new case management practices may help international arbitration be more cost and time efficient. But arbitrators alone cannot implement this change. Parties must cooperate as well. A good way to do that is by adopting practices that may aid arbitrators to smoothly lead the movement towards innovation. Parties could:

1. choose arbitration rules that provide the tribunal with explicit powers to decide on summary dispositions,
2. designate the seat of the arbitration in places where courts allow for these new practices, and
3. choose arbitrators that are more likely to side with the party's desired stance.

By combining these three, parties can push arbitrators to be more innovative. Although these practices will likely not launch arbitration into a complete change, they could give tribunals more leeway in managing cases.

ANDREINA ESCOBAR is an associate at Vinson & Elkins LLP in Houston, where she specializes in complex commercial litigation. Andreina obtained her J.D. from the University of Texas School of Law ("Texas Law") and her Bachelor of Arts in Government from the University of Texas at Austin ("UT"). At Texas Law, Andreina was a Student Attorney of the International Human Rights Clinic, where she advocated for victims of the enforced disappearances that took place during the 1970s dictatorships in the Southern Cone, and a Student Intern for the Honorable Jeffrey Boyd of the Supreme Court of Texas. At UT, Andreina was a research assistant, helping investigate the origins of democracy in Venezuela. Andreina is passionate about international dispute resolution, international relations, and human rights.

THE FUTURE OF EU INVESTMENT LAW

by Sushant Mahajan

I. INTRODUCTION

The era of modern Bilateral Investment Treaties (BITs) originated in Europe, when Germany and Pakistan adopted a bilateral agreement for protection of foreign investments of their nationals.[1] Soon after Germany, other European States followed suit: Switzerland concluded its first BIT in 1961,[2] and France soon thereafter in 1972.[3] Since then, EU Member States have been the most prolific negotiators of such treaties.[4] The most significant facet of these modern BITs was the provision for investor-state dispute settlement (ISDS) whereby a foreign investor could directly submit a dispute concerning a violation of the BIT by a host state to international arbitration.[5] This process of dispute resolution found favor with investors and sovereigns alike. Foreign investors who were keen on preventing the host state from enjoying a "home court advantage" found a neutral forum whereas foreign sovereigns relished the fact that they would no longer be required to involve themselves in claims by their nationals against another state.[6]

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[1] *See* RUDOLF DOLZER, URSULA KRIEBAUM & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 9 (3d ed. 2022).

[2] Traité entre la Confédération Suisse et la République Tunisienne relatif à la protection et à l'encouragement des investissements de capitaux [Treaty Between the Swiss Confederation and the Republic of Tunisia on the Protection and Encouragement of Capital Investments], Switz.-Tunis., Dec. 2, 1961, UN Conference on Trade and Development, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2982/download.

[3] Convention between the Government of the French Republic and the Government of the Republic of Tunisia on the protection of investments , Fr.-Tunis., June 30,1972, 848 U.N.T.S. 141.

[4] *See* Carrie E. Anderer, *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 BROOK. J. INT'L L. 851, 853 (2010).

[5] *See* Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 144 (2006); *see also* STANIMIR ALEXANDROV, MARINN CARLSON & JOSHUA ROBBINS, *The Future of Investment Treaty Protection in Eastern Europe*, *in* THE EUROPEAN & MIDDLE EASTERN ARBITRATION REVIEW 2009, at 2 (2009), https://www.sidley.com/-/media/files/publications/2008/12/the-future-of-investment-treaty-protection-in-ea__/files/view-article/fileattachment/gareurope--middle east. pdf?la=en.

[6] *See* George M. von Mehren, Claudia T. Salomon & Aspasia A. Paroutsas, *Navigating Through Investor-*

The Court of Justice for the European Union (CJEU), however, shook the ground of the investment law framework in the EU with its landmark decision in *Slovak Republic v. Achmea* in March 2018.[7] The CJEU ruled that the ISDS provisions contained in the BIT between the Netherlands and Slovakia were incompatible with EU law. While the international arbitration community was still grappling with the implications of *Achmea*, the CJEU in its decision in *Moldova v. Komstroy* held that the ISDS provisions in the Energy Charter Treaty (ECT) were not applicable to intra-EU disputes (disputes between EU Member States and investors from other EU Member States).[8] Finally, the CJEU in *Poland v. PL Holdings* barred Member States also from entering into intra-EU ISDS agreements on an *ad hoc* basis.[9] These three decisions effectively preclude intra-EU ISDS and have further cast aspersions on the legality of ISDS provisions contained in BITs between EU Member States and other (non-EU) States.

This drastic change in the law by the CJEU formed the basis of the discussion in the ITA-IBA EU Investment Law Virtual Conference on "The Future of Investment Law in the EU after *Komstroy* and *PL Holdings*," held on December 1, 2021. Building on the discussion in the Conference, the objective of this article is to brief the current framework of investment protection in the EU and, thereafter, to take a peek at the future of investment protection in EU, especially in the context of ISDS.

II. FRAMEWORK OF INVESTMENT PROTECTION IN THE EU

The Treaty Establishing the European Community ("EC Treaty"), the Treaty on the European Union ("EU Treaty") and the Treaty on the Functioning of the European Union (TFEU) comprise the major governing instruments of the EU. These treaties attribute certain areas to power of the EU, beyond which the EU cannot act. While the EC Treaty contained investment-related provisions, it did not confer exclusive

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State Arbitrations—An Overview of Bilateral Investment Treaty Claims, 59 DISP. RESOL. J. 69, 70 (2004); *see also* Wong, *supra* note 5, at 142.

[7] Case No. C-284/16, Slovak Republic v. Achmea B.V., ECLI:EU:C:2018:158 (Mar. 6, 2018).

[8] Case No. C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655 (Sept. 2, 2021).

[9] Case No. C-109/20, Republic of Poland v. PL Holdings Sàrl, ECLI:EU:C:2021:875 (Oct. 26, 2021).

competence over foreign investment upon the EU nor did it confer upon the EU the power to conclude international investment agreements with non-EU countries, leaving these areas within the competence of the various EU Member States.[10] Member States largely implemented this power through the negotiation and conclusion of BITs.[11] This position changed when on December 1, 2009, the Treaty on Lisbon amending the Treaty on European Union and the Treaty establishing the European Community ("Lisbon Treaty") entered into effect. The Lisbon Treaty extended the competence of the EU to the field of "foreign direct investment."[12] The Lisbon Treaty reflected a new governance arrangement and a new legal order which was not contemplated in the pre-Lisbon investment system.[13] As a result, the EU now had the power to conclude investment treaties on behalf of its Member States, bringing into question the validity of the numerous BITs that Member States had entered into with other States, both Member and non-Member.

A. *Slovak Republic v. Achmea* B.V.

The biggest change in the EU policy concerning ISDS came about through the decision of the CJEU in the *Achmea* case. The CJEU ruled that that the ISDS provisions contained in the BIT between the Netherlands and Slovakia were incompatible with EU law. The reasoning of the CJEU was premised on two specific principles: (i) the autonomy of the EU legal order, and (ii) the principle of mutual trust between EU Member States.[14] In regard to the first principle, the court noted that an arbitral tribunal which is required to interpret or apply EU law would not be subject to the

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[10] Carrie, *supra* note 4, at 864.

[11] *See* Jan Ceyssens, *Towards a Common Investment Policy? – Foreign Investment in the European Constitution*, 32 LEGAL ISSUES OF ECON. INTEGRATION 259, 268 (2005).

[12] *See* Stephen Woolcock, *The Potential Impact of the Lisbon Treaty on European Union External Trade Policy*, EUR. POL'Y ANALYSIS, June 2008, at 3, https://www.sieps.se/en/publications/2008/the-potential-impact-of-the-lisbon-treaty-on-european-union-external-trade-policy20088epa/Sieps-2008_8epa.pdf?.

[13] *See* L. Yves Fortier, *Investment Protection and the Rule of Law: Change or Decline?*, Address at the British Institute of International and Comparative Law 50th Anniversary Event Series, at 23 (Mar. 17, 2009), https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media01239278546014007 32_001.pdf.

[14] *See* Pierre Collet, *The Current European Union Investor State Dispute Resolution Reform: A Desirable Outcome for Investment Arbitration?*, 53 N.Y.U. J. INT'L L. & POL. 689, 694 (2021).

control of the CJEU as it would not be a "court of a Member State" within the meaning of Article 267 of the TFEU and thus not having access to the preliminary ruling procedure, which would violate the autonomy of the EU legal order.[15] As regards the second principle the court determined that the EU Member States enjoy an equal legal level of protection which cannot be selectively altered through a BIT.

The CJEU also considered whether the award made by the Tribunal would be subject to review by a court of the Member State, especially considering that the Netherlands-Slovakia BIT contemplated an *ad hoc* arbitral tribunal under the UNCITRAL Arbitration Rules. The court held that there was a sufficiently narrow scope of judicial review which was not sufficient to ensure compliance with EU law.[16] This conclusion appears to be hurried and contrary to the jurisprudence previously espoused by the CJEU itself in *Eco Swiss v. Benetton*.[17] The European Court of Justice (as the CJEU was known then) in *Eco Swiss* had ruled that arbitration in matters governed by EU law was permissible. The CJEU specifically noted that judicial review of an arbitral award by national courts of Member States was sufficient for the purpose of ensuring compliance with EU law.[18] Paradoxically, although the CJEU's judgment in *Achmea* is premised on the need for ensuring consistency in interpretation of EU law, the CJEU seems to have failed to abide by its own pronouncement in *Eco Swiss*.

B. *Republic of Moldova v. Komstroy LLC*

One could confidently argue that the impact and fallout of *Achmea* remained limited to intra-EU BIT situations. However, in *Komstroy* it was confirmed that the fallout of *Achmea* also applies to Energy Charter Treaty (ECT) disputes having a connection in the EU.[19] *Komstroy* concerned a dispute between the Republic of

[15] Case No. C-284/16, Slovak Republic v. Achmea B.V., ECLI:EU:C:2018:158, ¶¶ 42-50, 59 (Mar. 6, 2018); *see also* Collet, *supra* note 14, at 695 (citing Emmanuel Gaillard, *L'Affaire Achmea ou les Conflicts de Logiques*, 3 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE 616, 625 (2018)).

[16] *Achmea*, ¶¶ 50-55.

[17] Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV, 1999 E.C.R. I-3055.

[18] *See id.* ¶ 48.

