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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 the area of 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foras to current law students from different legal, linguistic and cultural backgrounds, IRIArb encourages previously unpublished papers that caters to developing an educated colloquy – that is contemporary, recent or novel.

Note: The views expressed in the articles published in this Volume of IRIArb are those of the authors, and do not in any way reflect the opinion of IRIArb, its editorial board, the Centre for Arbitration and Research or Maharashtra National Law University, Mumbai.

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EDITORIAL

2022 has been a year where arbitration matters have touched record highs in arbitral institutions.[1] The pandemic and the Russia-Ukraine war have had a dominant effect on the arbitration landscape.[2] The post-pandemic world has been flooded with arbitration matters are attributable to the pandemic. The war is expected to affect many sectors which may lead to more international disputes. Russia is a leading producer of oil, natural gas, steel, and nickel the imposition of sanctions by the US is expected to disrupt supply chains globally. Therefore, arbitration matters will in all probability increase in 2023. The world is still reeling from the pandemic wherein remote hearings had become the norm. While fillings and conferences may remain remote for good, hearings have resumed physically in most of the arbitral institutes. In 2022 many arbitral institutions recorded arbitration cases at an all-time high. In 2022 SIAC recorded 469 new cases, LCIA recorded 387 new cases, HKIAC recorded 483 new cases and ICC recorded 853 new cases.[3]

Along with the rise in number of cases, there were also some landmark arbitration cases that were decided in 2022.

1) *ZF Automotive US Inc. v. Luxshare Ltd.*[4]

In this case, it was decided whether the procedure for discovery under section 1782 of the 28 U.S.C applied to international private adjudicatory bodies. It was held that section 1782 only applied to 'governmental and intergovernmental bodies' and private adjudicatory bodies did not fall under this definition.[5] This judgment settled the hotly contested issue of what constituted a 'foreign or international tribunal' under section 1782 of the code which had been the subject of contradicting judgments.

2*) Morgan v. Sundance Inc.*[6]

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[1] Gary Born, *International Arbitration 2022*, CHAMBERS GLOBAL PRACTICE AND GUIDES https://practiceguides.chambers.com/practice-guides/international-arbitration-2022 (Dec. 12, 2022, 1:13 PM).
[2] *Id.*
[3] *Supra* Note 4.
[4] ZF Automotive US Inc. v. Luxshare Ltd., 596 U. S. (2022).
[5] Dana MacGrath*, "I Can See Clearly Now the Rain Is Gone…" U.S. Supreme Court Definitively Holds that Section 1782 Does Not Permit Discovery Assistance from U.S. Courts for Private Foreign or International Arbitrations*, KLUWER ARBITRATION BLOG, http://enalsar.informaticsglobal.com:2365/2022/06/14/i-can-see-clearly-now-the-rain-is-gone-u-s-supreme-court-definitively-holds-that-section-1782-does-not-permit-discovery-assistance-from-u-s-courts-for-private-foreign-or-i/. (Dec.12, 2022 accessed at 5:15 PM).
[6] Morgan v. Sundance Inc. 596 U.S. (2022).

This was another major decision delivered by the US Supreme Court. In this case, the question of law was: when can a party be considered to have waived its right to arbitrate; and what would be the test for such a waiver? The lower courts applied a two-fold test: i) whether the party was aware of its right and acted inconsistently with it, and ii) whether the party's inconsistent actions prejudiced the other party. The second requirement of prejudice was not a part of the federal waiver law. However, the courts added it because in their opinion the federal law was more favourable towards arbitration agreements. The Supreme Court did away with the requirement of prejudice and sent the case back to the lower court. The lower court held that arbitration agreements had to be treated as all other agreements and the only requirement to be considered was whether a party had acted inconsistent with its right to arbitrate.

3) *Kabab-Ji SAL (Lebanon) v. Kout Food Group (Kuwait) ("Kabab-Ji")*[7]

This case has led to two very important judgments both of which are contradictory and have been delivered in different jurisdictions – France and the United Kingdom. The moot question was whether the law that would apply to the arbitral proceedings would be English law because it was the law that was governing the contract; or French law because that was the law of the seat of arbitration. The case first went from French courts all the way up to the French Cour de Cassation and the ruling was in favour of KJS. Then KJS sought enforcement of the award and applied to English courts as the assets of KFG were located in England, however, the English courts denied enforcement on the grounds that KFG was not a party to the arbitration agreement.

The English courts ruled that the law that would apply would be the English law as it governed the contract and the French courts ruled that the French law would apply as it was the law of the seat of arbitration. This has created two very contradictory judgments. This case highlights the problem of not specifying the law that governs the arbitration agreement when the seat of arbitration is different from the place where enforcement of the award is sought. Therefore, in future arbitration agreements, the law governing the arbitration must be specified and existing agreements should be amended if they don't specify the governing law for arbitration.

[7] Raid Abu Manneh and Dany Khayat, *"The Anglo-French Clash over the Law Governing the Arbitration Agreement: Why this is Important"*, MAYER BROWN https://www.mayerbrown.com/en/perspectives-events/publications/2022/12/the-anglo-french-clash-over-the-law-governing-the-arbitration-agreement-why-this-is-important. (Dec. 14, 2022, 2:14 PM).

Arbitration is also rapidly growing in India. India is increasingly preferred as a seat of arbitration, fortified as by the developing pro-enforcement regime.[8] There have been a large number of arbitration judgments in 2022.[9] Like in the world, in India as well, the pandemic has made technology an essential part of the arbitration process. Although physical hearings and meetings have resumed, a large part of the process continues to be digitized. While disputes attributable to the pandemic are ongoing, the possibility of cryptocurrency and data protection legislation, after the acceptance of cryptocurrency in the financial budget there is a tangible possibility that could lead to an increasing number of disputes referable to arbitration in 2023. The centres for arbitration in India such as IAMC (International Arbitration and Mediation Centre) and MCIA (Mumbai Centre for International Arbitration) are also growing rapidly. The New Delhi International Arbitration (Amendment) bill introduced in the Lok Sabha in 2022,[10] aims to make the New Delhi International Arbitration Centre a centre of national importance.

There have also been some noteworthy domestic judgements regarding arbitration in 2022.

1) *UHL Power Company Ltd. v. State of Himachal Pradesh*[11]

In this case, the issue of whether post-award interest can be granted on the interest amount awarded was decided upon. The court while overturning the Himachal Pradesh High Court's decision said that post-award interest on the interest amount awarded can be granted. The court majorly relied on the decision of *Hyder Consulting (UK) Ltd.* v. *Governor, State of Orissa through Chief Engineer*[12] in which it had been held that an arbitral tribunal may award interest on interest or compound interest in the post-award or pre-award period.

2) *Cox and Kings Ltd. v. SAP India Pvt. Ltd.*[13]

In this case, the correctness of the 'Group of Companies' doctrine was questioned. The doctrine was expounded in the *Chloro Controls*[14] judgement wherein the court laid down the following factors to be considered when applying the doctrine (i) intention of the parties, (ii) directness of the relationship of the non-signatory to the signatory party, (iii) commonality of subject

[8] Ravi Singhania and Shilpa Shah, *India trends and development 2022*, CHAMBERS AND PARTNERS, https://practiceguides.chambers.com/practice-guides/international-arbitration-2022/india/trends-and-developments (Dec. 14, 2:30 PM)
[9] *Id.*
[10] The New Delhi International Arbitration Centre (Amendment) Bill, 2022, Bill no. 186, of 2022.
[11] UHL Power Company Ltd. v. State of Himachal Pradesh, (2022) 4 SCC 116.
[12] Hyder Consulting (UK) Ltd. v. Governor, State of Orissa through Chief Engineer, (2015) 2 SCC 189.
[13] Cox and Kings Ltd. v. SAP India Pvt. Ltd., 2022 SCC OnLine SC 570.
[14] Chloro Controls Private Limited v. Severn Trent Water Purification Inc. and Others, (2013) 1 SCC 641.

matter, (iv) serving end of justice. There is heavy onus on the party seeking joinder. The Supreme Court opined that this doctrine was too broad and open to be interpreted in different ways. Therefore, the three-judge bench, in this case, referred the matter to a larger bench for consideration.

3) *Indian Oil Corporation Ltd. v. NCC Ltd.*[15]

In this case, the court decided the extent of the powers given to courts under Section 11 of the Arbitration and Conciliation Act, 1996. The court held that questions of arbitrability of the dispute could be considered, and overturned the finding of the Delhi High Court that the scope of enquiry by the court was only limited to - whether an arbitration agreement existed or not. However, the court stated that the questions of arbitrability should be left to the arbitral tribunal unless the facts were very '*clear and glaring*'.

Against, this backdrop of significant arbitral developments, the Indian Review of International Arbitration ["**IRIArb**"] brings Volume 2 of its Second Issue which not only features the pandemic induced, widely discussed issue of online dispute resolution in the form of arbitration but also focuses of a very relevant theme – Energy Arbitration.

In December 2021, the Centre for Arbitration and Research ["**CAR**"] at Maharashtra National Law University had conceptualised, organised and hosted the Global Energy Arbitration Conference. The conference was a platform where eminent practitioners as well as sitting judges of the High Courts of Delhi, Allahabad and Orrisa, spoke about disputes in industries such as petroleum and natural gas, renewable energy and ESG. With the aim to carry forward conversations from the conference and take the dialogue on this issue to a wider platform, the journal wing of the CAR – IRIArb sought to centre Volume II Issue 2 around the theme of Energy Arbitration.

The article by Dr. Gordan Blanke titled "*Oil & Gas Arbitration in the MENA: An Introductory Overview*" provides an overview of oil and gas arbitration in the MENA. In doing so, it introduces the reader to the legal and procedural framework of oil and gas arbitration in the region. Throughout, the article makes reference to the acquis of such arbitrations to date. For practical guidance, an annex summarises a total of 49 MENA oil and gas arbitrations, both commercial and Investor-State, by reference to a number of main procedural and substantive parameters, such as the identity of the parties and the tribunal, the type of dispute, the seat of

[15] Indian Oil Corporation Ltd. v. NCC Ltd., 2022 SCC OnLine SC 896.

the arbitration, the procedural law applicable to the reference, the governing law on the merits and the tribunal's findings.

Thomas R. Snider in his article titled "*The Resolution of Disputes under Petroleum Production Sharing Agreements*" discusses the advent of Production Sharing Agreements ["**PSAs**"]. The author details the types of disputes commonly arising out of PSAs and types of damages that are pursued in PSA disputes including the calculation of damages in such claims. The author concludes with an observation that while PSAs are a preferred form of granting contract and have several beneficial legal attributes, disputes will nevertheless continue to be a fact of life in the PSA context given the conditions which are discussed in the article.

Gunjan Sharma in his article titled "*The Continuing Backlash against Investor-State Arbitration may Call for the Increasing Use of Contract Terms to Protect Energy Investments*" discusses the political risk in Investor-State Arbitration of uncompensated extortion or unlawful interference by government in large energy projects and international energy contracts as it involves high capital articulating the shifts during the life cycle of a project. The author makes suggestions for investor behaviour in host states in terms of factors that an investor must take into account while investing.

The Energy Charter Treaty ("**ECT**") is in crisis. The conclusion of the 2015 Paris Agreement raises legitimate concerns about its consistency with the substantive standards of investment protection in the ECT. These concerns bring into focus the critical role played by investment arbitration tribunals to resolve investor-state claims, including under the ECT. The article by Harshad Pathak mobilizes the lens of Critical Legal Studies and argues that the ECT crisis is more appropriately characterised as yet another attempt to review the jurisdiction of investment arbitration tribunals to decide critical issues of public importance. The article triggers a fundamental question – can the fate of the global response to climate change be left at the altar of investment arbitration tribunals? This question is elaborated on and answered in the paper titled "*The Energy Charter Treaty Crisis: Old Wine in a New Bottle*".

Online Dispute Resolution ("**ODR**") has become a very important mechanism for resolving disputes. After the pandemic, most disputes are getting resolved online to adapt to the change in the dispute resolution landscape. Even though hearings and arbitrations are once again taking place offline the authors Siddharth Kapoor and Ananya Singhal advocate for the ODR method to not lose momentum particularly in the context of small-value claims or disputes. Parties involved in small and medium-value claims would greatly benefit by using the ODR method

and would significantly cut their costs. The article titled "*Online Dispute Resolution: Creating A Level-Playing Field In Small Value Claims*" elaborates on this and also discusses the various advantages of the ODR method.

The subject of whether and under what circumstances ICSID tribunals may require security for costs is very disputed. With the recent appearance of third-party financing, a new element has been added to the debate over whether ICSID tribunals should evaluate petitions for security for costs in light of this factor. The article titled "*Competence of an ICSID Tribunal to Order Security for Costs*" by Ahan Gadkari and Vaneet Kumar focuses on this issue. The article argues that ICSID courts have the authority to impose these interim remedies after briefly discussing the purpose and function of security for costs.

OIL & GAS ARBITRATION IN THE MENA: AN INTRODUCTORY OVERVIEW

Gordon Blanke*

I. INTRODUCTION

Hydrocarbons, in particular oil and gas, are a key commodity in the countries of the Middle East and Africa ["**MENA**"].[1] They generate a lion share of the MENA's gross domestic product ["**GDP**"] and as such contribute significantly to the development of the MENA economies. Many of these, in particular Qatar, Saudi Arabia, Kuwait, Iran and the UAE, have sufficiently large reserves to be net exporters of oil and gas[2] and have attracted foreign direct investment in their home-grown oil and gas industries on a large scale. Such investments and oil and gas transactions more generally evidently give rise to a variety of disputes that require resolution through efficient and effective means of dispute resolution.[3] Depending on the precise subject of the individual dispute in question, disputing parties might prefer one means over another. Often, given its unique characteristics and, above all, its inbuilt procedural flexibility combined with the finality of a globally enforceable outcome, arbitration wins the day.

Arbitration has a long history in the Middle East. It is a form of dispute resolution that is known to have been practiced by Prophet Mohammed[4] and that has as such been endorsed by the Islamic Shari'ah. Despite its supreme qualities and its Shari'ah endorsement, arbitration fell out of favour with the ruling elites of the Arab Trucial States as a result of a number of oil and gas arbitrations in the early 1950ies that failed to pay deference to the Islamic Shari'ah as a collection of legal principles that could serve the interpretation of a dispute arising from hydrocarbon concessions granted by the Trucial rulers to international oil companies ["**IOC**s"].[5] These earlier experiences brought arbitration into disrepute in the wider Middle

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[1] For present purposes, the MENA includes Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia UAE, and Yemen.

[2] The MENA being home to 18 of the world's largest oil and gas fields, most of which in the GCC.

[3] These will usually include both contentious (e.g., litigation and arbitration) and non-contentious (e.g., amicable settlement, negotiation, mediation and expert determination) forms of dispute resolution.

[4] See, e.g., F. Kutty, "*The Shari'a Factor in International Commercial Arbitration*", 4 IJAA (2009), pp. 63–112.

[5] See, in particular, Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) 18 I.L.R. 161; Petroleum Development Ltd. v. Sheikh of Abu Dhabi, (1951) 18 ILR 144; and Saudi Arabia v. Aramco, (1963) 27 I.L.R. 117. On the latter, see the fascinating account by T. Martin, "*Aramco: The Story of the World's Most Valuable Oil Concession and Its Landmark Arbitration*", 7(1) BCDR (2020), pp. 3-51.

East, but the resulting animosity to arbitration as a form of dispute resolution has, over time, diminished and ultimately been laid to rest.[6]

The MENA, more specifically, saw a resurgence of arbitration as a form of dispute resolution in the oil and gas industry in the latter half of the twentieth century as a result of anti-colonial nationalisations, which led to a number of investment arbitration claims being brought by IOCs against MENA governments. This period also bore testimony to the establishment of the Iran-US Claims Tribunal, which has made a significant contribution to the development of investor-State arbitration over its lifetime to date.[7] A further wave of arbitrations, including in the oil and gas sector, could be witnessed in the aftermath of the Arab Spring in 2011/2012, which prompted a number of investor-State claims against revolutionary MENA governments.[8]

Against this background, this article seeks to provide a general, introductory overview of oil and gas arbitration in the MENA. In doing so, it will guide the reader through what to look out for in oil and gas arbitration in the Middle East and provide some main pointers on

i. the principal stakeholders involved;
ii. the type of disputes typically subject to oil and gas arbitration in the MENA;
iii. the procedural, institutional and legal framework of MENA oil and gas arbitration; and
iv. the recognition and enforcement of MENA oil and gas arbitral awards.

Throughout, reference will be made to the *acquis* of MENA oil and gas arbitrations to date.[9] For further guidance and a quick reference guide, the interested reader is referred to the table in annex, which lists a total of 49 oil and gas arbitral references from the 1950ies to date.[10] For the avoidance of doubt, this article does not intend to be exhaustive but only

[6] See, in particular, R. Mohtashami, "*Banishing the Ghost of Lord Asquith's Award: A Resurgence of Arbitration in the Middle East*", 1(1) BCDR IAR (2014), pp. 121 *et seq*.
[7] See, e.g., Phillips v. Iran & NIOC 21 IRAN-U.S. C.T.R., at 79 et seq., Amoco v. Iran & NIOC et al. IUSCT Case No. 56, SEDCO v. NIOC & Iran 10 Iran-U.S. Cl. Rep. 180 (1987), Amoco v. Iran (NPC) 15 IRAN-U.S. C.T.R., at 189 et seq., and Mobil v. Iran 16 IRAN-U.S. C.T.R., at 3 et seq. (1987).
[8] See, e.g., ICSID Case No. ARB/12/11.
[9] The acquis of oil and gas arbitrations in the MENA to date has helpfully been summarised by Tim Martin in his various writings on the subject: See, in particular, A. T. Martin, "*ICC Oil and Gas Cases in the MENA Region*", 25(2) ICC BULLETIN (2014), pp. 21-31; and T. Martin, "*Oil & Gas Disputes in the MENA Region*", in G. Blanke (ed.), *Arbitration in the MENA*, Juris 2016, Release 3-2020 (2020). See also "*Extracts from ICC Arbitral Awards in Oil and Gas Cases*", 25(2) ICC BULLETIN (2014), pp. 33-84.
[10] For the avoidance of doubt, this list of references meets the usual limitations: Above all, given that arbitration is usually confidential, the overall visibility of actual instances of arbitration is restricted. As such, this table relies upon the reporting by third parties and cannot be exhaustive. Notwithstanding, it provides some initial guidance on the overall breadth and technicality of the subject.

provide some initial guidance for further investigation on a complex and presently neglected area of study.[11]

II. THE MAIN STAKEHOLDERS IN OIL & GAS ARBITRATION IN THE MENA

Like in any other arbitration, the main stakeholders in oil and gas arbitration in the MENA are evidently the parties (and their representatives) on the one hand and the arbitral tribunal on the other. Under this head, one could, of course, add the arbitral institution to the extent that the arbitration process is an institutional one and the local courts in their curial and supervisory capacity under the applicable procedural law but these will be dealt with under separate (yet not necessarily their own) headings elsewhere in this study.

A. THE PARTIES AND THEIR REPRESENTATIVES

The parties in oil and gas arbitrations are predominantly the relevant industry players that are involved at some level in the oil and gas trade. Depending on the agreement from which the dispute that is submitted to arbitration arises, these are often IOCs that have signed a concession agreement[12] or a production sharing agreement ["**PSA**"][13] with a MENA host government,[14] the latter appearing as a respondent party.[15] Further down in the contractual hierarchy, disputes tend to arise between various types of specialist contractors and service providers that assist in the implementation of energy projects, including, e.g., the construction of the physical project facilities, the processing of the hydrocarbons into a range of energy products (such as refined oil, fuel, lubricants etc.), the transportation and the sale of those energy products to the end consumer. In an investment arbitration context more specifically, a foreign direct investor, often an IOC or a specialist service provider, such as an

[11] For some relevant research on the subject, see T. Martin, "*Oil & Gas Disputes in the MENA Region*"; in G. Blanke (ed.), Arbitration in the MENA, Juris 2016, Release 3-2020 (2020); F. Lavaud, C. Gugler and M. Ubbens, "*Oil and Gas Arbitration in the MENA Region*", 15(3) TDM (2017); and T. Martin, "*Oil and gas arbitration in the Middle East and North Africa*"; in R. King, *Arbitration in the International Energy Industry*, Globe Law and Business, 2019, pp. 93-111. More generally, also see T. Snider, K. Shahdadpuri and A. Suresh, "*Energy Arbitration in the Middle East*", The Middle Eastern & African Arb Rev 2021, GAR, (2021).

[12] See, e.g., Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) 18 I.L.R; Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951) 18 ILR 144; Qatar v. International Marine Oil Company (1953) 20 ILR 534; Sapphire v. NIOC (1963); BP v. Libya 53 I.L.R. 297 (1973); TOPCO & Calasiatic v. Libya (1975) YCA 1979, at 177 et seq.; LIAMCO v. Libya (1977) 17 I.L.M. 3; Phillips v. Iran & NIOC 21 IRAN-U.S. C.T.R., at 79 et seq.; and Amoco v. Iran & NIOC et al. IUSCT Case No. 56. For a study on Egypt, see M. S. Abdel Wahab, "*Petroleum Concessions in Egypt: A Recipe for Disputes?*", 7(1) BCDR IAR (2020), pp. 73-108, which confirms that despite constituting a *lex specialis*, Egyptian concession agreements remains subject to the principles of contract under the Egyptian Civil Code.

[13] See, e.g., Wintershall v. Qatar,28 ILM 795 (1988), ICC Case No. 4462, ICSID Case No. ARB/0725, ICSID Case No. ARB/09/14, ICC Case No. 14108, ICC Case No. 19299, and ICSID Case No. ARB/19/7.

[14] In support, see A. Powell, "*Understanding Petroleum regimes in the MENA region*", Al Tamimi Law Update (2018).

[15] Albeit that in at least two instances, the host State acted as a claimant: See Qatar v. International Marine Oil Company,(1953) 20 ILR 534 and Saudi Arabia v. Aramco,(1963) 27 I.L.R. 117.

international drilling company, will usually advance claims against a MENA host government.

Importantly, the involvement of a government entity as a respondent party might raise questions of *attribution* and whether violations of an underlying contractual or investment treaty framework are properly imputable to the respondent government. A host State can only be held responsible for a breach of contract and/or international law, whether direct or indirect, if the underlying conduct and/or breach is attributable to an organ of that State.[16] Attribution might pose additional challenges in claims for violation of prevailing full protection and security ["**FPS**"] standards in situations where civil unrest gives rise to governmental instability and violent interference with the covered investments. Such situations have given rise to a number of investment claims under regional investment instruments as a result of the Arab Spring.[17] The application of the ILC's Articles on State Responsibility might be sufficiently clear where the interests of the incumbent government are compatible with those of the wrongdoers but might be challenging where the wrongdoers are non-governmental actors, such as revolutionaries and freedom fighters. Such situations raise questions relating to the continuity of the State and the concept of *de facto* governments.[18] Under international law, a nation bears responsibility for acts of its *de jure* government. That said, a general *de facto* government is considered to be acting with the nation's consent, its acts are therefore binding on that nation (irrespective of whether it is internationally recognised). In other words, successful revolutionaries that manage to form a general *de facto* government create State responsibility for their acts on part of the nation. This includes the acts taken by the revolutionaries over the course of the revolution.

By way of example, in the recent *Ampal* case,[19] a foreign investor complained about a total of thirteen attacks on the pipeline between Egypt and Israel that served the transport of natural gas from Egypt to Israel, and more specifically that, following the tensions of the Arab

[16] For guidance on this question, see Arts 4(1) and 4(2) of the International Law Commission (ILC)'s Articles on State Responsibility (2001).
[17] One such case, arising within the oil and gas sector, is Ampal-American Israel Corporation and others v. Arab Republic of Egypt, ICSID Case No. ARB/12/11.
[18] The principle of the continuity of the State is deeply rooted in international law. Pursuant to this principle, the existence of a sovereign State together with all its rights and obligations remains continuous irrespective of any internal political or governmental changes and the nation retains international responsibility for acts of both present and past governments. As regards the qualification of governments, a *de facto* government is a government that is in the possession of the supreme power of the territory. It will be local if it controls only parts of the State's territory and general if it controls (almost) all of it. Once recognised by the community of nations, it will be a *de jure* government.
[19] *Supra* note 18.

Spring, Egypt *"failed to take reasonable precautionary, preventive, and remedial measures"* to protect the physical security of the pipeline from attacks of saboteurs in breach of Egypt's FPS obligations under the Egypt-US BIT. The *Ampal* tribunal confirmed that Egypt was under no absolute obligation or strict liability but had to comply with a standard of due diligence, which had to be assessed against the *"particular circumstances in which the damage occurs"*. The tribunal thus concluded that taking account of the *"political instability, security deterioration and general lawlessness [in the region]"*, the first attack did not violate the FPS standard. Relying on *Pantechniki*[20], the *Ampal* tribunal found that a government should not be made internationally responsible *"for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places."* That said, according to the *Ampal* tribunal, the subsequent attacks on the pipeline created a pattern of delayed measures or a failure to implement measures to ensure the safety and security of the pipeline and hence the investor's investment in violation of Egypt's obligation of due diligence.

Under most MENA arbitration laws, only signatories to the underlying arbitration agreement may be privy and as such parties to the arbitration.[21] Party representatives, in turn, may only serve in that capacity upon production of a valid special power of attorney, which confers upon the party representative the specific power to represent the instructing party in arbitration.[22] Failure to produce a special power of attorney constitutes a procedural irregularity that might result in a successful challenge of a prospective award. Care must also be taken that arbitration obligations might bind the Sovereign within limits only[23] and that

[20] Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009, in which Jan Paulsson, sitting as Sole Arbitrator, favoured a *"*modified objective standard*"* to FPS, which gives credit to the host State's particular circumstances, such as the host State's level of development and internal stability. In that case, Paulsson drew a distinction between a host State's refusal and a host State's inability to provide protection. Applied to the facts at hand, Paulsson found that the Albanian authorities were *"*powerless in the face of social unrest of [the given] magnitude*"* and dismissed the claim. Also, a foreign investor's pre-investment awareness of circumstances in the host State that pose a risk to security militates against a breach of the FPS standard (see LESI & Astaldi v. Algeria, ICSID Case No. ARB/05/3, Award, 12 November 2008).

[21] E.g., Art. 7(1) of the UAE Federal Arbitration Law ("FAL") and the accompanying commentary in G. Blanke, Blanke*, "UAE Arbitration Legislation and Rules"*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-099.

[22] E.g., Art. 4(1) FAL, read together with Art. 58(2) of the UAE Civil Procedures Code, and accompanying commentary in G. Blanke*, UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-067 *et seq*.

[23] E.g., Dubai Law No 3 of 1996 (as amended by Dubai Law No 10 of 2005), Art. 3D ("Suits against the government shall be initiated against the Attorney General as plaintiff as the representative of the government, subject to observing the following conditions: (1) Whoever wants to initiate a suit must deposit a written copy of the full details of his litigation with the Office of the Government of Dubai's Legal Advisor. (2) Within one week after receiving the litigation, the Legal Advisor shall, by letter, refer the litigation to the relevant authority for examination and response within fifteen days from the receipt of the referral letter. If no amicable settlement is reached for the dispute within two months from the submission of the litigation to the Legal Advisor the dispute, the Claimant may resort to the competent court."); Abu Dhabi Decree No 12 of 2013 in respect of

ancillary measures in support of an arbitration, such as attachment orders, might not be enforceable against the Sovereign.[24] That said, parties are free to choose their representatives – whether lawyers or non-lawyers[25] - taking into account the specific requirements of each arbitral reference: There are plenty of high-profile oil & gas specialists available in the MENA region to assist in representing parties in technical arbitrations across the oil and gas disputes spectrum; a combination of relevant legal and technical knowledge and experience is evidently an advantage.

B. THE ARBITRAL TRIBUNAL

The arbitral tribunal may be single- or multi-member. Given the complexity and the high stakes that are often involved in oil and gas arbitration in the MENA, three-member tribunals are the norm albeit that some of the earlier references were conducted by sole arbitrators.[26]
For the same reasons of complexity as well as the frequent technicality of oil and gas disputes, arbitrators will usually come from a highly specialised background with relevant industry experience. To assist in the nomination and subsequent appointment of suitable candidates, some special energy arbitrator lists are made available by a select few arbitral institutions, such as the Energy Arbitrator List ["**EAL**"],[27] which is dispensed by the International Centre for Dispute Resolution ["**ICDR**"] and facilitates a sector-focused search of arbitrator candidates. Even local arbitral institutions, such as the DIAC or the ADGMAC,[28] or the MENA chapter of the AIPN,[29] might assist in the effective selection of a suitable oil and gas tribunal.

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follow-up on cases against governmental departments and agencies, dated 30 June 2013 (taking effect from 1 November 2013); and Art. 2(2) of the Qatar Arbitration Law, which requires the approval of the Qatari Prime Minister to any submission to arbitration of contracts between IOCs and the Qatari government as these qualify as administrative contracts: See T. Williams and A. Durrani, "*Oil and Gas Arbitration: A Perspective from Qatar*", 7(1) BCDR IAR (2020), pp. 143-147, at p. 146.

[24] E.g., Dubai Law No 10 of 2005 Amending Certain Provisions of Government Lawsuit Law No 3 of 1996, Art. 3(1) (no attachments over assets owned by the Government, including public institutions and corporations, or the Ruler of Dubai).

[25] Albeit that some MENA countries used to limit party representation in arbitration to local advocates: See, e.g., Art. 3 of Qatari Law No. 23 of 2006 on the Issuance of Advocacy Law. Recent MENA arbitration laws follow a more modern trend: See, e.g., Art. 33(5) FAL, which permits the appointment of non-legal party representatives.

[26] See, e.g., Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951) 18 ILR 144, Sapphire v. NIOC 1963, at 136 et seq, BP v. Libya,53 ILR 297 (1979)., TOPCO & Calasiatic v. Libya, (1975) YCA 1979, at 177 et seq., LIAMCO v. Libya, (1977) 17 I.L.M. 3 (1978), and Elf v. NIOC ILM, 976 (1982).

[27] International centre for Dispute Resolution, Energy Arbitrators List, https://www.energyarbitratorslist.com.

[28] Which, albeit only qualifying as an international hearing facility, also assists in the selection industry-specific arbitrators.

[29] The Association of International Petroleum Negotiators, now the Association of International Energy Negotiators (AIEN): https://www.aien.org/about-aien/regional-chapters/middle-east/.

That said, three-member tribunals allow for a combination of arbitrators from different professional backgrounds to be chosen onto a panel of an oil and gas arbitration. This will usually ensure that both candidates with technical industry knowledge but also at least one lawyer with relevant experience in the oil and gas sector form a tribunal.[30] Given the multi-faceted legal questions, including of contract interpretation, that frequently arise in oil and gas arbitration, there is a general preference for lawyers to preside oil and gas tribunals in the MENA.[31]

Importantly, none of the arbitrators – whether co-arbitrator or presiding – must have a national bias, nor serve as a party advocate. The strict requirement for impartiality and independence applies in MENA oil and gas arbitration in the same way as it does in other types of arbitrations, whether in the MENA or elsewhere, albeit that, taking account of their specific historical context, in the earlier oil and gas arbitrations of the first half of the twentieth century, party advocacy was a commonly accepted feature on leading MENA oil and gas panels.[32]

Default-appointments will be facilitated by the chosen administering institution, by the competent curial courts (in arbitration *ad hoc*) or by reference to the relevant treaty framework from which the arbitration arises. In the latter context more specifically, on one occasion to date,[33] the president of the Paris *Tribunal de Grande Instance* was seized in his capacity as a *juge d'appui* pursuant to Art. 1505.4 of the French Code of Civil Procedure[34] with a request to facilitate the appointment of a co-arbitrator for Libya under the OIC Agreement[35] where Libya itself and the OIC Secretary General had failed to make an appointment.[36] For further context, default-appointments under the OIC Agreement usually fall within the competence of the OIC Secretary-General.[37] On a number of occasions to date,

[30] In favour of technical expertise (only), see F. Dias Simoes, "*Powered by expertise: selecting arbitrators in energy disputes*", 8(6) JWELB (2015), pp. 501-520.
[31] As is evident from the table provided at the Annex, to date, there has been a mix of sole arbitrators and multi-member tribunals. Earlier cases have seen a number of sole arbitrators, mostly lawyers as opposed to industry specialists.
[32] See, e.g., Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) 18 I.L.R, which involved so called "arbitrator-advocates" as party-appointed or co-arbitrators.
[33] See *Trasta Energy Limited v. Libya*, arbitration under the UNCITRAL Rules, albeit that in this case, once notified of the French court proceedings before the *juge d'appui*, Libya decided to co-operate in the constitution of the tribunal of its own motion.
[34] Which empowers a French *juge d'appui* to intervene in any arbitration, whether domestic or international (even if the arbitral proceedings in question do not exhibit any nexus to France) in circumstances in which "one of the parties is exposed to a risk of denial of justice".
[35] As defined at note 56 below.
[36] See H. Gharavi, "*Cocorico! French approach to the OIC treaty gives cause to crow*", GAR (2020).
[37] *Ibid.*

the OIC Secretary General has refused to exercise his default-appointment functions within the meaning of Art. 17(2) of the OIC Agreement. In such circumstances, in order to avoid procedural stalemate, the Secretary-General of the Permanent Court of Arbitration (PCA) has been asked to step in to default-appoint the missing members of the tribunal in reliance the MFN clause contained at Art. 8 of the OIC Agreement. To illustrate the point, in *beIn v Saudi Arabia,*[38] a foreign investor relied upon the reference to arbitration under the UNCITRAL Rules in the Saudi-Austria BIT[39] in order to refer for the designation of a default-appointing authority to the PCA in the terms of the UNCITRAL Rules. This follows the example set by UAE-registered D.S. Construction FZCO in its proceedings against Libya.[40] Libya has a long history in seeking to cause stalemate to the proceedings by systematically failing to appoint arbitrators in accordance with the prevailing procedural rules.[41]

III. THE TYPE OF DISPUTES DETERMINED IN OIL & GAS ARBITRATION IN THE MENA

The main types of disputes that fall for determination in oil and gas arbitrations in the MENA are of a commercial nature or investor-State. There are residual categories of other disputes, which are briefly outlined below.

A. COMMERCIAL

These are disputes between two corporates specialising in the oil and gas sector. They will usually arise from one of two types of commercial agreements:[42]

i. Agreements between joint venture partners, such as, e.g., joint operating agreements, farm-out agreements and sale and purchase agreements; and

[38] See beIn Corporation v. Kingdom of Saudi Arabia, arbitration under UNCITRAL Rules, Notice of Arbitration, 1 October 2018.
[39] Agreement between the Kingdom of Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investments, in force since 25 July 2003.
[40] See D.S. Construction FZCO v. Libya PCA, Case No. 2017-21, arbitration under UNCITRAL Rules. Albeit that it has to be cautioned that the award in this case has recently been set aside by the Paris Court of Appeal on the basis that Art. 17 of the OIC Agreement does not make any express reference to an alternative appointment regime in circumstances in which the OIC Secretary General fails in his default-appointment functions, the curial courts having natural competence: See D v. K, Case No. RG 18/05756, ruling of the Paris Court of Appeal, 23 March 2021.
[41] See, e.g., BP v. Libya, 53 ILR 297 (1979), TOPCO & Calasiatic v. Libya YCA,1979, at 177 et seq. and LIAMCO v. Libya, (1977) 17 I.L.M. 3, each causing the default-appointment of a sole arbitrator by the International Court of Justice (ICJ).
[42] For this division, see A. T. Martin, "*Dispute resolution in the international energy sector*", 4(4) JWELB (2011), pp. 332-368, at p. 335.

ii. Agreements between operators and service providers, such as, e.g., drilling[43] and well service contracts,[44] construction contracts, and transportation and processing contracts.

