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RIGHTING A WRONG: THE CORRECTION OF ARBITRAL AWARDS

Pragya Singh[1] *& Meha Tandon*[2]

Abstract

Post-award reliefs in the arbitral process include, inter alia, requests for correction, interpretation, and additional awards. These remedies have been conceptualised as a result of the understanding that even final awards may be contaminated by errors and oversights. The option to apply for correction of arbitral awards allows parties to side-step awards that are incongruous with their circumstances or intentions, and therefore, undesirable or unenforceable. Corrections may be warranted on several grounds, ranging from those purely technical or clerical to more serious mistakes and omissions. It can be argued that the significance of this particular post-award remedy has been underplayed. Accordingly, this editorial sheds light on the grounds on which correction can be sought, the practice across jurisdictions concerning time-periods for correction, the right to be heard in correction proceedings, and the appropriate authority for making corrections. By analysing all aspects of correction proceedings, the endeavour of this editorial is to propose a framework which ensures that the parties' right to seek correction of arbitral awards is most effectively realised.

I. Introduction

The arbitral process is now, more often than not, protracted and expensive. Consequently, there is no greater misfortune for parties than to find

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themselves with an incorrect or unenforceable award. Thus, the importance of the post-award stage and the remedies available to disputing parties dissatisfied with the contents of an award can never be over-emphasised. While contracting parties must acquaint themselves with the prevailing positions on recognition and enforcement of arbitral awards as well as on setting aside proceedings, it is equally important to be aware of the position of the law of the seat of arbitration on other post-award motions such as requests for correction of arbitral awards, interpretation of arbitral awards, and additional awards.[3] This is because disputes submitted to arbitration are now becoming increasingly complex, and mistakes in the award may not be grave enough to warrant setting aside on grounds of due process or public policy.[4] In any case, even where annulment is possible, it is best avoided, as restarting the arbitral process would be cumbersome and time-consuming for the parties. Given the significance of correction as a post-award relief, it is surprising that less attention has been paid to it in academic discourse.[5]

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3 The law of the seat assumes particular importance, as it is largely undisputed that the power to correct an arbitral award is governed by the law of the seat. *See generally* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3369 et seq. §24.03 (3d ed. 2021). In Part V of the article, the authors will also examine the relevance of the law governing correction of arbitral awards in enforcement jurisdictions.

4 Shalini Soopramanien, *Gauging the Tension Between Finality and Fairness in Arbitration: An Assessment of the Scope and Limits of "Correction" and "Interpretation" of Final Awards*, at ¶ 5.6.1, YOUNG ICCA BLOG (Oct. 17, 2011), *available at* https://youngicca-blog.com/gauging-the-tension-between-finality-and-fairness-in-arbitration-an-assessment-of-the-scope-and-limits-of-correction-and-interpretation-of-final-awards-by-shalini-soopramanien/.

5 Stuart Isaacs, *Life after Death: The Arbitral Tribunal's Role Following Its Final Award*, *in* JURISDICTION, ADMISSIBILITY AND CHOICE OF LAW IN INTERNATIONAL ARBITRATION: LIBER AMICORUM MICHAEL PRYLES 357 (Neil Kaplan & Michael J. Moser eds., 2016).

It is important to note that despite the fact that most jurisdictions provide that a tribunal is "*functus officio*"[6] once an arbitral award is rendered[7] and recognise the *res judicata* effect of the final award,[8] almost all national legal systems give parties the opportunity to avail these post-award remedies.[9] Even where the statute does not provide parties the right to seek correction or interpretation of arbitral awards, courts have recognised these remedies as part of the tribunal's inherent powers.[10] This is because it is impractical to assume that awards will always be free from defects, ambiguities, or errors. While applications seeking interpretation require the tribunal to clarify the intent behind an award or order rendered by it, requests for additional awards are made to enjoin the tribunal to decide a claim that was omitted in the original award. On the other hand, requests for correction seek rectification of inadvertent mistakes in the arbitral award.[11]

Such mistakes may be clerical or typographical but assume importance because of their financial or commercial effects.[12] At the same time, the errors need not be significant or monumental, and even minor and insignificant mistakes may be corrected through this mechanism.[13] When an award is corrected, a purely technical review is undertaken, and the

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6 "Functus officio" refers to a body whose mandate has been discharged, either by virtue of successful completion of the objective for which it was created or by reason of expiry of any time limits imposed.

7 CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1485(1) (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], §§ 1056, 1058, 1059 (Ger.); Arbitration and Conciliation Act, No. 26 of 1996, § 32 (India) [*hereinafter* "Arbitration Act"].

8 Soopramanien, *supra* note 2.

9 Arbitration Act, No. 26 of 1996, § 33 (India); BORN, *supra* note 1, §24.03.

10 Tribunale federale [TF] [Federal Supreme Court] Nov. 2, 2000, DFT 126 III 524 (Switz.).

11 Luiz Olavo Baptista, *Correction and Clarification of Arbitral Awards*, *in* ARBITRATION ADVOCACY IN CHANGING TIMES, 15 ICCA CONGRESS SERIES 280 (Albert Jan Van den Berg ed., 2011).

12 BORN, *supra* note 1, § 24.03.

13 *See infra* text accompanying notes 21, 22, 23, 24.

substance of the award is not interfered with in any manner.[14] In other words, the power to correct such defects in arbitral awards has been construed very narrowly and does not extend to permit rectification of errors of law or fact.[15] The idea behind this remedy is to ensure that parties do not find themselves bound by an award for reliefs they never sought or those the tribunal never intended to grant.[16]

With requests for correction being the most frequently made and often pivotal in the arbitral process, this article discusses the grounds on which correction can be sought **[Part II]**, the relevant time-periods for correction proceedings **[Part III]**, the right of parties to be heard in correction proceedings **[Part IV]**, and whether the tribunal alone has the power to make corrections or there is scope for judicial interference **[Part V]**. In Part V, the authors also provide suggestions for the most effective utilisation of correction as a post-award remedy. In the final part, the authors conclude **[Part VI]**.

II. Grounds for Correction

Most national legislations, institutional rules and other international laws and conventions governing arbitration, including the UNCITRAL Model Law and the ICSID Convention, allow for correction of only certain kinds of errors, namely computational errors, clerical or typographical errors, and other errors of similar nature.[17] As mentioned earlier, this scope of

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14 Isaacs, *supra* note 3, at 366.

15 Vanol Far E. Mktg Pte Ltd v. Hin Leong Trading Pte Ltd. [1996] SFHC 108 (Sing.) [*hereinafter* "Vanol"].

16 Isaacs, *supra* note 3, at 360–61; KLAUS PETER BERGER, PRIVATE DISPUTE RESOLUTION IN INTERNATIONAL BUSINESS: NEGOTIATION, MEDIATION, ARBITRATION 645 (3d ed. 2015) [*hereinafter* "Berger"].

17 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 33, G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006) [*hereinafter* "UNCITRAL Model Law"]; Convention on the Settlement of Investment

correction is extremely restricted and does not include within its ambit an erroneous understanding of established laws or facts.[18]

The three aforementioned types of errors are generally understood as being facile in nature – often characterised as "*noises in communication*",[19] "*slip of the pen*",[20] and "*petty errors*".[21] However, such characterisation does not do justice to the true scope and implications of such errors. Although seemingly insignificant in most cases,[22] a closer look reveals that such defects have ranged from minor heedless mistakes such as incorrect

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Disputes between States and Nationals of Other States, art. 49, Oct. 14, 1966, 575 U.N.T.S. 159; Arbitration Act 1996, c. 23, § 57 (Eng.) [*hereinafter* "English Arbitration Act"]; Arbitration Act, No. 26 of 1996, §33 (India); Federal Arbitration Act of 1925, 9 U.S.C. §11 (2018); Arbitration Act, No. 37 of 2001, § 43 (Sing.); Law on International Commercial Arbitration (Aug. 12, 1993), art. 33 (Russ.); London Court of International Arbitration (LCIA) Arbitration Rules 2020, art. 27 [*hereinafter* "LCIA Rules 2020"]; International Chamber of Commerce (ICC) Arbitration Rules 2017, art. 36 [*hereinafter* "ICC Rules 2017"]; Singapore International Arbitration Centre (SIAC) Rules 2016, r. 33 [*hereinafter* "SIAC Rules 2016"]; Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules 2018, art. 38 [*hereinafter* "HKIAC Rules 2018"]; International Centre for Dispute Resolution (ICDR) International Arbitration Rules 2009, art. 30 [*hereinafter* "ICDR Rules 2009"].

18 James M. Gatis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15(1) AM. REV. INT'L ARB. 12 (2005).

19 Baptista, *supra* note 10, at 275–88.

20 SC v. OE1 & OE2 [2020] HKCFI 2065 (H.K.); *see also* Tribunale federale [TF] [Federal Supreme Court] Republic A.________ v. B.________ International, Oct. 6, 2015, 4A_34/2015, ATF 141 III 495 (Switz.) (wherein such a slip was termed as '*lapsus calami*').

21 Diego Brian Gosis, *Addressing and Redressing Errors in ICSID Arbitration*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 864 (Jean E. Kalicki & Anna Joubin-Bret eds., 2015); JOHN TORREY MORSE, THE LAW OF ARBITRATION AND AWARD 329 (1872).

22 For example, in Fischer v. CGA Comput. Ass'n, Inc., 612 F. Supp. 1038, 1041 (S.D.N.Y. 1985), the Court held that the word "declares" must be substituted with "finds" in an award where the arbitrator had intended to provide a monetary relief distinct from a declaratory relief.

punctuation marks[23] or misprints[24] to more significant errors such as arithmetical miscalculations concerning damages or interests.[25] Left unchecked, these errors have the potential to manifest into greater cause for concern.[26]

For instance, in *Mutual Shipping Corporation* v. *Bayshore Shipping Co. (The Montan)*, the arbitral tribunal mistakenly transposed the names of the parties resulting in the award being made in favour of the losing party.[27] On the basis of the reasons provided by the arbitrator in the award, the Court could adjudge that the mistake was a clerical error which qualified for correction by the Tribunal. Accordingly, the Court remitted the award to the Tribunal for taking the necessary course of action.[28]

In *Doglemor Trade Ltd.* v. *Caledor Consulting Ltd.*, the Claimants brought a challenge against an LCIA award after the Tribunal refused to correct a computational error despite admitting that it added rather than subtracted certain amounts that resulted in the assessment of damages at USD 58 million as opposed to the contended figure of USD 4 million.[29] The Court found the existence of an error of such nature in an enforceable award

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23 Brooks W. Daly, *Correction and Interpretation of Arbitral Awards under the ICC Rules of Arbitration*, 13(1) ICC INT'L CT. ARB. BULL. 63 (2002) citing ICC Case No. 10386, Addendum to Award, 13(1) ICC INT'L CT. ARB. BULL. 86-87 (2002).

24 X v. Y & Ors., CCIG Case No. 130, Decision (Feb. 10, 2000).

25 Zimbabwe Electricity Supply Commission v. Genius Joel Maposa, Judgment No. HH-231-98 (Mar. 29, 1998 and Dec. 9, 1998) (unpublished) cited in XXV Y.B. COMM. ARB. 546 (2000).

26 INTERNATIONAL COMMERCIAL ARBITRATION AND MEDIATION IN UNCITRAL MODEL LAW JURISDICTIONS 437 (Peter Binder ed., 4th ed. 2019).

27 Mutual Shipping Corporation v. Bayshore Shipping Co. (The Montan) [1985] 1 WLR 625 (Eng.) [*hereinafter* "The Montan"].

28 *Id.* at 638; *see also* Gosis, *supra* note 21, at 864, 871–72.

29 Doglemor Trade Ltd v. Caledor Consulting Ltd. [2020] EWHC 3342 (Comm) [2] (Eng.) [*hereinafter* "Doglemor"].

capable of causing substantial injustice to the Claimants.[30] Since the award had otherwise conclusively determined the issues between the parties, the Court decided to remit only those paragraphs which were affected by the error to the Tribunal for correction.[31]

Similarly, in another dispute involving computational errors, *Railroad Development Corporation* v. *Republic of Guatemala*, an ICSID tribunal upheld the request for correction and proceeded to apply the correct discount rate to deliver a revised award.[32] The application of the correct rate ultimately led to an addition of USD 2 million towards the sum of the award.[33]

Evidently, the presence of such defects in an award may not only lead to situations of absurdity[34] but may also cause substantial injustice at the stage of enforcement.[35] In *Xstrata Coal Queensland Pty Ltd.* v. *Benxi Iron & Steel (Group) International Economic & Trading Co. Ltd.*, the Court remitted the arbitral award of a London-seated arbitration for correction after it had been refused enforcement in China.[36] In this case, the award creditor had earlier requested the arbitral tribunal to correct a typographical error in relation to the correct identity of one of the parties to the arbitration and the underlying sales contract.[37] Upon the refusal of its request, the Claimant

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30 *Id.* at [68].
31 *Id.* at [73], [78]–[79].
32 Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Decision on Claimant's Request for Rectification of Award (Jan. 18, 2013).
33 *Id.*
34 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 777 (Emmanuel Gaillard & John Savage eds., 1999).
35 Doglemore, [2020] EWHC 3342 (Comm) [65] (Eng.); Mobile Telecomms. Co. KSC v. HRH Prince Hussam Bin Saud Bin Abdulaziz Al Saud [2019] EWHC 3109 (Comm) (Eng.) [*hereinafter* "Mobile Telecommunications"].
36 Xstrata Coal Queensland Pty Ltd (Co. 098156702) [now known as Rolleston Coal Holding Pty Ltd] v. Benxi Iron & Steel (Group) Int'l Econ. & Trading Co. Ltd. [2020] EWHC 324 (Comm) [59] (Eng.) [*hereinafter* "Xstrata 2020"].
37 LCIA Rules 2014, art. 27.

challenged the award before the High Court under Section 68 of the Arbitration Act, 1996 ["**English Arbitration Act**"] on grounds of serious irregularity in the conduct of arbitration. Among other factors, the Court considered the judgment of the Shenyang Intermediate People's Court in China which refused enforcement of the impugned award in China.[38] In the said judgment, contrary to the findings of the Tribunal, the Chinese court declared that there was no contractual relationship between the Claimant and the Respondent and consequently, the Claimant could not be considered a party to the arbitration agreement or an award creditor to seek enforcement of the award.[39] Against this background and satisfied with its earlier assessment that such error falls into the category of 'errors of a similar nature',[40] the English High Court deemed it fit to remit the award to the Tribunal for necessary correction in the interest of justness and reasonableness lest the Claimant faces similar jurisdictional challenges during enforcement proceedings elsewhere.[41]

The 'any errors of similar nature' ground has emerged as a rather perplexing ground for correction over time. Due to gross ambiguity in its language and with no perceptible homogeneity underlying the terms 'computational', 'typographical', and 'clerical' for proper application of the *ejusdem generis* rule, it becomes difficult to construe the precise scope of this ground.[42] At times when parties attempt to abuse appellate arbitral processes to get a second bite at the cherry, such grounds allow parties to further misuse the

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38 Xstrata 2020, [2020] EWHC 324 (Comm) [56], [59] (Eng.).
39 *Id.* [20].
40 *Id.* [15] citing Xstrata Coal Queensland Pty Ltd (2) Sumisho Coal Australia Pty Ltd (3) Itochu Coal Resources Australia Pty Ltd (4) ICRA OC Pty Ltd v. Benxi Iron & Steel (Grp.) Int'l Econ. & Trading Co. Ltd. [2016] EWHC 2022 (Comm) [32] (Eng.) [*hereinafter* "Xstrata 2016"].
41 *Id.* [46]–[47]; *Cf.* Mobile Telecommunications, [2019] EWHC 3109 (Comm) (Eng.).
42 CNH Global NV v. PGN Logistics Ltd. [2009] EWHC 977 (Eng.).

correction provisions to reopen arbitral awards for review on merits or at the very least delay the enforcement process.[43]

Similar concerns have also been raised about other grounds for correction found in national legislations, most notably the English Arbitration Act and the United States Federal Arbitration Act ["**FAA**"]. Whereas the English Arbitration Act allows correction of "*accidental slip or omission*" in addition to the usual grounds for correction,[44] the FAA allows modifications and corrections by national courts in a number of instances including in cases where there exists an "*evident material mistake*" or where issues have been "*deliberately left open by an interim or partial final award*".[45] It is often argued that by allowing courts to take over the role of arbitral tribunals in the correction phase, the FAA has created an unnecessary affront to efficiency and expediency in obtaining legally correct awards in the U.S.[46] On the other hand, the accidental slip rule has extended the powers of the arbitrators to correct their unintentional oversight[47] or misunderstanding of relevant evidence(s)[48] as post-award remedial measures under the English law.[49] Regardless of such broad grounds, both jurisdictions require that a correction must not affect the merits of the award and should be limited to

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43 Andrew N. Vollmer & Angela J. Bedford, *Post-Award Arbitral Proceedings*, 15(1) J. INT'L ARB. 37, 48-49 (1998).

44 English Arbitration Act, c. 23, § 57(3)(a); Born, *supra* note 1, §24.03; Arif Hyder Ali, Jane Wessel, Alexandre de Gramont & Ryan Mellske, THE INTERNATIONAL ARBITRATION RULEBOOK: A GUIDE TO ARBITRAL REGIMES 576 (2019) [*hereinafter* "Ali et al."].

45 9 U.S.C. § 11.

46 BORN, supra note 1, §24.03; Stephen A. Hochman, *Judicial Review to Correct Arbitral Error – An Option to Consider*, 13 OHIO ST. J. DISP. RESOL. 106 (1997); *see also* Stephen Wills Murphy, *Judicial Review of Arbitration Awards under State Law*, 96(1) VA. L. REV. 887-937, 935 (2010).

47 Rees v. Windsor-Clive [2020] EWHC 2986 (Ch) (Eng.).

48 Gannet Shipping Ltd v. Eastrade Commodities Inc. [2001] EWHC 483 (Comm) [19] (Eng.).

49 In X v. Y [2018] EWHC 741 (Comm) (Eng.), the Court held that Section 57(3)(1)(a) of the English Arbitration Act could also be used to provide further reasons in an award at the corrective stage.

only "*effect the intent*" of the tribunal.[50] The very nature of the list of correctable errors demonstrates that correction should only be permitted to allow the award to reflect the intended expression of the tribunal.[51] Such interpretation is further buttressed by the fact that any decision regarding correction has to be compulsorily grounded exclusively on existing evidence and the satisfaction of the tribunal that there was indeed a mistake in the expression of its decision.[52] However, it is hard to imagine that, for instance, a corrected misreading of evidence (albeit existing) – as allowed under the slip rule – would not affect the intent of the tribunal in any situation.[53] Moreover, in the absence of any standards or guidelines laid down for handling correction requests, if such a situation emerges, there is no certain answer as to how it would be resolved. Ideally, it seems reasonable to assume that in such a situation the tribunal would most likely deny the request claiming it to be a mistake of error of fact or law.[54]

Understandably, arbitral tribunals (and courts) have the discretion to correct an error upon request as long as their corrective measures do not have a bearing on the merits of the award. However, the indeterminacy of a general standard for such corrective measures should not be taken lightly. As illustrated above, it is not always easy to conclusively determine the

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50 BORN, *supra* note 1.

51 BORN, *supra note* 1, n.99.

52 D.W. Caldwell, Inc. v. W.G. Yates & Sons Constr. Co., 242 So.3d 92, ¶ 20 (Miss. May 10, 2018); *see also* Tribunale federale [TF] [Federal Supreme Court] Apr. 25, 2017, 4A_34/2016, ¶ 3.5.1 (Switz.).

53 No Curfew Ltd v. Feiges Properties Ltd. [2018] EWHC 744 (Ch) (Eng.). For a similar situation in the U.S., *see* T.Co. Metals L.L.C. v. Dempsey Pipe & Supply, Inc., 592 F.3d 329 (2d Cir. 2010). *See generally* Jennifer Kirby, *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.: Are There Really No Limits on What an Arbitrator Can Do in Correcting an Award?*, 27(5) J. INT'L ARB. 524–28 (2010).

54 *See also* Janet Bignell QC, Not So Appealing? The Challenges of Challenging Awards and Determinations before the Court, Address at the Arbrix GP Open Conference 7 (Nov. 20, 2019).

nature of a request or, at times, even distinguish between an error of clerical, numerical, or similar kind and an error of fact or law.[55] An incorrect determination in either case may result in failure of administration of proper justice between the parties to the dispute, as explained earlier. In such cases, guidance can be sought from the decision on rectification in *Vivendi* v. *Argentina*, wherein the ad hoc committee was requested to correct seven errors in relation to the arguments advanced by the Respondent as presented in the award.[56] After reviewing a series of ICSID decisions on rectifications, the Committee laid down the appropriate standard for determining the fate of a request for correction. According to the Committee, the availability of this remedy depends on the satisfaction of the following two "factual conditions":[57]

> "*First, a clerical, arithmetical or similar error in an award or decision must be found to exist. Second, the requested rectification must concern an aspect of the impugned award or decision that is purely accessory to its merits*."

Cumulatively, these two conditions ensure that the award can be rectified for minor mistakes without any alteration in the substantive findings of the tribunal or a reconsideration of the claims, arguments, and evidence advanced by the parties prior to the making of the award.[58] In other words, this standard prevents parties from pleading fresh arguments or presenting

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55 Xstrata 2016, [2016] EWHC 2022 (Comm) [32] (Eng.).

56 Compañiá de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Arg. Republic, ICSID Case No. ARB/97/3, Decision of the ad hoc Committee on the Request for Supplementation and Rectification of its Decision concerning Annulment of the Award, ¶ 23 (May 28, 2003).

57 *Id.* ¶ 25.

58 This standard has been affirmed in more recent ICSID decisions: Victor Pey Casado & President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Decision on Rectification of the Award, ¶ 50 (Oct. 6, 2017).

new evidence[59] and thereby allows tribunals to approach correction as the restricted post-award remedy it is supposed to be.[60]

Lastly, it is important to correct a common misconception. Through the illustrations presented so far, it may appear that an amendable error originates only from the conduct of the arbitral tribunal. In reality, however, such errors are not restricted to arbitral tribunals alone; other stakeholders may also contribute to the making of erroneous awards. For example, in *Vanol Far East Marketing Private Limited* v. *Hin Leong Trading Private Limited*, the mistake of one of the parties to the dispute in not submitting a complete account of expenses led to computational errors that finally found place in the award.[61] In *Danella Construction Corp.* v. *MCI Telecommunications Corporation*, the mistake emanated from the conduct of the arbitral institution.[62] In this case, the arbitrator had forwarded his award to the American Arbitration Association ["**AAA**"] which erroneously transposed the name of the parties. The award was signed as such by all three arbitrators – a step that confirmed the erroneous award in favour of the wrong party. Interestingly, despite the presence of an evident mistake, the Court of Appeals refused to remit the award to the tribunal for correction or correct it itself on discussions based on the doctrine of *functus officio*.[63]

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59 THE ICSID CONVENTION, REGULATIONS AND RULES: A PRACTICAL COMMENTARY 548 (Julien Fouret, Rémy Gerbay, Gloria M. Alvarez eds., 2019).

60 *See*, *e.g.*, Philip Morris Brands Sàrl, Philip Morris Products S.A. & Abal Hermanos S.A. v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Decision on Rectification, ¶ 20 (Sept. 26, 2016).

61 Vanol, [1996] SGHC 108 (Sing.) cited in UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration 131–32 (2012).

62 Danella Constr. Corp. v. MCI Telecomms. Corp., 512 U.S. 218 (1994) (unpublished).

63 R. Glenn Bauer, *Once a Catchy Phrase, Always Immutable Law – The Origins and Destiny of Three Famous Mantras: Functus Officio Once on Demurrage, Always on Demurrage Manifest Disregard of the Law*, 11(4) J. INT'L ARB. 44 (1994).

Thus, to conclude, when arbitral tribunals (and courts) are met with requests for corrections, it becomes important to emphasise that the power to correct an arbitral award is a careful exception carved out of the doctrines of *functus officio* and *res judicata*.[64] A revision of the decision of the tribunal would lie in direct contradiction to the rather complex finality of the arbitral process. Therefore, it is important to keep in mind that a correction must serve its limited purpose.

III. Requests for correction: The significance of time periods

The time-limit within which a request for correction of an award must be made varies across jurisdictions and institutional rules.

For instance, in Quebec, parties must request corrections within 30 days from the date of receipt of award, and the tribunal must make the corrections within two months from the date of request.[65] In contrast, under the Qatari Arbitration Law, parties can request correction/a tribunal can make *suo moto* corrections only within 7 days from the date of receipt of award/date of award respectively.[66] However, most UNCITRAL Model Law jurisdictions follow the time period mentioned under Article 33 of the Model Law.[67] For instance, in India, tribunals can *suo moto* make any corrections within 30 days from the date of the award.[68] Additionally, a request for correction can be made by a disputing party within 30 days from the receipt of the arbitral award.[69] Should the tribunal accept the request,

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64 Rowan Platt, *The Appeal of Appeal Mechanisms in International Arbitration: Fairness over Finality?*, 30(5) J. INT'L ARB. 531, 534 (2013).

65 Code of Civil Procedure, C.Q.L.R., c C-25, § 643 (Can.).

66 Law No. 2 of 2017 promulgating the Civil and Commercial Arbitration Law, art. 32 (Qatar) [*hereinafter* "Law No. 2 of 2017"].

67 *See* Arbitration Act, No. 37 of 2001, § 43 (Sing.); CODE JUDICIAIRE [C.JUD.] arts. 1715(1)(a)–(b) (Belg.); Arbitration Law 60/2003 as amended by Laws 5/2011 and 11/2011, B.O.E. 2003, 309, art. XXXIX(V) (Spain).

68 Arbitration Act, No. 26 of 1996, § 33(3) (India).

69 *Id.* § 33(1)(a).

the correction must be made within 30 days from the receipt of the same.[70] However, the tribunal has the power to extend this period of time if it considers it necessary.[71] On the other hand, in the U.K., unlike the Indian position, the right to extend time period for making corrections does not rest with the arbitral tribunal, but with the English courts.[72] Meanwhile, some jurisdictions did not provide time restrictions at all, such as Switzerland.[73] Earlier, the Swiss legislation did not provide for the power to correct, but the same was nevertheless understood as an inherent power of the tribunal, and therefore there were no statutory time-limits curbing its exercise.[74] Similarly, in Germany, while parties must submit a request for correction within 30 days of receipt of the award, there is no limitation period on the *suo moto* powers of correction of the tribunal.[75] Likewise, in the U.S., the FAA is silent as far as limitation is concerned.[76] It can be argued that absence of any limitations on time within which a request must be made can lead to disruptions and excessive delays in the arbitral process.

Institutional rules also have procedures in place for the correction of arbitral awards. For instance, the Swiss Rules and ICC Rules provide a period of 30 days to the parties to request correction.[77] Similarly, the LCIA Rules provide for a time-period of 28 days from the date of receipt of the award to make a request for correction.[78] This timeline has been shortened

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70 *Id.* § 33(2).

71 *Id.* § 33(6).

72 Mobile Telecommunications, [2019] EWHC 3109 (Comm) (Eng.)

73 Switzerland now contains express provisions on correction of arbitral awards. *See* LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ [SWISS PRIVATE INTERNATIONAL LAW ACT] Dec. 18, 1987, art. 189(a) (Switz.).

74 B. BERGER & F. KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 1406 (2d ed. 2010)

75 Zivilprozessordnung [ZPO] [Code of Civil Procedure], § 1058 (Ger.).

76 9 U.S.C. §11.

77 Swiss Rules of International Arbitration 2012, art. 36 [*hereinafter* "Swiss Rules 2012"].

78 LCIA Rules 2020, art. 27.

from the pre-2014 period of 30 days, but at the same time parties are no longer entitled to reduce this period. This amendment was made to safeguard parties' right to request corrections.[79]

Institutional rules also regulate the time taken by a tribunal to make or refuse to make corrections. For instance, under the LCIA Rules there is no provision for extension of time by the tribunal for correcting an award. On the other hand, the SIAC Rules as well as the ICC Rules expressly allow the Registrar/Court to extend the period of time within which the tribunal must make the correction beyond the prescribed period of 30 days.[80] Other rules like the UNCITRAL Arbitration Rules provide a slightly longer period of 45 days within which the tribunal may make the correction.[81] It is interesting to note that this period has been prescribed only after the 2010 revisions of the Rules, and the 1976 Rules did not require the tribunal to make corrections within any specific time-limit. The fact that this change was made is indicative of the need to avoid unnecessary delays in the arbitral process where corrections are concerned. Nevertheless, some rules continue to leave this issue unaddressed. For instance, the Swiss Rules do not provide any time period within which a tribunal must make corrections to the award after receiving a request from a party.[82] This can certainly prove problematic, as it could unnecessarily delay the enforcement of arbitral awards and leave parties in doubt about their rights and obligations thereunder. However, while extensive periods of time can jeopardise the principle of finality of arbitral awards, very stringent timelines can also be

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79 MAXI SCHERER, LISA RICHMAN & REMY GERBAY, ARBITRATING UNDER THE 2014 LCIA RULES: A USER'S GUIDE 355 (2015).

80 SIAC Rules 2016, r.33; ICC Rules 2017, art. 36.

81 UNCITRAL Arbitration Rules 2010, art. 38; Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules, art. 38 (which also provide 45 days' time).

82 Swiss Rules 2012, art. 36. In fact, Article 38 of the Arbitration Rules of the Milan Chamber of Arbitration provides an even longer 60-day period for tribunals to make corrections requested by parties to the dispute.

detrimental to the rights of parties. For instance, the period of three or five days in Bolivia and Argentina respectively,[83] ten days in Romania,[84] or even the period of 15 days under the Istanbul Chamber of Commerce Rules,[85] and 20 days provided under the AAA Rules[86] may be insufficient in complex disputes.

From the above, it can be concluded that the procedure and time limits prescribed for the correction of arbitral awards can have significant implications for the rights of the parties. An excessively limited period of time can prove disadvantageous where the error is minute and not easily discoverable. Additionally, some scholars have asserted that most errors can be identified only at the time of enforcement.[87] Thus, with short limitation periods, parties risk finding themselves on the brink of enforcement with an undesirable award. For this reason, it is often argued that limitation periods should either extend up to one-year, or be triggered only upon the discovery of an error.[88] However, if corrections are allowed – either at the instance of the parties or *suo moto* by the tribunal – at *any* stage after passage of the award, parties would be plagued by uncertainty and might even have taken steps towards implementing the award. Additionally, as some national legislations and institutional rules provide for extension of time periods for correction by the courts/secretariats, this can also contribute to delays in the arbitral process. Lastly, some legislations and rules are silent on the issue of correction, potentially leading to litigation on whether the inherent

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83 Law No. 708, Conciliation and Arbitration Law 2015, art. 107 (Bol.); Julio César Rivera, *Arbitral Awards*, *in* ARBITRATION IN ARGENTINA 242 (Fabricio Fortese ed., 2020).

84 Stefan Dudas, *Setting Aside of Arbitral Awards*, *in* ARBITRATION IN ROMANIA: A PRACTITIONER'S GUIDE 213 (Crenguta Leaua & Flavius-Antoniu Baias eds., 2016).

85 Istanbul Chamber of Commerce Arbitration Centre (ITOTAM) Rules of Arbitration 2015, art. 39(1) [*hereinafter* "ITOTAM Rules"].

86 American Arbitration Association (AAA) Commercial Arbitration Rules 2013, r. 50.

87 JEAN FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 692 (2007).

88 Soopramanien, *supra* note 2.

powers of the tribunal include powers of correction, and if so, what the applicable timelines will look like.

Thus, the ideal framework governing the correction of arbitral awards would involve clear and reasonable time periods for both initiation and implementation of requests for correction and be free from external interference by the judiciary/institutional administration in the interest of efficiency and finality.

IV. Corrections and the Right to be Heard

The right to be heard or present one's case in an arbitration is recognised by national legal systems and institutional rules as a fundamental procedural right.[89] Additionally, an award may be denied recognition and enforcement under the New York Convention if it appears that a party did not have the opportunity to be heard.[90] The question therefore arises whether this right is guaranteed in correction proceedings as well.

Several jurisdictions and institutional rules require that if a party makes a request for correction, notice of the same must be given to the opposing party.[91] The requirement to deliver notice must be understood as an endeavour to enable the other party to comment on the request for correction, and in other words, "*be heard*" on the issue of correction. The

89 BORN, *supra* note 1, at § 15.04.

90 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(b), June 10, 1958, 330 U.N.T.S. 38.

91 UNCITRAL Model Law, *supra* note 17; ITOTAM Rules 2015, art. 39(2); ICDR Rules 2009, art. 33.1; HKIAC Rules 2018, art. 38; Arbitration Act, No. 26 of 1996, § 33(1)(a) (India); ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] § 610(2) (Austria).

time to respond to requests for correction must also be reasonable, in order for the right to be heard to be respected in spirit.[92]

Some legislations and institutional rules safeguard the right of parties to be heard in correction proceedings by creating express obligations on the tribunal to consult with parties and/or allow them to make representations with regard to requests for correction/*suo moto* corrections.[93] However, others are silent on this matter.[94] For instance, Section 643 of the Quebec Code of Civil Procedure provides that consent of the opposing party is necessary when making a request for interpretation, but does not prescribe any such requirement for requests for correction.[95] Similarly, even the CIETAC Arbitration Rules do not mandate notice or consultation with the parties in correction proceedings.[96] Omissions of this nature have given rise to a debate on whether parties must be heard in correction proceedings even where the applicable law does not provide for the same.

One view is that despite there being no express obligation, the right to receive notice/ be consulted is implicit in correction proceedings, as correction is an essential part of the arbitration proceedings.[97] However, it has also been argued that if the correction made by the tribunal is so technical and mechanical that it has no bearing on the rights of the parties,

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92 L W Infrastructure Pte Ltd v. Lim Chin San Contractors Pte Ltd & anr. appeal [2012] SGCA 57 (Sing.).

93 English Arbitration Act, c. 23 §57(3) (Eng.); Arbitration Rules of the Milan Chamber of Arbitration 2020, art. 38; LCIA Rules 2020, art. 27; SIAC Rules 2016, r. 33; Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) 2017, art. 37; ICC Rules 2017, art. 36.

94 *See, e.g.*, Ricardo Ma. P.G. Ongkiko, *Quick Answers on Arbitral Institutions – Philippine Dispute Resolution Center, Inc.* (PDRCI), in QUICK ANSWERS ON ARBITRAL INSTITUTIONS (2020).

95 Code of Civil Procedure, C.Q.L.R., c C-25, § 643 (Can.).

96 China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules 2015, art. 53.

97 BERGER, *supra* note 14, at 677.

even if notice is not given, it is inconsequential.[98] On the other hand, in some cases, *suo moto* corrections have been distinguished from party initiated corrections, and a German court has held that where the tribunal initiates *suo moto* corrections, it does not need to consult or give notice to the disputing parties.[99] However, scholars have argued that even *suo moto* correction proceedings affect party interests, and therefore, good practice would be for tribunals to inform and consult the parties regarding any corrections.[100]

From the above discussion, it is logical to conclude that while the right to be heard is implicit in both *suo moto*/party-initiated correction proceedings, a failure to give notice for minute corrections would not serve as grounds for setting aside the arbitral award. Nevertheless, to minimise potential challenges to the arbitral award and prevent unnecessary prolongation of the arbitral process, notice to or consultation with parties seems to be the way forward.[101]

V. The power to correct: a battle of jurisdiction

There has been a debate regarding the most appropriate authority to make corrections to the arbitral award i.e. whether it is the tribunal itself, or the courts at the seat, or even the enforcement courts. As earlier mentioned, most legislations and institutional rules empower the tribunal to correct

98 *Id.*

99 Oberlandesgericht Frankfurt am Main [OLG Frankfurt am Main] [Higher Regional Court of Frankfurt am Main] May 17, 2005, 2 Sch 2/03, SchiedsVZ 2005, 311 (Ger.).

100 Fabian von Schlabrendorff & Anke Sessler, *§ 1058 – Correction and Interpretation of Award; Additional Award*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 378–82 (Karl-Heinz Böckstiegel, Stefan Michael Kröll & Patricia Nacimiento eds., 2d ed. 2015).

101 Soopramanien, *supra* note 2; UNCITRAL, Rep. of Working Group on Int'l Contract Practices on the Work of its Seventh Session, U.N. Doc. A/CN.9/246, ¶ 124 (Mar. 6, 1984).

errors in the final award.[102] However, there are some jurisdictions which vest this power in the courts at the seat. For instance, Section 11 of the FAA provides that the court in the district where the arbitral award was made may make corrections to the same on the request of a party. Similarly, in Libya, Qatar, Bahrain, United Arab Emirates, and Yemen, only courts have the power to make corrections to arbitral awards.[103]

It appears that the most ideal approach would be to entrust the tribunal with the responsibility to consider and make corrections. This is because the arbitrators themselves are the most familiar with the award, the case of the parties, as well as their own intentions. Additionally, the regulation of the arbitral process has always been aimed at minimising judicial interference. Thus, there have been instances where courts have remitted the matter back to the tribunal where a case for correction has been made out.[104] However, where it is impossible to reconvene the tribunal (as may be in certain unique circumstances),[105] parties should have the option of approaching the courts at the seat.[106]

Despite the fact that time-limits are provided for correction proceedings with the sole purpose of ensuring that such requests do not interfere with enforcement proceedings,[107] it has been brought to light that most errors

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[102] UNCITRAL Model Law, *supra* note 17, art. 33; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1058 (Ger.); ICC Rules 2017, art. 35.

[103] Law No. 4 of 2010, art. 764 (Lib.); Abdul Hamid El-Ahdab, *The Post-arbitral Phase, in International Arbitration in a Changing World*, 6 ICCA CONGRESS SERIES 193–94 (Albert Jan Van den Berg ed., 1994).

[104] Xstrata 2020, [2020] EWHC 324 (Comm) [59] (Eng.).

[105] These circumstances may include situations where it is impossible to contact an arbitrator, where an arbitrator refuses to devote time from his/her schedule, or death or serious illness of arbitrator amongst others.

[106] This is the position in France. *See* Code de procédure civile [C.P.C.] [Civil Procedure Code] art. 1475 (Fr.).

[107] ALI ET AL., *supra* note 44.

are identified only at the time of enforcement.[108] The question, therefore, arises whether enforcement courts should have the power to make corrections to arbitral awards. In the recent case of *Government of India* v. *Vedanta Limited*, the Indian Supreme Court has held that enforcement courts do not have the jurisdiction to correct errors in arbitral awards.[109] Similarly, in Canada, where an application for correction was pending before the arbitral tribunal, the enforcement Court refused to recognise the award as final and dismissed the application for enforcement.[110] Since the Court did not make the correction on its own, despite acknowledging the modification required as minimal, it is logical to conclude that it considered correction to be within the arbitrator's exclusive domain. In Istanbul, the enforcement Court deemed an award enforceable despite a pending request for correction before the arbitral tribunal, on the grounds that Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] does not list correction proceedings as a ground to refuse enforcement.[111] Thus, once again, the court did not take matters of correction into its own hands.

On the other hand, some jurisdictions, such as Bolivia, provide that minor errors may be corrected at the time of enforcement.[112] This power of enforcement courts to make corrections in certain circumstances has also

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108 Poudret & Besson, *supra* note 85.

109 Gov't of India v. Vedanta Ltd. (formerly Cairn India Limited), (2020) 10 SCC 1, ¶ 83.14 (India).

110 Relais Nordik Inc. v. Secunda Marine Servs. Ltd., 1990 CarswellNat 1320 (Can. F.C.T.D.) (WL).

111 Ismail G. Esin & Stephan Wilske, *X v. Y, Regional Court of Istanbul, 14th Civil Chamber, 2018/1042, 11 October 2018*, *in* A CONTRIBUTION BY THE ITA BOARD OF REPORTERS (2018).

112 Law No. 708, Conciliation and Arbitration Law 2015, art. 107 (Bol.).

been recognised by German courts.[113] Such an approach appears favourable, as in many instances, parties may not discover errors in the award until the time for enforcement comes, and by such time, statutory/institutional time limits for making requests for correction may have expired. Instead of rendering the award unenforceable, enforcement Courts can easily correct minute errors themselves, or in fact, remit the matter back to the tribunal for the correction to be made.

A parallel can be drawn from the approach taken by a Chinese court in the case of *Granlit* v. *Kyoritsu Industries*. Herein, an application for annulment was made, and the initiating party indicated that it would withdraw the same if the Tribunal could correct the mistake in the award. In response, the Tribunal corrected the errors in the award so as to terminate the need for a setting aside application.[114] The Court held that such a correction by the Tribunal must be upheld notwithstanding the expiry of the statutory time limit of 30 days.[115] Likewise, where an arbitral award was challenged under Section 68 of the English Arbitration and Conciliation Act, the Court remitted the matter back to the arbitral tribunal for correction of errors leading to ambiguity in the award.[116] This approach reflects acceptance of the principle enshrined in Article 34(4) of the UNCITRAL Model Law, as per which Courts may take any necessary action to eliminate the grounds

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113 Obelandersgericht [OLG Karlsruhe] [Higher Regional Court of Karlsruhe] July 3, 2006, 9 Sch 01/06 (Ger.) *reprinted in* XXXII Y.B. COMM. ARB. 359, 361–62 (Albert Jan Van den Berg ed., 2007).

114 Beijing Granlit Membrane Structure Tech. Co. Ltd, Kyoritsu Indus. Co. Ltd. (北京光翌膜结构建筑有限公司，协立工业株式会社)，二中民特字第8456号(Beijing No. 2 Intermediate People's Ct. Dec. 13, 2004) (China) *reprinted in* WunschARB, *Granlit v. Kyoritsu Industries (2004), Second Intermediate People's Court of Beijing, [2004]二中民特字第8456号 (Beijing No. 2 IPC), 13 December 2004, in* CHINESE COURT DECISION SUMMARIES ON ARBITRATION (2004).

115 *Id.*

116 Xstrata 2020, [2020] EWHC 324 (Comm) [59] (Eng.).

for setting aside an arbitral award. Similarly, even in a case where the Tribunal heard the application seeking correction but refused to correct a material error, an English court under Section 68 remitted the matter back to the Tribunal, acknowledging that had the error been corrected, the award would have had a completely different effect.[117] Additionally, English courts have also granted applications seeking retro-active extensions of time-limit to apply to the tribunal for correction.[118]

Applying the approach discussed above, if enforcement is opposed on grounds that would not exist save for an error in the award, enforcement courts (like courts at the seat deciding setting aside applications) should also be able to direct tribunals to correct the same, irrespective of applicable limitation periods, thereby ensuring that parties do not end up with an unenforceable award[119] or are not forced to accept enforcement of an incorrect award which is contrary to the intentions of the parties/incongruous with their situation. However, this approach does not yet have wide-spread acceptance. For instance, in Zimbabwe, while the High Court held that an error related to computation could easily be corrected by remitting the matter back to the tribunal, the Supreme Court disagreed and set aside the award for being contrary to public policy.[120]

From the above, it becomes clear that there is no consensus across jurisdictions regarding the powers of tribunals and/or courts at the

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117 Doglemor, [2020] EWHC 3342 (Comm) (Eng.).

118 Xstrata 2016, [2016] EWHC 2022 (Comm) (Eng.); The Montan, [1985] 1 WLR 625 (Eng.).

119 For instance, in the case of *Xstrata 2020*, an award was refused enforcement in China because the identity of a party was erroneously mentioned. The Chinese Court did not remit the matter back to the tribunal for correction, and thus the parties had to resort to challenging the award before the English Courts i.e. the process of dispute resolution became drawn out, expensive, and complicated.

120 Michael Hwang & Amy Lai, *Do Egregious Errors Amount to a Breach of Public Policy?*, 71(1) INT'L J. ARB., MEDIATION & DISP. MGMT. 4 (2005).

seat/enforcement courts when it comes to corrections. The authors believe that the following framework would serve as ideal for disputing parties:

i. The arbitral tribunal should correct any errors in the award if the time-period for the same has not expired;
ii. In case it is impossible for the tribunal to reconvene[121] despite the request being made within time-period, the courts of the seat may entertain applications and correct any errors.[122] To assuage concerns of unnecessary judicial interference and pendency related delays, another option would be for the seat court to respond to requests for correction by appointing a sole arbitrator or a tribunal to decide the same.[123]
iii. Alternatively, if errors are identified at the time of enforcement, enforcement courts must remit the matter back to the tribunal for the correction to be made, despite expiry of statutory/institutional time limits;
iv. Where it is impossible to reconvene the tribunal, or the error is minute, the enforcement court may make the correction itself.[124]

In the opinion of the authors, adopting the aforementioned approach reduces the risk of unenforceable, unintended awards being enforced, delays, and disadvantage to parties due to prolonged litigation.

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[121] *See* note 103.

[122] *See* CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1475 (Fr.); Law No. 93-42 of 1993 related to the promulgation of the Arbitration Code, art. 37 (Tunis.); Law No. 2 of 2017, art. 32 (Qatar).

[123] *See* Arbitration Rules of the Common Court of Justice and Arbitration (CCJA) 2017, r. 26.

[124] *See generally* Carlos Henrique de C. Froes, *Correction and Interpretation of Arbitral Awards*, *in* GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION: LIBER AMICORUM IN HONOUR OF ROBERT BRINER 285–96 (Gerald Asken, Karl Heinz Böckstiegel, Paolo Michele Patocchi & Anne Marie Whitesell eds., 2005).

VI. Conclusion

In this editorial, the authors, acknowledging the significance of correction proceedings, have analysed the various aspects of correction of arbitration awards. The authors have sought to provide a holistic perspective on correction as a post-award remedy, by shedding light on the grounds on which correction can be sought, the variance in time limits for initiating correction proceedings, the scope of due process in correction proceedings, and the role of courts at the seat/enforcement courts as far as correction is concerned.

From the analysis of legislations, rules, and decisions of courts and tribunals, it has become clear that there is no singular approach to correction proceedings across jurisdictions, and therefore parties would do well to acquaint themselves with the position of the law of the chosen seat and institutional rules on this remedy. By being aware of the nuances of correction proceedings in the relevant jurisdiction, parties will be able to act in a timely manner and seek rectification of errors and omissions, thereby avoiding unenforceable awards riddled with errors. Additionally, the authors have recommended that parties and tribunals both pay heed to the due process aspects of correction proceedings, to safeguard against the possibility of challenges to the arbitral award and consequent protracted litigation. Further, the authors have suggested that in the absence of a uniform standard in international commercial arbitration, reference to the test in *Vivendi* v. *Argentina* can help arbitral tribunals ensure that they do not allow parties to interfere with the merits of the award.[125]

Lastly, by examining current practice across jurisdictions, the authors have recommended a step-by-step framework demarcating the role of arbitral tribunals and courts, to ensure that parties are able to effectually obtain

[125] *See supra* text accompanying notes 53–57.

correction of errors/omissions in arbitral awards. The authors have recommended that, where it is impossible to reconvene the tribunal, courts at the seat should have the power to either constitute a new tribunal or correct minor errors. Similarly, the authors propose that enforcement courts must also be empowered to remit the matter back to the tribunal, and where impossible, make the correction themselves. The authors believe that if this model is adopted, it will boost enforceability of awards, prevent unnecessary delays, and save time and costs in the arbitral process.

REASONING IN ARBITRAL AWARDS

Antonio Crivellaro[1]

Abstract

The author's analysis focuses on the standard of reasoning in international arbitration. In his view, the awards are unsatisfactorily reasoned whenever they leave unclear whether procedural legitimacy has been respected by the tribunal in the conduct of the proceedings or whenever the award does not allow the readers, especially the losing party and the court empowered to enforce or annul it, to check whether the tribunal has complied with the observance of due process and the crucial duties to not exceed its powers and to apply the proper law. The author underlines that, pursuant to the parties' expectations, the arbitrators owe to them a specific duty to provide understandable and convincing reasoning; indeed, they are appointed and remunerated by the parties to make a thorough, informed, and enforceable decision. The decision being final and not subject to appeal, the arbitrators' obligation to motivate is even sharper than the corresponding duty of domestic courts. After analysing the case law in both commercial and investment arbitration, the author concludes that the international arbitration community should improve the

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reasoning standards, if it wishes to maintain the privilege of being selected by users as their "premier choice".