[19] *See* Nikos Lavranos, *Regime Interaction in Investment Arbitration: EU Law; From Peaceful Co-Existence*

Moldova and a Ukrainian investor under the ECT. It is interesting to note that neither was the respondent state an EU Member State nor was the investor from an EU Member State. The CJEU nonetheless assumed jurisdiction on the ground that the ECT is an integral part of EU law and thus the CJEU can interpret ECT under its power to issue preliminary rulings.[20] The CJEU also ruled that the seat of arbitration being within a Member State, implied application of EU law as *lex fori*.[21] The CJEU then found that the ISDS provisions in the ECT ought to be interpreted as not being applicable to disputes between a Member State and an investor of another Member State.[22]

The CJEU's ruling stands as a strong reaffirmation of its strict position regarding intra-EU ISDS. Although the CJEU upheld its jurisdiction, the case at hand was arguably not best suited to rule on the validity of intra-EU arbitrations based on the ECT, as: (i) the dispute was not intra-EU and EU law was not directly applicable, (ii) no EU public policy concerns were raised, and (iii) this was not even the question referred to the CJEU for decision.[23] Nonetheless, the CJEU clarified the application of *Achmea* vis-à-vis the ECT rendering moot all prior academic discussions regarding the same.[24]

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to Permanent Conflict, KLUWER ARBITRATION BLOG (Jan. 13, 2022), https://arbitrationblog.kluwerarbitration.com/2022/01/13/regime-interaction-in-investment-arbitration-eu-law-from-peaceful-co-existence-to-permanent-conflict/.

[20] Case No. C-741/19, Republic of Moldova v. Komstroy LLC, ECLI:EU:C:2021:655, ¶ 27 (Sept. 2, 2021).

[21] *Id.* ¶¶ 33-34.

[22] *Id.* ¶ 66.

[23] *See* Peter Rosher et al., *Moldova v. Komstroy (Case C-741/19): Key lessons and takeaways*, REED SMITH: IN-DEPTH (Sept. 16, 2021), https://www.reedsmith.com/en/perspectives/2021/09/moldova-v-komstroy-key-lessons-and-takeaways.

[24] *See, e.g.*, Kim Talus & Katariina Särkänne, *Achmea, the ECT and the Impact on Energy Investments in the EU*, *in* THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT COURT 9 (Ana Stanič & Crina Baltag eds., 2020); Crina Baltag & Stefan Dudas, *Achmea, Arbitral Tribunals and the ECT: Modernisation or Regression? in* THE FUTURE OF INVESTMENT TREATY ARBITRATION IN THE EU: INTRA-EU BITS, THE ENERGY CHARTER TREATY, AND THE MULTILATERAL INVESTMENT COURT 23 (Ana Stanič & Crina Baltag eds., 2020).

C. *Republic of Poland v. PL Holdings Sàrl*

After *Achmea* and *Komstroy*, the CJEU in *PL Holdings* came to round out the trilogy by barring Member States from entering into intra-EU ISDS agreements that are identical to BIT arbitration clauses on an *ad hoc* basis.[25] The CJEU held that allowing a Member State to enter into such an *ad hoc* arbitration with an EU-based investor with "the same content as that clause [in a BIT]" would result in "a circumvention of the obligations arising for that Member State under the Treaties [of the European Union]."[26] The CJEU further held that national legislation permitting a Member State to enter into an *ad hoc* arbitration agreement, which would make it possible to continue arbitration on the basis of an agreement which is contrary to EU law, would also be contrary to EU law.[27]

D. *Micula v. Romania*

In its last blow to ISDS in the EU, the CJEU in *Micula* overturned a decision of the General Court quashing a Commission State aid ruling from 2015.[28] The Commission had held that payment of compensation to claimants as per their ICSID award was unlawful State aid and ordered them to recover amounts paid to Micula,[29] which decision was subsequently quashed by the General Court of the EU.[30] While reversing the decision of the General Court, the CJEU also held (inter alia) that any consent that may have been given by a Member State to arbitration pre-accession lacks any force, to the effect that the system of judicial remedies provided for by the EU and the TFEU replace the arbitration procedures upon accession to the EU.[31]

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[25] *See* Amina Ben Ayed, *Poland v PL Holdings: Another Twist in the Intra-EU Investor-state Arbitration*, SQUIRE PATTON BOGGS: LA REVUE (Dec. 14, 2021) https://larevue.squirepattonboggs.com/poland-v-pl-holdings-another-twist-in-the-intra-eu-investor-state-arbitration.html.

[26] Case No. C-109/20, Republic of Poland v. PL Holdings Sàrl, ECLI:EU:C:2021:875, ¶ 47 (Oct. 26, 2021).

[27] *Id.* ¶ 56.

[28] Case No. C-638/19 P, Comm'n v. Eur. Food SA et al., ECLI:EU:C:2022:50 (Jan. 25, 2022).

[29] Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013, 2015 O.J. (L 232) 43.

[30] Cases No. T-624/15, T-694/15 & T-704/15, Eur. Food SA, et al. v. Comm'n, ECLI:EU:T:2019:423 (June 18, 2019).

[31] Cyrus Benson et al., *The latest chapter of The Intra-EU Investment Arbitration Saga: What it entails for the protection of Intra-EU investments and enforcement of Intra-EU Arbitral Awards*, GIBSON DUNN (Feb.

E. *Effect of CJEU Rulings*

Achmea prompted EU Member States to sign the Agreement for Termination of all intra-EU Bilateral Investment Treaties ("Termination Agreement").[32] The Termination Agreement seeks to terminate some 130 intra-EU BITs along with their sunset clauses and declares that they cannot serve as legal bases for arbitral proceedings. The Termination Agreement also provides for the treatment of past, pending, and future arbitral proceedings under the various BITs. The European Commission in December 2021 initiated infringement proceedings against seven EU Member States, in addition to those previously initiated in 2020 against Finland and the UK, for failure to remove intra-EU BITs from their respective legal orders.[33] Through the judgments summarized above and actions of the European Commission, the EU (or at least the European Commission and the CJEU) has made it clear that ISDS in its current form is incompatible with EU law. The questions which now arise are what consequences this policy will have and what is in store for the future.

III. THE FUTURE OF ISDS IN EU INVESTMENT LAW

Since *Komstroy*, several tribunals have been called upon to revisit their past decisions upholding jurisdiction and, although some accepted to undertake the analysis as a matter of principle, none of the tribunals acceded to the request.[34]

4, 2022), https://www.gibsondunn.com/the-latest-chapter-of-the-intra-eu-investment-arbitration-saga-what-it-entails-for-the-protection-of-intra-eu-investments-and-enforcement-of-intra-eu-arbitral-awards/.

[32] *See generally* Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, May 29, 2020, 2020 O.J. (L 169) 1.

[33] *See* Alessandra Scotto Di Santolo, *EU in battle with its own states as it threatens countries with court over bilateral deals*, EXPRESS (Dec. 4, 2021), https://www.express.co.uk/news/politics/1531240/eu-news-eu-commission-bilateral-investment-treaties-bits-ecj-infringement-proceedings.

[34] *See* Erica Stein & Quentin Muron, *Komstroy, PL Holdings, Micula: closing the door to intra-EU investment arbitration – again*? 2022 B-ARBITRA – BELGIAN REVIEW OF ARBITRATION 7, 37 (2022) (citing Infracapital F1 S.à.r.l. & Infracapital Solar B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/18, Decision on Respondent's Request for Reconsideration Regarding the Intra-EU Objection and the Merits, ¶ 117 (Feb. 1, 2022); Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd & Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14, Decision on the Italian Republic's Request for Reconsideration (Dec. 20, 2021) (dismissing in an as yet unpublished decision Italy's request for reconsideration of the tribunal's decision on the intra-EU jurisdiction objection); Landesbank Baden-Wurttemberg, HSH Nordbank AG, Landesbank Hessen-Thuringen Girozentrale and Norddeutsche Landesbank-Girozentrale v. Kingdom of Spain, ICSID Case No. ARB/15/45, Decision on the Respondent's Application for Reconsideration of the Tribunal's Decision of 25 February 2019 Regarding the "Intra-EU"

Others, taking up the objection for the first time, similarly rejected the intra-EU jurisdictional objection.[35] *Ad hoc* committees, sitting in intra-EU ECT cases, have also declined to annul ICSID awards in the aftermath of the *Komstroy* judgment.[36] On the other hand, courts across EU are either annulling or refusing to enforce intra-EU awards. This peculiar situation is likely to continue to exist until the CJEU or European Commission take specific measures to bridge the gap between its policy, on the one hand, and principles of customary international law (especially the Vienna Convention on the Law of Treaties) on the other.

However, the CJEU's judgments have necessitated the evolution of a dispute resolution system to fill the void created by the CJEU. As a consequence, the EU has taken upon itself the burden to expedite the process of reform of ISDS and the establishment of a purportedly better system for resolution of investment disputes. In parallel, the EU has embarked on the propagation of a new policy for foreign investment which is premised on respect for Sustainable Development Goals (SDGs).

A. *Multilateral Investment Court*

The idea for a Multilateral Investment Court (MIC) was mentioned in the Transatlantic Trade and Investment Partnership (TTIP) Concept Paper and the Trade for all Communication.[37] Following an influx of criticism against the traditional ISDS mechanisms, the European Commission launched an ambitious global ISDS reform

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Jurisdictional Objection, ¶ 59 (Nov. 11, 2021); Cavalum SGPS, S.A. v. Kingdom of Spain, ICSID Case No. ARB/15/34, Decision on the Kingdom of Spain's Request for Reconsideration, ¶ 99 (Jan. 10, 2022); Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss et al. v. Kingdom of Spain, ICSID Case No. ARB/15/23, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, ¶ 48 (Dec. 6, 2021)).

[35] *See* Stein & Muron, *supra* note 34, at 37 (citing Sevilla Beheer B.V. et al. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum, ¶ 678 (Feb. 11, 2022)).

[36] *See* Stein & Muron, *supra* note 34, at 37 (citing SolEs Badajoz GmbH v. Kingdom of Spain, ICSID Case No. ARB/15/38, Decision on Annulment (Mar. 16, 2022); NextEra Energy Global Holdings B.V. & NextEra Energy Spain Holdings B.V. v. Kingdom of Spain, Decision on Annulment (Mar. 18, 2022)); *see also* Catherine Amirfar et al., *The Future of Investment Law in the EU: A Practical Perspective*, DEBEVOISE & PLIMPTON: DEBEVOISE UPDATE (Dec. 8, 2021), https://www.debevoise.com/insights/publications/2021/12/the-future-of-investment-law-in-the-eu.