A more specific example would be a dispute arising from a long-term gas supply agreement ["**GSA**"] also known as a gas sale and purchase agreement ["**GSPA**"] between a producer and a wholesaler of gas or between a wholesaler[45] and a reseller of gas.[46] Such an agreement will typically include an arbitration clause for the resolution of any disputes arising between the parties from its implementation. Such an agreement will also likely include a price review clause, which allows a party to request the adjustment of the contract price upon the occurrence of certain trigger events[47]. Given its technicality, such a price review will often be conducted by expert determination rather than arbitration albeit that price review arbitrations are a well-established means to resolve pricing disputes in the MENA[48].

Other examples include disputes arising from construction projects that typically form part, e.g., of the gas supply process, such as the construction of gas transport infrastructure (e.g., a pipeline for the transportation of gas), processing plants, liquefied natural gas ["**LNG**"] terminals, storage and LNG regasification facilities. Such disputes will ultimately amount to conventional construction arbitrations, often under the FIDIC Red Book[49]. Other typical disputes will include a seller's failure to supply the contractual quantity of gas under a GSA and breaches of prevailing take-or-pay obligations as well as a failure to deliver gas to the delivery point on time. Similar disputes will arise within corresponding contexts of the oil industry.[50]

B. INVESTOR-STATE

These are disputes between a foreign investor and a host State in relation to the State's breach of international investment obligations owed to the investor under international law which renders the investment partially or wholly unprofitable and causes the investor loss, which the

[43] See, e.g., ICC Case No. 10302, and ICC Case No. 11579.
[44] See, e.g., ICC Case No. 13686 (supply of drilling equipment), and ICC Case No. 13777 (supply of gas injection plant equipment).
[45] See, e.g., ICC Case No. 18215/MHM, and CRCICA Case No. 829/2012.
[46] See, e.g., Mobil v. Iran, 16 IRAN-U.S. C.T.R., at 3 et seq., and ICC Case No. 8198.
[47] Such as, e.g., a substantial change in the circumstances on which the GSA is based.
[48] See, e.g., ICC Case No. 10351, ICC Case No. 13898, and ICC Case No. 15051. See also the experience of Qatar, in which gas price review arbitrations are prevalent according to some commentators: See T. Williams and A. Durrani, "*Oil and Gas Arbitration: A Perspective from Qatar*", 7(1) BCDR IAR (2020), pp. 143-147, at p. 147.
[49] I.e., FIDIC 4th edition, 1987, as the version of FIDIC most in use in the MENA countries.
[50] See, e.g., ICC Case No. 13790 (development of an oil refinery), and ICC Case No. 16198 (construction of oil production facilities).

investor then seeks to recover in an action for damages through arbitration. The investor's right to initiate arbitration against the respondent host State will usually derive from express provisions contained in

i. a bilateral investment treaty ["**BIT**"] concluded between two States for the promotion and protection of investments of foreign nationals;[51]
ii. a multi-lateral investment treaty ["**MIT**"], i.e., a regional investment treaty concluded between a number of States to promote mutual foreign direct investment by nationals of the respectively other State, typically – in the energy context - the Energy Charter Treaty ["**ECT**"][52] or the ICSID Convention[53],[54] and in a MENA context more specifically, the OIC Agreement[55] and the Arab Investment Agreement[56];[57]

- a foreign investment law that seeks to establish favourable conditions for foreign direct investment;[58] or

[51] The vast majority of MENA countries have in place a web of BITs with third countries, both intra- and extra-MENA. For examples in the MENA oil and gas sector, see, e.g., ICSID Case No. ARB/07/25 (Jordan-US BIT); ICSID Case No. ARB/09/14 (Danish-Algerian BIT); ICSID Case No. ARB/11/7 (Egypt-UAE BIT); ICSID Case No. ARB/14/4 (Egypt-Spain BIT); ICSID Case No. ARB/12/11 (Egypt-US BIT); ICSID Case No. ARB/15/30 (Oman-South Korea BIT); ICSID Case No. ARB/16/7 (Oman-Turkey BIT); ICSID Case No. ARB/18/7 (Morocco-Sweden BIT); ICSID Case No. ARB/19/7 (Egypt-UK BIT); and ICSID Case No. ARB/19/27 (UAE-Egypt BIT).

[52] To which Jordan and Yemen are a party. Note, however, the fossil fuel exclusion in the latest revision of the ECT.

[53] To which the majority of MENA countries are a party: Algeria, Bahrain, Djibouti, Egypt, Iran, Jordan, Kuwait, Lebanon, Libya, Malta, Morocco, Oman, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, West Bank and Gaza, and Yemen.

[54] Albeit that only few ICSID references have, to date, been reported in the MENA oil and gas sector: See A. R. Parra, "*ICSID and Investor-State Petroleum Disputes in the MENA Region",* 7(1) BCDR IAR (2020), pp. 225-229. See also ICSID, "*Spotlight on the ICSID Caseload: Middle East and North Africa*", 2022, at p. 3, available at https://icsid.worldbank.org/sites/default/files/ICSID_Cases_Involving_ MENA_States_and_Investors.pdf (last accessed on 5 July 2022), which confirms that only 16% of a total of 97 MENA ICSID references to date relate to the oil, gas and mining industry.

[55] Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference 1981, in force since 23 September 1986. For further introductory reading, see M. N. Alrashid and L. Carpentieri, "*The Revival of Islamic and Middle East Regional Investment Treaties: A New Way Forward?*", 12(2) TDM (2015). The OIC Agreement has been signed by a total of 36 OIC Member States, but ratified by only by the following 29: Burkina Faso, Cameroon, Egypt, Republic of Gabon, Gambia, Guinea, Republic of Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tajikistan, Tunisia, Turkey, Republic of Uganda and the United Arab Emirates. For an example in the MENA oil and gas sector, see, e.g., *Trastra v. Libya*, (2019).

[56] Unified Agreement for the Investment of Arab Capital in the Arab States, signed in Amman, Jordan, on 26 November 1980. The following are its members: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Somalia, Sudan, Tunisia, United Arab Emirates and Yemen. The Arab Investment Agreement has been ratified by most of these, except for Algeria and Comoros.

[57] For further guidance on the operation of the OIC Agreement and the Arab Investment Agreement, see G. Blanke, "*Investment Arbitration in the GCC: An Introduction*", in G. Blanke and S. Corm-Bakhos (eds), *MENA Leading Arbitrators' Guide*, Juris, forthcoming 2022.

- an international investment agreement or a Free Trade Agreement ["**FTA**"][59] that deals (among other things) with the promotion, protection and liberalisation of cross-border investments between two countries.

Under most of these arrangements, the host State will be bound by a standing obligation to arbitrate that can be triggered by recourse to arbitration by the individual investor or company of the other State, a phenomenon known as "arbitration without privity". The arbitration obligation will typically specify the applicable institutional or *ad hoc* rules and the seat of the arbitration or leave an express choice to the investor to opt into the ICC or SCC Rules, the UNCITRAL Rules or the ICSID (Additional Facility) Rules. That said, some MENA countries have specifically contracted out of the application of their investment laws or of the provisions of a particular international investment instrument to disputes in the oil industry. By way of example, some GCC investment laws do not extend to all oil disputes[60] and Saudi Arabia has expressly reserved its position on the application of the ICSID Convention to *"*questions pertaining to oil*"*.[61]

Disputes will typically arise with respect to a host State's violation of one of the standards of substantive protection guaranteed under the above-mentioned instruments, such as unlawful expropriation,[62] a breach of fair and equitable treatment ["**FET**"][63] and the full protection and

[58] See, e.g., the various Gulf Cooperation Council (GCC) investment laws: Kuwait Law No. 116/2013 on the promotion of direct investment in the State of Kuwait, in force since 16 December 2013, read together with Executive Regulations of Law No. 116/2013 regarding the Promotion of Direct Investment in the State of Kuwait, 14 December 2014; Foreign Capital Investment Law, promulgated by Oman Sultani Decree No. 50/2019 of 1 July 2019, in force since 1 January 2020, read together with Executive Regulations, issued by the Ministry of Commerce and Industry of Oman, 14 June 2020; Qatar Law No. 1/2019 on Regulating Non-Qatari Capital Investment in the Economic Activity, adopted on 7 January 2019, in force since 25 February 2019, read together with Resolution No. 44 of 2020 of the Minister of Commerce and Industry, issued on 8 June 2020; Saudi Arabia Royal Decree No. M1/1421 on the Approval of the Foreign Investment Law, in force since 16 September 2002, read together with Executive Rules of the Foreign Investment Law, issued in 2004; and UAE Federal Law No. 19/2018 on Foreign Direct Investment issued on 23 September 2018 and in force since 1 October 2018, read together with Cabinet Resolution No. 16 of 2020 Concerning the Determination of the Positive List of Economic Sectors and Activities for Foreign Direct Investment and Percentage of their Ownership, 17 March 2020.

[59] E.g., Agreement between the Government of the United States of America and the Government of the Sultanate of Oman on the Establishment of a Free Trade Area, in force since 1 January 2009 ("*US-Oman FTA"*), which is based on the US Model FTA. See also the United States - Morocco Free Trade Agreement ("US-Morocco FTA"). For an example in the MENA oil and gas sector, see, e.g., ICSID Case No. ARB/18/29 (US-Morocco FTA).

[60] See, e.g., Art. 18, Saudi Arabia Royal Decree No. M1/1421 (which excludes the production of petroleum products and pipeline transport services); and Art. 7(2), UAE Federal Law No. 19/2018 (which excludes the exploration of oil and the production of petroleum products).

[61] See Art. 25(4), ICSID Convention and Saudi Royal Decree No. M/8, 22/3/1394 H: *"[T]he Kingdom reserves the right of not submitting all questions pertaining to oil and pertaining to acts of sovereignty to the International Centre for the Settlement of Investment Disputes whether by way of conciliation or arbitration."*

[62] See, e.g., ICSID Case No. ARB/18/29.

security ["**FPS**"] standard,[64] a breach of the guarantee of national treatment and non-discrimination and most-favoured nation treatment ["**MFN**"],[65] Historically speaking, MENA oil and gas references are amongst the first to give rise to the concept of unlawful[66] and creeping[67] expropriation in international law, awarding full compensation (comprised of the actual loss suffered and loss of profit).[68] Finally and importantly, investment claims might also arise from oil and gas related construction projects.[69]

C. OTHER

Residual categories of disputes, of lower frequency yet no less importance, are State-to-State disputes, which are mostly boundary disputes with respect to the delimitation of cross-border oil and gas fields and individual-to-company disputes, commenced by individuals against oil and gas services providers for personal injury or tort.[70] Given their existence in the margin,[71] these two residual categories of disputes will not be further discussed here.

IV. THE PROCEDURAL FRAMEWORK OF OIL & GAS ARBITRATION IN THE MENA

This section examines the procedural framework of oil and gas arbitration in the MENA by reference to the operation of conditions precedent prior to the recourse to arbitration, the seat of the arbitration, the applicable procedural rules and the language of the arbitration.

A. MULTI-TIER DISPUTE RESOLUTION

Oil and gas contracts invariably provide for multi-tiered dispute resolution (so-called escalation clauses) that escalates to arbitration only if the parties have been unable to settle their dispute by recourse to non-contentious forms of dispute resolution prior to recourse to arbitration. Such pre-arbitral steps qualify as conditions precedent that are usually strictly enforceable in MENA jurisdictions: A failure to comply with *precise* and *unambiguous*

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[63] See, e.g., ICSID Case No. ARB/07/25, ICSID Case No. ARB/13/15, ICSID Case No. ARB/18/7, ICSID Case No. ARB/19/7, and *Yosef Maiman & Others v. Arab Republic of Egypt,* (2017) PCA Case No. 2012/26.
[64] See, e.g., ICSID Case No. ARB/12/11, and ICSID Case No. ARB/14/4.
[65] See, e.g., ICSID Case No. ARB/14/4.
[66] See, e.g., Sapphire v. NIOC ILR, 1963, at 136 et seq., BP v. Libya, 53 ILR 297 (1979), TOPCO & Calasiatic v. Libya, (1975) YCA 1979, at 177 et seq., SEDCO v. NIOC & Iran, (1987), and Amoco v. Iran (NPC), 15 IRAN-U.S. C.T.R., at 189 et seq.
[67] See, e.g., Phillips v. Iran & NIOC, 21 IRAN-U.S. C.T.R., at 79 et seq., and Amoco v. Iran & NIOC IUSCT, Case No. 56.
[68] See also LIAMCO v. Libya, 17 I.L.M. 3 (1978) that lawful acts of nationalisation (and by extension expropriation) require full compensation. See also Kuwait v. Aminoil, 21 ILM 976 (1982), in which the tribunal awarded *"prompt, adequate and effective"* or *"fair compensation"* for a lawful act of nationalisation.
[69] See, e.g., ICSID Case No. ARB/16/7 (construction of oil production facilities), and ICSID Case No. ARB/19/27 (construction of a gas pipeline).
[70] For further guidance, see T. Martin, "*Dispute resolution in the international energy sector*", 4(4) JWELB (2011), pp. 332-368, at pp. 334 and 336.
[71] And the limited use of arbitration in the latter.

conditions precedent tends to afford an opportunity for a successful challenge under most MENA arbitration laws.[72] Typical pre-arbitral steps of this nature are attempts at amicable settlement, negotiation at the level of senior management and mediation.[73] In an investment arbitration context, so-called cooling-off periods are intended to operate to similar effect. The OIC Agreement and the Arab Investment Agreement provide for a mandatory pre-arbitral recourse to conciliation.[74]

Conditions precedent also play a major role in construction arbitrations in the MENA oil and gas sector. Cl. 67 of the FIDIC 4th edition 1987 prescribes a sequence of carefully-timed conditions precedent, starting with a claiming party's referral for an Engineer's decision, followed by a notice of intention to proceed to arbitration and an attempt to settle amicably before escalation to arbitration in a final instance in the event that amicable settlement fails.[75] These will equally find strict application in a construction project in the oil and gas sector in the MENA, prior to a referral to arbitration.

Bearing testimony to the parties' desire to conciliate disputes, either before escalation to arbitration or before the issuance of a final award, many references reported in the annex did indeed settle[76] or were discontinued.[77] This is evidently commendable in circumstances in which the contracting parties, more likely than not, are committed to a long-term contractual relationship and therefore reliant on each other's trade for extended periods of time.

B. SEAT OF ARBITRATION

The seat of the arbitration determines the governing procedural law of the arbitration. In order to minimise potential challenges of prospective arbitral awards, parties are well advised to choose seats of arbitration that are arbitration-friendly. This has often been achieved by designating a leading international seat, such as London[78],[79] Geneva,[80] Lausanne,[81] Zurich,[82]

[72] See, e.g., the position under UAE law: G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at II-012.
[73] For further guidance, see T. Martin, "Dispute resolution in the international energy sector", 4(4) JWELB (2011), pp. 332-368, at pp. 336 *et seq*.
[74] See Art. 17, OIC Agreement; and Art. 3(1), Annex, Arab Investment Agreement.
[75] For a strict application of these provisions under UAE law, see again G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-202.
[76] See, e.g., TOPCO & Calasiatic v. Libya, (1975) YCA 1979, at 177 et seq., Amoco v. Iran (NIOC) et al. , (1982/1990), and Amoco v. Iran (NPC), 15 IRAN-U.S. C.T.R., at 189 et seq.
[77] See, e.g., ICSID Case No. ARB/07/25, ICSID Case No. ARB/09/04, ICSID Case No. ARB/15/30, and ICSID Case No. ARB/19/07.
[78] Triggering the application of the 1996 Arbitration Act and the curial competence of the English courts.
[79] See, e.g., ICC Case No. 11579.

Copenhagen,[83] Paris,[84] The Hague,[85] and Athens[86] for MENA oil and gas arbitrations. Cairo has been the only choice of a seat in the Middle East in reported references to date.[87]

In order to compete on the regional and international stage, a number of MENA countries have nowadays modernised their arbitration offering with the adoption of stand-alone arbitration laws, modelled on the UNCITRAL Model Law.[88] Ready examples that come to mind are Saudi Arabia,[89] Bahrain,[90] Qatar[91] and the UAE,[92] which, over time, have grown and/or continue to grow into mature arbitration jurisdictions.

Some of these countries have also established so-called *judicial* free zones,[93] which are equipped with their own, autonomous legal systems based on the common law. The UAE's Dubai International Financial Centre ["**DIFC**"] and the Abu Dhabi Global Market ["**ADGM**"] serve as prime examples of such judicial free zones. They dispense their own arbitration laws, the DIFC Arbitration Law[94] and the ADGM Arbitration Regulations[95] and as such may serve as seats of arbitration in their own right. Choice of the DIFC/ADGM as the seat of the arbitration will engage the corresponding free zone arbitration law as the procedural law of the arbitration and the DIFC/ADGM Courts as the curial courts. Given the common law pedigree of the free zones and their courts,[96] the DIFC and the ADGM serve as an ideal substitute for a London seat in a MENA oil and gas arbitration.

Importantly and for the avoidance of doubt, ICSID arbitrations are delocalised and as such do not have a seat.

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[80] See, e.g., Saudi Arabia v. Aramco, 27 ILR 117 (1958), LIAMCO v. Libya, 17 I.L.M. 3 (1978), ICC Case No. 13777, ICC Case No. 13898, ICC Case No. 15051, and ICC Case No. 18215/MHM.
[81] See *Sapphire v. NIOC* ILR, 1963, at 136 et seq.
[82] See ICC Case No. 13790.
[83] See, e.g., BP v. Libya, 53 I.L.R. 297 (1973), and Elf v. NIOC YCA, 1986, at 97, 102 et seq.
[84] See, e.g., ICC Case No. 13686, ICC Case No. 14108, and ICC Case No. 19299.
[85] See Wintershall v. Qatar ILM, 795 (1988).
[86] See ICC Case No. 10302.
[87] See National Gas v. Egypt/EGPC, (2009), CRCICA.
[88] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.
[89] Royal Decree No M/34, dated 24/5/1433 AH (corresponding to 16/4/2012 AD) concerning the approval of the Law of Arbitration.
[90] Bahrain Law No. 9/2015 promulgating the Arbitration Law.
[91] The Qatari Arbitration Act No. 2 of 2017 Applying the Civil and Commercial Arbitration Law.
[92] UAE Federal Law No. 6 of 2018 Concerning Arbitration, also known as the UAE Federal Arbitration Law or simply the FAL.
[93] On the UAE's judicial free zones and their arbitration offering, see G. Blanke, "*Free zone arbitration in the DIFC and the ADGM*", 35(1) Arbitration International (2019), pp. 95-116.
[94] DIFC Law No. 1 of 2008.
[95] ADGM Arbitration Regulations 2015 as amended.
[96] The DIFC and ADGM judiciaries being drawn in their majority from Commonwealth countries.

C. APPLICABLE PROCEDURAL RULES

The applicable procedural rules in a MENA oil and gas arbitration are two-fold: Those of the arbitral institution (in the event of an institutional arbitration)[97] and the procedural or curial law, which is determined by reference to the seat of the arbitration. These topics are sufficiently discussed elsewhere in this study[98] and will therefore not be repeated here.

D. LANGUAGE OF ARBITRATION

Given the often-international background of at least one of the arbitrating parties, the language of MENA oil and gas arbitrations is usually English, which also tends to be the language of any underlying contractual arrangements or the underlying investment instrument. The parties may, of course, choose any other language that suits them better, for example, Arabic, provided that the dispute is one between two domestic parties to the exclusion of any international stakeholders.[99] That said, challenges have been seen to arise from the use of Arabic in earlier oil and gas arbitrations.[100]

Importantly, the tribunal members will have to be proficient in the language of the arbitration, which will inevitably also be the language of any prospective award. Care should be taken that some MENA arbitration laws used to require the tribunal to produce a final award in Arabic albeit that this does not appear to be the case any longer.

V. THE INSTITUTIONAL FRAMEWORK OF OIL & GAS ARBITRATION IN THE MENA

Arbitral proceedings in relation to oil and gas may be conducted with the assistance of an arbitral institution or *ad hoc*, i.e., outside any institutional framework. The question of the choice of the mode of the arbitration being one of party autonomy, it is entirely up to the parties to decide whether or not to contract into a pre-established set of procedural rules dispensed by a designated arbitral institution for the administration of their dispute.

A. INSTITUTIONAL V. AD HOC

More recent MENA oil and gas arbitrations have been conducted under the auspices of well-known, internationally or regionally leading arbitral institutions. These typically include the

[97] Or evidently the UNCITRAL Rules to the extent that parties have contracted into these in an ad hoc set-up.
[98] See section IV.B., V. and VI.A.
[99] More likely than not, a number of domestic CIRCICA proceedings in the oil and gas sector will have been conducted in Arabic.
[100] See, e.g., Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951): "*The Arabic of the Gulf, in which the contract is framed, is an archaic variety of the language, bearing, I was told, some such relation to modern current Arabic as Chaucer's English does to modern English. Such discrepancies, however, as exist between the two translations are fortunately trivial, and the Claimants were willing for purposes of argument to accept the translation put forward on behalf of the Respondent*." (see 18 ILR (1951), at p. 149)

London Court of International Arbitration ["**LCIA**"],[101] the International Chamber of Commerce ["**ICC**"] International Court of Arbitration,[102] the Arbitration Institute of the Stockholm Chamber of Commerce ["**SCC**"][103] and the Cairo Regional Centre for International Commercial Arbitration ["**CIRCICA**"].[104] Earlier proceedings were often conducted *ad hoc*,[105] most probably because of the lesser use of the institutional mode of arbitration in the days and given the frequent involvement of MENA State (entities) that might have been less familiar with institutional arbitration at the time and that would not have wished to entrust foreign arbitral institutions (identified with another nation State) with the administration of their dispute.[106] One further reason for the pronounced earlier use of *ad hoc* arbitration might have been the significant degree of procedural flexibility built into that process, giving the parties almost unlimited freedom (subject to considerations of due process and public policy) to design an arbitration process to suit them.

To provide some procedural assistance and certainty to an *ad hoc* arbitration process, the parties are, of course, at liberty to contract into the UNCITRAL Rules of Arbitration[107] and have indeed done so on occasion in the past.[108] One of the main benefits of doing so is the default-appointment regime provided for under the UNCITRAL Rules, which requires the PCA Secretary-General to select a default-appointing authority upon request of a party.[109] In addition, parties may designate an arbitral institution to default-appoint or even to administer their arbitration under the UNCITRAL Rules. This option is evidently limited to arbitral institutions that offer that type of service, such as the LCIA, which is available for default-

[101] Albeit that for reasons of confidentiality, no cases have been reported.
[102] See, e.g., ICC Case No. 4462, ICC Case No. 8198, ICC Case No. 10302, ICC Case No. 10351, ICC Case No. 11579, ICC Case No. 13686, ICC Case No. 13777, ICC Case No. 13790, ICC Case No. 13898, ICC Case No. 14108, ICC Case No. 15051, ICC Case No. 16198, ICC Case No. 18215/MHM, ICC Case No. 19299, ICC Case No. 24408/AYZ, and ICC Case No. 24722/AYZ.
[103] Albeit that for reasons of confidentiality, no cases have been reported.
[104] See, e.g., *National Gas v. Egypt/EGPC*, (2009), and CRCICA Case No. 829/2012.
[105] See, e.g., Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) 18 I.L.R, Petroleum Development Ltd. v. Sheikh of Abu Dhabi, (1951) 18 ILR 144, Saudi Arabia v. Aramco, (1958), Sapphire v. NIOC ILR, 1963, at 136 et seq., BP v. Libya, 53 I.L.R. 297 (1973), TOPCO & Calasiatic v. Libya, (1975) YCA 1979, at 177 et seq., LIAMCO v. Libya, (1977) 17 I.L.M. 3, Elf v. NIOC YCA, 1986, at 97, 102 et seq., and Kuwait v. Aminoil ILM, 976 (1982).
[106] The question of confidentiality might also have played in favour of *ad hoc* arbitration, avoiding the "unnecessary" involvement of third parties, i.e., the administrative staff of a chosen institution (including the institutional decision-making body), and hence limiting the risk of undesirable leaks (despite the institutional confidentiality undertakings that are typically in place).
[107] UNCITRAL Arbitration Rules 1976 as amended.
[108] See, e.g., Wintershall v. Qatar, 28 ILM 795 (1988), and Yosef Maiman & Others v. Arab Republic of Egypt, (2017), PCA Arbitration.
[109] See Art. 6(2), UNCITRAL Rules.

appointment in *ad hoc* arbitration, and the DIAC, which serves both as a default-appointment authority and as an administering institution under the UNCITRAL Rules.

B. INSTITUTIONAL CHOICES

The MENA is home to a wide range of arbitral institutions that may serve as reliable service providers in the administration of oil and gas arbitrations in the region. The CIRCICA leads by example, certainly in oil and gas arbitrations that involve Egypt as a respondent State.[110] There is no reason why other regionally leading centres should not do equally well. The Dubai International Arbitration Centre ["**DIAC**"], for example, has only just published its 2022 Rules,[111] which introduces a number of innovations that will serve the seamless administration of oil and gas arbitral proceedings.[112] In addition, the DIAC has been restructured to incorporate a DIAC Court and as such reconstituted, following the model of the ICC and the LCIA,[113] and has created a presence through a branch office in the Dubai International Financial Centre ["**DIFC**"].[114] Taken together with the designation of the DIFC as the "initial" default-seat under the 2022 DIAC Rules,[115] this will, no doubt, increase the attractiveness of the DIAC as an institutional service provider in regional oil and gas arbitrations involving international stakeholders.

The ICC has also embellished its regional offering by setting up its 5th regional overseas case management office[116] in the ADGM with effect from 1 April 2021. The ADGM-ICC is located on the premises of the ADGMAC and administers MENA arbitrations that have been submitted to the ICC Rules of Arbitration with the assistance of a specialist case management team. Needless to say, that given its physical closeness to the ADGMAC, the ADGM-ICC evidently benefits from the ADGMAC both as an in-person and as a virtual hearing venue. The parties' choice of the ICC Rules will import the usual benefits of ICC arbitration into the proceedings, in particular the requirement to sign terms of reference[117] and the scrutiny of

[110] See, e.g., National Gas v. Egypt/EGPC, (2009), CRCICA, and CRCICA Case No. 829/2012.
[111] DIAC Rules of Arbitration 2022, available online at http://www.diac.ae/idias/resource/Rules2022.pdf (last accessed on 3 July 2022).
[112] Such as joinder and consolidation, multi-party arbitration, and the scrutiny of awards.
[113] See Dubai Government Decree No. 34/2021 concerning the Dubai International Arbitration Centre (DIAC).
[114] And hence might aim to fill a gap left by the discontinuation of the DIFC-LCIA as a side effect of the adoption and entry into force of Decree No. 34/2021.
[115] See Art. 20.1, 2022 DIAC Rules.
[116] See ICC, "*ICC Court to Open 5th Overseas Case Management Office in Abu Dhabi Global Market", News*, Abu Dhabi (21 December 2020), available online at https://iccwbo.org/media-wall/news-speeches/icc-court-to-open-5th-overseas-case-management-office-in-abu-dhabi-global-market/.
[117] See Art. 23(2), ICC Rules.

ICC awards prior to their issuance.[118] In the MENA context more specifically, this tends to limit a latent risk of unenforceability of a resultant award on grounds of lack of a party's capacity to submit to arbitration or by reason of other procedural irregularities, including violations of public policy, such as the deficient execution of arbitral awards.[119]

Albeit not a stand-alone arbitral institution, the ADGM Arbitration Centre ["**ADGMAC**"], established in 2018, operates as a state-of-the-art hearing facility for domestic and international arbitration, both free zone and onshore. As such, it may serve as a fully-digitalised hearing venue for both institutional and *ad hoc* arbitrations, irrespective of their seat, whether onshore or offshore. In addition, it presently houses the ADGM-ICC, suggesting its operation as a multi-institutional dispute resolution complex modelled on Maxwell Chambers in Singapore.[120] Apart from serving as an arbitration venue, the ADGMAC is an ardent promoter of alternative dispute resolution in the wider Middle East and has, to date, published some helpful guidance for arbitrators, arbitration counsel and arbitration users on the conduct and best practices of arbitration in the ADGM, the Middle East and internationally. Such guidance includes the ADGMAC Arbitration Guidelines[121] and the ADGMAC Protocol for Remote Hearings.[122] To enhance its regional reach, the ADGMAC has also entered into a number of co-operation agreements with MENA arbitral institutions, such as the Saudi Centre for Commercial Arbitration ["**SCCA**"], the Cairo Regional Centre for International Commercial Arbitration ["**CRCICA**"] and the Lebanese Arbitration and Mediation Centre ["**LAMC**"].[123] These focus on the mutual co-operation and promotion of and grant access to each other's facilities for regional and international arbitration or alternative dispute resolution in the region more generally.

Other regional institutions with a viable pedigree that are likely to compete for future oil and gas arbitrations in the region are the Bahrain Centre for Dispute Resolution ["**BCDR**"], which has now completed its recent emancipation from the American Arbitration Association ["**AAA**"],[124] the Qatar International Centre for Conciliation and Arbitration ["**QICCA**"],

[118] See Art. 34, ICC Rules.

[119] E.g., a failure to sign each page of the award, which qualifies as a matter of procedural public policy under UAE law: See G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-388-III-389.

[120] See https://www.maxwellchambers.com (last accessed on 4 June 2022).

[121] *ADGM Arbitration Centre Arbitration Guidelines*, ABU DHABI GLOBAL MARKET, (3 July 2022) https://www.adgm.com/arbitrationcentre/resources/publications/arbitration-guidelines

[122] *ADGM Courts Protocol for Remote Hearings*, ABU DHABI GLOBAL MARKET (3 July 2022) https://www.adgm.com/arbitrationcentre/resources/publications/remote-hearings

[123] See https://www.adgmac.com/cooperation-agreements/.

[124] Having recently adopted a new set of (draft) 2022 BCDR Arbitration Rules.

which has emerged as one of the leading arbitration centres in the Middle East over the past twenty years, and the Saudi Centre for Commercial Arbitration ["**SCCA**"], which, albeit a relative newcomer on the stage of MENA arbitration, has so far enjoyed great acclaim.[125]

VI. THE LEGAL FRAMEWORK OF OIL & GAS ARBITRATION IN THE MENA

The legal framework of MENA oil and gas arbitrations is informed by the *lex arbitri*, i.e., the governing procedural law, the *lex contractus* or more generally the *lex causae*, i.e., the governing law on the merits and the role of the Islamic Shari'ah. Each of these will be briefly addressed below.

A. THE GOVERNING PROCEDURAL LAW (*LEX ARBITRI*)

The governing procedural law is the arbitration law that applies at the seat of the arbitration. As discussed above,[126] many MENA arbitration laws have been modernised to bring them into line with best international arbitration practice and procedure, taking guidance from the UNCITRAL Model Law. Further, the UAE's free zone laws, the DIFC Arbitration Law and the ADGM Arbitration Regulations, facilitate a common law style arbitral process with a seat in the midst of the Middle East.

Taking a look at the *acquis* of MENA oil and gas arbitrations to date, it is interesting to note that some earlier tribunals decided to take recourse to international law as the governing procedural law of the arbitration in circumstances where the parties were unable to agree.[127] The choice of international law was primarily motivated by considerations of sovereignty.[128] Other tribunals have deferred to the procedural law at the seat[129] out of, *inter alia*,

[125] See also J. Sutcliffe and J. Blaney, "*Arbitration of LNG Price Review Disputes*", 7(1) BCDR IAR (2020), pp. 133-142, at. P. 141, who expressly endorse regional venues, such as *"the credible arbitration centres in Abu Dhabi, Bahrain, Dubai and Riyadh"* as venues for gas price review arbitration in the Middle East.

[126] See section IV.B. above.

[127] See, e.g., Saudi Arabia v. Aramco, 27 ILR 117 (1958), deciding in favour of the application of the Law of Nations, TOPCO & Calasiatic v. Libya, (1975) YCA 1979, at 177 et seq. (international law, following the Aramco reasoning), and LIAMCO v. Libya, (1977) 17 I.L.M. 3 (1978), in which the tribunal took guidance from the *"general principles contained in the Draft Convention on Arbitral Procedure [of] the International Law Commission of the United Nations."*

[128] In that a sovereign State would not readily submit to the municipal procedural legislation of another Sovereign.

[129] See, e.g., Judge Lagergren in BP v. Libya 53 I.L.R. 297 (1973) (Danish law). Other examples include Sapphire v. NIOC, 1963, at 136 et seq. (Code of Civil Procedure of the Canton de Vaude, Switzerland), Elf v. NIOC YCA 1986, at 97, 102 et seq. (Danish law), Kuwait v. Aminoil, 21 ILM 976 (1982) (French law), Wintershall v. Qatar, 28 ILM 795 (1988) (Dutch law), ICC Case No. 11579 (1996 English Arbitration Act), ICC Case No. 13686 (French law), ICC Case No. 13777 (Swiss law), ICC Case No. 18215/MHM (Swiss law), and ICC Case No. 19299 (French law).

considerations of the ready enforceability of a prospective award under, e.g., the New York Convention.[130]

B. THE GOVERNING LAW ON THE MERITS (*LEX CONTRACTUS OR THE LEX CAUSAE*)

The governing law on the merits is usually determined by the contracting parties by reference to the governing law/ choice of law clause in their underlying contractual framework.[131] Where no agreement can be reached between the parties and where no guidance on the governing law can be gained from the parties' contract, the tribunal once appointed will be tasked with the determination of the applicable law on the merits. It will do so by reference to the conflicts of laws rules to the extent that any apply[132] or by reference to the general powers conferred upon it by the applicable procedural rules and laws, including the arbitration law governing arbitral process. Absent party agreement, a tribunal will usually be empowered to determine the governing law at its discretion (that it considers most appropriate). Some institutional rules expressly empower the Tribunal to take account of *"any relevant trade usages"* in doing so.[133] It should be cautioned that some laws in the country of operations might be of mandatory application, such as environmental, labour and safety laws[134] and that some countries' laws have extraterritorial reach, such as a number of antitrust laws or economic sanctions (supranational law).

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[130] To this effect, see Prof. Wetter's explanations of Judge Lagergren's findings in BP v. Libya, 53 I.L.R. 297 (1973): *"[…] application of the Aramco or the Topco/Calasiatic doctrines may be exposed to the risk of not resulting in awards recognised under the New York Convention. And indeed the wish to secure an award that could be so recognised and enforced was the main element that influenced Judge Lagergren in pronouncing that the BP Award was a Danish one; the Claimant also expressly regarded it as such. It is felt that Professor Dupuy, in holding that consideration of the enforceability of the award was riot within his jurisdiction, underestimated the practical and theoretical importance of the enforceability aspect and, in any event, erred in his quoted conclusion on the jurisdictional issue. […] The desirability to localise an award for the purpose of making it enforceable is the main reason for, and consequence of, preferring the BP doctrine. Another consideration is that, unless an award is so attached to a specific jurisdiction, claims of nullity or challenge procedures cannot be instituted, nor is it clear by which law the liability of the arbitrators is governed. And, lastly, as emphasised by Judge Lagergren, the attachment to a national jurisdiction provides the arbitrator with a supplementary reference system, a developed procedural law, that greatly aids the arbitrator in his task. However, in cases where none of these considerations are deemed to be of practical significance, the Aramco and Topco/Calasiatic doctrines are sustainable and may command attention. This does not imply acceptance of the widely exaggerated notions of a supranational arbitral jurisdiction and lex mercatoria hovering far above the reach of national jurisdictions."* (see J. G. WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE, (Oceana Publications 1979), at pp. 409-410.

