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ABOUT THE JOURNAL

Indian Review of International Arbitration ["**IRIArb**"] is a bi-annual publication of Maharashtra National Law University, Mumbai's Centre for Arbitration and Research. IRIArb accepts submissions on a rolling basis, and follows a double-blind peer review process. IRIArb is edited by professionals, is an open access journal, and is available for free of cost at www.iriarb.com. For any queries or feedback, you may write to the editors at iriarb@mnlumumbai.edu.in.

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AIMS AND SCOPE OF THE JOURNAL

IRIArb focuses on research in both academic and practical aspects of international commercial and investment arbitration and other connected areas of law. With the aim to provide for a balance between research on contemporary developments, and analysis of long-standing issues in international arbitration, IRIArb is dedicated to being a catalyst towards the progress of international arbitration through the publication of reliable and useful literature in arbitration. Creating a platform to facilitate dialogues among stakeholders, ranging from contributors from the highest legal foras to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.

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EDITORIAL

As India continues to establish itself as a key player in the international arbitration community, IRIArb's commitment to shaping the contemporary narratives of the field is stronger than ever.

The second half of 2023 was another instrumental year for arbitration law and practice in India, both at the legislative as well as judicial fronts. During this period, it became clear that arbitration law in India would be gearing towards another round of reforms. The Indian government set up a high-level expert committee ["**Expert Committee**"] to recommend reforms to the [Indian] Arbitration & Conciliation Act, 1996 ["**Act**"]. The terms of reference of the Expert Committee, among other issues, includes recommending statutory means to minimise recourse to judicial authorities in arbitration matters. The report of the Expert Committee is still pending, and it is expected to endeavour to supplement the pro-arbitration amendments made in 2015 and 2019, and further align India's practice with other pro-arbitration jurisdictions. Arbitration friendly reforms to the Act would be a great way to commemorate the silver jubilee of the Act and ensure that India moves closer to becoming the leading seat for arbitrations.

Notably, in parallel, the UK & Wales Law Commission ["**UK Law Commission**"], also concluded a detailed three-stage public consultation process, whereby it reviewed various facets of the [English] Arbitration Act, 1996.[1] The Expert Committee may consider taking inspiration from the wide-ranging areas of reforms suggested by the UK Law Commission to shed light on certain shortcomings in the Act.[2] One such area may be the approach taken towards the protection of confidentiality of an arbitration.

There is no gainsaying that arbitration's confidentiality is an essential element in determining the suitability of a seat of arbitration. It is essential that a regime for safeguarding confidentiality must include a robust list of exceptions coupled with guarantees that disclosures, if any, are only done to the extent necessary. Blanket confidentiality is certain to be a hindrance in the arbitral process as well as in the taking of evidence by courts. Once confidentiality has been breached, not much can be done, irrespective of whether the cause of disclosure was legitimate or not. It is therefore necessary to have the exceptions coupled with mechanisms of disclosures set out in law. This could either be instilled in common law or statute. On the one hand, the Law Commission considered the former to be better

[1] England and Wales Law Commission Report on the Review of Arbitration Act 1996 (2022-2023).
[2] Arbitration & Conciliation Act 1996 (India).

suited owing to the facts' specific and robust nature of confidentiality.[3] On the other hand, common law jurisdictions such as New Zealand,[4] Australia,[5] and Singapore,[6] have a codified robust confidentiality provision with exceptions and guidance on the extent of disclosure. For instance, when invoking an 'interests of justice' exception, the court will determine whether the disclosure is necessary for true evidence to reach the court and the extent to which it is necessary.

Although India has a codified provision in Section 42A of the Act, the same is rather rigid and not exhaustive or robust. The only exception envisaged by the provision is for the enforcement of awards. Arbitration practice however reveals that disclosures may also be required for other purposes such as solicitation of third-party Funders, disclosure by an arbitrator (as seen in *Haliburton v. Chubb),*[7] in public interest, interests of justice and protection of legitimate interests of the parties. Notably, the Justice B.N. Srikrishna Committee in its report had also recommended keeping "*disclosure is required by legal duty, to protect or enforce a legal right, or to enforce or challenge an award before a court or judicial authority"* as exceptions.[8] This suggestion, however, was not incorporated by the legislature.

Apart from the above-highlighted concern of Section 42A being rigid and a potential hindrance to the effective conduct of the arbitral process, a completely polar concern exists of the provision being construed very narrowly. The provision mandates that the delineated actors must maintain confidentiality of all 'arbitral proceedings'. The same is not defined in the Arbitration & Conciliation Act and because there is no jurisprudence, there may be uncertainty on fronts such as whether the provision covers documents being used in arbitration. In a nutshell, the current provision as it stands is rigid, which may act as a potential hinderance in certain arbitral processes. Apart from just adding robust exceptions, clarity on the scope of the provision's applicability to documents, evidence, other third parties such as witnesses and third-party funders, etc is also required. This is to ensure that the provision is not so narrow as to render it nugatory in certain circumstances.

On the judicial front, India witnesses a very eventful year with landmark judgments being pronounced on certain widely deliberated issues of Indian arbitration jurisprudence. In particular, the

[3] England and Wales Law Commission Consultation Paper 257 (Sept., 2022) [2.39-2.46].
[4] Arbitration Act 1996, §14B – 14E. (New Zealand)
[5] International Arbitration Act 1974, §15, 23C – 23G.
[6] International Arbitration Act, §23.
[7] *Halliburton Company v. Chubb Bermuda Insurance Ltd*, [2020] UKSC 48.
[8] High Level Committee to Review The Institutionalization of Arbitration Mechanism in India (July 30, 2017).

judgments pronounced by the constitutional bench of the Supreme Court in Cox and Kings and NN Global.

In our preceding issue, we extensively covered the case of *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd,* since then, there has been a pivotal development in this case, warranting further examination. Now *In re: Interplay between Arbitration Agreements under the Arbitration and Conciliation Act, 1996 And The Indian Stamp Act, 1899,*[9] a seven-judge bench of the Supreme Court delivered its judgment on the disputed position of unstamped arbitration agreements in India. The court ruled that arbitration clauses in unstamped or inadequately stamped arbitration agreements are enforceable. In overruling the position taken in *NN Global II,*[10] the court effectively affirmed its position in *NN Global I*.[11] The bench has unanimously ruled that the court under Sections 8 and 11 shall only limit its examination to the existence of the arbitration agreement and the issue of stamping shall be decided by the Tribunal under Section 16 of the Act.

The Supreme Court examined the provisions of Section 5, along with Section 16 of the Act, that were intended to minimise judicial interference in the arbitral process. The court noted that Section 5 began with a non-obstante clause due to which it prevailed over the duties of the court envisaged in Sections 33 and 35 of the Indian Stamp Act, 1899 ["**Stamp Act**"]. On a combined reading of the above, the Court held that judicial authorities could not interfere in matters dealing with the jurisdiction of the tribunal. Since the power of examining the validity of an arbitration agreement to determine jurisdiction has been vested solely upon the tribunal, it implies that courts can't decide the question of the validity of an arbitration agreement in a Section 11 application, and must limit them only to examine for its existence.

The court also emphasized the importance of honouring the separative presumption. It underscored that this presumption is crucial for upholding the parties' intentions and ensuring the effective operation of the competence-competence doctrine. Consequently, the court firmly established that the arbitration agreement stands entirely distinct from the underlying contract. Thus, even if the main contract were deemed unenforceable due to lack of stamping, it would not impede the enforceability of the arbitration agreement. As a result, objections related to stamping, which essentially question the validity of the arbitration agreement, cannot be raised in a Section 11 application, and squarely fall under the tribunal's exclusive jurisdiction.

[9] 2023 LiveLaw (SC) 1049.
[10] 2023 SCC OnLine SC 495.
[11] (2021) 4 SCC 379.

A single-judge bench of the Supreme Court in *M/S Larsen Air Conditioning and Refrigeration Company v. Union of India & Ors.*[12] reiterated its stance that a court exercising power under Section 34 of the Act is not clothed with the power to modify an arbitral award *qua* interest. The court can only set aside the award in part or whole. The issue before the bench was whether the High Court erred in modifying the arbitral award to the extent of reducing the interest rate from compound interest of 18% to a simple interest of 9% per annum.

The Supreme Court examined Section 31(7)(b) of the pre-amended Act and while citing a similar case, it observed that since the arbitration commenced in 1997, the Act applied to the present matter. In the pre-2015 amendment provisions of Section 31(7), the statutory threshold for interest was set at 18% per annum in cases where the arbitral award did not specify a rate and therefore, the order of the arbitrator could not be interfered with. It further observed that interference with the award was warranted solely on the grounds of patent illegality and unless the arbitrator interprets a contractual term unreasonably, the arbitral award remained immune to being set aside.

To substantiate its stance, the Supreme Court referred to *NHAI v. Hakeem*[13] ["***Hakeem***"], a division bench decision, to outline the narrow scope of interference with arbitral awards. However, it is noteworthy that neither the court in the present case nor Hakeem referred to *Vedanta Limited v. Shenzhen Shandong Nuclear Power*[14] ["***Vedanta***"] which modified the interest granted by the arbitral tribunal and set the stage for other courts to modify an award *qua* interest. More so, the Hakeem decision, and thereby the present case, posits its observation that modification of an award could be done only while exercising extraordinary powers under Article 142. At the same time, the Vedanta decision does not rely upon Article 142 and bases its observation on the anvils of reasonability, prevailing economic conditions, and interests of justice. It is evident that the Vedanta decision (also a division bench) still stands in place which has been completely overlooked by the court in the present case.

While the decision of the Supreme Court may be correct, it has overlooked a substantial question of law- a law still in existence, delivered by a higher bench of this court.

In another landmark case of *Cox and Kings v. Sap India Private Ltd,.*[15] the Supreme Court has given a new shape to the Indian arbitration landscape. It emphasized the crucial distinction between a non-party and a non-signatory and observed that implied consent can also be wielded to

[12] (2023) INSC 708.
[13] (2019) 11 SCC 465.
[14] (2021) SCC OnLine SC 473.
[15] *Cox and Kings v. Sap India Private Ltd*, (2023) SCC OnLine 1634.

consider a non-signatory as a party to an arbitration agreement. The Supreme Court has settled the dust concerning multi-party arbitration by ruling upon the application of the 'Group of Companies' doctrine in India. It laid down several factors namely the mutual intent, relationship of the non-signatory with the party signatory to the agreement, commonality of subject matter, composite nature of transactions and performance of the contract that must be cumulatively looked into before the application of the doctrine.

The global arbitration sphere has also witnessed developments with judgements being passed on various contentious issues in particular by the courts in U.S.A. and Singapore.

Whether an award annulled at the seat of arbitration can be recognized and enforced in another jurisdiction is always a contentious issue. A straight-jacketed answer in the negative would have major undesired ramifications striking at the foundations of the arbitration law. The aim/ desired ends of International Arbitration, as stated in Redfern & Hunter, is to be free from the constraints of national laws to the extent practicable. A fixed answer in the negative also furthers the misuse of such an approach by state entities in both investment and commercial arbitrations.

We witnessed an interesting development on this front in the US Court of Appeals for the Tenth Circuit. The holding of the impugned case i.e., *Compania de Inversiones Mercantiles SA* ["**CIMSA**"] *v. Grupo Cementos de Chihuahua SAB de CV* ["**GCC**"] was that an award annulled at the seat can still be enforced in the U.S.A. as long as it does not violate the American public policy.[16] The holding appears to be furthering the stance taken in the seminal case of *Chromalloy Aeroservices v. Arab Republic of Egypt*.[17] The approach (as will be detailed below) has also been taken in various other American cases,[18] as well as by courts in other jurisdictions.[19]

To delve into the instant case, CIMSA in 2015 was awarded damages for breach of shareholder agreement in a Bolivian seated arbitration. GCC then plead before a lower Bolivian court to annul the damages award, the ruling of which came in their favour. However, after subsequent rounds of appeal, the Plurinational Constitution Tribunal (apex court) vacated the lower court's decision of annulment. To counter the recognition of the award, GCC filed a new appeal leading another chamber of the Bolivian PCT to finally annul the award in October 2020. Coming to the chain of events

[16] *Compania De Inversiones v. Grupo Cementos de Chihuahua*, No. 21-1324 (10th Cir. 2023).
[17] *Chromalloy Aeroservices v. Arab Republic of Egypt,* 939 F. Supp. 907 (D.D.C. 1996).
[18] For example, See: *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex–Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016).
[19] See: UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016), at 220, 221.

revolving in the U.S.A., CIMSA back in September 2015 had already filed for recognition of the award in the district court of Colorado. The ruling for which was in their favour. GCC however asked the district court to vacate its judgement after the 2020 annulment by the PCT. The motion to vacate was denied on the grounds of i) finality being a part of the American Public Policy; ii) upholding parties' contractual expectations; and iii) policy in favour of arbitral dispute resolution. The majority in the Tenth Circuit bench upholding the district court's reasoning also held that per Article V(2)(b) of the New York Convention,[20] the courts have the discretion to not enforce an award when it violates the seat's public policy. It also observed that considerations of finality as a public policy outweighed considerations of comity. The dissent on the contrary held that the test applied had been rejected by the sibling circuits, is contrary to the New York Convention and overturned the district court's decision as finality did not constitute a part of the American public policy among other reasons of domestic law. As stated above, the majority reasoning (as also addressed in the judgement) is the one in line with other courts, both American and globally. The majority could also have relied on Article VII(1) of the New York Convention to further buttress its interpretation.[21] The same states "…*nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon*" and is a mandatory provision.

Another contentious judgment is in the case of *Anupam Mittal v. Westbridge Ventures II Investment Holdings.*[22] This case revolves around a shareholders' agreement ["**SHA**"] entered into by the parties in 2006, which included a dispute resolution clause mandating Singapore arbitration, subject to the Act for enforcing awards. Disputes arose in 2019, leading the Applicant to file a company petition[23] before the National Company Law Tribunal ["**NCLT**"] in India. In response, the Respondents sought an anti-suit injunction from the Singapore High Court ["**HC**"], leading to a complex legal battle. The HC[24] granted an ex-parte anti-suit injunction, upheld on appeal by the Court of Appeal in Singapore ["**SCA**"] in January 2023. Simultaneously, the Respondents initiated arbitration proceedings, and the Applicant sought relief from the Bombay High Court[25] against the anti-suit injunction, which was granted.

[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 330 UNTS 3. [hereinafter "**New York Convention**"]
[21] New York Convention art. VII (1).
[22] *Anupam Mittal v. Westbridge Ventures II Investment Holdings*, [2023] SGCA 1.
[23] *Anupam Mittal v. People Interactive (India) Pvt. Ltd. and Others*, CP/92(MB) 2021.
[24] *Westbridge Ventures II Investment Holdings v. Anupam Mittal*, [2021] SGHC 244.
[25] *Anupam Mittal v. People Interactive (India) Pvt. Ltd. and Others*, Suit No. 95 of 2021.

The SHA specified that the agreement and its execution would be governed by Indian law, but the SCA disagreed. The SCA applied the hierarchy laid down in the *Sulamerica*[26] case, prioritizing the express choice of law, the implied law reflecting intention, or the law closely connected to arbitration. The SCA found the arbitration clause ambiguous, allowing it to apply Singapore laws due to its interpretation of the *Sulamerica* case. The SCA's perspective considered the non-arbitrability of oppression and mismanagement ["**O&M**"] disputes in India and allowed Singapore laws to govern the arbitration, but only until the pre-award stage.

The anti-anti-injunction suit was granted by NCLT on the grounds of India's public policy. It raises concerns about the post-award stage, as Indian courts, under the Act, would likely refuse enforcement, considering O&M disputes non-arbitrable in India. The SCA's decision to apply Singapore laws until the pre-award stage is questioned, as it seems to prioritize protecting Singapore's pro-arbitration image over the potential enforceability issues in India. The SCA's approach may render the arbitration process futile, despite the court's assertion that it remains worthwhile for evidence gathering and legal principle establishment.

Amidst this backdrop of significant developments in the global landscape of Arbitration, IRIArb brings the second issue of its Volume 3. The issue contains contributions from around the world and features articles on issues relevant to arbitrations, such as the role of arbitration in combating climate change, the disproportionate impact of BITs on host states, the restricted pre-referral jurisdiction of Indian courts, and also includes an industry insight.

The article by Lalit Kumar Deb and Prithivi Raj titled "*Arbitration Strategies for Resolving Climate Change and Sustainability Disputes in Commercial Transactions***"** explores arbitration in addressing climate change and sustainability disputes in commercial transactions. Emphasising the challenges posed by regulatory shifts, extreme weather events, and changing consumer demands, the authors argue that arbitration's flexibility makes it a practical and confidential platform for resolving these issues. They highlight the potential of arbitration agreements to incorporate sustainability considerations, promoting responsible corporate behaviour. The article discusses the evolving landscape of climate-related disputes, emphasising the need for specialised expertise in environmental matters during arbitration. It categorises disputes based on legal actions, financial responsibilities, industry changes, meteorological phenomena, conflicts between nations, and government contracts. The authors stress the importance of aligning contractual obligations with

[26] *Sulamérica Cia Nacional de Seguros S.A. and Others v. Enesa Engenharia S.A. and Others*, [2012] EWCA Civ 638.

environmental responsibility to mitigate climate change risks. The article recommends proactive measures, including well-drafted arbitration agreements, early dispute resolution, risk audits, and dispute protocols for managing climate change and sustainability disputes in commercial transactions.

The article by Thiago Ferreira Almeida titled "*Protection of the Foreign Investor: An Analysis of the Main Substantive Clause under the Perspective of Host States*" critically examines the historical development and contemporary challenges of international investment law, centring on Bilateral Investment Treaties (BITs) and their repercussions on host states. Initially designed to unilaterally safeguard foreign investors, BITs saw a surge in adoption from the latter half of the 20th century, intensifying notably post-1980s. However, the 21st century brought forth substantial criticism, citing subjective decisions, contentious interpretations, and perceived constraints on states' legitimate pursuit of public interest goals, such as environmental protection and economic measures. The study delves into ad hoc arbitration cases, scrutinising substantive BIT rules including National Treatment, Most-Favoured-Nation Treatment, Minimum Standard of Treatment, Fair and Equitable Treatment, Full Protection and Security, Direct and Indirect Expropriations, Compensation, and the Umbrella Clause. The analysis unveils a discernible pattern of inconsistent arbitral awards that disproportionately affect states, particularly host nations, as underscored by recent amendments reflecting a shift towards more restrictive models in international investment protection.