[37] *See* Arman Melikyan, The Legacy of Opinion 1/17: To What Extent Is the Autonomous EU Legal Order Open to New Generation ISDS?, 6 EUROPEAN PAPERS 645, 650 (2021); Commission, *Trade for All: Towards a more responsible trade and investment policy*, at 21-22, COM (2015) 497 final (Oct. 14, 2015).

agenda in 2018, promising to address all concerns of the existing ISDS system with the MIC.[38] Primary among those concerns were (i) the lack of consistency in case-law and, (ii) lack of legitimacy and transparency.[39] The European Commission commenced work on an impact assessment on the MIC in 2016. In September 2017, it made the impact assessment public and issued a Recommendation to the European Council to open negotiations on the establishment of the MIC.[40] The authorization and negotiating directives were adopted by the Council and the EU Member States in March 2018.[41] The negotiating directives contemplate a court-like structure with an appellate mechanism, staffed by full-time and highly qualified adjudicators.[42] The goal is to address the concerns of the present system in relation to legitimacy and ethics of adjudicators.

As a stepping stone to the Multilateral Investment Court the EU has included Investment Court System (ICS) clauses in negotiations on a number of free trade agreements,[43] including the Comprehensive Economic and Trade Agreement with Canada (CETA) (provisionally in force),[44] the Investment Protection Agreement with Vietnam (signed but not yet in force),[45] the EU-Mexico Free Trade Agreement

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[38] *See* Melikyan, *supra* note 37, at 646.

[39] *EESC backs criticism of investor-State dispute settlement (ISDS), and calls for a more holistic approach*, EUR. ECON. & SOC. COMM. (Nov. 7, 2022), https://www.eesc.europa.eu/en/news-media/news/eesc-backs-criticism-investor-state-dispute-settlement-isds-and-calls-more-holistic-approach#:~:text=The%20most%20frequently%20identified%20problems,to%20legal%20uncertainty%20and%20potential.

[40] *See* Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes, COM (2017) 493 final (Sept. 13, 2017); Multilateral reform of investment dispute resolution, SWD (2017) 302 final (Sept. 13, 2017).

[41] *See Council Decision authorizing the European Commission to negotiate, on behalf of the European Union, a convention establishing a multilateral court for the settlement of investment disputes to the extent this falls within the Union's competence*, at 3 (Mar. 2, 2018), https://data.consilium.europa.eu/doc/document/ST-12981-2017-INIT/en/pdf.

[42] *See Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, at 4-5 (Mar. 1, 2018), https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.

[43] *See* Melikyan, *supra* note 37, at 646.

[44] *See* Comprehensive and Economic Trade Agreement (CETA), Can.-EU, arts. 8.27-8.28, Jan. 14, 2017, 2017 O.J. (L 11) 23, 66-69.

[45] *See Proposal for a COUNCIL DECISION on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam,*

(agreement in principle),[46] and the EU-Singapore Investment Protection Agreement (signed but not yet in force).[47] These agreements contemplate a first-instance tribunal and an appellate tribunal. In *Opinion 1/17*, the CJEU opined that the dispute resolution provisions contained in CETA are compliant with EU law.[48] The CJEU in its opinion made the following observations:

i. Jurisdiction of tribunals under CETA is limited to interpretation of CETA in light of principles of international law. Therefore, the question of interpretation of EU law does not arise and there is no requirement for availing the preliminary procedure in terms of Article 267 of TFEU.[49]
ii. There is no impact on the power of the institutions of the EU from operating in accordance with EU framework since CETA tribunals do not have the jurisdiction to declare incompatible with CETA, any level of protection of a public interest established under EU law.[50]
iii. CETA tribunals can consider questions of domestic law only as a matter of fact. This cannot be considered as an opportunity to interpret EU law.[51]
iv. CETA tribunals ensure fair and equitable trial and effective protection of the legitimate interest of the investors through an independent forum, thus dissipating any possible concerns under the Charter of Fundamental Rights of the EU.[52]

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of the other part, Annex 1, arts. 3.38-3.39, at 72-81, COM (2018) 693 final (Oct. 17, 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5932_2019_INIT&qid=1677074713378&from=EN.

[46] *See* European Commission, *Investment dispute resolution*, EU-MEXICO AGREEMENT: THE AGREEMENT IN PRINCIPLE, arts. 11-12, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/mexico/eu-mexico-agreement/agreement-principle_en.

[47] *See Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States of the one part, and the Republic of Singapore, of the other part*, Annex 1, arts. 3.9-3.10, at 41-47, COM (2018) 194 final (Apr. 18, 2018).

[48] Opinion 1/17, ECLI:EU:C:2019:341 (Apr. 30, 2019).

[49] *Id.* ¶ 122.

[50] *Id.* ¶ 130.

[51] *Id.* ¶ 131.

[52] *Id.* ¶¶ 199-200.

The Opinion has surreptitiously given a green light to the ISDS reforms undertaken by the EU and to the establishment of a multilateral dispute resolution system.53 The efforts by the EU has coincided with the work on ISDS reform undertaken by the United Nations Commission on International Trade Law (UNCITRAL) Working Group III. The Working Group looks to identify the areas of reform in ISDS and evaluate whether a MIC would be an ideal solution to the problems identified. The Working Group is intent on discussing the structure and function of such a MIC. In this light, *Achmea* could be categorized as a catalyst which lit fire to the movement of reform in ISDS.

B. *Sustainable Investment*

On June 23, 2022, the European Parliament adopted the Resolution on the future of EU international investment policy.[54] The key highlights of the Resolution include the following recognitions:

i. Investments should have positive impact on sustainable economic growth, job creation and sustainable development, and contribute to SDGs.[55]

ii. Investment arbitrations act as barriers for implementation of measures necessary for preservation of the environment and combat climate change.[56]

iii. Inclusion of ICS in new investment agreements would support the deliberations for a multilateral reform of ISDS system towards establishment of a MIC.[57]

The principles stressed by the European Parliament make it clear that EU Member States are intent upon acting towards fulfilment of SDGs and consider that purging investment protection through ISDS may be essential to fulfilling their goals. This

[53] *See* Melikyan, *supra* note 37, at 658.

[54] Resolution of 23 June 2022 on the future of EU international investment policy, EUR. PARL. DOC. P9_TA(2022)0268 (2022).

[55] *Id.* ¶ 1.

[56] *Id.* ¶¶ 28, 36.

[57] *Id.* ¶¶ 26, 45.

policy statement further reiterates the commitment of the European Union to the idea of a MIC and could be a final nail in the coffin for the traditional ISDS system in the EU.

IV. CONCLUSION

Though the jurisprudence espoused by the CJEU left more questions unanswered than it embarked on answering, the CJEU has helped cement the policy of the EU. On the strength of the CJEU's judgments, the EU has come to champion the cause of expeditious reform of international investment law and the ISDS system. This is evident from its newly adopted trade agreements as well as a sustained call for the establishment of a MIC. International investment law in the EU will thus be characterized by rapid change, and investors must be conscientious of this when investing in the EU and/or conducting arbitrations seated in EU jurisdictions for the foreseeable future.[58]

SUSHANT MAHAJAN is a qualified lawyer from India with a practice focused on commercial dispute resolution. He has represented multinational corporations and governments in a wide spectrum of matters before numerous international and domestic courts as well as tribunals. He holds a Bachelor's of Law (LLB) from ILS Law College in India, and is a candidate of the LLM concentration in International Arbitration, Mediation, and Other Forms of Dispute Resolution' at George Washington University Law School.

[58] *See* Amirfar et al., *supra* note 36.

IMPLICATIONS OF THE CHANGING ENERGY POLICY LANDSCAPE IN ENERGY DISPUTES: COMPARED VIEWS FROM LATIN AMERICA AND THE EU

by Munia El Harti Alonso & Vika Lara Taranchenko

I. INTRODUCTION.

The ITA-IEL-ICC Joint Conference on International Energy Arbitration was presented in Houston, with a panel on "Implications of Changing Energy Policy in Energy Disputes" held on January 20, 2023. The joint conference included a year-in-review analysis of key developments in international energy arbitration practice during the preceding year. The panel included experts Analia Gonzalez (Partner at Baker Hostetler LLP, Washington, DC) in the moderation, Lindsey D. Schmidt (Partner at Gibson Dunn, New York), Alberto Fortún (Partner of Cuatrecasas, Madrid), and Antonio Ortiz-Mena (Partner of Denton Global Advisors Washington, DC).

In the past years, energy policies have taken divergent directions in Latin America, with polarized political swings, especially in Peru, Brazil, Chile and Mexico, leading some investors to launch international disputes in different fora.

II. THE CURRENT LANDSCAPE FOR FOREIGN INVESTORS IN LATIN AMERICA: OSCILLATING FROM LIBERALIZATION TO NATIONALISM.

Ms. Schmidt pointed out that foreign investors have long been drawn to Latin America as a resource-rich region. Concomitantly, over the last years, the COVID-19 pandemic has had a concrete impact on the progress of energy projects. For instance, governments have been taking restrictive measures in response to the pandemic, in regulated industries (*i.e.*, transportation) that were affected in response to a decrease in demand of gas and electricity.

She also shared an empirical-based view on the other side of the coin to nationalism—liberalization. Even when considering the combined economic and political instability in the region, there is an indication of an increase in investment in the last few years, including commitments for a 70% increase in renewable energy use by 2030.

A. *Mexico: A Case Study of Changing Regulations.*

Ms. Schmidt stressed that Mexico, a state within the top ten of respondents in disputes, has had significant swings regarding its approach to foreign direct investment in the energy sector.

1. The Hydrocarbons Act Amendments.

For about 75 years, Petróleos Mexicanos ("Pemex"), a state-owned Mexican company, held a monopoly on the Mexican hydrocarbons sector until 2013. The tide shifted thereafter due to significant changes to the Hydrocarbons Act[1] that went into force in April 2021, thus dismantling the principles of free market competition.[2]

The bill justified the rationale of the proposed reforms aimed at the fight against corruption in the energy sector and the protection of national sovereignty. It contains several amendments that had an impact on the obtention and maintenance of permits. For example, under the bill, permits can be suspended for national and economic security reasons (*see* Art. 59 Bis). The only possible recourse for review under Art. 59 Bis is via the governmental Energy Secretary ("Secretaria de Energía") and Energy Regulation Commission ("Comisión Reguladora de Energía"), which are the same authorities that suspend the permits. During that suspension, regulators can come in and operate the business for the duration of the suspension in the regulator´s own discretion. Investors perceive the Hydrocarbon Act as creating a system of state sanctioned expropriations (*see* Art. 57).