[131] Which will typically refer to the national law of a particular country, e.g., (i) the law of the country with the closest connection to the contract/ dispute; (ii) the law of the country of operations; (iii) the law of the country where the contract was negotiated; or (iv) the law of the country where the contract was executed.

[132] It should be noted that the parties' choice of law (if any) tends to exclude the application of the conflict of laws rules of that country (to avoid the *renvoi* to a different law once a dispute arises).

[133] See, e.g., Art. 21(2), ICC Rules; and Art. 30.3, 2022 DIAC Rules.

[134] See, e.g., the consideration given to regulatory requirements for oil exploration and drilling in the host State (over and above the application of English law as the governing law on the merits) in ICC Case No. 11579.

Given its sophistication and long-standing use in oil and gas disputes, English law has been suggested for application in such disputes irrespective of the geographic location of the underlying energy project from which a dispute arises.[135] English law has indeed been applied in a number of MENA oil and gas arbitrations in the past,[136] at times at the cost of the Islamic Shari'ah,[137] which, for some time, brought arbitration in the Middle East into disrepute.[138] For reasons similar to those that have led to the promotion of English law as a desirable law on the merits in oil and gas arbitrations, consideration has also been given to the potential application of a *lex petrolea*,[139] for the first time in *Kuwait v. Aminoil* (1982),[140] but was, in that reference, discarded because of the insufficient identifiability of such a body of law at the time.

Host States or host State-owned entities will often insist on the application of the host-States domestic law, which will often be compromised by expressly limiting its application *"only to the extent that it is consistent with the principles of international law"*.[141] By way of further guidance, it is worth noting in this context that in accordance with Art. 38 of the Statute of the International Court of Justice ["**ICJ**"], the following are the sources of international law:

i. international conventions;
ii. international custom, as evidence of a general practice accepted as law (customary international law);[142]

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[135] See Ashurst, "Governing law and dispute resolution clauses in energy contracts", ETI litigation briefing (February 2011).

[136] For more recent examples, see, e.g., ICC Case No. 11579, and ICC Case No. 13777.

[137] See, e.g., Petroleum Development Ltd. v. Sheikh of Abu Dhabi (1951) 18 ILR 144, in which Lord Asquith of Bishopstone discarded the application of the law of Abu Dhabi in favour of English law as the "modern law of nature".

[138] In an attempt of reconciliation, more recent tribunals have made the point that the Islamic Shari'ah is compatible with the governing law on the merits, e.g., Libyan law, providing for the award of damages for wrongful expropriation (*ghash*), the limitation of compensation for lost profits that are not a *"certain and direct"* result of the underlying breach (*gharar*) and that it is *"just and equitable to consider interest claimed not as usuary (riba), but as compensatory equivalent of a discount rate."* See Prof. Mahmassani in LIAMCO v. Libya, 17 I.L.M. 3 (1978).

[139] For a further discussion in context, see A. T. Martin, "*Lex Petrolea* in International Arbitration", in R. King (ed.), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook*, Globe Law and Business, 2012.

[140] In the sense of *"a customary rule valid for the oil industry - a* lex petrolea *that was in some sort a particular branch of a general universal* lex mercatoria*"*.

[141] To this effect, see BP v. Libya, 53 ILR 297 (1979) ("*the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals"*), LIAMCO v. Libya 17 I.L.M. 3 (1978) (*idem*), and ICC Case No. 14108 (*"principles of law common to Yemen and the United States and in the absence of such common principle, then in conformity with the principles of law normally recognized by civilized nations in general, including those which have been applied by International Tribunals"*).

[142] Customary international law is composed of customary rules, which are created by a combination of two factors: (i) a consistent practice repeated by relevant State/ governmental actors over a sufficiently long period

iii. the general principles of law recognised by civilized nations; and

iv. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Applied to the facts at hand, earlier oil and gas tribunals have laid the foundations for the application of international law to MENA oil and gas disputes albeit that in a number of cases, the tribunal has been seen to resolve the parties' dispute by reference to the law of the host State,[143] at times in combination with international law (ensuring conformity in the application of the chosen municipal with international law).[144] One earlier tribunal also expressly relied upon Art. 38 of the Statute of the ICJ to define the meaning and scope of "principles of international law" applicable to the reference at hand.[145] On occasion, tribunals have relied upon the UNIDROIT Principles of International Commercial Contracts[146] and the principle of *pacta sunt servanda* in its own right[147]. On other occasions, tribunals have been guided by the "principles familiar to civilized nations"[148], the "principles of justice, equity and good conscience"[149], the "principles of good faith and good will"[150] and "considerations of equity and generally recognized principles of law and in particular International Law".[151]

More recent circumstances, including the COVID pandemic, have given rise to considerations to what extent the pandemic would qualify as *force majeure* or the doctrine of unforeseen circumstances or hardship under MENA municipal laws.[152] *Force majeure* and hardship have also received consideration in earlier MENA oil and gas arbitrations.[153]

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of time; and (ii) a shared conviction/ intention that the practice concerned originates in a legal obligation (*opinio juris*). Some areas of customary international law have been codified (underlying customary rules apply even absent ratification by a State), e.g.: (i) The International Law Commission (ILC) Articles on State Responsibility (albeit not binding as such, arbitral tribunals tend to rely on these as rules of customary international law); (ii) UN Convention on the Rules of State Immunity, currently pending ratification (UNGA Res 59/38 of 2 Dec. 2004, A/59/49); and Vienna Convention on the Law of Treaties, which assists in the interpretation of treaty provisions.

[143] Apart from the English law examples listed at note 137 above, see, e.g., *Saudi Arabia v. Aramco* (1958) (Saudi law), ICC Case No. 4462 (Libyan law), *Amoco v. Iran, (NPC)* (1987/1990) (Iranian law), ICC Case No. 13686 (French law), and ICC Case No. 19299 (Yemeni law).

[144] See, e.g., TOPCO & Calasiatic v. Libya YCA, 1979, at 177 et seq. (Libyan and international law), Kuwait v. Aminoil, 21 ILM 976 (1982) (Kuwaiti law, public international law and general principles of law), and Mobil v. Iran, 16 IRAN-U.S. C.T.R., at 3 et seq.

[145] See LIAMCO v. Libya 17 I.L.M. 3 (1978), as per Prof. Mahmassani.

[146] See ICC Case No. 14108.

[147] See, e.g., Sapphire v. NIOC, (1963), ILR 1963, at 136 et seq.

[148] See Petroleum Development (Qatar) Ltd. v. Ruler of Qatar, (1951) 18 I.L.R.

[149] See Qatar v. International Marine Oil Company, (1953) 20 ILR 534.

[150] See Sapphire v. NIOC, ILR 1963, at 136 et seq.

[151] See Elf v. NIOC., 1986, at 97, 102 et seq.

[152] See, e.g., G. Coop and R. Lupini, "*Caught between a Rock and COVID-19: Sharing the Pain of Onerous Oil and Gas Contracts in the Middle East*", 7(1) BCDR IAR (2020), pp. 171-192; M. Polkinghorne and Y. El Achkar, "*COVID-19 and the Exception to Contractual Liability in Arab Contract Law*", 7(1) BCDR IAR

C. THE ROLE OF THE SHARI'AH

Albeit that it is attributed a certain level of importance by practitioners in the industry,[154] the Islamic Shari'ah is of limited importance to the daily practice of oil and gas arbitrations in the MENA. Even though some MENA countries are more Shari'ah-devout than others,[155] most MENA countries have built the Islamic Shari'ah into their body of substantive laws so that compliance with mandatory Shari'ah requirements is subsumed into the applicable substantive laws on the merits.[156] For the avoidance of doubt, the application of any "Islamic public policy" concept has expressly been denied with respect to arbitrations seated in the DIFC.[157] *Gharar* (uncertainty or speculation) is worth bearing in mind by way of general guidance.[158]

In addition, both simple and (contractually agreed) compound interest provided they do not violate the prevailing prohibition of usuary (*riba*) are recoverable in arbitrations in the MENA[159] albeit that caution must be exercised in some MENA jurisdictions on the precise articulation of an interest claim.[160] That said, it is less clear whether in those jurisdiction that do not contain the relevant stipulations in their arbitration laws, the oath-taking requirement for fact and expert witnesses survives.[161]

(2020), pp. 149-170; and E. Al Tamimi, "*Oil and Gas Disputes in the Middle East: A COVID-19 Era Perspective*", 7(1) BCDR IAR (2020), pp. 53-72.

[153] See, e.g., Amoco v. Iran & NIOC et al. IUSCT Case No. 56, ICC Case No. 4462, Mobil v. Iran (1987), ICC Case No. 8198, and ICC Case No. 18215/MHM. See also R. Ziade and A. Plump, "*Changed Circumstances and Oil and Gas Contracts*", 7(1) BCDR IAR (2020), pp. 193-224.

[154] See, e.g., T. Martin, "*Oil and gas arbitration in the Middle East and North Africa*", in R. King, *Arbitration in the International Energy Industry*, Globe Law and Business, 2019, pp. 93-111, pp. 93-111, at pp. 108 *et seq*. See also generally for a MENA-wide view, N. Najjar, "*The Role of Islamic Sharia in MENA Arbitration*", in G. Blanke (ed.), *Arbitration in the MENA*, Juris, 2016, Release 2-2018/2019 (2019).

[155] The prime, outstanding example being the Kingdom of Saudi Arabia.

[156] See, e.g., the UAE's various codes of law.

[157] See the developments in E. Al Tamimi and R. Karrar-Lewsley, "Dubai", in M. OSTROVE, C. T. SALOMON AND BETTE SHIFMAN (eds), CHOICE OF VENUE IN INTERNATIONAL ARBITRATION, (Oxford University Press, 2014), pp. 118-146, at paras 5.40 and 5.96 *et seq*.

[158] See the helpful discussions in T. Martin, "*Oil and gas arbitration in the Middle East and North Africa",* in R. King, *Arbitration in the International Energy Industry*, Globe Law and Business, 2019, pp. 93-111, pp. 93-111, at p. 109.

[159] Some MENA jurisdictions ordaining the award of interest by law: See, e.g., Arts 77-78 and 88 of the UAE Commercial Transactions Code. See also recent developments in Qatar: See N. Tannous, "The Qatari Courts' Approach to Awarding Interest", available online at https://www.tamimi.com/law-update-articles/the-qatari-courts-approach-to-awarding-interest/ (last accessed on 4 July 2022). For an example in the oil and gas context, see LIAMCO v. Libya, (1977) 17 I.L.M. 3 (1978).

[160] See, e.g., Saudi Arabia, where, out of an abundance of caution, an interest claim is still best articulated as a claim for costs of finance.

[161] See, e.g., the UAE: Whereas Art. 211 of the former UAE Arbitration Chapter specifically stipulated the taking of witness evidence on oath, there is no longer an express requirement to that effect in the 2018 UAE Federal Arbitration Law. Query, however, whether the oath-taking requirement could survive as a form of

VII. RECOGNITION AND ENFORCEMENT OF OIL & GAS ARBITRAL AWARDS IN THE MENA AND BEYOND

MENA oil and gas arbitral awards[162] benefit from the existing enforcement regimes in place for international commercial and investment arbitration awards. Such enforcement regimes are typically codified in regional and international enforcement instruments, including the Riyadh[163] and the GCC Convention[164].[165] In the absence of any such instruments, enforcement follows the process laid down in the municipal laws, i.e., the arbitration law in the enforcement jurisdiction.

It should be cautioned in this context that in the past, some local MENA courts in their capacity as supervisory or enforcement courts have opposed the enforcement of both domestic and international awards on the basis of a number of peculiar procedural irregularities, at times camouflaged as a violation of public policy.[166] Over time, MENA enforcement court practice has matured considerably and most MENA countries will now adopt a narrow interpretation of public policy, in particular for the enforcement of foreign awards. That said, some local idiosyncrasies endure, such as the signature requirement of arbitral awards in the UAE.[167]

The best-known and most widely-used and applicable international enforcement instrument is the New York Convention ["**NYC**"]. [168] The NYC counts over 168 countries worldwide[169]

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procedural public policy. For further discussion, see G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-350.

[162] Importantly, this includes ratified awards rendered in the free zones, such as the DIFC and the ADGM: For confirmation and further guidance, see G. Blanke, "Free zone arbitration in the DIFC and the ADGM", 35(1) Arbitration International (2019), pp. 95-116.

[163] Riyadh Arab Agreement for Judicial Cooperation (1983), comprising: UAE, Jordan, Bahrain, Tunisia, Algeria, Djibouti, Saudi Arabia, Sudan, Syria, Somalia, Iraq, Oman, Palestine, Qatar, Kuwait, Lebanon, Libya, Morocco, Mauritania and Yemen.

[164] 1996 Gulf Co-operation Council (GCC) Convention for the Execution of Judgments, Delegations and Judicial Notifications, comprising:
UAE, Bahrain, Saudi Arabia, Oman, Qatar and Kuwait.

[165] These also bind the free zones, i.e., the DIFC and ADGM Courts: For confirmation and further guidance, see G. Blanke, "*Free zone arbitration in the DIFC and the ADGM",* 35(1) Arbitration International (2019), pp. 95-116.

[166] See G. Blanke, "*Recognition and enforcement of domestic and foreign arbitral awards in the Middle East*" in R. Nazzini (ed.), *Transnational Construction Arbitration: Key Themes in the Resolution of Construction Disputes*, informa law, 2018, pp. 139-174. For the breadth of the public policy concept across the MENA region, see M. Lau, "*The Public Policy Exception and International Commercial Arbitration in the MENA Region: A Contextual Analysis*", in G. Blanke (ed.), Arbitration in the MENA, Juris, 2016, Release 4-2021 (2021).

[167] On which see G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at III-401.

[168] On the recognition and enforcement of foreign arbitral awards, done at New York, 10 June 1958.

[169] This includes the following MENA countries: Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syria, Tunisia and United Arab Emirates.

and membership continues to grow year upon year; as such, it provides for the global enforceability of a NYC award. Member States that have not entered into the reciprocity reservation under the NYC are bound by a wide enforcement obligation, applying to both Convention and non-Convention awards. This includes some of the MENA countries, such as the UAE.[170] The NYC applies to both commercial and investment arbitration awards provided these latter are not subject to a specific enforcement regime under the relevant investment framework.

For the avoidance of doubt, the UAE's free zone courts are bound by the international enforcement instruments to which the UAE are a party, including the NYC and the Riyadh and GCC Conventions, and follow the public policy pronounced by the UAE courts, subject to adaptation on a case-by-case basis to reflect free zone requirements.[171]

The ICSID Convention[172] and some regional conventions[173] provide for their own specialist enforcement regimes and do therefore not qualify for enforcement under the NYC. For the avoidance of doubt, ECT awards are enforceable under the NYC.

VIII. CONCLUSION

Oil and gas arbitration in the MENA has seen some significant development since the 1950ies. Not only have tribunals become more sensitive to the Islamic Shari'ah as a potential element in the interpretation of contracts governed by Middle Eastern laws, MENA oil and gas references have also significantly contributed to the development of oil and gas law, often referred to as a *lex petrolea*, and of core investment protection principles, such as unlawful expropriation and the right to full compensation. Overall, this cannot but send encouraging signals to foreign investors and other key stakeholders in the regional oil and gas industry. As has been seen, the MENA arbitration landscape offers a reliable framework for oil and gas

[170] Which has demonstrated a – by and large - consistent enforcement practice of foreign arbitral awards under the NYC, see G. Blanke, *Blanke on UAE Arbitration Legislation and Rules*, Thomson Reuters/ Sweet & Maxwell, 2021, at I-192 *et seq*.

[171] See G. Blanke, "*Free zone arbitration in the DIFC and the ADGM*", 35(1) Arb. Intl. (2019), pp. 95-116, read together with G. Blanke, "*UAE public policy at the crossroads between onshore and offshore: a variable geometry of sorts*", PRACTICAL LAW ARBITRATION BLOG, Thomson Reuters, (18 June 2020), http://arbitrationblog.practicallaw.com/uae-public-policy-at-the-crossroads-between-onshore-and-offshore-a-variable-geometry-of-sorts/ (last accessed on 4 July 2022), which confirms the DIFC Courts' disposition to allow contingency fees, which are in violation of UAE public policy, within limits of reason.

[172] See Arts 53(1) and 54, ICSID Convention.

[173] See, e.g., Art. 2(11), Annex to the Arab Investment Agreement, which empowers the Arab Investment Court to adopt appropriate execution measures where the award debtor fails to comply with the terms of the subject award voluntarily within three months from issuance of the award; and Art. 17(2)(d), OIC Agreement, pursuant to which a member State is under an obligation to enforce a resultant award *"as if it were a final and enforceable decision of its national courts."*

arbitration references. With this in mind, unlike they may have done in the past, disputing parties do not need to look further afield for suitable oil and gas dispute resolution facilities and may instead entrust their disputes to the existing regional dispute resolution capabilities, which have matured significantly over time and will, no doubt, continue to do so in years to come.

ANNEX – Table on Oil & Gas Arbitrations from 1950 to Date

S/N	**Reference[174]/ Tribunal[175]/ Rules[176]**	**Parties** (Claimant/ Respondent)	**Seat/*Lex arbitri*[177]**	**Type of Dispute/ *Lex causae*[178]**	**Tribunal's Findings**
1	***Petroleum Development (Qatar) Ltd. v. Ruler of Qatar*** Award, April 1950[179] Three-member tribunal (two London-based *"arbitrator-advocates"* and Lord Radcliffe) *Ad hoc*	Petroleum Development (Qatar) Ltd./ Ruler of Qatar	n/a	Dispute about the areal extent of the Concession Agreement between the parties *"principles familiar to civilised nations"*	Tribunal delineates the areal extent of the Concession Agreement in its award
2	***Petroleum Development Ltd. v. Sheikh of Abu Dhabi*** Award, September 1951[180] Sole arbitrator (Lord Asquith of Bishopstone)	Petroleum Development/ Sheikh of Abu Dhabi	n/a	Dispute about the areal extent of the Concession Agreement for the exploration and development of oil and gas granted by the Sheikh of Abu Dhabi to the Claimant for the entire territory of Abu Dhabi *"The Ruler and the Company both*	Tribunal finds in favour of the Sheikh on the areal extent of the Concession Agreement

[174] For the avoidance doubt, unless stated otherwise, the language of arbitration in each of the references listed here is English.
[175] Sole arbitrator or three-member tribunal.
[176] Institutional or *ad hoc*.
[177] Procedural or curial law of the arbitration.
[178] Governing law on the merits.
[179] Petroleum Development (Qatar) Ltd. v. Ruler of Qatar 18 ILR (1951), at pp. 161 *et seq*.
[180] Petroleum Development Ltd. v. Sheikh of Abu Dhabi 18 ILR (1951), at pp. 144 *et seq*.

	Ad hoc			*declare that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason."*[181]	
3	***Qatar v. International Marine Oil Company***[182]	Ruler of Qatar/ International Marine Oil Company	n/a	Dispute about rent payable under a Concession Agreement between the parties, and whether, *inter alia*, that rent is payable in advance *"principles of justice, equity and good conscience"*[183]	Tribunal finds that rent is payable in advance on the basis of the application of *"the principles of justice, equity and good conscience"*

[181] "*This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would prima facie be that of Abu Dhabi. But no such law can be reasonably said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments."* (*ibid*., at p. 148); and *"[...] albeit English Municipal Law is inapplicable as such, some of its rules are in my view so firmly grounded in reason, as to form part of this broad body of jurisprudence - this 'modern law of nature' [...] yet on the other hand the English rule which attributes paramount importance to the actual language of the written instrument in which the negotiations result seems to me no mere idiosyncrasy of our system, but a principle of ecumenical validity."* (*ibid*., at p. 148)

[182] Reported in 20 ILR (1953), at pp. 534 *et seq.*

[183] *"[...] after hearing the evidence of the two experts in Islamic law, Mr. Anderson and Professor Milliot, 'there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments' to quote and adapt the words of Lord Asquith of Bishopstone, in his Award as Referee in an Arbitration in 1951 in which the Shaikh of Abu Dhabi, a territory immediately adjacent to Qatar and in fact much larger than Qatar, was a party, and the Arbitration concerned the interpretation of words in an oil concession contract. I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in that country. I have no reason to suppose that Islamic law is not administered there strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract. […] Arising out of that reason is the second reason, which is that both experts agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the Principal Agreement was full of irregularities from end to end according to Islamic law, as applied in Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract of this kind. I cannot think that the Ruler intended Islamic law to apply to a contract upon which he intended to enter, under which he was to receive considerable sums of money, although Islamic law would declare that the transaction was wholly or partially void. Still less would the Ruler so intend, and at the same time stipulate that these sums when paid were not to be repaid under any circumstances whatever. I am sure that Sir Hugh Weightman and Mr. Allan did not intend Islamic law to apply. In my opinion neither party intended Islamic law*

4	***Saudi Arabia v. Aramco*** Award, 23 August 1958[184] *Ad hoc*	Kingdom of Saudi Arabia/ Arabian American Oil Company (Aramco)	Geneva, Switzerland The Law of Nations[185]	Dispute about the transportation rights of Aramco's crude oil production in the light of a thirty-year exclusive crude oil shipping contract awarded by Saudi Arabia to Onassis ("Onassis Agreement") and Aramco's all-encompassing concession rights under a concession agreement between the parties Saudi law	Tribunal finds that Aramco has the conclusive right to transport and export the crude oil under the concession agreement and that the Onassis Agreement is not effective against Aramco
5	***Sapphire v. NIOC*** Award, 15 March	Sapphire Petroleums Ltd. (Canadian)/ National Iranian	Lausanne, Canton de Vaud, Switzerland	Disputed notice of termination by Respondent of Joint-Structure	Tribunal finds in favour of Claimant's claim for expropriation and orders

to apply, and intended that the agreement was to be governed by 'the principles of justice, equity and good conscience' as indeed each party pleads in Claim and Answer, alternatively to Islamic law, in the case of the Claimant."

[184] Saudi Arabia v. Aramco 27 ILR (1963), at pp. 175 *et seq.*

[185] As opposed to the procedural law of the seat (due to the involvement of a Sovereign): "*Although the present arbitration was instituted, not between States, but between a State and a private American corporation, the Arbitration Tribunal is not of the opinion that the law of the country of its seat should be applied to the arbitration […]. Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State. Any interference by the latter State would constitute an infringement of the prerogatives of the State which is a Party to the arbitration. This would render illusory the award given in such circumstances. For these reasons, the Tribunal finds that the law of Geneva cannot be applied to the present arbitration. It follows that the arbitration, as such, can only be governed by international law, since the Parties have clearly expressed their common intention that it should not be governed by the law of Saudi Arabia, and since there is no ground for the application of the American law of the other Party. This is not only because the seat of the Tribunal is not in the United States, but also because of the principle of complete equality of the Parties in the proceedings before the arbitrators. It is true that the practice of the Swiss Courts has limited the jurisdictional immunity of States and does not protect that immunity, in disputes of a private nature, when the legal relations between the Parties have been created, or when their obligations have to be performed in Switzerland. The Arbitration Tribunal must, however, take that immunity into account when determining the law to be applied to an arbitration which will lead to a purely declaratory award. By agreeing to fix the seat of the Tribunal in Switzerland, the foreign State which is a Party to the arbitration is not presumed to have surrendered its jurisdictional immunity in case of disputes relating to the implementation of the 'compromis' itself. In such a case, the rules set forth in the Draft Convention on Arbitral Procedure, adopted by the International Law Commission of the United Nations at its fifth session (New York 1955), should be applied by analogy.In considering that the arbitration, as such, is governed by the Law of Nations, the Arbitration Tribunal does not intend to apply this Law to the merits of the dispute, since the law governing the merits is independent of the law governing the arbitration itself.*" (*Saudi Arabia v. Aramco*)

	1963[186] Sole arbitrator, Swiss Federal Judge Pierre Cavin (default-appointed by the Swiss Federal Court) *Ad hoc*	Oil Company (NIOC)	Code of Civil Procedure of Vaud[187]	Agreement (JSA) to expand the production and export of oil (Concession Agreement) for Claimant's purported failure to perform *"[T]he parties undertake to carry out the provisions of the contract in accordance with the principles of good faith and good will and to respect the spirit as well as the letter of the agreement."* (Art. 38(1), Concession Agreement)[188]	compensation for actual loss suffered (*damnum emergens*) and loss of profit (*lucrum cessans*) on the basis of the *pacta sunt servanda* principle
6	***BP v. Libya*** Award, 10 October 1973 1 August 1974[189] Sole arbitrator, Judge Lagergren, President of the CA for Western	BP Exploration Company (Libya) Limited/ Government of the Libyan Arab Republic	Copenhagen, Denmark Danish law	Dispute about nationalisation of Concession granted by Libya to the Claimant, which the Claimant argues amounts to a repudiation of the Concession Agreement between the parties "*the principles of*	Tribunal finds that Libya's nationalisation of BP's assets, rights and interest under the Concession Agreement amounts to a repudiation of that Agreement; that BP's actions were confiscatory and in violation of international law, no compensation having been offered by Libya

[186] *Sapphire v. NIOC* 35 ILR (1963), at pp. 136 *et seq.*

[187] *"The judicial authority thus conferred upon the arbitrator necessarily implies that the arbitration should be governed by a law of procedure, and that it should be subject to the supervision of a state authority, such as the judicial sovereignty of a state." Ibid., at 169.*

[188] *"[The] substantive law applicable to the interpretation and performance of the concession agreement was the principles of law generally recognized by civilized nations*." (as per Judge Cavin) *Ibid*., at pp. 164-165. Relying on the principle of good faith, *"the interest of both parties to such agreements that any disputes between them should be settled according to the general principles universally recognized and should not be subject to the particular rules of national laws [such as the laws of Iran]."* (as per Judge Cavin) *Ibid*., at pp. 175-176.

[189] *BP v. Libya* 53 ILR (1979), at pp. 297 *et seq*. and V YCA (1980), at pp. 143 *et seq*.

	Sweden (default-appointed by the President of the ICJ) *Ad hoc*			*law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals"* (Art. 28(7), Concession Agreement)[190]	to BP; and awards damages to BP[191]
7	***TOPCO & Calasiatic v. Libya*** Preliminary Award, 27 November 1975 Award, 19 January 1977[192] Sole arbitrator, Prof. R. J.	Texaco Overseas Petroleum Co. (TOPCO) and California Asiatic Oil Company (Calasiatic)/ Government of the Libyan Arab Republic	n/a international law (following the *Aramco* reasoning)	Dispute about nationalisation of Concession granted by Libya to the Claimants Libyan and international law[193]	Tribunal finds that Libya's nationalisation of TOPCO's assets, rights and interest under the Concession Agreement amounts to a breach of that Agreement and orders *restitutio in integrum* Finally, the parties terminated the arbitration and settled

[190] "*The Tribunal cannot accept the submission that public international law applies, for paragraph 7 of Clause 28 does not so stipulate. Nor does the BP Concession itself constitute the sole source of law controlling the relationship between the Parties. The governing system of law is what that clause expressly provides, viz. in the absence of principles common to the law of Libya and international law, the general principles of law, including such of those principles as may have been applied by international tribunals."* (as per Judge Lagergren, 53 ILR (1979), at p. 329)

[191] "*when by the exercise of sovereign power a State has committed a fundamental breach of a concession agreement by repudiating it through a nationalization of the enterprises and its assets in a manner which implies finality, the concessionaire is not entitled to call for specific performance by the Government of the agreement and reinstatement of his contractual rights, but his sole remedy is an action for damages"* (as per Judge Lagergren, 53 ILR (1979), at pp. 354).

[192] *TOPCO & Calasiatic v. Libya* 53 ILR (1977), at pp. 389 *et seq*. and IV YCA (1979), at pp. 177 *et seq.*

[193] "*The meaning of the words 'principles of international law', as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States. Now, these principles of international law must, in the present case, be the standard for the application of Libyan law since it is only if Libyan law is in conformity with international law that it should be applied. Therefore, the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence the application of international law to the legal relations between the parties."* (as per Prof. Dupuy, 53 ILR (1977), at p. 453)

	Dupuy (default-appointed by ICJ President) *Ad hoc*				
8	***LIAMCO v. Libya*** Award, 12 April 1977[194] Sole arbitrator, Prof. S. Mahmassani (default-appointed by ICJ President) *Ad hoc*	Libyan American Oil Company (LIAMCO)/ Government of the Libyan Arab Republic	Geneva, Switzerland Guided by *"general principles contained in the Draft Convention on Arbitral Procedure [of] the International Law Commission of the United Nations"*	Dispute about nationalisation of Concession granted by Libya to the Claimant "*the principles of law of Libya common to the principles of international law and in the absence of such common principles then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals"* (Art. 28(7), Concession Agreement)[195]	Tribunal finds that Libya's nationalisation was lawful and subject to payment of compensation to LIAMCO and awards recovery of *damnum emergens* and *lucrum cessans*
9	***Elf v. NIOC*** Preliminary Award, 14 January 1982[196] Sole arbitrator, Prof. Bernard Gomard	Elf Aquitaine Iran (Elf)/ National Iranian Oil Company (NIOC)	Copenhagen, Denmark Danish law	Claimant claims for breach of payment obligations by Respondent under risk service agreement for exploration and production of oil	Tribunal affirms its own jurisdiction (*kompetenz-kompetenz*) and finds that it is a recognised principle of international law, including under Art. 25, ICSID Convention, that *"a State is bound by an arbitration*

[194] *LIAMCO v. Libya* 62 ILR (1977), at pp. 140 *et seq*. and VI YCA (1981), at pp. 89 *et seq.*
[195] Interpreted by Mahmassani as Libyan domestic law being the proper law of the Concession Agreement to the exclusion of any Libyan law in conflict with international law. For the meaning of *"principles of international law"*, Mahmassani relies on Art. 38, Statute of the ICJ.
[196] *Elf v. NIOC* 96 ILR 251, 11 Y.B. Com. Arb. 97 (1986).

	(default-appointed by the Supreme Court of Denmark) *Ad hoc*			Tribunal "*shall in no way be restricted by any specific rule or law, but shall have the power to base his award on considerations of equity and generally recognized principles of law and in particular International Law.*"[197] (Art. 41(5), risk service agreement)	*clause contained in an agreement entered into by the State itself or by a company owned by the State and cannot thereafter unilaterally set aside the access of the other party to the system envisaged by the parties in their agreement for the settlement of disputes."*
10	***Kuwait v. Aminoil*** Award, 24 May 1982[198] Three-member tribunal (Sir Gerald Fitzmaurice, Prof. Hamad Sultan, Prof. Paul Reuter) *Ad hoc*	Government of Kuwait/ American Independent Oil Company (Aminoil)	France French law[199]	Respondent claims for expropriation of the concession agreement between Kuwait and Aminoil and its assets (inclusive of violation of stabilisation clause[200]) by the Claimant and for compensation, including loss of profit Kuwaiti law, public international law and general principles of law[201]	Tribunal finds that the stabilisation clause does not make express reference to a prohibition of nationalisation, so could not be interpreted as such for the lifetime of a long concession agreement; tribunal rejects the argument of the application of a *lex petrolea*, *"a customary rule valid for the oil industry - a* lex petrolea *that was in some sort a particular branch of a general universal* lex

[197] To the exclusion of the laws of Iran.
[198] *Kuwait v. Aminoil* 66 ILR (1982), at pp. 518 *et seq*.
[199] Tribunal was contractually empowered to establish the rules of procedure "*on the basis of natural justice and of such principles of transnational arbitration procedure as it may find applicable*."
[200] "*The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement […]. No alteration shall be made in the terms of this Agreement by either the Shaikh or the Company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement."* (Art. 17, Concession Agreement)
[201] "*The parties base their relations with regard to the agreements between them on the principle of goodwill and good faith. Taking account of the different nationalities of the parties, the agreements between them shall be given effect, and must be interpreted and applied, in conformity with principles common to the laws of Kuwait and of the State of New York, United States of America, and in the absence of such common principles,*

					mercatoria*"*; tribunal awards *"appropriate compensation"* that is *"prompt, adequate and effective"* or *"fair"* for a legitimate act of nationalisation
11	***Phillips v. Iran & NIOC*** Award on Jurisdiction, 30 December 1982[202] Award, 29 June 1989[203] Iran-US Claims Tribunal	Phillips Petroleum Company Iran/ Islamic Republic of Iran	n/a	Claimant claims damages for repudiation by National Iranian Oil Company (NIOC) of Joint-Structure Agreement (JSA) (concession agreement) for the exploration, development and production of Iranian offshore petroleum fields n/a	Tribunal affirms its jurisdiction despite Respondent's nullity argument of the JSA and finds in favour of creeping expropriation by the Respondent[204]; tribunal rejects arguments of *force majeure* as defence to the Respondent's failure to perform
12	***Wintershall v. Qatar*** Partial Award, 5 February 1988[205] Final Award, 31 May 1988[206]	Wintershall, A.G., et al./ Government of Qatar	The Hague, The Netherlands Dutch law	Exploration and Production Sharing Agreement (EPSA) No governing law clause[207]	Tribunal affirms jurisdiction on all the claims; determines that the Respondent has not breached the EPSA; rejects allegation of expropriation of Claimant's rights and economic interests

then in conformity with the principles of law normally recognized by civilized States in general, including those which have been applied by international tribunals." (choice of law clause); and "*The law governing the substantive issues between the Parties shall be determined by the Tribunal having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."* (Art. III(2), Concession Agreement)

[202] *Phillips v. Iran & NIOC* 70 ILR, at pp. 483 *et seq*.

[203] *Phillips v. Iran & NIOC* 21 Iran-US CTR, at pp. 79 *et seq*.

[204] *"The conclusion that the claimant was deprived of its property by conduct attributable to the Government of Iran, including NIOC, rests on a series of concrete actions rather than any particular formal decree, as the formal acts merely ratified and legitimized the existing state of affairs."*

[205] *Wintershall v. Qatar* 28 ILM (1989), at pp. 795 *et seq*.

[206] *Wintershall v. Qatar* 28 ILM (1989), at pp. 795 *et seq*.

[207] "*By paragraph 2 of its Order of March 18, 1987, the Tribunal provided that 'In the absence of a controlling choice of substantive governing law clause and in consideration of the close links of...the EPSA...to Qatar, the governing substantive law shall be the law of Qatar and, in case the Tribunal should determine that it is relevant to an issue, public international law.' The Tribunal, after reviewing the deposited authorities on public international law, has determined that public international law is not independently relevant to the issues before*

	Ad hoc, UNCITRAL Rules				under the EPSA
13	***Amoco v. Iran & NIOC et al.*** Award on Jurisdiction, 30 December 1982[208] Award, 15 June 1990[209] Iran-US Claims Tribunal	Amoco Iran Oil Company/ Government of the Islamic Republic of Iran *et al*.	n/a	Claim for nullification by Respondent of Joint-Structure Agreement (JSA) for the exploration, development and production of Iranian offshore petroleum fields n/a	Tribunal affirms its jurisdiction over the dispute finds in favour of creeping expropriation by the Respondent; tribunal rejects arguments of *force majeure* as defence to the Respondent's failure to perform; ultimately, the parties settle and tribunal adopts a consent award
14	***SEDCO v. NIOC & Iran*** Interlocutory Awards, 24 October 1985[210] and 27 March 1986[211] Final Award, 2 July 1987[212] Iran-US Claims Tribunal	Sedco Inc. (US)/ National Iranian Oil Company (NIOC)	n/a	Claim for expropriation of oil rigs and other assets as a result of being forced to leave Iran due to the Iranian Revolution n/a	Tribunal finds in favour of expropriation; expropriation does not require a formal decree of nationalisation; international law requires full compensation regardless of the lawful/unlawful nature of the compensation
15	**ICC Case No. 4462** First Award, 31 May 1985[213]	National Oil Corporation (Libya) (NOC)/ Libyan Sun Oil Company	n/a	Claim by NOC for Respondent's withdrawal from Exploration and Production Sharing	Tribunal rejects the Respondent's argument of *force majeure* on the basis that competing

the Tribunal in this Partial Award on Liability, and that the governing substantive law on those issues is the law of Qatar." (*Ibid*., at p. 802)

[208] *Amoco v. Iran & NIOC et al.* 1 Iran-US CTR 493.