I. Introductive remarks

In the history of arbitration,[2] be it domestic or international, the total absence of reasoning in an award is either unknown or extremely rare. Most national arbitration laws and all institutional rules in force worldwide require a *reasoned* award. Only a few legal orders allow the parties to dispense the arbitrators with the duty to give reasons, if the parties so agree at the outset of the proceedings. However, this practice is criticised and, indeed, considerably decreasing over the years, especially because the parties tend to refrain, and rightly so, from granting the arbitrators the power to render awards without reasons.[3]

A further exception is represented by an "*award by consent*" due to its peculiar nature. In this case, the arbitral tribunal does not, and does not need to, provide its own reasoning for the decision, which is only meant to incorporate the terms of the settlement agreed by the parties, which are endorsed by the tribunal. The task of the tribunal is limited to vesting the settlement with the form of an award enforceable in law in case one of the parties fails to comply with the agreed settlement.

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2 For the purpose of this contribution, consideration was given to the practice during the last decades.

3 Significantly, the Paris Appeal Court has recently reversed the past French judicial approach, pursuant to which a foreign award, which was rendered under a law that allows the parties to waive the duty to state reasons, was not contrary to international public policy and could be enforced in France. On April 2, 2019, the Paris Court of Appeal took the opposite view, holding that "[t]he need for reasoning in making justice decisions is an element of the right to an equitable process. Arbitrators who fail to state reasons for their decisions disregard the scope of their mission and the recognition of an award devoid of reasoning goes against the French conception of International Public Policy". *See* Cour d'appel [CA] [regional court of appeal] Paris, Apr. 2, 2019, ARB (AF)/11/3, at 304.

Apart from these rare exceptions, the debate concerning the reasoning in arbitration takes for granted that – in whatever form it might be expressed – the reasoning is a constant feature in all awards and that a genuine failure to state reasons constitutes a ground for setting aside the award pursuant to most legal orders. The discussion on this matter is rather focused on establishing whether the reasoning is adequate or inadequate in the way it is expressed. In other words, what is lively debated is the standard of reasoning that the arbitral tribunals should satisfy to preserve the validity and enforceability of their decision, not their obligation to state the reasons in the award.

The practice shows that an award does not meet the acceptable standards where the reasoning is incomplete, or inadequate, or inconsistent, or unintelligible. Some examples may be useful, although the list cannot be exhaustive:

i. the award does not allow to understand the logical trajectory followed by the tribunal i.e. how the tribunal has proceeded from point A to point B, and eventually, to its conclusions;[4]

ii. the award does not allow to infer whether the tribunal has considered both parties' case on points of fact or law, including the determination of the applicable law, when this is a disputed matter;

iii. the award does not permit to verify whether the tribunal has exclusively relied on the evidence provided by the parties, or was

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[4] For a comparative analysis of domestic courts' approach when reviewing arbitral awards, *see* T. H. Webster, *Review of Substantive Reasoning in International Arbitral Awards by National Courts: Ensuring One-Stop Adjudication*, 22(3) ARB. INT'L 431 (2006); F. Madsen & P. Eriksson, *Deliberations of the Arbitral Tribunal – Analysis of Reasoned Awards from Swedish Perspective*, STOCKHOLM INT'L ARB. REV. 1, 17 (2006).

influenced by information known to the arbitrators but unknown to the parties, or never pleaded during the proceedings;[5]

iv. the award leaves unknown whether the tribunal has applied the agreed governing law, or what law it has applied, if any;

v. it is impossible to infer from the award whether the tribunal has exceeded its mandate by either omitting to decide a relevant issue (*infra petita*) or deciding an issue never referred to it by the parties (*extra petita*);

vi. the award simply refers to certain contract clauses, but fails to examine the interpretation offered by the parties, or even fails to provide the tribunal's interpretation;

vii. the reasoning does not show internal consistency and does not appear congruent with the deliberation process recorded in the award;

viii. even more importantly, the award raises concerns as to whether the decision is exclusively based on the legal arguments openly debated by the parties (as it should), or whether it is influenced by a legal solution adopted *ex officio* by the tribunal in its internal deliberations and never pleaded by the parties before the tribunal.

The above examples have a feature in common: they are generally affected by breach of due process, or breach of the right to be heard, or excess of

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[5] Failure to refer to evidence in the file may be a decisive omission leading to annulment. On January 8, 2018, the Tribunal Superior de Justicia de Madrid set aside an award dated April 6, 2017 for "lack of motivation" on the ground that the arbitrator made no reference to the evidence he had relied on to establish the dispositive section of the award: *see* R. Irra, F. Fortùn & C. Cachat, *The Obligation to Motivate an Award: An Open Door to the Substantive Review of an Award?*, 4 ICC DISP. RESOL. BULL. 27 (2018).

powers. Each such flaw may constitute an independent ground for either annulling or refusing enforcement of the award. However, they are also frequently merged into one single complaint, where the ground for challenging the award is the failure to state reasons, which may well embrace all related deficiencies as sub-categories of the main complaint. The procedural breach may be more or less flagrant, but it seems unquestionable that in all above cases, the arbitral tribunal is departing from or disregarding certain non-waivable requirements aimed at safeguarding the legitimacy of the arbitral process.[6]

Accordingly, at this introductory stage, it is reasonable to conclude that an award is unacceptably reasoned whenever it does not permit the readers, and especially the court which will be approached for either enforcing or annulling it, to make a proper control on the respect of due process at all stages of the proceedings. This is so because the reasoning is the only means available to the judge to check whether the tribunal has proceeded legitimately or has decided the dispute on its own arbitrary discretion.

As Professor Jarrosson rightly affirmed:

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6 *See* Tribunal fédérale [TF] May 16, 2011, 4A_46/2011 (Switz.). The Federal Tribunal annulled an arbitral award on the ground that the tribunal had omitted to deal with and decide an issue raised by one party, which was relevant to the disposal of the dispute and, if considered, might have reversed the outcome of the case. The annulment was based on the breach of the "right to be heard" in the meaning of Loi fedrale sur le droit international privi [LDIP], Bundesgesetz uiber das Internationale Privatrecht [IPRG] [Federal Statute on Private International Law] Dec. 18, 1987, SR 291, RS 291, art. 190(2)(d) (Switz.). The decision is published in ASA Bulletin, September 2011, with an interesting comment by François Perret, "Quelques considérations à propos de la motivation des sentences arbitrales en matière d'arbitrage international à la lumière d'une jurisprudence récente du Tribunal Fédéral." Professor Perret quite rightly observed that the most serious defect in the annulled award was the insufficient reasoning, a defect that may lead to annulment of the award, when it becomes apparent that the tribunal has left untouched a question on which the tribunal had been requested to take determination.

> "*Human justice must rely on reason, on the law, and cannot be subject to arbitrariness. Setting out the tribunal's reasoning is, by far, the preferred way of showing that the solution is not arbitrary, and that justice has been rendered: indeed, justice must not only be done, it must also be seen to be done.*"[7]

A recent event shows how sensitively this matter is perceived in the international arbitration community. The topic for the 39th Annual Conference of the International Chamber of Commerce Institute of World Business Law ["**ICC Institute**"], held in Paris on December 17, 2019, was defined as follows: *Explaining Why You Lost – Reasoning in Arbitration.* Prominent speakers from civil and common law jurisdictions discussed the various facets of the reasoning in arbitral awards and the risks incurred by the parties when the quality of reasoning is below the required standards.[8]

Almost simultaneously, on December 18, 2019, the Supreme Court of India issued an important judgment to sanction an unreasoned award.[9] Obviously, there was no connection between the two events. However, the coincidence in time confirms that the matter is viewed as lively relevant and topical in different regions of the world.

II. According to Supreme Court the award must be ***intelligible***

The above-mentioned decision of the Supreme Court of India goes straight to the point discussed here. The question put before the Court revolved around the requirement of a reasoned award and the need for parties and arbitrators "*to have a clear award, rather than to have an award which is muddled in form and implied in its content*" (emphasis added).[10] The Court underlined that

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7 C. JARROSSON, *Reasoning in Arbitration*, *in* EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 16 (A. Crivellaro & M. N. Hodgson eds., 2020).

8 *See id.* The Dossier is published since July 2020.

9 M/S Dyna Technologies Pvt. Ltd. v. M/S Crompton Greaves Ltd., (2020) 1 Arb. L.R. 1 (India) [*hereinafter* "Dyna Technologies"].

10 Dyna Technologies, (2020) 1 Arb. L.R. 1, ¶ 1 (India).

this deficiency "*inevitably leads to wastage of time and resources of the parties to get clarity, and in some cases, frustrates the very reason for going to arbitration*" (emphasis added).[11]

The dispute before the arbitral tribunal had arisen from a contract for the construction of ponds, channels, drains, and associated works. The contractor had requested compensation for "*premature termination*" of the contract by the employer, claiming for the loss resulting from the unproductive use of machineries and workforce and loss of profit. The tribunal granted the first claim and disallowed the second.

The award was first challenged by the employer under Section 34 of the Arbitration and Conciliation Act, 1996, before the Single Judge of the High Court at Madras, for alleged failure by the arbitrators to explain the reasons underlying the grant of compensation. However, according to the Single Judge, the arbitrators had provided "*a specific finding*" that the amount claimed was payable to compensate a loss of productivity incurred by the contractor.[12] This decision was appealed before the Division Bench of the High Court, which reversed the Single Judge's conclusion because the award *"does not contain sufficient reasons"* and the relevant paragraph in the award "*does not provide any reasons, discussions or conclusions*". The High Court explained why the challenged award was unreasoned, with the following language:[13]

> "*It is of course true that an Arbitrator cannot be expected to write a detailed judgment as in a law Court. However, the present Act contemplates that the award of the Arbitrator should be supported by reason. The decision relied upon by the counsel for the respondent, rendered on the basis of the Arbitration Act,*

11 *Id.*
12 *Id.* ¶ 13.
13 *Id.* ¶ 14.

> *1940, cannot be pressed into service keeping in view the specific provision contained in the Act. Moreover, even assuming that the ratio of the said decision is applicable, we cannot cull out any underlying reason in the award for directing payment of compensation. The basis for the right of the claimant and the basis of the liability of the present appellant have not been indicated anywhere within four corners of the award and in spite of the best effort it is not possible to discover even any latent reason in the award.*
>
> *It was also contended that the discussion in para 3.1(g) of the award contains the basis and reason given by the Tribunal.*
>
> *We have carefully gone through such paragraph as well as the proceeding and subsequent paragraphs. In our considered opinion, the statements recited in para 3.1 including para 3.1(g) are only substance of the submissions/claim made by the claimant and para 3.1(g) cannot be construed as a conclusion or even the reasoning given by the Tribunal.*" (emphasis added)

Before the Supreme Court, the contractor claimed that it was not open for the High Court to reassess the evidence produced before the arbitrators, nor substitute its own views on the merits to the conclusions reached by the arbitral tribunal. However, the Supreme Court disagreed, and imparted a lesson of law on the meaning of reasoned award, which is worth quoting:[14]

> "*The mandate under Section 31(3) of the Arbitration Act is to have reasoning, which is intelligible and adequate and, which can in appropriate cases be even implied by the Courts from a fair reading of the award and documents referred to thereunder, if the need be. [….]*
>
> *When we consider the requirement of a reasoned order three characteristics of a reasoned order can be fathomed. They are: proper, intelligible and adequate. If the reasons in the order are improper, they reveal a flaw in the decision-making*

[14] *Id.* ¶¶ 35–36.

> *process. If the challenge to an award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. Coming to the last aspect concerning the challenge on adequacy of reasons, the Court while exercising jurisdiction under Section 34 has to adjudicate the validity of such an award based on the degree of particularity of reasoning required having regard to the nature of issues falling for consideration. The degree of particularity [….] would depend on the complexity of the issue. Even if the Court comes to a conclusion that there were gaps in the reasoning for the conclusion reached by the Tribunal, the Court needs to have regard to the documents submitted by the parties and the contentions raised before the Tribunal so that awards with inadequate reasons are not set aside in casual and cavalier manner. On the other hand, ordinarily unintelligible awards are to be set aside, subject to party autonomy to do away with the reasoned award. Therefore, the courts are required to be careful while distinguishing between inadequacy of reasons in an award and unintelligible awards*." (emphasis added)

The Court concluded that the arbitral tribunal, after failing to address the claims distinctly and reproducing them confusedly and after quoting the factual narrative and legal arguments put forward by the parties in a muddled and non-intelligible fashion, abruptly jumped to the conclusion that a certain compensation was due to the contractor, without setting out its own independent reasons. The Court found the award unintelligible and vacated it for lack of reasoning.

The judgment certainly contributes to the progressive formation of the Indian arbitration law. However, it also amounts to an illustrative precedent from an international standpoint.

III. The duty to provide reasons is primarily owed to the parties

The ruling of the Indian Supreme Court has a further merit: it clearly recalls to all concerned that the first beneficiaries of the arbitrators' duty to give reasons are the parties to the individual case, and – I would add – the arbitration community at large.

The Court's reminder reflects a common understanding in international arbitration practice. Parties who opt to resort to arbitration for settling their disputes waive, on the one hand, any judicial review of the award on the merits, but, on the other hand, expect and wish to have, in exchange, a well-crafted and thorough decision rendered by esteemed and experienced arbitrators. This implies that, although there is almost no court control on the substance of the arbitrators' reasons, the arbitrators have a responsibility towards the parties to provide accurate and comprehensive reasons for their awards, and to deliver decisions that are enforceable at law.[15]

It may thus be stated that the mandate to the arbitrators does, *inter alia*, make them responsible towards the parties for the legitimacy and enforceability of the resulting decision.

As Lord Justice Bingham rightly observed more than 20 years ago, arbitral reasoning should be viewed distinctly from judicial reasoning.[16] Indeed, a badly or wrongly reasoned judgment remains subject to appeal and will be reviewed on both facts and law. It is because of this circumstance that the quality of the judicial reasoning may be relatively lower without causing irreparable harm to the parties. However, the appeal is not a remedy

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[15] *See*, *e.g.*, International Chamber of Commerce (ICC), Rules of Arbitration 2012, art. 41, pursuant to which "the arbitral tribunal shall make every effort to make sure that the award is enforceable at law".

[16] *See* Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences between a Court Judgment and an Arbitration Award*, 4(2) ARB. INT'L 141 (1997).

available to review or rectify an award, which remains "*final*", although potentially unsatisfactory or deficient on facts or law. It is this essential distinction that makes the arbitrators' task, when drafting the reasoning, significantly more burdensome and sensitive than the equivalent task of a State lower court.

The difference between arbitral and judicial reasoning is no surprise, for various reasons.

First, arbitral disputes often involve significant amounts and are – factually, or technically, or legally – more complex than in court litigation. The parties' preference to defer this kind of disputes to arbitrators rather than domestic courts, comes exactly from the expectation that the arbitrators will make a conscious effort to show they have considered every issue and every argument. This explains why the reasons in the awards are generally more detailed than in a court judgment.[17]

Second, the court is a State organ committed to render justice in accordance with the legal order of that State. It is obviously accountable to the public for improprieties or wrongdoings in administering justice, including for the violation of its duty to provide reasons of the judgment according to the standards established in the internal legal order. However, the arbitrators' duty to frame reasons is more intense, it being specifically owed to the parties in the individual case, from which the arbitrators received an ad hoc mandate. Differently from the court, the arbitrator is a "*private judge*" owing to the parties a duty to fulfil the mandate with diligence and care, which includes the duty to provide reasons understandable to the parties, by which he/she is remunerated. His/her principal duty is to render a decision that, in conformity with the parties' expectations, shall be exhaustively

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[17] JARROSSON, *supra* note 6, at 20.

responsive to their claims, arguments, and defences. In simpler terms, the arbitrator's responsibility is greater, but so is his/her paycheck.[18]

The parties are aware, and accept without reservation, that the drafting of the award will have a significant impact on the duration of the arbitral proceedings. Both in ad hoc and in institutional arbitrations, the parties agree that, after closure of the evidentiary phase, the arbitrators be provided with a considerable amount of time to draft their deliberations, and agree to extend the original time limit, if needed. By acknowledging that the drafting of an award is a time-consuming exercise, the parties show they are really interested in knowing the reasons upon which the award is based. Would it not be so, they would be satisfied with a much more rapid, but unreasoned, award.

IV. On the adequacy standard

In the search for an adequacy standard, the most convincing definition of "adequate" reasoning is, in my view, the one given by two International Centre for Settlement of Investment Disputes ["**ICSID**"] ad hoc committees in *Hussein Nuaman Soufraki* v. *United Arab Emirates* ["**Soufraki**"] and *Maritime International Nominees Establishment* v. *Republic of Guinea* ["**M.I.N.E.**"], respectively.

According to the Soufraki annulment committee, the expression of reasons in the award is the only way by which "*compliance with the fundamental prohibition of manifest excess of powers and with the critical duty to apply the proper law*

[18] *See* A. Crivellaro, How well Reasoned Must an Award Be to Satisfy Non-waivable Legitimacy Requirements, Introductory Presentation at the 39th Annual Conference of the International Chamber of Commerce Institute of World Business Law (Dec. 17, 2019), in EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 9 (A. Crivellaro & M. N. Hodgson eds. 2020).

may be observed".[19] Thus, quoting again from this Committee, "*the more lucid and explicit the reasons set out by a tribunal, the easier it should be to observe what a tribunal is in fact doing by way of compliance*".[20]

The above definition, therefore, calls for reasons which allow readers and controllers to check whether the tribunal has complied with fundamental duties of due process.

Following a slightly different approach, however reaching similar conclusions, the ad hoc committee in *M.I.N.E.* concluded that the requirement to state reasons is satisfied and the award stands as long as the logical itinerary followed by the tribunal is intelligible, or "*the award enables the reader to follow how the Tribunal proceeded from point A to point B and eventually to its conclusions*".[21]

I share the view expressed in both the above definitions. A reasoning showing manifest gaps on points of facts or law makes it impossible to understand how the tribunal arrived at certain conclusions rather than others. An obscure reasoning prevents one from verifying whether the tribunal was guided by self-made considerations, thus manifestly exceeding its powers. It cannot be denied that a laconic, or opaque, or puzzling reasoning sheds serious doubts as to whether the tribunal's findings are based on objective and rational grounds, in full safeguard of the procedural legitimacy, or whether they are the product of arbitrariness.

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[19] Hussein Nuaman Soufraki v. U.A.E., ICSID Case No. ARB/02/7, Decision on the Application for Annulment, ¶ 127 (June 5, 2007) [*hereinafter* "Soufraki"].

[20] *Id.*

[21] Maritime International Nominees Establishment v. Republic of Guinea, ICSID Case No. ARB/84/4, Decision on Annulment, ¶ 5.09 (Dec. 22, 1989), 4 ICSID Rep. 61 (1997).

In brief, prudent parties should be advised that a waiver to a reasoned award would empower an arbitral tribunal to adjudicate "*as it deems fit*", which implies the risk of a decision made in absolute arbitrariness.[22]

A related issue is whether an "*adequate*" reasoning should also be "*exhaustive*" and address all allegations, arguments, or defences raised by the parties. In common practice, parties support their claims or defences on multiple alternative or cumulative grounds. However, a well-reasoned award should primarily address the "*questions*" that have a direct *bearing on the disposal* of the dispute. Indeed, a distinction should be maintained between a relevant or decisive "*question*", on the one hand, and "*arguments*", or "*pleas*", or "*allegations*" raised in connection with that "*question*", on the other hand.

As already stated, the "*question*" is the issue the resolution of which determines the outcome of the case. For instance, the issue whether "*Party A is liable towards Party B for breach of contract*" or whether "*Party A must pay to Party B the sum of XX in reparation of the breach*" are the real "*questions*" that cannot be left undecided. They are indeed material to the outcome of the case, which is determined by the ruling of the tribunal on the merits of the relevant "*question*".[23] Otherwise, the award would be affected by an "*omitted decision*" (*infra petita)*, which, in most legal orders, amounts to breach of the "*right to be heard*" and is, as such, a ground for setting the award aside.[24]

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22 *See* T. Landau, *Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration*, *in* 14 ICCA CONGRESS SERIES 187 (2009) (according to T. Landau, the requirement that the award be adequately reasoned constitutes a "safeguard against arbitrariness or biased judgment, or private judgment, or irrational splitting of the differences between the parties" and is the "litigants' guarantee that […] justice should not only be done, but should manifestly and undoubtedly be seen to be done").

23 This view is commonly shared in literature. For a recent comment, *see* M. S. Abdel Wahab, *Judicial Review and Reasoning of Arbitral Awards*, *in* EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 30, 30 (A. Crivellaro & M. N. Hodgson eds., 1st ed. 2020).

24 *See* Tribunal fédérale [TF] May 16, 2011, 4A_46/2011 (Switz.).

As practice shows, the parties discuss the relevant "*issue*" or "*question*" to be decided by offering multiple arguments or pleas. However, in order to resolve the specific "*question*", a tribunal shall, of course, consider all arguments and counterarguments, but is not bound to decide them all, where it finds that certain arguments prevail over, or absorb, the others.[25]

V. Reasoning in investment arbitration

Article 48(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] reads as follows: "*The Award shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based*". Failure to state reasons is one of the few grounds for annulment of an ICSID award. Pursuant to Article 52(1), either party may apply for annulment if, *inter alia*: "*(e) the award has failed to state the reasons on which it is based*".[26]

The drafting history of the ICSID Convention shows that the reasons requirement was initially mitigated by the phrase "*except as parties otherwise agree*".[27] However, the insertion of this derogation raised serious criticism

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[25] On the adequacy of reasoning in commercial arbitrations, *see* P. Lalive, *On the Reasoning of International Arbitral Awards*, 1(1) J. INT'L DISP. SETTLEMENT 55 (2010). For the suggestion that the reasoning should not be excessively lengthy but focused on the essential points that lead to the decision, *see* R. Dupeyré, *Les limites de l'obligation de motivation: de la concision des sentences arbitrales*, 19(1) REVUE QUÉBÉCOISE DU DROIT INT'L 44 (2006).

[26] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 52(1), Oct. 14, 1966, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"].

[27] Art. 51(3) – First Draft (Doc. 43), *in* 1 THE HISTORY OF THE ICSID CONVENTION 213 (1970); Comments and Observations of Member Governments on the Draft Convention (Nov. 23, 1964), *reprinted in* 2(2) THE HISTORY OF THE ICSID CONVENTION 651, 664 (2006); Summary Proceedings of the Legal Committee meeting, December 8, morning (Dec. 30, 1964), *reprinted in* 2(2) THE HISTORY OF THE ICSID CONVENTION 812, 816 (2006).

and concerns. The issue was eventually voted upon, and the exception was removed by large majority.[28]

There are several good reasons that make the duty to state reasons in investment arbitration even more rigorous than in commercial arbitration.

First, one of the parties to an investment dispute is, necessarily, a sovereign State. Whereas private parties may renounce to the reason requirement (although, as seen above, they waive it in very rare circumstances), States have a specific entitlement to see whether and how the tribunal has addressed the balance between the State's right to exercise its sovereign powers according to its own legal order, on the one hand, and its duty to comply with international standards applicable to the treatment of foreigners, on the other hand. Investment tribunals must inevitably determine whether, acting as a sovereign, the State has complied, or not, with its obligations under customary international law or treaty provisions. This involves an analysis by the tribunals of the international legitimacy of the actions or omissions of the State organs and agencies, including its executive, legislative or judicial branches, for the conduct of which the State undertakes international responsibility. This requires arbitrators to be particularly careful in assessing the case and in motivating its conclusions.[29]

Second, the tribunals' determinations have a predictable impact on matters of public concerns, for which a State is also accountable to its own institutions and citizens, which have an evident interest in understanding

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[28] *Id.*

[29] According to certain authors, the reasoning functions as an intrinsic control mechanism to safeguard procedural correctness and, therefore, acquires a greater importance in international investment arbitration. *See* G. A. ALVAREZ and M. REISMAN, *How Well Are Investment Awards Reasoned?*, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION - CRITICAL CASE STUDIES 1-32 (2008).

whether the State behaved in accordance with its international duties. This further requires adamant clarity and persuasive reasoning in the award.

Third, well-reasoned awards in investor-to-State disputes contribute to the progressive development of international investment law. All States have an interest in understanding what conducts of the State are held to be illicit under international law by investment tribunals. In addition, investment arbitration usually places a greater reliance on precedents than commercial arbitration. This explains why an illustrative award made in a prior case is taken into consideration by the tribunals called upon to decide subsequent cases in which the same or similar issues are again disputed.[30] In this sense, investment awards unavoidably assume an interest which goes beyond the sphere of the two parties concerned.

Fourth, given the public domain in which the investor-State disputes are resolved, awards are open to broad review in the arbitration community and the arbitrators are particularly mindful of producing adequate reasoning to maintain their reputation.[31]

Fifth, while in commercial arbitration the reasoning should generally satisfy the parties' expectations originated from their respective pleadings, which are obviously known to the parties, in investment arbitration, public interest may require a *broader* reasoning to cover legitimacy or accountability issues implied by the involvement of a sovereign. As case law shows, a decision

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30 In this line, *see* a concurring comment by JARROSSON, *supra* note 6, at 19.

31 As a commentator observed, "[t]he quality of the reasoning is as a rule (though not automatically) much higher in investment awards expected to become public as the members of the tribunal will want to seek to safe guard their reputation not just before the appointing counsel, annulment committees and enforcement courts, but also before their peers and the professional and academic community". *See* T. W. Wälde, *Improving The Mechanisms For Treaty Negotiation And Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy*, *in* 1 YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2008-2009 505, 553 (2009).

may be rendered in a critical political climate, for instance, in cases where it emerges that State organs were corrupted by the foreign investor and the tribunal must determine the consequences of corruption upon the legality of the investment and the related State contracts. The tribunal's reasoning may have to be, in such cases, particularly instructive to the investors and, especially, to the States, in improving future compliance with principles of international public policy.

Investment tribunals had to deal with corruption in several cases during the last decade,[32] and the reading of their reasoning is rather enlightening for the detail and sophisticated motivational effort undertaken by the arbitrators. I draw here the reader's attention to two specific cases, namely *Metal-Tech.* v. *Uzbekistan* and *Spentex* v. *Uzbekistan*.

In the first case, after finding numerous "*red flags*" pointing to the existence of corruption in the acquisition of the investment contract, for the first

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32 The most important decisions were the following: World Duty Free Co. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 126 (Oct. 4, 2006); African Holding Co. of Am., Inc. & Société Africaine de Constr. au Congo S.A.R.L. v. La République démocratique du Congo, ICSID Case No. ARB/05/21, Sentence sur les déclinatoires de compétence et la recevabilité, ¶¶ 48–56 (July 29, 2008); Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. & Azpetrol Oil Servs. Group B.V. v. Republic of Azer., ICSID Case No. ARB/06/15, Award, ¶¶ 6–8, 84–89, 105 (Sept. 2, 2009); EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award (Oct. 8, 2009); Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 221–37 (Oct. 6, 2007); Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 293 (Oct. 4, 2013) [*hereinafter* "Metal-Tech Ltd."]; Spentex Neth., B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016) (the award is not public; however, it is known to the Author and a detailed report is available on IA – Investment Arbitration Reporter), *see* Spentex v. Uzbekistan, IAREPORTER, *available at* https://www.iareporter.com/arbitration-cases/spentex-v-uzbekistan/[*hereinafter* "Spentex"]; Vladislav Kim & Ors. v. Republic of Uzb., ICSID Case No. ARB/13/6, Decision on Jurisdiction, ¶ 543 (Mar. 8, 2017); Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pak., ICSID Case No. ARB/13/1, Award, ¶ 390 (Aug. 22, 2017); Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pak., ARB/12/1, Decision on Respondent's Application to Dismiss the Claims (With Reasons), ¶¶ 284–319 (Nov. 10, 2017).

time, the State was ordered to bear a relevant part of the arbitration costs, although it had prevailed on the invalidation of the contract and consequent flat rejection of all investor's claims. Indeed, the Tribunal observed that the State's victory on the substance "*does not mean that the State has not participated in creating the situation that leads to the dismissal of the claims*".[33] In other words, the State was deemed to be an accomplice of the investor in carrying out the corruption, a circumstance that the arbitrators found to be "*implicit in the very nature of corruption*".[34]

In the second case, the conclusion on the substance was similar and all investor's claims were dismissed "*because the investment was procured by corruption and thus is contrary to core values of the international 'ordre public'*".[35] However, the innovative part of this decision concerned, once again, the cost allocation. Exercising the discretion conferred to tribunals under Article 61(2) of the ICSID Convention, and with the explicit intent to contribute to the fight against corruption and discourage States from implementing corrupted schemes, the Tribunal invited Uzbekistan to donate the amount of USD 8 million to two United Nations agencies combatting corruption and keep at its own charge all its legal costs, failing which the State was ordered to refund Spentex for almost the entirety of its legal fees and costs.

This was a typical decision in which the reasoning was to play an essential role. Indeed, the "*sanction*" by which the Tribunal wished to stigmatise the State conduct was ordered by the Tribunal *sua sponte* (none of the parties had suggested it). Therefore, the Tribunal felt the duty to support its

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33 Metal-Tech Ltd., ICSID Case No. ARB/10/3, Award, ¶ 422 (Oct. 4, 2013).

34 *Id.* ¶¶ 414–22. This decision was applauded by commentators. *See*, inter alia, Y. Fortier, *Arbitrators, corruption, and the poetic experience: When power corrupts, poetry cleanses*, 31(3) ARB. INT'L 367 (2015); M. Hwang & K. Lim, *Corruption in Arbitration – Law and Reality*, 8 ASIAN INT'L ARB. J. 1 (2012).

35 *See* Spentex, ICSID Case No. ARB/13/26, Award (Oct. 4, 2013).

unprecedented approach on lengthily elaborated reasons. Basically, they are a reflection of its conviction that, having to resolve the dispute in accordance with international law, the Tribunal could not "*close the eyes*" before the serious breach of international public order committed by the State by taking part in the corruption plan devised by the investor.

The standard of adequacy for the reasoning in investment arbitration is not dissimilar from the standard analysed above for commercial arbitration. Concerning exhaustiveness of the award, the accepted rule is that (a) a tribunal must provide a reasoned decision in respect of each question that has a bearing on the overall resolution of the case and (b) the requirement "*to deal with every question submitted to the Tribunal*" (Article 48(3) of ICSID Convention) does not bind the tribunals to address every plea or contention underlying the relevant question. A good example is a State's objection that the investor's activity does not qualify as a protected investment under international law. This objection raises the question of whether the tribunal has or lacks jurisdiction and, as such, is directly material to the disposal of the case. The objection may be articulated through multiple arguments, for instance, lack of sufficient duration of the economic operation, absence of substantive risks, lack of capital contributions, failure to contribute to the host country economy, the investment was made in bad faith or in breach of the domestic laws of the recipient State, and so forth. If the tribunal finds in favour of the State based on the first and third argument and considers them decisive on the point, Article 48(3) does not require it to also address the outstanding arguments, since a response to them would in fact leave the tribunal's conclusion unaltered.[36]

[36] It is within the tribunal's discretion whether to extend its scrutiny to all outstanding allegations. Sometimes, this may be induced by the fact that the parties have pleaded all arguments in depth and expect a tribunal's response in respect of each of them. Alternatively, the same approach may be inspired by the legitimate desire to clarify an intricate topic by inserting in the award an *obiter* by which the tribunal may wish to add its

According to Professor Schreuer, the reasons need not deal with all arguments raised by the parties and are complete if they address the arguments that were accepted by the tribunal as necessary or relevant for the decision.[37] In any case, the reasons must address the parties' arguments that were rejected by the tribunal and which, had they been accepted, would have changed the outcome of the case.[38]

A similar approach had been recommended in 1973 by the International Court of Justice ["**ICJ**"] to international courts and treaty-based tribunals when drafting the statement of reasons in their decisions: [39]

> "*This statement must indicate in a general way the reasoning upon which the judgment is based; but it need not enter meticulously into every claim and contention on either side. While a judicial organ is obliged to pass upon all the formal submissions made by a party, it is not obliged, in framing its judgment, to develop its reasoning in the form of a detailed examination of each of the various heads of claim submitted. Nor are there any obligatory forms or techniques for drawing up judgments: a tribunal may employ direct or indirect reasoning, and state specific or merely implied conclusions, provided that the reasons on which the judgment is based are apparent. The question whether a judgment is so deficient in reasoning as to amount to a denial of the right to a fair hearing and a failure of justice, is therefore one which necessarily has to be appreciated in the light both of the particular case and of the judgment as a whole.*" (emphasis added)

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own contribution to the doctrinal or jurisprudential debate. In some other cases, the tribunal may instead wish to give prevalence to procedural economy, thus avoiding redundancies: *see* A. Crivellaro, *The Failure to State Reasons in ICSID Awards*, 4 LES CAHIERS DE L'ARBITRAGE [PARIS J. INT'L ARB.] 865 (2012).

37 C. SCHREUER, THE ICSID CONVENTION: A COMMENTARY 824 (2d ed. 2009).

38 *Id.*

39 Application for Review of Judgement No. 158 of the United Nations Admin. Tribunal, Advisory Opinion, 1973 I.C.J. Rep. 166, 210–11 (July 12, 1973).

Several ICSID tribunals and ad hoc committees refer to the standards recommended by the ICJ when stating or reviewing the reasoning of awards rendered in investment arbitrations, particularly the requirement that the reasons "*be apparent*".

VI. The control of reasoning by ICSID ad hoc committees

The failure to state reasons has been frequently invoked by losing parties as a ground for the annulment of awards under Article 52 of the ICSID Convention, which envisaged a mere and internal (through ad hoc committees appointed by ICSID itself) control of the procedural regularity, not an appeal on the merits.

From the very first annulment, dated 1985,[40] the ad hoc committees frequently fluctuated between two opposite tendencies: on the one hand, an interventionist approach that induced some committees to cross the boundaries between annulment for procedural deficiencies and appeal on the merits; on the other hand, the restriction of the committee's role to that of a guardian of no more than possible irregularities in the conduct of the proceedings, not errors in the substantive decision.[41]

After a period of excessive intrusion by the committees into the merits of the arbitral award,[42] in 2002, the committees' decisions in *Compania de Aguas*

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[40] Klóckner Industrie-Anlagen GmbH & Ors. v. United Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Rep. 9, 135 (1994) [*hereinafter* "Klóckner"].

[41] This is a very ancient distinction. Roman law already distinguished the *errores in decidendo* from the *errores in procedendo*.

[42] *See*, *e.g.*, Klóckner, ICSID Case No. ARB/81/2, Decision on Annulment (May 3, 1985), 2 ICSID Rep. 9, 135 (1994); Amco Asia Corp. & Ors. v. Republic of Indon., ICSID Case No. ARB/81/1, Decision on Annulment (May 16, 1986), 1 ICSID Rep. 413 (1993); Amco Asia Corp. & Ors. v. Republic of Indon. ICSID Case No. ARB/81/1, Resubmission, Decision rejecting the parties' applications for annulment of the award and annulling the decision on supplemental decisions and rectification (Dec. 17, 1992), 1 ICSID Rep. 569 (1993).

del Aconquija S.A. and Vivendi and Wena Universal S.A. v. *Argentine Republic* ["**Vivendi**"] and *Wena Hotels Limited* v. *Arab Republic of Egypt* ["**Wena**"] made it clear that the annulment power should be exclusively exercised where the alleged irregularity (for example, a failure to state reasons, or a manifest excess of power, or a serious departure from a fundamental rule of procedure) leads the tribunal to a result that, absent the irregularity, would be replaced by a different result. Both Committees established with persuading clarity that annulment is unnecessary, and even inconvenient, when a tribunal's misdeed is incapable "*of making a difference to the result*" and remains uninfluential on the disposition of the parties' rights.[43] This is what occurs in cases where, despite a possible procedural wrongdoing, the tribunal's overall reasoning show that the outcome would remain unchanged had the wrongdoing not materialised.

In particular, the *Vivendi* committee specified the standard for annulment based on lack of reasoning that should be correctly adopted, a standard which was then followed by the subsequent decisions made on applications for annulment. The relevant section reads as follows:[44]

> "*[I]t is well accepted both in the cases and the literature that Article 52(1)(e) concerns a failure to state any reasons with respect to all or part of an award, not the failure to state correct or convincing reasons ... Provided that the reasons given by a Tribunal can be followed and relate to the issues that were before the Tribunal, <u>their correctness is beside the point in terms of Article 52(1)(e).</u> Moreover, reasons may be stated succinctly or at length, and different legal*

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43 Compania de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Arg. Republic, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 86 (July 3, 2002), 6 ICSID Rep. 340 (2006) [*hereinafter* "Vivendi"]; *see also* Wena Hotels Limited v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the application for annulment, ¶ 58 (Feb. 5, 2002), 6 ICSID Rep. 129 (2006).

44 Vivendi, ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 64 (July 3, 2002), 6 ICSID Rep. 340 (2006).

traditions differ in their modes of expressing reasons. Tribunals must be allowed a degree of discretion as to the way in which they express their reasoning. ... In the Committee's view, annulment under Article 52(1)(e) should only occur in a clear case. This entails two conditions: first, the failure to state reasons must leave the decision on a particular point essentially lacking in any expressed rationale; and second, that point must itself be necessary to the Tribunal's decision. It is frequently said that contradictory reasons cancel each other out, and indeed, if reasons are genuinely contradictory so they might. However, Tribunals must often struggle to balance conflicting considerations, and an ad hoc committee should be careful not to discern contradiction when what is actually expressed in a Tribunal's reasons could more truly be said to be but a reflection of such conflicting considerations." (emphasis added)

Several ad hoc committees appointed in subsequent cases referred to the two above decisions as an important turning point and an inspiring guideline.[45] In two such cases – *MDT Equity Sdn. Bhd. and MTD Chile S.A.* v. *Republic of Chile* ["**MTD**"] and *CMS Gas Transmission Company* v. *Argentine Republic* ["**CMS**"] – the annulment had been applied for alleged failure to state reasons, so they deserve to be briefly summarised.

In *MTD*, the Committee admitted that in some parts of the award, the reasoning was "*extremely succinct*",[46] however, it concluded that the lack of

45 The relevant cases were the following: MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on the application for annulment (Mar. 21, 2007) [*hereinafter* "MDT Equity"]; Soufraki, ICSID Case No. ARB/02/7, Decision on the application for annulment (June 5, 2007); Industria Nacional de Alimentos, S.A. & Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. & Lucchetti Perú, S.A.) v. Republic of Peru, ICSID Case No. ARB/03/4, Decision on the application for annulment (Sept. 5, 2007); CMS Gas Transmission Co. v. Arg. Republic, ICSID Case No. ARB/01/8, Decision on the application for annulment (Sept. 25, 2007) [*hereinafter* "CMS Gas"].

46 MTD Equity, ICSID Case No. ARB/01/7, Decision on the application for annulment, ¶ 106 (Mar. 21, 2007).

reasoning must be viewed "*in terms of absence rather than inadequacy or brevity of reasoning*".[47] The failure to state "*correct or convincing*" reasons would thus be insufficient because what is needed is a "*failure to state any reason*" or some "*outright or unexplained contradictions*".[48]

In *CMS*, the Committee annulled one section of the award that it found to be affected by a lacuna which made it impossible to follow the reasoning on a particular point: [49]

> "*In the end it is quite unclear how the Tribunal arrived at its conclusion that CMS could enforce the obligations of Argentina to TGN. It could have done so by the above interpretation of Article II(2)(c), but in that case one would have expected a discussion of the issues of interpretation referred to above. Or it could have decided that CMS had an Argentine law right to compliance with the obligations, yet CMS claims no such right; and Argentine law appears not to recognise it.*
>
> *In these circumstances there is a significant lacuna in the Award, which makes it impossible for the reader to follow the reasoning on this point. It is not the case that answers to the question raised 'can be reasonably inferred from the terms used in the decision'; they cannot. Accordingly, the Tribunal's finding on Article II(2)(c) must be annulled for failure to state reasons.*"

However, the partial annulment did not affect the award as a whole: the outstanding parts of the award were not annulled, which was enough to find Argentina liable for damages.

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47 *Id.* ¶ 78.

48 *Id.*

49 CMS Gas, ICSID Case No. ARB/01/8, Decision on the application for annulment, ¶¶ 96–97 (Sept. 25, 2007).

A clear exemplification of the different forms that a failure to state reason may assume in the meaning of Article 52(1)(e) of the ICSID Convention was given by the *Soufraki* committee:[50]

> "*In quick summary, the ad hoc Committee considers that there may be a ground for annulment on the case of:*
>
> *i. a total absence of reasons for the award, including the giving of merely frivolous reasons;*
>
> *ii. a total failure to state reasons for a particular point, which is material for the solution;*
>
> *iii. contradictory reasons; and,*
>
> *iv. insufficient or inadequate reasons, which are insufficient to bring about the solution or inadequate to explain the result arrived at by the Tribunal.*"

Based on the decisions just commented upon, the ad hoc committees seemed to have restored a balanced definition of their correct mission under the ICSID Convention. However, their invasive approach suddenly resurfaced in 2010 in the cases *Sempra Energy International* v. *Argentine Republic* ["**Sempra**"] and *Enron Corporation and Ponderosa Assets, L.P.* v. *Argentine Republic* ["**Enron**"], in a particularly aggressive manner.

In *Sempra*, the disputed issue was whether the arbitral tribunal had applied Article XI of the United States of America-Argentina Bilateral Investment Treaty ["**U.S.-Argentina BIT**"], a treaty provision that exempts the State from liability for breach of its international obligations to the extent that its measures affecting foreigners are dictated by a situation of "emergency and

[50] Soufraki, ICSID Case No. ARB/02/7, Decision on the application for annulment, ¶ 126 (June 5, 2007).

necessity". Notwithstanding the Tribunal had amply addressed Article XI as well as all Argentina's defences on necessity, the Committee concluded that the arbitral tribunal had "*failed to apply*" this provision.[51] The surprising conclusion was caused by the Committee's disagreement on the way the Tribunal had interpreted the same provision in the light of international customary law on necessity as a limitation of States' responsibility, which amounted to an abusive interference on the merits of the award and an arbitrary conversion of the Committee into a Court of Appeal, which is expressly vetoed by Articles 52, 53, and 54 of the ICSID Convention.

Sure enough, the award was annulled just because the Committee impermissibly substituted its own views on the law and its own appreciation of the facts for those of the arbitral tribunal.[52] This was a clear excess of powers.

A similar amazing abuse was committed in the *Enron* annulment proceedings, which were again focused on the application of Article XI of the U.S.-Argentina BIT. The arbitral tribunal had found Argentina liable for damages holding that its "*Emergency Law*", that had substantially expropriated the investments of several foreign companies, was not, in the meaning of international customary law, "*the only way*" for Argentina to safeguard its essential interest against a grave and imminent peril.

The Tribunal had lengthily motivated its conclusion,[53] based also on the analysis made by a financial expert, but the Committee was of the opposite

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51 Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Decision on application for annulment, ¶ 207 (June 29, 2010) [*hereinafter* "Sempra"].

52 Sempra, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007); Sempra, ICSID Case No. ARB/02/16, Decision on application for annulment (June 29, 2010).

53 Enron Creditors Recovery Corp. (formerly Enron Corp.) & Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 322–42 (May 22, 2007) [*hereinafter* "Enron"].

view and concluded that Argentina had no other option available for addressing its crisis. As a result, the Committee blamed the Tribunal for failing to state sufficient reasons for its decision.[54]

This conclusion was evidently false: the Tribunal had indeed devoted tens of pages to explain why, in the particular case, Argentina was not entitled under international law to invoke a state of emergency or necessity, given that Argentina could and should have circumvented the crisis through various other governmental or legislative measures. Rightly or wrongly, the Tribunal concluded that, in the circumstances of the case, Argentina was not exempted from liability under the treaty provision in Article XI and, instead, bound to indemnify the investors.

Accordingly, the abusive interference by this Committee, namely its impermissible revision of the decision on the merits of the dispute, was a further case in which an ad hoc committee was not unsatisfied with the award for a genuine lack of reasoning. It was rather unsatisfied with the substance of the reasoning.

Both *Sempra* and *Enron* decisions were severely criticised, and, to my knowledge, their excessively intruding approach was not followed in the subsequent jurisprudence of the ad hoc committees.[55]

VII. The "*cultural*" functions of the reasons

The legal reasoning provided in support of a decision fulfils various functions.

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54 Enron, ICSID Case No. ARB/01/3, Decision on Annulment, ¶¶ 374–95 (July 30, 2010).

55 For an overall analysis of the annulment decisions under ICSID Convention from 1985 to 2010, including a more detailed analysis of the aberrant conclusions in *Sempra* and *Enron*, see my following contribution: A. CRIVELLARO, *Annulment of ICSID Awards: Back to the "First Generation"?*, *in* LIBER AMICORUM, EN L'HONNEUR DE SERGE LAZAREFF 145 (1st ed. 2011).

First, articulating the reasons in writing assists the arbitrator in identifying the correct solution of the case. The need for reasoning compels him to give a logical written form to the intellectual process he is following. This is the process which leads the arbitrator from the evidence in the file and the legal arguments of the parties to the solution of the dispute that he deems to be just and correct. A person who must decide might have an intuitive idea of who is right and who is wrong well before writing the reasons of the decision. However, it is during the drafting exercise that the decision-maker is enabled to check the soundness of his earlier instinctive perceptions or assumptions. In non-rare cases, he must revise his previous views, to reach a more thoughtful and robust conclusion.

Second, a credible reasoning may provide a valuable guide not only to the disputing parties, but also to other interested parties involved in future similar disputes. As a matter of the fact, the reasoning may allow them to "*learn from the forensic experience of others*",[56] thus assuming an educative role.[57]

Third, at a time when the arbitration community was still discussing whether to favour reasoned or unreasoned awards, important scholars stated, quite rightly in my view, that reasoning in the awards contributes to form "*a better basis for the elaboration of a common law of international transactions than national court decisions*".[58] As known in our community, academic researches which are devoted to the study of international public law, international trade law, law of international contracts, and international arbitration law, find their principal source in the analysis of the reasoning in published arbitral awards.

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56 Landau, *supra* note 21, at 188.

57 On the continuing professional education of judges and arbitrators on how to write reasoned decisions, *see* S.I. Strong, *Legal Reasoning in International Commercial Disputes - Empirically Testing the Common Law-Civil Law Divide*, *in* EXPLAINING WHY YOU LOST-REASONING IN ARBITRATION 53, 53 (A. Crivellaro & M. N. Hodgson eds., 2020).

58 T. E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 578, 597 (1985).

In my view, this part of the legal research is more extensive and even more relevant than the analysis of the pertinent law provisions as written down in domestic legislations or international conventions.

In the sphere of international commerce, the progressive formation of the relevant rules of law is indeed a creative process, which combines both written law and, more importantly, its interpretation and application by international tribunals when resolving real disputes.

Fourth, the reasons underlying an award have an important function in respect of the credibility of arbitration as an efficient settling-dispute mechanism. An unreasoned, or inadequately reasoned, award offers no bases to determine whether the decision was sound or arbitrary. In the long run, this creates the risk that arbitration be perceived as less effective than it should be. Awards that fail to observe the most basic notions of an adjudicatory process may cause progressive erosion of the trust in the arbitration system.[59]

Fifth, a convincing reasoning may avoid future challenges against the award. Both parties, particularly the losing party, have the right to know how the arbitrator arrived at a certain conclusion. When the losing party finds the reasons to be persuasive, it may prefer spontaneous compliance with the award rather than embarking in costly and risky challenges. In other words, the reasoning is the section in the award that should be drafted having in mind the need to try to persuade the losing party.

[59] This conclusion has been emphasised by G. Cordero-Moss, *Reasoning in Arbitration: What Do Users Want or Need?*, *in* EXPLAINING WHY YOU LOST - REASONING IN ARBITRATION 97 (A. Crivellaro & M. N. Hodgson eds., 2020).

VIII. Conclusions

It is common knowledge that international arbitration, as a system, has the ambition to retain the rank of "*premier choice*" and a standing of consolidated legitimacy for the resolution of disputes arising from international trade.

I see nothing wrong with this aspiration. However, the condition for the arbitration community to continue to enjoy the users' confidence is the acceptable quality of the awards, which must be able to show that the arbitrators made their best efforts to produce an intelligible, plausible, and solid reasoning.

Arbitrators should never forget that their awards are first and foremost written for two addressees: the losing party and the court which may be requested to revise the award. The more solidly the reasons are expressed, the more likely the losing party will not be tempted to refuse enforcement of or try to set aside the award, and the more likely the judicial control will leave the award untouched.