These measures have been challenged in the domestic courts with varying degrees of success through "amparo" constitutional actions focused on the specific changes to the permits (*see* Arts. 57 and 59), whilst amparos on the electric reform have been based on the reformed text as a whole.[3]

[1] Decreto por el que se reforma el Artículo Décimo Tercero Transitorio de la Ley de Hidrocarburos ("Amendment Decree to the Hydrocarbons Law Article Thirteen") of August 11, 2014, Diario Oficial de la Federación [DOF] 8-11-2014 (Mex.) *available at* https://www.dof.gob.mx/nota_detalle.php?codigo=5618799&fecha=19/05/2021#gsc.tab=0.

[2] On March 26, 2021, Mexican President López Obrador filed a bill to reform Mexico's Hydrocarbons Law in the Chamber of Deputies.

[3] *See e.g.*, Case 118/2021 (Mex.), *available at* https://macroeconomia.com.mx/admin/wp-content/uploads/2021/03/Suspensión-Provisional-A.I.-118.2021.pdf.

Most recently on February 28, 2023, the Comisión Reguladora de Energía established new restrictions on the number of permits that companies can submit every month, with a new limiting quota of 50 permits for hydrocarbons and 15 for electric energy.[4] This new development is demonstrative of a trend of further disputes looming in both the oil and gas and electric sectors in Mexico, with no indication of a cooling off in regulatory risk.

2. The Texas Gulf of Mexico Pipeline Dispute: Nuancing *de Facto* and *de Iure* Changes

Mr. Antonio Ortiz-Mena contextualized the dispute, explaining that even as the Electric Power Law[5] was amended,[6] there can be a lot of changes that are de facto and not just de jure. The Texas Gulf of Mexico Pipeline (or Marino Sur) dispute[7] exemplifies this distinction, whereby it was contended that the contracts were tainted by corruption with no evidence.[8] Concretely, a Canadian company pursued arbitration after the Electric Federal Commission canceled a contract the claimant had signed with the previous administration to build a natural gas pipeline near the city of Tula, Hidalgo.

The Canadian firm had already built most of the pipeline intended to supply a power plant but could not finalize the project due to resistance by local communities. In his remarks, Mr. Ortiz-Mena also nuanced that it is necessary to understand the

[4] ACUERDO Núm. A/004/2023 de la Comisión Reguladora de Energía por el que se reanudan los plazos y términos legales de manera ordenada y escalonada, que modifica el diverso A/001/2021 mediante el cual se establece la suspensión de plazos y términos legales, como medida de prevención y combate de la propagación del coronavirus COVID-19 (Agreement No. A/004/2023 of the Energy Regulation Commission amending Agreement A/001/2021 that suspended legal terms during the coronavirus COVID-19), Diario Oficial de la Federación [DOF] 2-28-2023 (Mex.), *available at* https://www.dof.gob.mx/nota_detalle.php?codigo=5680987&fecha=28/02/2023#gsc.tab=0.

[5] *See* Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Industria Eléctrica ("Decree Amending and Adding Various Provisions of the Electricity Industry Law"), Diario Oficial de la Federación [DOF] 3-9-2021 (Mex.), *available at* https://dof.gob.mx/nota_detalle.php?codigo=5613245&fecha=09/03/2021#gsc.tab=0.

[6] On February 1, 2021, the President of Mexico, Mr. López Obrador, announced the amendments to the Power Industry Law ("Ley de la Industria Eléctrica"). On March 2, 2021, the amendment was approved by the Mexican Congress.

[7] ATCO Pipelines S.A. de C.V. v. Comisión Federal de Electricidad, LCIA Case No. 173641.

[8] From the same token, no proof emerged from the assertion that profits from the energy companies were unbalanced.

sovereign subtleties of the political aims behind the law. In that regard, it is important for investors to consider investing in Mexico to assess political, economic, and legal risks which are a challenge for energy companies.

3. Untested Waters of the US-Mexico-Canada Agreement (USMCA) and North American Free Trade Agreement (NAFTA) Legacy Claims

Ms. Schmidt noted that Mexico experienced an increase in so-called NAFTA[9] legacy claims, in advance of the March 31, 2023 filing deadline for those claims. In contrast, the USMCA[10] offers a more restrictive scope, particularly for access to arbitration for fair and equitable treatment claims in "covered sectors", which prima facie would include energy. The contours of the USMCA are, however, untested and not comparable by analogy to Mexico´s other investment agreements, and thus the application framework of the USMCA is yet to be defined and implemented.

B. Elucidating the Continuous Changes of the Framework of Renewable Energy

Turning to another part of the globe, Mr. Alberto Fortun explained that some of the Member States of the European Union and the regulatory changes implemented by those Member States have been challenging to investors in the renewable energy sector.

1. A Double-Edged Sword

Regarding the implications of changing policies on energy disputes, there is a political commitment to fight against climate change and in the balance of this commitment, there are 80 arbitration disputes in renewable energy at the Stockholm Chamber of Commerce alone, some of which are still pending.

Mr. Fortun stressed that changes to the regulatory framework are acceptable, provided that the changes are only affecting future investments. The crux of the problem is regarding changes to the regulatory framework aimed at protecting the environment that impact exiting investments.

[9] North American Free Trade Agreement (NAFTA), Jan. 1, 1994, 32 I.L.M. 289.

[10] Agreement between the United States of America, the United Mexican States, and Canada (USMCA), July 1, 2020, *available at* https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between.

2. A Retrospective on the Energy Charter Treaty

Three key historical periods were identified by Mr. Fortun:

- **1994–1998**: The European Union established a clear energy policy to protect the environment. This period started in 1994 with the signing of the Energy Charter Treaty (entered into force in 1998)[11] and ended in 1997 with the signing of the Kyoto Protocol (that entered into force in 2005).[12.]
- **2001**: The regulatory framework from the international law perspective was anchored in the Energy Charter. In this point of the Energy Charter Treaty reform, there was a combination of high-level investment protection and an attractive framework for investment energy.
- **2015–2017**: There was a regulatory change affecting existing investments with the adoption of the Paris Agreement during COP21 and with the modernization process of the Energy Charter Treaty.[13]

In view of that attractive framework, states received investments in solar, wind and thermos-solar plants with some investments that were already in operation and delivering power into the grid. The concrete implication of the regulatory changes resulted in investment arbitrations under the Energy Charter Treaty (*see* Art. 26).

The system of investment protection in 1998 and the international law framework applying to investment decisions has been successful and effective. Investors have been granted favorable decisions stemming from international arbitrations under both the International Centre for Settlement of Investment Disputes and the Stockholm Chamber of Commerce.

This goes to show on a positive outlook that it is possible to conciliate energy policies to fight climate change and at the same time preserve the substantive protection that respective investment treaties provide. Mr. Fortun stressed that as it stands, treaties are the guarantors of investor rights.[14]

[11] Energy Charter Treaty (ECT), Dec. 17, 1994, 2080 U.N.T.S. 100.

[12] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

[13] In November 2017, the Energy Charter Conference confirmed in Ashgabat the launching of a discussion on the potential modernization of the Energy Charter Treaty. Within the framework set out by the Conference (CCDEC2017 23), it was also agreed to establish a subgroup of the Strategy Group to centralize and conduct the discussions in the most effective way.

[14] However, the European Commission and the European Parliament published a communication in 2019 stating that the level of protection under European Union law was similar or even higher than the level of protection under the treaties.

III. LESSONS LEARNED FOR THE NEXT YEARS: TIME IS OF THE ESSENCE

In the concluding remarks, the panel closed with lessons learned, focusing especially on large economies. The very timing of the investment regarding whether it is the beginning, or the conclusion of a government cycle should be critically considered. The recent March pensions reform strike of March 23, 2023, in France is an example of the direct ramifications of political contexts on concrete segments of energy supply, with the specter of blockades in petroleum refineries and gas supply. Pragmatically, this is because the promises and benefits could change or disappear in a transitory process of the government.

MUNIA EL HARTI ALONSO is Of Counsel at Robalino, advising clients in international commercial and investment arbitrations. She is an attorney admitted to the New York bar and worked in US litigation for a firm representing Ecuadorian investors before US state courts. She also advised investors in the enforcement of a landmark intra-European investment award under the Energy Charter Treaty in Washington D.C. She is a Researcher and Associate Professor at Universidad Complutense de Madrid at the Master's of Environmental Law and frequently publishes in specialized reviews and editorials such as Kluwer or Oxford University Press.

VIKA LARA TARANCHENKO is an Associate at Robalino and member of the firm's Natural Resources and Energy Team. She actively participates in transactions, advising national and foreign corporations in Ecuador to carry out their operations, regulated activities, and infrastructure projects. She speaks Spanish, English and Russian.

WHAT TOPICS WILL DOMINATE INTERNATIONAL ARBITRATION IN 2023?

by Todd Carney

I. INTRODUCTION

This past January, the Institute for Transnational Arbitration (ITA) hosted an event in London through their young professional division, Young ITA.[1] The event featured a panel of five up and coming international arbitration attorneys.[2] The chair and vice-chair of Young ITA's division, Katrina Limond and Robert Bradshaw, moderated the panel.[3] The overall topic of the panel was looking ahead for what issues in international arbitration were likely to dominate 2023.[4] Each panelist chose a topic and went into detail about how they thought the issue would develop in the upcoming year.[5]

II. REFORMING THE ARBITRATION ACT 1996

London is a major hub for international arbitration.[6] A UK law, known as the Arbitration Act 1996 (the "Act"), set the stage for this development by creating the framework for arbitration out of London.[7] The Act gives arbitrators around the world a reliable and consistent forum in London.[8]

September 2022 marked the 25-year anniversary of the Act going into effect, so the UK's Law Commission released their recommendations for updating the Act to

[1] *#YoungITATalks–2023: The Year Ahead in Arbitration*, INSTITUTE FOR TRANSNATIONAL ARBITRATION https://www.cailaw.org/Institute-for-Transnational-Arbitration/Events/2023/youngita-year-ahead-arbitration.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See Despite Brexit, London Retains its Appeal As a Leading Global Disputes Hub*, BURFORD CAPITAL, 2021, https://www.burfordcapital.com/insights/insights-container/burford-quarterly-2021-london-brexit-arbitration/.

[7] Lisa Dubot, Raid Abu-Manneh, and Rachael O'Grady, *Modernising The Arbitration Act 1996: A Critique of the Law Commission's Proposed Reforms*, KLUWER ARB. BLOG, Nov. 21, 2022, https://arbitrationblog.kluwerarbitration.com/2022/11/21/modernising-the-arbitration-act-1996-a-critique-of-the-law-commissions-proposed-reforms/#:~:text=The%20Arbitration%20Act%201996%20.