[209] *Amoco v. Iran & NIOC et al* 25 Iran-US CTR 301.

[210] *SEDCO v. NIOC & Iran* 15 Iran-US CTR 189.

[211] *SEDCO v. NIOC & Iran* 15 Iran-US CTR 189.

[212] *SEDCO v. NIOC & Iran*15 Iran-US CTR 189.

[213] *SEDCO v. NIOC & Iran* 29 ILM (1990), at pp. 565 *et seq.*

	Final Award, 23 February 1987[214] ICC Rules	(Delaware, US)		Agreement (EPSA) granted by Libya to the Respondent, in defence to which Respondent pleads repudiation and *force majeure* on the basis of US sanctions limiting the export of US equipment and workforce to Libya Laws of Libya	companies in identical circumstances, i.e., Occidental and Coastal, managed to continue exploration works under their respective EPSAs with NOC, hence the continuation of the Respondent's works under the EPSA could not be shown to be impossible Tribunal finds that on the basis of the evidence before it, the Respondent did not withdraw from the EPSA; no repudiation of EPSA by Claimant Tribunal finds Respondent in breach of the EPSA and awards damages in favour of Claimant as a result of the breach
16	***Amoco v. Iran (NPC)*** Award, 14 July 1987[215] 15 June 1990[216] Iran-US Claims Tribunal	Amoco International Finance Corporation (US)/ Government of the Islamic Republic of Iran (National Petroleum Corporation (NPC)	n/a	Claim for nullification by Respondent of the so-called Khemco Agreement for the exploration, development and production of Iranian offshore petroleum fields; expropriation of exploration licenses Laws of Iran	Tribunal finds that the expropriation claim is subject to customary international law and not domestic law; lawful expropriation as nationalisation not expressly prohibited in the Khemco Agreement; Claimant's assets constitute property under US-Iran BIT, unlawful expropriation of which creates entitlement to compensation (*restitutio in integrum*) for *damnum emergens*

[214] *SEDCO v. NIOC & Iran* 29 ILM (1990), at pp. 601 *et seq*.
[215] *Amoco v. Iran (NPC)* 15 Iran-US CTR 189.
[216] *Amoco v. Iran (NPC)* 25 Iran-US CTR 490-500.

					(not *lucrum cessans*) Parties ultimately settled, tribunal adopts consent award
17	***Mobil v. Iran*** Award, 14 July 1987[217] Iran-US Claims Tribunal	Mobil Oil Iran Inc. & Others/ Government of the Islamic Republic of Iran and National Iranian Oil Company (NIOC)	n/a	Claim for repudiation of the Sale and Purchase Agreement (SPA) for oil from Iran and expropriation by Respondent's Declaration of 10 March 1979 of the inoperability of the SPA Laws of Iran[218] and international law	Tribunal finds against the Declaration being an act of expropriation but to be read as an agreement to terminate the SPA in return for compensation; Islamic Resolution does not ground the frustration of the SPA by *force majeure* or changed circumstances
18	**ICC Case No. 8198** Final Award, March 1997[219] ICC Rules	Middle Eastern State/West European company	Capital, Middle Eastern State n/a	Sale of crude oil by Claimant (Seller) to Respondent (Buyer); late delivery; claim for storage charge by Claimant Claimant's law	Respondent found liable for storage charges and price differentials resulting from delay in taking delivery; tribunal rejects defence of *force majeure*
19	**ICC Case No. 10302** Final Award[220] ICC Rules	Contractor/ Subcontractor	Athens, Greece Greek arbitration law	Claim for delay in performance of seismic work under service contract for drilling between Contractor and Subcontractor n/a	Tribunal awards liquidated damages and loss incurred to step in for Subcontractor for Respondent's delay in arranging timely shipment of drilling equipment for timely mobilisation
20	**ICC Case No. 10351**	Western European company/ MENA	n/a	Price review arbitration:	Tribunal orders the parties to negotiate the

[217] *Mobil v. Iran*16 Iran-US CTR 3.
[218] In the terms of the SPA, the provisions of the SPA *"shall be interpreted in accordance with laws of Iran."* The Tribunal interpreted this wording as being limited to the *"interpretation of the [SPA]."*
[219] Reported in 25(2) ICC Bulletin (2014), pp. 33-36.
[220] Reported in 25(2) ICC Bulletin (2014), p. 24.

	Partial Award[221] ICC Rules	gas company		Dispute about an indexation price formula for the sale of LNG under a long-term LNG sales contract between the Claimant (Buyer) and the Respondent (Seller) n/a	revision of the correction factor of the price formula over a period of three months; following parties' failure to do so, tribunal determines necessary adjustment of formula and amounts to be awarded to the parties
21	**ICC Case No. 11579** Final Award, December 2005[222] ICC Rules	Rig-operator from Eastern Europe (Contractor)/North African company (Employer)	London 1996 English Arbitration Act	Termination of one of two onshore and offshore drilling contracts for non-payment by Respondent; Respondent's prevention of demobilisation of rig by Claimant English law (in addition to other regulatory requirements for oil exploration/drilling in North African State)	Respondent found liable for preventing Claimant from demobilisation of rig; tribunal rejects claim for compensation as Claimant failed to prove profitable use of rig elsewhere in the event of successful mobilisation; Claimant was entitled to suspend drilling operation pending payment by Respondent; Respondent found liable for repudiation of the contract by continuing in its failure to pay
22	**ICC Case No. 13686** Final Award, April 2007[223] ICC Rules	Company incorporated in Middle Eastern State/ 2 Caribbean companies (with offices in the same Middle Eastern State)	Paris, France French arbitration law	Respondent's attempt to terminate contract for the supply of drilling equipment and services to a third party (not party to the arbitration), caused by roadblock by local tribesmen seeking to prevent	Tribunal rejects request for termination and grants Claimant's claims for standby fees, but rejects claims for loss of revenue and compensation for Claimant's purported loss of reputation for lack of evidence With respect to the

[221] Reported in 25(2) ICC Bulletin (2014), p. 27; and 20(2) ICC Bulletin (2009), p. 76.
[222] Reported in 25(2) ICC Bulletin (2014), pp. 36-43.
[223] Reported in 25(2) ICC Bulletin (2014), pp. 44-48.

				delivery of equipment to place of drilling French law	reputation claim, the tribunal confirms that conditions precedent and more specifically a 45-day negotiation period have been complied with, that the Claimant's reputation claim is therefore not premature and that it does not qualify as a new claim under Art. 19, ICC Rules
23	**ICC Case No. 13777** Partial Award on Jurisdiction, April 2006[224] ICC Rules	Company incorporated in Middle Eastern State/ (1) Company incorporated in Western European State and (2) US company (parent of Respondent 1)	Geneva, Switzerland Swiss arbitration law	Contract for the supply by Respondent 1 (Seller) of gas injection plant equipment to Claimant (Buyer); whether Respondent 2, Respondent 1's parent, may be joined to the proceedings English law	Tribunal finds no grounds for including Respondent 2 (which is subject to US trade sanctions legislation) into the proceedings given that Respondent 2 is not a signatory to the underlying arbitration agreement, nor has it agreed to participate in the arbitration; no power of joinder on part of the tribunal under English law
24	**ICC Case No. 13777** Partial Award on Damages, September 2006[225] ICC Rules	Company incorporated in Middle Eastern State/ (1) Company incorporated in Western European State and (2) US company (parent of Respondent 1)	Geneva, Switzerland Swiss arbitration law	Claimant's claim for repudiation of contract for the supply of gas injection plant equipment by Respondent 1 (stating that it could not perform contract because Respondent 2 was subject to US trade sanctions legislation and losses incurred by Claimant by engagement of a replacement	Tribunal finds that contract was repudiated by Respondent 1 and awards Claimant damages for repudiation on the basis of *Hadley v. Baxendale*

[224] Reported in 25(2) ICC Bulletin (2014), pp. 48-49.
[225] Reported in 25(2) ICC Bulletin (2014), pp. 50-54.

				supplier) English law	
25	**ICSID Case No. ARB/07/25** Jordan-US BIT	Trans-Global Petroleum Jordan, Inc. (TGPJ)/ Hashemite Kingdom of Jordan	n/a	Dispute involving a Production Sharing Agreement (PSA) between Trans-Global Petroleum Jordan, Ltd., TGPJ and the Natural Resources Authority of Jordan, claiming violation of the FET standard under the Jordan-US BIT n/a	Parties settle their dispute and tribunal records settlement in the terms of a consent award
26	**ICSID Case No. ARB/09/14** Danish-Algerian BIT	Maersk Olie Algeriet A/S/ People's Democratic Republic of Algeria	n/a	Dispute involving Production Sharing Agreement (PSA) between the parties	Tribunal orders discontinuance under Art. 43(1), ICSID Convention following parties' settlement
27	**ICC Case No. 13790** Partial Award, April 2009[226] ICC Rules	Middle Eastern subcontractor/ Western European construction contractor	Zurich, Switzerland	Claimant claims for extension of time, disruption, prolongation costs for delays caused by Respondent under contract for the development of an oil refinery in a Middle Eastern country; Respondent claims liquidated damages in turn and contends for inadmissibility of Claimant's claims for breach of notice	Tribunal finds in favour of admissibility of Claimant's claims (albeit global) due to impossibility to establish link between individual instances of non-compliance and the quantification of damages; both parties found liable for some of the delay and disruption and tribunal apportions liability on that basis

[226] Reported in 25(2) ICC Bulletin (2014), pp. 55-66.

				requirements n/a	
28	**ICC Case No. 13898** Final Award[227] ICC Rules	East European State-owned company/ Middle Eastern State-owned company	Geneva, Switzerland	Price review arbitration: Dispute about price revision and reduction under long-term gas sales contract between Claimant (Buyer) and Respondent (Seller) *"relevant trade usages and general principles of law"* in combination with *pacta sunt servanda*	Tribunal decides against price reduction on the bases of deficiency in quality of gas but finds that conditions for price revision have been met by giving the wording of the contract its plain and ordinary meaning
29	**ICC Case No. 14108** Final Award, August 2008[228] ICC Rules	North American company/ Yemen	Paris, France	Claimant claims for breach of long-term PSA for oil exploration and extraction because of replacement of Claimant with NOC despite the purported renewal and extension of the PSA and resultant damages *"principles of law common to Yemen and the United States and in the absence of such common principle, then in conformity with the principles of law normally recognized by civilized nations in general, including*	Tribunal finds that the PSA has not been extended due to failure to exhaust relevant constitutional procedures; rejects Claimant's claim for breach of contract and damages but awards Claimant exploration costs incurred in reliance on Respondent's conduct on the basis of the principle of estoppel and the UNIDROIT Principles of International Commercial Contracts

[227] Reported in 25(2) ICC Bulletin (2014), p. 27.
[228] Reported in 25(2) ICC Bulletin (2014), pp. 67-71.

				those which have been applied by International Tribunals"	
30	***National Gas v. Egypt/ EGPC*** Award, 12 September 2009 CRCICA Rules	National Gas Company/ Arab Republic of Egypt and the Egyptian General Petroleum Corporation (EGPC)	Cairo, Egypt Egyptian law	Claim for compensation under gas supply contract between National Gas and EGPC	Tribunal finds in favour of National Gas
31	**ICC Case No. 15051** Final Award, August 2010[229] ICC Rules	North African State-owned oil producer/ Western European company	Geneva, Switzerland	Price review arbitration: Claimant claims grounds for extraordinary price review of long-term oil supply contract based on hardship, which is contested by Respondent n/a	Tribunal finds that extraordinary price review based on hardship could only succeed if the change in price of Brent could be shown not to have been in the parties' contemplation when signing the contract and on that basis rejects the Claimant's claim for lack of evidence
32	**ICC Case No. 16198** Final Award, January 2011[230] ICC Rules	Middle Eastern construction company/ South-East Asian oil producer	City, Middle East	Claimant claims for delays, variations and wrongful deductions of liquidated damages under an EPC agreement to construct oil production facilities for offshore oil production in a Middle Eastern State; Respondent's	Tribunal rejects Claimant's claims and the Respondent's claim for liquidated damages; finds that Respondent called performance bond in bad faith in circumstances where the value of the bond by far exceeded the Respondent's potential losses

[229] Reported in 25(2) ICC Bulletin (2014), pp. 72-77.
[230] Reported in 25(2) ICC Bulletin (2014), pp. 78-83.

				calling of performance bond n/a	
33	**ICSID Case No. ARB/11/7** Award, April 2014 Egypt-UAE BIT	National Gas SAE/ Arab Republic of Egypt	n/a	Claim for expropriation of Claimant's right to arbitrate and denial by Respondent to enforce its award in Egypt n/a	Tribunal declines jurisdiction on the basis that the Claimant, an Egyptian-incorporated company, fails the foreign control test under Art. 25(2)(b), ICSID Convention
34	**ICSID Case No. ARB/13/15**	Lundin Tunisia BV (Dutch)/ Republic of Tunisia	n/a	Dispute over taxation measures taken by Tunisia against the Claimant within the context of an existing concession agreement for offshore oil production	Tribunal finds in favour of the Claimant and awards compensation to the Claimant
35	**ICSID Case No. ARB/14/4** Egypt-Spain BIT	Union Fenosa Gas SA (UFG) (Spain)/ Arab Republic of Egypt	n/a	Claim by UFG that the Respondent through EGPC and EGAS breached its obligations of FET, FPS, MFN treatment with respect to the Natural Gas Sale and Purchase Agreement between the Claimant and Egyptian General Petroleum Corporation (EGPC)/ Egyptian Natural Gas Holding Company (EGAS) under the Egypt-Spain BIT n/a	Tribunal finds that Egypt is in breach of the FET standard and awards UFG compensation

36	**ICC Case No. 18215/MHM** Final Award, 4 December 2015 ICC Rules	East Mediterranean Gas Company (EMG)/ Egyptian General Petroleum Corporation (EGPC), Egyptian Natural Gas Holding Company (EGAS), Israel Electric Corporation (IEC)	Geneva, Switzerland Swiss law	Dispute about the termination of the Gas Sale and Purchase Agreement (GSPA) between EMG, EGPC and EGAS, the latter two raising a defence of *force majeure* n/a	Tribunal finds that the Respondent's termination of the GSPA was unlawful and rejects *force majeure* defence
37	**ICSID Case No. ARB/12/11** Award on Jurisdiction, 1 February 2016 Award on Liability, 21 February 2017 Egypt-US BIT	Ampal-American Israel Corporation & Others/ Arab Republic of Egypt	n/a	Dispute about the termination of the Gas Sale and Purchase Agreement (GSPA) between EMG, EGPC and EGAS and in particular Egypt's revocation of EMG's tax-free status, which it says is tantamount to an expropriation, as well as a violation of the FET and FPS standards n/a	Tribunal finds that Egypt wrongfully terminated the GSPA and that Egypt's actions amounted to expropriation as well as a violation of the FPS standard within limits
38	**ICSID Case No. ARB/15/30** Final Award, 17 January 2018 Oman-South Korea BIT	Samsung Engineering Co. (South Korea), Ltd./ Sultanate of Oman	n/a	Dispute about Oman's forfeiture of a deposit paid by the Claimant as part of a tender process for an upgrade of an Omani oil refinery	Parties settle and the tribunal adopts a consent award
39	**ICSID Case No. ARB/16/7** Award, 1 February	Attila Dogan Construction Inc./ Sultanate of Oman	n/a	Dispute about exproprietary measures taken by Oman as against Attila with respect	n/a

	2021 Oman-Turkey BIT			to a contract for construction of a project in Oman	
40	**PCA Arbitration** Partial Award, 28 December 2017 *Ad hoc*, UNCITRAL Rules Poland-Egypt BIT	Yosef Maiman & Others/ Arab Republic of Egypt	n/a	Dispute about the termination of the Gas Sale and Purchase Agreement (GSPA) between EMG, EGPC and EGAS n/a	Tribunal affirms its jurisdiction and finds that Egypt has violated the FET standard under the Poland-Egypt BIT by revoking the free zone status of EMG and by repudiating the GPSA
41	**CRCICA Case No. 829/2012** Award on Jurisdiction, 11 November 2013 Award, 7 April 2017 31 October 2018 CRCICA Rules	Egyptian General Petroleum Corporation (EGPC) and Egyptian Natural Gas Holding Company (EGAS)/ East Mediterranean Gas S.A.E.	n/a	Dispute about the termination of the Gas Sale and Purchase Agreement (GSPA) between EMG, EGPC and EGAS	Tribunal affirms its jurisdiction; on the merits, the tribunal finds wrongful termination/repudiation of GSPA by EGPC and EGAS and awards damages to EMG
42	**ICC Case No. 19299** Final Award, 10 July 2015 ICC Rules	Gujarat State Petroleum Corporation Limited, Alkoor Petroo Limited and Western Drilling Contractors Private Limited/ Republic of Yemen and the Yemeni Ministry of Oil and Minerals	Paris, France French law	Dispute about the termination of Production Sharing Agreements (PSAs) concluded between the parties Yemeni law	Tribunal finds that the PSAs were validly terminated on the basis of force majeure, the deterioration of the Yemeni security situation and the increase of security risk was such that it could not have been foreseen by the parties at the time of contracting
43	**ICSID Case No. ARB/18/7**	Corral Petroleum Holding AB (Corral)/ Kingdom	n/a	Claim for expropriation and violation of FET	pending

	Morocco-Sweden BIT	of Morocco		standard under the Morocco-Sweden BIT within the context of a privatisation agreement, whereby Corral Morocco Holdings AB, a wholly-owned subsidiary of Corral, acquired a majority stake in the SAMIR Group, the only refinery operator in Morocco, originally established as a joint venture between the Moroccan State and the Italian energy company ENI n/a	
44	**ICSID Case No. ARB/18/29** US-Morocco FTA	The Carlyle Group LP & Others/ Kingdom of Morocco	n/a	Claim for expropriation of Claimant's shareholding in SAMIR Group	pending
45	**ICC Case No. 24408/ AYZ** Award, 4 January 2018 ICC Rules	Libyan Emirates Oil Refining Company (LERCO)/ Libya National Oil Corporation	n/a	Dispute over shutdown of oil refinery n/a	n/a
46	**ICC Case No. 24722/ AYZ** Award ICC Rules	Trastra Energy/ Libya National Oil Corporation	n/a	Dispute over shutdown of oil refinery n/a	n/a
47	***Trastra v.***	Trastra Energy/	n/a	Claims arising out	pending

	Libya (2019) *Ad hoc*, UNCITRAL Rules OIC Agreement	State of Libya		of the Respondent's alleged failure to protect the Claimant's investment in an oil refinery from the 2011 civil war in Libya	
48	**ICSID Case No. ARB/19/7** Egypt-UK BIT	Petroceltic Holdings and Petroceltic Resources Limited/ Arab Republic of Egypt	n/a	Claim for violation of FET standard and umbrella clause under the Egypt-UK BIT within the context of a Production Sharing Agreement (PSA) between the parties n/a	Tribunal orders discontinuance under Art. 43(1), ICSID Convention following parties' settlement
49	**ICSID Case No. ARB/19/27** UAE-Egypt BIT	CTIP Oil & Gas International Limited/ Arab Republic of Egypt	n/a	Dispute about an agreement for the construction and operation of a gas pipeline n/a	pending

THE RESOLUTION OF DISPUTES UNDER PETROLEUM PRODUCTION SHARING AGREEMENTS

Thomas R. Snider*

I. INTRODUCTION

In most countries, natural resources below the soil and offshore are owned by the government.[1] In the Middle East, for example, natural resources are generally owned by the relevant state.[2] In India, offshore minerals are owned by the central government[3] while onshore minerals are owned by the states.[4]

As a result of the extremely high costs, high risks, environmental issues, and human rights concerns involved in the exploration of oil and gas, most states have created national oil companies ["**NOCs**"] to manage their upstream requirements. NOCs then enter into commercial agreements with private or international petroleum companies in order to assist with their upstream, downstream, and midstream needs.[5] Upstream activities (a stage characterized by high investment capital, high risks, and intensive technology) involve primarily exploration, appraisal, development, drilling, production, and decommissioning; downstream activities include refining, processing, distributing, and marketing the petroleum products to the consumers; and midstream activities involve transportation between initial production and end user, which includes infrastructure necessary to transport these resources over long distances.[6]

States have used different types of granting agreements over the years to regulate the exploration and production of their petroleum resources. An early form of a granting agreement was a concession agreement. Concession agreements trace their origins to the United States. Under a concession agreement, the state essentially concedes control over its petroleum resources to a petroleum company through a contract, permit, license, or other

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[1] Volker Lehmann, '*Natural Resources, the Extractive Industries Transparency Initiative, and Global Governance*', THE HAGUE INSTITUTE FOR GLOBAL JUSTICE, July 2015 https://eiti.org/documents/natural-resources-extractive-industries-transparency-initiative-and-global-governance.

[2] Thomas Snider, Khushboo Shahdadpuri and Aishwarya S. Nair, '*Energy Arbitration in the Middle East'*, GAR, 26 May 2021 https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2021/article/energy-arbitrations-in-the-middle-east.-

[3] Constitution of India, Article 297.

[4] *Id*, Article 294 and 295.

[5] *Supra* note 2.

[6] DW Insights, '*Upstream, Midstream, and Downstream in Oil and Gas Operations*', 1 June 2021 https://www.dwenergygroup.com/upstream-midstream-and-downstream-in-oil-and-gas-operations/.

legal instrument.[7] Title to petroleum is transferred and owned by the petroleum company upon extraction. The petroleum company is granted long-term, uninterrupted, and exclusive exploration rights over a large defined area of the host country to undertake, at its sole risk, exploration and production activities. An example of an early concession is the concession agreement between Petroleum Concession Limited (a UK-based company) and the Sultan of Muscat and Oman, which was entered into in 1937 for a period of 75 years.[8]

Over time, however, host countries sought to retain more control over their resources and, as a result, Petroleum Productions Sharing Agreements ["**PSAs**"] began to emerge. Early forms of PSAs emerged in Bolivia in the 1950s and Indonesia in the 1960s, and PSAs have been preferred over concession agreements since that time.[9] As discussed further below, under a PSA, the host country retains ownership over and the right to exploit resources with the petroleum company acting more akin to a contractor hired to perform the operations. Title to the extracted petroleum remains with the host country, and the PSA grants rights to the petroleum company to recover its costs from production (cost oil) before dividing the remaining production between the host country and the petroleum company (profit oil). PSAs are most common in Asia and Africa.[10]

Other types of granting agreements include service agreements, or risk service agreements ["**RSAs**"], which are popular in Latin America, and licenses, which are common in Europe.[11] Similar to PSAs, RSAs establish a scenario in which the host state retains ownership of the resources and production, and the contractor typically provides the funds required for the exploration and development of petroleum resources. The host state will allow the contractor to recover its cost through the sale of a certain percentage of the oil and gas once the project is successful and will also pay the contractor a fee based on a percentage of the revenues.[12] The main difference between a PSA and a RSA lies in the fact that in a RSA the oil company is paid a flat fee for its services and entails no element of exploration risk, while with PSAs,

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[7] Paul M Blyschak, '*Arbitrating Overseas Oil and Gas Disputes: Breaches of Contract Versus Breaches of Treaty*', 27 JIA, 6, 579, 581 (2010).
[8] Adam Powell, '*Understanding Petroleum regimes in the MENA region*', Al Tamimi Law Update, February 2018 https://www.tamimi.com/law-update-articles/understanding-petroleum-regimes-mena-region/.
[9] Kirsten Bindermann, '*Production-Sharing Agreements: An Economic Analysis*', OXFORD INSTITUTE FOR ENERGY STUDIES, October 1999 https://www.oxfordenergy.org/publications/production-sharing-agreements-an-economic-analysis/.
[10] *Id.*
[11] J William Rowley, Doak Bishop and Gordon Kaiser, '*The Guide to Energy Arbitrations*', GAR, 2nd Edition, Overview, Pg. 3 (2017).
[12] *Id,* Overview, Pg. 10.

the oil company is the sole bearer of the financial risk of exploration.[13] Licences, on the other hand, entitle an oil company to operate in a specific geographical area in exchange for a royalty or fee;[14] the government has policing powers over the licensee, and the licence can typically be revoked for various reasons.[15]

II. PRODUCTION SHARING AGREEMENT AND THEIR BASICS

Under a PSA, the state, as the owner of the resources, engages a petroleum company as a contractor to provide technical and financial services for exploration and development operations, often in an undeveloped, prospective territory. A PSA is typically a long-term contract of 20 or more years[16] where the oil company is granted the right to explore, appraise, develop, and produce petroleum within a designated territory. The petroleum company carries all of the costs and, effectively, the entire exploration risk. If no petroleum is found within a pre-determined period, then the company receives no compensation and relinquishes its rights to the block. The petroleum company typically acquires an entitlement to a stipulated share of the petroleum produced as a reward for the risk taken and services rendered. The host state, however, remains the owner of the petroleum produced subject only to the contractor's entitlement to its share of production.[17]

In a basic PSA, the petroleum company is expected to pay a royalty on gross production to the government. For example, under the Uganda Model PSA, the licensee shall pay to the government 12.5% royalty where the gross total daily production in barrels of oil per day (bopd) exceeds 7,500.[18] After the royalty is deducted, the petroleum company is entitled to a pre-specified share (e.g., 40 percent) of production for cost recovery, which is typically referred to as cost oil. The remainder of the production, so-called profit oil, is then shared between government and the petroleum company at a stipulated share (e.g., 65 percent for the

[13] Kirsten Bindermann, '*Production-Sharing Agreements: An Economic Analysis*', Oxford Institute for Energy Studies, October 1999 https://www.oxfordenergy.org/publications/production-sharing-agreements-an-economic-analysis/.
[14] J William Rowley, Doak Bishop and Gordon Kaiser, '*The Guide to Energy Arbitrations*', GAR, 2nd Edition, Overview, Pg. 10 (2017).
[15] CMS Law-Now, '*Revocation of production licence on an insolvency event*', 24 February 2009 https://www.cms-lawnow.com/ealerts/2009/02/revocation-of-production-licence-on-an-insolvency-event?cc_lang=en.
[16] See, e.g., Art. 11.5 India Model PSC 2005, "The Lease shall be granted for an initial period of twenty (20) years from the date of grant…".
[17] J William Rowley, Doak Bishop and Gordon Kaiser, '*The Guide to Energy Arbitrations*', GAR, 2nd Edition, 2017.
[18] Art. 9.1 Uganda Model PSC 1999.

government and 35 percent for the petroleum company).[19] The precise calculations of cost oil and profit oil are negotiated within the contract. The petroleum company will typically have to pay income tax on its share of profit oil.[20]

PSAs typically sit at the top of a chain of contracts. If there is a consortium of parties to a PSA, which is frequently the case, there will often be a joint operating agreement ["**JOA**"] under which two or more parties agree to work together to explore and exploit an area for petroleum.[21] In JOAs, the parties to the agreement can be broadly classified as operators and non-operators. The operator is responsible for the day-to-day management and operation of the field, while non-operators may be involved in decision-making and have obligations to pay and make cash calls to cover operating costs. As a result of such arrangements, disputes often arise in relation to the approval of operations, accounting, failure to pay cash calls, operator duties, and liability. For example, in *Hindustan Oil Exploration Company Limited v Hardy Exploration & Production*,[22] one party to a JOA initiated an arbitration against its joint-venture partners following the shutdown of a petroleum block in India seeking repayment of expenses it had incurred in the project.[23]

Other agreements in the chain of contracts under a PSA can include (1) engineering, procurement, and construction ["**EPC**"] contracts, (2) supply agreements, (3) participation agreements, (4) study and bidding agreements, (5) confidentiality agreements (6) drilling agreements, and (7) transportation-related contracts.

III. PSA-RELATED DISPUTES

PSAs are complex documents regulating complex activities. Due to this complexity, and in the operating environment at play, including factors such as geography, politics, and volatility of oil prices, diverse types of disputes involving PSAs often arise. The form of dispute resolution under PSAs is typically arbitration. This is for a variety of reasons, including the international nature of PSAs (involving cross-border investment), involvement

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[19] See, e.g., 1973 PSC between Nigeria National Oil Corporation and Ashland Oil Company https://core.ac.uk/download/pdf/234668092.pdf.

[20] Kirsten Bindermann, '*Production-Sharing Agreements: An Economic Analysis*', Oxford Institute for Energy Studies, October 1999 https://www.oxfordenergy.org/publications/production-sharing-agreements-an-economic-analysis/.

[21] Muhammad Waqas, '*History and development of JOAs in the oil and gas industry*', Oil & Gas Academy, 7 March 2016 http://oilgasacademy.com/blog/joint-operating-agreements/#:~:text=The%20Joint%20Operating%20Agreement%20(JOA,exploit%20an%20area%20for%20hydrocarbons.

[22] Hindustan Oil Exploration Company Limited v Hardy Exploration & Production Inc, (2022) MLJU 617.

[23] Toby Fisher, '*Malaysian challenge fails in Indian oil block dispute*', GAR, 28 April 2022 https://globalarbitrationreview.com/article/malaysian-challenge-fails-in-indian-oil-block-dispute.

of states, length of the contract, complexity of the contract, and the technical nature of the subject matter. Some of the types of disputes that frequently arise under PSAs are discussed below.

A. TERMINATION OR RENEGOTIATION OF PSAS BY THE STATE

The termination or renegotiation of a PSA may occur when a new government comes into power and is not satisfied with the terms of the PSA, especially when oil prices rise. For example, Tanzania passed legislation in 2017 that allowed the government to renegotiate or remove terms from PSAs deemed to be unconscionable by the government.[24] Similarly, in 2010, Ecuador stipulated that the state would own all of the oil and gas produced and replaced the terms of PSAs with flat fees.[25] In 2017, however, Ecuador's new government redirected the government's energy policy towards a more active participation by the private sector in the upstream, downstream, and midstream hydrocarbons sector.[26]

B. ABANDONMENT OF OBLIGATIONS BY PETROLEUM COMPANIES UNDER PSAS

Petroleum companies are required to carry out various exploration activities under a PSA, including seismic surveys, exploration drilling, and appraisal work. If the petroleum company does not make a commercial discovery during the exploration phase, the PSA will terminate and the contract area will be relinquished to the host government. If the petroleum company does make a commercial discovery during this phase then, provided the investor satisfies certain conditions as set out in the PSA, the PSA will move into the production phase. During the production phase, the petroleum company is obliged to develop and exploit the discovered petroleum in accordance with the provisions of the contract. However, disputes arise when petroleum companies withdraw from the blocks when they do not find petroleum or when petroleum prices fall drastically.

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[24]The Natural Wealth and Resources (Permanent Sovereignty) Act, 2017 https://www.madini.go.tz/media/Natural-Wealth-and-Resources-Permanent-Sovereignty-Act-2017.pdf.

[25] '*Ecuador increasing state control over oil sector*', BBC NEWS, 27 July 2010 https://www.bbc.com/news/world-latin-america-10772445.

[26] Jaime P. Zaldumbide, Perez Bustamante and Ponce, '*Oil and Gas regulation in Ecuador: overview*', TRPL, 1 (November 2020).
https://uk.practicallaw.thomsonreuters.com/w-028-6002?transitionType=Default&contextData=(sc.Default)&firstPage=true

In *Yemen Oil Gas Co. vs Dove Energy*,[27] for example, Dove Energy, which operated Block 53 in Yemen's Sayun-Masila Basin, issued a notice of withdrawal in 2014, citing low international oil prices, civil unrest, and the failure of the Yemeni Government to address a licence extension. Dove Energy's three partners in the block also withdrew in 2015 after the outbreak of civil war in the country. Shortly thereafter, the Yemeni Oil Ministry filed a USD 100 million International Chamber of Commerce ["**ICC**"] claim against the companies under the block's PSA, contesting the validity of their withdrawal. In a 2019 award, the tribunal found that the three partners had validly exercised their right to withdraw from the block but that Dove Energy's early withdrawal was wrongful. It went on to find all four of the partners jointly and severally liable to pay around USD 30 million to the Yemeni Oil Ministry and the state-owned Yemen Oil & Gas Corporation.[28]

C. GOVERNMENT APPROVAL

As noted above, the central government typically has control over a country's natural resources; in Iraq, however, there is a dispute between the Iraqi Federal Government and the Kurdistan Regional Government ["**KRG**"] as to which entity exercises this authority in Kurdistan. In 2005 Iraq's constitution was ratified to state that oil is "owned by all the people of Iraq" but included only vague principles for management. The Iraqi Government has taken the position that it represents the people and therefore is the exclusive authority in relation to Iraq's petroleum resources; the KRG takes the view that this authority lies in the federal regions and provinces of Iraq. As a result of this issue, in *Monde Petroleum SA v Westernzagros Ltd*,[29] the parties disagreed as to whether a PSA entered into with the KRG had become fully operational and enforceable. In particular, the issue was whether it was sufficient that the KRG had signed and ratified the PSA or whether it was also necessary for the parties to have received a signed copy of a confirmation and support letter from the Iraqi Government. The English Court of Appeal upheld the first-instance decision that the PSA had not become fully operational and enforceable at the relevant time because the confirmation and support letter had not been received from the Iraqi Government. The court based its decision on an interpretation of the relevant agreement as a whole and in light of the commercial background known to the parties at the time when that agreement was executed.

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[27] The Ministry of Oil and Minerals of Yemen v Dove Energy, Petrolin, DNO Yemen, MoE Oil & Gas Yemen and the Yemen Oil & Gas Corporation.

[28] Cosmo Sanderson, 'Yemen wins damages over abandoned oil block', GAR, 1 August 2019 https://globalarbitrationreview.com/article/yemen-wins-damages-over-abandoned-oil-block.

[29] Monde Petroleum SA v Westernzagros Ltd., (2016) EWHC 1472 (Comm).

D. TECHNICAL AND FINANCIAL DISPUTES

Technical and financial disputes are among the most common types of disputes that arise in relation to PSAs. These disputes include cost-recovery disputes that often involve issues regarding what costs are recoverable out of which production and at what point they are recoverable. Such disputes can have knock-on consequences in determining the amounts of profit production that each party is entitled to take or lift from the block and sell.

For example, in *Reliance Industries Ltd v Union of India*,[30] the relevant PSAs entitled the contractor to recover development costs by lifting and selling cost of petroleum subject to a cap referred to as the cost recovery limit ["**CRL**"]. The parties disagreed on which costs constituted development costs for these purposes. The contractor contended that the correct input was all development costs as defined by the PSAs based on other language and provisions in the PSA. In contrast, India contended – and the arbitral tribunal agreed – that the correct input was only the development costs below the CRL, not those in excess of that cap, the latter costs therefore falling to be borne by the contractor. The effect of this decision was that the amount of net profitable production was greater because the cost deduction amount was capped and, therefore, smaller, with the result that India was entitled to a greater share of profit petroleum than under the contractor's interpretation.

Disputes concerning the calculation of profit share in the PSAs are another common type of dispute arising under PSAs. These disputes revolve around accounting and valuation metrics that go into the formulae for calculating the profit shares of which the formulae can often be quite complex. For example, in *Kazakhstan v AGIP Karachaganak BV*,[31] a dispute between an energy consortium and Kazakhstan centred on a "fairness" index in a 40-year PSA signed in 1997. The index determines the amount of profit from the field that goes to Kazakhstan and the consortium respectively.[32] The case ultimately settled with the consortium agreeing to pay Kazakhstan over USD 1 billion and changes being made to the mechanism providing the state with additional revenues from the project.