Arbitrators should especially keep in mind that, when drafting the award, they are "*speaking to*" the judge who will review it. Setting out adequate and clear reasons is a guarantee of a proper judicial review of the award. Whereas court decisions are normally reviewed on both facts and law, arbitral awards are not reviewed on the substance. Under most legal orders, the reviewing judge cannot re-examine the evidence or reinterpret the law, a function that the arbitral tribunal has already accomplished. On the contrary, the judge is bound to respect the "*finality*" of the award and assign to it the effects of *res judicata*.

What a reviewing judge is rather interested in, and has the legal authority to do, is checking whether the award is the product of a legitimate process, and it is important to recall that the essential basis on which the judge may perform such a review is, precisely, the reasoning in the decision.

This explains why the reasoning has a so vital relevance for the future survival of the award and, more generally, for the correct administration of justice after that the arbitrators have completed their mandate.

THE GROUP OF COMPANIES DOCTRINE – ASSESSING THE INDIAN APPROACH

Charlie Caher,[1] Dharshini Prasad[2] & Shanelle Irani[3]

Abstract

Arbitration is a creature of consent. In establishing such consent, a variety of legal doctrines have been used, albeit sparingly, to bind non-signatories to an arbitration agreement. This article explores one such legal doctrine – the "group of companies" doctrine. With limited exceptions, the "group of companies" doctrine has received a lukewarm reception in most civil and common law jurisdictions, having been primarily criticised for disregarding the principle of separate legal personality and permitting distinct

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corporate entities within a group to be treated as a single economic unit. Breaking ranks with its common law counterparts, Indian courts have displayed a greater proclivity for the "group of companies" doctrine. Through a comparative lens, this article discusses the Indian Supreme Court's seminal judgment adopting the doctrine and the issues arising out of the Court's reasoning, some of which have arguably led to an overexpansion of the doctrine in subsequent case law. The article concludes by highlighting the imminent need to revisit the contours of the "group of companies" doctrine in India, to prevent its erroneous application in the future.

I. Introduction

Arbitration is a voluntary method of dispute resolution. Consent has thus rightly been described as the "*essential basis*" of arbitration,[4] and, as the embodiment of that consent, the arbitration agreement is of foundational

[4] REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 2.01 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 6th ed. 2015) [*hereinafter* "BLACKABY ET AL."]; *see also* ANDREA M. STEINGRUBER, CONSENT IN INTERNATIONAL ARBITRATION ¶¶ 2.10, 5.07 (2012) ("The principal characteristic of arbitration is that it is chosen by the parties by concluding an agreement to arbitrate. This is considered the foundation stone of international commercial arbitration, as it records the consent of the parties to submit to arbitration – a consent which is indispensable to any process of dispute resolution outside national courts.") ("The consensual nature is one of the fundamental elements of the classical characterization of the concept of arbitration"); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION ¶ 498 (Emmanuel Gaillard & John Savage eds., 1999) [*hereinafter* "FOUCHARD GAILLARD GOLDMAN"] ("The arbitration agreement binds only those parties that have entered into it."); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION ¶ 1–11 (2003) ("The principal characteristic of arbitration is that it is chosen by the parties."); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 280–81 (3d ed. 2021) [*hereinafter* "BORN"] ("It is elementary that arbitration is consensual … [T]hat is the uniform holding of national courts, commentary and other authorities. Simply put, absent an 'agreement' to arbitrate, there is, by definition, obviously no 'arbitration agreement.'").

importance to the arbitral process.[5] International conventions and national law universally require the existence of a valid arbitration agreement to found the jurisdiction of an arbitral tribunal and, conversely, to permit awards to be set-aside or refused enforcement in the absence of such an agreement.[6] In assessing that requirement, the existence of a written arbitration agreement is often the starting point for a complex jurisdictional analysis into who is bound by that agreement.

Typically, the parties that are bound by an arbitration agreement – and that are considered to have provided consent to arbitrate – are its signatories.[7] But like any other contract, non-signatories can also be bound by an arbitration agreement in limited circumstances. In cases where a party is not a signatory to an arbitration agreement, courts and arbitral tribunals have properly exercised caution in ascertaining whether that party is in fact

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5 BLACKABY ET AL., *supra* note 1, ¶ 2.01 ("The agreement to arbitrate is the foundation stone of international arbitration. It records the consent of the parties to submit to arbitration – a consent that is indispensable to any process of dispute resolution outside national courts. Such processes depend for their very existence upon the agreement of the parties … [T]he consent of the parties remains the essential basis of a voluntary system of international arbitration.") (emphasis added).

6 *See*, *e.g.*, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1)(a), June 6, 1958, 330 U.N.T.S. 3 [*hereinafter* "New York Convention"]; Arbitration and Conciliation Act, No. 26 of 1996, § 34(2)(a)(ii) (India) [*hereinafter* "Arbitration Act"]; United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, art. 34(2)(a)(i), G.A. Res. 40/72, U.N. Doc. A/RES/40/72 (Dec. 11, 1985), as amended by G.A Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

7 There is, on occasion, misplaced debate as to whether a signature is necessary for a valid arbitration agreement. It is well-established that the validity of an arbitration agreement, like any other contract, is not contingent on formal execution or signature by the parties. *See* William Park, *Non-Signatories and the New York Convention*, 2 DISP. RESOL. INT'L 84, 89–90 (2008) (discussing the position under various national laws and the New York Convention). The existence of signatories does, however, provide a useful starting point to ascertain the parties that are bound by the arbitration agreement.

bound by the agreement.[8] The reason for this is obvious: it contradicts the basic principles of international arbitration to impose an arbitration agreement on a party that has not consented to it. The majority of doctrines that are used to bind non-signatories to an arbitration agreement are thus well-established and clearly defined, deriving their basis from existing principles of contract, company, and agency law in domestic legal systems.[9] But there is one conspicuous outlier: the "*group of companies*" doctrine.

As the name suggests, the "*group of companies*" doctrine provides, in broad terms, that a non-signatory may be bound by an arbitration agreement if it forms part of the same group of companies as a signatory and all the parties to the arbitration agreement mutually intend that the non-signatory be bound by it. The parties' intentions are typically ascertained through their conduct, which includes a consideration of whether the non-signatory participated in the negotiation, performance, or termination of the contract. Authorities emphasise that mere existence of an affiliate relationship between a signatory and non-signatory cannot be the basis for consent.[10] Unlike other non-signatory theories that find their roots in domestic law principles, the "*group of companies*" doctrine stems from international arbitration jurisprudence.[11]

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8 *See*, *e.g.*, Smith/Enron Cogeneration LP, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 97 (2d Cir. 1999) ("[A] court should be wary of imposing a contractual obligation to arbitrate on a non-contracting party"); RV Solutions Pvt. Ltd. v. Ajay Kumar Dixit & Ors., (2019) 257 DLT 104, ¶ 12 (India) [*hereinafter* "RV Solutions"] ("A third party or a non-signatory could be subjected to arbitration without his prior consent, though this would only be in exceptional cases.").

9 BORN, *supra* note 1, at 1525–27.

10 BERNARD HANOTIAU, COMPLEX ARBITRATIONS: MULTI-PARTY, MULTI-CONTRACT, MULTI-ISSUE – A COMPARATIVE STUDY ¶ 244 (2d ed. 2020) ("…we will emphasise in the conclusions that we will draw from an analysis of the case law that the existence of a group of companies is not per se a sufficient element to allow the extension to a non-signatory company of an arbitration agreement concluded by another member of the group.").

11 BORN, *supra* note 1, at 1558–68; BLACKABY ET AL., *supra* note 1, ¶¶ 2.43–2.50.

The ease with which the "*group of companies*" doctrine appears to impute intent and glide over distinct legal entities and signatories strikes immediate discord with the sacrosanct principles of separate legal personality and privity of contract. Perhaps unsurprisingly, the doctrine is not without its critics and has been rejected by most national courts across the civil and common law divide. Scathing criticisms go so far as to suggest that the doctrine is simply a "*shortcut permitting avoidance of rigorous legal reasoning*".[12]

In a seminal decision that goes against the proverbial tide, the Indian Supreme Court in *Chloro Controls India Private Limited* v. *Severn Trent Water Purification Inc*[13] ["**Chloro Controls**"] adopted the "*group of companies*" doctrine into Indian law. Multiple Indian courts have since applied the doctrine in varying contexts, including to enforce an award against a non-signatory that was not party to the underlying arbitration. The doctrine now appears to be entrenched in Indian jurisprudence.

This article explores the genesis of the "*group of companies*" doctrine and its reception by national courts, arbitral tribunals and in commentary **[Part II]**, before setting out the manner of its adoption and application by Indian courts **[Part III]**. Through a comparative lens, the article then challenges the reasoning and reliance on precedent in *Chloro Controls* to conclude that the Indian Supreme Court should, if the opportunity arises, reconsider the existence and parameters of the "*group of companies*" doctrine under Indian law **[Part IV]**.

II. The "*group of companies*" doctrine – genesis and reception

The "*group of companies*" doctrine was first espoused and applied by an arbitral tribunal in *Dow Chemicals* v. *Isover Saint Gobain* ["**Dow**

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12 HANOTIAU, *supra* note 7, ¶ 245.

13 Chloro Controls India Private Limited v. Severn Trent Water Purification Inc. (2013) 1 SCC 641 (India) [*hereinafter* "Chloro Controls"].

Chemicals"].[14] Beyond French courts and some arbitral tribunals under the rules of the International Chamber of Commerce ["**ICC**"], the doctrine has largely been subject to critical reception. The main criticisms focus on the doctrine's apparent disregard for the principles of privity of contract and separate legal personality, blurring the requirement of consent in international arbitration.

A. *Dow Chemicals* — From arbitral jurisprudence to the French courts

The dispute in *Dow Chemicals* arose out of distribution agreements that were governed by French law and contained an arbitration clause which provided for ICC arbitration seated in Paris. Subsidiaries of Dow Chemical Company, Dow Chemical A.G., and Dow Chemical Europe, signed two distribution agreements to distribute thermal isolation equipment in France with certain companies, who later assigned their rights and obligations to Isover Saint Gobain ["**Isover**"]. Both contracts provided that any subsidiary of Dow Chemical Company could comply with the delivery obligations that were eventually fulfilled by Dow Chemical France, a subsidiary that was not a signatory to the distribution agreements.

In light of certain disputes over the performance of the distribution agreements, all four Dow Chemical entities – Dow Chemical Company, Dow Chemical A.G., Dow Chemical Europe, and Dow Chemical France – initiated arbitral proceedings against Isover. Isover objected to the jurisdiction of the Tribunal on the basis that two of the four Dow Chemical entities – Dow Chemical France and Dow Chemical Company – did not sign the distribution agreements and there was thus no valid arbitration agreement with those parties.[15] The Tribunal disagreed.

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14 Dow Chemical France, the Dow Chemical Company & Ors. v. Isover Saint Gobain, ICC Case No. 4131, IX Y.B. COMM. ARB. 131 (1984) [*hereinafter* "Dow Chemicals"].

15 *See id.* at 132.

In assessing whether the non-signatories were bound by the arbitration agreements, the tribunal held, applying the general principles of international arbitration law, that the scope and effect of the arbitration agreement should be determined by reference to the "*common intent of the parties*" as ascertained from the facts relating to the conclusion, performance, and termination of the agreements.[16] The Tribunal also took into account international trade usage, specifically in the presence of a group of companies.[17]

The Tribunal noted that none of the parties had attached any relevance to which company within the Dow Chemicals group signed and performed the distribution agreements.[18] Accordingly, the Tribunal held that all the companies within the Dow Chemicals group had understood themselves to be concluding the contract – an understanding shared by Isover's predecessors in contract.[19] In particular, the Tribunal found that Dow Chemical France played a central role in the formation, performance, and termination of the contracts as it was pivotal in organising "*the contractual relationship with the companies succeeded by [Isover]*" and had carried out the deliveries envisaged under both agreements.[20] The Tribunal also concluded that Dow Chemical Company had been involved in all stages of the contract as it owned the trademarks under which the relevant products were to be marketed in France and controlled the subsidiaries that entered into and performed the distribution agreements.[21] Observing that the Dow Chemical group operated as a single "*economic reality*," the Tribunal held that the non-signatories were bound by the arbitration agreements:

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16 *Id.* at 134.
17 *Id.*
18 *Id.* at 134–35.
19 *Id.* at 135.
20 *Id.* at 134.
21 *Id.* at 134–35.

> "*[T]he arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intentions of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.*"[22]

Isover applied to the French courts to set aside the award on jurisdictional grounds. The Paris Court of Appeal rejected the application, reasoning that the "*[arbitral tribunal] ha[d], for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that Dow Chemical France and Dow Chemical Company have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well.*"[23]

B. Reception across the civil and common law divide

Subsequent French courts have enforced arbitral awards where the arbitration agreement has been extended to bind non-signatories, either expressly or implicitly, on the basis of the "*group of companies*" doctrine.[24] In *Sponsor A.B.* v. *Lestrade*, for instance, the Court of Appeal of Pau affirmed the decision of the lower court in appointing an arbitrator for a party that was a non-signatory. In applying the "*group of companies*" doctrine, the Court observed that the non-signatory had played an important role in the conclusion, non-performance, and termination of the underlying contract,

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[22] *Id.* at 136.

[23] Yves Derains, *Is There a Group of Companies Doctrine?*, *in* DOSSIER OF THE ICC INSTITUTE OF WORLD BUSINESS LAW: MULTIPARTY ARBITRATION 131, 133 (Bernard Hanotiau & Eric E. Schwarz eds., 2010).

[24] *See*, *e.g.*, Cour de Cassation [Supreme Court for Judicial Maters] June 11, 1991, 1992(1) REVUE DE L'ARBITRAGE 73 (Fr.); Cour d'appel [Regional Court of Appeal] Paris, Oct. 7, 1999, 2000(2) REVUE DE L'ARBITRAGE 288 (Fr.); Cour d'appel [Regional Court of Appeal] Pau, Nov. 26, 1986, 1998(1) REVUE DE L'ARBITRAGE 153 (Fr.).

making it "*the soul, the inspirer and, in fact, in a word, the brains of the [signatory] party*."[25]

ICC tribunals have also adopted and applied the "*group of companies*" doctrine, often underscoring that the mere fact that the non-signatory belongs to the same group of companies as the signatory is a necessary but not sufficient condition to bind the non-signatory to the arbitration agreement.[26] Outside the French and ICC context, however, the "*group of companies*" doctrine has had a more lukewarm reception.

Perhaps most forcefully, the "*group of companies*" doctrine has been eschewed for running roughshod over the principle of separate legal personality and permitting distinct corporate entities within a group to be treated as a single economic unit.[27] The principle of separate legal personality is not limited to national legal systems and is even well-rooted in international jurisprudence, including decisions of the International Court of Justice.[28] In simple terms,

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25 Cour d'appel [Regional Court of Appeal] Pau, Nov. 26, 1986, 1998(1) REVUE DE L'ARBITRAGE 153, 156 (Fr.); Pietro Ferrario, *The Group of Companies Doctrine in International Commercial Arbitration: Is There any Reason for this Doctrine to Exist?,* 26(5) J. INT'L ARB. 647, 668 (2009) [*hereinafter* "Ferrario"].

26 *See*, *e.g.*, ICC Case No. 5103, 2(2) INT'L CT. ARB. BULL. 20 (1991); ICC Case No. 6519, 2(2) INT. CT. ARB. BULL. 34 (1991); ICC Case No. 11405 (cited in HANOTIAU, *supra* note 7, ¶¶ 418–21); HANOTIAU, *supra* note 7, ¶ 244 ("But the fact that the signatory and the non-signatory belong to the same group is only one factual element (*un indice*) to be taken into consideration to determine the existence of consent").

27 Otto Sandrock, *Group of Companies and Arbitration*, TIJDSCHRIFT VOOR ARBITRAGE 6 (2005) ("[The group of companies] doctrine must however, be rejected for several reasons. First, the rules developed under this doctrine are not clear-cut and defined enough to permit their unambiguous application ... Secondly, the basic principle of privity of contract is confusingly blurred. Thirdly, there is no reason whatsoever to deviate from the traditional approach which guarantees a much higher degree of certainty of law and of foresee ability. Fourthly, this theory often also runs counter to the clear intention of the parties."). For further discussion, *see* cases set out in Part II(B) of this article.

28 Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3, at 39 (Feb. 5).

the principle of separate legal personality provides that a company is a distinct legal entity from its shareholders and affiliates with the capacity to sue and be sued, enter into legal relations and own assets in its own right.[29] The rights and liabilities of a company cannot, without more, be transposed on its shareholders or affiliates or vice-versa.

Attempts to treat corporate actors in the same group as a single entity have found little favour, even in circumstances where non-contracting entities might have participated in transactions. Indeed, in international commerce, entities across a corporate group regularly and interchangeably negotiate and perform contracts, notwithstanding the legal form or named parties to a transaction. Imputing intent in such circumstances defeats the purpose of conferring separate legal personality.

As Robert Goff LJ famously observed in *Bank of Tokyo Ltd.* v. *Karoon*:

> "*Mr. Hoffmann suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.*"[30]

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[29] *See, e.g.,* Albacruz (Cargo Owners) v. Albazero [1977] AC 774 (HL) 807 (Eng.) ("[e]ach company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would enure beneficially to the same person or corporate body irrespective of the person or body in whom those rights were vested in law.").

[30] Bank of Tokyo Ltd. v. Karoon [1987] AC 45, at 64 (Eng.).

Given the primacy of separate legal personality, national courts have rejected attempts to import the "*group of companies*" doctrine in the international arbitration context.

In the United States, for instance, the Court of Appeals for the Second Circuit dismissed attempts to enforce an arbitral award against a non-signatory parent in *Sarhank Group* v. *Oracle Corp.*[31] In the arbitral proceeding, the Tribunal had found that the non-signatory was bound by the arbitration agreement and liable for obligations under the contract.[32] The Court of Appeals for the Second Circuit disagreed.

While accepting in principle that non-signatories could be bound by an arbitration agreement, the Court confirmed that the instances in which U.S. courts have bound non-signatories to an arbitration agreement are limited to "*incorporation by reference, assumption, veil piercing/alter ego and estoppel and the like*".[33] Stressing the importance of separate legal personality, however, the Court concluded that it would be impermissible to look beyond the corporate form of a subsidiary to bind a parent company because:

> "*[t]o hold otherwise would defeat the ordinary and customary expectations of experienced business persons. The principal reason corporations form wholly owned foreign subsidiaries is to insulate themselves from liability for the torts and contracts of the subsidiary and from the jurisdiction of foreign courts. The practice*

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31 Sarhank Group v. Oracle Corp, 404 F.3d 657 (2nd Cir. 2013) [*hereinafter* "Sarhank"].

32 *Id.* at 662 ("The Arbitral Tribunal held that, 'despite ... their having separate juristic personalities, subsidiary companies to one group of companies are deemed subject to the arbitration clause incorporated in any deal either is a party thereto provided that this is brought about by the contract because contractual relations cannot take place without the consent of the parent company owning the trademark by and upon which transactions proceed.'").

33 *Id.* at 662.

> *of dealing through a subsidiary is entirely appropriate and essential to our nation's conduct of foreign trade.*"[34]

Singapore courts have similarly rejected the doctrine. In *Manuchar Steel H.K. Ltd* v. *Star Pac. Line Pte Ltd.*,[35] the Claimant sought to enforce an award against a non-signatory that formed part of the same group of companies as the signatory, on the basis that the two companies formed a single economic entity.[36] In dismissing the argument, the Court concluded that the right to use a corporate structure in any manner legally permissible was inherent in Singapore's corporate law and that Singapore did not recognise the theory of single economic entity:

> "*[a] basic tenet of company law in Singapore … is that a company and its shareholders are separate legal persons. Save for very limited exceptions, most of which are statutory, the company has rights and liabilities of its own which are distinct from those of its shareholders.*"[37]

It is only in limited circumstances where there has been some form of abuse that the court looks past the corporate form of contracting entities.[38] In relation to the argument that the signatory and non-signatory company formed a single economic entity, the Court held that enforcing the arbitral award against a non-signatory on the basis of this theory "*would be anathema to the 'internal logic of the consensual basis of an agreement to arbitrate*'."[39]

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34 *Id.*; *see also* Alexandre Meyniel, *That Which Must Not Be Named: Rationalizing the Denial of U.S. Courts With Respect To The Group of Companies Doctrine*, 3(1) THE ARB. BRIEF 18, 34 et seq (2013).

35 Manuchar Steel H.K. Ltd. v. Star Pac. Line Pte Ltd. [2014] SGHC 181 (Sing.).

36 *Id.* ¶ 18.

37 *Id.* ¶ 89.

38 *Id.* ¶ 96.

39 *Id.* ¶ 70.

The English High Court in *Peterson Farms Inc.* v. *C&M Farming Ltd* similarly rejected the "*group of companies*" doctrine as forming "*no part of English law.*"[40] While not expressly articulated in those terms, the decision makes apparent that the Court was motivated by the primacy of separate legal personality under English law.

Swiss and German courts have also refused to apply the "*group of companies*" doctrine, noting, *inter alia*, that the corporate form of entities could only be disregarded in limited circumstances of abuse.[41]

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[40] Peterson Farms Inc. v. C&M Farming Ltd. [2004] EWHC (Comm) 121, ¶ 62 (Eng.) [*hereinafter* "Peterson Farms"]; *see also* The Mayor & Commonalty & Citizens of the City of London v. Sancheti [2008] EWCA (Civ) 1283 (Eng.) [*hereinafter* "Sancheti"] (rejecting arguments that a subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent).

[41] Bundesgericht [Bger] [Federal Supreme Court] Jan. 29, 1996, 14(3) ASA BULL. 496 (Switz.); *see also* DANIEL GIRSBERGER & NATALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 101 (3d ed. 2016); *see also* Andrea Meier, *Multi-party Arbitrations*, *in* ARBITRATION IN SWITZERLAND: THE PRACTITIONER'S GUIDE 2505, 2508 (Manuel Arroyo ed., 2d ed. 2018); Oberlandesgericht Hamburg [OLG Hamburg] [Higher Regional Court of Hamburg] Nov. 8, 2001, 2002 OBERLANDESGERICHT-REPORT 305 (Ger.); Christian Duve & Philip Wimalasena, *Part IV: Selected Areas and Issues of Arbitration in Germany, Arbitration of Corporate Law Disputes in Germany*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 927, 951 (Patricia Nacimiento eds., 2d ed. 2015). Both Swiss and German courts have been more receptive to the "group of companies" doctrine in cases where the tribunal applied foreign law. *See* Bundesgerichtshof [BGH] [Federal Court of Justice] May 8, 2014, GER. ARB. J. 151 (Ger.) ("[I]t is not evident that such a binding [of a non-signatory to the arbitration agreement] would offend against the *ordre public*. Article 6 of the Introductory Act to the German Civil Code protects – like other appropriate reservation clauses … only the 'core of the domestic legal system'…. The decisive factor in this respect is whether the result of the application of foreign law is so strongly at odds with the fundamental ideas of the German regulations and the ideas of justice contained in them that it appears unacceptable according to domestic perceptions…. For this purpose, it is not sufficient if the German judge, if he or she had to decide the case according to German law, would come to a different conclusion on the basis of mandatory German norms …. The assumption of a violation of the *ordre public*

The doctrine has also been criticised for disregarding the foundational requirement of party consent in arbitration and the contractual emphasis on privity.[42] One of its more vocal critics, Bernard Hanotiau argues that the "*group of companies*" doctrine has been misapplied in practice by tribunals that disregard the "*undisputed principle*" that jurisdiction over a non-signatory cannot be established solely on the basis that a non-signatory belongs to the same corporate group as a signatory.[43]

However, commentaries on the "*group of companies*" doctrine are not universally critical. In defence of the doctrine, some have underscored that it does not easily disregard corporate form and only applies in circumstances where the evidence objectively points to an intent for the non-signatory to be bound.[44] Equally, while there is some force to the criticism that the doctrine has been misused and is easy to misapply, as a matter of principle, it is difficult to challenge the "*group of companies*" doctrine as categorically eschewing party consent. To the contrary, the intentions of the parties, as manifested in their conduct, is the touchstone of the "*group of companies*" doctrine.[45]

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therefore only comes into consideration in extremely exceptional cases ….”); Bundesgericht [Bger] [Federal Supreme Court] Oct. 16, 2003, 129 Entscheidungen des schweizerischen Bundesgerichts [BGE] III 727 (Switz.).

42 Ferrario, *supra* note 22, at 652.

43 HANOTIAU, *supra* note 7, ¶ 390. *See also* BLACKABY ET AL., *supra* note 1, ¶ 2.46("on a close reading of the [*Dow Chemicals*] decision, the tribunal's analysis was based on the parties' common intention, and its decision may be explained by reference to the traditional requirement for consent in international arbitration").

44 Derains, *supra* note 20, at 138; FOUCHARD GAILLARD GOLDMAN, *supra* note 1, ¶¶ 500–01 (1999); *see also* BORN, *supra* note 1, at 1561–62.

45 Stavros Brekoulakis, *Rethinking Consent in International Commercial Arbitration: A General Theory for Non-signatories*, 8(4) J. INT'L DISP. SETTLEMENT 610, 618 (2017).

As some commentators have observed, the bone of contention for the "*group of companies*" is arguably one of semantics.[46] The doctrine is a manifestation of the principle of implied consent.[47] If one looks past labels, the doctrine, in essence, simply seeks to ascertain whether all the parties, signatories and non-signatories alike, intended the non-signatory to be bound by the arbitration agreement based on the conduct of the parties as objectively construed. The fact that the non-signatory is of the same group of companies as a signatory is, in that regard, merely one factor that points towards the existence of such intent.[48] But the relationship of the parties is not, in itself, dispositive of the inquiry.[49] That might beg the question of whether there is a need for a separate "*group of companies*" doctrine and whether it has any practical effect, but that ought not to diminish the underlying rationale that where parties intend for a non-signatory to be bound by an arbitration agreement, it should be held to its contractual obligations.

III. ***Chloro Controls*** **and the Indian approach to the "*group of companies*" doctrine**

The "*group of companies*" doctrine is of relatively recent import in India and has largely grown out of the need to avoid the fragmentation of disputes in multi-party and multi-contract situations (referred to as "*composite*" transactions). Like most arbitral laws, the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"] does not expressly recognise the doctrine. The Indian courts have, however, justified the application of the doctrine by

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46 *See*, *e.g.*, Jeffery Waincymer, Procedure and Evidence in International Arbitration 522–23 (2012).

47 BORN, *supra* note 1, at 1564.

48 Derains, *supra* note 20, at 141–42. *See also* WAINCYMER, *supra* note 43, at 523; Tobias Zuberbühler, *Non-Signatories and the Consensus to Arbitrate*, 26(1) ASA BULL. 18, 25 (2018).

49 *See*, *e.g.*, ICC Case No. 5103, 2(2) INT'L CT. ARB. BULL. 20 (1991); ICC Case No. 6519, 2(2) INT. CT. ARB. BULL. 34 (1991); ICC Case No. 11405 (cited in HANOTIAU, *supra* note 7, ¶¶ 418–421).

relying on the phrase "*party and any person claiming through or under him*" in Sections 8,[50] 35,[51] and 45[52] of the Arbitration Act.

The doctrine was first adopted by the Supreme Court in *Chloro Controls*.[53] The facts of the case are complex. Suffice it to note that various entities across two groups of companies, one foreign and one Indian, entered into a series of agreements for the distribution of chlorination equipment in India. The parties also incorporated a joint venture company for the purpose of distributing the equipment and the shareholders agreement was the principal contract that contained the arbitration clause that was used to invoke arbitration. Not all the contracting entities were parties to all the agreements, including the shareholders agreement.[54] Some of the agreements also contained inconsistent dispute resolution clauses, including references to the U.S. courts.[55]

Disputes arose when the parent company of the foreign group of entities started distributing its equipment through an entity other than the joint venture. The counterparties applied to Indian courts to obtain an injunction restraining this distribution arrangement. Some of the Respondent entities applied for the disputes to be referred to arbitration under the shareholders

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50 Arbitration Act, No. 26 of 1996, § 8(1) (India) (In Indian-seated arbitrations, the courts "shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substances of the dispute… refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.") (emphasis added).

51 *Id.* § 35 ("an arbitral award shall be final and binding on the parties and persons, claiming under them, respectively.") (emphasis added).

52 *Id.* § 45 (in foreign seated arbitrations, the courts "shall, at the request of one of the parties or any person claiming through or under him, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.") (emphasis added).

53 Chloro Controls, (2013) 1 SCC 641 (India).

54 *Id.* ¶ 18.

55 *Id.* ¶¶ 26, 30.

agreement on the basis that all the agreements form part of a composite transaction and any non-signatories to the shareholders agreement are bound on the basis of the "*group of companies*" doctrine because they are parties "*claiming through or under*" the signatory under Section 45 of the Arbitration Act.

The Supreme Court agreed. While noting that the doctrine has not been universally accepted, the Court observed that it had found judicial acceptance in the U.S.,[56] England,[57] and France.[58] In defining the parameters of the doctrine, the Court was careful to emphasise that any decision to bind non-signatories should take place with great caution and by "*definite reference to the language of the contract and intention of the parties*".[59] The Court stressed that "*'intention of the parties' is a very significant feature which must be established before the scope of arbitration can be said to include the signatory as well as the non-signatory parties*".[60]

Interestingly, however, in the case of composite transactions and multiple agreements, the Court goes on to observe that a non-signatory could be subject to an arbitration "*without their prior consent*" in "*exceptional cases*".[61] Here, the Court held that four factors guide the application of the doctrine in such cases:[62]

- The *direct relationship* of the non-signatory to the signatory to the arbitration agreement;

56 *Id.* ¶ 70.
57 *Id.* ¶ 66.
58 *Id.* ¶ 70.
59 *Id.* ¶ 71.
60 *Id.* ¶ 67.
61 *Id.* ¶ 68.
62 *Id.* ¶ 68.

- The *direct commonality of the subject matter and agreement* between the parties;

- The transaction should be of a *composite nature where performance of [the principal] agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements*; and

- Whether referring disputes under all the agreements would *serve the ends of justice*.

The Court concluded that "*[t]he intention of the parties to refer all the disputes between all the parties to the arbitration tribunal is one of the determinative factor[s]*".[63]

The Court's references to the need for consent and the ability to join non-signatories in the absence of consent are less-than-easy to reconcile. At points, the Court emphasises the requirement for party intent to bind the non-signatories in the same group of companies and at other times, it discusses the intent of the parties to create a group of contracts in a composite transaction.[64] The Court also appears to suggest that intent is irrelevant where equity calls for a different result.

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[63] *Id.* ¶ 69.

[64] *Id.* ¶ 68 ("The Court will examine these exceptions from the touchstone of direct relationship to the party signatory to the arbitration agreement, direct commonality of the subject matter and the agreement between the parties being a composite transaction. The transaction should be of a composite nature where performance of mother agreement may not be feasible without aid, execution and performance of the supplementary or ancillary agreements, for achieving the common object and collectively having bearing on the dispute. Besides all this, the Court would have to examine whether a composite reference of such parties would serve the ends of justice."), ¶ 102 ("We have already discussed that under the Group of Companies Doctrine, an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."), ¶ 139 ("The intention of the parties was clear that all these agreements were being executed as integral parts of a composite

One reading of the decision is that the Court was simply drawing a line between instances where party intent would be readily ascertainable from their conduct, including through the performance of contractual obligations of a signatory by a non-signatory, and cases where it could be implied by virtue of the structure of the transaction as a whole (although the reference to the "*ends of justice*" still muddies the waters). This reading would also be consistent with the Court's summary of the doctrine:

> "*[A]n arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties.*"[65]

In finding that the "*group of companies*" doctrine could be read into the phrase "*any person claiming through or under him*" under Section 45 of the Arbitration Act, the Court placed particular emphasis on the fact that the language does not appear in Article II of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (on the enforcement of arbitration agreements). The Court, therefore, held that it must give "*due weightage to the legislative intent*" in including those additional words, which was to promote arbitration:

> "*The language and expressions used in Section 45, 'any person claiming through or under him' including in legal proceedings may seek reference of all parties to*

transaction. It can safely be covered under the principle of 'agreements within an agreement'."), ¶ 154 ("Where the parties to such composite transaction provide for different alternative forums, including arbitration, it has to be taken that real intention of the parties was to give effect to the purpose of agreement and refer the entire subject matter to arbitration and not to frustrate the remedy in law."), ¶ 155 ("The real intention of the parties was not only to refer all their disputes arising under the agreement which could not be settled despite friendly negotiations to arbitration, but even the disputes which arose in connection with the shareholders/mother agreement to arbitration.").

65 *Id.* ¶ 102.

> *arbitration. Once the words used by the Legislature are of wider connotation or the very language of section is structured with liberal protection then such provision should normally be construed liberally.*
>
> *Examined from the point of view of the legislative object and the intent of the framers of the statute, i.e., the necessity to encourage arbitration, the Court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious cause of action, parties and prayers.*"[66]

It is worth noting that *Chloro Controls* reflects a shift towards a more pro-arbitration reasoning by the Supreme Court. Prior to *Chloro Controls,* in *Sukanya Holdings* v. *Jayesh H. Pandya* ["**Sukanya Holdings**"],[67] the Supreme Court had refused to refer a matter to arbitration on the ground that the claims fell outside the scope of the arbitration agreement and, importantly, some of the parties to the dispute were not signatories to the arbitration agreement. *Sukanya Holdings* has generally been viewed as adopting a restrictive approach to binding non-signatories to the arbitration agreement. Yet, the decision can be distinguished from *Chloro Controls* as it was rendered in respect of Section 8 of the Arbitration Act, which, at the time, did not contain the phrase "*claiming through or under.*" Indeed, given the centrality of that phrase to the Court's reasoning in *Chloro Controls*, in its 246th Report on the Amendments to the Arbitration and Conciliation Act, 1996, the Law Commission of India recommended that the definition of "*party*" contained in Section 2(1)(h) of the Arbitration Act be amended to include the phrase "*any person claiming through or under*". Curiously, while Section 8 of the Arbitration Act was subsequently amended by the

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66 *Id.* ¶¶ 90–91.

67 Sukanya Holdings v. Jayesh H. Pandya, (2003) 5 SCC 531 (India) [*hereinafter* "Sukanya Holdings"].

Arbitration and Conciliation (Amendment) Act 2015 to include the phrase "*claiming through or under*", the definition of "*party*" contained in Section 2(1)(h) remained unchanged.

Since *Chloro Controls,* subsequent Indian courts have applied the "*group of companies*" doctrine to bind non-signatories to arbitration agreements in the context of composite multi-party and multi-contract disputes.[68] In *Ameet Lalchand Shah* v. *Rishabh Enterprises* ["**Ameet Lalchand**"],[69] in light of the amendments to Section 8 to insert the phrase "*claiming through or under*", the Supreme Court extended the arbitration agreement to non-signatories in a composite transaction and, in effect, restricted the applicability of *Sukanya Holdings*.[70] In *Cheran Properties Limited* v. *Kasturi and Sons Limited* ["**Cheran Properties**"],[71] the Supreme Court also applied the doctrine where the dispute arose out of one agreement rather than a "*composite transaction"*. It would be right to conclude, therefore, that the "*group of companies*" doctrine is now well-rooted in Indian jurisprudence. Yet, a close review of *Chloro Controls* raises a number of issues over the Court's reasoning, some of which

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68 *See, e.g.,* Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India); Reckitt Benckiser v. Reynders Label Printing, (2019) 7 SCC 62 (India) [*hereinafter* "Reckitt Benckiser"] (decided against binding the parent company to the proceedings as it had not taken part in the negotiation of the arbitration agreement even though it was part of the group of companies); SEI Adhavan Power Pvt. Ltd. v. M/s SunEdison Solar Power India (Pvt.) Limited, (2018) SCC OnLine Mad 13299 (India); Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors., 2020 SCC OnLine Del 597 (India).

69 Ameet Lalchand Shah & Ors. v. Rishabh Enters. & Ors., (2018) 15 SCC 678 (India) [*hereinafter* "Ameet Lalchand"].

70 While the Supreme Court did not expressly overturn its judgment in *Sukanya Holdings*, the fact that *Sukanya Holdings* no longer applies to Section 8 applications can be inferred from the fact that the Supreme Court eluded to the amendments to Section 8 and referred the non-signatories to arbitration.

71 Cheran Props. Ltd. v. Kasturi & Sons Ltd. & Ors., (2018) 16 SCC 413 (India) [*hereinafter* "Cheran Properties"].

have arguably led to an overexpansion of the doctrine in subsequent case law.

First, the Court's reliance on the phrase "*claiming through or under*" in Section 45 of the Arbitration Act to adopt the "*group of companies*" doctrine is questionable. The "*group of companies*" doctrine is premised on ascertaining whether there is a mutual intent amongst all the parties, including the non-signatory, that the non-signatory be bound by the arbitration agreement. The non-signatory is, therefore, bound in its own capacity as a party to the arbitration agreement and has rights and obligations under the arbitration agreement in addition to the signatory. The phrase "*claiming through or under*", however, is designed to capture successors in interest that derive their rights through, and substitute the party to the arbitration agreement. This is apparent from case law and commentary in other jurisdictions that consider the phrase "*claiming through or under*" in different arbitral laws.

For instance, in *Tanning Research Laboratories Inc* v. *O'Brien,* the High Court of Australia was required to construe the phrase "*claiming through or under*" in the 1974 Australian Arbitration (Foreign Awards and Agreements) Act to determine whether a liquidator of a company is entitled to rely on an arbitration clause between the company and its creditor. In describing the meaning of those terms, and in finding that a liquidator did have a derivative interest through the company, the Court held that:

> "*[T]he prepositions 'through' and 'under' convey the notion of a derivative cause of action or ground of defence, that is to say, a cause of action or ground of defence derived from the party. In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before*

> *the person claiming through or under the party can rely on the cause of action or ground of defence.*"[72]

A leading treatise on arbitration under English law, Russell on Arbitration, similarly discusses the phrase "*claiming through or under*" in Section 82(2) of the 1996 English Arbitration Act in the context of "*substituted parties*"[73] or parties that are "*successors [in] interest*" to a signatory.[74] The typical scenarios where the entities claim "*through or under*" a party are assignment, subrogation, and novation. These are classic cases where the non-signatory steps into the shoes of the party rather than claiming an independent right under the agreement.[75]

Importantly, despite some ambiguity, English courts have unequivocally rejected attempts to read concepts akin to the "*group of companies*" doctrine into the phrase "*claiming through or under*". In the 1978 decision of *Roussel-Uclaf* v. *GD Searle & Co. Ltd.* ["**Roussel-Uclaf**"], the English High Court had to determine whether a non-signatory subsidiary was "*claiming through or under*" its signatory parent in the context of a stay application under Section 1(1) of the 1975 English Arbitration Act. Graham J. stayed the application on alternative grounds but noted in *obiter dicta* that, on the facts, the subsidiary and parent were so closely related to each other that the subsidiary was "*claiming through or under*" its parent:[76]

> "*...I see no reason why these words in the Act should be construed so narrowly as to exclude a wholly-owned subsidiary company claiming, as here, a right to*

72 Tanning Research Labs. Inc. v. O'Brien, (1990) 169 CLR 332, ¶ 11 (Austl.).

73 FRANCIS RUSSELL, RUSSELL ON ARBITRATION ¶¶ 3-029–3-035 (24th ed. 2015).

74 *Id.* ¶ 3-025 ("assignees and representatives may become a party to the arbitration agreement in place of the original signatory on the basis that they are successors to that party's interest and claim 'through or under' the original party.") (emphasis added).

75 *Id.* ¶¶ 3-029–3-035.

76 Roussel-Uclaf v. GD Searle & Co. Ltd. [1978] FSR 95, at 104 (Eng.) [*hereinafter* "Roussel-Uclaf"].

sell patented articles which it has obtained from and been ordered to sell by its parent. ... The two parties and their actions are, in my judgment, so closely related on the facts in this case that it would be right to hold that the subsidiary can establish that it is within the purview of the arbitration clause, on the basis that it is 'claiming through or under' the parent to do what it is in fact doing whether ultimately held to be wrongful or not."

Roussel-Uclaf thus left the door open for arguments akin to the "*group of companies*" doctrine under English law on the basis that non-signatories were, in fact, "*claiming through or under*" signatory affiliates. Nearly three decades later, the English Court of Appeal in *The Mayor and Commonalty & Citizens of the City of London* v. *Ashok Sancheti*[77] ["**Sancheti**"] definitively overruled *Roussel-Uclaf*. The Court strongly rebuked attempts to expand the scope of "*claiming through or under*" in Section 82(2) of the 1996 English Arbitration Act to groups of companies. Lawrence Collins L.J. (as he was then) observed that *Roussel-Uclaf* was simply "*wrongly decided on this point and should not be followed*".[78] Collins L.J. also highlighted prior commentary and case law critical of *Roussel-Uclaf,* including the seminal treatise of Mustill and Boyd on Commercial Arbitration.[79]

With its definitive dismissal of the *obiter dicta* statements in *Roussel-Uclaf*, the Court of Appeal in *Sancheti* is generally considered to have closed the door

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77 Sancheti, [2008] EWCA (Civ) 1283 (Eng.).

78 *Id.* ¶ 34.

79 *Id.* ¶ 33 ("In MUSTILL AND BOYD, COMMERCIAL ARBITRATION (2d ed. 1989) it is said (at 137) that the decision can perhaps be explained on the basis of agency, and otherwise it is difficult to see how the subsidiary could have taken any part in the arbitration, and elsewhere (at 472) the decision is described as 'curious'. In Grupo Torras SA v Sheikh Fahad Mohammed Al-Sabah*,* [1995] 1 Lloyd's Rep 374 Mance J (as he then was) said (at 451) that he did not find it easy to extract any principle from the reasoning.").

to use of the "*group of companies*" doctrine under Section 82(2) of the 1996 English Arbitration Act (and indeed, even outside that context).[80]

Interestingly, the Supreme Court in *Chloro Controls* refers to both *Roussel-Uclaf* and the disapproval of its reasoning in *Sancheti.* However, the Court does not meaningfully engage with the rationale of the cases or consider the limited scope of the phrase "*claiming through or under*."[81]

In short, the authors opine that the non-signatory should itself be a "*party*" to the arbitration agreement and not merely a person "*claiming through or under*" a party. The Supreme Court's expansion of the phrase "*claiming through or under*" to encompass the "*group of companies*" doctrine was not required and has, in fact, led to serious ramifications for non-signatories in a group of companies, as seen in *Cheran Properties*.

In *Cheran Properties*,[82] relying on a similar phrase in a different provision of the Arbitration Act, the Supreme Court held that an award could be enforced against a non-signatory even though it did not participate in the arbitration.[83] In particular, the Court relied on Section 35 of the Arbitration

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80 RUSSELL, *supra* note 70, ¶ 3-035; Kate Davies, *A Ghost Laid to Rest?,* KLUWER ARB. BLOG (Mar. 12, 2009), *available at* http://arbitrationblog.kluwerarbitration.com/2009/03/12/a-ghost-laid-to-rest.

81 Chloro Controls, (2013) 1 SCC 641, ¶ 95 (India) (After setting out *Roussel-Uclaf* and *Sancheti,* the Court concludes that the question of whether an entity is "claiming through or under" a party is a fact specific one: "Having examined both the above-stated views, we are of the considered opinion that it will be the facts of a given case that would act as precept to the jurisdictional forum as to whether any of the stated principles should be adopted or not. If in the facts of a given case, it is not possible to construe that the person approaching the forum is a party to the arbitration agreement or a person claiming through or under such party, then the case would not fall within the ambit and scope of the provisions of the section and it may not be possible for the Court to permit reference to arbitration at the behest of or against such party.").

82 Cheran Properties, (2018) 16 SCC 413 (India).

83 *Id.* ¶¶ 21–22.

Act which provides that an arbitral award "*shall be final and binding on the parties and the persons claiming under them respectively*."[84]

On its face, the Court's decision is surprising as awards are only binding and enforceable against the parties to the arbitration and their successors in interest, such as an assignee.[85] Awards do not have effect on non-parties to the proceeding, even if they are members of the same group of companies.[86]

The notion that an award can be enforced against a non-party to the proceeding, even if it may otherwise be a party to the arbitration agreement, raises serious due process concerns. If a non-signatory were indeed a party to the arbitration agreement, the appropriate recourse is for the party to be joined to the proceeding, so it has the opportunity to be heard and to properly defend against the claims. For instance, one sees this in the context of disputes between shareholders arising out of an acquisition, where the target company is also named as a party to ensure that the award is binding on it.

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[84] *Id.* ¶ 20 ("The expression 'persons claiming under them' in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression 'persons claiming under them' is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement.").

[85] RUSSELL, *supra* note 70, ¶ 6-183 ("Save where a third party agrees to be bound by it, an award is generally only effective as regards the parties to it and persons claiming through or under them including their privies. It does not bind third parties or the public at large, nor can it be invoked by them. This rule applies even if they happen to be members of the same group of companies.") (emphasis added).

[86] *See*, *e.g.*, Michael Wilson v. Thomas Sinclair [2012] EWHC 2560 [50] (Eng.) ("Arbitrations are private and consensual and non-parties cannot, in the absence of consent, be joined or be affected by the decisions of the arbitral tribunal.") (emphasis added).

Apart from raising due process concerns, *Cheran Properties* also expands the "*group of companies*" doctrine beyond its original purpose, which was to bind non-signatories to an arbitration agreement (rather than to an award in a proceeding that they may not have participated in). The authors have not identified a case where the doctrine has, in fact, been applied in this manner.

Building on *Chloro Controls* and *Cheran Properties* thus creates a dangerous precedent for the use of the "*group of companies*" doctrine – and the phrase "*claiming under*" in Section 35 – to enforce awards against non-parties to proceedings.

While questionable as a matter of principle, the Court's decision is perhaps easier to reconcile on the facts.[87] The non-signatory non-party in *Cheran Properties* was the entity that held the shares, which was the subject-matter of the dispute. The shares had been transferred to it by the signatory affiliate in accordance with the contract containing the arbitration agreement. That contract provided that any transfer of shares within the corporate group was subject to the transferee accepting the terms of the contract, including the arbitration agreement. The signatory and non-signatory entities were, therefore, aware from the outset that the award would have ramifications on the non-signatory. Indeed, in reaching its conclusion, the Court observed that to absolve the non-signatory of the consequences of the award "*would be to cast the mutual intent of the parties to the winds and to put a*

[87] Juhi Gupta, *India's Tryst with the Group of Companies Doctrine: Harbinger or Aberration?*, KLUWER ARB. BLOG (Nov. 27, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/27/indias-tryst-group-companies-doctrine-harbinger-aberration/.

premium on dishonesty."[88] The case is better rationalised on principles of acquiescence,[89] rather than the "*group of companies*" doctrine.

Second, the decision in *Chloro Controls* misstates the position on precedent in other jurisdictions. In particular, and as set out above, English[90] and U.S. courts[91] have not accepted the "*group of companies*" doctrine. U.S. courts have been circumspect of the doctrine's applicability under U.S. law given the primacy of separate legal personality in American jurisprudence and commerce.[92] Curiously, the U.S. Supreme Court judgment cited in *Chloro Controls* - *Ruhrgos AG* v. *Marathon Oil Co.*[93] – does not consider or mention the "*group of companies*" doctrine.[94] As regards England, the Supreme Court did not consider the clear rejection of the doctrine by the English High Court in *Peterson Farms Inc.* v. *C&M Farming Ltd,* wherein it was categorically held that the "*group of companies*" doctrine formed "*no part of English law*".[95] Given the numerous references to English cases and treatises in the

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88 Cheran Properties, (2018) 16 SCC 413, ¶ 26 (India).

89 Govett v. Richmond (1834) 7 Sim. 1 (Eng.); Thomas v. Atherton (1877) 10 Ch. D. 185 (Eng.). Both cases are examples where awards may be enforceable against non-parties to the proceeding that were aware of and did not object to the proceedings or the award. *See* RUSSELL, *supra* note 70, ¶ 6-185.

90 Chloro Controls, (2013) 1 SCC 641, ¶ 66 (India) ("Though the scope of an arbitration agreement is limited to the parties who entered into it and those claiming under or through them, the Courts under the English law have, in certain cases, also applied the 'Group of Companies Doctrine'.")