The article by Ieshan Sinha titled "*Pre-referral Jurisdiction: B&T AG v. Ministry of Defence Widens the Eye of the Needle*" analyses the extent of the pre-referral jurisdiction of the court i.e., at the stage of referring the matter to arbitration. It acknowledges how the scope of interference by the courts is limited to rejecting ex-facie time-barred claims or claims barred by limitation and highlights how the court wielded this ground of limitation to expand the scope of the pre-referral jurisdiction. The author concludes that such precedent would warrant unnecessary and unjustified interference by the courts denuding the claimant of its right to a prompt resolution of dispute.

In the industry insight, Shravan Niranjan and Aisvaria Subramaniam explore the Singapore International Arbitration Centre ["**SIAC**"] as a prominent arbitral institution, positioning itself as the second most preferred globally after the International Chamber of Commerce. The focus is on the 7th edition draft of SIAC amendment rules, designed to align with contemporary arbitration practices. The amendments include innovative features such as the Streamlined Procedure, Third-Party Funding, Preliminary Determination, and SIAC Gateway. The Streamlined Procedure, a notable addition, aims to expedite dispute resolution, introducing a quicker track for small-value disputes. However, concerns arise regarding potential limitations on party autonomy, the absence of guaranteed

rights to a hearing, and unclear criteria for its application. The article also highlights amendments related to Third-Party Funding, requiring disclosure of agreements, and the introduction of Preliminary Determination for efficient issue resolution. The SIAC Gateway incorporates technological advancements, facilitating centralized case filing and hybrid hearings. The SIAC's proactive approach to rule evolution is emphasized, aligning with the institution's commitment to adaptability and innovation in international arbitration.

ARBITRATION STRATEGIES FOR RESOLVING CLIMATE CHANGE AND SUSTAINABILITY DISPUTES IN COMMERCIAL TRANSACTIONS

Lalit Kumar Deb[*] and Prithivi Raj[*]

Abstract

Climate change and sustainability disputes present a unique set of unique challenges within the arbitration framework. These disputes arise from a variety of sources, including regulatory shifts, extreme weather events, and changing consumer demands. Arbitration is a flexible and adaptive method of dispute resolution that provides an avenue for parties to address issues in a confidential, neutral, and efficient manner. Arbitration can offer a forum for resolving disputes arising from climate change and sustainability issues, allowing parties to seek equitable solutions, interpret contractual clauses related to environmental performance, and adapt contracts to changing circumstances. Additionally, it provides an opportunity to encourage responsible corporate behaviour and promote sustainable business practices through arbitration agreements that incorporate sustainability and environmental considerations. This article examines how arbitration can serve as a valuable tool for addressing contractual disputes affected by climate change and sustainability concerns. It delves into the evolving landscape of climate change-related disputes, encompassing a broad range of sectors. It highlights the need for specialized expertise in environmental and sustainability matters in the arbitration process. The importance of developing arbitration mechanisms that are sensitive to climate change and sustainability concerns is emphasized, with a focus on tailored procedures, expert panels, and the recognition of emerging legal and ethical norms. Arbitration can play a significant role in aligning contractual obligations with environmental responsibility, making it an integral component in mitigating the risks associated with climate change. This article delves into the intersection of climate change and sustainability disputes within the context of arbitration, particularly focusing on contracts that are influenced by environmental challenges. As climate-related issues increasingly impact contractual obligations, the role of arbitration in resolving such disputes and fostering sustainable business practices becomes essential. This article underscores the vital role of arbitration in addressing climate change and sustainability disputes within contractual relationships. As environmental challenges continue to shape the business landscape, the adaptation and growth of arbitration procedures to accommodate these issues are imperative. By recognizing the significance of climate change and sustainability

[*] Dean & Professor of Law, Birla Global University, Odisha.
[*] Assistant Professor of Law, Birla Global University, Odisha.

within the scope of arbitration, we can enhance the resilience and sustainability of contractual relationships in an ever-changing world.

Keywords: Climate Change, Sustainability, Arbitration, Environmental Disputes, Contractual Obligations

I. INTRODUCTION

Climate change disputes revolve around legal conflicts and contentions that arise due to the multifaceted impacts and drivers of climate change. These disputes manifest in various forms, ranging from contentious debates over regulatory compliance to complex battles over financial liabilities. They include cases where entities, be they corporations, governments, or individuals, may be accused of failing to adhere to environmental regulations aimed at mitigating climate change, often related to greenhouse gas emissions and pollution controls. Climate adaptation disputes may emerge over decisions regarding land use and infrastructure development in areas vulnerable to sea-level rise and extreme weather events, with property rights and resource allocation often at the heart of these disagreements. Moreover, financial disputes can center on determining responsibilities and compensations for climate-related losses, such as claims for insurance or litigation against entities seen as contributing to climate change through activities like fossil fuel production. Notably, public interest litigation also plays a role, as individuals and organizations sue governments and corporations for perceived inaction or inadequate measures in addressing climate change and safeguarding the environment. Furthermore, conflicts may arise concerning the allocation and utilization of resources affected by climate change, including disputes over water rights in regions facing prolonged droughts or disagreements over land use for agriculture or conservation.

On the other hand, sustainability disputes encompass a broad spectrum of disagreements related to the principles and practices of sustainability, a concept that seeks to balance environmental stewardship, social equity, and economic viability. Environmental conservation is a focal point, with disputes over land use, natural resource management, and wildlife protection often arising as communities and stakeholders grapple with competing interests. Corporate responsibility disputes involve allegations of greenwashing or insufficient commitment to sustainable business practices, where stakeholders challenge the authenticity of a company's sustainability claims, particularly in marketing and operational practices. Sustainability disputes can also involve social equity issues, such as debates over fair labour practices, social justice, access to education, and community development, as the pursuit of sustainable practices often carries a social responsibility. Resource management conflicts may revolve around sustainable usage and equitable distribution of natural

resources like fisheries, forests, and water sources. Additionally, consumer rights can be implicated when products or services are marketed as sustainable or eco-friendly, leading to disputes when consumers believe they are being deceived by companies claiming to prioritize sustainability. International law and governance are essential for climate change and sustainability disputes. These structures allow governments and parties to collaborate on global issues. International agreements like climate accords set norms and commitments. International governance systems also check compliance, resolve disputes, and promote cooperation. Environmental justice and sustainability can be integrated into international legal frameworks to reduce climate change disputes and promote global sustainability. In sum, climate change and sustainability disputes are becoming increasingly prominent and complex in an era where environmental concerns and sustainable practices are at the forefront of global discussions and policy agendas. These disputes transcend legal and ethical dimensions, requiring innovative and multifaceted solutions to address the challenges of our rapidly changing world.

II. INSTANCES OF CLIMATE CHANGE AND SUSTAINABILITY DISPUTES

Disputes pertaining to climate change and sustainability cover a wide range of legal issues, and it can be relatively difficult to clearly define what these issues are. On the other hand, a helpful description of climate change disputes is provided in the International Criminal Court Commission Report titled "Resolving Climate Change Related Disputes through Arbitration and ADR".[1] This description defines such disputes as any conflicts that arise from or are related to the effects of climate change, climate change policies, the United Nations Framework Convention on Climate Change ["**UNFCCC**"], and the Paris Agreement. In recognition of the fact that these disagreements frequently encompass a variety of other unique issues that belong under the tent of sustainability, we have adopted this expansive approach by including the word 'sustainability' in our definition. For instance, human rights and basic rights are inextricably linked to climate change and are negatively impacted by it, despite the fact that these two categories are typically thought to be distinct from one another. Those keeping an eye on the trends in climate change disputes have correctly predicted that there will be a rise in arguments that are basic rights challenges wrapped around climate change issues.[2] This tendency is expected to pick greater steam in the years to come, particularly given the success these arguments have already demonstrated to some extent. Similarly, a variety of other

[1] International Chamber of Commerce, *Resolving Climate Change Related Disputes through Arbitration and ADR* (2019), https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf.

[2] UN Environment Programme, *Climate litigation more than doubles in five years, now a key tool in delivering climate justice*, UNEP (July 27, 2023), https://www.unep.org/news-and-stories/press-release/climate-litigation-more-doubles-five-years-now-key-tool-delivering.

factors influence biodiversity and land degradation concerns, which are influenced by climate change and thus intensify its aftermath. In essence, the term "climate change" has become overly restrictive in and of itself. It might be difficult to define climate change and sustainability disputes precisely because they involve many legal problems. Nonetheless, a useful explanation found in the ICC Commission Report titled "Resolving Climate Change Related Disputes through Arbitration and ADR" presents a comprehensive viewpoint, characterizing these disputes as any disagreements resulting from or connected to climate change policies, the Paris Agreement, the UNFCCC or their effects. We take this wide approach and include 'sustainability' in our definition, acknowledging that these disagreements frequently encompass a number of additional unique issues that are included under the more general sustainability heading. For instance, human rights and basic rights are inextricably linked to and damaged by climate change, although being typically seen as two distinct categories. The statement highlights the interconnectedness of human rights and basic rights and emphasizes that climate change is a significant factor that can affect and potentially harm both domains, challenging the conventional separation between these two categories of rights. This perspective underscores the need for integrated approaches to address the complex and interrelated issues arising from climate change and its impact on human well-being.

In light of these intricacies, it is more pragmatic to adopt the methodology employed by Justice Potter Stewart of the United States Supreme Court when delineating the term "obscenity": "you know it when you see it."[3] Furthermore, it can be advantageous to classify disputes regarding climate change and sustainability according to practical distinguishing characteristics. As an illustration, the subsequent classifications may be employed, mirroring the methodology employed by the ICC Taskforce when deliberating on such conflicts[4]:

i. Legal actions taken to require or alter behaviour or regulations connected to climate change.
ii. Legal actions taken to obtain monetary reparations for losses attributable to the effects of climate change.
iii. Legal issues resulting from the current industry changes in the energy and other large businesses.
iv. Contentious situations brought on by meteorological phenomena linked to climate change.
v. Conflicts arise between host countries and foreign investors.
vi. Conflicts arise between nations and other international entities.

[3] Rosen J, *The O'Connor Court: America's Most Powerful Jurist*, N.Y. TIMES, June 5, 2001.
[4] International Chamber of Commerce, *Arbitration Rules Mediation Rules* (2021), https://iccwbo.org/wp-content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf.

Because the function of arbitration differs substantially in accordance with the characteristics of the conflict, these classifications are established, with arbitration assuming a more conspicuous position in classifications 'iii' to 'vi'. This is predominantly due to the fact that claims classified as 'I' and 'ii' pertain to statutory, constitutional, or administrative legislation as opposed to contractual arrangements. As a result, these conflicts are typically resolved in political arenas or national tribunals. Generally, public interest organizations lack legal status in arbitration proceedings due to the contractual nature of the process. Exceptions include situations in which non-parties petition to intervene as amicus curiae in investment arbitration or in commercial arbitration with the consent of the parties. Additional complications may arise regarding the arbitrability of certain disputes that fall within the initial two classifications.

III. DISPUTES RELATING TO TRANSITION, ADAPTATION, MITIGATION, OR RESILIENCE ACTIVITIES IN CONTRACTS

Contractual disputes emerging from transition, adaptation, mitigation, or resilience efforts are legal conflicts or disagreements arising from contractual agreements meant to address and respond to the difficulties posed by climate change and environmental sustainability. These disputes typically involve various aspects of the contract, including its interpretation, performance, or breach, in the context of activities aimed at managing, responding to, or mitigating the impacts of climate change and enhancing resilience.[5]

i. *Transition Activities*: Contracts related to transition activities often focus on shifting from traditional, carbon-intensive practices to more sustainable and environmentally responsible approaches. Disputes in this category may arise when one party believes the other is not fulfilling its obligations to transition towards greener technologies, reduce carbon emissions, or meet sustainability targets outlined in the contract.

ii. *Adaptation Activities*: Contracts aimed at adaptation typically involve preparing for and responding to the inevitable effects of climate change, such as sea-level rise, extreme weather events, and changing environmental conditions. Disputes here may revolve around the adequacy of adaptation measures, such as disputes over the design and construction of climate-resilient infrastructure or disagreements regarding the allocation of resources for adaptation projects.

[5] Söderholm P, *The Green Economy Transition: The Challenges of Technological Change for Sustainability* (2020) 3 SUSTAINABLE EARTH, https://sustainableearthreviews.biomedcentral.com/articles/10.1186/s42055-020-00029-y#citeas.

iii. *Mitigation Activities*: Contracts related to mitigation involve efforts to reduce greenhouse gas emissions, limit environmental damage, and combat climate change directly. Disputes in this context may emerge when parties disagree on the extent to which emission reduction targets have been achieved, the effectiveness of mitigation technologies, or the allocation of costs and responsibilities for mitigation efforts.

iv. *Resilience Activities*: Resilience contracts focus on building the capacity to withstand and recover from climate-related events. Disputes in this category can pertain to the design, construction, or maintenance of infrastructure and systems that enhance a community's or an organization's ability to bounce back from climate-related challenges.[6]

These disputes can take various forms, including disagreements over the quality of work, delays in project completion, cost overruns, compliance with environmental regulations, and the allocation of financial responsibilities for climate change-related activities. Resolving these disputes often requires a nuanced understanding of both the contract's terms and the unique challenges presented by climate change and sustainability considerations.

Moreover, as the legal landscape evolves to address climate change and sustainability, these disputes may also encompass issues related to regulatory changes, environmental standards, and the enforcement of sustainability commitments made in the contract. Arbitration and alternative dispute resolution methods are increasingly used to address these complex and evolving issues, providing flexibility and confidentiality in resolving disputes related to transition, adaptation, mitigation, and resilience activities while aligning with the broader goals of environmental responsibility and sustainability.

IV. INTERNATIONAL GREY AREA ON TRANSITION, ADAPTATION, MITIGATION, AND RESILIENCE CONTRACT DISPUTES

The IPCC Special Report on 1.5°C global warming called for "swift, comprehensive, and unparalleled transformations across all facets of society." This includes notably, "rapid and extensive transitions in land, energy, industry, buildings, transport, and cities."[7] Whether taken individually or collectively, these transitions will have profound ramifications on every facet of private, commercial, and public enterprises. A century ago, transitions in energy, industry, and transportation ushered in

[6] *Id.*

[7] IPCC, *Global Warming of 1.5°C.An IPCC Special Report on the Impacts of Global Warming of 1.5°c above Pre-Industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty,* CAMBRIDGE UNIVERSITY PRESS.

transformative societal changes. For instance, the introduction of the automobile revolutionized travel, industry, trade, and urban development. Modern transitions aimed at mitigating and adapting to climate change, with a particular emphasis on the energy sector, require a similarly radical reorganization of the way societies, cities, industries, and lifestyles are structured and managed. What sets these transitions apart is the unprecedented pace at which they are occurring, a feat never before attempted in human history.

It is evident that significant financial investment is required to achieve these shifts. According to a recent IEA analysis, achieving net-zero emissions by 2050 will necessitate a threefold increase in global renewable energy expenditure over the current level, reaching nearly USD $4 trillion by 2030.[8] By 2030, widespread deployment of sustainable energy technologies such as renewables and electric cars, as well as significant investment in research and development of new technologies, are required. It should be noted that this cost is specific to the energy transition; other large businesses experiencing changes will also necessitate significant investment. Furthermore, according to the 2020 UNEP Adaptation Gap Report, the costs of adaptation—which include measures to increase a nation's or community's resilience to the effects of climate change—are estimated to be around USD $70 billion per year in developing countries, rising to USD $140-300 billion by 2030 and USD $280-500 billion by 2050.[9]

While these transitions offer substantial opportunities for industries and businesses, they also introduce a heightened risk of disputes. This heightened dispute risk arises from several factors. First, as the volume of transactions escalates, a certain percentage is inevitably prone to disputes. Second, the unique characteristics of these transactions, involving innovations, new collaborations, technologies, infrastructure, and rapidly evolving regulatory frameworks, create a fertile ground for disputes. Moreover, the pace of these transitions is a crucial factor influencing the risk profile, given that rapid, large-scale disruptions are susceptible to errors. Global investment is complex, and the link between broad-scale financial endeavours and specific dangers that lead to disputes is often unclear. Investment uncertainty shapes potential conflicts. Investors must manage cross-border transactions and varied economic contexts, where market dynamics, regulatory changes, and geopolitical upheavals can cause ambiguity and disagreements. Understanding uncertainty's tremendous impact in this setting is essential for understanding how global investment strategies relate to dispute risks. Unravelling uncertainty reveals investors' concerns and complexities,

[8] *Supra* note 5.
[9] *Id*.

highlighting potential disagreement triggers and the need for robust dispute resolution procedures in the global economy.

In this environment, international arbitration has emerged as the preferred conflict resolution procedure for many industries undergoing transformations, including energy, natural resources, infrastructure, and transportation. This preference is supported by statistics from major arbitral institutions, demonstrating a consistently high proportion of disputes related to these sectors. International arbitration is also favoured for cross-border transactions, especially when states or state-owned entities or emerging markets are involved, which is common in energy, natural resources, and infrastructure. Arbitration provides anonymity and privacy, which are significant factors, particularly in technology and innovation contracts. Many climate change and sustainability issues are extremely technical, making arbitration preferable to litigation since parties can choose arbitrators with relevant subject matter expertise. This preference for arbitration is backed up by a 2019 SCC Report on 'Green Technology conflicts in Stockholm,'[10] which said that an increasing number of green technology companies are turning to arbitration to settle their conflicts. As a result, many disputes resulting from industrial transitions, adaptation, and resilience operations end up in international arbitration processes.

A. Illustrative instances of arbitration proceedings concerning contractual matters pertaining to activities associated with transition, adaptation, mitigation, or resilience.