[30] Reliance Industries Ltd v Union of India, (2014) 7 SCC 603.
[31] Government of Kazakhstan v. AGIP Karachaganak BV, Eni SpA, et al., PCA Case No. 2017-11.
[32] Cosmo Sanderson, '*Kazakhstan to receive billion dollars in settlement*', GAR, 4 October 2018 https://globalarbitrationreview.com/article/kazakhstan-receive-billion-dollars-in-settlement.

E. DELAYS, DISRUPTIONS, AND CANCELLATIONS, INCLUDING FORCE MAJEURE CLAIMS

Political, environmental, and security issues will often lead to disputes under PSAs. In many such cases, the International Oil Company ["**IOC**"] may invoke force majeure as the reason for the delay, disruption, or cancellation of its obligations under the PSA. In *National Oil Corporation v Libyan Sun Oil Co.*,[33] for example, Sun Oil suspended its performance, invoking the force majeure provision in the PSA. Sun Oil claimed that its personnel, all of whom were U.S. citizens, could not enter Libya after the U.S Government instituted an order declaring that U.S. passports were no longer valid for travel to Libya. The Libyan National Oil Company disputed Sun Oil's claim and called for performance to be continued. The tribunal rendered an award in which it concluded that Sun Oil was not excused from its contractual obligations on the basis of force majeure.

In contrast, in *Gujarat State Petroleum Corporation Ltd. et al v. Republic of Yemen, et al.*,[34] the claimants argued and prevailed on the force majeure claim. This case was an ICC arbitration brought by three Indian companies against Yemen and its Ministry of Oil and Minerals involving a claim of force majeure as a result of the Arab spring protests in Yemen. The companies argued that the security situation, which included local clashes, kidnappings, and attacks in the region, culminating in a declaration of a state of national emergency, deteriorated to an extent that the companies were unable to perform their obligations. The tribunal found that the companies were entitled to terminate under the force majeure mechanism as they had been unable to send their employees to undertake the work required under the agreements or to use required sub-contractors.[35]

F. DISPUTES OVER A CONTRACTOR'S SALE OF ITS INTEREST IN A PSA

Disputes can arise when a petroleum company wishes to sell or farm out part of its operating interest and the state does not approve the transfer or delays approving it. In *Andes Petroleum v. Occidental* ["**Oxy**"],[36] for example, Oxy was awarded a contract in 1999 to explore and

[33] National Oil Corp (NOC) v Libyan Sun Oil Co, First Award of 31 May 1985, 29 ILM 565, 584 (1990), 16 YB Com Arb 54, 57 (1991) https://www.trans-lex.org/204462/_/icc-award-no-4462-yca-1991-at-54-et-seq-/.

[34] Gujarat State Petroleum Corporation Limited, Alkor Petroo Limited, and Western Drilling Constructors Private Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals, ICC Arbitration No. 19299/MCP https://www.italaw.com/cases/4209.

[35] Jack Ballantyne, '*Award against Yemen enforced in US*', GAR, 8 October 2018 https://globalarbitrationreview.com/article/award-against-yemen-enforced-in-us.

[36] Andes Petroleum Ecuador Ltd. v. Occidental Exploration & Production Company No. 1:21-cv-03930 (S.D.N.Y. Nov. 15, 2021) https://www.chamberlitigation.com/cases/andes-petroleum-ecuador-ltd-v-occidental-exploration-production-co.

develop an oil block in Ecuador. Soon after, it agreed to farm out a 40-percent interest in the block to Andes. Oxy was to retain full legal title to the contract until Ecuador approved the transfer. The dispute arose when Oxy refused to pay Andes its 40-percent share of the settlement it obtained from Ecuador's termination of the contract. In its award, an American Arbitration Association ["**AAA**"] tribunal found that the companies' agreement entitled Andes to a 40-percent share in the net amount received from an award that had been rendered against Ecuador, despite that award being premised on Oxy only having standing to bring a claim for 60-percent of the proceeds from the block.[37]

G. STABILISATION AND ECONOMIC EQUILIBRIUM CLAUSES

Another recurring issue in PSA disputes is a scenario in which local laws, regulations, or policies change after the PSA is signed, thereby altering the legal and economic basis on which the parties contracted. Many PSAs attempt to deal with situations of this kind by including stabilization or economic equilibrium clauses, pursuant to which a contractor whose rights under the PSA are materially and adversely affected by a change in law or policy can request that the PSA be modified so as to neutralize the effects of such change. The Tanzania Model PSA, for example, stipulates that should there be a change in legislation or regulations which materially affects the commercial and fiscal benefits afforded by the contractor under the PSA, the parties will consult each other and agree to amendments that are necessary to restore as near as practicable the commercial benefits that existed under the PSA as of the effective date.[38] Stabilization and economic equilibrium clauses can vary in their terms and approach. Early contracts sometimes had "freezing clauses" where the applicable laws and regulations were effectively fixed as they were at the time of the signing of the contract. These ordinarily preclude the host state from changing its legislation. This approach is criticised as an encumbrance on the host state's sovereign legislative prerogative and the permanency of sovereignty over its natural resources.[39] Some clauses may provide protection against negative changes in the legal regime (e.g., new taxes).[40] In other cases, where changes in law substantially alter the economic equilibrium between the parties, there

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[37] Sebastian Perry, '*Occidental ordered to hand over share of ICSID award*', GAR, 4 May 2021 https://globalarbitrationreview.com/occidental-ordered-hand-over-share-of-icsid-award.

[38] Tanzania Model PSA 2004, Art. 30(b).

[39] '*Stabilisation Clauses in International Petroleum Contracts, Illusion or safeguard?*', DELOITTE, April 2014 https://www2.deloitte.com/content/dam/Deloitte/ug/Documents/tax/tax_StabilisationClauses_2014.pdf.

[40] Uganda Income Tax Act, Section 89(B) 2: where there is inconsistency in the taxation of contractors and subcontractor's income from petroleum operations, the provisions of part IXA of the Act and petroleum agreement shall take precedence over other parts of the Act. https://s3.amazonaws.com/rgi-documents/0216350e05e4b5dd46a9abc9d5ce2ffe7cda0610.pdf.

may be an obligation to negotiate and agree to changes to the agreement to restore the equilibrium.

H. IMPOSITION OF NEW TAX REGIMES

Disputes may arise when the state imposes a new tax regime that is rejected or contested by the petroleum company. For example, in *Total E&P Uganda BV v Republic of Uganda*,[41] Total initiated a claim against Uganda under the PSA at issue after the Uganda Revenue Authority imposed a stamp duty on part of the field covered by the PSA. Total argued that the area was exempt from tax under the terms of the PSA, whereas Uganda argued that the Ministry of Energy and Mineral Development had lacked legal authority to grant the exemption.[42] The case ultimately settled.

In contrast, in *Tullow Uganda Operations Pty Ltd v Republic of Uganda*,[43] an UNCITRAL panel ruled in favour of Uganda in a USD 400 million contract dispute with Heritage Oil over capital gains tax levied on the sale of two oil blocks. Heritage filed the claim after the state applied a 30-percent tax on the company's sale of two oil blocks arguing that it did not owe tax because it had already filed its tax returns in Mauritius.[44]

I. DISPUTES OVER DECOMMISSIONING OBLIGATIONS

Under a PSA, a petroleum company will typically have certain decommissioning obligations to restore and reinstate any sites on which it has conducted activities to their original state on the termination or expiry of the PSA.[45] Historically, provisions on decommissioning and remediation in PSAs lacked in detail. More recently, there has been a trend of including more detailed provisions in PSAs that require the petroleum company to prepare an abandonment programme for approval by the host government, carry out that programme to the host government's satisfaction, and establish an escrow account into which funds are paid (or to post other financial security) to secure the investor's decommissioning obligations.[46] Conflicts can arise when these obligations are not met.

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[41] Total E & P Uganda BV v Republic of Uganda ICSID Case No. ARB/15/11.

[42] Cosmo Sanderson, '*Total and Uganda settle tax dispute*', GAR, 19 July 2018 https://globalarbitrationreview.com/article/total-and-uganda-settle-tax-dispute.

[43] Tullow Uganda Operations PTY LTD v Republic of Uganda (ICSID Case No ARB/12/34).

[44] Kyriaki Karadelis, '*Uganda wins tax dispute with Heritage*', GAR, 2 March 2015, https://globalarbitrationreview.com/article/uganda-wins-tax-dispute-heritage.

[45] See, e.g., Indian Model PSA, Art. 14.

[46] Peter D. Cameron and Michael C. Stanley, '*Oil, Gas and Mining: A Sourcebook for Understanding the Extractive Industries*', World Bank Group, 2017 https://openknowledge.worldbank.org/bitstream/handle/10986/26130/9780821396582.pdf?sequence=4.

Indeed, many PSAs in Asia are expected to expire within the next ten years and, since many of these were silent on who bears decommissioning obligations, this is bound to be an emerging potential source of dispute.[47] For example, in 2016, Thailand adopted regulations requiring gas field operators to pay the costs of decommissioning assets they have installed, including those they will transfer to a new operator.[48] As a result of these regulations, a USD 2.5 billion dispute between the Thai Government and Chevron has arisen over who is to pay for decommissioning in the Erawan gas field in the Gulf of Thailand.[49]

IV. TYPES OF CLAIMS AND DAMAGES SOUGHT IN PSA DISPUTES

As illustrated by the various types of disputes discussed above, conflicts in PSAs frequently involve contractual claims arising under the PSA itself or the applicable domestic law. These disputes often involve claims brought by the contractor, but they can also involve counterclaims by the state for the contractor's failure to meet the minimum work obligations, environmental claims, and other types of claims. For example, in *PetroTrans Company Ltd v Federal Democratic Republic of Ethiopia,*[50] an ICC tribunal rejected a USD 1.4 billion claim brought by PetroTrans against Ethiopia after the latter terminated five PSAs that had been awarded in 2011. Under the PSAs, PetroTrans had accepted an obligation to provide or arrange a loan for the Ethiopian Government to be repaid from the government's share of proceeds under the PSAs. After PetroTrans failed to obtain the loan and to fulfil other obligations, the government terminated all five PSAs.[51]

As can also be seen from some of the examples above, claims in PSA disputes are frequently brought on the basis of bilateral or multilateral investment agreements ["**BITs**]" and ["**MITs**"]. BITs and MITs seek to promote and protect investments made by foreign investors in the host countries. Broadly speaking, a foreign investor can initiate an arbitration against a host statement for violations of substantive provisions in an applicable BIT or MIT. These substantive protections frequently include fair and equitable treatment, protection

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[47] Elizabeth Chan, '*Forecasting Energy Disputes in Asia*', Kluwer Arbitration Practice, May 2020 https://www.kluwerarbitration.com/document/kli-aiaj-160102?q=decommissioning%20AND%20oil%20and%20gas.

[48] The Petroleum Act and the Petroleum Income Tax Act 1971 (Amended).

[49] Damon Evans, *'Chevron and Thailand at loggerheads over gas field transfer'*, Nikkei Asia, 20 October 2020 https://asia.nikkei.com/Business/Energy/Chevron-and-Thailand-at-loggerheads-over-gas-field-transfer2#:~:text=DENPASAR%2C%20Indonesia%20%2D%2D%20U.S.%20energy,to%20the%20country's%20energy%20production.

[50] PetroTrans Company Ltd v. Federal Democratic Republic of Ethiopia.

[51] Thomas R. Snider and Jackson Shaw Kern, '*Case Note on PetroTrans Company Ltc v. Ministry of Mines of the Federal Democratic Republic of Ethiopia*', EYIR 2017 https://link.springer.com/book/10.1007/978-3-319-90887-8.

against unlawful expropriation, full protection and security for investments, most-favoured-nation treatment, national treatment, and other protections. A number of disputes relating to PSAs have been subject to arbitrations arising under BITs and MITs.

Regardless of whether claims are brought on the basis of contract, domestic law, BITs, or MITs, the calculation of damages sought for the claims under PSAs can be complex and is typically assessed on a case-by-case basis. The quantification of the damage usually requires the valuation of the companies or projects affected by breaches or violations at issue.[52] The three approaches most commonly relied upon to value a business or an asset are; a) the income or discounted-cash-flow ["**DCF**"] approach, b) the market approach, and c) the asset approach.

The income or DCF approach views the commercial value of an asset as the discounted value of the expected returns (or cash flows) attributable to the asset or business. The DCF approach is widely relied on in international arbitration because it requires calculation of the cash flows associated with the project both in the actual scenario, namely after the liable action, and in the counterfactual scenario (i.e., but for the liable action).[53]

The market approach assumes that the value of an asset or business can be obtained from observed market transactions involving comparable assets or businesses. As oil blocks are unique assets, it is often difficult to obtain the data needed to rely on the market approach effectively. This can be exacerbated by the fact that in countries with underdeveloped financial markets, data might not be readily available and, even when available, it might not be reliable.

The asset approach assumes a rational investor would not pay more than the expected costs to create the asset or business. Because the asset approach depends on historical management decisions taken at a certain time, it is susceptible to management bias, might not be optimal from the perspective of a rational investor at the time the damage was suffered and is usually company specific. This approach also requires historical cost information availability. As already stated, in unstable volatile economies, this information is not always readily available.

V. CONCLUSION

[52] Fabrizio Hernandez, Timothy McKenna and Ralph Meghames, '*Damages in the Middle East and Africa: Trends from Recent Cases and Some Challenges*', GAR, 26 May 2021 https://globalarbitrationreview.com/review/the-middle-eastern-and-african-arbitration-review/2021/article/damages-in-the-middle-east-and-africa-trends-recent-cases-and-some-challenges#footnote-016.

[53] *Id.*

Notwithstanding the growth of renewable forms of energy, the exploration for and development of petroleum resources will continue to attract large-scale investment and be a substantial form of revenue for states around the world for decades to come. Many states will continue to undertake these activities through agreements with private parties in the form of PSAs. While PSAs are a preferred form of granting contract and have several legal attributes, disputes will nevertheless continue to be a fact of life in the PSA context given the conditions in which parties operate under these agreements as surveyed above.

THE CONTINUING BACKLASH AGAINST INVESTOR-STATE ARBITRATION MAY CALL FOR THE INCREASING USE OF CONTACT TERMS TO PROTECT ENERGY INVESTMENTS

Gunjan Sharma*

Just like concessions for natural resources, international energy contracts and large energy projects are particularly susceptible to the "political risk" of uncompensated expropriation or other internationally unlawful government interference. This is because an international energy contract or large energy project normally involves high up-front capital expenditures that might only be recovered from long-term profits many years after the expenditures are incurred.[1] As a result, some governments, regulators and regulated utilities may believe they have strong leverage to demand revisions to contract terms and other long-term expectations, on the basis that an investor can be induced to accept these changes once significant sums have been spent on constructing infrastructure but before the profits are extracted.[2]

As Peter Cameron has noted:

> "*Negotiating leverage shifts during the project life cycle: the investors require a long period to achieve their expected return while, once the investment is made, the host state has what it requires. For a variety of reasons, the host state may then conclude that the original bargain is obsolete.*"

Pertinent examples of this phenomenon abound. Investors in foreign energy projects routinely find, for instance, that the favourable feed-in-tariffs for solar energy projects are revised once the project nears completion.[3] Regulators may increase interference in energy tariffs and rates only

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1 PETER D. CAMERON, INTERNATIONAL ENERGY INVESTMENT LAW: THE PURSUIT OF STABILITY (Oxford University Press, 2ed., 2021), at p. 5; HENRY G. BURNETT & LOUIS-ALEXIS BRET, ARBITRATION OF INTERNATIONAL MINING DISPUTES: LAW AND PRACTICE (Oxford University Press, 2017), at p. 30 § 5.04.

2 *See* Cameron, *supra* note 2, at p. 5; *see also* Burnett & Bret, *supra* note 2, at p. 30 § 5.04 ("Similar to their energy or infrastructure counterparts, international mining investments are particularly vulnerable to political risk because of a variety of factors" including because "they generally require large upfront investments that will take years to recoup.").

3 *See* Maximilian Schmidl, '*The Renewable Energy Saga from Charanne v. Spain to The PV Investors v. Spain: Trying to See the Wood for the Trees*,' KLUWER ARBITRATION BLOG (Feb. 1, 2021), available

after a transmission line or power generation facility is constructed. The promise of market liberalisation in the power or oil and gas sectors may be quickly overturned, sometimes on the change of Government. Or, finally, successful energy projects may be assailed for obtaining so-called "windfall profits" that are compulsorily escheated to the State by legislation.

To mitigate this risk, many companies investing in large energy projects rely on the terms of over two thousand bilateral investments treaties ["**BITs**"] and other treaties that protect foreign investments[4] – called "international investment agreements," or IIAs.[5] IIAs provide a panoply of substantive rights to foreign investors and their investments in a host state's territory,[6] including, among others, a guarantee of fair market value compensation in the event of an expropriation;[7] treatment equivalent to that provided to nationals[8] and investors of any third state;[9] the free

athttp://arbitrationblog.kluwerarbitration.com/2021/02/01/the-renewable-energy-saga-from-charanne-v-spain-to-the-pv-investors-v-spain-trying-to-see-the-wood-for-the-trees/). See also Sebastian Perry, *Spain marks 50th renewables claim as new reforms roil investors* (Sep. 21, 2021), https://globalarbitrationreview.com/spain-marks-50th-renewables-claim-new-reforms-roil-investors.

4 Investment Policy Hub, United Nations Conference on Trade and Development: International Investment Agreements Navigator, http://investmentpolicyhub.unctad.org/IIA (May 17, 2022) (listing 2,794 BITs and 425 other investment protection treaties).

5 JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES, (Oxford University Press, 3ed., 2021), at p. 1 ("Investment treaties . . . are essentially instruments of international law by which states (1) make commitments to other states with respect to the treatment they will accord to investors and investments from those other states, and (2) agree to some mechanism for enforcement of those commitments.").

6 KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION (Oxfod University Press, 2010) at p. 121 ("The substantive provisions of a BIT typically apply to assets that fall within the definition of investment and that are located within the territory of one of the BIT parties."); *accord* Salacuse, *supra* note 5, at p. 188 ("Investment treaties often specifically limit their application to investments made within the territory of the respective contracting parties.").

7 *See* Vandevelde, *supra* note 6, at pp. 271-72 ("BIT expropriation provisions always acknowledge the power of the host state to expropriate covered investment, but they impose conditions on the exercise of that power. . . . The requirement of compensation always appears."); *see also id.* at p. 274 ("The reference to adequate compensation generally means the full value of the investment, that is, the fair market value of the investment.").

8 August Reinisch, '*National Treatment in Building International Investment Law: The First 50 Years of ICSID'*, ed. Meg Kinnear et. al., Kluwer Law International, 389 (2016) ("National treatment is one of the basic non-discrimination disciplines in international investment law. Almost all bilateral investment treaties ('BITs') and multilateral investment agreements contain national treatment provisions requiring contracting states to provide investors and investments from other contracting parties treatment no less favorable than that accorded to their own investors and investments.").

9 David D. Caron and Esmé Shirlow, '*Most-Favored-Nation Treatment: Substantive Protection* in Building International Investment Law: The First 50 Years of ICSID', ed. Meg Kinnear et. al. Kluwer Law International, 399 (2016) ("Most investment treaties contain most favored nation ('MFN') clauses. These clauses vary in their precise wording but in general state that the treatment or rights enjoyed by investors covered by a particular investment treaty shall not be less than that 'accorded to investments made by investors of any third State.') (citations omitted).

transfer of funds into and out of the host state;[10] and so-called "fair and equitable" treatment (or the protection of an investors' reasonable and legitimate expectations).[11]

Just as significantly, IIAs also often permit investors to raise claims against the host state for a breach of the treaty's substantive protections to a neutral, international tribunal – called "investor-state arbitration".[12] Investors have taken advantage of these provisions by filing almost 1,200 claims for breaches of BITs and FTAs[13] against numerous countries such as the United States, Canada, Mexico, Venezuela, Argentina, India, Germany, Australia, China and others.[14] Since its emergence as a nascent form of dispute resolution in the 1980s and 1990s, investor-State arbitrations have become one of the most common way in which large investment disputes between investors and States are resolved.

It is therefore fair to say that the "direct invocation of arbitration claims by investors themselves against the host State" is a "development . . . that has transformed the landscape of modern investment protection."[15] This is particularly true in the energy sector. As such, companies considering foreign energy investments should be aware of recent developments that suggest a possible backlash against IIAs and investor-State arbitration:

i. The final version of the US-Mexico-Canada Agreement ["**USMCA**"], the successor to NAFTA, eliminated virtually any investor-State arbitration for Canadian investors in the US, and vice versa, and essentially gutted the same protection for US investors in Mexico except in the case of a limited set of industries that had lobbied in the US for protection to continue.[16] Based on the author's considerable experience advising Governments who are drafting new model IIAs, the terms of the USMCA are gaining prominence outside of that one treaty. This is despite the fact that, in conversations

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[10] Vandevelde, *supra* note 6, at p. 419 ("The vast majority of BITs include a provision guaranteeing the free transferability of payments related to an investment. In many cases, this provision applies to transfers into the state as well as out of the state.").

[11] ANDREW NEWCOMBE AND LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT, pp. 234, 278 (2009).

[12] *See* CAMPBELL MCLACHLAN. ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (Oxford University Press, 2 ed., 2017), at p. 4 § 1.05.

[13] *See* Investment Policy Hub, United Nations Conference on Trade and Development: Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement (May 17, 2022).

[14] *See* "Respondent State", italaw, https://www.italaw.com/browse/respondent-state .

[15] McLachlan et al., *supra* note 13, at p. 4 § 1.05.

[16] Graham Coop and Gunjan Sharma, '*Procedural Innovations to ISDS in Recent Trade and Investment Treaties: A Comparison of the USMCA and CETA'*, AYIA 2019 (Christian Klausegger et. al, eds., 2019), at p. 474.

with the author, an Ambassador at the US Trade Representative refused to confirm whether the USMCA's terms represented a change in US Government policy on IIAs or a *sui generis* and bespoke result of a particular set of negotiating positions in a particular political environment.

ii. The European Commission has endorsed a policy of replacing IIAs that individual European Union ["**EU**"] member states have signed with non-EU countries, with investment protection chapters in the EU's trade agreements.[17] In 2018, this trend was officially endorsed by the Court of Justice of the European Union ["**CJEU**']'s *Achmea* decision, which ruled that intra-EU BITs are not compatible with certain principles EU law.[18] Following this decision, the EU Member States issued a declaration requesting that EU courts set aside intra-EU investment arbitration awards and suspending any new intra-EU investment proceedings.[19] On 5 May 2020, many EU Member States signed an Agreement for the Termination of all Intra-EU Bilateral Investment Treaties, which then entered into force on 29 August 2020.[20] In a similar ruling, the CJEU clarified, in its *Komstroy* decision, that Energy Charter Treaty ["**ECT**"] intra-EU investment arbitration is not compatible with EU law and thus cannot apply in conflicts between an EU investor and an EU Member State.[21]

iii. In the same vein, the EU's latest IIAs provide for a "multilateral investment court" whose judges will be selected exclusively by the Respondent States.[22] Investors may

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17 *See* European Commission, *EU takes key step to provide legal certainty for investors outside Europe* (Dec. 12, 2012), http://trade.ec.europa.eu/doclib/press/index.cfm?id=854.

18 Slovak Republic v. Achmea B.V., Case C-284/16, Judgment, Grand Chamber, 6 March 2018.

19 European Commission, *Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the legal consequences of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union* (Jan 17, 2019) https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en.

20 European Commission, '*EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties'* (May 5, 2020).

21 République de Moldavie v Komstroy LLC, Case C-741/19, Judgment, Grand Chamber, 2 September 2021.

22 Issam Hallak, '*Multilateral Investment Court: Overview of the reform proposals and prospects'*, EUROPEAN PARLIAMENTARY RESEARCH SERVICE, PE 646.147 (January 2020), at p. 3; European Commission, '*Commission Staff Working Document Impact Assessment: Multilateral reform of investment dispute resolution, Accompanying the document Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes'*, SWD (2017) 302, 13 Sept 2017, at 44; European Commission, *Commission welcomes adoption of negotiating directives for a multilateral investment court* (March 20, 2018) https://policy.trade.ec.europa.eu/news/commission-welcomes-adoption-negotiating-directives-multilateral-investment-court-2018-03-20_en).

be concerned that the final panel on this multilateral investment court does not contain the same level of business and commercial experience, and knowledge of the public international law of investment, as might be found in investor-State arbitrations today. Some commentators have also indicated a concern regarding the way the judges on such a court are appointed only by the respondent-States, who have an interest in the outcome of the cases.[23]

iv. Moreover, some countries have terminated IIAs, for a variety of reasons. For example, Venezuela terminated the Netherlands-Venezuela BIT,[24] India terminated the vast majority of its BITs,[25] and Pakistan terminated its BITs as well.[26]

v. Other States, such as the Netherlands, have adopted a new model for their IIAs that might diminish the protection afforded to investors.[27] Sometimes, these new treaties contain both substantive and procedural deviations from older generation treaties that diminish protection for investors – although, based on a systematic survey conducted by the author of 189 treaties signed between 2010 and 2019, that approach is apparently less common than often supposed.[28]

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[23] *See* The Bahrain Chamber for Dispute Resolution (BCDR), *Report on Panel 1: Should investment disputes be submitted to international arbitration or to a permanent investment court?* ("Dr. Lavranos noted that, under the EU-led investment court proposal, states would be able unilaterally to select judges of their choosing, and have some sway over their conduct as they would be unlikely to reappoint judges whose past rulings they disagreed with.").

[24] *See* Luke Eric Peterson, '*Venezuela Surprises the Netherlands With Termination Notice for BIT; Treaty Has Been Used By Many Investors to "Route" Investments Into Venezuela'* (May 16, 2008), https://www.iareporter.com/articles/venezuela-surprises-the-netherlands-with-termination-notice-for-bit-treaty-has-been-used-by-many-investors-to-route-investments-into-venezuela/.

[25] *See* Kavaljit Singh and Burghard Ilge, *India overhauls its investment treaty regime*, FT.com (July 15, 2016), https://www.ft.com/content/53bd355c-8203-34af-9c27-7bf990a447dc.

[26] *See* Zafar Bhutta*, Pakistan to terminate 23 bilateral investment treaties,* THE EXPRESS TRIBUNE (Aug. 5, 2021), https://tribune.com.pk/story/2313937/pakistan-to-terminate-23-bilateral-investment-treaties. *See also*, Ecuador had terminated all its BITs and exit the ICSID Convention, but was forced to change this policy due to investments' shortage (Juan Carlos Herrera-Quenguan, *Explaining Ecuador's shifting position on FDI, investment treaties, and arbitration*, Investment Treaty News (Oct 5, 2020), https://www.iisd.org/itn/en/2020/10/05/explaining-ecuadors-shifting-position-on-fdi-investment-treaties-and-arbitration-juan-carlos-herrera-quenguan/).

[27] *See Netherlands Model Investment Agreement*, INVESTMENT POLICY HUB (Mar. 22, 2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download; Ministry of Foreign Affairs, *IOAB evaluation - Trading interests and values, Evaluation of the international trade and investment policy of the Netherlands IOB Evaluation*, Nr. 442, Sep. 2021, pp. 129-13 .

[28] *See* Gunjan Sharma, *New Procedural Mechanisms for Investor-State Arbitration as Found in 189 Recently Signed Treaties*, in International Arbitration in Times of Economic Nationalisation (Bjorn Arp, Rodrigo Polanco, eds.) (publication pending) (on file with author).

Thus, companies with energy investments ideally should not limit themselves to depending on the protection of IIAs. They should also be using a variety of other ways to mitigate political risk, including not only IIAs, but by examining local law, considering political risk insurance and negotiating appropriate contract protections (among others).The possibility of a sustained "backlash" against IIAs means that there is an impetus to emphasise these other means of investment protection.

In particular, companies should likely be pressing (to the greatest extent possible) for terms in energy contracts (or other regulatory instruments) that guarantee legal protections and the neutral adjudication of disputes, such as:

i. Clauses referring all contract disputes to international arbitration in a neutral jurisdiction.

ii. Governing law clauses that provide for a neutral, well-established legal system to govern the contract in lieu of the host state's law.

iii. Clauses that measure the company's performance, including environmental obligations, to specific industry norms and standards and not inchoate standards such as found in certain documents of certain international organisations.

iv. Stabilisation clauses that freeze the regulatory regime applicable to the contract to the date of execution. However, reliance on stabilisation clauses should be predicated on performing significant research on whether the applicable law of the contract would enforce a stabilisation clause. Certain jurisdictions (such as Israel) have declared that certain stabilisation clauses may be unconstitutional or otherwise unenforceable.[29] Where a stabilisation clause is or may not be available, the investor should strongly consider a clause that permits an independent arbitrator to the re-balance of contract's economic terms in the event of regulatory changes.

[29] *See* HCJ 4374/15 (Israel), The Movement for Quality Government in Israel v Prime Minister, Judgment, 27 March 2016.

v. If possible (and the host state agrees), replicating some of the protections found in IIAs in energy contracts themselves, such as guarantees of fair market value compensation in the event of expropriation, the free transfer of funds, and non-discriminatory treatment.

Companies should also consider the possibility of obtaining unilateral guarantees from the State that certain core conditions on which a project is based – for instance, the price calculation in an off-take agreement – will be maintained throughout the project's life. Ideally, such guarantees would appear in a bilaterally signed contract that could not then be amended without the company's consent. However, where no bilateral promise is possible, a unilateral guarantee, in writing, can later provide strong evidence of a breach of an international legal norm.

Companies should also consider on-the-ground measures to protect foreign investments, such as (to the extent legally possible) maintaining sensitive operational information outside the host state. As an example, $240 million of Canadian mining company's $1.03 billion settlement of its IIA claims against Venezuela was attributed to Venezuela's acquisition of the company's mining data related to one of those mines.[30]

[30] *See Gold Reserves gets $40 million of $1.03 billion settlement deal with Venezuela*, REUTERS.COM (June 16, 2017), https://www.reuters.com/article/us-gold-reserve-arbitration-venezuela/gold-reserve-gets-40-million-of-1-03-billion-settlement-deal-with-venezuela-idUSKBN1972O7.

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THE ENERGY CHARTER TREATY CRISIS – OLD WINE IN A NEW BOTTLE

Harshad Pathak*

I. INTRODUCTION

The last week of November 2022 was pivotal to the intersection of a coordinated response to climate change and international dispute settlement. It witnessed three key developments.

Firstly, on 24 November 2022, the European Parliament passed a resolution calling on the European Commission to immediately begin the process of a coordinated exit from the Energy Charter Treaty, or the "ECT".[1]

Secondly, on 29 November 2022, a group of States, led by Vanuatu, circulated to all member States of the United Nations a draft resolution to request from the International Court of Justice ("**ICJ**") an advisory opinion on the obligations of States in respect of climate change.[2]

Thirdly, on 30 November 2022, the Hague District Court dismissed the compensation claims filed by three separate plaintiffs - RWE Eemshaven Holding II[3], RWE Generation NL BV,[4] and Uniper Benelux Holding BV and others[5] - stating that the Dutch coal phase-out legislation did not breach the plaintiffs' right to property in Article 1 of the First Protocol to the European Convention on Human Rights and Article 17 of the EU Charter of Fundamental Rights.[6]

On the face of it, each development– canvassing the distinct jurisdictions of an investment arbitration tribunal under the ECT, the ICJ, and the Hague District Court – appears unrelated to the other. However, closer scrutiny reveals a thematic nexus. Each development is ultimately a part of an overarching conversation about which fora may be appropriate, or acceptable to the

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[1] Toby Fisher, *EU parliament calls for ECT withdrawal*, GAR (24 November 2022).

[2] Vanuatu ICJ Initiative - Draft Resolution, available at < https://www.vanuatuicj.com/resolution>.

[3] *RWE Eemshaven Holding II v. The State of Netherlands*, Case No. C/09/608584 / HA ZA 21-244, District Court of The Hague, Judgment (30 November 2022).

[4] *RWE Generation NL BV v. The State of Netherlands*, Case No. C:/09/608588/HA ZA 21-245, District Court of The Hague, Judgment (30 November 2022).

[5] *Uniper Benelux Holding BV and others v. The State of Netherlands*, Case No. C/09/611221 / HA ZA 21/419, District Court of The Hague, Judgment (30 November 2022).

[6] Lisa Bohmer, *Dutch court declines RWE's and Uniper's damages claims prompted by the Netherlands' coal phase-out, seeing no violation of human rights instruments; parallel ICSID arbitrations remain suspended*, IA REPORTER (30 November 2022).

community of States, to decide disputes expected to arise from the measures adopted by a State to combat climate change. And at the heart of this conversation lies the fate of the ECT.

The ECT is a multilateral treaty that has been the subject of incessant controversy. Signed in December 1994, and in force since April 1998, the ECT establishes a legal framework to promote long-term cooperation in the field of energy, based on certain complementarities and mutual benefits, in accordance with the objectives and principles of the European Energy Charter.[7] This framework includes provisions for Investment Promotion and Protection,[8] any alleged breaches of which may be adjudicated by an investment arbitration tribunal if opted by the investor.[9] This includes claims advanced by foreign investors seeking compensation for measures adopted by the ECT contracting Parties to transition towards clean energy sources and to combat climate change by reducing their carbon emissions in accordance with the 2015 Paris Agreement.

This conflict between the investment protection standards in the ECT and the obligations in the 2015 Paris Agreement has raised legitimate concerns about the former's computability with the latter instrument. And since combating climate change is no longer an option, the existence of the ECT has been plunged into doubt. The attempts to modernise its text no longer appear to be adequate and several European States have announced their intention to withdraw from it altogether. It is this crisis that has engendered an intense debate about the role of international investment law and investment treaty arbitration in a post-climate change world.

It is unclear how this ECT crisis may eventually end; especially given that the proponents of the treaty continue to remain.[10] The objective of this article is not to speculate on such questions. Rather, this article aims to recharacterize the debate surrounding the ECT crisis through the lens of Critical Legal Studies ("**CLS**"), and bring the adjudicatory function of investment arbitration tribunals to the forefront of the discussion. CLS first emerged in the 1970s as a movement in legal theory representing a committed leftist political stance.[11] It put forth "another conception of

[7] Energy Charter Treaty, art. 2.
[8] Energy Charter Treaty, part III.
[9] Energy Charter Treaty, art. 26(2)-(3).
[10] Nikos Lavranos, *Energy Charter Treaty: Withdrawing is worse than signing up to reformed deal*, BORDERLEX (20 October 2022); Guillermo Garcia-Perrote, Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 1.
[11] Alan Hunt, *'The Theory of Critical Legal Studies'*, [Vol. 6(1)] OXFORD JOURNAL OF LEGAL STUDIES 1 (1986) 1.

law […] that implies a view of society and informs a practice of politics."[12] In international law, the CLS movement has emerged under the label of New Approaches to International Law ("**NAIL**"),[13] which challenges the assumption that the rules and doctrines of international law are apolitical and their application is objective.

In a nutshell, the ECT crisis debate assumes that the disagreement between the proponents and critics of the ECT is confined to the text of the treaty. As a corollary, it is also assumed that a viable solution to this conflict requires one to examine whether the modernised text sufficiently addresses the incompatibilities between the ECT and the 2015 Paris Agreement. However, this characterization is, at best, incomplete, and at worst, a red-herring. This article argues that the ECT crisis is more appropriately viewed as an attempt by the contracting Parties to not only review the substantive standards of investor protection in the ECT, but also the jurisdiction of an investment arbitration tribunal to decide critical issues that impact the existence of the planet as we know it. It triggers a far more fundamental question – can the fate of the global response to climate change be left at the altar of investment arbitration tribunals?