91 *Id.* ¶ 70 ("The doctrine has found favourable consideration in the United States…")

92 Sarhank, 404 F.3d 657 (2nd Cir. 2013).

93 Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

94 Chloro Controls, (2013) 1 SCC 641, ¶ 70 (India) ("The US Supreme Court in Ruhrgas AG v Marathon Oil Co. (526 US 574 (1999)) discussed this doctrine at some length and relied on more traditional principles, such as, the non-signatory being an alter ego, estoppel, agency and third party beneficiaries to find jurisdiction over the non-signatories.")

95 Peterson Farms, [2004] EWHC (Comm) 121 [62] (Eng.); *see also* Sancheti, [2008] EWCA (Civ) 1283 (Eng.) (rejecting arguments that a subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent company and a third party on the basis that the parent and subsidiary were "so closely related" that it could be said that the subsidiary was "claiming through or under" the parent).

judgment and the general influence of English law in Indian jurisprudence, including in the arbitration context, one wonders if the Court would have reached a different conclusion on the "*group of companies*" doctrine if the true position in England (and other common law jurisdictions) had been drawn to its attention.

Third, while the decision is careful to emphasise the importance of party intent under the "*group of companies*" doctrine at multiple junctures, the "*composite*" nature of the transaction and the desire to avoid parallel, fragmented proceedings and inconsistent decisions appears to have been a key factor motivating the Court's decision in *Chloro Controls*. This is most apparent where the Court suggests that in deciding whether to join the non-signatory, it would "*have to examine whether a composite reference of such parties would serve the ends of justice*."[96] If there is indeed party intent, that should be the end of the inquiry. There ought to be no need to resort to broader considerations of justice in determining whether the non-signatory should be bound by the arbitration agreement.

There is, of course, nothing objectionable in the desire to avoid multiple parallel proceedings. Far from it, the Court's pragmatic approach to consolidating potentially fragmented disputes is laudable. The consequence of the Court's approach, however, is that the threshold for ascertaining intent in the "*group of companies*" context has been considerably lowered. For instance, the Court concluded that the fact that the various agreements flow from a principal contract and are intertwined is a "*sufficient indicator of intent*".[97]

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[96] Chloro Controls, (2013) 1 SCC 641, ¶ 68 (India). There are also various arguments on the multiplicity of proceedings that were raised by the parties.

[97] *Id.* ¶ 71 ("Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is their composite

But most complex multi-contract transactions are almost always integrally intertwined. One needs to look no further than the complex web of contracts in a construction project to see this. Yet, the structure of these agreements, including the fact that different entities within a group are party to different contracts, are often deliberately designed to limit liability and take advantage of the separate legal status of group companies. The mere fact that a group of companies may have entered into overlapping contracts cannot in itself demonstrate intent. As Yves Derains rightly observed, the presence of a group of companies could allow for conflicting arguments on whether the non-signatories truly intended to be bound by an agreement signed by only one party.[98] The Court's formulation of the test, however, risks rendering any analysis of intent – and thus consent to arbitrate – illusory and makes the application of the "*group of companies*" doctrine an almost foregone conclusion. Indeed, in most composite transaction cases that have followed *Chloro Controls,* the courts have applied the "*group of companies*" doctrine.[99] Lower courts that have grappled with composite transactions appear to have indiscriminately applied the rationale in *Chloro*

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performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration.") (emphasis added).

98 Derains, *supra* note 20, at 141–42.

99 *See*, *e.g.*, Magic Eye Developers Pvt. Ltd. v. Green Edge Infra Pvt. Ltd. & Ors, 2020 SCC OnLine Del 597 (India); Ameet Lalchand, (2018) 15 SCC 678, ¶¶ 21–23 (India); Chatterjee Petrochem. v. Haldia Petrochem., (2014) 14 SCC 574, ¶¶ 30–31 (India); Sterling & Wilson Int'l Fze & Ors v. Sunshakti Solar Power Projects Pvt. Ltd. & Ors., O.M.P. (I) (COMM.) 460/2018, O.M.P (I) & (COMM.) 461/2018, ¶¶ 69–70 (India); Fernas Constr. Co. Inc. v. ONGC Petro Additions Ltd., 2019 SCC OnLine Del 8580, ¶¶ 24–25 (India); M/s. Duro Felguera S.A. v. M/s. Gangavaram Port Ltd., (2017) 9 SCC 729, ¶¶ 3, 6–9, 14, 37–38, 44–50 (India) (in relation to Section 11(6A) of the Act) (The Court did not follow the *Chloro Controls* rationale. The case was distinguished on the basis that, although there were five contracts, these were not interconnected to form one composite contract. It was the parties' intention to keep the contracts separate by incorporating different entities with different scopes of work. The Court also held that the arbitration clauses were narrower in scope than the one at issue in *Chloro Controls*.).

Controls to non-signatories where there is a mere commonality of subject matter and overlapping contracts.[100]

The threshold for intent appears to have been further lowered in *Mahanagar Telephone Nigam Ltd* v. *Canara Bank*.[101] Building on *Chloro Controls,* the Supreme Court in this case held that the "*group of companies*" doctrine also applies where "*there is a tight group structure with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality*" and in particular "*when the funds of one company are used to financially support or re-structure other members of the group*."[102] Again, this test sits at odds with commercial reality where subsidiaries are funded by parent companies and funds often flow between different corporate entities,[103] and increases the number of fact situations where a non-signatory affiliate may be bound by arbitration agreements.[104]

Given these difficulties in the reasoning in *Chloro Controls,* the Supreme Court should, if the opportunity arises, revisit the "*group of companies*" doctrine. As a starting point, the Court may wish to reconsider the continued application of the doctrine under Indian law, given the divergent approach of its common law counterparts (and indeed, even courts in civil

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100 *See*, *e.g.*, Nirmala Jain & Ors. v. Jasbir Singh & Ors., 2018 SCC OnLine Del 11342, ¶ 10 (India); RV Solutions, (2019) 257 DLT 104, ¶¶ 12–13 (India).

101 Mahanagar Telephone Nigam Ltd v. Canara Bank, AIR 2019 SC 4449 (India).

102 *Id.* ¶ 10.5.

103 Large corporate groups, for instance, engage in cash-pooling transactions to avoid recourse to external financing with specific entities within the group providing treasury services. *See* Organisation for Economic Co-operation and Development (OECD), *Transfer Pricing Guidance on Financial Transactions* (Feb. 2020) at ¶ 10.109, *available at* http://www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.pdf.

104 Sidhant Kumar, *Group Company Doctrine in India: Holding Labyrinth Corporate Structures Accountable*, BAR & BENCH (Jan. 15, 2020), *available at* https://www.barandbench.com/columns/group-company-doctrine-in-india-holding-labyrinth-corporate-structures-accountable.

law jurisdictions). Eschewing the doctrine will not create a void in jurisprudence. To the contrary, the principle of implied consent may be sufficient to bind non-signatories based on their conduct or other attendant circumstances that demonstrate intent. The principle is well-established in arbitral jurisprudence[105] and has also been adopted by other common law jurisdictions like the U.S.[106] and Singapore.[107] The principle of implied consent is based on the parties' intention that a particular entity be bound by the arbitration agreement.[108] This intention can be ascertained when a non-signatory party conducts itself as if it were a party to the arbitration agreement, which the signatory parties accept by for instance, playing a role in the negotiation and/or performance of the contract.[109] The basis for applying the principle of implied consent is similar to the basis for applying the "*group of companies*" doctrine, with the distinction that it can be applied to any non-signatory, whether that non-signatory is an affiliate of one of the parties to the arbitration agreement or not.

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105 *See* BORN, *supra* note 1, at 1539 *et seq*.

106 *See*, *e.g.*, Sunkist Soft Drinks v. Sunkist Growers, 10 F.3d 753 (11th Cir. 1993); Fluor Daniel Intercontinental v. General Electric, No. 98 Civ. 7181 (S.D.N.Y. 1999); Southern Illinois Beverage v. Hansen Beverage, No. 07-cv-391-DRH (S.D. Ill. 2007).

107 *See* The Titan Unity, [2014] SGHCR 4, ¶ 35 (Sing.) ("The cases above illustrate the principle that where the objective circumstances and parties' conduct reveal that the parties to the arbitration agreement have consented to extend the agreement to a third person who is not a party to the agreement, and that third party has shown by its conduct to accept to be bound by the agreement, parties can be found to have impliedly consented to form an agreement to arbitrate where this has been clearly and unequivocally shown to be the parties' objective intention. … In particular, implied consent is determined from the parties' intention to extend the written arbitration agreement to a non-party who accepts to be bound by it…"). While there are High Court decisions adopting the theory of implied consent, it has not been considered by the Singapore Court of Appeal. *See* A Co. & Ors. v. D & Ors. [2018] SGHCR 9, ¶ 29 (Sing.).

108 BORN, *supra* note 1, at 1540.

109 *Id.* at 1541.

Should the Court choose to retain the doctrine, it may nonetheless wish to clarify that the doctrine is not premised on non-signatories "*claiming through or under*" a signatory affiliate but is instead based on the non-signatory being a "*party*" in its own right. This avoids the due process risk raised by *Cheran Properties* of non-parties to arbitral proceedings being bound by awards merely on the basis that they are non-signatories from the same group of companies that are bound by the arbitration agreement. The Court should also consider reformulating the test of intent in more stringent terms (like in the case of *Reckitt Benckiser* v. *Reynders Label Printing*),[110] such that the fact of a principal contract and intertwined ancillary contracts does not, in itself, provide a basis to bind a non-signatory. The test of intent should instead look more closely at the rationale behind the structure of the transaction and any intent on part of the parties to separate the transaction and liability among group entities.

IV. Conclusion

The "*group of companies*" doctrine has a complex relationship with international arbitration. While some courts and tribunals have embraced it, most have been more critical of it. In adopting the "*group of companies*" doctrine, Indian courts have parted ways with their counterparts, particularly in common law jurisdictions. That is, of course, not a reason in itself to impugn the Indian approach. Indeed, the Indian approach to the "*group of companies*" doctrine reflects a fundamental, pragmatic desire to ensure that related disputes are resolved in a single forum. Yet, in its application by Indian courts, the rationale and contours of the "*group of companies*" doctrine appear to have expanded beyond the doctrine's original ambit and risk undermining the foundational requirement of consent in international arbitration. Therefore, it would be opportune for the Indian

[110] Reckitt Benckiser, (2019) 7 SCC 62 (India). The Court held that the burden was on the signatory party to establish that the non-signatory party intended to consent to the arbitration and be a party thereto.

Supreme Court to revisit the doctrine to determine whether it continues to have a jurisprudential basis in Indian law and, if so, what the parameters of the doctrine are.

CONSTITUTIONAL CONTROL OVER INTERNATIONAL AWARDS: A LATIN AMERICAN TREND

Maribel Mendoza Londoño[1]

Abstract

*Latin American jurisdictions have elevated arbitration to a constitutional level, meaning that arbitrators are conceived of as judges and awards are equivalent to court decisions. Within this context, the admissibility requirements of constitutional actions to vacate international awards for the protection of the fundamental rights of the parties have been debated as a secondary mechanism to the setting aside proceedings provided within the lex arbitri. In this regard, the purpose of this article is to study the relationship between international arbitration and constitutional control at the seat chosen by the parties for the proceedings. Therefore, the article aims to analyse one central question: should international awards be subject to constitutional control at the seat of arbitration? Accordingly, this investigation analyses whether the admissibility of constitutional actions would produce a different result from one obtained by initiating set aside proceedings based on the violation of the public policy of the seat. Further, the author also intends to study whether constitutional actions against international arbitral awards are contrary to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [“**New***

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York Convention*"]. *To examine this question, the article shall study the application of these actions, particularly in Colombia and Peru.

I. Introduction

It has been recognised in most jurisdictions that there are two ways in which an international award can be subjected to judicial control. The first manner is by opposing the recognition and enforcement of the award in the country where one party seeks to enforce it. The second is by initiating a claim to set aside the award before the courts of the country that was selected as the seat of arbitration. These mechanisms have been adopted worldwide in the interest of achieving harmonisation in international commercial arbitration. In that sense, there is global consensus as to the methodologies for challenging an arbitral award.

In this context, Article V of the New York Convention lays down the specific grounds for denying recognition and enforcement of international awards.[2] On the other hand, scholars such as Gary B. Born recognise that the New York Convention imposes limits over where the setting aside proceedings should be held, by requiring that the proceedings be held at the place where the award was made. Specifically, the author determines that "*[t]he New York Convention limits the jurisdictions in which annulment of an international arbitral award may be sought (in particular, to the place where the award was made or under the law of which the award was made)*".[3]

However, with respect to the grounds under which an arbitral award may be set aside, there is no transnational treaty that provides a common global answer to the issue. For this reason, most national arbitration regimes have adopted similar approaches to the New York Convention by basing their

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[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 330 U.N.T.S. 473 [*hereinafter* "New York Convention"].

[3] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3164 (2d ed. 2014).

lex arbitri on the UNCITRAL Model Law ["**Model Law**"].[4] The latter, within Article 36,[5] introduces the same grounds as the New York Convention for refusal of recognition and enforcement stated in Article V[6] as well as the procedure for the annulment of arbitration awards determined in Article 34[7] of the Model Law.

Notwithstanding the above, some jurisdictions, particularly in Latin America, have debated over the initiation of constitutional actions for the protection of fundamental rights and constitutional guarantees in arbitral proceedings. These actions have been initiated with the purpose of seeking annulment of awards. Hence, they are said to constitute a secondary mechanism to the set aside proceedings provided within the *lex arbitri*.[8]

Academics like Gónzales de Cossío argue that there is a growing tension between constitutional actions and arbitration proceedings. He describes this situation as:

> *"An interesting intellectual battle being fought in our region. The battle is important. The battle is transcendent: many things depend on its result. Currently, the battle holds both victories and defeats. Successes and failures.*

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4 United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, G.A. Res. 40/72 (Dec. 11, 1985), as amended by G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006). [*hereinafter* "Model Law"].

5 *Id.* art. 36.

6 New York Convention, *supra* note 1, art. V.

7 Model Law, *supra* note 3, art. 34.

8 Mariano Tobias de Alba Uribe, *An Unusual Motion Against Arbitral Awards in Latin America*, KLUWER ARB. BLOG (June 27, 2013), *available at* http://arbitrationblog.kluwerarbitration.com/2013/06/27/an-unusual-motion-against-arbitration-awards-in-latin-america/.

Heroes and wounded - also casualties. It consists of how the constitutional and the arbitral procedures coexist."[9] (translated from Spanish).

This phenomenon has occurred as part of the process known by international scholars as the constitutionalisation of international arbitration.[10] Various authors argue that constitutional actions constitute a major obstacle to the enforcement of decisions issued by international arbitrators.[11] By giving arbitration a constitutional status, it instantly becomes a part of the internal public order of a country and is subject to such control.[12] In light of the above, the author seeks to examine the nature and extent of constitutional control over international awards in the context of Latin America. The article shall be divided into four main parts. The first part shall introduce the importance of the *lex arbitri* in challenging an award before the courts. The second part reviews how Colombia, as an example of a Latin American jurisdiction, has adjudicated upon constitutional challenges against arbitral awards. The recourses so analysed are *tutela* actions or constitutional protection recourses. The third part discusses and analyses the development that the Peruvian *lex arbitri* has had with respect to constitutional control over arbitration in Peru. In furtherance of this, the fourth part analyses whether constitutional actions against international arbitral awards are contrary to the New York Convention. Finally, the last

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9 Francisco Gónzales de Cossío, *Procesos Constitucionales y Procesos Arbitrales: ¿Agua y Aceite?*, 6 REVISTA ECUATORIANA DE ARBITRAJE 229 (2014).

10 Ronald Ralf Becerra, *The constitutional review of international commercial arbitral awards in Latin America and the challenges for legal certainty. Insights from Colombian jurisdiction*, 3(6) REVISTA TRIBUNA INTERNACIONAL 11, 14 (2014) [*hereinafter* "Becerra - Insights"].

11 Manuel A. Gomez, *Article 5 - Extent of Court Intervention*, *in* UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: A COMMENTARY 94 (Ilias Bantekas, Pietro Ortolani, Shahla Ali, Manuel A. Gomez & Michael Polkinghorne eds., 2020).

12 Ronald Ralf Becerra, *Judicial intervention in Colombia in international arbitration and legal certainty*, 42 DIÁLOGOS DE SABERES 119, 119-129 (2015), *available at* https://revistas.unilibre.edu.co/index.php/dialogos/article/view/193/145 [*hereinafter* "Becerra – Intervention"].

part would examine the effects of the initiation of constitutional actions during the enforcement stage. The idea herein is to study whether constitutional proceedings that might be held at the seat of arbitration should be considered as an alternative during the recognition and enforcement stage.

The admissibility of constitutional actions as an alternative mechanism for annulment may have a major impact on the country to be chosen as the seat. This is because submitting to multiple setting aside mechanisms with various grounds can be highly unattractive since it encourages legal uncertainty as to when the award shall become binding.[13] Moreover, the result can be contrary to the main objectives of arbitration as an alternative dispute resolution mechanism by rendering the process ineffective.

In the words of A. Aljure,

> "*Although it is true that the awards may contain errors, even in the application of fundamental rights, the remedy is worse that the disease; it is greater the damage that is caused by trying to amend all awards than the one caused by prohibiting constitutional actions against them. At the international level, we believe that this is true, since a foreign company will prefer the certainty of an award that is only controlled by setting aside, to the Pandora's Box of Tutela actions.*"[14](translated from Spanish)

II. International arbitration and constitutional control at the seat

A. Lex arbitri and recourses against international arbitral awards

An issue of major importance in international arbitration is the place where the arbitral proceedings will be held. This location is known as the seat of

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[13] Becerra – Insights, *supra* note 9, at 13.

[14] Antonino Aljure Salame, *Comentario a la sentencia de anulación del laudo arbitral Bancolombia v. Gilinski*, 9 REVISTA INTERNACIONAL DE ARBITRAJE 170 (2008), *available at* https://xperta.legis.co/visor/temp_rarbitraje_945dd62c-a24b-4abd-ada1-a9aadface39c.

the arbitration and can be defined as the "*legal or juridical home (domicile) of the arbitration*."[15] The seat should not be confused with the geographical location where the hearings are conducted, because such a physical place does not affect the location of the seat nor does it change the applicable *lex arbitri*.[16]

The choice of a seat implies the choice of the *lex arbitri* of that country. This means that the law applicable to the existence and procedure of the arbitration corresponds to the arbitral law enacted by the country selected as the seat.[17] This law provides for the means of judicial control over the proceedings by providing the procedure for setting aside an arbitral award, the grounds for admissibility of setting-aside applications, and the competent national court.[18]

The Model Law, under Article 34, provides for an exclusive mechanism for setting aside international awards.[19] Therefore, the possibility to apply for

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15 BORN, *supra* note 2, at 2052.

16 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 175 (Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter eds., 5th ed. 2009).

17 BORN, *supra* note 2, at 2056 ("Often most important, the arbitral seat must have both national arbitration legislation and courts that are supportive of international arbitration (….) both the arbitration legislation and the so-called procedural law of the arbitration (also sometimes referred to as the *lex arbitri* or curial law) are almost always that of the arbitral seat.").

18 As a consequence, a wide range of "internal" and "external" procedural issues relating to the arbitration will virtually always be governed by the law of the arbitral seat, including the annulment of awards. *See* BORN, *supra* note 2, at 2057.

19 The Model Law in Article 34 provides for specific grounds for annulment. These being: (a) there was no valid arbitration agreement; (b) a party was denied the opportunity to present its case; (c) the arbitration was not conducted in accordance with the parties' agreement or, failing such agreement, the law of the arbitral seat; (d) the award dealt with matters not submitted by the parties to arbitration; (e) the award dealt with a dispute that is not capable of settlement by arbitration; or (f) the award is contrary to public policy of the seat. These grounds replicate the grounds for refusing recognition and enforcement dictated by Article V of the New York Convention. *See* Model Law, *supra* note 3, art. 34.

the annulment of an award through an alternative recourse is forbidden. Moreover, countries in Latin America are no strangers to the world trend of adopting the Model Law, or, failing that, basing their arbitration legislation on it. Therefore, in principle,

> "*In the Latin American scenario, a large part of the international arbitration regulations has established the principle of limited intervention by the national courts as proposed in the Model Law. This principle supposes that the legislator clearly defines the instances in which judges may intervene, which generates greater certainty for the parties and the arbitrators about the scope of their interaction. In addition, it guarantees, to a certain extent, the exclusion of any residual power that the courts may have based on other domestic rules.*"[20](translated from Spanish)

Furthermore, when describing the arbitral systems in Latin America, one must highlight that both the monist model and the dualist theory are present in the continent.[21] The monist conception determines that all the provisions that exist within the *lex arbitri* apply equally to the national and international arbitration. For example, Peru is a country that has a monist

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20 Pablo Rey Vallejo, *El Arbitraje y los Ordenamientos Jurídicos en Latino América: Un Estudio Sobre la Formalización y Judicialización*, 126 VNIVERSITAS 199, 229 (2013), *available at* https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/6125/4923.

21 Becerra – Insights, *supra* note 9, at 14–15. For the author, the distinction between monist and dualist arbitral models is relevant in order to determine whether the recourses available at the seat against national awards are also applicable to the international awards rendered in the same country when chosen as the seat. Particularly, clarifying that Colombia has a dualist model is important because by being dualist, in theory, it deems impossible to apply the same mechanisms provided for the annulment of national awards, in the same terms and grounds, to an international award rendered in Colombia. This is because the *lex arbitri* provides for only one annulment mechanism with its specific grounds. For example, if the law and the courts accept the applicability of constitutional actions against national awards, those should not be accepted in the same terms against international awards. Notwithstanding this, the constitutional courts analyse its applicability as explained through this article.

system regulated by the Legislative Decree 1071/2008.[22] Other countries in the region, such as Colombia, have adopted dualism, which entails that there are specific rules that apply to international arbitral proceedings being held in Colombia, which differ from the rules provided for national arbitral proceedings also held in the same country. In Colombia, Law 1563/2012[23] regulates national and international arbitration and has specific rules depending on the nature of the tribunal. For example, Article 107 of this law provides for annulment as the sole recourse to challenge international awards, and expressly prohibits the competent judge from deciding upon the merits of the case submitted to arbitration. Section III,[24] on international arbitration, is based on the Model Law, meaning that the intervention of the judge in the arbitral proceedings is limited to very specific cases and dictates that the *only* available recourse against international awards is annulment.

However, regardless of the arbitration law being based upon the Model Law, "*an interventionist culture has been consolidating*,"[25] and is effectuated in both types of arbitral systems in Latin American countries. This means that due to the lack of receptivity of the jurisprudence regarding the principle of party autonomy as the cornerstone of alternative dispute resolution mechanisms, national courts are expanding their control over the awards.[26]

It is here that the author considers it appropriate to highlight the warning raised by Alan Redfern and Martin Hunter, who note that "*the choice of a*

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22 Legislative Decree Regulating Arbitration, Legislative Decree Nº 1071 (June 28, 2008) (Peru) [*hereinafter* "Decree 1071/2008"].

23 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.] (Colom.).

24 *Id.* arts. 62–116.

25 Vallejo, *supra* note 19.

26 Sentencia Del Tribunal Constitucional [Judgment of the Constitutional Court], Tribunal Constitucional de Perú Expediente No. 6167-2005-PHC/TC, ¶11 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

particular place of arbitration may have important and unintended consequences. This is because the law of that place may confer powers on the courts or on the arbitrators that the parties did not expect".[27] Consequently, the primary concern remains that if the seat provides for additional mechanisms to challenge the award by means of its jurisprudence, such mechanisms could be applied to vacate the award. This may be the case for Latin American jurisdictions which, even though they are based on the Model Law, have incorporated through their jurisprudence, the admissibility of constitutional actions as a means for annulment.

B. Constitutionalisation of international arbitration: The powers of arbitrators are conferred by the National Constitution

The idea of the supremacy of the National Constitution in Latin American countries has led to some legislations undergoing the phenomenon known by international scholars as the *constitutionalisation* of arbitration.[28] As earlier mentioned, this means that some jurisdictions conceive of arbitration as a constitutional right or grant the arbitrator the status of a public functionary for administering justice. Within this framework, the nature of arbitration has been described as *jurisdictional,* and therefore, the arbitrators are seen as *real justice administrators*. Thus, as one Latin-American author has noted:

> "*[T]he study of the nature of arbitration should not take as its starting point the relationship or contract existing between the parties and the appointed arbitrators, but rather the very function they perform. When the parties appoint arbitrators, they oblige themselves to accept the decision they make upon the dispute. The arbitrators resolve a legal controversy -not an economic one- in the same way and with the characteristics in which a judge does in a court decision,*

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27 REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 169 (Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides eds., 6th ed. 2015).

28 Christian Albanesi, *Common Trends in International Arbitration in Latin America, ICCWBO* (Nov. 14, 2016), *available at* https://iccwbo.org/media-wall/news-speeches/common-trends-in-international-arbitration-in-latin-america/.

> *with the effect of full res judicata, a power that can only come from the national judges.*"[29] (translated from Spanish)

For example, Article 116 of the Colombian National Constitution determines that individuals, when appointed as arbitrators by the parties, are temporarily invested with the public function of administering justice and therefore, are empowered to settle disputes and render binding decisions.[30] Likewise, Article 138 of the Peruvian National Constitution states that the power of administering justice is exercised by the judicial branch and is in accordance with constitutional provisions.[31] Article 139 of the Peruvian National Constitution states that "*no independent jurisdiction shall exist or can be established, with the exception of the arbitral*".[32] These two provisions imply that arbitration is considered as a proceeding independent of the judicial branch. However, it similarly administers justice like the judicial branch and should do so while respecting the National Constitution.

From this perspective, an arbitrator's power to decide upon disputes originates from the National Constitution of the seat and not directly from the arbitration agreement itself. The author believes that the system is

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[29] Vallejo, *supra* note 19, at 204.

[30] CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 116 ("The CC, the Supreme Court of Justice, the Council of State, the tribunals and the judges administer justice. (…) Individuals may be entrusted temporarily with the function of administering justice as arbitrators authorised by the parties to issue verdicts in law or in equity in the terms defined by the law.").

[31] CONSTITUCIÓN POLÍTICA DEL PERÚ 1993 [CONSTITUTION] Dec. 31, 1993, art. 138 ("The power of administering justice emanates from the people. The Judicial Branch exercises it through its hierarchical entities in accordance with the NC and laws. In all proceedings, when an incompatibility exists between a constitutional and a legal rule, judges shall decide based on the former. Likewise, they shall choose a legal rule over any other rule of lower rank").

[32] *Id.* art. 139 ("principles and rights of the jurisdictional function are the following: 1. The unity and exclusivity of the jurisdictional function. No independent jurisdiction exists, nor shall it be established, except regarding the military and arbitration").

structured in such a manner possibly because of the idea that party autonomy does not have any legal effect without the National Constitution recognising the ability of the parties to opt for arbitration.[33]

Since the National Constitutions are the cornerstone of judicial authority in Latin American jurisdictions, domestic judges and administrative authorities (irrespective of their specialty or field) are subject to constitutional control within each national system. Therefore, judges must apply all the constitutional guarantees and fundamental rights while administering justice.[34] To secure this aim, constitutional actions are admissible against court judgments to verify that the National Constitution has been applied correctly. Likewise, if the arbitrator is conceived to have the jurisdictional function of a judge, it is logical to say that awards equate to court judgments.

In this scenario, Colombia has questioned the possibility of applying constitutional actions to international awards rendered within the country when it has been chosen as the seat of arbitration. This would mean that arbitrators are subject to constitutional control and therefore, the awards they render might be annulled for constitutional reasons. Consequently, constitutional actions against international awards could be used as extraordinary mechanisms for setting aside arbitral awards. For this reason, commentators explain that "*the constitutionalisation of arbitration entails a series of consequences in terms of the type of actions and the degree of judicial intervention that*

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33 Sentencia Del Tribunal Constitucional [Judgment of the Constitutional Court], Tribunal Constitucional de Perú Expediente No. 6167-2005-PHC/TC, ¶11 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

34 For example, Article 4 of the Colombian National Constitution specifies its primacy over all national regulations. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 4 ("The Constitution provides the norm of regulations. In all cases of incompatibility between the Constitution and the law or other legal regulations, the constitutional provisions will apply. It is the duty of citizens and of aliens in Colombia to obey the Constitution and the laws, and to respect and obey the authorities.").

can take place within an international arbitration proceeding at a given jurisdiction"[35] that has been chosen as a seat.

This phenomenon has been criticised by academics, who argue that submitting arbitration to the control of the constitutional judge makes the overall procedure inefficient.[36] This is because it is assumed that the objective of the parties when concluding an arbitration agreement is to settle their disputes in a fast and cost-effective manner. However, further mechanisms to challenge the award imply that the award will have to undergo more stages of court review to become binding and enforceable. This prevents the system from becoming truly international and damages the expectations of the foreign business community by constructing a system where legal uncertainty prevails. Thus, constitutionalisation "*distorts the essence of arbitration as an alternative solution mechanism, conceived to provide an alternative, quick and accurate legal solution to the parties*."[37]

Following this doctrinal opposition, the author believes that, in fact, the constitutionalisation of international arbitration threatens the whole system. The parties (investors, contractors, and merchants) are left vulnerable and in legal uncertainty, not knowing when their award is final, while perspective of the country chosen as a seat may be viewed as highly unattractive for parties and unconducive to promoting arbitration.

III. Constitutional control over arbitration in Colombia

A. Tutela actions

Tutela actions are a legal recourse provided by the National Constitution of Colombia with the objective of seeking immediate protection of fundamental rights that are violated by the act or omission of any public

[35] Vallejo, *supra* note 19, at 204.
[36] Gomez, *supra* note 10.
[37] Becerra - Intervention, *supra* note 11, at 119.

authority.[38] This mechanism is established in Article 86 of the Constitution and grants every individual the right to initiate a claim before a constitutional judge who then analyses the extent and magnitude of the violation.[39] Through a preferential and summary proceeding, the judge grants protection and avoids irreparable damage by issuing an order to the authority concerned, compelling it to act in a certain manner or refrain from doing so.

Article 86 states that the recourse should be resolved within ten days of the filing of the action. Apart from this, one of the main requirements for the admissibility of a *tutela* action is that the claimants must be in such a position that they do not have access to other means of judicial defence. This means that this constitutional recourse is considered secondary and would only be successful if all other available recourses were exhausted without obtaining a positive result that rectified the violation.

Further, procedural aspects of a *tutela* action are regulated by Decree 2591/1991 ["**Decree**"]. The principles of such a protective action are established under Article 3 of the Decree and include: publicity of the proceeding, celerity, and efficiency. These principles are reflected in Article 14 of the Decree, which states that the request for *tutela* actions has no formal requirements,[40] including the possibility of filing the recourse without legal representation. The claimant has to clearly explain the act or

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[38] Eduardo Zuleta & Maria Camila Rincon, *Colombia's Constitutional Court Declares that Constitutional Injunctions (Tutela) can be Upheld Against Awards in International Arbitration*, KLUWER ARB. BLOG (Nov. 4, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/11/04/colombias-constitutional-court-declares-that-constitutional-injunctions-tutela-can-be-upheld-against-awards-in-international-arbitration/.

[39] CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 86.

[40] The *Tutela* action enshrined in Article 86 of the National Constitution is regulated by Article 14 of Decree 2591/1991. *See* L. 2591/1991, noviembre 19, 1991, DIARIO OFICIAL [D.O.], art. 14 (Colom.).

omission committed by the defendant, the fundamental rights that are being threatened or violated by such action, and the details of the counterparty for its notification.

The competent judge to decide upon the claim in the first instance is the judge of the place where the right is violated, exercising its constitutional powers.[41] This ruling may be challenged before a second instance judge,[42] and finally reviewed by the Constitutional Court of Colombia itself.[43] The latter occurs when the topic is of such constitutional and national relevance that it needs to be analysed by the highest constitutional authority who might revoke previous decisions, unify its jurisprudence regarding the matter or clarify the extent and content of protection of a particular right.

The order issued by the constitutional judge is to be implemented instantly by the defending party. For this, the Decree in Article 29(5) limits the maximum period for compliance with the order to 48 hours.[44] Failing this, the defendant must face criminal liability, disciplinary consequences, and fines.[45]

The fundamental rights that may be subject to protection are those within Articles 1 to 41 of the National Constitution of Colombia.[46] For the purpose of this article, the main fundamental right to be assessed is the right to *due process* contained in Article 29[47] of the Constitution. This right shall

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41 *Id.* art. 37.
42 *Id.* art. 31.
43 *Id.* arts. 35, 36.
44 *Id.* art. 29(5).
45 *Id.* art. 52.
46 The fundamental rights whose protection shall be guaranteed by the Constitutional Judge will be those located in the national constitution under Title II on "Rights, Guarantees and Duties", Chapter I. These rights include life, non- discrimination, freedom, privacy, due process, etc. *See* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] ch. I.
47 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 29.

rein in all judicial and administrative proceedings, and its core elements include a fair trial conducted by a competent judge or tribunal following the appropriate procedure dictated by law, opportunity to present one's case, file evidence, and refute any presented by the counterparty. Also, this right entails that any evidence obtained in violation of due process is null and void and shall not be taken into account by the judge when deciding upon a case.

Moreover, as per Article 4 of the Decree, the interpretation of the contents of the fundamental rights subject to protection, should be done in accordance with the international treaties ratified by Colombia on human rights.[48] Therefore, *tutela* actions have been developed through constitutional jurisprudence and as a result, it is the judge who assesses how a right is being violated and considers this from a purely constitutional perspective and in terms of its imminent and unconditional protection.

As part of this development, the Constitutional Court of Colombia, in Decision C-590/2005,[49] held that *tutela* actions are admissible against national court judgments, considering that national judges also perform a public function i.e. the administration of justice as per Article 228 of the National Constitution.[50] This landmark decision puts forth that even though court decisions are final and binding and all administrative and civil judges are trained to comply with all constitutional guarantees within their

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48 L. 2591/1991, noviembre 19, 1991, DIARIO OFICIAL [D.O.], art. 4 (Colom.).

49 Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia C-590/05, Gaceta de la Corte Constitucional [G.C.C.], ¶ 11 (Colom.).

50 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 228 ("The administration of justice is a public function. Its decisions are independent. Its proceedings will be public and permanent and through its substantive rights will prevail. Legal limits will be diligently observed and failure to apply them will be sanctioned. The functioning of the judiciary will be decentralized and autonomous."). *See also* CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 229 ("The right of any individual to have access to the administration of justice is guaranteed.").

proceedings, *tutela* actions against these court decisions are admissible as an extraordinary recourse. The remedy exists in declaring the court decision as null or even ordering the judge to issue it again while respecting the fundamental right to due process.[51]

This reasoning is based upon a *tutela* action having two main aims within the legal system. *First*, it works as an instrument that ensures the protection of the rights when they are violated by an act or omission of a judge. *Second*, it also works as a mechanism to update the interpretation of the applicability of a fundamental right, making its content uniform and establishing a jurisprudential precedent that must be followed by all civil and administrative judges when deciding a case within their competence.[52] Additionally, the decision highlights that the *tutela* should not decide upon the merits of the case, but should guarantee the application of all fundamental rights in any judicial proceeding because the Constitutional Court is its *supreme interpreter*.[53]

In later decisions, the Constitutional Court opted to include national arbitration awards within the scope of *tutela* actions. As a result, national

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[51] The decision has origins in a request made by a citizen to the *Corte Constitucional* (Constitutional Court) seeking to declare as null Article 185 of the Criminal Procedural Code, Law 906/2004 (Colom.). The provision dictated that the decisions reached by the Supreme Court of Justice regarding Criminal proceedings shall be final and binding and without any recourse available for its challenge. The action initiated argued that this article was in violation of the National Constitution because Article 86 dictates that *tutela* actions shall be filed *whenever* a fundamental right has been violated, not excluding decisions issued under the Criminal Procedural Code from its scope. The decision reached by the Constitutional Court was that the *tutela* actions, as a constitutional action, had priority over the determinations of ordinary law, and therefore, were always admissible. *See* CÓDIGO DE PROCEDIMIENTO PENAL [C.P.P.], L. 906/04, DIARIO OFICIAL [D.O.] art. 185 (Colom.).

[52] Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia C-590/05, Gaceta de la Corte Constitucional [G.C.C.] at 35, ¶ 5 (Colom.).

[53] *Id.* at 43.

arbitration awards can be annulled by a constitutional judge if it is found to violate fundamental rights. The possibility of challenging a national arbitral decision through a *tutela* action is based upon the analogy between a court decision and an award, the latter being regarded as a judicial decision in essence. The Court Judgment T-244/2007 indicated that:

> "*In summary, an arbitral proceeding is materially a judicial proceeding, and the arbitration award is the equivalent of a judicial decision to the extent that it finishes the proceeding and definitively puts an end to the question under examination, additionally the arbitrators are temporarily invested with the public function of administering justice, which has also been legally qualified as a public service, for this reason there is no doubt that in their actions and in the decisions adopted by arbitration tribunals they are bound by fundamental rights, and that tutela action is appropriate when these are violated or threatened during an arbitration process.*"[54](translated from Spanish)

The facts of the abovementioned case involve a dispute that arose between the Colombian Navy and Marinser Ltda. during the execution of a contract of transportation of goods by boat. The Navy filed a *tutela* action against the arbitral award arguing that the arbitrators neither applied the substantive law correctly nor correctly analysed the evidence attached to the file, issuing an award that directed the Navy to pay damages to the contractor without coherent legal basis. The Constitutional Judge decided to not grant the protection of the right to due process, explaining that the arbitrators are independent and free to give such value to evidence as they deem appropriate and that, in the present case, analysis of evidence was undertaken extensively, even though the decision reached was contrary to the interests of the Navy.[55] Furthermore, the Court sustained that a judge,

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[54] Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.], ¶ III.6 (Colom.).

[55] *Id.* § 6, ¶¶ 14–16.

when resolving a *tutela* action, does not replace the arbitrators upon the issuance of *tutela* actions.[56] This is because the arbitrator is the competent authority to decide upon the matter. Thus, this decision demonstrates that *tutela* actions cannot be used to challenge the substance of the arbitral award, but only the procedure adopted to arrive at this award.

Notwithstanding this, the Court recognised that *tutela* actions are admissible against national arbitral awards. This follows from Article 86 of the National Constitution, under which the legislature has been delegated the power to establish the cases in which *tutela* actions can be filed against individuals entrusted with providing public services. Moreover, Article 42 (3) of the Decree also declares this recourse admissible against individuals that carry out administrative functions. Therefore, bearing in mind that the arbitrators provide a public service, i.e. guaranteeing access to justice to the parties that have opted for an alternative dispute resolution mechanism, they fulfil an administrative function. The parties are thus provided with the opportunity to initiate a *tutela* action against arbitral awards that may have violated the fundamental right to due process.

B. Tutela actions against international arbitral awards

Exercising its leading role as the guarantor of constitutional order, the Constitutional Court has recently declared the terms on which the *tutela* action would be admissible against international awards. Its decision, which is binding upon all judges at the seat of arbitration, underwent three stages as identified by the author. The first stage, Decision SU-500/2015, is with

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[56] *See id.* ("It is reiterated that the protection in the matter of judicial decisions, within which arbitration awards are included, does not have the nature of an ordinary remedy nor does the judge for the protection of fundamental rights act in these cases as a higher instance of the organ that issued the examined decision, empowered to make new evidential assessments or to replace the factual and normative interpretation made by the competent judge (or arbitrator) in the specific case.") (transl. from Spanish and brackets added by author).

regard to the admissibility requirements. The second, Decision SU033-2018, contains a recapitulation of the rules for admissibility. The third, T-354-2019, finally studies the specifics of international arbitration and establishes the admissibility of *tutela* actions against international awards.

i. *Stage 1 – Decision 500/2015*

In Decision SU-500/2015,[57] the Constitutional Court established that *tutela* actions are also admissible against international awards rendered in Colombia, when Colombia is chosen as the seat of arbitration.[58] The Court

57 Corte Constitucional [C.C.] [Constitutional Court], agosto 6, 2015, Sentencia SU500/15, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [*hereinafter* "SU500/15"]

58 *See id.* ¶ 5.1. Please note that the object of this court decision was to subject an international award rendered in Colombia – as this country was chosen as the seat for the proceedings – to constitutional control through a *tutela* action. In this case, the Constitutional Court highlighted that *tutela* actions are admissible against awards. However, the Constitutional Court did not mention that the nature of the award, being international and not national, would condition the admissibility of *tutela* actions. Therefore, it is inferred that the Constitutional Court in this decision declared that *tutela* actions were admissible against international awards rendered in Colombia in the same terms, and with the same procedural requirements as against national awards. However, it specifies that the procedural analysis must be more strict and rigorous in the face of arbitration awards than in the case of court decisions because it is understood that the parties have opted for an alternative dispute resolution mechanism, by showing opposition to the regular judicial mechanisms. In that sense, the decision determines that "[e]quivalence, however, does not operate directly in terms of verifying the admissibility grounds that the Constitutional jurisprudence has developed in the case of court decisions, since the special nature of arbitral justice implies for a more stringent procedural examination - both admissibility requirements and grounds for success".
See also id. ¶ 5.2 ("The reason why, in the case of *tutela* actions against arbitration awards, that particular and more restrictive reading of the procedural requirements established for the *tutela* action against court decisions is preached fundamentally, in the consideration that this is a scenario in which the will of the parties is to depart from the ordinary jurisdiction (…) This decision to depart from the ordinary justice, reaffirms the characteristic of awards as being a final of the decision adopted by the arbitral tribunal, which could not be conditioned to a subsequent ratification or questioning by an ordinary judge to which the parties have originally renounced. Such power of permanence is evidenced, for example, in the absence of an appeal before the ordinary courts, since submitting the award to the

also delved into what the admissibility requirements for such actions would be, and found that the requirements were similar to those for the admissibility of *tutela* actions against national awards. The aim was to ensure the correct application of the fundamental right of the parties to due process in the arbitral proceedings.[59] The abovementioned decision is a constitutional precedent that is to be applied uniformly by all constitutional judges within Colombia.[60] The Constitutional Court does not refer to the system being a dual one nor does it analyse that since national and international arbitrations are different in nature, they should be treated differently. However, as Colombia has a dual system where its *lex arbitri* has specific provisions for international arbitration proceedings[61] seated in Colombia which differ from the provisions to be applied by national arbitral tribunals,[62] the Constitutional Court should have made a particular analysis differentiating the nature of the international award under review from

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ordinary courts would mean ignoring the same will of the parties that provided for an alternative mechanism for the solution of their conflicts.") (transl. from Spanish).

59 *See id.* ¶ 4 ("It is up to this Corporation (Constitutional Court) to determine whether the international arbitration tribunal, on the one hand, and the Council of State, on the other, have violated Isagen's fundamental right to due process when rendering the international arbitral award issued by the former and the decision over the annulment recourse resolved by the second.") (transl. from Spanish).

60 The Constitutional Court has the faculty to decide upon issuing decisions classified as "*SU*" which means "*Sentencia de Unificación*" or *Present Unification Judgment*. This category of decisions unifies jurisprudential precedents to ensure that all the constitutional judges apply a legal concept uniformly. Failing to do so leads to a court decision being contrary to the national constitution, and, therefore, null. The Court has indicated this, while holding that "the need to give binding force to the precedents of the High Courts, also takes into account that the interpretation of the law is not a peaceful matter and, in that order, the precedents of these corporations constitute a transcendental tool in the solution of cases in which laws can admit diverse understandings in order to avoid contradictory decisions in identical cases." *See* Corte Constitucional [C.C.] [Constitutional Court], julio 5, 2018, Sentencia SU072/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

61 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], arts. 62–166 (Colom.).

62 *Id.* arts. 1–58 (Colom.).

national awards which are subject to *tutela* actions. Nevertheless, the Constitutional Court overlooks this difference and provides a recourse that in principle was only available to national award, to an international award.

This judgment decided a *tutela* action that was filed against an award rendered by an arbitral tribunal of the International Chamber of Commerce ["**ICC**"] and the judgment of the Council of State which denied annulment of the award.

The dispute arose during the execution of a contract arising out of tender number MI-100, concluded in 1995 between the Colombian public entity ISAGEN as the contractee and the consortium, La Miel, as the contractor. The latter was an integration of five foreign companies, one of which at the moment of the conclusion of the contract was ABB Sae Sadelmi SPA ["**ABB**"] from Italy. The object of the contract was the construction and design of the operation centre of a hydroelectric development project in the river La Miel. The contract provided for an arbitration agreement in Clause 33, specifying the seat as Bogota, Colombia.

In 1998, ABB transferred its business unit for power generation to Alstom Power Italia SPA ["**Alstom**"], another Italian company. The transaction was made through the Italian legal figure of "*Conferimento di complesso Aziendale*". Furthermore, in 2001, ABB ceased to exist. None of these changes were communicated to ISAGEN.

In 2004, the designated representative of the consortium signed an amendment to Clause 33 of the contract, stipulating that participating in mediation prior to arbitration was no longer compulsory. Later that year, the members of the consortium filed a request for arbitration against ISAGEN. This was based upon the claim that ISAGEN introduced technical changes to the project, causing it to paralyse and generate extra costs. As a result, the consortium sought compensation for these damages and an extension of the execution period of the contract.

In its statement of defence, ISAGEN argued that the arbitral tribunal lacked competence and jurisdiction due to a null arbitration agreement that was amended when ABB ceased to existed. Therefore, neither the consortium nor ISAGEN had fully consented to arbitration. In 2010, the Tribunal rendered an award which declared ISAGEN liable and ordered it to pay damages.

Regarding its jurisdiction, the Tribunal held that the agreement was valid and the Tribunal retained jurisdiction since Alstom was legitimately part of the consortium. This conclusion was based upon the finding that the transaction had been performed correctly under Italian law, and the whole energy production unit had been transferred *ipso jure* to the new company. This transfer did not constitute an assignment of contract but a universal transfer of all assets and liabilities, which did not require the authorisation of the contracting party. Therefore, Alstom was legitimately part of the consortium and had validly consented to resort to arbitration.

ISAGEN filed an annulment recourse for vacation of the award, claiming that the Tribunal had no jurisdiction due to a null and void arbitration agreement.[63] The competent court that decided the setting aside procedure was the Council of State, the highest administrative court. The decision of the Council of State was to deny the annulment of the award, upholding the validity of the amendment to the arbitral agreement concluded by the representative of the consortium, who had the power to bind all its member companies individually. Therefore, when ABB made a complete transfer of

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[63] The recourse was based upon Article 163(1) of Decree 1818/98, which was the law in force at that moment. This ground corresponds to "*the nullity of the arbitration agreement*". This ground is equivalent to Article 108(1)(a) of Law 1563/2012, which is the *lex arbitri* currently in force at Colombia, based upon Article 34 of the Model Law for the application for setting aside an arbitral award. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(1)(a) (Colom.).

assets (including its energy unit and the MI-100 contract) to Alstom, the latter was also represented by the same person.

ISAGEN filed a *tutela* claim requesting the constitutional judge to set aside both the award and the decision that denied its annulment. They claimed that a grave violation of the fundamental right to due process had occurred during the arbitral proceedings because the Tribunal lacked competence to judge the parties, given that the members of the consortium that filed the request for arbitration were not the same that had amended Clause 33 of the contract. Moreover, the transactions that involved ABB were not notified to ISAGEN, which led the public entity to falsely believe that the amendment to the agreement and the execution of MI-100 was performed by ABB. However, in reality, the company that filed the request for arbitration was Alstom. Therefore, the parties never gave proper consent to arbitrate in accordance with Article 116 of the National Constitution that provides for the parties to opt for arbitration expressly and voluntarily.

The consortium filed a submission opposing the *tutela*, arguing that such action was not admissible because the setting aside recourse had been decided, which implied that the award was final and binding. Additionally, it argued that if the constitutional judge declared its admissibility, it would be contrary to the New York Convention which provides for setting aside as the sole mechanism to challenge an award.

The constitutional judge declared that, although the *tutela* was admissible against the award due to its nature being the same as that of a court judgment, it was not successful. The judge held that the reasons provided by the Council of State were sufficient and adequate to conclude that the arbitral agreement was valid. Hence, the parties were judged by a competent judge and violation of the right to due process was not proven.