Arbitration cases within the context of climate change and sustainability-related issues can be varied and complex. The SCC (Stockholm Chamber of Commerce) Report[11] presented several cases as illustrations of the types of disputes that frequently emerge in these areas:

i. *Renewable Energy Facilities Disputes***:** Over 60% of the green technology disputes analyzed in the SCC Report[12] pertained to renewable energy facilities, including wind farms and biogas installations. These disputes often revolved around questions of whether the facility met the contractual standards, such as the agreed-upon power production or measures to prevent environmental risks.

ii. *Construction-Related Disputes*: Conflicts over quality, who is responsible for extra expenses, the calibre of the work, and project delays are common in the construction industry and can

[10] SCC Arbitration Institute, *Green Technology Disputes at the SCC Arbitration Institute,* https://sccarbitrationinstitute.se/sites/default/files/2022-12/report_green_technology_disputes.pdf.
[11] Global Arbitration News, *Stockholm Chamber of Commerce Publishes Report on Investor State Arbitration*, BAKER MCKENZIE (2017) https://www.globalarbitrationnews.com/2017/03/07/3274-2-03072017/.
[12] *Id.*

result in claims for liquidated damages. Notably, a well-known instance involving the Hidroituango hydroelectric dam failure in Colombia, which caused a significant flood, sparked legal battles demanding hefty settlements from project participants.

iii. *Financing Disputes*: Recent global and regional upheavals have sometimes left companies struggling to secure financing for projects. These financial challenges can lead to project delays or, in some cases, contract terminations, ultimately leading to arbitration proceedings.

iv. *Disputes Related to Financing Climate Change and Sustainability Projects***:** These conflicts cover a wide range of topics, such as disagreements over the technical requirements for obtaining funding connected to sustainability or the green economy, the proper use of money related to climate change or sustainable finance, and disputes resulting from carbon credits or emissions trading schemes. A Danish engineering company that was awarded a $150 million SCC award in an arbitration pertaining to a contract for lowering carbon emissions at gas pipes is one example given in the SCC Report. The project's goal was to produce carbon credits in accordance with the Kyoto Protocol. However, the Russian businesses involved neglected to register it in time, which resulted in a disagreement.[13]

v. *Supply and Delivery Disputes*: These disputes often involve performance, delivery, quality, and quantity issues, particularly in commodities. Fluctuations in commodity prices, influenced by climate change and transition activities, further complicate matters. For instance, extreme weather conditions can disrupt the sourcing and transportation of commodities, impacting supply and demand.

vi. *Contract-Based Disputes***:** The SCC Report[14] cited several contract-based disputes, including the unpaid delivery of wind energy converters, requests for payment for consulting services associated with the issuance of shares for an organic food producer, and conflicts arising from distribution agreements. Additionally, it is recommended to be well-prepared for potential commercial disputes in the context of licensing, partnerships, and sustainability and climate change initiatives.

vii. *Government Contracts and State Entities*: Contractual conflicts between governments and state-owned entities are anticipated to develop if governments invest in projects connected to energy and other industry transitions or mitigating the effects of climate change. For instance, after the government of Lesotho declined to carry out a contract to buy solar energy equipment, a German renewable energy company filed for ad hoc arbitration against the country. A $400 million USD ICC claim has been made against Nigeria for allegedly breaking

[13] *Supra* at 10.
[14] *Supra* at 9

a settlement linked to a hydroelectric project. A comparable conflict arose in the Dominican Republic with a wind energy complex, as the government-owned electricity provider declined to formally establish a power purchase deal.[15]

viii. *Infrastructure Disputes*: Infrastructure-related disputes may increase, particularly in the case of initiatives involving transitions. A wind farm cooperation agreement, for instance, was subject to arbitration in the event of a default event resulting from a failure of the grid connection. A separate case involved a Chinese-owned company that threatened arbitration by alleging commissioning delays and making counter-allegations regarding the impact on the local infrastructure of a USD $2.2 billion power transmission project as part of the Belt and Road Initiative.[16]

These examples highlight the diverse range of disputes that arise in the context of climate change, sustainability, and industry transitions, making arbitration a critical mechanism for resolving complex and multifaceted conflicts in these rapidly evolving fields.

V. CONTRACTS AFFECTED BY CLIMATE CHANGE AND SUSTAINABILITY ISSUES

Climate change is already having an effect on the economic world, and it will eventually have an impact on contractual agreements. Insurance company reports show a significant increase in losses attributable to extreme weather events, with an increasing correlation between climate change and the frequency and severity of these catastrophes. Concerns about climate change go beyond its physical effects, as these effects are predicted to worsen in the years to come. Transitional effects, including the loss of current markets or the entry of new competitors, are anticipated, along with legal and regulatory ramifications like difficult permit renewal processes or stricter corporate regulations that can have a major negative impact on profitability.[17]

There are several instances in which weather-related problems might negatively impact contracts and lead to business disputes. Claims of force majeure, frustration, or contract termination because of weather-related occurrences' disruptive influence are clear examples. Insurance-related disputes are also expected to rise as businesses deal with the fallout from catastrophic weather occurrences. As we addressed in our article on supply chain disputes in this issue, the recent COVID-19 outbreak

[15] Philippe Hameau et al., *Energy Arbitration in Africa*, GLOBAL ARBITRATION REVIEW (Apr. 21, 2023), https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2023/article/energy-arbitration-in-africa.

[16] Simon Bianchi, *Offshore Wind - a Rise in Disputes in an Industry at the Crossroads*, LEXOLOGY (Oct. 10, 2023), https://www.lexology.com/library/detail.aspx?g=21bebeb1-aaf0-4e54-a011-f23fff4f0a9.

[17] Antonio Grimladi et al., *Opportunity and Threats of Climate Change on Insurance*, MCKINSEY (Nov. 19, 2020), https://www.mckinsey.com/industries/financial-services/our-insights/climate-change-and-p-and-c-insurance-the-threat-and-opportunity.

highlighted the vulnerability of supply systems and offered a peek at the possible global disruption that climate change could bring. Furthermore, shifts in policy, technology, and the heightened physical risks posed by climate change can lead to a re-evaluation of the value of various assets. As the costs and opportunities associated with these changes become more apparent, they may trigger contractual defaults or result in assets being classified as distressed or stranded. In response to emerging risks, parties involved in contracts will naturally seek ways to mitigate and allocate these risks among themselves through contractual provisions. It is worth mentioning that a considerable number of contracts currently incorporate clauses or warranties pertaining to adherence to sustainability, human rights, or environmental obligations. Additionally, the parties agree to establish back-to-back agreements with counterparties downstream. Consequently, conflicts that may arise due to these provisions are essentially unavoidable.[18]

Once again, commercial arbitration is expected to be the preferred mechanism for resolving these contractual disputes. As the effects of climate change continue to manifest globally, there is anticipated growth in the number of disputes brought to arbitration, as it offers flexibility, confidentiality, and expertise in handling complex climate change and sustainability-related disputes.

A. Examples of Arbitration on contracts affected by Climate Change and sustainability.

In the wake of the severe storms that struck Texas in early 2021, causing widespread power blackouts, disruptions in the oil and gas industry, frozen pipelines, and a significant surge in the price of natural gas, a series of disputes emerged, underscoring the role of arbitration in addressing climate-related issues and infrastructure challenges.

i. *Power Outages and Gas Price Surge in Texas***:** Extensive power outages caused by Texas's extreme weather impact several industries, especially the energy sector. In addition, there was a sharp rise in natural gas prices. The impact of this spike in gas prices went beyond Texas; it was especially felt in nations like Mexico that import natural gas from the US. A US investment bank filed for international arbitration against Mexico's state electricity provider in reaction to these events. Under a gas purchase agreement, the bank attempted to collect USD $400 million in debt, claiming that the debt was caused by sharp increases in the daily gas price rate relative to the monthly rate. The utility contested the payment increase, citing it

[18] IPCC WORKING GROUP II, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY 811-841 (Cambridge University Press 2007).

as a consequence of an unforeseen event and raising allegations of other discrepancies in the agreement.[19]

ii. *Infrastructure Damage Disputes*: The severe storms also wreaked havoc on critical infrastructure in Texas, including ports and railway lines, resulting in extensive damage due to flooding. These infrastructure damages led to disputes between the impacted transport companies and the state, particularly regarding liability for the repair costs and whether the flooding should be categorized as an event of force majeure. The inability to reach a mutual agreement on these matters prompted some of these disputes to be referred to arbitration and litigation, highlighting the role of alternative dispute resolution mechanisms in addressing climate-related infrastructure challenges.[20]

These examples illustrate the diverse range of disputes arising from climate-related events, infrastructure damage, and financial implications, with arbitration being a key mechanism for resolving complex and multifaceted issues that arise in the aftermath of such events. In cases like these, arbitration provides a flexible and effective means of addressing disputes, particularly when parties involved cannot reach a consensus on issues related to liability, contractual obligations, and unforeseen events.

VI. CONCLUSION AND RECOMMENDATIONS

Climate change is no longer a distant environmental concern; it has become an integral part of the economic landscape, necessitating adaptation by both state and corporate entities. As a result, climate change and sustainability disputes have emerged as a new corporate reality and addressing them effectively is crucial in the modern business world.

It is imperative to recognize that no transaction is devoid of risk. However, parties should approach every transaction with foresight and consider dispute resolution strategies from the outset. One of the primary mechanisms for managing these risks is a well-drafted arbitration agreement. Arbitration, as a neutral and flexible forum, provides access to expert adjudicators and is well-suited to take a central role in resolving the growing number of climate change and sustainability disputes arising from contractual relationships.

[19] Keith Everhart et al., *Severe Power Cuts in Texas Highlight Energy Security Risks Related to Extreme Weather Events – Analysis*', INTERNATIONAL ENERGY AGENCY (Feb. 18, 2021), https://www.iea.org/commentaries/severe-power-cuts-in-texas-highlight-energy-security-risks-related-to-extreme-weather-events.

[20] James Neumann and Jason Price, *Adapting to Climate Change: The Public Policy Response – Public Infrastructure,* RESOURCES FOR THE FUTURE (June 1, 2009), https://rosap.ntl.bts.gov/view/dot/17294.

To effectively navigate the evolving landscape of climate change and sustainability, the following recommendations should be considered:

i. *Early Dispute Resolution Mitigation*: Parties should integrate dispute resolution mitigation and resolution strategies into the initial stages of every transaction. Well-crafted arbitration agreements, tailored to the specific needs and potential risks, can serve as a cornerstone for risk allocation and dispute resolution.

ii. *Conducting Risk Audits*: Companies should regularly conduct climate change and sustainability dispute risk audits, assessing the impact of climate-related factors on their global and regional operations. Identifying potential disputes early can help devising proactive measures to mitigate risks and enhance preparedness.

iii. *Establishing Dispute Protocols*: Proactive protocols for dealing with disputes as they arise should be established. These protocols should outline clear steps for addressing disputes promptly, efficiently, and collaboratively. Quick and informed responses can save valuable time, reduce costs, safeguard reputations, and maintain positive relationships with counterparties, which is especially critical in long-term contractual arrangements involving substantial investments.

In conclusion, addressing disputes related to climate change and sustainability at the outset of transactions is the most effective strategy for averting a climate change dispute disaster. By taking these proactive steps, businesses and organizations can not only safeguard their interests but also contribute to the broader goal of sustainable and responsible business practices in an ever-changing global landscape.

THE INCONSISTENCIES OF THE INVESTOR-STATE SOLUTION IN THE INTERNATIONAL PROTECTION OF THE FOREIGN INVESTOR: AN ANALYSIS OF THE MAIN SUBSTANTIVE CLAUSES FROM THE PERSPECTIVE OF HOST STATES

Thiago Ferreira Almeida*

Abstract

*International investment law is historically structured by the unilateral protection of the foreign investor. The dissemination of the Bilateral Investment Treaty ["**BIT**"] model dates back to the second half of the twentieth century, and its expansion occurred only after the 1980s. BITs consist of an international agreement comprising substantive and procedural rules, defining the protection of foreign investment and investors in a territory other than their nationality and establishing a dispute resolution model, with the adoption of the Investor-State solution system via ad hoc arbitration. In the 21st century, after decades of the prevalence of BITs, there have been numerous criticisms of this model characterized by subjective and controversial decisions, incongruous interpretations, and, above all, by blocking the legitimate exercise of the State to dispose of its public interest, such as environmental protection, health and economic measures. The article analyses these substantive clauses from* ad hoc *arbitration cases: (i) National Treatment; (ii) Most-Favoured-Nation Treatment; (iii) Minimum Standard of Treatment principle; (iv) Fair and Equitable Treatment; (v) Full Protection and Security; (vi) Direct and Indirect Expropriations and Compensation; and (vii) Umbrella Clause. Finally, the article concludes that the arbitral awards are inconsistent and inflict serious damage to the exercise of the States, especially to host States, which is evidenced by the recent amendments of the BITs by more restrictive models of international investment protection.*

Keywords: Bilateral Investment Agreement; Investor-State Arbitration; Foreign Investment; Public Interest; Host States.

I. INTRODUCTION[1]

A set of rules is applied to international investment protection commonly provided for in bilateral and regional agreements. Essentially, these are rules to protect investors against acts of the host state, guarantees of non-discrimination against national and third-country investors, prohibition of arbitrary

* Specialist in Public Policy at the Development Bank of Minas Gerais (BDMG) PhD of international investment law at the Federal University of Minas Gerais - UFMG (Brazil).

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and discriminatory acts, rules for compensation in the event of expropriation, and mainly, the definition of the dispute settlement system through conciliation or mediation, domestic jurisdiction and state-state or investor-state arbitration. This plurality of legal alternatives often leads to practices such as *forum shopping* and *forum treaty*, to circumvent legal systems that are not advantageous to foreign investors.

The historical understanding of International Investment Law allows us to recognize the recurrent use of rules arising from capital-exporting nations, then perceived as international, with the purpose of avoiding the domestic jurisdiction of capital-importing countries, mostly developing ones.

In this sense, it is possible to identify in the contemporary international investment law the main substantive rules in BITs and FTAs that will be analysed in this article: (i) National Treatment ["**NT**"]; (ii) Most-Favoured-Nation Treatment ["**MFN**"]; (iii) Minimum Standard of Treatment ["**MST**"] principle; (iv) Fair and Equitable Treatment ["**FET**"]; (v) Full Protection and Security ["**FPS**"]; (vi) Direct and Indirect Expropriations and Compensation; and (vii) Umbrella Clause.[2]

These clauses are important to understand the international protection system and its relationship with host states, especially those that are in the condition of emerging or developing countries, whose impacts of an arbitration award are significant. At the end of this analysis, a summary of the main cases examined is provided, divided according to the interpretative lines that have been identified.

This paper shows the inconsistency of arbitral awards with the main standard clauses upheld in BIT models. As a result, both developing and emerging countries, as well as developed countries, are moving away from international investment protection, focusing on national jurisdiction or the adoption of more restrictive agreements.

The movement away from the traditional model of investment agreements can be seen, in concrete

[2] The list of the main clauses applied in BITs and FTAs is based on the doctrine that focuses its analysis on these institutes. See: Andrew Bjorklund, *Practical and legal avenues to make the substantive rules and disciplines of international investment agreements converge*, in ROBERTO ECHANDI, PIERRE SAUVÉ (eds.) PROSPECTS IN INTERNATIONAL INVESTMENT LAW AND POLICY ' 182-185 (Cambridge University Press 2013); RUDOLF DOLZER, CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 178-179, 182-183, 186-187 (Cambridge University Press 2008); RUDOLF DOLZER ET AL., PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 3 254-255 (Oxford University Press 2022); MATTHIAS HERDEGEN, PRINCIPLES OF INTERNATIONAL ECONOMIC LAW 67, 69, 85, 413, 459-460 (Oxford University Press 2016); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 4 131, 242, 410-413 (Cambridge University Press 2017); JOSE E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT, The Hague Academy of International Law 177 (The Hague: AIL-Pocket, 2011); Locknie HSU, *Rule of Law and Foreign Investment*, Rule of Law Symposium 2014, The importance of the rule of law in promoting development, Research Collection School Of Law, Singapore Management University (2015), 139; Stephan W. Schill, Vladslav Djanic, *International Investment Law and Community Interests*, in E. BENVENISTI, SCHILL, G (eds.), COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 2-3 (Oxford University Press, 2018); Katia Yannaca-Small, *Improving the System of Investor-State Dispute Settlement*, OECD Working Papers on International Investment, 2006/01 (OECD Publishing, 2006); Stephan W. Schill, *Derecho internacional de inversiones y derecho público comparado en una perspectiva latino-americana*, in Attila Tanzi, Alessandra Asteriti, Rodrigo Polanco Lazo, Paolo Turrini, (eds.), INTERNATIONAL INVESTMENT LAW IN LATIN AMERICA / DERECHO INTERNACIONAL DE LAS INVERSIONES EN AMÉRICA LATINA 30-32 (Brill Nijhoff 2016); ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 448, 453-454, 467-468 (Kluwer Law International 2009).

terms, in the adoption of balanced bilateral agreements, including exceptions to the application of foreign protection rules when it involves the public interest of the host State. In addition, regional agreements with specific chapters on investment have been adopted. In the latter case, these regional agreements, known as mega agreements, are very careful in adopting international arbitration solutions, clearly outlining the limits of their scope and providing a wider range of guarantees for the host state's public interest.

II. NATIONAL TREATMENT

National treatment indicates that the foreigner should be given treatment no less favourable than that accorded to the national of the state. Thus, the institute was constructed to ensure equality of conditions between nationals and foreigners. The NT is a principle of non-discrimination (as is the MFN), which differs from the MST, FET and FPS and compensation for expropriation, which are part of investment protection rules.

As to the NT wording, it should analyze the term "*in like circumstances*" or "*in like situations*" foreseen mainly in NAFTA (art. 1102(1)), in the current USMCA (art. 14.4), and the ECT (art. 10(3)),[3] to allow a comparison between domestic and foreign companies to establish whether there would be discrimination based on the nationality of the legal entity. This issue is evidenced in *S.D. Myers v. Canada.*[4]

The term "*in like situations*" has been replaced in recent years by "*in like circumstances*", as noted in the United States BIT models of 2004 and 2012, both in art. 3. In NAFTA (art. 1102), USMCA (art. 14.4) and CETA (art. 8.6) they also apply this formulation. The expression "*in like situations*" is commonly used for same-sector comparisons, and "*in like circumstances*" to different economic sectors.[5]

In *Occidental v. Ecuador*, the court understood the application of national treatment broadly even allowing the comparison between different economic sectors, such as oil, flowers and marine products.[6]

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[3] North American Free Trade Agreement, art. 1102, 1994, <http://www.sice.oas.org/trade/nafta/chap-111.asp#A1102>). Note that NAFTA was changed in 2020 and renamed as United States-Mexico-Canada Agreement - USMCA ('United States-Mexico-Canada Agreement'. Chapter 14. July 7, 2020, <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>). About the Energy Charter Treaty (ECT), see: 'Energy Charter Treaty', <https://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf>.

[4] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 248 (Nov. 13, 2000).

[5] RUDOLF DOLZER ET AL. , PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 254-255 (3 ed. Oxford University Press 2022).

[6] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶ 168 (July 1, 2004).

The specificities of oil production go well beyond the comparison of treatment with other goods, such as flowers, bananas and palm oil, not having enough legal basis. However, the Occidental case has been used extensively in other disputes involving NT.