Towards this end, this article endeavours to shift the emphasis from the text of the ECT to its application through arbitral decision-making. In this context, it argues that the adjudication of investor-state disputes essentially entails apolitical function in which the outcome of a case is not constrained by rules and doctrines. Instead, it is constrained by subjective value-judgments and political choices made by investment arbitrators based on their histories, experiences, and ideologies. Thus, a meaningful understanding of the ECT crisis must conform to this paradigm.

Part II of this article provides an overview of the ECT crisis, which forms the context for the subsequent analysis. Part III thereafter discusses how the rules and doctrines of law, including international investment law, denote the language through which political value-judgments are clothed with an appearance of objectivity. This analysis equally extends to the ECT crisis, which merely mirrors in a different context the increasing resistance by Global South states to investor-state arbitration. Part IV concludes.

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[12] Roberto Unger, '*The Critical Legal Studies Movement',* [Vol. 96(3)] HARVARD LAW REVIEW 561 (1983) 563.
[13] Nigel Purvis, *'Critical Legal Studies in Public International Law'*, 32 HARVARD JOURNAL OF INTERNATIONAL LAW 81 (1991) 89.

II. THE ENERGY CHARTER TREATY CRISIS

The ECT is in crisis! Over the past decade, the contracting Parties to the ECT – especially Spain, Italy, and the Czech Republic – have faced several claims under the ECT made by foreign investors in relation to the State's measures for transitioning to clean energy sources. In many cases, investment arbitration tribunals have ruled in favour of the investor and awarded significant monetary compensation. This naturally encouraged other investors to also file similar claims for monetary compensation under the ECT, as opposed to the national courts of the host State. But at the same time, the increasing number of claims under the ECT, and its resultant application by investment arbitration tribunals, engendered apprehension about the objectives and impact of the treaty on the contracting Parties. One rightly questioned whether the ECT may eventually discourage the contracting Parties from adopting necessary measures relating to clean energy transition and reducing carbon emissions in accordance with the 2015 Paris Agreement.

The adoption of the 2015 Paris Agreement was a watershed moment to combat the threat of climate change. It also sparked legitimate concerns about its compatibility with the ECT. Article 2 of the Paris Agreement set a goal of limiting the increase in the global average temperature to well below 2 degrees Celsius, while simultaneously attempting to limit the increase to 1.5 degree Celsius.[14] The attainment of this goal would require all contracting Parties to adopt necessary measures that would adversely impact existing industries and investments. The recent COP27 UN Climate Change Conference in November 2022 reaffirmed this sentiment. The European Commission endeavoured to "push for the implementation of existing commitments to move from ambitious words to concrete actions"; being well-aware "that only the most drastic cuts in carbon emissions from now would help prevent an environmental disaster."[15] It is likely for this reason that the Preamble to the 2015 Paris Agreement itself recognizes that the "Parties may be affected not only by climate change, but also by the impacts of the measures taken in response to it."[16] But what could this impact be?

It did not take long for the ECT contracting Parties to foresee that this impact may arrive in the form of investment arbitration awards issued under the ECT, imposing significant monetary

[14] Paris Agreement, art. 2(1)(a).
[15] European Commission Press Release, *COP27: EU calls on all Parties to take concrete steps to limit global warming to 1.5°C and respect the Paris Agreement* (4 November 2022).
[16] Paris Agreement, Preamble.

liabilities on States that attempted to comply with their obligations under the Paris Agreement. Indeed, many of the "ECT contracting parties have implemented or will soon implement policy measures to phase out fossil fuels and alter their energy mix, as a step toward meeting their Net Zero targets and obligations under the [2015] Paris Agreement", which were "likely to affect investments associated with fossil-based energy sources, and thus may give rise to claims under the ECT's investor protections."[17]

Such fears were not misplaced. In 2021, the Netherlands received two claims under the ECT, by RWE[18] and Uniper,[19] which challenge the same 2019 Dutch law requiring a phase-out of all coal-based power plants by 2030 that was also considered by the Hague District Court. Though the ICSID arbitration proceedings have been currently stayed by a German court on account of certain jurisdictional constraints,[20] other similar claims under the ECT are expected to follow.

It is in these circumstances that in 2017, the ECT contracting Parties commenced a process to "modernise" the ECT. In June 2022, the contracting Parties "reached an agreement in principle, thus concluding the negotiations for a modernised ECT."[21] Yet, this was not the end of the road.

Independent organisations persistently questioned the adequacy of the modernisation of the treaty. For instance, in December 2020, a report published by a collective of independent policy think-tanks published a report that analysed the ECT and termed it "an antithesis to the Paris Agreement, allowing fossil fuel companies to sue countries over their climate policies rather than strengthening the global response to climate change."[22] Among other things, it was argued that (1) there was no evidence that the ECT attracted investment[23] or that its existence was an important factor for renewable energy investors;[24] (2) the national courts were a suitable forum

[17] Anja Ipp, Annette Magnusson and Andrina Kjellgren, *The Energy Charter Treaty, Climate Change and Clean Energy Transition* (Climate Change Counsel, 2022) p.13.
[18] *RWE AG and RWE Eemshaven Holding II BV v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/4 (introduced on 2 February 2021).
[19] *Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V. v. Kingdom of the Netherlands*, ICSID Case No. ARB/21/22 (introduced on 30 April 2021).
[20] Lisa Bohmer, *RWE v. Netherlands arbitration is suspended, pending appeal against German Anti-Arbitration Declaration*, IA REPORTER (15 November 2022).
[21] Energy Charter Secretariat, *Decision of the Energy Charter Conference* (24 June 2022).
[22] PowerShift, Corporate Europe Observatory, Transnational Institute, et al., *Busting the myths around the Energy Charter Treaty A guide for concerned citizens, activists, journalists and policymakers* (December 2020) 4.
[23] *Ibid* at p.10.
[24] *Ibid* at p.18.

to hold governments accountable;[25] (3) the envisaged modernisation is likely to merely result in "cosmetic changes";[26] and (4) a widespread opposition to investment treaties, in general, should not be overlooked.[27]

In 2022, the Climate Change Counsel, a Stockholm-based think tank, reviewed 64 (of the 75 known) arbitral awards rendered under the ECT prior to August 2021.[28] Among other things, it concluded that the fact that countries such as Spain and Italy have faced a significant number of investment claims under the ECT can create a regulatory chill, i.e., "a disincentive for states to pass bold energy transition policies."[29] Further, while the ECT contains provisions emphasizing sustainability, renewable energy, and coordination of energy policy, these "provisions have not played any significant role in investor-state disputes to date."[30] Likewise, it noted that "[d]espite the long-recognized connection between the energy sector and global warming, climate change and energy transition are generally absent from the ECT jurisprudence."[31]

In October 2022, the International Institute for Sustainable Development ("**IISD**") published its report analysing the proposed reform of the ECT and its modernised text.[32] It concluded that "the revised treaty has not, overall, succeeded in addressing major challenges for host states regulating in the public interest, including when taking climate action."[33] The report noted that, among other concerns, the modernised text continued to embrace broad investment protection standards with weak, limited carve-outs to shield public policy,[34] and did not even attempt a systemic reform of the investor-state dispute settlement framework[35] or the compensation and valuation standards and techniques.[36] The report termed the modernised ECT "an instrument that remains a serious obstacle to states' ambitions to limit global warming to 1.5°C."[37]

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[25] *Ibid* at pp.20-21.
[26] *Ibid* at pp.24-25.
[27] *Ibid* at pp.34-35.
[28] *Supra* note 17 at p.5.
[29] *Ibid* at p.34.
[30] *Ibid* at p.6.
[31] *Ibid* at p,6.
[32]Lukas Schaugg and Sarah Brewin, *Uncertain Climate Impact and Several Open Questions - An analysis of the proposed reform of the Energy Charter Treaty* (IISD, 2022).
[33] *Ibid* at p.3.
[34] *Ibid* at pp.3-4, pp.23-30.
[35] *Ibid* at p.4, pp.39-40.
[36] *Ibid* at p.4, pp.32-34.
[37] *Ibid* at p.41.

This independent criticism was fittingly accompanied by two awards issued under the ECT, namely *Rockhopper Exploration PLC and others v. Italian Republic*[38] and *Mathias Kruck and others v. Kingdom of Spain,*[39] which found the host State liable for breaches of the treaty. While the award on compensation in the latter case is awaited, in the former case, the tribunal directed Italy to compensate the investor to the extent of EUR 184 million along with a further sum towards the payment of costs and interests (pre- and post-award). At the very least, the timing of the awards did not assist the proponents of the ECT.

As a statement published by IISD noted:

> "*The growing number of withdrawal announcements follows widespread criticism of the reform proposals, which IISD analysis confirms leave too many open questions over the "modernized" ECT's climate impacts. Recent arbitration cases based on the existing treaty have only served to underscore the problems inherent in the ECT's design, such as the claims brought by energy giants RWE and Uniper against The Netherlands contesting the Dutch decision to phase out coal-fired power generation by 2030.*"[40]

In such circumstances, some ECT contracting Parties began to question the sufficiency of the modernisation attempts. They wondered if exiting the ECT may be a more effective solution to address climate change and clean energy transition concerns. Many of them titled towards the latter, with Poland, Spain, Belgium, France, Slovenia, the Netherlands, and Germany shortly announcing their intention to withdraw from the ECT.[41] Predictably on 22 November 2022, the contracting Parties to the ECT delayed their vote on whether to adopt a modernised version of the treaty due to a lack of consensus.[42] Mere two days later, the European Parliament passed a resolution, by 303 votes against 209, calling on the European Commission to immediately begin

[38] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022).
[39] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (14 September 2022).
[40] IISD Newsroom, *Energy Charter Treaty Withdrawal Announcements Reflect Reform Outcome is Insufficient for Climate Ambition* (IISD, 2022).
[41] Guillermo Garcia-Perrote and Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 1.
[42] Jack Ballantyne, *ECT parties delay vote on treaty reform*, GAR (22 November 2022).

processing a coordinated exit from the ECT and to nullify its sunset clause providing for twenty years of post-exit application.[43]

For the time being, while the controversy surrounding the continuation of the ECT post its termination may persist, it appears that the demise of the ECT may be near. To then paraphrase a traditional proclamation - the ECT is dead, long live the ECT no more!

III. LAW AS THE LANGUAGE OF POLITICS

As previously foreshadowed, the ECT crisis is often reduced to assessing the compatibility between a modernised ECT and the 2015 Paris Agreement. It is described as a conflict between two international instruments and the values they embrace. This paves the way to hypothesize that this conflict can be harmoniously addressed by bringing the ECT in line with the 2015 Paris Agreement. And the fate of the ECT is ultimately determinable by the success of this attempted harmonisation or modernisation process. This approach is adopted not only by the proponents of the ECT, but is also visible in the criticism of the modernisation process.[44]

While the incompatibility of the text of the ECT and the 2015 Paris Agreement is relevant to the discourse surrounding the ECT crisis, it is hardly the whole of it. Rather, this discourse is incomplete until item braces the role of investment arbitration tribunals as decision-makers. The fundamental question is not about the compatibility of the substantive standards of investment protection in the ECT, but rather the extent of trust that can be placed in those who conventionally interpret and apply it to resolve investor-state disputes implicating the contracting Parties' policies to combat climate change. This is because the outcome of a case under the ECT, or any other investment treaty, is not necessarily constrained by the substantive provisions of a treaty, but rather the political choices and value-judgments made by an arbitral tribunal.

This assertion is appropriately explored through the lens of (A) CLS and the Indeterminacy Thesis, which permits (B) a Reformulation of the Energy Charter Treaty Crisis.

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[43] Toby Fisher, *EU parliament calls for ECT withdrawal*, GAR (24 November 2022).

[44] N. Bernasconi-Osterwalder and M.D. Brauch, *Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition*, TDM Special Issue on Modernisation of the ECT (2019); Aishwarya Nair and Lukas Schaugg, *The Reform That Isn't: Why the Reformed Energy Charter Treaty Threatens Climate Commitments,* VERFBLOG (18 November 2022); Martin Dietrich Brauch, *The Agreement in Principle on ECT "Modernization": A Botched Reform Attempt that Undermines Climate Action*, COLUMBIA CENTER ON SUSTAINABLE DEVELOPMENT BLOG (17 October 2022).

A. CLS, INDETERMINACY, AND FUNDAMENTAL CONTRADICTION

The regime of international investment law rests upon a twin-assumption: *firstly*, the rules of international investment law are apolitical; and *secondly*, these rules are sufficiently determinate such that they can be objectively applied by neutral decision-makers, or arbitrators, to constrain a singular correct outcome. These assumptions are, however, inaccurate, as demonstrated through a CLS-led critique.

In mainstream scholarship, the most popular claim advanced by CLS is that law is politics;[45] closely followed by its "indeterminacy" thesis which says that "rules are not on their own capable of providing a solution, as they are indeterminate."[46] However, though accurate, these aspects warrant further explanation.

At its core, CLS challenges the assumption "that some type of analysis provides a solution to problems of legal choice, policy choice, or social analysis by limiting the range of pure choice within which the analyst - judge, policy-maker, social scientist - operates."[47] And this challenge is based on the indeterminacy thesis, namely that legal rules and doctrines are indeterminate, or at least, not sufficiently determinate.[48]

Determinacy implies that a legal rule or doctrine, if applied correctly, would distinguish right from wrong in a specific case. While resolving any legal issue, it would constrain the decision-maker to reach a singular accurate outcome by eliminating all other available choices. Inversely, to claim "that a legal doctrine is indeterminate means that [it] allows choice rather than constraining or compelling it."[49] In other words, an indeterminate rule or doctrine "does not provide determinate answers or cover all conceivable situations."[50] It simply becomes the

[45] Andrea Bianchi, *International Law Theories* (OUP 2016) 135.
[46] *Id*.
[47] Mark Tushnet, 'Perspectives on Critical Legal Studies', [Vol. 52] THE GEORGE WASHINGTON LAW REVIEW 239 (1984) 239.
[48] Ken Kress, 'Legal Indeterminacy', [Vol. 77(22)] CALIFORNIA LAW REVIEW 283 (1989) 283.
[49] Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' [Vol. 94(1)] THE YALE LAW JOURNAL 1 (1984) 11.
[50] J. Stuart Russel, 'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy', 18 OTTAWA LAW REVIEW 1 (1986) 8.

language through which a decision-maker can imperfectly mediate between equal competing interests, neither of which is dominant, based on their own value judgments.[51]

The indeterminacy thesis, in turn, is based on the notion of fundamental contradiction. This notion understands that legal rules and doctrines are perforated with a pervasive contradiction between the sanctity of individual freedoms and a simultaneous need to preserve relations with others.[52] As such, the maintenance of social order was predicated on "a series of contradictory dualities and values", such as autonomy and community.[53] To put it differently, legal doctrines and rules are infused with "competing, and indeed irreconcilable, principles and ideals", such that to resolve this contradiction in a dispute, "the judge must make a choice which is not dictated by the law."[54] These choices are influenced by the historical experiences, ideologies, and values of a decision-maker; thereby, contradicting the claims of neutrality or objectivity in decision-making.[55] Consequently, the prevalence of fundamental contraction makes legal rules and doctrines inherently malleable, and incapable of being applied objectively and apolitically to constrain a singular correct outcome.[56] On the contrary, they are capable of being applied to justify a plurality of plausible outcomes, no matter how opposing they may appear.[57]

From this perspective, the concept of "[m]ediation between conflicting interests at best offers only a pragmatic response to social conflict which can achieve nothing other than a set of results which reflects the unequal distribution of power and resources whilst claiming to act in the name of a set of universal social values."[58] It is neither objective nor apolitical. This reveals legal reasoning and decision-making as a value-driven process that seamlessly "blends into political and ideological discourse."[59]

This analysis extends to the regime of international investment law and arbitration as well.

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[51] *Ibid,* at p.8.
[52] Duncan Kennedy, *'The Structure of Blackstone's Commentaries'* 28 BUFFALO LAW REVIEW 205 (1979) 213.
[53] J. Stuart Russel, *'The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy'* 18 OTTAWA LAW REVIEW 1 (1986) 10.
[54] Andrew Altman, '*Legal Realism, Critical Legal Studies, and Dworkin'* 15(3) PHILOSOPHY AND PUBLIC AFFAIRS 205 (1986) 217.
[55] Joseph Singer, '*The Player and the Cards: Nihilism and Legal Theory'* 94(1) THE YALE LAW JOURNAL 1 (1984) 5-6.
[56] *Supra* note 53 at p.18.
[57] *Supra* note 54 at p.209.
[58] Alan Hunt, *'The Theory of Critical Legal Studies'* 6(1) OXFORD JOURNAL OF LEGAL STUDIES 1 (1986) 5-6.
[59] *Ibid.*

The international investment law regime embraces a fundamental contradiction between two competing, but equal, values relating to individual and community interests. On the one hand, the framework of investment treaties and arbitration is designed to protect the property rights-based interests of a foreign investor. On the other hand, it also endeavours to avoid excessive interference with the sovereign autonomy of the host State to adopt public interest measures. This equality is logical. It emanates from the emphasis of investment treaties on the protection of foreign investment, balanced against the candid acknowledgment that "if the protection of the foreign investors were exaggerated, the host State might be dissuaded from admitting all foreign investors."[60]

Accordingly, an investment treaty denotes a negotiated balance between the two competing values, reached in the context of the politics of the global order. This is accepted by investment arbitration tribunals too. For instance, they rightly recognize that the ECT is "aimed at realizing a balance between the sovereign rights of the state over energy resources and the creation of a climate favorable to the flow of investments on the basis of market principles."[61] Further, this is not confined to the ECT, but instead denotes a more general principle that "the protection of investments and the right to regulate operate in a balanced way under the ECT as in all other investment treaties."[62]

The mere existence of a balancing exercise, however, does not guarantee uniformity. Rather, the contours of the balance arrived in each treaty are perennially uncertain. It remains contingent on multiple considerations, such as the identities of the negotiating States, their social, political, and economic priorities, and any relevant circumstances prevailing at the time of the conclusion of the treaty. Notably, any fundamental change in such circumstances would necessarily require the negotiating States to revisit the tenability of the balance attained. The aforementioned desire of European States to exit the ECT in the face of climate change concerns, and the learning from the previous ECT arbitration decisions, is a contemporary example of this tendency.

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[60] *Rumeli Telekom A.S. and Telsim Mobil TelekomunikasyonHizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award (29 July 2008) ¶ 598.
[61] *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award (28 February 2020) ¶ 570. See also *Sevilla Beheer B.V. and others v. Kingdom of Spain*, ICSID Case No. ARB/16/27, Decision on Jurisdiction, Liability and the Principles of Quantum (11 February 2022) ¶ 714.
[62] *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012-14, Final Award (28 February 2020) ¶ 570.

Therefore, the structural design of investment treaties, and the equal competing values they embrace, provide the argumentative framework within which each investor-State dispute must be resolved through the agreed processes of dispute settlement. And within this framework, the purpose of international investment law rules and doctrines is to mediate the conflict between these equal competing values in the context of a specific dispute. An investment treaty, as such, merely provides a prescriptive framework for ordering relations between a host State and its foreign investors. It still requires interpretation and application, either by consensus or through peaceful coercion. The latter predominantly occurs through investment arbitration proceedings, in which arbitrators are required to decide which competing value to prioritize in the factual circumstances before them. This is the function of an investment arbitration tribunal that cannot be described as apolitical or value-neutral.

B. REFORMULATING THE ENERGY CHARTER TREATY CRISIS DEBATE

The above deconstruction of the framework of international investment law and arbitration allows us to reformulate the debate surrounding the ECT crisis. Contrary to certain oft-repeated assumptions, the locus of this crisis is not the conflict between investment protection standards in the ECT and the obligations in the 2015 Paris Agreement. Rather, this crisis largely emanates from, and is centred around, identifying the decision-makers for resolving the apparent conflict.

As noted by certain scholars, albeit in relation to the clean energy transition disputes: "[t]he interaction between international legal frameworks leads to the States' competing obligations – towards protection of the environment on the one hand and protection of the investor on the other hand. Effectively, it requires a fine balance between States' right to regulate aiming at a just energy transition and protection of (fossil fuels) investors."[63] The ECT crisis is, therefore, not only about reconciling "the States' competing obligations" that require to be balanced, but also about revisiting which forum will determine this balance.

In this regard, the evidence relating to investment arbitration claims and decisions under the ECT in relation to the clean energy transition measures hardly inspires confidence. For instance, even the proponents of the modernised ECT acknowledge that:

[63] Piotr Wilinski and Matthew Brown, *Is the Energy Charter Treaty Fit for The Energy Transition? The Analysis of The Climate Change Counsel Report*, JUS MUNDI BLOG (3 October 2022) p.5.

> "*The increase in cases brought by investors in the renewable energy sector (as a proportion of treaty claims generally) has been remarkable. Available data suggests that of all claims initiated under the ECT since its inception in 1994, approximately 60% are claims made by investors in the renewable energy sector (up to 1 June 2022). The increase is particularly noteworthy when considering claims commenced in the past decade only. Of all claims commenced under the ECT since 2012, claims relating to reforms affecting the renewable energy sector make up just under 70%.*"[64]

It is logical and foreseeable that such a remarkable increase in cases may disincentivise States from adopting the necessary policies to combat climate change due to a fear of justifiable as well as unjustifiable adverse outcomes. This was essentially the "regulatory chill" that the Climate Change Counsel had warned about.[65] And it exists not only in relation to the obligations under the 2015 Paris Agreement, but also in general international law. After all, all States have "the right and the duty to enact regulations and to take measures to protect society and the environment. The right to regulate arises out of the basic attributes of sovereignty, while the duty to protect arises out of a range of international and domestic legal instruments."[66]

Nonetheless, under the existing and modernised text of the ECT, investment arbitration tribunals "have the power to integrate these two areas of international law or to decide that one trumps the other."[67] They essentially "set the boundaries for state regulatory conduct",[68] and for this reason, "continue to play an important role in interpreting the investor protections and deciding how they apply, including in the context of climate change and energy transition."[69]

It is this insistence that may prove the biggest obstacle to the survival of the ECT. There is a diminishing confidence that an investment arbitration tribunal could be trusted to undertake an analysis similar to that of the Hague District Court for assessing the three compensation claims relating to the Dutch coal phase-out legislation.

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[64] Guillermo Garcia-Perrote, Ella Wisniewski, *European exodus from the ECT: politics and unintended consequences*, GAR (15 November 2022) 2.
[65] *Supra* note 17 at p.34.
[66] SA Spears, *´The Quest for Policy Space in a New Generation of International Investment Agreements´*, 13 *Journal of International Economic Law* 4 (2010) 1038.
[67] *Supra* note 17 at p.74.
[68] *Ibid*.
[69] *Supra* note 17 at p.75.

Indeed, while dismissing the compensation claims, the Hague court adopted a "fair balance test" to assess whether the legislation under challenge struck a reasonable balance between the requirements of public interest and the protection of the fundamental rights of the plaintiff.[70] As part of this analysis, the court considered the Dutch government's concern about "the arrival of new coal-fired power stations" and the prevalence of "the condition that they had to fit in with the climate policy and the climate objectives to which the Netherlands has committed itself."[71] It equally noted that "it is not merely decisive whether financial compensation has been provided for the owners of the coal -fired power stations , let alone that this can only be met if they are offered "full compensation" or if they are given the opportunity to "recoup their investments in full", as RWE Generation seems to assume."[72]

This analysis can be contrasted with the observation made by the ECT tribunal in *Rockhopper Exploration PLC and others v. Italian Republic* that:

> "*… Italy's sovereign choice to proscribe such offshore production, based on its own inherent authority and dignity, was its to make. However, that sovereign choice or act or decision… of Italy may carry with it a concomitant consequence to pay certain compensation pursuant to internationally-binding promises it made to foreign investors arising from its being a party to the ECT at the material time*."[73]

Admittedly, both decisions applied distinct legal instruments and provisions. However, in each case, notwithstanding the legal rule or doctrine raised, the decision-maker was confronted with a fundamental contradiction between an investor's right to property and the State's public interest. Each litigant naturally prioritized his own interest, and it fell for the decision-maker to decide where the appropriate balance lay. This decision was, as is frequent in decision-making, based on the political value-judgments and prioritizations made by the decision-maker, clothed with objectivity through the language of the applicable legal rules and doctrines. This is not a criticism, but only a more accurate description of decision-making provided by CLS.

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[70] *RWE Generation NL BV v. The State of Netherlands*, Case No. C:/09/608588/HA ZA 21-245, District Court of The Hague, Judgment (30 November 2022) ¶ 5.15.
[71] *Ibid* at ¶ 5.17.30.
[72] *Ibid* at ¶ 5.20.2.
[73] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022) ¶ 6.

From this perspective, the *Rockhopper* tribunal's conscious, but self-serving clarification, that "this award is not a "victory" for one side or the other in that environmental debate, which is of a civic or political character, but rather addresses the legal issue at hand"[74] misses the point. It is based on a flawed assumption that the determination of the "legal issue at hand" in an investor-state dispute is apolitical or somehow insulated from the politics immanent in decision making processes. It is intended to create an illusion that the seemingly apolitical adjudication of a legal dispute under the ECT and the European States' political choice to modernise or withdraw from the ECT are distinct issues. CLS-led scrutiny exposes the frivolity of such claims, and affirms that the two are fundamentally similar and thus, intrinsically interlinked. Indeed, the ECT and its related documents "provide an important legal and political basis for the creation of an open international energy market."[75] Therefore, it is logical that the interpretation and application of the ECT to resolve investor-state disputes cannot remain apolitical.

A further example of the subjectivity inherent in arbitral decision-making, and the failure of international investment law rules to constrain a singular accurate outcome, is found in *Mathias Kruck and others v. Kingdom of Spain*.[76] Therein, the majority tribunal decided that by establishing a new regulatory regime, Spain had breached its Fair and Equitable Treatment obligation under the ECT,[77] for which it was obliged to make reparation to the investors.[78] It did so by resolving the "main disagreement between the Parties as to the content of the FET standard", especially in which manner it includes "the doctrine of legitimate expectations".[79] The majority decided this issue in favour of the investors and reasoned that:

> "*The question here, however, is not whether Spain had the right and the legal power to amend its regulatory regime. The question here is whether Spain had committed itself to refrain from exercising its undoubted power in a particular manner, so that if it chose to exercise its power in a manner that breached that commitment it may incur liability for losses suffered by those who acted in reliance upon the*

[74] *Rockhopper Exploration PLC and others v. Italian Republic*, ICSID Case No. ARB/17/14, Final Award (23 August 2022) ¶ 10.
[75] The International Energy Charter – Consolidated Energy Charter Treaty with Related Documents, foreword.
[76] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision on Jurisdiction, Liability and Principles of Quantum (14 September 2022).
[77] *Ibid* at ¶¶ 211-225, 303, 366(5).
[78] *Ibid* at ¶ 366(6).
[79] *Ibid* at ¶ 158.

> *commitment. There is nothing particularly arcane about this question: it is essentially the mirror image of the question whether a State can, consistently with the FET provision in ECT Article 10, bind itself to perform a contract, in a manner that cannot be undone by the State enacting legislation that purports to abrogate its contractual obligations. The Tribunal has no doubt that a State can make such commitments and may do so by way of a unilateral declaration or representation. Nor does it doubt that in principle a breach of such a commitment can amount to a violation of an FET provision*."[80]

The majority's reasoning was not isolated, but drew support from certain previous cases that had reached the same conclusion. Nonetheless, the arbitrator appointed by Spain, Zachary Douglas KC, dissented.

Douglas accepted that the contours of the doctrine of legitimate expectations in international investment law are far from settled.[81] While one school of thought attributes liability based on a notion of strict liability,[82] the rival conception of legitimate expectation is based upon fault.[83] He agreed with the latter[84] on the basis of a comparative analysis of the national and regional legal systems. Disagreeing with the majority's conclusions, he explained that "no national or regional legal system contemplates that a government should be strictly liable for modifying or revoking an undertaking in a public regulation as if it were an undertaking in a private law contract."[85] Accordingly, the majority's adoption of the notion of strict liability was incorrect.

Douglas' unflinching criticism of the majority's reasoning is particularly instructive for this discussion. He explained that the doctrine of legitimate expectation, including its incarnation as a principle of strict liability, was only acceptable if it could be identified as a "general principle of law recognised by civilised nations" in the sense of Article 38 of the ICJ Statute, which in turn required a comparative analysis.[86] Critically, "if inspiration cannot be drawn from comparative

[80] *Ibid* at ¶ 199.
[81] *Ibid* at ¶ 2.
[82] *Ibid* at ¶ 2.
[83] *Ibid* at ¶ 3.
[84] *Ibid* at ¶ 4.
[85] *Ibid* at ¶ 29.
[86] *Ibid* at ¶ 18.

law in giving content to the FET standard, then the popular alternative, which is for arbitrators just to make it up, may prove to be irresistible."[87]

In this context, Douglas criticizes that the majority's decision does not cite any authority for its central proposition extracted above.[88] He also critically questions: "Where does the majority's conception come from and how is it compatible with the basic architecture of an investment treaty and the fundamental principles of state responsibility towards foreign investors? Their decision is silent on these matters."[89]

For these reasons, and other considerations articulated in his Dissent, Douglas compares the majority's reasoning as being "no different to just making it up under the shade of a fig leaf."[90] Yet, despite the conviction of his criticism, he acknowledges that the majority's decision is not isolated and draws support from previous cases:

> "*A total of 24 decisions on liability in the Spanish solar cases have been made available to the Tribunal in this case. There is a clear division in this jurisprudence between tribunals or majorities that have adopted a strict liability approach in interpreting the concept of legitimate expectations under the FET standard and those that have found or rejected liability based on fault. The touchstone of fault that is generally adopted is proportionality, which is assessed primarily in terms of whether the investment continued to earn a reasonable rate of return after the regime of RD 661/2007 was abolished. The division between the two strands in the jurisprudence is rather neat: there are 12 decisions favouring strict liability as against 12 decisions adopting a fault-based approach.*"[91]

In other words, what Douglas describes as "an extraordinary proposition with far-reaching consequences"[92] was endorsed in at least twelve previous investment arbitration cases. The very existence of these cases provides sufficient ammunition for one to argue, correctly or not, that it is Douglas' critique that warrants correction. The ultimate choice is then left for the next arbitral tribunal to make in the context of the next investment arbitration claim under the ECT.

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[87] *Ibid* at ¶ 18.
[88] *Ibid* at ¶ 16.
[89] *Ibid* at ¶ 16.
[90] *Ibid* at ¶ 21.
[91] *Ibid* at ¶ 47.
[92] *Ibid* at ¶ 54.

This sharp divide between the majority decision and Douglas' dissent in *Mathias Kruck*, and other ECT cases involving the same issue, adequately illustrates the aforementioned CLS-driven analysis. Through the metaphor of strict versus fault-based liability in the doctrine of legitimate expectations, it affirms that the fidelity of a decision-maker towards a particular outcome is not guided by rules and doctrines of international investment law. Instead, it is largely premised on a subjective choice between the competing values involved, and how the two may be balanced. The legal reasoning follows this value-judgment, which is intrinsically political and a product of the arbitrator's history, experiences, and ideologies. And for each outcome, there exists ample rules, doctrines, and existing decisions of persuasive value that inform the eventual reasoning, and obfuscate the preceding value-judgment. This is the core critique that emerges from a CLS-driven analysis.

The objective of this analysis is not to argue either in favour of or against a specific award or school of thought. Instead, it is simply to showcase the ensuing unpredictability in the adjudication of investment disputes under the ECT. Ironically, this demonstration is not novel, and is echoed by existing reports which do not adopt a CLS-driven analysis.

For instance, after reviewing the body of cases under the ECT relating to the clean energy transition measures, the Climate Change Counsel report also reached the same conclusion:

> "*With regard to the FET standard and legitimate expectations, it is difficult to predict how these principles will apply in fossil phase-out disputes, because the reviewed awards present divergent and inconsistent assessments based on similar facts and the same ECT provisions. Some tribunals found that a foreign investor is entitled to legitimate expectations of legal stability based on the laws in place at the time of investment. Other tribunals rejected that idea, stating instead that investors cannot expect regulatory stability in the absence of a specific commitment to that effect. The Masdar tribunal characterized these as "two schools of thought" on the question of legitimate expectations. Which of these two schools of thought will gain traction in cases relating to fossil investments remains to be seen.*"[93]

[93] *Supra* note 17 at p.67.

Equally, it is for this reason that the IISD Report lamented that "the reform leaves the most problematic provision—the investor-state dispute settlement mechanism—intact."[94]

Consequently, unless the discourse surrounding the ECT crisis shifts from a comparison of the text of the modernised ECT and the 2015 Paris Agreement, it is unlikely to be of meaningful assistance. It must first acknowledge the politics inherent in arbitral decision-making and devise ways to address it. This could include reforming or abandoning the existing framework relating to investment arbitration, or at least, making the decision-makers conscious of the multifarious non-legal considerations that influence their reasoning and outcome.

Indeed, once the politics in arbitral decision-making is acknowledged, it paves the way for a more holistic conception of the regime of international investment law. This would disclose the doctrinal biases,[95] and permit the creation of a framework in which the political choices can be made in a nuanced, historically informed, and socially responsible manner. In other words, if international law cannot be detached from its politics, then at least a cumulative interpretative approach, premised on CLS, allows one to strive for "better politics".[96]

IV. CONCLUSION

It is easy to make sense of the ECT crisis if one views it from the lens of the former colonies, or the Global South broadly, who upon attaining sovereignty were soon "encouraged" to sign investment treaties as part of a barter for receiving access to foreign capital. Indeed, the few years immediately following the conclusion of such treaties were uncontroversial; characterized by none or a limited number of claims by foreign investors to be decided by investment tribunals. But as each State began to exercise its sovereign discretion, admittedly with some instances of indiscretion, it came with a rise in the number of investment arbitration decisions. Each arbitral decision reflected the value-judgements and political choices of the decision-making arbitrator. And each decision constituted a limitation on the host State's sovereignty, albeit the one that the State had itself agreed to.

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[94] Lukas Schaugg and Sarah Brewin, *Uncertain Climate Impact and Several Open Questions - An analysis of the proposed reform of the Energy Charter Treaty,* (IISD, 2022) 41.

[95] Deborah Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' 65 NORDIC JOURNAL OF INTERNATIONAL LAW, 341 (1996) 377.

[96] Martii Koskenniemi, 'The Politics of International Law – 20 Years Later', [Vol. 20(1)] EUROPEAN JOURNAL OF INTERNATIONAL LAW 7 (2009) 8.

Given the need and lure of foreign capital, it was anticipated that the difference between the value- judgements and political choices of the arbitrator and the host State would be tolerated. However, it was also foreseeable that at some point in the future, the limits of tolerance would be breached if the need to attract foreign investment is matched, or outweighed, by a competing public interest. For many Global South States, this point of time arrived during the past decade. It now appears that the threat of climate change was the final straw that broke the camel's back for the European continent too.

Unsurprisingly, the response of the European continent has mirrored the one provided by the Global South States that first bore the brunt of investment arbitration decisions on issues of sovereign priority. Their arguments are also familiar; highlighting the regulatory chill created by inconsistent arbitral decision-making, failure to balance an investor's property-based rights with the host State's public interest, and the ramifications of awarding crippling compensation. Soon, the contrary voices in select corridors, which critique the grievances and / or point to the possibility of reform, are crowded out.

Sooner than later, States that have burnt their hands are no longer able to place their hopes in the possibility of reform. By now, they have analysed (1) the lack of any proven link between the conclusion of investment treaties and the receipt of foreign investment, (2) the unpredictability in the interpretation of investment protections standards, and (3) the disproportionate power held by a small community of non-state actors to globally influence existing and future policies. At this stage, the decision to terminate investment treaties, and search for better alternatives, becomes a mere formality.