Thus, the Constitutional Court reviewed the *tutela* decision and established a constitutional precedent regarding the admissibility of *tutela* actions

against international awards rendered in Colombia, transcribing the admissibility requirements for *tutela* actions as being the same as those against national awards. The reasoning of the Court was as follows:

First, an arbitrator seated in Colombia performs a public service which is the administration of justice like a judge, and is, therefore, equally subject to constitutional control and must guarantee the correct application of the fundamental right to due process throughout the entire procedure. The competence of the arbitrator originates from the option given to the parties under Article 116 of the National Constitution to consensually opt for an alternative dispute resolution mechanism. Therefore, when consent is not validly given, thereby making the agreement void, the tribunal is not competent to administer justice and the right to due process is gravely violated.[64]

Second, there are specific admissibility requirements for *tutela* actions to proceed. The admissibility requirements are:[65]

A) The claim should be based on the violation of a fundamental right. This is because the *tutela* should not become a means to examine the merits of the dispute but only the violation of fundamental rights during the procedure.

B) *Tutela* action is a subsidiary mechanism, available only after exhausting all the existing legal recourses to challenge the award. However, the Constitutional Court argued that it is possible to chance upon cases where the violation of fundamental rights would

[64] SU500/15, ¶ 5.1 (Colom.). This part of the decision refers to Constitutional Court of Colombia court case T-244/2007. *See* Corte Constitucional [C.C.] [Constitutional Court], marzo 30, 2007, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.], § 3 (Colom.).

[65] SU500/15, ¶ 5.4.2.2 (Colom.).

not fit under the scope of any of the grounds for annulment. In this situation, being obliged to exhaust all legal recourse would lead to inefficiency.[66] This means that a *tutela* action can be filed in parallel to the annulment recourse.

C) There is no limitation period to file a *tutela*. However, it must be initiated within a reasonable period.

D) The violation of the rights of the claimant must have a direct impact upon the decision reached by the tribunal in the award, meaning that they would have issued a different one in the absence of the same.

Third, the grounds for the success of a *tutela* against an award are:[67]

A) *Substantive Defect*, which occurs when the arbitrators make an incorrect application of the substantive law or the award lacks motivation, or its motivation is manifestly unreasonable.

B) *Lack of Competence or Organic Defect* of the arbitrators to resolve the matter submitted for their consideration, either because they have clearly acted outside the scope defined by the parties within the arbitration agreement or because they have ruled on non-arbitrable matters.

C) *Procedural Defect*, when the arbitrators violate the procedure established in the *lex arbitri* or the one agreed by the parties. For a

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[66] *Id.* ¶ 6.2.1 ("Indeed, forcing a party to exhaust setting aside proceedings in such cases would imply starting a judicial process manifestly irrelevant and without possibilities of satisfying the claims filed."); *see also* Corte Constitucional [C.C.] [Constitutional Court], noviembre 15, 2007, Sentencia T-972/07, Gaceta de la Corte Constitucional [G.C.C.], § 6 (Colom.).

[67] SU500/15, ¶5.4.3 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], junio 9, 2011, Sentencia T-466/11, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

procedural defect to be counted as a ground for the success of a *tutela* against an award, the defect or violation of procedure must be of such a magnitude that its absence would change the outcome of the award.

D) *Defect related to Evidence*, wherein the arbitrator fails to assess a crucial means of evidence or its analysis is supported by a manifestly unreasonable legal interpretation.

Fourth, *tutela* actions are admissible against international awards and/or against the judgment that decides whether an award should be set aside, the latter being a national court decision. Therefore, if the annulment action has been exhausted previously, the analysis of the constitutional judge will centre around reviewing how the fundamental rights were guaranteed during both stages.[68] In case the motion to set aside an award has not been filed, the analysis at the constitutional level will be stricter since no national judge had exercised control over the award.[69]

When applying these criteria to the facts of the case, the Constitutional Court stated that the *tutela* action fulfilled all the admissibility requirements.

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68 SU500/15, ¶ 6.2 (Colom.).

69 *Id.* ¶ 5.4.2.1 ("In other words, the *Tutela* action can be started in two scenarios, depending on whether or not it is necessary to exhaust the annulment recourse. This situation determines that the approach of the Constitutional judge, in both cases, is different. Although it is always based upon the respect of autonomous decision of the arbitrators over the case that should not be invaded by the Constitutional judge, who is not responsible for ruling on the merits of the matter submitted to arbitration, it is also true that in the cases in where it is not necessary to exhaust the annulment recourse, the *Tutela* action makes a first approach to the arbitral award, and in this sense the assessment of the direct violation of fundamental rights must be stricter. While in cases in which the annulment recourse has been exhausted, the award has already been subjected to a first examination, the Constitutional judge performs a more distant function, and proceeds to control whether, upon the resolution of the annulment recourse, no fundamental rights violation was noted.").

The claim dealt with the possible violation of a fundamental right and the setting aside recourse had been exhausted and the *tutela* was filed within the reasonable period of seven months after the Council of State issued its decision denying the annulment.

However, when analysing if the award violated the right to due process because of lack of competence of the arbitrators, it concluded that this ground was not satisfied, and therefore, the *tutela* action was not successful. The Constitutional Court analysed all the arguments given by both the arbitral tribunal and the Council of State regarding the validity of the agreement. It concluded that the decisions reached in both stages were reasonable, coherent, and sufficiently motivated. The agreement was validly concluded by the consortium and the transfer of the energy unit from one of its members to the new company did not affect the previously given consent by the parties to arbitrate. Therefore, the award and the setting aside decision were made with complete and fair analysis of the validity of the agreement, addressed all the claims alleged by ISAGEN, and followed the due process.

The author finds it particularly interesting that the decision contains a dissenting opinion[70] signed by two court magistrates that disagree with the majority opinion of the Constitutional Court. The dissenting opinion argued that the award and the setting aside decision should be declared as null and void because they violate the right to due process for two main reasons.

First, the arbitral tribunal lacked competence because the members of the consortium that had concluded the arbitration agreement and its amendment were not the same as the ones that had filed the request for arbitration. Therefore, the consent of the real parties involved in the

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[70] *See id.*

proceedings was not properly taken and the Tribunal was not constitutionally habilitated to administer justice.

Second, the Tribunal made an incorrect application of the substantive law. This is because it applied Italian law, when considering that the "*Conferimento di complesso Aziendale*" was validly executed and had *ipso jure* effects in Colombia, to a dispute that had to be solely settled under Colombian law.

Therefore, as all the requirements were satisfied, the *tutela* had a high probability of being admissible and overturning the award, even though it did not in this particular case.

Figure: Relationship between the setting aside recourse and *tutela* action in Decision SU-500/2015[71]

The table below shows the relationship between the main characteristics of the annulment recourse provided by the Colombian *lex arbitri* and the *tutela* action against international arbitral awards rendered in Colombia, the applicability of which has been developed through constitutional jurisprudence:

Feature	Annulment recourse	Tutela Action	Comment
Legal provision	Articles 107 to 110 of Law 1563/2012.	Article 86 of the National Constitution, and its procedural aspects are regulated by	The admissibility of *tutela* actions in relation to international arbitral awards has been settled through

[71] *Id.*

Feature	Annulment recourse	Tutela Action	Comment
		Decree 2591/1991.	constitutional case law (SU-500/2015).
Competent judge	Civil judge (Supreme Court of Justice) or the Administrative Judge (Council of State) if a party to the arbitration procedure is a Colombian public entity (Article 68 of Law 1563/2012).	The judge of the place where the violation of the fundamental rights took place, exercising a constitutional role (Article 37 of Decree 2591/91). It can also be reviewed by the Constitutional Court itself (Articles 35 and 36 of Decree 2591/91).	Different judges decide upon the recourses.
Means of appeal	The setting aside mechanism has only one stage with no provision of a means of appeal (Article 107 of Law 1563/2012).	The decision of a *tutela* action can be appealed to a second instance constitutional judge (Article	

Feature	Annulment recourse	Tutela Action	Comment
		31 of Decree 2591/91). Moreover, the Constitutional Court may review the decision taken over the *tutela* action (Article 35-36 of Decree 2591/91).	
Grounds	The grounds for annulment are those established under Article 108 of Law 1563/2012, which correspond to Article 34 of the Model Law and therefore, to Article V of the New York Convention for denying recognition and enforcement of international awards.	Substantive defect, lack of competence, procedural defect, and defect related to evidence, as stated in SU-500/2015, all of which are designed to protect the fundamental right to due process (Article 29 of the	

Feature	Annulment recourse	Tutela Action	Comment
		National Constitution).	
Stages	Filed against the award	In principle, it is a subsidiary mechanism that should be filed against the award only after having previously exhausted the annulment recourse.	The Constitutional Court argued that a *tutela* can be filed even if the action for annulment has not been exhausted. This occurs when *"matters excluded from the scope and grounds of the setting aside mechanism"* violate constitutional rights that have special protection. (SU-500/2015)
Procedural terms	Initiated within one month from the date on which the party making the application has received the award, its correction or interpretation. The	The action has no limitation period but should be filed with immediacy. This should be understood as	*Tutela* actions are expeditious, but the author believes that the expression *"reasonable term"* is ambiguous and subjective, as is

Feature	Annulment recourse	Tutela Action	Comment
	procedure includes one month for the notification and submission of any opposition by the counterparty and two months for the issuance of the decision by the judge (Article 109 of Law 1563/2012).	within a reasonable term initiated from the moment when the violation to the right began (SU-500/2015). The judge should decide within ten days. The appeal should be filed during the three days following the notification of the court judgment, with the second instance judge having 20 days to settle the claim (Articles 29-32 of Law 1563/2012).	"*from the moment in which the violation began*" since it might be interpreted to include not only the notification of the award but also any interim, preliminary, or procedural decision rendered by the tribunal.

Feature	Annulment recourse	Tutela Action	Comment
Effect sought	Annulment of the arbitral award.	Protection from the violation of the fundamental right to due process through the declaration of nullity of the award.	Both actions seek to vacate the award.

ii. *Stage 2 – Decision SU033/2018*

In Decision SU033/2018[72], the Constitutional Court recapitulated the rules for admissibility of *tutela* actions against awards[73]:

a) The constitutional judge, when deciding upon a tutela action, should never review the decision of the tribunal regarding the substantial rights of the parties but restrict himself to studying the procedural aspects of the tribunal and the award. This means that only the arbitrator shall decide upon the merits of the case.

b) *Tutela* actions should be admissible especially when a violation of the fundamental rights of the parties, specifically the right to due process, is derived from the award.

c) *Tutela* actions are admissible against awards but the analysis by the Constitutional Judge over the specific grounds for success

72 Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2018, Sentencia SU033/18, Gaceta de la Corte Constitucional [G.C.C.], ¶ III (Colom.).

73 *Id.*

(substantive defect, lack of competence/organic defect, procedural defect and defect related to evidence) shall be performed bearing in mind the main characteristic of arbitration, this being an alternative dispute resolution mechanism.

d) *Tutela* actions are subsidiary to other legal recourses available to the parties to vacate the award. This means that the annulment recourse should be exhausted. However, when the violation of the fundamental rights cannot be reviewed under any of the grounds of the setting aside mechanism, *tutela* actions can be initiated without the exhaustion of annulment recourse.

Given these rules, recapitulated from those established as the admissibility requirements and grounds described in Decision SU-500/2015,[74] it can be observed that, until this point, a *tutela* action could be filed against an international award rendered in Colombia. However, its admissibility requirements would have been the same as for national awards notwithstanding that the arbitral system in Colombia is dualist.

iii. *Stage 3 – Decision T-354-2019*

Decision T-354-2019[75] highlights that *tutela* actions against awards are admissible against national awards, but rarely against international awards. This occurs due to the nature of international arbitration and its differences from the national procedure. To arrive at this conclusion, the Constitutional Court revealed that there are three unique characteristics of the

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74 SU500/15 (Colom.).

75 This decision has been rendered by one of the chambers of the Constitutional Court, and, therefore, it is not a *unifying decision*. *See* Corte Constitucional [C.C.] [Constitutional Court], agosto 9, 2019, Sentencia T-354/19, Gaceta de la Corte Constitucional [G.C.C.] (Colom.) [*hereinafter* "T-354/19"].

international arbitral system that make constitutional actions against awards possible but extremely exceptional.

The Constitutional Court, when deciding upon the case, established the differences between national and international arbitration that make *tutela* actions against awards rendered in the latter more exceptional than the former. These characteristics are:[76]

A) The express will of the parties to opt for arbitration as an alternative dispute resolution mechanism, therefore, banning judicial control and intervention in international arbitral proceedings and the award rendered. However, this does not mean that the admissibility of *tutela* actions is forbidden by Law 1563/2012 when stating that annulment is the only recourse against the award. This is because Law 1563/2012 is an ordinary law, which does not condition the authority of the National Constitution, which provides for constitutional control over judges and, by interpretation, over arbitrators.[77]

B) International arbitration permits parties to choose the substantive law applicable to the dispute. This means that when Colombia is the seat of arbitration, but the law chosen to solve the dispute is foreign (not the Colombian substantive law), the *tutela* action does not proceed against the award.[78]

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76 *Id.* ¶ 3 ("This Chamber, therefore, will study the elements that stand out from the regulations that govern international arbitration, in particular: (i) the express prohibition of judicial intervention; (ii) the freedom to choose the applicable rules of law; and (iii) the international grounds for annulment; which affect the constitutional jurisprudence on the exceptional admissibility of the Tutela action against national awards.").

77 *Id.* ¶ 3.1.

78 *Id.* ¶ 3.2.

C) The Colombian *lex arbitri* provides for specific grounds for setting aside an international award (based on the Model Law), which differ from the grounds of vacation of a national award.[79] The clearest distinction is the ground for vacating an award when it violates the international public order of Colombia.[80] Analysis regarding the same must be conducted by the setting aside judge automatically (even without the petition of the party that initiated the annulment). The Constitutional Court explained that the international public order of Colombia includes fundamental rights.[81] It is important to clarify the main components of the international public order of Colombia as recognised by the jurisprudence of its Supreme Court of Justice,[82] which in turn is applied by the Constitutional Court. In that sense, it has been established that the concept of international public order is restricted to those fundamental principles for the

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[79] L. 1563/12, julio 12, 2012, Diario Oficial [D.O.], art. 41 (Colom.). Article 41 of the Colombia *lex arbitri* provides for the grounds of annulment of national awards, the same being: 1) the non-existence, invalidity, or unenforceability of the arbitration agreement; 2) limitation of the action, lack of jurisdiction, or competence; 3) the tribunal has not been legally constituted; 4) improper representation of the appellant or lack of legal notification; 5) have been denied a piece of evidence or having failed to practice a piece of evidence dully received by the tribunal; 6) the award or the decision on its clarification, addition, or correction has been rendered after the expiration of the term set for the arbitral proceeding; 7) the decision of the arbitrators was made in conscience or equity, when it had to be made based on the law; 8) the award contains contradictory provisions, arithmetic errors, or errors by omission or change of words or alteration of these, provided that they are included in the final decision; 9) the award decides matters that fall out of the scope of the agreement, it grants more than requested by one of the parties or not having decided on matters subject to the arbitration.

[80] *Id.* art. 108(2)(b).

[81] T-354/19, ¶ 3.3 (Colom.) ("The international procedural public order includes the fundamental guarantees that ensure the defense and a fair trial, such as the right to receive adequate notification, a reasonable opportunity for defense, equality between the parties and a fair procedure before an impartial judge."); *see also* Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, marzo 23, 2018, Expediente 2017-00080-00, Gaceta Judicial [G.J.] (Colom.).

[82] *Id.*

> Colombian legal system, which include fundamental rights, which are of such importance that the enforceability or recognition of the international arbitration award in Colombian territory cannot be allowed when vulnerating them.[83]

Therefore, bearing in mind that the international public order in Colombia includes fundamental rights, the setting aside judge would have to seek their protection. This results in the *tutela* actions being completely and necessarily subsidiary to the annulment recourse.[84]

As a matter of fact, and bearing in mind these characteristics, the Constitutional Court decided upon the case by rejecting the *tutela* action, leaving the parties to wait for the decision of the setting aside judge who had been reviewing the annulment recourse in parallel.

In conclusion, the current position regarding constitutional control over international arbitration in Colombia permits the admissibility of *tutela* actions as a mechanism to ensure that fundamental rights of the parties were respected through the proceedings and the award rendered. However, all the admissibility requirements described must be fulfilled and they shall be analysed by the constitutional judge keeping in mind that international arbitration has specific particularities and characteristics that makes it different from national arbitration or national court decisions. As a result, the admissibility of *tutela* actions against international arbitration awards is very exceptional and strict.

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83 *See* T-354/19, ¶ 9 (Colom.).

84 *Id.* ¶ 3.3.

IV. Constitutional control over arbitration in Peru – Another Example

A. Constitutional protection: Recourse against awards

Peru is another Latin American jurisdiction that has debated the admissibility of constitutional actions against awards rendered within the State when it is chosen as a seat. However, the treatment has differed from that of Colombia. Traditionally, the Peruvian Constitutional Tribunal has declared *recurso de amparo*[85] or constitutional protection recourses as admissible against arbitral awards. The aim of this recourse is to ensure the guarantee of a fundamental right that is being violated by a public authority or individual. Therefore, the constitutional judge can order such individual to cease the action or rectify the omission that is causing the damage. In failing to do so, the individual or authority will attract the imposition of fines and criminal liability.[86.]

For the specific court decisions and arbitral awards that are subject to constitutional control, the judicial protection consists of declaring such decisions null and void.[87] The argument developed by the Peruvian Constitutional Tribunal in its jurisprudence to declare this constitutional action constitutionally admissible is based upon the rationale that arbitration is an independent jurisdiction that administers justice. Therefore, it is obliged to comply with all constitutional guarantees within the procedure. This includes preventing any violation of the parties' fundamental rights.

In this sense, it has been said that:

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85 CONSTITUCIÓN POLÍTICA DEL PERÚ 1993 [CONSTITUTION] Dec. 31, 1993, art. 200.

86 CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 1 (Peru).

87 *Id.* art. 4.

> "*The special nature of arbitration, that requires the consent of the parties, and at the same time, being an independent jurisdiction as per established in the national constitution, never implies its disengagement from the constitutional scheme, much less from the task of applying all rights and principles recognized by the constitution (…) On the contrary, it must observe these principles as any other organ that administers justice.*"[88] (translated from Spanish).

Following this train of thought, the Constitutional Tribunal in Case STC 189-1999-AA/TC concluded that:

> "*[T]he possibility of challenging an award through constitutional actions cannot be considered as a choice that is contrary to the law of the Constitutional system given that, if under certain circumstances, such constitutional actions are admissible against court decisions, there is no reason to prevent the use of these legal mechanisms against the arbitral jurisdiction.*"[89] (translated from Spanish).

However, in Case 00142-2011-PA,[90] the Constitutional Tribunal established precedent that the constitutional protection recourse would no longer be admissible against awards. The decision has its origin in a constitutional action filed by Sociedad Minera Maria Julia against the arbitral tribunal composed of a sole arbitrator (Luis Humberto Arrese), for the vacation of the award rendered on the count that it violated the right to due process and access to justice. This was because the award was based upon an

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88 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 6167-2005-PHC/TC, ¶ 20 (Feb. 28, 2006) (Peru), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf.

89 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. STC 189-1999-AA/TC, ¶ 3 (Oct. 26, 1999) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2000/00189-1999-AA.html.

90 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

incorrect interpretation of the substantive law and an insufficient analysis of the facts and evidence of the case.

At the first instance, the Constitutional Judge declared the action as being inadmissible because the claimant did not use the annulment recourse provided by the *lex arbitri* to challenge the award, implying that the Judge understood the constitutional action as being a subsidiary mechanism. Sociedad Minera Maria Juliathen filed an appeal, which was decided by the Constitutional Tribunal.

The Constitutional Tribunal reasoned that the annulment recourse is a satisfactory mechanism through which constitutional control can be achieved. Thus, fundamental rights should be guaranteed through the setting aside mechanism because the competent judge that resolves the dispute has the capacity and is under the obligation to grant their full application. Yet, the decision establishes three scenarios for the extraordinary admissibility of constitutional actions against the award (even when the annulment recourse has not been initiated). These are:[91]

i) The award violates any constitutional precedent issued by the Constitutional Tribunal,

ii) The arbitral tribunal does not apply a legal provision provided in the law applicable to the case, considering such legal provision as unconstitutional when analysed against the Peruvian National Constitution (such consideration arises from an analysis performed solely by the arbitrators), or

iii) The recourse has been filed by a third party to the proceedings whose fundamental rights were violated by the award.

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[91] *Id.* ¶21.

Thus, the Constitutional Tribunal dismissed the constitutional action, considering that the allegations submitted by the claimant did not correspond to any of the new requirements for its admissibility but most importantly, because the annulment recourse was the more appropriate mechanism to seek such protection.

Figure: Relation between the setting aside recourse and constitutional protection recourse

The table below shows the relation between the main characteristics of the annulment recourse provided by the Peruvian *lex arbitri* and the constitutional protection recourse against arbitral awards rendered in Peru, the applicability of which has been developed through constitutional jurisprudence:

Feature	Annulment recourse	Constitutional Protection recourse	Comment
Legal provision	Articles 62 to 65 of Legislative Decree 1071/2008.[92]	Code of Constitutional Procedure, Law Nº 28237.[93]	The admissibility and applicability of constitutional protection recourse to arbitral awards has been developed through the

[92] Decree 1071/2008, arts. 62–65.

[93] CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237 (Peru).

			jurisprudence of the Constitutional Tribunal (N 00142/2011-PA).[94]
Competent judge and means of appeal	Superior Court. The decision can be appealed in the Supreme Court (Article 64 of Legislative Decree 1071/08).[95]	Constitutional Judge of the district where the right has been violated (Article 12 of the Code of Constitutional Procedure, Law Nº 28237). The decision can be appealed in the Constitutional Tribunal through the recourse known as "*Agravio Constitutional*" (Article 18 of the Code of Constitutional Procedure, Law Nº 28237).[96]	Different judges that decide upon the recourses.

94 Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

95 Decree 1071/2008, art. 64.

96 CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 18 (Peru).

Grounds	Contained in Article 63 of the Legislative Decree 1071/08, which is based upon Article 34 of the Model Law and therefore, upon Article V of the New York Convention for denying recognition and enforcement of international awards.	In principle, not admissible. However, they are available when: (i) the award violates any constitutional precedent issued by the Constitutional Tribunal; (ii) the arbitral tribunal does not apply a legal provision, considering it as unconstitutional; or (iii) the recourse has been filed by a third party to the proceedings whose fundamental rights were violated. The Constitutional Tribunal determines that the annulment recourse is appropriate for the protection of the fundamental rights of the parties in all other scenarios.	

Stages	Filed against the award.	Follows in principle, subsidiarity and is an extraordinary mechanism that should be filed against the award only after the exhaustion of the annulment recourse (Article 5 (2) of the Code of Constitutional Procedure, Law Nº 28237).	
Effect sought	Annulment of the arbitral award.	Protection from the violation of the fundamental right to due process through the declaration of nullity of the award.	Both actions seek to vacate the award.

V. Analysis: Should tutela actions be declared as admissible against international awards?

A. Are arbitrators judges and awards court decisions?

The reasoning provided by the Colombian Constitutional Court and the Peruvian Constitutional Tribunal in the above discussed cases shows that in practice, it has been debated whether to declare constitutional actions against international awards as admissible. As described, the idea is based upon recognizing that the power conferred upon the arbitrator to decide upon a dispute corresponds to the faculty of administering justice, which is rooted in the National Constitutions.

Following this, the courts hold the view that arbitrators are judges because they perform judicial functions and therefore, awards are equivalent to court decisions.[97] This means that the awards and proceedings should accord due importance to constitutional guarantees and rights, always remaining under the purview of constitutional control.

However, arbitration is an alternative dispute resolution mechanism through which two or more parties give power to a panel of arbitrators to settle a defined set of disputes by rendering a final and binding award. Therefore, arbitral proceedings abide by the principle of party autonomy, which means that the power of the arbitrator to decide upon the disputed

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[97] The most important court cases in Colombia that have the above-mentioned points discussed are those discussed within Part II of this article. The same being: (i) Constitutional Court of Colombia court case T-244/2007, Colombian National Navy v. Marinser Ltd.; (ii) Constitutional Court of Colombia court case: SU-500/2015; (iii) Constitutional Court of Colombia court case: SU033/2018; (iv) Constitutional Court of Colombia court case: T-354/19. *See* Corte Constitucional [C.C.] [Constitutional Court], junio 8, 2005, Sentencia T-244/07, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); *see also* SU500/15, 6; Corte Constitucional [C.C.] [Constitutional Court], marzo 3, 2018, Sentencia SU033/18, Gaceta de la Corte Constitucional [G.C.C.] (Colom.); T-354/19 (Colom.).
The most important court cases in Peru that have the above-mentioned points discussed are those discussed within Part III of this article. The same being: (i) Constitutional Tribunal of Peru, court case: STC 6167-2005-PHC/TC (Feb. 28, 2006); (ii) Constitutional Tribunal of Peru, court case: STC 189-1999-AA/TC (Oct. 26, 1999); (iii)Constitutional Tribunal of Peru, court case: EXP. N 00142-2011-PA/TC (Sept. 21, 2011). *See* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 6167-2005-PHC/TC (Feb. 28, 2006), *available at* https://tc.gob.pe/jurisprudencia/2006/06167-2005-HC.pdf; *see also* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. STC 189-1999-AA/TC (Oct. 26, 1999) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2000/00189-1999-AA.html; *see also* Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC (Sept. 21, 2011) (Peru), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

matters is conferred exclusively by the will of the parties through a contract.[98]

Although it is true that arbitration is constitutionalised under Article 116 of the Colombian Constitution, the author believes that this constitutional authorisation would only constitute an intermediate foundation of the arbitration, with the immediate or direct basis of arbitration being the principle of party autonomy. Therefore, the author would like to emphasise that the authority of the arbitrators shall always have origins in the existence of an agreement concluded by the parties, through which they decide to dislodge a dispute from the permanent system of administration of justice and submit it to a tribunal.

Contractualism explains that the keystone of arbitration is the arbitration agreement,[99] therefore, party autonomy itself is the foundation of the authority of the tribunal as well as the legitimacy of the binding award. Scholars explain that arbitrators obtain their power from a private contract, not from the authority of a State and that they must solve such disputes based only on such agreement.[100]

Some authors also argue that arbitrators do not have a forum and therefore, should not be made subject to invasive control in any jurisdiction. This is

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[98] Both the Colombian *lex arbitri* in Article 101 and the Peruvian lex arbitri in Article 57 provide for the arbitrators to conduct the proceedings accordingly to what has been consented by the parties in the arbitration agreement. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 101 (Colom.); *see also* Decree 1071/2008, art. 57.

[99] TIBOR VÁRADY, JOHN J. BARCELÓ III, STEFAN KROLL & ARTHUR TAYLOR VON MEHREN, INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE (2015) ("Irrespective of the form of the arbitration agreement, there must be a certain minimum content: the parties must express the clear will that they want their disputes – or at least a particular dispute of a group of disputes – to be decided by arbitration in place of court litigation.").

[100] Vallejo, *supra* note 19, at 205.

known as the delocalisation theory,[101] and infers that when solving an international commercial dispute, the tribunal "*has its own autonomous system*" which is "*detached from stringent abusive state control.*"[102] Following this idea, authors such as Zaherah Saghir and Chrispas Nyombi describe the relevance of the delocalisation theory by emphasizing that the award rendered is the product of the choices made by the parties distant from the procedural national dispositions of the seat. In the words of the authors,

> "*[t]he importance of delocalised arbitration is established upon certain distinct arguments. The first is the parties' autonomy to arbitrate. Their choice to select arbitration rather than being subject to national laws is an imperative feature (…) On this basis, delocalisation views the arbitral procedure and any award as originating autonomously and independently of the national legal systems. Furthermore, the arbitral agreement is central to the arbitral process from which the right to arbitrate arises rather than from lex loci arbitri, the law of the seat.*"[103]

It is also argued that the delocalisation theory agrees with the pro-arbitration philosophy of the New York Convention. In line with this idea, every interpretation of the New York Convention should aim at the recognition of the legitimacy of the award. "*For this reason, it is regarded as a 'pro-enforcement' principle that results in the arbitral award being placed above the State's*

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101 *See* Jose Manuel Álvarez Zárate & Camilo Valenzuela*, Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's 'Sovereign Spaces'*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 208 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019) ("In sum, the foundation of this concept is that given that international arbitration focuses on resolving international commercial conflicts, it should have and benefit from its own principles and rules developed in a dossier, which should be detached from the standards used for other intra-State level legal procedures.").

102 *Id.* at 207.

103 Zaherah Saghir & Chrispas Nyombi, *Delocalisation in International Commercial Arbitration: A Theory in Need of Practical Application*, 8 INT'L CO. COM. L. REV. 269, 270 (2016).

laws and power".[104] Therefore, this pro-enforcement principle inhibits all intrusive national court processes as much as possible.

These two theories imply that the tribunal should never be considered a court, the power of which is sourced from the National Constitution. Its obligation arises from an agreement between the parties that have the faculty to decide upon the procedural aspects of the proceedings. Therefore, arbitrators are not bound directly to constitutional orders, and *tutela* actions and constitutional protection recourses are not compatible with the nature of arbitration. As a result, the author believes that the analogy between judges and arbitrators made through the jurisprudence studied above is incorrect. Thus, the constitutional law of the seat of arbitration should not have direct applicability over the arbitral proceeding. This means that the arbitrator should not be subject to constitutional control and the awards should not be annulled by constitutional actions.

This analysis is consistent with the position of Latin American scholars who oppose the constitutionalisation of arbitration by arguing that international commercial arbitration is not part of the constitutional system. This is because they are not specialised constitutional courts, or even organs of the State.[105]

There are two additional arguments identified by the author, which reveal that the reasoning of the constitutional courts in the above-discussed cases is incorrect. *First*, it is common in most arbitral regulations that arbitrators possess less powers than those conferred upon judges. In that sense, arbitrators usually seek the cooperation of national courts at the seat of

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104 Zárate & Valenzuela, *supra* note 100, at 207.

105 Alfredo De Jesús, *La autonomía del arbitraje comercial internacional a la hora de la constitutionalización del arbitraje en América Latina*, 2(1) REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES 29–80 (2009).

arbitration for actions such as taking of evidence, interim relief, and enforcement of arbitral decisions.

For instance, the *lex arbitri* in Colombia, in Article 88,[106] dictates that any party can request a national judge for the execution of an interim relief order granted by a tribunal. Article 100[107] also provides for the taking of evidence within the national territory, with the cooperation of national judges by entrusting them with the task under the provisions of the General Code of Procedure. Similarly, under Article 8,[108] the *lex arbitri* in Peru provides for judicial collaboration and control for obtaining evidence and interim relief orders as well as for the execution of arbitral decisions.

Second, arbitrators may decide upon a matter *ex aequo et bono* if parties have consented to it.[109] Judges are prohibited from doing so, since they must always perform an exhaustive analysis of all aspects of the case based on substantive law. The irony is created by the system itself when it creates the possibility for the arbitrator to render an award *ex aequo et bono* but at the same time has the discretion to nullify a decision that lacks motivation based on the correct application of substantive law.

The above-mentioned reasons portray how the core reasoning of Colombian and Peruvian constitutional jurisprudence is incorrect when comparing the origin and faculties of an arbitrator to the obligations and powers of a national judge. Therefore, subjecting the former to constitutional control is excessive and inappropriate.

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106 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 88 (Colom.).

107 *Id.*

108 Decree 1071/2008, art. 8 (Peru).

109 This faculty is expressly granted to the parties under Article 101(3) of Law 1563/2012 and Article 57(3) of Legislative Decree 1071/08. *See* L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 101(3) (Colom.); *see also id.* art. 57(3).

Lastly, it is evident that even though both branches of law have a common aim i.e. to seek the respect of the law, there is also an unmistakable difference. This difference is that the constitutional judge defends fundamental rights while the arbitrator has the objective to defend private and economic rights that have been acquired contractually. For this reason, the author opines that since participating in arbitration is a contractual obligation that rests upon private consent, its adoption into constitutional provisions leads to a contradictory relationship between two areas of law that have distinct objectives and origins.

B. Are constitutional actions as a secondary mechanism to set aside awards at the seat of arbitration contrary to the New York Convention?

i. *Obligations imposed by the New York Convention*

Notwithstanding the arguments described above, other scholars debate that arbitration is not delocalised and that the law of the seat of arbitration plays a pivotal role which cannot be overlooked. For these scholars, the New York Convention is based upon the principle of territoriality, which means that the tribunal must conduct the proceedings in accordance with the will of the parties but only to the extent that the *lex fori* does not enter into conflict with it.[110] This principle provides a strong base for national courts to exercise supervisory powers over the arbitration.[111]

The author recognises that the principle of territoriality is evidenced within two levels of control by the seat. The first is the capacity of the State to recognise the validity of the arbitration agreement. This is derived from

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110 William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L COMP. L. Q. 21 (1983); Michael Mustill, *The New Lex Mercantoria: The First Twenty Five Years*, 4 ARB. INT'L 86 (1988); MICHAEL J. MUSTILL & STEWART CRAUFORD BOYD, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND 66–68 (1989).

111 Sai Ramani Garimella, *Territoriality Principle in International Commercial Arbitration – The Emerging Asian Practice* (May 29, 2014) (unpublished), *available at* https://ssrn.com/abstract=2584332.

Article I(1) of the New York Convention which demonstrates that each State makes a sovereign decision to give effect to an agreement within their territory when reviewing the decision of a tribunal that decides its competence, showing that no one in the international arbitration system is delocalised.[112] Moreover, when arbitrators declare their competence, it is done on the basis of the *lex arbitri,* which implies that they will never be wholly disconnected from the State.

The second level refers to the authority of courts to review the awards issued by a tribunal. In this case, the principle of territoriality is found in Articles V(1)(e) and VI of the New York Convention, which recognise that setting aside is a faculty entrusted only to the "*competent authority of the country in which the award was made*." This principle implies that the *lex arbitri* is competent to choose the mechanisms as well as the grounds for setting aside arbitral awards.[113]

In that sense and from this perspective, since the legislature at the seat of the arbitral proceedings has the autonomy to decide which actions are admissible to annul arbitral awards, the author concludes that constitutional actions for setting aside would not be contrary to the New York Convention in principle. This is because neither are there any direct limits imposed upon the seat regarding the possibility of creating multiple legal mechanisms to challenge the award, nor does it prohibit the seat from according competence upon different national judges to annul an award

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112 *See* Zárate& Valenzuela , *supra* note 100, at 209 ("In other words, the Convention has not provided the freedom for the different parties in a dispute to make *contra legem* meaningful interpretations or to make exceptions that evade States' control in its jurisdiction and territory.").

113 *See* BORN, *supra* note 2, at 3165 ("The grounds which are available for annulling an international arbitral award in the place of arbitration are defined principally, and arguably entirely, by national law. The New York has frequently been interpreted as imposing no limits on the substantive grounds that may be invoked to annul an international arbitral award, thus leaving the subject entirely to national law.").

through parallel recourses. Likewise, if the arbitrator is always bound by the *lex fori* when declaring his competence, nothing within the New York Convention excludes constitutional principles from this test.

ii. *Implied limits imposed by the New York Convention on the mechanisms and grounds to annul awards*

However, to the author's understanding, accepting that a State has such broad authority to create various annulment mechanisms with multiple grounds to set aside an award is certainly contrary to the obligation imposed by Article II of the New York Convention.[114] This provision directs Contracting States (without differentiating between States chosen as seat for the arbitral proceedings or as the place for the enforcement of the award) to recognise that the parties have consented to arbitrate. This, in turn, implies that the seat should respect the desire of the parties to reach a binding and easily enforceable award. This means that the whole arbitral system would only be effective when no invasive judicial intervention is exercised in the State that has been chosen as the seat.

Moreover, constitutional control would also be contrary to the overall purpose of the New York Convention. Article 31 of the Vienna Convention on the Law of Treaties[115] determines that a treaty has to be interpreted in good faith, in light of its object and purpose and considering its preamble and annexes. The New York Convention indicates in its introductory note that the aim of the Convention is to ensure the non-discrimination of awards and safeguard their enforcement.[116] This allows the interpretation

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[114] New York Convention, *supra* note 1, art. II ("Art. II (1) Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.").

[115] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 311.

[116] New York Convention, *supra* note 1, at 1.

that the motive of the New York Convention is to achieve the full effect of arbitration as an alternative to litigation.

Given that the New York Convention indirectly imposed limits to the scope of review of awards during the setting aside stage,[117] the question remains as to what States must keep in mind while dealing with annulment proceedings. The answer is the obligation of States not to undermine and ignore the parties' basic agreement to arbitrate. Therefore, annulment proceedings should be structured to allow courts a supervisory function over only the procedural aspects of the arbitral proceedings. Annulment should not include the possibility of starting judicial analysis of the merits of the dispute *de novo*.

For example, permitting the annulment of an award by a secondary mechanism such as a *tutela* action, based upon a so-called procedural defect, would violate the principle of party autonomy. The parties can choose the rules applicable to the dispute, but conferring constitutional judges the power to decide whether the rules chosen have been correctly applied, implies that the court would evaluate whether the tribunal's errors had such an impact as to have resulted in a different decision. This review would be done under the garb of protecting the fundamental right to due process of the parties, but ultimately would result in a *de novo* analysis of essential matters submitted to the arbitrator's discretion.

This analysis is coherent with the position adopted by scholars who argue that the annulment recourse provided within the *lex arbitri* shall suffice for the purpose of exercising procedural control over the award. Any further control, such as constitutional control through other recourses, strikes at the heart of arbitration:

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[117] BORN, *supra* note 2, at 3163–3392.

> *"I predict that this position will irritate some people: the arbitrators shall not be subject to the procedural mechanisms of constitutional control? Answer: yes. Reason: because the award is final; because that was the desire of the parties when they opted for an alternative dispute resolution mechanism. Alternative to what? - To the judicial system. Any other position would be contrary to the will of the parties. If a party submits its dispute to arbitration, which only takes place in one instance, it is because it wants everything to be resolved in a single instance."*[118]

Having implied limits to annul awards means that *tutela* actions are contrary to the New York Convention and to the essential function of arbitration, which is to settle disputes in an efficient and binding manner. Not only do such actions result in a double review of the award from the national courts (done by the civil or administrative judge and the constitutional judge through different actions), but also create legal uncertainty as to when the award becomes final and binding.

Therefore, having multiple recourses available with multiple alternative grounds affects the enforcement stage directly, even if there are extremely exceptional situations for their admissibility. Instead, providing for a single expedited annulment procedure which is rooted in pre-established grounds as stated in the *lex arbitri* and not as developed though ever-evolving constitutional jurisprudence, will provide for easy enforcement of awards.

iii. <u>*The grounds for annulling awards through tutela actions*</u>

Bearing in mind the arguments discussed above, it is interesting to examine whether grounds for the success of *tutela* actions are contrary to the obligation imposed by Article II of the New York Convention. Accordingly, in this part, the author will comment upon each defect established through Colombian constitutional jurisprudence, proving that

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[118] de Cossío, *supra* note 8, at 238.

they indeed might violate the commitment of the State to recognise arbitration agreements concluded on the basis of party autonomy.

The first ground is substantive defect, which occurs when the arbitrator incorrectly applies the law to the resolution of the case or reaches a decision that lacks motivation. Fortunately, the Constitutional Court determined that this ground is inapplicable to international awards rendered in Colombia when a foreign law is chosen to decide upon its merits.[119] Any understanding to the contrary would have opened the door for constitutional judges to decide upon the merits of the dispute because it implies that the Court has to analyse whether the law has been correctly interpreted as well as its effects upon the parties. It also implies that the parties cannot consent to an award being rendered without motivation, extensive reasoning, or a part that analyses all the arguments presented by the parties within every submission. Most importantly, it implies that the Constitutional Court judges, trained in Colombian law, would have to decide matters under laws that are foreign to them.

The second ground is defect related to evidence, which occurs when the arbitrator renders an award and fails to assess a means of evidence that a party believes has fundamental impact upon the outcome of the case. It may also be a defect on the ground of the analysis being unreasonable. This gives the opportunity to the constitutional judge to interfere in the analysis carried out by the arbitral tribunal regarding the admissibility, relevance, materiality, and weight of evidence. Furthermore, the adjective "*unreasonable*" is a subjective concept, which will be left to the individual understanding of the judge to assess. Therefore, the judge would have to undertake the task of the arbitrator if the latter has either chosen not to give weight to a particular means of evidence because he autonomously

[119] *See* T-354/19 (Colom.).

considered it superfluous or when the arbitrator believes that other evidence is sufficient to decide upon the case. In this scenario, the judge would analyse and give weight to the evidence as the arbitrator does when assessing the merits of the dispute.

The third ground is defect for the lack of competence, which implies that the award has been rendered on the basis of an agreement that is void, or where the dispute involves non-arbitrable matters, or where the arbitrator decides upon matters that are outside the scope consented upon by the parties for its permitted action. The author believes that this ground violates the principle of party autonomy and *kompetenz-kompentenz* of the tribunal.

The principle of *kompetenz-kompetenz* has both positive and negative effects, as described by international scholars[120] and recognised by the Constitutional Court of Colombia.[121] The positive effect is that the tribunal determines the limits of its own competence based on the arbitral agreement. The negative effect of *kompetenz-kompetenz* is related to the positive one i.e. if the power to decide on competence is conferred upon the arbitrator, the interference of the judges must be limited. Therefore, *"a presumption of chronological priority for the tribunal with respect to resolving jurisdiction questions is established,*" imposing a "*negative or restraining effect on the court, whose role is generally deferred to subsequent review of the tribunal's decision*".[122]

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[120] *See* Andre Luis Monteiro, *The Kompetenz-Kompetenz Rule in Brazilian Arbitration Law*, KLUWER ARB. BLOG (May 29, 2019), *available at* http://arbitrationblog.kluwerarbitration.com/2019/05/29/the-kompetenz-kompetenz-rule-in-brazilian-arbitration-law/("The positive effect of the *Kompetenz-Kompetenz* rule ensures that the arbitral tribunal can rule on its own jurisdiction, while the negative effect implies that that courts cannot decide on arbitral jurisdictional challenges before the arbitrators (chronological priority).").

[121] *See* SU500/15, ¶ 5.4.3.1 (Colom.).

[122] Amokura Kawharu, *Arbitral Jurisdiction*, 23(2) N. Z. UNIVERSITIES L. REV. 238, 243 (2008).

The author considers that initiating a *tutela* action based on the defect of lack of competence violates the autonomy of the tribunal to establish its jurisdiction, since it transfers the analysis of the validity and existence of the arbitration agreement as well as the interpretation of its content to the judge. Therefore, this defect conflicts with the *kompetenz-kompetenz* principle in both its positive and negative sphere.

Moreover, regarding procedural defects*,* Law 1563/2012 in Colombia already states the grounds for setting aside an award and holding the arbitral agreement void where "*the party was unable to present the case*" due to procedural violations.[123]

Having analysed the grounds for success of the *tutela* action, the author considers that such constitutional action violates Article II of the New York Convention. This is because such grounds for success of the action overlook the main objective that parties seek to fulfil when consenting to arbitration. Thus, ignoring the will of the parties to exclude the jurisdiction of the national courts (which is unequivocally established by the arbitration agreement), but in turn opening a gate for jurisdictional control through a constitutional mechanism is contrary to the obligation of the State to recognise such agreement and refer the parties to arbitration.

iv. *Sufficiency of the annulment recourse*

The conclusion is that the grounds for success of *tutela* actions not only violate the principle of party autonomy but also cause inefficiency in the arbitral system, resulting in double control over the award. The Constitutional Court of Colombia also recognises that the competent judge who decides upon the annulment is suited to exercise constitutional control. The Constitutional Court has stated that "*the annulment recourse is a legal mechanism suitable to correct the violations of fundamental rights that have taken place*

[123] L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.).

when rendering the arbitration award".[124] As a result, the Constitutional Court determined that one of the tasks of the judge whilst deciding upon setting aside proceedings is to verify whether the procedure followed during the arbitration was in accordance with the National Constitution.

The author believes that this implies that the annulment recourse is, in itself, enough to protect the fundamental right of the parties to due process. Notwithstanding this, the Constitutional Court upholds the admissibility of a retrospective constitutional review.

In contrast, although the position adopted by the Constitutional Tribunal of Peru also accepts that setting aside proceedings are a satisfactory scenario for the protection of fundamental rights, the huge difference is in that the Peruvian Constitutional Tribunal decided to declare constitutional actions inadmissible against awards.[125] The author believes that this is because it is clear that one disease does not require many medicines. Meanwhile, the Colombian Constitutional Court has determined that constitutional control may be exercised after exhaustion of the annulment recourse. The competence for strict constitutional control lies with the constitutional judge, thus making the cure worse than the disease. This happens because the power exercised by the Constitutional Judge becomes problematic when it is considered that its control is undertaken from a constitutional perspective, perhaps invading the scope of competence of the arbitral tribunal and permitting double review over the award by two national judges, first during the annulment recourse stage and then the subsequent *tutela* action.

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[124] SU500/15 (Colom.).

[125] Sentencia Del Tribunal Constitucional [Judgement of the Constitutional Court], Tribunal Constitucional de Perú, Expediente No. 00142-2011-PA/TC, ¶ 20 (Sept. 21, 2011), *available at* https://www.tc.gob.pe/jurisprudencia/2011/00142-2011-AA.html.

Even though the author believes that the decision reached by the Peruvian Constitutional Tribunal is appropriate, the author deems it fit to make two comments upon the three extraordinary grounds that still permit the admissibility of the constitutional protection recourse against awards. *First*, from the author's perspective, permitting constitutional actions when the award violates any precedent issued by the Constitutional Tribunal, is a subjective ground that may encompass numerous alternative scenarios within its scope. This may become problematic at the setting-aside or any other subsequent stage given that: (1) arbitrators will be required to keep abreast with constitutional developments; (2) courts may have alternative interpretations of fundamental rights and precedents may not be congruous to each other, in which case the determination of the applicable precedent will be a consideration for the tribunal; and (3) awards will have to be worded similarly to court judgments, and there may be situations where the parties have agreed that the award need not be a speaking award. This alludes a greater degree of responsibility upon the arbitrator than what is entrusted through the arbitral agreement.

Second, the tribunal must also not apply a provision of law which is considered unconstitutional, necessarily implying that the arbitrator fulfils the role of a judge. This is because one of the core obligations of national judges in Peru is to exercise constitutional control when rendering a decision, by excluding the application of a legal provision of law that is incompatible with a constitutional mandate and hierarchically inferior to it.[126] This is known as *control difuso de constitutionalidad*. Therefore, by transferring to the tribunal the duty of exercising such control, it is essentially envisioned as a judicial authority.

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[126] CÓDIGO PROCESAL CONSTITUCIONAL [CONSTITUTIONAL PROCEDURAL CODE], Ley 28237, art. 6 (Peru).

In this sense, the author believes that while the principles determined by the Constitutional Tribunal are a cure to double review, they still remain deficient. As a result, the author considers that all fundamental constitutional procedural rules are already protected, and should be, via setting aside proceedings.

VI. Is it possible to protect constitutional fundamental rights through public policy violation grounds?

So, if there are two recourses with the same purpose, why not choose only one? Will the annulment recourse be adequate to exercise constitutional control, per the reasoning of the Peruvian Constitutional Tribunal? Or will setting aside proceedings not suffice in granting the correct application of fundamental rights during arbitration, as opined by the Colombian Constitutional Court?

As it will be argued in this part, public policy as a ground for annulment should be enough to assess whether an award violates the constitutional guarantees of the parties. This also implies that constitutional actions in international arbitration not only make the whole system inefficient but are also unnecessary.

Both, the Peruvian and the Colombian arbitration regimes provide for setting aside proceedings to vacate an international award due to the award being in violation of the public policy of the State.[127] From an elementary approach, one could argue that this ground would cover all the constitutional guarantees of the State. However, this could only be true if

[127] L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.); Decree 1071/2008, art. 63(1)(f) (Peru).

public policy is understood as the "*most fundamental rules and values which are of utmost importance for that States society*".[128]

Yet, in this scenario, the concept of public policy is understood as national public policy. This concept has a broad scope and is shaped by each particular nation's sources of law.[129] Therefore, it would comprise only of each State's particular constitutional mandates, because their application depends exclusively upon their jurisprudential development.

Nonetheless, both the Colombian and Peruvian arbitration regimes determine that it is not domestic public policy that is the standard of review,[130] but international public policy.[131] Moreover, the Constitutional

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128 Margaret L. Moses, *Public Policy under the New York Convention: National, International and Transnational*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 173 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019).