[8] *Id.*

tackle the challenges that have developed in international arbitration since then.[9] The Commission invited attorneys to opine on the recommendations. In response to the sought-out input, the Law Commission will release a final report this year.[10]

Aashna Agarwal, an associate from Allen & Overy, chose the potential reforms of the Act as her topic for the panel.[11] The Law Commission's report was 159 pages, so Ms. Agarwal could not address all of them.[12] One particularly interesting proposal that Ms. Agarwal covered was the Law Commission's idea to change Section 67.[13] Currently, under this section, a decision can only be challenged based on lack of jurisdiction through a rehearing, which some feel takes too much time and money.[14] As a result, the proposal would allow for parties to a dispute to appeal the decision in the situation where the party took part in the proceedings and filed an objection to the jurisdiction of the tribunal, and when the tribunal has issued a ruling on the jurisdiction.[15]

This reform makes sense. The report noted that people from all aspects of the legal field have raised as point of concern the waste of time and money from these rehearings because of the unnecessary added length to the proceedings.[16] A full rehearing involves going through motions that parties agree on. The amount of time to go through these steps inevitably costs more money.[17] Additionally, a losing party could raise a jurisdictional challenge to get another try at the whole proceeding.[18] At the new proceeding, the losing party can further develop arguments and introduce

[9] *Id.*

[10] *Id.*

[11] Aashna Agarwal, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

new evidence to give them a better shot at winning.[19] All legal jurisdictions typically limit the evidence that can be introduced on appeal, so it makes sense to limit this for appeals.[20]

Those opposing the change argue that section 67 rehearings are only a small percentage of cases, so this will not have some major reform.[21] But section 67 is just one of the many reforms proposed. The recommendations seem to combine a series of reforms to save time and money. It should not matter that a specific reform only has a small impact on an area. Another argument against this reform was brought up by Ms. Agarwal, that courts can limit what can go on at a rehearing, so this reform could be too far reaching.[22] Critics maintain that this reform would eliminate necessary cases for rehearing, just to eliminate unnecessary ones that a judge could have limited anyways. In theory this is true, but as noted before, many people have shown evidence that the current situation is creating unnecessary time and money.[23] Even if a judge can control the ultimate proceedings, they will still have to listen to arguments and the other party will have to respond to those arguments, which all results in at least some unnecessary time and money.

The report noted that major arbitration jurisdictions have varying rules regarding jurisdictional challenges.[24] The US allows for rehearings.[25] Singapore and Switzerland have some limits, but not to the degree of the proposal.[26] Firms in these jurisdictions typically have a London office, so they are certain to opine on this proposal. It will be interesting to see how the Law Commission responds to the input.

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[19] *Id.*

[20] *Id.*

[21] Dubot, et al., *supra* note 7.

[22] Review of the Arbitration Act 1996: A Consultation Paper, THE UNITED KINGDOM LAW COMMISSION (Sept. 2022), *available at* https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2022/09/Arbitration-Consultation-Paper.pdf.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

III. GOING GREEN IN INTERNATIONAL ARBITRATION

The second topic came from Stela Negran, an associate at LALIVE.[27] Ms. Negran discussed how the need to pursue green policies will continue to become apparent in international arbitration.[28] There are a variety of ways that the field of international arbitration can pursue more green policies.[29] There are practical steps like using less paper and traveling less for arbitration.[30] This might seem simple, but ultimately arbitration tribunals often control whether submissions can be done electronically and if hearings can take place remotely.[31]

There are elements of carbon footprints that might not be seen in the lead up to arbitration. For example, if an associate writes a draft of something for a partner internally during arbitration, the partner might prefer to edit it on paper. Additionally, some demanding clients might want lawyers to be in person for meetings leading up to the arbitration. This is where "cultural" campaigns can make a difference. Many firms have picked up the ideology of "environmental, social, and corporate governance," as have corporations.[32] There is also a campaign known as the "campaign for greener arbitrations." These can hopefully influence how firms change in terms of practices.

Looking at cultural pressure for change, there are mixed results. For example, most firms like to brag about their pro bono projects.[33] At the same time, reports have shown that on average, an individual attorney does not do as much pro bono

[27] Stela Negran, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Natalie Runyon, *Law Firms' ESG Practice Continues to Drive Economic Growth and Better Alignment with Clients*, REUTERS (Dec. 14, 2022), https://www.reuters.com/legal/legalindustry/law-firms-esg-practice-continues-drive-economic-growth-better-alignment-with-2022-12-14/; *Global Survey Finds Businesses Increasing ESG Commitments, Spending*, NAVEX INC. (Feb. 23, 2021) https://www.navex.com/blog/article/environmental-social-governance-esg-global-survey-findings/.

[33] Steve Kennedy, *Pro Bono Is Broken*, BALLS AND STRIKES (May 16, 2022) https://ballsandstrikes.org/legal-culture/biglaw-pro-bono-is-broken/.

work as the American Bar Association suggests.[34] Firms are businesses, and they are going to be responsive to money. While trying to go green can be great marketing, if a less green initiative produces better results for their clients, firms will prefer that option. That does not mean that people should throw up their hands and do nothing, but it is important to adjust expectations for the effectiveness of this self-governance.

Another factor in making arbitration greener is how the arbitration agreements are written. This could give firms more influence, since they are the ones ultimately writing the agreements. It is still up to the clients to decide how much they want to value engaging in environmentally friendly practices. Again, values matter, so the best to hope for is that influence of ESG and various campaigns can make all parties want to be greener.

Ms. Negran touched on a challenge here that the ease of expanding environmentally friendly practices could vary by location.[35] The environmental views of Singapore, Paris, Hong Kong, New York, Washington DC, and London, among other places, all vary. So certain jurisdictions might be more receptive to going green than others. Still, any improvement in a jurisdiction helps. But if firms and clients remain committed to going green, they could prioritize jurisdictions that are greener, which could pressure all jurisdictions to have more environmentally friendly policies. Locality can also impact the behavior of each office. Countries and cities have different incentives and penalties regarding behavior that impacts the environment, so some offices might act greener.

IV. UPDATING THE ENERGY CHARTER TREATY

Sophie Freelove, an associate with Vinson & Elkins, discussed modernizing the Energy Charter Treaty (ECT).[36] In 1994, nations primarily from Europe and Central Asia came together to establish the ECT to protect both sides when outside

[34] *Hours Worked*, AMERICAN BAR ASSOCIATION (2022) https://www.abalegalprofile.com/pro-bono.php.

[35] Negran, *supra* note 27.

[36] Sophie Freelove, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

investments are made in energy.[37] At the time, the ECT largely concerned oil and gas.[38] About three decades later, a lot has changed in terms of how the world views those sectors. Considering the obligations of the Paris Agreement, many of the parties to the ECT felt a need to update the treaty.[39] In November 2022, the Energy Charter Conference agreed to final provisions of an updated framework.[40]

Some countries and legal actors have criticized these updates. The most controversial provision was the fact that the ECT would still allow for agreements that protect investments in fossil fuels.[41] It does provide a provision that allows signatories to not protect future investments in fossil fuels, and to phase out existing ones.[42] Critics argue that instead, states should not have the option to protect fossil fuels.[43] The idea is that by not providing special protections to fossil fuels, states and companies will be more inclined to invest in renewable energy, since there will be added protection to make them more attractive.[44]

Similarly, critics are upset that the framework protects investment in activities like hydrogen, synthetic fuels, carbon capture, and other practices that are technically not fossil fuels directly but utilize fossil fuel.[45] Many in the energy field have argued that focus on these initiatives takes away from investment in renewable

[37] Bart-Jaap Verbeek, *The Modernization of the Energy Charter Treaty: Fulfilled or Broken Promises?*, BUS. HUM. RTS. J. 1, 1 (2023), https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/modernization-of-the-energy-charter-treaty-fulfilled-or-broken-promises/AFD3E4B53C019FD6DA0915B493987DDE.

[38] *Id.*

[39] *Id.* at 2.

[40] *Id.* at 1.

[41] *Id.* at 4.

[42] *Id.*

[43] *Id.* at 5.

[44] *Id.*; *See also* Fiona Harvey, *No New Oil, Gas or Coal Development If World is to Reach Net Zero by 2050, Says World Energy Body*, GUARDIAN (May 18, 2021) https://www.theguardian.com/environment/2021/may/18/no-new-investment-in-fossil-fuels-demands-top-energy-economist.

[45] Verbeek, *supra* note 37, at 4; *Why 'Blue Hydrogen' is Fossil Fuel Industry Greenwash and Won't Fix the Climate*, GLOBAL WITNESS (Oct. 28, 2020) https://www.globalwitness.org/en/blog/why-blue-hydrogen-is-fossil-fuel-industry-greenwash-and-wont-fix-the-climate/.

energy.[46]

One's view on these protections likely depends on their beliefs on the best way to bring about environmental changes. The concept of "nudging" changes the situation for people to encourage them to make better choices, but to not forbid them from making certain choices.[47] Some have said this should apply to pursuing better environmental practices in international arbitration.[48] Currently, fossil fuels make firms a lot of money and consist of clients to whom firms are deeply loyal.[49] Radically changing the framework to harm those clients could bring a negative reaction that would cause firms or even countries not to want to operate under the ECT. Instead, updating the ECT to better protect emerging renewable energy investment, coupled with the general positive press that comes with working in renewable energy, and the promise of financial gains from renewable energy, could be the best way to create more environmentally friendly energy practices.

There is also a practical aspect to the debate. If the world could only rely on renewable energy and eliminate the use of fossil fuels, much of the world would have done it already. But the technology is not there yet.[50] Products like electric vehicles may be free of fossil fuels, but they are more damaging to the environment and put more strain on grids.[51] Massachusetts tried to go free of fossil fuels and ended up having to use even more environmentally damaging fuel oil when winter came.[52] It

[46] Verbeek, *supra* note 37, at 4.

[47] Lucy Greenwood & Leonor Díaz-Córdova, *Nudging Towards a Greener Future in Arbitration*, CIARB (Nov. 29, 2021) https://www.ciarb.org/resources/features/nudging-towards-a-greener-future-in-arbitration/.

[48] *Id.*

[49] *See* Lea Di Salvatore, *Investor–State Disputes in the Fossil Fuel Industry*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Dec. 31, 2021) https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry.

[50] Angela Macdonald-Smith, *Renewables Break Records But Still Lag 2030 Target*, FINANCIAL REVIEW (Jan. 3, 2023) https://www.afr.com/companies/energy/renewables-break-records-but-still-lag-2030-target-20230103-p5ca0m.

[51] Nina Lakhani, *Revealed: How US transition to Electric Cars Threatens Environmental Havoc*, THE GUARDIAN (Jan. 24, 2023) https://www.theguardian.com/us-news/2023/jan/24/us-electric-vehicles-lithium-consequences-research.