Until recently, it appeared that the European continent was oscillating between placing their hopes in reform, or modernisation of the ECT, and exiting it entirely. While the final decision is yet to be made, given the threat of climate change to the existence of the world as we know it, the tide may be turning towards the latter. If this were to be, it would not only reflect the lack of trust in the modernised text of the ECT, but also in those who interpret and apply it. Therefore, this decision is not merely a referendum on the modernised text of the ECT, but more broadly on the acceptability of its application through investment arbitration.

Viewed from this perspective, the ECT crisis is akin to old wine in a new bottle. It is merely yet another instance, this time in the context of climate change, of certain States revisiting their

acceptance of an investment arbitration regime that increasingly prioritizes the property rights of an investor over a competing public interest. It is simply another manifestation of the crisis of confidence that has already engulfed States in other parts of the world, ranging from Africa,[97] Asia,[98] Latin America,[99] and the European Union itself for intra-EU disputes.[100]

Until this crisis of confidence, including with respect to the ECT, is appropriately addressed, it will continue to raise its head in novel contexts. Till then, as far as the ECT crisis is concerned, one can take solace in Douglas' warning that - "The regulatory chill that inevitably accompanies this approach will be no consolation to a warming planet."[101]

[97] Naomi Tarawalli, 'Towards or Away from Investment Treaty Arbitration in Africa?', (2019) 9 EMERGING MARKETS RESTRUCTURING JOURNAL 1, 4.
[98] Alison Ross, *'India's Termination of BITs to begin'*, GAR (22 March 2017); Prabhash Ranjan, *'Making the BIT Unworkable for Investors' in India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash* (OUP 2019); Zafar Bhutta, *'Pakistan to terminate 23 bilateral investment treaties'*, The Express Tribune (5 August 2021); Olivia Chung, *'The Lopsided International Investment Law Regime and its Effect on the Future of Investor-State Arbitration'*, (2007) 47(4) Virginia Journal of International Law 953, 969-975 (discussing how States such as Pakistan, Indonesia and Russia have attempted to escape the "unfair BIT regime by defying arbitration".)
[99] Katia Fach Gomez, *'Latin America and ICSID: David versus Goliath'*, (2011) 17(2) LAW AND BUSINESS REVIEW OF THE AMERICAS 195, 200.
[100] See generally, Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union (29 May 2020), SN/4656/2019/INIT.
[101] *Mathias Kruck and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Partial Dissenting Opinion of Zachary Douglas (13 September 2022) ¶ 57.

ONLINE DISPUTE RESOLUTION: CREATING A LEVEL-PLAYING FIELD IN SMALL VALUE CLAIMS

Siddharth Kapoor and Ananya Singhal*

I. INTRODUCTION

The Internet, which was relatively inaccessible to the citizens of India a few decades ago, is now an integral part of their daily lives. India's internet penetration rate went up to nearly 47 percent in 2021, from just about four percent in 2007.[1] The pandemic in particular, contributed to the wide-spread access to a variety of online resources—including access to Indian courts to a certain extent—and accelerated the adoption of this "Internet revolution" by the population. All these changes have pressured India's dispute resolution area to adapt to this new and emerging reality, especially given that it is on the brink of a complete breakdown as the justice system suffers from a pendency of over 40 million cases and counting.[2] For this reason, ODR has become a need of the hour.

In this paper, the authors examine ODR as a new form of Alternate Dispute Resolution ["**ADR**"] in the adjudicatory environment. The first chapter overviews the benefits of ODR and how it needs to become the norm when compared to traditional litigation (Chapter I). Thereafter, we analyse the current scenario of the ODR ecosystem and why it is the need of the hour, especially for small-value disputes (Chapter II). The incorporation of ODR in the context of the Indian ecosystem is thereafter considered. This analysis focuses on small-value disputes with banks, MSMEs, and consumers (Chapter III). Finally, the concept of using ADR in the form of arbitration which shall include automated arbitration, in the context of small-value disputes, is discussed.

II. ODR – AN UNCONVENTIONAL METHOD OF DISPUTE RESOLUTION

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[1] Tanushree Basuroy, Internet penetration rate in India 2007-2021, Statista, Jun 9, 2022.

[2] Louis F. Del Duca, Colin Rule and Kathryn Rimpfel, *eBay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ARB. & MEDIATION p.204 (2014).

Typically, ODR refers to the process of resolving disputes online. ODR is the use of ICT in the practice of dispute resolution. Today, by using technologies like algorithm-based learning, Artificial Intelligence ["**AI**"], Machine Learning ["**ML**"], and other computer programs, ODR can also be extrapolated to move beyond resolution to prediction and prevention of disputes altogether.

Aspects of ODR include e-Arbitration, e-Mediation, and e-Negotiation, or a combination thereof, which involves performing all types of Alternative Dispute Resolution ["**ADR**"] online. In the arbitration sphere, ODR comprises the entire procedure of pleadings, evidence presentation, cross-examination, oral arguments, and rendering of awards in an online setting. In the context of mediation, sessions can be conducted online in a secure environment, along with resource sharing, and ultimately drawing up and executing settlement agreements online. Negotiations can also be conducted online along with prompts of optimal settlement ranges. ODR is gaining popularity as a result of its several advantages over the offline alternatives customarily available to parties, including litigation, mediation, negotiation, and arbitration.

A. THE BENEFITS AND ADVANTAGES OF ODR

As stated earlier, ODR is the process of resolving and even preventing disputes through the use of technology.

The use of technology in administering ODR eliminates the need for the parties to convene at a central location, travel across states, and take days off work to attend a hearing that lasts just a few hours. In this way, ODR not only substantially reduces expenses but also saves time and gives parties flexibility and convenience to participate from the location and at the time of their choice. As a result, the dispute resolution system is accelerated, as parties no longer need to set aside several days per month to engage in the dispute resolution process, but rather only a few hours for an online conference. None of these benefits are offered by any other existing conflict settlement process.

Moreover, with the incorporation of algorithm-based inputs, the parties involved can make an informed decision prior to initiating a dispute. Inputs regarding the merits of the case, details of the disputed facts, timeline, etc. can be analysed to evaluate a party's likelihood of success in a

dispute. Consequently, any party desiring to engage in a dispute resolution process, whether ODR or litigation, can evaluate their position beforehand and make an informed decision regarding whether or not to pursue the matter in court, or even arrive at mutually acceptable settlement ranges through smart algorithms. If they choose to pursue the dispute, a smart algorithm can offer the most appropriate resolution process and forum based on the relevant facts and subject matter.

Due to these advantages, ODR has become the favoured method of dispute settlement not only among parties involved in cross-border transactions but also among parties engaged in domestic contracts, transactions or disputes. For example, what began as eBay's Modria[3] pilot project has proven to be a revolution in the legal sector. With the expanding adoption of ODR, it is permeating a variety of online-resolvable conflicts, including traffic offences and now certain consumer disputes.

To summarise, ODR has both short and long-term benefits which include:[4]

- Increasing access to justice;
- Providing a level-playing field to the parties;
- Improving the legal health of society, i.e., individuals becoming aware of their respective rights and enforcing them;
- Getting a cost-effective process by drastically reducing the costs of hearings by 60-70%,[5] such as by eliminating costs associated with travel, food accommodation, visa expenses, etc.; and
- Eliminating bias in the dispute resolution process by using AI and ICT.

A detailed comparison between ODR and litigation has been done in the following part of the paper.

B. ACCEPTANCE OF ODR AS AGAINST LITIGATION

[3] Edwards, B., *Is the future of Civil Justice Online? Modria thinks so.*, BLOOMBERG LAW (December 19, 2022) https://news.bloomberglaw.com/business-and-practice/is-the-future-of-civil-justice-online-modria-thinks-solast.
[4] Conference Report, Niti Aayog, Designing the Future of Dispute Resolution: The ODR Policy Plan for India Designing the Future of Dispute Resolution: The ODR Policy Plan for India, https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf. (Oct, 2021).
[5] *Ibid.*

In the context of litigation, even after spending significant costs and time, often spanning over several decades, most parties involved are not satisfied with the decision. Since the average time taken by most judges in the Higher Judiciary per case ranges from two to fifteen minutes, most litigants are not convinced that their issues have been duly considered.[6] For a decision that will decide the fate of a dispute, a few minutes are barely enough to understand the facts of the case, the submissions of the parties, the history of the dispute, and the commission of the alleged offence, amongst other things. However, given the burden of the Indian system, a judge cannot devote enough time to each case. Due to this, the essence of justice may be lost during a litigation procedure. To remedy this defect, the litigants only have the option of appealing, which incurs additional expenses, time, and uncertainty.

As per a report published by the think-tank Daksh—State of the Indian Judiciary in 2016, the average yearly loss of wages and business due to litigation is approximately Rs. 50,500 crores, and the total yearly spending of all litigants to attend courts is approximately Rs. 30,000 crores.[7] Considering this, litigation is not only burdensome to the litigating parties but also to the State. On every person, the State spends Rs. 50-150 every year and on every case, Rs. 1,600 – 2,700.[8] On a conservative base, the economic cost of delay can be as high as 1.5% of the Indian GDP without accounting for the professional fees.[9] These huge costs make litigation an unattractive option for every stakeholder involved.

To gauge the perspective of the general public on the issue of ODR v. Litigation, an 'Appeal for Change'[10] survey was conducted. The object of this survey was to determine the acceptance of ODR and ADR amongst people who included judges, mediators, arbitrators, lawyers, chartered accountants, businesspersons, professionals, litigants, students, and homemakers from age groups

[6] *HCs have just a few minutes to hear each case - Cap on hearings crucial to reduce pendency: Study*, THE HINDU, https://www.thehindu.com/news/national/%E2%80%98HCs-have-just-a-few-minutes-to-hear-each-case%E2%80%99/article14568361.ece. (Oct. 18, 2016).
[7] Daksh, Access to Justice Survey 2016-17 (2017), http://dakshindia.org/access-to-justice-2017/index.html.
[8] *Id.*
[9] Harish Narasappa, *Cost of pendency of cases could be as high as 1.5% of GDP,* BUSINESS STANDARD, https://www.business-standard.com/article/opinion/cost-of-pendency-of-cases-could-be-as-high-as-1-5-of-gdp-harish-narasappa-116081400774_1.html. (Aug. 14, 2016).
[10] An on ground empirical study by Presolv360.

ranging from 22-65 years.[11] With review, feedback, and comments from 1002 participants, the survey revealed some interesting observations.

On a question that asked individuals to choose their stance in case a dispute arises, 77.3% of the participants preferred settling the dispute by way of a compromise outside of the court instead of fighting in court. Further, when asked if they would want to opt for an alternative measure before proceeding to the court, a majority of 64.7% were in agreement without any reservations. Another 22% said that they would opt for an alternative measure if things fail to move ahead in court. Only a minority of 13.3% were unwilling to try an alternative remedy. This reflects the transition phase that India is in. People are aware of alternative dispute resolution mechanisms and are willing to undertake them.[12]

Surprisingly, on a question where the participants were asked if they would be open to the idea of resolution of a dispute by an expert as opposed to judicial machinery, 75.5% of participants had a positive response.[13] This mindset can prove to be extremely beneficial for the dispute resolution system of India by taking the burden off judges and involving experts to determine disputes concerning specific and specialized subject matters. As an example, in a dispute arising out of a patented product, if subject matter experts with a science background can aid in dispute resolution, the award can be expected to be sounder, more reasoned, and well-analysed. This also takes the burden off judges to be experts in all fields.

From these results, it may be deduced that most individuals are beginning to accept ADR techniques. Several questions were raised regarding the incorporation of technology in dispute resolution as a means of progression. The first and most obvious question is, "Do you believe technology can be used to drive dispute resolution?". A majority of the participants, i.e., 77%, believed it was time for technology to make conflict resolution more convenient, cost-effective, and efficient.[14] This is a clear indication that the public has been ready for ODR and its introduction would be welcomed by all.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

III. ODR IN ITS CURRENT STAGE

After seeing the potential of ODR, a few start-ups have emerged to provide ODR services including Presolv360, Cyber Settle,[15] Smartsettle,[16] and the Mediation Room[17] on the global stage.

Many jurisdictions have also incorporated ODR in their state-administered dispute resolution mechanisms. Countries like Brazil,[18] the Netherlands,[19] Columbia,[20] Canada, the United Kingdom ["**UK**"],[21] and the United States[22] have incorporated ODR mostly for their consumer disputes or for small-value civil disputes. There have also been attempts at e-Mediation by the Singaporean[23] and British governments.[24]

China has various ODR incorporations in its judicial systems which have been leading the way for ODR internationally. It has formed internet courts[25] to cater to civil and administrative disputes arising from e-commerce websites, and another ODR Platform called 'Online Dispute Resolution Platform' (ODRP) for matters of consumer disputes in the European Union.[26] Similarly, the UK has an online Money Claims Tribunal for matters pertaining to money claims which can be resolved online.[27] South Korea has also established an e-Commerce Mediation Committee (ECMC) to resolve disputes arising out of e-Commerce and e-Transactions.[28]

A. NEED OF ONLINE DISPUTE RESOLUTION FOR SMALL VALUE DISPUTES

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[15] CYBER SETTLE, http://www.cybersettle.com/ (Nov. 14, 2022).
[16] SMART SETTLE, https://www.smartsettle.com/ (Nov. 14, 2022).
[17] Karolina Mania, *Online dispute resolution: The future of justice*, 1 INT. COMP. JURIS. 76-86 (2015).
[18] CONSUMIDOR, https://www.consumidor.gov.br/ (Nov. 14, 2022).
[19] RECHTWIJZER, 'https://rechtwijzer.nl/ (Nov. 14, 2022).
[20] CIVIL RESOLUTION TRIBUNAL, https://civilresolutionbc.ca/ (Nov. 14, 2022).
[21] HM COURTS AND TRIBUNAL SERVICE, https://www.moneyclaim.gov.uk/web/mcol/welcome (Nov. 14, 2022).
[22] New Mexico Courts Online Dispute Resolution Center, https://adr.nmcourts.gov/home/odr/ (Nov. 14, 2022).
[23] Community Justice and Claims Tribunal (State Courts of Singapore), https://www.judiciary.gov.sg/services/cjts (Nov. 14, 2022).
[24] Financial Ombudsman Service, https://www.financial-ombudsman.org.uk/ (Nov. 14, 2022).
[25] China Court Observer *China Establishes Three Internet Courts to Try Internet-Related Cases Online- Inside China's Internet Courts Series – 01*, https://www.chinajusticeobserver.com/a/china-establishes-three-internet-courts-to-try-internet-related-cases-online (Dec. 16, 2018).
[26] Online Dispute Resolution Platform, https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN (Nov. 14, 2022).
[27] Money Claims Online, https://www.moneyclaim.gov.uk/web/mcol/welcome (Nov. 14, 2022).
[28] *E-commerce disputes on the rise in Korea*, THE PAYPERS, https://thepaypers.com/online-payments/e-commerce-disputes-on-the-rise-in-korea--733431. (Apr. 14, 2008).

Adoption of ODR systems to tackle small-value disputes and consumer disputes has attained normalcy in multiple jurisdictions owing to the benefits it has compared to litigation. Litigation is tedious,[29] elaborate, formal and taxing. For this reason, most litigants refuse to come to court with their disputes. 26.8% of respondents to Daksh's Access to Justice Survey (2017) stated that they did not file a case in court due to the high cost of litigation.[30]

Hence, there is an urgent need for ODR. The need has been echoed by the top institutions of the country and was acknowledged by Chief Justice DY Chandrachud, who had observed,

> "*[i]n the wide variety of litigation that comes before every court, there is a confluence of the very substantive and not very small, but important, disputes which don't have to come before the court. Cases like motor accidents claims, cheque bouncing cases, personal injury claims and issues such as this may be dealt with by ODR. The ODR initiative by NITI Aayog is commendable and the draft report is meticulously compiled. This is a unique analysis of the interface between dispute resolution and technology and its prospects in India*."[31]

When 30-40% of the claim value is spent on litigation, coupled with the uncertainty of the outcome of the case, litigation becomes inaccessible to the majority. This percentage is even higher for small value disputes since the parties do not want to engage in litigation where it is certain that the litigation will be a liability for the party even if the outcome is eventually in their favour.

For low-value claims, such as that of Rs. 10 to 20 lakhs or less, India's current court system is too costly, too slow, and too complex at its core. As per a survey, 55% of civil litigants and 67% of criminal litigants surveyed expected their cases to be resolved within a year from when they first filed them.[32] When litigants who had spent three to five years litigating were interviewed, this percentage drastically dropped.[33] The expectations of the parties can be understood from this data. The parties expect a speedy resolution of their disputes especially when the quantum of the same does not demand years of deliberation.

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[29] An Empirical Research by Presolv360, Understanding the Indian legal scenario, 2018.
[30] *Supra* note 5.
[31] Press Release, Niti Aayog, NITI Aayog Pushes for Online Dispute Resolution for Speedy Access to Justice (Nov. 29, 2021).
[32] Daksh, A Report on the State of Indian Judiciary 2015-16 (2016), https://www.dakshindia.org/state-of-the-indian-judiciary/28_chapter_15.html#_idTextAnchor320.
[33] *Id.*

For this reason, use of ODR for low-value disputes is a need of the hour. The introduction of ODR for the resolution of these small-value disputes will have two benefits: first, an increase in access to justice; second, savings in the costs spent on litigation.

If the low quantum claims are to be addressed, the appropriate procedure would be ODR given the accompanying transparency, lack of bias, and legal validity it brings, which has the potential to take the burden off the judiciary to tackle such disputes.

IV. INCORPORATION OF ODR IN THE INDIAN CONTEXT

Claims of about Rs. 10 to 20 lacs would fall under the ambit of small-value claims. As per the authors' ODR platform's experience[34] in dealing with small claims disputes, such claims arise out of majorly three subject matters which are loans, consumer disputes, and those relating to Micro, Small & Medium Enterprises[35] ["**MSMEs**"]. How they are currently dealt with is elaborated below:

A. DISPUTES WITH BANKS

Disputes with banks, especially loan default cases, have been on an exponential rise in India. As per a 2022 report, loan defaults in India are valued at Rs. 2.4 trillion[36] out of which, Rs. 1.41 trillion alone is owned by 312 wilful defaulters who have the capacity to repay their loans but choose not to.[37] In the context of a dispute of a customer with a bank, currently, the first step to resolving a dispute is at the bank level. Banks, supported by the Damodaran Committee,[38] the Indian Bank Association,[39] and the Ministry of Finance[40] enable customers to register complaints online first. If the dispute is not resolved at this stage, the party can approach the Bank Ombudsman where

[34] Bhaven Shah and Garv Sultania *How to tackle delayed payments to MSMEs*, THE HINDU BUSINESS LINE. https://www.thehindubusinessline.com/opinion/how-to-tackle-delayed-payments-to-msmes/article65802608.ece (December 20, 2022).
[35] An Empirical Research by Presolv360 (2017).
[36] *Wilful loan defaults grow 10 times since 2012 to Rs 2.4 trn: Report*, BUSINESS STANDARD, https://www.business-standard.com/article/current-affairs/wilful-loan-defaults-grow-10-times-since-2012-to-rs-2-4-trn-report-122072000508_1.html (Jul. 20, 2022).
[37] RBI Circular, Master Circular - Management of Advances - UCBs (Apr. 08, 2022).
[38] DAMODARAN COMMITTEE RECOMMENDATIONS, https://www.indianbank.in/departments/damodaran-committee-recommendations/#! (Nov. 14, 2022).
[39] INDIAN BANKS ASSOCIATION, https://www.iba.org.in/ (Nov. 14, 2022).
[40] MINISTRY OF FINANCE, https://finmin.nic.in/ (Nov. 14, 2022).

they feel the need for a neutral third party to look at the dispute, or a Lok Adalat if they require negotiations with the bank or even the Consumer Court to seek protection of their rights.The Banking Ombudsman Scheme is an expeditious and inexpensive forum for bank customers to resolve complaints relating to certain services rendered by banks.

Owing to the Pandemic, relying on the case of *Meters and Instruments Private Limited and Anr. v. Kanchan Mehta,*[41] the Hon'ble Supreme Court allowed online dispute resolution for bank-related disputes provided that the parties were willing to drop the criminal charges in the complaint.

As per the belief of the authors, moving forward, the banking sector in India can launch an e-redressal forum for loan defaulters or even for other disputes where they can be resolved online by a neutral third party. Since these disputes are very straight forward with respect to the facts of the case, elaborate court proceedings are not necessarily required for every dispute. All banks can have a common redressal forum where the parties can register their dispute and an effective resolution process can be formulated. Alternatively, they can collaborate with an ODR platform resolution of all disputes relating to loan defaults, recalculation of interest rates, or negotiation of the terms and conditions while availing of any banking service.[42]

B. CONSUMER DISPUTES

As the second-most populated country in the world, India is one of the biggest consumer markets globally. In the second quarter of 2022, the consumer market of India amounted to a total of Rs. 22.6 trillion.[43] In 2021, 140 million people in India shopped online.[44] This also gives rise to numerous consumer disputes, all of which cannot be taken to court owing to the limitation of time and costs.

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[41] Soumyajit Saha, *Online Dispute Resolution of Banking Disputes in the wake of COVID-19*, BAR AND BENCH, https://www.barandbench.com/apprentice-lawyer/online-dispute-resolution-of-banking-disputes-in-the-wake-of-covid-19 (Jun. 13, 2020).
[42] Criminal Appeal No. 1731 of 2017.
[43] World Bank, *Final consumption expenditure,* The World Bank Data https://data.worldbank.org/indicator/NE.CON.TOTL.CD?locations=IN.
[44] *Id*.

For this reason, most e-Commerce websites have an internal dispute resolution/grievance redressal body which addresses the grievances of its consumers. Issues such as those relating to defective goods, delayed or non-delivery, guarantees, and warranties are addressed by the internal grievance support of the platform. The drawback noticed in this mechanism was that, since the grievance redressal body was constituted by workers of the platform, the resolutions were conducted to the benefit of the platform. Thus, the resolution was biased and not catered to the consumers satisfactorily. As a result, many e-commerce platforms started using ODR. Currently, ODR is being used to settle more than 60 million disputes a year by e-commerce platforms such as eBay.[45] The inspiration for the same comes from Modria,[46] which was the first attempt at ODR by eBay.

In India, consumers also have the option to take their consumer complaints to Integrated Grievance Address Mechanism[47] ["**INGRAM**"], which is a platform for consumer complaint redressal launched by the Consumer Affairs Department.

It is imperative to note that Lok Adalat has also been used as a forum to resolve consumer disputes. The Department of Consumer Affairs ["**DoCA**"] in association with the National Legal Services Authority ["**NALSA**"] held a Lok Adalat for this purpose in the month of November 2022.[48] Interestingly, the DoCA also engaged with private ODR firms[49] for the purpose of providing technical assistance to carry out the successful process of the Lok Adalat. In this exercise, ODR firms were successful in counselling and amicably settling many cases.

Such results showcase that efforts to use ODR and the expertise of ODR firms are a laudable effort and advisable to resolve disputes amicably and in an efficient manner.

C. MICRO, SMALL & MEDIUM ENTERPRISES – MSMES

[45] Colin Rule, *Technology and the Future of Dispute Resolution* 21 A.B.A. (2015). http://law.scu.edu/wp-content/uploads/Rule-Technology-and-the-Future-of-Dispute-Resolution-copy.pdf.
[46] Ethan Katsh, Janet Rifkin and Alan Gaitenby, 'Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law', (2000) 15 OHIO ST. J. ON DISP. RESOL. p.705 http://www.umass.edu/cyber/katsh.pdf (Sept. 05, 2020).
[47] NATIONAL CONSUMER HELPLINE, https://consumerhelpline.gov.in/ (Nov. 14, 2022).
[48] National Lok Adalat held on Nov. 12, 2022.
[49] Firms such as Presolv360.

The Union Ministry recognized the MSMEs as a special sector that had to be regulated considering their financial limits, working operations, and system of doing business. These enterprises are now regulated by the Micro Small & Medium Enterprises Development Act of 2006 ["**Act**"], which governs the functioning, development, and regulation of enterprises covered under the Act.

One of the main objectives of formulating this legislation was to provide for a proper legal framework for the small sector to relieve it of the requirements to comply with multiple rules and regulations made by Committees, such as the Abid Hussain Committee (1997)[50] and Study Group under Dr. S.P. Gupta (2000).[51] The services provided by the enterprises covered under the Act have proven to be an important and significant part of India's economy since they substantially contribute to the employment of millions of workers. Therefore, it becomes necessary to address the concerns of small-scale industries and services together and to recognise them as small businesses. In a fast-growing economy like India's, governmental interventions and legal frameworks must encourage the natural movement of small businesses to medium businesses.

The disputes that arise in such enterprises also need to be treated differently than those of high value contracting parties. Most of the enterprises covered under the Act do not have the means to engage in costly litigation processes or refer their dispute to arbitration. These procedures can become a big liability for these enterprises and may even lead to the closing down of the business. Therefore, in order to address such a circumstance, the Act laid down that if a dispute arises between such enterprises, they can approach a Facilitation Council which either conducts conciliation between the parties or refers the parties for mediation or arbitration. The binding nature of arbitration is preferred by most parties as an alternative to court proceedings even if arbitration gets expensive owing to the procedural flexibility provided by the process.

In view of this, the best alternative to these costly procedures is ODR, which fulfils the expectations of the disputing enterprises. ODR will reduce the burden on the owners of small businesses, will not make dispute resolution a liability, and will also assist in meeting the ends of justice.

[50] Expert Committee on Small Enterprises 2022 RECSE India.
[51] *Id.*

ODR has currently not been introduced by the Indian government for dispute resolution as it pertains to MSMEs, but inspiration can be taken from other jurisdictions to implement it in India. Canada has the 'Civil Resolution Tribunal' (CRT)[52] for a variety of disputes relating to MSMEs, small value claims, and e-commerce which has been a success in resolving disputes therein. The states of Ohio[53] and Utah also have separate courts for small value disputes.[54] New York State Courts have launched their first ODR system for small claims.[55] These attempts have been globally applauded for being a leap forward to make justice accessible to all.

V. ONLINE ARBITRATION FOR SMALL VALUE CLAIMS

Arbitration is increasingly becoming prevalent for disputes between businesses. The contracting parties, while entering into their contract, usually opt for arbitration as their chosen method of dispute resolution. While arbitration has numerous advantages over litigation, conducting arbitration offline can still be financially burdensome for the parties owing to the costs and logistics spent on travelling, accommodation and meals for all the individuals involved. There are also additional costs for renting a venue to conduct the proceedings.

While these costs may not make a dent for parties involved in a high-value dispute, they are deterrents for parties that have small or medium claims. If the value of the dispute is merely Rs.10-20 lakhs, it is unreasonable to spend Rs. 5-10 lakhs, which is nearly 50% of the value of the claim, on such ancillary requirements. This is where online arbitration kicks in and helps in cutting down these costs.

Online Arbitration or ODR-premised Arbitration is not a separate mechanism but refers to administering arbitration virtually with the help of case management tools, digital communication infrastructure, audio-video conferencing and other avenues. Controversies have arisen involving online arbitration, such as the determination of the seat and venue of an online arbitration;

[52] CIVIL RESOLUTION TRIBUNAL, https://civilresolutionbc.ca/ (Nov. 14, 2022).
[53] OH RESOLVE – SUPREME COURT OF OHIO, https://www.supremecourt.ohio.gov/JCS/disputeResolution/OH-Resolve/ODR.pdf.
[54] UTAH STATE COURTS, https://www.utcourts.gov/odr/ (Nov. 14, 2022).
[55] ONLINE DISPUTE RESOLUTION PLATFORM, https://cii2.courtinnovations.com/NYNYSC (Nov. 14, 2022).

however, the law itself provided answers to these issues when differentiating between a seat and venue.

It is well known that the seat of an arbitration proceeding determines the jurisdiction of the courts, whereas the venue of the arbitration proceeding is for the convenience of the parties. As per Section 20(1) of the Arbitration and Conciliation Act, 1996, the parties are free to agree on the seat of arbitration. The seat remains static and fixed, whereas the venue of arbitration can change and move to a different location. Section 20(3) specifically states and draws a distinction between the venue of arbitration and the seat of arbitration by stating that, for convenience and other reasons, the arbitration proceedings may be held at a different place than the seat of arbitration, which location is referred to as the venue of arbitration.

Hence, when arbitration proceedings are conducted virtually, the location of the parties and of the arbitrator is not material, so long as they can conveniently participate from their respective locations. Additionally, the location of the players involved does not interfere with questions relating to the jurisdiction of the courts, nor with the law applicable to the procedure and to the merits of the underlying dispute. This enables parties to submit their case effectively and, for all jurisdictional purposes, the seat of the arbitration proceedings is derived from the agreement between the parties inter-se.

Hence, the law not only enables ODR-premised arbitration, but it has also gained wide recognition in India from the Judiciary and the Government.

Insofar as the convenience of the parties is concerned, when arbitration is held online for such disputes, parties are required to spare only a few hours every week to be present online. In most online arbitrations, even the requirement of physical copies of written submissions is dispensable. This in essence makes the whole dispute resolution process effective, easy, accessible, cost-friendly, and environment-friendly.

A. HOW ODR CAN HELP IN THE AUTOMATION OF SMALL CLAIM DISPUTES

On the contrary to popular belief, ODR is not limited to resolving small claims disputes through audio or video conferencing. The definition of ODR is considerably more fluid, inclusive, and dynamic. Automated dispute resolution is also included in ODR. Automated dispute resolution is

illustrated when a consumer files a complaint on an e-commerce platform and receives a fast, automated resolution to the problem.

These mechanisms can be implemented in the field of dispute resolution. Imagine a scenario in which a consumer files a dispute against an e-commerce platform for failing to provide reimbursement for a return shipment. The consumer submits the issue online on a dispute resolution mechanism related to the e-commerce platform in question. The moment a consumer initiates a grievance, the dispute resolution platform scans through the e-commerce platform's bank information and compares it with the consumer ID and transaction ID, if applicable. In the event the algorithm determines that the refund was not started, an award is immediately granted in favour of the originating party, which can be enforced in court. An automated dispute resolution could thus be provided at the click of a button. If the source of a small claim dispute is a click of a button, then the resolution too should be just a click away and not via a lengthy court proceeding.

VI. CONCLUSION

In conclusion, ODR can prove to be a catalyst to revolutionise the legal industry, especially in regard to small claim disputes, and make it efficient to deliver justice to the ever-increasing population of India. Governance and value issues will definitely become more prominent as online dispute resolution advances from isolated private-sector initiatives to widespread public-sector institutionalisation.

However, it must be noted that despite the challenges, ODR holds the potential for bridging the gap between dispute and resolution and bringing access to justice on the fingertips of all.

The low internet penetration rate of 47% in India presents a significant challenge to the widespread adoption of online dispute resolution (ODR) as a norm. In addition, the general population will need to be educated and trained on the use of ODR. Therefore, a coordinated effort by government agencies, including the Department of Telecom and Communication, the Ministry of Law and Justice, and the Ministry of Education, will be necessary to successfully incorporate ODR into the legal system.

COMPETENCE OF AN ICSID TRIBUNAL TO ORDER SECURITY FOR COSTS

Ahan Gadkari and Vaneet Kumar*

I. INTRODUCTION

"Only in the jurisprudence of an imaginary Wonderland would this make sense." This comment was made by the dissenting arbitrator in the *RSM Production Corporation v. Saint Lucia*[1] case before the International Centre for the Settlement of Investment Disputes [**"ICSID"**]. In this proceeding, the arbitral tribunal – for the first time in the history of ICSID arbitration – granted the respondent state's request to order the claimant investor to provide security for costs.[2] The dissenting arbitrator not only questioned the tribunal's authority to order security for costs, but also criticised the majority's consideration of the existence of a third-party funding agreement on the claimant's side when determining the redressability of the claim.[3]

Highly contentious is the issue of whether and under what conditions ICSID tribunals may compel security for expenses. With the recent emergence of third-party funding, a new element has been introduced to the argument over whether ICSID tribunals should consider this consideration when evaluating petitions for security for expenses.

This topic will be addressed in the present article. After briefly describing the objective and function of security for expenses, the authors will demonstrate that ICSID courts have the jurisdiction to impose these provisional measures. The article will next address the prerequisites that must be satisfied for an ICSID tribunal to impose security for expenses. After providing an explanation of the concept of third-party funding, the authors will analyse the role that third-party funding may play in an ICSID tribunal's judgment regarding security for expenses by using these standards.

II. WHAT IS A SECURITY FOR COSTS ORDER?

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[1]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10¶ 8 (Aug. 12, 2014) (Edward Nottingham, J., dissenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").

[2]*Id.* ("The tribunal ordered the claimant to post security for costs in the amount of USD 750,000.").

[3]RSM v Saint Lucia, *supra* note 1, ¶ 17.

A security for costs order is a special form of provisional measures requiring the party bringing a claim (or counter-claim) to provide sufficient security to cover the respondent's legal costs that may be awarded against the claimant should the claim be dismissed.[4] This provisional measure is typically requested by a respondent who fears that the claimant may be unable or unwilling to honour an adverse costs award and who wants to preserve the ability to recover its costs.[5] The security might take a variety of forms, but is commonly a bank guarantee or an escrow deposit.[6]

III. DOES THE ICSID TRIBUNAL HAVE THE AUTHORITY TO ORDER COSTS SECURITY?

A. THE ABSENCE OF PRECISE LANGUAGE

No express provision in the ICSID regime[7] addresses the competence of an ICSID tribunal to require security for expenses. Some arbitrators have taken this absence of express language as a reason to generally question an ICSID tribunal's authority to grant such measures.[8] However, a large number of arbitration tribunals have ruled that security for costs orders do not fall outside an ICSID tribunal's authority, classifying them as a subset of general provisional measures mentioned in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.[9]

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[4]Jeff Waincymer, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION p.642 (2012); Noah Rubins, *In God we Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 AM REV INT'L ARB 307, 310 (2000); Blackaby et al., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION5.35 (6th ed. 2015).

[5]Jean E Kalicki, *Security for Costs in International Arbitration*, 3(5) TDM, (2006); Joe Tirado & Max Stein, *Security for Costs in International Arbitration – A Briefing Note*, 9(4) TDM, (2012).

[6]Jonas von Goeler, THIRD-PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE 333 (2016); Wendy Miles and Duncan Speller, *Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference*, THE EUROPEAN ARBITRATION REVIEW 32, 32 (2007); Waincymer, *supra* note 4, at p. 652.

[7]*Id.*

[8]RSM v Saint Lucia, *supra* note 1, ¶ 8.

[9]Atlantic Triton v Guinea, cited in Paul D Friedland, *Provisional Measures and ICSID Arbitration*, 2 ARB INT'L 335, 347 (1986); Emilio Agustin Maffezini v Kingdom of Spain, ICSID Case No ARB/97/7 ¶ 6 – 8 (Oct. 28, 1999) ("Procedural Order No 2 of Oct. 28, 1999."); Rachel S Grynberg, Stephen M Grynberg, Miriam Z. Grynberg and RSM Production Corporation v Grenada, ICSID Case No ARB/10/6 ¶ 5.16 (Oct. 14, 2010) ("Decision on Respondent's Application for Security for Costs."); RSM v Saint Lucia, *supra* note 1, ¶ 52; *See* Von Goeler, *supra* note 6, at 335 (This view has been supported by Scholars & Commentators as well); Tirado and Stein, *supra* note 5; Rubins, *supra* note 4, at 346; Christoph Schreuer, THE ICSID CONVENTION – A COMMENTARY p.784 (2nd ed. 2009).