129 *See* HELENA HSI-CHIA CHEN, PREDICTABILITY OF 'PUBLIC POLICY' IN ARTICLE V OF THE NEW YORK CONVENTION UNDER MAINLAND CHINA'S JUDICIAL PRACTICe 11–26 (2017); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 360–61 (1981) ("It may suffice to draw attention to the important distinction between domestic and international public policy. According to this distinction what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. It means that the number of matters considered to fall under public policy in international cases is smaller than that in domestic cases.").

130 L. 1563/12, julio 12, 2012, DIARIO OFICIAL [D.O.], art. 108(2)(b) (Colom.); Decree 1071/2008, art. 63(f) (Peru).

131 Authors differentiate national public order, composed of all norms of a particular system, from international public order, composed of only the main principles of a system. In that sense, it has been said that the enforceability of an award will vary depending upon the standard of review chosen by the State. *See* Margaret L. Moses, *Public Policy: National, International and Transnational*, KLUWER ARB. BLOG (Nov. 12, 2018), *available at* http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/ (Particulary refering to Article V(2)(b) of the New York Convention, the author states "[t]he plain language of the clause and the drafters' intent indicate that public policy means national public policy, the public policy or ordre public of the State of the enforcing court. This interpretation is warranted because the purpose behind the exception was to permit a country to refuse to enforce an award that was

Court does not address the question of international arbitration specifically in its jurisprudence i.e. it does not specifically address what the relationship between the application of the fundamental rights provided by the National Constitution and the concept of international public policy in international arbitration is. Nevertheless, the Constitutional Court, in Decision SU-500/15, held *tutela* actions to be admissible when the violation of constitutional rights occurs on "*matters excluded from the scope of the setting aside mechanism*" or "*outside of its scope*."[132] The author believes that this implies that the Constitutional Court understands that none of the grounds for setting aside (not even the violation of public policy) are sufficient for the protection of all constitutional rights and their jurisprudential development.

Also, this reasoning provided by the Constitutional Court opens the door to the filing of a *tutela* action not only as a subsidiary remedy but also as an alternative to setting aside proceedings, even when the latter has not been exhausted. The author interprets that if the Constitutional Court is reluctant to declare *tutela* actions inadmissible against awards and instead it gives them the status of the primary alternative to annul awards, it may be because the Court considers that the National Constitution cannot be adequately protected under the ground of international public order.

Fortunately, the Constitutional Court, in Decision T-354-2019,[133] corrects this mistake and establishes that since the annulment judge is able to review

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contrary to its own system. However, in practice, courts have varyingly used national, international and even transnational interpretations of the public policy exception (…) A State's international public policy tends to be interpreted more narrowly than its domestic public policy, such that a foreign arbitral award is less likely than a domestic one to be refused enforcement.").

132 SU500/15, ¶ 5.4.2.3 (Colom.).

133 This decision, unique in its analysis, content and conclusion is not a *Sentencia de Constitucionalidad* or *Sentencia de Unificación*, meaning that it is only binding upon the parties to the dispute. However, it is extremely relevant because it reveals the evolution upon the treatment of the topic by the Constitutional Court. Moreover, it works as an auxiliary

the protection of fundamental rights in the setting aside stage on the ground of the integrity of the international public policy of Colombia, the *tutela* action will be inevitably subsidiary.

Notwithstanding this scenario, the author believes that filing a *tutela* action against an award would necessarily result in double control, performed by two different national judges. This would only make the system unproductive and inefficient because the result sought from both the constitutional action and the set aside claim (based on the violation of the public policy) is the protection of the fundamental rights of the parties before the arbitration. Both actions having the same purpose, causes a double review of the award at different levels and moments in time. The author would base the hypothesis on the following premise:

Fundamental rights and constitutional guarantees such as the right to fair trial are a part of the international public order of Colombia,[134] which indicates that the setting aside recourse is necessary and enough for its protection. This means that no extra analysis by means of a constitutional action would be required. Moreover, what makes the annulment recourse even more convenient is the fact that it permits judges to analyse the international public policy violations *motu proprio*.

On the other hand, the Supreme Court of Justice of Colombia (civil court competent to decide upon annulment recourses where the parties involved in the arbitration are of a private nature) has explained the meaning of international public policy applicable to setting aside proceedings and to the

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criterion of judicial proceedings. This view has been expressed in Council of State of Colombia Case 11001-03-15-000-2020-03234-00. *See* Consejo de Estado, Sección Quinta [C.E.] [Council of State], Septiembre 24, 2020, Sentencia 11001-03-15-000-2020-03-234-00 (AC), § 2.6.2 (Colom.).

134 Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, marzo 23, 2018, Expediente 2017-00080-00, Gaceta Judicial [G.J.] (Colom.).

recognition and enforcement of international awards. The case cited has its origin in an annulment recourse initiated by the international consortium Ferrovial-Sainc against an award rendered by an ICC tribunal seated in Colombia. The dispute originated due to the termination of a contract for the construction of a project at a port, concluded with the multinational company, Cerrejón Ltd.[135]

The annulment recourse was resorted to on the allegation of violation of the international public policy of Colombia, on the ground that the Tribunal did not take into account the testimony of an expert witness whilst rendering the award and thus violated the fundamental right to due process. The Supreme Court of Justice denied the annulment, concluding that Colombia's international public policy was not violated since "*all procedural guarantees were granted, along with the right to due process*", and because the Tribunal analysed all the available and relevant evidence it had at hand, issuing a decision that was not arbitrary.

While reaching this decision, the Court defined international public policy as "*the basic principles of morality; a set of legal, economic, political, private and moral principles that are absolutely obligatory for the social conservation of a people at a given time*" and also "*a dynamic, constructive and tolerant public order for the international community*".[136]

Additionally, the Supreme Court of Justice highlighted that it was the witness who had not presented himself at the hearing without a valid excuse. Most importantly, it determined that the consortium did not prove that the omissions of evidence had the magnitude to alter the decision

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135 Corte Suprema de Justicia [C.S.J.] [Supreme Court], Civil Chamber, diciembre 19, 2018, Expediente SC5677-2018, Gaceta Judicial [G.J.], at 58-59 (Colom.)

136 *Id.* at 33.

reached by the Tribunal on merits, and therefore, the claim for annulment lacked constitutional relevance.

From the author's perspective, the analysis made by the Supreme Court of Justice indicated that it considers fundamental rights (such as that of due process) as part of the international public policy of Colombia. Moreover, it shows that the Court is aware that its position requires it to evaluate which claims are constitutionally relevant, and consequently, protect them through a setting aside decision.

Besides, the Constitutional Court indicated that the concept of international public policy includes the protection of procedural guarantees such as a fair trial, the right to receive adequate notification, a reasonable opportunity for defence, equality between the parties and a fair procedure before an impartial judge.[137]

Moreover, the definition of international public policy given by the Supreme Court of Justice is coherent with how scholars traditionally define international public policy to be the minimum and fundamental standards that comprise *jus cogens*.[138] The content of international public policy is believed to include the prohibition of bribery, corruption and abuse of rights,[139] and the protection of principles such as freedom and equality.

From the author's perspective, the scope of international public policy allows it to overlap with the concept of fundamental rights granted by the

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137 T-354/19, ¶ 3.3 (Colom.).

138 *See* CHEN, *supra* note 128, at 21 ("Truly international public policy has a fairly narrow scope that includes fundamental rules of natural law, principles of universal justice, ius cogens in public international law, and the general principles of morality accepted by what are referred to as civilized nations.").

139 *See* Moses, *supra* note 130 ("International public policy, however, can be considered a subset of internal public policy. It is generally narrower than domestic public policy and includes only the most fundamental norms of a State's domestic public policy.").

National Constitution, not only because fundamental rights are the *core* or *most fundamental norms of Colombia's public policy*,[140] but also because they are comparable to the rights preserved through human rights law. The latter is considered as *jus cogens*, meaning that legal sources such as the General Comments of the Human Rights Committee[141] cannot be overlooked by any Colombian judge or authority.

This means that the judge that adjudicates upon the setting aside proceedings will undertake a complete and full analysis of any violations of human rights when deciding upon a case and ensure their protection if necessary. As a result, the aim of the *tutela* action would also be achieved through the filing of a set aside motion based on international public policy grounds.

This, in turn, means that if the Constitutional Court shared the definition of international public policy by the Supreme Court of Justice, it would result in the inadmissibility of *tutela* actions against international awards. The analysis gets support from Article 93 of the Colombian National Constitution, which incorporates all international human rights treaties into the internal constitutional system and gives them priority within the national legal system.

Moreover, the Constitutional Court has stated, in Decision C410/2001, that any international humans rights treaty recognised by the Colombian Congress whose objective is "*the protection of the dignity of any human*," like "*the Declaration of Human Rights of 1948, which has been considered as fundamental for the international community, makes it an essential principle for International Law of the*

140 T-354/19, ¶ 3.3 (Colom.).

141 Observaciones generales aprobadas por el Comité de Derechos Humanos, *available at* https://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CCPR/00_2_obs_grales_Cte%20DerHum%20%5BCCPR%5D.html.

Human Rights, and a norm that cannot be violated by the States, acquiring the character jus cogens".[142] (translated from Spanish).

As a result, we can conclude that fundamental rights, as part of the international human rights treaties ratified by the Congress in Colombia, are recognised as *jus cogens*, and therefore, are a part of the international public policy of Colombia. Therefore, the competent judge that decides upon an annulment recourse, based on the violation of public policy, against an arbitral award in Colombia should grant protection to all human rights of the parties.

Following the same train of thought, even though *tutela* actions are not admissible against awards rendered at a seat which is not Colombia, in practice, the defence of public policy violations to refuse the recognition of an award in Colombia should produce the same effect as to the annulment of an award by a *tutela* action.

However, the Constitutional Court maintains the position that, although extremely exceptional, *tutela* actions should be admissible against international awards. This analysis is interesting because it shows how Latin American countries retain judicial control over arbitration, to indicate the ascendancy of the Constitution. Therefore, some Latin American authors who have studied the relationship between public policy and fundamental rights argue that these two concepts are like oil and water, meaning that they are so different, that the danger is materialised when the judge makes the mistake of using the concept of fundamental rights as an "*analytic shortcut to refer to the concept of public policy*".[143]

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142 Corte Constitucional [C.C.] [Constitutional Court], abril 5, 2001, Sentencia C-410/01, Gaceta de la Corte Constitucional [G.C.C.], ¶ 3.3.2 (Colom.).

143 de Cossío, *supra* note 8, at 224.

VII. Enforcement of an award that is subject to constitutional control at the place of arbitration

As stated earlier, the New York Convention imposes specific grounds on Contracting States to refuse the recognition and enforcement of awards based on Article V. Specifically, Article V(1)(e) provides two grounds for this purpose: the award has not yet become binding on the parties or it has been set aside or suspended by the competent authority at the seat of the arbitration.

A relevant issue is raised by commentators, who centre their critique around the position taken by the Constitutional Court of Colombia in the case SU-500/2015,[144] arguing that it did not address the relationship between *tutela* actions and the New York Convention. Specifically, the Constitutional Court did not state whether Article V(1)(e) of the New York Convention "*should be construed as including tutela judgments when successful*".[145]

In this context, one must examine whether the enforcing state will consider the filing and resolution of constitutional actions against an award, when the seat chosen by the parties provides for its admissibility as a means to annul an award. To the author's understanding, there are two possible alternative interpretations.

The *first* is that the country of enforcement will consider the decision given by the Colombian constitutional judge in the *tutela* claim regarding the award. This is because Article V(1)(e) was expressly included to secure the finality of arbitration awards. In this sense, if the seat of arbitration has included the possibility to resort to constitutional actions to challenge the

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[144] SU500/15 (Colom.).

[145] Daniela Corchuelo Uribe, *Tutela in International Arbitration in Colombia*, 30 REVISTA DEL CLUB ESPAÑOL DEL ARBITRAJE 49, 67 (2017).

award as part of the *lex arbitri*, the award would be final only when such determination has been reviewed by the constitutional judge.

From this perspective, the *tutela* action should be understood as a legitimate means to set aside or suspend the award, more so when the *lex arbitri* of the seat has granted *tutela* action the same nullification effects such as that of the annulment recourse.

The supporters of the doctrine that endorse the impossibility of recognizing and enforcing awards that have been vacated by the court of the seat base their conviction upon the principle of "*ex nihilo nilhil fit (nothing comes from nothing), that is, once an arbitral award is annulled at the seat, there is simply nothing to be recognized and enforced anywhere*".[146]

Supporters of this thesis argue that the seat has primary jurisdiction over the award, meaning that its review and control is legitimately conferred upon the courts of the seat, whose decisions will have *erga omnes* effects, restricting any review done by any other secondary jurisdiction to situations where the primary jurisdiction has not annulled the award. Some scholars go even further: according to Pieter Sanders, if the seat of arbitration declares the award as null, its enforcement is no longer possible because it would be against the public policy of the country of the seat.[147]

Therefore, from this first perspective, if the *tutela* action is a legitimate recourse that the seat has provided for the setting aside or suspension of the award, then the country of enforcement should consider that the

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[146] Clifford J. Hendel & María Antonia Pérez Nogales, *Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations*, *in* 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 189 (Katia Fach Gómez & Ana Mercedes López Rodríguez eds., 2019).

[147] *Id.*; Fernando Cantuarias Salaverry, *Reconocimiento y ejecución de laudos arbitrales anulados en el lugar del arbitraje*, 56 DERECHO PUCP 583, 602 (2003).

decision issued by the appropriate constitutional judge is with the aim of securing the *finality* of the award.

The *second* option is to recognise that the country of enforcement is independent to choose which effect it wants to give to the *tutela* action. This means that the enforcing state "*may*" rely upon the verdict of the constitutional action to conclude that the award is not binding, which, in turn, implies that it can recognise and enforce the award without taking into account the filing and resolution of the *tutela* award.

This idea leads to the possibility of enforcing awards that might have been declared as null and void at the seat. However, commentators have established that "*Article V(1) of the New York does not oblige state courts to refuse enforcement of foreign awards but instead provides for their potential rejection*".[148] They do so by relying upon the literality of the Article that provides for the word "*may*". Moreover, supporters of this idea say that "*once issued and irrespective of eventual subsequent annulment at the seat, awards are part of a free-floating autonomous legal order. Therefore, their existence does not cease once annulled by the court of the seat of the arbitration*".[149]

In conclusion, from this second perspective, the court of enforcement is not obliged to consider the decision made by the Colombian constitutional judge, but it has the discretionary power to determine the recognition and

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[148] Hendel & Nogales, *supra* note 145.

[149] *See* Salaverry, *supra* note 146, at 192 ("Supporters of the free-floating argument stress the idea of the NY Convention as an open instrument, where Article (V)(1) acts as a status of minimums for the enforcement of awards. As a result, Article (V)(1)(e) should not be interpreted by courts as a mandate but as a suggestion or recommendation." (…) "As sustained by some authors, preventing enforcement courts from enforcing annulled arbitral awards would run against the sovereign power of this court to rule on the efficacy of the arbitral award.").

enforcement of the award based upon its autonomous analysis of whether the award is in order.

Another issue that must be highlighted regarding the enforcement of awards that are subject to constitutional control at the seat of arbitration, is the status of a *tutela* action when its resolution is ongoing parallel to a request of the other party for the enforcement of the award in another jurisdiction. This scenario might occur when the constitutional judge at the seat has not decided the outcome, or it has yet not been resolved completely due to a pending appeal before a second instance judge or review before the Constitutional Court.

In this situation, it is debatable if the award rendered in Colombia has become binding as required by Article V(1)(e) of the New York Convention. One way in which the term 'binding' can be understood is by interpreting the word in accordance with the law applicable to the procedure i.e. the Colombian law (when chosen as the seat). This result establishes that the award would only become binding when the *tutela* action has been decided upon by the constitutional judge (and even after a review by the Constitutional court itself).

In this sense, an ongoing *tutela* claim would prevent an enforcing court from recognizing the award in its jurisdiction because it has not yet become binding. The country of enforcement should adjourn recognition proceedings and wait for the competent judge at the seat to decide upon the constitutional actions, as prescribed in Article VI of the New York Convention.

The proposed solution for this debate requires an interpretation of Article V(1)(e) to mandate that all possible proceedings offered by the law of the seat need to be exhausted for the award to become final and therefore enforceable. However, this would not be in accordance with the overall purpose of the New York Convention.

As discussed above, the aim of the New York Convention is to construct a system that ensures fast and easy enforcement of awards. However, unless enforcing states are able to independently decide whether to take into account ongoing tutela actions, the arbitral system would become more complicated and slower, consequently losing its intended place as an efficient alternative to litigation.

VIII. Conclusion

International arbitration is a creature of party autonomy, which means that it is a dispute resolution mechanism shaped almost entirely by the will of the parties who, in order to settle their disputes, opt for an alternative mechanism to litigation.

The author uses the term 'almost entirely' because, while it is true that one of the advantages of arbitration is the possibility for the parties to choose the rules applicable to both the procedure and the merits of the dispute, selecting the seat of the arbitration implies that they have expressed their will to be bound by its domestic rules on international arbitration. The most important feature governed by the seat of arbitration is the recourse and grounds for challenging the award. Therefore, when the parties consent to the seat, they are also choosing the rules by which the annulment of the award can be sought and declared.

This means that if parties choose a seat that provides for multiple mechanisms to set aside the award, they will either rejoice with the ample possibilities they have to challenge the award, or will have to pull through, facing a situation riddled with legal uncertainty, especially with regard to when the award becomes binding and enforceable.

According to the author, this is the scenario in countries that have undergone constitutionalisation of arbitration – jurisdictions where the system is structured around the power of the arbitrator being recognised by the National Constitution as a public function of administering justice. The

consequence of this is constitutional control over the award in order to verify whether the arbitral tribunal correctly applied all constitutional guarantees and fundamental rights available to the parties.

The author considers such a rationale incorrect. Arbitrators should not be subject to constitutional control, since neither are they judges nor is the award a court decision. This is because the power to settle disputes is conferred directly upon the arbitrator by the parties through a contract (the arbitral agreement). As a result, party autonomy is the real basis of arbitration.

In principle, the New York Convention does not impose mandatory grounds and mechanisms upon its Contracting States for setting aside proceedings, as it does for recognition and enforcement. Therefore, one could say that the seat of arbitration has discretionary power that allows it to create multiple mechanisms to review and control the award, such as *tutela* actions and constitutional protection recourses. Notwithstanding this, the author believes that such an approach is inappropriate because the admissibility of such secondary mechanisms is adverse to the overall purpose of arbitration. It results in double control over the award, preventing an expedient and efficient proceeding.

Conversely, the author understands that the New York Convention imposes implied limits upon annulment recourses, these being, *first*, the obligation to recognise the consent given by the parties to choose arbitration over litigation by concluding an arbitral agreement and *second*, the duty to ensure easy enforcement of awards. Therefore, these limits create various grounds with various mechanisms to set aside awards stands are contrary to the New York Convention.

Either way, the annulment recourse inspired by the Model Law is sufficient to challenge an award that has violated fundamental rights through the ground of international public policy violations of the seat. This is because

human rights are part of *jus cogens* and therefore, a part of international public policy. Moreover, human rights equate to fundamental constitutional rights. Hence, they cannot be overlooked by a competent judge when deciding upon setting aside proceedings.

Thus, there is only one conclusion – constitutional actions against awards makes a country unattractive as a choice of seat for arbitral proceedings.

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INVESTOR-STATE ARBITRATION IS DEAD: LONG LIVE INVESTOR-STATE ARBITRATION IN INDIA

Angshuman Hazarika[1] *& Kirti Bhardwaj*[2]

Abstract

*Investor-State arbitration has been presented as an undesirable consequence of bilateral investment treaties ["**BIT**"], and States have gone to the extent of terminating their BITs to escape from it. India is no exception to this phenomenon – having terminated the bulk of its BITs after the award passed in White Industries Australia Ltd. v. Republic of India ["**White Industries**"]. These terminated treaties have been sought to be replaced by a new generation of BITs, which are to be signed on the basis of a new Model Indian BIT released in 2015. This article seeks to evaluate whether the termination of these BITs has been a favourable development, and how successful India has been in its aim to replace them. The article also suggests pathways to deal with potential claims that may arise from the sunset clauses of terminated BITs and alternatives to ensure continued investor-protection in the absence of BITs, with an aim to promote foreign investment.*

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I. Introduction

"*The carrying trade is the natural effect and symptom of great national wealth*".[3] The free movement of goods and capital permits the market to determine the direction of international investment flows and seeks to insulate the market from politics.[4] A State maximises its productivity through the economies of specialisation and scale through investment.

BITs are seen as commitments to liberal economic policies which are aimed at increasing prosperity through foreign investment.[5] To avoid ambiguities over the protection of foreign investments under international law, a typical BIT aims at the creation of credible commitments for investment by nationals and companies of one State-party in the territory of the other. There is an expectation of economic development in both States and improvement of commercial relations between the two parties.[6] Deficiencies of customary international law on foreign investment triggered countries to enter into BITs.[7]

India started signing BITs in the early 1990s as a part of its overall strategy of economic liberalisation adopted in 1991, and had a clear goal of inviting

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3 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 630 (1776).

4 JEFFREY A. FRIEDEN & DAVID A. LAKE, THE INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 8 (4th ed. 2014).

5 Kenneth J. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L L. 621, 627 (1998).

6 J. BONNITHCA, L. PAULSEN & M. WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 314 (2017).

7 JESWALD SALACUSE, THE LAW OF INVESTMENT TREATIES 85 (2015).

and facilitating foreign investments.[8] India has signed 86 bilateral investment agreements from 1994 to 2020.[9]

Facilitation of foreign direct investment is one of India's policy objectives and to achieve this objective and ensure certainty, guidelines were laid down to widen the scope of investment activities under bilateral agreements.[10] This process of India's integration with the global economy through BITs made India vulnerable to investor claims of more than 80 countries. The threat turned into reality due to the actions of the Indian executive, judiciary and legislature which did not align with the policy objective of increasing the scope of investment activities under bilateral agreements.[11]

The nation received several arbitration notices and investor treaty claims, which resulted in a critical backlash against investor-State arbitration and India ultimately reviewing its BIT regime.[12] In this background, India's new treaty-making process and dispute resolution approach merits a comment.

In Part I, the article seeks to examine India's mixed experience with investor-State arbitration. Part II explores the perceived unpredictability of investor-State arbitrations, along with largely ignored positives of the system. In Part III, the article seeks to explore the steps taken by the

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8 P. Ranjan, *India and Bilateral Investment Treaties – A Changing Landscape*, 29(2) ICSID REV.: FOREIGN INV. L. J. 419, 429 (2014).

9 *International Investment Agreements Navigator: India*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=bits.

10 Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) VIKALPA: THE JOURNAL FOR DECISION MAKERS 275–287 (2016).

11 PRABHASH RANJAN, INDIA AND BILATERAL INVESTMENT TREATIES: REFUSAL, ACCEPTANCE, BACKLASH, 223 (2019) [*hereinafter* "RANJAN"]; *see also* Ctr. for P.I.L. v. Union of India, (2013) 10 SCC 270 (India); Finance Act, No. 23 of 2012, § 4 (India).

12 Saurabh Garg, Ishita G. Tripathy & Sudhanshu Roy*, The Indian Model Bilateral Investment Treaty: Continuity and Change*, *in* RETHINKING BILATERAL INVESTMENT TREATIES – CRITICAL ISSUES AND POLICY CHOICES 69 (Kavaljit Singh & Burghard Ilge eds., 2016).

Government of India ["**Government**"] to resolve the concerns related to investor-State arbitration. Part IV seeks to evaluate the potential effects of the steps taken by the Government on the country's investment regime and Indian investors investing abroad. Further, it seeks to compare the global and Indian approaches towards the backlash against investor-State arbitration. Finally, the article, in Part V, attempts to suggest steps to balance India's interest to regulate with investment protection.

II. India's mixed experience with investor-State arbitration

India's first-ever known experience with investor-State arbitration was related to the Dabhol Power Company ["**DPC**"] (*Bechtel Enterprises Holdings, Inc & GE Structured Finance (GESF)* v. *Government of India* (2003)), which was a joint venture of three American multinational companies.[13] The first case in this saga was filed in 2003.[14] Eight other cases followed in 2004.[15] Dabhol Power Project ["**DPP**"] was formed to build a power station in Maharashtra by signing a power purchase agreement with the Maharashtra State Electricity Board. However, the contract was later cancelled by the electricity board due to alleged irregularities, political opposition, and the high cost of power.[16]

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13 Rajendra Beniwal & Kumar Sumit, *Bilateral Investment Treaty and Investment Arbitration: A Critique from India Perspective,* SCC ONLINE BLOG (June 26, 2020), *available at* https://www.scconline.com/blog/post/2020/06/26/bilateral-investment-treaty-and-investment-arbitration-a-critique-from-india-perspective.

14 Bechtel Enters. Holdings, Inc. & GE Structured Fin. (GESF) v. Gov't of India, Award (2003).

15 *International Investment Agreements Navigator: India*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india?type=bits; Premila Nazareth Satyanand, *Once BITten, Forever Shy: Explaining India's Rethink of Its Bilateral Investment Treaty Provisions*, 16(1) AIB INSIGHTS 17, 20 (2016), *available at* https://documents.aib.msu.edu/publications/insights/v16n1/v16n1_Article5.pdf.

16 Won Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, 49 LOY. UNI. C LJ 405, 434–38 (2017); Louis T. Wells Jr., *Enron*

DPC initiated arbitration proceedings but faced an anti-arbitration injunction issued by the Delhi High Court.[17] Thereafter, the investors invoked the India-Mauritius BIT to file India's first-ever investment treaty arbitration on the grounds of expropriation. Eight other cases were filed using BITs with the United Kingdom ["**U.K.**"], Netherlands, Austria, Switzerland, and France, United Arab Emirates and the Russian Federation.[18] Meanwhile, the majority shareholder in DPC, GE, and Bechtel claimed the insurance pay out under political risk insurance cover from the Overseas Private Investment Corporation, United States of America ["**U.S.**"] for the loss of investment in the project.[19] After paying the insurance amount, the U.S. government filed an international inter-State arbitration against India under the terms of the 1997 U.S.-India Investment Incentive Agreement in an effort to recover the sums paid out.[20]

After several rounds of litigation, commercial, investor-State, and State-to-State arbitration, a settlement was finally negotiated by the Indian government in 2005.[21] A case study on the Dabhol Power Project stated

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Development Corp.: The Dabhol Power Project in Maharashtra, India (B) (Abridged), HARV. BUS. SCH.: CASE STUDY COLLECTION 797 (1997).

17 Union of India v. Dabhol Power Co., 2004 SCC OnLine Del 1298 (India) [*hereinafter* "Dabhol"].

18 *International Investment Agreements Navigator: India – Cases as Respondent State*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india.

19 Gus van Harten, *TWAIL and the Dabhol Arbitration*, 3(1) TRADE L. & DEV. 133, 143–44 (2011).

20 Gov't of the United States of America v. Gov't of India, Request for Arbitration under the Incentive Agreement between the Gov't of the U.S.A. and the Gov't of India, Nov. 19, 1997 (Nov. 4, 2004), *available at* https://www.dfc.gov/sites/default/files/2019-08/GOI110804.pdf.

21 JESWALD SALACUSE, THE THREE LAWS OF INTERNATIONAL INVESTMENT: NATIONAL, CONTRACTUAL, AND INTERNATIONAL FRAMEWORKS FOR FOREIGN CAPITAL 293 (2013).

that the Government of India, through its judiciary, [22] thwarted international arbitration panels from proceeding, and also refused to commit the resources to solve the problems raised through the project's failure. Additionally, the Government also contributed to the failure of four-year-long negotiations by not only sending representatives without sufficient negotiating authority, but also frequently replacing them with new representatives, who similarly lacked negotiating authority. Further, the State government also failed to constructively participate in arbitrations and litigations or put in efforts to work out a solution for the project.[23]

The investor-State dispute settlement ["**ISDS**"] claims, which arose out of the DPP, did not get the requisite attention and did not receive adequate analysis from government functionaries, which could have promoted learnings from the experience. It took the *White Industries* case[24] to mainstream the discussion around BITs and ISDS claims in India. In a contractual dispute between *White Industries* and *Coal India*, an International Chamber of Commerce ["**ICC**"] tribunal ruled in favour of *White Industries* and awarded it AUD 4.8 million.[25] Coal India applied to the Calcutta High Court to set aside the Award without informing White Industries.[26] Coal India sought the enforcement of the Award in the Delhi High Court.[27] Both proceedings experienced substantial delays.[28] The enforcement proceedings were stayed pending the decision of the set-aside proceedings at the

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22 *ENRON's Dabhol Power Project*, INDIAN POWER SECTOR, *available at* http://indianpowersector.com/home/about/case-study.
23 *Id.*
24 White Indus. Austl. Ltd. v. Republic of India, Final Award (UNCITRAL Arb. Nov. 30, 2011) [*hereinafter* "White Industries"].
25 *Id.* ¶ 16.1.1(b).
26 *Id.* ¶¶ 3.2.35, 3.2.39–40.
27 *Id.* ¶ 3.2.43.
28 *Id.* ¶¶ 10.4.12, 10.4.19, 14.2.57–65.

Calcutta High Court.[29] The matter was then appealed to the Supreme Court of India where it remained pending.[30]

With the enforcement and set-aside proceedings pending since 2002, White Industries invoked the India-Australia BIT and filed an investor-State arbitration claim against India in 2010. The Tribunal found that India had violated its obligation to provide the investor with "'*effective means' of asserting claims and enforcing rights*", a provision borrowed from the India-Kuwait BIT, by way of a Most-Favoured Nation ["**MFN**"] clause present in the India-Australia BIT.[31] According to the Tribunal, "*the Indian judicial system's inability to deal with the investor's jurisdictional claim in over nine years and the Supreme Court of India's inability to hear the appeal for over five years amounted to undue delay and constituted a breach of India's voluntarily assumed obligation under the treaty*".[32]

In various cases, particularly in early 2000s, courts were unwilling to accept jurisdiction of arbitral tribunals situated outside India and granted anti arbitration injunctions.[33] India had not yet attuned itself to a modern international arbitration system, or the rules of international commercial arbitration, despite its membership to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] and the provisions adopted in the Indian Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"]. This, however, was not an isolated situation in India, but was a reflection of the condition of a lot of other developing countries.[34] The realisation of the far-reaching nature and the enforceability

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29 *Id.* ¶ 3.2.60.

30 *Id.* ¶¶ 10.4.19, 10.4.21.

31 Agreement on the Promotion and Protection of Investments, Austl.-India, Feb. 26, 1999, 2116 U.N.T.S. 145; White Industries, Final Award, ¶¶ 4.4.2, 11.2.1–11.2.9, 11.2.3.

32 White Industries, Final Award, ¶ 11.4.19.

33 Ronald J Bettauer, *India and International Arbitration: The Dabhol Experience*, 41(2) GEO. WASH. INT'L L. REV. 381, 386 (2009).

34 Joseph T. McLaughlin, *Arbitration and Developing Countries*, 13 INT'L L 211, 215 *et seq*. (1979).

of the obligations enshrined in the BITs did not dawn upon India until the *White Industries* decision.

The next year, in 2012, two investment treaty arbitration claims were filed by telecom license-holder investors against India after the Supreme Court of India held that the grant of 2G spectrum licenses to telecom companies by the Indian government was arbitrary and unconstitutional, and hence all the licenses were illegal.[35] In 2008, these telecom licenses were not auctioned, but were granted by the Government on a first-come-first-serve basis. Foreign investment by the telecom companies had been jeopardised on account of the arbitrariness of the Government in the first place.[36]

Two other cases were brought against India for cancellation of the agreement to lease capacity in the S-Band, which formed part of the electromagnetic spectrum available in satellites for providing multimedia services to mobile users across India.[37] These licenses were cancelled after the Cabinet Committee on Security ["**CCS**"] announced that due to an increased demand for allocation of the spectrum for national and social needs and the country's strategic requirements, the Government will not be able to provide slots in the S-band for commercial activities.[38]

India argued before the Permanent Court of Arbitration that the agreement was annulled keeping in mind the essential security interests of the State. Arbitrator David R. Haigh noted that even three and a half years after the CCS took the decision to withdraw the spectrum, no decision was taken as

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35 Ctr. For Pub. Int Litig v. Union of India, (2012) 3 SCC 104 (India).

36 *Id.*

37 CC/Devas (Mauritius) Ltd., Devas Emp. Mauritius Pvt. Ltd. & Telcom Devas Mauritius Ltd. v. Republic of India, Case No. 2013-09 (Perm. Ct. Arb. 2013) [*hereinafter* "Devas"]; Deutsche Telekom AG v. Republic of India, Case No. 2014-10 (Perm. Ct. Arb. 2014).

38 Press Release, Press Information Bureau, Gov't of India, CCS decides to annul Antrix-Devas Deal (Feb. 17, 2011) (on file with the authors).

to whether the spectrum would be used for either defence purposes or social needs.[39] This indicates a situation where decisions may have been taken in retaliation without adequate plans to deal with the consequences.

Three investment arbitration claims have also been brought against India due to imposition of taxes retrospectively.[40] The Government amended tax laws and clarified that offshore transactions are taxable for capital gains and have a retrospective application.[41] The amendment differed from the law laid down by the Supreme Court in *Vodafone International Holdings BV* v. *Union of India*.[42] As a consequence, affected investors took recourse to investor-State arbitration, and in a keenly awaited award (*Vodafone International Holdings BV* v. *Republic of India*), the amendments were considered to be in violation of the fair and equitable treatment standard of the Netherlands-India BIT.[43] In another dispute related to the same issue, *Cairn Energy PLC & Cairn UK Holdings Ltd.* v. *Republic of India*, India argued that the BIT does not provide for arbitration of taxation matters and thus refused to appoint an arbitrator.[44] Consequently, Cairn was forced to request the President of the International Court of Justice ["**ICJ**"] to intervene. India named its arbitrator only after intervention from the ICJ.[45]

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39 Devas, Case No. 2013-09, Dissenting Opinion of David R. Haigh to Award on Jurisdiction, ¶¶ 92, 98 (Perm. Ct. Arb. July 25, 2016).

40 Vodafone Int'l Holdings BV v. Gov't of India, Case No. 2016-35 (Perm. Ct. Arb. 2016) [*hereinafter* "Vodafone Int'l Holdings"]; Cairn Energy PLC & Cairn UK Holdings Ltd. (CUHL) v. Republic of India, Case No. 2016-7 (Perm. Ct. Arb. 2016) [*hereinafter* "Cairn"]; Vedanta Res. plc v. Gov't of India, Case No. 2016-05 (Perm. Ct. Arb. 2016).

41 Finance Act, No. 23 of 2012, §§ 4, 77 (India) (amending the Income-tax Act, No. 43 of 1961, §§ 9, 195 (India)).

42 Vodafone International Holdings BV v. Union of India, (2012) 6 SCC 613 (India).

43 Vodafone Int'l Holdings, Case No. 2016-35, Award, ¶ 363 (Perm. Ct. Arb. Sept. 25, 2020).

44 Cairn, Case No. 2016-7, Procedural Order No. 3, ¶ 47 (Perm. Ct. Arb. Mar. 31, 2017).

45 Sanjeev Choudhary, *Cairn wants India to appoint arbitrator by November 11 in Rs. 10,247 tax dispute*, ECON. TIMES, Nov. 9, 2015, *available at* https://economictimes.indiatimes.com/industry/energy/oil-gas/cairn-wants-india-to-

Additionally, two other investment arbitrations were brought against India due to the actions of its State governments.[46] The CEO of one of the investor companies escalated the issue to the Prime Minister of India in 2016 and claimed that there was a violation of the fair and equitable treatment ["**FET**"] standard due to non-payment of incentives which were promised by a State government under its 'investment incentives scheme'. However, appropriate actions by the Government to manage the claims were still missing.[47]

The history of cases discussed above indicates that India has been the subject of claims because the Indian judiciary moved too slowly, the executive failed to act in good faith and efficiently, or because the legislative actions of the Government were problematic for investors. This, however, does not provide a complete picture. There may be instances where the investors might have abused ISDS and investor-State arbitration in particular.[48] However, it would still be incorrect to say that each time an investor uses the ISDS mechanism, it is to encroach the host State's right to regulate.[49] Nevertheless, following the global backlash against ISDS, India responded by reviewing its BIT regime.[50]

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appoint-arbitrator-by-november-11-in-rs-10247-tax-dispute/articleshow/49709467.cms?from=mdr.

46 Ras Al Khaimah Inv. Auth. v. Republic of India (2016) (UNCITRAL); Nissan Motor Co., Ltd. v. Republic of India, Case No. 2017-37 (Perm. Ct. Arb. Apr. 29, 2019) [*hereinafter* "Nissan"].

47 Nissan, Case No. 2017-37, Decision on Jurisdiction, ¶¶ 309, 310 (Perm. Ct. Arb. Apr. 29, 2019).

48 Utku Topcan, *Abuse of the Right to Access ICSID Arbitration*, 29(3) ICSID REVIEW 627, 629 (2014); Emmanuel Gaillard, *Abuse of Process in International Arbitration,* 32(1) ICSID REVIEW 17, 19 (2017).

49 RANJAN, *supra* note 9, at 265; Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18, Award, ¶ 366 (June 22, 2017).

50 James J. Nedumpara and Akshaya Venkataraman, *FDI In India: A Bird's Eye View* 11 (Centre for Trade and Investment Law, Discussion Paper No. 8, 2020), *available at*

This response, due to the slew of investor-State arbitration notices, is consistent with the reactionary approach of several other States that continued to ignore the risk posed by BITs until they were hit by numerous ISDS claims.[51]

India lost the *White Industries* case, but it must be noted that it is the *only* investor-State arbitration lost by India. While some investor-State arbitrations ended up in a settlement, there are instances of India winning some treaty claims such as in *Tenoch Holdings* v. *Republic of India*,[52] and *Louis Dreyfus Armateurs SAS* v. *Republic of India*.[53] These facts, which are the actual results of the investor claims raised after *White Industries* Award, are the antithesis of the dominant narrative that India has suffered due to the ISDS mechanism. Thus, it can be argued that India has had a mixed experience with its previous ISDS mechanism.

III. The debate about investor-State arbitration: Is it the culprit?

The termination of Indian BITs is often attributed to the investor-State arbitration proceedings commenced against the country and the perceived unpredictability of the investor-State arbitration awards.[54] Considering the shrill debate on the issue, it becomes crucial to sieve the chaff from the grain and determine whether investor-State arbitration is the real problem or there is a bigger one lurking in the shadows.

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https://ctil.org.in/cms/docs/Papers/Discussion/Discussion%20Paper%20on%20FDI%20in%20India_Final%20Draft%2004-03-2020.pdf.

51 Lauge N.S. Poulsen & Emma Aisbett, *When the claims hit: Bilateral Investment Treaties and Bounded rational Learning*, 65(2) WORLD POL. 273, 276 (2013).

52 Press Release, Press Information Bureau, Ministry of Finance, BIT claims against India dismissed (Jan. 20, 2020), *available at* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1599905.

53 Louis Dreyfus Armateurs SAS (Fr.) v. Republic of India, Case No. 2014-26, Final Award, ¶ 452 (Perm. Ct. Arb. Sept. 11, 2018).

54 Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India 100 (July 30, 2017) (India) [*hereinafter* "HLC Report"].

The disquiet amongst government policymakers regarding the existence of BITs originates from the mixed experience of the Indian government while dealing with investor-State arbitration based on the old BITs, which followed a neo-liberal model focusing on liberalizing global trade and cross border investments.[55] It has, however, become key that we focus on identifying the origin of these problems, rather than looking at investor-State arbitration as the sole pain point, since dispute resolution proceedings commence only after a 'dispute' has emerged in the first place.

Preliminary scrutiny reveals that a large share of investor-State arbitration disputes originated from inaction or delayed action by governmental authorities, which may or may not have resulted from a lack of adequate knowledge about India's international obligations.[56] Key stakeholders in India have already realised that it is essential that a structure is developed to deal with investor-State arbitration disputes as and when they arise (dispute management), supported by dispute prevention schemes.[57] They have also suggested that India should also disseminate information about its obligations under international agreements to all departments and levels of the Government as a part of dispute prevention strategies.[58] This becomes essential considering that when investor-State arbitration proceedings commence, defending them can be very expensive.[59]

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55 Paul Robert Gilbert, *Sovereignty and tragedy in contemporary critiques of investor state dispute settlement*, 6(2) LOND. REV. INT. L. 211, 216 (2018); M. Sornarajah, *A law for need or a law for greed?: Restoring the lost law in the international law of foreign investment*, 6 INT'L ENVTL. AGREEMENTS: POLITICS, L. & ECON. 329, 335 (2006); Prabhash Ranjan, *Building confidence, BIT by BIT*, THE HINDU, June 19, 2019, *available at* https://www.thehindu.com/opinion/op-ed/building-confidence-bit-by-bit/article28067297.ece [*hereinafter* "Ranjan"].

56 *Id.*

57 HLC Report, *supra* note 52, at 101.

58 *Id.* at 111.

59 *Id.* at 101.

The recent debate on investor-State arbitration has largely ignored the positives of the system, which is now the preferred mode of dispute resolution for investment disputes. ISDS, including investor-State arbitration, may have contributed to investment flows into India in the past.[60] The Queen Mary and White & Case survey stated that 97 per cent of respondents indicated that international arbitration is their preferred method of dispute resolution owing to the attributes of arbitration such as party autonomy, confidentiality, transparency, cost and time efficiency.[61] While underlining the need to reform the system, it must also be understood that States have won more disputes than they have lost in investor-State arbitration.[62]

As indicated by the Government, the problem originates from the broad provisions in the old BITs, and not from investor-State arbitrations itself.[63] The report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India ["**HLC Report**"] also raises the issue by asking for a reconsideration of whether a complete move away from

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60 Prabhash Ranjan, Harsha Vardhana Singh, Kevin James & Ramandeep Singh, *India's Model Bilateral Investment Treaty: Is India too Risk Averse*? 38, 39 (Brookings India IMPACT Series No. 082018, Aug. 2018), *available at* https://www.brookings.edu/wp-content/uploads/2018/08/India's-Model-Bilateral-Investment-Treaty-2018.pdf [*hereinafter* "Ranjan et al."]; Rashmi Banga, *Impact of Government Policies and Investment Agreements on FDI Inflows* (ICRIER Working Paper No. 116, 2003).

61 White & Case & School of Int'l Arb., Queen Mary Univ. of London, *2018 International Arbitration Survey: The Evolution of International Arbitration* 5 (2018), *available at* http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF.

62 *Investment Dispute Settlement Navigator*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement?status=1.

63 Lok Sabha, Unstarred Question No.169: Bilateral Investment Treaties, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 17, 2017), *available at* http://164.100.24.220/loksabhaquestions/qhindi/12/AU169.pdf [*hereinafter* "Answer No. 169 on BITs"].

investor-State arbitration is required.[64] This indicates that a broader reform may be required rather than using investor-State arbitration as the scapegoat for all issues in question.

IV. Exorcising the demons of *White Industries*

The Indian government woke up to the possible dire consequences of investor-State arbitration based on the old BITs after the *White Industries* award and the slew of cases which followed. This led it to terminate its existing BITs and attempt to renegotiate new BITs on the basis of a new model.[65] The Government in 2016 also formed a High Level Committee under the Chairmanship of Mr Justice B N Srikrishna, Retired Judge, Supreme Court of India ["**HLC**"] to "*review the institutionalisation of arbitration mechanism in India*".[66] In this Part, we discuss whether these and other steps taken by the Indian government have worked to resolve the concerns related to investor-State arbitration.

A. A fresh start for BITs

The Indian government considered that "*India's earlier BITs contained many provisions which could be subjected to broad and ambiguous interpretations*" and thus moved ahead to terminate more than 58 out of 83 BITs which existed in 2015 as a step to deal with investor-State arbitration.[67] This was followed by the release of a new Model BIT in 2015,[68] which, as per the Government,

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64 HLC Report, *supra* note 52, at 106–07.

65 HLC Report, *supra* note 52, at 100; Law Commission of India, Report No. 260 – Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, ¶ 1.7 (2015), *available a*t http://lawcommissionofindia.nic.in/reports/Report260.pdf [*hereinafter* "Report No. 260"].

66 HLC Report, *supra* note 52.

67 Answer No. 169 on BITs, *supra* note 61; Tim R. Samples*, Winning and Losing in Investor – State Dispute Settlement*, 56(1) AM. BUS. L.J. 115, 147 (2019).

68 For the purposes of clarity, it is stated that the text of the 'Model Indian BIT 2015' is taken from the document *available at* https://dea.gov.in/sites/default/files/ModelTextIndia_BIT_0.pdf [*hereinafter* "Model

"*balances the investor's rights and obligations and is likely to reduce the possibility of broad interpretations in the context of any investment disputes under the treaty*."[69] The new Model BIT has particularly modified the standards of protection, and has also included detailed provisions on investor-State arbitration. These steps have been taken to fulfil two key objectives: *first* to provide protection to foreign investors;[70] and *second* to reduce the discretion of arbitral tribunals over treaty interpretation.[71]

The HLC also recommended adoption of alternatives to investor-State arbitration such as mediation and State-to-State arbitration, and incorporation of an appellate mechanism. These measures have been seen in the new BITs signed in recent years with Belarus, Taiwan, and the Kyrgyz Republic after the release of the Model BIT, 2015.[72]

Indian BIT 2015"]. There was a 'Draft Model Indian BIT, 2015' which was released earlier in the same year and is *available at* https://www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf [*hereinafter* "Draft Model Indian BIT 2015"].

69 Answer No. 169 on BITs, *supra* note 61.

70 Lok Sabha, Unstarred Question No.1290: Bilateral Investment Treaties, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 25, 2016), *available at* https://dipp.gov.in/sites/default/files/lu1290.pdf; Model Indian BIT 2015, *supra* note 66, art. 3.2 mentions the FPS standard.

71 Prabhash Ranjan & Pushkar Anand, *The 2016 Model Indian Bilateral Investment Treaty: A Critical Deconstruction*, 38(1) NW. J. INT'L L. & BUS. 1, 8 (2017) [*hereinafter* "Ranjan & Anand"]; Department of Economic Affairs, Ministry of Finance, Government of India, *Transforming the International Investment Agreement Regime: The Indian Experience* (2015), *available at* https://worldinvestmentforum.unctad.org/wp-content/uploads/2015/03/India_side-event-Wednesday_model-agreements.pdf; Model Indian BIT 2015, *supra* note 66, arts. 3.1, 5.4, 13.2, 13.3, 13.5, 26.1.

72 HLC Report, *supra* note 52, at 106–11 *et seq*.

B. Inclusion of a new format for investor-State arbitration

Detailed provisions on investor-State arbitration have been included in the recent BITs signed by India. The BIT with Belarus signed in September 2018 included detailed provisions which covered a requirement to exhaust domestic remedies for a time period of five years (i.e. a strict time period within which disputes should be filed), and a requirement of conduct of consultation, negotiation, or other third party procedures for a period of six months before pursuing investor-State arbitration.[73] Similar requirements are also seen in the Indian Taipei Association-Taipei Economic and Cultural Center in India Bilateral Investment Agreement, albeit with variations in the time periods for completion of pre-arbitration proceedings.[74] These provisions are, in turn, supported by detailed provisions on transparency, qualification of arbitrators, rules on conflict of interest, and the possibility of submission of joint interpretations.[75]

The provisions on investor-State arbitration included in these recent BITs are modified versions of the provisions seen in the Draft Model Indian BIT 2015, and some remove controversial issues, such as the requirement of consent for investor-State arbitration for a second time.[76] The new BITs still continue with the exclusion of umbrella clauses and restriction on review of domestic judicial decisions.[77] Combined with the large number of qualifications discussed above, the investor-State arbitration provision in

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[73] Treaty on Investments, Belr.-India, art. 15, Sept. 24, 2018.

[74] India-Taiwan Bilateral Investment Agreement, art. 15, 2018.

[75] *Id.* arts. 21, 17, 18, 23.

[76] Draft Model Indian BIT 2015, *supra* note 66, art. 14.4 (ii); Report No. 260, *supra* note 63, ¶ 5.5.2; A requirement for a second consent (besides the treaty itself) would have meant that the State would be able to slow down the recourse of the investor to investor-State arbitration by withholding the consent to arbitration thereby reducing the effectiveness of protection under the treaty.