The inconsistency of the arbitral awards is seen when comparing the Occidental case with *Pope & Talbot v. Canada*, where this arbitral tribunal held that the claim of discrimination regarding national treatment should be analyzed only within a single economic sector ("*in like situations*").[7] The same in *Marvin Feldman v. Mexico,*[8] *S.D. Myers v. Canada*[9] and *United Parcel Service of America Inc. v. Canada*[10]

Regarding the application of WTO case law in BIT arbitration disputes, *S.D Meyers v. Canada*,[11] *Pope & Talbot v. Canada,*[12] *Feldman v. Mexico,*[13] *Corn Products v. Mexico,*[14] and *Cargill v. Poland*[15] indicated the relevance of WTO precedents on national treatments for investment. *Occidental v. Ecuador* was the first to address the issue in 2004, rejecting the possibility of relying on the WTO's understanding of national treatment. The term used by the WTO was "*like products*", while the BIT used "*like situations*".[16]

Despite the opposition, *Methanex v. United States* compared the WTO and NAFTA nomenclature on NT, noting the existence of two different terms: "*like goods*" for the WTO, and "*like circumstances*" for NAFTA. Although a certain similarity between the wording was recognized, NAFTA rules should be interpreted autonomously in relation to the WTO[17] The same in *Bayindir v. Pakistan,*[18] *Cargill v. Mexico,*[19] *Merrill & Ring v. Canada*[20] and *Clayton/Bilcon v. Canada.*[21] The majority position is for the autonomous interpretation of "*like circumstances*" or "*like situations*".

In *Nykomb v. Latvia*, the claim of an NT violation must be between companies subject to the same set of rules and regulations, but the court dismissed the claim for lack of evidence.[22] The same in

[7] *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).
[8] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 250 (Nov. 13th, 2000).
[9] *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ¶ 171 (Dec. 16, 2002).
[10] *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, ¶¶ 119, 120 (May 24th, 2007).
[11] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 244 (Nov. 13th, 2000).
[12] *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, ¶¶ 45, 56 (Apr. 10, 2001).
[13] *Marvin Roy Feldman Karpa v. United Mexican States*, Award, ¶¶ 165, 166 (Dec. 16, 2002).
[14] *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, ¶ 121-123 (Jan. 15, 2008).
[15] *Cargill, Incorporated v. Republic of Poland,* Final Award, ¶ 311 (Feb. 29, 2008).
[16] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶ 153, 155, 174 (July 1, 2004).
[17] *Methanex Corporation v. United States of America***,** Final Award of the Tribunal on Jurisdiction and Merits, ¶¶ 25, 37 (Aug. 3, 2005).
[18] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan***,** Award, ¶ 389 (Aug. 27, 2009).
[19] *Cargill, Incorporated v. United Mexican States*, Award, ¶ 193 (Sept. 18, 2009).
[20] *Merrill and Ring Forestry L.P. v. Canada*, Award, ¶ 86 (Mar. 31, 2010).
[21] *Bilcon of Delaware et al v. Government of Canada*, Award on Jurisdiction and Liability, ¶ 692 (Mar. 17, 2015).
[22] *Nykomb Synergetics Technology Holding AB v. The Republic of Latvia,* Arbitral award, ¶ 34 (Dec. 16, 2003).

Consortium RFCC v. Morocco[23] and *ADF v. United States.*[24]

In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*, although the arbitral tribunal understood that they were companies of the same economic sector, there were singularities that differentiated them, in financial terms.[25]

In *Ronald Lauder v. Czech Republic*, the domestic legislation determined differentiated treatment only in the telecommunications sector, being an exception to the application of the NT.[26]

In *Thunderbird v. Mexico*, the foreigner was barred from engaging in illegal activity (gambling). Even though it was aware of the illegal activity, it claimed NT violation under NAFTA.[27]

Furthermore, it is necessary to verify whether the claim of NT violation may occur in the hypothesis that the host State applies a rule according to its public interest, like in *Oscar Chinn's Case* (*United Kingdom v. Belgium*).[28]

In *Siemens v. Argentina*, the company alleged arbitrary and discretionary conduct as due to application of emergency domestic legislation during the 2001 crisis. The Argentine government, in turn, claimed that the governmental measure was intended to protect its citizens and was not discretionary[29] to this foreign company.[30] The same in *Genin v. Estonia*[31] and *GAMI v. Mexico*.[32]

In *Methanex v. USA*, the arbitration award ruled out the recognition of NT as an international custom observing the principle of *inclusio unius est exclusio alterius*, because the NT is in a different *locus* in the BIT and could not be interpreted as part of the MST.[33]

I. MOST-FAVOURED-NATION TREATMENT

It prohibits treatment no less favourable to a foreigner than that accorded to a foreigner from a third country. The principle expands the equality of conditions between nationals and foreigners and, as

[23] *Consortium RFCC v. Royaume du Maroc*, Arbitration Award, ICSID, ¶¶ 74, 75 (Dec. 22, 2003).
[24] *ADF Group Inc. v. United States of America*, Award, ¶ 157 (Jan. 9, 2003).
[25] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ICSID, ¶¶ 402, 408, 411 (Aug. 27, 2009).
[26] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 220 (Sept. 3, 2001).
[27] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶¶ 176, 178, 182, 183 (Jan. 26, 2006).
[28] *The Oscar Chinn Case,* Judgement, ICGJ 313 (PCIJ 1932), 78 (Dec. 12, 1934).
[29] Jürgen Kurtz, *On Inter-Disciplinary and Inter-Systemic Approaches to International Investment Law', in Roberto Echandi, Pierre Sauvé (eds.) 'Prospects in International Investment Law and Policy' (Cambridge University Press 2013),* 16(3) JWIT, 563-564 (2015).
[30] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 314 (Jan. 17, 2007).
[31] *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, Award, ¶ 370 (June 25, 2001).
[32] *Gami Investments Inc. v. Mexico*, Final Award, ¶ 114 (Nov. 15, 2004).
[33] *Methanex Corporation v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Chapter C, 7-8, 11-12 (Aug. 3, 2005). See also: *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 78 (Apr. 10, 2001).

with the NT, the MFN is not a customary international norm.

MFN is used by foreign investors to invoke a rule between the host state and a third country that provides more favourable treatment. It is, therefore, necessary for the MFN clause to be present in the basic agreement.[34]

The limits of application of the MFN should meet the principle of *expressio unius est exclusio alterius*. Part of the doctrine understands that MFN applies exclusively to substantive rules, while another defends the application in any clause, including Investor-State Dispute Settlement ["**ISDS**"] clauses.

This doctrinal division originates from the case *Maffezini v. Spain*, in which an Argentinian company, in order to initiate an ICSID claim against Spain and depart from the rule of prior exhaustion of local remedies,[35] relied on the MFN to use the BIT dispute settlement rule between Chile and Spain, bypassing the requirements applied for Argentine companies. The MFN, therefore, was used for a procedural rule.[36]

The Spanish government, in its defense, indicated that the MFN should refer to a substantive rule, rejecting any extension to procedural or jurisdictional rules. The arbitral tribunal relied on the *Anglo-Iranian Oil Company (United Kingdom v. Iran) of* 1952,[37] and *Ambatielos (Grecce v. United Kingdom)* of 1953.[38] In the first, the ICJ ruled that the MFN should be in the international agreement that would link the UK and Iran in order to respect the canon *res inter alios acta, aliis nec nocet nec prodest*, which means that something done between two parties can neither harm nor benefit third parties. In the second case, the canon *ejusdem generis*, meaning of the same nature or class, determines that the MFN clause only allows it to be applied in matters of the same category. The *Ambatielos* case interpreted extensively the MFN.

The arbitral award in the Maffezini case presented a subjective judgment that international arbitral remedies were better suited to protect the interests and rights of foreign investors *vis-à-vis* the domestic jurisdiction. In addition, the tribunal invoked the principle of *Kompetenz-Kompetenz*. Therefore, by ruling that MFN was possible in procedural matters, the court created a precedent of great proportions.[39]

As a way to mitigate the effects of the MFN, subsequent BITs after that decision have become more

[34] *Supra* at 5, 264.
[35] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 art. 26, http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/main-eng.htm
[36] *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 40-41, 56 (Jan. 25, 2000).
[37] *Anglo-Iranian Oil Co. case (United Kingdom v. Iran),* ICJ, Preliminary Objection (Judgement of July 22, 1952).
[38] *Ambatielos case (Greece v. United Kingdom),* ICJ, Merits: obligation to arbitrate (Judgement May 19, 1953).
[39] *Emilio Agustín Maffezini v. The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 55, 64 (Jan. 25, 2000).

stringent about substantive rules, while other BITs excluded MFN. For example, in the Brazilian Agreement on Cooperation and Facilitation of Investments ["**ACFI**"] between Brazil and India in 2020, the MFN standard is not included.[40] The 2015 Indian BIT model also doesn't mention MFN protection.[41] In the case of restricting the application of MFN, the 2015 BIT between China and Turkey stipulates that NT and MFN do not apply to dispute settlement.[42] On the other hand, the 2008 UK model BIT maintained the traditional model by applying MFN in the substantive and procedural clauses (art. 1 to 12).[43]

In *Plama v. Bulgaria*, the arbitral tribunal held that MFN could not be used without the consent of the parties. In this decision, the tribunal was explicit in indicating that *Maffezini v. Spain* was an exception and therefore should not be treated as a broad interpretation. The tribunal cautioned that rather, the reasoning to be adopted would be that MFN should not be applied for procedural and dispute settlement rules unless the agreement expressly provides otherwise.[44]

It is possible to observe two quite different thoughts of MFN: (i) a position which assumes that MFN applies to all cases, except if the BIT has been specific in restricting its use (*Maffezini v. Spain*); and (ii) a position which assumes that MFN applies only to substantive rules, except if the BIT specifically describes that its use extends to procedural and investment dispute settlement rules (*Plama v. Bulgaria*).

Siemens v. Argentina,[45] *Grid v. Argentina,*[46] *Salini v. Jordan,*[47] *Gas Natural SDG v. Argentina,*[48] *Suez, Vivendi v. Argentina,*[49] *Camuzzi v. Argentina*[50] and *Impregilo v. Argentina*[51] followed *Maffezini*'s *position*.[52] Otherwise, *Telenor v. Hungary,*[53] *Tecmed v. México* and *Wintershall v.*

[40] Brazil - India Investment Cooperation and Facilitation Agreement, UNCTAD, Investment Policy Hub.
[41] India BIT Model 2015, UNCTAD, Investment Policy Hub.
[42] China-Turkey BIT 2015, UNCTAD, Investment Policy Hub.
[43] United Kingdom 2008 BIT Model: art. 3(3) "*For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 12 of this Agreement*" ('United Kingdom 2008 BIT Model', UNCTAD, Investment Policy Hub). See also: OECD, *Most-Favoured-Nation Treatment in International Investment Law*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 2004/02 4.
[44] *Plama Consortium Limited v. Republic of Bulgaria*, Decision on Jurisdiction, ¶¶ 198, 207, 212, 223-224 (Sept. 6, 2005).
[45] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 103, 109 (Aug. 3, 2004).
[46] *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 92-93 (June 20, 2006).
[47] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ¶¶ 102,105 (Nov. 9, 2004).
[48] *Gas Natural SDG, S.A. v. The Argentine Republic*, Decision of the Tribunal on Preliminary Questions on Jurisdiction, ¶ 30 (June 17, 2005).
[49] *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic*, Decision on Jurisdiction, ¶ 66 (Aug. 3, 2006).
[50] *Camuzzi International S.A. v. The Argentine Republic*, Decision on Objection to Jurisdiction, ¶ 120 (May 11, 2005).
[51] *Impregilo S.p.A. v. Argentine Republic***,** Award, ¶ 103 (June 21, 2011).
[52] *National Grid plc v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 92, 93 (June 20, 2006).
[53] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, ¶¶ 20, 95 (Sept. 13, 2006).

Argentina[54] followed *Plama*'s position.[55]

Finally, in *Parkerings-Compagniet AS v. Lithuania*, the arbitral tribunal denied the Norwegian company's claim of MFN violation in Lithuania as the act was not discriminatory in nature but rather was born out of historical, archaeological and environmental protection.[56]

II. MINIMUM STANDARD OF TREATMENT

The MST is a traditional rule of BIT, originating from the 1926 *Neer* case, which developed the idea of a minimum right for aliens in foreign territory. This understanding was built in terms of reasonable and proportional protection by public authorities, including the right of access to justice. This institute aimed to guarantee a minimum protection equal to the enjoyment of existing rights for citizens of the host State.[57] As an example, the Brazilian Constitution guarantees equal treatment between foreigners residing in that country and its nationals (art. 5).[58]

In this sense, it is necessary to establish what would be the concept of international minimum protection, since there is not a definition of protection in *stricto sensu*. In turn, the search for an international concept inevitably falls within historically established limits of the traditional capital-exporting nations. The minimum protection has evolved in International Investment Law into two other institutes: FET and FPS.

In *Pope & Talbot v. Canada*, there is express mention of the *Neer* case as the foundation of the MST's understanding as a customary principle of international law.[59] The same is true in *UPS v. Canada*[60] and *ADF v. USA*,[61] in which the court established both the MST and the FET and FPS as customary norms.

Merrill & Ring v. Canada, on the other hand, held that the minimum treatment is defined according to international customary law, being a broader treatment than in the *Neer* case.[62]

In *Loewen v. USA*, the tribunal refused jurisdiction on the grounds that he plaintiff had not exhausted local remedies, i.e., had not appealed to the Supreme Court of the United States not recognizing the allegation of the foreign company that was a violation of the MST. Specifically, the court held that it

[54] *Wintershall Aktiengesellschaft v. Argentine Republic*, Award, ¶ 162 (Dec. 8, 2008).
[55] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 69 (May 29, 2003).
[56] *Parkerings-Compagniet AS v. Republic of Lithuania***,** Award, ¶ 396 (Sept. 11, 2007).
[57] *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States,* Reports of International Arbitral Awards (Oct. 15, 1926) https://legal.un.org/riaa/cases/vol_IV/60-66.pdf.
[58] 'Constituição Federal [C.F.] [Constitution] art. 5 (Braz.),' https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm.
[59] *Pope & Talbot Inc. v. The Government of Canada*, Award in Respect of Damages, ¶ 57 (May 31, 2002).
[60] *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, ¶¶ 77, 78 (Nov. 22, 200).
[61] *ADF Group Inc. v. United States of America*, Award, ¶ 181 (Jan. 9, 2003).
[62] *Merrill and Ring Forestry L.P. v. Canada*, Award, ¶ 213 (Mar. 31, 2010).

could not qualify as a sort of court of appeal from the domestic jurisdiction.[63] The same in *Mondev v. USA*.[64]

In *Thunderbird v. Mexico*, the tribunal held that the irregular administrative procedures did not constitute sufficient harm to cause MST violation.[65]

In *Metalclad v. Mexico*, the foreign company alleged a lack of due process in denying a construction permit. Despite the counterarguments presented by Mexico, referring to the need for environmental protection and the local communities, the arbitral tribunal held that the denial of the permit was improper. In particular, the arbitral tribunal held that the administrative act denying the permit for the construction of the landfill violated the transparent and predictable business environment, as well as the investor's expectations to be treated fairly and equitably, also alleging a violation of the MST.[66]

III. FAIR AND EQUITABLE TREATMENT

FET is the most widely used standard of investor protection in arbitration cases, comprising very extensive interpretations. The European Parliament criticized the use of vague language in the 2011 Resolution.[67]

The history of FET dates back to the FCN treaties and failed attempts at multilateral agreements of the 20th century, highlighting its origin among traditional capital-exporting countries that projected this exclusive protection of their investors as an international practice. The term was initially conceived as a non-binding rule, to promote equal treatment between the parties, as noted in the 1954 FCN between West Germany and the United States.[68]

As for the BITs until the 2000s, FET was an institute that appeared in the preamble and was not considered a standard clause.[69] This reality of FET as a substantive clause was incorporated only in the first decade of the 21st century, which demonstrates the absence of a consistent practice, in the sense of forcing its inclusion as a mandatory clause, reversing its nature as a programmatic rule.

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[63] *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, Award, ¶¶ 134, 138 (June 26, 2003).
[64] *Mondev International Ltd. v. United States of America*, Award, ¶ 136 (Oct. 11, 2002).
[65] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶ 200 (Jan. 26, 2006).
[66] *Metalclad Corporation v. The United Mexican States*, Award, ¶¶ 91-93, 99-101 (Aug. 30, 2000).
[67] "*G. whereas after the first dispute settlement cases of the 1990s, and in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation, particularly concerning the possibility of conflict between private interests and the regulatory tasks of public authorities, for example in cases where the adoption of legitimate legislation led to a state being condemned by international arbitrators for a breach of the principle of 'fair and equitable treatment'.*" ('European Parliament resolution of 6 April 2011 on the future European international investment policy', 2010/2203(INI)). On the other hand, part of the doctrine understands that the lack of precision in FET would be more a virtue than a harm, as it allows flexibility (*Supra* at 5, 187).
[68] "Article I. Each Party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests." (Treaty of Friendship, Commerce and Navigation, UN Treaties (Oct 29, 1954). *Supra* at 5, 188-189.
[69] *Supra* at 5, 189.

The 2012 U.S. BIT Model (art. 5) treats FET (and FPS) as international customary rules. The BIT between France and Argentina of 1991 treats the FET as a principle of international law (art. 3). The BIT between the United States and Argentina of 1991 defines it as an international minimum treatment (art. II(2)). In regional agreements, the FET is a party to NAFTA (1105(1)), the current USMCA (14.6(1)) and the ECT (art. 10 (1)). In the FTAs involving the EU, with Canada (art. 8.10(2) of CETA), Singapore, Vietnam and Mexico, the FET is defined in a restricted way.