In *RSM Production Corporation v. Saint Lucia*, the ICSID tribunal attempted to explain why security for costs was not expressly mentioned and listed as a separate provisional measure in these provisions.[10] It held that the provisions on provisional measures were worded broadly on purpose in order to leave to the tribunal's discretion which concrete measure it deems necessary and appropriate under the specific circumstances of each case.[11]

B. WHAT DOES 'RECOMMEND' MEAN?

In addition to the absence of clear language, the competence of an ICSID tribunal to impose security for costs has been contested on the basis of the definition of 'recommend' in Article 47 of the ICSID Convention and ICSID Arbitration Rule 39.

The dissenting arbitrator in *RSM Production Corporation v. Saint Lucia* noted that the drafters of the ICSID Convention purposefully excluded the phrase 'order' because they did not intend provisional measures – such as security for costs – to be enforceable on the parties.[12]

Despite this issue, ICSID tribunals have repeatedly found that the word 'recommend' must be interpreted as 'order.' In *Maffezini v. Spain*, the tribunal concluded that "the difference is more apparent than real" and that the parties to the ICSID Convention did not intend to "create a substantial difference in the effect of these two words."[13]As a result, the tribunal saw its jurisdiction to decide on provisional measures as "no less binding than that of a final award."[14] This logic has been confirmed and accepted by subsequent ICSID tribunals dealing with provisional measures.[15] Commentators have also endorsed this approach, noting that a concept under which provisional measures have binding consequences on the parties would

[10]RSM v Saint Lucia, *supra* note 1, ¶ 54.
[11]*Id.*
[12]*Id*, ¶ 13.
[13]Maffezini v. Spain, *supra* note 9, ¶ 9.
[14]*Id.*
[15]Pey Casado v Chile, ICSID Case No ARB/98/2 ¶ 17-20 (Sept. 25, 2001)("Decision on Request for Provisional Measures."); TokiosTokelés v Ukraine, ICSID Case No ARB/02/18 ¶ 4(July 1, 2003) ("Procedural Order No 1."); Occidental Petro- leum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No ARB/06/11 ¶ 58 (Aug. 17, 2007) ("Decision on Provisional Measures.").

promote the successful implementation of verdicts and protect the integrity of the arbitral process.[16]

C. NO ENFORCEABILITY

In this context, however, it should be clarified that provisional measures issued by an ICSID tribunal do not have a 'binding' effect in terms of being enforceable through the ICSID Convention because recommendations under ICSID Arbitration Rule 39 do not qualify as final awards within the meaning of Article 54 of the ICSID Convention.[17] Nonetheless, parties should not underestimate the authority of these recommendations, as an ICSID tribunal may consider the behaviour of the parties and draw unfavourable conclusions from their failure to comply with provisional measures in its final award.[18]

IV. BEFORE AN ICSID TRIBUNAL MAY PROVIDE SECURITY FOR COSTS, WHAT PREREQUISITES MUST BE MET?

After establishing that ICSID tribunals normally have the tribunal to impose security for expenses, we turn to the issue of what prerequisites must be satisfied for such measures to be granted.

A. GENERAL STANDARDS FOR PROVISIONAL MEASURES

Given that security for costs orders is often classified as a subset of provisional measures according to Article 47 of the ICSID Convention, it appears reasonable to first examine the criteria arbitral courts apply to evaluate requests for general provisional measures.

In this context, it is important to note that neither the ICSID Convention nor the ICSID Arbitration Rules specify the conditions under which tribunals may order provisional

[16]Zannis Mavrogordato and Gabriel Sidere, *The Nature and Enforceability of ICSID Provisional Measures*, 75(1) Arbitration p. 38, 42 (2009).
[17]Gabrielle Kaufmann-Kohler and Aurélia Antonietti, *Interim Relief in International Investment Agreements*, *in* Katia Yannaca-Small (eds), ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS – A GUIDE TO THE KEY ISSUES p. 546 (Katia Yannaca-Small ed., 2010); RSM v Saint Lucia, *supra* note 1, ¶ 50.
[18]Kaufmann-Kohler and Antonietti, *supra* note 17, at p. 546; Loretta Malintoppi, *Provisional Measures in Recent ICSID Proceedings: What Parties Request and What Tribunals Order*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER p.180 – 181 (Christina Binder et al. eds., 2009); Schreuer, *supra* note 9, at p. 758.

measures.[19] As a result, the decision to grant provisional measures is left to the discretion of each ICSID tribunal, without the ICSID regime providing guidance on how this discretion should be exercised.[20] Nonetheless, an examination of ICSID case laws discloses that they may only be granted if the respondent can demonstrate that they are essential, urgent, and required to prevent irreparable damage.[21]

B. HIGHER THRESHOLD FOR SECURITY FOR COSTS ORDERS

Unfortunately, the criteria laid down by ICSID courts for ordinary provisional remedies are of little use in identifying the requirements for evaluating petitions for security for expenses. This is due to the fact that, although security for costs fall under the category of general provisional measures pursuant to Article 47 of the ICSID Convention, they represent a special form of provisional measures that raises specific issues that necessitate a higher threshold for the evaluation of respective applications.[22]

This higher threshold is primarily due to the effect that orders for security for costs have on the claimant's access to justice. It is a common concern among practitioners and scholars in international arbitration that an order for security for costs could prevent a claimant who cannot afford to provide the ordered security from pursuing a meritorious claim.[23] This concern is even more justified if the claimant's impecuniosity has been caused by the respondent's actions that are the subject of the dispute between the parties.[24] In the context of disputes between private investors and governments, where the respondent state is often accused of unjustly expropriating the claimant, leaving the claimant with insufficient finances to pursue expensive investment arbitration, allegations to this effect are prevalent.[25] In many instances, it would appear improper and unreasonable to impose a further financial burden on

[19]ICCA-Queen Mary Task Force on Third Party Funding in International Arbitration, Subcommittee on Security for Costs and Costs, Draft Report of 1 November 2015, at p. 13.
[20]Kaufmann-Kohler and Antonietti, *supra* note 17, at 514; BLACKABY ET AL., *supra* note 4, at p. 310; VON GOELER, *supra* note 6.
[21]SCHREUER, *supra* note 9, at p. 776; Malintoppi, *supra* note 18, at 161; Kaufmann-Kohler and Antonietti, *supra* note 17, at p. 529.
[22]Blackaby et al., *supra* note 4, at ¶5.35; Waincymer, *supra* note 4, at p. 647; Von Goeler, *supra* note 6, at p. 336; Pey Casado v Chile, *supra* note 15, ¶86.
[23]Waincymer, *supra* note 4, at p. 643; Miles and Speller, *supra* note 6, at 32; Blackaby et al., *supra* note 4, at ¶5.35.
[24]Waincymer, *supra* note 4, at p. 643; Blackaby et al., *supra* note 4, at 5.35;Weixa Gu, *Security for Costs in International Commercial Arbitration*, 22(3) JOURNAL OF INTERNATIONAL ARBITRATION 167, 185 (2005).
[25]Von Goeler, *supra* note 6, at p. 337.

the claimant by obtaining security for expenses due to circumstances for which the claimant may not even be liable.[26]

C. OBSTACLES TO ESTABLISHING A UNIFORM TEST

In view of what has been said so far, it is not unexpected that ICSID tribunals have traditionally been quite hesitant to provide security for expenses. In *Libananco v. Turkey*, the tribunal opined that the possibility of granting security for costs should be entertained only in the most extreme cases, i.e., when an essential interest of either party was in jeopardy of irreparable harm.[27] However, apart from handling requests for security for costs with extreme caution, ICSID tribunals have not yet developed a uniform test or specific conditions under which such measures may be granted. One ICSID tribunal acknowledged that "it is difficult, in the abstract, to formulate a rule of general application against which to measure whether the making of an order for security for costs might be reasonable."[28] Creating a common standard is made more difficult by the fact that many factors used to evaluate requests for security for expenses in commercial arbitration do not apply in investment treaty arbitration.

Commentators stress that in international commercial arbitration, the parties have freely entered into a business partnership that includes an arbitration agreement. Therefore, by the time the agreement was closed, each party must be presumed to have accepted any risks inherent in the other party's nationality, creditworthiness, and trustworthiness.[29] As a result, it is insufficient for a respondent requesting security for costs in commercial arbitration proceedings to merely point to an alleged insolvency of the claimant that could prevent him from paying a potential adverse costs award, given that the possibility of a business partner's credit rating changing over time is generally regarded as a normal commercial risk.[30] To justify a security for costs order, the respondent must demonstrate that the claimant's financial circumstances have substantially and unpredictably altered since the completion of

[26]Rubins, *supra* note 4, at p. 362; Von Goeler, *supra* note 6, at p. 337.
[27]Libananco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/8 ¶57 (June 23, 2008) ("Decision on Preliminary Issues.").
[28]RSM v Grenada, *supra*note 9, ¶ 5.20.
[29]Alastair Henderson, *Security for Costs in Arbitration in Singapore*, 7(1) ASIAN INTERNATIONAL ARBITRATION JOURNAL 54, p. 69 (2011).
[30]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 13; Waincymer, *supra* note 4, at p. 650.

the arbitration agreement.[31] This criteria, however, cannot be applied to the system of treaty-based and legislation-based arbitration, since the responding state has not engaged into an arbitration agreement with a specific claimant investor in these instances.[32] Therefore, it cannot be stated that the respondent state has accepted the danger of interacting with a financially shaky claimant business, since it does not even know it's possible opponent in a future arbitration action.

D. PRINCIPAL CONDITIONS DEMANDED BY ICSID TRIBUNALS

Despite the difficulties in developing a uniform test with regard to specific criteria for security for costs orders, it is possible by examining ICSID case jurisprudence, to extract certain key requirements that ICSID tribunals generally consider necessary prior to considering ordering security for costs.

i. The Claimant's Lack of Funds

As a first stage in assessing petitions for security for costs, ICSID tribunals often investigate the financial status of the claimant investor and determine whether the respondent state has provided sufficient information demonstrating the claimant's inability to pay a possible adverse costs award.[33]

However, ICSID tribunals have emphasised that in order to justify an order for security for costs,"more should be required than a simple showing of the likely inability of a claimant to pay a possible costs award."[34] In their opinion, "it is simply not part of the ICSID dispute resolution system that an investor's claim should be heard only upon the establishment of a sufficient financial standing of the investor to meet a possible costs award".[35]

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[31]ICC Case No 10032 ¶ 45 (Nov. 9, 1999) ("Procedural Order."), cited in Pierre A Karrer and Marcus Desax, *Security for Costs in International Arbitration – Why, When, and What If ...,in* LIBER AMICORUM KARL-HEINZ BÖCK- STIEGEL339, 348 (Robert Briner et al. eds., 2001); Henderson, *supra* note 29, at p. 69; Gu, *supra* note 24.
[32]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 14.
[33]Commerce Group Corp & San Sebastian Gold Mines, Inc v Republic of El Salvador, ICSID Case No ARB/09/17 ¶51 (Sept. 20, 2012) ("Decision on El Salvador's Application for Security for Costs; RSM v Grenada, *supra* note 9,¶ 5.18; RSM v Saint Lucia, *supra* note 1, ¶ 82.
[34]RSM v Grenada, *supra* note 9, ¶ 5.20; EuroGas Inc and Belmont Resources Inc v Slovak Republic, ICSID Case No ARB/14/14 ¶ 120 (June 23, 2015) (Procedural Order No 3) ("Decision on the Parties' Request for Provisional Measures.").
[35]RSM v Grenada, *supra* note 9, ¶ 5.19; EuroGas v Slovak Republic, *supra* note 34, ¶ 120; Pey Casado v Chile, *supra* note 15, ¶ 86.

ii. 'Exceptional Circumstances'

In addition to the claimant's indigence, ICSID tribunals have considered evidence of 'exceptional circumstances' a prerequisite for granting security for costs.[36] While the term 'exceptional circumstances' has not been defined in the abstract, one tribunal, in an attempt to at least narrow the threshold of exceptional circumstances, identified 'abuse or serious misconduct' as elements that had to be demonstrated on the claimant side before security for costs could be granted.[37] These cases have been cited in later ICSID decisions,[38] and experts have concurred that the claimant's conduct in this circumstance may likewise entail elements of bad faith.[39] The bar for 'exceptional circumstances' consequently seems to be reached when the claimant conducts an arbitration procedure abusively or in poor faith.

V. WHAT ROLE DOES THIRD-PARTY FUNDING PLAY IN THE EVALUATION OF REQUESTS FOR SECURITY FOR COSTS?

The authors will now assess the impact that third-party funding may have in an ICSID tribunal's ruling on security for expenses.

A. BRIEF INTRODUCTION TO THIRD-PARTY FUNDING

First, a brief introduction of the idea of third-party funding, its application, and funding conditions pertinent to security for expenses will be presented.

i. Understanding Third-Party Funding

Third-party funding[40] can take many forms, but one model is predominant in international arbitration.[41] This model defines third-party funding as an arrangement whereby an outside

[36]EuroGas v Slovak Republic, *supra* note 34, ¶ 121; RSM v Saint Lucia, *supra* note 1, ¶ 75; Liba-nanco Holdings Co Limited v Republic of Turkey, ICSID Case No ARB/06/8¶ 57 (June 23, 2008) ("Decision on Preliminary Issues of 23 June 2008."); Commerce Group v El Salvador, *supra* note 33, ¶ 45; RSM v Grenada, *supra* note 9, ¶ 5.17.
[37]Commerce Group v El Salvador, *supra* note 33, ¶ 45.
[38]EuroGas v Slovak Republic, *supra* note 34, ¶ 121.
[39]VON GOELER, *supra* note 6, at 356; ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 17.
[40]*Id.*

entity unrelated to a legal action agrees to pay the claimant's costs associated with pursuing its case.[42] In exchange for funding the claimant's legal representation in the dispute, the third-party funder obtains a percentage or fraction of the case's revenues if the claimant prevails.[43] However, if the lawsuit is unsuccessful, the claimant is not required to return the funder, and the funder loses its investment in the claimant's case.[44]

ii. Third-Party Funding Utilization

Third-party financing is often lauded as a means of facilitating access to justice by allowing claimants with limited financial resources to continue arbitration procedures.[45] This benefit is especially significant in the context of investor-state arbitration, where the claimant investor's inability to sue the host state for reimbursement in an expensive investment arbitration procedure may come from measures made by the host state. However, third-party funding is also used by financially secure claimants who are able to pay for the expenses of arbitration themselves but would rather outsource the costs in order to retain liquidity.[46]

iii. Relevant Funding Terms in the Context of Cost Security

The conditions of third-party funding products available to finance international arbitration procedures vary per funder.[47] It is beyond the scope of this article to discuss all conceivable contract structures underpinning third-party funding arrangements. Nonetheless, it is worthwhile to highlight a few frequent funding provisions that might shed light on a funder's contractual duty for unfavourable costs and, therefore, play a part in an ICSID tribunal's decision to approve a security for costs application.

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[41]Victoria Shannon Sahani and Lisa Bench Nieuwveld, THIRD-PARTY FUNDING IN INTER- NATIONAL ARBITRATION5 (2012); CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION 185 (2014).
[42]Victoria Shannon Sahani, *Judging Third-Party Funding*, 63 UCLA LAW REVIEW 388, 392 (2016); VON GOELER, *supra* note 6, at p. 73; Cento Veljanovski, *Third-Party Litigation Funding in Europe* 8(3) JOURNAL OF LAW, ECONOMICS & POLICY 405 (2012).
[43]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at 392; Von Goeler, *supra* note 6, at 73; Rogers, *supra* note 41, at p.185.
[44]Veljanovski, *supra* note 42, at 405; Von Goeler, *supra* note 6, at p.73; Shannon Sahani, *supra* note 42.
[45]Susanna Khouri, Kate Hurford and Clive Bowman, *Third Party Funding in International Commercial and Treaty Arbitration – A Panacea or a Plague? A Discussion of the Risks and Benefits of Third Party Funding*, 8(4) TDM, 2011.
[46]Von Goeler, *supra* note 6, at 83-84; Chiann Bao, RSM v Saint Lucia:With Prejudice—The Unlikely Death Knell, 35 ICSID REVIEW - FOREIGN INVESTMENT LAW JOURNAL 44, 44 – 49 (2021).
[47]Aren Goldsmith and Lorenzo Melchionda, *Third Party Funding in International Arbitration: Everything You Ever Wanted to Know (But Were Afraid to Ask)*, 53 INTERNATIONAL BUSINESS LAW JOURNAL 53, p. 56 (2012); Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 28.

Clauses explicitly excluding the funder's liability for adverse costs are the first funding terms that come to mind in this context.[48] Such clauses would naturally attract the attention of an arbitral tribunal deciding upon security for costs, as they indicate that the funder will not be responsible for the respondent's costs if the claim fails.

Provisions granting the donor the right to cancel the funding arrangement may also be relevant in this situation. While virtually all third-party funders insist on including such provisions in their funding agreements, the design of such terms varies across the industry.[49] Some termination clauses allow the funder to cease funding at its sole discretion; other terms require material changes in circumstances or a material breach by the funded party.[50] Depending on the ease with which a funder might cancel a funding arrangement, it is possible that a claimant will be stuck in a case without money and unable to pay unfavourable costs.[51]

The budget limit reflects the maximum amount of capital that the third-party funder is willing to invest in the case and is typically determined at the outset of the funding agreement.[52]Once the budget limit is reached, the funder is contractually not required to increase its financial commitment and pay for costs in excess of this limit.[53] Expenses arising from adverse costs awards granted at the very end of a proceeding, i.e., when the budget is likely to be almost depleted, may thus exceed the case budget, resulting in the likelihood that the third-party funder will not reimburse these expenses.[54]

B. THE DEBATE

There is a heated dispute in the arbitration community over the role that third-party funding should play in an arbitral tribunal's evaluation of a security for costs request.

[48]ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 18.
[49]Maxi Scherer, Aren Goldsmith and Camille Flechet, *RDAI/IBLLJ Roundtable 2012: Third Party Funding in International Arbitration in Europe (Part 1: Funders' Perspective)*, 2 INTERNATIONAL BUSINESS LAW JOURNAL, (2012); Von Goeler, *supra* note 6, at p. 35.
[50]Scherer, Goldsmith, and Flechet, *supra* note 49; Von Goeler, *supra* note 6, at p. 35.
[51]Von Goeler, *supra* note 6, at p. 340.
[52]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 27; Von Goeler, *supra* note 6, at p. 29.
[53]Von Goeler, *supra* note 6, at p. 29.
[54]Shannon Sahani and Bench Nieuwveld, *supra* note 41, at p. 27.

Some scholars object to the notion that funders provide impoverished investors with the means to sue states and share in the proceeds if the claimant wins, but – as third parties to the action – cannot be held liable to meet any award of costs that might be made against the claimant if it loses.[55] This scenario has been dubbed 'arbitral hit and run' and described as 'particularly compelling grounds for security for costs.'[56]

Given that arbitral tribunals lack the authority to make costs orders against third-party funders, commentators have suggested that a security for costs order should be used as pressure to compel the third-party funder to participate.[57] In accordance with this logic, the concurring arbitrator in *RSM v. Saint Lucia* opined that the mere presence of a third-party funder on the claimant side should be sufficient for a tribunal to order security for costs, unless the claimant demonstrates its ability and willingness to pay adverse costs in the event that the tribunal rules in favour of the respondent.[58] This plan, however, has been criticised as 'too drastic or misconceived' by several critics, most notably financing industry professionals.[59] They have claimed that it would be 'unfair and discriminatory' to treat specialised funding firms differently than insurance companies or contingent-fee lawyers.[60]

C. INVESTMENT ARBITRATION JURISPRUDENCE

In some investment arbitration proceedings,[61] arbitral tribunals have addressed the effect of third-party funding on rulings for security for costs.

i. Guaracachi and Rurelec v. Bolivia

Guaracachi and Rurelec v. Bolivia was one of the first decisions in which an investment arbitration tribunal had to examine the presence of a third-party funding arrangement while

[55]Kalicki, *supra* note 5.
[56]*Id.*
[57]David Howell, cited in Alison Ross, *The Dynamics of Third Party Funding*, 7 GLOBAL ARBITRATION REVIEW, 12 (2012); William Kirtley and Koralie Wietrzykowski, *Should an Arbitral Tribunal Order Security for Costs When an Impecunious Claimant is Relying upon Third-Party Funding?*,30(1) JOURNAL OF INTERNATIONAL ARBITRATION 17, 20 (2013).
[58]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10 ¶ 16 (Aug. 12, 2014) (Gavan Griffith, J., assenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").
[59]Alison Ross, *A Storm Over St Lucia*, 9(5) GLOBAL ARBITRATION REVIEW 12, p. 14 (2014).
[60]Christopher Bogart, *Why the Majority Got it Wrong on Security for Costs*, 9(5) GLOBAL ARBITRATION REVIEW, 16 (2014); Todd Weiler, cited in Ross, *supra* note 59, at p. 14.
[61]*Id.*

evaluating a request for security for expenses.[62] In this proceeding, where the UNCITRAL Arbitration Rules were applicable, the arbitral tribunal denied the respondent state's request to compel security for costs, citing the 'very rare and exceptional' character of the proposed provision. The tribunal determined that the respondent had failed to establish that the claimants would be unable to pay an adverse costs award and emphasised that the mere existence of third-party funding on the claimants' side does not automatically support the conclusion that the claimants lack the means to pay a costs award rendered against them.[63]

ii. RSM Production Corporation v. Saint Lucia

Another pertinent case was the previously noted case, *RSM Production Corporation v. Saint Lucia*.[64] In this proceeding, for the first time in the history of investment arbitration, the tribunal required the claimant investor to give security for expenses. Noting that the provisional measure of security for costs required proof of 'exceptional circumstances,' the majority of the tribunal determined that this criterion was met for two reasons: First, the claimant had a documented history of non-compliance with prior decisions and failure to make advance payments. Second, the existence of a third-party funder on the claimant's side added to the tribunal's worry that the claimant would not comply with an adverse cost award.[65] The tribunal reasoned that it was unreasonable to burden the respondent state with such uncertainty and risk.[66]

iii. Eurogas Inc.& Belmont Resources v. Slovac Republic

In 2015, a third reported ruling was issued in the case of *EuroGas and Belmont v. Slovak Republic*.[67] In an ICSID proceeding, the tribunal refused the respondent state's request to compel the claimant to give security for costs, finding that no extraordinary circumstances had been shown to warrant such a step. The panel ruled that 'financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute *per se*

[62]Guaracachi America, Inc (USA) and Rurelec plc (United Kingdom) v Plurinational State of Bolivia, PCA Case No 2011–17, (Mar. 11, 2013) (Procedural Order No 14).
[63]Guaracachi v Boliva, *supra* note 62, ¶ 7.
[64]RSM v Saint Lucia, *supra* note 1.
[65]*Id.*¶ 86.
[66]*Id.* ¶ 83.
[67]EuroGas v Slovak Republic, *supra* note 34.

exceptional circumstances justifying that the Respondent be granted an order of security for costs.'

iv. South American Silver Limited v. Bolivia

Based on similar considerations, the arbitral tribunal in *South American Silver Limited v. Bolivia* denied the respondent's request for security for costs.[68] Like previous arbitral tribunals, the tribunal in *South American Silver Limited v. Bolivia* emphasised the exceptional nature of this provisional measure and its high threshold. In light of this, the tribunal determined that the respondent state had not presented sufficient evidence demonstrating that the claimant investor was impoverished and therefore, financially unable to satisfy an adverse cost award.[69] The mere support by a third-party funder was not considered proof for the claimant investor's impoverishment, as funding solutions were not only utilised by financially unstable claimants. An investor's dependence on third-party funding might be considered by an arbitral tribunal as one of many factors in its decision-making process; but, the funder's mere existence was not deemed sufficient to approve a request for security for costs.[70]

v. Interpretation

Analyzing the preceding cases, it is clear that all tribunals evaluated requests for security for expenses using the same criteria. Aware of the extraordinary character of this interim remedy, all courts have emphasised the high threshold for ordering security for costs – 'exceptional circumstances' – and have maintained that financial constraints on the claimant side alone cannot support an award for security for costs. Therefore, it should not come as a surprise that none of the arbitral courts saw the mere existence of a third-party funder on the side of a claimant investor as sufficient justification for granting a request for security for costs.

In the instance of *RSM v. Saint Lucia*, where the majority predicated its decision to impose security for costs in part on the fact that the claimant investor depended on third-party finance, this finding is even more accurate. However, it does not appear that the admitted involvement of a funder played a significant role in the tribunal's evaluation, as the main

[68]South American Silver Limited v The Plurinational State of Bolivia, PCA Case No 2013–15 (Jan. 11, 2016)(Procedural Order No 10).
[69]South American Silver Limited v The Plurinational State of Bolivia, *supra* note 68, ¶ 66–67.
[70]*Id*, ¶ 65-77.

reason for the tribunal's decision was the claimant's documented history of non-compliance with costs orders, which the tribunal deemed sufficient evidence of bad faith. The panel seemed to view the claimant's dependence on third-party finance as a favourable point.[71]

D. ANALYSIS

Keeping in mind the position of ICSID tribunals affirming the high threshold for security for costs, which requires proof not only of the claimant's indigence but also of exceptional circumstances, the authors will analyse the impact of third-party funding on an ICSID tribunal's evaluation of an application for security for costs.

i. The claimant's Lack of Funds

Given that the claimant's impecuniosity seems to be a prerequisite for requiring security for costs, it is essential to emphasise that a claimant's dependence on third-party funding alone should not lead an ICSID tribunal to conclude that a supported claimant is impoverished. This is because third-party funding is not only used by financially distressed claimant investors, but also by solvent parties that are in a position to pay for the costs of arbitration themselves but seek recourse to third-party funding in order to share costs risks or remain financially liquid.[72] Therefore, an ICSID tribunal may view a claimant's reliance on third-party funding as an initial indication of the funded party's overall financial situation. This should not, however, halt the tribunal's investigation into perjury. Instead, it should confirm that the claimant is really experiencing financial hardship. This may be performed by evaluating additional financial documents to determine whether a supported claimant is impoverished.[73]

ii. Exceptional Circumstances

In addition to the claimant's indigence, unusual circumstances must be shown in order for security for costs to be ordered. Thus, the issue is whether the existence of a third-party

[71]RSM v Saint Lucia, *supra* note 1, ¶ 83; *See* Von Goeler, *supra* note 6, at 353.
[72]*Id.*
[73]See ICCA-Queen Mary Task Force Draft Report, *supra* note 19 at 17.

funder represents an extraordinary situation that might justify an order of these provisional measures.

Given that ICSID tribunals require evidence of abuse or an element of bad faith on the claimant side in order to meet the threshold for exceptional circumstances,[74] it appears that recourse to third-party funding must be placed on the same level as conducting investment arbitration abusively or in bad faith in order to be considered 'exceptional.'

E. RELYING ON THIRD-PARTY FUNDING AS A SIGN OF BAD FAITH OR ABUSE?

In the context of bad faith or abuse connected to honouring cost decisions given in arbitration processes, commentators often allude to a situation in which, prior to initiating a claim, the claimant investor takes active steps to insulate itself from possible obligation for unfavourable costs.[75]

One technique to do this is to assign a claim to a legal company with no assets and maybe no financial resources to prosecute the claim in an arbitration proceeding. This legal entity is a so-called 'empty shell' whose costs and expenses incurred during the proceeding are covered by an unrelated but financially stable third party.[76] In this context, the nominal claimant functions as a mere procedural vehicle that will collect the proceeds if the case is won but will be unable to pay adverse costs if the case is lost and a costs award is issued in the respondent's favour.[77] Is this conduct, which may serve as an example of abuse or bad faith, analogous to a case in which an impoverished claimant investor depends on the financial help of a third-party funder to file a claim against a respondent state?

F. TWO CIRCUMSTANCES WITH DIFFERENT EVIDENCE-BASED FACTORS

To address this issue, it is useful to differentiate between two situations that ICSID tribunals may encounter in investment arbitration procedures and that vary with respect to the evidentiary foundation ICSID tribunals will have for assessing security for costs petitions.

[74]Von Goeler, *supra* note 6, at p. 356; ICCA-Queen Mary Task Force Draft Report, *supra* note 19, at p. 14.
[75]Kirtley and Wietrzykowski, *supra* note 55; Von Goeler, *supra* note 6, at 357; Kalicki, *supra* note 5.
[76]Rubins, *supra* note 4, at p. 361.
[77]Von Goeler, *supra* note 6, at p. 358.

i. The First Scenario

In the first scenario, an ICSID tribunal may become aware of an indigent claimant's access to third-party funding without being privy to the precise details of the agreement underlying the funding connection. In this case, an ICSID tribunal must decide whether or not to impose security for costs on the basis of shaky factual evidence. The only information the ICSID tribunal has regarding third-party funding and which it may include in its assessment is the fact that a funder is actually financing the case on behalf of an impecunious claimant.[78] There is no more information on the nature or terms of the financing arrangements, either because the tribunal does not think it essential to conduct any enquiries or because the supported claimant refuses to divulge the specifics of the funding arrangement.

Can the simple reliance of an impoverished claimant to third-party financing in this situation be contrasted to the previously mentioned scenario in which a claimant purposefully avoids culpability for unfavourable expenses by assigning its claims to an 'empty shell'? The fact that an impoverished claimant relies on third-party support does not preclude a responder from recovering its expenses if the claimant is unsuccessful. Although not all third-party funders give coverage for future adverse costs awards as part of their funding packages, depending on the contract and price structure, certain funders are willing to bear responsibility for adverse costs.[79] For example, a representative of the finance sector recently stated in an article that his company supplied After the Event Insurance (ATE Insurance), which reimburses the opponent's expenditures in the event that the claim is unsuccessful.[80] Such insurance inevitably comes with a premium, which is the responsibility of the claimant.[81]

Typically, financing conditions stipulate whether and to what degree a sponsor would pay unfavourable expenses. In the absence of the precise provisions of a financing arrangement, an ICSID tribunal cannot definitively determine whether or not a claimant has planned for unfavourable costs to be reimbursed if its case is lost. Due to this uncertainty, several commentators and arbitrators have suggested that the funded claimant should be required to 'disclose all relevant factors' and ‘make a case why security for costs orders should not be

[78]RSM v Saint Lucia, *supra* note 1.
[79]Scherer, Goldsmith and Flechet, *supra* note 49.
[80]Bao, *supra* note 46.
[81]*Id.*

made.'[82] However, this technique is deceptive. It is commonly acknowledged that the asking party has the burden of evidence when obtaining security for expenditures.[83] There is no reason a claimant's reliance on third-party financing should, as a general rule, place the burden of evidence on the claimant.[84] As an interim result, it can be stated that, in cases where an ICSID tribunal's evidentiary basis for its decision on security for costs is limited to the fact that a funder is financing the impoverished claimant's case, this fact alone should not prompt an ICSID tribunal to order security for costs.

ii. The Second Scenario

In the second scenario, an ICSID tribunal may not only be aware of the presence of a third-party funder on the side of the indigent claimant, but may also be aware of the terms of the funding agreement indicating that the funder will not assume responsibility for adverse costs. In this circumstance, an ICSID tribunal may base its judgement on security for expenses on stronger evidence. The tribunal may be aware of the details of the funding arrangement, for instance, because the supported claimant voluntarily disclosed the funding conditions.[85] By analysing the funding terms, the tribunal discovers that the funder is not contractually accountable for foreseeable unfavourable expenses. As described before, an ICSID tribunal may reach this determination due to funding agreements expressly removing the funder's liability for unfavourable expenses, provisions allowing the funder to cancel the funding arrangement, or clauses establishing a certain budget cap for the case.[86]

An ICSID tribunal confronted with an impoverished claimant relying on the financial support of a third-party funder who is manifestly unwilling to cover adverse costs may find this situation comparable to the previously described scenario where the claimant attempts to avoid liability by using an 'empty shell.' In both instances, the claimant decides to pursue a claim knowing from the proceeding that the respondent cannot recover its costs if the claim is unsuccessful.

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[82]RSM Production Corporation v Saint Lucia, ICSID Case No ARB/12/10 ¶ 18 (Aug. 12, 2014) (Gavan Griffith, J., assenting) ("Decision on Saint Lucia's Request for Security for Costs of 13 August 2014.").
[83]SCHREUER, *supra* note 9, at p. 776; Romesh Weeramantry and Montse Ferrer, *RSM Production Corporation v Saint Lucia: Security for Costs – A New Frontier?*, 30(1) ICSID REVIEW 30, 32 (2015).
[84]Von Goeler, *supra* note 6, at p. 354.
[85]Muhammet Çap and SehilInsa at EndustriveTicaret Ltd Sti v Turkmenistan, ICSID Case No ARB/12/6 (June 12, 2015) (Procedural Order No 3).
[86]*Id.*

Despite the fact that these scenarios look equivalent in this sense, they are not comparable. In the scenario involving the 'empty shell' model, the original claimholder takes proactive steps to assign its claim to an entity without assets in order to thwart a potential costs award rendered against it; the claimant investor's sole intent behind the deliberate assignment of claims is to circumvent procedural obligations by avoiding future liability for adverse costs. Different rules apply when an impoverished claimant turns to a third-party funder who is not accountable for unfavourable expenses. In contrast to the case mentioned above, the claimant in this instance has not actively contributed to its own financial hardship. The claimant has neither outsourced its claim to another business organisation with insufficient assets to fulfil an adverse costs judgement, nor has it intentionally disposed of its assets to become impoverished and therefore, made itself incapable of paying adverse costs. Rather, the primary objective of the impoverished claimant is to empower itself to arbitrate. If this objective can only be accomplished with the assistance of a third-party funder who is ready to support the lawsuit but unwilling to pay unfavourable costs, a claimant's turn to such a funder may not be seen as abusive or in bad faith. Because in these circumstances, the respondent's inability to collect its expenses if the claim is denied is not intentional. It is only a side consequence – one might even argue a 'necessary evil' – of the claimant's resort to a valid financial remedy, which may be the only choice for an impoverished investor to access justice.[87]

For these reasons, even if an ICSID tribunal is aware of the provisions of a funding agreement indicating that the funder would not be responsible for an adverse costs judgement, the tribunal should not force the claimant to provide security for costs. As one observer noted, it may seem unjust that a respondent state would confront a lawsuit made by an insolvent claimant investor who is financially backed by a third-party funder and may arbitrate as if it were solvent. Such a claimant does not have to assume any economic risk and may leave the respondent unable to recover its costs if the claim fails.[88] However, as other scholars and practitioners have pointed out, the investment treaty dispute resolution mechanisms were primarily designed to protect investors and their investments – not the

[87]Von Goeler, *supra* note 6, at p. 359.
[88]*Id.*

contracting states.[89] Therefore, it seems appropriate to prioritise the ability of claimant investors to obtain justice.

VI. CONCLUSION

The determination of a request for security for costs by an ICSID tribunal is a delicate balancing act between the legitimate interests of the claimant investor and the responsible state. The respondent state, which is employing public money to fight the claim, wants to be in a position to recoup its costs if the claim is unsuccessful, while the claimant investor seeks effective access to international justice.

To date, no universal criterion has been developed to determine whether security for expenditures may be given. Rather, ICSID courts often evaluate petitions for security for expenses by considering the circumstances of each case. However, it seems that a claimant investor's prospective bankruptcy is insufficient to offer security for expenses. Due to the mentioned policy concerns, namely the risk of stifling a meritorious claim and denying a claimant investor access to justice, ICSID tribunals require, in addition to the claimant's demonstrated lack of financial resources, proof of exceptional circumstances, such as abusive behaviour or a similar element of bad faith on the claimant side.

According to the authors, an impecunious claimant's recourse to third-party funding does not constitute bad faith or abusive behaviour. Therefore, an ICSID tribunal should not be required to impose security for costs, regardless of whether the tribunal is aware of a funder on the claimant's side or the conditions of an underlying funding arrangement indicating that the funder would not be liable for unfavourable costs.

[89]Bao, *supra* note 46.