[77] An umbrella clause can bring contractual commitments by a State under the protection of an investment treaty. *See* Grant Hanessian & Kabir Duggal, *The 2015 Indian Model BIT: Is This Change the World Wishes to See?*, 30(3) ICSID REVIEW 729, 736 (2015).

the new Model BIT and the latest BITs signed by India are considered to be favourable to the host State, which may not be a much desired outcome since the ultimate aim was a balance of powers between the investor and the host State.[78] In any case, the inclusion of investor-State arbitration in the recent BITs indicates that India has not given up on investor-State arbitration, and still sees it as a viable model for dispute resolution, albeit with modification of the mechanism.

C. Promotion of State-to-State arbitration as an alternative to investor-State arbitration

The India-Brazil Investment Cooperation and Facilitation Treaty, 2020 ["**India-Brazil ICFT**"] went a step further than the dilution of investor-State arbitration in the Model Indian BIT 2015 by eliminating it altogether. State-to-State arbitration has been included as the sole mode of binding dispute resolution, with the mandate and power of such tribunal also being highly restricted.[79] This step may have been shaped by a combination of two key factors.

First, the Brazilian Cooperation and Facilitation Investment Agreements, which had been signed prior to this India-Brazil ICFT, also contained State-

[78] Ranjan & Anand, *supra* note 69, at 51.

[79] Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Br.-India, art. 19, Jan. 25, 2020, *available at* https://dea.gov.in/sites/default/files/Investment%20Cooperation%20and%20Facilitation%20Treaty%20with%20Brazil%20-%20English_0.pdf. State-to-State arbitration is a means for dispute resolution between the parties to a treaty and normally deal with disputes regarding interpretation or application of the treaty. A recourse to State-to-State arbitration is possible under most investment treaties based on the clause providing for resolution of disputes between the parties to the treaty. *See* ANGSHUMAN HAZARIKA, STATE-TO-STATE ARBITRATION BASED ON INTERNATIONAL INVESTMENT AGREEMENTS 19 (2020).

to-State arbitration as the sole mode of third-party dispute resolution. This has also been explained in an official release by the Brazilian government.[80]

Second, the inclusion of a tiered dispute resolution model with State-to-State arbitration as the final tier as an alternative to investor-State arbitration, had been suggested by the HLC in its report. This may have been an attempt by the Government to adopt that suggestion.[81]

D. Unilateral and joint interpretative statements

India has chosen to issue joint interpretative statements on the meaning of a few important terms included in the new BITs. Bangladesh and Colombia have chosen to enter into agreements to accept this joint interpretative statement.[82] Before this step, India, on February 8, 2016, had made a unilateral interpretative statement, while requesting the 25 States mentioned in the statement to come forward for joint interpretative statements if they wanted their BITs to continue to remain in force.[83] Keeping in view that most States (except two) preferred their BITs to expire rather than entering into a joint interpretative statement with India, it prima facie appears that

80 Prior to this, Brazil had entered into Cooperation and Facilitation Investment Agreements with Mozambique, Angola, Malawi Mexico, Colombia, and Chile. *See* Ministry of Development, Industry and Foreign Trade (MDIC), Gov't of Brazil, *The Cooperation and Facilitation Investment Agreement*, MDIC, *available at* http://www.mdic.gov.br/arquivos/CFIA-Presentation-EN.pdf.

81 HLC Report, *supra* note 52, at 106–07.

82 Joint Interpretative Declaration between the Republic of India and the Republic of Colombia regarding the Agreement for the promotion and protection of investments, India-Colom., (2018) *available at* https://dea.gov.in/sites/default/files/JID%20with%20Colombia.pdf; Joint Interpretative Notes on the Agreement between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investment, India-Bangl.,(2017) *available at* https://dea.gov.in/sites/default/files/Signed%20Copy%20of%20JIN.pdf.

83 Ministry of Fin., Dep't of Econ. Aff., Gov't of India, *IC Office Memorandum — Regarding Issuing Joint Interpretative Statements for Indian Bilateral Investment Treaties*, Off. Memo. F.No. 26/07/2013 (Feb. 8, 2016) (on file with the authors).

the aim has not been completely fulfilled.[84] In the absence of consent from the opposite State, the value of the unilateral interpretative statements would be determined by any future arbitral tribunal which may have to deal with disputes based on sunset clauses under these now expired treaties.[85] In any case, under international law, the tribunals have to consider these interpretative statements (whether unilateral or joint) while making a decision.[86]

V. Analysis of India's approach in the new Model BIT

The aforementioned steps taken by India including approaching the courts to impede ongoing investor-State arbitrations and terminating existing BITs in favour of entering into fresh agreements with States have wide consequences. It thus becomes important to evaluate whether these steps have worked in India's favour, or hurt her prospects.

A. Potential effects of India's new investment 'protection' regime

An actual analysis of the impact of the termination of BITs with respect to FDI inflows or business has not been undertaken. However, in practice, the termination of BITs has definitely led to a difference in perception between the Government's goal to attract more foreign investment and the message that goes out to the investors regarding India's desire to protect

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84 *International Investment Agreements Navigator: India – Bilateral Investment Treaties*, UNCTAD: INV. POL'Y HUB, *available at*, https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.

85 HLC Report, *supra* note 52, at 112; Geoffrey Gertz & Taylor St John, *State interpretations of investment treaties: Feasible strategies for developing countries* (Policy Brief, Global Economic Governance Programme, Balavatnik School of Gov't, Univ. of Oxford, June 2015), *available at* https://www.geg.ox.ac.uk/sites/geg.bsg.ox.ac.uk/files/GEG%20Gertz%20and%20St%20John%20June2015_A.pdf.

86 HLC Report, *supra* note 52, at 111, 112.

investors.[87] Evidence shows that BITs have helped to attract foreign investment to India.[88] Additionally, many countries insist on investment treaty protection for their investors as a precondition for providing political risk insurance for their investments.[89] In such a situation, termination of BITs at one go is an issue which at least merits a careful cost-benefit analysis by an appropriate government authority.

Authors have stressed that the new Model Indian BIT may not be completely suitable for replacing the old BITs for several reasons.[90] First, the replacement of the FET standard with a new standard sought to be linked to customary international law, brings about a high level of uncertainty and possibility of wide interpretation by a tribunal, thereby creating a problem which India sought to avoid in the first place.[91] This unique standard, called 'treatment of investments', is distinct from customary international law and contains four specific instances when violations can be considered.[92] These four instances are denial of justice,

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87 RANJAN, *supra* note 9, at 355; Pragya Srivastava, *What new Bilateral Investment Treaty is, and what it does*, FIN. EXPRESS, Aug. 2, 2018, *available at* https://www.financialexpress.com/economy/india-scaring-away-foreign-investors-what-new-bilateral-investment-treaty-is-and-what-it-does/1267124.

88 *Id.*; Nilanjan Sen & Amarendu Nandy, *What ails India's Model BIT?*, THE HINDU: BUS. LINE, June 28, 2020, *available at* https://www.thehindubusinessline.com/opinion/what-ails-indias-model-bit/article31939413.ece.

89 James J. Waters, *A Comparative Analysis of Public and Private Political Risk Insurance Policies with Strategic Applications for Risk Mitigation*, 25 DUKE U. J. COMP & INT. LAW 360, 370 (2015); Aditya Goyal, *Fixing the Broken Legs of Investor-State Arbitration*, 1 HNLU STUDENT BAR J. 17, 19 (2016) [hereinafter "Goyal"].

90 Jarrod Hepburn & Ridhi Kabra, *India's new model investment treaty: fit for purpose?*, 1(2) INDIAN L. REV. 95, 112 (2017) [*hereinafter* "Hepburn & Kabra"]; Anujay Shrivastava & Kaustabh Kapoor, *Significance of International Investment Arbitration in India's Efforts towards instituting a robust regulatory regime,* 9 INDIAN J. INT'L ECON. L. 82, 97 (2019).

91 Manu Thadikkaran, *Model text for the Indian Bilateral Investment Treaty: An Analysis*, 8 NUJS L. REV. 31, 37 (2015).

92 Model Indian BIT 2015, *supra* note 66, art. 3.1; Hanessian & Duggal, *supra* note 75, at 736; Prabhash Ranjan, *Investment Protection and Host State's Right to Regulate in the Indian Model*

fundamental breach of due process, targeted discrimination on manifestly unjustified grounds linked to 'gender', 'race', or 'religion' and manifestly abusive treatment. A reference to customary international law here opens the pandora's box on what is the exact standard in customary international law and since the tribunals are dealing with a completely new 'autonomous' standard, without any prior guidance, they may exercise their discretion to come to a wide interpretation.[93]

Further, globally prevalent standards, such as MFN – which are seen in almost all trade and investment agreements till date – have been removed, therefore creating further confusion about the exact scope of protection which would be provided in the absence of known standards of protection.[94] In view of this situation, the new Model BIT, which removes the MFN standard, brings uncertain standards, and provides wide-ranging regulatory power, may not be attractive to an investor.[95] Key issues which may be of concern to investors are the exclusion of measures by local governments and taxation measures, power of issuance and revocation of compulsory licenses, and inclusion of the new standard to replace FET as discussed above.[96]

The Law Commission of India ["**Law Commission**"] had flagged out a number of provisions on investor-State dispute settlement in the Draft

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Bilateral Investment Treaty: Lessons for Asian Countries, *in* ASIA'S CHANGING INTERNATIONAL INVESTMENT REGIME 47, 57 (Julien Chaisse, Tomoko Ishikawa & Sufian Jusoh eds., 2017).

93 Ranjan et al., *supra* note 58, at 27; Thadikkaran, *supra* note 89; Saurabh Garg et al., *supra* note 10.

94 Priti Patnaik, *Deconstructing India's Model Bilateral Investment Treaty*, THE WIRE (Sept. 16, 2016), *available at* https://thewire.in/economy/deconstructing-indias-model-bilateral-investment-treaty.

95 Sen & Nandy, *supra* note 86; Model Indian BIT 2015, *supra* note 66, arts. 2.4, 6.4.

96 Model Indian BIT 2015, *supra* note 66, arts. 2.4, 3.1.

Model Indian BIT for modification or removal.[97] Key clauses which had been flagged out for removal were:

The purpose clause at Article 14.1, which has been described as vague and potentially unacceptable to other countries on the negotiating table.[98] While including the clause, no explanation was provided on what would be considered as a situation where an investor is using or threatening to use investor-State arbitration to compel a host State to act or refrain from acting. In the absence of an explanation, a host State could use this provision in case of any dispute to argue that it was an attempt to threaten the host State.

The clause restricting the power of an investor-State arbitral tribunal in Article 14.2(ii)(a), which is considered to render 'the entire BIT unworkable'.[99] This assessment may have been made based on the fact that while a domestic judicial authority may have made a decision based on the prevailing local laws, an investor-State arbitral tribunal evaluates the issue on the basis of the standards of protection present in the treaty and/or international law (based on the applicable law provisions in the treaty). With a blanket prohibition on consideration of a dispute by a tribunal after it has

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97 Report No. 260, *supra* note 63, at 40 *et seq*.

98 Draft Model Indian BIT 2015, *supra* note 66, art. 14.1 ("Without prejudice to the rights and obligations of the Parties under Article 15, this Article establishes a mechanism for the settlement of Investment Disputes. An Investor shall not use or threaten to use this Article in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting."). This provision was not included in the final Model Indian BIT 2015, *supra* note 66.

99 *Id.* art. 14.2(ii)(a) ("In addition to other limits on its jurisdiction, a tribunal constituted under this Article shall not have the jurisdiction to: a. re-examine any legal issue which has been finally settled by any judicial authority of the Host State between the Investor party to the Investment Dispute (the "Disputing Investor") and the Party to the Investment Dispute ("Respondent Party"), or between the Disputing Investor, Investment or any other natural/legal person having a common right or interest in the Investment and a Respondent Party or a third party.").

been dealt with by a domestic forum, obtaining protection under the investment treaty standards would not have been possible for an investor.

Article 14.8(iv), which allowed a non-disputing State party to make submissions regarding treaty interpretation, has been found to be potentially in conflict with the State-to-State dispute resolution provision.[100] The objection on this issue was related to the fact that the 'State-to-State' arbitral provision in the treaty is already present for resolution of disputes regarding the interpretation of the treaty between the State parties. If the non-disputing party is allowed to make submissions on interpretation directly to the investor-State tribunal here without specifying what would be the scope of the submission (whether it is optional for the tribunal for the consider or not), and there is a difference between the opinion of the State parties, it may mean that the investor-State tribunal is in practice resolving an inter-State dispute.

India's trade and investment partners have also disagreed with the new model, and negotiations with the U.S., the European Union ["**EU**"] and Canada have stagnated over this issue.[101] Combined with the tendency of the Government of India to change policies at short intervals, it is unlikely that any partner will be willing to agree to a model which provides a great deal of power to the State (it is a pro-State model).[102] This can be seen from the current status of negotiations under the new model (after 2016), wherein only four agreements (Taiwan Economic and Cultural Center-2018, Kyrgyz Republic-2019, Belarus-2018, and Brazil-2020) have been signed and two (Taiwan and Belarus) are in force.[103] As discussed above, in the prior paragraph, the Law Commission had already flagged out this

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[100] *Id.* art. 14.8 (iv) ("The Non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.").
[101] RANJAN, *supra* note 9, at 356.
[102] Ranjan & Anand, *supra* note 69 at 55.
[103] Sen & Nandy, *supra* note 86; RANJAN, *supra* note 9; Thadikkaran, *supra* note 89, at 42.

possibility for disagreement between negotiating partners in a number of provisions of the Draft Model Indian BIT, and hence this does not come as a surprise.[104]

Considering that India needs to attract more investment at the earliest, owing to the slowdown in the economy in the background of the COVID-19 crisis and the rise of protectionism which preceded it, a relook at its BIT strategy is crucial. Emphasis may be laid on refraining from radical deviation in treaty texts, which may prolong negotiations. India may have already missed many investors who have left for China in recent years owing to the termination of BITs with prominent capital-exporting countries such as Germany, the Netherlands, France, and the U.K.[105] Destinations such as Vietnam, Singapore, and Cambodia already have BITs with these countries or have even moved ahead to sign new investment agreements with the EU itself (Singapore and Vietnam).[106] India, on the other hand, does not have any investment protection agreements in force with the EU and has only two remaining BITs in force with two of the smallest EU economies.[107]

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104 Report No. 260, *supra* note 63, ¶¶ 5.2.1, 5.5.3.

105 The status of Indian BITs is *available at* https://dea.gov.in/bipa.

106 *International Investment Agreements Navigator: EU - Viet Nam Investment Protection Agreement (2019)*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-nam-investment-protection-agreement-2019; *International Investment Agreements Navigator: EU - Singapore Investment Protection Agreement (2018)*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu---singapore-investment-protection-agreement-2018.

107 BITs between the following two EU Member States and India were in force as on Aug. 21, 2020: Latvia and Lithuania. Official information about GDP of EU Member States, *see Which Member States have the largest share of EU's GDP?*, EUROSTAT, *available at* https://ec.europa.eu/eurostat/web/products-eurostat-news/-/DDN-20180511-1?inheritRedirect=true.

B. Impact on Indian investors investing abroad

It is useful to understand that while India was traditionally a capital importing country, in recent years a number of Indian companies have emerged as multinationals with significant investments abroad.[108] Investor-State arbitration has been used extensively by Indian investors in the past, with at least nine known disputes at various stages of dispute resolution.[109] The Indian investors have also repeatedly obtained benefits of the Indian BIT program, with a network of BITs which at a time were more than 89 in number, rather than BITs being only an option for a foreign investor in India. India has also emerged as a country with major FDI outflows and ranked 23rd in the world in this regard.[110] This has meant that the Indian investors may need BIT protection, particularly while dealing with more politically volatile regions of the world.

Indian investors have invested in different countries of the world, including developing countries and historically politically unstable regions such as the African continent.[111] These investments may give rise to disputes, and past experience, based on the list of cases where Indian investors have sought the benefit of investment treaty protection, includes some countries which are considered highly politically unstable. Out of the nine known cases,

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108 Ranjan et al., *supra* note 58, at 39.

109 *Investment Dispute Settlement Navigator: India – Cases as Home State of Claimant*, UNCTAD: INV. POL'Y HUB, *available at* https://investmentpolicy.unctad.org/investment-dispute-settlement/country/96/india; *Indian company invokes Dutch BIT – rather than Indian treaty – in new arbitration over withdrawn subsidies in Uzbekistan*, IA REPORTER (Sept. 30, 2013), *available at* https://www.iareporter.com/articles/indian-company-invokes-dutch-bit-rather-than-indian-treaty-in-new-arbitration-over-withdrawn-subsidies-in-uzbekistan.

110 *Foreign direct investment, net outflows (BoP, current US$)*, WORLD BANK, *available at* https://data.worldbank.org/indicator/BM.KLT.DINV.CD.WD?most_recent_value_desc=true.

111 Harsh Vardhan Singla, *Why the India Africa bond matters*, HINDUSTAN TIMES, Feb. 13, 2020, *available at* https://www.hindustantimes.com/analysis/why-the-india-africa-bond-matters/story-P59WWjGjfguAeNYBYKmcBO.html.

based on investment treaties, raised by Indian investors,[112] four of them were against countries which were rated below India (ranked 63rd) in the latest Ease of Doing Business Rankings.[113] This indicates that they were operating in countries which may have tougher business environments than what they faced at home.[114] In light of this situation, the availability of investment treaty protection may be of significant importance to these investors.

The wide net of Indian investment treaty partners includes developing countries, which do not typically have such BITs with a large number of other countries; for example, Djibouti (with eight other countries), Trinidad and Tobago (with 12 other countries), Myanmar (with ten other countries), and Seychelles (four other countries).[115] This provides Indian investors with an extra layer of protection as compared to investors from other countries while investing in these countries. With the current world order, where countries are competing to secure a foothold in new destinations through investments, and where Indian investors are being encouraged to invest in

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112 The known cases in this list are: Khadamat Integrated Solutions Pvt. Ltd. v. Kingdom of Saudi Arabia, Case No. 2019-24 (Perm. Ct. Arb. 2019); Spentex Neth., B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016); Simplex Projects Ltd. v. Libya (2018); Naveen Aggarwal, Neete Gupta & Usha Indus., Inc. v. Bosn. & Herz., Case No. 2018-03 (Perm. Ct. Arb.); Binani v. N. Maced., Case No. 2018-38 (Perm. Ct. Arb. 2017); Indian Metals & Ferro Alloys Ltd (IMFA) v. Republic of Indon., Case No. 2015-40, Award (Perm. Ct. Arb. Mar. 29, 2019); Flemingo DutyFree Shop. Pvt. Ltd. v. Republic of Pol., Case No. 2014-11 (Perm. Ct. Arb. Jan. 6, 2014); Ashok Sancheti v. United Kingdom (1976); Ashok Sancheti v. Germany (2000).

113 *Ease of doing business rankings*, THE WORLD BANK, *available at* https://www.doingbusiness.org/en/rankings; Disputes against Uzbekistan, Libya, Bosnia and Herzegovina and Indonesia.

114 *Id.*

115 *International Investment Agreements Navigator: India – Bilateral Investment Treaties*, UNCTAD: INV. POL'Y HUB, *available at*, https://investmentpolicy.unctad.org/international-investment-agreements/countries/96/india.

new places, reducing the level of protection for them by terminating BITs may be counterproductive.

If the new Indian Model BIT, which provides an impression that it has been drafted from the perspective of a capital importing nation is implemented, it may significantly hurt the interests of Indian businesses overseas.[116] The narrow interpretation of the term 'investment', which requires formation of a local enterprise and providing a list of exceptions, which includes popular financial investments, is particularly going to hurt Indian investors, since a broad range of their investments may no longer be protected.[117] As such, a balanced BIT model may also be helpful to protect Indian investments abroad.[118]

C. Comparison between the global and the Indian approach

There is an accepted global backlash against investor-State arbitration, which arises primarily from the broad language of the BITs.[119] The Indian approach of terminating BITs, without having an alternative mechanism in hand, is, however, in stark contrast to the efforts by other countries to resolve concerns regarding old BITs.[120] States have chosen to amend BITs, issue joint interpretative statements, withdraw from the ICSID or even repudiate the investor-State arbitration mechanism, but very rarely have they decided to terminate an entire bundle of BITs at one go.[121] Some have

[116] Ranjan et al., *supra* note 58, at 18; Thadikkaran, *supra* note 89, at 32.
[117] Thadikkaran, *supra* note 89, at 33.
[118] Report No. 260, *supra* note 63, ¶¶ 1.12, 7.2.4.
[119] Ranjan et al., *supra* note 58, at 6.
[120] An exception here relates to intra-EU BITs which are being terminated by EU Member States, but that is because of the need for compliance with instructions of the European Commission and the Achmea judgment of the Court of Justice of the European Union (Slowakische Republik v Achmea BV, ECLI:EU:C:2018:158).
[121] Ranjan et al., *supra* note 58, at 6. The exception is South Africa which terminated a number of its investment treaties at one go. For details, *see* Tarcisio Gazzini, *Travelling the National*

also signed alternative agreements, brought about specific domestic legislation, or have joined new systems of providing investor protection at an international level,[122] with an aim to continue with at least some method of protection under international law for the investors.[123]

Based on the alternatives followed by other nations, India's step to terminate a number of BITs in one go could seem extreme.[124] India could have certainly chosen a middle path of negotiating new BITs which took care of its concerns, whilst keeping the old BITs in force for the time being.[125] It could have also chosen to adopt some less radical recommendations of the HLC, such as the appointment of an International Law Adviser and undertaking dispute prevention strategies through awareness creation and better cooperation with different branches of the Government on investment law issues.[126] The Model BIT, which has been brought to the table for negotiation as a replacement for the terminated treaties, was aimed at reducing the possibility of discretionary

Route: South Africa's Protection of Investment Act 2015, 26(2) AF. J. INT'L & COMP. L. 242–63 (2018).

122 An example of a new system is the UNASUR which was formed as an alternative for resolution of investment disputes in Latin America. For details, *see* Kendall Grant, *ICSID's Reinforcement?: UNASUR and the Riseof a Hybrid Regime for International Investment Arbitration*, 52(3) OSGOODE HALL L. J. 1115, 1138–49 (2015).

123 Makane Moïse Mbengue, *Africa's Voice in the Formation, Shaping and Redesign of International Investment Law*, 34(2) ICSID REV. 455, 463 (2019); Ranjan & Anand, *supra* note 69, at 4 *et seq*.

124 Ranjan et al., *supra* note 58, at 7.

125 Ranjan, *supra* note 53.

126 HLC Report, *supra* note 52, at 114. The suggested role of the International Law Adviser is to advise the Government and coordinate dispute resolution strategy for the Government in disputes arising out of its international law obligations and BITs and to train the regular staff of the Ministry of external affairs to transfer the knowledge and skills to deal with Investment disputes. Ministry of External Affairs, *Advertisement for Engagement of a Consultant (Legal)*, *available at* https://mea.gov.in/Images/amb1/DPA_III_Consultant_final.pdf.

interpretation.[127] However, it still contains a number of provisions, *inter alia*, the new standard of 'treatment of investment', the issue of 'manifest legal merit' of a dispute, applicable law for disputes, the issue of disclosure of documents based on domestic law, and scope of enforcement of investor obligations laid under the provision on 'compliance with laws' and 'corporate social responsibility', which may be subject to wide interpretation.[128] Additionally, the ISDS provision in the Model BIT contains a complicated model for investor-State arbitration, based on a requirement for exhaustion of domestic remedies and waiting for five years which has made access to this mode of dispute resolution an extremely long drawn out process for investors.[129] As earlier mentioned, the common investment protection standards (FET & MFN) have been removed or have broad exceptions,[130] making them almost irrelevant for investors.[131] Due to all these limitations, instead of facilitating negotiations, the Model BIT has been considered as a barrier to further negotiations.[132] Ultimately, the Model BIT seems to have failed in its aim to balance investor and State interests and does not fully protect the interests of either party.[133]

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127 Rajya Sabha, Unstarred Question No.1290: Investment Agreements with Foreign Countries, Answered by the Minister of State (Independent Charge) of the Ministry of Commerce & Industry (Shrimati Nirmala Sitharaman) (July 26, 2017), *available at* https://dipp.gov.in/sites/default/files/ru1122_0.pdf; Ranjan & Anand, *supra* note 69, at 17.

128 Model Indian BIT 2015, *supra* note 66, arts. 3.1, 11, 12, 21.1, 23.3, 20.3.

129 *Id.* arts. 15.1, 15.2; Ranjan & Anand, *supra* note 69, at 51.

130 *See* Model Indian BIT 2015, *supra* note 66, arts. 2.4, 6.3.

131 Ranjan & Anand, *supra* note 69, at 51.

132 Hepburn & Kabra, *supra* note 88, at 112.

133 Leïla Choukroune, *Indian International Investment Agreements and 'Non Investment Concerns'?: Time for a right(s) approach*, 7(2) JINDAL GLOB. L. REV. 157, 162 (2016).

VI. Balancing India's interest to regulate with investor protection

With the termination of BITs, the position of investment promotion and investor protection is currently in a vacuum.[134] In response, India needs to recreate an alternative regime, re-engage with the system, introduce and strengthen policies to promote investment, prevent investor-State disputes from emerging and escalating, and manage investor-State dispute settlements more effectively to balance India's right to regulate with the need for investor protection. The following approaches are suggested as a way forward.

A. Development of a mechanism to fill the current investor protection vacuum.

The Indian legal system does not have a good reputation for rapid resolution of disputes.[135] With that in mind, even with the debate about the true benefits of investor-State arbitration and the shortcomings of the system, investor-State arbitration remains the preferred mode for resolution of investor disputes.[136] Among the factors which promote the attractiveness of investor-State arbitration are its key features: access to arbitration as an alternative to adjudication; party autonomy; ability to appoint qualified arbitrators; pre-declared standards of protection; and the seat of arbitration at a neutral site (commonly).[137]

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134 Ranjan, *supra* note 53.

135 Upmanyu Trivedi & Ruth Carson, *What a 38-year-old turmeric scandal says about business in India*, ECON. TIMES, Aug. 19, 2020, *available at* https://economictimes.indiatimes.com/news/economy/indicators/what-a-38-year-old-turmeric-scandal-says-about-business-in-india/articleshow/77603984.cms?from=mdr.

136 Belen Olmos Giupponi, *Investment Mediation and Regional Economic Integration Organizations: The European Union and the Central American Integration System in Comparative Perspective*, 34(2) CONFICT RESOL. Q. 119 (2016).

137 Stephan Schill, *The Virtues of Investor-State Arbitration*, EJIL: TALK! (Nov. 19, 2013), *available at* https://www.ejiltalk.org/the-virtues-of-investor-state-arbitration/.

It is proposed that an alternative to a treaty-based arbitration mechanism – which is urgently required in the absence of BITs for investors in India – can be developed without signing fresh BITs as well. The foundation for such a mechanism shall depend on the Government's commitment to adhere to certain standards of protection, which shall be clear with no ambiguity, and the inclusion of arbitration as a trusted dispute resolution mechanism. The mechanism to bring about these commitments into action can be undertaken as a two-part process, as discussed below.

i. *Agreement between investors and the Central Government*

Foreign investment contracts, which are also popularly referred to as investor-State contracts, have been a key part of investment protection regimes till date. They have been defined as:

> "*[…] agreements between a foreign investor (or a local subsidiary of a foreign investor) and a state (or a state-owned entity). They set the terms and conditions for an investment project in the territory of that state.*"[138]

While the definition itself is quite wide and may potentially include investments in all forms and structures, they have largely been limited to public services such as road or rail infrastructure, power generation, oil and gas exploration and the like.[139] Further, these contracts have generally involved the payment of a certain sum of money or providing other benefits to the Government or a Government-owned entity for the exploration rights of a mineral resource, or for permits to provide the public service.[140] Traditionally, these contracts have taken the form of concession

[138] Lorenzo Cotula, Foreign Investment Contracts 1 (International Institute for Environment and Development, Sustainable Markets Investment Briefing No. 4, 2007), *available at* https://pubs.iied.org/pdfs/17015IIED.pdf.

[139] Lise Johnson & Oleksandr Volkov, *Investor-state Contracts, Host-State "Commitments" and the myth of stability in International Law*, 24(3) AM. REV. INT'L ARB. 361, 362 (2013).

[140] *Id.* at 363.

agreements or production sharing contracts for raw material extraction, profit/revenue sharing arrangements for public services, and build-operate-and-transfer agreements for roads, railways and similar infrastructure projects.[141] A major part of the criticism for these agreements was the lack of transparency and different standards for investors based on their negotiating ability.[142]

The criticism mentioned above does not mean that investor-State contracts are a failed system. A modified mechanism based on such investor-State contracts is proposed, which would be available to investors in all sectors notified by the Government, and not merely to investors signing an agreement for public service or resource extraction with the Government or a Government agency. Under this mechanism, investors who desire investment protection may sign an agreement directly with the Government for the protection of their investments if they desire to be covered under the regime. This agreement can give expanded rights to the investor vis-à-vis the Government while protecting the interests of the Government, as well.[143] Additional provisions which may be included in such an agreement but are currently excluded from the Model BIT 2015 are, *inter alia*, guarantees on tax breaks, grant of subsidies, exemption from compliance with certain labour laws, and guarantees for special treatment by sub-national (State) governments.[144]

Under this mechanism, the Government may release certain sector-specific investment promotion regimes (schemes) which would contain commitments from the Government for protection of investment from foreign investors. These commitments may cover specific risks, obligations,

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141 Cotula, *supra* note 136.
142 *Id.*
143 Sam Halabi, *Efficient Contracting Between Foreign Investors and Host States: Evidence from Stabilization Clauses*, 31 NW. J. INT'L L. & BUS. 261, 268 (2011).
144 *See also* Model Indian BIT 2015, *supra* note 66, arts. 2.4, 4.2, 6.3.

and other terms in consonance with the aims and objectives of both the investor and the State. As with the current practice for such schemes, the Government would sign an agreement with any investor who agrees to make an investment in that particular sector, in adherence with the scheme. These commitments may be added in the existing investment promotion schemes of the Government as well. For instance, if it is included in the much-publicised Production Linked Incentive Scheme for Large Scale Electronics Manufacturing notified by the Ministry of Electronics and Information Technology,[145] a foreign investor willing to invest through the scheme will also benefit from the investment protection commitments.

This proposed mechanism of inclusion of the possibility for special investor-specific commitments within the investment promotion schemes resolves the problem of lack of transparency associated with investor-State contracts as the commitments which will be provided will be known to all beforehand, and no wide discretionary amendments would be possible. A limited leeway may be provided, in a transparent manner, for specific commitments in the agreement which may vary from investor to investor, depending upon the complexity of the investment. Such exemptions could include, *inter alia*, a coverage of subsidy commitments, tax holidays, exemption from local content requirements etc. Under the proposed scheme, investments which require a shorter time commitment and fewer resources may have simpler contracts with adequate compensation and an easy exit as a primary remedy for the investors. On the other hand, an

[145] Ministry of Electronics and Information Technology, Gov't of India, Notification No. W-28/1/2019-IPHW-MeitY – Production Linked Incentive Scheme (PLI) for Large Scale Electronics Manufacturing (Apr. 1, 2020), *available at* https://www.meity.gov.in/writereaddata/files/production_linked_incentive_scheme.pdf.

investment that requires a significant commitment of time and resources will demonstrate more complex arrangements addressing specific risks.[146]

The proposed schemes will likely include contractual provisions governing the States' ability to regulate or change the law in a way that balances investment protection. Investors can mitigate political risk through inbuilt early termination rights, open-ended exploration and development commitments, and balancing of clarity and vagueness with respect to obligations undertaken by the State and duties of the State to ensure compliance with those obligations.[147] Examples of such situations could include a promise of tax breaks which are provided by a government or special laws or rules framed by States to facilitate investments. There is a risk that such commitments are withdrawn with a change of governments. A balance could be obtained by inclusion of these commitments also as a part of the contract with the investor and linking them with compensation guarantees and possibility for dispute resolution in a mutually agreeable mode (or forum) in case those terms are violated. Thus, investors and the State can both benefit from a regime of law that balances State obligations with investor expectations.

This option is unavailable in a BIT regime as governments, at the time of signing the treaty, have little incentive or know-how about unforeseen situations (such as an economic downturn or emergence of disruptive technologies) in the future to negotiate appropriate political risk (political risk mitigation) for investors in the future, based on the requirements of the specific sector of investment. Providing investment friendly conditions to attract more investments in an economic crisis or a willingness of the

[146] Halabi, *supra* note 141, at 277.
[147] Thomas Wälde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31(2) TEX. INT'L L. J. 215, 224, 226–27, 231–37 (1996).

government to attract specific investors or investors in specific sectors may be reflected by providing investor-State contracts.

For example, a BIT based on the Model Indian BIT 2015 may provide that investors will have to wait for four (or five) years before recourse to investor-State arbitration. This may be acceptable to investors at times of economic stability or with small investments, but investors investing large sums of money in rapidly changing industries may wish faster resolution of disputes as a five-year wait may mean that their investment loses value by the time investor-State arbitration is possible.

Agreements based on the proposed scheme will save from the horrors of a wide interpretation of any clause of the BIT. Since investor-State contracts are based on the agreement of the parties and the specific requirements of the particular investment, customised provisions could be included in the contracts which could be designed in a narrower manner. BIT provisions, on the other hand, are designed to cover a wide range of future situations and provide the general agreement between the States. Further, in the context of re-emergence of State-to-State arbitration[148] and the prevailing view that State engagement can threaten investor's rights and re-politicise investor-State disputes, the scheme provides ways to retain investor-State arbitration, as the dispute resolution method, as discussed below.[149]

The suggested schemes and agreements signed under them can radically promote the interest of both the investors and the State. This is because in the specific text of the contracts, the rights and claims of both, investors and host States, are recognised and valued, rather than one being reflexively privileged over the other.[150] As such, a major foreign investor who promises

[148] Investment Cooperation and Facilitation Treaty, India-Braz., Jan. 25, 2020.

[149] Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55(1) HARV. INT'L L.J. 4 (2014).

[150] *Id.* at 5.

creation of large number of jobs or promises investment in a sector which is considered important for the country may be provided added incentives to facilitate its entry. This may not be possible under the BIT regime which lays down broad commitments for investment protection and facilitation rather than considering the requirements of a particular investor or the importance of a particular investment. Even a country which has a BIT model tilted in favour of the host State may be willing and able to provide additional exemptions/commitments for investments in strategic industries or for very large investments which it considers would benefit the State. Ultimately, the investment protection provisions will act as an added bonus to the incentives already promised under investment promotion schemes.

The standards of protection and the applicable law which are committed in this scheme may be broadly based on the Indian Model BIT 2015, since the Government has already conveyed that it is comfortable with providing those standards of protection. Investors and the Government may, however, choose to negotiate specific commitments which go beyond the BIT commitments to overcome any discomfort regarding them. Any provisions on fork-in-the-road clauses and waiting periods for the commencement of investor-State arbitration may be based on the Model BIT 2015 and India's recent BITs with Taiwan, Kyrgyz Republic, and Belarus, which were signed based on this Model BIT in 2018 and 2019, and reflect the latest Government's comfort level on the issue.[151]

ii. *Inclusion of arbitration as a trusted dispute resolution mechanism*

The agreements entered into on the basis of the investment protection scheme discussed above would include an arbitration mechanism modelled

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[151] These treaties prescribe that the investor must have pursued domestic remedies for 4 years (or 5 years) and must waive their right to pursue further remedies in domestic forums. *See* India-Belr. BIT, arts. 15.2, 15.6; India-Taiwan BIT, art. 15.4; Treaty on Investments, Kyrgyz Rep.-India, arts. 15.2, 15.5(iv), June. 14, 2019.

on commercial arbitration. This would essentially entail the resolution of a dispute by an arbitral tribunal on the basis of the applicable law prescribed under the aforementioned scheme at a pre-determined seat outside the country, in a New York Convention country. This agreement would refer to established rules such as the ICC or the United Nations Commission on International Trade Law ["**UNCITRAL**"] Rules, and an award under this arbitration would be explicitly notified by the Government as an award arising from a commercial dispute. This would ensure that the generated award would have a guarantee of enforcement under the New York Convention in India.[152]

The other key benefits of this mechanism are as follows:

i. The investor and the Government are both clear about the standards of protection and the commitments under the system.

ii. There is no requirement for the home State of the investor to enter into any BITs, which will make the process simpler and faster. India's BIT negotiations have turned out into a long-drawn process and only a handful of States have entered into BITs with India based on the new model. Considering that negotiating a treaty may take time and investors from across the globe may need immediate protection, the government may enter into agreements with investors based on the framework already available under the aforementioned investment promotion schemes.

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[152] India has made a reservation under the New York Convention under which it has committed to apply the Convention for the recognition and enforcement of 'commercial' disputes only. *See* India, NEW YORK CONVENTION GUIDE, *available at* https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1.

iii. The government can make different commitments under different schemes based on the specific requirements of the sector.

iv. The investors will have recourse to arbitration, which is the preferred mode for investment dispute resolution.[153]

Investor-State arbitration, under this new mechanism, is proposed since the Government has still expressed willingness to submit to direct arbitration with investors in the recent India-Taiwan BIT, India-Kyrgyz Republic BIT and India-Belarus BIT. This means that there is still acceptability for arbitration which balances the interests of both parties. Overall, the inclusion of the arbitration mechanism will raise investor confidence in the protection of investments, as their rights will not be in abeyance even with the current vacuum in investor-protection frameworks.[154]

B. Development of coordination and response mechanism between the Central and State Governments

India's reaction to investor-State disputes has been to terminate many of its old BITs and issue unilateral and joint interpretative statements, but the provision of sunset clause in the terminated treaties continues to leave scope for the emergence of further investor-State arbitration claims.[155] For the avoidance of disputes reaching the stage of a treaty arbitration, the scattered response of the Government in the form of proposing Centre-

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[153] Giupponi, *supra* note 134.
[154] *See* discussion *supra* Part IV(A) regarding the 'vacuum'.
[155] Kshama Loya Modani & Moazzam Khan, *India: Investment Arbitration & India – 2019 Year In Review,* MONDAQ (Jan. 14, 2020), *available at* https://www.mondaq.com/india/arbitration-dispute-resolution/883366/investment-arbitration-india-2019-year-in-review.

State Investment Agreement,[156] setting up of inter-ministerial groups,[157] a proposal of appointment of mediators and setting up of fast track courts[158] may be inadequate, and convergence is required in its efforts. As a host State, India needs to preserve certain policy space by which it can ensure that investors are committing themselves to responsible business conduct.[159]

Development of a State coordination and response system for investment disputes ["**State Coordination and Response System**"] may be a pathway to achieve this goal. Peru has established a similar system for international investment disputes.[160] India may be guided by Peru's approach to ensuring

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156 Arup Roychoudhury, *FinMin preparing draft Centre-state investment pact*, BUS. STD., Mar. 18, 2016, *available at* https://www.business-standard.com/article/economy-policy/finmin-preparing-draft-centre-state-investment-pact-116031700999_1.html. Centre-State investment agreements were proposed to ensure fulfilment of the obligations of the State government under India's BITs. They were expected to ensure better implementation of investment treaty obligations and remove delays from the States in clearing projects. The agreements were also proposed to have dispute resolution provisions to deal with potential violation of obligations by States, before they are taken for international arbitration. *See* Surabhi, *Centre-State pact on cards to shield foreign investors*, HINDU BUSINESS LINE, Jul. 4, 2016, *available at* https://www.thehindubusinessline.com/economy/policy/centrestate-pact-on-cards-to-shield-foreign-investors/article8807925.ece.

157 The inter-ministerial groups are formed to handle the issues which arise after a notice for arbitration has been served to the Indian Government by an Investor. *See Minutes of the 1st Inter-Ministerial Group (IMG) meeting on arbitration under BIPA by RAKIA, UAE held on 5.1.2017 at Shastri Bhawan, New Delhi under the chairmanship of Secretary (Mines), Shri Balvinder Kumar*, ITA LAW (2017), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw8083_0.pdf.

158 *Id.*

159 K. P. Sauvant, *The Evolving International Investment Law and Policy Regime: Ways Forward* 7, 21 (Int'l Ctr. for Trade and Sustainable Dev. & World Econ. Forum, E15 Task Force on Inv. Pol'y, Policy Options Paper, 2016).

160 United Nations Conference on Trade and Development (UNCTAD) Best Practices in Investment for Development, *How to Prevent and Manage Investor-State Disputes: Lessons from Peru* 38 (Investment Advisory Series, Series B, No. 10, 2011), *available at* https://unctad.org/system/files/official-document/webdiaepcb2011d9_en.pdf [*hereinafter* "Lessons from Peru"].

efficient handling of potential investor-State disputes. A State Coordination and Response System can:

i. increase understanding and awareness of the implications of international dispute settlement clauses;

ii. consolidate the investment obligations of the State;

iii. provide a system that recognises investment controversies and disputes at an early stage;[161]

iv. centralise actions when disputes arise at different levels of the State, to build capacity of the involved agencies and timely and coordinated management of the dispute; and

v. make the officials responsible for their discretionary actions.

Commitments of a BIT are applicable to both the State and Central governments. Thus, it is essential that all levels of the government and people that deal with foreign investors consider the scope and consequences of the obligations under the BITs along with the practical implications of the decisions taken with regards to the investment.[162]

The State Coordination and Response System can be empowered to directly negotiate, conciliate and mediate in the dispute. Basically, accumulation of

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[161] Analysis, *Peru's State Coordination and Response System for International Investment Disputes*, INVESTMENT TREATY NEWS, Jan. 14, 2013, *available at* https://cf.iisd.net/itn/2013/01/14/perus-state-coordination-and-response-system-for-international-investment-disputes.

[162] Lessons from Peru, *supra* note 158.

expertise, experience, knowledge, and institutional capacity can play crucial roles in an effective response to investment disputes.[163]

C. Creation of a financial protection system to deal with sunset clauses

Financial issues play an important role in building a response system for investment disputes, and a stable mechanism for payment of investor claims helps in building investor confidence. As earlier mentioned, presence of sunset clauses in the terminated BITs still leaves India with chances of claims against it based on those treaties.[164] In such a scenario, the Central Government would have to make provisions for losses arising out of claims from the sunset clauses of these BITs and ensure that a pathway is available for payment of potential investment claims, while minimising the impact on government finances.

The HLC has recommended preparing for the payment of investment treaty arbitration awards through an allocation from the Union Budget to a separate fund.[165] It is proposed, however, that instead of a separate fund, which may involve a substantial budget outgo, an insurance policy may be taken. Through the policy, a cover would be obtained for payment of any awards arising out of an unexpected interpretation of the investment agreements. The insurance policy will pay out any claims of previously unforeseen nature, which arise from the sunset clauses of the terminated agreements. As any insurer is unlikely to cover blatant violations of the

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163 UNCITRAL Working Group III, 38th Session, Submission from the Republic of Korea, at 5, U.N. Doc. A/CN.9/WG.III/WP.179 (July 31, 2019).

164 *See, e.g.,* Treaty for the promotion and protection of investments, Ger.-India, art. 15, July 10, 1995, 2071 UN.T.S. 121; Agreement for the promotion and protection of investments, India-Neth., art. 16, Nov. 6, 1995, 2242 U.N.T.S. 101; Agreement on the promotion and protection of investment, India-S. Kor., art. 15, Feb. 26, 1996, 1942 U.N.T.S. 175. The aforementioned BITs are *available at* https://dea.gov.in/bipa.

165 HLC Report, *supra* note 52, at 113.

treaty by the State, the policy could be limited to cover 'unforeseen interpretation of treaty provisions and obligations' by arbitral tribunals. Such a policy could be similar to a 'Legal Protection Insurance', which is commonly obtained by businesses to deal with potential unforeseen claims.[166] The investors are expected to feel secure due to this proposed insurance cover, as the presence of an insurance policy shows the intention of a State to pay the award money in case the investor wins a dispute against the Republic of India.

Creation of such an insurance product, even if it may not be available immediately, is not impossible. Innovative insurance products to cover investment-arbitration related situations, such as possible adverse cost awards, a requirement to repay wrongfully granted awards, or repayment due to loss in an appeal/review against awards, are already available in the market.[167]

The premium for the proposed insurance cover could be paid jointly by the central government and the States. States play a key regulatory role for many investments, and their decisions involve key issues such as land acquisition, construction permits and security provisions for investors.[168] Involving States in an insurance policy against ISDS claims might be an alternative pathway to achieve the goal of creating awareness about BIT obligations among the State government decision-makers, who would now be required to learn about them.[169] Further, the governments at both levels could

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166 More details about Legal Protection Insurances are available here: ANNA MCNEE, IBA LEGAL POLICY & RESEARCH UNIT, LEGAL EXPENSES INSURANCE AND ACCESS TO JUSTICE 12 (2019).

167 *Dispute Resolution Insurance*, GALLAGHER (Aug. 26, 2020), *available at* https://www.ajg.com/uk/corporate-insurance/dispute-resolution-insurance.

168 Sudhanshu Roy, *Reconsidering Treaty-Making In India: An Argument for Reform Through the Prism of International Investment Agreements*, 54 IND. J. INT'L L. 283, 284 (2014)

169 Dabhol, 2004 SCC OnLine Del 1298 (India); Nissan, PCA Case No. 2017-37, Decision on Jurisdiction (Perm. Ct. Arb. Apr. 29, 2019).

internally negotiate the exact share of premiums payable by a State. The quantum of premiums for a State could be linked to the implementation of measures by the States to ensure that key officials in the State government are aware of India's obligations under the BITs. This would, also have the effect of addressing the recommendation laid down in the HLC Report, to tackle the lack of knowledge about BITs among government officials.[170]

Involvement of State governments as parties in an investment protection regime was already foreseen in 2016 by the Finance Ministry through its general budget document which proposed to introduce a Centre-State Investment Agreement to ensure fulfilment of the obligations of the State government under India's BITs.[171] The proposal claimed that the States which signed such an agreement would be considered as more attractive destinations by foreign investors and if a State refuses to do so, it will be informed to all BIT partner countries.[172] This proposal was, however, withdrawn by the Ministry.[173] The decision was prudent as the Central Government informing its BIT partners about a State government not signing a Centre-State agreement may not present the best image of the country abroad.[174] Additionally, such a step may also have affected the coordination between the Centre and States by building an image among foreign investors and BIT partners that certain States are not supported as

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170 HLC Report, *supra* note 52, at 114.

171 Arun Jaitley, Minister of Fin., Speech annoucing Budget 2016–2017, at 34 (Feb. 29, 2016), *available at* https://www.indiabudget.gov.in/doc/bspeech/bs201617.pdf.

172 Prabhash Ranjan, *Sensitise States, don't intimidate them*, THE HINDU, Apr. 26, 2016, *available at* https://www.thehindu.com/opinion/columns/Sensitise-States-don%E2%80%99t-intimidate-them/article14257240.ece.

173 RANJAN, *supra* note 9, at 303.

174 Prabhash Ranjan & Jay M.S, *A proposal by the Centre to enter into investment agreements with States as an optional arrangement may further sour fragile Centre-State relations*, SOUTH ASIAN UNIVERSITY (Apr. 26, 2016), *available at* http://blog.sau.ac.in/a-proposal-by-the-centre-to-enter-into-investment-agreements-with-states-as-an-optional-arrangement-may-further-sour-fragile-centre-state-relations.

investment destinations by the Central government. This would be contrary to the balance which was sought to be maintained by mechanisms such as the Inter-State Council established under Article 263 of the Constitution of India.[175]

Considering the delicate balance of this relationship, in the extreme event that the Central and State governments are unable to agree on payment of premiums for the proposed insurance policy, as a last resort, premiums for this policy can be diverted from the aforementioned fund which has been proposed by the HLC.

D. Creation of a mechanism for enforcement of international investment arbitration awards

Proper recognition and enforcement of arbitral awards is of utmost importance to the parties and the successful party in the arbitration expects the award to be performed without undue delay. Non-compliance of the award renders the entire arbitral process meaningless.[176] The ease of enforceability of the arbitral award is the principal advantage of arbitration for the parties. Absence of an enforcement mechanism of investment arbitral awards in India raises grave concerns about India's commitment to investment promotion and protection.

The projection of India as a nation committed to the rule of law is extremely important, and this is currently under challenge due to the missing enforcement mechanism for investor treaty arbitration. While the executive decision to not ratify the Convention on the Settlement of Investment

175 Roy, *supra* note 166, at 359.
176 Goyal, *supra* note 87, at 17, 25; Michael Hwang SC & Yeo Chuan Tat, *Recognition and Enforcement of Arbitral Awards*, *in* THE ASIAN LEADING ARBITRATOR'S GUIDE TO INTERNATIONAL ARBITRATION 407, 408 (Michael Pryles & Michael J Moser eds., 2007).