[52] Gerson Freitas Jr & Naureen S Malik, *New England Power Plants Burn Most Oil Since 2011 as Gas Soars*,

will likely be a long time until it is economically feasible to not use fossil fuels, so it makes sense to protect them as it does to protect any other major economic player. Similarly, while the world looks for workable alternatives to fossil fuels, it is worth investing in all solutions, including ones like hydrogen, that have shown a lot of promise.[53]

The main answer to these arguments is that climate change is such a grave threat, that it requires aggressive measures. This inclination is understandable, but again there is a question of practicality. Often people panic and try extreme actions to get out of a bad situation but end up making things worse. Massachusetts is an example of that. So, if time is limited in terms of rescuing the environment, it is best to make good use of this time.

Another argument in favor of becoming more aggressive is the fact that some European countries are threatening to withdraw from the treaty because it does not comply with the Paris Agreement.[54] If this happens, the ECT could fall apart and leaves all energy industries worse off. As a result, even skeptics of more aggressive measures should compromise to protect the treaty long-term. This is a strong argument, but Europe is only one player on the global scale of energy. Asia, the Middle East, Latin America, and the United States all have strong energy markets. The collapse of the treaty could lead to further investments in these regions. Even though some countries in these regions are members of the ECT, they do not necessarily agree with the European objectors, so they might be willing to set up individual protections for fossil fuels that mirror what is in the ECT.

V. THE UNCITRAL WORKING GROUP III

Nina Melzer, an associate with LALIVE, spoke about the investor-state dispute settlement reform proposals of the United Nations Commission on International

BLOOMBERG (Feb. 22, 2022) https://www.bloomberg.com/news/articles/2022-02-22/new-england-power-plants-burn-most-oil-since-2011-as-gas-soars?leadSource=uverify%20wall.

[53] Michael Kobina Kane & Stephanie Gil, *Green Hydrogen: A Key Investment for the Energy Transition*, WORLD BANK BLOG (June 23, 2022) https://blogs.worldbank.org/ppps/green-hydrogen-key-investment-energy-transition.

[54] Verbeek, *supra* note 37, at 5.

Trade Law's (UNCITRAL) Working Group III. The UNCITRAL started working on reforms in 2017.[55] The UNCITRAL consists of government, international, and NGO representatives.[56] Since 2017, they have worked to address issues in the current procedure of dispute settlement, and whether it is worth creating reforms to act on these concerns.[57] Now they are focused on coming up with precise solutions to these issues.[58]

The UNCITRAL meets two to three times a year.[59] The most recent meeting was in January 2023.[60] The working group always focuses on multiple issues, but a recurring one has been the establishment of a multilateral investment court.[61] This is an issue because the absence of consistent rules on investment can make the outcome of cases dependent on forums.[62]

This issue has been discussed for a while. In 2020, the European Union (EU) raised this idea at a meeting.[63] The EU argued for a system that would oversee multilateral issues in investment arbitration.[64] It would only allow for appeals when there are errors in law.[65] The body would consist of judges who would not have any conflicts of interest by working on the court full time.[66] They would serve only one term and must meet strict qualifications.[67] The jurisdiction of the body would consist of states

[55] Nina Melzer, Address at #YoungITATalks - 2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[56] Andreea Nica, *UNCITRAL Working Group III: One Step Closer to a Multilateral Investment Court?* KLUWER ARB. BLOG (Mar. 24, 2020) https://arbitrationblog.kluwerarbitration.com/2020/03/24/uncitral-working-group-iii-one-step-closer-to-a-multilateral-investment-court/.

[57] Melzer, *supra* note 55.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Nica, *supra* note 56.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

deciding whether they want to join the court.[68]

In theory this sounds workable, but as Ms. Melzer pointed out, many questions emerge for any type of joint body like this.[69] How would nominations to the court work? Would each member state nominate someone? If so, there could be situations where the body does not want to accept any of the people nominated by the state, as seen with the European Court of Human Rights.[70] If each state does nominate someone, there could be the risk of certain states like the UK or the US dominating the decisions because they may have more people "qualified" for the court, since they have prominent people in the field. Some from these states might argue this makes sense since so much arbitration does take place in their states, that the make-up of the court should be based on where arbitration takes place. Alternatively, states that feel they are often manipulated by international arbitration might argue that they should have a greater representation on the court because they are the responding party in most investment disputes.[71]

Going off these points, it could be difficult to get enough states to agree to the jurisdiction of a court. The US has opted out of the International Criminal Court.[72] The UK has raised leaving the European Court of Human Rights (ECtHR).[73] Many states have refused to give the ECtHR expanded jurisdiction.[74] If states feel that the set up for the court is wrong, they might not agree to its jurisdiction. Additionally,

[68] *Id.*

[69] Melzer, *supra* note 55.

[70] Cengiz Aktar, *Ankara Unwilling to Name a Judge to European Court*, AHVAL (Oct. 17, 2018) https://ahvalnews.com/echr/ankara-unwilling-name-judge-european-court.

[71] *Facts on Investor-State Arbitrations in 2021: With a Special Focus on Tax-Related ISDS Cases*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (Jul. 2022), *available at* https://unctad.org/system/files/official-document/diaepcbinf2022d4_en.pdf.

[72] Michel Martin, *The U.S. Does Not Recognize the Jurisdiction of the International Criminal Court*, NATIONAL PUBLIC RADIO (Apr. 16, 2022) https://www.npr.org/2022/04/16/1093212495/the-u-s-does-not-recognize-the-jurisdiction-of-the-international-criminal-court.

[73] Jessica Elgot, *Tory MPs to Push for UK Exit from European Convention on Human Rights*, GUARDIAN (Feb. 5, 2023) https://www.theguardian.com/politics/2023/feb/05/tory-mps-to-push-for-uk-exit-from-european-convention-of-human-rights.

[74] *See* András Csúri, *Entry into Force of Protocol No. 16 to the ECHR*, EUCRIM (Oct. 20, 2018) https://eucrim.eu/news/entry-force-protocol-no-16-echr/.

arbitrators try different forums for a reason, so if they feel they are better off continuing to have the option of multiple jurisdictions, then they might refuse to join the court.

A big question in terms of actual jurisdiction is what role would international investment agreements play in it? Would the court only have jurisdiction if an arbitration treaty decides that will be the forum? Or would the court have jurisdiction over all multi-state investment arbitrations from member states? If the latter, what happens when only one member state in a treaty is a member? The most palpable solution would likely be for it to be dependent on arbitration treaty. Going this route could gradually build pressure for more powerful states to use this system. They will not feel locked in the court, but as they negotiate for agreements, the other side could keep pushing for using this forum, gradually building pressure.

VI. CHALLENGES TO ARBITRATION

The final topic of the panel came from Lucy Preston, an associate at Orrick.[75] Ms. Preston noted that unsuccessful challenges to arbitrations are increasing.[76] She explained that the fact that they are unsuccessful could be a good or bad thing.[77] If the challenges are without merit, it is good to quickly dispatch them.[78] But there is always the concern that some of the challenges could fail due to various biases in arbitration bodies.[79]

This is a long-standing issue, and many have pushed to fix it. For gender, a report from 2020, found that women comprised 23.4 percent of International Chamber of Commerce (ICC) arbitration tribunals.[80] This represented a steady increase, but it is

[75] Lucy Preston, Address at #YoungITATalks–2023: The Year Ahead in Arbitration, Remarks on Zoom (Jan. 26, 2023).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Guest Blog: Gender Diversity in Arbitral Tribunals–The Challenges Ahead*, INTERNATIONAL CHAMBER OF COMMERCE (Dec. 9, 2021) https://iccwbo.org/media-wall/news-speeches/guest-blog-gender-diversity-in-arbitral-tribunals-the-challenges-ahead/.

well below the percentage of women in the population.[81] Many might be concerned that the shortage of females could bring institutional biases against female practitioners or when an issue concerns gender.[82] There is not much data on ethnic diversity in terms of ethnicity.[83] On a similar note, there is a concern regarding regional diversity.[84] Given that international arbitration is often accused of unfairly taking advantage of certain states, it is understandable that if states are underrepresented, they might feel there are institutional biases against this.[85]

The main solution seen so far to diversity is to get international bodies pledging to do better. The ICC has vowed to appoint more women and people from different countries.[86] The ICC argues that this is working because they are hitting new records. As noted above, the ICC has steadily increased the number of women.[87] It is again more difficult to find concrete numbers on progress in ethnic diversity. In 2019, the ICC noted it had 972 arbitrators from 89 countries.[88] But there is not a further breakdown of those numbers. If they appoint one person for each of the 72 countries, and then disperse the other 900 slots to just 17 countries, they are not achieving diversity.

Some would argue that the arbitration bodies are limited because the field of international arbitration is not that diverse. The numbers of female partners in

[81] *Id.*

[82] *Id.*

[83] *See* Are *We Getting There?* BERWIN LEIGHTON PAISNER, *available at* https://www.bclplaw.com/a/web/150194/FINAL-Arbitration_Survey_Report.pdf.

[84] Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil, Emilia Onyema, *The Diversity Deficit in International Investment Arbitration*, ACADEMIC FORUM ON ISDS CONCEPT PAPER (Jan. 21, 2020) https://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/2020/5-diversity.pdf.

[85] *Taking States to International Arbitration*, MIND THE GAP (Jul. 7, 2020) https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/taking-states-to-international-arbitration/.

[86] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80; *Key Moments in ICC Dispute Resolution in 2019*, INTERNATIONAL CHAMBER OF COMMERCE (2020) https://library.iccwbo.org/content/dr/STATISTICAL_REPORTS/SR_0042.htm?l1=Statistical+Reports.

[87] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80.

[88] *Key Moments in ICC Dispute Resolution in 2019*, *supra* note 86.

international arbitration mirror the statistics for women at the ICC.[89] So, defenders of the ICC would argue that the legal field needs to increase diversity. This is a fair point. Firms have tried to increase diversity, as have law schools.[90] While law school classes and starting associates are more diverse today, it is going to take time until law students and starting associates are at the skill level to be appointed as arbitrators, as it would for any law student or starting associate.

Another solution Ms. Preston suggested was for international arbitration bodies to increase transparency.[91] Even if an arbitration proceeding is not biased against someone, without sufficient insight on the decision, people might assume that there was a bias. While parties are typically privy to much of this information, outside spectators are not. Different bodies and working groups have come up with different solutions.[92] For example, the ICC has created a database of cases that provides information such as the name of the arbitrator, their nationality, how they got the appointment, and where the case is in the proceedings.[93]

The UNCITRAL says that the public must have access to "written submissions, transcripts of hearings, a list of exhibits of documents, expert reports, witness statements presented in the proceedings, and awards to be made available to the public."[94] The International Centre for Settlement of Investment Disputes (ICSID) only permits such disclosure if both parties agree to it.[95]

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[89] *Gender Diversity in Arbitral Tribunals – The Challenges Ahead*, *supra* note 80.