The variation of the term FET in different decisions, such as *fair and equitable, just and equitable, just and fair, equitable and reasonable*, are understood as synonyms in *Parkerings v. Lithuania,*[70] *Total v. Argentina,*[71] *OKO Pankki v. Estonia*[72] and *Bosca v. Lithuania.*[73] The FET is related to the non-legal terms of fairness and equity, but should not be confused with the decision *ex aequo et bono.*[74]

FET presents two divergent positions. The first understands that its dimension is identical to an international minimum treatment and therefore, adhering to the concept of equality between foreigners and nationals. This is the interpretation of NAFTA. The second advocates a broader concept of protection, by differentiating the MST clause and applying additional treatment for the foreign investor versus the national investor.[75]

In *Saluka v. Czech Republic*, the arbitral tribunal was not convinced that the FET falls within the usual international standard of MST.[76] There is no definition of whether the FET should fall within the framework of an international customary standard, equating to the MST, or whether its protection would be superior and autonomous MST.[77]

The NAFTA Free Trade Commission, on June 31, 2001, established a narrow concept of FET and FPS, equating them with international minimum protection as the customary standard. It expressly ensured that FET and FPS do not involve additional treatment. The post-2001 model BITs of the United States (2004 and 2012) and Canada have followed the committee's understanding, as noted in the US-Chile BIT (2003 FTA, art. 10.4) and 2004 US-Uruguay BIT (art. 5). In 2020, in the amendment to the USMCA, the new agreement adopted exactly the 2001 wording in its art. 14.6(2). CETA (art. 8.9, 8.10, 28.3, and 28.6) and the CPTTP (art. 9.6(4)) followed the FET approach in NAFTA, indicating that contemporary international law is moving towards the progressive adoption

[70] *Parkerings-Compagniet AS v. Republic of Lithuania***,** Award, ¶¶ 277-278 (Sept. 11, 2007).
[71] *Total S.A. v. The Argentine Republic,* Decision on Liability, ¶ 106 (Dec. 27, 2010).
[72] *Oko Pankki Oyj, VTB Bank (Deutschland) AG and Sampo Bank Plc v. The Republic of Estonia*, Award, ¶ 215 (Nov. 19, 2007).
[73] *Luigiterzo Bosca v. Lithuania*, Award, ¶ 196 (May 17, 2013).
[74] *Supra* at 5, 187.
[75] *Supra* at 29, 44-45.
[76] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 291-292 (Mar. 17, 2006).
[77] *Id*. See *Supra* at 5, 189.

of *stricto sensu* concepts, reversing the previous period of expansion of universal investor protection.[78]

In *Chemtura v. Canada*, the mere quantitative existence of BITs with the FET clause would indicate international customary developments. However, the arbitral tribunal neglects the reality that almost all BITs derive from the models of traditional capital exporters. The signatory countries, mostly developing countries, are not able to discuss or modify the clauses since the BITs are characterized as pre-formulated agreements.[79]

In *Thunderbird v. Mexico*, the arbitral tribunal held that the investor was aware that the operation of certain gambling conducts was considered illegal in Mexico and that there were no legitimate expectations.[80]

In *Metalclad v. Mexico*, the arbitral tribunal decided that the legitimate expectation should be specific, not ambiguous or repetitive, in view of the inconsistency between approval at the international level and refusal at the local level. However, a municipality has the competence to define rules for land use and occupation, independent of the federal government, which the tribunal did not consider. The same in *MTD v. Chile.*[81]

In *Tecmed v. México*, the tribunal held that legitimate expectations had been violated by denying the renewal of the license upon opposition from the local community.[82] The same in *Pope & Talbot v. Canada*[83] and *LG&E v. Argentina*[84]

In *Generation v. Ukraine*, legitimate expectations must be understood according to the risk analysis of the host state by the investor prior to the commencement of his investment. When investing in a state that has a higher return on capital, the foreign investor is aware of the reality of higher risks to the business.[85]

In *GAMI v. Mexico*, the arbitral tribunal held that the authorities' encouragement comments were not legitimate expectations.[86] In *Eastern Sugar v. Czech Republic*, the arbitral tribunal found a violation of FET, without providing reasons for that decision.[87]

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[78] *Supra* at 5, 230.
[79] *Chemtura Corporation v. Government of Canada*, Award, ¶ 236 (Aug. 2, 2010).
[80] *International Thunderbird Gaming Corporation v. The United Mexican States,* Arbitral Award, ¶¶ 164,166 (Jan. 26, 2006).
[81] ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 284-285 (Kluwer Law International 2009).
[82] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 154 (May 29, 2003).
[83] *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 181 (Apr. 10, 2001).
[84] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, Award, ¶¶ 125, 129, 131 (July 25, 2007).
[85] *Generation Ukraine, Inc. v. Ukraine*, Award, ¶¶ 20, 37 (Sept. 16, 2003).
[86] *Gami Investments Inc. v. Mexico*, Final Award, ¶ 110 (Nov. 15, 2004).
[87] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, Partial Award, ¶¶ 199-200 (May 27, 2007).

Therefore, it is possible to have a generic understanding of the FET institute, in which certain decisions relate it as synonymous with the MST, as in *S.D. Myers v. Canada*,[88] *Occidental v. Ecuador*,[89] *CMS Gas v. Argentina*,[90] and *Mondev v. USA*[91] while others qualify it as an autonomous institute, as in *Pope & Talbot v. Canada*.[92]

IV. FULL PROTECTION AND SECURITY

The origin of FPS dates back to the 19th century, as a form of physical protection for the alien in a territory different from his nationality. The Full Protection and Security (FPS) is found in the ECT (art. 10(1)), NAFTA (art. 1105(1)) and USMCA (art. 14.6(1)).

The understanding of FPS, similar to FET, also presents two opposing positions. The first interpretation is restricted to the host State's obligation to ensure a minimum protection of physical integrity. The second interpretation is extensive, encompassing a legal protection of foreign property.

In the first group, *Saluka v. Czech Republic* is categorical in describing the FPS in narrow terms, limiting it to protection against physical violence or civil unrest. This position means that the FPS cannot be understood as a guarantee of any risk that the foreign investor would be subject to.[93] The same in *Wena Hotels*[94] *v. Egypt, Suez and InterAgua v. Argentina,*[95] *Enron v. Argentina*[96] and *Sempra v. Argentina.*[97]

In *BG Group v. Argentina*, the tribunal presented the concept of FPS as identical to FET, and as minimum protection (MST).[98]

In *AAPL v. Sri Lanka,* the tribunal held that there was government excess in the actions against insurgents that generated losses for foreign investors.[99] In *AMT v. Zaire*, the court held that there was a violation due to a robbery by the armed forces.[100]

[88] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶ 262 (Nov. 13, 2000).
[89] *Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ¶¶ 183, 188-190 (July 1, 2004).
[90] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶¶ 270, 273-274, 284 (May 12, 2005).
[91] *Mondev International Ltd. v. United States of America*, Award, ¶ 118 (Oct. 11, 2002).
[92] *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, ¶ 110 (Apr. 10, 2001).
[93] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 483-484 (Mar. 17, 2006).
[94] *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, ¶ 84 (Dec. 8, 2000).
[95] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, ¶¶ 168, 170, 173 (July 30, 2010).
[96] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Award, ¶ 287 (Aug. 4, 2004).
[97] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 323 (Sept. 18, 2007).
[98] *BG Group Plc. v. The Republic of Argentina*, Final Award, ¶¶ 290-291, 311-312, 91-92 (Dec. 24, 2007).
[99] *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Final Award, ¶ 78 (June 27, 1990).
[100] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Award, ¶ 6.08 (Feb. 21, 1997).

In *Tecmed v. Mexico,*[101] *Sempra v. Argentina,*[102] *Azurix v. Argentina,*[103] *Tenaris v. Venezuela, Noble Ventures*[104] *v. Romania,*[105] *Pantechniki v. Albania*[106] and *Eureko v. Poland*,[107] the absence of evidence refuted the claim of a violation of the FPS by the government or its encouragement of social demonstrations.

As for the second group, in *Compañía de Aguas, Vivendi Universal v. Argentina*, the arbitral tribunal held that the FPS goes beyond protection for physical violence and also encompasses violations of unfair treatment.[108] The same in *Siemens v. Argentina,*[109] *Vivendi v. Argentina*[110] and *Biwater Gaulf v. Tanzania.*[111]

In *CME v. Czech Republic*, the court understood that there was a violation by the State in creating a regulatory rule that undermined the legal security of the investment.[112] Involving the same case, in *Ronald Lauder v. Czech Republic*, the arbitral tribunal decided the opposite, because the FPS focuses on physical protection. The only legal protection guaranteed to the foreign investor by the FPS would be access to justice.[113]

V. DIRECT AND INDIRECT EXPROPRIATIONS AND COMPENSATION

Expropriation is one of the most debated topics in international investment law, being the most severe form of interference in private property. It is a sovereign act of the host State. International customary law adopts certain limits on the exercise of the domestic act of expropriation, like (i) public purpose; (ii) non-discriminatory act; (iii) due process of law; and (iv) compensation.[114] However, the procedure for carrying out the expropriation does not have a consensus in the doctrine. The act itself is not a violation of foreign investment protection. Only the act of expropriation performed in a discriminatory manner and without public purpose is a violation. As it is a sovereign act, it falls to the State to define the regulations and ample defense. Even the compensation or indemnification

[101] *Noble Ventures, Inc. v. Romania*, Award, ¶ 165 (Oct. 12, 2005).
[102] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 323 (Sept. 18, 2007).
[103] *Azurix Corp. v. The Argentine Republic*, Award, ¶ 408 (September 1, 2009).
[104] *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, Award, ¶ 443 (Jan. 29, 2016).
[105] *Noble Ventures, Inc. v. Romania*, Award, ¶ 165 (Oct. 12, 2005).
[106] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, Award, ¶¶ 83-84 (July 30, 2009).
[107] *Eureko B.V. v. Republic of Poland,* Partial Award, ¶ 236 (Aug. 19, 2005).
[108] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, § 7.4.15 (Aug. 20, 2007).
[109] *Siemens A.G. v. The Argentine Republic*, Decision on Jurisdiction, ¶ 303 (Aug. 3, 2004).
[110] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Award, § 7.4.15 (Aug. 20, 2007).
[111] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ¶ 729 (July 24, 2008).
[112] *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶ 613 (Sept. 13, 2001).
[113] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 314 (Sept. 3, 2001).
[114] *Supra* at 5, 183.

conditions are configured as a domestic act.

Commonly, expropriation involves two types: direct and indirect, as viewed in BITs and regional agreements like NAFTA or CETA. The first consists of the withdrawal of property from a private party to the public entity. In this process, there is an effective transfer of the asset and compensation for the injured party. In the second case, there is the allegation of recurrent interference with the enjoyment of the property, reducing or even preventing its use, causing financial loss and possibly leading it to cease its operations. This allegation has gained importance in arbitral awards due to the fact that the recognition of an indirect expropriation reduces the host State's regulatory power. In this sense, States become reluctant to recognize this modality in their BITs or FTAs.

Indirect expropriation is even marked by a shift away from its application in recent bilateral and regional agreements. For example, Annex 14-B of the USMCA agreement. Specifically, in the USMCA, Canada does not figure as a party in investor-state arbitration and, in the investor-state arbitration between Mexico and the United States (Annex 14-D, art. 1(a)(i)(B)), the foreign investor is not allowed to claim indirect expropriation.[115]

The same wording is observed in Annex I of the 2016 BIT concluded between Canada and the Hong Kong Special Administrative Region,[116] in India's 2015 model BIT (art. 5),[117] and in the 2012 United States Model BIT (Annex B).

In *Oscar Chinn*, the investors are not insured against any alteration in the economic conditions of the business, being an investor's risk regarding the variation of expectations of future gains.[118] The same in *Fireman's Fund v. Mexico.*[119]

As for direct expropriation, in *Saluka v. Czech Republic*, the court analyzed whether the Czech government's act of intervention in the foreign investor's property consisted of the exercise of police powers or an expropriatory act.[120]

In *Santa Elena v. Costa Rica*, the expropriation of property for the regulation of an environmental area was considered a breach of the BIT.[121] The arbitral tribunal held that, regardless of the environmental protection grounds, the expropriation had been identified. It should be noted that the constitution of environmental areas is based on the sovereign exercise of the host State. The same in

[115] United States-Mexico-Canada Agreement, Chapter 14 (July 7, 2020), <https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf>.
[116] Canada-Hong Kong China Special Administrative Region BIT 2016, UNCTAD, Investment Policy Hub.
[117] India 2015 BIT Model, UNCTAD, Investment Policy Hub.
[118] *The Oscar Chinn Case,* Judgment, ICPJ, 4, 27 (Dec. 12, 1934).
[119] *Fireman's Fund Insurance Company v. The United Mexican States*, Award, ¶ 218 (July 17th, 2006, § 218.
[120] *Saluka Investments B.V. v. The Czech Republic*, Partial Award, ¶¶ 262-265 (March 17th, 2006, §§ 262-265.
[121] *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award, ¶ 72 (February 17th, 2000, para. 72.

Metalclad v. Mexico[122] and *Ampal-American v. Egypt.*[123] In *Methanex v. United States*, the court understood that the changes related to environmental regulation did not constitute a breach of investor expectations.[124]

In *ADC v. Hungary*, the court held that it would be absurd for a foreign investor to submit to any rule of the host state.[125] In *Pope & Talbot v. Canada,* the arbitral tribunal rejected the Host State's defense that the regulatory act was a police power.[126]

In *Sempra v. Argentina*, the arbitral tribunal analysed the emergency measures adopted by Argentina, in the midst of the 2001 crisis, and held that Argentina's emergency measures were a legitimate exercise of the State.[127] The same in *CMS v. Argentina.*[128] In *Siemens v. Argentina,*[129] the court understood that the low performance of the host State's certain action did not configure an expropriation, being necessary an official act.[130] In *LG&E v. Argentina*, the court held that only permanent expropriation could be considered.[131]

In *SPP v. Egypt*, it was considered that the rights resulting from an investment contract are also affected by the expropriatory act, not only the property.[132] The same in *Tokios Tokelès v. Ukraine,*[133] *Eureko v. Poland,*[134] *Gold Reserve v. Venezuela*[135] and *Vigotop v. Hungary.* In *Middle East Cement v. Egypt*, the court ruled in the opposite way.[136]

[122] *Metalclad Corporation v. The United Mexican States*, Award, ¶¶ 109-112 (Aug. 30, 2000).
[123] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt*, Decision on Liability and Head of Loss, ¶¶ 178-180,242 (Feb. 21, 2017).
[124] *Methanex Corporation v. United States of America*, Final Award on Jurisdiction and Merits, IV, D, § 10 (Aug. 3, 2005).
[125] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, Award of the Tribunal, ¶¶ 432-433 October 2nd, 2006).
[126] *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, ¶ 99 (June 26th, 2000).
[127] *Sempra Energy International v. The Argentine Republic*, Award, ¶ 286 (September 18th, 2007).
[128] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶ 263 (May 12th, 2003).
[129] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 267 (January 17th, 2007).
[130] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 253 (January 17th, 2007).
[131] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc.v. Argentine Republic*, Decision on Liability, ¶¶ 193-195 (October 3rd, 2006).
[132] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award, ¶¶ 164-165 (May 20th, 1992).
[133] *Tokios Tokelés v. Ukraine***,** Decision on Jurisdiction, ¶¶ 92-93 (April 29th, 2004).
[134] *Eureko B.V. v. Republic of Poland***,** Partial Award, ¶¶ 239, 242 (Aug. 19, 2005).
[135] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Award, ¶¶ 667-668 (Sept. 22, 2014).
[136] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, ¶¶ 152, 154, 156 (Apr. 12, 2002).

In *Electrabel v. Hungary* and *Burlington v. Ecuador,*[137] the partial expropriation was rejected.[138] In *Wena Hotels v. Egypt*[139] and *Tippetts v. TAMS-AFFA (Iran-US Claims Tribunal),*[140] it was considered.

In *Thunderbird v. Mexico,* the foreign investor implemented an illegal business (gambling) and claimed indirect expropriation for preventing its operation in Mexican territory.[141]

In *CME v. Czech Republic,* the court recognizes the distinction between direct and indirect expropriation but rejects the foreign investor's claims for lack of proof.[142] In *Ronald Lauder v. Czech Republic*, the arbitral tribunal did not consider the claim of indirect expropriation. On the contrary, it held that it was a regulatory measure of the host State.[143]

In *Waste Management v. Mexico II*, the court ruled that failure to make a payment does not constitute an expropriatory act.[144] The same in *SGS v. Philippines*.[145] In *RFCC v. Morocco*, the court differentiates the exercise of a contractual right from an expropriatory act.[146]

In *Biwater Gaulf v. Tanzania*, the court decided that there was indirect expropriation concerning the measures that preceded the cancellation of the contract.[147] In *Suez and InterAgua v. Argentina*, the court understood that it was an administrative contract, not involving Argentine sovereignty and, therefore, not covered in the bilateral agreement.[148]

In both *Biwater Gaulf v. Tanzania* and *Suez and InterAgua v. Argentina* the courts did not consider the intention of the host state based on public interest regulation. In *Alpha v. Ukraine*, the court dismissed the state's defense of differentiating commercial and sovereign acts, ruling for indirect expropriation.[149] In this case, expropriation was defined in broad terms, refuting the State's regulatory power. In contrast, in other cases, like in *Suez and InterAgua v. Argentina*, it was considered that contractual relations of the state should not fall under the institute of expropriation, which requires a sovereign state act.

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[137] *Burlington Resources Inc. v. Republic of Ecuador*, Decision on Liability, ¶¶ 260, 398, 470. (Dec. 14, 2012)
[138] *Electrabel S.A. v. Republic of Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.57-6.58 (Nov. 30, 2012).
[139] *S.D. Myers, Inc. v. Government of Canada*, Partial Award, ¶¶ 283-284 (Nov. 13, 2000).
[140] *Tippetts v. TAMS-AFFA*, Award, 6 Iran-US CTR 219, 225 (June 22, 1984).
[141] *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, ¶¶ 147, 164 (Jan. 26, 2006).
[142] *CME Czech Republic B.V. v. The Czech Republic*, Partial Award, ¶¶ 318-319 (Sept. 13, 2001).
[143] *Ronald S. Lauder v. The Czech Republic*, Final Award, ¶ 282 (Sept. 3, 2001).
[144] *Waste Management, Inc. v. United Mexican States II*, Award, ¶¶ 159-160, 175-176 (Apr. 30, 2004).
[145] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ¶ 161 (Jan. 29, 2004).
[146] *Consortium RFCC v. Royaume du Maroc*, Arbitration Award, ¶¶ 65, 87, 89 (Dec. 22, 2003).
[147] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Award, ¶ 464 (July 24, 2008).
[148] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, Decision on Liability, ¶¶ 125, 128-129 (Dec. 14, 2008).
[149] *Alpha Projektholding GmbH v. Ukraine*, Award, ¶ 412 (Nov. 8, 2010).

In *Grand River v. United States*, the court held that government interference in the investment must be necessary in order to constitute expropriation.[150] In *ECE v. Czech Republic*, legitimate expectations must be recognized on objective grounds.[151]

In *Middle East Cement v. Egypt*, the arbitral tribunal considered the expropriation, due to the act performed by administrative means and, therefore, without due legal process.[152]

In *Saint-Gobain v. Venezuela*, the situation of *de facto* expropriation was configured. It was the takeover of the factory by the workers' union, and the act was attributed as ordered by the State.[153]

Moreover, the loss of investment control was considered an important element in the expropriation, as in *El Paso v. Argentina*[154] and *Enkev Beheer v. Poland.*[155]

In *Tecmed v. México*, the arbitral tribunal distinguished between direct and indirect expropriation. Regarding the latter, it used the term de facto expropriation, characterizing it as the set of actions and laws that make it impossible for the foreign investor to enjoy its property, without allocating such property to third parties or the government.[156]

While in *Tecmed v. Mexico,* the arbitral court held that the effects of host State measures are more important than government intentions, in *Biwater Gaulf v. Tanzania* and *Suez and InterAgua v. Argentina* a contrary understanding prevailed.