Disputes between States and Nationals of Other States,[177] can be debated, the recent conclusion of the Delhi High Court (in two cases) that the Arbitration Act applies only to commercial arbitrations and not to investment treaty arbitrations, has raised uncertainties for investors.[178] This is more surprising considering the recent arbitration-friendly attitude of the Indian Supreme Court,[179] in the existing case of the Calcutta High Court on the issue,[180] and the past law laid down by the Supreme Court in *R.M. Investments*, wherein it advocated a wide interpretation of the term 'commercial' under the New York Convention.[181]

In order to prevent such a situation in the future, where an investor is left with an unenforceable award arising from an arbitration based on a treaty signed by India, it is proposed that a mechanism for enforcement of investor treaty arbitration awards in India be legislated. This can probably be done most rapidly through a notification of the Central Government under Section 2(c)(xxii) of the Commercial Courts Act, 2015, declaring investment treaty arbitration as a commercial dispute. This will fulfil the requirement of the Indian reservation under the New York Convention, through which it undertook to apply the Convention "*only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under*

177 Convention on the settlement of investment disputes between States and nationals of other States, Mar. 18, 1965, 575 U.N.T.S. 159.

178 Union of India v. Khaitan Holdings (Mauritius) Ltd., 2019 SCC OnLine Del 6755 (India); Union of India v. Vodafone Group Plc United Kingdom, 2018 SCC OnLine Del 8842 (India) [*hereinafter* "Vodafone Delhi"]; *see also* Prabhash Ranjan & Pushkar Anand, *Indian courts and bilateral investment treaty arbitration*, 4 INDIAN L. REV. (2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542383.

179 Vijay Karia v. Prysmian Cavi e Sistemi S.r.l., 2020 SCC OnLine SC 177 (India).

180 *Board of Trustees of the Port of Kolkata* v. *Louis Dreyfus Armatures SAS, 2014 SCC OnLine Cal 17695 (India).*

181 R.M. Invs. & Trading Co. Pvt. Ltd. v. Boeing Co. & Anr., (1994) 4 SCC 541 (India).

the national law".[182] This will nullify the ground used by the Delhi High Court in the *Vodafone* case to refuse coverage of an investor-State arbitration award under the Convention.[183]

The incumbent Government is ambitious about making India a global arbitration hub,[184] and has the political will to promote arbitration, for which it is actively seeking to inspire confidence and credibility among potential investors. Greater clarity on the possibility to enforce investment arbitration awards will be a key step in this direction.

VII. Conclusion

With the new approach adopted by India, the old obligations still linger on through sunset clauses in old BITs and, therefore, while India tried to get rid of investment treaty arbitrations, there are still chances of India facing claims. Thus, it is only prudent to be prepared for such claims or nip them in the bud. The development of a preventive mechanism in the form of a Coordination and Response System between Central and State governments would help in resolving disputes before investors take the investment treaty route.

The unresolved and unenforced international commercial arbitrations have a possibility of later becoming investment treaty arbitrations.[185] In light of

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182 India, NEW YORK CONVENTION GUIDE, *available at* http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=11&menu=581&opac_view=-1.

183 Vodafone Delhi, 2018 SCC OnLine Del 8842, ¶ 90 (India).

184 New Delhi International Arbitration Centre Act, No. 17 of 2019 (India).

185 *See*, *e.g.*, Romak S.A. v. Republic of Uzbekistan, PCA Case No. AA280, Final Award (Perm. Ct. Arb. Nov. 26, 2009); *see also* Marco Gavazzi & Stefano Gavazzi v. Romania, ICSID Case No. ARB/12/25, Decision on Jurisdiction Admissibility and Liability, ¶ 120 (April 21, 2015) (stating that "an award which compensates for an investment made in the host State is a claim to money covered by the BIT as an investment"); *see also* the notion of investment in Jan A. Bischoff & M. Wuhler, *The notion of investment*, *in* FOREIGN

this fact, steps such as following evolved international commercial arbitration standards, development of arbitral institutions, and improving the commercial dispute resolution methods in India will also make the invocation of investment treaties redundant. This will serve India's goal of avoiding investor-State arbitration. The new Commercial Courts Act[186] and the signing of the Singapore Convention[187] further assure India's intention of safeguarding and prioritising commercial interests.

It will be interesting to see the impact on foreign direct investment inflows into India and on the Indian investors investing abroad, due to the current disconnect between the aim of economic liberalism in foreign investment and the new treaty-making approach. Nevertheless, investor-State arbitration is very much here to stay owing to India's efforts to become a global arbitration hub.

INVESTMENT UNDER THE COMPREHENSIVE ECONOMIC AND TRADE AGREEMENT (CETA) 19, 41 (M.M. Mbengue & S. Schacherer eds., 2019).

186 Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, No. 4 of 2016 (India).

187 United Nations Convention on International Settlement Agreements Resulting from Mediation, Sept. 12, 2020.

"IS THE CORRUPTION DEFENCE A BIG RED FLAG?": AN ANALYSIS OF THE POTENTIAL ABUSE OF THE CORRUPTION DEFENCE VIS-À-VIS RED FLAGS

Akshata Kumta[1]

Abstract

Arbitral tribunals have often held that the claims of an investor will be defeated if it is found that the investment was procured through corruption. As a consequence, commentators have believed that the use of corruption as a defence to investor claims by States that have participated equally in the corruption gives the States a clear advantage. One wonders, however, whether the States can potentially abuse this advantage by implicating less culpable investors, purely for their own political or tactical advantages. This essay seeks to explore this question and understand whether the use of a low threshold of proof, such as the use of circumstantial evidence or red flags, by a tribunal can aggravate the potential abuse.

I. Introduction

It is trite that corruption in any form is "*universally illegal*"[2] as it allows parties to unfairly benefit at the expense of other parties and the economy of a State.[3] To combat the effect of illegally-procured investments, States have often argued that this very corruption is a defence against investor claims

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2 R. Doak Bishop, *Toward a More Flexible Approach to the International Legal Consequences of Corruption*, 25(1) ICSID REV. FOREIGN INV. L.J. 63, 63 (2010).

3 *Id.* at 63.

["**the corruption defence**"].[4] A positive finding of corruption would usually have serious consequences for the investor, either rendering the investment null on account of the void investment contract or leaving the investor with no practical remedy due to the tribunal's lack of jurisdiction.[5] The corruption defence, as used in the context of arbitration, stems from the 1963 award rendered by Judge Gunnar Lagergren in ICC Case No. 1110, where he declined jurisdiction on the ground of violation of international public policy, *inter alia*, because the contract in question was centred around the bribery of Argentinian government officials.[6]

Despite these well-intentioned beginnings of the corruption defence, it has recently been used by host States for their own unilateral benefit, in cases where investments have been procured by the mutual corruption of the host State government officials and the investor.[7] At the same time, for equal participation in the corrupt activity, the State (or government officials involved) may bear no consequences for accepting a bribe from an investor and will have the benefit of an enforceable contract, while the investor may stand to have its claim dismissed before a tribunal, when neither party should be allowed to unjustly benefit directly or indirectly from the corruption.[8] In furtherance of this, it has been surmised by some

4 World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶¶ 105–08 (Oct. 4, 2006), 17 ICSID Rep. 209 (2016); Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award, ¶ 110 (Oct. 4, 2013) [*hereinafter* "Metal-Tech"]; TSA Spectrum de Argentina S.A. v. Arg. Republic, ICSID Case No. ARB/05/5, Award, ¶¶ 164–68 (Dec. 19, 2008).

5 ALOYSIUS P. LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 221 (2014).

6 J. Gillis Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110*, 10(3) ARB. INT'L 277, 282–94 (1994).

7 Mathew Reeder, *Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration*, 27(3) AM. REV. INT'L ARB. 311, 316 (2016).

8 *Id.* at 316.

commentators that some States may potentially find this situation so attractive, that they may use the corruption defence for their own tactical and political agenda.[9] In other words, there is potential for States (acting through their government officials) to abuse the corruption defence to gain political or tactical advantage, such as the downfall of their political rivals. For instance, consider the political uprising witnessed in Egypt in 2011, which resulted in the termination of the rule of long-time President, Hosni Mubarak's government.[10] During the political coup, an Israel-based gas company brought arbitral proceedings against the Egyptian Natural Gas Holding Company and the Egyptian General Petroleum Corporation for breach of a gas concession contract.[11] The Respondents, operating under the nascent Mohammad Morsi-led government, alleged that the contract was void since it had been procured through corruption under the overthrown Mubarak government.[12] More specifically, they alleged that the Claimant had bribed the then Minister of Petroleum, Sameh Fahmy, to obtain the contract.[13] While there is no doubt that Egypt's government had long been riddled with claims of corruption,[14] the timing and manner of the Respondents' reliance on the corruption defence is rather suspicious. This suspicion arises *first*, because the corruption defence was used by the Respondents against Fahmy consistently throughout the arbitral

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9 Nikhil Gore & Amanda Tuninetti, *Gazprombank v Belarus: the value of requiring direct evidence to support illegality allegations,* GLOBAL ARBITRATION REVIEW (July 13, 2020), *available at* https://globalarbitrationreview.com/article/1228561/gazprombank-v-belarus-the-value-of-requiring-direct-evidence-to-support-illegality-allegations [*hereinafter* "Gore & Tuninetti"]; LLAMZON, *supra* note 4, at 237.

10 Clayton Swisher, *Egypt's Lost Power*, AL JAZEERA, June 9, 2014, *available at* https://interactive.aljazeera.com/aje/2014/egyptlostpower/index.html.

11 East Mediterranean Gas S.A.E. v. Egyptian Nat'l Gas Holding Co., Egyptian General Petrol. Corp., Israel Elec. Corp. Ltd., ICC Case No. 18215/GZ/MHM, Award, ¶ 20 (Dec. 4, 2015) [*hereinafter* "East Mediterranean Gas"].

12 *Id.* ¶ 180.

13 *Id.* ¶¶ 484–91.

14 Swisher, *supra* note 9.

proceedings even though he was acquitted of all bribery charges by the Egyptian Court of Cassation,[15] and *second*, it was used to accuse Fahmy, an appointee of Morsi's political rival, Hosni Mubarak, in the midst of the political coup.

In recounting these events, this essay does not opine on the alleged corruption of Fahmy and whether there was any abuse of the corruption defence. Additionally, the essay does not, in any manner, suggest that any form of corruption be condoned. What the essay does observe, however, is the curiously suspicious timing of events, which adds value to the apprehension of abuse of the corruption defence for political agendas that has recently been the subject of serious discussion.[16] In fact, commentators have gone so far as to question if the potential abuse of the corruption defence could be exacerbated by the use of a low threshold of proof of corruption, comprising purely '*red flags*' or indicators of corruption based on circumstantial evidence ["**the red flag threshold**"], thus allowing States to take liberties with the arbitral process by raising facile claims of corruption.[17]

This essay seeks to examine the likelihood of abuse of the corruption defence. For this purpose, Part II of this essay shall analyse the general consequences of the corruption defence and examine certain cases to understand the motivations behind actions of States. Part III of the essay shall examine the significance of the red flag threshold, specifically to

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[15] Omar Fahmy, Yara Bayoumy & Stephen Powell, *Egypt court acquits ex-oil minister of corruption charges*, THOMSON REUTERS, Feb. 21, 2015, *available at* https://in.reuters.com/article/uk-egypt-court/egypt-court-acquits-ex-oil-minister-of-corruption-charges-idUKKBN0LP0GF20150221.

[16] Gore & Tuninetti, *supra* note 8; John Branson & Rau□l Manon, *Why tribunals should not ignore "red flags" of corruption,* GLOBAL ARBITRATION REVIEW (Aug. 12, 2020), *available at* https://globalarbitrationreview.com/article/1229354/why-tribunals-should-not-ignore-%E2%80%9Cred-flags%E2%80%9D-of-corruption [*hereinafter* "Branson & Manon"].

[17] Gore & Tuninetti, *supra* note 8.

observe if the threshold amplifies the likelihood of abuse of the corruption defence. Finally, the essay aims to understand what threshold of proof is best suited to international arbitration, to avoid possible exploitation of the corruption defence.

II. The corruption defence and evidence of its misuse

A. The consequences of using the corruption defence

The tribunal in *World Duty Free Company Ltd.* v. *Republic of Kenya* was the first tribunal constituted under the International Centre for Settlement of Investment Disputes ["**ICSID**"] to adjudicate on a matter where the State relied on the corruption defence. The facts posed what was, at the time, a unique situation – the invocation of '*corruption*' as a defence by a State to the investor's contract-based arbitration claim, after the investor admitted to paying bribes, which had allegedly been solicited by the President of the State.[18] Despite the unequivocal proof of corruption stemming from both the investor and the Kenyan President, the Tribunal ultimately dismissed the investor's claims on the ground that these actions of the Kenyan President could not be imputed to the Kenyan State.[19] The Tribunal's acknowledgment that corruption operates as a complete defence[20] has had a significant impact on investment arbitration.[21] The paradigm set for the corruption defence appears to be that even though in most cases, States are

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18 World Duty Free, ICSID Case No. ARB/00/7, Award, ¶ 180 (Oct. 4, 2006), 17 ICSID Rep. 209 (2016).

19 *Id.* ¶¶ 169, 185.

20 *See* World Duty Free, ICSID Case No. ARB/00/7, Award, ¶ 188 (Oct. 4, 2006), 17 ICSID Rep. 209 (2016) ("The Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings as a matter of *ordre public international* and public policy under the contract's applicable laws"); R. Zachary Torres-Fowler, *Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration*, 52 VA. J. INT'L L. 995, 1010 (2012) [*hereinafter* "Torres-Fowler"].

21 LLAMZON, *supra* note 4, at 199.

as culpable as the investor for corruption, they may escape liability leaving the investor to bear the brunt of the consequences.[22]

Following in these footsteps, many host States have attempted to unilaterally rely on the corruption defence to dismiss investor claims, despite the "*inherently bilateral nature*" of corruption.[23] It has been argued that this paradigm has given host States a somewhat superior position[24] and given the thrust of this benefit, the rise in the number of host States using the corruption defence[25] is unsurprising.

B. Evidence of misuse of the corruption defence through suspicious behaviour

Gore and Tuninetti observe that the '*superior position*' granted to States from the corruption defence could potentially leave gaping opportunities for them to raise frivolous claims of corruption for political or tactical reasons.[26] They compound their concern by arguing that a low threshold of proof of corruption, such as the red flag threshold, will simply aid States in such endeavours.[27]

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22 Torres-Fowler, *supra* note 19, at 1014–17; Jason Webb Yackee, *Investment Treaties and Investor Corruption: An Emerging Defense for Host States*, 52 VA. J. INT'L L. 723, 733 (2012) [*hereinafter* "Yackee"]; *see also* Michael A. Losco, *Streamlining the Corruption Defense: A Proposed Framework For FCPA-ICSID Interaction*, 63(5) DUKE L.J. 1201, 1233 (2014) [*hereinafter* "Losco"].

23 LLAMZON, *supra* note 4, at 199.

24 Margareta Habazin, *Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration*, 18 CARDOZO J. CONFLICT RESOL. 805, 807 (2017).

25 LLAMZON, *supra* note 4, at 198–99; *see also* Tamar Meshel, *The Use and Misuse of the Corruption Defence in International Investment Arbitration*, 30(3) J. INT'L ARB. 267, 272–74 (2013) [*hereinafter* "Meshel"].

26 Gore & Tuninetti, *supra* note 8.

27 *Id.*

Others, such as Branson and Manon, however, insist that the increasing use of the corruption defence by host States cannot be imputed to pure tactics.[28] Rather, they argue that the use of the defence is more likely a result of a zero-tolerance policy toward corruption.[29] Therefore, they suggest that the red flag threshold is sufficient to prove a case of corruption when there is absence of direct evidence and consequently, there is no necessity to rely solely on the 'clear and convincing' standard of proof of corruption.[30] No doubt, the merit to upholding the red flag threshold of proof is undeniable due to the comparative ease with which this threshold can be met.[31] However, Branson and Manon's suggestion is primarily premised on the belief that increasing use of the corruption defence cannot be attributed to pretextual or tactical reasons. This premise, *first*, ignores the fact that the current apprehension is centred around the very real potential or possibility for misuse of the corruption defence rather than a confirmed and definite use of the corruption defence by States purely for tactical reasons. *Second*, while their premise is not without merit in regard to certain cases where States may have adopted a zero-tolerance policy towards corruption, it unjustifiably envelops every single host State (along with its government officials) into a paradigm of virtuosity in foreign investment, devoid of corrupt practices. In fact, Doak Bishop notes at least one case of corruption where the government of a host State and its President actively took no steps to curb the solicitation of bribes by public officials, despite having sufficient time and being adequately notified to put an end to the practice.[32] Therefore, irrespective of their suggestion to abide by the '*clear and convincing*'

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[28] Branson & Manon, *supra* note 15.
[29] *Id.*
[30] *Id.*
[31] *See infra* notes 71–77 and accompanying text.
[32] Bishop, *supra* note 1, at 65.

standard, Gore and Tuninetti's apprehension regarding agenda appears to be a valid one.

Admittedly, it is difficult to find direct evidence to aid this postulation. Torres-Fowler asserts, however, that this should be no surprise given the power wielded by the host States over investors in return for their promise not to alert law enforcement bodies of the investors' alleged corruption.[33] In any case, the following pieces of indirect contemporary evidence coupled with the ubiquitous character of corruption make it impossible to disregard the argument's merit.

iii. Politically-strategic action taken by States

The first bit of evidence comes from cases where it appears that the host States (or their public officials acting in official capacity) may have claimed the corruption defence to achieve their political goals. The aforementioned gas-concession scenario in Egypt serves as a prime example.[34] As earlier mentioned, Egypt's State entities responded to the contract-based arbitration claim of East Mediterranean Gas by relying on the corruption defence, claiming that EMG had bribed the then Minister of Petroleum, Sameh Fahmy to alter the tender process to give it an advantage.[35] The Tribunal, however, observed that Fahmy was being implicated despite having been acquitted of corruption charges by the Egyptian Court of Cassation and therefore, the State entities' claim had failed to satisfy even the most minimal threshold of proof of corruption.[36] The Egyptian government's reliance on the corruption defence implicating Fahmy, who was acquitted, would curiously give it a distinct political advantage in consideration of the fact that it just so happened to be taking over from the

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[33] Torres-Fowler, *supra* note 19, at 1018.
[34] *See supra* notes 9–14 and accompanying text.
[35] East Mediterranean Gas, ICC Case No. 18215/GZ/MHM, Award, ¶¶ 571–82 (Dec. 4, 2015).
[36] *Id.* ¶ 582.

previous Mubarak-led government that Fahmy had represented at the very same time.

Similarly, following a raid ordered by the Belarusian National Bank on the offices of Belgazprombank (a bank owned mainly by the Russian financial institutions Gazprom and Gazprombank Commercial Bank), Belarusian authorities arrested Belgazprombank's senior executives and appointed new key personnel. Belarus claimed that the crackdown resulted from an investigation into tax evasion[37] with the Belarusian President, Alexander Lukashenko, accusing the former head of Belgazprombank, Viktor Babariko, of corruption.[38] Gazprombank responded by threatening to bring international action against Belarus, possibly under the Treaty on the Eurasian Economic Union.[39] Notwithstanding Gazprombank's previous trysts with corruption charges in Venezuela[40] and Switzerland,[41] Belarus's actions in this case appear suspiciously political when one notes the following facts: *first*, it alleged corruption against Babariko in June, right before the upcoming Belarusian presidential election in August 2020, where

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[37] Andrei Makhovsky, *Belarus unit of Gazprombank raided as Lukashenko cracks down on election opponents*, THOMSON REUTERS, June 11, 2020, *available at* https://www.reuters.com/article/us-belarus-election-idUSKBN23I1UG.

[38] Andrei Makhovsky, *Belarus president accuses election rival of corruption after raid*, THOMSON REUTERS, June 12, 2020, *available at* https://in.reuters.com/article/belarus-election/belarus-president-accuses-election-rival-of-corruption-after-raid-idINKBN23J2AZ.

[39] *Joint statement by Gazprombank and Gazprom regarding current situation with Belgazprombank,* GAZPROM (June 12, 2020), https://www.gazprom.com/press/news/2020/june/article507063.

[40] Alexandra Ulmer, *France's Perenco, Russia's Gazprombank named in Venezuela graft case – source,* THOMSON REUTERS, Nov. 2, 2018, *available at* https://in.reuters.com/article/venezuela-pdvsa-companies-exclusive/exclusive-frances-perenco-russias-gazprombank-named-in-venezuela-graft-case-source-idINKCN1N663M.

[41] Press Release, Swiss Financial Market Supervisory, FINMA concludes Panama Papers proceedings against Gazprombank Switzerland (Feb. 1, 2018), *available at* https://www.finma.ch/en/news/2018/02/20180201-mm-gazprombank-schweiz.

Babariko was the top rival of President Lukashenko;[42] *second,* Babariko, a contender for the presidential election, was suddenly arrested for alleged corruption exactly two months prior to the scheduled date for the election;[43] and *third*, Belarus' actions are set against the politically tense environment of deteriorating relations with the Russian government,[44] which is the primary shareholder of Gazprom.[45]

iv. *Claiming "corruption" as an afterthought to defeat a claim or avoid an award*

The second reason for suspecting the potential misuse of the corruption defence is the behaviour of certain States which, rather suspiciously, claim corruption after a prolonged period without any reasonable cause. Such delayed claims of defence appear to be an afterthought to defeat the arbitration itself or escape the consequences of an award. For example, in *Unio n Fenosa Desarrollo y Accio n Exterior, S.A.* v. *Arab Republic of Egypt* ["**Unión Fenosa**"], the Tribunal observed that the Claimant and the Egyptian General Petroleum Corporation had executed a Natural Gas Sale and Purchase Agreement ["**SPA**"] on August 1, 2000.[46] However, when the Claimant instituted ICSID proceedings against Egypt in 2015, Egypt turned to the corruption defence, claiming that the SPA had been procured through the Claimant's corruption. The Tribunal observed, among other

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42 Makhovsky, *supra* note 37.

43 Linas Jegelevicius, *Victor Babariko, main rival of Alexander Lukashenko, barred from Belarus presidential election*, EURONEWS, July 30, 2020, *available at* https://www.euronews.com/2020/07/14/victor-babariko-main-rival-of-alexander-lukashenko-barred-from-belarus-presidential-electi; Gore & Tuninetti, *supra* note 8.

44 Brian Whitmore*, Is Russia's Pressure on Belarus Putting It in Play for the West?*, WORLD POL. REV. (Feb. 24, 2020), *available at* https://www.worldpoliticsreview.com/articles/28556/deteriorating-belarus-russia-relations-could-put-minsk-in-play-for-the-west.

45 GAZPROM'S SHARES, *available at* https://www.gazprom.com/investors/stock/ (last visited Jan. 25, 2021).

46 Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, ¶ 3.8 (Aug. 31, 2018) [*hereinafter* "Unión Fenosa"].

things, that Egypt's belated objection had come 15 long years after the SPA had been signed and appeared to serve the tactical purpose of seeking to defeat or delay the investor's claim.[47] When faced with its delayed use of the corruption defence, Egypt did not deny having had prior knowledge of the alleged corruption, rather it simply asserted that there is no time bar to raise corruption claims in international arbitration.[48] This appears starkly different from a case where a State raises delayed claims of corruption due to the genuine lack of knowledge (or suspicion) regarding the corruption, despite having taken reasonable care.[49]

The events following the award passed by the tribunal in *Ron Fuchs* v. *Republic of Georgia*[50] offer yet another example. The ICSID tribunal, which was instituted upon the termination of an oil concession by Georgia, awarded the investor compensation of approximately USD 98 million on March 3, 2010.[51] Following the award, Ron Fuchs was arrested for bribery on October 14, 2010 and sentenced to seven years in prison in Georgia.[52] Georgia also filed an application for revision of the award on January 21, 2011, based on the fact that the alleged bribery of Mr. Fuchs was newly discovered during the investigation which was immediately followed by Mr. Fuchs' arrest.[53] This, however, appears incongruous with Fuchs' account

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47 *Id.* ¶¶ 7.53, 7.111–112.

48 *Id.* ¶ 7.22.

49 *See* Fed. Republic of Nigeria v. Process & Indus. Dev. Ltd. [2020] EWHC (Comm) 2379 [239] (Eng.).

50 Ron Fuchs v. Republic of Geor., ICSID Case No. ARB/07/15, Award (Mar. 3, 2010).

51 *Id.* ¶ 693.

52 Luke Eric Peterson, *Georgian Authorities Arrest Foreign Investor on the Eve of ICSID Hearing and Charge Him with Corruption; Israeli Businessman and Greek Partner Release Text of $90 Million Arbitration Verdict Against Georgia*, INVESTMENT ARBITRATION REPORTER (Oct. 15 2010), *available at* https://www.iareporter.com/articles/georgian-authorities-arrest-foreign-investor-on-eve-of-icsid-hearing-and-charge-him-with-corruption-israeli-businessman-and-greek-partner-release-text-of-90-million-arbitration-verdict-against-georg.

53 Ron Fuchs v. Republic of Geor., ICSID Case No. ARB/07/15, Decision of the ad hoc Committee to suspend the Annulment Proceeding, ¶¶ 2–4 (Mar. 21, 2011).

that prior to his arrest, he had been pressed by Georgian officials to agree to a reduced value of award compensation, following which he had specifically been invited to Georgia by the Prime Minister, Nika Gilauri, on the pretext of arranging payment of the award.[54] Fuchs additionally claimed that Georgian officials had made his release from prison conditional on the forfeiture of the USD 98 million award against Georgia.[55] Georgian authorities have since denied these allegations and claimed that the bribery charges have nothing to do with the ICSID ruling.[56] However, it is suspicious that after serving one year of his prison sentence, Fuchs was pardoned by the Georgian President and a sudden announcement was made that the parties had agreed to settle the dispute for USD 37 million, a significantly smaller sum compared to the award compensation.[57] The application for revision was also discontinued on December 21, 2011.[58] Even though this particular case does not concern the corruption defence, it is still pertinent to observe that after the award was declared in Fuchs's favour, Georgia attempted to obtain a settlement from Fuchs. Shortly thereafter, Georgia alleged corruption, arrested Fuchs and then requested a revision of the award. Further down the line, Georgia obtained a settlement and then discontinued the application for revision. Evidently, there is the

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54 Gornitzky & Co., *Israeli Hostage Rony Fuchs Will Appeal Conviction by Georgia to European Court of Human Rights, says Jailed Man's Lawyer, Archil Kbilashvili*, PR NEWSWIRE (Apr. 1, 2011), *available at* https://www.prnewswire.com/news-releases/israeli-hostage-rony-fuchs-will-appeal-conviction-by-georgia-to-european-court-of-human-rights-says-jailed-mans-lawyer-archil-kbilashvili-119061069.html.

55 *Id.*

56 Molly Corso, *Georgia: Israeli Bribery Case Puts Spotlight on Court System,* EURASIANET, Feb. 11, 2011, *available at* https://eurasianet.org/georgia-israeli-bribery-case-puts-spotlight-on-court-system.

57 Margarita Antidze, *Georgia pardons two Israelis jailed for bribery*, THOMSON REUTERS, Dec. 3, 2011, *available at* https://www.reuters.com/article/georgia-israel-businessmen-idAFL5E7N22IE20111202.

58 Natalia Charalampidou, *Range of Disputes under the Energy Charter Treaty*, 7 TRANSNAT'L DISP. MGMT. (2018), *available at* www.transnational-dispute-management.com/article.asp?key=2622.

likelihood that the claim of corruption was merely an afterthought, designed to obtain a tactical advantage of settlement for the State.

v. *Use of corruption allegations as leverage*

The following sub-part observes those cases where investors have admitted to indulging in acts of corruption, while congruently assessing the behaviour of host States after such confessions have been made. These particular examples do not suggest or allude that States have made tactical accusations of corruption. In fact, it is clear that the investors have consented to the corruption, under no duress from the State. The focus, rather, is on the apprehension that host States may not necessarily be above using confessions of corruption to their advantage.

First is the case of *Siemens A.G.* v. *Argentine Republic*, where Siemens entered into a contract with Argentina to create official national identity cards for its public.[59] Four years later, Siemens instituted ICSID proceedings against Argentina, alleging unlawful expropriation of its investment due to a change in the regulatory framework.[60] However, shortly after winning an award of almost USD 218 million in 2007,[61] Siemens was investigated by German and American authorities for large-scale corruption. Subsequently, its key personnel confessed to procuring the contract by bribing Argentinian officials to American regulatory authorities.[62] Argentina responded by filing a request with the ICSID for a revision of the award.[63] It is important to

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[59] Siemens A.G. v. Arg. Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 81–97 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009).

[60] *Id.* ¶¶ 96–115.

[61] *Id.* ¶ 403.

[62] Press Release, U.S. Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html.

[63] Luke Eric Peterson, *Argentina And Siemens Ask Annulment Panel To Suspend Proceedings, So Original Arbitrators Can Look At Bribes Evidence*, INVESTMENT ARBITRATION REPORTER

note *first*, that there was no certainty regarding Argentina's success in the revision proceeding and *second*, that the Argentinian public officials were equally involved in the act of corruption as they had accepted the bribes. Despite this, Siemens chose to discontinue the arbitration proceedings, losing its USD 218 million award.[64] It is believed that Siemens's decision to "walk away" from the massive award was motivated by Argentina's keenness to use the allegations of corruption to its advantage and the resultant impact of ongoing litigation on its reputation.[65]

In *Azpetrol International Holdings B.V.* v. *Republic of Azerbaijan*, the Claimant's director, Michael Booster, admitted to bribing Azeri officials to protect certain unnamed individuals in Azerbaijan while being cross-examined.[66] After his testimony, Booster retracted his admission claiming it had been untrue, however, the details of the confession had already been transferred to law enforcement officials in Azerbaijan, the Netherlands, and Britain.[67] The State allegedly used this confession to leverage its position, effectively ensuring that the Claimant would avoid bringing any more claims against it, for the fear that the State would reveal the details of the corruption.[68]

Torres-Fowler argues that if host States are allowed to benefit so publicly from confirmed cases of corruption where public officials partake in the

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(July 28, 2008), *available at* https://www.iareporter.com/articles/argentina-and-siemens-ask-annulment-panel-to-suspend-proceedings-so-original-arbitrators-can-look-at-bribes-evidence.

64 Luke Eric Peterson, *Siemens Waives Rights Under Arbitral Award Against Argentina, Follows Company's Belated Corruption Confessions*, INVESTMENT ARBITRATION REPORTER (Sep. 2, 2009), *available at* https://www.iareporter.com/articles/siemens-waives-rights-under-arbitral-award-against-argentina-follows-companys-belated-corruption-confessions.

65 Torres-Fowler, *supra* note 19, at 1028; Yackee, *supra* note 21, at 725.

66 Azpetrol Int'l Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Servs. Group B.V. v. Republic of Azer., ICSID Case No. ARB/06/15, Award, ¶ 6 (Sep. 8, 2009).

67 *Id.* ¶ 7.

68 Torres-Fowler, *supra* note 19, at 1023.

bribery, there is a valid concern that future investors could be denied the protection of their investments even when they are in less culpable positions (having participated in the corruption under duress).[69]

While the evidence may not necessarily establish abuse in a concrete manner, the suspicious behaviour of States is sufficient to give legitimacy to the apprehension of misuse of the corruption defence by States for tactical or political purposes.

III. The increasing use of red flags to adduce corruption in arbitration

A. The transition from a higher threshold to a lower threshold of proof of corruption

Generally, tribunals hearing arguments on corruption in international arbitration would utilise standards of proof such as the clear and convincing evidence standard (which requires direct evidence of impropriety)[70] and a more nuanced approach to the balance of probabilities standard (where an allegation of impropriety must be proved on the basis of the entire body of direct and indirect evidence before it).[71]

Llamzon's seminal work on corruption, however, highlights the slow but steady expansion of evidentiary standards from these standards to include more flexible ones such as the red flag threshold.[72] Llamzon opines that tribunals were initially hesitant to move away from the higher standard of proof to establish corruption due to their acknowledgment of its serious

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69 *Id.* at 1028; *see also* Losco, *supra* note 21, at 1233.

70 EDF (Servs.) Ltd. v. Rom., ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009) [*hereinafter* "EDF"]; Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 325–26 (June 1, 2009) [*hereinafter* "George Siag"].

71 The Rompetrol Group N.V. v. Rom., ICSID Case No. ARB/06/3, Award, ¶ 183 (May 6, 2013).

72 LLAMZON, *supra* note 4, at 234–37.

consequences, some of which would include the invalidation of the contract, the unenforceability of the contract or a finding of lack of jurisdiction.[73] Ironically, some tribunals encouraged this high burden of proof despite being cognisant of the practical difficulty in adducing direct evidence of corruption, as there tends to be little or almost no physical evidence of corruption.[74] This incongruous paradigm set by tribunals was adeptly summarised by the noted practitioner, Constantine Partasides QC as: "*Dear investor, you will inevitably find the allegation almost impossible to prove, but we are nonetheless going to raise the evidential hurdle to make it even harder.*"[75]

This difficulty in procuring direct clear and convincing evidence of corruption led to a change in approach, with the Tribunal in *Metal-Tech Ltd.* v. *Republic of Uzbekistan* ["**Metal-Tech**"], being the first to allow corruption to be established through circumstantial evidence, which could establish corruption with reasonable certainty.[76] This expansion of evidentiary standards has proved to be a refreshing response to the innate difficulty in proving corruption.[77] In fact, according to Gaillard, "*[t]his practice should be applauded as an appropriate contribution of arbitrators' inherent fact-finding powers to the global fight against corruption.*"[78]

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73 *Id.*; *see also* Saba Fakes v. Republic of Turk., ICSID Case No. ARB/07/20, Award, ¶¶ 131–35 (July 14, 2010); George Siag, ICSID Case No. ARB/05/15, Award, ¶¶ 325–26 (June 1, 2009).

74 EDF, ICSID Case No. ARB/05/13, Award, ¶ 221 (Oct. 8, 2009); Lao Holdings N.V. v. Lao People's Dem. Republic, ICSID Case No. ARB(AF)/12/6, Award, ¶¶ 109–10 (Aug. 6, 2009); *see also* LLAMZON, *supra* note 4, at 236.

75 Constantine Partasides, *Proving Corruption in International Arbitration: A Balanced Standard for the Real World*, 25(1) ICSID REV. FOREIGN INV. L.J. 47, 56 (2010).

76 Metal-Tech, ICSID Case No. ARB/10/3, Award, ¶ 243 (Oct. 4, 2013).

77 Emmanuel Gaillard, *The Emergence of Transnational Responses to Corruption in International Arbitration*, 35(1) ARB. INT'L 1, 9–10 (2019).

78 *Id.*

B. The current red flag threshold

The *Metal-Tech* tribunal observed multiple red flags in the testimony of the Claimant's Chairman, which established corruption with reasonable certainty.[79] The fact that the Claimant hired the brother of the then-Prime Minister of Uzbekistan as a consultant, the consultants' lack of qualification to advise on the molybdenum industry, the disproportionately large fee paid to the consultants despite the tangible lack of services provided, and the absence of documentation regarding the consultancy contract and financial records of the transactions collectively pointed to corruption.[80] The Tribunal also drew adverse inferences from the Claimant's failure to provide additional documentary or testimonial evidence regarding the legitimacy of the consultancy agreement and services provided, when questioned.[81]

Similarly, the ICSID tribunal in *Spentex Netherlands, B.V.* v. *Republic of Uzbekistan*[82] ["**Spentex**"] found a USD 130 million claim to be inadmissible based purely on circumstantial evidence of corruption, such as the inordinately large sum of money paid to a consultancy firm, controversial payments made to accounts situated in known tax havens such as the British Virgin Islands, the consultancy firm's lack of qualification in that particular sector of business, the investor's failure to disclose the consultancy contracts, other documents regarding the consultancy services, and bank records of the transaction.[83] Additionally, on obtaining the contracts from

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79 Metal-Tech, ICSID Case No. ARB/10/3, Award, ¶¶ 240–43 (Oct. 4, 2013).
80 *Id.* ¶¶ 337–51.
81 *Id.* ¶ 245.
82 Spentex Netherlands, B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016).
83 Vladislav Djanic, *In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of All Claims Under Dutch BIT*, INVESTMENT ARBITRATION REPORTER (June 22, 2017), *available at* https://www.iareporter.com/articles/in-newly-unearthed-uzbekistan-ruling-

the Respondent, the Tribunal also noted that the consultancy contracts contained no details about the services provided and only vague descriptions of the contract such as "*ensuring good support for the bid*".[84] Despite the lack of direct evidence, the Tribunal decided that if the dots marking individual pieces of circumstantial evidence were connected, corruption could be construed.[85] Evidently, the *Metal-Tech* and *Spentex* tribunals have centred the red flag threshold around five broad themes:

i. Relationships between the State officials and the investor or consultant (if any);

ii. Insufficient qualifications and absence of legitimate legal existence of the consultant;

iii. Unusually generous compensation paid to the consultant;

iv. Absence of legitimate documentation regarding the consultancy contract, duties, and services performed by the consultant; and

v. Absence of tangible work performed by the consultant.

These central themes have been reiterated recently in a toolkit entitled "*Corruption and Money Laundering in International Arbitration: Toolkit for Arbitrators*", which details various instances characterised within the aforementioned themes.[86] The toolkit adds another important central theme which is the poor reputation of the parties to the contract. In other

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exorbitant-fees-promised-to-consultants-on-eve-of-tender-process-are-viewed-by-tribunal-as-evidence-of-corruption-leading-to-dismissal-of-all-claims-under-dutch.

84 *Id.*

85 *Id.*

86 Mark Pieth & Kathrin Betz, *Corruption and Money-Laundering in International Arbitration: A Toolkit for Arbitrators,* BASEL INSTITUTE ON GOVERNANCE (Apr. 19, 2019), *available at* https://baselgovernance.org/sites/default/files/2019-05/a_toolkit_for_arbitrators_29_05_2019.pdf.

words, that the State, investor or consultant may have a history of corruption and improper payment practices.[87] Therefore, the current red flag threshold is comprised of six central themes to identify corruption.

C. The practical problems with the current red flag threshold vis-à-vis the corruption defence

In spite of the aforementioned theoretical advantage over a high standard of proof, it appears that the current red flag threshold is not without practical limitations.

The first issue is that the present red flag threshold does not cover a broad enough spectrum of practical circumstances and situations. As observed above, it is apprehended by Gore and Tuninetti that States relying on the corruption defence have the resources to plant innuendo in the press at short notice and manufacture alleged red flags in many industries.[88] Considering Gore and Tuninetti's argument that it would not be difficult for governments to "*come up with*" red flags to dismiss investor claims, the limited range of circumstantial evidence currently in use could enable States to portray a case of corruption where there is none.[89] For instance, a State government that is currently in place could highlight a connection between the party (or the consultant) and a public official to portray the effect of influence or could possibly initiate unnecessary investigations or proceedings against the party or the consultant to show corruption.

Second, no tribunal or institution has adequately addressed how to handle a situation where the circumstantial evidence presented consists purely of a series of mere coincidences or which has a perfectly reasonable justification. For example, there may be a case where an investor hires a consultant who

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87 *Id.*
88 Gore & Tuninetti, *supra* note 8.
89 *Id.*

just so happens to be well-connected with the State government officials or where the consultant is accused of corruption for being well-paid (above industry standards) for his services, but has no personal stake in or control over the project. The Tribunal in *Unión Fenosa*, which decided to adopt the red flag threshold to check for corruption, noted the presence of several classic red flags which were offset by "*neutral black flags*".[90] While the Tribunal failed to expressly explain what constituted a neutral black flag, it appears from contextual understanding that such black flags are comprised of innocent explanations, genuine coincidences and justifications which counteract the effect of a series of red flags. This opinion, however, was criticised as paying mere "*lip service*"[91] to the red flag threshold which shows that the idea of a tribunal adopting a more holistic approach to the red flag threshold may not be widely accepted. Nevertheless, its value cannot be discredited.

The final issue with the current red flag threshold is that it lacks safeguards to prevent the ease with which it may be exploited by a party. Unfortunately, no arbitral tribunal or institution has distinctly identified a counter-mechanism (consisting of circumstances or incidences) to check if the red flag threshold is being misused by a State (or a public official) relying on the corruption defence. In the event of abuse, there is the likelihood that influential public officials could not only obtain the dismissal of the investor's claim, but additionally also stand to gain personal or political advantages. This apprehension finds its basis in the aforementioned examples, which display what appears to be the suspiciously-timed use of the corruption defence by States.[92]

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[90] Unión Fenosa, ICSID Case No. ARB/14/4, Award, ¶ 7.114 (Aug. 31, 2018).

[91] Lucinda A. Low, *Dealing with Allegations of Corruption in International Arbitration*, 113 AM. J. INT'L. L. 341, 344 (2019).

[92] *See supra* notes 33–56 and accompanying text.

It is unequivocal that this present assessment of the *lower* red flag threshold vis-à-vis the corruption defence does not aim to curb or trivialise genuine claims of corruption. Rather, it seeks to ascertain and repair the practical loopholes existing in a theoretically ideal threshold, to implement effective change.

IV. The way forward

Undoubtedly, an unchecked low threshold to prove corruption would increase the risk of States misusing the corruption defence. Gore and Tuninetti suggest that this may be combatted by using the threshold of clear and convincing evidence of impropriety in lieu of circumstantial red flags, since direct evidence cannot be easily generated on "*tactical timelines*".[93] Their suggestion, however, ignores the previously discussed difficulty involved in obtaining actual evidence of corruption.[94] According to Partasides, all that is required is cogent evidence of corruption.[95] Consequently, applying an impractically severe threshold of proof risks the non-detection of genuine cases of corruption. Therefore, Branson and Manon's suggested use of the red flag threshold[96] may be adopted with the caveat that such a threshold may easily be abused for political and tactical advantages. Accordingly, this essay recommends that a strengthened version of the red flag threshold would cogently demonstrate corruption.

A. Including more themes within the red flag threshold

To tackle issue of the limited range of themes in the red flag threshold, this essay suggests the inclusion of as many scenarios as possible which may allude to corruption. To ensure that the red flags are not "*manufactured*" or planted, a tribunal could adopt a slightly revised threshold which would

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93 Gore & Tuninetti, *supra* note 8.
94 Partasides, *supra* note 74, at 57.
95 *Id.* at 57–59.
96 Branson & Manon, *supra* note 15.

include more themes sub-divided into indicia or indicators. These additional themes could include indicia that require a solid basis in fact, which cannot be generated by governments, both past and incumbent (and their officials) for their political or private convenience. A tribunal would ideally assess the current red flag indicia in tandem with the following indicative (and non-exhaustive) list:

i. *Suspicious behaviour of the State while awarding contracts*

- If the State specifically recommended or insisted upon working with a particular investor or hiring a specific consultant;
- Absence of transparent records regarding the tender process or other mechanism for States to choose investors or consultants;
- Absence of transparency as to the public officials who shall be involved in the tender process (or any other chosen process), especially if there is a conflict of interest between the officials and applicants;
- Records of the State having awarded multiple contracts to the same investor or consultant;
- Complaints from other bidders/applicants regarding the lack of transparency in the bidding process or in awarding the contract. For example, a complaint that the losing bidder has won the contract without any explanations or reasoning given by the State.

ii. *Suspicious activity of the investor/consultant*

- The investor or the consultant has close ties to other public officials who have a history of corruption;
- The consultant has a personal stake or equity in the investment;

- Complaints that shadow bidding has occurred, where the investor wins the tender by giving an appearance of competition by arranging for colluders to manipulate the tender system;

- Any suggestion from the consultant that otherwise illegal conduct is acceptable in the present case because it is the norm in a different country;

- Suspicious statements made by the consultant. For example, needing payments to "*take care of things*" or "*finalize the deal*".

iii. *Expanding red flags on reputation and history of the parties*

- A public official involved in facilitating the investment deal currently has other allegations of corruption levelled against him or has been convicted for corruption charges in the past;

- The investor or the hired consultant have previously been convicted of corruption in the past, in the host State or elsewhere;

- The consultant suspiciously has either no track-record in that particular field or on the other hand, has a poor reputation in that field.

Raising the red flag threshold to include some of these factors would automatically increase the plausibility of proving corruption before a tribunal. In fact, evidence of a wide range of indicia would also reduce the likelihood of a corrupt party being able to offer paltry justifications or take advantage of the previously lower threshold. A tribunal or court would, therefore, be able to evaluate a case holistically, rather than risk a fallacious outcome based on a limited set of indicators.

B. Legitimising the 'neutral black flag' mechanism

As a corollary to the use of the corruption defence, Partasides opines that a party denying its corruption must be given an adequate evidentiary

hearing.[97] The 'neutral black flags' reasoning where the tribunal could assess the innocent explanations offered by the accused party, adopted in *Unión Fenosa* proves particularly useful for a party to prove its innocence, specifically in those cases where there might be an abuse of the corruption defence.[98] The tribunal could, therefore, adjudge the absence of corruption by duly evaluating any neutral black flags or reasoned justifications raised by the party to vindicate the circumstantial evidence of corruption, in the absence of availability of direct evidence. The evidentiary weight of each black flag must be compared to its corresponding red flag to assess the likelihood of corruption.

It may be argued that if an actual corrupt investor is allowed to prevail by offering justifications, however inadequate they might be, for every red flag noticed by the tribunal, the red flag threshold is rendered powerless. However, given the efficacy of the strengthened red flag threshold, it stands to reason that a corrupt party's behaviour would be subject to an increased number of red flags, which would automatically be difficult for the corrupt party to justify adequately before a tribunal. It follows that if the tribunal finds that the weight of black flags outweighs that of the red flags, the party has adequately shown the absence of corruption.

C. Safeguards

Finally, it is suggested that the tribunal also consider circumstances or factors that point to the abuse of the red flag threshold by a State that has relied on the corruption defence. These may either be presented by the party proclaiming its innocence or taken up *sua sponte* by the tribunal. This provides a safeguard against States which may use the corruption defence

97 Partasides, *supra* note 74, at 60.
98 Unión Fenosa, ICSID Case No. ARB/14/4, Award, ¶ 7.114 (Aug. 31, 2018).

for political or tactical advantages in an arbitration. To set off the potential abuse, the tribunal could consider the following factors:

- Whether the corruption has been claimed by the State when elections to its government offices are scheduled to begin shortly thereafter?

- Whether any official (or a relative of an official) of the investor company happens to be a business or political rival of any public official of the State (or the relative of the public official) involved in the matter?

- Whether the State or a public official (or a relative of a public official) ostensibly has something to gain by implicating the investor as corrupt or by winning the arbitration, other than merely defeating the investor's claim?

- Whether the State has suddenly raised the corruption defence to defeat the investor's claim despite an unreasonable delay in making such a claim at any time prior[99] or after an unreasonable prolonged period of passivity to corruption suspicions and complaints?[100]

- Whether the State suddenly begins conducting investigations or prosecuting allegedly corrupt parties after the investor institutes arbitration proceedings, despite having known of such corruption for a significant period of time and having remained passive to it till the institution of the arbitration?

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[99] LLAMZON, *supra* note 4, at 272–74.
[100] *Id.*

V. Conclusion

As a final comment, this essay acknowledges that many commentators have suggested the use of principles such as equitable estoppel and contributory fault to hold States accountable when using the corruption defence.[101] There is unequivocal merit to these suggestions, however, they are applicable to a case only after the corruption has been established in the conventional sense and if the corruption is found to have been perpetuated mutually by both parties.[102]

As this essay has been premised on the potential for abuse of the corruption defence, the assessment of behavioural patterns of States determines that there is significant likelihood of a State concocting a claim of corruption to defeat an investor's claim for its own political or tactical advantages in the future. To prevent the aggravation of this abuse by allowing States to show corruption through a limited range of indicia, this essay suggests the tribunal adopt a well-rounded, yet attainable threshold of proof to test for the presence of corruption. In conclusion, the author believes that an elevated form of the red flag threshold, complete with aforementioned checks and balances, will ideally curb any potential abuse of the corruption defence.

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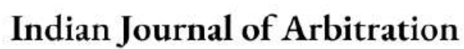
101 Losco, *supra* note 21, at 1219; Meshel, *supra* note 24, at 281.
102 Losco, *supra* note 21, at 1219–20; Meshel, *supra* note 24, at 281.



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