[90] Karen Sloan, *Law Student Diversity Hits New High as Schools Await Affirmative Action Ruling*, REUTERS (DEC. 21, 2022) https://www.reuters.com/legal/government/law-student-diversity-hits-new-high-schools-await-affirmative-action-ruling-2022-12-21/#:~:text=Nearly%2037%25%20of%20U.S.%20first,represented%20an%20all%2Dtime%20high; Karen Sloan, *Law Firm Associate Diversity Deepened in 2022 as Partners Saw Slower Change*, REUTERS (Jan. 12, 2023) https://www.reuters.com/legal/legalindustry/law-firm-associate-diversity-deepened-2022-partners-saw-slower-change-2023-01-12/.

[91] Preston, *supra* note 75.

[92] Sonia Anwar-Ahmed Martinez, *Transparency Rules in Investment Arbitration: Institutional Differences and Prospects of Standardisation*, KLUWER ARB. BLOG (Apr. 8, 2021) https://arbitrationblog.kluwerarbitration.com/2021/04/08/transparency-rules-in-investment-arbitration-institutional-differences-and-prospects-of-standardisation/.

[93] *Id.*

[94] *Id.*

[95] *Id.*

The main argument for protection of information is to protect clients. There may be important business issues that they do not want shared. Additionally, they might fear that they could be targeted for harassment due to certain cases. But ultimately disclosure fosters greater discussion and that is a good thing. Having outside parties look at information can help to independently evaluate if there was a bias, provide additional perspectives, and even fact check the proceedings.

Bringing transparency can be challenging. So long as there are forums like ICSID that are not fully transparent, parties with something to hide could prioritize those forums. It is best to work within all forums to ensure that there is broad transparency.

VII. CONCLUSION

These topics are just a few of the wide array of ones that will impact international arbitration in 2023. International arbitration is a fast-changing topic. Interestingly, many of these topics intersect with each other. Changes to the ECT are relevant to the push to go green in arbitration. The efficiency standards concerning the UK's Law Commission have been raised in terms of how to best make a multilateral investment court workable. The concerns of diversity and bias at challenges to arbitrations are at stake in the establishment of a multilateral investment court.

While it is possible that the specific topics discussed in this panel could have some resolution by the end of this year, the overarching issues of diversity, efficiency, fairness, cooperation, environmentalism, and pragmatism will remain in international arbitration for a long time through a variety of ways. People should keep overarching issues like these in mind when dealing with any given topic in the field.

TODD CARNEY has a JD from Harvard Law School. Todd currently works at the European Court of Human Rights. Todd has clerked at the US Court of Appeals for the Armed Forces. Todd holds a bachelor's degree in political science and public communications from American University. Before law school, Todd worked in digital media in New York City and Washington D.C. for five years.

#YOUNGITATALKS MENA
A COMMENTARY ON YOUNG ITA AT DUBAI ARBITRATION WEEK

by Thomas Parkin

I. INTRODUCTION

Young ITA held an "Ask the Arbitrator" panel event on November 16, 2022 as part of the Dubai Arbitration Week. The event was organized by Jennifer Paterson of K&L Gates and moderated by Robert Landicho of Vinson & Elkins. Four leading practitioners who regularly act as both counsel and arbitrators in international arbitrations were invited to put on their "arbitrator hats" and answer intriguing questions about how arbitrators think, how they tackle difficult issues, and what arbitration counsel can do to best represent their client while being helpful to the tribunal.

Jonathan Sutcliffe, Reshma Oogorah, Rupert Choat KC and Ann Ryan Robertson gave some invaluable insights on how to navigate the arbitration process and highlighted the importance of being a helpful and effective counsel. The event was a fantastic opportunity to learn from some of the most accomplished experts in the field and gain a deeper understanding of the mind of an arbitrator.

II. THE PANEL COMPRISED OF FOUR SEASONED ARBITRATION PRACTITIONERS WITH EXTENSIVE EXPERIENCE IN THE MIDDLE EAST

Attendees had a chance to hear from Jonathan Sutcliffe, a partner at K&L Gates based in the Dubai office and a member of the international arbitration practice group. He is dual-qualified in England and Wales and New York, and previously practiced in London, New York, Houston, and Texas. Jonathan has established himself as an expert in disputes and arbitration in the Middle East, and his expertise is highly sought-after. He regularly sits as an arbitrator under a range of institutional rules and in ad hoc arbitrations, and his exceptional track record in this field speaks volumes about his skills and abilities.

Reshma Oogorah joined the panel discussion to share her experience as an international arbitrator and legal counsel with over a decade of experience in high-value and complex commercial disputes. She is qualified as a barrister and solicitor

and is registered in Mauritius, England and Wales, and the United Arab Emirates. Prior to setting up her own practice, Niyom Legal in the United Arab Emirates, Reshma worked at leading law firms in the Middle East and Mauritius, and a leading barristers' chambers in London.

Her extensive knowledge of the legal systems in these regions makes her a highly sought-after arbitrator: she regularly sits as arbitrator in a range of institutional and ad hoc arbitrations.

Rupert Choat KC of Atkin Chambers is a barrister and arbitrator specializing in complex construction, engineering, PFI/PPP and energy disputes. With extensive experience handling disputes concerning projects across more than 50 jurisdictions globally, Rupert has established himself as a go-to expert in these industries, particularly in the Middle East. He sits as arbitrator in institutional and ad hoc arbitrations, and on disputes boards. He also teaches in the master's program of Construction Law and Dispute Resolution at King's College, London.

Finally, Ann Ryan Robertson, a partner at Locke Lord LLP in Houston, brings extensive experience to the panel as an international arbitration practitioner. She has acted as chair, wing, sole, and emergency arbitrator in a variety of cases involving oil and gas, manufacturing, sales, buy-sell agreements, and insurance disputes. She also represents clients as counsel in complex business disputes across a wide range of industries.

III. PANELISTS ENGAGE IN LIVELY DEBATE ON HOT TOPICS IN INTERNATIONAL ARBITRATION

The discussion revolved around questions from the audience on a range of topics of interest to international arbitration practitioners, and provoked lively debate among the panelists.

A. *Qualities of a Tribunal Chair*

The first question asked about the qualities sought in a tribunal chair where co-arbitrators are tasked with appointing a presiding arbitrator. The panelists noted that arbitrators' reputation could be affected by poor procedural management or the ultimate failure to issue an enforceable award. Therefore, co-arbitrators are incentivized to appoint a skilled and competent chair. Besides the obvious technical

and organizational skills, the panelists raised a number of other considerations: the increasing importance of technological familiarity, particularly with regard to virtual hearings, electronic bundles, and electronic presentation of evidence. They also noted the importance of cultural awareness and diversity, particularly where the parties, counsel, and the tribunal come from different parts of the world and with different legal traditions. Lastly, the panelists emphasized the importance of diversity as a desideratum in itself and as a proven technique to ensure better quality decision making.

Competence and sound judgment are naturally important characteristics for an arbitrator and in particular for the presiding arbitrator. It is difficult to easily quantify these skills, as a result, arbitrators tend to rely on their reputation to secure appointments. Co-arbitrators are incentivized to appoint a tribunal chair who can manage the arbitral procedure fairly and competently. Although it is common for the tribunal chair to take the lead in managing proceedings, tribunal's the tribunal's conduct is difficult to attribute to a particular member. Therefore, failings by the tribunal chair "behind the scenes" may reflect poorly on all members.

The author agrees with the panel's comments regarding the importance of managerial and, to an extent, technological competence for the tribunal chair. In principle, much of a tribunal's administrative work can be delegated to a tech-savvy tribunal secretary. However, experience suggests that the most efficient and cost-effective way to administer an arbitration is by appointing a competent and engaged tribunal chair with a firm grip on proceedings.

B. Document Production and Disclosure

Document production and disclosure are often a thorny issue in international arbitration, particularly where parties or counsel hail from jurisdictions with different fundamental approaches. It was observed that the International Bar Association Rules on the Taking of Evidence in International Arbitration (IBA Rules) are often used as a framework for document production, being either explicitly referred to by the tribunal or in substance underpinning the procedure which the tribunal orders. However, other systems for document production are available, such as the Prague

Rules, which provide an alternative framework for rules of evidence, which may be adopted in arbitration, with a focus on inquisitorial-style proceedings and minimal document production.

Where document production is contentious, members of the panel said that there is a case to be made for erring in favor of allowing disclosure. This is to ensure that parties cannot argue that they have not had the chance to have their case properly heard (where document production is in some circumstances essential for one party to advance their case), and because it can, even if uncommonly, produce pivotal evidence.

It is certainly correct that practitioners from different legal backgrounds may have a different perspective on the concept of disclosure and the extent to which it should be employed. However, experienced international arbitrators, despite their background, usually tend to adapt well to the concept and typically adopt an approach which is more generous than that of a typical civil law court, though less extensive than that of a British or American common law court. While the panel addressed contested disclosure requests through the lens of whether or not to order document production, they did not address the arguably more difficult situation where one party discloses documents pursuant to the tribunal's order, and the other party argues forcefully that disclosure is incomplete and that material is being (deliberately or otherwise) withheld. This situation may potentially be even more challenging for a tribunal, as they lack the authority and powers of a national court. Obtaining satisfactory disclosure from an unscrupulous opposing party can be a frustrating experience for many practitioners.

C. Guerrilla Tactics

Moving on to another topic discussed by the delegates, "guerrilla" tactics are commonly used to delay or derail arbitration. They may be more or less transparent, but it is critical for the tribunal to ensure that the arbitral procedure is sufficiently thorough and meticulously recorded. Ultimately, such tactics may "poison the well" by affecting the credibility of a party that employs them and be taken into account in the allocation of costs.

The panelists observed that the proper way for a tribunal to counter guerrilla tactics is to strictly comply with the relevant arbitration law and institutional rules where applicable. This helps to avoid opening the door to further grounds of challenge. In the short term, this can unfortunately play into the hands of the "guerrillas", in absorbing time and inflicting cost on the other party, such as the thorough hearing of a spurious jurisdictional challenge. However, the panel observed that in the end, guerrilla tactics usually do not ultimately benefit those employing them and are more likely to harm or hinder their prospects in a final award.