In *Telenor v. Hungary,* the court did not recognize the indirect expropriation because it was of minimal value, without significant economic impact.[157] the same in *Electrabel v. Hungary*[158] and *Azurix v. Argentina.*[159]

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[150] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Award, ¶¶ 140-141 (Jan 12, 2011).
[151] *ECE Projektmanagement v. The Czech Republic*, Award, ¶¶ 4.8.13-4.8.14 (Sept. 19, 2013).
[152] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, Award, ¶¶ 139, 142-144 (Apr. 12, 2002).
[153] *Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela*, Decision on Liability and the Principles of Quantum, ¶¶ 464, 477 (Dec. 30, 2016).
[154] *El Paso Energy International Company v. The Argentine Republic*, Award, ¶ 248 (Oct. 31, 2011).
[155] *Enkev Beheer B.V. v. Republic of Poland*, First Partial Award, ¶ 346 (Apr. 29, 2014).
[156] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, ¶ 113 (May 29, 2003).
[157] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, ¶ 79 (Sept. 13, 2006).
[158] *Electrabel S.A. v. Republic of Hungary***,** Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 6.62-6.63 (Nov. 30, 2012).
[159] "In *Santa Elena*, that the Respondent found a useful point of reference for the concept of creeping expropriation, the tribunal did not take into account the environmental purpose of the expropriatory measures: "Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains." The same tribunal was persuaded by the finding in *Tippetts* that "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact." (*Azurix Corp. v. The Argentine Republic*, Award, ¶ 309 (July 14, 2006)).

Indirect expropriation is seen in cases that only recognize the effect (*sole effect doctrine*), while another is the intention (*host States' intentions*)[160] *Chemtura v. Canada,*[161] *Saipem v. Bangladesh,*[162] *Vivendi v. Argentina,*[163] *Rumeli v. Kazakhstan,*[164] *Bayindir v. Pakistan,*[165] *Gemplus v. Mexico*[166] and *E energija v. Latvia*[167] consider only the effects.

VI. THE UMBRELLA CLAUSE

The umbrella clause is a legal fiction, altering previously contractual provisions to elevate them to the same level as an international treaty. In this way, the foreign investor could apply the BIT's clauses in any administrative contract, completely bypassing the domestic system, which, as a rule, would be the applicable law.

Despite its presence in BITs since 1959, including the BIT between West Germany and Pakistan, the use of this instrument was largely expanded from the first decade of the 21st century, with the decisions of the cases *SGS v. Pakistan* and *SGS v. SGS v. Philippines*. Previously there was an understanding that the parties involved had to agree beforehand on an international solution. The umbrella clause is found in Art. 2(2) of the UK model BIT, Art. 8(2) of the German model BIT and Art. 10(1) of the ECT. However, the provision is not included in NAFTA, USMCA, CETA or other FTA agreements negotiated with the European Union.[168]

This institute results from the use of the generic wording of the BIT that can be extended to any obligation to which the foreign investor is a party, as observed in the BIT British model: "art. 1(2) (…) Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party."[169]

The *Serbian Loans* case in 1929 decided that any contract that was not concluded between states as subjects of international law was domestic.[170]

The use of the umbrella clause begins in the post-World War II period, during the period of the Afro-Asian independence movements. During this period capital exporting countries, were "dissatisfied"

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[160] *Supra* at 5, 170.
[161] *Chemtura Corporation v. Government of Canada*, Award, ¶ 242 (Aug. 2, 2010).
[162] *Saipem S.p.A. v. The People's Republic of Bangladesh*, Award, ¶ 133 (June 30, 2009).
[163] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Resubmitted case, Award, ¶ 7.5.20 (Aug. 20, 2007).
[164] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, Award, ¶7000 (July 29, 2008).
[165] *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award, ¶ 459 (Aug. 27, 2009).
[166] *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, Award, Part IV, § 8.23 (June 16, 2010).
[167] *UAB E energija (Lithuania) v. Republic of Latvia*, Award, ¶ 1079 (Dec. 22, 2017).
[168] *Supra* at 5, 272, 274-275; *Supra* at 81, 441-444.
[169] United Kingdom Model BIT 2008, UNCTAD, Investment Policy Hub.
[170] *Serbian Loans*, Judgment, PCIJ (July 12, 1929).

with an international protection that was considered "ambiguous".[171]

The dissatisfaction derives from the absence of a universal guarantee for foreign investors. In the event of an allegation of violation of a foreign investor's rights, especially with regard to direct expropriation, the investor relied on diplomatic protection and was subordinated to the will of the home state. There were also decisions against the interests of investors at the International Court of Justice, as in the *Anglo-Iranian Oil Company* of 1952, which ruled that there was no jurisdiction because it was a domestic contract and not an international treaty. The ICJ's decision in 1951 was not enough to prevent the coup d'état perpetrated by the United Kingdom and the United States in 1952.[172] From this, these capital-exporting countries built the argument that domestic contracts should be protected at the international level.

The use of the umbrella clause has two major positions involving the Swiss company Société Générale de Surveillance S.A. (SGS). While the *SGS v. Pakistan* case has a narrow understanding, the *SGS v. Philippines* case has a broad understanding, automatically elevating a trade dispute to the level of an international violation.

In *SGS v. Pakistan*, the arbitral tribunal established that a breach of contract between the foreign investor and the host state would not constitute an automatic breach of the BIT.

The arbitral tribunal drew important consequences from the inadvertent use of the umbrella clause in international investment law. First, such use would transform various domestic contracts signed by the host State into international obligations. Further, the substantive rules of BITs would become superfluous since it would be unnecessary to demonstrate a breach of such rules to constitute an international liability.[173]

Interestingly, in *SGS v. Pakistan,* the tribunal held that the umbrella clause is procedural and not substantive. Plus, it established that the umbrella clause was not located in the BIT together with the other substantive rules. Thus, it indicated that the signatory parties wished to give this clause a differentiated, and therefore procedural, nature.[174]

[171] *Supra* at 5, 273; *Supra* at 81, 441.
[172] Sundhya Pahuja and Cait Storr, *Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited*, in THE INTERNATIONAL LEGAL ORDER: CURRENT NEEDS AND POSSIBLE RESPONSES, ESSAYS IN HONOUR OF DJAMCHID MOMTAZ (Brill, 2017).
[173] *Supra* at 81, 467.
[174] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 169-170 (Aug. 6, 2002).

When the decision taken was contrary to the interest of the home State, in the case of Switzerland, this country sent a letter of disapproval to the Deputy Secretary-General of ICSID in 2013, registering its indignation.[175]

El Paso v. Argentina and *Pan American v. Argentina* added an important finding: the differentiation between a sovereign act to a management act. While BITs fall under acts of State, only those will be covered by investment arbitration.[176] In *SGS v. Paraguay*, the court found that the lack of compensation in a contract of pre-shipment inspection would be configured as a violation of the BIT.[177]

In *Salini v. Jordan,* the tribunal was also emphasized in demonstrating the inconsistency of the decisions between two arbitration cases involving the Swiss company SGS. The same company, in a similar situation and using the same institute, obtained opposite decisions. The court added that the contractual rules of dispute resolution must be observed.[178] In the end, the tribunal decided to a strict position on the umbrella clause, following *SGS v. Pakistan*.

These cases were based on the French doctrine of administrative contracts (*contracts administratifs*), widely applied in Latin America, which recognizes the supremacy of public over private interest. In turn, arbitrators of the Common Law inheritance tend to deny the application of this doctrine in the context of public international law.

In *Impregilo v. Pakistan*[179] and *Azurix v. Argentina*,[180] the *umbrella clause* was not applied because the domestic contracts were signed with separate entities of the host State.[181]

The group of arbitration rulings advocating a restrictive application of the umbrella clause, following the case *SGS v. Pakistan*, applies a restrictive interpretation based on the principle *in dubio mitius*, which means one should decide on the least onerous alternative for the party that assumes the

[175]" (…) [T]he Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which not only runs counter to the intention of Switzerland when concluding the Treaty but is quite evidently neither supported by the meaning of similar articles in BITs concluded by other countries nor by academic comments on such provisions.....With regard to the meaning behind provisions such as Article 11 the following can be said:...they are intended to cover commitments that a host State has entered into with regard specific investments of an investor or investment of a specific investor, which played a significant role in the investor's decision to invest or to substantially change an existing investment, i.e. commitments which were of such a nature that the investor could rely on them...It is furthermore the view of the Swiss authorities that a violation of a commitment of the kind described above should be subject to the dispute settlement procedures of the BIT". Vide: K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT, 2006/03, OECD Publishing; Also: *Supra* at 5, 279.

[176] *El Paso Energy International Company v. The Argentine Republic*, Decision on Jurisdiction, ¶¶ 79-80, 100 (Apr. 27, 2006).

[177] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, Award, ¶¶ 91-92 (February 10th, 2010).

[178] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, Decision on Jurisdiction, ¶ 127 (Nov. 9, 2004).

[179] *Impregilo S.p.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, ¶ 223 (Apr. 22, 2005).

[180] *Azurix Corp. v. The Argentine Republic*, Award, ¶ 384 (Sept. 1, 2009).

[181] *Supra* at 81, 465.

obligation. This principle is also found in the jurisprudence of the WTO in *DS48.*[182]

Regarding the cases that apply the broad understanding of the umbrella clause, the *SGS v. Philippines*,[183] decided in the opposite of *SGS v. Pakistan*. According to this, the contractual obligations would be covered by the BIT provisions.[184]

Texaco v. Libya de 1977 e *AAPL v. Sri Lanka* were crucial in the process of internationalization of concession contracts, replacing domestic jurisdiction with international. In *AAPL v. Sri Lanka*, it was the first time that a violation of the BIT rule was alleged without the existence of a domestic contract between a foreign investor and the host State.[185]

In *Siemens v. Argentina*, the tribunal dismissed the difference between BIT and administrative contract, arguing that the BIT applied to "*any obligations*".[186] The same in *Eureko v. Poland*[187] and *Fedax v. Venezuela.*[188]

In *Noble Ventures v. Romania,* the tribunal dismissed the theory that distinguishes *acta iure imperii* and *acta iure gestionis,* deciding that an international responsibility was identified.[189] The same in *CMS v. Argentina*[190] and *Sempra v. Argentina.*[191] The *Vivendi Annulment Committee* decided the opposite.[192]

The judgement in *Burlington v. Ecuador* goes beyond the grounds found in *CMS v. Argentina* and *Sempra v. Argentina*, understanding that the umbrella clause applies even when it does not exist to the exercise of state sovereignty.[193]

Therefore, it is possible to understand the abundance of positions in the arbitral decisions according to the table below, which summarises each examined clause by the main reasoning identified in arbitration cases.

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[182] *DS48. European Communities — Measures Concerning Meat and Meat Products (Hormones)* (WTO) Report of the Appellate Body, § 165 and footnote 154 (Jan. 16, 1998).
[183] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision of the Tribunal on Objections to Jurisdiction, ¶¶ 125, 127 (Jan. 29, 2004).
[184] *Supra* at 81, 468.
[185] Julien Cantegreil, *The Audacity of the Texaco/Calasiatic Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law*, 22(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 455 (2011).
[186] *Siemens A.G. v. The Argentine Republic*, Award, ¶ 206 (Jan. 30, 2007).
[187] *Eureko B.V. v. Republic of Poland*, Partial Award, ¶ 257 (Aug.19, 2005).
[188] *Fedax N.V. v. The Republic of Venezuela*, Award, ¶ 29 (Mar. 9, 1998).
[189] *Noble Ventures, Inc. v. Romania*, Award, ¶¶ 82, 85. (Oct. 12, 2005)
[190] *CMS Gas Transmission Company v. The Republic of Argentina*, Award, ¶ 299 (May 12, 2005).
[191] *Sempra Energy International v. The Argentine Republic*, Award, ¶¶ 310, 313 (Sept. 28, 2007).
[192] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, Decision on Annulment, ¶¶ 101-102 (July 23, 2002).
[193] *Burlington Resources Inc. v. Republic of Ecuador***,** Decision on Jurisdiction, ¶ 190 (June 2, 2010).

Table No. 1- Summary of BIT substantive clauses according to the reasoning found in arbitral cases

Standard Clause	Position	Leading Case	Other Cases
MFN	**Applicable in substantive and procedure rules (except if the BIT expressly determines a restrictive use)**	*Emilio Agustín Maffezini v. The Kingdom of Spain* *Ambatielos (ICJ)*	*Siemens v. Argentina* *Salini v. Jordan* *Grid v. Argentina* *Gas Natural SDG v. Argentina* *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentina* *Camuzzi v. Argentina* *Impregilo v. Argentina*
	Applicable only in substantive rules (except if the BIT expressly determines the use for procedural and dispute resolution rules)	*Plama v. Bulgaria*	*Telenor v. Hungary* *Wintershall v. Argentina*
	Non-application of the MFN	*Anglo-Iranian Oil Company (ICJ)*	*Tecmed v. México* *Parkerings-Compagniet AS v. Lithuania*
NT	**Comparison in different sectors**	*Occidental Exploration Production Company v. Ecuador*	*Methanex v. USA* *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan*
	Comparison in the same sectors	*Pope & Talbot v. Canada*	*Marvin Feldman v. Mexico* *UPS v. Canada* *S.D. Myers v. Canada* *Feldman v. Mexico*
	Denial of the use of WTO	*Occidental Exploration*	*Methanex v. United States* *Bayindir v. Pakisthan*

Standard Clause	Position	Leading Case	Other Cases
	jurisprudence to investments		*Cargill v. Mexico* *Merrill & Ring v. Canada* *Clayton/Bilcon v. Canada*
	Possibility to use of WTO jurisprudence to investments	*SD Meyers v. Canada* *Pope & Talbot v. Canada* *Feldman v. Mexico*	*Corn Products v. Mexico* *Cargill v. Poland*
	Same group of norms and regulations	*Nykomb Synergetics Technology Holding AB v. Latvia*	*Consortium RFCC v. Morocco* *Ronald Lauder v. Czech Republic*
	Lack of proof	*Thunderbird v. Mexico*	*ADF v. United States*
	Discrimination arising from domestic norms (public policy)	*Oscar Chinn Case (United Kingdom v. Belgium (ICJ)*	*Siemens v. Argentina* *Genin v. Estonia* *GAMI v. Mexico*
MST	**MST as minimum protection**	*Neer (1926)*	*Mondev International Ltd v. United States* *UPS v. Canada* *ADF v. USA* *Robert Azinian, Kenneth Davitian, & Ellen Bacca v. Mexico*
	MST as a consuetudinary norm	*Pope & Talbot v. Canada*	*Merrill & Ring v. Canada* *Metalclad v. Mexico* *Middle East Cement v. Egypt*
	Non-application of the MST	*Loewen v. USA*	*Thunderbird v. Mexico*
FET	**FET = MST**	*Metalclad v. Mexico*	*Occidental Exploration and Production Company v. Ecuador* *MTD v. Chile*

Standard Clause	Position	Leading Case	Other Cases
			Generation v. Ukraine *LG&E v. Argentina* *SD Myers v. Canada* *CMS Gas v. Argentina*
	FET = international custom	*Mondev v. USA*	*BG v. Argentina* *Chemtura v. Canada*
	FET like autonomous norm (additional protection)	*Saluka v. Czech Republic*	*Tecmed v. Mexico* *Pope & Talbot v. Canada* *LG&E v. Argentina*
	Synonyms of the term FET	*Parkerings v. Lithuania*	*Total v. Argentina* *OKO Pankki v. Estonia* *Bosca v. Lithuania*
	Non-application of the FET	*Eastern Sugar v. Czech Republic*	*Thunderbird v. Mexico* *GAMI v. Mexico*
FPS	**Physical protection**	*Saluka v. Czech Republic*	*Enron v. Argentina* *BG v. Argentina* *Wena Hotels v. Egypt* *Tecmed v. Mexico* *Noble Ventures v. Romania* *Suez and InterAgua v. Argentina* *AMT v. Zaire* *Eureko v. Poland* *Tenaris v. Venezuela*
	Physical and legal protection	*AAPL v. Sri Lanka*	*Compañía de Aguas, Vivendi Universal v. Argentina* *CME v. Czech Republic* *Sempra v. Argentina* *Siemens v. Argentina* *Vivendi v. Argentina*

Standard Clause	Position	Leading Case	Other Cases
			Biwater Gaulf v. Tanzania *Azurix v. Argentina*
	Non-application of the FPS	*Ronald Lauder v. Czech Republic*	*Pantechniki v. Albania*
Expropriation	**Direct**	*Saluka v. Czech Republic*	*Santa Elena v. Costa Rica* *Compañía de Aguas, Vivendi Universal v. Argentina* *LG&E v. Argentina* *Middle East Cement v. Egypt*
	Indirect	*Metalclad v. Mexico*	*Pope & Talbot v. Canada* *CME v. Czech Republic* *Metalclad v. Mexico* *Ampal-American v. Egypt* *Biwater Gaulf v. Tanzania* *Middle East Cement v. Egypt* *El Paso v. Argentina* *Enkev Beheer v. Poland*
	Expropriation of rights derived from an investment	*SPP v. Egypt*	*Tokios Tokelès v. Ukraine* *Eureko v. Poland* *Gold Reserve v. Venezuela* *Vigotop v. Hungary*
	Non-application of the expropriation	*Ronald Lauder v. Czech Republic*	*Oscar Chinn Case (United Kingdom v. Belgium (ICJ)* *Fireman's Fund v. Mexico* *Sempra v. Argentina* *Methanex v. United States* *Thunderbird v. Mexico* *Waste Management v. Mexico II* *SGS v. Philippines* *RFCC v. Morocco* *Suez and InterAgua v. Argentina* *Alpha v. Ukraine* *Grand River v. United States* *ECE v. Czech Republic*

Standard Clause	Position	Leading Case	Other Cases
			CMS v. Argentina
Umbrella Clause	**Restricted understanding**	*SGS v. Pakistan*	*El Paso v. Argentina* *Pan American v. Argentina* *Salini v. Jordan* *Impregilo v. Pakistan* *Azurix v. Argentina* *Vivendi Annulment Committee*
	Broad understanding	*SGS v. Philippines*	*SGS v. Paraguay* *Texaco v. Libya* *AAPL v. Sri Lanka* *Siemens v. Argentina* *Noble Ventures v. Romania* *Eureko v. Poland* *Fedax v. Venezuela* *CMS v. Argentina* *Sempra v. Argentina* *Burlington v. Ecuador*
	Non-application of umbrella clause	*Serbian Loans (PCIJ)* *Anglo-Iranian Oil Company (CIJ)*	

Source: created by the author from the cases of arbitration tribunals and international permanent courts.

VII. CONCLUSION

The lack of consistency in different arbitral cases dismisses the unjustified claim of the *jurisprudence constante*. The investment dispute settlement system, eminently based on ISDS, takes advantage of this anarchical situation that benefits foreign investors, allowing them to use legally weak or controversial positions, such as forum treaty, forum shopping, MFN in procedural rules, autonomous and undefined FET, indirect expropriation, FPS and umbrella clause *lato sensu*. As a consequence, host States, mostly developing countries, find themselves subject to the reduction of the legitimate

exercise of public interest, the violation of the principle of *pacta sunt servanda*, and upholding rules historically elaborated by capital exporting nations. Therefore, this lack of coherence is reflected in recent modifications of bilateral and regional agreements, in which States have become more cautious by imposing more stringent substantive clauses or even excluding them from these instruments.

The recent and constant revision of BITs and FTAs and the new agreements concluded after the 2008 financial crisis show that States systematically adopt more restrictive agreements with less room for generic standard clauses. If these agreements do exist, a series of exceptions are necessarily provided for, in order to establish explicit limits. The ISDS system, therefore, is unable to ensure a secure set of precedents, and the emphasis in the arbitral awards is the preconception idea of the foreign investor's hypo-sufficiency *vis-à-vis* the host State.

Therefore, the movement towards a withdrawal of international investment law is not restricted to developing countries historically disadvantaged by a unilateral system of foreign investor protection. The European Union, the United States, Canada and Australia are also presenting new, and more restricted, agreements. It is notorious that investor protection lacks a legal foundation to constitute an equitable system in public international law.

PRE-REFERRAL JURISDICTION: B&T AG V. MINISTRY OF DEFENCE WIDENS THE EYE OF THE NEEDLE

Ieshan Sinha*

Abstract

While the principle of lopping off manifestly "deadwood" claims at the pre-referral stage, i.e. at the stage of referring the matter to arbitration either under section 8 or section 11 of the Arbitration and Conciliation Act, 1996, is a salutary one, the Supreme Court of India's judgment in B&T AG v. Ministry of Defence presents a troubling expansion in the application of the said principle. This case comment analyses the said judgment by locating it in the context of the narrow pre-referral jurisdiction carved out by the Supreme Court.

I. INTRODUCTION

The Supreme Court, in *NTPC Ltd. v. SPML Infra Ltd.*[1] ["***NTPC Ltd.***"], quite pithily described the pre-referral jurisdiction of the Courts under Section 11(6) of the Arbitration and Conciliation Act, 1996 ["**Arbitration Act**"], as one of "*limited scrutiny, through the eye of the needle*"[2]. This "*extremely limited*"[3] jurisdiction extends to examining whether an arbitration agreement exists – nothing more, nothing less.[4]

As a consequence of this limited and restricted scope of review, objections pertaining to limitation or claims being time-barred are generally not entertained by the Court under Section 11 of the Arbitration Act and have to be left for the arbitrator to decide.[5] However, the Supreme Court has made an exception for a certain category of claims or disputes that are manifestly and *ex facie* time-barred and which may be interfered with by the court even at the referral stage (i.e. under Section 8 or 11 of the Arbitration Act), in attempts to "*cut off the deadwood*".[6] Mindful of the potential for opening the floodgates of unnecessary interference and long-winded scrutiny at the pre-referral stage itself (which it is widely accepted ought to be discouraged, as with other unnecessary court interference as per the mandate of Section 5 of the Arbitration Act) the Supreme Court has clarified that such scrutiny ought to be undertaken "*rarely as a demurrer*" and only in cases of manifest and

* Ieshan Sinha is a Partner with the Dispute Resolution Team at Wadia Ghandy & Co. (Mumbai).
[1] (2023) SCC OnLine SC 389.
[2] *Id*, ¶ 28.
[3] Vidya Drolia v. Durga Trading Corporation, (2021) 2 SCC 1, ¶ 154.2 ["***Vidya Drolia***"].
[4] Duro Felguera, SA v. Gangavaram Port Ltd., (2017) 9 SCC 729, ¶ 59 ["***Duro Felguera* and *Mayavati Trading***"]; *See also* Mayavati Trading Pvt. Ltd. v. Pradyut Deb Burman, (2019) 8 SCC 714.
[5] Uttarakhand Purv Sainik Kalyan Nigam Ltd. v. Northern Coal Field Ltd., (2020) 2 SCC 455, ¶ 7.13.
[6] *Id* at 3, ¶¶ 148, 154.4.

ex-facie certainty of the claims being dead.[7]

However, in the author's view, the Supreme Court's judgment in *B&T AG v. Ministry of Defence*[8] ["***B&T AG***"] sets a troubling precedent. It may provide unwarranted impetus for unjustified and abusive objections on the ground of limitation to be taken up and entertained at the referral stage under Section 11 (or for that matter under Section 8) since the Supreme Court here enters into a wider and more detailed examination than would otherwise be permitted as part of the very narrow and *ex facie* scrutiny available under Section 11 of the Arbitration Act.

II. BRIEF SURVEY OF THE LAW LEADING UPTO THE EYE OF THE NEEDLE

Prior to the seven-judge bench judgment of the Supreme Court in *SBP & Co. v. Patel Engineering. Ltd.*[9] ["***Patel Engineering***"], much controversy surrounded the nature of power exercised while appointing an arbitrator under Section 11, whether administrative or judicial. The Supreme Court in Patel Engineering held that the court under Section 11 exercised a judicial power and was required to decide all threshold issues with respect to jurisdiction, such as the existence of the arbitration agreement, its validity, whether the claim was a dead one or whether it was time-barred or discharged by accord and satisfaction.

Based on the Law Commission's 246th Report[10], Section 11 was substantially amended by the 2016 Amendment Act, which most importantly inserted sub-Section (6-A) to Section 11 which provides that:

> "(6-A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-Section (4) or sub-Section (5) or sub-Section (6), shall, **notwithstanding any judgment, decree or order of any court, confine to the examination of the existence of an arbitration agreement.**" [emphasis supplied]

By virtue of the aforesaid sub-Section (6-A), previous judgments rendered in Patel Engineering and the line of judgments following it were legislatively overruled, and the scope of examination was confined only to the existence of the arbitration agreement.[11] All other preliminary or threshold issues

[7] *Id* at 3, ¶¶ 148, 154.4.
[8] (2023) SCC OnLine SC 657.
[9] (2005) 8 SCC 618.
[10] LAW COMMISSION OF INDIA, REPORT NO. 246: AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 (August 2014).
[11] *Id* at 4.

are left for the arbitral tribunal to decide.[12]

Thereafter, the three-judge bench in *Vidya Drolia* carved out a sliver or pinhole through which the court could excise manifestly and *ex facie* time-barred and dead cases where there is no subsisting dispute. The Supreme Court held that while Limitation law is procedural and normally disputes, being factual, it would be for the arbitrator to decide maintainability on the basis of limitation, but the court at the referral stage may interfere when it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute.[13] However, the Supreme Court clarified that such interference should be rare and as a demurrer, the intention behind the restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably 'non-arbitrable' and to cut off the deadwood.[14] It was further held that the pre-referral stage was not the stage for the court to enter into a mini-trial or elaborate review.[15]

In view of the aforesaid, it is evident that the idea behind exercising such a review is to lop off the evidently deadwood claims. Consequently, the contours of such review have been intentionally kept strictly narrow:

i. The Court can interfere at the referral stage only when the claims are manifestly and *ex facie* time-barred;
ii. Such interference should be rare and based on demurrer;
iii. The review ought not to be elaborate or a mini-trial.

Vidya Drolia affirms the position of law expounded in *Duro Felguera* and *Mayavati Trading*, It has not resurrected the pre-amendment position on the scope of power as held in *Patel Engineering*.[16]

Following the precedent in *Vidya Drolia*, the Supreme Court rightly rejected the evidently dead claims in *Nortel Networks* and *Secunderabad Cantonment Board v. B Ramachandraiah*[17] ["***Secunderabad Cantonment Board***"]. Even in *NTPC Ltd.,* the Supreme Court exercises what it memorably calls the "*eye of the needle*" jurisdiction. Still, since that was a case of discharge by accord and satisfaction, a detailed discussion of that case is not relevant for our purposes.

III. THE TROUBLING WIDENING OF THE EYE OF THE NEEDLE

A. Nortel Networks

In *Nortel Networks*, the Supreme Court was seized with disputes under the works contract awarded

[12] BSNL v. Nortel Networks India Pvt. Ltd., (2021) 5 SCC 738, ¶ 34 ["***Nortel Networks***"].
[13] *Id* at 3, ¶ 148.
[14] *Id* at 3, ¶ 154.4.
[15] *Id*.
[16] *Id*, ¶ 46.
[17] (2021) 5 SCC 705.

by BSNL to Nortel Networks, where on completion of the works under the Purchase Order, BSNL deducted/withheld amounts towards liquidated damages and other levies. Nortel addressed a communication dated 13th May 2014 raising a claim for the said amount, which was rejected by BSNL by way of its letter dated 4th August 2014. After over 5.5 years, Nortel invoked the arbitration clause by way of a letter dated 29th April 2020.

In the judgment, the Supreme Court finds that the cause of action arose on 4th August 2014 when the claims made by Nortel were rejected by BSNL, and Nortel has not stated any event that would extend the period of limitation thereafter. Hence, since the case fell within the category of deadwood cases, the Supreme Court rightly dismissed the Section 11 application.

B. Secunderabad Cantonment Board

Similarly, in *Secunderabad Cantonment Board*, there was a clear and grossly time-barred claim where again in a works contract, the final contract certificates were issued by the appellant on 18th February 2002 and 26th March 2003, the final payment was received by the respondent. However, the respondent made further demands by way of letters last of which was dated 12th October 2004, all of which went unresponded. Eventually, the respondent resumed correspondence after a hiatus of about 2 years, which did not result in any favourable result for the respondent who then filed the applications under Section 11 on 6th November 2013. Rightly holding that the claims were hopelessly time-barred, the Supreme Court set aside the order of the concerned High Court appointing an arbitrator.

Both these cases concerned hopelessly time-barred claims on the face of it, and a reference to arbitration was rightly rejected.

C. B&T AG v. Ministry of Defence

Although even in *B&T AG*, the Supreme Court holds that the case is undoubtedly one of a hopelessly barred claim, it is the author's view that the facts weren't as clear cut as the above two cases. Furthermore, the Supreme Court's reasoning to reach the said conclusion is slightly tortured and inexplicably relies on judgments arising under the repealed Arbitration Act of 1940 under which, contrary to the position under the Arbitration Act (of 1996), the jurisdiction to decide questions of non-arbitrability including issues of limitation and accord and satisfaction rested with the courts. In any event, the examination conducted by the Supreme Court in that case most certainly did not fit the criteria of examination on a demurrer as prescribed by *Vidya Drolia*.

In *B&T AG*, the Supreme Court was concerned with disputes arising out of a contract dated 27th

March 2012 between a Swiss arms company (B&T AG) and the Ministry of Defence. Disputes arose between the parties in relation to the purported wrongful encashment of a bank guarantee by the Ministry of Defence on 16th February 2016, which was eventually deducted on 26th September 2016. It was B&T AG's case that after such encashment of the bank guarantee parties were engaged in bilateral discussions, but the Ministry of Defence for the first time communicated to B&T AG that it would not reconsider the request by way of letter dated 22nd September 2017. B&T AG claimed that there was further negotiation between parties till 2019 but eventually, B&T AG invoked arbitration on 8th November 2021. Quite pertinently, in its response to the invocation dated 18th February 2022, the Defence Ministry did not oppose a reference to arbitration but objected to the appointment of a sole arbitrator (the contract itself provided for a 3-member tribunal). B&T AG claimed the benefit of the Supreme Court's *suo moto* order extending limitation on the ground of Covid and also relied on the 3-judge bench judgment of the Supreme Court in *Geo Miller and Co. Pvt. Ltd. v. Rajasthan Vidyut Utpadan Nigam Limited*[18], whereby the Supreme Court laid down the foundation for claiming exclusion of time period *bona fide* spent on exhausting pre-arbitration negotiations.

On the other hand, the Ministry of Defence contended that cause of action arose on 26th September 2016 when the amounts were finally deducted by the Government, and consequently, the limitation expired on 25th September 2019. It is pertinent to note that the Supreme Court's *suo moto* Covid Order took effect on 15th March 2020, a mere 6 months away even from the Defence Ministry's admitted position on when the cause of action arose.

In its judgment, the Supreme Court states that the question that falls for consideration is "*whether time-barred claims or claims which are barred by limitation, can be said to be live claims, which can be referred to arbitration?*", which in the framing itself goes wrong. To answer the question as framed, the nature of the Court's scrutiny will need to be such as would be prohibited under Section 11 after the 2016 Amendment Act. One must mention the apt epigram that if one asks the wrong question, one will get the wrong answer.

Thereafter, while analysing the case law on the subject, the Supreme Court most confoundingly and inexplicably relies on three judgments of the Supreme Court arising under the Arbitration Act, 1940, under which, as already mentioned, the position of law prevailing was contrary to that under Section 11 of the Arbitration Act (of 1996) as has also been noted in *Vidya Drolia*[19].

The Supreme Court then notes the judgments in *Patel Engineering* and *National Insurance Company*

[18] (2020) 14 SCC 643.
[19] *Id* at 3, ¶ 84.

Ltd. v. Boghara Polyfab Pvt Ltd.[18], which follows *Patel Engineering*, without explaining that the position of law has changed thereafter.

Basis its reading of the law, including the aforementioned judgments and the record, the Supreme Court arrives at a finding that the disputes actually cropped up way back in 2014 itself, which does not seem to be either party's case, with the Defence Ministry itself only relying on the date of 26th September 2016 for when the cause of action arose. The Supreme Court further holds that when the bank guarantee came to be encashed and stood transferred to the Government's account in 2016, that was the end of the matter, and the basis of such finding came to the conclusion that the case on hand is a "*hopelessly barred claim*". Such a conclusion does not give due credence to B&T AG's submission on Geo Miller, which at the very least was an arguable contention, and completely ignores that accounting for the Covid period exclusion, B&T AG's claims would be a mere 6 months short of the limitation, even if B&T AG's case on the negotiation period not being excluded were to be rejected. Further, it seems to disregard the contemporaneous response of the Defence Ministry in replying to but not opposing the arbitration invocation itself but objecting to the appointment of a sole arbitrator.

Ultimately, it is not the author's contention that the Supreme Court was wrong in its finding on limitation but rather that the Supreme Court's willingness to even entertain the objections in a closely contested case of this sort is worrying and is a troubling departure from the contours of judicial review set up in *Vidya Drolia*. The *B&T AG* case was not one where it was readily apparent that the claims were time-barred, and, the applicant, B&T AG, seemed to have a wholly arguable case on the exclusion of time spent on pre-arbitration negotiations. In this background, the Supreme Court's reliance on cases under the Arbitration Act of 1940 and citation of *Patel Engineering* and *Boghra Polyfab*[20], without noting that they have both been over-ruled, is particularly deficient in the requisite judicial rigours which one would expect from the Apex Court.

IV. CONCLUSION

The effect of the amendments to Section 11 and other consequential amendments under the Amendment Act of 2019 (once enforced) would be to denude the courts of the jurisdiction to appoint arbitrators and endow it solely to designated arbitral institutions, thereby making it a purely administrative action and ending all the hand-wringing surrounding the depth and width of court interference.

[20] (2009) 1 SCC 267.

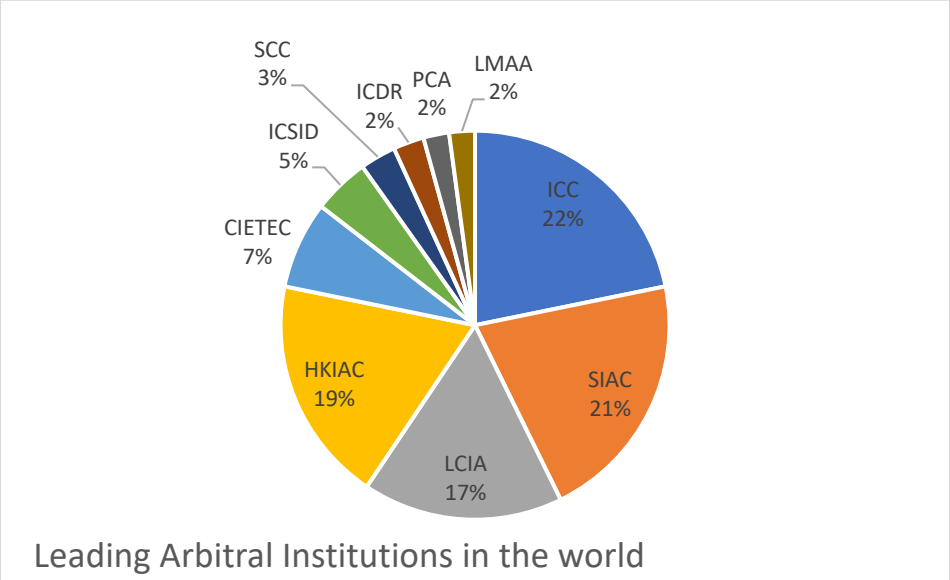
Till such time, however, the Supreme Court's judgment in *B&T AG* may provide unwarranted support to an unscrupulous litigant seeking to merely obstruct and delay a rightful claimant.

2023 SIAC UNRAVELED- THE PINNACLE OF ARBITRATION PRACTICE

Shravan Niranjan & Aisvaria Subramaniam*

I. INTRODUCTION

The Singapore International Arbitration Centre ["**SIAC**"] has emerged as one of the leading arbitral institutions in the world, being the second most preferred institution after the International Chamber of Commerce ["**ICC**"].[1] In order to sustain this changing regime of arbitration, SIAC has brought forth the 7th edition draft SIAC amendment rules ["**Draft Rules**"], designed to be in tune with the latest practices in arbitration. The Draft Rules were released for public consultation from 22nd August to 21st November 2023. Owing to the success of the previously held public consultations, SIAC aims to cater for the rules of the institution based on the feedback and opinions given by the arbitration community, to ensure that it is only moving forward within the arbitral world.



[2]

SIAC, having already emerged as number two in the world, is only looking forward towards improvement, in accord with the evolving arbitral practices across the globe. Having achieved this, SIAC is now aiming to introduce some unique features, such as a Streamlined Procedure, one that

* Shravan Niranjan [BALLB'2020 graduate from O.P. Jindal Global University, currently practicing in Arbitration and Litigation, associated with Agarwal Law Associates, New Delhi], and Aisvaria Subramanian [BALLB'2022 graduate from O.P. Jindal Global University, currently pursuing LLM in International Arbitration and Dispute Resolution from National University of Singapore].

[1] *2021 International Arbitration Survey: Adapting arbitration to a changing world* conducted by Queen Mary University London in association with White & Case LLP, https://www.whitecase.com/sites/default/files/2021-05/quml-international-arbitration-survey-2021-web.pdf.