D. Expert Evidence

The panel next moved to discuss expert evidence and provided guidance on what they consider beneficial in expert reports and particularly joint expert reports. There was a strong preference expressed by the panelists for short, properly referenced joint reports set out in tabular form. They also recommended that (where applicable) experts opining on quantum issues should provide an Excel spreadsheet with easily identifiable formulae that allows the tribunal to input their own numbers and dates to perform their own calculations, such as for interest claims. One key consideration, often overlooked in arbitration, is the value of ensuring that experts are dealing with the same issues. An agreed list of issues developed at an early stage can serve to channel the discussion. The panel also remarked that there is value in ordering the experts to deal not just with their own assumed set of facts but also with their counterpart's assumed set of facts.

On this subject, the panel referred to a common issue encountered in international arbitrations where the parties instruct independent experts whose reports address quite different issues. This is less common where the arbitral procedure calls for memorial-style pleadings where the respondent's expert report(s) will necessarily respond to those of the claimant. However, it frequently occurs that the tribunal adopts a common law-style procedure, and the parties simultaneously exchange expert reports that barely correspond with each other. This practice is unhelpful to the tribunal and sometimes results in additional costs or delays as the parties request additional rounds of expert evidence to deal properly with the issues

raised. The problem is that arbitrations sometimes adopt the basic sequence of a common law court, without any order as to the questions that experts should seek to answer. It is standard practice for parties to disclose the number, identity, and disciplines of the experts they will call on in advance, and in many cases the issues in dispute are evident from the parties' respective pleadings. Therefore, in principle it should be entirely possible to agree or set the issues for experts to address in advance in these cases. However, this is a step often omitted by tribunals (and, in fairness, in many cases it may not be requested or argued for by the parties).

E. Virtual and In-Person Hearings

Before concluding the discussion, the panel also discussed virtual hearings, which are here to stay in some form or another. Members of the panel expressed support for, ideally, having the tribunal together in the same room in person to establish better cooperation and interpersonal dynamics between the arbitrators. This militates in favor of in-person hearings or a hybrid model, depending on the circumstances.

The panel considered that having people in the same physical space tends to result in better communication and better teamwork. However, this does not necessarily prevent a tribunal from forming a strong working relationship without ever meeting in person, as was the case in numerous arbitrations during the COVID-19 pandemic. Subjecting a witness or expert to cross-examination is also often better done in person, face to face, to allow the tribunal the best possible opportunity to consider their responses and credibility. Few would argue that there are not (at least in principle) some benefits to holding substantive proceedings in person. It is harder to make a case for anodyne case management conferences, procedural hearings, and such to be held in person, with the attendant cost and inconvenience. The debate is likely to focus on whether it is appropriate for major hearings to be held wholly in person or whether, and to what extent, some hybrid element should be adopted, and this is often a question of proportionality (and sometimes tactics) to be considered on a case-by-case basis.

The panel discussion shed light on some of the most pertinent issues faced by

practitioners and arbitrators in the field of international arbitration. From the challenges posed by guerrilla tactics and document disclosure to the increasing prevalence of virtual hearings, the discussion highlighted the need for arbitrators to remain vigilant and adaptable in order to navigate these issues effectively. While there may be no one-size-fits-all solution, the panel's insights provide valuable guidance for practitioners seeking to optimize their strategies and procedures in international arbitration.

THOMAS PARKIN is an associate in the international arbitration and dispute resolution team of K&L Gates LLP's Dubai office. Thomas is experienced in representing high profile corporate clients in complex, high value, and often multi-jurisdictional disputes in the Middle East and internationally, with a particular focus on international arbitration and commercial litigation.

BOOK REVIEW

THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY ON THE UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION EDITED BY GUILLERMO PALAO

Reviewed by Denise Ereka Peterson, FCIArb

I. INTRODUCTION

Concerns about cross-border dispute resolution options often focus on the enforceability of those options. Before the Singapore Convention on Mediation (the "Convention"), arbitration was the primary, non-litigation option utilized. The success of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") created a framework by which the UNCITRAL established a formal Working Group to evaluate and, if possible, create a framework similar to that of the New York Convention.

The complexity of creating the Convention and the work necessary to develop the consensus to ratify it form the opening of *The Singapore Convention on Mediation: A Commentary on the United Nations Convention on International Settlement Agreements Resulting from Mediation* (the "Commentary").[1]

The substantive part of this book unfolds a nuanced analysis of each segment of the text of the Convention, roadmapping the thought processes and global involvement behind its creation. Beginning with the Preamble, each Article of the Convention is covered in its own section. A typical section has a mini table of contents for that Article, the text of the Article itself, usually introductory remarks for the section, and then a thorough discussion of each phrase.

What makes this book uniquely valuable is its examination of the thought processes of the Working Group and its intent for implementing the Convention's

[1] THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY ON THE UNITED NATIONS CONVENTION ON INTERNATIONAL SETTLEMENT AGREEMENTS RESULTING FROM MEDIATION (Guillermo Palao ed., 2022) [hereinafter THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY].

enforcement requirements. The various sections are authored by individuals directly involved in the discussions, working groups, or interested states and stakeholders. The authors are all distinguished experts in law and dispute resolution, with Guillermo Palao's editing seamlessly combining all sections.

While the book itself is not formally divided into parts, this review has taken the liberty of creating rough groupings to highlight each section appropriately.

II. THE BOOK

A. *Part One: Chronicles of the Singapore Convention – An Insider's View*

Itai Apter and Roni Ben David bring us both the why and the how of the Convention in this section, setting the stage for a deeper understanding of the process underlying the Articles of the Convention itself. Extensively footnoted, Apter and Ben David lay out the historical foundations of the Convention, from the critical work done by S.I. Strong in analyzing "the legal framework leading to the limited use of mediation to resolve cross-border commercial disputes compared to more traditional mechanisms,"[2] to how her presentation of that work in 2014 connected her study to UNCITRAL Working Group II, whose remit is dispute resolution.[3]

The authors of this chapter then fold in the various other players and their roles, dubbed "experts meeting diplomats."[4] With the cast of characters established, they explain the procedural steps, discussions, formal deliberations, critical buy-in, and consensus-building vital to the Convention's successful creation. While this section may appear on the surface merely as a historical perspective, it also neatly roadmaps how the work was accomplished, creating a future model.

B. *Part Two: The Preamble*

Preambles set the tone for the underlying document and can "also be extremely helpful when courts and tribunals are seeking to interpret and apply treaty provisions."[5] S.I. Strong, the author of this section of the Commentary, "was a non-

[2] *Id.* at 5.

[3] *Id.* at 6.

[4] *Id.* at 7.

[5] *Id.* at 43.

governmental observer at UNCITRAL and Working Group II during the drafting"[6] of the Convention, providing a unique insight into the drafters' intent for the four clauses of the Preamble.

Strong states that there is "a complex history behind each of the four elements of the preamble."[7] For each element, she discusses whether the language was factual compared to aspirational and which underlying prior treaties, agreements, or studies drove her conclusions. This complex history is reflected in the role the author played by responding to the Working Group's request for a better understanding of the current state of mediation in cross-border disputes. Indeed, her discussion of how the study came about and its impact on the Convention are notable.

Strong opines that when a judicial body finds it necessary to interpret the Convention, "courts would do well to consider the genesis and evolution of the various provisions to gain a complete understanding of the language in question."[8] Strong's nuanced analysis of the Preamble enables such considerations.

C. Part Three: The Articles

The Convention features 16 Articles from "Scope of Application" ("Scope") to "Denunciations," which results in a total of 16 chapters. By looking into the first chapter with some depth, the usefulness of this Commentary for legal practitioners, scholars, and jurists is evident.

The Scope chapter, authored by Pablo Cortés,[9] delves into the impact of specific verbiage choices in the Scope Article. On its surface, this Article merely limits the application of the Convention with such factors as the minimum requirements on the number of parties, the situs of the parties, and the types of cases to which this Convention applies, *e.g.*, not family law. However, while the Scope Article is seemingly straightforward, Cortés shows how those who work in collaborative or hybrid ADR practices may be impacted by how specific terms, such as mediation, are defined in

[6] *Id.* at 41.

[7] *Id.* at 45.

[8] *Id.* at 62.

[9] Pablo Cortés is the Professor of Civil Justice at the University of Leicester (United Kingdom).

Article 2, "Definitions."

Mediations under the Convention are limited to cases where the mediator "does not have the authority to impose upon the parties a solution to the dispute."[10] This potentially excludes med-arb and mediator's proposals from being covered by the Convention. This article-overlapping analysis by Cortés exemplifies a critical approach by the authors of each chapter. They do not limit their work to their specific Article but rather how it integrates into the Convention, making this Commentary a handbook for mediators, legal practitioners, and jurists.

III. CONCLUSION

The book's overall structure is excellent for its use as a quick reference, research guide, and textbook. The editor, Guillermo Palao's, decision to include both a conventional, bird's-eye view "Contents" section and an "Extended Contents" section minimizes the need for scrambling through the index for an entry. The Table of Abbreviations assures readers of consistent usage by all contributors. The Table of Cases and the Table of Legislation neatly cross-reference the sections where they are discussed. Each chapter's paragraphs are clearly identified with a margin number indicating chapter and paragraph number, making internal indexing simple. As shown by some recent publishing failures by popular legal guides, the importance of clarity and ease of access to information cannot be over-emphasized.

While domestic mediators and legal professionals may not immediately see the usefulness of this Commentary, it is still a text that should be strongly considered as commercial and legal markets become increasingly globalized. COVID has increasingly moved parties to online and more remote deal-making, increasing the need for an enforceable cross-border dispute resolution process. From a historical perspective, or for those working in or with governments to improve access to justice and resolution systems, this book provides an excellent roadmap of how the Convention's agreements were reached in a relatively short time frame.

[10] THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY, *supra* note 1, at 68.

DENISE EREKA PETERSON is a full-time professional neutral, focusing her practice exclusively on alternative dispute resolution services. She mediates both civil and probate cases and is on multiple arbitration panels. Now in her tenth year of practice as an attorney, she is licensed in both the states of Texas and New York and she is a solicitor to the Senior Courts of England and Wales. As a current fellow and past chair for the Chartered Institute of Arbitrators, she helped the organization achieve diversity goals by taking the law student membership nationwide from less than a dozen to over one hundred and fifty inside of a year. She currently serves on the Scholarship Committee as a board member for The Woodlands Bar Association.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
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issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

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Institute for Transnational Arbitration
ITA IN REVIEW

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The Institute for Transnational Arbitration
A Division of The Center for American and International Law

5201 Democracy Drive
Plano, Texas, 75024-3561
USA