[2] *Id.*

other arbitral institutions have not adopted. The new rules aim to introduce new key features comprising of streamlined procedure, SIAC gateway, third-party funding, preliminary determination, and various other amendments focused on enhancing the user experience and increasing the efficiency of SIAC proceedings.[3]

The present paper focuses on the Streamlined Procedure, Third-Party Funding Preliminary Determination, and SIAC Gateway as sought to be introduced in the draft of the 7th Edition of the SIAC Rules.

A. Streamlined Procedure

The Draft Rules propose to introduce a new procedure, namely the Streamlined Procedure, the addition of which is aimed at a substitution of the Expedited Procedure and which most people would claim was the most innovative aspect of the Draft Rules.

Streamlined Procedure is covered by Rule 13, which states that a party may, at any time prior to the constitution of the Arbitral Tribunal, file an Application for the arbitration to be conducted in accordance with the Streamlined Procedure set out in Rule 13, read with Schedule 2 of the Draft Rules provided that (a) the Parties have mutually consented to the Application of the Streamlined Procedure; (b) the amount in dispute does not exceed SGD 1,000,000 at the time of the application; or (c) the circumstances of the case warrant the application of the Streamlined Procedure.[4] The final determination as to whether a dispute ought to be adjudicated in accordance with the Streamlined Procedure will ultimately be decided by the President on receipt of an application for the same from the parties.

On the approval of an application seeking Streamlined Procedure by the President, the parties to a dispute may jointly nominate a Sole Arbitrator within three days from the date of the President's decision[5]. On the failure of the Parties to do so, or if the parties so request, the President shall appoint the sole arbitrator within three days.[6] The appointment of such arbitrator may be challenged by either party through an application to be filed before the Registrar in accordance with Rule 27 of the Draft Rules within 3 days from the notice of appointment or the date from which the circumstances specified in Rule 26.1 of the Draft Rules become known to the party.[7]

[3] Clifford Chance, *Draft 7th Edition of the SIAC Rules: Embracing the next generation of disputes* (Sept. 2023) https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/09/SIAC-rules-client-briefing.pdf.
[4] SIAC Rules (7th Edition) (consultation draft), Rule 13, Singapore International Arbitration Centre, 2023.
[5] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 2, Singapore International Arbitration Centre, 2023.
[6] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 3, Singapore International Arbitration Centre, 2023.
[7] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clauses 5 and 7, Singapore International Arbitration Centre, 2023.

On a successful application for Streamlined Procedure, the newly appointed Tribunal shall conduct a case management hearing with the parties to discuss the timelines for the proceedings including but not limited to the time period for filing and determining any interlocutory applications.[8] Clause 11 to Schedule 2 further gives the Tribunal the authority to determine the dispute simply based on written submissions and accompanying documentary hearings without any hearings for the production of documents and evidence being led by any fact/expert witness.[9]

The final award shall be published within three months from the date of the constitution of the Tribunal, which is about half the time prescribed for publishing an award under the Expedited Procedure in the existing regime.[10] Furthermore, the fees of the Tribunal as well as SIAC, ordinarily shall not exceed 50% of the maximum amount calculated under the Schedule of Fees. [11]

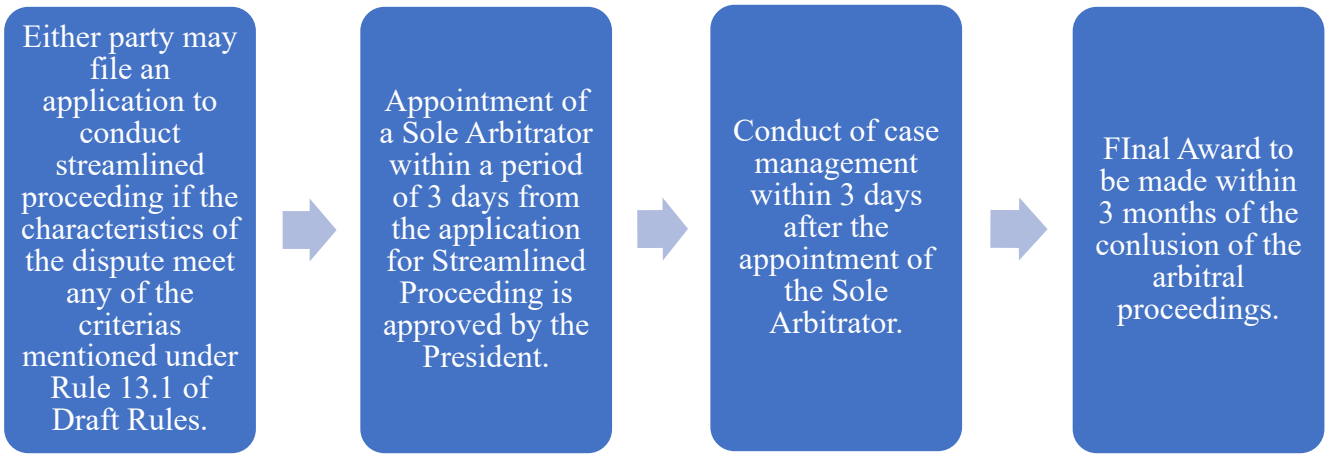


*Chart- Represents the summary of the proceeding of the Streamlined Procedure.

In tandem with the introduction of the Streamlined Procedure, the threshold for the Expedited Procedure has been raised from SGD 6,000,000 to SGD 10,000,000[12] making it a viable option for more parties as an opportunity to save not only time but also costs. Besides the increment in the financial threshold, there has been no other significant proposed amendment to the Expedited Procedure.

[8] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 8, Singapore International Arbitration Centre, 2023.
[9] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 11, Singapore International Arbitration Centre, 2023.
[10] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 12, Singapore International Arbitration Centre, 2023.
[11] SIAC Rules (7th Edition) (consultation draft), Schedule 2, Clause 14, Singapore International Arbitration Centre, 2023.
[12] SIAC Rules (7th Edition) (consultation draft), Rule 14.1(b), Singapore International Arbitration Centre, 2023.

i. *Difference between Streamlined Proceedings and Expedited Proceedings*

As stated above, one of the distinct reasons for introducing a separate Streamlined Proceeding was the lowering of the monetary threshold. Expedited procedure is expected to deliver the award within 6 months, whereas streamlined procedure has an even lower timeframe being three months. Compared to the tribunal limiting the number, length and scope of Written Submissions and Witness Evidence in an expedited proceeding, the parties under a streamlined procedure are not entitled to file any fact or witness evidence. With respect to the case management hearings, while it has not been given a fixed timeline under the expedited proceedings, the case management hearing must be conducted within three days of the appointment of the Sole Arbitrator in Streamlined Procedure.

While the monetary threshold for the Streamlined Procedure and the Expedited Procedure has been fixed as SGD 1,000,000 and SGD 10,000,000, respectively, the said procedures may be opted for even in disputes of higher value if the circumstances of the said disputes warrant the application of the same. What remains to be seen is whether the newly proposed to be introduced Streamlined Procedure is likely to be as popular as the Expedited Procedure introduced in 2010. The three-month period for the publishing of the award and the reduced fee structure are likely to entice smaller enterprises into having their disputes adjudicated under the aegis of the SIAC. The major concern, however, is that the ultimate discretion with respect to the grant of an application for Streamlined Procedure remains with the President of the SIAC as the same is likely to interfere with the concept of party autonomy. There is no clarity in the Draft Rules, as to the factors to be considered by the President while making such determination thus leaving the parties in a shadow.

ii. The objective of introducing a Streamlined Procedure

This procedure aims to provide an even faster track procedure compared to an expedited procedure, targeted at small-value disputes. This procedure ultimately also targets bridging the gap in the issue of age diversity in arbitration, by promoting the practice of younger practitioners in the role of Arbitrators.[13] It attempts to target disputes of not very high monetary value or disputes which require in-depth analysis of the issue of facts and law, enabling parties to resolve disputes at the earliest.

[13] Julie Raneda and Alvin Tan, *SIAC's new 'Streamlined Procedure': an innovative proposal for even faster-track arbitration*, LEXOLOGY (August 31, 2023), https://www.lexology.com/library/detail.aspx?g=a1838c68-8262-4506-b1fb-cfadbb325767.

iii. Shortcomings of the Expedited Procedure

While the Streamlined Procedure ensures quicker resolution of disputes, the following issues, as set out hereinafter would require further clarifications from SIAC as the same could lead to a breach of the principles of natural justice.

As per Rule 13.1 of the Draft Rules, an application for Streamlined Procedure can be made by either Party at any point in time before the constitution of the arbitral tribunal. Further, Rule 13.1 sets forth three situations where such an application can be made. However, it is to be noted, that two out of the said three situations, namely (a) when the dispute amount does not exceed SGD 1,000,000; and (b) the circumstances of the case warrant the application of the Streamlined Procedure; do not warrant the consent of the opposite party. As a result, on an Application being made by either Party along with their Notice of Arbitration or Response thereto, the opposite Party would be forced to decide whether they would want to opt for the said Procedure without having enough time to study and analyse their case, the issues therein, and any counterclaims that could be raised. As a result, the parties are solely at the discretion of the arbitral tribunal, which shall be unappealable, thus stripping away the concept of party autonomy from the entire procedure.

Another shortcoming is that there is no guaranteed right to a hearing. As per Clause 11 of Schedule 2, the arbitration is to be decided only based on written submissions and documentary evidence subject to any variations at the discretion of the arbitral tribunal. Thus, there is no guaranteed right to a hearing and no possibility to obtain or rely on any evidence, including but not limited to expert witnesses, should a party opt for the Streamlined Procedure.

Another aspect which requires a certain amount of clarity is the applicability of the Streamlined Procedure to arbitration agreements entered into prior to the introduction of the said procedure. This would apply not only to the Streamlined Procedure but to other new features sought to be introduced by the Draft Rules as well. It would be a violation of the rights of the parties, who negotiated with each other before entering into an arbitration agreement (prior to the introduction of the 7th Edition of the SIAC Rules), to force the parties into a procedure which did not exist at the time of the arbitration agreement.

Lastly, the language deployed in Rule 13.1(c) of the Draft Rules provides for the application of the Streamlined Procedure where the circumstances of a case warrant so. However, there is no clarification as to what are the said circumstances which would warrant the application of the Streamlined Procedure. This vague wording once again leaves the parties at the discretion of the

arbitral tribunal, which may not always be used appropriately and may lead to forcing either party into accepting something it did not sign up for while entering into the arbitration agreement.

II. THIRD-PARTY FUNDING

A third-party funding arrangement is one in which an unaffiliated party (i.e., none of the disputed parties) offers to pay all or a portion of one of the parties' expenses, including the costs of expert testimony, institutional advances, and/or legal representation. Such funding can be viewed as an investment, with the funder receiving payment in the form of a success fee, an agreed-upon percentage of the award earnings, a combination of the two, or through an even more complex financial structure. The flexibility of third-party finance, which can be customized to the unique risks of each case since different funders have varying risk tolerances, is one of its appeals.

Until now, third-party funding or external funding under the SIAC was regulated by the Practice Note PN – 01-17 dated 31.03.2017, which set forth the standards of practice and conduct to be observed by arbitrators in proceedings involving an external funder.[14] However, the Draft Rules seek to introduce specific rules to regulate the same.

As per Rule 38 of the Draft Rules, a party is required to disclose any agreement relating to third-party funding along with the identity of the said funder in its notice of arbitration, the response thereto or on immediately concluding any such agreement.[15] Further, the Tribunal has the authority to order the disclosure of details of the funder's interest in the proceedings including but not limited to the liabilities of the funder in respect of adverse costs.[16] However, once the Tribunal is constituted, there is a bar on either party from entering into a funding agreement, which may give rise to a conflict of interest with any member of the tribunal.

III. PRELIMINARY DETERMINATION AND EARLY DISMISSAL OF CLAIMS AND DEFENSES

Under Section VII of the Draft Rules, the concept of Preliminary determination has been introduced through Rule 46, which is a tool that would allow parties to request the tribunal to decide on one or more issues or points of law without going through every procedural step.[17] This is not the first time

[14] Practice Note (PN)- 01/17 for administered cases under the Arbitration Rules of the Singapore International Arbitration Centre, on *Arbitrator Conduct in Cases Involving External Funding*, Singapore International Arbitration Centre, https://siac.org.sg/wp-content/uploads/2022/08/Practice-Note-for-Administered-Cases-%E2%80%93-On-Arbitrator-Conduct-in-Cases-Involving-External-Funding.pdf.
[15] SIAC Rules (7th Edition) (consultation draft), Rule 38.1, Singapore International Arbitration Centre, 2023.
[16] SIAC Rules (7th Edition) (consultation draft), Rule 38.3, Singapore International Arbitration Centre, 2023.
[17] UNCITRAL Working Group II - A/CN.9/WG.II/WP.212 (Dispute Settlement), Feb. 3-7, 2020, https://documents-dds-ny.un.org/doc/UNDOC/LTD/V19/110/68/PDF/V1911068.pdf?OpenElement.

this has been introduced in an institutional rule.[18] Under the SCC arbitration rules, the preliminary determination and early dismissal of proceedings have been combined within Article 39 of the SCC Arbitration Rules, which is comprised of the Summary Procedure.

As discussed during Working Group II, the introduction of preliminary determination and early dismissal was brought forth with the paramount reason being the intention to discourage frivolous claims.[19]

As per Rule 46.1, a party may apply to the tribunal for the preliminary determination of any issue[20]:

a) Where the parties agree that the tribunal may determine such an issue on a preliminary basis;
b) Where the applicant can demonstrate that the determination is likely to contribute to the saving of time and costs and a more expeditious and efficient resolution of the dispute; OR
c) Where the circumstances of the case warrant a preliminary determination.

On an Application under Rule 46.1 being allowed, the Tribunal shall, after allowing the parties to be heard, make a decision, ruling, order or award within 45 days from the date of filing of the said application subject to any extension of time granted by the Registrar.[21]

Preliminary Determination coupled with Early Dismissal of the proceedings under Rule 47 of Draft Rules allows the tribunal to rule on certain issues of fact or law without delving into a thorough assessment of the facts of the case. In comparison to Rule 47, which requires the tribunal to determine whether or not the claim or defence is manifestly without legal merit or outside the jurisdiction of the tribunal, the threshold for Article 46 is lower, wherein the tribunal would determine the case, if proven it is likely to save time and costs or provide a decision in a more expeditious or efficient manner. Such a feature enables the parties to bring matters to the tribunal's attention separately to obtain an early decision on a few claims involved in the dispute.

In comparison with the early disposal of the procedure or claims, the time frame for Articles 46 and 47 under the current draft rules are the same, i.e., 45 days, as opposed to the 2016 rules wherein an application for Early Dismissal of the cases had to be made within 60 days.[22] One of the common criticisms of this procedure points towards the abuse of the process by parties to the dispute as a tactic to delay proceedings. It is further believed that the tribunal has power throughout the arbitral

[18] Amanda Lees et al., *Proposed new rules for the SIAC - improved procedures for small disputes, new preliminary determination rule and enhanced powers for the Registrar and President*, LEXOLOGY, (Nov. 7, 2023) https://www.lexology.com/library/detail.aspx?g=3ffd7d20-f144-4f87-b815-1e1b48a8179a
[19] *Ibid* at 17.
[20] SIAC Rules (7th Edition) (consultation draft), Rule 46, Singapore International Arbitration Centre, 2023.
[21] Ibid.
[22] SIAC Rules (6th Edition), Rule 29.4, Singapore International Arbitration Centre, 2016.

proceeding to determine issues, thus not a requirement to spell it out which would avoid the abuse of the process. [23]

While this provision is not contained in all the institutional rules across the world, this provision is a called for amendment, which will help enhance the institution's expedited arbitral procedure. [24]

A. SIAC Gateway

With the technology of the world only moving forward, it has become crucial that arbitral institutions keep up to date with technological advances and proceed with introducing newer technologies to facilitate the conduct of arbitral proceedings.

i. Centralised case filing platform:

(i) Rules 4.2 and 4.3- provide for the uploading of all communications between the parties to the Gateway, thus significantly reducing the burden of case administration.[25]

(ii) Rule 6.1- The claimant would be able to file the Notice of Arbitration online through the online platform gateway.[26]

ii. Hybrid hearings:

Rule 39.2- In conformance with the current practice of the legal system worldwide, which has accepted the norm of hybrid and online hearings. This now is also being confirmed in the SIAC new rules, under Rule 39.2 wherein the tribunal may be conducted in-person, in hybrid form, or by videoconference, teleconference or any other form of electronic communication. [27]

iii. Cybersecurity measures:

Under Rule 61, the Tribunal, on the first case management hearing, shall in accordance with the parties' opinions, decide on the procedure to be followed for the protection of the information, which also includes cybersecurity and cyber reliance. [28]

IV. CONCLUSION

In the last 2 decades, SIAC has consistently managed to enhance the rules of the institution by making certain of the fact that the rules do not become stale. Through the mode of introducing Public

[23] Giuditta Cordero-Moss, *UNCITRAL Working Group II: Early Dismissal and Preliminary Determination in Expedited Arbitration?*, KLUWER ARBITRATION, (Sept. 19, 2020) https://arbitrationblog.kluwerarbitration.com/2020/09/19/uncitral-working-group-ii-early-dismissal-and-preliminary-determination-in-expedited-arbitration/.

[24] *Id.*

[25] SIAC Rules (7th Edition) (consultation draft), Rule 4, Singapore International Arbitration Centre, 2023.

[26] SIAC Rules (7th Edition) (consultation draft), Rule 6, Singapore International Arbitration Centre, 2023.

[27] SIAC Rules (7th Edition) (consultation draft), Rule 39, Singapore International Arbitration Centre, 2023.

[28] SIAC Rules (7th Edition) (consultation draft), Rule 61, Singapore International Arbitration Centre, 2023.

Consultations during every institutional rule amendment they bring forward, they further attempt to ensure that their amendments are in tune with the arbitration community of the world while at the same time, providing the same community to also participate in the building up of one of the most successful institutions in the world. With the introduction of the Streamlined Procedure, SIAC has sought to introduce a new mechanism for the quicker resolution of disputes in a more cost-efficient manner, thus encouraging more entities to submit their disputes to arbitration to SIAC.

On the scrutiny of the Streamlined Procedure, one can safely arrive at the conclusion that with the changes being aimed at, SIAC is successfully evolving and is ensuring that its rules are in conformity with the changing practices. As Charles Darwin rightfully said, *"It is not the strongest of the species that survives, not the most intelligent that survives. It is the one that is the most adaptable to change."* SIAC has established its dominance in the field of International Arbitration, not merely by the quality, but also through its willingness to adapt constantly.